No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

The Government openly advocates a legal rule that would make a felon of every official at every level of government—from a "cabinet secretary" to a "janitor" (U.S.Br.20)—who accepts travel in exchange for public appearances, who has lunch with a lobbyist when both know the lobbyist will pick up the check, who trades campaign contributions for a few minutes of time, or who cleans one classroom with special care because its teacher brings him gift cards. No court has ever suggested that the federal corruption laws sweep so broadly, while every prior court to consider the issue has said the opposite. To defend its all-embracing rule, the Government must dismiss a recent, unanimous opinion of this Court as "erroneous" and disclaim more than half the statutory definition of "official act" as performing "no work." And this is all supposedly so clear that the rule of lenity and array of other constitutional principles are irrelevant.

The Government is very wrong. The federal corruption laws are not omnibus good government provisions. They are confined to "the most blatant and specific attempts … to influence governmental action." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam). Far from condemning every instance of janitorial favoritism, these laws target the serious problem of public officials who abuse the sovereign power they wield by virtue of their offices. To commit bribery, an official must agree to either make a specific decision on the sovereign's behalf or take action to sway a sovereign decision by another official, as in *United States v. Birdsall*, 233 U.S. 223 (1914). That limit harmonizes every bribery decision

in history and comports with officials' commonsense belief (as expressed in the many bipartisan amicus filings) that they cross the line when they abuse official powers for graft—not when they express interest in a donor's ideas, politely refer a benefactor to a subordinate, or compliment the sponsor of their first-class travel.

The Government presses this sweeping theory of corruption because Governor McDonnell's convictions cannot stand without it. There was no evidence that Governor McDonnell ever directed, urged, or attempted to influence anyone to make any governmental decisions favoring Williams. As the only staffer who met with Williams during the "conspiracy" explained, Governor McDonnell never "interfere[d] with [her office's] decision-making process." V.JA.3071. Nor was the jury required to find abuse of sovereign power—or, for that matter, any "influence" over governmental decisions—to convict. Far from "paradigmatic," these convictions are unprecedented.

Finally, the Government's position confirms that the Court should not allow federal prosecutors to continue brandishing open-ended felonies. Rather than scrupulously adhere to this Court's careful limitations, the Government displays extraordinary disregard for them—rejecting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999), as "erroneous," while ignoring this Court's confinement of honest-services fraud to "core" bribery in *Skilling v. United States*, 561 U.S. 358 (2010). This case makes clear that Congress—not courts—must enact a corruption statute that comports with due process.

I. THE GOVERNMENT'S DEFINITION OF OFFICIAL ACTION IS BARRED, BASELESS, AND BOUNDLESS.

The Government's position is that "official action" includes *everything* officials do in their official capacity. U.S.Br.20. On that limitless definition, official action encompasses everything from appearing at events to handling "routine constituent services." U.S.Br.31, 33. If that is so, any federal, state, or local official who accepts gifts, travel, or campaign contributions in exchange for such acts is a felon—even if he never exercises, agrees to exercise, or presses anyone else to exercise governmental power on his benefactor's behalf.

That is not the law. This Court's cases foreclose it; the pre-*McNally* "core" and the bribery statute for federal officials refute it; and it would criminalize routine political conduct, thus handing prosecutors enormous discretion in a highly sensitive area. Constitutional principles—and common sense—require resolving all doubt against that construction.

A. The Government Rejects This Court's Unanimous *Sun-Diamond* Decision.

This Court's unanimous opinion in *Sun-Diamond* explained that "official action" must be construed narrowly, to "eliminate the absurdities" that would otherwise result. 526 U.S. at 408. Thus, when the President "receiv[es] … sports teams at the White House," the Education Secretary "visit[s] [a] high school," or the Agriculture Secretary "speak[s] to … farmers about USDA policy," those "are not 'official acts' within the meaning of the statute." *Id.* at 407.

Yet those acts would be "official" on the Government's definition, since they occur "in the

course of … official duties." U.S.Br.24; U.S.Br.48 (attending events was official). The Government admits as much—advancing the remarkable contention that *Sun-Diamond* is "erroneous" and the acts it cited are "unquestionably" official. U.S.Br.30. But *Sun-Diamond* has been the law for over fifteen years. The Government cannot unilaterally jettison it as "unquestionably" "erroneous" and embark on prosecutions that flout this Court's declaration that not all "official" conduct constitutes "official action."

