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 AMICI CURIAE PUBLIC POLICY ADVOCATES AND BUSINESS LEADERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—including U.S. Congressmen Reid Ribble and E. Scott Rigell, former Arizona Governor Jan Brewer, former Georgia Governor Sonny Perdue, and former Mississippi Governor Haley Barbour—are a broad collection of current and former elected officials, business leaders, public policy leaders, and political consultants. By nature of their respective professions, every individual within this group has an acute interest in clear legal guidance on how to interact with public officials, structuring effective compliance programs around public corruption laws, avoiding political prosecutions, and seeing political participation protected in full by the First Amendment.

A full list of *Amici* is provided as an Appendix to this brief.

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[1] Counsel for all parties have submitted blanket consent to the filing of amicus briefs in this case. No counsel for a party authored the brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

If the Court fails to reverse the Fourth Circuit's decision to uphold Governor McDonnell's honest services and Hobbs Act convictions, robust political participation will not be governed by the First Amendment—it will be governed by a prosecutor's wishes. *Amici* see in this case an attempt to criminalize through the public corruption statutes what the First Amendment continues to safeguard: the access, responsiveness, and favoritism that inheres in democracy. The Government's understanding of *quid pro quo* here transgresses the limitations of the First Amendment, and the limitations this Court has placed upon both the honest services fraud statute and the Hobbs Act. Indeed, its understanding is susceptible to no limiting principle at all. The Court should reject it.

The Government's understanding of *quid pro quo* would allow an elected official speaking with aides, asking a staff member to attend a meeting, or asking questions at a donor's product-launch event to constitute the "official act" needed for the *quo* in *quid pro quo*. By employing this understanding to prosecute Governor McDonnell, the Government embraces three positions about *quid pro quo* that the Court rejects: (1) *any* action taken by a public official, even those of mere political access or favoritism to a supporter unconnected to any exercise of government power, can be an "official act" as it is defined in statute; (2) that *quid pro quo* means one thing in the "campaign contribution context" and something else in the "public corruption context"; and (3) that a *quid pro quo* evinced by generic favoritism or influence shown to a supporter can be prosecuted without

offending the First Amendment. These positions have no basis under the applicable law, and they amount to a thinly-veiled attempt to target the access that robust political support may afford. No matter how much the Government dislikes the Court's curtailing of its political-participation regulations, it must respect these limitations. If, however, the Government's positions are tenable under existing law, their chilling effect on robust political participation should counsel this Court to strike the honest services fraud statute as unconstitutionally vague and overturn its decision extending the Hobbs Act to bribery.

I. AFFIRMING THE FOURTH CIRCUIT GIVES THE GOVERNMENT A "BACK DOOR" TO TARGET ROBUST POLITICAL PARTICIPATION AS PUBLIC CORRUPTION.

More than once, this Court has "admonished" the Government to "not penalize an individual for 'robustly exercis[ing]' his First Amendment rights." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1449 (2014) (quoting *Davis Fed. Election Comm'n*, 554 U.S. 724, 739 (2008)). It is well established that the "robust exercise" of First Amendment guarantees may occur for self-interested reasons and may result in political access and influence. After all, "[i]t is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)).

The First Amendment therefore prohibits the Government from "target[ing] . . . the political access such [financial] support may afford," *McCutcheon*, 134 S. Ct. at 1441.

Discontent with this jurisprudence, the Government here seeks to put Governor McDonnell into federal prison based upon the "robust exercise" of First Amendment activity and the political access it generated. *Amici* fear they, as "robust exercisers" of First Amendment guarantees, could be next.

On the surface, the Government claims not to disagree with Justice Kennedy in *McConnell*: "[I]n the context of the real world *only a single definition of corruption* has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*." 540 U.S. at 297 (opinion of Kennedy, J.) (emphasis added). Indeed, as this Court has held, both the Hobbs Act and the honest services statute *require* that the Government prove *quid pro quo*—that is, "a specific intent to give or receive something of value *in exchange* for an official act." *See United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999) (emphasis in original).[2] But the

[2] *See Skilling v. United States*, 561 U.S. 358, 412-13 (2010) (application of the honest-services statute "draws content . . . from federal statutes proscribing—and defining—similar crimes," and citing 18 U.S.C. § 201(b)); *see also Evans v. United States*, 504 U.S. 255, 260 (1992) (describing extortion, proscribed by the Hobbs Act, as the "rough equivalent of what we would now describe as 'taking a bribe'"). While the gratuities statute was at issue in *Sun-Diamond*, the definition of *quid pro quo* quoted above applied to the definition of bribery. Further, the gratuities statute and the "official act" definition for bribery are part of the same statutory scheme.

