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 *Amicus Curiae* of U.S. Justice Foundation, Citizens United, Citizens United Foundation, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

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These legal, policy, and religious organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

SUMMARY OF ARGUMENT

Former Virginia Governor Robert McDonnell stands unconstitutionally convicted of federal crimes of bribery and corruption arising out of actions taken by him while in office. Purporting to have jurisdiction over the ethical and legal relationship of a state

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

government official and one of his constituents, federal prosecutors have ignored the constitutional limits placed on the national government by the Constitution's federal structure.

There is no enumerated power vesting in Congress any authority to impose upon the States a national code of ethics and law governing the communications and conduct of an elected public official and a person seeking some State benefit. Instead, regulation of such matters is reserved by the Constitution to the States as independent sovereign entities, and to the People who constitute the citizenry of their respective States.

The constitutional basis for the federal statutes, the violation of which is the basis of this case of government bribery and corruption, is the enumerated power vested in Congress to regulate interstate commerce, and the Necessary and Proper Clause which extends that regulatory power to activities that "affect" commerce. But the facts of this case demonstrate that any "effect" that the Governor's activities might have had on commerce was negligible, and wholly fortuitous. Instead, the entire focus of this case was the charge that the Governor's activities polluted the State's political process, which is outside any enumerated power vested in the federal government.

What federal prosecutors cannot do directly, cannot be done indirectly without imploding the Constitution's federal structure which preserves

inviolate the independence and sovereignty of the States.

The significance of this case in determining the role of States in our federal structure cannot be overestimated. If allowed to stand, the States will be led by elected and appointed officials who are under the effective supervisory authority of unelected federal prosecutors. It would be unrealistic to assume that States would stand strong against federal encroachment into their constitutionally-recognized spheres of authority, if State and local officials operated in fear that one of thousands of federal prosecutors could at any time launch a career-ending investigation based on one of the many ambiguous statutes at his disposal, all containing draconian punishments. An affirmance of the McDonnell prosecution would reduce the role of sovereign States to mere administrative subdivisions of the federal government.

The problem is compounded, since the take-down of a state or local official based on charges of corruption can be ever so tempting to an ambitious federal prosecutor. In the past, federal prosecutors have used their discretion to launch investigations into persons who are candidates for political office for improper reasons, but sanctions on prosecutors for improper behavior are almost never imposed. The historic role of the grand jury is to provide a check between a prosecutor and the people. Unfortunately, the system no longer works that way, with virtually no grand juries refusing a prosecutor's request for an indictment in the federal system. Moreover, a review

of the record of the Justice Department's Public Integrity Section demonstrates many instances of abuse in political prosecutions. Indeed, we are seeing the criminalization of politics, where in many instances federal prosecutors choose who may run for office or serve in office, rather than the people.

Allowing for the problem to develop in the first place is Congress having exceeded its narrowly limited constitutional authority to criminalize behavior. Virtually all criminal law was to be a function to the states, but the promiscuous use of the commerce power has led to enactment of innumerable federal crimes. This case presents this Court with the opportunity to restore order, and protect the vital role of the States in our federal system.

STATEMENT

It is without question that the actions of former Virginia Governor, Robert McDonnell, in this case broke no state law. *See* Petition for a Writ of Certiorari at 16. It is also without question that Virginia law governing the actions taken by Governor McDonnell "reflect the considered, comprehensive determinations of [the] state's legislative body regarding prevention and punishment of corruption in state government." *See* Brief of *Amici Curiae* Virginia Law Professors ("Va. Profs.") at 15. It is further without question, upon consideration of the ethical charges being brought against Republican Governor McDonnell, that Virginia's Republican Attorney General delegated to a Democrat Commonwealth's Attorney the responsibility of investigating those

charges.[2] And, finally, preempting the Commonwealth's Attorney, the United States Attorney for the Eastern District of Virginia took over the investigation.[3]

Neither at the time of the federal take-over of this case, nor now, was there any whiff of a cover up by state officials associated of the charges against the Governor. Indeed, as the Governor has demonstrated in his opening brief, all of the allegedly incriminating activities had been previously disclosed to the public, as required by Virginia law. *See* Brief for the Petitioners ("Pet. Br.") at 3, 5, and 9. And, as one *amicus curiae* brief in support of the petition has pointed out: "Virginia approaches corruption in state government [by] statutes [that] restrict[] the abilities of state officials to accept gifts, loans, and payments and to participate in certain business before the Commonwealth, [and] criminalizes the receipt of bribes by such officials." Va. Profs. at 14.

