No. 15-A-____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT F. MCDONNELL,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

EMERGENCY APPLICATION TO STAY MANDATE, OR IN THE ALTERNATIVE FOR RELEASE ON BAIL, PENDING DISPOSITION OF CERTIORARI PETITION

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Applicant Robert F. McDonnell moves for an emergency stay of the Fourth Circuit's mandate, or in the alternative for release on bail, pending the filing and disposition of a timely petition for certiorari. Absent relief, Gov. McDonnell may be forced to report to prison at any point after the mandate issues on August 27, 2015; he therefore respectfully requests expedited consideration of this application and an administrative stay pending its resolution.

An individual Justice is authorized to issue a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). Such action is proper if there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). Similarly, any judicial officer—including a Circuit Justice—"shall order" release on bail pending disposition of a certiorari petition, so long as (i) the applicant is not likely to flee or pose any danger, and (ii) his appeal presents a "substantial question of law" that, if decided in his favor, is "likely to result in ... reversal" or "a new trial." 18 U.S.C. § 3143(b). Explicating that standard, Justices have looked to whether there exists "a reasonable probability that four Justices are likely to vote to grant certiorari." *Julian v. United States*, 463 U.S. 1308 (1983) (Rehnquist, C.J.); *see also* U.S. Mem. in Opp. 12, *Warner v. United States*, No. 07A373 (Nov. 2007) (objecting to bail, as "there is no reasonable probability that this Court will grant certiorari").

Thus, whether framed as a stay under 28 U.S.C. § 2101(f) or release on bail under 18 U.S.C. § 3143(b), the legal standard is materially the same: Is there a reasonable probability of certiorari, and do the equities favor maintenance of the status quo until this Court has an opportunity to consider the certiorari petition?

Here, the answer to both questions is undeniably yes. Gov. McDonnell's certiorari petition will present at least *two* questions independently warranting this Court's review under the objective certiorari criteria. And, absent a stay or release, Gov. McDonnell may well *complete* his 2-year prison sentence before this Court has an opportunity to rule on (i) whether the conduct for which he was convicted was actually illegal, and (ii) whether he received an "impartial jury" consistent with the Sixth Amendment. On the other hand, if this Court grants relief and then denies review, Gov. McDonnell would still serve the entirety of his sentence.

A former Virginia Governor and lifelong public servant, Gov. McDonnell was convicted on federal corruption charges based on the theory that he accepted gifts and loans (themselves perfectly legal under state law) in exchange for taking five supposedly "official acts." A *quid pro quo* exchange for "official acts" is necessary to establish honest-services fraud or Hobbs Act extortion. *Infra* n.3. Yet the five purportedly "official acts" alleged in the indictment, argued to the jury, and relied upon by the courts below were limited to the pedestrian acts of arranging meetings and attending events. Gov. McDonnell indisputably did not *exercise* any governmental power, *urge others* to exercise any governmental power, or *promise* to exercise any governmental power. Governmental power played no role in the acts

he took as part of the *quid pro quo* inferred by the jury. Indeed, the jury was never instructed that it had to find any link between Gov. McDonnell's actions and any exercise of governmental power. Nonetheless, the district court held that these actions were "official"—and thus criminal—because they are "customary" for public officials. And the Fourth Circuit affirmed, reasoning that arranging a meeting to discuss a policy issue, or asking a question about such an issue, is an "official" act "on" that issue—even if the official takes no other steps to influence the actual, substantive policy decision at stake. The jury instructions were also "adequate[e]," according to the court, because they quoted the statute once and then elaborated with a host of expansive, unrestricted glosses—even though they never limited or clarified the scope of "official action," the heart of Gov. McDonnell's legal defense.

That is not the law. The federal corruption laws are concerned with "control [over] the exercise of an officeholder's *official duties*," *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (emphasis added), *i.e.*, officials exercising *governmental power* to favor donors, either directly or by inducing others to exercise such power on the official's behalf. "It is the corruption of official positions through misuse of influence in *governmental decision-making* which the bribery statutes make criminal." *United States v. Carson*, 464 F.2d 424, 434 (2d Cir. 1972) (emphasis added). That is why, for decades, corruption prosecutions have invariably focused on the exchange of *quids* for true and obvious "official act" *quos*—*e.g.*, voting on legislation, awarding contracts, implementing policies, appropriating funds, appointing personnel, or threatening to exercise those official powers in order to achieve the desired result.

By contrast, actions that involve no such exercise of government power—that neither exert "inappropriate influence on decisions that the government actually makes," *Valdes v. United States*, 475 F.3d 1319, 1324-25 (D.C. Cir. 2007) (en banc), nor rely on actual or threatened "use [of] official powers," *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008)—do not implicate the corruption statutes. Hence this Court's statement that "receiving [ ] sports teams at the White House, visiting [a] high school, and speaking to ... farmers about USDA policy," while "assuredly 'official acts' in some sense"—and certainly customary—"are not 'official acts' within the meaning of the statute." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999). Simply put, those acts do not implicate sovereign power.

The Government's theory in this case rejects that fundamental distinction between exercising governmental power and merely making an introduction, attending a meeting or event, or inquiring into an issue—a distinction this Court and three other Circuits have embraced. Gov. McDonnell made *no governmental decisions* and took *no governmental actions* that favored the individual who gave him otherwise-lawful gifts. Nor did he advise, urge, or request such action from others. Not a single witness testified that Gov. McDonnell asked him or her to do anything other than make an independent judgment about Virginia's best interests and act accordingly—and the courts below did not claim otherwise. Equally important, the jury was never instructed that this mattered. This is the first time in the history of the Nation that an official has been convicted of corruption despite never putting an official thumb on the scales of *any* actual government decision.

This Court is at least reasonably likely to grant certiorari here. The Fourth Circuit's construction of "official acts" (i) was called literally "absur[d]" by this Court in *Sun-Diamond*; (ii) has been squarely rejected by all three Circuits that have confronted it; (iii) criminalizes conduct that this Court has repeatedly held in its campaign-finance cases is constitutionally protected; (iv) dramatically expands the reach of three broad federal crimes to encompass routine political practices, transforming nearly every elected official nationwide into a potential felon; and (v) thereby grants vast discretion to politically motivated federal prosecutors to intrude into state politics. The Fourth Circuit's staggering reinvention of federal corruption law thus satisfies *all* traditional grounds for certiorari review. S. Ct. R. 10.

