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

AMICI CURIAE BRIEF OF 77 FORMER STATE ATTORNEYS GENERAL (NON-VIRGINIA) SUPPORTING PETITIONER ROBERT F. MCDONNELL

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BRIEF OF 77 FORMER STATE ATTORNEYS GENERAL AS *AMICI CURIAE* SUPPORTING PETITIONER

Amici—the former Attorneys General listed on the preceding pages—submit this brief supporting Petitioner Robert F. McDonnell.[1]

STATEMENT OF INTEREST

Amici are former Attorneys General who each served as the chief legal officer or law-enforcement officer for their State, Commonwealth, or Territory. A bipartisan group (41 Democrats, 35 Republicans, and 1 independent), *amici* believe that the boundless definition of "official act" that emerged from the proceedings below threatens to criminalize wide swaths of state political life. At the very least, it empowers federal prosecutors to *charge* state officials with crimes for routine political pleasantries, casting a fog over every dinner with a constituent or appearance at a fundraiser.

That uncertainty will make it difficult for state attorneys general to advise their clients about whether particular conduct crosses the (now) constantly shifting line between common political courtesy and indictable corruption. Depending on which way the political winds are blowing, activities

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no party or counsel for a party helped fund the preparation or submission of the brief. No person other than *amici curiae* or their counsel funded work on the brief.

On February 10, 2016, Mr. McDonnell and the Government each filed a letter consenting to the filing of *amicus* briefs.

previously thought innocent may now carry the threat of federal criminal liability.

Amici have a strong interest in seeing Governor McDonnell's convictions overturned because the courts below endorsed an unprecedented construction of "official act" that ignores this Court's teachings, conflicts with the decisions of other Courts of Appeals, and threatens to turn common political gestures into federal crimes.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Ingratiation and access . . . are not corruption." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010). On the contrary, "[t]hey embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

More than two centuries of American political life have proceeded on that understanding. Indeed, much of the advice that state attorneys general have given public officials over that span has rested on the assumption that introductions and public appearances are perfectly legal.

The proceedings below threaten to change all that.

A jury convicted Mr. McDonnell of public corruption based on ingratiation and access and nothing more. The jury accepted the Government's theory—embellished in the District Court's jury

instructions—that Mr. McDonnell was guilty of bribery even though he never exercised (or promised to exercise) official government power to assist donor Jonnie Williams in a particular matter. It was enough, the jury concluded, that Mr. McDonnell asked an aide a question about research studies relating to Williams's company, appeared in public twice at receptions that Williams attended, and suggested and arranged a staff meeting with Williams. No court before had accepted that legal theory. Those that had considered it had rejected it.

For good reason: Mr. McDonnell's acts were "assuredly 'official acts' in some sense," but they "[were] not 'official acts' within the meaning of" the federal bribery statutes. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999). None involved Mr. McDonnell's exercising or promising to exercise the Commonwealth of Virginia's power in a particular matter. They were political pleasantries at best, markers of ingratiation and access at worst. Neither amounts to corruption.

In sustaining Mr. McDonnell's convictions, the courts below embraced a definition of "official act" that leaves few interactions between public officials and their constituents beyond its reach. A boundless definition is bound to produce absurd results, and so it would here. The Fourth Circuit's definition would potentially "criminalize . . . the replica jerseys given [to the President] by championship sports teams each year during ceremonial White House visits," "a high school principal's gift of a school baseball cap to the Secretary of Education . . . on the occasion of the latter's visit to the school," and even "providing a complimentary lunch for the Secretary of Agriculture

in conjunction with his speech to [] farmers concerning various matters of USDA policy." *Sun-Diamond*, 526 U.S. at 406–07. This Court had no trouble concluding that those exchanges are not crimes (*id.*), but in the Fourth Circuit, they might be.

The Fourth Circuit's definition would be bad enough if confined to cases involving *federal* officials, but it is even more problematic when applied to a *state* official's conduct that is otherwise legal under state law. Under our system of dual sovereignty, "perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)). Accordingly, courts must not "be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Yet if left to take on a life outside this case, the definition of "official act" that drove the outcome below would federalize the law of public corruption, empowering federal prosecutors to transform innocent political dealings into fodder for federal prosecutions. This Court has instructed courts to refrain from construing statutes "in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987). The courts below ignored that teaching.