Of specific interest here is the fact that Virginia bribery law is different from federal bribery law, in that:

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[2] *See, e.g.*, J. Nolan, "City prosecutor investigating McDonnell's disclosures," Richmond Times-Dispatch (May 23, 2013), http://goo.gl/U67Z0J.

[3] *See, e.g.*, R. Helderman, "State investigation of McDonnell to be dropped without charges," Washington Post (Jan. 27, 2014) https://goo.gl/auPWGY; B. Sizemore, "McDonnell trial tells politicians that feds are watching," The Virginian-Pilot (July 27, 2014) http://goo.gl/MeGmbE.

> Virginia's bribery statute dovetails with an entirely distinct statutory regime, codified as the "State and Local Government Conflict of Interests Act," devoted to regulation of gifts to state and local public officials, including the governor. The Act was adopted "for the purpose of establishing a single body of law applicable to all state and local government officers and employees ... so the citizenry can "maintain[] the highest trust in their public officers and employees." [*Id.* at 16.]

Undeterred by any consideration of federalism, the United States Attorney pressed forward with his investigation, even though, "the cupboard seems virtually bare when one seeks federal laws explicitly aimed at state and local corruption." *See* S. Beale, "Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal ("Beale")," 51 *Hastings L.J.* 699, 704-05 (Apr. 2000). What the prosecutor found were two laws — the Hobbs Act and the honest services fraud statutes — that conferred upon a federal prosecutor "expansive and flexible authority to prosecute many forms of misconduct by state and local officials." *Id.* at 705. Indeed, as Duke law professor Sara Beale has observed, the "net result of these expansive interpretations is that federal prosecutors have as broad or broader authority to prosecute state and local officials as they have to prosecute federal officials under [an] intricate web of statutes...." *Id.*

In his opening brief, Governor McDonnell has protested that the two federal laws — the Hobbs Act and the honest services provision of the mail/wire fraud statutes — "jeopardize the federal-state balance by superseding state ethics codes with national rules of good government." Pet. Br. at 18. Further, the Governor contends that "[f]ederalism demands respect for the authority of states to govern their officials, yet the federal corruption laws threaten to impose nationally whatever ethical standards federal prosecutors believe should prevail." *Id.* at 22. And, capping this line of argument, the Governor's opening brief protests that "[it] is bad enough for *Congress* to impose a national code of ethics, but it is far worse for *federal prosecutors* to promulgate one through a series of *ad hoc*, case-by-case convictions." *Id.* at 24. Although *amici* agree with the Governor that "[f]ederalism principles thus require giving these statutes a narrow reading," they urge the Court to find the Hobbs Act and the honest services fraud statute unconstitutional as applied in this case.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL POWER VESTED IN CONGRESS TO SANCTION STATE AND LOCAL GOVERNMENT CORRUPTION.

A. Congress Has No Jurisdiction over State and Local Corruption Matters.

Among the enumerated powers created by the United States Constitution, there is no vesting in

Congress of any power over the subject matter of state and local government corruption. And because there is no power in the general government to create and impose on the states standards of ethics and other improper conduct, such as bribery or extortion, the necessary and proper clause does not open the door to such regulation as a means to enforce any other enumerated power. Rather, the necessary and proper clause is limited to the making of only those rules necessary and proper "for carrying into Execution the ... Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."[4] By way of contrast, each State has inherent police power to address government corruption in that State and its political subdivisions. As this Court put it in 1869:

> [t]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.... [W]ithout the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design

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[4] "The same does not apply to the states, because the Constitution is not the source of their power." National Federation of Independent Business v. Seblius, 567 U.S. __, 132 S.Ct. 2566, 2578 (2012).

