No. 09-

In The
Supreme Court of the United States

RICHARD M. SCRUSHY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW
25th Floor
Atlanta, GA 30309
(404) 875-2700

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909

Counsel for Petitioner

Blank Page

QUESTIONS PRESENTED

I. Does the *McCormick v. United States*, 500 U.S. 257, 273 (1991), holding that campaign contributions cannot constitute bribery unless "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act" mean what it says, or may a conviction be obtained by implying or inferring that such a promise occurred?

II. Did *Evans v. United States*, 504 U.S. 255 (1992), which was not a campaign contribution case, modify the *McCormick v. United States* "explicit promise" requirement?

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 4

A. The Procedural History, Charges, Conviction and Sentence 4

B. The Facts 7

REASONS FOR GRANTING THE PETITION 9

I. THE DECISION BELOW CONFLICTS WITH *McCORMICK v. UNITED STATES*, MISUSES *EVANS v. UNITED STATES*, AND PRESENTS THE IMPORTANT QUESTION OF THE PRECISE PROOF REQUIREMENT IN AN ISSUE RELATED CAMPAIGN CONTRIBUTION BRIBERY CASE. 10

II. CONFUSION AND CONFLICT IN THE CIRCUITS ABOUT THE IMPACT OF *EVANS* ON *McCORMICK'S* "EXPLICIT PROMISE" REQUIREMENT IS ANOTHER REASON FOR GRANTING REVIEW 13

CONCLUSION 18

APPENDIX

Appendix A – Decision of the United States
Court of Appeals for the Eleven Circuit 1a-69a

Appendix B – Order Denying Rehearing 70a

TABLE OF AUTHORITIES

CASES

Evans v. United States, 504 U.S. 255 (1992) ..... *passim*

McCormick v. United States, 500 U.S. 257 (1991) .. *passim*

United States v. Abbey, 560 F.3d 513 (6th Cir. 2009) 15

United States v. Blandford, 33 F.3d 685 (6th Cir. 1994) 13-15

United States v. Collins, 78 F.3d 1021 (6th Cir. 1996) ... 15

United States v. Garcia, 992 F.2d 409 (2d Cir. 1993) ... 13

United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009) 15-17

United States v. Martinez, 14 F.3d 543 (11th Cir. 1994) .. 13

United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009) 1

United States v. Taylor, 993 F.2d 382 (4th Cir. 1993) 13

STATUTES

18 U.S.C. § 371 ..... 2, 4

18 U.S.C. §§ 666(a)(1)(B) & (2) 2, 4

18 U.S.C. § 1341 3-4

18 U.S.C. § 1346 4

28 U.S.C. § 1254(1) 1

OTHER

Webster's Encyclopedic Unabridged Dictionary of the English Language (1996) 12

Blank Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Scrushy petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on March 6, 2009. It is reported at 561 F.3d 1215 (11th Cir. 2009). The opinion is reprinted in the Appendix at 1a-69a.

JURISDICTION

The judgment and opinion of the Eleventh Circuit affirming Richard Scrushy's conviction and sentence was entered on March 6, 2009. A timely Petition for Panel Rehearing or for Rehearing *En Banc* was denied on May 14, 2009. App. 70a. This petition for writ of certiorari is filed within 90 days of the May 14, 2009 denial of rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371
Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §§ 666(a)(1)(B) & (2)
Theft or bribery concerning programs receiving Federal funds

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; . . . .

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian

tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; . . . .

18 U.S.C. § 1341
Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of

the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346
Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE AND FACTS

A. The Procedural History, Charges, Conviction and Sentence

In May 2005, Richard Scrushy, Don Siegelman, Paul Hamrick, and Mack Roberts were named in a multi-count sealed indictment. A second superseding indictment was returned in December 2005. Scrushy was named in Counts Three through Nine. Counts Three and Four charged Scrushy and Siegelman with federal funds bribery and aiding and abetting each other, in violation of 18 U.S.C. §§ 666(a)(1)(B) & 2. Count Five charged Scrushy and Siegelman with conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. § 371. Counts Six through Nine charged Scrushy and Siegelman with honest services mail fraud and aiding and abetting each other, in violation of 18 U.S.C. §§ 1341, 1346. Scrushy was not named in the remaining 27 counts of the indictment.

