No. 15-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. 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.

II. In *Skilling v. United States*, this Court held that juror screening and *voir dire* are the primary means of guarding a defendant's right to an impartial jury against the taint of pretrial publicity. 561 U.S. 358, 388-89 (2010). The question presented is whether a trial court must ask potential jurors who admit exposure to pretrial publicity whether they have formed opinions about the defendant's guilt based on that exposure and allow or conduct sufficient questioning to uncover bias, or whether courts may instead rely on those jurors' collective expression that they can be fair.

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The Fourth Circuit's opinion (App.1a) is at 792 F.3d 478. The district court's opinion denying a new trial (App.80a) is at 64 F. Supp. 3d 783, while its opinion denying acquittal is at 2014 WL 6772486.

JURISDICTION

The Fourth Circuit entered judgment on July 10, 2015, and denied rehearing on August 11, 2015. App.136a. 28 U.S.C. § 1254(1) confers jurisdiction.

PROVISIONS INVOLVED

Relevant statutory provisions are at App.137a.

STATEMENT

Robert F. McDonnell is a former Virginia Governor, retired U.S. Army officer, and lifelong public servant who was convicted on federal corruption charges based on the theory that he accepted otherwise-lawful gifts and loans in exchange for taking five supposedly "official acts." Yet those five acts—as alleged in the indictment, argued to the jury, and relied on by the courts below—were limited to routine political courtesies: arranging meetings, asking questions, and attending events. There is no dispute that Gov. McDonnell never exercised any governmental power on behalf of his benefactor, promised to do so, or pressured others to do so. Indeed, the only staffer to meet with the alleged bribe-payor during the supposed conspiracy testified that Gov. McDonnell never "interfere[d]" with her office's "decision-making process." App.203a. The courts below nonetheless reasoned that arranging a meeting to discuss a policy issue, or inquiring about it, is itself "official" action "on" that issue—even if the

official never directs any substantive decision. Moreover, the jury was never instructed that, to convict, it needed to find that Gov. McDonnell exercised (or pressured others to exercise) any governmental power. But the panel upheld the instructions as "adequat[e]" because they quoted a statute, while adding a host of improper elaborations that the Government aggressively exploited.

This is the first time in our history that a public official has been convicted of corruption despite never agreeing to put a thumb on the scales of any government decision. Officials routinely arrange meetings for donors, take their calls, and politely listen to their ideas. By affirming the convictions and endorsing the instructions below, the Fourth Circuit construed "official action" so broadly that it made these commonplace actions federal felonies whenever a jury infers a link to the donor's contributions. That dramatic expansion of three corruption statutes conflicts with this Court's decisions, decisions in three other Circuits, and common sense.

Moreover, although Gov. McDonnell's prosecution was preceded by a barrage of inflammatory and misleading media coverage that nearly all potential jurors admitted seeing, the district court repeatedly refused to ask them the most basic question: had they already formed opinions about Gov. McDonnell's guilt as a result? Instead, the court collectively asked 142 potential jurors to stand if they had heard about the case and sit if they felt they could "be fair." Almost all stood; unsurprisingly, all sat. The panel upheld that perfunctory process—of "merely asking for a show of hands" (App.31a)—in conflict with authority from this Court and other Circuits.

1. The Government's case centered around Gov. McDonnell's interactions with Jonnie R. Williams, Sr., the CEO of a Virginia-based public company, Star Scientific ("Star"). Neither Williams nor Star received "a dime of state money" or any other state benefit. App.175a. Nor did Gov. McDonnell pressure anyone to give Williams state benefits, or promise Williams he would help him obtain such benefits. Rather, as the district court found, the prosecution hinged on the following "five specific actions taken by McDonnell" and their temporal proximity to otherwise-lawful loans and gifts from Williams (including golf at his club), App.87a:

(1) Williams and some people he recommended (along with hundreds of others) were invited to a cocktail reception for "Healthcare Leaders." It was undisputed that no official business was discussed at that party. App.186a-188a, 219a.

(2) Gov. McDonnell emailed his chief counsel, Jason Eige, asking Eige to "see me" about Star research studies. Nobody could remember whether Eige actually "saw" him, but it was undisputed that Eige never did anything to try to obtain studies, and Eige testified that Gov. McDonnell "never followed back up with me or never pushed back or never directed me to actually go forward and try to make something happen with the universities." App.210a-211a.

(3) Gov. McDonnell suggested two subordinates meet with Star, noting that its product might be good for state employees. It was undisputed that they never took up that suggestion. App.225a-226a, 230a-231a, 234a-236a.

(4) Gov. McDonnell asked a subordinate to send a staffer to meet with Williams, after which the staffer sent Williams an undisputed "blow-off email." App.201a (characterizing this email as "'No' with a smile."), 198a-199a.

(5) Gov. McDonnell appeared at a lunch at the Executive Mansion (*i.e.*, his home), paid for by his PAC, at which Williams presented checks from Star to state university researchers, as planning grants to prepare research proposals to study a Star product. At the event, Gov. McDonnell asked the researchers whether the studies would be good for Virginia. It was undisputed that no proposals were ever submitted and that his Administration never contacted the researchers or universities. App.178a-179a, 183a-185a, 215a-218a.

Gov. McDonnell repeatedly argued that these acts did not qualify as "official" ones because he did not take, or pressure anyone to take, any action on any governmental matter. He also requested jury instructions reflecting this principle, including that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts'"; that "you must decide … whether that conduct was intended to or did in fact influence a specific official decision the government actually makes"; and that "mere ingratiation and access are not corruption." App.146a-147a; App.251a-257a.

The district court refused these requests to limit "official action." Instead, it quoted the definition of "official act" from the separate bribery law governing

federal officials—"decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity," 18 U.S.C. § 201(a)(3)—and added:

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

App.275a.