> and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. [Texas v. White, 74 U.S. 700, 725 (1869).]

Nothing could be more vital to the independence and autonomy of each of the 50 States than for each State to define the permissible relations, communications, and contacts between the State's governing officials and their constituents. As this Court observed in Gregory v. Ashcroft, 501 U.S. 452 (1991):

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. [*Id.* at 458.]

Animated by this federalist principle, the Gregory Court refused to apply a federal statute prohibiting age discrimination to a State's judges who were required by State law to retire at age 70. In support of its narrow reading of the federal statute, the Court stated that "it is a decision of the most fundamental

sort for a sovereign entity [to] structure ... its government, and the character of those who exercise government authority." *Id.* at 460. Further strengthening its opinion that it is of the essence of sovereignty to "define itself," the Court cited Taylor v. Beckham, 178 U.S. 548, 570-71 (1900): "'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be **exclusive**, and free from external interference, except so far as plainly provided by the Constitution of the United States'" (citation omitted). *Id.* (emphasis added).

At stake in this case then is who has authority to define each State's political community, including the ethical and legal standards governing the relationships developed, and contacts made, between public officials and the people that they have been elected or appointed to serve. According to the predicate upon which the prosecution and conviction of Governor McDonnell rests, it is for the national government — for persons appointed to the office of federal prosecutor in the name of the People of the United States as a whole — to establish, on an *ad hoc* basis through the exercise of so-called "prosecutorial discretion," a uniform rule of what constitutes bribery or extortion, or a breach of political ethics for each state. According to the Constitution, however, it is for the People of each State — through their State government — to establish the norms governing the relationships between public official and individual citizen.

There are some who would contend that federal oversight is "necessary" to protect the people from the failure of corrupt States to deal with their own corruption. *See* M. Kurland, "The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials, 62 S. CAL. L. REV. 367, 377 n.26 (1989) ("Kurland"). But, as pointed out above, there is no enumerated power vested in Congress to do what is "necessary." Congress may only make laws to carry out powers that are vested in either it or in some other branch of the federal government. In reality, any appeal to "necessity" is, itself, a breach of the federal structure of the government which is designed to "reduce the risk of tyranny" by maintaining a "healthy balance of power between the States and the Federal Government." *See* Gregory at 458-59.

Because the Constitution does not vest in Congress the power to define and to enforce ethical and good government standards governing state or local government, the Tenth Amendment stands as a bulwark against aggrandizement of such power by the federal prosecutors in this case.

B. The Commerce Power Is Unavailing.

In the trial court below, the Governor was convicted of one count of a conspiracy to violate, and five counts of violation of, the Hobbs Act, as well as one count of a conspiracy to commit, and three counts of committing, wire fraud. *See* Brief of the United States in Opposition at 2. Specifically, the Governor was charged and convicted of having "affect[ed] commerce ... by ... extortion, [i.e.,] the obtaining of

property ... under color of official right." As Sara Beale points out, "[o]n its face this provision has no obvious application to bribery or other forms of official corruption." Beale at 706. Rather, Beale writes, "[i]nitially the lower federal courts held that extortion required proof of duress or fear ... and did not reach the acceptance of voluntary payments to influence or procure official action." *Id.* By the 1970's ("since Watergate"), however, the federal prosecutorial flood gates opened, *and* the Hobbs Act has been construed to prohibit "official bribery." *See* Beale at 706.