Nor does the Government provide any basis for overruling *Sun-Diamond*. Not everything officials do in their official capacities is action "on" a "matter." 18 U.S.C. § 201(a)(3). That statute forbids the sale of *official powers*. Pet.Br.32-37; *infra* I.B.3. As Judge Boudin explained in *United States v. Urciuoli*—which *Skilling* cited approvingly, 561 U.S. at 408—the line is crossed only by "misus[e]" of "official power." 513 F.3d 290, 297 (1st Cir. 2008). Heightened "access and attention" does not qualify. *Id.* at 296. *Sun-Diamond* reflects this intuitive understanding.

The Government says the absurdities *Sun-Diamond* foreswore were due to its "de minimis" hypothetical gifts rather than (as the Court said) because the reception, visit, and speech were not "official acts." U.S.Br.30. But it would be just as absurd to imprison an official who accepts an expensive trip to Europe in exchange for speaking at the sponsor's event. Conversely, trading a vote on legislation for even "de minimis" bribes would plainly be illegal. As *Sun-Diamond* rightly recognized, criminality turns not on the character of the *quid* but the nature of the *quo*: The corruption laws are implicated only if sovereign powers are abused.

B. The Government Scorns The Constraints Of History And Text.

The Government also barrels through the pre-*McNally* history and the text of the bribery statute governing federal officials—the two sources of law *Skilling* incorporated, 561 U.S. at 409, 412.[1]

1. Every prior bribery conviction involved an official's agreement to exercise sovereign power on the bribe-payor's behalf or induce others to. Pet.Br.27-29. Efforts to exercise the state's regulatory power—*e.g.*, expending funds, issuing regulations, or enforcing laws—have always been the *sine qua non* of bribery. That makes sense: An official corrupts the sovereign by trading governmental powers for cash, but not by recording birthday greetings for bundlers or appearing publicly alongside generous patrons.

The Government does not identify a *single* case that departs from the sovereign-power paradigm. It also ignores *United States v. Rabbitt*, which vacated the conviction of the Missouri House Speaker, who took payments for setting up meetings with state contracting officials. 583 F.2d 1014, 1026-27 (8th Cir. 1978). The court held that accepting bribes to "influence" or "control" contract decisions is unlawful; but selling "access"—so long as the decisionmaker awards contracts "on merit"—is fundamentally different. *Id.*

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[1] The Government claims Governor McDonnell agreed below that "official action" is defined *solely* by the latter. U.S.Br.19. But Governor McDonnell was clear that, while the "*Government's* position" was that § 201 exclusively controls, C.A.Br.27 (emphasis added); I.JA.234, the pre-*McNally* "core" mattered too, *e.g.*, I.JA.229 & n.7.

In light of *Skilling*'s confinement of the vague corruption laws to "core" pre-*McNally* offenses, the Government's failure to cite any counter-authority—any conviction absent agreement to put a thumb on the governmental scales—is dispositive.

2. The Government relies almost exclusively on this Court's 1914 decision in *United States v. Birdsall* and lower-court decisions following it. U.S.Br.14-16, 20-28, 37-38, 47, 51-52. But *Birdsall* merely held that "official acts" are not limited to acts prescribed by statute; they can include customary acts, such as advising other officials on *their* statutory duties. Crucially, *Birdsall* and every decision applying it involved deploying sovereign power or pressing others to exercise *their* sovereign power favorably to bribe-payors. *Birdsall* thus defeats only straw-men.

In *Birdsall*, officials were bribed to "falsely" "advise" the Commissioner of Indian Affairs that "clemency ought to be granted" to the bribe-payor's clients, and to encourage him to recommend as much to others. *United States v. Birdsall*, 206 F. 818, 821 (N.D. Iowa 1913). There was no dispute that the officials were bribed to advocate a particular resolution of a specific governmental matter—clemency, a classic exercise of sovereign power. But the district court dismissed the indictments because "no act of Congress" authorized the Commissioner to recommend clemency, which, in the court's view, rendered the entire affair insufficiently "official." *Id.*

This Court rejected that distinction. 233 U.S. at 230-35. It does not matter whether actions are "prescribed by statute" or "written rule"; acts taken pursuant to "settled practice" may count. *Id.* at 231.