The importance of this legal line in separating lawful politics from criminal corruption cannot be overstated. It is why a remarkably broad, deep, and bipartisan collection of *amici* from around the Nation urged the Fourth Circuit to reverse Gov. McDonnell's conviction. Those *amici* included forty-four former State Attorneys General (23 Democrats and 21 Republicans), who argued that "[b]asing federal criminal prosecutions on common political pleasantries would extend the federal government's reach far too deeply into state political life." C.A. Dkt. 61, at 18. They included high-ranking former federal officials, including White House Counsels from every Administration since Ronald Reagan, U.S. Attorneys General, a Solicitor General, and others who argued that the "law should not subject government officials to the threat of prosecution for engaging in innocent conduct that occurs on a routine basis." C.A. Dkt. 75-1, at 3. Academics weighed in, too,

with Harvard professors Nancy Gertner and Charles Ogletree, and former UVA Dean John Jeffries (among others) noting that "when political figures are concerned, vaguely defined crimes whose outer boundaries are ambiguous pose especially grave dangers." C.A. Dkt. 62, at 15. As six former Virginia Attorneys General bluntly observed: The Government's theory is "alien to any legal advice that [they] would have given to any Governor," C.A. Dkt. 60, at 2. Other *amici*—including the 31 sitting governors represented by the Republican Governors Association's Policy Committee, over 100 Virginia business and civic leaders, Virginia legislators and law professors, and the NACDL—all agreed. *See* C.A. Dkts. 74, 65, 76, 67, 59.

In addition, Gov. McDonnell's petition will present a *second* issue warranting this Court's review: namely, whether it suffices—in a highly publicized prosecution where jurors admit general exposure to 16 months of negative pretrial publicity—to neither ask potential jurors if their admitted exposure to that publicity has led them to form opinions about guilt, nor conduct individualized questioning about that admitted exposure. Gov. McDonnell's prosecution was one of the most high-profile in Virginia's history—so much so that nearly *half* of the judges on the Fourth Circuit disqualified themselves from his appeal. The trial was preceded by a barrage of hostile coverage that nearly all potential jurors *admitted* seeing. Yet, rejecting a joint request by the defense *and Government*, the district court repeatedly refused to ask the potential jurors the most basic question, *viz.*, whether they had formed opinions as to Gov. McDonnell's guilt based on exposure to pretrial publicity. Instead, the court asked nearly 150 potential jurors over 100 feet from

the bench—*as a group*—to stand up if they had heard about the case and sit down if they felt they could still "be fair." Almost all stood; and unsurprisingly all sat down. The panel upheld that summary process, in conflict with authority from this Court and other Circuits. *Skilling v. United States*, for example, denied relief in a high-profile case only because the jury questionnaire asked about "opinions regarding the defendants and their possible guilt" and the court asked individual questions about publicity. 561 U.S. 358, 371 & n.4, 374 (2010). And at least seven other Circuits hold that "asking potential jurors to raise their hands if they could not be impartial [is] not adequate voir dire in light of significant pretrial publicity." *United States v. Pratt*, 728 F.3d 463, 471 (5th Cir. 2013). *But see* App. A ("Op.") at 35 ("[W]e have held that merely asking for a show of hands was not an abuse of discretion."). Indeed, until now, there is not a single published opinion upholding the summary procedure embraced here. If allowed to stand, meaningful *voir dire* on pre-trial publicity will be a dead letter in the Fourth Circuit and any court that follows it.

In light of these issues, the mandate should be stayed, or Gov. McDonnell should be released on bail, pending disposition of his forthcoming petition. This relief is particularly necessary given that Gov. McDonnell was sentenced to two years in prison—a term that, if begun now, is certain to be almost, if not entirely, completed *before* this Court would have opportunity to vindicate him. Needless to say, it would be grossly unfair irreparable injury to be compelled to serve all or most of a prison sentence only to later have the critical legal premise for the conviction invalidated, or the fundamental unfairness of the trial confirmed.

STATEMENT

Gov. McDonnell served the public for 38 years, including as a U.S. Army Lt.-Colonel, state prosecutor, Attorney General, and ultimately Governor of Virginia. This prosecution turns on his interactions with Jonnie R. Williams, Sr., CEO of a Virginia-based publicly traded company, Star Scientific ("Star"). The indictment charged that, in exchange for gifts and loans, Gov. McDonnell took "official action" as Governor to assist Williams and Star. Whether the actions he took were indeed "official," and whether the jury was properly instructed as to that term, were the primary legal disputes throughout trial and on appeal—along with the question whether the jury selection comported with the Sixth Amendment.

1. Pretrial Publicity & Jury Selection. Notwithstanding the promise of grand jury secrecy, an onslaught of prejudicial pretrial publicity began shortly after prosecutors convened a grand jury in spring 2013. Improper disclosures fed a 16-month pretrial barrage of negative articles, TV spots, and blog posts about Gov. McDonnell.[1] After the indictment was unsealed, wall-to-wall press coverage followed, condemning Gov. McDonnell in harsh and quite often inaccurate terms.[2]

In light of the undisputed, overwhelming negative pretrial publicity, *see* D.Ct. Dkt. 110 (examples), Gov. McDonnell and the Government jointly requested

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[1] *E.g.*, A. Barton Hinkle, *McDonnell Family Values*, RICHMOND TIMES-DISPATCH, May 12, 2013, at E-03; Ruth Marcus, *Unfit for His Office*, WASH. POST, July 12, 2013, at A15; Julian Walker, *Va. Legislator Calls on Gov. Bob McDonnell to Resign*, VIRGINIAN-PILOT, July 2, 2013.

[2] *E.g.*, Robert McCartney, *Bob McDonnell Was a Man In Denial about Legal Risks of Taking Gifts*, WASH. POST, Jan. 22, 2014; Rosalind S. Helderman & Carol D. Leonnig, *McDonnell Rejected Plea Offer to Face One Felony, Spare Wife Any Charges, Avoid Trial*, WASH. POST, Jan. 23, 2014; Petula Dvorak, *McDonnell's Betrayal of His Wife Is Anything But Moral*, WASH. POST, Aug. 22, 2014.

individual voir dire of jurors who admitted knowing about the case. III.J.A.1688-90. The district court refused. *Id.* at 1690. Instead, it limited oral voir dire on pretrial publicity to two questions. After acknowledging "a lot of media interest," the court asked the roughly 150 prospective jurors to stand up "if you have read, heard or seen something in the media." *Id.* at 1691. 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.* at 1692. Everyone sat. *Id.* The court announced it was "satisfied with ... the responses," and—over repeated objections—declined to ask further questions. *Id.*

The district court did individually voir dire a handful of jurors whose answers to the court-selected, less-important questions on the juror questionnaire gave rise to specific concern. But, critically, it had refused to include on that questionnaire any question—despite both parties requesting one, Joint Proposal, Q.112 (I.JA.527)—asking whether prospective jurors had formed an opinion about guilt or innocence. Indeed, the district court repeatedly rejected Gov. McDonnell's request that this question be posed to the jury. I.J.A.527; II.J.A.917; III.J.A.1690. Instead, the court allowed the parties to ask only whether the potential jurors had *expressed* an opinion about the case to someone else, III.J.A.1696-1706, which is obviously quite different (and narrower). As a result, the defense still does not know whether any of the publicity-exposed jurors who voted to convict stepped into the jury box with a fixed opinion about guilt based on admitted exposure to pre-trial publicity.

