No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

vs.

DON EUGENE SIEGELMAN, et al., Appellants

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF APPELLANT GOVERNOR DON SIEGELMAN, ON REMAND FROM SUPREME COURT OF THE UNITED STATES

Vincent F. Kilborn, III
David A. McDonald
Kilborn, Roebuck & McDonald
Post Office Box 66710
Mobile AL 36606
(251) 479-9010

Redding Pitt
Farris, Riley & Pitt, LLP
Massey Bldg., Suite 400
2025 Third Ave. North
Birmingham AL 35203
(205) 324-1212

Sam Heldman
The Gardner Firm
2805 31st St. NW
Washington DC 20008
(202) 965-8884

Robert D. Segall
Copeland, Franco, Screws & Gill, PA
444 South Perry St.
P.O. Box 347
Montgomery AL 36104
(334) 834-1180

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decision to finalize the agreement we made regarding the motorcycle early on, and this was to finish that." [*Id.* p. 243 (Tr. 482)]. According to Bailey, "We met at the Governor's attorney's office and with my attorney, and that's when I finished paying the Governor in full for the motorcycle to carry out the plan that we had entered into probably 12 to 18 months earlier." [*Id.* p. 244 (Tr. 483)].

C. Standard and Scope of Review

A motion for judgment of acquittal is reviewed *de novo*, taking the prosecution's evidence as true. *See*, *e.g.*, *U.S. v. Frank*, 599 F.3d 1221, 1233 (11th Cir. 2010). Where (as here) a challenge to jury instructions is that they did not correctly state the law, review is *de novo*. *See*, *e.g.*, *Frank*, 599 F.3d at 1236.

Summary of the Argument

First, after *Skilling* there can no longer be an "honest services" charge based on the assertion that an official took action because of a contribution to an issue-advocacy or referendum election campaign (or, for that matter, a contribution to any election campaign.) *Skilling* pared down "honest services" to its pre-*McNally* core. The only "honest services" cases that survive are those that fall into patterns that were well established as consensus applications of the law before *McNally*. But the pre-*McNally* core of "honest services" was only about "self-enrichment schemes," not about campaign contributions.

If there can be any "honest services" charge here, then *Skilling* demands at least that there be strong application of the "explicit *quid pro quo*" standard. *Skilling* emphasized due process in interpretation of criminal laws, in order to give fair warning of what is covered and to reduce the likelihood of arbitrary enforcement. These concerns should lead this Court, on reconsideration, to reject the discussion in the prior opinion holding that a mere "implied" agreement or "state[] of mind" is enough to constitute an "explicit *quid pro quo*."

By the same token, *Skilling* should lead to reversal on the § 666(a)(1)(B) count concerning the C.O.N. Board appointment. In emphasizing the due process concerns of fair warning and avoidance of arbitrary enforcement, *Skilling* teaches that § 666(a)(1)(B) should receive the same narrow construction as the "honest services" statute does in this context.

Likewise, *Skilling*'s discussion of due process and the rule of lenity should lead to reversal on the sole remaining count, under 18 U.S.C. § 1512(b)(3). The panel previously affirmed on that count, but in doing so the panel did not adhere to the words of the statute. Instead of focusing on the particular intent that the statute requires – the intent to "hinder, delay or prevent" communications to law enforcement – the panel focused on the nonstatutory colloquialism "coverup." *Skilling* reminds us the criminal laws must not be expanded through loose interpretation of that sort.

Argument

Under the principles discussed in *Skilling*, Governor Siegelman is entitled to a judgment of acquittal, or at least a new trial with correct jury instructions, on all of the charges upon which he was convicted.

1. *Skilling* requires reversal on all the "honest services" counts for Governor Siegelman.

Skilling requires reversal of the convictions on all the "honest services" counts (including the conspiracy count, which was premised on "honest services"), all of which have to do with the C.O.N. Board appointment and the contributions to the pro-lottery advocacy campaign.[6]

The end result of *Skilling*, with regard to "honest services" law under 18 U.S.C. § 1346, is that the statute survived a constitutional challenge for vagueness only because the Supreme Court pared the statute down to its "core." *See Skilling*, 130 S.Ct. at 2928. No longer is the law of "honest services" allowed to remain in a state of "chaos," as it had been. *See Sorich v . U.S.*, ___ U.S. ___, 129 S.Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari). The statute is no

[6] The panel recognized that there was an absence of evidence to support Governor Siegelman's conviction on counts 8 and 9. The Government did not seek certiorari review of this conclusion. The conclusion is surely not subject to question at this point. *Skilling* makes it all the more clear that those convictions cannot stand, since the allegations underlying those charges (about alleged "self-dealing" by Scrushy while on the C.O.N. Board, *see Siegelman*, 561 F.3d at 1232) are outside the "core" of the "honest services" crime that *Skilling* preserved.

longer interpreted, as many lower courts had done before *Skilling*, as covering a wide array of many sorts of putative ethical lapses or improprieties committed by public officials or private citizens. Instead, the statute covers *only* "bribes and kickbacks." *Skilling*, 130 S.Ct. at 2928.

