No. 15-474

In The
Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

Whether "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest services fraud statute are unconstitutional?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. Its approximately 9,200 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL works to resist overcriminalization—the steady expansion of federal crimes, through new

[1] Under S.Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Both parties have lodged blanket consents to the filing of amicus briefs with the Clerk of the Court under Rule 37.2(a).

criminal statutes and broad interpretations of existing statutes by the executive and judicial branches.[2] The bribery charges in this case—alleged as honest services and Hobbs Act violations—implicate two of the core problems of overcriminalization: the federalizing of crimes traditionally reserved for state jurisdiction, and the arbitrary criminalization of conduct without meaningful definition or limitation. NACDL's views will assist the Court in deciding whether the lower courts' interpretation of the "official act" element impermissibly broadened the scope of the statutes at issue.

NACDL's Amicus Curiae Committee requested and authorized undersigned counsel to file this brief.

SUMMARY OF THE ARGUMENT

1. The lower courts' unbounded interpretation of the "official act" element conflicts with at least three fundamental principles that constrain the scope of federal criminal statutes: (1) that, absent a clear statement from Congress, a federal criminal statute should not be interpreted to alter the federal-state balance in prosecuting crime; (2) that, under the rule of lenity, ambiguities in criminal statutes must be resolved against the prosecution; and (3) that statutes should be interpreted, to the extent possible, to avoid grave constitutional questions--here, the potential vagueness of the Hobbs Act and 18 U.S.C. § 1346. Under these principles, the lower courts' "official act"

[2] For a description of NACDL's efforts to reduce overcriminalization, see https://www.nacdl.org/overcrim/.

interpretation represents an impermissibly broad reading of these statutes.

2. If the Court concludes that judicially limiting the scope of "official act" would encroach on the power of Congress to enact criminal laws, then it should hold the honest services statute and the Hobbs Act void for vagueness under the Fifth Amendment Due Process Clause. Interpreted as broadly as the lower courts did here, those statutes have both vices of vague criminal laws: they fail to give ordinary people fair notice of the conduct they punish, and they are so standardless that they invite arbitrary enforcement. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

ARGUMENT

I. THE LOWER COURTS' INTERPRETATION OF "OFFICIAL ACT" VIOLATES PRINCIPLES THAT LIMIT THE SCOPE OF BROADLY WORDED FEDERAL CRIMINAL STATUTES.

The lower courts' broad interpretation of the "official act" element violates the "clear statement" principle that maintains the federal-state balance in prosecuting crime; the rule of lenity; and the doctrine that statutes should be construed if possible to avoid serious constitutional questions. Under these settled principles of construction, the lower courts' reading of "official act" represents an impermissibly broad interpretation of the honest services statute and the Hobbs Act.

A. The "Clear Statement" Rule.

The Commonwealth of Virginia, through its elected representatives, has established a comprehensive statutory scheme regulating gifts to state officials. Va. Code Ann. § 2.2-3101 et seq. Violations of some provisions of the statute constitute state misdemeanors; other violations are punishable solely through noncriminal means, including loss of office, civil penalties, and forfeiture. Here, there was no contention that Mr. McDonnell violated any of these state provisions; as the district court instructed the jury, "[t]here has been no suggestion in this case that Mr. McDonnell violated Virginia law." XXVI T. 6125. This federal prosecution thus marks an extraordinary intrusion by federal prosecutors into an area of traditional state regulation. As this Court has held, federal prosecutors may usurp state jurisdiction in this manner only where Congress clearly authorizes it. No such clear authority exists here.

1. This Court has repeatedly recognized that use of broadly worded federal crimes to prosecute matters traditionally regulated by the states raises federalism concerns. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (declining to read 18 U.S.C. § 229 broadly to "alter sensitive federal-state relationships") (quotation omitted); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (declining to extend the mail fraud statute to "a wide range of conduct traditionally regulated by state and local authorities"); *Jones v. United States*, 529 U.S. 848, 858 (2000) (same; interpreting federal arson statute); *Williams v. United States*, 458 U.S. 279, 290 (1982) (construing statute narrowly in part because the case

involved "a subject matter that traditionally has been regulated by state law"); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (construing 18 U.S.C. § 1952 and rejecting a broad interpretation where it "would alter sensitive federal-state relationships").

Federal-state tension becomes particularly acute when federal prosecutors turn broadly worded federal statutes against local elected officials. As the en banc Fifth Circuit observed in interpreting the honest services statute: "We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services--to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure." *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc); *see, e.g., McNally v. United States*, 483 U.S. 350, 360 (1987) (declining to read mail fraud statute in a way that would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials"); *United States v. Panarella*, 277 F.3d 678, 693 (3d Cir. 2002) (same).