The Government capitalized on this expansive language in its closing. It ridiculed the notion that taking official action requires pressuring others for governmental action: "They keep on talking about no one was pressured. When you get these jury instructions, ladies and gentlemen, you look for the

word pressure. It doesn't appear anywhere." App.268a. It continued: "[Counsel] talked about defining quo. … But what he failed to mention is that official action … includes those actions that have been clearly established by settled practice as part of a public official's position." App.265a. Because anything could be part of "a series of steps to exercise influence," as the jury was instructed, App.275a, prosecutors argued that if Gov. McDonnell posed for "photos" or "ma[de] comments at … ribbon cuttings" in exchange for money, "it's a crime," App.264a. "Whatever it was, it's all official action." App.263a.

The jury convicted Gov. McDonnell on all 11 corruption counts. Because the jury was not instructed to identify, or reach unanimity on, which acts it found to be "official," the jury could have convicted based on any one of the five acts. App.257a-258a (proposing unanimity instruction). As the Government told the jury, "any one of those [acts] is sufficient" to convict. App.268a.

2. Gov. McDonnell's trial followed an onslaught of prejudicial pretrial publicity. Despite the requirement of grand jury secrecy, publicity began shortly after prosecutors convened a grand jury in spring 2013. Improper disclosures fed a 16-month pretrial barrage of negative articles, TV and radio spots, and social-media posts. After the indictment, wall-to-wall coverage ensued, condemning Gov. McDonnell in harsh and inaccurate terms. *See* D.Ct. Dkt. 110 at 2-12; D.Ct. Dkt. 518-1 (compilation).

In light of this overwhelming negative pretrial publicity, Gov. McDonnell and the Government jointly requested individual *voir dire* of jurors who

had heard about the case. App.157a-159a. The district court refused. *Id.* Instead, it limited oral *voir dire* on pretrial publicity to two questions. After acknowledging "a lot of media interest," the court asked the 142 prospective jurors to stand up "if you have read, heard or seen something in the media." App.160a. Almost all stood. The court then asked whether, "[b]ased on what you have heard or read or seen relating to this case, if you are, in your mind, able to put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides, then I want you to sit down." *Id.* Everyone sat. *Id.* The court announced it was "satisfied with ... the responses," and—over repeated objections—declined to inquire further. App.160a-161a.

The district court did individually *voir dire* a few potential jurors whose answers to other questions on a jury questionnaire gave rise to concern. But critically, it refused to include any question—despite the parties' joint request, App.150a—asking whether prospective jurors had formed opinions about guilt. Indeed, the court repeatedly rejected defense requests that this question be posed to the jury pool. App.150a, 151a-153a, 159a. The court allowed only a question asking whether potential jurors had *expressed* an opinion about the case to others. App.29a. Gov. McDonnell thus still does not know whether any of the publicity-exposed jurors who voted to convict had pre-formed opinions about guilt.

3. The district court denied motions for acquittal or a new trial. It agreed that the verdict's validity "hinges on the interpretation of an 'official act.'" App.84a. Yet, to distinguish "official" acts (criminal if part of a *quid pro quo*) from acts that are not "official"

(not criminal *even if* part of a *quid pro quo*), the court circularly ruled that it "look[s] to whether a quid pro quo agreement existed." *Id.* Recognizing that there was no direct evidence of any *quid pro quo* agreement, the court ruled that the jury could *infer* one based on "the timing of Williams' gifts" vis-a-vis Gov. McDonnell's "five specific actions"—*i.e.*, attending events and arranging meetings—things Gov. McDonnell "customarily" did. App.87a-89a.

The district court sentenced Gov. McDonnell to two years in prison, App.123a, and then denied him bond pending appeal, App.130a-134a.

4. Recognizing that Gov. McDonnell's appeal presented "substantial" questions, the Fourth Circuit granted him release pending appeal. App.118a.

On July 10, 2015, the panel (Judges Motz, King, and Thacker) rejected Gov. McDonnell's arguments. The court held that Gov. McDonnell's acts—which it described as "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"—were "official acts" allowing conviction. App.73a. By affirming the jury's general verdict, the panel necessarily held that all five of Gov. McDonnell's acts were "official." In its view, each was action "on" the question whether state universities or agencies should conduct or fund studies of Star's product, because that request by Williams was a topic of the meetings and questions. App.73a-74a. It did not matter that Gov. McDonnell never directed—or even requested—that studies be done (which is, of course, why no studies happened). It was sufficient that he took steps to gather

information about the issue through meetings, inquiries to aides, and questions to researchers. *Id.* On the Fourth Circuit's unprecedented theory, those prefatory, information-gathering acts themselves "exploited" state power "to influence the work of state university researchers." App.73a.

Moreover, the jury was never told it had to find any effort by Gov. McDonnell to "exercise the actual regulatory power of the state" or "influence" governmental decisions, despite the defense seeking precisely such instructions. App.146a-147a; App.251a-257a. Yet the panel held that the instructions "adequately delineated" the meaning of "official act" because they quoted the statutory definition from the bribery statute governing federal officials. App.49a. The panel further blessed all of the district court's expansions of that definition—including to all acts an official "customarily performs," those "in furtherance of longer-term goals," and anything that is "one in a series of steps to … achieve an end." App.62a. And the panel also affirmed the court's refusal to place any limits on "official action," including proposed instructions drawn directly from decisions of this Court and other Circuits. App.47a-65a.

As to pretrial publicity, the panel upheld, as within the district court's discretion, its refusal to ask whether publicity-exposed jurors had formed opinions about guilt, deeming the brief stand-up-sit-down routine "adequate." App.32a.

5. Gov. McDonnell sought rehearing en banc. A poll was requested, but seven of the Circuit's fifteen active judges recused, meaning that the votes of all

five remaining judges not on the original panel were required to grant the petition. 4th Cir. R. 35(b). The petition was denied. App.136a. The original panel then refused to stay its mandate pending a certiorari petition. App.116a.