The prosecutors, we expect, may say that this is a bribery case and that it survives *Skilling*. The question therefore becomes: what does "bribery" mean, as the Supreme Court used the word in *Skilling*, and does it encompass this case? The answer is that this case falls outside the now-limited scope of "honest services" doctrine. "Bribery," as the Supreme Court used the word in *Skilling*, does not encompass the allegation that a public official took action because of a contribution to an issue-advocacy, referendum election campaign. Or at the very least, following *Skilling*, if such conduct is ever covered by "honest services," it is only upon proof of a truly explicit *quid pro quo* – with the word "explicit" here being used in its ordinary sense, as meaning "express" or actually stated, rather than being a matter of a mere state of mind or implied.

In considering these questions, the Court should also be guided by the arguments presented by a bipartisan group of ninety one former State Attorneys General, and several professors of constitutional law, in *amicus* briefs in this case (both in this Court and in the Supreme Court). As the former Attorneys General put it in the Supreme Court, the panel decision "create[d] extreme uncertainty

regarding the breadth of criminal liability in campaign contribution cases, and the potential for the arbitrary and discriminatory enforcement of anti-corruption statutes raises serious First Amendment concerns." *See* Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, in *Siegelman v. U.S.* (No. 09-182), p. 5. As the law professors explained in a similar vein, the panel decision "create[d] a genuine uncertainty for public officials and potential contributors to political campaigns," which was "especially dangerous in the context of this case because of the great danger … of the abuse of power in prosecuting political opponents." *See* Brief of Law Professors as *Amici Curiae* in Support of the Petition for a Writ of Certiorari, in *Siegelman v. U.S.* (No. 09-182), p. 15. With guidance from *Skilling*, those dangers should be eliminated in this case.

A. The history of "honest services" doctrine, and the Supreme Court's holdings in *Skilling*.

In order to understand *Skilling*, it is helpful to start with its precursor, which was Justice Scalia's dissent from denial of certiorari in *Sorich v. U.S.*, ___ U.S. ___, 129 S.Ct. 1308 (2009). In *Sorich*, Justice Scalia described and decried the "chaos" of existing "honest services" doctrine. *Id.*, 129 S.Ct. at 1311. He noted how the "honest services" doctrine leant itself to prosecutorial abuse in high-profile cases (of which our case, frankly, is one of the highest-profile). "[T]his expansive phrase ["honest services"] 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." *Id.* at 1310. Justice Scalia pointed out the fundamental unfairness of convictions gained under such a vague, malleable, and unsettled legal standard. "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Id.*

The Supreme Court agreed to consider a constitutional challenge to the "honest services" law a few months later in *Skilling*. And when the Court issued its opinion, the Court's approach echoed the concerns that Justice Scalia had raised in *Sorich*: the concern about the possibility of prosecutorial abuse, and the concern that the criminal laws must be clear in advance (so that people can know, before they act, what the law forbids), rather than being developed after the fact through prosecutorial advocacy. Both of those concerns, as the Court recognized in *Skilling*, are a matter of constitutional due process.

> To satisfy due process, "a penal statute [must] 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." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Skilling, 130 S.Ct. at 2927-28.

In the end, the Supreme Court in *Skilling* did not go so far as to hold the "honest services" law unconstitutionally vague. Instead the Court saved the law by dramatically cutting back its scope.

In narrowing "honest services," the Supreme Court looked back to the development of the doctrine. "Honest services" doctrine was, at first, a judicial and prosecutorial creation that developed through caselaw; it was a way of broadening the mail- and wire-fraud statutes to cover cases in which no one was defrauded of money or property, by asserting that the defendant had defrauded someone (the public, or a private-sector union or employer) of its intangible "right to honest services." But in 1987, the Supreme Court put a stop to this, and held that the fraud statutes were limited to the protection of property rights, not such intangible things as "honest services." *McNally v. U.S.*, 483 U.S. 350, 107 S.Ct. 2875 (1987). Congress responded by enacting § 1346, giving new statutory life to the "honest services" doctrine; but the statute itself offered practically no detail or clarity about what was covered. And then, over the next couple of decades, prosecutors argued and courts held that an astounding variety of situations were covered by the doctrine. This led to *Sorich* and ultimately to *Skilling*.

In dramatically narrowing the scope of "honest services" in *Skilling*, the Supreme Court declared that the statute could be saved from concerns about unconstitutional vagueness by "par[ing]" the statute's coverage down to its pre-*McNally* "core." This, the Court said, was "bribes or kickbacks," of the sort that formed the bulk of pre-*McNally* reported decisions.

> We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an

> endeavor to ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

Skilling, 130 S.Ct. at 2928. The Court said that it had "surveyed" "the body of pre-*McNally*" caselaw, *see Skilling*, 130 S.Ct. at 2929. The Court described the results of its survey:

> While the honest-services cases preceding McNally dominantly and consistently applied the fraud statute to bribery and kickback schemes -- schemes that were the basis of most honest-services prosecutions -- there was considerable disarray over the statute's application to conduct outside that core category.

