IN THE SUPREME COURT OF THE UNITED STATES

No. 15A218

ROBERT F. McDONNELL, APPLICANT

v.

UNITED STATES OF AMERICA

ON EMERGENCY APPLICATION TO STAY MANDATE,
OR FOR RELEASE ON BAIL, PENDING THE FILING AND
DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the emergency application to stay the mandate of the United States Court of Appeals for the Fourth Circuit, or in the alternative for release on bail, pending the filing and disposition of a petition for a writ of certiorari.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, applicant was convicted on one count of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. 1349; three counts of honest-services

wire fraud, in violation of 18 U.S.C. 1343; one count of conspiracy to obtain property under color of official right, in violation of 18 U.S.C. 1951; and six counts of obtaining property under color of official right, in violation of 18 U.S.C. 1951. Appl. App. A22 & n.9. Applicant was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. Id. at A23.

1. From 2010 until 2012, while applicant was the Governor of Virginia, he and his wife engaged in a quid pro quo bribery scheme with Jonnie Williams, a Virginia businessman. Applicant and his wife solicited and secretly accepted more than $177,000 in money and luxury goods from Williams. In exchange, applicant agreed to use the power of his office to help Williams's company secure assistance from the Virginia government.

a. Applicant became the 71st Governor of Virginia in January 2010. At the time, he and his family were in considerable financial distress. They owed nearly $75,000 in credit-card debt, an amount that soon grew to $90,000. Compounding that debt, applicant and his sister were losing more than $40,000 each year on a pair of heavily mortgaged rental properties. Appl. App. A4; Gov't C.A. Br. 5-6.

Jonnie Williams was the founder of Star Scientific, Inc. (Star), a Virginia company that produced a dietary supplement called Anatabloc. Anatabloc was derived from anatabine, an

alkaloid compound found in tobacco that purportedly could be used to treat inflammation. Williams wanted the FDA to approve Anatabloc as a pharmaceutical, which would have made the product more lucrative by allowing Star to advertise its ostensible therapeutic effect. But Star lacked the resources to fund all of the extensive testing needed for FDA approval. Williams therefore hoped to persuade independent institutions -- in particular, Virginia's state-run medical schools -- to conduct some of the required studies. Appl. App. A5-A7.

b. In October 2010, applicant used Williams's private jet for a cross-country trip. Appl. App. A6. Williams used the six-hour flight to "extol[] the virtues of Anatabloc" and to "explain[] that he needed [applicant's] help." Ibid. As Williams later testified, he told applicant that "what [he] needed from [applicant] was that [he] needed testing and [he] wanted to have this done in Virginia." Id. at A6-A7.

Williams first met applicant and Mrs. McDonnell in 2009, and saw them only rarely during 2010. Appl. App. A5.; C.A. App. 2205. In April 2011, however, Mrs. McDonnell asked Williams to take her shopping in New York. Appl. App. A7. During the trip, Williams spent approximately $20,000 on luxury clothing and accessories for Mrs. McDonnell. Ibid. Five days later, applicant and Mrs. McDonnell invited Williams to a private dinner at the Governor's Mansion. Ibid. Their discussion at

the dinner "centered on Anatabloc and the need for independent testing." Ibid.

Two days after the dinner -- and less than an hour after receiving an email about Star from Mrs. McDonnell -- applicant contacted his sister to gather information about the financial status of their mortgaged rental properties. Appl. App. A8. He also asked his daughter about outstanding bills for her upcoming wedding. Ibid. The next day, Williams returned to the Governor's mansion to meet with Mrs. McDonnell. Ibid. After describing her family's financial difficulties, including "thoughts about filing for bankruptcy," she told Williams that "[t]he Governor says it's okay for me to help you and -- but I need you to help me. I need you to help me with this financial situation." Id. at A9. Mrs. McDonnell then asked to borrow $50,000 and mentioned that she and applicant still owed $15,000 for their daughter's wedding. Ibid. Williams agreed to provide the loan and to make the $15,000 payment. Ibid. Before doing so, however, Williams spoke to applicant to "make sure [he] knew about it." Ibid. (brackets in original). Williams later testified that he made the payments because he knew "that [applicant] control[led] the medical schools" in Virginia and he "needed [applicant's] help with the testing." C.A. App. 2234.

c. Over the next year and a half, Williams not only provided the $65,000 that Mrs. McDonnell had solicited, but also

gave applicant and his family another $80,000 and tens of thousands of dollars' worth of luxury goods. For example:

- In May 2011, August 2011, and January 2012, Williams paid for applicant and members of his family to golf, eat, and shop at his private golf club. Appl. App. A10, A13, A15. The outings cost more than $5000. Ibid.

- In July 2011, Williams allowed applicant and his family to use Williams's vacation home. Appl. App. A11. Williams spent more than $2000 to rent a boat for the family and paid $600 to have his Ferrari delivered to the home for applicant to drive. Id. at A11-A12.

- In August 2011, at Mrs. McDonnell's request, Williams spent more than $6000 on a custom-engraved Rolex watch for applicant. Appl. App. A13.

- Between January and March 2012, applicant and Mrs. McDonnell arranged for Williams to make another $50,000 loan. Appl. App. A16-A17.

- In May 2012, applicant sent Williams a text message stating that he "would like to see if [Williams] could extend another 20k loan." Appl. App. A20. Twelve minutes later, Williams responded: "Done, tell me who to make it out to and address." Ibid.

- In July 2012, Williams texted applicant: "If you need cash let me know" and suggested a vacation over Labor Day weekend. Appl. App. A20. Applicant and Mrs. McDonnell accepted the offer, and Williams spent more than $7300 on the couple during the trip. Id. at A21.

- In December 2012, Williams gave one of applicant's other daughters $10,000 for her wedding. Appl. App. A21-A22.