Government's prosecution of Governor McDonnell considers identifying both a *quid* and a *quo*—in particular, the "*quo*," the "official act"—"irrelevant." *See, e.g.*, Gov't Br. 14. This cannot square with this Court's First Amendment jurisprudence, which has held that "[i]ngratiation and access are not corruption," *McCutcheon*, 134 S. Ct. at 1441 (citation omitted).

The Government's blasé attitude towards the need to identify a particular "official act" here—epitomized by telling the jury,"[w]hatever it was, it's all official action," App.263a—trivializes two critical teachings from this Court: (1) some "acts" taken by a public official "are not 'official acts' within the meaning of the [bribery] statute[s] . . . ." *See Sun-Diamond*, 526 U.S. at 407-08; and (2) "acts" that are the manifestation of a political contributor's "mere influence or access" do not establish a *quid pro quo*. *McCutcheon*, 134 S. Ct. at 1451 (citing *Citizens United*, 558 U.S. at 360). Simply put, "[w]hatever it was" is not a limiting principle worthy of Supreme Court jurisprudence.

To prove *quid pro quo*, the Government, thus, must identify "a particular 'official act,'" *Sun-Diamond*, 526 U.S. at 408, and that "act" cannot rest on a "generic favoritism or influence theory," *see Citizens United*, 558 U.S. at 359-60 (citation omitted). Instead, the Government must identify an

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Circuit courts thus have no difficulty applying *Sun-Diamond*'s "official act" analysis to Hobbs Act or honest services prosecutions. *See, e.g.*, *United States v. Kemp*, 500 F.3d 257, 281 (3rd Cir. 2007) (finding that *Sun-Diamond*'s *quid pro quo* bribery analysis "is equally applicable to bribery in the honest services fraud context"), *cert. denied,* 552 U.S. 1223 (2008).

"official act" that implicates the exercise of government power. *See id.* at 341 (holding that political activity may be restricted when it does not "allow[] governmental entities to perform their functions"); *McCutcheon*, 134 S. Ct. at 1450-51 (holding that when an individual makes "an effort to control the exercise of an officeholder's official duties" a *quid pro quo* is established). That never occurred here—leaving the Government to make a federal case out of gifts and loans from a political contributor that resulted in the enjoyment of mere political access.

Unable to satisfy the Court's First Amendment jurisprudence, the Government asks the Court to jettison it. It attempts to cabin *Citizens United* and *McCutcheon* as "campaign finance decisions" that address only "general" political gratitude, not the "*specific quid pro quo* arrangement[]" it purports to have found here. *See* Gov't Br. 25-26 (emphasis in original). When "specific" political gratitude is at issue, the Government contends that the First Amendment does not apply, and one need only look at the supposedly-separate "public corruption" cases to determine that a "specific" *quid pro quo* can be identified without any *quo*. This contrived distinction neither states the law nor reflects the facts of the prosecution against Governor McDonnell. Worse still, it evinces that the Government's real target here is the robust exercise of First Amendment guarantees—going to the core of *Amici*'s interest in this case.

Pace the Government's protestations, the public corruption statutes and the First Amendment

do not exist in parallel universes. They both speak to the same—indeed, the "only . . . single"—"definition of corruption" that critically separates political activity from crime. *See McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.). Accordingly, *both* contexts require a "particular" official act that cannot be mere political favoritism.[3]

It is thus unsurprising that the "acts" described as not "official acts" in *Sun-Diamond*—a "public corruption" case—are analogous to the "acts" specified in *McConnell* that *Citizens United* characterized as "ingratiation" and "access," "not corruption." For example, *Sun-Diamond* explained that the Secretary of Agriculture giving a speech to farmers on "matters of USDA policy" is not action "on" those matters, even if the farmers treated the Secretary to lunch because he "*always* has before him or in prospect matters that affect [them]." *See*