Clemency recommendations were not categorically outside "the purview" of the corruption laws just because no statute mandated them. *Id.* at 230. Far from contesting that principle, Governor McDonnell's proposed jury instructions highlighted that official acts *may* include "settled practice[s]." Pet.App.146a.

Birdsall "did not, however, stand for the proposition that every action within the range of official duties *automatically*" is "official." *Valdes v. United States*, 475 F.3d 1319, 1323 (D.C. Cir. 2007) (en banc). As *Sun-Diamond* clarified, that would be absurd; it would also disregard § 201's terms, *infra* I.B.3. Rather, the fundamental characteristic of an official act—whether statutory duty or settled practice—is that an official seeks to sway resolution of a governmental matter. Hence a legislator takes official action by whipping a vote—even though whip operations are customary. But an Agriculture Secretary's speech at a ranch is not "official action"—even though she oversees promotional campaigns for beef. U.S.Br.49. *Birdsall* and its lower-court progeny all reflect that sovereign-power paradigm.[2]

[2] The lower-court cases the Government cites all involved efforts to sway exercises of sovereign power, such as accepting goods under "procurement contracts" (U.S.Br.22), releasing "seized liquor" and "money held in trust" (U.S.Br.22-23), approving a "promotion" to a state job (U.S.Br.24), issuing USDA certificates (U.S.Br.24), extending a visa (U.S.Br.24-25), voting on legislation (U.S.Br.38 & n.9), and awarding contracts (U.S.Br.37). Other cases involve promises by law-enforcement officials not to report violations, which is "vitally related to the question of the prosecution of a violator of the law." *McGrath v. United States*, 275 F. 294, 299 (2d Cir. 1921). Like *Birdsall*, these cases simply reflect that "advice or recommendation" on exercising sovereign power are official acts. *United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972).

Birdsall's take-away is thus that the corruption laws restrain not only ultimate decisionmakers exercising statutory duties, but also their advisors and peers. Governor McDonnell agrees. *Contra* U.S.Br.15, 27, 37-38. As he has explained, official acts include those that "urge a specific decision … on behalf of the sovereign." Pet.Br.18-19; *see also* Pet.Br.32 ("pressuring others"). Hence § 201 covers not only "decision[s]" (by decisionmakers) but also "action[s]" (by those who advise or direct them). The point is that there must be "action" "on" a "question" "pending" before the sovereign. That means an effort to alter some exercise of governmental power—whether through *directing* subordinates, *advising* superiors, or *urging* colleagues. Since Governor McDonnell was the State's ultimate decisionmaker, the verb "directing" is most apt here.

The Government evidently prefers a different verb: "influencing." U.S.Br.14, 20, 25. Defining official action as an effort to "influence" sovereign decisions is a fine formulation; Governor McDonnell proposed using it to instruct the jury. Pet.App.147a, 254a. But the court below drained that word of meaning by treating informational, outcome-neutral acts like asking questions and proposing meetings—acts that *precede* actual "action" "on" a matter"—as efforts to "influence" that matter. Pet.App.71a-74a; *accord* U.S.Br.43-45. On that view, Governor McDonnell could have been convicted for forwarding an article about Star as an "FYI" to his Health Secretary (U.S.Br.5), or for advising Williams that the Secretary was the right person to approach about Anatabloc (U.S.Br.3).

That goes far too far. Efforts to secure particular resolutions of governmental decisions are attempts to "influence" those decisions. But if an official does not advocate, recommend, counsel, pressure, urge, direct, advise, encourage, lobby, cajole—*i.e.*, make clear he wants a *particular* decision—then he does not corrupt the process. The Government's contrary claim wrongly conflates *influence over decisions* with *access to decisionmakers*. Thus, every court to address this issue has explained that only the former constitutes "official action." *E.g., United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) ("granting or denying access … not an 'official act'"); *Rabbitt*, 583 F.2d at 1027 (selling "access" not criminal); *Urciuoli*, 513 F.3d at 296 (trading on "access" not criminal); *see also Sun-Diamond*, 526 U.S. at 407-08.

In short, urging another official to make a sovereign decision is plainly an official act. But that does not advance an inch the Government's extraordinary theory that everything officials do in their official capacity equally qualifies.