6. Petitioner sought relief from this Court, filing an application to stay the mandate pending this certiorari petition. The Government opposed, noting that such relief would be warranted only if this Court were "likely to grant a writ of certiorari and reverse." Stay Opp'n 17, *McDonnell v. United States* (No. 15A218). The Chief Justice referred Gov. McDonnell's application to the Court, which granted it without noted dissent. Order, *McDonnell v. United States*, Aug. 31, 2015 (No. 15A218).

REASONS FOR GRANTING THE PETITION

This petition presents two questions meriting review. *First*, the courts below adopted an unprecedented and erroneous construction of "official action" under the federal corruption laws, expanding those laws to reach any official who so much as takes a phone call from a donor, and any donor who places such a call. That holding conflicts with decisions of this Court and three other Courts of Appeals, while threatening to criminalize politics in America. *Second*, the Fourth Circuit approved a deficient *voir dire* process that this Court's decisions have foreclosed for decades and seven other Circuits have rejected. That holding presents an issue of vital importance in the modern era of pervasive, sensationalist media coverage—necessitating this Court's clarification of the essential elements of *voir dire* in cases involving prejudicial pretrial publicity.

I. THE MEANING OF "OFFICIAL ACTION" MERITS THIS COURT'S REVIEW.

The federal bribery statute, honest-services fraud statute, and Hobbs Act prohibit exchanging "official action" for money, campaign contributions, or other things of value.[1] This case turns on the scope of that critical phrase, as the district court and Fourth Circuit recognized. App.47a, 69a, 84a.

Specifically, does an official take "official action" by "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," App.73a—even without exercising or pressuring others to exercise any governmental power? The decision below is the first ever to conclude that these ubiquitous actions are "official" ones that can turn a devoted public servant into a felon. The Fourth Circuit held that even asking an aide to hear out a constituent's request—the most basic of political duties—is *itself* an "official act" on that request. That means a jury could infer a criminal *quid pro quo* whenever an official arranges a staff meeting for a donor, something officials reflexively do all the time. That unbounded construction—which was imparted to the jury, and without which there was insufficient evidence to convict—flies in the face of decisions of this Court and the three other Circuits to consider it.

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[1] The phrase "official act" appears in the federal bribery statute (18 U.S.C. § 201), which applies only to federal officials. As narrowed by *Skilling*, the honest-services statute (18 U.S.C. § 1346) proscribes "bribes" and "draws content" from the federal bribery statute. 561 U.S. 358, 412 (2010). And under *Evans v. United States*, a bribe for "official acts" also violates the Hobbs Act. *See* 504 U.S. 255, 260, 267-68 & n.18 (1992).

And by making a potential felon of every politician who provides "access" to donors, it vests prosecutors with a frightening degree of control over the political process. This wholesale reinvention of federal corruption law manifestly merits review.

A. The Opinion Below Conflicts With Multiple Decisions From This Court.

On both its specific construction of "official act" (divorced from any exercise of governmental power) and its general approach to the federal corruption statutes (adopting a broad and vague interpretation), the opinion below contradicts this Court's decisions.

1. In discussing the meaning of "official action" in *United States v. Sun-Diamond Growers of California*, this Court emphasized the need to construe that phrase narrowly lest it criminalize routine conduct. 526 U.S. 398, 408 (1999). Unanimously rejecting the Government's construction, the Court explained it would lead to "absurdities." *Id.* "It would criminalize … the replica jerseys given [to the President] 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 … on the occasion of the latter's visit," and "providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to [] farmers concerning various matters of USDA policy." *Id.* at 406-07. Even if those gifts were in exchange "for" those actions, they are not crimes: Such acts—"while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute." *Id.* at 407. That is because none exercise actual governmental power.

Nor do the acts the Fourth Circuit held criminal—asking questions, arranging meetings, and making introductions. If asking a question about the prospect of research studies counts as an action "on" the matter whether to conduct the studies, then the Agriculture Secretary's speech to farmers about "matters of USDA policy" is likewise an action "on" those matters, making his receipt of lunch in exchange for the speech a felony. *But see Sun-Diamond*, 526 U.S. at 406-07. Nor was the jury ever instructed on *Sun-Diamond*'s critical lesson, *i.e.*, that some acts are official "in some sense," yet not "within the meaning of the statute." *Id.* at 407.

The panel sought to distinguish what it called "dicta" in *Sun-Diamond* on the ground that the acts *Sun-Diamond* described are "strictly ceremonial or educational" and thus "rarely" cross the criminal line. App.54a-55a. But that dichotomy is nowhere in this Court's opinion. It is also wrong. An Agriculture Secretary "*always* has before him or in prospect matters that affect farmers." *Sun-Diamond*, 526 U.S. at 407. Thus, on the panel's reasoning, if instead of speaking to farmers, the Secretary participated in a "roundtable" to listen to their policy views—a common practice, *see, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 130 (2003) (describing donor programs that "promised 'special access to high-ranking … elected officials")—then his acceptance of lunch *would* be criminal. It would be in conjunction with action "on" the policies discussed because, on the panel's view, that discussion would "have the purpose or effect of exerting some influence on those policies." App.54a. Or, if a mayor visited a school and asked students questions about their desire for increased school

funding, his acceptance of a cap *would* be a crime—given to him for his action "on" school funding. Those consequences of the Fourth Circuit's holding are no less "absur[d]" than the acts *Sun-Diamond* listed.

2. Not only has this Court held that actions like a visit, speech, or meeting are not, standing alone, "official acts," it has even held that paying for such "access"—through campaign contributions or independent expenditures—is constitutionally protected. While the government can forbid true corruption—*i.e.*, the "direct exchange of an official act for money"—it "may not target … the political access such [financial] support may afford." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Rather, only payments "to control the exercise of an officeholder's official duties" warrant intervention. *Id*. at 1450. That is because "[i]ngratiation and access … are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

In other words, paying for "access"—the ability to a get a call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system. *McCutcheon*, 134 S. Ct. at 1450-51. Yet Gov. McDonnell was convicted for, at worst, providing just that. Campaign donations, no less than gifts, can serve as *quid* in a forbidden exchange. *See Evans*, 504 U.S. 255. The opinion below thus conjures a federal felony out of what this Court has held to be a fundamental constitutional right.

