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* LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Amici are professors who teach, study, and write about criminal law.[1] They believe the district court's instructions under the Hobbs Act and the honest services wire fraud statute, if upheld, would expand the scope of those criminal prohibitions beyond any predictable boundaries. The expansion would cause a constitutional deficiency in notice to the defendant and create the potential for unguided prosecutorial overreaching. *Amici* respectfully believe their views will assist the Court.

Nancy Gertner is a former United States District Judge for the District of Massachusetts, where she served for seventeen years. She is currently a Senior Lecturer on Law at Harvard Law School. She has written, taught, and spoken extensively on a wide variety of criminal law issues, including issues of white collar crime and sentencing.

Charles J. Ogletree is the Harvard Law School Jesse Climenko Professor of Law, and Founding and Executive Director of the Charles Hamilton Houston Institute for Race and Justice. He is a respected legal theorist with particular prominence in the area of criminal law and issues of criminal justice.

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[1] Counsel of record for all parties received notice of the *amici curiae*'s intent to file this brief. The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, *amici curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

John C. Jeffries, Jr., is the David and Mary Harrison Distinguished Professor of Law, of the University of Virginia, and has taught criminal law for forty years. He is also the co-author of a well-regarded casebook, *Criminal Law: Cases and Materials* (with Richard J. Bonnie, Anne M. Coughlin, and Peter W. Low).

SUMMARY OF THE ARGUMENT

Through its nearly unfettered definition of an "official action," the district court's jury instructions allowed Governor Robert F. McDonnell to be convicted of acts which this Court has characterized as "ingratiation and access." Yet no government official could have had sufficient notice, as the criminal law requires, that such acts violated the honest services wire fraud statute or the Hobbs Act. Indeed, in a post-*Skilling* and post-*Citizens United* world, a government official would have reasonably believed precisely the opposite.

In *Skilling*, this Court limited honest services wire fraud to its "traditional" core of bribery and kickbacks, rejecting efforts to cover other, intangible good government theories because doing so would violate due process. *See Skilling v. United States*, 561 U.S. 358, 408–09 (2010).

The question presented by this case is whether the government can criminalize the giving of money in exchange for a government official's acts of access and ingratiation. The Supreme Court suggested the answer to that question in the same Court Term as *Skilling*. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court explained that, in the context of campaign finance regulations, "[i]ngratiation and access . . . are not

corruption." *Id.* at 360. Though the decision dealt expressly with political activity protected by the First Amendment, it took pains to suggest that exchanges of money for "ingratiation" or "access" are a protected part of American politics. *Id.* Four years later, this Court made the point even more clearly in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (plurality opinion), stating that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, *or the political access such support may afford*." *Id.* at 1441 (emphasis added).

Since *Citizens United* and *McCutcheon* dealt with regulation, not criminal law, they did not address the issue with which this case is concerned, namely, the meaning of "official act" in the language of the federal criminal bribery statutes.

But these cases make clear that there is a continuum of *quid pro quo* exchanges. At one end, money in exchange for the specific exercise of government power in securing a contract, or voting a certain way, is clearly criminal. At the other end, money for access and ingratiation is lawful when that money is in the form of a campaign contribution, as in *Citizens United* and *McCutcheon.* But when the contribution is not in the context of a political campaign, when state laws as in Virginia permit the practice, when this Court in case after case has called this part of ordinary politics, criminalizing it raises substantial due process concerns at the very least.

In the case at bar, the district court's instructions on "official act" made none of these distinctions, i.e., where on the continuum Governor McDonnell's actions must fall for him to be properly convicted. Nor did the Fourth

Circuit in affirming McDonnell's conviction. If its decision stands, any official acts on the spectrum, even access and ingratiation, are at risk for prosecution under the vague language of the Hobbs Act and honest services fraud statute. McDonnell's conviction must be reversed.

ARGUMENT

I. *CITIZENS UNITED* SUGGESTS THAT, THOUGH CORRUPT *QUID PRO QUO* EXCHANGES CAN BE, AND ARE, CRIMINALIZED, INGRATIATION AND ACCESS ARE NOT.