Id. at 2929. The Court pointed to a catalog of dozens of pre-*McNally* cases that appeared in the Government's brief; this catalog reflected what the "solid core" of pre-*McNally* law consisted of.

> The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States v. Runnels*, 833 F.2d 1183, 1187 (CA6 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).

Skilling, 130 S.Ct. at 2930.

Thus, the Court concluded, "Congress' reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications." *Id.* at 2931.

The Court expressly tied this, again, to the due process concerns of providing fair notice, and confining prosecutorial discretion, that the Court had discussed earlier in its opinion.

> Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

Id., 130 S.Ct. at 2931 (emphasis in original, footnotes omitted); *see also id.* at 2933 (again noting the dual concerns of due process: "(1) fair notice and (2) arbitrary and discriminatory prosecutions.") Likewise, the Court tied its decision to the longstanding "rule of lenity" in the interpretation of unclear criminal laws. *Id.* at 2932.

The Court understood that there were *some* pre-*McNally* cases that did not fall within that "solid core," *Skilling*, 130 S.Ct. at 2930. The Court did not ratify *every* pre-*McNally* case, because there was "considerable disarray" about the doctrine's pre-*McNally* content outside the solid core. *Id.* at 2929. For instance, the Court knew that there were some "relative[ly] infrequen[t]" pre-*McNally* cases based on conflicts of interest; but the Court did not allow that part of the doctrine to survive. *Id.* at 2932. The Court allowed only the true "solid core" to survive, the area in which – as reflected by the "dozens" of cases that the Government had cited in its brief to the Court, *id.* at 2930 – there was broad pre-*McNally* consensus

as developed through consistent and repeated application. This was "bribes and kickbacks" of the sort reflected in case after case before *McNally*.

B. An alleged connection between official action and a campaign contribution – especially a contribution to an issue-advocacy or referendum-election campaign, like this one – is not a "bribery" case within *Skilling*'s surviving "solid core."

The term "bribery," as that word is used in *Skilling* to refer to the remaining "solid core" of "honest services" doctrine, does not encompass political contributions – especially not issue-advocacy referendum election contributions. This is the best understanding of what "bribery" means in this particular context, because of (a) pre-*McNally* history, as relied upon in *Skilling*, (b) the due process concerns identified in *Skilling*, and (c) the important First Amendment implications of political contributions, as contrasted with the utter absence of First Amendment concerns in the context of true bribery. Because a campaign contribution is outside the sensible definition of *Skilling* "bribery," all of the honest-services charges against Governor Siegelman must fall.[7]

There is a significant difference between giving money (or some other thing of value) to an official personally, and making a contribution to an issue-advocacy campaign that an official supports. This statement is obvious, but is very

[7] Governor Siegelman raised this contention – the contention that charges under the statutes involved in this case simply cannot be premised on an issue-advocacy-campaign contribution – in his prior briefing to this Court. *See* Siegelman opening brief, filed May 2008, p. 34.

important. There is, for that matter, a significant difference between giving money to an official personally, and making a contribution to the official's own election campaign. The law recognizes this difference, even with regard to officials' own election campaigns; contributions are different from personal payments. And contributions to issue-advocacy campaigns, we submit, are even a step farther removed from personal enrichment.

The difference is so great, as a matter of law, that contributions and other political advocacy expenditures are protected by the First Amendment to the Constitution – while, of course, there is no First Amendment protection for a personal payment to an official himself. Just this year, the Supreme Court emphasized and expanded the First Amendment protections for political spending. *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010). This is not to say that the First Amendment protection of political spending or contributions is absolute; but it is to say that there are vital First Amendment interests at stake in cases involving campaign contributions and issue-advocacy contributions, issues that make such cases very different from cases involving payments to officials personally.

The panel, in its original opinion in this case, echoed these points. The opinion recognized that the "honest services" charges in this case "are based upon the donation Scrushy gave to Siegelman's education lottery campaign. 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." *Siegelman*, 561 F.3d at 1224 (footnotes omitted). "Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does." *Id.* at 1224 n.13.

Given this very large distinction between personal enrichment and campaign contributions, it is unsurprising to find that cases involving campaign contributions are not encompassed within *Skilling*'s "solid core" of pre-*McNally* "honest services" doctrine. There was no pre-*McNally* settled understanding that an official could be charged with mail- or wire fraud based on an alleged connection between true campaign contributions and an official action. Certainly, there was no such settled understanding with regard to the type of contributions at issue in our case, i.e., contributions that are not even for the official's own election campaign but are for an issue-advocacy campaign that the official supports. As noted in the prior opinion in this case, "Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions." *Id.*, 561 F.3d at 1224 n.13.

