No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND DEMOCRACY 21 IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is an advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a range of issues. Prominent among Public Citizen's concerns is combating the corruption, and appearance of corruption, of governmental processes that can result from infusions of private money into campaigns for public office. Public Citizen therefore seeks to enact and defend workable and constitutional campaign finance reform legislation at the federal and state levels. Public Citizen and its attorneys have been involved as amicus curiae and counsel in many cases in this Court and others involving the constitutionality of such legislation.

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. It supports campaign finance and other political reforms, conducts public education efforts, participates in litigation involving the constitutionality and interpretation of campaign finance laws, and works for the proper and effective implementation and enforcement of those laws. Democracy 21 has participated as counsel or amicus curiae in many cases before this Court involving the constitutionality of campaign finance laws.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

The amici submitted a brief last Term in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), which contested the argument that *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), required application of a narrow conception of "corruption" under which the law at issue there, prohibiting solicitation of campaign contributions by judicial candidates, could not be sustained. The Court in *Williams-Yulee* properly rejected that overly broad reading of *Citizens United* and *McCutcheon*. This case involves similarly unsustainable arguments that *Citizens United* and *McCutcheon* preclude application of criminal statutes to transactions in which officeholders sell access and influence over governmental decisionmaking for personal gain. The amici submit this brief in the belief that it may be helpful to the Court in articulating the reasons why those arguments, too, must be rejected.

SUMMARY OF ARGUMENT

In this case, former Virginia Governor Robert McDonnell urges this Court to hold that the criminal statutes under which he was convicted for taking bribes do not apply to his conduct. He asserts that a contrary reading would render the statutes unconstitutional. In McDonnell's view, this Court's decisions in First Amendment challenges to campaign finance laws establish that the Constitution does not allow Congress to prohibit officeholders from accepting bribes in return for providing access to and influence over governmental decisionmaking processes.

McDonnell's constitutional arguments are wholly unfounded. His reliance on First Amendment decisions is misplaced because this case involves no campaign contributions or expenditures subject to First

Amendment protection, but only gifts and payments made for his and his family's personal benefit and gain, which fall entirely outside the First Amendment's scope. Applying criminal penalties to such payments thus cannot violate the First Amendment, and there is no need for a narrow construction of the relevant statutes to avoid possible First Amendment issues in other cases.

Even if this case involved First Amendment activity, this Court's decisions would offer no support for McDonnell's arguments. Although this Court has stated that favoritism by politicians toward their political supporters is not "corruption," it has not held that the First Amendment protects bargains in which candidates promise to provide access to and influence over particular government decisionmaking processes in return for money.

As this Court has stated, elected officials in our representative system of government are expected to be responsive to those who agree with and support them politically. It does not follow that it is expected, much less accepted, that politicians may trade responsiveness for personal gain. Adopting that view, which McDonnell advocates here, would substitute the animating principles of kleptocracy for those of democracy.

ARGUMENT

I. The conduct at issue falls far outside the First Amendment's protection.

Former Governor McDonnell argues that the statutes under which he was convicted do not reach his conduct in part because, he contends, it is unconstitutional to proscribe payments that do not seek to control a government official's final decision with re-

spect to some official matter before him or her, but are instead given for access to or influence over decisionmaking processes. McDonnell asserts that this supposed constitutional principle rests on the First Amendment and on this Court's decisions in cases involving regulation of campaign spending and contributions—specifically, *Citizens United v. FEC*, 558 U.S. 310, and *McCutcheon v. FEC*, 134 S. Ct. 1434.

McDonnell contends that *Citizens United* and *McCutcheon* "establish that the government 'may not target … the political access' that financial support for candidates 'may afford.'" Pet. Br. 24–25 (quoting *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion)). "Only payments 'to control the exercise of an officeholder's official duties' may be criminalized," *McDonnell* argues, "because '[i]ngratiation and access … are not corruption.'" *Id.* at 25 (quoting *McCutcheon*, 134 S. Ct. at 1441 (plurality), and *Citizens United*, 558 U.S. at 360).

McDonnell's arguments are wrong on a number of levels. Most fundamentally, *Citizens United* and *McCutcheon* have no bearing on this case because the subject they address—whether a governmental interest is substantial enough to justify restrictions on activities that fall within the protection of the First Amendment—is not at issue here. *Citizens United* and *McCutcheon* say nothing about what interests suffice to justify the application of a criminal statute to actions that do not involve the exercise of First Amendment rights.

