No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL, *PETITIONER*,

v.

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the jury's finding that petitioner's *quid pro quo* bribery scheme violated the honest services statute, 18 U.S.C. § 1346, and the Hobbs Act, 18 U.S.C. § 1951, because the things petitioner agreed to do in exchange for personal benefits were "official act[s]."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Constitution Does Not Protect the Sale or Purchase of Access to Government Officials 4

A. The Court's Campaign Finance Jurisprudence Does Not Apply 4

B. McDonnell's Suggested Interpretation Would Raise Constitutional Problems 12

II. The Federal Bribery Statutes Cover the Corrupt Sale of Access to an Official 13

A. An Official's Meetings are Official Acts 14

Table of Contents -- Continued **Page**

B. The Bribery Statute Only Requires an Agreement to Be Influenced in an Official Act 18

C. The Honest Services Fraud Statute and Hobbs Act Include Bribery Beyond the Conduct Defined in 18 U.S.C. § 201 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Borough of Duryea, Pa. v. *Guarnieri*,
564 U.S. 379 (2011) 12

Brown v. *Hartlage*,
456 U.S. 45 (1982) 10

Buckley v. *Valeo*,
424 U.S. 1 (1976) 6, 7, 9

Cecchini v. *United States*,
394 U.S. 946 (1969) 21

Citizens United v. *FEC*,
558 U.S. 310 (2010) 5, 6, 7, 8

Evans v. *United States*,
504 U.S. 255 (1992) 21

Harper v. *Va. St. Bd. of Elections*,
383 U.S. 663 (1966) 13

Holder v. *Humanitarian Law Project*,
561 U.S. 1 (2010) 10

McConnell v. *FEC*,
540 U.S. 93 (2003) ..... *passim*

McCutcheon v. *FEC*,
134 S. Ct. 1434 (2014) 4, 5, 6

Table of Authorities – Continued **Page(s)**

McNally v. *United States*,
483 U.S. 350 (1987) 14

Osborne v. *Ohio*,
495 U.S. 103 (1990) 11

R.A.V. v. *City of St. Paul*,
505 U.S. 377 (1992) 10

Republican Nat'l Comm. v. *FEC*,
698 F. Supp. 2d 150 (D.D.C. 2010) 5

Skilling v. *United States*,
561 U.S. 358 (2010) 13, 14, 20

Turner Broad. Sys. v. *FCC*,
520 U.S. 180 (1997) 10

United States v. *Birdsall*,
233 U.S. 223 (1914) 14, 15

United States v. *Heffler*,
402 F.2d 924 (3d Cir. 1968) 21

United States v. *Muntain*,
610 F.2d 964 (D.C. Cir. 1979) 21

United States v. *O'Brien*,
391 U.S. 367 (1968) 10

United States v. *Ring*,
706 F.3d 460 (D.C. Cir. 2013) 7, 10

Table of Authorities – Continued **Page(s)**

United States v. *Sun-Diamond Growers of Cal.*,
526 U.S. 398 (1999) 16, 17

United States v. *Weyhrauch*,
548 F.3d 1237 (9th Cir. 2008) 20

United States v. *Williams*,
705 F.2d 603 (2d Cir. 1983) 13

Weyhrauch v. *United States*,
561 U.S. 476 (2010) 20

Wisconsin v. *Mitchell*,
508 U.S. 476 (1993) 10

Statutes and Regulation

2 U.S.C. § 1604 15

5 U.S.C. § 552b 15

18 U.S.C. § 201(a)(3) 15

18 U.S.C. § 201(b) 14, 18, 19, 20

18 U.S.C. § 201(b)(2) 18

18 U.S.C. § 201(b)(2)(A) 18, 19

18 U.S.C. § 201(b)(2)(B) 18

18 U.S.C. § 201(b)(2)(C) 18

18 U.S.C. § 201(c) 16

Table of Authorities – Continued **Page(s)**

18 U.S.C. § 1341..... 20

18 U.S.C. § 1346..... 1, 13, 20

52 U.S.C. § 30125..... 4

Hobbs Act:

18 U.S.C. § 1951 .....*passim*

18 U.S.C. § 1951(b)(2) 20

Va. Code Ann. § 2.2-3707 15

5 C.F.R. § 2635.202(b) 17

Other Authorities

3 Am. Jur. 2d *Agency* § 243 (2016)..... 16

27 Am. Jur. 2d *Employment Relationships* § 3 (2016)..... 16

4 William Blackstone, Commentaries 20

Joshua Kalla and David Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, Am. J. Pol. Sci., 2015 22

Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(3) Persp. on Pol. 564 (2014)..... 23

Table of Authorities – Continued **Page(s)**

Michael J. Barber, *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate*, 80 Pub. Opinion Q. (forthcoming Spring 2016) (available at http://michaeljaybarber.com/research/) 23

Restatement (Third) of Agency § 5.02 (2006) 16

INTEREST OF *AMICUS CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect citizens' rights to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the conduct of government officials and those individuals and organizations that seek to influence them. Where appropriate, CREW files complaints with Congress, the Federal Election Commission, the U.S. Department of Justice, and files suit in the federal courts.

CREW's core beliefs are that no public official is above the law and that our nation's laws must be applied equally to all. CREW participates in this case as an entity that monitors government officials' conduct to ensure the people are represented by honest officials working for the public interest, rather than for their own personal, pecuniary interests. To that end, CREW advances a construction of corruption laws that preserves them as indispensable prosecutorial tools for fighting public corruption.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus and its counsel, make a monetary contribution to the preparation or submission of this brief.

McDonnell v. *United States* puts the Hobbs Act and honest services fraud statute at issue. In filing this brief, CREW defends prosecutorial power to curb the corruption inherent in the exchange of official action for pecuniary gain. A public official's request for money in return for the use of his political office to advance an individual's interests inherently erodes the public interest and the public trust in elected officials. CREW is uniquely qualified to speak for the public in this regard.

This brief is filed with the blanket consent of the parties under Supreme Court Rule 37.3(a).

SUMMARY OF THE ARGUMENT

As his family and business finances unraveled during 2011 and 2012, former Virginia Governor Robert F. McDonnell saw an opportunity for salvation in the person of Jonnie Williams. This Virginia businessman had good reason to trade money for influence; Williams' company, Star Scientific, sought the governor's help in arranging for testing of its supplement at Virginia's state medical schools. Governor and Mrs. McDonnell, "broke" already by his 2009 inauguration, needed funds to pay business and family expenses that ultimately included designer clothing and accessories for Mrs. McDonnell.

And so the story played out. From April 2010 on, the exchange of Williams' money for the power of Governor McDonnell's office progressed apace. As the United States convincingly argues and this brief demonstrates, Governor McDonnell indeed did trade

official acts for donor money in a classic—and illegal—*quid pro quo* scheme. But even beyond the illegal acts performed, Governor McDonnell deeply betrayed the public trust. He put a price tag on the access to public officials that is the birthright of every American citizen, rich or poor.

The Constitution does not protect the sale or purchase of access to government officials. The Court's decisions interpreting the First Amendment in the context of campaign finance regulations do not apply here because the corrupt *quid pro quo* in this case cannot be protected speech. Additionally, if the Court were to accept Governor McDonnell's suggested application of its campaign finance jurisprudence to federal public corruption law, this interpretation would actually raise First Amendment problems, not solve them, and would undercut the principles on which our democracy is based. The constitutional right of a citizen to petition the government is well established. That right has no price tag.

The Hobbs Act and honest services fraud statutes are clearly defined and appropriately limited under existing law, and they encompass McDonnell's conduct in this case, including his sale of access. A reasonable government official knows what is permitted under these statutes. The scope of prohibited conduct does not impinge on an official's ability to engage properly with the public. Even less does it criminalize "politics as usual"—at least not where those politics require an elected official to engage with all citizens, without regard for pecuniary gain.