All four Defendants were tried before a jury from May 1, 2006 through June 29, 2006. Prior to deliberations, the court ordered the Government to elect as to multiplicitus Counts Three and Four, and dismissed Count Three as to Scrushy. After eleven days of deliberations, two jury notes indicating inability to reach a verdict on any count, one note indicating problems deliberating, and an *Allen* charge, the jury convicted Scrushy of Counts Four through Nine. Siegelman was convicted of Counts Three, Five through Nine and Seventeen. Roberts and Hamrick were acquitted on all charged counts.

Scrushy filed two motions for new trial based on jury misconduct. After the verdict, counsel for both Scrushy and Siegelman received a series of envelopes by U.S. Mail from an anonymous source or sources. The envelopes contained copies of e-mails between jurors. Six of the e-mails were exchanged between Jurors 7 and 40 and at least two other jurors in the evening hours during the eleven-day jury deliberations. Two of the mid-deliberation e-mails were especially troublesome:

Sunday, June 25, 2006 10:41 PM
from: [e-mail address containing name of Juror 40]
to: [e-mail address containing name of Juror 7]

I can't see anything we miss'd. u?
articles usent outstanding! gov & pastor up s—t creek.
good thing no one likes them anyway. all public officials r scum; especially this 1.
pastor is reall a piece of work
...they missed before, but we won't
...also, keepworking on 30...
will update u on other meeting.
[first name of Juror 40]

Sunday, June 25, 2006 10:47 PM
from: [e-mail address containing first name of Juror 7]
to: [e-mail address containing name of Juror 40]

great info for our friends
% of prosecution increases dramatically.
Could not find that when I surfed it.
Gov/Pastor GONE....

The district court rejected Scrushy's jury misconduct new trial motions, refusing to permit discovery into the authenticity of the e-mails.

The court sentenced Scrushy to 82 months imprisonment, three years supervised release, 500 hours community service, a $150,000 fine, $267,000 restitution, and $600 special assessment. The court immediately remanded Scrushy to custody, and he has been incarcerated since June 28, 2007. Scrushy's motions for release pending appeal were denied by the district court and the court of appeals.

The Eleventh Circuit Court of Appeals affirmed Scrushy's convictions, based upon Justice Kennedy's concurrence in *Evans v. United States* which led the court of appeals to conclude that the jury could imply or infer from the evidence the "explicit promise" required by *McCormick v. United States*. App. 20a, 23a. The court affirmed the district court's decision that the e-mails did not constitute grounds for a new trial. App. 58a-60a.

B. The Facts

The essential facts are that Richard Scrushy had been previously appointed to the Alabama Certificate of Need Board by three former governors. Scrushy had not supported Governor Siegelman in the Alabama gubernatorial election; he had contributed $350,000 to Siegelman's opponent. Siegelman told a lobbyist for Scrushy's company that Scrushy needed to contribute to the education lottery campaign "to make it right." The Government's star witness, Siegelman's aide Nick Bailey, told of a meeting between Scrushy and the Governor, at which Bailey was not present. According to Bailey, Scrushy gave a $250,000 check to the Governor. The following trial colloquy with the Governor's aide was the heart of the prosecution's case:

> Q. [AUSA] Okay. Now, when you saw the Governor, did he have this check in his hand? Did he have it?
>
> A. [Governor's Aide Nick Bailey]: Yes.
>
> Q. Okay. Now, when the Governor showed you the check, what if anything, did he say to you?
>
> A. He made the comment, referring to Mr. Scrushy's commitment to give $500,000, that he's halfway there.
>
> Q. Okay. And what, if anything, did you say to him?

A. I said – I responded by saying, what in the world is he going to want for that? And his response was the CON Board, the C-O-N Board.

Q. Okay. And what did you say?

A. I said, I wouldn't think there would be a problem, would it? And he said, I wouldn't think so.

R36-506-07; App. 22a.