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[3] More broadly, the Government's distinction between acceptable gratitude in the "campaign finance context" and suspect gratitude outside it suggests an unwarranted assumption: politics stops being political when an election season ends. As *Amici* know well given their robust political participation, that is divorced from the "transactional" reality of a democratic political process and, to an extent, is foolhardy when democratic governance depends upon consensus and responsiveness. *See* Jonathan Rauch, BROOKINGS INST., POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY 7 (2015). The wisdom of James Madison's insight in the *Federalist* still holds true: rather than proscribe "faction" with the threat of federal prison and chill robust political participation, *political* remedies—making "[a]mbition . . . counteract ambition"—will neutralize undesired political "coziness" and not harm First Amendment guarantees. *See* THE FEDERALIST No. 10, at 78, No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

526 U.S. at 406-07 (emphasis in original). *McConnell* pointed to a number of instances where the "promise[] [of] special access to candidates and senior Government officials in exchange for large soft-money contributions" occurred. *See* 540 U.S. at 130-31. These included "White House coffees that rewarded major donors with access to President Clinton, and the courtesies extended to an international businessman named Roger Tamraz, who candidly acknowledged that his donations of about $300,000 to the [Democratic Party] were motivated by his interest in gaining the Federal Government's support for an oil-line project in the Caucasus." *Id.* When *Citizens United* concluded that "[i]ngratiation and access, in any event, are not corruption," *it cited as support McConnell*'s discussion of these "certain donations . . . made to gain access to elected officials." *See* 558 U.S. at 360-61. They cannot be "official acts" within the meaning of the federal bribery statutes when the First Amendment guarantees that they are not corruption.

In the same way, the "acts" identified by the Government in prosecuting Governor McDonnell fall within the ingratiation and access that are not corruption. At no point did Governor McDonnell's "acts"—"asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue," App.73a, come with the exercise of government power. They are no different in kind than the "acts" referenced by *Sun-Diamond* and *Citizens United*: they manifest the unavoidable "[f]avoritism and influence" of democratic politics. *See McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.). The Government's attempt to have one

definition of *quid pro quo* for "public corruption cases" and another for the First Amendment fails on its face.

Moreover, the Government's distinction between acceptable "general ingratiation" in First Amendment cases and "specific *quid pro quo*" arrangements at issue in public corruption cases like this is belied by its purported explanation of Governor McDonnell's liability. *See* Gov't Br. 25-26. As the Government explained when defending its jury instruction—adopted verbatim by the district judge and affirmed by the Fourth Circuit: any type of action can be part of "*a series of steps* to exercise influence," App.275a (emphasis added). The Fourth Circuit concluded that *anything* that has the "purpose or effect" of "influencing" official action *at some unidentified future point* will suffice as an "official act." App.54a-55a. The Government looked to the political courtesies that Governor McDonnell gave this donor over time, such as seeking information about research studies and occasionally speaking highly about the donor's product. *See* App.73a-74a. The Government and the Fourth Circuit thus *used* a period of general ingratiation to define "official act"—even as the Government now claims that general ingratiation is protected by the First Amendment and part of what distinguishes political activity from corruption. This case shows how easily the Government can smuggle "general ingratiation" into the definition of "specific" *quid pro quo* by dismissing the relevance of the Court's First Amendment jurisprudence.

The Government's theory of general-ingratiation-over-time-equals-specific-*quid-pro-quo*

does more than reveal a false dichotomy (though it does that)—it ignores the Court's rejection of corruption prosecuted on "generic favoritism or influence theor[ies]." *See Citizens United*, 558 U.S. at 359-60. The Court rejected this approach precisely because it would create what the Government's understanding of "official act" creates: "substantial litigation" over the First Amendment's guarantee of robust political participation. *See id.* at 326-27. These prosecutions chill political activity. *See id.* (observing that they "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable."). *Amici*'s longstanding relationships with public officials will be used against them with no knowable limiting principle, identified in law in advance, to guide their political conduct. The First Amendment rejects this outcome, regardless of how much the Government may dislike the Court fine-tuning its political contribution regulations. *See Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (per curiam) (internal quotation marks and citations omitted) (finding that vague distinctions between politics and corruption "not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.").