3. The text of § 201 is further proof. To justify its rule, the Government reads more than half of § 201's definition "out of the statute entirely." *Valdes*, 475 F.3d at 1323. It says "official act" means "any decision or action … in [an] official's official capacity." 18 U.S.C. § 201(a)(3). That means 27 words—"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," *id.*—"perform[] no work." U.S.Br.27. But courts must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

As the en banc D.C. Circuit has explained, these words perform crucial work, cabining the statute to acts that "inappropriate[ly] influence … decisions that the government actually makes." *Valdes*, 475 F.3d at 1325. That helps solve an "overbreadth problem." *Id.* at 1329. If everything officials do in their official capacities is "official action," then § 201 would devour, *e.g.*, (i) the provision forbidding outside payment for federal employees' "services," 18 U.S.C. § 209(a); *United States v. Project on Gov't Oversight*, 616 F.3d 544, 547 (D.C. Cir. 2010); (ii) the prohibition on accepting gifts from anyone "whose interests may be substantially affected by the performance or nonperformance of the individual's official duties," 5 U.S.C. § 7353(a)(2); and (iii) a host of ethics rules, including a prohibition on using "public office" for "private gain," 5 C.F.R. § 2635.702.

The Government acts as though § 201 is the only constraint against corruption. But as Justice Scalia explained in *Sun-Diamond*, that statute is "merely one strand of an intricate web of regulations," administrative and criminal; and given the "other regulations and statutes littering this field," laws that can "be interpreted to be either a meat axe or a scalpel" should be taken as "the latter." 526 U.S. at 409, 412. That disqualifies the Government's reading of § 201—and, *a fortiori*, its derivative construction of the vague statutes here.[3]

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[3] The Government also adverts to § 201's history, but its argument about congressional ratification is premised on its misreading of *Birdsall*. U.S.Br.23. And its explanation for the expansion of the predecessor statute's "vote or decision" language confirms Congress's focus on exercises of sovereign power, like "procur[ing] a government contract." U.S.Br.28.

C. The Government Boldly Embraces The "Absurdities" Of Its Rule.

If the Fourth Circuit opened the floodgates to prosecuting nearly any elected official nationwide (Pet.Br.40-43), the Government bombs the levees. Its "official capacity" rule would leave every official and donor at every level of government at the mercy of federal prosecutors. It is beyond commonplace for officials to accept first-class travel for speeches, or for politicians to trade access for campaign donations. Yet the Government doubles down on the notion that all of this is illegal. U.S.Br.32-33.

The Government insists its sweeping rule would not "wreak havoc upon participatory democracy" (VA.AGs.Br.2), because prosecutors must still prove a *pro* (U.S.Br.33). That is no solution at all.

First, courts permit juries to "infer" an agreement solely from the "temporal relationship" between the official act and the benefit—as here. Pet.App.76a-78a. Even unadorned "winks and nods" suffice. *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and in judgment). This is a subjective *mens rea* element—not an objective evidentiary threshold that constrains juries (much less prosecutors). Officials faced with that threat of *ex post* condemnation by hostile jurors and ambitious prosecutors will simply "abstain" from routine constituent services. Va.AGs.Br.15.

The Government says the *pro* requirement is stricter in campaign-contribution cases. U.S.Br.35. But courts have been equally lax in that context, holding that the *pro* element "is not onerous," *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995),

or "stringent," *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011). Nor would this distinction shield many other routine practices from skeptical jury inferences—*e.g.*, lobbyist-funded lunch meetings, speeches at foreign junkets, or "major donors" to a charitable foundation gaining "high-level access to press their policy concerns." Rep.Gov.Br.13.

Second, campaign fundraising events *explicitly* sell access. Pet.Br.41-42; Fed.Off.Br.10-12. The Government concedes this, but attempts to rescue the DNC and RNC from RICO exposure by declaring that such events do not involve officials "in their official capacities." U.S.Br.34. That *ipse dixit* is not credible. Donors do not pay large sums for "intimate sit-down meetings with … policy experts" (Pet.Br.42) because of their personal qualities. They do so to discuss *official* policy with policymakers—like Q&As with the EPA Administrator about oil pipelines. *Id.* And discussing *official* policies is why institutions furnish luxury travel to officials who speak to them.

