ORAL ARGUMENT NOT YET SCHEDULED

No. 11-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN A. RING,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 08-CR-274 (ESH)

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CENTER FOR COMPETITIVE POLITICS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons and entities listed by Appellant, the following listed persons and entities as described in Circuit Rule 29 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") works to advance the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct.[1] NACDL provides *amicus* assistance on the federal and state level in cases that present issues of importance to criminal defendants, criminal defense lawyers, the criminal justice system as a whole, and the proper and fair administration of criminal justice.

The Center for Competitive Politics ("CCP") is a non-profit organization that seeks to educate the public about the effects of money in politics, and the benefits of a more free and competitive electoral process. CCP works to defend the constitutional rights of speech, assembly, and petition through legal briefs and academic studies.

PRELIMINARY STATEMENT

NACDL agrees with the Statement of Jurisdiction, the Statement of the Issues, and the Statement of the Case in the Brief of Appellant. NACDL also

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amicus* brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amicus Curiae* National Association of Criminal Defense Lawyers hereby certifies that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amicus curiae*, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

agrees with Appellant's Statement of Relevant Facts and Standard of Review. NACDL will address only the District Court's erroneous instructions with regard to honest services fraud under 18 U.S.C. §§ 1343 & 1346, and its mistaken decision to admit evidence of legal campaign contributions in support of the charges against Mr. Ring.

SUMMARY OF THE ARGUMENT

In *Skilling v. United States*, 130 S. Ct. 2896 (2010), the Supreme Court held that to prove "honest services" fraud under 18 U.S.C. § 1346, the government must prove bribery. *Id.* at 2933. And in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) , the Court made clear that bribery requires proof that a "thing of value" was "give[n], offer[ed] or promise[d]" as a *quid pro quo* for an official act. *Id.* at 405. Therefore, to prove honest services fraud, the government must show an "exchange" between a "thing of value" and an act taken in response. The District Court's instructions in this case read this requirement out of the statute, permitting the jury to convict Mr. Ring of honest services fraud without a showing of any *quid pro quo*, but on the basis of a unilateral "intent to influence". This error threatens to chill, or worse, criminalize, an extraordinarily broad range of conduct that is engaged in on a daily basis by millions of Americans — including not only lobbyists like Mr. Ring, but men and women in any business who seek to "influence" customers through hospitality — and which has never

been thought to be criminal.

In addition, campaign contributions may be made to build influence or even as a "reward" for official action. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 910 (2010); *McCormick v. United States*, 500 U.S. 257, 272 (1991). Nevertheless, the District Court allowed the government to introduce evidence of such legal campaign contributions in support of its charges against Mr. Ring. The prosecution then expressly invited the jury to convict Mr. Ring on the basis of this legal conduct. This evidence should have been excluded under Federal Rule of Evidence 403. Its admission violated Mr. Ring's rights under the First Amendment, and threatens to chill or even criminalize the making of constitutionally protected campaign contributions.

ARGUMENT

Lobbyists like Kevin Ring seek to influence public officials and help shape public policy in manners favoring their clients. It is illegal for a lobbyist to provide a "thing of value" to an official in exchange for an official act, 18 U.S.C. § 201(b), or "for or because of" a particular official act. 18 U.S.C. § 201(c). However, it is not illegal to provide the same official with the same thing of value when the gift is not tied to an official act, but is given to "build a reservoir of good will," *Sun-Diamond Growers*, 526 U.S. at 405, or where the gift is given:

> [I]n the hope that, when . . . particular official actions move to the forefront, the public official will listen hard to, and hopefully be

swayed by, the giver's proposals, suggestions, and/or concerns.

United States v. Schaffer, 183 F.3d 833, 842 (1999); *see also Citizens United*, 130 S. Ct. at 910 ("Ingratiation and access . . . are not corruption.")

Kevin Ring was tried for providing "things of value" — including meals and entertainment — to public officials. He was not charged with bribery, but with honest services fraud under 18 U.S.C. §§ 1343 & 1346. Despite the Supreme Court's ruling in *Skilling*, 130 S. Ct. at 2933, the District Court allowed Mr. Ring to be convicted of honest services fraud absent a showing of the *quid pro quo* required for bribery, but upon a showing of a unilateral "corrupt intent to influence" — *i.e.*, with no showing that he "g[ave], offer[ed], or promise[d]" anything to anyone "in exchange" for any official act. *Sun-Diamond Growers*, 526 U.S. at 405.

