No. 24-142

In the Supreme Court of the United States

BRIAN BENJAMIN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Due Process Institute is a non-profit bipartisan public interest organization that seeks to ensure procedural fairness in the criminal justice system. Due Process Institute has often appeared as amicus curiae in cases addressing the proper scope of vague, ambiguous, or unduly broad criminal statutes, including recently before this Court at the petition and merits stages in *Snyder v. United States*, No. 23-108.

SUMMARY OF ARGUMENT

Among the principles most critical to the sound functioning of our democracy are due process, the right to free speech and association, and federalism. When these principles have been placed in jeopardy through enforcement of vague criminal statutes, this Court has not hesitated to intervene. This case presents a unique context—the government's burden of proof in federal bribery prosecutions predicated on campaign contributions—where all three of these fundamental principles are placed at risk.

Acknowledging the inherent dangers that arise from federal prosecutions based on campaign contributions, this Court established a bright line rule in *McCormick v. United States*, 500 U.S. 257 (1991), holding that prosecutors must prove an "explicit" quid

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[1] No counsel for a party authored this brief in whole or in part and no person other than Amicus and its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, both parties have been timely notified of our intent to file this brief.

pro quo in such cases. By establishing that bright-line test, this Court attempted to ensure that federal prosecution of state and local officials (and their constituents) was limited to the clearest cases of corruption. But following this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992), which some lower courts interpreted as having loosened the *McCormick* standard, the legal landscape has become muddled.

A host of constitutional values are threatened if this Court does not step in to provide much needed clarity. Although the Due Process Clause requires criminal law to provide fair notice of its prohibitions, the existing ambiguity in the law plainly does not provide sufficient guidance for politicians and their constituents. In circuits where the *McCormick* standard has been relaxed, these individuals may be prosecuted whenever federal prosecutors merely allege an inferred connection between a campaign contribution and an official act. But such connections are an inherent feature of our campaign finance system in which constituents regularly support politicians who represent and advance their interests in the public arena. Exacerbating this due process concern is the fact that the quid pro quo requirement is not actually spelled out in any of the federal statutes used by prosecutors, so the public is left to look to the inconsistent—and sometimes internally contradictory—decisions of the courts of appeals. The lower courts' contradictory rulings fail to provide the fair notice that due process demands.

The constitutional concerns do not end there. The expansive interpretation adopted by some courts of appeals also threatens to chill conduct protected by

the First Amendment: the rights of constituents to express their political views and associate with candidates through campaign contributions. Additionally, important issues that are normally left to the sound judgment of state and local governments are exposed to unfettered federal intervention. Federal prosecutors may now set ethical standards for, and regulate the scope of interactions between, state and local officials and their constituents, jeopardizing our system of federalism.

The current state of the law poses grave risks to individual liberties, our electoral process, and federalism. Subject to vague standards of criminality, officials and their constituents may be deterred from fully exercising their rights in the political arena. Qualified potential candidates may avoid running for office altogether, unwilling to gamble on the arbitrary discretion of aggressive federal prosecutors or the muddled state of the law. And in many states, overzealous prosecutors can more easily impact elections and override local governance. This is not what this Court intended through its decisions in *McCormick* and *Evans*. Due Process Institute thus respectfully urges the Court to grant the Petition for a Writ of Certiorari.

ARGUMENT

I. Fair Notice Requires Strict Application of *McCormick*'s "Explicit" Quid Pro Quo Requirement in Cases of Alleged Bribery Based on Campaign Contributions

A. Due Process Compels Strict Construction of Criminal Laws, Particularly Those Implicating First Amendment Rights

It is axiomatic that the Due Process Clause of the Fifth Amendment requires federal criminal laws to provide fair notice of their prohibitions. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."). This "first essential of due process" is a "well-recognized requirement" that tracks "ordinary notions of fair play and the settled rules of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The principle that laws must be defined with clarity ensures that "[e]very man . . . know[s] with certainty when he is committing a crime," *United States v. Reese*, 92 U.S. 214, 220 (1875), and helps guard against "arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). At bottom, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

To enforce the requirement of fair notice, this Court routinely interprets criminal statutes narrowly.

In particular, "[t]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* at 266 (compiling cases); *see also United States v. Bass*, 404 U.S. 336, 347–48 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))); *Wooden v. United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring) ("Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws.").