The court below recounted other evidence adduced by the Government to support the notion that there was an explicit *quid pro quo* – that being on the CON Board was important to Scrushy; that some of the donation was made by Scrushy through a company because Scrushy and his wife were against the lottery; that an outside lobbyist for Scrushy's company did not want Scrushy to be "let down" if he made the contribution. App. 6-9; 23-25a. But the Bailey testimony of his colloquy with Governor Siegelman was the Eleventh Circuit's linchpin: "Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." App. 24a. The court concluded that "[i]nferring actors' states of mind from the circumstances" was "the province of the jury" and specifically relied on Justice Kennedy's concurrence in *Evans v. United States*, "'the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *See Evans*, 504 U.S. at 274 (Kennedy, J., concurring.)'" App. 24a.

There was no direct evidence of the words spoken at any Scrushy/Siegelman conversation; no evidence of any explicit promise; no direct evidence of any Siegelman assertion that his actions would be controlled by a Scrushy donation to the Alabama Education lottery fund. The only direct evidence was that Scrushy gave $500,000 as a campaign contribution to the fund for a lottery for education initiative and that Scrushy was appointed to the CON Board.

And there can be no dispute that the only case law basis for the Eleventh Circuit's affirmance of Scrushy's conviction is Justice Kennedy's concurrence in *Evans*. *Evans* was a non-campaign contribution case where the issue presented to and decided by the Court was whether an affirmative act of inducement by a public official was an element of extortion under color of official right. Here, the issue presented is whether in a campaign contribution case, *Evans* modified *McCormick*.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit recognized the important First Amendment issue presented in this case. The convictions of Scrushy and Governor Siegelman were based on Scrushy's donations to the Alabama Education lottery campaign and the court wrote: "As such, they impact the First Amendment's core values – protection of free political speech and the right to support issues of great public importance . . . . In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error [a conviction upon an improper instruction] to be committed." App. 14a-15a. Against that backdrop we present these reasons for granting review:

I. THE DECISION BELOW CONFLICTS WITH *McCORMICK v. UNITED STATES*, MISUSES *EVANS v. UNITED STATES*, AND PRESENTS THE IMPORTANT QUESTION OF THE PRECISE PROOF REQUIREMENT IN AN ISSUE RELATED CAMPAIGN CONTRIBUTION "BRIBERY" CASE

Addressing campaign contributions to candidates, this Court made clear that such contributions violate the law "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." *McCormick*, 500 U.S. at 273 (emphasis supplied). The Court continued: "In such situations the official *asserts* that his official conduct *will be controlled* by the terms or promise of the undertaking." *Id.* (emphasis supplied). The "explicit" *quid pro quo* standard was necessary because "[t]o hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation" *Id.* at 272.

The Court's use of the words "explicit" "asserts," "controlled by the terms or promise" convey the need for articulated commitments, not inferences or implications, in order to satisfy the *McCormick* standard.

The court below affirmed Scrushy and Siegelman's conviction despite the absence of proof of "an explicit promise," or an official's assertion or agreement to be controlled by a promise. It did so saying "[i]nferring actors' states of mind from the circumstances surrounding their

conversation" is sufficient: "Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." App. 24a; *see* pp. 8, *supra*. No fair reading of Bailey's testimony – or any of the testimony – proved "an explicit promise," and *Evans* did not authorize a retreat from *McCormick's* concern that political contributions not be criminalized without proof beyond a reasonable doubt of "an explicit promise" of a *quid pro quo*. Watering down that principle by invoking Justice Kennedy's concurring opinion in *Evans* misapplies *Evans*. To allow a jury by implication, "'to decide [ ] the intent . . . [of the] actions taken as well as the reasonable construction given to them by the official and the payor'" (App. 24a), opens the door to that which the Court sought to avoid in *McCormick*: prosecutions based on inferences that campaign contributors' appointments were the product of bribery.