Third, the Government ignores § 201's gratuity provisions, which require no *quid pro quo*. On its broad view of official action, a constituent who thanks a Senator for a Capitol tour with a fruit basket has earned himself two years in prison; same for a lobbyist who sends flowers to an official after a referral to a mid-level staffer. To even "*offer*" a gift is a crime. 18 U.S.C. § 201(c)(1)(A).[4]

[4] The Government claims that campaign contributions may support *bribery* charges but not *gratuity* charges. U.S.Br.34. But its only authority "*refus[ed]* to carve out an exception … for campaign contributions." *United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2013) (emphasis added) (citing *United States v. Brewster*, 506 F.2d 62, 77 (D.C. Cir. 1974)).

The Government's rule would therefore "open to prosecution … conduct that has long been thought to be well within the law," *McCormick v. United States*, 500 U.S. 257, 272 (1991)—or, at most, governed by non-criminal ethics codes, as in Virginia. Va.Law.Profs.Br.13-20. The correct "definition" of official action eliminates these "absurdities." *Sun-Diamond*, 526 U.S. at 408.

* * *

The Government's rule flouts precedent, breaks from history, rewrites the statute, and greenlights prosecution of officials (and donors) nationwide. At minimum, that is foreclosed by the rule of lenity and other constitutional canons. Pet.Br.21-25. Even if *Sun-Diamond* were "erroneous," Governor McDonnell cannot be jailed for believing otherwise.[5]

II. THE CONVICTIONS CANNOT SURVIVE.

The Government advocates this extraordinary legal rule because the convictions cannot survive without it. The undisputed evidence was clear: Governor McDonnell neither took nor agreed to take "official action," properly understood. This Court should thus reverse the convictions and dismiss the charges. At the very least, Governor McDonnell is entitled to a trial where the jury is properly instructed on the crucial line between politics and corruption.

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[5] The Government's *amici* accuse Governor McDonnell of seeking to constitutionalize graft. Not at all. His point, rather, is that the vague corruption laws implicate constitutionally sensitive areas and so should be construed narrowly to avoid imperiling run-of-the-mill campaign-finance activities.

A. The Evidence Fails Under The Correct Legal Rule.

1. The Government argues that, even if *none* of Governor McDonnell's five acts were "official," he can be convicted for *agreeing* to take official acts. But its theory below was that "Williams was sitting in that Mansion at the events and getting those meetings because he was paying for it," XI.JA.7615; XI.JA.7412 ("exactly what he was paying for")—not that he was buying *other*, unspecified acts. And the district court upheld the verdict because "Williams' gifts were tied to the five identified 'official acts.'" Pet.App.90a-91a. If those acts were not "official," the Government's case collapses.

The Government suggests a broader agreement can be inferred from the Governor's "knowledge" of "what Williams wanted." U.S.Br.42. But officials routinely accept campaign contributions, travel, and other benefits from people whom they know hope to someday win official favor. It is called "lobbying." Nor does it matter that Williams told others he had the Governor's support. *Id.* Williams received immunity for multiple unrelated felonies and met with the Government "seven or eight times"—including "the day before the jury was picked"—to get his story straight. IV.JA.2402, 2505. Yet not even he testified that his bragging had any basis in reality. To the contrary, he testified to, at most, expecting unspecified "help" (Pet.Br.11)—not that Governor McDonnell promised sovereign decisions in his favor.

Thus, as the lower courts acknowledged, the Government's only evidence of a corrupt agreement was the "temporal relationship" between "the gifts,

payments, loans and favors and the official acts," Pet.App.76a-77a, such that the case "hinges on the interpretation of an 'official act' and whether McDonnell's actions constitute such," Pet.App.84a. Indeed, the Government conceded there was "no express agreement," Pet.App.269a, arguing only that the "timing" of the five acts and benefits "establishes the pro," XI.JA.7615.

If there was no promise to take future official acts and the acts performed were not "official," there was necessarily no basis to infer an agreement to provide actual official acts. Finding an agreement to provide official action, based solely on five alleged official acts, cannot insulate the question whether those acts were actually "official." The Government's contrary claim is circular.

2. Turning to the five acts the Government contended were "exactly what [Williams] was paying for," XI.JA.7412, it is clear none were "official."

a. The Government's most extravagant argument is that "promot[ing Star's business]" qualifies, because "a customary part of the job of the Virginia Governor was promoting Virginia business development." U.S.Br.47. This rule, which even the Fourth Circuit declined to adopt, is essential to convert the Mansion event and healthcare leaders cocktail reception into "official" acts.