The premise of both *Citizens United* and *McCutcheon* was that the laws challenged in those cases—which, respectively, prohibited corporate campaign expenditures and individual campaign

contributions exceeding aggregate limits set by statute—restricted activity protected by the First Amendment. That premise was established by this Court's opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), which afforded First Amendment protections, to different degrees, to both campaign expenditures and political contributions.

Buckley held that laws limiting independent *expenditures* to influence elections restrict "core" political speech protected by the First Amendment. *Id.* at 19–20, 39. The Court has therefore held that such laws may be sustained only to advance a compelling governmental interest. *See Citizens United*, 510 U.S. at 340.

Campaign *contributions*, *Buckley* held, also implicate First Amendment interests because they involve some degree of political expression and political association. *See* 424 U.S. 20–23. But the communicative and associational value of contributions is limited enough that the Court has viewed laws restricting them as calling for a lesser degree of First Amendment scrutiny, under which a contribution limitation is constitutional if "closely drawn" to serve a "sufficiently important" government interest. *See McConnell v. FEC*, 540 U.S. 93, 136 (2003).

This Court's decisions applying the *Buckley* standards of scrutiny to campaign contribution and spending limits establish that the "governmental interest in preventing corruption or the appearance of corruption" is not just "sufficiently important" to satisfy the test for contribution limits, *Citizens United*, 558 U.S. at 359, but "compelling" for purposes of strict scrutiny. *See McCutcheon*, 134 S. Ct. at 1445 (plurality) (citing *FEC v. Nat'l Conservative Political*

Action Comm., 470 U.S. 480, 496–97 (1985)). Accordingly, the discussions of "corruption" in both *Citizens United* and *McCutcheon* concern whether the statutes at issue in those cases served the government's asserted anticorruption interests sufficiently to justify the limits on First Amendment activity that the statutes imposed.

Citizens United, applying strict scrutiny to a statute prohibiting political expenditures by corporations, held that although preventing "corruption" or its appearance was a compelling governmental interest, that interest was not implicated by independent expenditures that did not provide opportunities for quid pro quo arrangements. 510 U.S. at 345, 356–57. The government's interest in preventing corruption, the Court held, did not encompass the mere possibility that politicians might be grateful for such expenditures and might grant *unbargained-for* preferential treatment or access as a result. *Id.* at 359–61.

The *McCutcheon* plurality's statements about corruption likewise came in the context of a case testing whether a restriction on First Amendment-protected interests met the applicable level of constitutional scrutiny. In *McCutcheon*, the subject was a contribution limit and the issue was whether the government had met the lesser, but still significant, burden of showing that the limit was "closely drawn" to achieve a "substantial interest." *See* 134 S. Ct. at 1445–46. The *McCutcheon* plurality briefly repeated *Citizens United*'s observations about corruption. *See id.* at 1450–51. The plurality then proceeded to conclude that the aggregate limits did not serve a sufficiently important anticorruption interest because it was unlikely, in the plurality's view, that contributions within base limits, widely distributed among candi-

dates and political committees, would in the aggregate pose a threat of corrupting or appearing to corrupt a particular candidate (or of circumventing limits on contributions to that candidate). *See id.* at 1452–62.

Regardless of whether, or how much, the statements about corruption in *Citizens United* and the *McCutcheon* plurality opinion might limit the scope of the anticorruption interests that are considered substantial enough to justify restrictions on First Amendment-protected activity, those statements have no application to this case, where First Amendment activity is not at issue. McDonnell does not assert that the payments he and his wife received were campaign contributions, that they were acts of political expression or association, or that they qualified in any other way for First Amendment protection.

Although making personal gifts and "loans" and offering free use of vacation homes and sports cars may involve some form of "association," this Court's decisions rule out the possibility that such association is the kind of "expressive association" that is entitled to heightened protection under the First Amendment. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989); *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13 (1988); *Ellis v. B'hood of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 456 (1984). And nothing in *Buckley* or its progeny suggests that payments for the personal benefit of an individual or his family somehow take on the characteristics of protected political speech or association just because the recipient is a politician.