The end result? Public officials must now go about their days wondering whether a fundraising

lunch at a downtown eatery or dinner reception at the local university might end up in the pages of an indictment. And when they ask their legal advisers, "Does this violate the law?," too often the reply will be, "We really don't know."

Amici support reversal of Mr. McDonnell's convictions because the Fourth Circuit's rule would hamstring state attorneys general and other legal officers in their ability to advise clients about what constitutes bribery and what doesn't.

ARGUMENT

Amici agree with Mr. McDonnell that an "official act" requires more than making a public appearance, arranging a meeting, or introducing someone at a dinner. The Fourth Circuit's contrary conclusion portends a standardless expansion of federal criminal law into state politics that will convert routine aspects of the political process into federal crimes. If Congress intended the federal bribery statutes to displace state regulation of corruption so decisively, it would have made that clear in the statutes. It did not.

I. AN "OFFICIAL ACT" REQUIRES MORE THAN ARRANGING A MEETING OR INTRODUCING SOMEONE AT A DINNER.

The Hobbs Act and the honest-services-fraud statute—the statutes underpinning Mr. McDonnell's convictions—are notoriously vague. *See* 18 U.S.C. § 1951(b)(2) (Hobbs Act) (prohibiting "extortion" through "obtaining of property from another, with his consent . . . under color of official right"); 18 U.S.C. § 1346 (honest services) (prohibiting a "scheme or artifice to defraud," defined to include "a

scheme or artifice to deprive another of the intangible right of honest services"). Neither statute explicitly criminalizes "bribery." Neither mentions "official acts."

But this Court—recognizing that the statutes raise constitutional vagueness concerns—has cabined their reach, interpreting them to prohibit the exchange of "official acts" for payments. *Evans v. United States*, 504 U.S. 255, 268 (1992); *Skilling v. United States*, 561 U.S. 358, 409 (2010). With that judicial gloss, the statutes reach only classic bribery—the "most blatant and specific attempts of those with money to influence governmental action." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).[2] The Court has drawn "the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire to simply limit political speech" at a "direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441.

Rather than prosecute within the lines established by this Court, the Government asked the District Court and then the Fourth Circuit to do something remarkable: It invited those courts to import the definition of "official act" from the statute prohibiting bribery of a *federal* official (18 U.S.C. § 201(a)(3)) and then to apply that definition in the

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[2] Even then, questions remain about the statutes' constitutionality. *See Skilling v. United States*, 561 U.S. 358, 425 (2010) (Kennedy, J., concurring in the judgment, joined by Scalia and Thomas, JJ.); *Evans*, 504 U.S. 255, 290–91 (1992) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).

broadest possible way to a *state* official. The courts below accepted the Government's invitation and, in so doing, criminalized conduct far removed from the "bribe-and-kickback core of the pre-*McNally* case law." *Skilling*, 561 U.S. at 409.

Amici question whether the definition of "official act" in 18 U.S.C. § 201(a)(3) applies in cases involving state officials. But even if § 201(a)(3) has some place in the analysis, the Fourth Circuit's decision to define "official act" in breathtakingly broad terms violated basic principles of statutory construction, ignored the serious vagueness problems that attend a broad definition, and displaced state power over local corruption without a clear directive from Congress to do so.

A. Making an appearance or introduction or arranging a meeting is not "performing" an "official act."

The statute criminalizing bribery of a federal official prohibits an official from being "influenced in the *performance* of any official act." 18 U.S.C. § 201(b)(2)(A) (emphasis added). Perform does not mean "think about," "consider," or "take steps toward." It means "carry out in action," "execute," "fulfill." OXFORD ENGLISH DICTIONARY ONLINE (last visited Mar. 4, 2016). Mr. McDonnell did not "perform" an official act simply by asking an aide a question, appearing in public, suggesting a meeting, or arranging a meeting. Those actions were markers of ingratiation and access, not evidence of a crime. Otherwise, most politicians are criminals.[3]

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[3] If the statutory definition of "official act" in 18 U.S.C. § 201 applies, it buttresses that conclusion. The definition requires

B. An "official act" is a decision "that the government actually makes" on a particular matter.

Amici also believe that the text of the statute, opaque as it is, at least reveals that "official act" requires a "decision[] that the government actually makes" on a *particular* matter. *See Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007) (en banc). The statute limits "official" acts to "any decision or action on any question, matter, cause, suit, proceeding or controversy . . . ." 18 U.S.C. § 201(a)(3). Under the familiar canon of construction *noscitur a sociis*—which "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress" (*Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))—"a word is known by the company it keeps." *Id.*