To address these federalism concerns, this Court has held that, absent a clear statement of Congressional intent, the federal government may not intrude into areas of criminal law enforcement traditionally left to the states. *See, e.g., Bond*, 134 S. Ct. at 2088 ("The problem with this interpretation is that it would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear

indication that they do.") (quotation and brackets omitted); *Cleveland*, 531 U.S. at 25 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." (quotation omitted)); *Jones*, 529 U.S. at 858 (same); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

2. The "clear statement" principle applies with particular force here, because this federal prosecution intrudes directly into an intricate and carefully calibrated system of state regulation. *See, e.g., United States v. Ratcliff*, 488 F.3d 639, 648-49 (5th Cir. 2007) (rejecting application of mail fraud statute to local election fraud in part because "Louisiana law establishes a comprehensive regulatory system governing campaign contributions and finance disclosures for state and local elections, with state civil and criminal penalties in place for making misrepresentations on campaign finance disclosure reports").

In 1987, a special session of the Virginia General Assembly enacted the State and Local Government Conflict of Interests Act, Va. Code Ann. § 2.2-3101 et seq. ("the Act"). Section 2.2-3103—titled "Prohibited conduct"—forms the heart of the Act. That section contains a series of carefully drawn prohibitions applicable to any "officer or employee of a state or local governmental or advisory agency," including the Governor. Knowing violations of some categories of prohibited conduct constitute state

misdemeanors. Va. Code Ann. § 2.2-3120. For other categories of conduct—which, in *Brumley*'s words, address only "appearances of corruption," 116 F.3d at 734—the statute declares that "[v]iolations . . . shall not be subject to criminal law penalties." Va. Code Ann. § 2.2-3103(8), (9).

In addition to the prohibitions in § 2.2-3103, the Act requires public officials (including the Governor) to make annual, detailed disclosures of certain "personal and financial interests," including gifts from third parties to the official, his spouse, or other immediate family members. Va. Code Ann. §§ 2.2-3113, -3114, -3117. Knowing violations of the disclosure requirements constitute misdemeanors. *Id.* § 2.2-3120.

The Act assigns a crucial role to the Virginia Attorney General. First, the Attorney General provides advisory opinions on the application of the Act to state officers or employees who request them. *Id.* § 2.2-3126(A)(3). Second, the Attorney General has the power to investigate potential violations of the Act that come to his attention. *Id.* § 2.2-3126(A)(1). Finally, and critically, the Act provides that if the Attorney General "determines that there is a reasonable basis to conclude that any officer or employee serving at the state level of government has knowingly violated any provision of this chapter, he shall designate an attorney for the Commonwealth who shall have complete and independent discretion in the prosecution of such officer or employee." *Id.* § 2.2-3126(A)(2). The low threshold ("reasonable basis to conclude") for the Attorney General's designation of a Commonwealth Attorney to prosecute, and the

"complete and independent discretion" of the Commonwealth Attorney once designated, ensure that partisan political considerations play as small a role as possible in the Act's enforcement.

The investigative and enforcement process established in the Act worked as intended here until the federal prosecution intervened. Then-Attorney General Ken Cuccinelli designated Commonwealth Attorney Michael Herring (a Democrat) to investigate potential state charges against the McDonnells. Mr. Herring investigated the allegations and would have made an independent charging decision but for the federal interference that this case represents. That charging decision may well have been favorable to Mr. McDonnell; as the district court instructed the jury, "[t]here has been no suggestion in this case that Mr. McDonnell violated Virginia law," XXVI T. 6125, including the Act. But there is no way to know for sure, because Mr. Herring ended his investigation once federal charges were brought.[3] Although the federal courts "have traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system," *Bond*, 134 S. Ct. at 2092, the federal prosecutors here chose to preempt that discretion. They chose, in other words, to "displace[] the public policy of the Commonwealth of [Virginia], enacted in its capacity as sovereign." *Id.* at 2093 (quotation omitted).[4]

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[3] *See* Rosalind S. Helderman, *State To Drop Investigation of McDonnell Without Charges*, The Washington Post (Jan. 27, 2014).

[4] Despite the district court's instruction that there was no suggestion Mr. McDonnell had violated Virginia law, the government introduced his state disclosure forms into evidence

3. The obvious clash between this federal prosecution and the Act's "comprehensive regulatory system" warrants careful adherence to the "clear statement" principle in determining whether the Hobbs Act and the honest services statute sweep as broadly as the lower courts found. *Ratcliff*, 488 F.3d at 648-49. Under that principle, the district court's "official act" instruction impermissibly expanded the statutes' scope. The instruction permitted the jury to convict Mr. McDonnell for accepting gifts from Mr. Williams in exchange for attending events and arranging access to other public officials. Congress has made no statement at all that such conduct involves "official acts," much less the "clear statement" that this Court requires. Under federal law, an "official act" requires a decision or other action on a pending governmental matter. The mere attending of events or arranging of access, without either taking action on a pending governmental matter or pressuring someone else to take action, does not meet that standard.

