No. 15-474

In the

Supreme Court of the United States

Robert F. McDonnell, *Petitioner,*
v.
United States of America, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
CRAIG L. PARSHALL
BENJAMIN P. SISNEY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. Counsel of record for the ACLJ has presented oral argument before this Court in numerous cases concerning the First Amendment, and ACLJ attorneys have submitted numerous *amicus* briefs in cases involving the First Amendment, including *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), and *McConnell v. FEC*, 540 U.S. 93 (2003).

The proper resolution of this case is a matter of utmost concern to the ACLJ because of the potential impact on First Amendment liberties, particularly in the context of grassroots political activity and the daily interaction between public officials and their constituencies. The Fourth Circuit's disregard of this Court's controlling precedents on the First Amendment's protection of political speech warrants review.

---

* The requisite notice of intent to file this brief has been provided. The parties in this case have filed statements of blanket consent to amicus briefs. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court should grant *certiorari*. The decision below, if left in place, drastically redefines the corruption *quid pro quo* from "dollars for political favors" to "dollars for influence or access," criminalizing a large swath of American political process. The answer to the question, whether the Appellant undertook an "official act" constituting the *quo* of forbidden *quid pro quo* corruption by granting "access" for consideration of a donor's issue, has tremendous implications for protected political speech occurring everyday in Washington, D.C., Virginia, Maryland and elsewhere.

The Fourth Circuit's decision dramatically expands the reach of federal corruption law to include payment by donors or activists who win "access" to public officials. The result: Protected political speech of both donors *and* public officials is now a felony. The court below thereby disregarded the foundation of this Court's rulings in *McCutcheon v. FEC* and *Citizens United*, embracing instead a minority view on defining political corruption.

The Fourth Circuit acknowledged the importance of proving an evidentiary link between the payor's reasonable belief in the sufficiency of an official's power and that official somehow exploiting that belief for pecuniary gain. Yet the court below *approved jury instructions omitting any such link*. The absence of that crucial link in federal corruption

prosecutions will undoubtedly chill political speech between donors and officials.

If this Court does not intervene, federal prosecutors in the Fourth Circuit may feel empowered, notwithstanding this Court's political speech jurisprudence, selectively to prosecute based on campaign donations and private gifts alike, treating subsequent access to officeholders as comparable to corrupt official action.

ARGUMENT

It is a matter of common sense and political reality that a politician will look favorably upon, and be more eager to meet with—grant "access" to—those who help that politician get elected or reelected. Such help may come in the form of favorable media coverage, voter mobilization, contribution bundling, and campaign contributions themselves. That such supporters enjoy enhanced access to the officeholder is not corruption but rather a feature—indeed a feature the First Amendment protects—of a system of elected representative governance. This Court has therefore recognized the crucial importance of distinguishing between genuine *quid pro quo* corruption (payment of money in return for specific official action) and more generic influence. *Infra* § III(A). The decision below, however, badly misconceives that fundamental distinction, adopting as a legal rule a new line that deems "corrupt" what falls rather within the broad

range of routine, and constitutionally protected, constituent influence. This Court should grant review.

I. THE UNDISPUTED FACTS SHOW A ROUTINE AND LEGITIMATE INTERACTION BETWEEN A PUBLIC OFFICIAL AND A DONOR.

To fully comprehend the First Amendment danger posed by the Fourth Circuit's erroneous expansion of corrupt "official acts," consider the undisputed relevant facts below: The Fourth Circuit identified three outcomes desired by the donor that would advance the donor's product.[1] Not one of these favorable outcomes materialized.[2]

---

[1] No evidence suggested that the Petitioner said something in person, made a telephone call, sent an email, or sent a text message to anyone within state government directing that any of these three scenarios be *decided* in any way at all, much less decided in a manner favorable to the donor's company, Star. *See* JV DeLong, *SCOTUS Should Hear Robert McDonnell's Case--And He Should Win,* Forbes, Oct. 15, 2015, http://www.forbes.com/sites/jvdelong/2015/10/15/mcdonnell-and-the-supreme-court ("No actual votes or executive actions were involved, and the only *quids* the government could find for the company's *quos* consisted of a few trivial events, such as a pointless meeting with staff and attendance at a large reception.").