As this Court's First Amendment jurisprudence takes some direct regulation out of its toolbox, the Government is relying on the honest services statute and Hobbs Act—perhaps hoping that their reputation for mud-like clarity will obscure the

First Amendment implications of this case. Instead, the Government's doing so eliminates important limitations this Court has placed upon those two statutes.

The Government's targeting of political access caricatures this Court's limitation of the honest-services statute to "core" bribery and kickbacks—announced during the same term in which *Citizens United* was decided. *See Skilling*, 561 U.S. at 368. Having relieved itself of the burden to identify a particular "official act," the Government now understands "core" bribery to include attending an event, meeting with an aide, and speaking highly of a product. This raises the very vagueness concern that compelled *every member of this Court* to reject an open-ended understanding of bribery when construing the honest services statute. *See id.* 561 U.S. at 418 (majority opinion).

Skilling does nothing to support the notion that "official act" should include political favoritism. Just as *Skilling* rejected any suggestion that it was "creat[ing] a common law crime" by narrowing the honest services statute to the "core" statutory definition of bribery, *see id.* at 409 n.43, so too is "official act" limited to its meaning within the bribery statute. *See id.* at 366, 412 (the honest services statute "draws content" from the bribery statute). Courts are thus without authority to "find" a new meaning to "official act" that includes mere political influence without the threat, pressure, or actual exercise of government power required by the statute. *See* 18 U.S.C. § 201(a)(3) (defining "official act" as "any decision or action on any question,

matter, cause, suit, proceeding or controversy" before the public official).

Undeterred by *Skilling*, the Government's theory would allow mere political influence that *could, maybe, someday*, *lead* to an "official act" to be a stand-in for satisfying the statutory definition and thus provide the needed *quo*. This leaves *Amici* without any standard or limiting principle to determine what the "core" of bribery is, making it impossible to conform their political activity to the public corruption laws. *See Buckley*, 424 U.S. at 41 n.48. *Skilling* compels rejecting this misuse of the honest services statute as much as the First Amendment does.

In a similar way, the Government's theory of *quid pro quo* without the *quo* transgresses this Court's limitations of the Hobbs Act. When this Court extended the Hobbs Act from extortion to bribery in *Evans*, *see* 504 U.S. at 260, 268, it did not alter bribery's requirement that it includes an "agreement to perform *specific* official acts," *id.* at 268 (emphasis added). This confirmation from *Evans* is ignored by the Government's understanding of "official act." The need for a "specific requested exercise of his official power," *id.* at 258 (citation omitted) confirms what the Government seeks to escape from here: "official acts" under the Hobbs Act are those that implicate the exercise of "official power," not simply "acts" of political access and influence. The fact that an "official act" need not occur for a bribe to be complete, as the Government repeatedly reminds this Court, does nothing to answer the question of what an official act *is* under the statute, what it cannot be due to the First

Amendment's and the statute's limitations, and whether the Government identified a true "official act" here. No answer to this fundamental question is fatal to the Government's *prima facie* case.

There is no basis under this Court's First Amendment jurisprudence, or under its limitations on both the Hobbs Act and honest services statute, to conclude that the political favoritism Governor McDonnell administered here amounted to an "official act" for purposes of *quid pro quo* corruption. Concluding otherwise would satiate the Government's desire for a "back door" to regulate the robust political participation the Court continues to safeguard with the First Amendment, but it would not satisfy the Constitution or the public corruption statutes. The Court should vindicate its own limitations and reverse the Fourth Circuit.

II. IF THE COURT'S LIMITATIONS ON THE HONEST SERVICES STATUTE AND THE HOBBS ACT ALLOW FOR POLITICAL FAVORITISM TO SUFFICE AS "OFFICIAL ACTION," THEN THE HONEST SERVICES STATUTE IS UNCONSTITUTIONALLY VAGUE AND *EVANS* SHOULD BE OVERTURNED.

