ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 28, 2006

03-3066

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

UNITED STATES OF AMERICA,

Appellee,

v.

NELSON VALDES,

Appellant.

Appeal From The United States District Court For The District Of Columbia
Criminal Action No. 01-0154 (RMU)

BRIEF AMICUS CURIAE FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEE UNITED STATES OF AMERICA AND URGING AFFIRMANCE

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Rule 28(a)(1), the Campaign Legal Center, *amicus curiae* in the above-captioned case, submits this Certificate of Counsel. Pursuant to Rule 29 of this Court, *amicus* Campaign Legal Center timely filed in this Court a written representation that all parties to this appeal had consented to their participation. This Court granted leave to the Campaign Legal Center to participate as *amicus curiae* on July 12, 2006.

(A) Parties and *Amici*. All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the brief for appellant.

(B) Rulings Under Review. References to the ruling at issue appear in the brief for appellant.

(C) Related Cases. This case was previously heard before this Court and the District Court below. *Amicus* is not aware of any "related cases," as that term is defined in D.C. Cir. R. 28(a)(1)(C), currently pending in this Court or any other Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Legislation and Legislative History:

* Authorities on which *amicus* chiefly relies are marked with asterisks.

Miscellaneous Sources:

STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding disclosure, political advertising, contribution limits, enforcement issues, and many other matters. In addition to participating as *amicus curiae* in many campaign finance-related cases throughout the nation, the CLC served as counsel to defendant-intervenors Senator John McCain, Senator Russell Feingold, *et al.*, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) [hereinafter *McConnell*], before the U.S. Supreme Court. The CLC also works to identify ethics breaches by government officials and prompt rigorous enforcement of government ethics rules. The CLC assembled and leads the Congressional Ethics Coalition, an ideologically diverse group of the nation's leading government reform organizations. The Coalition works to improve the congressional ethics process. The CLC has a longstanding, demonstrated interest in government ethics and campaign finance law, and this case directly implicates the CLC's interest.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

> "Corruption" can be used to describe any movement away from an ideal; this is the sense in which illness is a corruption of the body. But in politics "corruption" has typically had a more specific connotation: that an officeholder has been led by private inducements away from the ideal of disinterested public service.

Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Commentary 127, 136 (1997).

While a detective with the D.C. Metropolitan Police Department, Nelson Valdes accepted cash from an FBI informant as a reward for searching and providing information from databases accessible only to law enforcement personnel. *United States v. Valdes*, 437 F.3d 1276, 1277 (D.C. Cir. 2006), *reh'g granted*, 2006 U. S. App. LEXIS 12532 (D.C. Cir.). In the District Court, Valdes was convicted under 18 U.S.C. § 201(c)(1)(B) of three counts of receipt of illegal gratuities "for or because of an[] official act." *Valdes*, 437 F.3d at 1277. The anti-gratuity statute provides that:

> Whoever … being a public official … otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person … shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(1)(B). The term "official act" is defined as:

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by

> law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3). On appeal to the D.C. Circuit Court of Appeals, the three-judge panel incorrectly held that Valdes did not violate the gratuities statute because his action of selling information from a restricted database was not an "official act" within the meaning of the statute. *Valdes*, 437 F.3d at 1281–82. As the Government's brief discusses, Valdes' actions fall within the statutory definition of "official act." Valdes took "actions" – by running database queries and disclosing the results – on "questions" that "may by law be brought before" police detectives in their "official capacity" – by conducting investigations relating to private individuals. Brief of Appellee at 15, 26, 29, 30, 33, *United States v. Valdes*, No. 03-3066 (D.C. Cir. July 26, 2006).

