No. 15-474

In The
Supreme Court of the United States

ROBERT F. MCDONNELL, *Petitioner,*
v.
UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Amicus Curiae James Madison Center for Free Speech Supporting Petitioner

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Question Presented

1. Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value. The question presented is whether "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

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Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including *McCutcheon v. FEC,* 134 S.Ct. 1434 (2015), *Citizens United v. FEC,* 558 U.S. 310 (2010), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Summary of Argument

The Court has held that evidence of quid quo pro corruption is required under the Hobbs Act and the honest-services fraud statute. How quid pro quo corruption is defined is critical to avoiding not only the criminalization of politics, but of elections.

The Court's jurisprudence establishes five elements of proof for quid pro quo corruption. First, there must be an explicit arrangement. Second, that arrangement must be for the direct exchange of something of value. Unearmarked contributions to a third party, for example, do not pose legitimate corruption risks. Third, the candidate's or public official's promise or commitment must be improper promise or commitment. Promises are indispensable to democracy, and government must be responsive to the people. A candidate's affirmation of previously existing positions, or a public official's altering of a position because of a contribution, isn't in itself corrupt. Fourth, the promise must be contrary to the obligations of the office. Promises to vote consistent with a political platform or in favor of or against an issue do not thwart the obligation of an office. And last, the arrangement must be an effort to control an official, sovereign act. The duties or requirements of the office must be implicated—access is not enough.

Campaign finance law recognizes quid pro quo corruption as a compelling government interest. In doing so, adherence to the five elements the Court has established is necessary. If they are not, a backdoor into regulating speech for impermissible motivations that have been rejected by the Court—ingratiation,

access, influence, and leveling the playing field—is created.

Additionally, broad-sweeping chill of protected political speech will occur. Constituents will be forced to choose between supporting a candidate and interacting with that candidate once elected. Out-of-state donors will markedly increase. Good candidates will be deterred from running from office unless independently able to fund their campaign. Contributions to independent expenditures groups would dry up. Candidates will campaign on vague statements that prevent voters from holding them accountable. And public officials will be immobilized from doing anything with constituents that supported their campaigns.

Argument

I. Quid Pro Quo Corruption Must Be Narrowly Defined To Avoid Unconstitutional First Amendment Chill In Elections.

The Court in *McCormick v. U.S.,* 500 U.S. 257 (1991) unanimously held that the "color of official right" requirement found in the Hobbs Act requires proof of quid pro quo corruption. *Id.* at 273, 274. Likewise, in *U.S. v. Sun-Diamond Growers of California,* 526 U.S. 398 (1999), an unanimous Court required quid pro quo corruption as the intent element of the honest-services fraud statute. *Id.* at 404. The application of a proper definition of quid pro quo corruption in this case is critical: not only would an improperly broad definition of quid pro quo corruption risk criminalizing politics, (*see* Pet. Br. at 40-43), it poses an even greater risk of criminalizing elections.

A. Quid Pro Quo Corruption Has An Established Meaning Under Supreme Court Precedent.

This Court's decisions defining quid pro quo corruption can be summarized as 1) an explicit arrangement 2) for the direct exchange of something of value for 3) a public official's improper promise or commitment that is 4) contrary to the obligations of his or her office 5) in an effort to control an official, sovereign act.

1. Quid Pro Quo Arrangements Must Be Explicit.

The Court in *McCormick v. U.S.*, 500 U.S. 273 (1991) states that a quid pro quo arrangement must be explicit. Addressing political contributions and their use for quid pro quo arrangements, the Court observed that "[t]he receipt of [ ] contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking . . . ." *Id.* at 273.