Even the Government, in its brief to the Supreme Court in *Skilling*, framed its suggested understanding of "honest services" bribery doctrine in terms of *personal enrichment* of officials – without any hint that campaign contributions, much less issue-advocacy campaign contributions, were at the core of what the doctrine covered. The Government argued in *Skilling*, "Schemes to deprive others of 'the intangible right of honest services' require that a public official, agent, or other person who owes a comparable duty of loyalty breaches that duty by secretly acting in his own financial interests while purporting to act in the interests of his principal." *See* Government Brief in *Skilling*, p. 39 (emphasis supplied).[8] At the same page of the Government's brief, the Government described the impermissible motivation as a "personal financial interest." *Id*. (emphasis supplied). And on the next page: "his [i.e., the defendant's] own interests," id., p. 40. And page 42: "whether the office-holder has placed his self-interest above that of the public."

And at page 51 of the Government's brief, and perhaps most strikingly given the way the Supreme Court ultimately disposed of the case, the Government conceded: "the vast majority (if not all) pre-*McNally* honest-services cases did involve self-enrichment schemes." (emphasis supplied). The Government thus admitted that the pre-*McNally* caselaw was almost entirely, and maybe even literally entirely, about "self-enrichment schemes." *Id.* This would make up the

[8] <http://www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1394.mer.aa.pdf>.

"core" as the Supreme Court described it in *Skilling*. Even according to the Government's own description, there was no settled pre-*McNally* understanding that an official could be jailed on account of a connection between a campaign contribution (much less an issue-advocacy campaign contribution) and an official act. Most, if indeed not literally all, of the pre-*McNally* "bribery" cases were about personal "self-enrichment" of officials; they were not about campaign contributions, much less issue-advocacy contributions.[9]

This is further borne out by the long footnote in the Government's *Skilling* brief, which the Supreme Court then expressly invoked in its discussion of the pre-*McNally* "bribery" caselaw. In the words of the Supreme Court, the Government "cit[ed] dozens of examples" of pre-*McNally* "bribery or kickback" honest services cases. *Skilling*, 130 S.Ct. at 2930, citing Government Brief p. 42 and n.4. This, according to the Court, was a reflection of the doctrine's "solid core," which is what the Court allowed to survive. *Skilling*, 130 S.Ct. at 2930.

Looking to the cited portion of the Government's brief, we find those dozens of examples, elucidating what the pre-*McNally* "solid core" was. These are the cases that the Government itself chose to identify as representing "bribes or

[9] A cynic, we suppose, might say that a candidate seeking funds for his election is thinking of his own self-interest (getting a job with a salary) rather than the public interest. But an official such as Governor Siegelman, when fundraising for an issue-advocacy referendum campaign, is quite plainly pursuing the public good as he perceives it. Even a cynic would recognize that this case is different from cases about "self-enrichment schemes" as the Government called them in *Skilling*.

kickbacks" cases prior to *McNally*, *see* Government Brief p.42; and the Supreme Court relied on this listing. And here is the striking and dispositive thing: none of them was a case charging a campaign contribution as a bribe or kickback (much less a contribution to an issue-advocacy campaign). They were, in the phrase quoted above from the Government's brief, self-enrichment cases – envelope-full-of-cash cases, and the like. Twenty-nine cases, selected by the best minds in the Justice Department as representing bribery and kickback "honest services" cases pre-*McNally* – and none of them held that a true campaign contribution amounts to an "honest services" bribe.[10]

It is conceivable that the Government will now cite, in this case, to some pre-*McNally* case that actually did involve a real campaign contribution (not an

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[10] Some of them mention campaign contributions, but not in ways inconsistent with our statements in the text above. *See*, *e.g.*, *U.S. v. Pecora*, 693 F.2d 421 (5th Cir 1982) (a brief mention of a conversation about possible contributions regarding a millage campaign, though with no finding or holding of any relationship between that and the $9,000 cash bribe to the Sheriff and District Attorney); *U.S. v. Craig*, 573 F.2d 455 (7th Cir. 1977) (tens of thousands of dollars in cash-stuffed envelopes, given to officials in exchange for legislation); *id.* at 494 (reflecting the Government's theory was that this was *not* campaign contributions, and the Government's argument to the jury that a defendant's assertion that he received money as a campaign contribution was a fabrication); *U.S. v. Barrett*, 505 F.2d 1091, 1094-97 (7th Cir. 1974) (reflecting that the case was about payments given to the official personally in valises and envelopes full of cash; there seems to have been a request above and beyond that for a political contribution, followed by the funny retort (met with a smile by the official) that the valises and envelopes full of cash were political contributions); *U.S. v. Isaacs*, 493 F.2d 1124, 1132, 1134 (7th Cir. 1974) (occasionally mentioning campaign contributions, though noting that none of them was charged as having been improper).

envelope or valise full of cash given to the official personally) as the premise for an "honest services" bribery charge. If there is any such case, it would have been outside the "core" of honest services bribery as the Government identified it, and as the Supreme Court accepted it, in *Skilling*. After all, the Supreme Court recognized in *Skilling* that there were some pre-*McNally* cases that were outside the "core." Not every pre-*McNally* case survives *Skilling*; only the "core" survives.