ARGUMENT

I. The Constitution Does Not Protect the Sale or Purchase of Access to Government Officials

In an astounding attempt to constitutionalize plain corruption, McDonnell asserts that "paying for 'access'—the ability to get a call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system." Pet. 14 (citing *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1450 (2014)), see also Pet. Br. 24–25. McDonnell argues that, because buying access and paying to curry favor with powerful politicians is common, "prosecutors could potentially imprison people for speech this Court has held is constitutionally protected." Pet. Br. 25. This argument misconstrues the Court's campaign finance jurisprudence and its effect on the proper interpretation of the statutes at issue in this case.

A. The Court's Campaign Finance Jurisprudence Does Not Apply

In *McConnell*, the Supreme Court distinguished between "mere political favoritism or opportunity for influence" and "the manner in which the parties have *sold* access to federal candidates and officeholders." *McConnell* v. *FEC*, 540 U.S. 93, 153–54 (2003) (emphasis in original). This distinction buttressed the Court's conclusion that the soft-money ban in the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441i (now codified at 52 U.S.C. § 30125), could pass First Amendment

muster. The *McConnell* court concluded that, based on the record before Congress when it enacted the provision, "[i]t was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption." *McConnell*, 540 U.S. at 153-154.

Shortly after this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), a three-judge panel recognized that *Citizens United* did not undermine this distinction:

> To the extent the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence, *Citizens United* makes clear that those theories are not viable. But that is not enough for the RNC to prevail here because *McConnell*'s decision to uphold the soft-money ban rested on something more specific: record evidence of the *selling* of *preferential* access to federal officeholders and candidates in exchange for soft-money contributions.

Republican Nat'l Comm. v. *FEC*, 698 F. Supp. 2d 150, 158 (D.D.C. 2010) (citing *McConnell*, 540 U.S. at 153–54 and *Citizens United*, 558 U.S. at 360–361). Petitioner therefore must argue, impliedly, that the Court's later decision in *McCutcheon* overruled both *McConnell* and *Citizens United* in this respect. For the reasons set forth below, *McCutcheon* cannot bear the weight of this argument.

McCutcheon and its antecedents considered the "*possibility*" that funds spent on contributions and independent campaign-related speech would provide the spender with "'influence over or access to' elected officials." See *McCutcheon*, 134 S. Ct. at 1450–51 (emphasis added) (citing *Citizens United*, 558 U.S. at 359, *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)). The question before the Court was whether the possibility of such influence provided a sufficiently compelling interest to justify a limit on the contributor's speech, not whether the influence and access were themselves constitutionally protected. See *Buckley* v. *Valeo*, 424 U.S. 1, 19 (1976) (finding that monies contributed to campaigns and spent on electioneering enjoy First Amendment protection because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"). McDonnell simply confuses the Court's discussion of whether the dangers of ingratiation and access suffice to limit free speech rights with the Court's discussion of the free speech right itself.

McDonnell, however, presents no constitutionally protected activity at all. The Government prosecuted McDonnell for corruptly accepting loans, cash payments and gifts in excess of $100,000 that were provided directly to McDonnell or his family. The record does not reflect any of that money going toward any speech, nor does it reflect that it went toward McDonnell's campaign activities.

See Resp't Br. 1–10. Restricting the ability of government officials to accept personal payments in no way "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, [or] the size of the audience reached." *Buckley*, 424 U.S. at 19; see also *United States* v. *Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) ("[W]hereas soliciting campaign contributions may be practicably unavoidable so long as election campaigns are financed by private expenditures, accepting free dinners is certainly not. Moreover, although providing information, commenting on proposed legislation, and other lobbying activities implicate First Amendment speech and petition rights, the First Amendment interest in giving hockey tickets to public officials is, at least compared to the interest in contributing to political campaigns, de minimis." (internal citations and quotation marks omitted)). Thus, regardless of the strength of the Government's interest in combating ingratiation and access, the Government's prosecution of McDonnell does not require the Court to scrutinize that interest under the First Amendment.

Further, and again unlike the Court's campaign finance cases, this case presents a situation far beyond "mere ingratiation and access," instead presenting a case of demonstrably corrupt access. While "*mere* ingratiation and access are not corruption," Pet. Br. 13 (emphasis added); id. at 25 (quoting *Citizens United*, 558 U.S. at 360), "[b]ad responsiveness may be demonstrated by pointing to a relationship between and an official and a *quid*," *McConnell*, 540 U.S. at 297 (Kennedy, J. concurring in part and dissenting in part). Indeed, access and

influence may reflect "*corrupt* favoritism or influence." Id. at 296 (emphasis added).

