No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a 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 CURIAE*

Amici are professors who teach, study, and write about criminal law.[1] They believe the district court's instructions defining "official action" under the Hobbs Act and the honest services fraud statute expanded the scope of those criminal prohibitions beyond any predictable boundaries. This expansion raises constitutional concerns about notice and creates 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.

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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

This case—like an increasing number of others around the country—turns on the scope of the definition of an "official action" in the Hobbs Act and honest services fraud statutes. The Fourth Circuit affirmed jury instructions so broadly worded as to enable Governor Robert McDonnell to be convicted of taking the following "official actions" in exchange for things of value: asking a staffer to attend a briefing, questioning a university researcher at an event, and directing a policy advisor to "see" him about an issue.

No government official would have had notice that such acts violated federal criminal law. Indeed, in a post-*Citizens United* and post-*Skilling* world, government officials like Governor McDonnell would have reasonably believed precisely the opposite. As law professors, we believe this result to be deeply troubling and dangerous. And, in addition to stretching these criminal statutes beyond what the law or logic required, it flies in the face of this Court's precedent and other circuits' case law, not to mention common sense.

ARGUMENT

I. THE FOURTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S JURISPRUDENCE IN *SKILLING* AND *CITIZENS UNITED*.

By sustaining the trial court's jury instructions, the Fourth Circuit failed to make the distinction this Court has suggested—between permissible acts of ingratiation and access and criminal acts of bribery and kickbacks. Put otherwise, the distinction is between money 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 intended to make a "favorable government action more likely." Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, U. of Chi., Pub. L. Working Paper No. 502, at 9 (Jan. 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555912.

In *Skilling*, this Court rejected efforts to expand honest services wire fraud beyond the "traditional" core of bribery and kickback schemes, expressly rejecting its application to otherwise questionable acts like undisclosed self-dealing and hidden conflicts of interest. *See Skilling v. United States*, 561 U.S. 358, 408–09 (2010); *see also McCormick v. United States*, 500 U.S. 257 (1991) (*quid pro quo* required for Hobbs Act conviction when official receives campaign conviction).

In the same term, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court broadened the category of

campaign contributions beyond the reach of government regulation, namely contributions for access and ingratiation. While *Citizens United* dealt expressly with political activity protected by the First Amendment, its dicta went further—suggesting that money in exchange for "ingratiation" or "access" is part and parcel of American politics. *Id.* at 360.

The message is clear: gifts given in exchange for access and ingratiation may surely be regulated in ways that campaign contributions are not. But to date they have not been, at least not with the precision we require of criminal statutes. In the face of that ambiguity, the Hobbs Act and honest services fraud statute must be construed narrowly to cover only what is clearly illegal. The lower court's instructions, ratified by the Fourth Circuit, did the opposite.

The history of *Citizens United* is instructive on this point. In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court concluded 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 was the majority opinion in *Citizens United*, which overruled *McConnell*. In *Citizens United*, this Court declared that *McConnell* was wrong and, in fact, "[i]ngratiation and access . . . are not corruption." 558 U.S. at 360. The kind of corruption on which campaign regulations may be based was only *quid pro quo* corruption—the traditional form of bribery—which was very different from money for "ingratiation and access." *Id.* at 356–61; *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) ("[G]overnment 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*.") (emphasis added).

The Fourth Circuit brushed aside *Citizens United* as a "campaign-finance case, [which involved] neither the honest-services statute nor the Hobbs Act" and that, in any event, the district court had given a good-faith instruction, which would have allowed the jury to acquit if Governor McDonnell "believed in good faith that he . . . was acting properly." *United States v. McDonnell*, 792 F.3d 478, 513, 515 (4th Cir. 2015); *see also* App. 64a–65a.

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. The Court's language was expansive; *dicta* surely suggests that it covers the case at bar.