[2] Amazingly, the court below deemed Petitioner's mere question to two officials whether "they would be willing to meet with Star," after favorably commenting on Star's product, an "official act."

The Fourth Circuit categorized, as corrupt "official acts," "the kind of activities [Petitioner] is accused of – e.g., speaking with aides and arranging meetings," *United States v. McDonnell*, 792 F.3d 478, 508 (4th Cir. 2015). The "limiting" factor the court below identified – that such access "relate" to some government action or decision on a matter before the government, *id.*, is no limit at all. Untold numbers of public officials' actions fall within the Fourth Circuit's expanded and revised version of section 201(a)(3)'s term, "official action."

The text of the statute is not so broad. Neither is the common legal meaning of these terms. A "decision or action on" a matter, 18 U.S.C. § 201(a)(3) (2012), encompasses the *act of determination* on the subject under consideration -- *not the consideration itself*. [3] Here, the Petitioner merely facilitated consideration of a donor's issue by the relevant government officials.

---

[3] For example, Black's Law Dictionary defines "decision" as "a judicial or agency determination *after considering* the facts and the law." *Black's Law Dictionary* 436 (8th ed. 2004) (emphasis added).

II. THE JURY INSTRUCTIONS ON "OFFICIAL ACTS" FAILED TO INCLUDE THE VERY ELEMENT THAT THE FOURTH CIRCUIT TREATED AS CRUCIAL, AN ELEMENT THAT COULD CLARIFY THE *EVANS* RULE.

In upholding the "official acts" jury instruction, the Fourth Circuit permitted the jury to find the existence of "official acts" even if it found the Appellant had no power or influence over the matters in question, as long as there was "proof of a bribe payor's subjective belief in the recipient's power or influence over a matter." *McDonnell*, 792 F.3d at 511. The Fourth Circuit elaborated: "As to the second part of the court's instruction, we have no difficulty recognizing that proof of a bribe payor's subjective belief in the recipient's power or influence over a matter will support a conviction for extortion under color of official right." *Id.* (citations omitted). Here, the Court cited *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), for the proposition that "[t]he official need not control the function in question if the extorted party possesses a reasonable belief in the official's powers." *McDonnell*, 792 F.3d at 512 (citing *Rabbitt*, 583 F.3d at 1027). [4] The Fourth Circuit continued:

---

[4] In *Rabbitt*, the Eighth Circuit *overturned* a conviction resting on access -- introductions to decisions makers -- because "[t]he Government failed to prove [the payor] entertained a

(Footnote Continued on Next Page)

> As the First Circuit explained in *United States v. Hathaway*, the phrase "under color of official right" "includes the misuse of office to induce payments not due." Accordingly, *the "relevant question" when contemplating a prosecution under this statute is simply whether the government official "imparted and exploited a reasonable belief that he had effective influence over"* the subject of the bribe.

Id. (quoting *United States v. Hathaway*, 534 F.2d 386, 394 (1st Cir. 1976)) (emphasis added). The *Hathaway* principle must be viewed in context: The jury instruction in *Hathaway* certainly made clear that the impartation or inducement had to come from the public official:

> Where the initiative and the inducement for the payment comes from or is on the part of the public official, and not the voluntary payment on the part of the so-called victim, it is this wrongful use of the office clothed with power of authority that converts official action into extortion.

---

reasonable belief [the payee] possessed effective control over [awarding contracts] necessary to establish extortion 'under color of official right' in violation of the Hobbs Act." 583 F.2d at 1028.

Hathaway, 534 F.2d at 394 (quoting jury instruction); *id.* (noting a second time jury had been charged that initiation and inducement of payments had to come from the official).[5]

Here, the Fourth Circuit employed the rule from *Hathaway*, that the mere subjective belief of the payor that the payee had influence or power on the matters in question could support a finding of "official action" if, and only if, the "*government official 'imparted and exploited a reasonable belief that he had effective influence over'* the subject of the bribe." *McDonnell*, 792 F.3d at 512 (emphasis added).

The critical flaw in the Fourth Circuit's reasoning lies in the fact that the jury instructions in this case *never included* the very element that the Court used to justify the instruction. In pertinent part, the instruction given to the jury charged:

> Now, you've heard this term official action several times, and I will define it for you. . . . *And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor.*

---

[5] In another case relied on by the Fourth Circuit, *United States v. Bencivengo*, 749 F.3d 205 (3d Cir. 2014), the jury instructions also included "a public official induced" language. *Id.* at 209.