But officials do not take official action when they invite donors to prestigious events, cut ribbons at businesses, or compliment benefactors. Otherwise, the President would commit crimes by offering "White House coffees and 'overnights' to … major donors," *McConnell v. FEC*, 540 U.S. 93, 130 n.28

(2003), posing for photographs at exclusive White House receptions, or showering a donor with praise while visiting his business (Fed.Off.Br.19-20).[6] Touting homestate businesses—donors' and non-donors' alike—is what governors do. There is no legal basis for making "Bob's for Jobs" the marquee of a criminal indictment.[7]

b. The Government asserts Governor McDonnell attempted to "influence" two subordinates to add Anatabloc to the state's health formulary. But that misunderstands "influence" and distorts the record.

Most fundamentally, there is no evidence that Governor McDonnell did anything besides obliquely encourage two subordinates to meet with Star. He never urged, encouraged, or "influenced" the aides to alter the state formulary; indeed, he never mentioned the issue. That is why neither aide had any inkling of the telepathic "influence" the Government invokes.

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[6] Nominal "expenditure" of "state employees' time" (U.S.Br.48) changes nothing; bribery does not encompass every "misuse of government resources." *Valdes*, 475 F.3d at 1324.

[7] This error alone requires a new trial. The Government argued that "any one" act "is sufficient," Pet.App.268a, and the jury may have convicted based solely on one of these acts. Convictions must "be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957). The Government does not disagree, contending only that its *proof* suffices if any act crossed the line. U.S.Br.40 n.10. The decision it invokes, *Griffin v. United States*, thus involved a verdict with *correct* instructions where one factual theory was "unsupported by sufficient evidence." 502 U.S. 46, 56 (1991). That decision never questions the bedrock rule that wrongly instructing the jury on a critical issue requires a new trial.

Pet.Br.49-50. The Government's argument thus depends on its mistaken claim, *supra* I.B.2, that suggesting a meeting *alone* impermissibly "influences" that meeting's outcome.

And besides, the focus of this supposed "official act" is pure *post hoc* invention. Williams never asserted any desire to add Anatabloc to the state health plan, for which it was ineligible anyway. Pet.Br.8. The Government makes it seem otherwise only by invoking a different issue (U.S.Br.10, 46)—namely, Williams' bizarre proposal, made to *Mrs.* McDonnell, to "test[] Anatabloc on state employees." IV.JA.2271; V.JA.3054 ("control group"); V.JA.3692 ("study"). That unrelated proposal—which never reached the Governor—had nothing to do with the state's health formulary or the meeting eight months later on consumer-driven health plans.

c. Finally, Governor McDonnell never pressured universities to research Star's products, or lobbied state agencies to fund such research.

First, the Government cites no evidence that Governor McDonnell sought to sway a governmental decision by asking the Health Secretary—known for his "independence," VIII.JA.5257—to send a staffer to a meeting with Williams. It claims this was "highly irregular." U.S.Br.43. But when prosecutors called the Secretary to testify, he said the opposite: "It was not uncommon for us to show up for meetings on very short notice." V.JA.3749. The staffer agreed, recognizing that nothing was expected beyond "attending." Pet.App.194a. And far from making "his pitch for state testing" (U.S.Br.43), Williams said nothing the staffer "construed to be an ask."

V.JA.3075. It hardly gets more routine than informational meetings with mid-level staffers who are experts in a constituent's field.

Second, the Government cites nothing the Governor did to sway any sovereign decision at the Mansion lunch. Blatantly mischaracterizing the evidence, the Government claims the Governor "'extoll[ed]' successful testing on Anatabloc." U.S.Br.44. The actual testimony was that "the tenor of the meeting was that it would be great *if we could show that tobacco was a useful product*"—*that* is what the Governor was "extolling" "as something that would be a good thing for the Commonwealth." V.JA.3355 (emphasis added). And it surely would be.

The Government notes one UVA official thought the Governor supported Anatabloc research. But that official neither attended the Mansion event nor even "spoke with Bob McDonnell"; she based her conclusion on *internet research*. Pet.App.240a-241a. In contrast, the UVA official who did attend testified that Governor McDonnell asked neutral questions that "were appropriate for a Governor" and that he never violated any "principles about the integrity of research." V.JA.3360-62.