Likewise, the Fourth Circuit ignores this Court's holding in *Skilling*. In *Skilling*, decided several months after *Citizens United*, this Court defined what corruption was, rejecting efforts to expand the honest services fraud statute to "intangible" good government theories. Instead, the *Skilling* Court scaled back the reach of honest services mail fraud to the "paradigmatic cases of bribes and kickbacks" or the "solid core" of acts with which traditional bribery and kickback prosecutions were concerned. 561 U.S. at 407, 411. "Reading 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. To sweep access and ingratiation conduct under the Hobbs Act or the honest services fraud statute is to do precisely what the Constitution and *Skilling* forbid—namely, carving out a new crime, after the fact, as to which no person, let alone any government official, could have had notice. *McNally v. United States*, 483 U.S. 350, 360 (1987) (criminal statute must be construed narrowly and in such "a manner that does not leave[] its outer boundaries ambiguous").

In effect, the district court's instruction focused only on the genre of the act—an "official" or formal one, or a "settled practice." It did not clarify what made that official act or settled practice illegal. And in so doing, it failed to distinguish between exercising government authority to carry out a specific act on behalf of the briber—activities indisputably within the core of the Hobbs Act and honest services fraud—and ordinary politics, which regularly entails private payments for access and ingratiation. We may want to regulate the latter

going forward, but until we do, we may not criminalize it.

II. THE FOURTH CIRCUIT'S OPINION IS SQUARELY AT ODDS WITH OTHER CIRCUITS' PRECEDENT.

The Fourth Circuit decision also conflicts with the jurisprudence of the other circuits that have considered the limits of what may qualify as an "official action" by a government official alleged to have violated the Hobbs Act or honest services fraud statute. Each of the three other circuits that has examined this question—the First, Eighth, and D.C. Circuits—has defined an "official action" more narrowly than the Fourth Circuit did. In doing so, these circuits have carefully delineated a distinction between, on the one hand, acts conducted pursuant to or related to official duties and, on the other hand, other acts, such as informal efforts by politicians to ingratiate their supporters by providing them with access to other government officials and information.

In *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008), the First Circuit considered an appeal by health care executives convicted of multiple counts of conspiracy to commit honest services wire fraud. The multi-faceted conspiracy involved the hiring of a Rhode Island State Senator, John Celona, who undertook certain actions as a legislator that would benefit his employer and its affiliates (collectively, "Village").[2] Celona, *inter alia*, contacted local government officials and encouraged them to ensure

[2] Legislators serve part-time in Rhode Island's "citizen legislature."

their jurisdictions complied with certain provisions of Rhode Island law; Village would benefit from increased compliance. Celona also informally mediated a dispute between Village and Blue Cross/Blue Shield.

As in Governor McDonnell's case, the appeal concerned the breadth of the instructions given to the jury regarding the scope of the honest services law, and whether nearly any action undertaken by a government official to benefit a third party could be deemed a predicate for an honest services prosecution. In *Urciuoli*, the district court instructed the jury that all actions performed under the "cloak of office" fell within the ambit of the honest services fraud statute, including "behind-the-scenes activities and influence" and any "other actions that the official takes in an official capacity. . . ." *McDonnell*, 792 F.3d at 508 n.18 (quoting *Urciuoli* jury instruction); *see also* App. 53a–64a.

The First Circuit held that such an instruction swept too broadly, as it blurred any distinction between actions that "exploit[ed]" Celona's legislative duties or the legislative process and actions that merely capitalized on the access that Celona's position as a state official afforded to local officials. 513 F.3d at 296. The court noted that "there is no indication that Celona invoked any purported oversight authority or threatened to use official powers in support of his advocacy" with local government officials regarding compliance with state law. *Id.* In other words, Celona did not attempt to utilize his power or influence as an office-holder to directly benefit Village; he merely used the *access* his position affords him to communicate with local

government officials in a manner that would benefit Village.

The Eighth Circuit considered similar facts thirty years earlier in the pre-*McNally* honest services case *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978). In that case, the Speaker of the Missouri House of Representatives, Richard Rabbitt, was convicted of multiple counts of Hobbs Act and honest services wire fraud for: (1) accepting a payoff for a legislative favor regarding a tax bill; (2) soliciting a payoff for ushering through favorable legislation; and (3) assisting an architectural firm with obtaining state contracts by contacting state employees with the power to hire such contractors. Rabbitt appealed the convictions. The Eighth Circuit rejected his appeal regarding the first two schemes because they concerned payoffs for acts related to his core legislative role, yet it overturned the conviction related to Rabbitt's architectural firm recommendations.