Like the Hobbs Act, the mail and wire fraud statutes are a product of the same promiscuous use of the constitutionally vested powers to sanitize the mails and interstate commerce. Further, like the Hobbs Act, both fraud statutes were originally conceived to criminalize the misuse of the mails and of the wires "to protect the people from schemes to deprive them of their money or property." *See* McNally v. United States, 483 U.S. 350, 356-58 (1987). Like the Hobbs Act, the mail/wire fraud statutes were not in the enforcement arsenal of federal prosecutors to go after "governors and former governors of several states and many hundreds of lower level officials in state and local government ... until the [post-]Watergate period." Beale at 711. Utilizing the "intangible rights theory," federal prosecutions of state and local government officials for mail and wire fraud flourished until McNally applied the brakes with its ruling that "the mail fraud act applies only to the deprivation of property, and does not reach other intangible rights." *Id.* at 712. In response to this narrowing of the statute, Congress amended "the mail and wire fraud

statutes to include 'a scheme ... to deprive another of the intangible right of honest services.'" *Id.*

By this amendment Congress has unleashed federal prosecutors to "bring[] not only cases based upon allegations of bribery, but also prosecutions based upon ethical breaches that would not violate the criminal statutes regulating the conduct of federal officers and employees." *Id.* at 713. As Professor Beale has observed, "[i]n a federal system, there is no justification for subjecting a city alderman or county commissioner to more stringent federal criminal penalties than those applicable to federal officials." *Id.* at 718.

Nevertheless, courts have allowed prosecutions to proceed to conviction even when "the effect or potential effect on commerce is negligible." *Id.* at 707. Indeed, "no one seriously contends that protecting the sanctity of interstate commerce ... is the principal reason the federal government allocates so much time and resources toward prosecuting official corruption cases." Kurland at 415. To the contrary, the enumeration of the power to regulate interstate commerce serves as a constitutional fig leaf which, upon removal, would reveal that the true jurisdictional basis for the prosecution of the Virginia Governor is the unenumerated power to curb state and local government corruption. Thus, the Government's opposition to the Governor's petition for writ of certiorari makes no reference whatsoever about the "effect," if any, that the targeted activities have on "commerce." Rather, the entire focus of the prosecution was the effect of the Governor's "use [of]

the power of his office to help Williams seek favorable actions from the Virginia government." *See, e.g.,* Brief in Opposition at 2, 6, and 8. Whatever purported "effect" such activities may have had on interstate commerce was negligible, if any, and serves as a mere pretext. Typically, as demonstrated here, the prosecution of a state official has nothing to do with the jurisdictional base of the Hobbs Act; instead, the statutory reference to "affecting commerce" has become a mere formality. *See* Kurland at 370-71.

Although this Court has let such concerns fall through the constitutional interstices between the enumerated powers as a limit on federal power and the reservation of powers not delegated to the States, Congress still cannot "use its commerce power to compel citizens to act as the [federal] Government would have them act" politically in their relation to State and local officials. *Cf.* NFIB v. Sebelius at 2589. Rather, the power to regulate interstate commerce presupposes "the existence of **commercial** activity to be regulated." *See id.* at 2586 (emphasis added). To invoke Congress's power to regulate interstate commerce in order to justify imposing a national code of political ethics upon the States and local governments, especially when that code is more stringent for state and local governments than the one applying to the national government, would show blatant disregard for the federalist principle of "the diffusion of sovereign power." *See id.* at 2578. In short, the federal government cannot do indirectly what it is not constitutionally authorized to do directly.

C. The Republican Form of Government Guarantee Clause Is Unavailing.

In Gregory v. Ashcroft, Justice O'Connor concluded that "resting firmly within a State's constitutional prerogatives" is the "'recognition of a State's .... responsibility for the establishment and operation of its own government...." *Id.* at 462. In support of this principle, Justice O'Connor cited the constitutional "guarantee to every State in this Union a Republican Form of Government." *Id.* She placed "the authority of the people of the States to determine the qualifications of their most important government officials" to be at the heart of "representative government." *Id.* If a government is to be truly representative of the people, then the way that the government relates to the people and the way that the people relate to their government are equally at the center of representative government.

Justice O'Connor is not the only one championing the guarantee clause as a federalist safeguard of state autonomy. Harvard law professor, Lawrence Tribe, has warned that:

> The most fundamental threats to state sovereignty – those that genuinely portend reduction of the states into "field offices of the national bureaucracy" or "bureaucratic puppets of the Federal Government" – would seem to arise ... from federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves. [L. Tribe, American Constitutional

> Law, §5-23, 397 (Foundation Press: 2d. Ed. 1988).]