The Court and its members have long suspected that the "intangible right of honest services" is hopelessly vague. *See, e.g.*, *Skilling*, 561 U.S. at 402-06 (identifying the serious vagueness problems with the honest services statute); *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also Sorich v. United States*, 555 U.S. 1204, 1204-08 (2009) (Scalia, J., dissenting from the denial of

certiorari). Indeed, *no* member of the Court in *Skilling* disagreed that the honest services statute possesses vagueness defects—the only disagreement existed over whether the statute could be salvaged, with three justices concluding that it could not. *See* 561 U.S. at 415 (Scalia, Thomas, Kennedy, JJ., concurring in judgment). If—even after *Skilling* narrowly construed it to "core" bribery and kickbacks—the honest services statute *still* criminalizes the manifestation of political access from robust political participation, then the statute is incurable, and it should be struck as unconstitutionally vague.

The Government's prosecution against Governor McDonnell is representative of *Skilling*'s ineffectiveness. *Skilling* conceded that, before its narrowing construction, courts were in "considerable disarray" over the honest services statute's reach—even with its "dominant[] and consistent[] applica[tion]" to what is now the statute's "core." *See* 561 U.S. at 405. The case against Governor McDonnell reveals that this "considerable disarray" continues.

"In response [to *Skilling*], courts, rather than insisting on strict definitions of 'bribery' or 'kickbacks,' have gone out of their way to shoehorn conduct into the ['core'] meaning of [the honest services statute]."[4] And whenever *Skilling* may provide a limitation on prosecuting political access, the Government will simply pursue the same conduct

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[4] Sarah P. Kelly & Megan E. Jeans, *Honest Services Fraud: The Trial Courts' Turn*, MONDAQ (July 7, 2012), http://www.mondaq.com/unitedstates/x/185554/White+Collar+Crime+Fraud/Honest+Services+Fraud+The+Trial+Courts+Turn.

through another statute where courts have permitted a loose understanding of bribery, like the Hobbs Act. "Indeed, a review of more than 600 published decisions involving the honest services statute reveals that the overwhelming majority of such cases involved either allegations of a bribe or a kickback, or conduct that . . . could have been charged as traditional wire/mail fraud or under other federal statutes," like the Hobbs Act—making *Skilling* "unlikely" to temper the Government's appetite for prosecuting political contributions.[5] *Skilling* limited the honest services statute as a *first resort* against its vagueness, not because it was the Court's only option. *See* 561 U.S. at 405. But now that circumstances have proved that the statute is not "amenable to a limiting construction," it is appropriate to strike the statute as vague. *See id.*

The Court's construction of the Hobbs Act in *Evans* resulted in another statute peddling in a similarly-vague understanding of bribery that threatens the First Amendment. Even as *Evans* claimed to rely on *quid pro quo* when extending the Hobbs Act to bribery, *see* 504 U.S. at 268 (requiring an "agreement to perform specific official acts"), it has been understood to dilute the specificity requirement. *See, e.g.*, Gov't Br. at 19 (citing *Evans* to argue that it did not need to identify that Governor McDonnell took a particular official act because "exercis[ing] influence" can take many forms); *see also United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) ("*Evans* modified [the *quid*

[5] *See* Mark J. Stein & Joshua A. Levine, *Skilling: Is It Really a Game-Changer for Mail and Wire Fraud Cases?*, in Securities and Litigation Enforcement Institute 2010 at 938-39 (PLI Corp. Law & Practice, Course Handbook Ser. No. 23726, 2010).

pro quo standard] in non-campaign contribution cases . . . [holding that an] agreement may be implied from the official's words and actions . . . .") (quoting *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) (citing *Evans*, 504 U.S. at 274, Kennedy, J., concurring)). By expanding the Hobbs Act to reach not simply extortion but bribery too, it encouraged the Government to rely on a "stream of benefits" view of bribery, rather than *quid pro quo*—allowing *both quid* and *quo* to be established simply by how the Government frames the *quid*. *See, e.g.*, *United States v. Holck*, 398 F. Supp. 2d 338, 348 (E.D. Pa. 2005) (citing *Evans* to hold that "[g]iven all of the benefits reviewed above which Commerce had directed to Kemp personally, or to others at Kemp's request, the jury was entitled to find that Kemp was returning those favors . . . .").