Not only did this violate Mr. Ring's right to due process; it threatens to criminalize a broad swath of conduct that is not only not illegal, but intrinsic to the democratic process. The intent to "influence," often by providing meals and other entertainment, is ubiquitous in politics, and the District Court's rulings here threaten those who seek to influence public policy with jail.

The effort to "influence" is pervasive not only in politics, but also in American business. Businesses seek to "influence" customers, and salespeople routinely entertain existing and potential clients with meals and other hospitality.

Various federal and state laws prohibit bribery in the commercial context, *e.g.* 15 U.S.C. § 78dd-2(a) (Foreign Corrupt Practices Act); Cal. Penal Code § 641.3 (commercial bribery), but if the District Court's rulings — which blur the line between the *quid pro quo* required for bribery and a unilateral intent to "influence" — are allowed to stand, millions of American men and women would face prison for engaging in conduct that is essential to their jobs, and which has never been thought to be illegal.

In addition, campaign contributions made to build influence or even as a "reward" for official action are not only lawful, but are protected by the First Amendment. *Citizens United*, 130 S. Ct. at 910; *McCormick*, 500 U.S. at 272. Nevertheless, the District Court allowed the prosecution to introduce evidence of legal contributions to support its charges against Mr. Ring. Not only does this error violate Mr. Ring's rights under the First Amendment; it threatens to deter, or even criminalize, constitutionally protected conduct.

I. THE DISTRICT COURT FAILED TO REQUIRE THE GOVERNMENT TO PROVE BRIBERY.

The criminal law — "[t]he state's authority to deprive freedom or even life itself" — is "the most potent action any government can take against the governed." Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 714 (2005). Although a civil penalty may be costly, imprisonment is "different in kind, rather than degree, from monetary dispossession, involving an

incomparable denial of human dignity and autonomy." *Id.* at 714. In addition to a loss of freedom, "[t]he convicted defendant and the community understand that the state uses the criminal law to condemn publicly the offender, who experiences shame because of the notoriety of his punishment." Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal And Civil Law*, 101 Yale L. J. 1795, 1808 (1992); *see also* Luna, *supra*, 54 Am. U. L. Rev. at 713 ("convicted offenders [are] viewed as outcasts subject to social scorn").

The stigma of a criminal judgment and "[t]he terrible nature of prison," William J. Stuntz, *Substance, Process, And The Civil-Criminal Line*, 7 J. of Contemp. Legal Issues 1, 24 (1996), require that this most awesome power be exercised with care, and that individuals be subjected to criminal punishment only when they violate clear proscriptions. A criminal statute that fails to "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement" violates the Due Process Clause and is void for vagueness. *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see also United States v. Bass*, 404 U.S. 336, 349 (1971) (citing "an instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should").

When a criminal statute applies to activity that furthers First Amendment

interests, courts must exercise "particular care" to ensure that the statute "provide[s] more notice and allow[s] less discretion than for other activities." *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988); *see also Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J., concurring) (vague statute affecting First Amendment interests "is an invitation to selective enforcement; and even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted"). Mr. Ring was a lobbyist, and lobbying stands at the core of the First Amendment's guarantees of free speech and the right to petition the government. While those protections do not extend to bribery, the proper exercise of those rights must not be criminalized by the improper application of a vague statute. Otherwise, vast amounts of conduct that are not criminal, have never been thought to be criminal, and clearly should not be criminal — for example, a salesman taking a prospective customer to dinner in order to "influence" the prospect to buy the salesman's product — would expose millions of Americans, in politics, government service, and business, to the threat of lengthy jail terms.

Here, the government argued to the jury that:

> The defendant's job may have been to influence the course of government policy, but the defendant's job does not entitle him to influence that policy by showering public officials with things of value.

Tr. 11/4/10 (a.m.) at 6:18-21. However, as the prosecution conceded, "offering a thing of value with an intent to build a reservoir of good will or with an intent to cultivate a political friendship" is not illegal. *Id*. at 7-8; *see Sun-Diamond*, 526 U.S. at 405; *Schaffer*, 183 F.3d at 842; *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007) (Sotomayor, J.) ("[B]ribery is not proved if the benefit is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be at some unknown, unspecified later time, be in a position to act favorably on the giver's interests—favorably to the giver's interest. That describes legal lobbying."). Therefore, it was critical in this case for the District Court to define precisely the point at which legal lobbying — including the provision of meals and entertainment to build good will and cultivate political friendships — crosses into bribery and honest services fraud. As made clear by the jury's manifest confusion on this precise point, *see* J.A. 397 (question from jury asking "what are the criteria for deciding when giving gifts are legal or illegal"), the District Court failed to do so.