Fair notice and strict construction are particularly important where a criminal law implicates conduct protected by the First Amendment. A lack of clarity resulting from an ambiguous statute or conflicting judicial interpretations risks chilling the exercise of core First Amendment rights. Thus, this Court has repeatedly demanded greater clarity when a law has the potential to infringe on rights of free speech or association. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values."); *Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (demanding "a greater degree of specificity" in the context of the First Amendment).

Campaign contributions are constitutionally protected as an exercise of Americans' "expressive and associational" rights under the First Amendment. *McCutcheon v. FEC*, 572 U.S. 185, 204 (2014). Indeed, "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *FEC v. Cruz*, 596 U.S. 289, 302 (2022) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). "If the First Amendment has any force," this Court has observed, "it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech." *Citizens United v. FEC*, 558 U.S. 310, 349 (2010).

B. The Current State of the Law Fails to Provide Fair Notice in Bribery Cases Based on Campaign Contributions, a Core First Amendment Right

More than three decades ago, this Court recognized the potential constitutional dangers arising from federal bribery prosecutions involving the exercise of a core First Amendment right: donations to political campaigns. In *McCormick v. United States*, this Court acknowledged that our political system accepts—indeed, encourages—candidates' solicitation of campaign contributions during times when the candidates are staking out their views and expressing the policies they plan to enact or follow if elected. 500 U.S. 257, 272 (1991). This Court thus interpreted the federal law at issue in a manner that avoided the criminalization of "conduct that has long been thought to be well within the law." *Id.*

Specifically, *McCormick* held that in the context of a prosecution for bribery based on the payment or receipt of campaign contributions, the government is required to prove that the relevant "payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273 (emphasis added). The Court believed that a high bar for prosecution adequately protected the First Amendment rights at issue because "[i]n such situations[,] the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*[2]

The statute at issue in *McCormick*—like the federal funds bribery statute, *see* 18 U.S.C. § 666(a)(1)(B), and honest services fraud statute, *see* 18 U.S.C. §§ 1343, 1346, at issue in this case—said nothing on its face about any quid pro quo requirement. This Court held, however, that the Hobbs Act's prohibition against "the obtaining of property from another . . . under color of official right," 18 U.S.C. § 1951(b)(2), required proof of an "explicit" quid pro quo involving campaign contributions. *See McCormick*, 500 U.S. at

[2] *McCormick* interpreted the "under color of official right" language in the Hobbs Act, 18 U.S.C. § 1951(b)(2). As noted by the Second Circuit, both parties here have proceeded on the assumption that the quid pro quo requirement also applies to the criminal statutes at issue in this case: federal funds bribery, *see* 18 U.S.C. § 666(a)(1)(B), and honest services wire fraud, *see* 18 U.S.C. §§ 1343, 1346. *See United States v. Benjamin,* 95 F.4th 60, 67–68 (2d Cir. 2024). Other courts of appeals have either proceeded under the same assumption or expressly held that *McCormick* applies to these statutes. *See id.* at 68 n.2 (compiling cases).

273. By limiting bribery based upon campaign contributions to explicit quid pro quo agreements, the Court sought to avoid unclear and unrestrained federal criminal liability in this area. *See id.* at 272. In other words, the "explicit" quid pro quo was intended to uphold the fair notice requirement; that is, to "define[] the forbidden zone of conduct with sufficient clarity." *Id.* at 273.

Since *McCormick*, however, the clear lines that this Court tried to stake out have become vague and distorted. The confusion stems, in large part, from the lower courts' attempts to reconcile this Court's decisions in *McCormick* and *Evans v. United States*, 504 U.S. 255 (1992), the following year. *Evans* involved a public official's receipt of a personal cash payment of $7,000 and a $1,000 campaign contribution. *Id.* at 257. This Court granted certiorari to resolve a question different from the one posed in *McCormick*: whether the Hobbs Act required the defendant to have affirmatively "induced" the bribe payment, or whether passive acceptance of the payment was sufficient. *Id.* at 257, 267.[3] In answering that question, this Court held that a prosecution for bribery required only "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. At no point in its opinion in *Evans* did this Court state that it was modifying *McCormick*'s requirement of an "explicit" quid pro quo in campaign contribution cases.

[3] This question was expressly left open by this Court in *McCormick*. *See* 500 U.S. at 266 n.5.