In *McCormick*, Justice Scalia wrote that receipt of money by a public official "should not be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for *an explicit promise* of favorable future action." 500 U.S. at 276, Scalia, J., concurring (emphasis supplied). There can be no doubt that an explicit, not an inferred or implied promise, is the *sine qua non* for a criminal conviction in a campaign contribution case.

United States v. Evans does not support the Eleventh Circuit's deviation from the *McCormick* "explicit" rule. *Evans* was not a campaign contribution case. The defendant in Evans took $7,000 cash to vote in favor of a rezoning application. The difference is important. The Court was careful in *McCormick* to limit the decision to campaign

contributions, and Justice Thomas emphasized that in his dissent in *Evans*. 504 U.S. at 287, Thomas, J., dissenting, joined by Chief Justice Rehnquist and Justice Scalia. Moreover, review in *Evans* was granted "to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act. . . ." 504 U.S. at 256. *Evans* did not intend to, or attempt to, water down "explicit." The only question in *Evans* was whether a public official had to take the first step – "induce" the payment.

Thus the Eleventh Circuit's use of *Evans* to dilute "explicit" presents important questions for this Court: Did *Evans* alter the *McCormick* standard? Does *Evans*, in which review was granted only on the question of whether an "inducement" or demand is an element of the offense of extortion "under color of official right," stand for the proposition that "explicit" means inferred or implied? The court below candidly acknowledged that "McCormick does use the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions." App. 18a. But, drawing on *Evans*, the court said that "does not however mean *express*." *Id.* (emphasis in original). Interestingly, "express" means "to put thought into words: to express an idea clearly." Webster's Encyclopedic Unabridged Dictionary of the English Language (1996). Even the Eleventh Circuit's semantic circumlocution cannot evade *McCormick's* mandate.

It is for this Court to decide what "explicit" means and the Court should make that decision in a case which poses the question in the context of the campaign contribution First

Amendment concerns that animated *McCormick*. This case provides that opportunity.

The important principles that motivated *McCormick* support granting review to resolve the interplay, if any, between *McCormick* and *Evans*.

II. CONFUSION AND CONFLICT IN THE CIRCUITS ABOUT THE IMPACT OF *EVANS* ON *McCORMICK'S* "EXPLICIT PROMISE" REQUIREMENT IS ANOTHER REASON FOR GRANTING REVIEW

A series of Circuit Court cases reflect the struggles to reconcile *McCormick* and *Evans*. *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1994) states it plainly: "Exactly what effect *Evans* had on *McCormick* is not altogether clear. The federal circuits that have considered the matter assume that the former [*Evans*] establishes a modified or relaxed *quid pro quo* standard to be used in non-campaign contribution cases. Under this view, the comparatively strict standard of *McCormick* would still govern when the alleged Hobbs Act violation arises out of the receipt of campaign contributions by a public official." *Id.* at 695. The court cited *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994), *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993) and *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993) for that view, but the Sixth Circuit then took a different tack:

> We read *Evans* somewhat differently. *Evans,* we believe, merely clarified (1) that no affirmative step towards the performance of the public official's promise need be taken (*i.e.* fulfillment of the *quid pro quo* is not an element of the offense) and (2) that the

> *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.*, merely knowing the payment was made in return for official acts is enough).

Blandford, 33 F.3d at 696. That court concluded that "*Evans* provided a gloss on the *McCormick* Court's use of the word 'explicit' to qualify its *quid pro quo* requirements. Explicit as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated." *Id.* at 696. However, *Blandford* continued:

> Pursuant to our interpretation of *Evans*, we cannot be certain whether the Supreme Court would have courts apply a different standard when a public official's acceptance of payments that are concededly not campaign contributions forms the basis for that official's extortion charge. Indeed, a strong argument could be advanced for treating campaign contribution cases and non-campaign contribution cases disparately. Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy. Although legitimate campaign contributions, not unlike Hobbs Act extortion payments, are given with the hope, and perhaps expectation, that the payment will make the official more likely to support the payor's interests, we punish neither the giving nor the taking presumably because we have decided that the alternative of financing campaigns with public funds is even less attractive than the current arrangement.

Id. at 697.