A national ethics code imposed upon the States by federal prosecutorial actions enforcing laws, to rid states and their subdivisions of purported corruption, threatens to transform a democratically responsive government into one that is more responsive to its federal overseer than to its own People. Indeed, Professor Tribe has proposed that:

> the authority to decide ... how one's people will represent themselves and participate in their own governance – seems the essence of all self-government. [*Id*. at 398.]

In an extensive study of the text and history of Article IV, Section 4, Professor Deborah Merritt contends that the guarantee of a federal form of government has a two-fold purpose:

> the clause prohibits the states from adopting nonrepublican forms of government [and] as long as the states adhere to republican principles, the clause forbids the federal government from interfering with state governments in a way that would destroy their republican character. [D. Merritt, "The Guarantee Clause and State Autonomy: Federalism for Third Century" ("Merritt"), 88 *Colum. L. Rev.* 1, 25 (1988).]

With respect to the second purpose, Professor Merritt explains: "the citizens of a state cannot operate a

republican government, 'choos[ing] their own officials' and 'enact[ing] their own laws,' if their government is beholden to Washington." *Id.* Rather, the two purposes are complementary, "shield[ing] state governments from federal intrusion as long as they remain republican, but invites that intervention when the states repudiate republican precepts." *Id*. at 26.

There is no evidence in the federal case against Governor McDonnell of any departure by the Commonwealth of Virginia from republican principles. Rather, the State legislature has put into place a viable and comprehensive set of statutes addressing bribes and kickbacks, gifts and loans, which is applicable to all Virginia state and local public officials. *See* Va. Profs. at 14-20. There is no evidence of corrupt neglect of enforcement of those laws in this case. There is, however, strong evidence of "federal government[] power to interfere with the organizational structure and governmental processes chosen by a state's residents." *See* Merritt at 41.

In short, instead of guaranteeing Virginia a republican form of democratically representative government, this federal prosecution wrests from the Commonwealth of Virginia "control over [her] internal governmental machinery." *See id.*

II. ALLOWING THE VERDICT AGAINST GOVERNOR MCDONNELL TO STAND EFFECTIVELY WOULD PLACE ALL ELECTED STATE AND LOCAL OFFICIALS UNDER THE SUPERVISORY AUTHORITY OF UNELECTED FEDERAL PROSECUTORS.

A. Governor McDonnell's Brief Understates the Threat to Federalism Posed by the Government's Prosecution Theory.

Governor McDonnell's brief asserts that the government's broad reading of the Hobbs Act and the honest services law "would upend the political process, vesting federal prosecutors with extraordinary supervisory power over every level of government." Pet. Br. at 40. His brief describes that power as being entrusted to "93 U.S. Attorney's Offices employing thousands of ambitious prosecutors...." *Id*. at 2. His brief contends that failure to seriously limit the authority of federal prosecutors would have the effect of "disrupting the vertical balance of powers" between federal and state governments. *Id*. at 24.

McDonnell obviously understands, but actually understates, the threat to our constitutional republic if this Court were to accept the government's theory of this case. At its core, the theory advanced by the federal government in its prosecution of Governor McDonnell constitutes a shameless attempt by the U.S. Department of Justice to reduce the sovereign states to mere administrative subdivisions of the federal government.

The consequences would not be limited to the elected officials and the states, but would result in the erosion of the rights of the people as well, for it would undermine the Founders' plan to guarantee constitutional balance of power by pitting the power of States against the power of the federal government. In urging ratification of the U.S. Constitution, James Madison denied that the powers "transferred to the federal Government" would be "dangerous to the portion of authority left in the several States." J. Madison, Federalist 45, G. Carey & J. McClellan, The Federalist (Kendall Hunt 1990) at 235. He gave assurances to the states that "[t]he powers reserved to the states will extend to ... the internal order, improvement, and prosperity of the State." *Id*. at 238.