As lower courts have continued to grapple with *Evans*' impact, if any, on *McCormick*'s explicit quid pro quo requirement, the result has been considerable confusion about the standard that applies in cases of alleged bribery based on campaign contributions. In addition to the Second Circuit in this case, the Third, Fifth, Seventh, and Eleventh Circuits have stated that *Evans* modified *McCormick*'s "explicit" requirement. *See United States v. Benjamin*, 95 F.4th 60, 71–72 (2d Cir. 2024); *United States v. Allinson*, 27 F.4th 913, 925 (3d Cir. 2022); *United States v. Whitfield*, 590 F.3d 325, 349 (5th Cir. 2009); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Siegelman*, 640 F.3d 1159, 1171–72 (11th Cir. 2011). Other circuits, however, have indicated that a prosecution for bribery involving campaign contributions requires something more than implied conduct to prove an explicit quid pro quo. *See, e.g.*, *United States v. McDonough*, 727 F.3d 143, 155 n.4 (1st Cir. 2013); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993); *United States v. Chastain*, 979 F.3d 586, 591 (8th Cir. 2020); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936–37 (9th Cir. 2009).[4]

Indeed, the Second Circuit's post-*McCormick* jurisprudence encapsulates the confusion. Prior to its decision in this case, the Second Circuit had observed

[4] The Sixth Circuit has pronounced contradictory positions on this issue. *Compare United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) (determining that *Evans* is "limited to the campaign contribution context") *with United States v. Abbey*, 560 F.3d 513, 517–18 (6th Cir. 2009) (noting that "*Evans* modified the standard in non-campaign contribution cases . . . .").

that *Evans* only modified the standard in *non-campaign contribution* cases. *See United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993); *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) (Sotomayor, J.). In *Ganim*, the Second Circuit noted that "proof of an express promise is necessary when the payments are made in the form of campaign contributions." *Id.* The court also observed that it had "harmonized" *McCormick* and *Evans* and that "*Evans* modified [*McCormick*'s] standard in non-campaign contribution cases by requiring that the government show only '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.* (quoting *Garcia*, 992 F.2d at 414 (internal citations omitted)). Although the Second Circuit in this case claimed its prior statements were merely "dicta," *Benjamin*, 95 F.4th at 65, 72–73, that conclusion would not have been apparent to any candidate, elected official, or constituent reading—and relying upon—the court's pronouncements over the past several decades.

The fact that none of the relevant anti-corruption statutes spell out what type of quid pro quo agreement is required to prove bribery also raises heightened fair notice concerns. When the contours of criminal law are based on judicial interpretations of statutes, an individual's right "to fair warning" may be violated based on "criminal penalties" attaching to "what previously had been innocent conduct." *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001); *see also Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (explaining that "a deprivation of the right of fair warning can result not only from vague statutory language but also from

an unforeseeable and retroactive judicial expansion" of criminal law).

While the interpretations of the courts of appeals of broad or ambiguous criminal statutes can provide the fair notice that the Due Process Clause requires, *see Lanier*, 520 U.S. at 268–69; *Screws v. United States*, 325 U.S. 91, 104–05 (1945), they can also have the opposite effect when "disparate decisions" leave the law "insufficiently certain," *Lanier*, 520 U.S. at 269. That is the case here: candidates, elected officials, and their constituents are faced with conflicting decisions pronouncing the boundaries between legal campaign contributions and illegal bribes. When there is no consensus, and the judicial decisions are unclear or vague, the public is unable to shape their behavior to accord with the law's prohibitions.

By allowing prosecutors to allege a quid pro quo through inferences based on a series of discrete actions taken over an indeterminate period of time, the Second Circuit rendered *McCormick*'s requirement of an "explicit" agreement a dead letter. Not only did the decision give short shrift to the significant First Amendment concerns inherent in such a broad expansion of federal criminal liability, it also provided no guidance as to the type of conduct that could render a quid pro quo "explicit." The Second Circuit's standard thus amounts to little more than "we know it when we see it." Due process requires more.

Furthermore, the distinction that underlies the Second Circuit's reasoning—and that of some other courts of appeals—revolves around hair-splitting differences between the terms "express" and "explicit."