The Constitution therefore imposes no heightened standard of justification for a criminal prohibition on such payments. A compelling or substantial governmental interest is not required to support the application of a criminal law to conduct that is not constitutionally protected, nor does such a law have to be "closely drawn" to achieve the interests supporting it: A rational relationship to a permissible governmental interest will do. *See*, *e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *Sabri v. United States*, 541 U.S. 600, 605 (2004); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983). "It is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

Neither *Citizens United* nor the *McCutcheon* plurality opinion suggests that the government has *no* legitimate interest in addressing venal conduct that might not satisfy their conceptions of the corruption that suffices under the elevated First Amendment scrutiny applied in those cases. Nor do those decisions say or imply that it would be irrational for the government to penalize activities *not* protected by the First Amendment for reasons that might not suffice to restrict campaign contributions or expenditures that the First Amendment does protect. Indeed, McDonnell does not even attempt to establish that the application of criminal penalties to the conduct at issue fails under rational basis scrutiny. Whether his conviction can be sustained thus presents only questions of statutory construction and evidentiary sufficiency, not a constitutional issue.

The possibility that the statute might be applied in other circumstances involving First Amendment-protected activities, such as bona fide campaign contributions or expenditures, cannot assist McDonnell here. He does not contend that the statute is substantially overbroad—an argument that would in any event be untenable because "[i]n the vast majority of its applications, this statute raises no constitutional problems whatever." *United States v. Williams*, 553 U.S. 285, 303 (2008). If the statute were to be applied to protected activity in a way that raised a significant issue about whether First Amendment standards of scrutiny were satisfied, this Court could consider an as-applied challenge or possible narrowing construction. *See Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 39 (2010); *see*, *e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001). But the possibility of applications that might raise constitutional questions provides no reason to hold the statute inapplicable to circumstances where First Amendment issues are not remotely at stake.

II. Where First Amendment interests are implicated, the government may still prohibit quid pro quo arrangements in which politicians and officeholders sell access and influence.

Even if First Amendment-protected activity were involved in this case, *Citizens United* and the *McCutcheon* plurality opinion do not establish that penalizing quid pro quo arrangements such as the ones involved here is unconstitutional. Rather, even if the "quid" in this case had been a campaign contribution or expenditure, the nature of the "quo" would have implicated the compelling governmental interest in preventing corruption or its appearance suffi-

ciently to justify the criminal sanctions imposed here. Nothing in this Court's decisions suggests that it violates the First Amendment to prohibit government officials from accepting money in return for influencing government decisionmaking (by, for example, directing subordinates to meet with someone who wants the government to so something or encouraging government employees to consider taking the desired action). Even if such a bargain could accurately be described as involving only "access," "ingratiation," or "influence," neither *Citizens United* nor the *McCutcheon* plurality opinion cloaks it with constitutional protection.

Indeed, the most pertinent opinion of this Court expressly holds that bargains involving the sale of access to officeholders do implicate the government's anticorruption interest and justify restrictions aimed at preventing opportunities for such deals. In *McConnell v. FEC*, the Court upheld the constitutionality of provisions of the Bipartisan Campaign Reform Act (BCRA) prohibiting "soft money" (*i.e.*, unregulated) contributions to political parties. The Court did so in part because of evidence that the political parties had engaged in "peddling access to federal candidates and officeholders in exchange for large soft-money donations." 540 U.S. at 150.

The Court emphasized that the government's anticorruption interest "extends beyond preventing simple cash-for-votes corruption," *id.*, and is implicated when contributors "give[] substantial donations to gain access to high-level government officials." *Id.* If, as *McConnell* holds, that interest suffices to justify contribution limits that act as *preventive* measures to avoid the reality or appearance of deals in which contributors acquire access or influence in return for

large gifts of money, it necessarily follows that Congress can also enact more narrowly targeted measures that outlaw express quid pro quo transactions in which money is exchanged for access and influence.[2]

Citizens United and the *McCutcheon* plurality opinion are not to the contrary. *Citizens United* left *McConnell*'s soft-money holding intact, *see* 558 U.S. at 360–61, a point confirmed when the Court summarily affirmed a three-judge district court's holding that *McConnell*'s condemnation of the sale of access in return for unregulated soft-money contributions survived *Citizens United*. *See Repub. Nat'l Comm. v. FEC*, 561 U.S. 1040 (2010), *aff'g* 698 F. Supp. 2d 150 (D.D.C. 2010) (*RNC*). The *McCutcheon* plurality likewise emphasized that the holding there "clearly does not overrule *McConnell*'s holding about soft money." 134 S. Ct. at 1451 n.6.

