No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value. The question presented is whether "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

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INTEREST OF *AMICI CURIAE*[1]

Amici are current and former elected members of the Virginia General Assembly. The Virginia General Assembly dates from the establishment of the House of Burgesses at Jamestown in 1619 and is heralded as the oldest continuous law-making body in the world. Many of the nation's founding fathers served at one time as members of this body, including George Washington, Thomas Jefferson, James Madison, James Monroe, Patrick Henry, and Richard Henry Lee.

The Virginia General Assembly is a bicameral legislature consisting of a lower house, the House of Delegates, and an upper house, the Senate of Virginia. The House of Delegates is comprised of 100 members, and the Senate of Virginia is composed of 40 members. Each State Senator represents a district of approximately 205,000 people, and each State Delegate represents a district of approximately 90,000 people. The chief function of each member is to represent the interests of his or her constituent district and propose and enact laws that promote the general welfare of all citizens of the Commonwealth.

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1. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Government has consented to the filing of this brief and its blanket consent is on file with the Clerk of this Court.

The Virginia General Assembly is a "citizen legislature." Thus, when the body adjourns following its annual session, members return to their districts to resume their occupations and concurrently provide constituent services.

Amici have a strong interest and stake in this case. The conviction of Governor Robert McDonnell on a uniquely broad interpretation of the federal bribery statutes blurs the line between honest political interactions with constituents and public corruption. It now appears that accepting token gifts from a constituent—even in the absence of the legislator's promising or undertaking an official act—may lead to federal prosecution should the constituent request even the slightest assistance from the legislator. Likewise, members are concerned that the Government's broad construction of the federal corruption statutes criminalizes conduct not proscribed under Virginia law. This result unnecessarily encroaches on Virginia's state sovereignty and right to self-governance guaranteed by the Tenth Amendment of the United States Constitution. It is important that the Court have the benefit of *amici*'s viewpoints on these critical issues.

SUMMARY OF ARGUMENT

1. Recognizing the textual vagueness of the honest-services statute and the Hobbs Act, the Court has consistently construed the statutes narrowly to reach only core fraud, bribery, and extortion. Ignoring this precedent, the Fourth Circuit endorsed a construction that potentially criminalizes any action taken by a legislator on behalf of a donor or benefactor. Under the Fourth Circuit's definition of "official acts," a legislator who, for example,

attends a charity function where a meal is served may violate federal law if he later arranges a meeting between the charity and a state official.

2. The Fourth Circuit's unprecedented expansion of the federal bribery laws chills Virginia's citizen legislators from effectively representing their constituencies. The limitless theory of criminal liability endorsed by the Fourth Circuit puts at risk of federal criminal prosecution every Virginia public official who accepts any gift and then performs an action—no matter how unremarkable—that may benefit a donor. If this construction of the federal anti-corruption statutes is allowed to stand, Virginia's legislators will have little choice but to scale back important interactions with constituents, especially interactions with donors. Such a result is anathema to a democratic society where public officials must connect and interface with their constituents to represent their interests effectively.

3. The Government's capacious construction of the anti-corruption statutes upsets the balance of power between state and federal governments enshrined in the Tenth Amendment. The ability to establish standards defining the legal duties and obligations of its public officials is at the very core of Virginia's authority as a coequal sovereign. The Government's expansive use of the honest services statute and the Hobbs Act to usurp a core power reserved to Virginia by the Tenth Amendment is constitutionally suspect.

ARGUMENT

I. The Fourth Circuit's Boundless Definition of "Official Act" Warrants This Court's Review.

This Court has narrowed the scope of the honest services fraud statute and the Hobbs Act[2] to prohibit only the direct exchange of "official acts" for payment. *Evans v. United States*, 504 U.S. 255, 268 (1992). In other words, core bribery as historically understood. *See Skilling v. United States*, 561 U.S. 358, 409 (2010) (holding that honest-services fraud "criminalizes *only* the bribe-and-kickback *core* of the pre-*McNally* case law") (second emphasis added)); *United States v. Sun–Diamond Growers*, 526 U.S. 398, 404–05 (1999) ("Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act . . ., there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.") (emphasis in original).