Like the Sixth and Eleventh Circuits, the Second Circuit held that "explicit" in *McCormick* did not mean "express." *See Benjamin*, 95 F.4th at 68; *Siegelman*, 640 F.3d at 1171; *Blandford*, 33 F.3d at 696. The basis for criminal liability thus rests on a very fine distinction between two facially synonymous terms.[5] Indeed, dictionaries define these words using the same or similar terms. *Compare Explicit*, Black's Law Dictionary (12th ed. 2024) ("clear, open, direct or exact," or "[e]xpressed without ambiguity or vagueness, leaving no doubt") *with Express*, Black's Law Dictionary (12th ed. 2024) ("[c]learly and unmistakably communicated; stated with directness and clarity"); *see also Express*, Merriam-Webster Online Dictionary (2024) (def. 1a: "directly, firmly, and explicitly stated"); *Explicit*, Merriam-Webster Online Dictionary (2024) (def. 1a: "fully revealed or expressed without vagueness, implication, or ambiguity" or "leaving no question as to meaning or intent"). In addition, nothing in *McCormick* or *Evans* indicates that this Court intended "explicit" in these opinions to mean anything other than its ordinary, plain meaning. It is unrealistic to assume that candidates, elected officials, and constituents have fair notice of the strained distinction between "explicit" and "express" drawn by the Second Circuit and other courts of appeals. *Cf. Taylor v. United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring) (describing "plain meaning" as "the domain of the rule of lenity").

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[5] In fact, as noted above, the Second Circuit had previously interpreted *McCormick*'s requirement of an "explicit promise" to mean "[t]hat . . . proof of an express promise is necessary when the payments are made in the form of campaign contributions." *Ganim*, 510 F.3d at 142.

The Second Circuit's decision in this case, coupled with the general lack of clarity among the lower courts about what the government must prove when alleging bribery based on campaign contributions, undermines basic principles of fair notice required by the Due Process Clause and supports granting the Petition for a Writ of Certiorari.

II. The Second Circuit's Vague and Expansive Interpretation Criminalizes Common Political Conduct, Deters Participation in Our Democracy, and Threatens Federalism

While it is not uncommon for the lower courts to disagree on the interpretation of a federal criminal law, *see, e.g.*, *Moskal v. United States*, 498 U.S. 103, 108 (1990) (rejecting the argument that "a division of judicial authority" is "automatically sufficient to trigger lenity"), the lack of clarity here has a meaningful impact on our democracy and requires this Court's intervention. The Second Circuit's vague and expansive interpretation of federal bribery laws involving campaign contributions not only contravenes due process, it also criminalizes common political conduct and undermines both participation in our democracy and principles of federalism.

A. The Second Circuit's Interpretation Will Inconsistently and Inequitably Inhibit Participation in Our Democracy

As this Court has recognized, the blunt reality is that "[c]ampaigns must be run and financed." *McCormick*, 500 U.S. at 272. To do so, contributions are "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." *Id.* Unlike personal gifts to elected officials, campaign contributions are "a general expression of support" for a candidate and the candidate's views, serving to "affiliate a person with a candidate," *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976), and supporting activities that are "integral to the operation of the system of government established by our Constitution," *id.* at 14.

Campaign contributions naturally involve mutual benefit—a quid and a quo—between the donor and the candidate. As this Court has noted, "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *McCormick*, 500 U.S. at 272. For their part, "constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Cruz*, 596 U.S. at 308 (quoting *McCutcheon*, 572 U.S. at 192 (plurality opinion)). "It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors." *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part). As the district court in this case put it, "[a]n official act taken in the hope that it will yield campaign contributions is not a bribe; it is a basic aspect of the American political system." *United States v. Benjamin*, No. 21 Cr. 706 (JPO), 2022 WL 17417038, at *12 (S.D.N.Y. Dec. 5, 2022).

"To be sure, the line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Cruz*, 596 U.S. at 308 (internal quotation marks and citation omitted). This Court has observed that criminally sanctioning legislators "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" could risk criminalizing conduct that has long been considered a legitimate attribute of our political system and "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." *McCormick*, 500 U.S. at 272. An expansive theory of federal criminal liability in this sphere would "cast a pall of potential prosecution over these relationships," where "citizens with legitimate concerns might shrink from participating in democratic discourse." *McDonnell v. United States*, 579 U.S. 550, 575 (2016).

As it stands, candidates for public office across the country are operating without clear guidelines as to how they may solicit funds and what future actions may subject them to prosecution. Here, as in *Snyder v. United States*, "the Government does not identify any remotely clear lines separating an innocuous or obviously benign" acceptance of a campaign contribution from an implicit, unlawful agreement to act corruptly in the interests of a constituent. 144 S. Ct. 1947, 1957 (2024). Such an ill-defined interpretation of a federal criminal law not only runs afoul of the Due Process Clause's fair notice requirement but also will

have a chilling effect on how constituents, donors, candidates, and elected officials participate in our democratic process.