The statute at issue in this appeal is one that provides the Government with an important tool for attacking corruption. The corruption concerns that underlie the anti-gratuities statute are similar to those that form the basis for regulating political contributions through campaign finance law. The Supreme Court has long recognized the government's compelling interest in avoiding corruption, the appearance of corruption, and the erosion of public trust in government resulting from political contributions to public officials. *See, e.g.*, *McConnell*, 540 U.S. at 120–21; *Nixon v. Shrink Mo. Government PAC*, 528 U.S. 377, 389–91 (2000)

[hereinafter *Shrink Missouri*]; *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) [hereinafter *Buckley*]. Just as the public's trust is eroded when officials accept unregulated large political contributions, so too is the public's trust eroded when public officials accept gratuities in exchange for favors. Simply put, anti-gratuities laws serve the government's compelling interest in avoiding actual and apparent corruption of public officials in order to maintain public trust in government, just as campaign finance regulations do.

For this reason, the scope of "official action" in anti-gratuities law should be defined broadly enough to serve these compelling government interests. If the definition of "official action" in the anti-gratuities statute is narrowed such that public officials can freely accept money in exchange for favors by claiming that the actions they took were not "official," the anti-gratuities statute will be undermined to the point where it will no longer serve the interests for which it was created, interests that the Supreme Court has ruled in the campaign finance cases are sufficiently compelling to justify even burdening constitutional interests.

Campaign finance law provides a useful analogy for illuminating the great importance of both the federal anti-gratuity statute generally, and a broad interpretation of the "official action" element of the statute specifically. For the reasons detailed below, we respectfully urge the *en banc* Circuit Court to give full

force to the anti-gratuity statute by broadly interpreting the statutory term "official act" as urged by the United States in this case.

ARGUMENT

I. Congress and the Supreme Court have long recognized the compelling government interests in preventing actual and apparent corruption.

Gratuities have much in common with political contributions in that both raise concerns about improper influence. As explained in detail below, Congress has regulated political contributions for more than 100 years, and the Supreme Court has discussed its view of corruption extensively in decisions analyzing the constitutionality of Congress' campaign finance laws. These Congressional Acts and Supreme Court decisions serve as a useful reference point for similar discussions of corruption in the context of illegal gratuities because of the common interests that both campaign finance and anti-gratuities laws serve. Indeed, Professor George D. Brown of Boston College Law School has noted that the compelling government interest that the Court views as justifying regulation of political contributions "bears a strong resemblance to that underlying the anti-gratuity statute: fighting corruption by curbing attempts to acquire influence that cannot be adequately reached through bribery laws." George D. Brown, *The Gratuities Debate and Campaign Reform—How Strong is the Link?*, WAYNE L. REV. (forthcoming 2006), (manuscript at 51, *available at*

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901628) [hereinafter Brown]. According to Brown:

> What links the [anti-gratuity and campaign finance] lines of cases is a concern over what constitutes corruption that government can prevent. In each area the question of improper influence within the political/governmental process is central. The campaign finance cases are more explicit in identifying and weighing the governmental interest in preventing corruption. Their conclusions can be applied to the gratuities issue, despite the contextual differences.

Id. at 34.

The connection between anti-gratuity and campaign finance laws is evident. The Supreme Court's decisions with respect to campaign finance law provide strong support for maintaining a broad definition of "official action" in anti-gratuities law.

A. For more than 100 years Congress has regulated contributions to public officials in an effort to prevent corruption and the appearance of corruption.

Congress has long recognized the threat of corruption posed by monetary contributions to public officials. For this reason, Congress has regulated the role of money in politics since the mid-nineteenth century. *See, e.g.*, Naval Appropriations Act of 1867, ch. 172, 14 Stat. 489; Pendleton Civil Service Act, ch. 27, 22 Stat. 403 (1883); Tillman Act of 1907, ch. 420, 34 Stat. 864; Federal Corrupt Practices Act of June 25, 1910, ch. 392, 36 Stat. 822 (1910), amended by Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 25, 26–29 (1911), amended by Federal

Corrupt Practices Act, ch. 368, §§ 241–256, 43 Stat. 1053 (1925); Hatch Political Activities Act, ch. 410, 53 Stat. 1147 (1939); Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 136 (1947); Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–455); *see also* THE CAMPAIGN LEGAL CENTER, THE CAMPAIGN FINANCE GUIDE, 5 (2004), *available at* http://www.campaignfinanceguide.org.