Here, there is ample evidence of a relationship between "an official," McDonnell, and "a *quid*," thousands of dollars in cash and gifts given to buy the Governor's time, influence, and more. There exists a proven "tether between *quid* and access." Id. at 296. This is not a case where McDonnell provided access as an extension of his "favor [for] certain policies" and thus his "favor [for] the voters and contributors who support those polices." Cf. id. at 297. In contrast to simply "say[ing] favoritism or influence *in general* is the same as *corrupt* favoritism or influence *in particular*," or "equating vague and generic claims of favoritism or influence with actual or apparent corruption," this case presents a clear situation of just such "corrupt favoritism or influence in particular." Id. at 296. McDonnell points to discussion of "mere" access in the campaign-finance cases, but "ignore[s] the fact that * * * the money at issue [here] was given to [him]," rather than expended on a campaign or other speech, a transaction that "creat[es] an obvious *quid pro quo* danger." Id. at 295.

And indeed, an express *quid pro quo* was achieved: McDonnell traded his time, influence, and the power of his office for personal profit. The fact of that relationship means that this is not a case of "access, without more" nor one of "mere ingratiation and influence." Cf. id. at 294; *Citizens United*, 558 U.S. at 360. Rather, this is a case of "corrupt favoritism and influence," one that demonstrates the corruption of the Governor's regime. The

Constitution does not protect such corruption, and common decency demands it be prosecuted.

Even if campaign contributions or independent electioneering were at issue here, the First Amendment would not cabin application of criminal bribery laws. Mere use of otherwise constitutionally protected speech as a *quid* neither sanitizes that unlawful conduct nor immunizes the speaker from prosecution for bribery. The First Amendment resists limits on contributions and campaign expenditures, standing alone. But because such speech is valuable to a candidate, it risks use in an exchange as a *quid* for a returned *quo*. See *Buckley*, 424 U.S. at 26 ("Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign."); see also id. at 47 (noting "absence of prearrangement and coordination of an expenditure with a candidate * * * undermines," but does not eliminate, "the value of the expenditure to the candidate"). McDonnell and amicus concede as much. See, *e.g.*, Pet. Br. 25 ("Campaign contributions can serve as forbidden *quid*, just like personal gifts."); Law Professors Amicus Br. 7 ("Under both the Hobbs Act and the honest-services fraud statute it is a felony to agree to take 'official action' in exchange for money, campaign contributions, or any other thing of value." (internal citations omitted)).

Simply, the First Amendment does not prohibit government from prohibiting corruption. "Although the First Amendment limits the government's

authority to criminalize speech and other protected activity, * * * the Amendment simply 'does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," *Ring*, 706 F.3d at 471 (quoting *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993)), nor prohibit regulation of speech "associated with particular 'secondary effects' * * * so that the regulation is '*justified* without reference to the content of the speech.'" *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992) (internal alterations and citations omitted). Rather, under the test the Court outlined in *United States* v. *O'Brien*, a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 189 (1997) (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

While *O'Brien*'s intermediate scrutiny test is inapplicable to a government regulation triggered by the content of speech, see*, e.g.,* *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010), the corruption laws do not target the *content* of speech; rather, they hinge on the perceived *value* of the speech to the government official. It is irrelevant whether the item of value is speech or not. Thus speech may constitute the element of the crime of bribery. See, *e.g.*, *Mitchell*, 508 U.S. at 479 (jury could use defendant's statements to prove he "intentionally selected his victim because of the boy's race"); *Brown* v. *Hartlage*, 456 U.S. 45, 55 (1982) ("Although agreements to engage in illegal conduct

undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or the underlying conduct, the constitutional immunities that the First Amendment extends to speech."); *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.").