Over the same time period, applicant repeatedly used the powers of his office to assist Williams and Star in their efforts to obtain favorable actions from the state government. On May 5, 2011 -- three days after Williams promised the initial $65,000 -- applicant met with the Virginia Secretary of Health

and Human Resources, Dr. William Hazel, and discussed Anatabloc. Appl. App. A9. Later, applicant directed his assistant to send Hazel a favorable press article about Star that he had received from Mrs. McDonnell. Ibid.

In June 2011, Williams sent applicant a letter attaching an 18-page protocol for a clinical trial of Anatabloc and "suggesting that [applicant] use the attached protocol to initiate the 'Virginia Study' of Anatabloc at the Medical College of Virginia and the University of Virginia" (UVA). Appl. App. A11; see C.A. Gov't Supp. App. 29-47. Applicant forwarded the letter and attachments to Secretary Hazel. Appl. App. A11. By July 2011, applicant and Williams had also discussed the possibility of funding the studies at the universities through grants from the state-created Tobacco Indemnification and Community Revitalization Commission (Tobacco Commission), which applicant told Williams "would be a good source of funding for something like this." C.A. App. 2260.

On July 31, 2011, the night after returning from the trip to Williams's vacation home, applicant directed Secretary Hazel to have his deputy meet with Williams and Mrs. McDonnell the next morning about "the Star Scientific anatablock [sic] trials planned in va at vcu [Virginia Commonwealth University (VCU), the home of the Medical College of Virginia] and uva." C.A. Supp. App. 80; see Appl. App. A12. At the meeting, Williams

reiterated his desire to have studies of Anatabloc conducted at Virginia's state-run medical schools. Appl. App. A12.

On August 30, 2011, applicant and Mrs. McDonnell hosted the launch of Anatabloc at the Governor's mansion and invited numerous state officials, including doctors with authority over studies at UVA and VCU. Appl. App. A13-A14; Gov't C.A. Br. 19-22. During the launch, Williams gave $25,000 checks to two doctors who were employees of the state medical schools to help them prepare applications for grants from the Tobacco Commission to fund studies of Anatabloc. Id. at A13-A14. Six other doctors employed by the State received $25,000 checks for the same purpose shortly after the launch. Id. at A18.

In January 2012, at the same time he was agreeing to provide applicant a $50,000 loan, Williams told Mrs. McDonnell that UVA was moving slowly on the studies. Appl. App. A16. Mrs. McDonnell, who was "furious" at the news, later reported to Williams that she had advised applicant of the problem and that applicant "want[ed] the contact information of the people that [Star] [was] dealing with at [UVA]." Ibid. (quoting C.A. App. 2309) (brackets in original). Mrs. McDonnell received the requested information on February 9 and forwarded it to applicant and his chief counsel, Jacob Jasen Eige. Id. at A18. A day later, while she was with applicant, Mrs. McDonnell sent Eige the following message:

> Pls call Jonnie today [and] get him to fill u in on where this is at. Gov wants to know why nothing has developed w studies after Jonnie gave $200,000 [in planning grants]. * * * Gov wants to get this going w VCU MCV. Pls let us know what u find out after we return.

Ibid. (quoting C.A. Supp. App. 154) (first pair of brackets in court of appeals opinion). And six days after that -- minutes after checking with Williams about the pending loan -- applicant himself emailed Eige: "Pls see me about anatabloc issues at VCU and UVA." Id. at A18-A19 (quoting C.A. Supp. App. 157).

Applicant also urged other state officials to take actions favorable to Star. In March 2012, he met with the Virginia Secretary of Administration, who oversaw the health plan the State provided for its employees. Appl. App. A19. During a discussion of the drugs to be covered under that plan, applicant "reached into his pocket, retrieving a bottle of Anatabloc." Ibid. He told the Secretary "that Anatabloc was 'working well for him, and that he thought it would be good for . . . state employees.'" Ibid. Applicant then asked the Secretary to meet with Star about the supplement. Ibid.[1]

d. Williams's testimony made clear that he had made payments and gifts to applicant and his family on the

[1] Williams had previously explained to a state official that, in addition to the studies at UVA and VCU, he wanted state employees to take Anatabloc as part of the state health plan and study the result. C.A. App. 2271, 3054.

understanding that applicant would use his office to help Star obtain benefits from the state government. With respect to the March 2012 loan, for example, Williams explained that he "agreed to help [applicant and Mrs. McDonnell] with money" "[b]ecause they [we]re helping [him]." C.A. App. 2307. He added that, when he had made the payment, he had expected that "[applicant] would continue to help me move this product forward in Virginia * * * [w]hether it was assisting the universities, with the testing, or help with government employees, or publicly supporting the product." Id. at 2355.

2. In January 2014, a grand jury indicted applicant and Mrs. McDonnell. Appl. App. A22. Applicant was charged with conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. 1349; honest-services wire fraud, in violation of 18 U.S.C. 1343; conspiracy to obtain property under color of official right, in violation of 18 U.S.C. 1951; obtaining property under color of official right, in violation of 18 U.S.C. 1951; and making a false statement to a financial institution, in violation of 18 U.S.C. 1014. Appl. App. A22 & n.9. After a six-week trial, the jury found applicant not guilty on the false-statement counts but found him guilty on the remaining charges. Id. at A22. The district court sentenced him to 24 months of imprisonment. Id. at A23.

3. The court of appeals affirmed. Appl. App. A1-A89.

a. As relevant here, the court of appeals first rejected applicant's contention that the district court abused its discretion by conducting an inadequate voir dire on pretrial publicity. Appl. App. A29-A35. The district court gave prospective jurors a questionnaire with 99 questions, including general questions about their news consumption and specific questions about their exposure to coverage of this case. Id. at A31-A32. Prospective jurors were asked whether they had "seen, heard or read anything" about the case; "[h]ow closely" they had followed news about the case; and from what types of media they had learned about the case. Id. at A32. The questionnaire also asked whether prospective jurors had "expressed an opinion about this case or those involved to anyone." Ibid.