The "stream of benefits" approach to bribery encouraged by *Evans* is a synonym for the "generic favoritism or influence" theory that the First Amendment prohibits using to target corruption. *See Citizens United*, 558 U.S. at 359-60; *cf.* Kelly & Jeans, *supra* note 4 (discussing *United States v. Ring*, 768 F. Supp. 2d 302, 302 (D.D.C. 2011), *aff'd* 706 F.3d 460 (D.C. Cir. 2013), where the district court dismissed any significance to the *de minimus* value of the individual gifts given by the lobbyist, considering only their cumulative value. "Extending this line of reasoning to its logical end, an individual could be held guilty of bribery under an honest-services-fraud theory with a few too many free cups of coffee."). Nevertheless, it persists in light of *Evans* and the irrelevance of *Skilling*. "By stretching the bounds of extortion to make it encompass bribery," the Court facilitated the weakening of *quid pro quo*

to the point that the Government may bring prosecutions based entirely on First Amendment activity. *See Evans*, 504 U.S. at 284 (Thomas, Rehnquist, Scalia, JJ., dissenting).

Evans has diluted *quid pro quo* in cases involving campaign contributions too. Indeed, *Evans* admitted that the payments at issue were partly "a campaign contribution," 504 U.S. at 258, which has permitted campaign contributions to *both* be a *quid and* not evinced by express agreement. *See id.* at 266-71; *see also, e.g.*, *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (holding that an "explicit" agreement in the campaign contribution context "does not mean *express*.") (emphasis in original); *United States v. Inzunza*, 638 F.3d 1006, 1014 (9th Cir. 2009). By allowing the Government to set forth a bribery theory based entirely upon how it frames the amount of *quid*, explicitly or implicitly given, a bribery agreement may be—from beginning to end—activity protected by the First Amendment.

Considering both "core" bribery's reach despite *Skilling* and the "stream of benefits" approach to bribery post-*Evans*, the Government's failure to identify a particular official act against Government McDonnell is unsurprising. Under the honest services statute, the Government considers political favoritism part of bribery's "core," and, given *Evans*, it does not need to identify any particular official act at all. The Fourth Circuit agreed: any act could be an official act, even political favoritism, s*ee* App.54a., and, such an act need not be specified because anything that has the "purpose or effect" of "influencing" official action as it is defined in statute will suffice. App.54a-55a. Working together, the

failed limitation on honest services fraud from *Skilling* and the dilution of *quid pro quo* post-*Evans* facilitate vague prosecutions against all forms of robust political activity—both in and out of the campaign contribution context. *Evans* should accordingly be reversed and the honest services statute struck down.

CONCLUSION

"The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *McCutcheon*, 134 S. Ct. at 1451. If the First Amendment and the Court's complimentary insistence on particular official action tied to the exercise of government power cannot reverse the Fourth Circuit here, then the honest services statute must be struck down as unconstitutionally vague and the extension of the Hobbs Act from extortion to bribery in *Evans* must be reversed. Without reversing the Fourth Circuit here, *Amici*'s robust political participation will occur under a dark cloud of criminality.

The prosecution of Governor McDonnell reveals how the Government intends to use its public corruption statutes in a war of attrition against robust political participation. Elected officials now wear a "halo," following them everywhere they go. Even when an elected official is not aware of the "purpose" or "effect" of his "influence" on official action, he always has it in the Government's eyes. Every relationship *Amici* possesses with elected officials and political candidates, and every period of those relationships, may be used as evidence against

them in a criminal prosecution. No interaction is innocuous to the Government—everything can be just one step in a series to exercise influence, even campaign contributions, even trite tokens and gifts over time—even if no actual official act is ever identified. Worse, how innocent this participation seems to the Government will be determined by a prosecutor. Whether a prosecutor is interested in pursuing (or not pursuing) certain elected officials or certain political supporters will effectively determine the activity's legality. In short, it is best if *Amici*, and the elected officials they may want to support or interact with, converse as little as possible. "Robust" political supporters should be avoided and interactions with them carefully monitored by "compliance" counsel. What this means for the First Amendment is of less importance to the Government than its zeal to take "robust" political participation out of our democracy. *Amici* respectfully ask this Court to continue its defense of the political process and reverse the Fourth Circuit.

Respectfully submitted,

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