McDonnell does not dispute that an unlawful *quid* may take the form of otherwise constitutionally protected speech. See Pet. Br. 25 ("Campaign contributions can serve as forbidden *quid*, just like personal gifts."). McDonnell admits that such speech could give rise to a *quid pro quo*, so long as it is used to buy an "exercise of governmental power." Id. at 19. But if federal bribery statutes may be constitutionally enforced where a constitutionally significant *quid* exists, they necessarily may be enforced where no such *quid* exists and where, rather, the *quid*s are unprotected cash payments and gifts. Further, the nature of the *quo* is immaterial. Whether the case before the Court involves a cash-for-vote *quid pro quo* or a cash-for-access *quid pro quo*, neither situation raises constitutional doubt as to the enforceability of the federal bribery statute.

B. McDonnell's Suggested Interpretation Would Raise Constitutional Problems

Adopting McDonnell's suggested interpretation of the statutes in this case could actually *create* a First Amendment problem: permitting paid-for access would effectively deny a broad swath of citizens the exercise of their rights to petition and to equal access to government. The First Amendment protects the right of citizens to petition government; by accepting paid-for access, McDonnell and other public officials effectively put a price on that access. McDonnell and amici assert that the provision of expensive gifts is "routine" and has essentially become the price of admission, without which a citizen will have no voice before the elected official. Pet. Br. 3, 41 (acknowledging providing free plane rides to officials has become "common practice here in Virginia" and necessary payment "to have access to" officials); Former Federal Officials Amicus Br. 11 (noting *quid pro quo*'s for access are "commonplace"). But the right to petition, like the right to vote, is "integral to the democratic process," *Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 388 (2011), and no official may put a price on its exercise.

Almost exactly 50 years ago, this Court struck down Virginia's poll tax because it unconstitutionally infringed on the right of citizens to equal access to the franchise. The same reasoning should apply to the Virginia Governor's attempt to deny Virginia's citizens equal right to petition him by charging fees for such access. "The principle that denies the State the right to dilute a citizen's

[petition] on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to [petition] or who fail to pay." *Harper* v. *Va. St. Bd. of Elections*, 383 U.S. 663, 668 (1966).

Most Virginia citizens could not afford to give the Governor a luxury watch, a ride in a luxury car, or a trip on a private plane in order to secure his attention. Construing federal law to permit the sale of access risks exclusion of those citizens from a crucial part of the democratic process.

II. The Federal Bribery Statutes Cover the Corrupt Sale of Access to an Official

Petitioner argues that the *quid pro quo* scheme at issue led to anodyne results like "politely listen[ing]" or otherwise tolerating Williams' political speech. Pet. Br. 1. Putting aside the cynicism inherent in this remark, CREW submits that harm inherent in the corruption is not limited to the sale of a vote, but results as well from the sale of access.

Federal law bars a "scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. "[T]he honest-services theory target[s] corruption * * * ." *Skilling* v. *United States*, 561 U.S. 358, 400 (2010). "Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe." *United States* v. *Williams*, 705 F.2d 603, 623 (2d Cir. 1983). In *Skilling*, the Court, concerned with the vagueness of the term "honest services," limited the statute to

"bribery and kickback schemes." 561 U.S. at 368. The Court recognized that, so constructed, the honest-services statute "draws content" from the pre-*McNally* v. *United States*, 483 U.S. 350 (1987), case law and from federal statutes proscribing "similar crimes." *Skilling*, 561 U.S. at 412.

As the Government makes clear, Resp't Br. 1–10, 41–49, the record demonstrates that McDonnell sold more than access to himself, agreeing to perform various official acts, including selling access to his subordinates, in exchange for loans, cash, and gifts valued well into the hundreds of thousands of dollars. But, even had he sold no more than access, the corrupt exchange would violate section 201(b), the Hobbs Act, and the honest services fraud statute.