B. The Rule of Lenity.

Federalism concerns are reason enough to construe narrowly the "official act" element of the

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over objection, cross-examined him and other witnesses about them, and suggested in closing argument that he had completed them improperly to hide his relationship with Mr. Williams. The district court compounded the harm from this evidence by excluding defense expert testimony that would have explained the forms. Thus, this federal prosecution not only invaded an area traditionally regulated by the state; it also used Mr. McDonnell's compliance with state law requirements misleadingly as evidence that he had violated federal law.

corruption charges. But there is a second, equally fundamental reason: the rule of lenity.

Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60; *see, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (same); *Skilling v. United States*, 561 U.S. 358, 410-11 (2010) (applying rule of lenity to honest services statute); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003) (applying rule of lenity to Hobbs Act).

In a case such as this, where the government advances an expansive interpretation of federal criminal statutes against a state official in an area covered by comprehensive state regulation, the "fair warning" principle that underlies the rule of lenity is especially critical. A state official might readily believe that state law fully defines his ethical obligations as an officeholder. It is unlikely that any state official, having concluded that his conduct is lawful under state law (as Mr. McDonnell's conduct indisputably was), would go on to consider whether that conduct might nonetheless violate the Hobbs Act or the honest services statute and thus subject him to a felony conviction and a substantial prison term. If these statutes are to displace state law, fairness demands that courts permit them to do so only when the state officeholder's conduct falls unambiguously within their scope.

The "official act" element of the Hobbs Act and the honest services statute does not encompass Mr.

McDonnell's conduct (attending events and arranging access to other public officials) at all, much less unambiguously so. Under the rule of lenity, therefore, the lower courts' rulings permitting conviction for that conduct were erroneous.

C. Constitutional Avoidance.

This Court "avoid[s] constitutional difficulties by adopting a limiting interpretation [of a statute] if such a construction is fairly possible." *Skilling*, 561 U.S. at 406 (bracketed language added; brackets and quotation omitted). If "official act" is given the sweeping interpretation that the government urged and the lower courts adopted, the Hobbs Act and the honest services statute are void for vagueness, at least in the context of payments for political access. *See* Part II *infra*. The Court can avoid this "constitutional difficult[y]" by interpreting "official act" to require exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power. Under that standard, Mr. McDonnell violated neither the honest services statute nor the Hobbs Act.

II. THE STATUTES AT ISSUE ARE IMPERMISSIBLY VAGUE IF THEY CANNOT BE CONSTRUED TO LIMIT THE SCOPE OF "OFFICIAL ACT."

For the reasons outlined above, NACDL maintains that the phrase "official act" can be given an appropriately limited interpretation through the usual tools of statutory construction: the "clear

statement" rule, the rule of lenity, and the principle of constitutional avoidance.

This Court has held, however, that "[l]egislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. It is at least arguable that it is for Congress, and not the courts, to set limits on the broad language of the honest services statute and the Hobbs Act. *See Skilling*, 561 U.S. at 415-24 (Scalia, J., concurring in the judgment) (arguing that the honest services statute is void for vagueness and cannot be saved through a limiting construction). As Judge Jacobs put it, "When courts undertake to engage in legislative drafting, the process takes decades and the work is performed by unelected officials without the requisite skills or expertise; and as the statutory meaning is invented and accreted, prosecutors are unconstrained and people go to jail for inchoate offenses." *United States v. Rybicki*, 354 F.3d 124, 164 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting); *see, e.g., Brumley*, 116 F.3d at 736 (Jolly, J., dissenting) (accusing the majority of "assum[ing] a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute").

If this Court concludes that a narrowing construction of "official act" encroaches on the power of Congress to enact criminal laws, then it should hold the honest services statute and the Hobbs Act void for vagueness under the Fifth Amendment Due Process Clause. The Court recently declared that the government violates the guarantee of due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary

people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556 (residual clause in ACCA definition of "violent felony" found unconstitutionally vague).

The lower courts' interpretation of "official act" has both vices of a vague statute. That boundless reading fails to provide public officials with "an ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). Prosecution is particularly unfair when, as here, the public official complies fully with a detailed state regulatory scheme, only to discover that a federal prosecutor deems his conduct a federal felony under the elastic language of the honest services statute and the Hobbs Act.

Similarly, the lower courts' construction of "official act" gives prosecutors a free hand to pick arbitrarily (or, worse, on the basis of political views) the elected public officials they want to target with federal charges. Virtually every elected official receives campaign contributions. Virtually every elected official affords access to major contributors. Under the lower courts' understanding of "official act," therefore, virtually every elected official represents a potential target for federal prosecution. Not all of those officials can be charged, of course, meaning that federal prosecutors will pick and choose among them. The lower courts' "official act"

interpretation thus "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular [public officials] deemed to merit their displeasure." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (quotations omitted).

For these reasons, if the Court declines to interpret "official act" narrowly, it should hold that the honest services statute and the Hobbs Act are unconstitutionally vague.

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted,

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