In derogation of those assurances, placing every state and local government official, both elected and appointed, in jeopardy of a career-ending indictment by a federal prosecutor would weaken the resolve of any such official who seeks to do his constitutional duty to resist federal government in any usurpation of the powers constitutionally reserved to the states and the people. *See*, *e.g.*, S. Gaylord, "States Need More Control Over the Federal Government," NY Times (July 17, 2013).[5] Consider the following hypothetical based on a real world example.

In January 2012, a member of a Virginia House of Delegates, Robert G. Marshall, concluded that sections

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[5] http://www.nytimes.com/roomfordebate/2013/07/16/state-politics-vs-the-federal-government/states-need-more-control-over-the-federal-government.

1021-1022 of the National Defense Authorization Act of 2012, which authorize the U.S. Armed Forces to forcibly detain U.S. citizens indefinitely without charges, without counsel, and without trial, are unconstitutional. He introduced a bill that "prevent[s] any agency, political subdivision, employee, or member of the military of Virginia from assisting an agency of the armed forces of the United States in the investigation, prosecution, or detention of a United States citizen in violation of the United States Constitution, the Constitution of Virginia, or any Virginia law or regulation." Virginia House Bill 1160 (2012 session).[6] After this bill passed the Virginia General Assembly with overwhelming bi-partisan support (being approved by the House of Delegates by a vote of 89-7 and the Senate by a vote of 36-1), the bill was then presented to Governor Robert McDonnell for signature or veto. Despite opposition from agencies of the federal government, Governor McDonnell signed that bill. Had that bill been presented to him after he had become aware that he was under investigation by the U.S. Department of Justice, would it be unreasonable to believe that his judgment, or the judgment of any other Governor in such a situation, as to what was best for the people of the Commonwealth could have been clouded?

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[6] http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+HB1160.

B. Politically Ambitious Prosecutors Have Used Prosecution of Elected Officials as a Fast Road to the Top.

Political Scientist Richard L. Engstrom tested the commonly accepted truism that political prosecutors are "often ambitious politically" with his examination of state prosecutors. R. Engstrom, "Political Ambitions and the Prosecutorial Office," THE JOURNAL OF POLITICS, vol. 33, no. 1 (Feb. 1971), pp. 190. He concluded, based on studies from Indiana and Wisconsin, that "the prosecutorial office is a temporary position from which some sort of advancement ... is planned. Lawyers usually do not assume this office with the idea of remaining in the position for an extended tenure." *Id*. Almost half of all Kentucky Commonwealth's Attorneys had "definite political ambitions" and 86.5 percent believed that their service as a prosecutor would help politically. *Id*. at 192. Although no similar study of federal prosecutors has been identified, would there be any question that many harbor ambitions that would be advanced by the high-profile prosecution of a state official for corruption?

Indeed, in a highly-regarded series on the federal criminal justice system entitled "Win At All Costs" and published by the Pittsburgh Post-Gazzette, former Reagan-appointed U.S. Attorney for the Middle District of Florida Robert Merkle pulled no punches in identifying the role of such ambition existing in the federal system:

> "Those who practice this misconduct are never penalized or disciplined. It's a result-oriented process today, fairness be damned...." A federal prosecutor "is a political animal," he said. "His boss is politically ambitious...." [B. Moushey, "Win At All Costs," The Pittsburgh Post-Gazette (Nov. 22, 1998).]

It is not difficult for federal prosecutors to obtain favorable press in rooting out corruption in state and local government. Some of the abuses of the vast tools that are entrusted to federal prosecutors were cataloged in the important expose by New York civil liberties lawyer Harvey A. Silverglate. H. Silverglate, Three Felonies a Day: How the Feds Target the Innocent (Encounter Books: 2009). Silverglate reviews numerous federal prosecutions of state and local officials, and demonstrates that the abuses have increased, for "as the criminal code became broader, it also became more and more vague ... becom[ing] a trap for the unwary." *Id.* at xliv. Prosecutors can operate with, to put it charitably, mixed motives, in prosecuting state and local officials. Silverglate's discussion of the federal prosecution of Hialeah, Florida Mayor Raul Martinez is telling:

> In 1989, a state investigation of Martinez had just closed, finding nothing in the way of bribery or extortion to pin on the mayor. Still, the federal investigation continued and, after the death of Representative Pepper, the feds ramped it up. "The timing raises further questions about the motivation of the prosecution," wrote *The Miami Herald*. The

> [wife of the] United States Attorney at the time ... expressed interest in replacing Pepper when he had fallen ill. Sure enough, Martinez dropped out of the congressional race when the corruption investigation made its way into the press. And [the wife of the United States Attorney] sought and won Pepper's seat after his death. [*Id.* at 5-6.]