The panel responded that *Citizens United* is "a campaign-finance case," which "involved neither the honest-services statute nor the Hobbs Act." App.64a. True. But the First Amendment principles it invoked

are no less applicable to penal statutes. Moreover, *Citizens United* was decided the same Term as *Skilling v. United States*, in which this Court saved the honest-services statute from unconstitutionality by limiting it to its "bribe-and-kickback *core*." 561 U.S. at 409 (emphasis added). (Three Justices still would have invalidated the law. *Id.* at 415 (Scalia, Thomas, Kennedy, JJ. concurring in judgment).) By now interpreting that same statute to criminalize the very purchasing of "access" that *Citizens United* held cannot be constitutionally proscribed, the decision below makes a mockery of *Skilling*'s limitation to "core" bribery. If Gov. McDonnell can be imprisoned for giving routine access to a gift-giver, any official could equally be imprisoned for agreeing to answer a donor's phone call about a policy issue.

3. The panel's expansive definition of "official act" is also contrary to this Court's teachings about *how* to construe vague corruption laws. Numerous canons of construction require interpreting these statutes narrowly—including the rule of lenity, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); the federalism canon, *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); and constitutional avoidance, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As *Sun-Diamond* summarized: "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." 526 U.S. at 412. Here, the panel's interpretation is not a "meat axe"; it is a chainsaw. It contravenes all of these principles.

First, the statutes at issue do not *unambiguously* encompass acts that neither take nor even urge

governmental action. The Hobbs Act and honest-services statute do not use the term "official act" at all; the Fourth Circuit borrowed that term from the statute governing federal officials, 18 U.S.C. § 201(b), and then gave it the broadest construction ever articulated. Further, that statutory definition requires that officials take action "on" a "question" or "matter" "whose answer or disposition is determined by the government." *Valdes v. United States*, 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc). It is not enough to take action *pertaining* to a *general* matter; the official must act "*on*" a *specific governmental* matter—*i.e.*, concrete action controlling or urging a particular disposition. Arranging a meeting or asking a question—prefatory, informational steps—do not act "on" governmental disposition of anything.

Second, the panel's construction "'overrides' the 'usual constitutional balance of federal and state powers.'" *Bond*, 134 S. Ct. at 2089. Regulating the ethical conduct of state officials is traditionally a function of state law. Here, Virginia law expressly permitted Virginia officials to accept unlimited gifts and loans; hence the jury was instructed that there was "no suggestion" Gov. McDonnell violated Virginia law. App.276a; *see* Va. Code § 2.2-3103(8)-(9) (accepting gifts, even "on a basis so frequent as to raise an appearance of the use of … public office for private gain," or where "timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality," is not criminal).[2] The Government may dislike Virginia's ethics laws,

[2] And indeed, prior Virginia officials accepted similar gifts and benefits without consequence. *See, e.g.*, $*18,000 Vacation Puts Kaine Atop Gift Recipients List*, WASH. TIMES, Feb. 4, 2006.

but it cannot displace them absent clear congressional intent.

Third, the panel's interpretation of these statutes raises grave doubts about their constitutionality. Most significantly, it makes them both extremely vague and extremely broad—vesting prosecutors with unbridled discretion to choose targets from among virtually every elected official. That risk of "arbitrary and discriminatory prosecutions" "raise[s] the due process concerns underlying the vagueness doctrine." *Skilling*, 561 U.S. at 408, 412. Further, the panel's holding criminalizes political fundraising—wherein money is expressly exchanged for access—that the First Amendment protects. *Supra*, II.A.2. Finally, the panel's theory raises Tenth Amendment concerns, akin to federal limits on campaign contributions to state officials. *Cf. United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). Indeed, if the panel's construction were correct, these statutes would be unconstitutional.

In short, the panel's decision construing the federal corruption statutes "in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials" warrants this Court's review. *McNally v. United States*, 483 U.S. 350, 360 (1987).

B. The Opinion Below Conflicts With Three Other Circuits.

Three Circuits have squarely rejected the novel theory embraced below.

1. In an important early honest-services fraud and Hobbs Act case, the Eighth Circuit rejected an

expansive definition of "official act" that would have encompassed the acts here. *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978). In *Rabbitt*, which has been cited by more than 100 courts, Missouri's House Speaker "offered, for a fee … , to introduce [an architectural] firm" to high-ranking state officials who "might be able to secure [state] architectural contracts for it." *Id.* at 1020. That was not criminal: "[W]hile Rabbitt's influence obviously helped these architects obtain state jobs, no testimony established that any state contracting officer awarded any contract … because of Rabbitt's influence." *Id.* at 1028. As the court later explained, it reversed the conviction because Mr. Rabbitt "promised only to introduce the firm to influential persons" and "did not promise to use his official position to influence those persons." *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993).

Rabbitt confirms the critical distinction between pressuring others to make a governmental decision versus affording access without trying to control the ultimate outcome. The Eighth Circuit held it was not criminal for Mr. Rabbitt to introduce benefactors to officials "and thereby gain them a friendly ear," even though their goal was "obtain[ing] state jobs." 583 F.2d at 1028. Mr. Rabbitt may have taken official action in a colloquial sense—but not in the statutory sense, as he did not exercise government power or pressure others to. To take official action, he needed to take the further step of "us[ing] his official position to influence those persons." *Loftus*, 992 F.2d at 796.