After a century-long piecemeal approach to campaign finance regulation, the Watergate scandal of the early 1970s prompted Congress to enact a comprehensive overhaul of our nation's campaign finance laws—through the 1974 amendments to the Federal Election Campaign Act (FECA). Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (codified as amended in scattered sections of 2 U.S.C.). Congress' 1974 FECA amendments were intended to prevent corruption and the appearance of corruption "spawned by the real or imagined coercive influence of large financial contributions." *Buckley*, 424 U.S. at 25. To this end, the 1974 FECA amendments, *inter alia*, established strict limits on political contributions and strengthened disclosure requirements for political contributions and expenditures.

Despite Congress' best efforts in the 1970s to enact a comprehensive campaign finance law, evolving campaign finance practices exploited legal loopholes created by the Federal Election Commission (FEC) which, by the late

1990s, enabled federal officials to solicit unlimited so-called "soft money" contributions that posed a serious threat of corruption within the federal electoral process.[1]

In response to the threat of corruption posed by federal official and political party "soft money" fundraising, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA). *See* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107–155, 116 Stat. 81. BCRA closed the "soft money" loophole by prohibiting federal candidates and elected officials, and national political party committees, from soliciting or receiving any funds, and state party committees from spending any funds in connection with a federal election, unless such funds comply with FECA contribution amount limits and source prohibitions. *See* BCRA, Pub. L. No. 107–155, § 101, 116 Stat. 82-86 (codified at 2 U.S.C. § 441i).

When examining the constitutionality of BCRA's "soft money" ban in *McConnell*, the Supreme Court looked to the declarations of candidates, lobbyists

[1] Although the term "soft money" appears nowhere in federal statutes or regulations, the term is often used to described funds not in compliance with federal campaign finance law amount limitations, *see* 2 U.S.C. § 441a, and source prohibitions (*i.e.*, no corporate or labor union treasury funds), *see* 2 U.S.C. § 441b. Prior to the Congressional passage of BCRA in 2002—which outlawed the raising and spending of "soft money" by national political parties and federal candidates/officeholders—national political party committees were permitted by the FEC to raise "soft money" so long as the soft money was spent by the parties on activities like voter registration or get-out-the-vote (GOTV) drives that in part influenced non-federal elections, or ads which did not constitute "express advocacy" of the election or defeat of federal candidates. Federal officeholders typically solicited "soft money" donations from prohibited sources such as corporations and labor unions, or from individuals in amounts well in excess of the FECA contribution amount limits. Parties, in turn, would use the "soft money" to pay for so-called "party building" activities like voter registration or GOTV, or for candidate-specific sham issue advertising that avoided the use of "express advocacy" and, therefore, was deemed by the FEC to not to fall within the scope of the FECA definition of "expenditure." For a more detailed examination of the history of "soft money" and the BCRA provisions outlawing its use to influence federal elections, *see McConnell*, 540 U.S. at 122–189.

and contributors to determine the extent that political donations unduly influenced candidates. *See McConnell*, 540 U.S. at 132–133. One public official after another testified regarding the uncomfortable and potentially corruptive link between receiving money and political influence. BCRA sponsor Senator John McCain, for example, stated:

> At a minimum, large soft-money donations purchase an opportunity for the donors to make their case to elected officials … in a way that average citizens cannot. … When someone makes a significant soft-money donation … and then calls the member a month later and wants to meet, it is very difficult to say no, and few do say no.

ANTHONY CORRADO, TREVOR POTTER & THOMAS MANN EDS., INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 324 (Brookings Institution Press 2003) [hereinafter CORRADO]. "Regardless of whether the interested donors received a *quid pro quo* for their donation, the entire process was skewed by these large contributions and there was clearly an appearance of improper influence," McCain continued. CORRADO at 326. Former Senator Warren Rudman espoused a similar view, adding: "[e]qually important, the assumption that more money buys more influence gravely affects the public perception of the political process." CORRADO at 320. And former Senator Alan K. Simpson echoed Rudman's concern about public perception: "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as

cynical about government as they have ever been because of the corrupting effects of unlimited soft-money donations." CORRADO at 121.