In 1991, this Court required prosecutors to demonstrate the existence of a *quid pro quo* agreement between an official and a contributor in order to sustain a conviction under the Hobbs Act. *See McCormick v. United States*, 500 U.S. 257 (1991). Later, in *Skilling*, this Court rejected efforts to expand the honest services wire fraud statute to cover questionable acts, such as undisclosed self-dealing and hidden conflicts of interest. *See Skilling* 561 U.S. at 408–11. Instead, this Court limited the statute to its traditional core of bribery and kickback schemes. *Id.*

If *Skilling* defined what *is* corruption, then language in *Citizens United*, decided just a month before *Skilling,* defined what is *not*. In *Citizens United*, this Court broadened the category of campaign contributions beyond the reach of government regulation. 558 U.S. at 360. While *Citizens United* dealt expressly with political activity protected by the First Amendment, its language went further—plainly stating that money, given in exchange for "[i]ngratiation and access . . . [is] not

corruption" but, instead, an accepted part of American politics." *Id.* Writing for the majority, Justice Kennedy went so far as to embrace the practice of providing such ingratiation and access, explaining that "[f]avoritism and influence are not . . . avoidable in representative politics. It 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." *Id.* at 359.

The history of *Citizens United* is instructive: Seven years earlier, in *McConnell v. FEC*, 540 U.S. 93 (2003), this Court arrived at the opposite conclusion, stating that "peddling access to federal candidates . . . in exchange for large soft-money donations" was corrupt and, therefore, could give rise to campaign finance regulation. *Id.* at 150. Justice Kennedy, concurring in the judgment in part and dissenting in part, criticized the breadth of the *McConnell* majority's rationale: "The Court . . . concludes that access, without more, proves influence is undue. Access, in the Court's view, has the same legal ramifications as actual or apparent corruption of officeholders. This new definition of corruption sweeps away all protections for speech that lie in its path." *Id.* at 294 (Kennedy, J.).

By 2010, Justice Kennedy's concurrence became the majority opinion in *Citizens United*, which overruled *McConnell*. This Court declared that *McConnell* was wrong and, in fact, "[i]ngratiation and access . . . are not corruption." 558 U.S. at 360. The Court concluded that the kind of corruption on which campaign finance regulations may be based was only the traditional form of *quid pro quo* corruption, which was different from money given in exchange for general "[i]ngratiation and access." *Id.* at 360–61. In language that could apply to the present

case, the Court explained that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt[.]" *Id.* at 359.

In 2014, this Court affirmed this language in *McCutcheon*. The Court stated that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, *or the political access such support may afford*." 134 S. Ct. at 1441 (plurality opinion) (emphasis added). Moreover, the plurality in *McCutcheon* recognized that not all forms of *quid pro quo* were inherently corrupt. Rather, it concluded that the "line between *quid pro quo* corruption and general influence must be respected," such that "[a]ny regulation must . . . target what we have called '*quid pro quo*' corruption or its appearance." *Id.*

McCutcheon and *Citizens United* arguably define a spectrum of *quid pro quo* exchanges. There are corrupt *quid pro quo* exchanges, where money is given in exchange for a specific outcome, and *quid pro quo* exchanges, where money is simply given in return for general ingratiation and access. Put another way, this is the difference between money given for a "favorable action," such as a piece of legislation or a public contract, the traditional currency of Hobbs Act/honest services wire fraud, and money simply intended to make a "favorable governmental action more likely." *See* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 Fordham L. Rev. 463, 472 (2015). Though the law makes the former criminal, *McCutcheon* and *Citizens United* implied that the latter is not.

II. THE DISTRICT COURT'S JURY INSTRUCTIONS WERE OVERBROAD AND FAILED TO ADEQUATELY INSTRUCT THE JURY ON WHAT KINDS OF ACTIONS ARE NOT CRIMINAL.

Under both the Hobbs Act and the honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value.

The district court instructed the jury that the definition of "official action" encompassed any act taken by a public official, including "those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law" such as "acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description" and "includ[ing] actions taken in furtherance of longer term goals" such as an act "in a series of steps to exercise influence or achieve an end." Trial Tr. vol. 26, 6102-03, *United States v. McDonnell*, No. 3:14CR12 (E.D. Va. Sept. 2, 2014).