Therefore, based on *Skilling*, the proper holding in this case is that a contribution to an issue-advocacy campaign is just not an "honest services" bribe after *Skilling*. The application of "honest services" law to campaign contribution cases, through the assertion that someone linked an official action too closely to a political contribution, is one of those aggressive post-*McNally* prosecutorial arguments that the Supreme Court buried in *Skilling*.[11] (This is certainly true in the issue-advocacy campaign context; for as the panel recognized, this seems to be the first-ever prosecution in this sort of case.) The "bribery and kickbacks" core of pre-*McNally* law, which the Supreme Court allowed to survive, was a core of cases

[11] The Government may point to some discussions in a few cases before *McNally*, dealing with the possibility of prosecutions based on campaign contributions under *other* statutes, such as the Hobbs Act. Any such argument would miss the mark, because it would be an attempt to evade the Supreme Court's reasoning in *Skilling*. In *Skilling*, the Supreme Court saved the "honest services" statute by attributing to Congress an intent to resuscitate the pre-*McNally* solid core of "honest services" law – not an intent to use "honest services" to cover things that had previously been prosecuted instead under *other* laws.

about personal self-enrichment, not about campaign contributions much less issue-advocacy contributions. And as we have shown, the two types of cases are very different in their legal implications, largely by virtue of the fact that the First Amendment interests that are so important in contribution-related cases are absent in cases about rank personal enrichment. There is no reason to allow prosecutors to gloss over that important distinction, in support of a prosecutorial effort to expand the core of "bribery" to include cases involving contributions.[12]

Furthermore, allowing "honest services" to cover this sort of case would raise all the due process concerns that the Supreme Court was trying to eliminate in *Skilling*. It would (as this case itself demonstrates) raise the troubling possibility of arbitrary or discriminatory prosecutorial action. Officials take action benefiting contributors all the time; there is a real danger that prosecutors will investigate

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[12] Prosecutors would gain no ground on this point by arguing that the contributions in this case helped to retire a loan (to the advocacy campaign) that Governor Siegelman had guaranteed. Despite that fact, there is no doubt that these were, in fact, actual campaign contributions rather than personal payments to Governor Siegelman. Prosecutors will not be able to show that there was any pre-*McNally* core understanding that the "honest services" implications of a campaign contribution depended, to any degree, on whether the candidate was personally liable for the campaign's expenses. In other words, even if prosecutors argued that the loan guarantee gave Governor Siegelman some degree of personal financial interest, still the fact would remain that prosecutors would be trying to expand "honest services" beyond the boundaries of the pre-*McNally* core. Such expansion is impermissible under *Skilling*. (For that matter, Governor Siegelman became a guarantor on the loan long *after* the appointment of Scrushy and long *after* Scrushy's pledge of contributions to the lottery campaign, so Governor Siegelman had no personal financial stake *at all*, not even of this indirect sort, at those times.)

officials whom they oppose or distrust, while not even investigating those towards whom they feel more favorably.[13] And allowing "honest services" prosecutions in this area would subject officials and citizens to criminal jeopardy, in an area where the line between constitutionally-protected activity and crime is still the subject of unsettled debate. *Compare U.S. v. Ganim*, 510 F.3d 134, 142 (2nd Cir. 2007) (Sotomayor, J.) (holding that a case involving political contributions requires proof of an "explicit *quid pro quo*," meaning "an express promise"), *with Siegelman*, 561 F.3d at 1226, 1228 (holding that "explicit" in this sense does *not* mean "express," and that an inferable state of mind is sufficient). This raises the fair warning concerns that are central to *Skilling*'s discussion of due process.

Therefore, given *Skilling*'s holding that limits "honest services" doctrine to its pre-*McNally* solid core, Governor Siegelman is entitled to a judgment of acquittal on all the "honest services" counts, including the related conspiracy charge, as a matter of law.

C. If there can be any "honest services" charges based on campaign contributions (especially issue-advocacy campaigns), *Skilling*'s due-process and rule-of-lenity holdings require firm application of the *McCormick* "explicit *quid pro quo*" standard, in the ordinary and undiluted sense of the word "explicit."

Even if political contributions (and in this case, an issue-advocacy

[13] *See* United States House of Representatives, Committee on the Judiciary, "Allegations of Selective Prosecution in Our Federal Criminal Justice System" (Majority Staff Report, April 17, 2008), p. ii (discussing this case).

referendum election contribution) could ever constitute "bribes" after *Skilling*, still *Skilling* should guide this Court to revisit and correct the panel's original holding about the type and degree of connection between contribution and action that must be proven in order to constitute a crime. The proper answer, guided by *Skilling*'s lessons about due process and the rule of lenity, is that a robust and undiluted application of the "explicit *quid pro quo*" standard is required – with "explicit" having its ordinary meaning, and thus requiring proof of an actual, expressly communicated promise or agreement linking the action to the contribution.