After some potential jurors were eliminated based on their answers to the questionnaire, the district court conducted an in-person voir dire involving 142 venire members. Appl. App. A33-A34; Gov't C.A. Br. 72. It first questioned the venire members as a group about pretrial publicity, asking them to stand up if they had read, heard, or seen press reports about the case, and then to sit down if they would be "able to put aside whatever it is that [they] heard, listen to the evidence in this case and be fair to both sides." Appl. App. A33-A34. The court then invited applicant's counsel to identify any specific prospective jurors that he wished to question further

regarding pretrial publicity. Id. at A34. Applicant's counsel identified eight members of the venire and the court questioned each of them. Ibid. The court then asked applicant's counsel whether he wished to question "[a]nybody else." Ibid. Counsel responded "[n]ot on publicity." Ibid.

Applicant contended that this process was inadequate, and that the district court was required to question, outside the presence of the other prospective jurors, every juror who had been exposed to pretrial publicity. Appl. App. A34. The court of appeals rejected that per se rule. It emphasized that trial courts enjoy "wide discretion" in determining how best to question potential jurors about pretrial publicity. Id. at A31 (quoting Mu'Min v. Virginia, 500 U.S. 415, 427 (1991)). After reviewing the record, the court of appeals was "satisfied that the trial court's questioning in this case was adequate to 'provide a reasonable assurance that prejudice would [have been] discovered if present.'" Id. at A35 (citation omitted).

b. The court of appeals also rejected applicant's challenge to the sufficiency of the evidence on the "official act" requirement of the corruption charges. Appl. App. A79-A84.[2]

[2] The parties agreed that, to establish honest-services fraud or Hobbs Act extortion, the government was required to prove that applicant had agreed to accept a thing of value in exchange for an "official act" or "official action." The honest-services statute makes clear that the mail and wire fraud statutes encompass a "scheme or artifice to defraud" another

As defined in the federal bribery statute and the jury instructions in this case, an "official action" is "[1] any decision or action on [2] 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." Id. at A53 (quoting C.A. App. 7671); see 18 U.S.C. 201(a)(3).

The court of appeals held that government proved the existence of three "questions or matters within [applicant's] sphere of influence." Appl. App. A79. The first was "whether researchers at any of Virginia's state universities would initiate a study of Anatabloc." Ibid. The second was whether the Tobacco Commission would "allocate any grant money for the study of anatabine." Ibid. The third was "whether the health

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person of the "intangible right to honest services." 18 U.S.C. 1346. In Skilling v. United States, 561 U.S. 358 (2010), this Court held that the statute "covers only bribery and kickback schemes." Id. at 368. The Court further specified that, in the bribery context, the honest-services statute "draws content" from the federal bribery statute, 18 U.S.C. 201(b). 561 U.S. at 412. That statute, in turn, applies to a federal official who "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value * * * in return for * * * being influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A) (emphasis added). The Hobbs Act makes it unlawful to "obtain[] property from another * * * under color of official right." 18 U.S.C. 1951(b)(2). In this case, the parties agreed that the Hobbs Act counts required proof that applicant, inter alia, obtained a thing of value "knowing that the thing of value was given in return for official action." Appl. App. A52-A53 (emphasis added).

insurance plan for state employees in Virginia would include Anatabloc as a covered drug." Ibid. The court concluded that "[t]hese were all government matters, and [applicant], as head of the Commonwealth's government, was in a prime position to affect their disposition." Ibid.; see id. at A79-A81. The court accordingly concluded that, to the extent that applicant "made any 'decision' or took any 'action' on these matters," his conduct would qualify as "official action." Id. at A81.

The court of appeals emphasized that the government was not required "to prove that [applicant] actually took any such official action." Appl. App. A81. Instead, it was required to establish only that "the allegedly corrupt agreement between [applicant] and Williams carried with it an expectation that some type of official action would be taken." Ibid. The court concluded, however, that "the Government exceeded its burden" by proving that applicant "did, in fact, use the power of his office to influence governmental decisions" on the matters and questions at issue. Ibid.; see id. at A82-A84.

4. The court of appeals denied applicant's petition for rehearing en banc. Appl. App. C1-C2. Seven members of the court recused themselves; the remaining eight judges unanimously voted to deny the petition without requesting a response from the government. Id. at C2.

5. The release of the defendant during the pendency of a federal criminal case is governed by the Bail Reform Act of 1984 (Bail Act), 18 U.S.C. 3141 et seq. In this case, the court of appeals granted applicant's motion for release pending an expedited appeal. Appl. App. D1-D2. After the court denied rehearing en banc, applicant filed a motion seeking to "clarify" that the order granting release would continue to apply during the pendency of a petition for a writ of certiorari. Id. at B2. Alternatively, applicant asked the court to stay its mandate pending the filing and disposition of a petition. Ibid. The court denied the motion. Id. at B1-B2.

ARGUMENT

Applicant seeks a stay of the court of appeals' mandate -- or, in the alternative, release on bail -- pending the filing and disposition of a petition for a writ of certiorari. Applicant cannot make the demanding showing required to obtain that extraordinary relief. The court of appeals correctly rejected the contentions that applicant proposes to raise in his forthcoming certiorari petition, and its decision does not conflict with any decision of this Court or another court of appeals. In arguing that the decision below threatens to impose criminal liability on a broad swath of honest office-holders and garden-variety political conduct, applicant repeatedly fails to acknowledge or confront unfavorable aspects of the trial record

and the court of appeals' opinion. This Court is not likely to grant a writ of certiorari, and it would not be likely to reverse if it did so. The application should be denied.