2. Government's Theory of "Official Acts" and Jury Instructions.

Neither Williams nor Star received a single dime of state money or any other state benefit. Nor did Gov. McDonnell ever tell Williams that he would help him obtain such benefits. The Government's case hinged, rather, on "five specific actions taken by McDonnell" and their temporal proximity to gifts. App. F at 6; Op. at 81-84.

(1) Gov. McDonnell sent an email to his chief counsel asking the counsel to "see me" about an issue related to Williams. The counsel never actually saw him. *See* V.J.A.3216-19.

(2) Gov. McDonnell's wife invited Williams, some of Williams' associates, and private doctors recommended by Williams, along with hundreds of other people, to a cocktail reception for "Healthcare Leaders." Nothing else happened. *See* IV.J.A.2312-14, 2334-36; V.J.A.3672-3716.

(3) Gov. McDonnell possibly suggested to two subordinates that they meet with Star. The subordinates disagreed about whether Gov. McDonnell made the request, but in any event, they never met with anyone, and they never heard about it again from Gov. McDonnell or anyone else. *See* VI.J.A.4205-06, 4226-27; 4230-31, 4219-20.

(4) Gov. McDonnell asked a subordinate to send a staffer to a meeting with Williams that Gov. McDonnell did not attend, immediately after which meeting the staffer sent Williams a "blow-off email." Nothing else happened. *See* V.J.A.3043-44, 3058-59, 3068-69, 2073.

(5) Gov. McDonnell briefly appeared at a lunch at the Executive Mansion, paid for by his PAC, at which Williams presented checks from Star to researchers from two Virginia public universities, as planning grants to prepare Tobacco Commission research proposals into Star products. At the event, Gov. McDonnell asked two researchers whether they thought such studies would be good for Virginia. No proposals were ever submitted, nobody from the Administration ever mentioned them again, nor did anyone ever contact the Commission or the researchers or universities. *See* IV.J.A.2278-79, 2284-85; V.J.A.3344-46, 3361-63.

Gov. McDonnell repeatedly argued that none of these qualify as "official acts" because in none did he take, or pressure anyone else to take, any actual decision or

action on any pending governmental matter. D.Ct. Dkts. 106, 409, 510, 548. Gov. McDonnell also requested numerous jury instructions reflecting that principle, including that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts'"; that "[t]he questions you must decide are both whether the charged conduct constitutes a 'settled practice' *and* 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." D.Ct. Dkt. 287, at 79-80; *see also* X.J.A.7341 (similar request).

The district court refused all of these requests and declined to provide a definition of "official act" that limited it in any relevant way. Instead, the district court quoted the definition of "official act" from the federal bribery statute (which was not directly at issue, because it applies only to *federal* officials)—"any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity," 18 U.S.C. § 201(a)(3)—and then elaborated:

> 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.

XI.J.A.7671-72.

The Government seized on this expansive language in its closing: "[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." *Id.* at 6039. Recognizing that anything could be "one in a series of steps to exercise influence," as the jury was instructed, *id.* at 7671-72, prosecutors argued that if Gov. McDonnell posed for "photos ... [or] ma[de] comments at different ribbon cuttings ... in exchange for money, it's a crime," *id.* at 7439-40—which describes *every* fundraiser. "Whatever it was, it's all official action." *Id.* The jury convicted Gov. McDonnell on eleven corruption counts, acquitting him of the (unpublicized) non-corruption charges. App. E.

3. Post-Trial Motions & Sentence. The court denied motions for acquittal or a new trial. It agreed that the conviction's validity "hinges on the interpretation of an 'official act.'" App. F at 4. Yet, to distinguish "official" acts (*i.e.*, those that are criminal if part of a *quid pro quo*) from acts that are *not* "official" (*i.e.*, those that are not criminal *even if* part of a *quid pro quo*), the court circularly ruled that it "must look to whether a quid pro quo agreement existed." *Id.* It then ruled that the jury could draw "permissible inferences" of a *quid pro quo* based solely on "the timing of Williams' gifts" vis-a-vis McDonnell's "five specific actions"—*i.e.*, attending events and arranging meetings, acts Gov. McDonnell would "customarily" do. *Id.* at 6-7.

On January 6, 2015, Gov. McDonnell was sentenced to two years in prison. App. E. A week later, the district court denied bail pending appeal. *See* App. G.

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

On July 10, 2015, the panel (Judges Motz, King, and Thacker) rejected all of Gov. McDonnell's arguments (which were supported by ten sets of broad, bipartisan *amici*). It 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. Op. 83. In the panel's view, each was action "on" the question whether State universities or agencies should fund or conduct studies of Star's product, because that request by Williams was a subject of the meetings and questions. Op. 79-81. It did not matter that Gov. McDonnell never directed—or even *requested*—that the studies be done (which is why they *were not done*). Rather, it was sufficient that he took prefatory steps to gather information (through meetings, inquiries to aides, and questions to researchers). Op. 81-83. On the panel's unprecedented theory, those information-gathering acts *themselves* "exploited the power of his office" in order "to influence the work of state university researchers." Op. 83-84.

The jury, moreover, was never instructed that it had to find any effort by Gov. McDonnell to "exploit the power of his office" or "influence" any state decisions, even though the defense sought precisely such an instruction. D.Ct. Dkt. 287, at 79-80. Nonetheless, the panel held that the jury instructions "adequately delineated" the meaning of "official act" solely because they *quoted the statutory definition* from the bribery statute applicable to *federal* officials. Op. 54. That statute defines an

official act as a "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). The panel blessed the district court's sweeping expansion of the definition, *e.g.*, that it includes acts an official "customarily performs" and acts "in furtherance of longer-term goals" (Op. 62-66), and affirmed its failure to convey any limits (Op. 70-73).

Finally, as to pretrial publicity, the panel upheld the district court's refusal to ask if jurors had formed opinions about guilt and its stand-up-sit-down routine to gauge impartiality as "adequate" and within the court's discretion. Op. 29-35.

5. Rehearing Petition and Stay Motion. Gov. McDonnell moved for rehearing en banc. A poll was requested, but seven of the Circuit's fifteen active judges recused, meaning that *all five* of the remaining judges who were not on the original panel would have had to vote to grant the petition. 4th Cir. L.R. 35(b). The petition was denied. App. C. The panel then denied Gov. McDonnell's motion to stay the mandate, after *sua sponte* (and without explanation) shortening the response time from ten days, Fed. R. App. P. 27(a)(3), to just *one*. *See* App. B.