In effect, these instructions answered a different question than the question raised here. What is critical here is not the line between official and non-official actions or settled or unsettled practices. What is critical in this case is the line between official acts and settled practices which are the usual *quo* of bribery or kickbacks, as opposed to allowable, even routine, acts of access and ingratiation. The district court made no effort to instruct the jury on that line.

Likewise, the Fourth Circuit focused on the distinction between acts done in the official's "official capacity," for the purposes of honest services wire fraud statute and the Hobbs Act, and those done in the official's "non-official capacity." *See United States v. McDonnell*, 792 F.3d 478, 505–10 (4th Cir. 2015) (generally discussing *Birdsall*, *Jefferson*, and *Sun-Diamond*, among other cases, to clarify the meaning of official act). In *United States v. Birdsall*, the Court determined that actions not specifically prescribed by statute, written rule, or regulation could still be considered official actions within the meaning of the criminal bribery statute. 233 U.S. 223 (1914). The Fourth Circuit applied this rule in *United States v. Jefferson*, 674 F.3d 332, 351–58 (4th Cir. 2012), *as amended* (Mar. 29, 2012), determining that a Congressman's actions, via letters and meetings directed at other government officials, constituted official action within the meaning of the federal bribery statute.

But neither *Birdsall* nor *Jefferson* confront the questions raised in *Citizens United* and even earlier in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999). These cases recognized that while numerous activities—hosting a ceremony, visiting a school, or delivering a speech—"are assuredly 'official acts' in some sense," it would be "absurd[]" to consider them within the scope of the federal bribery statute. *Sun-Diamond*, 526 U.S. at 407–08; *see also Valdes v. United States*, 475 F.3d 1319, 1323, 1325 (D.C. Cir. 2007) (noting that not "every action within the range of official duties *automatically* satisfies [the federal bribery statute's] definition" and concluding that police officer who accepted money from an undercover agent and conducted searches, at the agent's request, of license-plate and warrant

databases, was simply "moonlighting") (emphasis in original).

Though not cited by the Fourth Circuit, the district court's jury instructions in *Valdes*, similarly to those in *McDonnell*, explained that an "official duty is not limited to a duty imposed by law or statute, but includes any duty lawfully imposed in any manner by settled practice within the government agency." 475 F.3d at 1325. The D.C. Circuit, overturning the *Valdes* conviction, suggested that, while accessing departmental databases might be a "settled practice" for a police officer, doing so on behalf of a supporter is not an "official act," and therefore is not corrupt, because it does not inappropriately influence an actual governmental decision. *See id.*

The district court's jury instructions enabled McDonnell to be convicted *no matter where* his behavior fell on the continuum of official acts and settled practices that may comprise *quid pro quo* exchanges, from the clearly illegal, money in exchange for the specific exercise of government power, on the one hand, to conduct which was not illegal, money in exchange for access and ingratiation, on the other. So long as the act was "official" or the practice "settled," it made no difference to the court that the gifts were made in exchange for constituent services, making introductions, extending invitations to a reception, acts which the Court in *Citizens United* and its progeny have labeled not "corrupt."

III. LEGITIMIZING INGRATIATION AND ACCESS IN *CITIZENS UNITED* BUT STILL ALLOWING IT TO BE CRIMINALIZED VIOLATES DUE PROCESS.

The message in *Citizens United* is clear: gifts given in exchange for access and ingratiation may be regulated in ways that campaign contributions are not. But to date, such gifts have not been—at least with the precision we require of criminal statutes. *See McCutcheon*, 134 S. Ct. at 1441 ("[G]overnment regulation may not target . . . the political access such support may afford") (plurality opinion); *Citizens United*, 558 U.S. at 360 ("Ingratiation and access, in any event, are not corruption.").

In the face of such ambiguity, the Hobbs Act and the honest services mail fraud statute must be construed narrowly to cover only what is *clearly* illegal, as the Court cautioned in *Skilling*. There, this Court rejected the invitation to expand the honest services mail fraud statute to cover intangible good government theories. 561 U.S. at 407, 409–11 (rejecting the statute's application to promote other good government objectives, such as punishing undisclosed self-dealing and hidden conflicts of interest). In rebuffing the more expansive application of the statute, this Court specifically warned that "[r]eading the statute to proscribe a wider range of offensive conduct, . . . would raise the due process concerns underlying the vagueness doctrine." *Id.* at 408.

