No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Far from "unexceptionable" (Opp.11), this prosecution is unprecedented. It hinges on a novel, sweeping theory that puts every public official at the mercy of federal prosecutors. Now, facing the prospect of this Court's review, the Government tries to downplay that theory—rewriting history, the record, and the decisions below to pretend that the fundamental question of what counts as "official action" is somehow not presented. But what actions are "official" has been *the* central legal issue in this case since day one; the viability of the prosecution and legitimacy of the jury's instructions depend on it. The Government's revisionism is thus an admission that the radical theory it successfully peddled below is untenable. Indeed, that theory conflicts with countless decisions of this Court and other Circuits, while threatening to upend the political process at every level of government. This Court's review is undoubtedly warranted.

Review is also warranted on the voir dire issue. The Government acknowledges that the dispositive Sixth Amendment question is whether jurors have formed fixed opinions about guilt. Opp.30. Yet it defends the panel's holding that district courts need not ask concededly publicity-exposed jurors whether they possess opinions at all. One obviously cannot know whether an opinion is *fixed* without asking whether an opinion *exists*. Nor is it possible to determine *which* opinions are "fixed" without individual questioning. By junking this basic inquiry, the panel opinion conflicts with decisions of this Court and other Circuits on an important, recurring constitutional question.

I. The "Official Action" Issue Warrants Review.

From the start, this case has "hinge[d] on the interpretation of an 'official act.'" Pet.App.84a. Gov. McDonnell has contended—since literally the day of indictment—that acts are official only if they exercise governmental power or urge others to do so. But the district court instructed the jury that official action includes any act an "official customarily performs" (App.275a) and refused to require the jury to find intent to "influence a specific official decision the government actually makes" (App.147a). The Government exploited those instructions to argue in closing that "it's all official action," even when Gov. McDonnell posed for "photos," and even though "no one was pressured" to exercise any governmental power. App.263a-264a, 268a. And the panel affirmed, holding that "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue" were all official acts. App.73a.

That boundless conception of official action contradicts decisions of this Court and other Circuits, while giving prosecutors and juries unfettered discretion to indict and convict virtually any official they choose. Opposing review, the Government tries to recast this case to avoid the question presented. But it is too late to change the evidence. It is too late to alter the jury instructions. And it is too late to rewrite the decisions below. The Government's attempts to do so confirm the need for review.

A. The Government first offers the incredible claim that it is "irrelevant" whether Gov. McDonnell *engaged* in official action, because the jury could

have convicted him for *agreeing* to engage in such action, even if he later "default[ed]." Opp.14-16. That is incorrect for three reasons.

First, the only evidence of an *agreement* to take official actions was the *five actions themselves*, which were charged in the indictment and recited in the instructions. I.C.A.App.114-15; XI.C.A.App.7659-60. The Government conceded there was "no express agreement," asking the jury to infer one from the temporal nexus between those acts and the gifts. App.269a. The lower courts likewise relied exclusively on these five acts coming "on the heels" of gifts. App.75a; *see also* App.89a ("timing of Williams' gifts" relative to "McDonnell's official actions"). So if those acts were not "official," there was no basis to infer an agreement to provide official acts either. An agreement inferred from supposedly official acts cannot circumvent the predicate question of whether those acts were actually official. That is circular.

The Government suggests an alternative basis to infer an agreement: that Williams *wanted* state-sponsored studies and *hoped* Gov. McDonnell would help obtain them. Opp.15. But the claimed desires of a triply-immunized witness—notably, never satisfied—obviously prove nothing about Gov. McDonnell's general intentions, much less his specific intentions as to specific action on a specific pending matter, as the law requires.

Second, the Government ignores the Fourth Circuit's actual holding. The panel expressly ruled that, even if an official never exercises state power or presses others to, merely "asking a staffer to attend a briefing, questioning a university researcher at a

product launch, and directing a policy advisor to 'see' him about an issue" are official acts. App.73a. That broad rule—lifted from the Government's contention that "meetings" and "events" are official acts, C.A.Ans.Br.58—is the law in the Fourth Circuit.