A. An Official's Meetings are Official Acts

The federal definition of official act is appropriately broad. As "action[s]" of an official on a "question, matter, cause, * * * proceeding or controversy," public officials' meetings and interactions with members of the public and/or other government officials are official acts, conducted under the authority and color of the office. *United States* v. *Birdsall*, 233 U.S. 223, 230 (1914) ("Every action that is within the range of official duty comes within the purview" of federal bribery statute).[2] Like

[2] 18 U.S.C. § 201(b) prohibits, among other things, the giving or receipt of "anything of value" to or by a "public official" with "intent to influence any official act" or in return for "being influenced in the performance of any official act." The statute

other official acts, an official's meetings are "governed by a lawful requirement of the Department under whose authority the officer was acting." Id. at 231. For example, federal law requires that certain meetings of agencies be conducted in a manner that is "open to public observation." 5 U.S.C. § 552b. Further, certain meetings must be reported even if they are not open to the public. See*, e.g.*, 2 U.S.C. § 1604 (mandating disclosure of meetings by lobbyists). Virginia law similarly recognizes that meetings of officials are official acts subject to regulation. See Va. Code Ann. § 2.2.-3707. These laws regulate the meetings of officials because meetings are an integral part of the exercise of an official's power.

Defining "official act" to include any activity taken under color of authority—including meeting with citizens and/or staff to discuss official business—is clear, comports with standard employment and agency law, and avoids the vagaries of applying the definition to a vaguely-delineated subset of "[e]very action that is within the range of official duty." *Birdsall*, 233 U.S. at 230. Rather than attempting to craft some new ill-defined category of qualifying acts, the law comports with standard agency law that delineates those acts outside the scope of the agency relationship and those acts that are within the scope: i.e., those acts which are

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further defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy" pending or brought before an official in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

"official" rather than merely personal. And under black-letter agency law, representations made by or to an employee at, for example, a meeting can bind the employer and thus constitute activity within the scope of that employment, even if no further action is taken. See 27 Am. Jur. 2d *Employment Relationships* § 3 (2016) ("Under basic agency law, the employer's direction and control over the details of the employee's work and conduct is what makes their relationship one of actual agency."); 3 Am. Jur. 2d *Agency* § 243 ("A principal is bound by the act of its agent if the agent acts within the scope of the agent's authority * * * . [A] representation made by an authorized agent of the principal is binding upon the principal."); Restatement (Third) of Agency § 5.02 (2006) ("A notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification * * * .").

The Court has scrutinized differently some gratuities or gifts given free of a *quid pro quo* scheme, but the analysis does not apply here. The sale of a meeting distinguishes this case from *United States* v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999). There, the Court considered the applicability of 18 U.S.C § 201(c), which proscribes unlawful gratuities given without an agreement or solicitation, but solely given "for or because of any official act." Because the statute did not require agreement or solicitation, the Court worried that a broad reading of the statute might encapsulate "jerseys given by championship sports teams each year during ceremonial White House visits" and "a high school principal's gift of a school baseball cap to

the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school." 526 U.S. at 406–07. But McDonnell was not provided a trinket or a memento "by reason of [his] mere tenure," id. at 408; he was provided with more than a hundred thousand dollars in loans, cash, and gifts in exchange for his sale of access to him in his official capacity and more. In contrast, the gifts that concerned the Court in *Sun-Diamond* were given "by reason of [the official's] office," id. at 407; they did not seek to buy access to the official. Further, the gifts described in *Sun-Diamond* are de minimis and allowed by federal regulation, 5 C.F.R. § 2635.202(b), which cannot be said of the thousands of dollars accepted by McDonnell. The Court may not have been so accommodating if the hypothetical situations involved tens of thousands of dollars given to the Secretary of Education to ensure his attendance so that he could be lobbied to increase funding to the school in question.

Contrary to the assertions of McDonnell and his amici, upholding McDonnell's conviction will not risk extending the honest services fraud statute and the Hobbs Act to such routine occurrences. A reasonable government official can distinguish between accepting a small token of hospitality and the corrupt peddling of access for his own personal enrichment.

B. The Bribery Statute Only Requires an Agreement to Be Influenced in an Official Act

Further, section 201(b) is not limited to the corrupt sale of "official acts." The statute does not, for example, bar only the corrupt receipt of an item of value in return for performing an official act. Section 201(b)(2) outlaws the "corrupt[] * * * recei[pt]" of "anything of value" in exchange for "*being influenced* in the performance of any official act." 18 U.S.C. § 201(b)(2)(A) (emphasis added). While the gift must be received corruptly, i.e., as part of a *quid pro quo*, there is no requirement that the corrupt gift be received in *exchange* for the "official act"; rather, the exchange need only buy the opportunity to exert influence in that act. Thus, the corrupt receipt of a gift in exchange for an opportunity to exert influence in the performance of an official act—for example, at a paid-for meeting or some other corruptly purchased contact—violates the statute even if the official never expressly agrees to alter the performance of the official act itself.