2. The First Circuit has drawn the same line. *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008), considered a state senator who took payments

from a hospital in exchange for three types of conduct. Judge Boudin's opinion found that the participants could be convicted for paying the senator to "try to 'kill' certain bills," to take action "with respect to pending legislative matters," and to "deliver[] a barely veiled warning of potential legislative trouble" for insurers if they did not favor the hospital, thereby "deliberately" "exploit[ing]" the senator's "leverage" of official powers. *Id.* at 292, 296-97. In contrast, paying the senator to lobby mayors to act in a way that benefited the hospital was not criminal. *Id.* at 294. Unlike the other acts, that conduct did not abuse the senator's "*official power*." *Id.* at 297 (emphasis added). There was "no indication that [he] invoked any purported oversight authority or threatened to use official powers in support of his advocacy." *Id.* at 296.

Urciuoli rested on the critical difference between acts that use or invoke "official power[s]," *id.* at 295, 296, 297, versus merely "trad[ing]" on the "reputation, network," or prestige that "comes with political office," *id.* at 296. The latter assures "access and attention," but does not control any government decision. *Id.* It is thus not an "official act." Because the jury in *Urciuoli* was not instructed on this crucial distinction, the court ordered a new trial. *Id.* at 295.

3. Finally, the D.C. Circuit agrees that "official action" is limited to acts that influence actual government decisions. In *Valdes*, the *en banc* court concluded that a policeman who used an official database to perform searches for license plates and outstanding warrants had not taken official action. 475 F.3d at 1321-22. While those searches fell within his official duties, he did not exercise any

"inappropriate influence on decisions that the government actually makes." *Id.* at 1325.

As the court later explained, Valdes' "purely informational inquiry" is distinct from seeking "to influence" an actual government decision, such as by "urg[ing]" another official "to expedite" a visa application. *United States v. Ring*, 706 F.3d 460, 469-70 (D.C. Cir. 2013). Thus, in stark contrast to this case, D.C. federal courts instruct juries that "[t]he fact that gifts or hospitality might make a public official willing to take a lobbyist's phone call or might provide the lobbyist greater access to the official's appointment schedule is not enough by itself" to warrant conviction. Trial Tr. Day 12, *United States v. Ring*, No. CR 08-274 (D.D.C. Nov. 3, 2010), Dkt. 270, at 37. That conflict—between the Circuit housing our Nation's capital and the one surrounding it—is alone untenable enough to warrant review.

4. While the First, Eighth, and D.C. Circuits have limited "official action" to exercising, urging the exercise of, or threatening to exercise governmental power, the Fourth Circuit upheld Gov. McDonnell's convictions even though he did none of those things and even though the jury was not required to find *any* connection between his acts and any exercise of state power. The acts the panel cited to affirm the convictions—(i) asking a cabinet secretary to send a deputy to a "briefing" about Star; (ii) asking researchers whether studying Star's product would be "good"; (iii) asking his counsel to "see" him about the matter; and (iv) asking two state officials "if they would be willing to meet" with Star, App.71a-74a—would not suffice for liability in the other Circuits.

Rabbitt held that arranging meetings, even those at which state business would be discussed, was not "official" absent further efforts "to influence" policy outcomes. *Loftus*, 992 F.2d at 796. Yet Gov. McDonnell was convicted for just that—arranging or proposing meetings at which Williams could discuss matters of interest to him with other officials. While Gov. McDonnell facilitated introductions, he never "use[d] his official position to influence" anyone. *Id.* To the contrary, the staffer who attended the only meeting that ensued testified that Gov. McDonnell wanted "nothing more" than her attendance and honest judgment on any policy issues. App.194a, 200a-203a.

The decision below is also in direct conflict with *Urciuoli*. None of Gov. McDonnell's actions involved an exercise—or "threat[]" to exercise—"official power[]" on behalf of Star; there is no evidence that Gov. McDonnell ever "misus[ed] his official power," as opposed to granting mere "access and attention." *Urciuoli*, 513 F.3d at 296-97. And the jury was not instructed it had to find misuse of official power; to the contrary, it was told, akin to the jury in *Urciuoli*, to convict if Gov. McDonnell took any "acts that a public official customarily performs." App.275a.

Nor could Gov. McDonnell have been convicted in the D.C. Circuit. Attending briefings, asking questions, and talking to aides are all "purely informational." *Ring*, 706 F.3d at 470. They exert no "inappropriate influence on decisions that the government actually makes." *Valdes*, 475 F.3d at 1325. Gov. McDonnell never took the next step—the only prohibited step, under D.C. Circuit law—of urging a governmental decision in Williams' favor.

And again, over objection, the jury was not instructed—unlike the *Ring* jury, *see supra* at 25—that taking a "phone call" or granting "greater access" are not, standing alone, "official acts."

The panel made no attempt to distinguish *Rabbitt, Loftus*, *Valdes*, or *Ring*, thus implicitly acknowledging its disagreement with those courts. The panel did cite *Urciuoli* in a footnote, purporting to distinguish its jury instructions. App.53a. The instructions were indeed different, but the panel overlooked *Urciuoli*'s broader holding—*i.e.*, that an "official act" is one that exercises or threatens to exercise "official power," thus "misusing" sovereign authority. 513 F.3d at 297. That misuse of official power is absent here. And just as in *Urciuoli*, the requirement that an "official act" invoke "official power" was never imparted to the jury.

5. The panel appeared at times to accept Gov. McDonnell's legal rule yet find it satisfied, broadly asserting that he "use[d] the power of his office to influence governmental decisions." App.71a. But the panel's explication of that "influence" exposes its conflict with the other Circuits.

In explaining how Gov. McDonnell supposedly "use[d] the power of his office to influence governmental decisions," the panel's first illustration was that he "asked his Secretary of Health … to send a deputy to a 'short briefing'" about potential research trials. App.71a. But there was no evidence (and the panel cited none) that Gov. McDonnell told the Secretary or deputy to institute trials, to pressure anyone to do so, or to do anything besides attend a briefing. The deputy's testimony confirmed as much:

> Q[:] What did you understand the desires of the Governor and the First Lady to be specific to this issue?
>
> A[:] At the time of the note, nothing more than attending the meeting.