1. Applicant frames his application principally as a request for a stay of the court of appeals' mandate. Appl. 14-15. But "[t]he statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. 3143(b)." Morison v. United States, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers). Accordingly, the application should be evaluated using the standard prescribed in Section 3143(b), rather than under the stay factors that the Court applies when Congress has not established the governing criteria.

Section 3143(b) imposes stringent restrictions on the availability of bail pending certiorari. See Stephen M. Shapiro et al., Supreme Court Practice §§ 17.15, 17.17, at 911-913, 916-917 (10th ed. 2013) (Supreme Court Practice). A convicted defendant who has been sentenced to imprisonment must be detained pending appeal and certiorari unless he establishes that he is not likely to flee or to pose a danger if released and that his appeal is not for the purpose of delay. 18 U.S.C. 3143(b)(1). In addition, the applicant must identify "a substantial question of law or fact likely to result in" a reversal of his convictions or a new trial. 18 U.S.C.

3143(b)(1)(B). Congress thus "plac[ed] on the defendant the burden of showing * * * that he is likely to prevail * * * on the petition to the Supreme Court for a writ of certiorari." Supreme Court Practice § 17.15, at 913.[3]

As Justices of this Court explained even before enactment of the Bail Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers) (citation omitted); accord McGee v. Alaska, 463 U.S. 1339 (1983) (Rehnquist, J., in chambers). Relief under the stricter standard adopted by Congress in 1984 is even more unusual: A leading treatise reports that "there is not a single published in-chambers opinion under the Bail Reform Act of 1984 granting bail" and that "it is not clear that a Circuit Justice has ever granted an application for bail" under the Bail Act. Supreme Court Practice § 17.15, at 911 & n.67.

It is undisputed that applicant is neither a flight risk nor a danger to the community. But he falls well short of

[3] The standard governing an application for a stay in other contexts requires an analogous showing. The applicant must demonstrate, inter alia, "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

demonstrating that this Court is likely to grant a writ of certiorari and reverse the decision below on either of the questions he proposes to raise.[4]

2. Applicant principally contends (Appl. 16-35) that the court of appeals affirmed his convictions based on an erroneous understanding of the term "official act." Encompassed within that argument are challenges both to the sufficiency of the evidence presented at trial and to the jury instructions given at the close of the case. The court below correctly rejected those challenges, and its decision does not conflict with any decision of this Court or another court of appeals. This Court recently denied a petition raising a similar question, in which the petitioner sought review of a decision on which the Fourth Circuit in this case heavily relied. Jefferson v. United States, 133 S. Ct. 648 (2012) (No. 12-111); see Appl. App. A54, A57, A59, A62, A65-A66. The same result is warranted here.

a. The court of appeals correctly held that applicant's convictions were supported by sufficient evidence. Applicant does not contest the sufficiency of the proof that he solicited and accepted payments from Williams. As the court of appeals explained, overwhelming evidence established that Williams

[4] For similar reasons, applicant would not be entitled to relief if his application were treated as a request for a stay. See n. 3, supra.

"supplied the 'quid,' and plenty of it." Appl. App. A78. Applicant also no longer challenges the jury's finding that he solicited and accepted Williams's largesse under a "corrupt quid pro quo" agreement. Id. at A84. Instead, applicant contends that no rational jury could have found that the things he agreed to do for Williams in that quid pro quo agreement qualified as "official actions." That is incorrect.

i. Applicant's arguments focus on an aspect of the court of appeals' reasoning that was not necessary to the result below. Applicant challenges the court's conclusion that the government proved that he took "official actions" for Williams. See, e.g., Appl. 16-17. But as the court recognized, and as the jury was instructed, "it was not necessary for the Government to prove that [applicant] actually took any such official action." Appl. App. A81. Instead, "[w]hat the Government had to show was that the allegedly corrupt agreement between [applicant] and Williams carried with it an expectation that some type of official action would be taken." Ibid.[5]

[5] See C.A. App. 7669 (instructing the jury that "[b]ribery also includes a public official's solicitation or agreement to accept a thing of value in exchange for official action * * * whether or not the public official ultimately performs the requested official action or intends to do so"); id. at 7682 (Hobbs Act instruction that applicant "must have known that the thing of value was given in exchange for official action," but that the jury did not need to "determine whether [applicant] could or did actually perform the official action").

Applicant thus contends that the court of appeals erred in holding that "the Government exceeded its burden" by proving that he "did, in fact," take official actions on Williams's behalf. Appl. App. A81. But applicant does not challenge the court's holding that such proof was unnecessary.[6] Applicant also does not advance any developed argument that the evidence was insufficient to support a conclusion that his agreement with Williams "carried with it an expectation that some type of official action would be taken." Ibid. Any such challenge would be implausible. Inter alia, Williams testified that he had loaned applicant money because he "kn[e]w that [applicant] controls the medical schools here in Virginia" and because he "needed [applicant's] help with the testing." C.A. App. 2234; see, e.g., id. at 2355 (Williams expected applicant "to help [him] move this product forward in Virginia" by "assisting with the universities, with the testing, or help with government employees, or publicly supporting the product").

ii. In any event, the evidence was also sufficient to establish that applicant did, in fact, follow through on his agreement to take "official actions" to assist Williams.

[6] That holding follows not only from the definition of bribery, see 18 U.S.C. 201(b)(2), but also from the statutes of conviction, all of which require an agreement or scheme that need not be completed. See Neder v. United States, 527 U.S. 1, 25 (1999); Evans v. United States, 504 U.S. 255, 265–268 (1992); Iannelli v. United States, 420 U.S. 770, 777 (1975).

Applicant does not challenge the basic definition of that term in the jury instructions, which was drawn directly from the federal bribery statute and which was consistent with applicant's own proposed instruction. Under that definition, an official action is "[1] any decision or action [2] 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." Appl. App. A53; see 18 U.S.C. 201(a)(3).