C. Grand Juries Are Not an Effective Check on Prosecutorial Discretion.

The constitutional plan was not to entrust the federal indictment power to prosecutors, instead vesting that responsibility in the grand jury. That certainly has not worked as planned. If we know anything about the grand jury system today, it has long ceased to be the bulwark against federal prosecutorial power that it was intended to be. Prosecutors are known to indict at will. A relatively recent study shows that federal grand juries return indictments on more than 99.6 percent of the cases presented to them.[7] It is beyond question that the decisions of this Court, and other lower federal courts following its lead, have eroded the protections of the grand jury.

> The grand jury from early federal history was, if anything, more judicial than prosecutorial.... [C]ontrary to modern myth,

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[7] G. Fouts, "Reading the Jurors their Rights: The Continuing Question of Grand Jury Independence," 79 IND. L.J. 323, 330 (Winter 2004).

> the dominant strand of American grand jury history ... imposed strict evidentiary limits on grand jury evidence, and required a significantly higher standard for grand jury indictment than do the modern federal courts. [T]hrough the middle of the twentieth century, the grand jury played a role far closer to a trial jury that heard half of the government's evidence than to the modern minimal, accusatory body that the Supreme Court has approved.... [Niki Kuckes, "Retelling Grand Jury History," Grand Jury 2.0: Modern Perspectives on the Grand Jury, Carolina Academic Press (2011) at 126-28.]

From Chief Justice Marshall's day to the time of Costello v. United States, 350 U.S. 359 (1956), Professor Kuckes explained, the grand jury was subject to the rules of evidence: "[T]he grand jury could indict only upon such 'legal evidence' such as would be admissible at trial, and not upon hearsay." Grand Jury 2.0 at 137. Today, a target can be indicted without a shred of evidence which would be admissible at trial.

It is a small wonder that former Deputy Attorney General Arnold I. Burns (who served under President Reagan) observed that the federal grand jury "is no longer a protection of the person who is suspected of crime, it is a vicious tool...."[8] Rather than serving the purpose intended by the founders, "[t]he grand jury

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[8] Quoted in Bill Moushey, "When Safeguards Fail," The Pittsburgh Post-Gazette (Dec. 6, 1998).

process today is as far afield from it was intended to be as it could possibly be." *Id.*

Having been stripped of its essential character, the modern federal grand jury cannot be trusted to protect individuals against abuse by prosecutors, as had been originally intended.

D. The Department of Justice's Public Integrity Section Is Not a Model of Professionalism.

The U.S. Department of Justice's Public Integrity Section ("PIN") is tasked with the responsibility of prosecuting cases involving federal, state, and local public corruption. PIN, however, has found it difficult to live up to its name. After the Senator Ted Stevens prosecution, PIN's public reputation has suffered due to gross misconduct in its own ranks. In 2008, then-Attorney General Eric Holder was forced to dismiss corruption charges against Senator Stevens after it was brought to light that the PIN prosecutors had intentionally withheld exculpatory evidence, failed to reveal damning facts about the government's star witness, and even knowingly let a witness give false testimony.[9] District Judge Emmet G. Sullivan, who handled the Stevens case, determined that the intentional misconduct on the part of PIN prosecutors was so pervasive and "'too serious and too numerous' to be left to an internal Justice Department

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[9] http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in- ted-stevens-case.

investigation," instead appointing an independent investigator.[10]

The Stevens' case was viewed widely as a "high-profile blunder" only to be followed in 2012 by the unit's failure to convict former U.S. Senator and presidential candidate John Edwards on charges of allegedly using illegal campaign donations to cover up an extramarital affair. Many saw that case against Edwards as incredibly weak, and wondered why charges had even been brought in the first place.[11] One commentator observed that "'I hope the Justice Department learns it shouldn't bring cases that are weak and could potentially end someone's political career without giving it some additional thoughts.'" *Id*.