For more than a century, Congress has seen first hand the corruptive influence between political contributions and undue influence on public and party officials. As explained by the United States in its brief, similar concerns were behind Congress's enactment of the anti-gratuity statute at issue in this appeal. Brief of Appellee at 16–20, *United States v. Valdes*, No. 03-3066 (D.C. Cir. July 26, 2006).

B. The Supreme Court ruled in *Buckley* and its progeny that the compelling government interest in preventing actual and apparent corruption justifies regulation of political contributions, notwithstanding potential burdens on constitutional rights.

From its *Buckley* decision in 1976 to its *McConnell* decision in 2003, which upheld the constitutionality of nearly all the provisions of BCRA, the Supreme Court has concluded that the Government has a compelling interest in preventing corruption or the appearance of corruption that warrants legislation in this area. For example, in *Buckley*, the Court found that it was legitimate for Congress to impose strict limits on contributions to candidates, stating that avoiding the appearance of improper influence is "critical … if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (quoting *Civil Service Comm'n. v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

And when the Court upheld BCRA's "soft money" ban in *McConnell*, it again found compelling Congress' concern that large amounts of money given to public officials can cause corruption or give rise to the appearance of corruption as donors gain greater access to officials. *See McConnell*, 540 U.S. at 132–133.

> The question for present purposes is whether large soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do. … It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.

McConnell, 540 U.S. at 145.

Importantly, the Court's longstanding rationale for the constitutionality of political contributions is not limited to instances of actual corruption. The Court has repeatedly emphasized that "[o]f 'almost equal' importance has been the Government's interest in combating the <u>appearance or perception of corruption</u>" created by large political contributions. *McConnell*, 540 U.S. at 143 (quoting *Buckley v. Valeo*, 424 U.S. at 27) (emphasis added). The Court's decisions "have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *McConnell*, 540 U.S. at 150 (quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S., 431, 441 (2001) [hereinafter *Colorado II*]). As the Court has explained:

> Many of the "deeply disturbing examples" of corruption cited by this Court in *Buckley* U.S. at 27, to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the "appearance of such influence."

McConnell, 540 U.S. at 144 (internal citations omitted) (citing *Buckley*, 424 U.S. at 27; *Buckley v. Valeo*, 519 F.2d at 821, 839–40 n.36 (D.C. Cir. 1975); and *Colorado II*, 533 U.S. at 441). "Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Shrink Missouri*, 528 U.S. at 390 (citing *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

It is important to note that in both *Buckley* and in *McConnell*, restrictions on contributions and soft money were upheld against strong First Amendment challenges. In both cases, the Government's interest in regulating contributions and soft money was broadly construed. Despite the rigorous standard of review necessitated by the burdens imposed on First Amendment rights, the Supreme Court nevertheless found that the concerns about real or apparent corruption were sufficiently compelling for Congress

to enact these far-reaching prophylactic measures. *See, e.g., Buckley*, 424 U.S. at 29.[2]

Similar concerns about corruption motivated Congress to enact the anti-gratuity statute involved in this case, and this Court should interpret the statute in a way that gives full effectiveness to the congressional concerns that are behind it, as was done in the campaign finance context in *Buckley* and *McConnell*. This is especially true in the instant case because, unlike campaign finance cases, this Court does not need to balance corruption interests against a candidate's First Amendment concerns. Appellant Valdes raises no First Amendment claims to balance against Congress' interest in preventing actual and perceived corruption.

II. Like political contribution limits, anti-gratuities laws serve a compelling government interest in preventing actual and apparent corruption detrimental to the public's trust in officials—and must be interpreted broadly to achieve this purpose.

A. The interests served by anti-gratuities laws are identical to those served by campaign finance laws, preventing actual and apparent corruption.