The court of appeals identified "three questions or matters" at issue in this case: whether researchers at Virginia state universities would study Anatabloc; whether a state-created Commission would provide funding for the studies, and whether the State's employee health plan would cover the drug. Appl. App. A79. The court then held that applicant had taken "actions" on those "questions or matters" because he had "use[d] the power of his office to influence governmental decisions on each of the three questions or matters." Id. at A81.

The court's holding that a public official's effort to influence the conduct of other officials can constitute an "official act" follows directly from United States v. Birdsall, 233 U.S. 223, 229-230 (1914). In that case, the Court held that two officers appointed by the Commissioner of Indian Affairs could be charged with accepting bribes from an attorney in

exchange for recommending leniency for his clients in sentencing and clemency. Id. at 227-228. The officials did not have final authority over those matters. Instead, they made recommendations to the Commissioner, who, in turn, was customarily consulted by federal judges and the President. Id. at 228-229. The Court nonetheless held that the officials' recommendations constituted "official actions" for purposes of the predecessor to the bribery statute. Ibid.

Consistent with Birdsall, the court of appeals correctly held that the evidence in this case "was more than sufficient" to establish that applicant used the power of his office to urge other Virginia officials to resolve governmental matters favorably to Williams. Appl. App. A84. Applicant's contrary argument distorts the record by truncating the facts. For example, applicant all but ignores one of the principal actions relied upon by the court of appeals. As the court explained, during a meeting with the state official responsible for the State's employee health plan, applicant told the official that he had been taking Anatabloc, "that [it] was working well for him, and that he thought it would be good for . . . state employees." Ibid. Applicant then asked the official to meet with Star. Ibid.[7] The court of appeals correctly held that, in

[7] In describing this incident, applicant asserts that he merely "ask[ed] two state officials 'if they would be willing to

so doing, applicant "used his position as Governor to influence a matter of importance to Virginia." Ibid.

Applicant devotes more attention to the court of appeals' conclusion that he took official actions by "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy adviser to 'see' him about an issue." Appl. App. A83; see Appl. 16, 26, 29-31. But, contrary to applicant's suggestion, the court did not hold that such activities are always (or even often) "official actions." Instead, the court concluded that, under the circumstances of this case, applicant's activities constituted official actions because they were part of "an ongoing effort to influence the work of state university researchers." Appl. App. A83-A84.

That conclusion was amply supported by the evidence. For example, the aide who was directed to "see" applicant about testing of Anatabloc at state universities explained that he had "been asked by the Governor to call [the universities] and put -- you know, show support for this research." C.A. App. 4374. The aide expressed discomfort with applicant's instructions, explaining that he "d[id]n't think we should be

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meet' with Star." Appl. 26. But as the court of appeals explained, applicant did far more: He asked a subordinate official responsible for determining what supplements would be covered under the State's health plans to meet with Star immediately after telling her that he thought Star's product "would be good for . . . state employees." Appl. App. A84.

pressuring UVA and VCU on this research." Ibid. Similarly, the "questions" to which the panel referred were not innocuous requests for information. They were leading questions asked of researchers at state universities at a product launch for Anatabloc hosted at the Governor's mansion. As Mrs. McDonnell explained, the purpose of the event was to "encourag[e] the universities to do research on [Anatabloc]." C.A. App. 3608.

Applicant's statements and questions were consistent with that purpose. He was "generally supportive" of the drug, and his questions were framed to encourage further research -- for example, he asked whether it would "help to have additional information" about Anatabloc. Appl. App. A14. The state employees who attended the launch got the message. For example, a UVA official later wrote a pro/con list about UVA's potential involvement in the studies. The first "pro" was "[p]erception to Governor," and the first "con" was "[p]olitical pressure from Governor and impact on future UVA requests from the Governor." C.A. Supp. App. 109; C.A. App. 4321.[8]

In the end, applicant does not dispute the central legal principle on which the court of appeals relied: A public

[8] Applicant's efforts did not ultimately succeed in having state universities conduct studies on Anatabloc. C.A. App. 4209, 4322. But the failure of the scheme does not render it lawful. See, e.g., United States v. Verrusio, 762 F.3d 1, 18 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2911 (2015); United States v. Potter, 463 F.3d 9, 17 (1st Cir. 2006).

official can take an "official action" by "us[ing] the power of his office to influence governmental decisions." Appl. App. A81. Indeed, applicant expressly concedes (Appl. 28) that the quoted statement from the decision below is an accurate description of the law. Applicant contends only that the court of appeals' decision reflects a de facto departure from that standard, and that the evidence in this case was insufficient to allow a rational jury to conclude that he "urge[d] others to exercise any governmental power" on Williams's behalf. Appl. 2.[9] As just demonstrated, that argument is refuted by the record. But more importantly, the nature of applicant's disagreement with the court of appeals makes clear that -- despite the sweeping rhetoric in the application -– the forthcoming petition will present a factbound contention that the decision below misapplied "a properly stated rule of law." Sup. Ct. R. 10.

iii. Essentially for the reasons stated in the foregoing discussion, applicant is also wrong in asserting (Appl. 17-18) that the decision below is inconsistent with this Court's decision in United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999). In Sun-Diamond, the Court held that an

[9] See also, e.g., Appl. 4 (asserting that applicant did not "advise, urge, or request [governmental actions] from others"); id. at 16 (asserting that applicant did not "ask[] anyone to exercise any governmental power"); id. at 26 (asserting that applicant did not "pressure or urge anyone else to exercise * * * governmental power on Williams' behalf").

illegal-gratuity conviction under 18 U.S.C. 201(c)(1)(A) requires proof that a thing of value was given to the public official for or because of some "particular" or "specific" official act. 526 U.S. at 406, 414. The jury instructions in that case had not required such a connection, and this Court reversed the defendant's conviction because it "refus[ed] to read [the illegal gratuity statute] as a prohibition of gifts given [merely] by reason of the donee's office." Id. at 408. That holding, and the errors in the jury instructions given in Sun-Diamond, have no relevance here, since applicant does not contend in this Court that the government failed to allege or prove an appropriate nexus between the things of value he received from Williams and the official acts he performed.