Third, the Government implies that an aide testified the Governor wanted him to push universities to conduct studies. U.S.Br.45. But it conceals that it is not quoting the aide; rather, it is quoting double-hearsay from Williams' lobbyist. The aide's *actual* testimony was that the Governor "never directed [him] to … try to make something happen." Pet.App.210a-211a. That is why he felt empowered to phone Williams' lobbyist to "shut this request

down." V.JA.3216. That aide did not "thwart" Governor McDonnell (U.S.Br.45)—he did his job precisely as the Governor wanted.

* * *

Officials need not use "magic words" to improperly sway government decisions (U.S.Br.44), but they must do *something*. Governor McDonnell never did, which is why Williams did not receive any government assistance despite supposedly bribing the most powerful official in Virginia for two years. That wholly insufficient evidence requires reversal and dismissal of the charges.[8]

B. The Jury Instructions Failed To Convey The Correct Legal Rule.

Reversal is indisputably required if the instructions gave "equivocal direction to the jury on a basic issue," allowing conviction for lawful conduct. *Yates*, 354 U.S. at 327. That rule governs here, because the instructions "were as consistent with [innocent conduct] as they were with [criminal]." *Id.* at 325. At minimum, a new trial is necessary.

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[8] The Government claims that Governor McDonnell "no longer disputes" that "he acted corruptly, with intent to defraud, and without a good faith belief that his conduct was proper." U.S.Br.57. Wrong. These elements are inextricably intertwined with the erroneous "official act" instruction; juries who are told it is illegal to invite benefactors to cocktail parties would readily infer bad faith when senior officials engage in that very conduct.

It is also false to say that Governor McDonnell kept the loans and gifts "secret." U.S.Br.1, 40, 42, 57. Many of Williams' gifts were disclosed (Pet.Br.5, 9); the rest were "secret" only insofar as Virginia law did not require their disclosure. Hence the Government's decision to not "argue, much less establish, any violation of Virginia law." I.JA.724.

1. The Government's principal argument is that quoting the ponderous definition from § 201(a)(3) suffices because that 150-year-old text is "neither technical nor complex." U.S.Br.50. But if "official action" requires *influence* on official decisions, then the Government concedes that quoting the statute is insufficient. After all, it says § 201 is not limited to "influence," but covers "[e]very action … within the range of official duty." U.S.Br.20. No lay jury—ignorant of the relevant interpretive principles—would understand this language more restrictively than the Solicitor General.

Merely supplying the statutory definition is thus not sufficient when the key issue is whether particular acts are "official." That is why judges in cases presenting similar issues have explicated this term clearly. For example, in *United States v. Ring,* a lobbyist furnished "meals, tickets and other gifts" to various officials. II.JA.1080. Judge Huvelle carefully explained to jurors that "official act" "refer[s] to a class of questions or matters whose answer or disposition is determined by the government"; and that "[m]ere favoritism, as evidenced by a public official's willingness to take a lobbyist's telephone call or to meet with a lobbyist," or "helping to develop a lobbying strategy," "is not an official act." II.JA.1082-83. She thus educated the jury about what "official action" includes *and* excludes, rather than just quoting the statute and allowing jurors to pass upon the propriety of common practices.

Moreover, the instructions here did not merely recite the statute. Rather, the court added an "expansive gloss," riddled with errors. *Sun-Diamond*, 526 U.S. at 403; Pet.Br.53-54. The Government's

defense of those elaborations confirms as much. For example, the unprecedented "series of steps" instruction did not say an act qualifies only if *that act* "is an effort" to exert influence. U.S.Br.52. It said that each in "a series of steps to exercise influence *or achieve an end*" qualifies. Pet.App.275a (emphasis added). That describes *everything* that could ever lead to *anything*. No wonder the jurors convicted.

Indeed, under these instructions, the Governor became a felon when he told Williams that the Health Secretary was the right person to approach about Anatabloc. U.S.Br.3. Answering such questions is something "a public official customarily" does; the answer "is one in a series of steps to ... achieve an end" (Williams' desire to win over the Secretary); and the Governor answered the question "because" he was on a flight Williams had donated. Accordingly, the instructions failed to give "clear and explicit" guidance on issues at the "heart of the charges"—and thus require reversal. *Yates*, 354 U.S. at 327.

2. The Government diverts attention by attacking the defense's *proposed* instructions. But the court was required to give correct instructions regardless of what was proposed. Its failure to do so—over repeated objection—requires reversal. Pet.Br.51.