As noted above, Congress has enacted, and the Supreme Court has upheld as constitutional, limits on political contributions because of concerns that large contributions, at the very least, result in differential access to officials—a form of

[2] At the same time that it has broadly construed the term "contributions" and upheld regulation of them, the Court has narrowly construed the term "expenditures" because of concerns about vagueness. *Buckley*, 424 U.S. at 79. Further, the Court did not uphold restrictions on expenditures because they "do not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46.

corruption that erodes public confidence in government officials. *See, e.g.*, *McConnell*, 540 U.S. at 120–21. Just as political contributions to public officials are constitutionally regulated, so too are gratuities to public officials. *See* 18 U.S.C. § 201(c)(1)(B). The anti-gratuities statute prohibits:

> [a] public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty [from] directly or indirectly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person.

Id. Corruption concerns similar to those motivating campaign finance regulations underlie anti-gratuities law. For example, the proposed preamble to the 1962 revision of the anti-gratuity statute states that:

> The proper operation of a democratic government requires that officials be independent and impartial; that government decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. The attainment of one or more of these ends is impaired whenever there exists, or appears to exist, an actual or potential conflict between the private interests of a government employee and his duties as an official.

To Strengthen the Criminal Laws Relating to Bribery, Graft, and Conflicts of Interest and for Other Purposes: Hearing on H.R. 8140 Before the S. Comm. on the Judiciary, 87th Cong. 52 (1962) (statement of Roswell B. Perkins, Chairman, Special Committee on the Federal Conflict of Interest Laws, the Association of the Bar of the City of New York) (emphasis added).

Illegal gratuities raise the same types of corruption concerns as large political contributions. Like political contributions, gratuities essentially allow the purchase of governmental favors or access by those willing to pay for them when a public official is willing to use his or her position to sell such favors or access. It follows as a matter of common sense that money given to a public official as a gratuity will likely have the same effect as a large political contribution or soft money, in terms of both creating actual corruption and giving rise to the appearance of corruption. Using public office for personal gain, as Valdes did in this case, is corruption in every sense of the word. Both campaign finance and anti-gratuities laws safeguard the workings of democracy through preservation of the public's trust in honest public officials who are not beholden to moneyed interests.

The Supreme Court itself has noted that the interests served by campaign finance regulation and the anti-gratuities statute—preventing corruption and the appearance of corruption—are the same. In upholding state contribution limits in *Shrink Missouri*, the Court noted that "[e]ven without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed, which after all, underlie bribery and antigratuity statutes." *Shrink Missouri*, 528 U.S. at 390. *McConnell* endorsed this view as well. *See McConnell*, 540 U.S. at 157–58. The Court's discussion of campaign finance laws alongside the bribery

and anti-gratuity statutes makes clear that the Court sees these two areas as sharing common goals.

The Court's treatment of corruption and the appearance of corruption in campaign finance cases supports a broad reading of the anti-gratuities statute. The Court's willingness to sustain even potential restrictions on First Amendment rights of candidates and political parties in order to serve the Government's interest in preventing corruption reflects the Court's broad view of corruption and the Government's interest in combating it. Similarly, the anti-gratuities statute should also be given a reading sufficiently broad to protect those same public interests where a public official uses his or her official position for private gain.

Legal scholar George Brown has also argued in support of these points. Brown, *supra* at 32–49. As Professor Brown correctly observes:

> [*Buckley*] treated the appearance of corruption as an evil almost on par with *quid pro quo* arrangements themselves. Its rejection of the argument that bribery laws can eliminate such arrangements is an endorsement of prophylactic legislation. The analysis is bolstered by references to 'improper influence' and the importance of citizens' confidence in government and the preservation of governmental integrity. All of these concepts lie at the heart of the concept of a broad anti-gratuities prohibition… the gratuities offense is a means, other than bribery laws, of furthering these goals through prophylactic legislation.

Id. at 48–49.

Indeed, there is an even greater case for regulation of gratuities than political contributions because campaign contributions can have a legitimate function in a

system where elections are privately financed, but gratuities given to public officials serve no such role. Campaign contributions permit ordinary citizens to amass funds to run effective campaigns and also permit voters to offer financial support to candidates who reflect their values and beliefs. Gratuities given to public officials do not serve this purpose—or any legitimate function for that matter.