This conclusion is based on three premises, of which we believe that only one was disputed by the panel in the original opinion. The premises that we take to be undisputed are:

1. If there can be an "honest services" prosecution for official action taken allegedly in response to an issue-advocacy or campaign contribution, the governing standard is the "explicit *quid pro quo*" standard that comes from *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991) (adopting the "explicit *quid pro quo*" standard for campaign-contribution cases under the Hobbs Act). The panel stopped just short of so holding, but did not dispute the point. *Siegelman*, 561 F.3d at 1224-25. Given *Skilling*'s emphasis on the need for clarity and fair warning in criminal laws, as to where the line is drawn between lawful and unlawful conduct, surely at this point the Government will concede this.

2. If Governor Siegelman is correct that the "explicit *quid pro quo*" standard requires prosecutors to prove an express statement, promise or agreement – if "explicit" means "express" or "actually and clearly stated" in this context as it ordinarily does – then he is entitled to reversal. He would be entitled to a judgment of acquittal since there was no evidence that he made any "explicit *quid pro quo*" statement, promise or agreement in that sense. And he would at least, and solely in the alternative be entitled to a new trial, since the jury was not instructed in the "explicit *quid pro quo*" standard in this sense. The jury instructions allowed conviction without a finding of any explicitness in this sense. We take this premise to be undisputed, because the panel did not dispute it. If the panel had believed we were wrong on this point – that is, if the panel had thought the convictions could stand even if we were right on the legal issue about what the *McCormick* standard is – the panel surely would have said so. For this reason, it is unnecessary to belabor the point now.

Rather than disputing either of these premises, the panel's crucial step in its opinion on these charges was to disagree with us on the substance of the *McCormick* standard, and to deny that *McCormick*'s "explicit *quid pro quo*" standard requires proof of an express, or actual and clear, communication.

When the Supreme Court laid out the standard in *McCormick*, the Supreme Court's choice of words indicated that the standard truly does depend on whether

there was an actual and clear, express, *quid pro quo* communication. Recognizing that campaign contributions are a constant in the real life of politicians, the Court held that a link between such a contribution and an official act would constitute the crime of extortion only if there was an "explicit *quid pro quo*." *Id.*, 500 U.S. at 271 & n.9, 111 S.Ct. at 1815 & n.9 (formulating the question in that way). The Court declared:

> Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

500 U.S. at 273, 111 S.Ct. at 1816 (emphasis supplied). The criminally-prohibited situations, said the Court, are those in which there is an "explicit promise or undertaking" by the official to act in exchange for the contribution, in which "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id*. (emphasis supplied).

Justice Stevens in dissent would have allowed conviction based on an "implicit" *quid pro quo* linkage between a contribution and a "specific" official action. *McCormick*, 500 U.S. at 282-83, 111 S.Ct. at 1821 (Stevens, J., dissenting). But the Court's opinion used a stricter standard. Not just the word "explicit," but also the word "asserts," indicate that the line as laid down by the Supreme Court

was the line between cases involving an overtly and expressly stated *quid pro quo* on the one hand, and cases involving only the potential for an implied linkage on the other.

But the panel in this case disagreed with this understanding of *McCormick*; the panel's view of the law echoed the *McCormick* dissent more than it did the *McCormick* majority. The crucial step in the panel's reasoning was the denial that "explicit," as used in *McCormick*, means "express." To the panel, there need not have been proof of any actually and clearly communicated *quid pro quo*. It is enough, according to the panel's view, if the jury can infer the existence of an unspoken agreement from the surrounding circumstances. "Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Siegelman*, 561 F.3d at 1226 (emphasis in original). The panel stated "Furthermore, an explicit agreement may be 'implied from [the official's] words and actions.'" *Id.* at 1226 (brackets in original). Likewise the panel insisted that the evidence was sufficient to prove the requisite "state[] of mind," regardless of whether a quid pro quo promise was made expressly. *Id.* at 1228.

It was this step in the argument – the panel's conclusion that when the Supreme Court in *McCormick* said "explicit *quid pro quo*," it meant to accept an implied agreement and state of mind rather than requiring any actual express

communication - that led to affirmance of Governor Siegelman's convictions. Without this step divorcing "explicit" from "express," the jury instructions were plainly inadequate; and the evidence was insufficient as well.

But with guidance from *Skilling*, it should be recognized that "explicit" in this sense really does mean the same thing as "explicit" in its ordinary usage – that is, actually and clearly stated, or express, not a mere "state of mind" or an inference about something "implied" and unspoken. The guidance from *Skilling*, again, is the Supreme Court's discussion about due process and the rule of lenity.

As the Supreme Court said in *Skilling*, one of the due process concerns in interpreting criminal laws is the importance of reducing the chance of prosecutorial arbitrariness or discrimination. *Skilling*, 130 S.Ct. at 2927-28; *id.* at 2933. That concern is very important here. All politicians must raise funds, and all politicians do things that benefit their supporters. This is the reality that the Supreme Court recognized in *McCormick*. If a criminal prosecution can be undertaken without proof of an explicit *quid pro quo*, and if instead an implicit connection between contribution and official action is enough to make out a crime, prosecutorial discretion will be markedly expanded. Prosecutors will then, in deciding whom to seek to indict, be in the position of inferring the unspoken mental states of elected officials – inferring which of them took action for "good" reasons (such as a belief that an appointee will be a valuable member of the board in question) and which of

them was motivated by "bad" reasons (contributions).