Consistent with this requirement, federal appellate courts have required that any alleged violations of the Hobbs Act must show that the offer at issue was "made in exchange for an explicit promise to perform or not to perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993). *See also United States v. Martinez,* 14 F.3d 545, 552-553 (11th Cir. 1994) (addressing appellant's argument that "the government must prove the existence of an explicit promise . . . to obtain a

conviction under the Hobbs Act" to conclude that the district court erred in failing to give a jury instruction embodying the quid pro quo requirement of *McCormick*); *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994) ("an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect.").[2]

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[2]The *McCormick* dissent argues that "the critical issue [is] the candidate's and contributor's intent at the time the specific payment was made." *McCormick,* 500 U.S. at 287. Some argue that *Evans v. U.S.*, 504 U.S. 255 (1992) supports this position. In *Evans,* the Court was satisfied that "petitioner accepted the cash knowing that it was intended to ensure that he would vote in favor of the rezoning application and that he would try to persuade his fellow commissioners to do likewise." *Evans*, 504 U.S. at 257, and 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," *id.* at 268. However, as the *Martinez* court correctly observes, the *Evans* court was discussing the necessity of an affirmative act or inducement by the official for conviction under the Hobbs Act. *Martinez,* 14 F.3d at 553. The *Evans* court held that a public official need not demand or request money for quid pro quo corruption to be established. *Evans*, 504 U.S. at 259. The *Evans* court affirmatively applies the quid pro quo requirement of *McCormick* (a campaign-related corruption case) to its case (a non-campaign-related corruption case) and finds it satisfied. *Id.* at 268.

2. Quid Pro Quo Arrangements Require A Direct Exchange.

An explicit arrangement must also be a direct one: the hallmark of quid pro quo corruption is "a direct exchange of an official act for money." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1441 (2014) (citing *McCormick v. United States,* 500 U.S. 257, 266 (1991)). This is because "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *Id.* at 1441. "That an individual might 'contribute massive amounts of money to a particular candidate through the use of unearmarked contributions' to entities likely to support the candidate'" is inadequate grounds for quid pro quo corruption to be established because it is too speculative. *McCutcheon*, 134 S. Ct. at 1452 (quoting *Buckley v. Valeo,* 424 U.S. 1, 38 (1976)). The quid pro quo arrangement must be made directly between the individual or group and the public official.

3. Quid Pro Quo Corruption Requires An Improper Promise Or Commitment.

For a quid pro quo arrangement to occur, the candidate or public official must make an improper promise or commitment. *See Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 615 (1996) (quoting *Buckley v. Valeo,* 424 U.S. 1, 47 (1976) (holding that for expenditures to be corrupt they must "be given as a *quid pro quo* for improper commitments from the candidate.").This promise or commitment need not be fulfilled for a quid pro quo to occur; rather, a quid pro quo is completed "at the time

when the public official receives a payment in return for his agreement . . . ." *Evans*, 504 U.S. at 268.

Not all promises or commitments are improper:

> [T]here are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707 (1978); and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote.

Brown v. Hartlage, 456 U.S. 45, 55-56, (1982). Indeed, that a candidate or public official alters or reaffirms his positions on issues because of a contribution or makes a promise or commitment is not, in and of itself, evidence of quid pro quo corruption. *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 498 (1985). So commitments such as "a promise to lower taxes, to increase efficiency in government, or . . . to increase taxes in order to provide some group

with a desired public benefit or public service" are fully within the permissible scope of campaign promises protected under the First Amendment" and are not "considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding." *Brown*, 456 U.S. at 58 (reasoning that Petitioner Brown's promise to reduce his salary was a protected campaign promise because it was "an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens.").

Additionally, promises or commitments to an individual that serve that individual's self-interest are not inherently improper:

> The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. 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.

Whether the promise is made as a private arrangement bears on its propriety: "So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a

reputable basis upon which to cast one's ballot." *Id.* at 56.

4. Quid Pro Quo Corruption Requires That Promised Conduct Be Contrary to The Obligations of Office.

A quid pro quo arrangement cannot occur where the obligations of public office are not thwarted. This is because:

> [c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.

NPAC, 470 U.S. at 497. For this reason, this Court found no quid pro quo arrangement where a candidate promised not to take a salary if elected: "the commitment was fully in accord with our basic understanding of legitimate activity by a government body." *Brown*, 456 U.S. at 57.