Applicant focuses (Appl. 17-18) on Sun-Diamond's observation that reading the illegal gratuity statute to reach gifts given merely "by reason of the donee's office" would potentially criminalize de minimis gift-giving -- for example, the President's receipt of a replica jersey from a championship sports team visiting the White House, "a high school principal's gift of a school baseball cap to the Secretary of Education," or "a group of farmers * * * providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of [Department] policy." 526 U.S. at 406-407. This Court acknowledged that its "more

narrow interpretation * * * can also produce some peculiar results" if one were to treat the hypothetical gifts as given "'for or because of the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers." Id. at 407. But the Court observed that such "absurdities," id. at 408, would be avoided if "those actions * * * are not 'official acts' within the meaning of [Section 201(a)(3)]," id. at 407.

Ceremonial events like those discussed in Sun-Diamond are not official actions because they are not actions on a pending question, matter, cause, suit, proceeding, or controversy. But this case is entirely different. When a sitting state governor secretly receives payments totaling more than $177,000 over two years, in exchange for agreeing to help the payor obtain valuable benefits through the governor's influence over other state officials, his conduct readily falls outside of Sun-Diamond's dicta. That is so even if some of the acts taken by the governor on the company's behalf occurred at "receptions, public appearances, and speeches" that in other contexts would not be official actions. Appl. App. A60.

b. Although applicant principally challenges the sufficiency of the "official act" evidence, he also asserts (e.g., at 31-32) that the jury instruction on the meaning of "official act" was erroneous. That challenge lacks merit.

After defining "official act" using language drawn from 18 U.S.C. 201(a)(3), the court further instructed the jury:

> 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 bribe payor reasonably believes that the public official had influence, power, or authority over a means to the end sought by the bribe payor.

Appl. App. A53. That portion of the instruction was grounded in this Court's decision in Birdsall, and portions of it were drawn directly from the Court's opinion. See 233 U.S. at 230-231. Finally, the court instructed the jury:

> 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.

Appl. App. A53-A54. The application does not appear to challenge that portion of the instruction either, and applicant has pointed to no legal error in it.

Instead, applicant appears to argue that the jury should have been "told that [he] had to try 'to influence' governmental decisions." Appl. 31. The precise import of that contention is unclear. As explained above, conviction under the laws at issue here did not require proof that applicant actually attempted to

influence governmental decisions, only that he agreed to do so in exchange for things of value.

The instructions given at trial appropriately conveyed that applicant could not be found guilty based on his performance of purely ceremonial acts. To find an "official action," the jury was required to identify a "decision or action" on a "question, matter, cause, suit proceeding, or controversy." Appl. App. A53. The instructions also accurately explained the necessary connection between the payment and the official action. See C.A. App. 7669 ("Bribery means that a public official demanded, sought or received something of value * * * in return for being influenced in the performance of any official act[,] * * * whether or not the public official ultimately performs the requested official action or intends to do so.").

c. Applicant errs in asserting (Appl. 23-33) that the decision below conflicts with decisions of the First, Eighth, and D.C. Circuits. In United States v. Urciuoli, 513 F.3d 290 (2008), the First Circuit held that the honest-services statute did not reach a part-time state legislator's conduct in "urging local officials to obey state law." Id. at 295. The court noted that the legislator had no direct authority over the state officials, and that his lobbying did not involve a "matter before him." Ibid.; see id. at 295-296. Here, by contrast, the government matters in question were undoubtedly within

applicant's "sphere of influence," and the officials whom he sought to influence were his direct or indirect subordinates. Appl. App. A79-A80 (describing applicant's authority as the chief executive of Virginia). The First Circuit has recognized that the "honest services that a legislator owes to citizens fairly include" not only his formal legislative action, but also "his informal and behind-the-scenes influence on legislation." United States v. Potter, 463 F.3d 9, 18 (2006).

United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), is distinguishable for much the same reason. In Rabbitt, the Eighth Circuit reversed a state legislator's convictions for mail fraud and Hobbs Act extortion, which were based on the legislator's introduction of members of an architectural firm to the state board that granted architectural contracts. Id. at 1028. As the Eighth Circuit later explained, it reversed the convictions because "the official in Rabbitt promised only to introduce the firm to influential persons; he did not promise to use his official position to influence those persons." United States v. Loftus, 992 F.2d 793, 796 (1993). Here, by contrast, the evidence established that applicant agreed to use -- and then did use -- his authority as governor to influence other state officials to take action favorable to Williams and Star.

Finally, the D.C. Circuit's decision in United States v. Valdes, 475 F.3d 1319 (2007) (en banc), is entirely consistent

with the decision below. In Valdes, the D.C. Circuit held that a police officer did not commit "official acts" when he received payments in exchange for retrieving information about license-plate records and outstanding warrants from a police database. Id. at 1320-1322. The court did not discuss the type of "decision or action" that is sufficient to constitute an official action. Instead, the court concluded that the officer had not taken action on a pending "question, matter, cause, suit, proceeding, or controversy" because those terms "refer to a class of questions or matters whose answer or disposition is determined by the government." Id. at 1323-1324. In holding that the mere retrieval of information for non-governmental purposes was not an "official act," the court "emphasize[d]" that its decision left intact the principle that a bribe-taker can be held liable for exercising "inappropriate influence on decisions that the government actually takes," even if he is not the ultimate decision-maker. Id. at 1325. Here, there is no dispute that the "questions" or "matters" at issue -- including whether state universities should study Anatabloc and whether the state employee health plan should cover the drug -- fall within the definition. The question is whether applicant's (promised and actual) efforts to influence governmental policy on those questions qualify as "any action or decision."[10]

[10] On that question, the D.C. Circuit's more recent

d. Finally, applicant asserts (Appl. 18-19, 33-35) that review is warranted because the interpretation adopted by the panel threatens to criminalize routine political conduct, including conduct protected by the First Amendment. That argument rests in part on applicant's overbroad understanding of the decision below. The court of appeals did not hold that attending or arranging a meeting or giving a speech always or even often constitutes "official action." Rather, the court's analysis rests on the unusual facts of this case, where applicant engaged in a concerted effort to "influence the work of state university researchers" and other state officials, in the context of a corrupt, quid pro quo agreement and in return for substantial monetary and in-kind payments.