To ensure that the federal anti-corruption laws criminalize only that "bribe-and-kickback core," *Skilling*, 561 U.S. at 409, this Court has rejected an all-actions-are-official interpretation of "official acts." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999). *Sun-Diamond* explained that performing political actions like hosting guests at an official function or event—"while . . . assuredly 'official acts' in some sense—are not 'official

2. *See* 18 U.S.C. § 1346 (honest services wire fraud) (prohibiting "scheme or artifice to defraud," defined to include "a scheme or artifice to deprive another of the intangible right of honest services"); 18 U.S.C. § 1951(b)(2) (Hobbs Act) (prohibiting "extortion" through "obtaining of property from another, with his consent . . . under color of official right").

acts'" within the meaning of the federal corruption statutes. 526 U.S. at 407. Imposing clear limitations on the definition of "official acts" prevents the "absurdit[y]" of criminalizing an official's constituent-service conduct that is not an exercise of actual government power, for example: "token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits"; "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"; and "providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy." *Id.* at 407.

The Fourth Circuit's construction effectively eliminates *Sun-Diamond*'s distinction between routine political acts and "official acts." The panel reasoned that *Sun-Diamond*'s "point was that job functions of a strictly ceremonial or educational nature will rarely, if ever" constitute "official acts" because "strictly ceremonial or educational" functions do not "have the purpose or effect of exerting some influence on . . . policies." Pet. App. 54a. Applying this reasoning, the Fourth Circuit held that "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue," Pet. App. 73a, are "official acts"—even without exercising, or pressuring others to exercise, any governmental power.

The Fourth Circuit's distinction, however, does nothing to inform representatives and their constituents of the line between lawful politics and criminal corruption.

Taking a *Sun-Diamond* example and applying the Fourth Circuit's reasoning proves the point. The Agriculture Secretary—who "*always* has before him or in prospect matters that affect farmers," *Sun-Diamond*, 526 U.S. at 407—who eats a free lunch before speaking with farmers about USDA policy is on the right side of the politics/corruption divide if the speech is "strictly . . . educational." Pet. App. 54a. But if after his speech the Agriculture Secretary takes questions that "have the purpose or effect of exerting some influence on [USDA] policies" *or* gives answers that have that same "purpose or effect," the speech has turned into a discussion that is an "official act" under the Fourth Circuit's construction.

The Fourth Circuit's understanding of "official acts" is boundless and can make criminal virtually any act taken by a public official to assist a benefactor or donor. It provides Virginia's representatives and constituents no clear line separating healthy political discourse and public corruption. It appears, building on the *Sun-Diamond* example, that the panel attempts to draw the distinction based entirely on the "purpose or effect" of a representative's *or* constituent's post-speech question or answer. Essentially, the Fourth Circuit embraced a standard under which a public official may be found guilty of public corruption because of the donor's subjective intent to influence government action. It is not even clear that the public official must have knowledge of the donor's intent.

The Fourth Circuit's ruling is entirely inconsistent with the historical understanding of honest services fraud and provides no clear standard to which public officials must conform their conduct. *See Evans*, 504 U.S. at 268.

Indeed, it provides no standard at all; hence, legislators are left with no reasonable degree of certainty as to whether a particular act they perform on behalf of a constituent donor will run afoul of the law. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

In *Sun-Diamond*, this Court made pellucidly clear that not all actions deemed "official" in some sense are "official acts" within the meaning of 18 U.S.C. § 201. 526 U.S. at 407; *see also United States v. Jefferson*, 674 F.3d 332, 356 (4th Cir. 2012) ("[T]he bribery statute[s] do[] not encompass every action taken in one's official capacity."). This Court, as well as other courts of appeals, have concluded that a representatives' conduct is an "official act" only when it involves the exercise of actual governmental power. *United States v. Valdes*, 437 F.3d 1276, 1279 (D.C. Cir. 2006), *aff'd on reh'g en banc*, 475 F.3d 1319 (D.C. Cir. 2007) (explaining that "official act" involves "a decision or action directly related to an adjudication, a license issuance (or withdrawal or modification), an investigation, a procurement, or a policy adoption."). Such a construction sufficiently separates legitimate political activity—a constituent's supporting a representative to get a meeting scheduled—from public corruption. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 360 (2010) ("Ingratiation and access . . . are not corruption.") This Court should review the Fourth Circuit's failure to make that critical distinction.

II. The Fourth Circuit's Approval of the Government's Expansive Theory of Liability Threatens Legitimate Political Activity.