A. The Honest Services Fraud Statute Is Unconstitutionally Vague Unless Limited To Bribery, As *Skilling* Requires.

As Congress turns increasingly to the criminal law to regulate conduct, the phenomenon of "overcriminalization" has raised concerns across the political spectrum. *Reining in Overcriminalization: Assessing the Problem, Proposing*

Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. 51, 65 (2010) [hereinafter *Overcriminalization Hearing*] (statements of Brian W. Walsh, Heritage Foundation, and Prof. Stephen F. Smith, Notre Dame Law School). In the last quarter-century, Congress has enacted new criminal laws at a rate of more than one per week. John S. Baker, Heritage Foundation, *Revisiting the Explosive Growth of Federal Crimes*, Legal Memo No. 26 at 1-2 (June 16, 2008). During the 109th Congress (2005-2006) alone, legislators proposed 446 new non-violent offenses. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent*, (Heritage Foundation and National Association of Criminal Defense Lawyers 2010) at 11-13.

It would be naïve at best to believe that this pell-mell pace leaves the opportunity (or reflects the political will) to devote the attention and consideration necessary to ensure that new criminal laws are clear and precise, and do not threaten constitutional values. As Justice Scalia has stated: "[w]e face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

In the criminal arena, the consequences are "particularly dire when legislative language is vague, unclear, or confusing: the misuse of governmental

power unjustly deprives individuals of their physical freedom." *Overcriminalization Hearing* at 55 (statement of Brian W. Walsh). Congressional representatives have noted that many federal criminal statutes are "poorly defined," and "set[] traps for the uninformed, the unaware, and the naïve." *Id*. at 7 (statement of Rep. Conyers). Imprecise statutes encourage arbitrary and discriminatory enforcement, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972), and vague federal criminal statutes "have been stretched by prosecutors, often with the connivance of the federal courts, to cover a vast array of activities neither clearly defined nor intuitively obvious as crimes." Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* xxxv (2009).

The honest services fraud statute, 18 U.S.C. § 1346, is emblematic of these problems. The statute was "rushed through," Frank C. Razzano and Kristin H. Jones, *Prosecution of Private Corporate Conduct: The Uncertainty Surrounding Honest Services Fraud*, Business Law Today, Vol. 18, No. 3 (January/February 2009), with minimal consideration, Daniel W. Hurson, *Mail Fraud, the Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 Hou. L. Rev. 297 (2001), by a Congress reacting to a well-publicized Supreme Court decision addressing political corruption that supposedly dealt "a crippling blow to the ability of Federal law to curtail political corruption in the United

States." 133 Cong. Rec. E3240-02, 1987 WL 944184 (Aug. 4, 1987) (remarks of Rep. Conyers).

The resulting vague and uncircumscribed language of the statute "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). Prosecutors have brought "honest services" cases against a variety of high-profile targets for a wide range of conduct; but in the wake of *Skilling*, many of these convictions have been overturned.[2]

In the midst of Enron Corporation's highly publicized bankruptcy, the company's President and COO was indicted for honest services fraud and accused of defrauding shareholders by manipulating Enron financial statements in order to increase his own compensation. *Skilling*, 130 S. Ct. at 2908. On appeal, he argued that the honest services fraud statute, 18 U.S.C. § 1346, is unconstitutionally vague because it "does not adequately define what behavior it bars," and because its

[2] *See, e.g., Black v. United States*, 130 S. Ct. 2963 (2010) (newspaper magnate and owner of Chicago Sun Times); *United States v. Ford*, 639 F.3d 718 (6th Cir. 2011) (Tennessee state senator); *United States v. Bruno*, 661 F.3d 733 (2nd Cir. 2011) (Majority Leader of New York Senate); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (Alabama governor); *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010) (mayor of Newark); *United States v. Hereimi*, 396 F. App'x 433 (9th Cir. 2010) (wealthy small business owner); *United States v. Harris*, 388 F. App'x 608 (9th Cir. 2010) (former city councilman and mayor).

"standardless sweep . . . facilitate[s] opportunistic and arbitrary prosecutions." *Skilling*, 130 S. Ct. at 2928. The Supreme Court agreed that, on its face, the statute raises due process concerns, but applied a saving construction limiting the statute's reach to bribery and kickback schemes. *Id*. at 2931. The Court made clear that "no other misconduct falls within § 1346's province." *Id.* at 2933.