More specifically, there is an acute risk that constituents will be less likely to donate to the campaigns of their favored candidates, out of the fear that an overly aggressive prosecutor may interpret that contribution as a bribe. Similarly, candidates running for office or reelection may fear acting in the interests of individuals and entities who have donated—or may in the future donate—to their campaigns. Certain qualified candidates may even refrain from running for office altogether, because they would be unwilling to subject themselves to a vague criminal standard.

This chilling effect is also not consistently imposed across our country. Due to the circuit split described above, improper bargains between donors and candidates may be inferred in some states, while in others only proof of an explicit quid pro quo will lead to federal criminal prosecution. Such a patchwork of First Amendment protections will cause the character of political representation and participatory opportunities in our democracy to vary from state to state across the country. That is not a sound law.

In addition, where the Second Circuit's interpretation applies, participation in the democratic process will also be inequitably stifled based on socio-economic means. The heightened risk faced by candidates who depend on contributions will unfairly redound to the benefit of candidates who have the personal wealth to self-fund their campaigns. Advantaging self-funded candidates will likely skew political participation

along social and racial lines. *See* Abhay P. Aneja, Jacob M. Grumbach & Abby K. Wood, *Financial Inclusion in Politics*, 97 N.Y.U. L. Rev. 566, 620 (2022). These second- and third-order effects alone are troubling, but for federal law to cause them to occur in only some regions is incompatible with our country's founding values.

B. The Second Circuit's Expansive Interpretation Invites Prosecutorial Overreach and Endangers Federalism

The conduct sought to be criminalized here—the solicitation and provision of campaign contributions—also implicates important federalism principles. After all, "[a] state defines itself as a sovereign through the 'structure of its government, and the character of those who exercise government authority.'" *McDonnell,* 579 U.S. at 576 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). And just last term, this Court emphasized that it is generally the States who "have the 'prerogative to regulate the permissible scope of interactions between state officials and their constituents.'" *Snyder*, 144 S. Ct. at 1956 (quoting *McDonnell*, 579 U.S. at 576).

As a result of the ambiguity surrounding *McCormick*, the line between lawful, constitutionally protected activity and criminal conduct is left to the discretion of prosecutors and the conflicting decisions of the federal courts. But given the stakes for our democracy, an expansive interpretation that permits criminal prosecutions of state and local elected officials based on inferred agreements in the context of campaign contributions leaves too much to the discretion

of federal prosecutors. Even when donors or candidates charged with bribery are exonerated in the courts, or when prosecutors initiate an investigation but ultimately decide not to bring charges, damage to our representative system is done.

In these circumstances, this Court has routinely limited the reach of federal statutes based on "principles of federalism inherent in our constitutional structure." *Bond v. United States*, 572 U.S. 844, 856 (2014). The Second Circuit's vague standard undoubtedly threatens our system of federalism, for clarity in the law is paramount when federal prosecutors are provided wide discretion to severely impact state and local elections. Indeed, mere investigative steps by federal prosecutors, such as the issuance of a subpoena, much less a federal indictment, could tarnish a candidate's reputation and change the result of an election. Once the results of an election are altered, the state or locality could feel the effects for years to come, regardless of the ultimate results of the investigation. Once a federal criminal probe is announced, the damage will likely already be done—and extremely difficult, if even possible, to undo. And with no proper guidelines, federal prosecutions in this area are more likely to be viewed as political, which could also subvert the public's trust in multiple branches of government.