Read in light of each other, the terms in § 201—"question, matter, cause, suit, proceeding or controversy"—"suggest 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

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the official to take action "on" a particular matter. *See* 18 U.S.C. § 201(a)(3). An official does not take action "on" a particular governmental matter by arranging a meeting or making an introduction. The Fourth Circuit's rationale—that a meeting or introduction is the first "step" toward the donor's objective—is no answer to the statutory text. The statute requires an "official act," not a "step" toward an official act. Nor does the statute criminalize the "exploiting" of governmental power (whatever that means), the Fourth Circuit's suggestion to the contrary notwithstanding. It criminalizes official action on a particular matter.

investigation, a procurement, or a policy adoption."[4] *United States v. Valdes*, 437 F.3d 1276, 1279 (D.C. Cir. 2006) (emphasis added), *aff'd on reh'g en banc*, 475 F.3d 1319 (2007). They "refer[] to a class of questions or matters whose answer or disposition is *determined by the government*." *Valdes*, 475 F.3d at 1324 (emphasis added).

Arranging a meeting does not qualify as official government action on a particular matter. Neither does making an appearance or asking an aide a question. Those acts—"assuredly 'official acts' in some sense—are not 'official acts' within the meaning of [the federal bribery laws]." *Sun-Diamond*, 526 U.S. at 407. Otherwise, the bribery statutes would "encompass every action taken in one's official capacity"—a position that the Fourth Circuit felt constrained to reject in the past. *United States v. Jefferson*, 674 F.3d 332, 356 (4th Cir. 2012). Indeed, before the decision below, the circuit courts had uniformly agreed that trading on the "network and influence that comes with political office" is not against the law. *United States v. Urciuoli*, 513 F.3d 290, 294, 296 (1st Cir. 2008) (Boudin, J.) (rejecting an overbroad interpretation of "official act" "lest it embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental

[4] The narrower terms "suit," "proceeding," and "controversy" limit the broader terms "question," "cause," and "matter." A "suit" is a "proceeding" or a "case." BLACK'S LAW DICTIONARY (9th ed. 2009). A "proceeding" is a "procedural means for seeking redress" (*id.*) or a "*particular* action or course of action." OXFORD ENGLISH DICTIONARY ONLINE (last visited Mar. 4, 2016) (emphasis added). "Controversy" means a "dispute." *Id.* Taken together, the terms suggest formality and specificity—the wielding of formal governmental power on a particular issue.

position"); *see also United States v. Rabbitt*, 583 F.2d 1014, 1028 (8th Cir. 1978) (reversing Hobbs Act conviction because official's recommendation of a friend's architecture firm did no more than "gain them a friendly ear").

Applying the *noscitur* canon to the statutory definition of "official act" resolves the ambiguity in the definition against the construction below. But this Court should also consider the limited role that the federal bribery statutes play in regulating corruption; those statutes are "merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *Sun-Diamond*, 526 U.S. at 409. "[T]his is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions," so "a statute . . . that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 412.

Put another way, the courts below should have chosen a narrower definition of "official act" because they *could have* chosen a narrower definition—one that gave fair notice of criminality and accounted for the atomized regulatory scheme already in place. Instead, they opted for a meat axe.

C. Defining "official act" to encompass mere ingratiation and access resurrects the very vagueness problems that this Court has sought to avoid.

Without this Court's limiting constructions, both the Hobbs Act and the honest-services-fraud statute

raise constitutional vagueness concerns. Given the fragile constitutional state of those statutes, the courts below should have taken care to measure their definition of "official act" against the constitutional minima of due process and fair notice. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). They did not. On the contrary, they gave a wide berth to a vague statutory definition, breathing new life into the vagueness problems that this Court has tried to eliminate in the bribery context.

Along the same lines, when "construing a criminal statute," courts "are . . . bound to consider application of the rule of lenity." *Crandon v. United States*, 494 U.S. 152, 168 (1990). Like the avoidance canon, the rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Id.* at 158. Neither the District Court nor the Fourth Circuit calibrated the definition of "official act" to fit those constitutional restraints.