B. The District Court Failed to Require The Government To Prove Bribery.

In *Sun-Diamond*, the Supreme Court addressed the question when, precisely, the gift of "things of value" to a government official becomes criminal. The Court found that gifts may legally be given to an official "based on his official position and not linked to an identifiable act" taken, or to be taken, by the official. 526 U.S. at 406-07. As the *Sun-Diamond* Court held, gifts to an official become criminal only when they are linked to particular official acts. *Id*. at 404-05, 408. The *Sun-Diamond* Court also took note of the "distinguishing feature" that makes bribery so much more serious than gratuities — a *quid pro quo*, or the exchange of a thing of value for an official act. *Id*. at 404-05. An illegal gratuity, by contrast, "may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken." *Id*. at 405.

In sum, *Sun-Diamond* differentiates three different scenarios in which an individual provides a "thing of value" to a government official:

1. When the "thing of value" is given not in connection with a

> particular official act, but merely "to build a reservoir of goodwill that might affect one or more of a multitude of unspecified acts," there is no crime;
>
> 2. When the same individual provides the same "thing of value" to the same official as a "reward" for "some particular official act," he violates the gratuities statute,[3] 18 U.S.C. §201(c); and
>
> 3. When the same individual provides the same "thing of value" to the same official "in exchange for an official act" — *i.e.*, where there is a *quid pro quo* between the thing of value and the official act — he commits bribery.

Sun-Diamond, 526 U.S. at 405; *see also United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) ("bribery may not be founded on a mere intent to curry favor. . . . There is a critical difference between bribery and generalized gifts provided in an attempt to build goodwill") (citing *Sun-Diamond*). Scenario (1) — as conceded by the government in this case, Tr. 11/4/10 (a.m.) at 7:23-8:10 — is not illegal. And the crucial factual distinction between scenarios (2) and (3) (*i.e.*, between a gratuity and a bribe) is the difference between a "reward," on one hand, and an "exchange," or *quid pro quo*, on the other.

Even where a thing of value is linked to a particular official act, in order to prove bribery, the government must show that the linkage between gift and act involved an exchange, rather than a mere unilateral "reward." Since *Skilling* limits honest services fraud to bribery, and *Sun-Diamond* holds that gifts meant to "build

[3] It is not, however, illegal to provide campaign contributions as a "reward" for official acts. *See* § II, *infra*.

a reservoir of good will" and even a "reward" for an official act are insufficient to show bribery, it necessarily follows that the gift of "things of value" to an official to build goodwill, or even as a reward for a particular act, are insufficient to support a conviction for honest services fraud.

For example, if a lobbyist gives expensive sports tickets to an official, who then takes an act favorable to the lobbyist's client, there is no gratuity absent additional evidence that the gift was a "reward" for the act, rather than a generalized attempt to "curry favor." *Sun-Diamond*, 526 U.S. at 405. And absent still further evidence of an "exchange" between the gift and the act, these facts do not permit a conviction for bribery under *Sun-Diamond*, or for honest services fraud under *Skilling*. The same is true where a salesman entertains a potential customer who then buys the salesman's product — there can be no honest services fraud absent proof of a *quid pro quo*.

Even if, as the District Court found here, the bribery statute's prohibition on "offer[ing]" a bribe means that the offeror may be convicted whether or not the official *agrees* to an exchange, *Unites States v. Ring*, 768 F. Supp. 2d 302, 308-09, such an exchange must be proposed, understood, or agreed to before bribery can be shown. Otherwise, the bribery statute's *quid pro quo* or "exchange" requirement would be meaningless. The *Sun-Diamond* Court made clear that even if the giver of a thing of value hopes or even intends that the gift will result in some particular

official action, that mere unilateral intent or hope is insufficient to elevate the gift to a bribe. 526 U.S. at 405. Even if a "thing of value" is conveyed to an official in connection with a particular official act, absent the recipient's agreement — explicit or implicit — to the exchange, or, at least, the offeror's proposal of an exchange, the gift can be, at most, a mere unilateral "reward" (and therefore a gratuity) rather than an "exchange" (and thus a bribe).

The District Court's instructions in this case failed to preserve this crucial distinction. The court instructed the jury that "[w]hen a public official acts to enrich him or herself through his or her office by accepting things of value, he or she acts against the public's expectation that he or she will work for, and serve, the public welfare." J.A. 368. However, as discussed above, to prove bribery it is not sufficient merely to show that an official has "enrich[ed] him or herself" — there must be an "exchange."