J.A. 7671-72 (emphasis added). Thus, the Fourth Circuit has hitched its decision to a crucial element that *never appeared* in the jury instructions -- an element described by the Fourth Circuit as "*the* relevant question."

The reasoning of the First Circuit in *Hathaway* is obvious: Failure to require the jury expressly to find the all-important link between the subjective, but mistaken beliefs of the gift-giver, and the "exploitation" of that mistaken belief by the public official, would lead to the absurd result that criminality would hinge not on the government official's culpable mental state, but on the subjective (even mistaken) belief of the constituent. Thus, in this case, informal meetings, ingratiation, and episodes of collegiality between a governor and a donor were converted into federal crimes.

The result is as equally wrong as it is absurd: A gift-giver's subjective belief (in the official's influence) dictates whether the access and influence provided are either a federal felony or protected political speech. Here, there is neither evidence nor a jury finding that the public official *actually imparted and exploited* the constituent's belief. The absence of that link in federal bribery, Hobbs Act, and Honest Services prosecutions will create more than a chilling effect on the free speech rights of citizens to interact with officials, and for officials to respond to their supporters. *See Citizens United v. FEC*, 558 U.S. 310, 336 (2010) (ongoing chill upon protected speech can and must be invalidated). It will place

such relationships into a deep freeze because of the threat of federal prosecution based on the mere "subjective" and wrongheaded assumptions of citizen supporters about the power or influence of their public officials.

The "official exploitation" factor is essential to clarify unanswered questions resulting from *Evans v. United States*, 504 U.S. 255 (1992). There, this Court determined that conviction in "under color of official action" cases does not require that the public official/recipient be the one who initiates the transaction with the payor, stating:

> [E]ven if the statute were parsed so that the word "induced" applied to the public officeholder, we do not believe the word "induced" necessarily indicates that the transaction must be initiated by the recipient of the bribe.

Id. at 266. However, *Evans* did not fully explain the dimensions of the public official's part in the *quid pro quo* equation. This case presents the opportunity for this Court to reconsider the clarifying rule urged by Justice Kennedy in *Evans* that the official must deliberately attempt to convey the idea to the payor that, absent payment, favorable treatment will not be forthcoming:

> [P]rosecution under the statute has some similarities to a contract dispute, with the

> added and vital element that motive is crucial. For example, a *quid pro quo* with the attendant corrupt motive can be inferred from an ongoing course of conduct. In such instances, for a public official to commit extortion under color of official right, *his course of dealings must establish a real understanding that failure to make a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment, a victimization or withholding accomplished by taking or refraining from taking official action, all in breach of the official's trust.*

Id. at 274-75 (Kennedy, J., concurring in part, and concurring in the judgment) (citations omitted) (emphasis added).

Given the fact that the jury instructions here failed to include this kind of explanation of the *quid pro quo* agreement between the Governor and the payor, and the crucial need for clarification to avoid oppressive prosecutions that implicate fundamental political rights, this Court should grant *certiorari*.

III. IN CRIMINALIZING CORRUPTION, THE GOVERNMENT MAY TARGET DOLLARS FOR OFFICIAL ACTS, BUT NOT DOLLARS FOR ACCESS.

Without doubt, campaign contributions -- like media exposure and voter mobilization -- enhance

constituent access and influence. All of these constitute political speech protected by the First Amendment. Time and time again, this Court has recognized that political speech "is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329.[6] Equally true, "[t]he right to participate in democracy through political contributions is protected by the First Amendment." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Of course, "that right is not absolute," and the government may regulate political contributions "to protect against corruption or the appearance of corruption." *Id.* (citation omitted). Accordingly, in drawing the lines between what the government may and may not do to target corruption, the meaning of "corruption" takes center stage.[7]

---

[6] "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights." *NAACP v. Button*, 371 U.S. 415, 431 (1963). These First Amendment rights are to be robustly exercised without penalty. *McCutcheon*, 134 S. Ct. at 1449; *Davis v. FEC*, 554 U.S. 724, 739 (2008).

[7] The dissent in *McCutcheon* also recognized the "critical[] importan[ce] of the 'definition of "corruption."'" *McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting).