Similarly, applicant's attempt to invoke the First Amendment principles that govern campaign-finance regulation rests on a false analogy. This Court has repeatedly recognized that "[t]he First Amendment has its fullest and most urgent

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decision in United States v. Ring, 706 F.3d 460, cert. denied, 134 S. Ct. 175 (2013), supports the approach adopted by the court of appeals. In Ring, the court found sufficient evidence of an official act in a government attorney's sending an email reading, "Thank you for looking into this. I do not know if anything can be done but I said I would look into it," to another government employee. Id. at 469. The court held that the attorney had taken an official action or decision by attempting to influence the visa-granting process, even though he lacked authority to grant the visa himself. Id. at 470.

application to speech uttered during a campaign for political office." Citizens United V. FEC, 558 U.S. 310, 339 (2010) (internal quotation marks omitted); see Buckley v. Valeo, 424 U.S. 1, 19 (1976). And while restrictions on contributions to candidates have been subjected to less stringent First Amendment scrutiny than restrictions on independent electoral spending, see, e.g., McCutcheon v. Federal Election Commission, 134 S. Ct. 1434, 1444-1445 (2015), such contributions are used by the donor "to participate in the public debate through political expression and political association," id. at 1448; they are used by the candidate to fund his own electoral advocacy; and for all but the wealthiest candidates they are a practical necessity for the conduct of an effective campaign.

Those considerations might affect the proper analysis in any bribery or similar prosecution where the alleged bribe was in fact a campaign contribution. Cf. McCormick v. United States, 500 U.S. 257, 271-273 (1991). They do not remotely suggest, however, that every payment to an elected office-holder should be treated for these purposes as though it had been contributed to the recipient's campaign. Petitioner cites no decision supporting that proposition, nor could he plausibly contend that Williams's monetary and in-kind payments had any prospect of being translated into electoral advocacy.

3. Applicant also contends (Appl. 36-40) that this Court is likely to grant review and reverse on the question whether the district court took adequate steps to ensure an impartial jury. For at least four reasons, review of that issue is unwarranted, and applicant's challenges lack merit.

a. During voir dire, the district court asked the venire members, as a group, to stand "if you have read, heard or seen something in the media" about the case. C.A. App. 1691. The court then asked the standing jurors to sit down "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." Id. at 1692. All of the standing jurors then sat.

The stay application largely analyzes (and impugns) the adequacy of the court's juror-examination process as though this brief exchange represented the only measure that the court took to identify and exclude jurors biased through exposure to pretrial publicity. But as the court of appeals explained in rejecting the same argument, the district court "did a good deal more than that." Appl. App. A31. In fact, the exchange on which applicant focuses was simply one step among many that the court took to ensure juror impartiality.

The district court's process began with a 99-item questionnaire that included four questions about pretrial publicity, including whether the prospective juror had

"expressed an opinion about this case or about those involved." Appl. App. A31-A32 (quoting C.A. App. 593). Based on their questionnaire responses, some potential jurors were eliminated, so the venire that appeared in court was to some extent a pre-selected group. After the venire members in open court sat down to indicate their belief that they could weigh the evidence impartially, the court then "invited defense counsel to identify any specific veniremen it would like to question further." Id. at A34. Based on the questionnaires, the defense identified eight potential jurors for further questioning, which the court conducted. Ibid.; C.A. App. 1692-1695, 1696–1706. After that questioning concluded, the court invited defense counsel to identify "[a]nyone else" for further questioning. Appl. App. A34. Counsel stated that there was no one else he wished to have questioned "on publicity." Ibid.[11]

b. Applicant complains (Appl. 36) that the district court did not ask prospective jurors whether they had "formed" an opinion about applicant's guilt or innocence. The district court could have posed that question to venire members,

[11] Applicant contends (Appl. 37 & n.5) that the district court required something more than exposure to pre-trial publicity as a predicate for this more in-depth questioning of particular venire members. The record belies that contention. The court accepted each request for questioning made by the defense, including at least one predicated on nothing more than a juror's questionnaire response that "he ha[d] followed the case very closely from multiple news sources." C.A. App. 1693.

collectively or individually. But applicant cites no decision requiring that inquiry, and it was not the only permissible way to identify jurors who might have formed disqualifying biases due to their exposure to pretrial publicity.

Even if applicant's preferred question had been asked, moreover, it need not have followed that any venire member who answered affirmatively would have been struck. The Constitution does not require the exclusion of every potential juror who acknowledges having an opinion on the defendant's guilt or innocence. Rather, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irwin v. Dowd, 366 U.S. 717, 723 (1961); see, e.g., Patton v. Yount, 467 U.S. 1025, 1036 (1984). Accordingly, even if applicant's preferred question had been posed directly, the district court then might have asked any venire members who acknowledged having formed an opinion about the case whether they could put that opinion aside and decide the case based on the evidence presented at trial. That was in substance the question the court posed to the venire members collectively, and to the eight venire members whom defense counsel asked to be examined individually.

c. "No hard-and-fast formula dictates the necessary depth or breadth of voir dire." Skilling v. United States, 561 U.S. 358, 386 (2010). That is so "[p]articularly with respect to

pretrial publicity," where this Court has "stressed the wide discretion granted to the trial court" and rejected any constitutional requirement of asking "questions specifically dealing with the content of what each juror has read." Mu'Min v. Virginia, 500 U.S. 415, 427, 431 (1991). Rather, "primary reliance on the [trial court's] judgment * * * makes good sense" because "that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation * * * his own perception of the depth and extent of news stories that might influence a juror." Id. at 427.