REASONS FOR GRANTING THE APPLICATION

A motion to stay the mandate pending a certiorari petition is appropriate if there is a "reasonable probability" of certiorari, a "fair prospect" of reversal, and a "likelihood" of irreparable harm. *King*, 133 S. Ct. at 2; *see also Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers). Justices will also grant release, under 18 U.S.C. § 3143(b), if there is "a reasonable probability that four

Justices are likely to vote to grant certiorari," *Julian*, 463 U.S. at 1308, and the applicant is neither a flight risk nor a public threat.

Framed either way, Gov. McDonnell should be granted relief. There is no dispute, at the threshold, that he is not a flight risk or threat to public safety. Apps. D & G. Nor is there doubt that "irreparable harm" would otherwise result: If Gov. McDonnell begins his two-year sentence immediately, as will be required absent relief from this Court, he will have no remedy if this Court later invalidates his conviction. (By contrast, if a stay is granted and then the Court denies review, Gov. McDonnell would still serve his entire two-year sentence.) The dispositive question is thus whether there is a "reasonable probability" that this Court will grant certiorari. The answer is clearly "yes." The theory on which Gov. McDonnell was convicted is stunningly broad, historically unprecedented, and directly in conflict with decisions of this Court and three Circuits. There is at least a reasonable probability that this Court will want to weigh in on such an important revolution in federal corruption law—one that would "wreak havoc" on "the democratic process." Va. A.G. Am. Br., C.A. Dkt. 60, at 2. The panel's voir dire ruling is *independently* certworthy, given its departure from the settled rule in this Court and other Circuits and its immense importance with today's 24/7 coverage of high-profile cases.

I. GOV. MCDONNELL IS NOT A FLIGHT RISK OR THREAT AND, ABSENT RELIEF, HE WOULD SERVE MUCH OF HIS SENTENCE BEFORE THIS COURT CAN REVIEW HIS DUBIOUS CONVICTION.

Gov. McDonnell is clearly not a flight risk or a threat to the public (Apps. D & G), so the threshold requirements for release under § 3143(b) are plainly satisfied.

Moreover, the irreparable harm from denying relief would be stark and inequitable. If Gov. McDonnell is required to begin his two-year sentence now, it is very likely that this Court will not have an opportunity to consider the validity of his conviction until *after* he has served much of his term. It would be grossly unfair to condemn Gov. McDonnell to prison only to later hold that his conviction or trial was legally flawed. Finally, if this Court grants a stay and then denies review, there is no harm done. A 24-month sentence is a 24-month sentence, whether it begins in August 2015 or March 2016. The equities thus decisively favor preserving the status quo.

II. THERE IS A REASONABLE PROBABILITY OF CERTIORARI AS TO THE SCOPE OF THE FEDERAL CORRUPTION LAWS.

Gov. McDonnell's petition will raise this fundamental question: What is an "official act" that can serve as a *quo* that violates the bribery statute, honest-services fraud statute, and Hobbs Act?[3] More specifically, does a public 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," Op. 83—even without asking *anyone* to exercise *any* governmental power?

The decision below is the first in the Nation to conclude that these ubiquitous actions are "official" and can turn a public servant into a felon. The Fourth Circuit held that even asking an aide to investigate a constituent's request—the most

[3] The phrase "official act" actually appears only in the federal bribery statute (18 U.S.C. § 201), which applies only to federal officials. But, as narrowed by *Skilling*, the honest-services statute (18 U.S.C. § 1346) proscribes "bribes" and "draws content" from the federal bribery statute. *Skilling*, 561 U.S. at 412-13 (citing 18 U.S.C. § 201). And, under *Evans v. United States*, 504 U.S. 255 (1992), receipt of a bribe in exchange for "official acts" also constitutes Hobbs Act extortion. *See id.* at 260, 267-68 & n.18. The scope of all three statutes, therefore, depends on the meaning of "official act."

rudimentary of political acts—is *itself* an "official act" as to the underlying request. That means a jury could infer a *quid pro quo* based on the constituent's campaign donation and convict the official of a host of federal crimes. That unbounded construction—imparted to the jury, and without which there was insufficient evidence to convict—flies in the face of this Court's decisions and those of the three other Circuits to have considered it. Absent review, it will revolutionize politics, dramatically expanding federal corruption laws to make every routine political fundraiser that trades any "access" for campaign donations into a felony.

A. The Opinion Below Conflicts with Multiple Lines of Authority from This Court.

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

1. In *Sun-Diamond*, this Court discussed the meaning of "official act," and emphasized the importance of narrowly construing it lest it criminalize routine political conduct. 526 U.S. 398, 408 (1999). The Court unanimously rejected the Government's construction, which would lead to "absurdities." *Sun-Diamond*, 526 U.S. at 408. "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 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 406-07. Even if those gifts were expressly given in exchange "for" the official's acts, they *are not crimes*: Such actions—"while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute." *Id.* at 407. Simply put, they do not implicate any sovereign power. Yet neither do the acts that the panel below held criminal—asking questions, requesting staffers to attend meetings, and making introductions. Op. 81-84. Nor was the jury ever instructed on *Sun-Diamond*'s critical lesson.

The panel sought to distinguish what it called "dicta" in *Sun-Diamond* on the basis that the acts described there are "strictly ceremonial or educational" and thus "rarely" cross the line. Op. 57, 60-61. This limit, of course, is found *nowhere* in this Court's opinion. It is also wrong. As *Sun-Diamond* noted, an Agriculture Secretary "always has before him or in prospect matters that affect farmers." 526 U.S. at 407. So, on the panel's reasoning, if instead of speaking to farmers, the Secretary held a "roundtable" to listen to their policy views, then his acceptance of lunch *would* be criminal; it would be an act "on" the policy matters discussed. Or, if a mayor visited a school and took town-hall style questions about school funding, his acceptance of a cap *would* be a crime—an action "on" the funding issue. Those consequences of the panel's holding are no less "absur[d]" than those in *Sun-Diamond*.