* * *

There is another interpretive principle that seems to have gotten lost below. Just last year, this Court reaffirmed that when "ambiguity derives from the improbably broad reach of [a] key statutory definition," "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve [that] ambiguity." *Bond*, 134 S. Ct. at 2090. Indeed, this Court has often relied on federalism principles to construe federal statutes

that touch areas of traditional state concern. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 459–61 (1991) (qualifications for state officers); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (titles to real estate); *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (land and water use).

Sensitivity to the federal-state balance would have yielded a different outcome below.

II. THE CONSTITUTION FORBIDS COURTS FROM CONSTRUING VAGUE FEDERAL STATUTES TO CRIMINALIZE CONDUCT THAT IS LEGAL UNDER STATE LAW.

Virginia law permits state officials to accept gifts. *See* VA. CODE ANN. § 2.2-3103(8)–(9). And there was no suggestion at trial that Mr. McDonnell violated Virginia law. Yet Mr. McDonnell—an innocent man under his own State's law—now faces incarceration in federal prison because the courts below gave the broadest conceivable reading to a vague definition of "official act."

That result would have surprised the Founders. They were not quick to displace state police power absent a clear statement from Congress. *See* The Federalist No. 17 (Alexander Hamilton, Dec. 5, 1787) ("There is one transcendent advantage belonging to the province of the State governments . . . , I mean the ordinary administration of criminal and civil justice."). It is also at odds with "the well-established principle" that if Congress wants to unseat state law in an area of traditional state responsibility, it must not mince words. *Bond*, 134 S. Ct. at 2087.

A corollary to that well-established principle is that *Congress*, not the courts, possesses the power to alter the "sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. It is "'incumbent on the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond*, 134 S. Ct. at 2089 (quoting *Gregory*, 501 U.S. at 460).

A. Policing local corruption is an area of traditional state concern.

"Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond*, 134 S. Ct. at 2089; *see also Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States."). Consistent with the Tenth Amendment's reservation of rights to the States, "the primary responsibility for ferreting out [local] political corruption must rest, until Congress [properly] directs otherwise, with the State, the political unit most directly involved." *United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976).

States have shouldered that responsibility since the Founding. In fact, by the late nineteenth century, most States had passed statutes regulating gifts to public officials or criminalizing bribery of local officials. *See, e.g.*, Thomas Herty, A DIGEST OF THE LAWS OF MARYLAND BEING AN ABRIDGEMENT, ALPHABETICALLY ARRANGED, OF ALL THE PUBLIC ACTS OF ASSEMBLY NOW IN FORCE, AND OF GENERAL USE 101 (Bribery), 406–08 (Office and Officer) (1799); A COLLECTION OF ALL SUCH ACTS OF THE GENERAL

ASSEMBLY OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE AS ARE IN FORCE, ch. 59 ("An Act to punish Bribery and Extortion, passed the 19th of October 1792") (1803).[5] Punishing state corruption was a state prerogative; public officials usually faced prosecution in state court. With the passage of the Hobbs Act in 1946 (an amendment to the 1934 Anti-Racketeering Act), that changed somewhat as federal prosecutors generously employed the new statute, but the police power principally remained with the States.

Because the power to regulate local corruption resides foundationally with the States, Congress must leave no doubt if it wishes to displace state power in that arena. Within constitutional limits, Congress may increase federal oversight over state officials, but it must "make its intention to do so 'unmistakably clear in the language of the statute.'"

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[5] *See also* 2 William Charles White, A COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS, tit. XXX Bribery, Embracery, and Extortion (1809); LAWS OF THE STATE OF NEW JERSEY § 24 at 249 (1821); William A. Hotchkiss, A CODIFICATION OF THE STATUTE LAW OF GEORGIA, ch. XXIX, §§ 26–28 (1845); THE CODE OF WEST VIRGINIA COMPRISING LEGISLATION TO YEAR 1870, ch. 147, §§ 4–7 (Bribery) (1868); WILLIAM H. BATTLE'S REVISAL OF THE PUBLIC STATUTES OF NORTH CAROLINA ADOPTED BY THE GENERAL ASSEMBLY AT SESSION OF 1872-73, ch. 32, §§ 130–32 (Bribery) (1873); 1 Frederick C. Brightly, A DIGEST OF THE LAWS OF PENNSYLVANIA § 77 at 330 (1873); 3 George W. Cothran, REVISED STATUTES OF NEW YORK, tit IV, § 9 at 957 (6th ed. 1875); THE GENERAL STATUTES AND THE CODE OF CIVIL PROCEDURE OF THE STATE OF SOUTH CAROLINA ADOPTED BY THE GENERAL ASSEMBLY OF 1881, ch. 103, §§ 2536–41 (Bribery) (1882); William M. Chase and Arthur H. Chase, THE PUBLIC STATUTES OF THE STATE OF NEW HAMPSHIRE, ch. 280, § 20–21 (1900); THE GENERAL STATUTES OF CONNECTICUT REVISION OF 1902 § 1260 at 366–67 (1902).