A robust application of *McCormick* requiring an actually explicit *quid pro quo* is particularly important here, since the First Amendment is implicated in both sides of the alleged connection between the contributions and the appointment. By accepting appointment to the C.O.N. Board, Scrushy was seeking to take part in the formulation and execution of public policy, through public service. By arranging for contributions to the lottery campaign, Scrushy was engaging in conduct squarely within the core of the First Amendment. Governor Siegelman, too, was engaged in conduct protected by the First Amendment, by raising funds to support the Education Lottery issue-advocacy campaign. "First Amendment freedoms need breathing space to survive." *Citizens United*, 130 S.Ct. at 892. "An intent test provides none." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 469, 127 S.Ct. 2652, 2666 (2007) (plurality opinion).

It is no answer to hypothesize that if these prosecutors ever find some other official about whom the evidence is exactly the same as it was against Governor Siegelman, they might prosecute that person as well. That is not an answer, because that is not the way high-profile prosecutions work. Cases do not knock on prosecutors' doors fully grown, asking to be prosecuted or not based on evidence already compiled. Instead, prosecutors choose which cases to *build*. Prosecutors (and their investigatory colleagues) start building cases when the evidence is only

embryonic, and is just enough to make them believe that there is something worth investigating. Then they cajole and subpoena and dig and convince, to *make* the case. The first crucial step, and the step where arbitrariness and discrimination can first take root, is the step of deciding whether a given official is worth *investigating* or not.

A governing legal standard that allows conviction of officials based not on words but on state of mind, therefore, will allow prosecutorial arbitrariness and discrimination free rein. If that is the standard, then prosecutors' initial judgments about which officials are trustworthy and which are shady – which can, too often, be an intuition that is itself tainted by political feelings – will make the difference as to which ones get investigated, and then prosecuted. Most who raise money and then take action benefiting their contributors will never even have a file opened on them in a U.S. Attorneys' Office. But those whom prosecutors distrust from the outset will be investigated, and cases will be vigorously constructed against them, if prosecutors have been told by the courts that "states of mind" are enough for conviction in this realm. A governing legal standard that requires proof of actual *communication* – a true application of the "explicit *quid pro quo*" standard – would lessen this danger appreciably.

The other aspect of *Skilling*'s due process holding – its emphasis on the importance of fair warning in criminal statutes – is also central here, as a reason to

reject the panel's reading of the *McCormick* standard. *See Skilling*, 130 S.Ct. at 2927 ("To satisfy due process, 'a penal statute [must] define the criminal offense … with sufficient definiteness that ordinary people can understand what conduct is prohibited."); *id.* at 2932 ("Further dispelling doubt on this point is the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"). This area of official action, fundraising, and contributing truly is an area in which responsible officials and citizens try to know in advance, and need to know in advance, what the law is. Officials *must* raise funds; it is not optional. Similarly, officials *must* take actions of all sorts that may either help or harm the interests of those who support them; again, deciding what to do as an official, deciding whom to appoint, deciding what laws to support, these things are not optional either. These things are inherent in our democracy. Both officials and citizens want (and even need) to be able to exercise their constitutional rights, and their official powers, to the fullest; and they need clear warning in advance about where those constitutional rights end and where criminal jeopardy begins.

A person in Governor Siegelman's position – faced with the necessity of fundraising, and also with the task of making appointments – could not have known or understood in advance that this Court would eventually declare that "explicit," in the *McCormick* standard, does not mean "express." A person in that

position could not have known that a court would accept an "implied" agreement, inferred as a "state of mind," to be an "explicit" agreement.

A person hoping to understand the law in advance, to predict what was permitted and what was not, could have reasonably believed and understood that when the Supreme Court used the word "explicit" in *McCormick*, it meant what the word ordinarily means: clearly and actually stated, or in other words, express. The Oxford dictionary, for instance, defines "explicit" as "stated clearly and in detail, leaving no room for confusion or doubt."[14] For that matter, some courts have taken the word "explicit" to require even *more* overtness, clarity and directness than the word "express." *See U.S. v. Figueroa*, 105 F.3d 874, 877 (D.C. Cir. 1996). This underscores the point that it could never have been clear, in advance, that a panel of this Court would eventually adopt exactly the opposite conclusion as the justification for a criminal conviction. And other courts have taken the word "explicit" in the *McCormick* formulation to mean just what we are arguing here: express, or spoken outright. *See*, *e.g.*, *Ganim*, 510 F.3d at 142 (holding that a case involving political contributions requires proof of an "explicit *quid pro quo*," meaning "an express promise") (Sotomayor, J.).