App.193a-194a. Following the meeting, the deputy sent a "blow-off e-mail" to Williams:

> Q[:]... When you wrote this e-mail, what did you understand your job to be going forward ... ?
>
> A[:] Nothing at the time of the written e-mail.
>
> …
>
> Q[:] So after this meeting ... you still had no idea what [Mrs. McDonnell's] desires, if any, were with respect to Mr. Williams and Star. Is that fair?
>
> A[:] Shy of attending the meeting, no.

App.198a, 201a, 206a-207a. As the deputy testified, Gov. McDonnell never "interfere[d] with [her office's] decision-making process." App.203a. Yet under the reasoning below, merely asking the deputy to attend that meeting—without placing a thumb on the ultimate decision—consummated a felony.

The panel's next examples were Gov. McDonnell asking researchers whether clinical studies "could 'be something good'" for Virginia and asking an aide to "see" him about studies. App.72a. But again, the panel cited no evidence that Gov. McDonnell pressured anyone to make governmental decisions one way or the other. No such evidence exists; and no studies happened. *Accord* App.74a (last example is

asking two officials "if they would be willing to meet with Star," but not directing them further).

In short, the panel held that arranging a meeting or inquiring about an issue itself "exploit[s]" official power "to influence" the ultimate policy decision. App.73a. But that conflates procedural access with substantive influence, eradicating the foundational line drawn by *Rabbitt*, *Valdes*, and *Urciuoli*. Under the Fourth Circuit's flawed rationale—that a meeting is a "step" toward a donor's objective, so arranging a meeting illegally promotes that objective—Mr. Rabbitt *did* influence the official decisions whether to award state contracts to the bribe-payors. After all, his efforts to "gain [his benefactors] a friendly ear" was the first step toward their "obtain[ing] state jobs." *Rabbitt*, 583 F.2d at 1028. *But see Loftus*, 992 F.2d at 796. Likewise, on the Fourth Circuit's logic, a "purely informational" inquiry about a matter is an action "on" the matter. *But see Ring*, 706 F.3d at 470. Granting "access" is, on that view, legally equivalent to exercising "official powers." *But see Urciuoli*, 513 F.3d at 296 (trading on "access" not criminal).

Procedural access may be a first step toward a governmental decision. But that does not make the access itself (the call, email, or meeting) an "official act." Access merely allows government to work; it does not corrupt it, and cannot be "described as a deprivation of honest services, actually or potentially harmful to the citizens." *Urciuoli*, 513 F.3d at 295. The corruption laws are not implicated when the officials responsible for making actual government decisions exercise unfettered judgment. And those officials undisputedly *did* exercise such unfettered judgment here, App.201a, 210a-211a, 237a—as their

failure to do anything for Williams throughout a supposed two-year conspiracy confirms, and as the courts below never denied. The convictions here are thus based on precisely the sort of "[i]ngratiation and access" this Court has consistently explained "are not corruption." *Citizens United*, 558 U.S. at 360.

6. Further, the panel did not, unlike *Urciuoli* and *Ring*, require the jury to be instructed that Gov. McDonnell had to agree to "influence" governmental decisions. Rather, it sufficed that the jury was quoted a complex statutory definition of "official act" followed by a broad expansion of what it *includes*—never hinting at what it *excludes*. App.55a-65a. *But see Urciuoli*, 513 F.3d at 295 (vacating where jury not told this critical point); *Ring*, *supra*, Dkt. 270, at 37 (instructing jury that taking "phone call" or providing "greater access to the official's appointment schedule is not enough"). Jurors were never told, for example, despite repeated defense requests, that an "official act" must be "intended to … influence a specific official decision the government actually makes." App.254a; *see also* App.146a-147a; App.251a-257a.

That left the Government free to argue that influencing governmental decisions was *irrelevant*. It told the jury to review the "jury instructions" and "look for the word pressure"—it "doesn't appear anywhere." App.268a. All that mattered, it claimed, was that Gov. McDonnell took "actions that have been clearly established by settled practice as a part of a public official's position … on the issue of Virginia business development," a "capital priority of Bob McDonnell's administration." App.263a. Thus, if Gov. McDonnell posed for "photos … making comments at different ribbon cuttings … for money,

it's a crime." App.264a. "Whatever it was, it's all official action," App.263a, which is, no doubt, why the jurors wrongly believed the question was: "Would the McDonnells have received these gifts if Bob McDonnell weren't governor?" Josh Gerstein, *Why John Edwards Won and Bob McDonnell Lost*, POLITICO, Sept. 5, 2014 (quoting juror).

The evidence and arguments below illustrate the radically expansive definition of "official action" in the panel-approved instructions. One of the acts the Government relied heavily on was Williams' invitation to a cocktail party, with the Government stressing how "valuable it was to get invited." App.262a. But that party did not involve discussion of any governmental matter, so it could not possibly be an "official act." It *was*, however, "official" under the instructions—which is why the Government accurately argued that, under the instructions, the invitation was an "official act[]" on the broad "issue of Virginia business development." App.263a. Yet the panel's opinion completely ignores this act, even though the jury could have convicted on it alone.

In sum, the jury instructions validated the Government's all-encompassing theory that each of Gov. McDonnell's five acts was an "official" one allowing for conviction. By endorsing those instructions, the Fourth Circuit departed from its sister courts; blessed a conception of "official action" that reaches every action officials take; and thus created the very "absurdities" *Sun-Diamond* rejected.