2. Not only has this Court held that actions like a visit, a speech, or a meeting are not, standing alone, "official acts," it has even held that paying for such "access"—through contributions to an official's campaign—is *constitutionally protected*. While the government can forbid true corruption—*i.e.*, "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 1450-51. 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 phone call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system. *See McCutcheon*, 134 S. Ct. at 1450-51. Yet Gov. McDonnell was convicted for allegedly trading such access for gifts. And campaign contributions, no less than personal gifts, can serve as *quid* in a forbidden exchange. *See generally Evans*, 504 U.S. 255. The opinion below thus conjures a *federal felony* out of what this Court has held to be exercise of a *fundamental constitutional right.*

The panel responded that *Citizens United* is "a campaign-finance case" and it "involved neither the honest-services statute nor the Hobbs Act." Op. 72. True. But this Court decided *Citizens United* the same Term as *Skilling*, in which it saved the very statute being abused here from unconstitutionality only by limiting it to its "bribe-and-kickback *core*." 561 U.S. at 409 (emphasis added). (And three Justices still would have invalidated the law. *See id.* at 415 (Scalia, Thomas, Kennedy, JJ. concurring in part and in judgment). By interpreting that statute to criminalize the very purchasing of "access" this Court 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 special access to a gift-giver, any official

could equally be imprisoned for the routine acts of agreeing to answer a donor's phone call about a policy issue or arranging a meeting for him about that issue.

3. The panel's expansive definition of "official act" is also contrary to this Court's teachings about *how* to construe the vague federal corruption laws. Indeed, it departs from at least four basic principles this Court has set forth.

First, "an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *see also Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). This rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Thus, as this Court explained in invalidating the original "honest services" fraud theory, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987).

The federal corruption laws do *not* clearly cover acts that do not directly influence governmental decisionmaking. An "official act" is a "decision or action on any question, matter, cause, suit, proceeding or controversy" that may come "before any public official, in such official's official capacity." 18 U.S.C. § 201(a)(3). These words refer to "a class of questions or matters whose answer or disposition is determined *by the government*." *Valdes*, 475 F.3d at 1324 (emphasis added). And it is not enough to take an action *pertaining to* such a matter; the official must make act "*on*" it—connoting concrete action that affects (or seeks to affect) its disposition.

Arranging a meeting or asking a question is not taking action "on" anything. Those are *prefatory* or *informational* steps, not themselves actions "on" the matter.

Second, this Court has admonished that the federal corruption laws should be given "a narrow, rather than a sweeping," interpretation. *Sun-Diamond*, 526 U.S. at 409. Thus, "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." *Id.* at 412. That makes sense, as the bribery laws target only the "most blatant and specific attempts of those with money to influence governmental action." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam). They are not comprehensive ethics codes.

Yet if "official action" includes arranging a meeting or attending an event, then basically everything officials do is official action. That means, in turn, that officials become potential felons whenever they do one of these mundanities for someone who has given them anything of value. If that is the law, officials will not be able to accept campaign contributions, travel, meals, gifts, or anything else (disclosed or not) from someone with whom they frequently personally interact, lest a jury later find a *quid pro quo*. That is not a "meat axe"; it is a chainsaw.

Third, this Court recently reaffirmed "the well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). Courts thus should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* Most

saliently, this Court applied that basic principle in *McNally*, refusing to construe a federal fraud statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360.

The Fourth Circuit's opinion dramatically upsets the balance of power between the federal government and the states. Under Virginia law, receipt of unlimited gifts by public officials was *expressly permitted* at the time; hence the jury was instructed that there was "no suggestion" that Gov. McDonnell violated state law. XI.J.A.7696. *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 subject to "criminal law penalties"). The Government may disapprove of Virginia's ethics laws, but it cannot displace them absent clear congressional intent, which does not exist here.

Fourth, if one construction of a statute "would raise serious constitutional problems," the Court "will construe the statute to avoid such problems," if possible. *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Fourth Circuit's broad view of "official act" raises at least *three* "serious constitutional problems." For one, its incredible breadth criminalizes a wide range of routine activities, leaving prosecutors free to prosecute whoever they desire. *Infra*, II.C. That "raise[s] the due process concerns underlying the vagueness doctrine," given the risk of "arbitrary and discriminatory prosecutions."

Skilling, 561 U.S. at 408, 412. Moreover, this criminalization of political fundraising raises First Amendment concerns. *Supra*, II.A.2. Finally, the panel's theory raises Tenth Amendment concerns, just as would federal limits on campaign contributions to state officials. *Cf. United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

In short, the "serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies" further requires rejecting the Government's theory and reversing the opinion below. *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari).

B. The Opinion Below Conflicts with Three Other Circuits.

Beyond conflicting with this Court's description of "official act," criminalizing conduct this Court has held protected by the Constitution, and ignoring numerous applicable canons of construction, the novel theory embraced by the court below has been squarely rejected by three other Courts of Appeals.

1. In an important early honest-services fraud and Hobbs Act case, the Eighth Circuit squarely rejected an expansive definition of "official act" that would have encompassed acts like those here. *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978). *Rabbitt*, which has been cited by more than 100 courts, involved Missouri's House Speaker, who "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 & n.5. The court held such conduct 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 Mr. Rabbitt's conviction because he "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 thus confirms the basic distinction between taking action to *influence* a government decision versus merely affording *access* without trying to control the ultimate decision. The Eighth Circuit held it was not criminal for Mr. Rabbitt to introduce bribe payors 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 action in a *colloquial* sense—but not in the *statutory* sense, as he did not exercise any government power or attempt to influence other officials to do so. To take official action, he would have had 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 different types of conduct. Judge Boudin's opinion for the court 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 settle a dispute with the hospital, thereby "deliberately" "exploit[ing]" the senator's "leverage" of official powers. *Id.* at 292, 296-97. But, at the same time,

paying the senator to merely lobby mayors to act in a way that benefited the hospital was not criminal. *Id.* at 294. That conduct, unlike the other acts, did not abuse the senator's "*official power* over legislation." *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 directly use (or threaten to use) "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.* For that reason, it is not an "official act" under the corruption laws. Because the district court, however, "instructed the jury that the statute extended" beyond "exercises of official power," the First Circuit ordered a new trial. *Id.* at 295.

3. Finally, the D.C. Circuit's en banc decision in *Valdes*, 475 F.3d 1319, similarly agreed that "official acts" under the corruption laws are limited to those acts that influence an actual governmental decision about actual governmental policies. In *Valdes*, a policeman took payments in exchange for using an official database to perform searches for license plates, outstanding warrants, etc. *Id.* at 1321-22. That was not an "official act." It fell within his official duties, but he did not exercise any "inappropriate influence on decisions that the government actually makes." *Id.* at 1321-25. Valdes made a "purely informational inquiry," which is distinct from seeking "to influence" an actual government decision. *United States v. Ring*, 706 F.3d 460, 470 (D.C. Cir. 2013) (upholding conviction of official paid "to

influence" visa application process by urging others to expedite visa); Trial Tr. Day 12, *United States v. Ring*, No. CR 08-274 (D.D.C. Nov. 3, 2010), Dkt. 270, at 36:8-39:21 (instructing jury 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"). *Accord United States v. Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979) ("It is the corruption of official decisions *through the misuse of influence in governmental decision-making* which the bribery statute makes criminal." (emphasis added)).