These concerns apply with equal force here. Under the Due Process Clause, a criminal statute must be "explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *See Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). For

that reason, our Constitution requires that every criminal statute be construed narrowly and in such "a manner that [does not] leave[] its outer boundaries ambiguous." *McNally v. United States*, 483 U.S. 350, 360 (1987).

Such narrow interpretations are especially significant when construing criminal bribery statutes. Indeed, when political figures are concerned, vaguely defined crimes whose outer boundaries are ambiguous pose especially grave dangers. Justice Jackson said it best:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18, 25–26 (1940).

The instructions given by the district court would bring within these statutes significant routine and ordinary activities undertaken by political officials on a regular basis, making all politicians vulnerable to arbitrary enforcement of the law. This Court has recognized that

> the numerous . . . regulations and statutes littering this field [ ] demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.

Sun-Diamond, 526 U.S. at 412. Unfortunately, the Fourth Circuit allowed the scalpel to become the meat axe.

The Fourth Circuit dismissed the notion that *Citizens United* could have held any "talismanic significance." *McDonnell*, 792 F.3d at 513. Devoting only a single paragraph to the issue, the Fourth Circuit brushed aside *Citizens United* as a "campaign-finance case, [which involved] neither the honest-services statute nor the Hobbs Act." *Id.* The Fourth Circuit concluded that the district court had given a good-faith instruction, which would have allowed the jury to acquit Governor McDonnell if they "believed in good faith that he . . . was acting properly." *Id.*

Citizens United should not be so easily dismissed. Indeed, the notion that the Constitution forbids the

regulation of exchanging money or gifts for access and ingratiation in connection with an electoral campaign, but that a government official may be criminally convicted for the same exchange outside of a campaign, cannot be fully explained by the context in which the issue arose.[2] The language in *Citizens United* was sweeping, and was not obviously limited to the campaign finance context. To be sure, Congress may well want to regulate gifts given for ingratiation and access, outside of the campaign context. But until it does so with clarity, this conduct may not be criminalized.

This Court has not drawn a clear line between criminal and non-criminal *quid pro quo* agreements, or even clarified whether access and ingratiation can be criminalized. Without this line, it is impossible to determine where ingratiation and access, as opposed to clearly criminalized corruption, begins and ends within the spectrum of *quid pro quo* arrangements.

McDonnell's conviction should not stand. While the Government may want the criminal bribery statutes to cover access and ingratiation, the law – decisional and

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[2] *See* George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With A Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 Notre Dame L. Rev. 177, 178 (2015). Professor Brown, though suggesting that *Citizens United* should not apply outside of the campaign finance context, recognizes that the Court's statements in *Citizens United* and *McCutcheon* "cast doubt on the validity of some anticorruption statutes . . . and call for extremely narrow construction of others." *Id.* at 185. Indeed, although he does not address the due process concerns described here, his article acknowledged that "[t]he Court's language appears to cover corruption in general, without limiting the analysis to the electoral context." *Id.*

statutory – has not done so to date with anything approaching the requisite clarity demanded of our criminal laws. Lacking that precision, the Fourth Circuit's decision should be reversed.

CONCLUSION

Skilling v. United States held what *is criminal* – bribery and kickbacks, the traditional core of federal anticorruption statutes. Language in *Citizens United*, decided just month before *Skilling,* suggests what is *not* criminal in the context of a political campaign: access and ingratiation. The Government urges the Court to use this case to clarify the law, and criminalize the giving of money in exchange for access and ingratiation, outside of the context of a political campaign.

But the criminal law does not work that way. In the face of ambiguity, the Hobbs Act and honest services mail fraud must be construed narrowly to cover only what is *clearly* illegal. The lower court's instructions, ratified by the Fourth Circuit, did the opposite. Accordingly, the Fourth Circuit violated the notice requirement of the Due Process Clause by upholding the application of a criminal statute that insufficiently warned those who are subject to it of the conduct it criminalizes.

We urge the Court to reverse the conviction.

Respectfully submitted,

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