C. The Opinion Below Criminalizes Ordinary Politics, Turning Nearly Every Elected Official Into A Felon.

The panel's sweeping decision presents an issue of extraordinary importance. The panel expanded "official action" from swaying specific sovereign decisions to anything that could "have the purpose or effect of exerting some influence on" any eventual sovereign decision, no matter how remote (App.54a); and the instructions it blessed turn every "settled practice" into official action. Under that limitless conception of corruption, every elected official and campaign donor risks indictment—which is why a broad, diverse, and bipartisan coalition of *amici* urged rejection of the Government's rule in both of the courts below. At the intersection of politics, federalism, and criminal justice, the scope of the corruption laws is of tremendous public significance.

Again, under the Fourth Circuit's rule, a call to discuss a policy issue is an "official act" to "influence" that issue. Referring a donor to an agency with jurisdiction over his concern is an "official act" to "influence" its work. Participating in a roundtable is an "official act" to "influence" any issue that arises. Even inviting donors to the White House Christmas Party is "official action" because of the "halo effect" or "credibility" it confers. App.261a. If that is the law, prosecutors have every reason to investigate whether the call, referral, roundtable, or invitation involved someone who had given a gift or campaign donation. If so, prosecutors could (as here) ask a jury to find a wink-and-nod *quid pro quo*—based solely on temporal nexus—and convict. Every official who accepts campaign funds and every citizen who gives

them is a potential target. Indeed, even independent expenditures backing the official could be the premise of criminal charges. *See United States v. Menendez*, No. 15-155, 2015 U.S. Dist. LEXIS 129850 (D.N.J. Sept. 28, 2015) (upholding indictment alleging official acts traded for contributions to Super PAC).

This is not hypothetical. The Court in *McConnell* described—without suggesting that any of this was criminal—"White House coffees that rewarded major donors with access to President Clinton," "courtesies extended" to someone whose donations were "motivated by his interest in gaining the Federal Government's support for an oil-line project," and donor programs that "promised 'special access to high-ranking … elected officials, including governors, senators, and representatives.'" 540 U.S. at 130. "[N]ational party committees actually furnish[ed] their own menus of opportunities for access …, with increased prices reflecting an increased level of access" to legislators. *Id.* at 151. The Court distinguished this open "peddling [of] access" from selling "actual influence." *Id.* at 150. Yet on the panel's view, there was no need for campaign-finance reform—all those officials, from the President down, *could have been convicted of bribery*.

In one striking example of an express exchange, the PAC created by Gov. McDonnell's successor, Gov. Terry McAuliffe, offered "events that donors may participate in for donations ranging from $10,000 to $100,000," including "intimate sit-down meetings with the governor and 'policy experts.'" Laura Vozzella, *In Va., $100,000 Will Get You a Sit-Down with 'Policy Experts,' Governor's New PAC Says*, WASH. POST, Mar. 18, 2014. Or during President

Obama's reelection, donors were openly rewarded with opportunities to speak to top officials about policies within their jurisdiction. Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011 (fundraisers where EPA Administrator took questions about oil pipeline). Neither Gov. McAuliffe nor President Obama has been indicted—but, given the panel's (erroneous) rule, that is presumably only by grace of prosecutorial discretion.

The rule below gives prosecutors a basis to investigate and indict essentially any official they choose. That is a dangerous power, inconsistent with our Nation's commitment to resolving political disputes through the political process rather than by putting opponents in prison. As President Obama's former White House Counsel recently wrote, the panel failed "to clarify the distinction between criminal and lawful politics," instead endorsing "ad hoc" tests that create "opportunity" for prosecutors, "risk" for politicians, and a "challenge" for courts. Bob Bauer, *The Judging of Politicians—By Judges*, MORE SOFT MONEY HARD LAW, July 14, 2015, http://goo.gl/DXb8F9.

This Court has few opportunities to review clean legal disputes about the scope of the corruption laws. And those opportunities come long after misguided prosecutions have shattered lives and altered elections. The staggeringly broad legal rule adopted below amply warrants this Court's review.

II. THE PRETRIAL PUBLICITY ISSUE ALSO MERITS THIS COURT'S REVIEW.

Must a trial court ask potential jurors who admit exposure to pretrial publicity if they have formed opinions about guilt and allow further questioning to uncover bias? The panel said no, holding that courts may rely on those jurors' collective, untested assurance that they can be fair. That ruling conflicts with decisions of this Court and the other Circuits.

A. The Panel Endorsed Inadequate *Voir Dire* Of Publicity-Exposed Jurors.

The decision below endorsed, in one of the most politicized, high-profile prosecutions in Virginia history, the district court's refusal to ask jurors who admitted exposure to vitriolic pretrial publicity—including 10 of the 12 jurors who voted to convict, *see generally* D.Ct. Dkt. 656-1, at Question 83—the most basic question: Have you formed opinions about guilt based on such exposure?

The defense repeatedly requested this question, at first *jointly* with the Government in a proposed questionnaire: "Based on what you have read, heard, seen, and/or overheard in conversations, please tell us what opinions, if any, you have formed about the guilt or innocence of [petitioner]." App.150a. The district court inexplicably struck that question. The panel upheld that deletion on a ground nobody advanced—that the question "invites" jurors "to deliberate on the defendant's guilt." App.30a. But that question asked only whether jurors (who completed the questionnaires at home) had already formed opinions; it did not invite them to start forming them. Besides, Gov. McDonnell requested

three different forms of this question, such as: "At any time have you ever formed or expressed any opinion about this case, or any of the people involved?" App.152a. The court rejected those, too. App.159a ("I'm not asking these questions").