Third, the Government's argument cannot rescue the jury instructions. Even if the record allowed a finding that Gov. McDonnell *agreed* to take official action despite no evidence he *ever did*, the jury was given a grossly overbroad definition of "official action." *Infra*, I.C. That error necessarily infected the verdict, because the jury was instructed to convict if Gov. McDonnell *agreed* to take official acts—defined as any act an official "customarily performs." The scope of "official action" thus remains crucial, and squarely presented.

B. The Government next insists the Fourth Circuit *agreed* that acts, to be official, must seek to "influence" a governmental decision. Opp.16-21. But apart from not addressing the instructional error, that is empty wordplay. The chasm between the competing legal theories could hardly be deeper. The panel did not merely *misapply* the legal standard (Opp.12); it drained that standard of all meaning by expanding "influence" to encompass everyday political conduct this Court and other Circuits have held is not criminal.

Gov. McDonnell's definition of "official action" is simple, and consistent with all prior decisions: An act is "official" if it resolves a specific government matter, or urges another official to do so. The latter clause accounts for officials who lack direct authority over the desired end, but make specific

"recommendations" to those who do. *United States v. Birdsall*, 233 U.S. 223, 234 (1914); *see also United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972) ("advice or recommendation"); *United States v. Ring*, 706 F.3d 460, 469 (D.C. Cir. 2013) ("urged" visa expedition). The Government emphasizes these cases (Opp.13), but they are inapt: Gov. McDonnell *had* authority to order what Williams wanted. He never did. Nor did he "urge" or "recommend" that others make decisions favoring Williams.

The Fourth Circuit's rule is thus far broader: Gov. McDonnell can be imprisoned for arranging meetings, directing a staffer to "see him," and asking questions at an event. App.73a. And under the instructions the panel blessed, inviting Williams to a cocktail party *alone* sufficed to convict. XI.C.A.App.7659-60. In the panel's view, such acts "exploited" state power to "influence" governmental decisions. App.73a-74a. But that conflates *influence over the decision* with *access to the decisionmaker*. Numerous courts—including this Court—have held the latter is not illegal. Pet.24-25; Opp.24 n.9.

The Government contends "context" shows that Gov. McDonnell, by arranging a meeting and asking a staffer to "see" him, implicitly sought to influence specific governmental decisions. Opp.16-17, 19-20. But no "context" changes the undisputed fact that Gov. McDonnell *never directed or urged any state action*. Nor did any of Gov. McDonnell's subordinates *perceive* any unspoken directives—even assuming such telepathic "influence" could suffice. To the contrary, the only staffer who met Williams testified

that Gov. McDonnell never "interfere[d]" with her decisionmaking process *at all*. Pet.22-23.

Ignoring that testimony, the Government serially distorts the record to falsely imply otherwise:

- The Government claims Gov. McDonnell "recommended a particular substantive result" by describing Anatabloc as "good." Opp.19. But the career official who heard this comment testified *just the opposite*: It was "personal" and came with "no ask." App.229a.
- The Government implies an aide testified that the Governor wanted him to push universities to conduct studies. Opp.20. But it conceals that it *is not quoting the aide*. The aide's testimony was *actually* that the Governor "never directed [him] to actually … try to make something happen." App.210a-211a.
- The "pro/con list" the Government cites (Opp.20) was created by an official who "never spoke with Bob McDonnell about Star" and based it on *internet research*. App.240a-241a.
- A witness recalled *Mrs.* McDonnell saying the mansion event was to "encourage" research. Opp.16. But that same witness testified that Gov. McDonnell was not even "aware the event was happening." V.JA.3649-50.

The Fourth Circuit's rule is thus that, even if an official never urges a specific governmental decision, no employee intuits any directive, and no decision is ever made—a jury can *still* infer attempted "influence" and convict. As the Government admits it told the jury, it suffices that "petitioner *had*

influence" over matters Williams cared about (Opp.22 n.7 (emphasis added)), regardless of whether he *exerted* it. It is, in other words, a felony for officials who *have* influence (*i.e.*, all of them) to accept anything from anyone who *wants* something (*i.e.*, everyone). That is hardly "unexceptionable."[1]

C. The question of what constitutes "official action" is also clearly and independently presented by the error-filled jury instructions, which the panel endorsed and the Government hardly defends.