Moreover, the observations in *Citizens United* and the *McCutcheon* plurality opinion about the nature of corruption by no means condone bargains in which money is exchanged for access aimed at influencing governmental decisionmaking. What *Citizens United* said was that, *in the absence of* the opportunity for prearrangement and quid pro quo deals that contributions afford, any apparent ingratiation or preferential access that may result from purely independent campaign spending by persons or groups unaffiliated with a candidate is not actual or apparent cor-

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[2] *Citizens United* emphasized that "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." 558 U.S. at 357.

ruption that can justify a limit on such spending. 558 U.S. at 357–60. As *Citizens United* put it, the fact that such independent "speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Id*. at 359.

Citizens United expressly stated that the matter was different when money changed hands, creating the opportunity for corrupt bargains. *See id*. at 356–57. The opinion acknowledged that the *McConnell* record established that transactions in which contributions were exchanged for access to elected officials had occurred in the soft money era. *See id.* at 360–61. *Citizens United* also recognized that the Court owed deference to congressional findings of such abuses. *Id*. at 361.

Thus, in the wake of *Citizens United*, the three-judge court in the *RNC* case determined that the opinion's statements about corruption did not override *McConnell*'s finding that there is a substantial anticorruption interest in preventing "the *selling* of *preferential access* to federal officeholders and candidates in exchange for soft-money contributions." 698 F. Supp. 2d at 158. The three-judge court's holding that BCRA's soft-money provisions remained intact, which this Court affirmed, 561 U.S. 1040, rested significantly on the view that Congress had a sufficiently important interest in preventing transactions involving such outright sales of access.

The *McCutcheon* plurality's brief discussion of the nature of corruption echoes *Citizens United*'s observation that "mere influence or access"—absent any quid pro quo arrangement—is not corruption. 134 S. Ct. at 1451; *see id.* at 1441, 1450–51. Like the Court in *Citizens United*, however, the *McCutcheon* plurali-

ty did not purport to validate preferential access or other forms of favoritism and influence that result not merely from a supporter's "[s]pending large sums" independently of a candidate, *id*. at 1450, but from prearrangements or understandings reached in exchange for contributions. The plurality's statement that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford," *id.* at 1441, in no way suggests that bargains in which money is paid *specifically* to secure access to decisionmaking processes are similarly protected.

The *McCutcheon* plurality's observation that "the Latin phrase," "'*quid pro quo*' corruption," "captures the notion of a direct exchange of an official act for money," *id*., does not purport to define a constitutional standard, still less to constitutionalize a restrictive definition of "official act" that grants First Amendment protection for payoffs aimed at obtaining procedural advantages as opposed to guarantees of substantive outcomes. Indeed, the nature of the "official acts" whose sale could be characterized as corruption was not remotely at issue in *McCutcheon*. Moreover, the *McCutcheon* plurality immediately followed its reference to "the notion of a direct exchange" with the statement that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id*. (citation omitted). That formulation nicely captures the conduct proved in this case and refutes the suggestion that the *McCutcheon* plurality intended to endorse such transactions.

In any event, the *McCutcheon* plurality's statements about the nature of corruption do not appear central to the plurality's reasoning in holding the ag-

gregate limits unconstitutional. Rather, the plurality's reasons for striking down the aggregate contribution limits rested principally on the four Justices' skepticism that limited contributions spread among a plethora of candidates, party committees, and other political committees would be likely to corrupt any particular candidate or circumvent base limits on contributions to candidates and party committees. *See id.* at 1452–56. Moreover, although the FEC and its supporters had argued that, in the absence of aggregate contribution limits, large sums could be solicited by or amassed to benefit particular candidates in many ways, the plurality took the view that those scenarios were implausible, unlikely, and unsupported by evidence, and would or could be prevented by the operation of other laws. *See id.* at 1453–60.

Rather than adopting a new and dramatically narrower understanding of corruption, the plurality concluded that "widely distributed support [for political parties] *within all applicable base limits*" was unlikely to present opportunities for corruption. *Id.* at 1461 (emphasis added). Indeed, the *McCutcheon* plurality strongly reaffirmed *Buckley*'s analysis of the anticorruption interests served by base limits, s*ee*, *e.g.*, *id.* at 1441, 1450, and expressly left intact *McConnell*'s soft money holding, which in turn was based to a large degree on a recognition that there is a sufficiently important interest in preventing outright sales of access to officeholders and candidates even when the consideration takes the form of First Amendment-protected campaign contributions.[3]

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[3] Thus, even if the plurality's opinion were authoritative, its discussion of "corruption" would fairly be characterized as dicta,

(*Footnote continued*)

In short, this Court has never held that the government lacks a substantial interest in prohibiting corrupt transactions in which public officials sell access to or influence over the government's decisionmaking processes. Thus, even if this case involved First Amendment-protected activity, the reasoning of *Citizens United* and the *McCutcheon* plurality would pose no obstacle to the application of the criminal statutes at issue here to such conduct.