4. While the First, Eighth, and D.C. Circuits have limited the meaning of "official act" to the exercise (or threatened exercise) of actual governmental power, the Fourth Circuit upheld Gov. McDonnell's conviction even though he did not exercise, promise to exercise, pressure or urge anyone else to exercise, or threaten to exercise governmental power on Williams' behalf. Nor was the jury instructed that this distinction—or *any* link between Gov. McDonnell's acts and some ultimate exercise of actual governmental power—was relevant to finding "official action."

The acts the panel's opinion cited to affirm Gov. McDonnell's conviction were (i) asking a cabinet secretary to send a deputy to a "briefing" about Star's product; (ii) asking university researchers whether studying Star's product would be "good"; (iii) asking his counsel to "see me" about the matter (he did not); and (iv) asking two state officials "if they would be willing to meet" with Star (they did not). Op. 81-82, 84. Those acts would not suffice for criminal liability in the other Circuits.

Rabbitt, for example, held that arranging meetings, even those at which state

business would be discussed, was not "official" absent efforts "to influence" actual policy outcomes. *Loftus*, 992 F.2d at 796. Yet Gov. McDonnell was convicted for doing just that—arranging a meeting at which Williams could discuss matters of interest to him with the appropriate state official. While Gov. McDonnell facilitated introductions (as he did thousands of times as Governor), there is no evidence he "use[d] his official position to influence those persons." *Loftus*, 992 F.2d at 796. To the contrary, the staffer involved in that one meeting testified she understood that Gov. McDonnell wanted "nothing more" than her attendance, V.J.A.3043:14-3044:8; *see also id.* at 3068:10-25, and her honest judgment on any policy issues that arose, VI.J.A.4231. So if Gov. McDonnell's conduct was criminal, so was Rabbitt's. And if there was any difference, the jury was certainly not required to find it.

The decision below is in similarly direct conflict with *Urciuoli*. None of the acts the panel relied upon involved any exercise—or "threa[t]" to exercise—any "official power" on behalf of Williams; there is no evidence that Gov. McDonnell ever "misuse[d] his official power" in exchange for gifts, especially given that decision's distinction between "official power" and mere "access and attention." *Urciuoli*, 513 F.3d at 296-97. And the jury was certainly not *told* it had to find misuse of official power; to the contrary, it was instructed, akin to the jury in *Urciuoli*, that if Gov. McDonnell took any "acts that a public official customarily performs," even absent "authority over the end result sought by a bribe payor," he was guilty. XI.J.A.7672.

Gov. McDonnell could no more have been convicted in the D.C. Circuit than in the First or Eighth. The purportedly "official acts" relied on by the panel—*i.e.*,

attending briefings, asking questions, and talking with aides—are all "purely informational," *Ring*, 706 F.3d at 470, exerting no "inappropriate influence" (or *any* 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 directing or urging that a true governmental decision be made in Williams' favor. And again, over objection, the jury below was not told—unlike the *Ring* jury, *see supra* at 25—that taking a "lobbyist's phone call" or granting him "greater access" to an appointment schedule are not, standing alone, "official acts."

The panel made no attempt to distinguish *Rabbitt* or *Loftus*, *Valdes* or *Ring*, thus implicitly acknowledging its disagreement with those courts' construction of "official action." The panel did cite *Urciuoli* in a footnote, purporting to distinguish the jury instructions in that case. Op. 59 n.18. The instructions were indeed different, but the panel overlooked *Urciuoli*'s broader significance—its insistence that an "official act" is one that exercises or threatens to exercise "official power," thus "misus[ing]" sovereign power. 513 F.3d at 296-97. That close nexus to official power is absent here—and, just as in *Urciuoli*, it was never imparted to the jury.[4]

5. The panel appeared at times to accept Gov. McDonnell's legal rule yet find it satisfied, asserting (for example) that "Appellant did, in fact, use the power of his office *to influence governmental decisions*." Op. 81 (emphasis added).

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[4] The fact that the Fourth Circuit's rule conflicts with the D.C. Circuit's creates a type of jurisdictional confusion demanding particularly prompt resolution. The Fourth Circuit encompasses the Virginia and Maryland suburbs that surround the District of Columbia. That raises the prospect that a Member of Congress who has lunch with a donor in D.C. would have no fear—but that same lunch across the Potomac could land him in prison. That is plainly untenable.

But the panel's explication of that standard exposes its conflict with the other Circuits. In explaining how Gov. McDonnell "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 the prospect of research trials at Virginia universities. Op. 81. There was, however, no evidence (and the panel cited none) that Gov. McDonnell told that deputy to institute trials, to pressure universities to hold them, or to do anything besides attend the briefing. To the contrary, the deputy's own repeated testimony was exactly the opposite:

> 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.

V.JA.3044. Following the meeting, the staffer sent a "blow-off email" to Williams:

> Q[:] When you wrote this email, what did you understand your job to be going forward ... ?
>
> A[:] Nothing at the time of the written email.
>
> ... 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.

Id. at 3058, 3068, 3080. In short, as the deputy testified without contradiction, Gov. McDonnell never "interfere[d] with [the] decision-making process." *Id.* at 3071. Yet under the reasoning below, merely asking her to attend that meeting—without placing any thumb on the scale of the ultimate decision—was itself a federal felony.

The panel's next examples were that Gov. McDonnell asked state university researchers whether clinical studies "could 'be something good'" for Virginia and

requested that one of his aides "see" him about the matter. Op. 82-83. But again, the panel cited no evidence that Gov. McDonnell directed anyone to make governmental decisions one way or the other. And there was no such evidence at trial. *See also* Op. 84 (last example is asking two officials "if they would be willing to meet with Star," but not directing anyone to do anything).

In other words, in the panel's view, asking a question about a policy issue or gathering information about it *itself* "exploit[s]" official power "to influence" the ultimate policy decision. The meeting or question might be a "first step" toward exercising government power, which the jury was expressly directed was sufficient to convict—even if the step led nowhere. XI.J.A.7672:11-14 (instructing that action "in furtherance of longer-term goals," or taking "steps" to an end, "no less official").

That logic, however, conflates *procedural access* with *substantive influence*—eradicating the foundational line drawn by *Rabbitt*, *Valdes*, and *Urciuoli*. Under the panel's rationale—that a meeting is a means to an end, and so to arrange a meeting is an action "on" the end that seeks "to influence" it—Rabbitt *did* influence the official acts of awarding state contracts to the bribe-payors. After all, Rabbitt's efforts to "gain [the bribe-payors] 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 793, 796. Likewise, on the panel's logic, a "purely informational" inquiry about a matter is itself an action "on" the decision how to resolve it. *But see Ring*, 706 F.3d at 470.