The District Court went on to instruct the jury that a *quid pro quo* was required, but eliminated the "exchange" requirement by focusing solely on Mr. Ring's unilateral intent. It instructed the jury that it could convict Mr. Ring of honest services fraud if it found that he "intend[ed] to receive an official act in return" for a thing of value, or "intend[ed]" that a public official "realize or know that he or she is expected, as a result of receiving this thing of value, to exercise particular kinds of influence or decision-making to benefit the giver as specific

opportunities to do so arise." *Id.*

By focusing solely on the defendant's intent, and omitting any requirement that the government prove an agreement — explicit or implicit — to an exchange, or even that that the defendant offered one, this instruction allowed the jury to convict Mr. Ring for honest services fraud upon a showing of something less than bribery — *i.e.*, gifts given to build goodwill or as a mere "reward," rather than an "exchange." *See Schaffer*, 183 F.3d at 841 (gratuity requires only "one-way nexus," but bribery requires "two-way nexus").

The flaw in the District Court's instruction is demonstrated by the example of an individual who takes a public official or potential customer to dinner in the hope, and with the intent, that in exchange for the dinner, the official or potential customer will take action favorable to the individual. The District Court's instruction would stretch to this individual even if he never expresses his hope or intent, and where the official or potential customer attends and leaves the dinner believing that the individual is merely attempting to "curry favor," and then takes no action because of the dinner. In such a case, it is crystal clear that no one has "give[n], offer[ed] or promise[d]" anything of value, or "demand[ed], s[ought], receive[ed], accept[ed], or agree[d] to receive" anything of value, as required by the express language of the bribery statute, 18 U.S.C. § 201(b). Nevertheless, even though it is clear that no bribery occurred, the District Court's instruction would

permit the individual to be convicted of honest services fraud, contrary to *Skilling*.

The District Court's suggestion, Tr. 8/13/09 at 52:21-53:8, 62:21-63:1, 64:22-24, *see also Ring*, 768 F. Supp. 2d at 307, that where a defendant is charged with conspiracy to commit honest services fraud, the government need only prove the defendant's intent, and need not prove any offer of or agreement to any *quid pro quo*, misses the mark. In this case, this instruction was provided to the jury not only on the conspiracy count, but also on the substantive honest services counts. J.A. 378. Moreover, the District Court's suggestion that the defendant's intent alone suffices to support an honest services conviction because §§ 1343 and 1346 criminalize "schemes," 768 F. Supp. 2d at 308-09, proves too much. Were the District Court's reading correct, the lobbyist/salesman described above (who entertains an official or potential customer with the unexpressed, and ultimately unfulfilled, hope and intent that that person will take favorable action) would be liable under §1343 to a punishment of as much as 20 years in prison for wire fraud were he, for example, to telephone a restaurant to make a dinner reservation.

This flaw in the instructions was particularly critical in this case which, as the District Court found, presented "novel" and "complicated" questions concerning legal versus illegal lobbying and the prosecution of a lobbyist for providing things of value to a public official without an explicit *quid pro quo*, where a jury is not asked to determine the culpability of the public official. Tr.

10/26/11 at 72:23; *see also id.* at 61:3-10, 61:20-62:1; 67:13-20. Lobbying goes to the heart of the First Amendment's guarantees of free speech and the right to petition the government. *See United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J., dissenting); William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 35 (2006). Unless carefully circumscribed as required by *Skilling*, the vague honest services statute threatens to allow "abuse by headline-grabbing prosecutors" seeking criminal penalties for "any manner of unappealing or ethically questionable" — or even merely unpopular — conduct. *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari).

By permitting Mr. Ring to be convicted of honest services fraud with no showing that he "g[ave], offer[ed], or promise[d]" any *quid pro quo*, or that any official accepted such a proposal, explicitly or implicitly, the District Court allowed the jury to find honest services fraud absent a showing of bribery, in violation of *Skilling*. The court's instructions are an invitation to arbitrary and discriminatory enforcement of the honest services statute. The practices engaged in by lobbyists — *e.g.*, entertaining officials with expensive meals and sporting events and providing them with campaign contributions — are certainly offered with the intent to influence official policy, and may be unappealing to the average American, or to individuals who disagree with the causes for which an individual

lobbies. But absent a *quid pro quo*, these practices do not constitute bribery, *Sun-Diamond*, 526 U.S. at 405, and therefore do not constitute honest services fraud. *Skilling*, 130 S. Ct. at 2933.

The same is true in the commercial context. According to *Skilling*, a salesman may entertain a prospect with the hope and intent of receiving business in return, but absent evidence that he "g[ave], offer[ed] or promise[d]" anything of value "in exchange" for that business, there can be no honest services fraud. By ignoring this crucial limitation, the District Court's ruling would have disastrous and absurd consequences for the business community. The District's Court interpretation would make felons of businessmen who engage in activities as commonplace and innocuous as buying Girl Scout cookies from a valued customer's daughter.

II. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF LEGAL AND CONSTITUTIONALLY PROTECTED CAMPAIGN CONTRIBUTIONS.

In *McCormick v. United States*, 500 U.S. 257, 272 (1991), the Supreme Court made clear that "[w]hatever ethical considerations and appearances may indicate," it is no crime to make campaign contributions to Members of Congress who take actions one views as favorable. The *McCormick* Court wrote that:

> Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after

> campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 272. Therefore, the Court held, campaign contributions may be the basis of a public corruption prosecution "only if the payments are made in return for an *explicit promise or undertaking* by the official to perform or not perform an official act." *Id*. at 273 (emphasis added).[4]

There was no evidence that Kevin Ring ever made any campaign contribution on the basis of an explicit *quid pro quo*. The government conceded as much, Tr. 8/20/09 at 19:13-17, and Mr. Ring was not charged with any illegality in connection with any campaign contribution. However, the government was permitted to introduce dozens of email messages in which Mr. Ring and other lobbyists carried on crude discussions of campaign contributions. For example, in one email, Mr. Ring suggested that he and his colleagues "reward" a Congressman with additional campaign contributions because he had taken actions favorable to

[4] *McCormick* involved extortion, but bribery and extortion are "different sides of the same coin," *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), and the *McCormick* rule has been applied to bribery. *See Evans v. United States*, 504 U.S. 255, 268 (1992); *United States v. Siegleman*, 640 F.3d 1159, 1172 n.14 (11th Cir. 2011).

their clients. Tr. 8/13/09 at 58:18-24. The government recognized that these emails reflected activity that was "well within the law," *McCormick*, 500 U.S. at 272, but nevertheless sought to introduce them as evidence of "Mr. Ring's intent, how he approaches fundraising, the provision of things of value." Tr. 8/13/09 at 59:19-21. The District Court originally worried that this evidence could "infect the entire case" by suggesting that the campaign contributions themselves were illegal, *id*. at 60:4, but ultimately admitted it as evidence of the alleged conspiracy's "*modus operandi*." Tr. 24, Aug. 20, 2009.

At trial, the government expressly linked evidence of campaign contributions to its claim that Mr. Ring committed honest services fraud by entertaining officials. Tr. 11/4/10 at 7:4-5. The admission of this evidence allowed the government to encourage the jury to convict on the basis of legal (and constitutionally protected) conduct.

Campaign contributions can be a highly emotional subject, since individuals may disagree with the causes and individuals to whom contributions are made, may believe that moneyed interests have inordinate influence on the political process through campaign contributions, or may find the entire process of election financing distasteful. As a result, criminalizing campaign contributions would invite prosecutions based on differing political views. Therefore, in order to protect this conduct, the *McCormick* Court walled it off from criminal liability

where there is no explicit *quid pro quo*. Permitting the government to use evidence of this constitutionally protected conduct as evidence of gratuities and "honest services" fraud constitutes an end-run around *McCormick*, allowing prosecutors to take aim at political enemies, and jurors to convict defendants for conduct that they may find unappealing, but which is not illegal.

A. Any Relevance The Campaign Contribution Evidence May Have Had Was Vastly Outweighed by Its Extraordinary Prejudice.

Federal Rule of Evidence 403 permits a district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Where, as here, a defendant is charged with illegal gratuities and honest services fraud, Rule 403 requires that evidence of lawful campaign contributions be excluded because such evidence is not probative of unlawful bribery but does pose an enormous risk of unfair prejudice and juror confusion. The facts of Mr. Ring's case provide a perfect example of how such improperly admitted evidence can "infect the entire case." Tr. 8/13/09 at 60:4.

Mr. Ring was charged with providing, and conspiring to provide, illegal gratuities. Although *McCormick* makes clear that it is perfectly legal to make campaign contributions as a "reward" for official action, under *Sun-Diamond*, the provision of things of value as a "reward" for official action constitutes an illegal

gratuity. In this case, the government deliberately exploited the inevitable juror confusion stemming from the (legal) use of campaign contributions as rewards.[5] Tr. 11/4/10 (a.m.) at 7:4-5; *see also* Tr. 8/13/09 at 58:18-24 (government argues that evidence of campaign contributions as "rewards" was relevant to prove honest services fraud).

Nor was this evidence relevant to prove honest services fraud. The District Court's decision to admit the campaign contribution evidence was made in August 2009, before Mr. Ring's first trial, which ended in a hung jury, and which took place before the *Skilling* Court limited honest services fraud to bribery. At that point, the government argued that this evidence would go to prove the "sort of briberesque conduct" it would be required to prove for honest services fraud. Tr. 10/5/09 at 44:4-6.