Thus, even in the court of appeals, applicant could not have prevailed simply by persuading the Fourth Circuit that a different combination of jury-examination measures would have been more efficacious in minimizing the likelihood that a biased juror would be seated. Rather, to receive a new trial based on pretrial publicity, applicant was required to establish on appeal that the district court had abused its discretion by conducting a voir dire that failed to "provide [a] reasonable assurance that prejudice w[ould] be discovered if present." E.g., United States v. Hill, 643 F.3d 807, 836 (11th Cir.), cert. denied, 132 S. Ct. 1988 (2011). And to invoke this Court's certiorari jurisdiction, applicant must make the additional showing that the jury-selection procedures used here raise a legal issue of broad and recurring importance. Even

apart from its lack of merit, applicant's factbound challenge to the combination of juror-examination measures employed by the district court in this case does not satisfy this Court's traditional certiorari criteria. There is accordingly no reasonable likelihood that the Court will grant review on the jury-selection issue, or that it would reverse the court of appeals' judgment on that question if it did grant certiorari.

d. Contrary to applicant's contentions, the court of appeals' resolution of the jury-selection issue does not conflict with any decision of another circuit. The cases on which applicant relies involved either far more perfunctory juror-examination procedures, or far more inflammatory pre-trial publicity, than were involved in this case.

Applicant cites (Appl. 39) United States v. Pratt, 728 F.3d 463, 471 (5th Cir. 2013), cert. denied, 134 S. Ct. 1328 (2014), for the proposition that "merely asking potential jurors to raise their hands if they could not be impartial was not adequate voir dire in light of significant pretrial publicity." In the quoted passage, however, the court was discussing its holding in United States v. Davis, 583 F.2d 190 (5th Cir. 1978), in which the district court asked only that "single, group question, * * * gave a general admonishment to the venire that they would be required to decide the case impartially[, and] asked no follow-up questions and made no specific inquiries

of any individual juror." Pratt, 728 F.3d at 471. Here, in contrast, the "stand up, sit down" exchange that applicant emphasizes was simply one component of a much larger effort to identify potentially biased jurors, which included extensive questionnaires and individualized questioning by the district court of venire members identified by defense counsel.

Several of the other decisions that applicant cites (Appl. 40 nn. 6-10) are similarly distinguishable because the district courts in those cases failed to ask even a single question about pretrial publicity, to the jurors individually or as a group.[12] Similarly, in Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), the court identified two errors: (1) two of the seated jurors had answered no individual questions, either via questionnaire or in court, id. at 640; and (2) the district court had refused to "inquire of the jury what information they had obtained relative to the case and their source of knowledge," id. at 639. The questionnaire used here resolved both of those concerns.[13]

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[12] See, e.g., United States v. Dellinger, 472 F.2d 340, 367-376 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); Patriarca v. United States, 402 F.2d 314, 317-318 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969).

[13] Waldorf v. Shuta, 3 F.3d 705 (3d Cir. 1993), was a civil case involving mid-trial publicity. The jurors had disobeyed the court's instructions to avoid publicity about other accidents and had circulated a newspaper article in the jury room. Id. at 707, 713. The facts of that case differ so

The publicity in United States v. Denno, 313 F.2d 364 (2d Cir. 1963) (en banc), cert. denied, 372 U.S 978 (1963), was of an entirely different nature from that involved in this case, such that it would be considered presumptively prejudicial under Skilling. See 561 U.S. at 378-384. As in the cases that the Skilling Court examined, the defendant in Denno was tried in an atmosphere "utterly corrupted by press coverage." Id. at 380. The defendant had confessed to three murders, a rape, and an assault on an elderly woman; the press had "widely published news of [his] confession"; newspapers reaching a significant proportion of the county's population had run stories critical of the State's insanity-defense law (which the defendant intended to invoke); and the trial commenced a mere eight months after the last murder. 313 F.2d at 366-367, 370. Denno thus involved publicity wholly different in kind from that at issue here. Like the other cases on which applicant relies, it fails to demonstrate that any other court of appeals would have held, under the circumstance of this case, that the jury-selection procedure used here constituted an abuse of the district court's considerable discretion.

4. Applicant contends that the equities favor a stay because he will be irreparably harmed if he begins serving a

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greatly from those presented here that no fair comparison between them can be drawn.

sentence that is ultimately reversed, whereas the government will suffer no harm if his reporting date is delayed. But the same argument could be made in any criminal case in which the defendant is not a flight risk or a danger to the community. Congress has nevertheless directed that, even when the applicant satisfies those requirements, see 18 U.S.C. 3143(b)(1)(A), he must also show that further review is "likely to result in" a disposition favorable to him, 18 U.S.C. 3143(b)(1)(B).

In any event, even in stay contexts where the Court balances the harms, see, e.g., Hollingsworth v. Perry, 558 U.S. 183, 190 (2010); but cf. 18 U.S.C. 3143(b), the threshold requirement is a reasonable probability that the Court will grant certiorari and reverse. Here, for all of the reasons set forth above, that standard is not met. The decision below does not raise broad questions of law on which courts disagree, but instead presents a sound application of settled legal principles to the facts established at trial. Release pending certiorari is therefore unwarranted.

CONCLUSION

The application should be denied.

Respectfully submitted.

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Solicitor General

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