Likewise, promises to vote in a way that is consistent with a candidate's or political party's platform, or in favor of or against an issue do not subvert the political process because they are not contrary to the obligations of office. Indeed, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court held that the government "may constitutionally prohibit judicial candidates from pledging or promising certain results." *Id.* at 813. It held this because such promises contravened the judge's obligations in office: "Pledges or promises of conduct in office, however commonplace in races for the political branches, are inconsistent 'with the judge's obligation to decide cases

in accordance with his or her role.'" *Id.* at 813. And for this reason, too, it tailored the judicial promise that can be constitutionally proscribed narrowly. It does not encompass *all* promises. That is because not all promises contravene the obligations of office. *See Buckley v. Ill. Jud. Inquiry Bd.,* 997 F.2d 224, 229 (7th Cir. 1993) (striking down Illinois' pledges and promises clause because it "is not limited to pledges or promises to rule a particular way in particular cases or classes of case; all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office. . . he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. . . . The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election."). Only promises of conduct contrary to the obligations of office can implicate quid pro quo corruption.

5. Quid Pro Quo Corruption Requires An Effort to Control A Specific Official, Sovereign Act.

For quid pro quo corruption to be implicated, the arrangement at issue must also be an effort to control an official act. *Sun-Diamond Growers of California*, 526 U.S. at 404-05 ("there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."). It is not enough that the act in question "pertain[s] to the office," it must pertain to *particular* official acts." *Id.* at 409. *See also Evans*,

504 U.S. at 268 (holding that quid pro quo corruption occurs when a "public official receives a payment in return for his agreement to perform specific official acts."). "In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *McCormick v. United States*, 500 U.S. 257, 273 (1991).

This Court in *U.S. v. Birdsall*, 233 U.S. 223 (1914), applying the language of § 201 before it was re-codified in 1962, defined "official act" as "duties" or "requirements of office":

> To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a *lawful requirement* of the Department under whose authority the officer was acting . . . . Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed *the duties of those engaged in its activities*. . . . duties not completely defined by written rules are clearly established by settled practice; and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.

Birdsall, 233 U.S. at 230-31 (emphasis added). Moreover, the relevant duties and requirements constituting "official acts" are statutorily restricted to "'any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public

official, in such official's official capacity, or in such official's place of trust or profit.'." *Id.* at 407 (quoting 18 U.S.C. § 201(a)(3)). An official act, then, must be an act on behalf of the sovereign, an act that is for the government. (Pet. Br. 37) (citing H.R. Report No. 87-748, at 18 (1961) (affirming that § 201 would retain "[t]he definition of 'official act . . . to include any activity that a public official undertakes *for the Government*.")) (emphasis added).

And so, when properly understood as the exercise of duties or requirements of office on behalf of a sovereign, not everything an elected official does qualifies as an official act. For example, "the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA policy . . . —while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute." *Sun-Diamond Growers of California,* 526 U.S. at 407.

B. This Court's Established Meaning Of Quid Pro Quo Corruption Is Constitutionally Necessary Under *Buckley, Citizens United* and *McCutcheon*.

Failure to follow this Court's definition of quid pro quo corruption "would have the effect of criminalizing conduct traditionally within the law and unavoidable under this country's present system of elected politics." *Martinez*, 14 F.3d at 553. This is because quid pro quo corruption has particular significance in campaign finance jurisprudence.

In the seminal campaign finance decision *Buckley v. Valeo*, the Court assessed cognizable state interests

to justify contribution limits and found that quid pro quo corruption is such an interest. 424 U.S. 1, 25-26 (1976). It affirmed this interest in *Citizens United v. FEC,* 558 U.S. 310 (2010), where it found that a ban on corporate independent expenditures did not serve a quid pro quo corruption interest because such expenditures are inherently without prearrangement and coordination with a candidate. *Id.* at 908-09. The Court observed that "the practices *Buckley* noted would be covered by bribery laws" such as the honest-services fraud statute, and that in consequence, "restrictions on contributions are preventative, because few if any contributions to candidates will involved quid pro quo arrangements." *Id.* at 456-57. And in *McCutcheon v FEC,* 134 S.Ct. 1434 (2015), the Court again recognized quid pro quo corruption as a cognizable state interest. It concluded that federal aggregate contribution limits were not tailored to quid pro quo concerns because individual contribution limits were already in place to address "the problem of large contributions." *Id.* at 1445. And it concluded that unearmarked contributions to entities supporting candidates ceded control to those entities and so had little likelihood of creating the necessary "direct exchange of an official act for money, " *id.* at 1441, that are the hallmark of quid pro quo corruption. *Id.* at 1452.