Gregory, 501 U.S. at 460–61 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Oblique enlargements of federal power over state political life will not do.

B. The Fourth Circuit displaced state police power even though Congress has not made its intention to do so "unmistakably clear."

Vagueness concerns should have yielded a narrower definition of "official act" than the courts below chose, but more was at stake than the vagaries of a federal statute. The Government's definition of "official act"—now ensconced in the Fourth Circuit—extends the federal criminal power so that it potentially reaches every facet of state political life. In adopting that definition, the Fourth Circuit cast aside not only Virginia's choice not to criminalize Mr. McDonnell's conduct but also Virginia's and other States' choices not to criminalize wide swaths of lobbying and political activities—many of which have gone unquestioned since the earliest days of the Republic. Now, those activities are fair game for federal prosecution.

If Congress wanted to federalize the law of public corruption, it would not have done so through a strained definition of "official act" that applies only to federal officials. It would have said so clearly in a statute that applied on its face to state officials. *See Bond*, 134 S. Ct. at 2089; *Gregory*, 501 U.S. at 460–61*; Bass*, 104 U.S. at 349. By adopting a definition of "official act" that alters the federal-state balance so

dramatically in favor of federal criminal power, the Fourth Circuit took a step that Congress has not.[6]

C. By adopting a definition of "official act" that arguably captures most interactions with constituents, the decision below effectively deputized federal prosecutors to set ethics standards for state officials.

If Mr. McDonnell must face jail time for facilitating some meetings, then there is no limit to the federal bribery laws. The decision below hands federal prosecutors virtually unfettered discretion to prosecute state officials for political courtesies and other innocent acts that are part of the fabric of American political life. No lunch with a lobbyist is safe.

The disruption to American politics will prove all the more acute because federal prosecutors act independently and have wide discretion in picking which cases to prosecute. *See* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 847 (2004) ("[I]ndividual prosecutors' preferences still control a vast range and number of choices, free of outside or supervisory controls."); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 266 (2001) ("Prosecutorial discretionary power is quite broad and often

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[6] *See also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1023 (1989) ("[D]eferring to the constitutional values inherent in federalism, the Court will 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress' (the rule against preemption of traditional state functions).") (citation omitted).

unregulated."). With statutes in hand that may cover everything from preferred seats at a dinner to time on the state official's motor coach, a prosecutor's charging decisions will often reflect personal predilection more than statutory interpretation. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines [for law enforcement], a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.") (internal alteration, quotation marks omitted).

The upshot is that state officials will not know that they may have committed a federal crime until the local federal prosecutor informs them that their lunch presentation at the local chamber of commerce was one link in a chain adding up to bribery. Such a fundamental transformation of criminal jurisdiction should come, if at all, through an unambiguous act of Congress, not through a judicial gloss on a vague statute.

III. DANGLING THE THREAT OF CRIMINAL LIABILITY OVER EVERY LUNCH WITH A LOBBYIST AND EVERY MEETING WITH AN INTEREST GROUP WOULD IMPEDE THE PROPER FUNCTIONING OF STATE AND LOCAL GOVERNMENTS.

The Fourth Circuit's decision to override state corruption law is not merely of academic concern. The consequences would be felt on the ground.

At best, the lower courts' definition of "official act" will make public officials think twice before delivering basic constituent services—and lobbyists think twice before seeking them—for fear of possible federal prosecution. At worst, it could chill the delivery of those services altogether. Why speak about the State's economic progress at a lobbyist-organized lunch if that lunch might later feature in an indictment? Why introduce businesspeople in the community to legislators and other policymakers when a federal prosecutor might later call those introductions "official actions" bought at the price of a lunch at the local steakhouse?