Anyway, Governor McDonnell's written proposal was entirely correct. Far from being "a thinly veiled attempt to argue the defense's case" (U.S.Br.53), it was drawn from *Ring*, detailed above, and numerous other authorities, Pet.App.147a-49a. The district court even rejected the request that the jury determine whether Governor McDonnell "intended to

or did, in fact, influence a specific official decision the government actually makes," *id.*—which even the Government (sometimes) concedes is correct.

The Government claims that Governor McDonnell waived this proposal. U.S.Br.54. But he cited this precise language in his appellate brief (C.A.Br.53) and, in an extended colloquy at oral argument, explained that the identical language was offered as part of a fallback proposal during the charging conference. C.A.Or.Arg. 17:16-19:33 (court: "Did you offer the Court a lesser included…"; counsel: "As an alternative, we requested that the Court give two additional instructions, at pages 7340 and pages 7341 of the appendix…")). Those prolonged discussions were more than enough to put the Fourth Circuit "on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

The Government also claims the proposal wrongly required finding an agreement to perform a "specific" official act. U.S.Br.55. But the relevant part of the proposal had nothing to do with specific *acts*—it required only that the ultimate object of the exchange be "a specific official *decision* the government actually makes." Pet.App.254a (emphasis added). That is unambiguously correct.

And regardless, the language the Government challenges came straight from *Evans*, which explained that bribery occurs "when the public official receives a payment in return for his agreement to perform *specific* official acts." 504 U.S. at 268 (emphasis added). Same for the circuit case the Government invokes, which required trial courts to "explain that the defendant must have intended

for the official to engage in some *specific* act (or omission) or course of action (or inaction)." *United States v. Jennings*, 160 F.3d 1006, 1019 (4th Cir. 1998) (emphasis added); *accord United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007).

3. Finally, in a last-ditch effort, the Government invokes harmless error. U.S.Br.55-56. That is both forfeited and frivolous. Forfeited, because neither the Government nor either court ever suggested below that misdefining official action could be harmless. *E.g.*, *United States v. Johnson*, 467 F.3d 559, 564 (6th Cir. 2006) ("harmless error" forfeited if not pressed on appeal). And frivolous, because the scope of "official action" was *the* central issue. Governor McDonnell was plainly prejudiced by instructions allowing the jury to find he took official action whenever he posed for "photos" or "ma[de] comments at … ribbon cuttings." Pet.App.264a. Having successfully elicited instructions under which "[w]hatever it was, it's all official action," Pet.App.263a, the Government may not prolong these proceedings with a pointless remand to litigate the long-abandoned issue of whether those critical instructions mattered.

III. THE GOVERNMENT'S BRIEF CONFIRMS THE NEED TO INVALIDATE THE STATUTES AT ISSUE.

To the extent there was doubt about whether the Government can be entrusted with vague corruption statutes, its position here dispels it. Jettisoning this Court's decisions as "erroneous" and ignoring its confinement of honest-services fraud to "core" bribery, the Government seeks to arm federal prosecutors nationwide with the power to imprison every "filing clerk" who more carefully staples copies

for a litigant who sometimes brings him breakfast (U.S.Br.20), every legislator who trades "routine constituent services" for "$100 campaign contribution[s]" (U.S.Br.33), and every judge who accepts luxury accommodations in exchange for "appearances" at foreign locations (U.S.Br.31).

The Constitution forbids boundless prosecutorial discretion, and the prosecutorial reaction to this Court's rescue of honest-services fraud in *Skilling* confirms that cabining these statutes has been a "failed enterprise." *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015); *see also* Jealous.Br.19-31. If Congress wants to vest unelected prosecutors with the extraordinary power to police state and local ethics, it must speak with far greater clarity than it has. "[T]he phrase 'under color of official right' … is vague almost to the point of unconstitutionality," *Evans*, 504 U.S. at 275 (Kennedy, J., concurring in part and in judgment), and no official—certainly no state official focused on state ethical rules—could have anticipated the Government's sweeping construction, VA.Law.Profs.Br.20-25. The Court should thus invalidate the honest-services statute and hold the Hobbs Act unconstitutional as applied.

CONCLUSION

This Court should reverse the decision below and set aside Governor McDonnell's convictions.

Respectfully submitted,

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