Nor can one read section 201's reference to "corrupt []" receipt to import the requirement that it be given in exchange for an official act. After all, the corrupt exchange of the opportunity to be influenced in the performance of an official act is only one of three ways that the bribery statute may be violated. See 18 U.S.C. § 201(b)(2)(B), (C). While the other subsections similarly require a "corrupt gi[ft]" or "corrupt recei[pt]," they do not require a nexus with any official act. It would be improper, therefore, to impose on those statutory subsections an element

that they do not require by limiting corrupt gifts or demands to only those given or received in exchange for an official act. Whether an official sells an official act or sells a meeting to allow the official to "be[] influenced in the performance of any official act," a *quid pro quo* exists that runs afoul of section 201(b).

Of course, if the official actually performs the official act for which he agreed to be influenced, as is the case here, the fact would be persuasive evidence that the official had agreed to be so influenced. Nevertheless, proving that the official performed the act is not necessary to prove an agreement to be influenced; indeed, as the Fourth Circuit below recognized, the official need not even have had actual authority to carry out the act. Pet. App. 59a–60a. Further, as the Fourth Circuit recognized, the statute does not limit the influenced official act to the official act of the *seller*. Ibid.; see also 18 U.S.C. § 201(b)(2)(A) (outlawing sale in return for being influenced in the performance of "*any*" official act, not simply the public official's). Because McDonnell sold, among other things, access to himself in return for allowing himself to be influenced in a later official act by McDonnell or some other official, that sale is unlawful under section 201(b) and constitutes the acceptance of a bribe.

C. The Honest Services Fraud Statute and Hobbs Act Include Bribery Beyond the Conduct Defined in 18 U.S.C. § 201

Moreover, while the question presented on appeal assumes that the honest services fraud

statute and the Hobbs Act depend on the meaning of "official act" under section 201(b), the statutes are not cabined by section 201(b). Neither the Hobbs Act nor the honest services fraud statute speaks of "official acts." 18 U.S.C. §§ 1341, 1346 (proscribing "scheme or artifice to defraud"); 18 U.S.C. § 1951(b)(2) (defining extortion to mean "the obtaining of property from another, with his consent, * * * under color of official right."). And notably, *Skilling* does not define the "honest services" statute as co-extensive with the federal bribery statutes. Rather, it allows for a more expansive set of sources of law encompassing a broader definition of bribery.[3]

Bribery at common law was not limited to the trading of a limited set of official activities, but covered the taking of any "undue reward to influence [one's] behavior in [one's] office." 4 William Blackstone, Commentaries, *139–*140. Blackstone

[3] When deciding *Skilling*, the Court reversed a companion case, *Weyhrauch* v. *United States*, 561 U.S. 476 (2010), that concerned the honest services of a public official where the public official had been charged with honest-services fraud for acting in a way benefiting an oil company in return for a promise of future employment. Notably, however, the case had been tried on the theory that the official's failure to disclose the conflict constituted honest-services fraud, not on the ground that the official's sale of his official powers to the benefit of the oil company constituted such fraud. *United States* v. *Weyhrauch*, 548 F.3d 1237, 1240 (9th Cir. 2008). Neither this Court nor the Ninth Circuit on remand held that such exchange could not constitute honest services fraud. Rather, following the Court's decision in *Skilling*, the Ninth Circuit found that "non-disclosure of a conflict of interest is no longer a basis for prosecution under 18 U.S.C. § 1346." 623 F.3d 707, 708 (9th Cir. 2010).

described bribery as including people accepting "presents for doing their duty." Ibid.; see also *Evans* v. *United States*, 504 U.S. 255, 260 (1992) ("At common law, extortion was an offense committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties. * * * Extortion * * * was the rough equivalent of * * * 'taking a bribe.'"). Indeed, limiting the concept of "bribery" to paid-for votes to the exclusion of paid-for access would undermine the very purpose of bribery statutes.