It is clear that the *McCormick/Evans* struggle continues. *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) began its analysis this way: "This Court took its first stab at harmonizing these decisions in *United States v. Blandford* . . . . In *Blandford* we stated that *McCormick's quid pro quo* requirement should not apply outside the campaign-contribution context . . . ." *Id.* at 517. *Abbey* then pointed to *United States v. Collins*, 78 F.3d 1021 (6th Cir. 1996) which called for *quid pro quo* proof in all Hobbs Act cases, adding this new luster to the inquiry: "But not all *quid pro quos* are made of the same stuff." *Id.* The court then quoted a Don Corleone/Bonasera colloquy from *The Godfather* as an example "of a corrupt *quid pro quo*." *Id.* at 518 n.3. Seeking help from screenwriters underscores the need for this Court to have the final say.

The linguistic turmoil persists across the circuit decisions trying to resolve the *McCormick/Evans* meaning. The Ninth Circuit wrote that *McCormick* held "the government must prove that there was an explicit *quid pro quo*," and continued:

> *see also United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) ("[P]roof of an express promise is necessary when the payments are made in the form of campaign contributions."). However, "[w]hether or not there is a *quid pro quo* requirement in the non-campaign context is an issue that has not been directly addressed by the Supreme Court." *United States v. Collins*, 78 F.3d 1021, 1034 (6th Cir. 1996)

United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009). The Ninth Circuit, using "express" as a synonym for

"explicit," acknowledged the *quid pro quo* difference between campaign and non-campaign contexts: "[I]t is well established that to convict a public official . . . for receipt of property *other than campaign contributions* '[t]he official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods.'" *Evans*, 504 U.S. at 274 (Kennedy, J. concurring). *See id.* at 268 (majority opinion)." *Kincaid-Chauncey* at 937 (emphasis supplied).

Thus *Kincaid-Chauncey's* reading of *McCormick/Evans* properly draws a distinction between campaign contribution cases and non-campaign contribution cases. The additional question is whether there is a quantum of proof difference between campaign contribution cases and non-campaign contribution cases. This Court should also resolve that question.

The Eleventh Circuit read too much into Justice Kennedy's "winks and nods" in his concurring opinion in *Evans*. That was the court's major rationale for retreating from "explicit," applying a less rigorous standard, improperly we submit, to campaign contributions cases.

Judge Berzon's concurrence in *Kincaid-Chauncey*, although addressing a different aspect of honest services prosecutions, articulated the reasons why clarifying *McCormick vis-á-vis Evans* is so important in this case:

> The stakes are considerably higher in the case of public officials. The lack of statutory specification can give rise to selective prosecution and political misuse. *See* Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption*

> *Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes,* 105 Dick.L.Rev. 57, 57-58 (2000) ("With no established standards, a federal public corruption prosecution, based on the intangible right to honest services, is particularly vulnerable to being snarled by politics."); *see also United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting) ("It may be a disagreeable fact but it is nevertheless a fact that political opponents not infrequently exchange charges of 'corruption,' 'bias,' 'dishonesty,' or deviation from 'accepted standards of . . . fair play and right dealing.' Every such accusation is now potentially translatable into federal indictment." (alteration in the original)). As the Third Circuit observed, "[d]eprivation of honest services is perforce an imprecise standard, and rule of lenity concerns are particularly weighty in the context of prosecutions of political officials, since such prosecutions may chill constitutionally protected political activity." *Paranella*, 277 F.3d at 698.

Kincaid-Chauncey at 949.

That brings us full circle to the Eleventh Circuit's recognition of "the First Amendment core values" that are at stake here. App.23a. The Scrushy/Siegelman prosecution stemmed from contributions to an education lottery campaign. Were there political considerations in play in bringing the charges? Perhaps. But the question for this Court transcends the hurly-burly of politics; it goes to the heart of what the Government must prove to criminalize the exercise of the First Amendment right to support a candidate or public issue referenda.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW
25th Floor
Atlanta, GA 30309
(404) 875-2700

BRUCE ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
500 East Broward Blvd.,
Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909