Similar concerns about federal overreach and the potential for prosecutorial abuse animated the limitations imposed by this Court on the scope of numerous criminal statutes used by prosecutors to target perceived corruption. *See*, *e.g.*, *McNally v. United States,* 483 U.S. 350, 356 (1987) (eliminating the application of the wire fraud statute to "honest services" fraud);

United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 406–07 (1999) (interpreting the federal anti-gratuity statute to require that a gratuity paid to a government official be linked to a particular official); *Cleveland v. United States*, 531 U.S. 12, 23 (2000) (rejecting the government's theory that a state's regulatory power was a form of "property" for purposes of the wire fraud statute); *Skilling v. United States*, 561 U.S. 358, 408–11 (2010) (limiting the reach of the honest services fraud statute to "bribes and kickbacks"); *McDonnell*, 579 U.S. at 567 (narrowly interpreting the term "official act" for purposes of the federal bribery statute); *Kelly v. United States*, 590 U.S. 391, 400 (2020) (in the context of a public corruption prosecution, limiting the definition of what constitutes a property interest for purposes of wire fraud); *Ciminelli v. United States*, 598 U.S. 306, 314 (2023) (rejecting a "right-to-control" theory of wire fraud); *Snyder*, 144 S. Ct. at 1955 (rejecting the government's interpretation of the federal funds bribery statute as covering gratuities).

As this Court has observed, prosecutors cannot simply be trusted to cabin their own discretion in a way that relieves these concerns. Just last term, this Court reiterated that it "cannot construe a criminal statute on the assumption that the Government will use it responsibly." *Snyder*, 144 S. Ct. at 1958 (quoting *McDonnell*, 579 U.S. at 576); *see also id.* at 1960 (Gorsuch, J., concurring) ("[C]ourts cannot 'rely upon prosecutorial discretion to narrow the' scope of an 'otherwise wide-ranging' criminal law." (quoting *Marinello v. United States*, 584 U.S. 1, 11 (2018))). Time and time again, this Court has instead chosen to "exercise[] restraint in assessing the reach of a federal

criminal statute" rather than proceed under the assumption that the government will act responsibly. *Marinello*, 584 U.S. at 11 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)).

Here, there is even greater reason to question the government's exercise of discretion in light of the varying positions it has taken regarding the applicable standard. *Compare* Transcript of Oral Argument at 92, *Snyder v. United States*, 144 S. Ct. 1947 (2024) (No. 23-108) (government stating at oral argument that "under *McCormick* . . . there really has to be an express quid pro quo when we're dealing with a bona fide campaign contribution"), *with* Brief of the United States of America at 15–22, *United States v. Benjamin*, 95 F.4th 60 (2d Cir. 2024) (No. 22-3091) (arguing below that *McCormick* does not require the government to prove an express quid pro quo).

Lastly, state and local laws already provide criminal prohibitions against bribery, as well as an extensive, intricate regulatory framework for campaign contributions.[6] Therefore, "a narrow, rather than a

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[6] *See, e.g.*, *Campaign Finance Regulation: State Comparisons*, National Conference of State Legislatures (Oct. 24, 2022), available at https://www.ncsl.org/elections-and-campaigns/campaign-finance-regulation-state-comparisons; Thomas F. McInerney, *The Regulation of Bribery in the United States*, 73 Int'l Rev. of Penal L. 81, 100 (2002) (noting that "[b]ribery of a public official is a crime in all fifty states"). Several states have gone as far as to include prohibitions on bribery in their respective constitutions. *See, e.g.*, Colo. Constit. Art. XII, §§ 6, 7; Kan. Constit. Art. 2, § 28; Miss. Constit. Art. 4, § 50; N. M. Constit. Art. 4, § 39; N.D. Constit. Art. 4, § 9; Tex. Constit. Art. 16, § 41; Wyo. Constit. Art. 3, §§ 42–43.

sweeping" interpretation of the federal criminal statute is warranted. *See Sun-Diamond Growers of Cal.*, 526 U.S. at 409 (explaining that a narrow interpretation of the federal bribery statute is "more compatible with the fact that" the statute "is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials"). Otherwise, federal prosecutors would be left to impose their own "standards of good government for local and state officials," *McDonnell*, 579 U.S. at 577 (internal quotation marks and citation omitted), without any clear indication that Congress envisioned such a significant encroachment on state and local authority.

CONCLUSION

The Second Circuit's interpretation of the quid pro quo requirement in cases of alleged bribery based on campaign contributions sets "a vague and unfair trap" for millions of state and local officials and their constituents. *Snyder*, 144 S. Ct. at 195. Due process calls for greater clarity in the law, particularly where the rights to free speech and association at the heart of our democratic system are at stake. This Court should intervene to ensure that the cudgel of federal corruption charges is not wielded against state and local officials and their constituents in unpredictable, inconsistent, and irreversibly damaging ways.

For the foregoing reasons, and for the reasons stated in the Petition, the Court should grant the Petition for a Writ of Certiorari.

Dated: September 9, 2024

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