A. The Government May Only Target Actual or Apparent *Quid Pro Quo* Corruption—Dollars for Official Acts.

This Court has spoken on what does *not* constitute criminally targetable corruption: The government "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*." *McCutcheon*, 134 S. Ct. at 1441 (emphasis added). This is because "[i]ngratiation and access are not corruption." *Id.* (quoting *Citizens United*, 558 U.S. at 360) (internal ellipses omitted). "[T]he possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties" "does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S. Ct. at 1451 (internal quotation marks and citation omitted). "[B]ecause the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the *Government may not seek to limit the appearance of mere influence or access*." *Id.* (citation omitted) (emphasis added).

This Court has also elaborated on what does constitute criminally targetable corruption: "Corruption is a subversion of the political process," *id.*, *not the political process itself*. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). Congress may only target "*quid pro quo* corruption or its appearance." *McCutcheon*, 134 S. Ct. at 1441; *see id.* at 1450 ("[W]hile preventing

corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—'*quid pro quo*' corruption."). "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 1441 (citing *National Conservative Political Action Comm.*, 470 U.S. at 497). "That Latin phrase captures the notion of a direct exchange of an *official act* for money." *Id.* (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)) (internal quotation marks omitted) (emphasis added).

It is true that "that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S. Ct. at 1460 (citing *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976)). But corruption (whether actual or apparent), and the risk of corruption are two different things. Criminally targetable corruption, that is, *quid pro quo* corruption, occurs only when public officials undertake official acts "*contrary to their obligations of office* by the prospect of financial gain to themselves or infusions of money into their campaigns." *McCutcheon*, 134 S. Ct. at 1460-61 (citing *National Conservative Political Action Comm.*, 470 U.S. at 497) (internal brackets omitted).

As Justice Kennedy explained, "[f]avoritism and influence are not avoidable in representative politics," and "[t]he fact that speakers," *i.e.*, donors, "may have influence over or access to elected officials does not mean that these officials are corrupt."

Citizens United, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)).

The government's interest in combatting actual or apparent corruption, "must be limited to a specific kind of corruption -- *quid pro quo* corruption -- in order to ensure that the Government's efforts do not have the effect of" violating First Amendment rights. *McCutcheon*, 134 S. Ct. at 1462. "The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Id.* at 1451. This Court cautioned that, "in drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Id.* (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C. J.)) (internal brackets omitted).

The vitality of this line is now before this Court for consideration. The line the Fourth Circuit drew, by contrast, cuts right through the heart of political speech, association and activity; hence, this Court should grant *certiorari.*

B. Targetable "Official Acts" are Policy-Altering Decisions, not Acts Demonstrating Consideration of a Donor's Desire.

The Fourth Circuit's all-encompassing "official acts" definition, if left to stand, will snatch up all

sorts of protected political speech. Hardly any exchange between a donor and public official could escape its grasp. That which might escape will be chilled into silence by the glaring uncertainties and the threat of prosecution.

The term *quid pro quo* "captures the notion of a direct exchange of an *official act* for money." *McCutcheon*, 134 S. Ct. at 1451 (citing *McCormick*, 500 U.S. at 266) (internal quotation marks omitted) (emphasis added). The court below implemented its broader view of corruption [8] by expanding the definition of "official acts," for all practical purposes, to include access, influence and favor. However, the statute defining "official acts" is not so broad, limiting an "official act" to:

---

[8] In support of its ruling, the Fourth Circuit effectively adopted a broader view of corruption -- "dollars for access" -- a view rejected by this Court in *McCutcheon* and *Citizens United*. *See McCutcheon*, 134 S. Ct. at 1451 (rejecting dissent's "broader conception of corruption"); *cf. id.* at 1466 (Breyer, J., dissenting) ("plurality defines 'corruption' too narrowly"); *id.* (explaining its disagreement with plurality opinion "that corruption does *not* include efforts to garner influence over or access to elected officials" (emphasis in original)); *id.* at 1468 ("campaign finance laws" "rest[] upon a broader and more significant constitutional rationale than the plurality's limited definition of 'corruption' suggests."); *Citizens United*, 558 U.S. at 447 (Stevens, J., dissenting) ("Undergirding the majority's approach to the merits is the claim that the only 'sufficiently important governmental interest in preventing corruption or the appearance of corruption' is one that is 'limited to *quid pro quo* corruption.'").