The chilling effect will extend to the advice givers—the attorneys general and other legal officers who daily answer state officials' legal questions. As *amici* know firsthand, state officials often look to the Attorney General's office for advice about thorny questions across the range of political involvement. *See, e.g.*, N.C. GEN. STAT. § 114-2 (2014) ("It shall be the duty of the Attorney General . . . [t]o give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor,

Treasurer, or any other State officer.");[7] William H. Pryor, Jr., *A Report from the State's Law Firm*, 62 ALA. L. REV. 264, 267 (2001) (the state attorney general "provides formal written opinions on questions of law to the Governor; other constitutional officers; heads of state departments, agencies, boards and commissions; members of the legislature; and thousands of other state and local officials"). With increasing frequency, those questions touch on the campaign-finance and bribery laws.

If Governor McDonnell's convictions stand, giving advice to state officials about the legality of particular interactions with constituents will prove more divination than interpretation. Attorneys general will struggle to define the outer bounds of legal conduct because there would be no readily discernible outer bounds; a political pleasantry could provoke an indictment one week but raise no eyebrows the next. That uncertainty will prevent attorneys general from carrying out one of their principal functions: giving sound advice on the propriety of governance. The opinion letters and memoranda that state officers have depended on to navigate the ethics and campaign-finance laws will become frail reeds on which to rely.

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[7] *See also, e.g.*, ARIZ. REV. STAT. ANN. § 41-192 ("The attorney general shall . . . be the legal advisor of the departments of this state . . . ."); MD. CODE ANN., STATE GOV'T § 6-106 (2009) ("the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government"); MISS. CODE. ANN. § 7-5-1 (same); OKLA. STAT. ANN. TIT. 74, § 18b.5 (same); R.I. GEN. LAWS ANN. § 42-9-6 (same); S.C. CODE ANN. § 1-7-90 (1976) (same); VA. CODE ANN. § 2.2-505 (2001) (same); WASH. REV. CODE ANN. § 43.10.030 (same); W. VA. CODE § 5-3-1 (1991) (same).

Constituents' will for political action will also atrophy. For a long time (maybe for all time), the word "lobbyist" has carried a negative connotation in some corners, but one can hardly question the integral role that concerned citizens play in the legislative process. The "political associations" that de Tocqueville described as defining American democracy (*see Democracy in America*, ch. XII (1838)) continue to drive much of the positive change in our Nation. As federal Senator Jack Reed (D–Rhode Island) put it, the most effective lobbyists are constituents "who are personally involved in something important to them. They are a lot more central and crucial to a lot that you're doing than someone paid in Washington." David T. Cook, *How Washington lobbyists peddle power*, THE CHRISTIAN SCIENCE MONITOR, Sept. 28, 2009, http://www.csmonitor.com/USA/Politics/0928/how-washington-lobbyists-peddle-power.

Criminalizing wide swaths of state political life will make politics risky business for those constituents, too. The Government can prosecute constituents under the same statutes that underlie Mr. McDonnell's convictions. *See* 18 U.S.C. § 371 (prohibiting conspiracies to violate federal laws). With the Fourth Circuit's decision on the books, informed citizens will hesitate to engage their public officers through such innocent activities as having lunch with the official or inviting the official to a community event. Seen in the light of the proceedings below, buying a state senator an admission ticket to a county fair in hopes of gaining an introduction to a real-estate developer in the stands could count as bribery.

* * *

Legend has it that upon leaving the White House some evenings, President Ulysses S. Grant would head to the lobby of the Willard Hotel to enjoy a brandy and a cigar. As citizens learned that the President was holding court in the hotel lobby, they began to congregate there hoping to bend his ear, lodge a grievance, or arrange an introduction to one of the many senators and representatives that flanked the Commander-in-Chief.[8] If the legend is true, then no doubt drinks and cigars changed hands as constituents sought access to the President and his political brethren.

If President Grant were alive today, he might be surprised to learn that buying the President a cognac or his favorite Colfax cigar to gain an introduction to his senator-friend could land someone in jail. And yet that is the political consequence presaged by Mr. McDonnell's convictions.

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[8] Although linguists note that the word "lobbyist" pre-dates Grant's presidency, the Willard Hotel claims that President Grant coined the term "lobbyists" to describe the would-be powerbrokers who gathered in the lobby to seek a minute with the President. *See* Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 STAN. L & POL'Y REV. 23, 37 (2008); *see also* Jan Witold Baran, *Can I Lobby You?*, WASHINGTON POST (Jan. 8, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/06/AR2006010602251.html.

CONCLUSION

For all these reasons and those stated in Mr. McDonnell's separate brief, this Court should reverse the judgment below.

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