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision. The statute plainly proscribes such corrupt interference with the normal and proper functioning of government.

United States v. *Heffler*, 402 F.2d 924, 926 (3rd Cir. 1968), *cert. denied sub nom. Cecchini* v. *United States*, 394 U.S. 946 (1969). "It is the corruption of official decisions through the misuse of influence in governmental decision-making which the bribery statute makes criminal." *United States* v. *Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979).

Society cannot adequately protect its interest in "objective evaluation and unbiased judgment" and guard against the "misuse of influence" unless paid-for access is similarly proscribed. A recent randomized field experiment demonstrated that constituents seeking meetings with their representative's office to talk about a specific issue were between three and four times more likely to meet with a senior policy maker, as opposed to a lower-level staffer, if they identified themselves as donors. Joshua Kalla and David Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, Am. J. Pol. Sci., 2015, at 1.

Common sense and experience demonstrate that an official who predominately or solely hears from one side of a debate will exercise official powers in a biased way, favoring those voices he hears. Indeed, the knowledge that access will influence votes or other exercises of official power is the stated *reason* that individuals are willing to pay for that access. In this case, Williams admitted that he sought access because he "needed [McDonnell's] help with the testing" of his drug. Resp't Br. 42. That understanding is not anomalous. The Court in *McConnell* recounted the example of an international businessman who gave $300,000 to the DNC in exchange for "special access to candidates and senior Government officials" so that he could "gain the Federal Government's support for an oil-pipeline project in the Caucasus." *McConnell*, 540 U.S. at 130; see also Pet. Br. 40 (quoting contributor as saying "'I sign my checks to buy access.'").

The effect of this sold access is essentially the same as if the politicians had sold votes: a skewing of public policy in favor of the bribe payors, as social scientists have observed. See*, e.g.*, Michael J. Barber, *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate*, 80 Pub. Opinion Q. (forthcoming Spring 2016) (available at http://michaeljaybarber.com/research/). The research indicates that purchasing access has been effective: "Results show that legislators' ideologies most closely align with the preferences of campaign contributors [and] are quite distant from the ideological preferences of the average voter." Ibid. Another study comparing the influence of broader groups of actors demonstrated a similar pattern: "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence." Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(3) Persp. on Pol. 564, 565 (2014).

As these studies demonstrate, who has access to a government official can have a significant impact on that official's views and, ultimately, exercise of authority. Permitting government officials to sell that access undercuts fundamental principles of our democracy, including the First Amendment-protected rights of citizens to petition and to equal access to their government.

Although the record demonstrates McDonnell sold much more, at a minimum, McDonnell

indisputably sold access to himself in his official capacity in exchange for personal enrichment, a clear *quid pro quo*. The sale of his time as Governor is the sale of an "official act" within the meaning of 18 U.S.C. § 201 or, at least, the sale of the opportunity to influence of an official act. Finally, even if not expressly covered by § 201, the Hobbs Act and "honest services" fraud are not limited to the federal statute and encompass a broader category of bribery that includes paid-for access to elected officials.

* * *

McDonnell agreed to provide ongoing assistance to a wealthy patron pursuing state subsidies for research and development of the patron's unproven drug, including by influencing research plans at several of Virginia's highly regarded state universities and the state's Tobacco Indemnification and Community Revitalization Commission, and by seeking to shoehorn the drug into state employees' health care plans. In exchange, he and his family directly received tens of thousands of dollars in cash, loans, and lavish gifts. That his assistance took the form of things government officials commonly do—directing staff, advocating within government, sponsoring events—is not surprising; it is precisely this similarity that gives the assistance its value in the *quid pro quo*. However, that does not make McDonnell's actions "politics as usual"; many hard working and ethical government officials spend entire careers advocating for their constituents because that advocacy is in the *public* interest. Only the corrupt few do it for their personal enrichment, and a jury of McDonnell's fellow Virginians properly

held him accountable as one of these few. Neither federal law nor the Constitution requires a different result.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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