In reversing the conviction related to this count only, the Eighth Circuit noted, "Rabbitt did not, in his official capacity, control the awarding of state contracts to architects" and there was "no evidence that Rabbitt failed to carry out the duties and responsibilities of his legislative office or leadership position for the sake of" the architectural firm. *Id.* at 1026. All Rabbitt promised the architectural firm was a recommendation to the state procurement officers, "thereby gain[ing] them a friendly ear" in the state procurement offices. *Id.* at 1028. There was "no testimony establish[ing] that any state contracting officer awarded any contract . . . because

of Rabbitt's influence" or that they felt pressure from Rabbitt to do so. *Id.*

The Eighth Circuit characterized the facts in *Rabbitt*, in effect, as access and ingratiation. The court wrote, "[t]he official in *Rabbitt* promised only to introduce the firm to influential persons; he did not promise"—as Loftus had—"to use his official position to influence those persons." *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993) (upholding the conviction of a county official who, at the behest of a childhood friend turned FBI informant, pressured city officials to support a project).

Finally, the D.C. Circuit has considered this issue on two different occasions. In *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007), the D.C. Circuit considered the appeal of a D.C. Metropolitan Police Detective, Nelson Valdes, who was convicted under 18 U.S.C. § 201(c)(1)(B) for receiving an illegal gratuity. In return for cash, Valdes searched government databases for information at the behest of an associate, who turned out to be an FBI informant.

The *Valdes* jury instruction defining an "official act" bears a striking resemblance to the McDonnell jury's instruction describing an "official action." Both borrowed from and quoted the anti-bribery statute, 18 U.S.C. § 201, which defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). Both instructions went further

including within their ambit "settled practices" and not just acts that engage the official's formal duties. The *Valdes* instruction 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. Likewise, the district judge in the *McDonnell* trial told the jury, "Official action as I just defined it includes 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." Trial Tr. Vol. XXVI at 6102:23-6103:5, *United States v. McDonnell*, No. 3:14-CR-12 (E.D. Va. Sept. 2, 2014), ECF No. 487. Neither district court, however, parsed what official acts or settled practices amount to access and ingratiation, and what amount to the exercise of official power to accomplish the briber's goals.

The D.C. Circuit overturned the *Valdes* conviction. It stated that providing an individual with access to non-secret public information did not constitute an "official act", and that the term only "concern[s] inappropriate influence on decisions that the government actually makes." 475 F.3d at 1325. In other words, while accessing departmental databases may be a "settled practice" of a police officer, doing so on behalf of a supporter in a manner that does not inappropriately influence an actual governmental decision is not corrupt.

The D.C. Circuit grappled with the issue again in *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013). Kevin Ring, a once prominent lobbyist, was convicted of honest services wire fraud, paying an

illegal gratuity, and conspiracy. The illegal gratuity charge related to basketball tickets Ring provided to an attorney in the Justice Department's Intergovernmental Affairs Office as a reward for expediting a visa application by speaking to various INS officials. The appellant, citing *Valdes*, claimed the Justice Department attorney's efforts did not amount to an "official action," as he did not have any decision-making authority over the visa application. The D.C. Circuit disagreed, writing, "unlike attorneys in DOJ units who litigate on behalf of agency clients, attorneys in the Intergovernmental Affairs Office are responsible for reaching across agency boundaries to get things done. . . . Ultimately, the attorney's swift success in procuring expedited review spoke for itself." *Id.* at 470.