The government did not explain what "briberesque" conduct meant, but it is plain that the evidence was offered at the pre-*Skilling* trial to prove something perhaps similar to bribery, but without the crucial element of a *quid pro quo*.[6]

[5] Although *McCormick* requires that *quid pro quo* to be explicit, the government argued that it need not be "expressed," but could be a *quid pro quo* existing only "in terms of what these conspirators are thinking." Tr. 8/13/09 at 45:14-18. This theory would eviscerate *McCormick*.

[6] Indeed, when the District Court noted that the exhibit discussed above reflected a "reward" rather than a *quid pro quo*, the government did not assert that the emails showed more than a "reward," but instead argued that it was not necessary to show more than a reward: "*McCormick* is tough to apply in the honest services context. *It wasn't written for honest services, it was written for a sort of one-for-one, a tit-*

Prosecutors argued that the campaign contribution emails were evidence that Mr. Ring and his colleagues "only gave things when they needed something, when they wanted to *groom* someone or *reward* someone or *influence* someone." Tr. 8/13/09 at 47:8-11. But as the Supreme Court held in *Sun-Diamond*, and as discussed above, a "reward" does not amount to bribery, and, under *Skilling*, cannot support a conviction for honest services fraud.

At Mr. Ring's second trial, following *Skilling*, the prosecution advanced another theory to support admitting the campaign contribution evidence. The government now stated that it would seek to prove that the emails were evidence of a scheme to "use campaign contributions for explicit promises for official actions." Tr. 10/18/10 at 3:9-11. The Court rejected this attempt to revise the charges against Mr. Ring, *id*. at 18, but, despite the intervening *Skilling* decision, did not revisit the rationale for admitting the campaign contributions during the first trial.

The government's shifting arguments in favor of admission reveal how little probative value lawful campaign contributions and gifts have in an honest services fraud prosecution post-*Skilling*. Even if lawful contributions constitute "rewards" to officials, the critical question after *Skilling* is whether those contributions are offered, given, or received "in exchange" for favorable official action. And the very reason that campaign contributions are lawful under *McCormick* is that no

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for-tat." Tr. 8/13/09 at 45:10-12 (emphasis added).

quid pro quo is involved. Such evidence therefore cannot support a conviction for honest services fraud, which requires a *quid pro quo*.

At the same time, such evidence can be extraordinarily prejudicial.[7] As the *McCormick* Court noted, the relationship between legislative action and campaign contributions is likely to create an unsavory appearance even where there is no illegality. *McCormick*, 500 U.S. at 272. That relationship gives the government a powerful tool, which the *Ring* prosecutors exploited. A "running joke" Mr. Ring supposedly made regarding campaign contributions — in which he would hold up campaign checks and say, "Hello *quid*. Where's the *pro quo*?" was featured in the government's closing argument, Tr. 11/4/10 (p.m.) at 7:4-5, even though there was no evidence of any connection between any campaign contribution and any *quid pro quo*. It is difficult to imagine evidence more prejudicial to a defendant.

B. The District Court Erred In Admitting The Campaign Contribution Evidence As Evidence Of The Alleged Conspiracy's "*Modus Operandi*."

The District Court's evidentiary ruling on campaign contributions also sets a dangerous precedent. Because the government charged a conspiracy in addition to honest services fraud, the court admitted evidence of campaign contributions as acts in furtherance of the conspiracy. However, bolstering relevance by referencing an accompanying conspiracy charge throws open the door to the

[7] The District Court itself noted that "there could well be a [Rule] 403 argument" regarding the campaign evidence. Tr. 8/20/09 at 12:22-24.

admission of wildly prejudicial evidence (of constitutionally protected activity) whenever a conspiracy is charged in conjunction with honest services fraud. Although jurors can be instructed to consider certain evidence for the fraud count alone, as they were in this case, no jury instruction can remedy the undue prejudice that Rule 403 is designed to prevent.

While the government struggled to invent a theory under which this extraordinarily prejudicial, but irrelevant, evidence could be admitted, the trial judge conjured up the notion that the campaign contributions were "sort of part of the conspiracy:"

> [I]n a way what they're doing . . . the conspiracy is that they conspired to corruptly influence public officials. And one of the ways that they at least do this is to engage in legal and illegal, we'll call them payments. The legal ones are contributions.