Significantly, the *McCutcheon* Court addressed and dismissed numerous other interests the government has offered to justify contribution and other restrictions. Among them are preventing ingratiation, *id.* at 1441, preventing access, *id.* at 1441, "ad hoc balancing of relative social costs and benefits," *id.* at 1449, leveling the playing field, *id.* at 1450, leveling electoral

opportunities, *id.* at 1450, equalizing campaign financial resources, *id.* at 1451, and garnering influence, *id.* at 1451. The Court has been adamant in its rejection of these other interests, firmly concluding, for example, that "because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access," *id.* at 1451 (citing *Citizens United*, 558 U.S. at 360), and "that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *McCutcheon,* 134 S.Ct. 1434, 1441. *See also Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 295 (1981) ("*Buckley* . . . made clear that contributors cannot be protected from the possibility that others will make larger contributions.").

The reasons for rejecting these interests are clear.

In *Citizens Against Rent Control*, 454 U.S. 290, the Court rejected:

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others" as "wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources," ' and ' "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Id. at 295-96 (internal citations omitted). The Court

observed that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 296.

In *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), the Court rejected equalizing campaign resources as an interest because such an interest might "'handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign'." *Id.* at 2826 (quoting *Buckley,* 424 U.S. at 57).

In *Davis v. FEC*, 554 U.S. 724 (2008), the Court rejected "leveling electoral opportunities" because of its ominous and dangerous implication that the government, rather than voters, would evaluate the strengths of the candidates seeking office to impose its own judgment on what considerations can contribute to the outcome of an election. *Id.* at 742. *See also McCutcheon*, 134 S.Ct. at 1450 ("The First Amendment prohibits such legislative attempts to 'fine-tun[e]' the electoral process, no matter how well intentioned. *Bennett, supra,* at ——, 131 S.Ct., at 2824."). Likewise, it rejected a governmental interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" because "there is no legal right to have the same resources to influence the electoral process." *Id.* at 742 (citing *McConnell v. FEC,* 540 U.S. 93, 227 (2003)).

In *Citizens United v. FEC,* 558 U.S. 310 (2010), the Court rejected ingratiation and access as justification for campaign finance regulations because they "embody

a central feature of democracy—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 v. FEC*, 134 S. Ct. 1434, 1441(2014) (citing *Citizens United,* 558 U.S. at 360.).

The definition of quid pro quo corruption this Court has established, *see supra* Part I.A, ensures that the corruption interest in the campaign finance context—presently the only cognizable interest this Court has recognized for campaign finance limits and bans—remains the only interest.

Limiting quid pro quo corruption to official, sovereign acts contrary to the obligations of office ensures that the government does not improperly regulate candidates who respond to supporters in gratitude with access to them as an elected official or to other political allies, such as an opportunity to meet with the official attending events held for public officials and their guests. *See McCutcheon,* 134 S.Ct. at 1451.

Limiting quid pro quo corruption to only improper commitments and promises contrary to the obligations of the office ensures unfettered interchange of ideas and that candidates, when elected, can be responsive to the concerns of constituents with whom they share beliefs and interests. *Id.* at 1441.

And limiting quid pro quo corruption to direct exchanges and explicit arrangements ensures the government is not supplanting the voters' right to assess the strengths of a candidate with its own, and that the government does not regulate election-related spending and speech based on conjecture or speculation

about re-routed funds and other implausabilities. *Id.* at 1452 (quoting *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 392 (2000).

In short, the Court's carefully crafted quid pro quo definition prevents the government from pursuing other objectives this Court has expressly rejected and that "impermissibly inject [the government] 'into the debate over who should govern,'" the last place a government should be *Id.* at 1441-42 (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct., 2806, 2826 (2011)). The definition "'err[s] on the side of protecting political speech rather than suppressing it.'" *Id.* at 1451 (quoting *FEC v. Wisconsin Right to Life,* 551 U.S. 449, 457 (2007) (opinion of Roberts, C.J.)).