As this discussion demonstrates, prior to the Fourth Circuit's opinion in the instant case, three other circuits had considered the outer boundaries of the term "official actions." Each drew roughly the same line between "official actions" taken on behalf of a contributor that are unlawful and those that are not. Yet the Fourth Circuit opinion dismisses *Urciuoli* in a footnote, *McDonnell*, 792 F.3d at 508 n.18,[3] and never addresses *Rabbitt*, *Loftus*, *Valdes*,

[3] The Fourth Circuit distinguishes *Urciuoli* by noting that the district judge in that case did not utilize section 201's definition of "official act" in its jury instruction, but it is difficult to understand why this is meaningful. *McDonnell*, 792 F.3d at 508 n.18; *see also* App. 53a–54a. Governor McDonnell was not charged under section 201. Although his defense team agreed to the use of section 201's definition in the jury instruction to explain the definition of "official action" with respect to the honest services wire fraud charges, it objected to the additional explication the district court judge added to the instruction, which is the key language at issue here.

or *Ring*. And by drawing no distinctions within the category of "official actions" or even "settled practices" sweeps within the law activities of access and ingratiation, which are the stuff of ordinary politics.

The Fourth's Circuit decision adds another layer of perplexity, as it creates significant variation in the definition of "official action" from circuit to circuit. This Court should bring clarity to this legal jumble.

III. THE FOURTH CIRCUIT'S OPINION WILL SIGNIFICANTLY IMPACT PROSECUTIONS AND REPRESENTATIVE DEMOCRACY ACROSS THE COUNTRY.

Federal public corruption prosecutions are in vogue. The Justice Department's Public Integrity Section has a staff of 30, and every large United States Attorney's Office has a Public Corruption Unit. In 2013, the Justice Department charged 1,134 individuals with public corruption, including 804 federal, state, and local officials. *See* U.S. Dep't of Justice, Report to Congress on the Activities of the Public Integrity Section for 2013, at 19-20 Table II, http://www.justice.gov/sites/default/files/criminal/legacy/2014/09/09/2013-Annual-Report.pdf. Nearly all those charged with public corruption crimes are convicted. *Id*.

Though the Department of Justice possesses myriad other tools to prosecute corruption, *see, e.g.*, 18 U.S.C. § 1952 (the Travel Act); 18 U.S.C. § 666 (the federal program bribery statute), the Hobbs Act and—despite *Skilling*—the honest services fraud

statute provide the most sweeping and powerful. Politicians across the country are being investigated, charged, and tried for honest services fraud or Hobbs Act violations. *See, e.g.*, *United States v. Silver*, No. 15-cr-00093–VEC (S.D.N.Y.) (charging former New York State Assembly Speaker, currently on trial for Hobbs Act violations and honest services wire fraud); *United States v. Skelos*, No. 15-MJ-01492-UA (S.D.N.Y.) (charging New York State Senate Majority Leader with same crimes); *United States v. Menendez*, Cr. No. 15-155 (D.N.J.) (charging United States Senator and his supporter with honest services wire fraud, conspiracy to commit honest services wire fraud, and other crimes).

The impact of such prosecutions has a profound impact on not only the reputations of the accused, but on the functioning of federal, state, and local government. Politicians, like every other regulated workforce, must be able to understand the rules of their profession so they can act accordingly.

Given this case law, there is no question that "[t]he federal law of bribery is a muddle." *See* Alschuler, *supra*. And that "muddle" has substantial consequences. Vaguely defined crimes are traps for the unwary. As Justice Jackson wrote, "If the prosecution 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." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940). Particularly during these partisan times, in which deep mistrust of politics spurs the Department of Justice to investigate its

practitioners, the threat of prosecutorial abuse and selective prosecutions for ordinary political activity is real.

CONCLUSION

Both the public and government officials have a shared interest in ensuring that the laws governing political and governmental activity are clear. The law cannot suggest that "ingratiation and access . . . are not corruption" (and indeed are protected by the First Amendment), while providing prosecutors with nearly unfettered ability to criminalize the routine behavior of government officials who cater to their supporters in exactly this manner. If Congress wishes to criminalize mere influence peddling by public officials, it must do so clearly and not *post hoc*.

We urge the Court to grant *certiorari*.

Respectfully submitted,

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