The limitless theory of criminal liability endorsed by the Fourth Circuit puts at risk of federal criminal prosecution every Virginia public official who accepts a gift and performs any action that may impart some benefit to the donor. If this construction of the federal anti-corruption statutes endures, Virginia's legislators may be forced to scale back constituent services and other socially beneficial efforts, such as collaborating with local business leaders to encourage business development in their districts and providing support to charitable organizations.

General Assembly members frequently receive meals or other benefits from constituents, and thereafter take actions that may further the pecuniary or nonpecuniary interests of those same donors.[3] This is entirely proper in a democratic society. *See Citizens United*, 558 U.S. at 359 ("It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that

3. At the time of the federal crimes alleged in this case, although Virginia law prohibited legislators from accepting gifts in certain circumstances, violations of those laws were expressly not "subject to criminal law penalties." Va. Code § 2.2-3103(8)-(9). Neither were members of the General Assembly prohibited under state law from accepting honoraria for appearances or speeches in which they provided expertise or opinions "related to the performance of [their] official duties." Va. Code § 2.2-3103(7) (limiting prohibition on accepting honoraria to executive branch officials).

the candidate will respond by producing those political outcomes the supporter favors.").

For instance, a typical senator or delegate attends many public events every year at which a civic club or organization provides breakfast or lunch without cost. Likewise, a business supporting a charitable cause may invite a member of the General Assembly to attend a major fund-raising event and sit at a featured table as its guest. In both situations, the General Assembly member may later have to consider a legislative matter that could either help or harm the entity that provided the benefit.

For nearly 400 years in Virginia, no one ever suggested that these or similarly innocuous actions might constitute a criminal offense. But the boundless legal standard applied by the Fourth Circuit does just that. For instance, under the Fourth Circuit's construction a legislator who receives a constituent's gift of lunch or dinner could be in jeopardy of federal criminal prosecution for assisting the constituent by setting up a meeting with a government employee, helping the constituent obtain unemployment compensation, helping the person resolve problems with the DMV, or calling VDOT after a snowstorm to inform it that the constituent's street is not plowed.

The Fourth Circuit's unprecedented broadening of the federal bribery laws is particularly concerning to Virginia's citizen legislators. Most hold full-time jobs,[4]

4. This arrangement is viewed as eminently desirable. "[T]hat the members [of the legislature] may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station [and] return into that body from which they were originally taken." Va. Const. Art. I, § 5.

and during the course of their jobs they may receive legitimate benefits, such as meals and token gifts. A delegate who is also a contractor who builds roads, for example, may attend an annual picnic hosted by one of his company's largest subcontractors. Weeks after the event, the subcontractor's CEO may reach out to the delegate about a completely unrelated legislative matter. Again, until Governor McDonnell's trial and conviction, no Virginian could have foreseen that federal authorities might assign criminal liability in such a case.

Indeed, in some cases the temporal link between a gift or benefit to a state legislator and a potential official act may be immediate and obvious, but no one—at least until *United States v. McDonnell*—would have thought it would lead to a federal felony charge. A bankers' association, for example, might invite a senator to attend a luncheon where it presents detailed lists of bills that the association favors and opposes. Or a major charity might host a delegate at a breakfast where it pointedly describes the charity's top legislative priorities in the upcoming session. At both events, the legislator receives a benefit from a constituent at precisely the same time that his or her legislative assistance is sought. Under the traditional understanding of honest services fraud, at neither event has a crime been committed. Yet, as defined by the Fourth Circuit in *United States v. McDonnell*, federal law raises the specter of criminal prosecution in both instances.

As noted by one prominent legal scholar,

> Part of designing a political system is separating gifts from bribes—that is, defining what gifts ought to be categorized as corrupting. As

> Daniel Hays Lowenstein argued thirty years ago, a concept of corruption or bribery 'means identifying as immoral or criminal a subset of transactions and relationships within a set that, generally speaking, is fundamentally beneficial to mankind, both functionally and intrinsically.'

Z. Teachout, *Corruption in America* 18 (2014) (quoting Daniel Hays Lowenstein, *For God, for Country, or for Me*, 74 Cal. L. Rev. 1479, 1481 (1986)). The theory espoused in this case makes it impossible for legislators to distinguish between gift and bribe. In fact, under the Fourth Circuit's boundless standard, what is "immoral or criminal" and what is "fundamentally beneficial to mankind" is a question left to the discretion of federal prosecutors.