C. Failure to Follow This Court's Quid Pro Quo Corruption Definition Will Criminalize Not Only Politics, But Elections.

Without this Court's definition of quid pro quo corruption strictly adhered to, chill of political campaign speech and association is inevitable.

Without an explicit arrangement requirement, constituents will be forced to choose between their right to support and associate with a like-minded candidate on one hand, and their right to voice their opinion and attempt to influence that candidate's vote as a public official on the other. If they do both, they run the risk of an agreement being inferred between them and jeopardizing their candidate or public official's seat:

> Whenever an elected official adheres to the positions that prompted voters and contribu-

> tors to support him, he exhibits a pattern of favoritism for these supporters. This pattern may bespeak conviction, not corruption. Ambitious prosecutors and cynical jurors, however, can easily infer a corrupt agreement from the common pattern. When an official has supported widget subsidies after accepting large contributions from widget manufacturers, for example, prosecutors and jurors may infer that there must have been an implicit understanding. Allowing inferences of this sort whenever officials have acted to benefit contributors could make public life intolerable.

Albert W. Alschuler, *Limiting Political Contributions After Mccutcheon, Citizens United, and Speechnow*, 67 Fla. L. Rev. 389, 462 (2015).

To avoid the possibility of such inferences, candidates will be inclined to seek out-of-state donors to fund their campaigns so that elected officials are free to talk with their constituents without quid pro quo allegations lurking. Indeed, without an explicit arrangement required, quid pro quo allegations become readily abused and can be turned into a weapon wielded by a political opponent.

Such ready abuse and threat of civil or criminal penalties would deter any good candidate from running from office:

> If an official were subject to lengthy imprisonment whenever a jury could be persuaded that he had acted deliberately to benefit a campaign contributor or other benefactor rather than the public, only a fool would take the job.

Id. at 464. Only those who can independently fund their campaigns would remain undeterred.

The resulting chill on constituent participation and deterrence of good candidates would only be exacerbated without a direct exchange requirement. With the government free to infer arrangements through contributions to and spending by third party contributors, the chill on financial participation in elections at any level would be complete.

Permitting *any* promise or commitment to establish the basis for quid pro quo corruption will also chill robust political campaign participation and support. This is especially true where such promises or commitments are not contrary to the obligations of the office. The commonplace practice *White* recognized of making promises about legislative intentions or commitments to address issues of great import to voters during campaigns will be replaced with abstract discussions about what a candidate thinks and perpetual disclaimers that no promises are being made. Voters will be unable to hold public officials accountable for behaving inconsistent with their campaign positions; indeed, candidates will ensure such positions are largely unknown to avoid investigation and prosecution.

Last, if quid pro quo corruption is not tied to a specific official, sovereign act on behalf of the government, a public official becomes immobilized from acting in conjunction with a constituent who also financially supported his campaign. When "no particular 'official act' need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents . . . prosecut[ion]." *Sun-Diamond Growers of*

California, 526 U.S. at 408. Indeed, as the *McCormick* Court warned, if campaign contributions can be "the subject of a Hobbs Act prosecution [without] be[ing] proven to have been given in return for the performance of or abstaining from an official act . . . any campaign contribution might constitute a violation." *McCormick*, 500 U.S. at 273. This outcome would be all but assured employing the standard established in the court below, which would criminalize "mere steps in furtherance of a final action or decision may constitute an 'official act,'" even if "a bribe recipient[] lack[s] actual authority over a matter." *United States v. McDonnell*, 792 F.3d 478, 510, 512 (4th Cir. 2015).

In order to ensure quid pro quo corruption is consistent with First Amendment principles, this Court must continue to define quid pro quo corruption as 1) an explicit arrangement 2) for the direct exchange of something of value for 3) a public official's improper promise or commitment that is 4) contrary to the obligations of his or her office 5) in an effort to control an official, sovereign act. Defined any other way, quid pro quo corruption would criminalize not only politics but elections, casting a vast, unconstitutional chill on protected political speech and association.

Conclusion

The district court erred in failing to include a jury instruction properly defining quid pro quo corruption. The decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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