Procedural access may be a first step toward an actual, substantive governmental decision. Yet, contrary to the Fourth Circuit, that does not turn the

access itself (the call, email, meeting, or introduction) into an "official act." Access merely allows government to work; it does not corrupt it, and so cannot be "described as a deprivation of honest services, actually or potentially harmful to the citizens." *Urciuoli*, 513 F.3d at 295. So long as the officials responsible for making actual government decisions are permitted to exercise unfettered, independent judgment—as they undisputedly were here, V.J.A.3043:14-3044:8, 3068:10-25; VI.J.A.4231; as their *rejection* of all Williams' requests confirmed; and as the courts below never denied—the corruption laws are not implicated. Hence this Court's distinction between "access" and true "corruption." *Citizens United*, 558 U.S. at 360; *see also Urciuoli*, 513 F.3d at 296 (trading on "access and attention" not criminal).

6. Even if the panel's broader view of "influence" were defensible—and it is not—the panel did not, unlike *Urciuoli* and *Ring*, require the jury to be *told* that Gov. McDonnell had to try "to influence" governmental decisions. Rather, the panel found it sufficient that the jury was quoted a complex statutory definition followed by a set of expansive glosses on what "official action" *includes*—never hinting at what it *excludes*. Op. 54. *But see Urciuoli*, 513 F.3d at 295 (vacating where jury not told this critical point); *Ring*, *supra*, Dkt. 270, at 36:8-39:21 (instructing jury there that "tak[ing] a lobbyist's phone call" or providing "greater access to the official's appointment schedule" is not "enough" to be "official act"). Jurors were never told, despite repeated requests, that an "official act" must be "intended to ... influence a specific official decision the government actually makes." X.J.A.7341; I.J.A.753-54.

That left the Government free to argue to the jury that influencing

governmental decisions was *irrelevant*. All that mattered, prosecutors 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." XI.JA.7438-39. "Whatever it was, it's all official action." *Id.* at 7439. Thus, if Gov. McDonnell posed for "photos ... making comments at different ribbon cuttings ... in exchange for money, it's a crime." XI.J.A.7439-40. Or: "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." *Id.* at 7611.

Moreover, even under the panel's radically expansive and erroneous view of "influence," one of the supposedly official acts the district court and Government relied on plainly does not qualify. Gov. McDonnell's attendance at a cocktail party for healthcare leaders was treated by the district court as "official action," since it allegedly gave Star legitimacy. App. F. at 6. *But see Urciuoli*, 513 F.3d at 296 ("access and attention" not official action). But because that party did not involve any formal discussion of anything, much less research studies, it is *not* an "official act" even on the Fourth Circuit's view, though it *was* "official" under the capacious instructions the panel endorsed—a point the Government hammered in closing: "The Healthcare Leaders Reception itself occurs five hours after Mr. Williams and Gov. McDonnell have a private meeting about the loan." XI.JA.7616. Despite that, the panel *ignored this act altogether*, never mentioning it—even though the jury could have convicted on it *alone*. That underscores how the Government's theory,

enshrined in the jury instructions affirmed below, embraces the very "absurdities" rejected in *Sun-Diamond*, in conflict with decisions of three other Circuits.

C. The Opinion Below Criminalizes Standard Political Practices, Turning Nearly Every Official in the Country into a Felon.

The real-world consequences of the Fourth Circuit's opinion give this issue extraordinary importance. The panel expanded "official action" from swaying actual sovereign decisions to any action that could conceivably sway an eventual sovereign decision, no matter how remote; and the instructions it blessed make every "settled practice" of an official into official action. Under that limitless conception of corruption, "potentially every elected official in the nation would be in danger of indictment by an overzealous federal prosecutor." RGA Am. Br., C.A. Dkt. 74, at 8. At the intersection of politics, federalism, and criminal justice, the scope of the corruption laws is of great public significance and warrants this Court's attention.

On the panel's view, "official action" encompasses any action by an official that may bear on any hypothetical future exercise of governmental power. *See* Op. 79-84. Taking a phone call to discuss a policy is an "official act" to "influence" whether to adopt the policy. Connecting a donor to an agency with jurisdiction over his concern is an "official act" to "influence" the agency's resolution of that concern. Participating in a roundtable is an "official act" to "influence" official policy on any issue aired therein. If that is really the law, then prosecutors have every reason to investigate whether such a call, referral, or roundtable was done with, or on behalf of, someone who had given a gift or campaign donation. If so, they could ask a jury to find a nod-and-wink *quid pro quo* (based *solely* on a temporal nexus) and convict.

Any official who holds a fundraiser (*i.e.*, all of them) is a potential target.

These situations are not hypothetical. They are *routine*. Thus, *McConnell v. FEC* cited—without suggesting that any of this was criminal—"White House coffees that rewarded major donors with access to President Clinton," "courtesies extended to an international businessman" whose donations were "motivated by his interest in gaining the Federal Government's support for an oil-line project in the Caucasus," and donor programs that "promised 'special access to high-ranking ... elected officials, including governors, senators, and representatives.'" 540 U.S. 93, 130 (2003). Indeed, "national 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 150-51. These practices involved the open "peddling [of] access," which this Court distinguished from the sale of "actual influence." *Id.* On the panel's view here, there was no need for campaign-finance reform—all those officials, from President Clinton down, *could have been convicted of bribery*.

And officials continue to accept free travel, vacations, and campaign donations in at least partial exchange for speeches on official matters or providing enhanced access at policy seminars or discussions about pending legislative matters. *See* Fredreka Schouten, *Lawmakers Accept Millions In Free Travel*, USA TODAY, Feb. 27, 2014. No doubt those officials ask questions and listen to pitches at these events—just as Gov. McDonnell did (and asked others to do) in this case.

In one striking example of an express *quid pro quo*, 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. And during President Obama's reelection, donors were openly rewarded with opportunities to speak with top administration officials, including about policies within their jurisdiction. Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011 (fundraisers at which EPA Administrator took questions about oil pipeline, etc.). Neither Gov. McAuliffe nor President Obama has been indicted—but, given the Fourth Circuit's rule, that is presumably only by grace of prosecutorial discretion.

The decision 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 here failed "to clarify the distinction between criminal and lawful politics," instead endorsing "ad hoc" standards—creating "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/KqJgXg. This Court has few opportunities to review clean legal disputes about the scope of the corruption laws. And those it has come long after misguided prosecutions have upended lives and altered elections. The Court's intervention is thus sorely needed; it is at least "reasonably probable."

III. THERE IS ALSO A REASONABLE PROBABILITY OF CERTIORARI ON THE SIXTH AMENDMENT PRETRIAL PUBLICITY ISSUE.

Gov. McDonnell's petition will present another question, about the degree of *voir dire* required in cases of extreme pretrial publicity, on which the panel's ruling again conflicts with decisions of this Court and at least seven other Circuits.