The Government's only justification for the instructions is that *quoting* the statute obviates the need to *explain* the statute. Opp.22. But we do not give juries copies of the U.S. Code and let them figure it out. That is why *United States v. Sun-Diamond Growers of California* reversed; the instructions there quoted the statute and added an "expansive gloss." 526 U.S. 398, 403, 412-13 (1999). The district court here did the same, quoting a complex statutory definition along with a lengthy disquisition on what conviction does *not* require—without even a *word* clarifying what it *does* require (namely, taking or urging a governmental decision).

Illustrating the problem, those instructions freed the Government to tell the jury Gov. McDonnell took "official[] acts on the issue of Virginia business

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[1] The Government claims Gov. McDonnell no longer "challenges" numerous other issues. Opp.12. But petitioning for certiorari on the legal questions that most satisfy the high standard for this Court's review obviously does not concede the myriad other errors committed below.

development" when he did things like appear in "pictures" with Williams at any public "function," even without *any* nexus to *any* governmental matter. App.263a, 268a-269a; *see also* D.Ct.Dkt.532 at 14 (arguing Gov. McDonnell took official action by "promot[ing] Virginia business"). The Government now focuses on state-sponsored studies (that Star never applied for) rather than "Virginia business development." But it capitalized on the district court's limitless instructions back when it mattered. Those defective instructions are primed for review.

Changing the subject from the actual, overbroad instructions, the Government attacks Gov. McDonnell's *proposed* instructions. Opp.21. That is a distraction, because the instructions *as given* were wrong; they never conveyed the critical line between "official action" and every action officials customarily take. Regardless, Gov. McDonnell's proposal *did* correctly explain that distinction: Official acts are those that seek to "influence a specific official decision the government actually makes." App.147a. Even the Government now concedes "influence" is the linchpin of corruption. But the district court refused to tell the jury that.

The Government notes the instructions twice used the word "influence" (Opp.22), but those usages both improperly *expanded* the instructions. The first made "official action" turn on Williams' subjective, self-serving, immunized testimony—informing the jury that it was enough if "the *alleged bribe payor* reasonably believes that the public official *had* influence." App.275a (emphases added). The second expanded the definition even further to include every

miscellaneous "step" on the path to someday doing something—reaching anything "in a series of steps to exercise influence *or achieve an end*." *Id.* (emphasis added). These statements made the instructions worse, not better. And neither required actually exercising or promising to exercise direct influence over specific governmental decisions.

The Government says there were other errors—though it never identifies any—in Gov. McDonnell's proposed definition of "official action." Opp.21-22. That is not true, but it also ignores Gov. McDonnell's alternative proposal at the charging conference: "To find an official act, the questions you must decide are both whether the charged conduct constitutes a settled practice and whether that conduct was intended to or did, in fact, influence a specific official decision the government actually makes." App.254a. The court rejected that, too.

Finally, the Government claims Gov. McDonnell "forfeited" any challenge to the court's refusal to include his (concededly correct) "influence" language. Opp.21. But the Government did not even *argue* forfeiture below, presumably because Gov. McDonnell spent 35 pages in his appellate brief arguing "official action," including eight dissecting the flawed instructions. C.A.Br.24-59. And far from finding it forfeited, the panel recognized that instructional error was the "core" of Gov. McDonnell's appeal. App.43a. True, the panel never explained why the "influence" proposals were wrong. But the panel did not overlook this argument because it was forfeited; it omitted it because it is unanswerable.

D. By construing official action to open-endedly include virtually everything officials do, the opinion below confers unbridled discretion on prosecutors and juries—just what the vagueness doctrine forbids. The Government tries to assuage this fear by noting it must prove a "quid pro quo." Opp.25. But its rule evaporates that burden. Everything—from Rotary Club breakfasts, to campaign donations, to Super PAC contributions—counts as *quid*. And a jury can already infer an implicit *pro* via "winks and nods." App.269a. Now, under the panel opinion, any meeting, call, or photo op can have the "purpose or effect of exerting some influence," App.54a—perhaps as the first "in a series of steps" to someday "achieve an end," App.275a—and thus counts as *quo*. That amorphous standard may be a dream come true for prosecutors, but it gives no guidance to officials who are trying to govern without going to prison.