III. The notion that the Constitution protects the sale of access to and influence over government decisionmaking processes contradicts fundamental premises of our system of government.

McDonnell's assertion that the Constitution prohibits penalizing transactions in which officeholders are paid for access to or favoritism in decisionmaking processes—as long as they do not promise a particular final outcome—is breathtaking in its consequences. Acceptance of that proposition would permit elected officials to charge money for the opportunity to meet with them or members of their staffs, or for recommendations that agencies take particular actions—and to do so openly. The same "principle," if read into the Constitution, would presumably allow civil servants to demand that individuals or corporations seeking action by their agencies make pay-

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just as the *McCutcheon* dissenters justifiably labeled *Citizens United*'s comments on corruption to be dicta. *See* 134 S. Ct. at 1471 (Breyer, J., dissenting). In any event, views expressed in a plurality opinion, whether dicta or not, "d[o] not represent the views of a majority of the Court," and the Court is "not bound by [the] reasoning" of such an opinion. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987).

ments in order to meet with agency staff, to get agency staff to review materials or conduct studies or investigations, or to expedite the processing of applications or other matters before them.

Such a constitutional doctrine would be particularly beneficial to the most venal officeholders because, by prohibiting them only from entering into deals to arrive at particular outcomes in matters before them, it would maximize their opportunities to require payments from interested parties. After all, a given substantive result can be sold only once, to a party seeking it. But access—meetings, directions to staff to look into a matter, phone calls urging agencies to give the matter further study—can be sold repeatedly, to all sides of a pending matter. Adopting McDonnell's view would create endless opportunities for politicians and officeholders to require supplicants to grease their palms just to obtain access to a governmental decisionmaking process.

It is, to say the least, a mystery where the Constitution sets forth the doctrine that pay-to-play arrangements are protected as long as they stop short of pay-to-win deals—particularly in a case such as this one where the payment does not even arguably fall within the protection of the First Amendment. Certainly the answer cannot be found in *Citizens United*'s invocation of the theory of representative democracy:

> Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legit-

> imate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

558 U.S. at 359 (citation omitted). As the Court put it more briefly last Term, "[p]oliticians are expected to be *appropriately* responsive to the preferences of their supporters." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. at 1667 (emphasis added).

That democratically elected officials are expected to share the views of their *political* supporters does not, however, imply that they are expected to be similarly "responsive" to those who shower them with gifts, buy thousands of dollars worth of expensive clothing for their spouses, give them tens of thousands of dollars in undocumented "loans," and provide them free use of vacation homes (and Ferraris to get there and back) as quid pro quos for favorable treatment. Nor is it "well understood" that obtaining favoritism is a "substantial and legitimate reason" for making such payoffs. Such expectations and understandings are not characteristic of representative democracy, but of the kleptocracy that prevails in countries such as Afghanistan, where both members of the public and civil servants expect that officials will routinely ask for or be offered money to facilitate government decisionmaking.[4] In such systems, the

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[4] See United Nations Office on Drugs and Crime, *Corruption in Afghanistan: Recent Patterns and Trends* 27–28 (2012), *available at* http://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf.

practice and expectation is that bribes will be paid not only to "finalize" decisions, but also to "speed up a procedure" or "receive better treatment," and the "most common of those purposes is 'getting things done' or, in other words, to facilitate or speed up the delivery of a public service that otherwise would not be provided."[5]

Such expectations have no place in our system of government, and nothing in *Citizens United* or the *McCutcheon* plurality opinion suggests otherwise. The notion that the Constitution limits the power of the government to penalize officeholders who sell access or favorable treatment for personal gain has no basis in the text of the Constitution, in case law, or in reason. The Court should therefore reject McDonnell's arguments that the Constitution requires a narrow construction of the statutes at issue and should affirm his conviction for the reasons set forth in the brief of the United States. Indeed, regardless of its decision on the statutory and evidentiary issues posed by McDonnell's challenge to his conviction, the Court should repudiate McDonnell's argument that the Constitution protects quid pro quo arrangements in which officeholders sell favoritism and access in governmental decisionmaking processes, and should clarify that nothing in *Citizens United* or the *McCutcheon* plurality opinion should be understood to support that cynical view.

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[5] *Id.* at 15; *see generally* Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (2015).

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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