B. Campaign finance and anti-gratuities laws each serve compelling governmental functions that are not reached by existing federal bribery statutes.

When campaign finance issues reached the Court in *Buckley*, the argument was made that existing bribery laws were sufficient to meet the Government's interest in combating political corruption. The Court rejected that view:

> Our cases have made clear that the prevention of corruption or the appearance of corruption constitutes a sufficiently important interest to justify political contribution limits. We have not limited that interest to the elimination of cash-for-votes exchanges. In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws "deal[t] with only the most blatant and specific attempts of those with money to influence governmental action."

McConnell, 540 U.S. at 143 (citing *Buckley*, 424 U.S. at 28). "Thus," the Court continued, "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from

politicians too compliant with the wishes of large contributors." *McConnell*, 540 U.S. at 143 (citing *Shrink Missouri*, 528 U.S. at 389). The fact that bribery laws do not adequately prevent corruption or the appearance of corruption figured significantly in the Court's recognition that campaign finance laws were a necessary and narrowly tailored way to accomplish these goals. As the *Shrink Missouri* Court stated, these concerns "were the obvious points behind our recognition that Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." *Shrink Missouri*, 528 U.S. at 389 (citing *Buckley*, 424 U.S. at 28).

Like campaign finance laws, anti-gratuities laws attempt to curb corruption that is not covered by bribery laws. Indeed, "[o]ne can view the main point of creating a gratuities offense as making available a prosecutorial tool to reach examples of improper attempts to influence government that bribery cannot reach." Brown, *supra* at 2. A strong anti-gratuities law is necessary in order to prevent officials from advancing their personal financial interests at the expense of the public's time, money, and belief in honest government.

Anti-gratuities laws continue to play an important role in preventing the real and perceived corruption of public officials. If the anti-gratuities statute were to be narrowed in the manner adopted by the original panel decision, public officials would likely be able to accept money, vacations and services with impunity, all

while taking actions both materially detrimental to the public interest and damaging to public confidence in officials' ability to perform their jobs without putting their personal interests first. "For improper acts by nonelected officials such as the defendant in *Valdes*, the gratuities offense remains an important safeguard." Brown, *supra* at 50.

In addition, just as campaign finance laws work to reach the appearance of corruption, anti-gratuities laws also serve the important function of curbing the appearance of corruption where the bribery offense's requirement of an explicit *quid pro quo* prevents bribery prosecutions from doing so. "The anti-gratuities statute is separate and distinct from bribery laws in that the former can be used to guard against more generalized undue influence peddling. The gratuities statute plays an important role as an auxiliary to bribery, serving as a prophylactic statute and permitting the prosecution of 'appearances' of unethical behavior." Brown, *supra* at 51. Bribery statutes do not encompass actions that create an appearance of corruption, an issue of great concern to the Court in the campaign finance cases.

C. The Circuit panel's narrow interpretation of the anti-gratuities statute will lead to increased actual and apparent corruption of public officials—further eroding the public's trust in government.

In the split *Valdes* Circuit panel decision, the Court said that Valdes' actions were not a sufficiently "formal" part of his job and thus were not an "official act"

within the meaning of the gratuities statute. *Valdes*, 437 F.3d at 1279. The Court stated that the statutory definition of "official act" suggests:

> at least a rudimentary degree of formality, such as would be associated with a decision or action directly related to an adjudication, a license issuance (or withdrawal or modification), an investigation, a procurement, or a policy adoption.