> 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).

The Fourth Circuit's error occurred when it expanded the "target" far beyond substantive displays of policy-altering action or decision-making power. In keeping with its broader, yet mistaken, view of corruption, the lower court's new "target" includes customary, procedural and functional practices transpiring everyday in the offices of elected public officials "insofar as *a purpose or effect of those practices is to influence*" a "question" or "matter." *McDonnell*, 792 F.3d at 509 (quoting 18 U.S.C. § 201(a)(3)) (emphasis added). But the court's addition of general influence -- a great deal more than mere judicial gloss -- contradicts this Court's First Amendment jurisprudence. *See McCutcheon*, 134 S. Ct. at 1451 ("The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights."); *id.* at 1441 (government "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)); *id.*

("Ingratiation and access are not corruption.") (quoting *Citizens United*, 558 U.S. at 360) (internal ellipses omitted).

Consistent with an overinclusive definition, the District Court had included this in its Circuit-approved jury instruction: "In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end." *McDonnell*, 792 F.3d at 506; *see id.* at 509-10. This instruction does more than explain the statue; it substantively changes it.

Hidden within this dangerously broad definition is a speech-chilling truth: A public official's *single* comment, telephone call, email, or text message relating to a donor's issue may be said to be "one in a series of steps to exercise influence or achieve an end," and thus "actions taken in furtherance of longer-term goals." This means that if a public official so much as emails an advisor suggesting the plausibility of a donor's request, he may be prosecuted for corruption. If he directs that a staffer be sent to a meeting hosted by a donor, or presents the donor's issue to other government officials for consideration, he has exposed himself to corruption charges. If he grants an in-person meeting to a donor: a felony.[9] By including such mundane,

---

[9] The requisite criminal intent in such situations could in theory be inferred, as it was in this case, based on the temporal

(Footnote Continued on Next Page)

innocuous and non-decisive "acts" of communication and interaction somehow relating to a donor's issue, the court below expands the scope of federal anti-corruption statutes far beyond its text and purpose, defying common sense and criminalizing, *ipso facto*, the protected interaction between officials and their donors.

As in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), "if the Government's interpretation were correct, it would have sufficed [for the statute] to say 'for or because of such official's ability to favor the donor in executing the functions of his office,'" i*d.* at 406, as opposed to the more restrained "official acts" definition chosen by Congress. This Court should grant *certiorari* and make clear that "official acts" do not include routine access, favor, and influence.

C. This Court Should Grant "Strategic Protection" to the Political Speech Criminalized and Chilled by the Court Below.

Facially, the criminal statutes at issue pose no threat to political speech. Instead, it is the manner in which the Fourth Circuit reinterpreted and

---

proximity of the donation to the public official's act of communication to his staffer. *McDonnell*, 792 F.3d at 519. "How close is too close" is the hazy question that will inevitably chill legitimate political speech.

applied the criminal statutes that present a danger. The sweeping language used by the court below -- expanding targetable corruption by redefining "official acts" -- applies to campaign donations with as much force as it applies to private gifts. As such, the Fourth Circuit allowed the government to circumvent this Court's constitutional admonitions in *Citizens United* and *McCutcheon*. In the Fourth Circuit, the government may now prosecute, under the guise of targeting a substantively "revised and expanded" variation of corruption, routine political activity that this Court has succinctly described as *not* corrupt. Acts of ingratiation, acts of granting access, acts exploring the merits of a donor's request, are all now "official acts" in the crosshairs of federal corruption statutes without regard to whether the money is given to an official's campaign or to the official directly.

Where, as here, fundamental First Amendment rights of citizens and political officials are on the chopping block, this Court should err on the side of protecting from decapitation the robust, long-standing, and uncorrupted interactions that are part of our political fabric. This Court should grant *certiorari* to provide "strategic protection" to these citizen-politician interactions, including those that reside at the margins of legitimacy.