Instead, after acknowledging "a lot of media interest," the court asked the 142 prospective jurors to stand "if you have read, heard or seen something in the media." App.160a. Virtually everyone stood. The court then directed: "[I]f you are, in your mind, able to put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides, then I want you to sit down." *Id.* Everyone sat. *Id.* The court announced it was "satisfied," *id.*, and refused more questions about exposure to publicity, despite defense counsel requesting additional inquiry. App.161a ("I can't trust the credibility of that without a further inquiry."). The panel blessed that process, holding that criminal defendants have no right to "individual questioning" to ferret out "the pernicious effects of pretrial publicity." App.31a.[3]

[3] As the Government agreed at oral argument below, the defense requested "individual voir dire of each one of these [142] people to discuss pretrial publicity" and "the district court said no." Oral Arg. Audio at 32:13-32:38, http://goo.gl/O86TIB. The panel noted that the court conducted "one-on-one questioning" of eight prospective jurors "after the defense singled them out on the basis of their responses to a jury selection questionnaire." App.26a. That questioning was limited to "specific folks who we need to look at specific responses [on questionnaires]," App.161a—*i.e.*, issues *other than* mere exposure to pretrial publicity. Hence the court refused to question one juror who had not given answers beyond admitting exposure to publicity. *See* App.164a ("I'm sorry, ma'am. We thought there was something on your questionnaire. So you can have a seat.").

B. The Decision Below Conflicts With Decisions Of This Court And Multiple Other Circuits.

The panel departed from decisions of this Court and other Circuits in two fundamental respects.

First, this Court has long required district courts to ask potential jurors exposed to prejudicial pretrial publicity whether they have formed opinions about guilt as a result. For example, *Patton v. Yount* held that "[t]he relevant question is … whether the jurors … had such fixed opinions that they could not judge impartially the guilt of the defendant." 467 U.S. 1025, 1035 (1984). Likewise, *Mu'Min v. Virginia* explained that trial courts "must" decide "is this juror to be believed when he says he has not formed an opinion about the case?" 500 U.S. 415, 425 (1991). It is impossible to know whether a juror's opinion is "fixed," or whether a juror is "to be believed," if the court refuses to ask whether publicity-exposed jurors have formed opinions in the first place.

The other Circuits faithfully follow these rulings and require this basic question. *See, e.g.*, *United States v. Rahman*, 189 F.3d 88, 121 (2d Cir. 1999) ("[T]he Constitution requires only that the Court determine whether they have formed an opinion about the case."); *Pruett v. Norris*, 153 F.3d 579, 587 (8th Cir. 1998) (similar); *United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972) (similar). Petitioner is aware of no decision, other than the panel's, endorsing *voir dire* that omits it. The Fourth Circuit stands alone in denying defendants the right to know whether potential jurors who admit exposure to pretrial publicity have formed opinions about guilt.

Second, this Court has long recognized that, although potential jurors are probably "sincere" when they say they can "be fair and impartial," "the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Thus, in *Murphy v. Florida*, the Court held that "[a] juror's assurances that he is equal to this task [of laying aside his opinions and being fair] *cannot be dispositive of the accused's rights*." 421 U.S. 794, 800 (1975) (emphasis added). Applying this principle, the Court rejected a *voir dire* challenge in *Skilling* only after finding that the trial court "examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members" and accorded the parties "an opportunity to ask follow-up questions of every prospective juror brought to the bench for colloquy." 561 U.S. at 389. And three Justices still dissented. *See id.* at 427 (Sotomayor, Stevens, Breyer, JJ., dissenting in part).

Consistent with these decisions, the other Circuits forbid trial courts from relying "solely on a juror's assertion of impartiality." *United States v. Pratt*, 728 F.3d 463, 470 (5th Cir. 2013). In the Fifth Circuit, for example, "a court may not rely solely on a juror's assertion of impartiality but instead must conduct a sufficiently probing inquiry to permit the court to reach its own conclusion." *Id.* "[M]erely asking potential jurors to raise their hands if they could not be impartial was not adequate voir dire in light of significant pretrial publicity," even with "a general admonishment to the venire that they would be required to decide the case impartially." *Id.* at 471. The decision below squarely rejects that rule.

App.31a ("[M]erely asking for a show of hands was not an abuse of discretion.").

Six other Circuits agree—contrary to the opinion below—that courts cannot accept jurors' assurances of impartiality at face value:

> **First Circuit**: "[W]here there is … a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence." *Patriarca v. United States*, 402 F.2d 314, 318 (1st Cir. 1968); *see also United States v. Rhodes*, 556 F.2d 599, 601 (1st Cir. 1977) (reversing conviction).
>
> **Second Circuit**: "[M]erely going through the form of obtaining jurors' assurances of impartiality is insufficient." *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963) (en banc) (reversing conviction).
>
> **Third Circuit**: "We agree with [the Second Circuit in *Bloeth*] that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining juror's assurances of impartiality is insufficient to test that impartiality.'" *Waldorf v. Shuta*, 3 F.3d 705, 712 (3d Cir. 1993) (reversing).

Seventh Circuit: "Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial.… [T]he question is not adequate to bring out responses showing that jurors had gained information and formed opinions about relevant matters in issue if in truth any had." *Dellinger*, 472 F.2d at 375 (reversing conviction).

Ninth Circuit: "Because of the voluminous publicity antedating appellant's trial, some of which was prejudicial in nature, … the court's voir dire examination should have been directed to the individual jurors." *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (reversing conviction).

Eleventh Circuit: It is not sufficient to ask if potential jurors have "formed and expressed any opinion in regard to … guilt or innocence" and whether jurors' minds are "perfectly impartial," because those questions yield only a "conclusory protestation." *Jordan v. Lippman*, 763 F.2d 1265, 1281 (11th Cir. 1985) (vacating conviction).

C. This Is An Increasingly Important Issue Worthy Of The Court's Review.

The right to an impartial jury is the cornerstone of our criminal justice system; *voir dire* is the primary mechanism for protecting that right. The minimum requirements for *voir dire*—the rules that ensure it supplies more than empty theater—present an important, recurring question of law. And it is one that becomes more important every day, as media coverage becomes increasingly pervasive, sensationalist, and vituperative.

The panel opinion blesses a perfunctory *voir dire* that this Court's decisions foreclose and seven other Circuits reject. That provides an ideal vehicle for this Court to clarify the minimum *voir dire* requirements in the face of extensive, negative pretrial publicity.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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