This is a troubling result given the extraordinary power enjoyed by federal prosecutors, and the concomitant dangers of selective and arbitrary prosecutions. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 197 (1985) ("Prosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law."). As Justice Robert Jackson warned decades ago:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of

> almost anyone. In such a case . . . it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. of Crim. L. & Criminology 3, 5 (1941). This Court should take this opportunity to flatly reject the Fourth Circuit's expansive reading of the federal bribery laws and restore clear lines between lawful constituent interactions and schemes involving bribes or kickbacks.

III. The Fourth Circuit's Ruling Infringes on Virginia's Core Right of Self-Governance.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Federalism is a fundamental structural means of securing core democratic values that guarantees "our fundamental liberties" and serves as a check on abuses of centralized federal power. *Id.* at 458. Hence, the powers afforded the federal government are limited, while "[t]he powers reserved to the several States . . . extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist* No. 45 (James Madison). The principles of federalism described by

Madison form the foundation of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

As part of its powers, a state is entitled to establish rules governing the conduct and qualifications of its elected officials.

> Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.

Gregory, 501 U.S. at 457.

Federal interference with state governance upsets the delicate balance between federal and state power. Thus, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory*, 501 U.S. at 460; *accord Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity."). This Court explained, "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do

so unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Put differently, but equivalently, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States . . . ." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, (1989); *see also United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976) ("[T]he primary responsibility for ferreting out [local] political corruption must rest, until Congress [properly] directs otherwise, with the State, the political unit most directly involved.").

Congress has not through the language of the federal anti-corruption statutes made "clear and manifest" its intention to preempt Virginia's historic role in setting standards to govern the conduct of its most important public officials. This is in part why this Court has rejected overly broad constructions of the federal bribery laws that would improperly "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987).

While the anti-corruption statutes, as construed by this Court, make manifest that they reach core bribery and kick-back schemes, they do not express a Congressional intention of criminalizing the range of acts falling within the scope of the expansive theory unveiled by the Government, and approved by the Fourth Circuit, in *United States v. McDonnell*. That expansion warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted.

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November 16, 2015

APPENDIX

APPENDIX A — LIST OF MEMBERS AND FORMER MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY

Senate

Richard H. Black

Charles W. Carrico

A. Benton Chafin, Jr.

Charles J. Colgan

John A. Cosgrove, Jr.

Thomas A. Garrett, Jr.

Emmett W. Hanger

David W. Marsden

Stephen H. "Steve" Martin

Stephen D. Newman

Thomas K. Norment

Bryce E. Reeves

Frank M. Ruff, Jr.

William M. Stanley, Jr.

Appendix A

House of Delegates cont.

Kenneth W. Stolle (1992-2010)

Walter A. Stosch

Frank W. Wagner

John C. Watkins

House of Delegates

Leslie R. Adams

David B. Albo

Richard L. "Rich" Anderson

Ralph L. "Bill" Axselle, Jr. (1974-1990)

Richard P. Bell

Jeffrey L. Campbell

Mark L. Cole

John A. Cox (2010-2014)

M. Kirkland Cox

Glenn R. Davis

Appendix A

House of Delegates cont.

William R. DeSteph, Jr.

Thelma D. Drake (1996-2005)

C. Matthew Farris

T. Scott Garrett

Thomas A. "Tag" Greason

Christopher T. Head

M. Keith Hodges

Speaker William J. Howell

Riley E. Ingram

Johnny S. Joannou

William R. "Bill" Janis (2002-2012)

Terry G. Kilgore

Barry D. Knight

James A. "Jay" Leftwich, Jr.

L. Scott Lingamfelter

Appendix A

House of Delegates cont.

Daniel W. Marshall, III

J. Randall Minchew

James W. ("Will") Morefield

Richard L. "Rick" Morris

David A. Nutter (2002-2012)

John M. O'Bannon

Charles D. Poindexter

David I. Ramadan

Thomas D. Rust

Christopher B. "Chris" Saxman (2002-2010)

Edward T. Scott

Christopher P. Stolle

Scott A. Surovell (Senator-Elect for the 36th District)

Terrie L. Suit (2000-2008)

Scott W. Taylor

Appendix A

House of Delegates cont.

Ronald A. Villanueva

Michael B. "Mike" Watson (2012-2014)

Michael J. Webert

Thomas C. "Tommy" Wright, Jr.

Joseph R. Yost