As Justice Alito noted in *Elonis v. United States:* "We have sometimes cautioned that it is necessary to 'exten[d] a measure of strategic protection' to otherwise unprotected false statements of fact in

order to ensure enough 'breathing space' for protected speech." *Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) (Alito, J., concurring in part, and dissenting in part) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974)). Indeed, "First Amendment freedoms need breathing space to survive," *Citizens United*, 558 U.S. at 329 (quotation marks and citation omitted), and "political speech must prevail against laws that would suppress it, whether by design *or inadvertence*." *Id.* at 340 (emphasis added). This Court should err on the side of political speech, *McCutcheon*, 134 S. Ct. at 1451, and eliminate the First Amendment chill imposed by the court below.

IV. EXAMPLES OF ACTS DEEMED FELONIOUS BY THE COURT BELOW UNDERSCORE THE NEED FOR THIS COURT'S INTERVENTION.

The phrase, "any decision or action on" a matter, 18 U.S.C. § 201(a)(3), is simply not the same as a practice undertaken with the purpose or effect of influencing a matter, *McDonnell*, 792 F.3d at 509, or a practice that "*relate*[*s*] in some way to a matter," *id.* at 508 (emphasis in original). The Court need not look far to find examples of political speech in the form of everyday occurrences, now forbidden as corrupt by the Fourth Circuit.

A. The President of the United States

Reportedly:

> During President Obama's reelection campaign, in 2012, Hoffman [founder of LinkedIn] and Pincus [founder of Zynga] each gave a million dollars to Priorities USA, the Democratic Super PAC. Since then, they have had the opportunity to spend time with Obama. In a private forty-five-minute meeting in the Oval Office in 2012, Pincus gave the President a PowerPoint presentation on what he calls "the product-management approach to government." Obama telephones him now and then, sometimes at home, and Pincus and his wife have been Obama's dinner guests.
>
> . . . .
>
> In June, Hoffman helped organize the guest list for a dinner party for Obama in San Francisco, and he has had conversations with Obama at several meetings and dinners at the White House.

Nicholas Lemann, *The Network Man, Reid Hoffman's Big Idea*, NEW YORKER (Oct. 12, 2015), http://www.newyorker.com/magazine/2015/10/12/the-network-man. According to the article, Hoffman's

company, LinkedIn, provided its data to the government, and "[e]arlier this year, a former LinkedIn executive, DJ Patil, was named to the new position of chief data scientist in the White House." *Id.*

In the Fourth Circuit, the above-described scenario, abundantly routine in American politics, depicts money in exchange for access and influence. Under the Fourth Circuit's flawed rationale: federal felonies.

B. The Secretary of State

Another recent news article recounts how "a top contributor to the Clinton Foundation" had emailed then-Secretary of State Hillary Clinton with information and requests for meetings. Tom Hamburger, *How Hillary Clinton kept her wealthy friends close while at State Department*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/politics/how-hillary-clinton-kept-her-wealthy-friends-close-while-at-state-department/2015/10/05/5cfbe884-6930-11e5-9223-70cb36460919_story.html. Mr. Hamburger continues:

> Other [email] exchanges included references to entertainment mogul Haim Saban, who has said he would pay "whatever it takes" to propel Clinton to the White House in 2016, as well as other major Clinton Foundation donors such as Microsoft's Bill Gates,

> fashion industry executive Susie Tompkins Buell and Ukrainian steel magnate Viktor Pinchuk.

According to the article, "The e-mails show that, in some cases, donors were granted face-to-face contact with top officials." *Id.* In the Fourth Circuit: Money in exchange for "official acts" and henceforth, corruption felonies.

Importantly, and with material similarity to the case now before this Court, "[t]he e-mails that mention donors . . . *do not show that financial supporters were able to alter policy decisions*." *Id.* (emphasis added). The significance of the distinction -- understood by Secretary Clinton, recognized by her donors, and even acknowledged by this article's author -- is precisely what escaped the Court below. *Dollars for access is not synonymous with dollars for decisive policy-altering "official acts*." The distinction makes all the difference in the world.

CONCLUSION

This case is not about limiting personal gifts to officeholders. Rather, it is about treating "speaking with aides and arranging meetings," 792 F.3d at 508, as criminal corruption despite the plain threat to First Amendment rights.

This Court should grant *certiorari*.

Respectfully Submitted,

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
CRAIG L. PARSHALL
BENJAMIN P. SISNEY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

NOVEMBER 16, 2015 *Attorneys for Amicus Curiae*