Id. The panel's decision, in determining that Valdes' actions lacked the necessary "formality" to be subject to prosecution under the anti-gratuities statute, looked to the hypothetical examples that the Supreme Court said would not fall under the statute in *U.S. v. Sun-Diamond Growers*. *Id.* (citing *United States v. Sun-Diamond Growers*, 526 U.S. 398, 406–407 (1999) [hereinafter *Sun-Diamond*]). These included giving a sports jersey to the President during a White House visit, giving a school baseball cap to the Secretary of Education during a school visit, and providing a lunch to the Secretary of Agriculture in connection with a speech to farmers. *Sun-Diamond*, 526 U.S. at 406–407. The Circuit panel majority concluded that what these acts have in common is that none is a "'decision or action' that directly affects any formal government decision made in fulfillment of government's public responsibilities." *Valdes*, 437 F.3d at 1280. Therefore, the court found that Valdes' disclosures of license tag and arrest information did not constitute a "'decision or action' … in the usual sense of those words." *Id.*

The *Valdes* panel's decision used the hypothetical examples from *Sun-Diamond* to unduly narrow the definition of "official action" in the anti-gratuities

statute. But the comparison is inapt: the issue in *Sun-Diamond* was whether the receipt of a gratuity in and of itself is sufficient for a conviction, or whether there must be a nexus or "link" between the gratuity and the official action. *Sun-Diamond*, 526 U.S. at 414. The issue here is the entirely separate question of, assuming such a link, how "formal" the "official action" must be. The *Sun-Diamond* Court's use of the ceremonial hypotheticals described above was in the context of supporting the new nexus requirement. The *Sun-Diamond* Court did not additionally require or suggest that the "official act" be "formal," as the panel did in this case. A broad definition of "official act" is entirely consistent with the *Sun Diamond* "nexus" requirement. *Compare Sun-Diamond*, 526 U.S. at 414 *with Valdes*, 437 F.3d at 1279.

The new "formality" test created by the *Valdes* panel would open a potentially large loophole for corrupt public officials to receive gifts and favors linked to the performance of actions taken by them while in a public position but lacking the required "degree of formality" necessary to meet the *Valdes* panel's definition of official acts. To permit public officials to use their position of public trust to line their pockets with cash and escape prosecution under the anti-gratuities statute because the action fails to meet some vague degree of "formality" makes a mockery out of the law's attempt to punish corruption. Public officials in all areas

of government—from Congress to police officers—could enrich themselves by receiving lucrative thank-you gifts for performing informal functions.

Real life examples demonstrate how gratuities cause officials at all levels of government to compromise the public interest and create an aura of corruption. For example, in 1988, Congressman Mario Biaggi was convicted of accepting vacations and spa treatments from Brooklyn Democratic leader Mead Esposito in exchange for using his influence to urge city and federal officials to make favorable accommodations for a ship company that was a major client of Esposito's insurance agency. *United States v. Biaggi*, 853 F.2d 89, 91–94 (2d Cir. 1988). Biaggi's actions consisted primarily of making telephone calls, writing letters on congressional stationery, and attending meetings in order to further Esposito's financial interests. *Id.* Although the *Biaggi* case would be covered by the *Sun-Diamond* "nexus" test because a link exists between the gift of gratuities and Biaggi's actions, it's not clear that he would be convicted under the *Valdes* heightened "formality" standard. Because his actions arguably did not involve a "formal government decision made in fulfillment of government's public responsibilities," these gifts to Biaggi—and gifts to other public officials who have been prosecuted and convicted under the federal anti-gratuities statute—might well be legal under the *Valdes* panel's re-formulation of the federal law. *Valdes*, 437 F.3d at 1280.

The Circuit panel majority's imposition of a new undefined "formality" requirement into the "official action" definition of the anti-gratuities statute would allow greater numbers of public officials like Biaggi to accept money or other gifts from interested private parties. Overall, fewer public officials will be prosecuted and convicted for accepting gratuities and those who give gratuities will easily gain special access to public officials. *See* Petition for Panel Rehearing or Rehearing En Banc and Addendum for Appellee at 4, *United States v. Valdes*, No. 03-3066 (D.C. Cir. Apr. 10, 2006). As one media report noted:

> Scholars say that as a result of the *Valdes* case, the process of charging lawmakers and their aides with wrongdoing in the Abramoff scandal (and others like it) will be more difficult. … Any future bribery charges against lawmakers or their aides will probably be harder to prove thanks to this obscure onetime detective….