Tr. 8/20/09 at 11:21-12:1. The Court stated, "I believe [the campaign contributions are] so intertwined and so integrally part of what he did, and so the legal [campaign contributions are] critical." *Id*. at 23:25-24:1.[8] But absent evidence that campaign contributions are themselves improper, the notion that the contributions are "intertwined" with, or "integrally part of" the gift of meals and tickets alleged to be gratuities and honest services fraud simply does not bear

[8] The Court concluded that Mr. Ring and his fellow lobbyists made campaign contributions "to see who might bite," and once they "g[ot] the bites in response to putting the money out there," they "cross[ed] the line" into honest services fraud by providing meals and tickets to officials. Tr. 8/13/09 at 136:12-25; 8/13/09 at 20:16-23.

scrutiny. In a case like Mr. Ring's, prosecutors can put on a case alleging gratuities and honest services fraud with no evidence whatsoever of lawful campaign contributions. Such a case would show the jury a group of lobbyists who entertained officials, and ask the jurors to determine whether that entertainment was provided as a *quid pro quo* for official action. Campaign contribution evidence adds nothing essential to that case — it adds only salacious encouragement for the jury to convict for improper reasons.[9]

The District Court noted that legal acts may be overt acts by a conspiracy, giving the example of bank robbers who purchase a car to use in their getaway. But that facile comparison is invalid. Whereas the bank robber's purchase of the car is an act essential to, or that at least advances, the goals of their conspiracy, there is no evidence that the campaign contributions advanced, or were part of, any scheme to provide meals, tickets and other entertainment improperly.

More importantly, unlike the purchase of cars, campaign contributions are an essential part of our democracy, and are protected by the First Amendment. Courts must take great care to ensure that the participation in the democratic process represented by proper campaign contributions — as the government conceded was the case here — is not discouraged or, worse, criminalized. *See*

[9] As the District Court noted, and the government conceded, the campaign contributions were independent of the meals, tickets, etc. at the heart of the honest services allegations, and the former were not criminal even if made to "grease the wheels." Tr. 8/13/09 at 47:12-24, 48:18, 72:8-9.

Thomas, 864 F.2d at 194 (when criminal statute applies to activity that furthers First Amendment interests, courts must exercise "particular care" to ensure that it "provide[s] more notice and allow[s] less discretion than for other activities"). By admitting evidence of the concededly legal campaign contributions to prove gratuities and honest services fraud, the Court invited the government to argue that Mr. Ring should be convicted of those crimes based on comments made in the context of the legal campaign contributions, *see* Tr. 11/4/10 (p.m.) at 7:4-5, and allowed the jury to convict him for conduct that is not criminal.

CONCLUSION

The District Court's instructions allowed the jury to convict Mr. Ring of honest services fraud without a showing of a *quid pro quo*, in violation of *Skilling*. At the same time, the Court allowed the government to blur, if not obliterate, the line between legal, constitutionally protected conduct and illegal political corruption by admitting prejudicial evidence of lawful campaign contributions. The combination of these rulings had a devastating impact on Mr. Ring's case, and would have the same effect on millions of people (including not only lobbyists, but also businesspersons) who make campaign contributions or who entertain officials or customers in the hope of influencing them. The decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Paul F. Enzinna
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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of March, 2012, I caused this Brief Of National Association Of Criminal Defense Lawyers And Center For Competitive Politics As *Amici Curiae* In Support Of Appellant to be filed via the CM/ECF filing system, which will then send notification of such filing to all counsel of record.

/s/ Paul F. Enzinna
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STATUTORY ADDENDUM TO BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CENTER FOR COMPETITIVE POLITICS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

TABLE OF CONTENTS

STATUTES

Except for the following, all applicable statutes are contained in the Brief for Appellant.

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15 U.S.C. § 78dd-2(a) – Foreign Corrupt Practices Act

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

Cal. Penal Code § 641.3 – Commercial Bribery

(a) Any employee who solicits, accepts, or agrees to accept money or any thing of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.

(b) This section does not apply where the amount of money or monetary worth of the thing of value is two hundred fifty dollars ($250) or less.

(c) Commercial bribery is punishable by imprisonment in the county jail for not more than one year if the amount of the bribe is one thousand dollars ($1,000) or less, or by imprisonment in the county jail, or in the state prison for 16 months, or two or three years if the amount of the bribe exceeds one thousand dollars ($1,000).

(d) For purposes of this section:

(1) "Employee" means an officer, director, agent, trustee, partner, or employee.

(2) "Employer" means a corporation, association, organization, trust, partnership, or sole proprietorship.

(3) "Corruptly" means that the person specifically intends to injure or defraud (A) his or her employer, (B) the employer of the person to whom he or she offers, gives, or agrees to give the money or a thing of value, (C) the employer of the person from whom he or she requests, receives, or agrees to receive the money or a thing of value, or (D) a competitor of any such employer.