E. The U.S. Constitution Vests Little Power in Congress to Define Federal Crimes.

The U.S. Constitution hardly provides unquestioned support for the type of robust federal criminal code that has developed in recent years. Indeed, the Constitution expressly authorizes

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[10] https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm. For an in-depth treatment of the Stevens prosecution by a former federal prosecutor, *see* Sydney Powell, Licensed to Lie: Exposing Corruption in the Department of Justice (Brown Books: 2014) at 1-11, 188-263. *See generally* A. Kozinski, "Criminal Law 2.0," 44 GEO. L. J. ANN. REV. CRIM. PROC. (2015) at viii, xxii-xxvi.

[11] http://www.usnews.com/news/articles/2012/06/05/governments-leading-anticorruption-group-fraught-with-failure.

Congress to create only a handful of federal criminal offenses, such as counterfeiting[12] (Art. I, Sec. 8, cl. 5), piracy (Art. I, Sec. 8, cl. 9), and treason (Art. II, Sec. 4; Art. III, Sec. 4). Only the near limitless use of the Commerce Clause, combined with the neglect of the Tenth Amendment, has enabled the federal government to occupy the field of criminal law reserved to the states.[13]

Just two decades ago, after decades of proliferation of federal crimes, the Supreme Court reviewed the possible constitutional bases for criminal law in Art. I, Sec. 8, and reaffirmed that the Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation. *See* Art. I, Sec. 8." United States v. Lopez, 514 U.S. 549, 566 (1995). Indeed, "[f]or much of our national history, the deeply rooted principle that the general police power resides in the states — and that federal law enforcement should be narrowly limited — was

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[12] After vesting in the federal government the power to coin money, Art. I, Sec. 8, Cl. 4, the Founders believed it necessary to supplement expressly that power with the power to punish counterfeiting in the next clause. No stronger argument from the Constitutional text can be made as to why the "necessary and proper clause" must not be relied upon to support a federal power to criminalize behavior ancillary to each itemized power.

[13] "Virtually all of the federal criminal legislation of the twentieth century has been based on the Commerce Clause." G. Ashdown, "Federalism and the Criminal Justice System," 98 W.VA.L.REV. 789, 807 (Spring 1996). "The path of our Commerce Clause decisions has not always run smooth, see *United States* v. *Lopez* ... but it is now well established that Congress has broad authority under the Clause." NFIB v. Sebelius at 2585.

recognized in practice as well as in principle."[14] However, now, with well over 3,000 federal crimes on the books (*id*. at 91-94) gives the appearance that there is a federal police power, when no such power exists.

The instant case well illustrates the degree to which federal criminal law has come to conflict with state criminal law. Virginia law prohibits any state or local officer or employee from soliciting or accepting "money or other thing of value for services performed within the scope of his official duties..." among other prohibited official conduct. Va. Code § 2.2-3103. However, Virginia law does not criminalize the acceptance of any gifts or loans. *See* Va. Code § 2.2-3103(8)-(9). The McDonnell prosecution prevents the people of Virginia, acting through their elected officials, to make their own decisions about which forms of behavior should be criminalized. But the federal prosecutors have taken that decision out of the hands of the people of Virginia.

As Seventh Circuit Judge Richard A. Posner has observed:

> The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn

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[14] ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law at 17 (1998).

> criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, **it can nail anybody**. There is some truth to this, since there are **literally thousands of federal criminal laws**, many of them **at once broad, vague, obscure**, and underenforced.... [R. Posner, An Affair of State, Harvard University Press at 87 (1999) (emphasis added).]

Indeed, the Hobbs Act and honest services laws remain "broad, vague, [and] obscure," leading to prosecutions of the type appealed from here.

CONCLUSION

The decision of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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