If that is the law, felonies are committed daily. Just this month, it was reported that, "[a]s secretary of state, Hillary Clinton intervened in a request forwarded by her son-in-law on behalf of a deep-sea mining firm to meet with her or other State Department officials." Stephen Braun, *Clinton Intervened for Firm After Request to Son-in-Law*, ASSOCIATED PRESS, Dec. 9, 2015. All Secretary Clinton did was ask an aide to "have someone follow up on this request." *Id.* But that referral is virtually identical to the marquee "official" action below, Pet.22-23, and is enough under the panel's rule. There was ample potential *quid*—including million-dollar donations by the mining firm's investment bank to the Secretary's foundation—and under the

panel's rule, the referral counts as *quo*. A jury need only infer "winks and nods" to connect the two.

Fundraisers are also hotbeds of criminal activity under this rule. The Government responds that discussions at fundraisers do not "see[k] to influence the disposition of government matters." Opp.26. But it just finished explaining that juries may infer intent to influence official matters from whatever "motives and consequences" they deem relevant. Opp.19. Most jurors will be quite prepared to "infer" that a Senator who touts a donor's company or listens to his sales pitch at a high-dollar fundraiser has an implicit "purpose or effect of exerting some influence." App.54a.

In a world of omnipresent *quid* and inferential *pro*, the decision below eliminates the only objective constraint on federal corruption law—the *quo*. The prospect of prison for every official who runs afoul of adverse "inferences" by hostile prosecutors and suspicious jurors has spooked *amici* of all political persuasions from every level of government. It warrants this Court's review.

II. The Voir Dire Issue Also Warrants Review.

The Government dwells on the trial court's willingness to ask far-less-important questions, but does not deny that it refused to ask potential jurors who admitted exposure to vitriolic publicity whether they had formed opinions about guilt, or allow any follow-up questioning based on that exposure. The panel's endorsement of that refusal conflicts with decisions of this and other courts.

The Government disagrees, claiming that, while this Court sometimes requires inquiry on "a particular *issue*," it leaves the "particulars" of that inquiry to district courts' discretion. Opp.31. But whether to ask about an "issue" *at all* is not a "particular" that district courts may dispense with. The Government concedes jurors with fixed opinions about guilt must be struck. Opp.30. There is thus no defense for the district court's refusal to ask potential jurors who admitted exposure to publicity "what opinions, if any" that exposure caused them to form. App.150a. The Government cites *no other case* affirming *voir dire* that omitted this fundamental question.

The Government claims this Court has never required individual questioning about pretrial publicity. Opp.32. Not true. *Mu'Min v. Virginia* declined to mandate individual questioning about the *precise content* of publicity; but it did not dispense with individual questioning. To the contrary, the opinion explains that the critical "decision" is whether a "juror" is "to be believed when he says he has not formed an opinion about the case." 500 U.S. 415, 425 (1991). Trial courts cannot decide whether to believe a juror's *answer* without first asking *the question*. Far from micro-managing *voir dire*, that requirement is necessary to ensure that trial courts cannot nullify core constitutional rights.

Finally, the Government seeks to obscure the Circuit conflict with a grab-bag of immaterial distinctions. Opp.32-33. But each of those decisions adopted a rule of law irreconcilable with the panel's holding. For example, the Fifth Circuit has long held

that "merely asking potential jurors to raise their hands if they could not be impartial was not adequate voir dire," *United States v. Pratt*, 728 F.3d 463, 471 (5th Cir. 2013), which conflicts directly with the Fourth Circuit's rule that "merely asking for a show of hands was not an abuse of discretion," App.31a. This important, recurring constitutional issue—over which "state courts are also in conflict" (NACDL.Am.Br.14)—warrants review, too.

Respectfully submitted,

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