Jeffrey H. Birnbaum, *Why Clearing A Cop's Name Matters In Abramoff Scandal*, WASHINGTON POST, Mar. 20, 2006, at D1.[3]

Preventing public officials from accepting gratuities is important to maintaining public confidence in government, even if the money is not accepted as part of an explicit *quid pro quo.* As Professor Brown has observed:

> Even a diffuse, generalized form of influence based on the giving of gifts can threaten democratic values. Lavish gifts to key officials can lead to advantages, such as access and agenda setting, that members

[3] The narrow definition of official action in the D.C. Circuit's original *Valdes* opinion would also make it "that much harder to win bribery cases involving campaign contributions." Jeffrey H. Birnbaum, *The End of Legal Bribery*, WASHINGTON MONTHLY, June 2006, *available at* http://www.washingtonmonthly.com/features/2006/0606.birnbaum.html (last visited July 6, 2006).

> of the public do not enjoy. These are obvious issues of improper appearances, divided loyalties, preferential treatment, and inefficient government.

Brown, *supra* at 30. Much as political contributions, if unlimited, lead to a loss of faith in public officials, the public will lose faith in public officials' ability to serve as independent and disinterested public servants if officials are free to receive gratuities given to them even when there is a link between the gratuity and action taken, as *Sun-Diamond* requires. As one federal prosecutor has observed in the context of the Connecticut Governor John Rowland corruption case: "[i]f that person, John Rowland, is not held accountable, then the people's trust simply isn't that important. Honest government matters, it has to matter. Send that message, send it loud and clear. Without that rule of law, we are all lost." Associated Press, *A Sampling of Reaction to Rowland's Sentencing*, AP STATE WIRE, Mar. 18, 2005.

The specter of government officials who accept money freely with little regard for ethical concerns has already generated considerable public concern. According to a USA Today/Gallop Poll conducted June 23–25, 2006, 85 percent of Americans said that corruption in government will be extremely or very important to them when voting for Congress this year. Susan Page, *Poll show[s] Americans keeping an eye on Congress*, USA TODAY, June 27, 2006, *available at* http://www.usatoday.com/news/washington/2006-06-27-poll-results-elections_x.htm (last visited June 28, 2006.). Corruption in government tied with

the economy as the second highest extremely or very important issue to voters, ranking just below the situation in Iraq. *Id.*[4]

A narrow definition of the "official action" component of the anti-gratuities statute will permit increasing numbers of public officials to accept money and gifts as gratuities without fear of prosecution. Such a relaxation of the anti-gratuities statute will not only increase levels of actual corruption, it will increase the public's perception of the corruption of public officials. Such concerns were cited by the Supreme Court in campaign finance cases (*see Shrink Missouri*, 528 U.S. at 388–391) as reasons to uphold contribution limits. Those concerns are no less applicable to the anti-gratuities statute, which is intended to combat actual or perceived corruption in the same way.

[4] A January 2006 ABC News Poll reached similar results. The poll found that 58 percent of Americans see lobbyist Jack Abramoff's plea deal as a sign of widespread corruption in Washington and 90 percent of Americans favor banning lobbyists from giving members of Congress anything of value. Jon Cohen and Gary Langer, *Poll: Majorities See Widespread Corruption*, ABC NEWS, Jan. 9, 2006, *available at* http://abcnews.go.com/Politics/PollVault/story?id=1487942 (last visited July 25, 2006).

CONCLUSION

Amicus respectfully urges the Court to affirm the decision below convicting defendant Nelson Valdes under 18 U.S.C. § 201(c)(1)(B) for receiving illegal gratuities for or because of an official act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH Fed. R. App. P. 32(a)(7)

As required by Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the length requirements of Fed. R. App. P. 32(a)(7)(B), D.C. Cir. R. 32(a)(7)(B) and D.C. Cir. R. 29(d). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 6111 words (which is less than the allowable 7000 words).

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), as modified by D.C. Cir. R. 32(a)(5)(A), and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately space typeface using Microsoft Word 2000 in Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2006, a copy of the foregoing Brief *Amicus Curiae* for the Campaign Legal Center was served by regular mail, first-class, postage prepaid, and addressed as follows:

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