In divorcing "explicit" from "express," the panel quoted a Sixth Circuit case. *Siegelman*, 561 F.3d at 1226, *citing and quoting U.S. v. Blandford*, 33 F.3d 685,

[14] <http://www.oxforddictionaries.com/definition/explicit?view=us>.

696 (6th Cir. 1994) ("*Evans* [*v. United States*, 504 U.S. 255, 112 S. Ct. 1881 (1992)] instructed that by 'explicit' *McCormick* did not mean express"). But even in the Sixth Circuit, *Blandford*'s treatment of *quid pro quo*, *McCormick* and *Evans* is now recognized as *dicta* and is not followed. *U.S. v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009). The Sixth Circuit recognizes that, rather than diluting the word "explicit" in campaign-contributions cases, "*Evans* modified the standard in non-campaign contribution cases." *Abbey*, 560 F.3d at 517. In any event, even if the Sixth Circuit had not later abandoned *Blandford* (as it has), still *Blandford* as contrasted with *Ganim* would at least demonstrate that there is ambiguity and lack of clarity here.

Due process as explained in *Skilling* does not allow a conviction under these circumstances. The panel's interpretation – that "explicit" does not mean "express," and that an implied agreement or state of mind can count as an explicit *quid pro quo* – is an example of what Justice Scalia rightly warned against: "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich*, 129 S.Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). Under *Skilling*, honest services convictions are supposed to be limited to what has been well understood by long consensus as being covered. Therefore, even if a campaign- or issue-advocacy contribution case can be an "honest services" case at all, a conviction certainly cannot be justified on

the basis of a surprising, and (to say the least) reasonably disputable, interpretation of the "explicit *quid pro quo*" standard.[15]

2. *Skilling* requires reversal of the conviction on the § 666 charge as well.

Besides the "honest services" charges, the only other charge relating to the C.O.N. Board appointment was count three, under 18 U.S.C. § 666(a)(1)(B). With guidance from *Skilling*, reversal of the conviction on this count should follow as well.

Skilling is relevant to this charge for two reasons. First is the passage of the *Skilling* opinion, manifesting the Court's expectation that (at least in some respects) "honest services" law and § 666 would receive similar interpretations. *See Skilling*, 130 S.Ct. at 2933. Second, and as we have discussed above, the lesson of *Skilling* is not just about "honest services" in particular. It is about fair warning, and due process, in the interpretation of criminal laws in general. The

[15] As explained above in Section 1(b), here again prosecutors would gain no ground by pointing to the fact that – long *after* the appointment of Scrushy to the Board – Governor Siegelman became a guarantor of a loan to the pro-lottery campaign. It is not uncommon for candidates or officials to personally guarantee loans to their campaigns, or even to loan money of their own to their campaigns, and then to retire those loans with campaign contributions. (Recall, for instance, now-Secretary of State Clinton's multi-million dollar loan to her own campaign in the 2008 Presidential primary battle.) We are not aware of any case, from any court, holding that the existence of such an arrangement changes the *McCormick* standard for that particular candidate or official. If prosecutors tried to make such an argument, they would be doing precisely what due process and *Skilling* forbid: making up the criminal law as the case goes along.

Conclusion

The impact of *Skilling* on this case comes not only from the Supreme Court's narrowing of "honest services" doctrine. It comes, also, from *Skilling*'s broader lessons about the nature of our criminal law. In our system, the laws are to be clear in advance. If there is a fair question about a law's coverage, the question must be resolved against the prosecutors. These principles are all the more important in a case like this one, which is at the intersection of law, electoral politics, and constitutionally protected activity; in this area above all, the dangers of prosecutorial overreaching are enormous. For the reasons stated herein, the judgment of conviction should be reversed. Governor Siegelman should receive a judgment of acquittal, or at least a new trial.

Respectfully submitted,

Vincent F. Kilborn, III
David A. McDonald
Kilborn, Roebuck & McDonald
Post Office Box 66710
Mobile AL 36606
(251) 479-9010

Redding Pitt
Farris, Riley & Pitt, LLP
Massey Bldg., Suite 400
2025 Third Ave. North
Birmingham AL 35203
(205) 324-1212

Sam Heldman
The Gardner Firm
2805 31st St. NW
Washington DC 20008
(202) 965-8884

Robert D. Segall
Copeland, Franco, Screws & Gill, PA
444 South Perry St.
P.O. Box 347
Montgomery AL 36104
(334) 834-1180

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I certify that copies of the foregoing have been served by U.S. Mail on the following this 31st day of August, 2010, that on the same day the brief has been uploaded electronically to the Court, and that an original and six copies have been sent by U.S. Mail to the Clerk for filing.

James K. Jenkins
Maloy & Jenkins
75 14th St. NE, Suite 2500
Atlanta, GA 30309-3676

John Alex Romano
United States Department of Justice
P.O. Box 899, Ben Franklin Station
Washington, DC 20044

Louis V. Franklin, Sr.
Acting U.S. Attorney
P.O. Box 197
Montgomery, AL 36101-0197

Bruce Rogow
Bruce Rogow, PA
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394

_____
Vincent F. Kilborn, III