A. The decision below endorsed, in one of the most politicized, high-profile prosecutions in Virginia history, the district court's adamant refusal to ask jurors whether their *admitted* exposure to an avalanche of vitriolic pretrial publicity caused them to form opinions about guilt. 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 Robert F. McDonnell." I.J.A.527. The district court inexplicably struck that question. The panel upheld that deletion on a ground that neither the district court nor any party advanced—that the question "invites respondents to deliberate on the defendant's guilt or innocence and to stake out a position" prematurely. Op. 33. But the question asked only whether potential jurors (who filled out the questionnaires at home) *already formed* opinions, without inviting them to *start forming* opinions or somehow "deliberate on ... guilt or innocence." Besides, Gov. McDonnell later requested three different forms of this question during *voir dire*, such as: "At any time have you ever formed or expressed any opinion about this case, or any of the people involved?" II.J.A.917; *id.* at 916-17. The court rejected those questions, too, III.J.A.1690 ("I'm not asking those questions"), and the panel affirmed, Op. 35.

Beyond that, the panel endorses the following *voir dire*: After summoning just under 150 potential jurors—and acknowledging that this case "generated a lot of media interest"—the district court asked the prospective jurors to stand "if you have read, heard or seen something in the media." III.J.A.1691. Virtually everyone 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.* at 1692. Everyone sat. *See id.* The court announced it was "satisfied with ... the responses" and refused to ask more questions about general exposure to pretrial publicity, despite counsel requesting additional inquiry. *Id.* (defense: "I can't trust the credibility of that without a further inquiry...."). [5] The panel endorsed this, holding that criminal defendants have *no right* to "individual questioning" to ferret out "the pernicious effects of pretrial publicity." Op. 35.

B. The panel opinion endorsing this perfunctory process conflicts with this Court's decisions and those of the other Circuits in two basic respects. Foremost, in every other federal decision touching the issue of which Applicant is aware, defendants were entitled to ask potential jurors who admitted exposure to

[5] The panel suggested that Mr. McDonnell was invited "to identify any specific veniremen it would like to question further," Op. 34, but the record makes clear that—consistent with the panel's holding that individual questioning on exposure to publicity is not required—the court allowed further questions only on issues *beyond* mere exposure to negative publicity. At that point, the district court had already refused to question everyone who had been exposed to publicity and was permitting further questioning of solely those "specific folks who we need to look at specific responses [on their questionnaires]," III.J.A.1692—*i.e.*, responses beyond sitting down when asked if they could be fair. That is why the court refused to question one juror who had not given problematic answers to questions in her questionnaire beyond admitting exposure to pretrial publicity. III.J.A.1696 ("I'm sorry, ma'am. We thought there was something on your questionnaire. So you can have a seat.").

prejudicial pretrial publicity whether that publicity has caused them to *form opinions* about guilt. That is, no doubt, because this Court has held for decades that district courts need to determine whether publicity-exposed jurors are biased. Thus, in every modern case this Court has decided, the trial court asked that threshold question. For example, in *Mu'min v. Virginia*, "[w]henever a potential juror indicated that he had read or heard something about the case, the juror was then asked whether he had formed an opinion...." 500 U.S. 415, 420 (1991); *see also, e.g.*, *Patton v. Yount*, 467 U.S. 1025, 1029-30 (1984) (same). This Court's elaborate analysis in cases like *Mu'min* of whether voir dire sufficiently plumbed prejudice would be irrelevant if the district court had discretion to refuse to ask potential jurors whether they had formed opinions *in the first place.* Yet the panel blessed the district court's refusal to pose that question. In Fourth Circuit, defendants in high-profile cases thus no longer have the right to ask jurors who admit exposure to pretrial publicity whether they have formed an opinion on guilt. That untenable result is reasonably likely to attract this Court's attention.

In addition to that threshold conflict, this Court has long recognized that potential jurors are "[n]o doubt ... sincere" when they say they can "be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Similarly, 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). And

in *Morgan v. Illinois*, the Court explained that, "[a]s to general questions of fairness and impartiality, [ ] jurors could in all truth and candor respond affirmatively, personally confident that [their] dogmatic views are fair and impartial, while leaving the specific concern unprobed." 504 U.S. 719, 735 (1992). Applying that bedrock principle, this Court recently rejected a *voir dire* challenge in *Skilling*, a comparably high-profile prosecution, only after finding that the trial court, among other things, "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 388-89. And three Justices *still* dissented. *Id.* at 427 (Sotomayor, Stevens, Breyer, JJ., dissenting in part).

Consistent with this Court's decisions, other Circuits regularly vacate convictions where the trial court relied "solely on a juror's assertion of impartiality." *Pratt*, 728 F.3d at 470. In the Fifth Circuit, "[i]t is clear ... that 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. *But see* Op. 35 ("[W]e have held that merely asking for a show of hands was not an abuse of discretion."). That is in square conflict with the

decision below. And the First,[6] Second,[7] Third,[8] Seventh,[9] Ninth,[10] and Eleventh Circuits all agree with the Fifth. As the Eleventh Circuit puts it, "relief is required where there is a significant possibility of prejudice plus inadequate voir dire to unearth such potential prejudice in the jury pool." *Jordan v. Lippman*, 763 F.2d 1265, 1275 (11th Cir. 1985). The Fourth Circuit's starkly different approach conflicts with these decisions, and, if correct, reduces *voir dire* in high-profile cases to empty theater that does not ensure criminal defendants are judged by impartial juries. This issue, too, is vitally important and amply worthy of the Court's review.

CONCLUSION

Gov. McDonnell respectfully requests that this Court stay the mandate, or grant release on bail, pending disposition of a timely certiorari petition. He also requests a brief administrative stay pending resolution of this application.

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[6] *E.g.*, *Patriarca v. United States*, 402 F.2d 314, 317-18 (1st Cir. 1968) ("In cases where 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.").

[7] *E.g.*, *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963) (en banc) ("[M]erely going through the form of obtaining jurors' assurances of impartiality is insufficient.").

[8] *E.g.*, *Waldorf v. Shuta*, 3 F.3d 705, 712 (3d Cir. 1993) ("We agree with [the Second Circuit's decision 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.'").

[9] *E.g.*, *United States v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972) ("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial.... We think the 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.").

[10] *E.g.*, *Silverthorne v. United States*, 400 F.2d 627, 639-40 (9th Cir. 1968) ("Because of the voluminous publicity antedating appellant's trial, some of which was prejudicial in nature, and in view of the trial court's denial that any prejudice existed because of the pretrial publicity, the court's voir dire examination should have been directed to the individual jurors.").

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Yaakov M. Roth, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application was served on August 20, 2015, via electronic mail and by Federal Express on:

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