No. 21-___

IN THE

Supreme Court of the United States

DAVID LYNN ROBERSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HENRY W. ASBILL
BUCKLEY LLP
2001 M St. NW, Suite 500
Washington, DC 20036

DAVID J. FEDER
JONES DAY
555 S. Flower St., 50th Fl.
Los Angeles, CA 90071

BRETT M. BLOOMSTON
THE BLOOMSTON FIRM
2151 Highland Ave.
Suite 310
Birmingham, AL 35205

YAAKOV M. ROTH
Counsel of Record
ANTHONY DICK
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

DAVID BOUCHARD
FINCH MCCRANIE LLP
225 Peachtree St. NE
1700 South Tower
Atlanta, GA 30303

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether, in a bribery prosecution based on issue-advocacy payments that would otherwise enjoy First Amendment protection, the government must prove that the payments were explicitly linked to official action.

2. Whether a jury must be instructed that merely "expressing support" for a policy cannot support conviction under the federal bribery laws.

PARTIES TO THE PROCEEDING

Petitioner, who was an Appellant in the Eleventh Circuit, is David Lynn Roberson.

Respondent, who was the Appellee in the Eleventh Circuit, is the United States.

Joel Iverson Gilbert was also an Appellant in the Eleventh Circuit.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This Court has long expressed concern about how prosecutors' aggressive use of federal bribery statutes risks punishing ordinary political activity and chilling democratic engagement. After all, it is very normal—indeed, an integral part of our system of government—for citizens to interact with public officials. Citizens offer support for officials, *e.g.*, by contributing to their campaigns, engaging in issue advocacy, or honoring them at events. Meanwhile, officials act every day to support their constituents, *e.g.*, by helping them solve problems with government, or speaking out on policy issues. This usual give-and-take of politics, however, can readily assume a sinister complexion when neatly packaged for hostile jurors who may view themselves as victims of political corruption. A contribution here, a speech or vote there, and—voila—there is enough for a jury to "infer" corruption and send the politician and his rich friend to prison. And all of this only gets worse in the context of state legislators, who are often part-time and therefore *must* engage financially with their constituents just to make a living.

To mitigate those threats, this Court adopted two important constraints on bribery prosecutions. *First*, the Court in *McCormick v. United States*, 500 U.S. 257 (1991), imposed a heightened standard in cases where the alleged bribe takes the form of otherwise-protected First Amendment activity (like a campaign donation). In such a case, conviction requires an "explicit" link between the payment and the official action. *Second*, the Court in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), restricted the types of official actions that can support a bribery charge. Only a true exercise of sovereign power can serve as a predicate.

By both tightening the *pro* element of bribery and limiting the *quo* element, these decisions offer some protection from overzealous prosecutors for public officials and for the citizens who interact with them. In the decision below, however, the Eleventh Circuit eviscerated those protections. The court artificially limited the *McCormick* standard to electoral campaign donations—excluding other First Amendment activity such as issue-advocacy spending. That distinction has no foundation in the Constitution or common sense. Further, the court concluded that a jury need not be instructed that a public official does not take "official action" merely by expressing support for a policy. That indefensible rule conflicts with *McDonnell* and two other Circuits. And even worse, the court went on to say that neither *McCormick* nor *McDonnell* applies *at all* to federal-program bribery (18 U.S.C. § 666). That holding, which creates and exacerbates two more circuit splits, opens a gaping loophole to evade this Court's precedents.

Viewed together, the panel's holdings revive all of the practical and constitutional concerns that drove *McCormick* and *McDonnell*: At least in the Eleventh Circuit, prosecutors can now once again imprison any state or local official simply by asking a jury to "infer" a corrupt link between political spending and some temporally proximate speech, meeting, or op-ed. That threat hangs over the heads of every official—part-time legislators especially—and, in turn, chills democratic engagement. It also again intrudes on federalism by empowering federal prosecutors to "set[] standards" of "good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987). This matter deserves the Court's attention.

This a particularly compelling case to revisit—and reiterate—these core protections against abusive bribery prosecutions. It is the story of an innocent man—forced to stand trial with lawyers whose advice he relied upon in good faith—who has been targeted by a vengeful federal government after successfully pushing back against its misguided environmentalist agenda. And the government prevailed only because of the extreme latitude the courts below afforded to the prosecutors, contrary to this Court's precedents.

The case stems from the EPA's baseless decision, as as part of a sweeping environmental-justice offensive, to blame the Drummond Company for pollution in North Birmingham. Drummond fought back. It hired a premier law firm, Balch & Bingham, which hired experts, conducted research, filed comments with the agency, and lobbied officials. Balch also sought to mobilize public support, including by retaining a non-profit organization run by a popular, part-time state legislator, Oliver Robinson. His foundation engaged with the community to combat EPA misinformation.

In a sense, Drummond prevailed. Facing scientific and political pushback, the EPA's proposals went nowhere. But instead, a wounded federal government indicted a mid-level Drummond executive, petitioner David Roberson, on charges of *federal bribery*. The theory was that the contract with Robinson's group functioned as a bribe, paying not only for legitimate, First Amendment-protected community outreach but also for Robinson himself to use his office to benefit Drummond. Robinson met once with EPA officials at their invitation, spoke briefly at a public meeting of a state environmental commission, and participated in a voice vote on a nonbinding anti-EPA resolution.

Under *McCormick* and *McDonnell*, the government had no case. Robinson took nothing resembling official action at the two meetings in question—at most, he conveyed support for Drummond's policy position. And every witness and document confirmed there was no link, much less an "express" nexus, between the issue advocacy that Drummond funded and Robinson's committee vote months later on a pointless resolution he was unaware that Balch promoted. But the lower courts let prosecutors turn a constitutionally protected public-advocacy campaign into a "bribe" by stretching federal bribery law to dangerously elastic levels.

Specifically, the district court sabotaged Roberson's defense by mangling the two crucial points of law this Court announced in *McCormick* and *McDonnell*. The court told the jury that it need *not* find an "explicit" agreement in order to convict, and *refused* to tell the jury that merely "expressing support" is not an official action. That allowed the jury to convict by finding either that Robinson had exerted vague "influence" by discussing policy matters at meetings, or by finding an unspoken implicit agreement to trade the advocacy contract for Robinson's vote on a future resolution.

On both points, the panel approved. Writing for the panel, Judge Restani (visiting from the Trade Court) contracted *McCormick* and rendered *McDonnell* a dead letter. By jettisoning these legal safeguards, the panel unshackled prosecutors, created or expanded multiple circuit conflicts, and committed a particularly stark miscarriage of justice. Roberson is now facing years in prison for helping his employer stand up to EPA overreach in a core exercise of First Amendment freedoms. Certiorari is once again needed to resist the overcriminalization of politics.

OPINION BELOW

The decision of the U.S. Court of Appeals for the Eleventh Circuit affirming petitioner's judgment of conviction (Pet.App.1a) is reported at 998 F.3d 1237.

JURISDICTION

The Eleventh Circuit issued its opinion and entered judgment on May 27, 2021, and denied a petition for rehearing on August 12, 2021. Pet.App.1a, 38a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant statutory provisions (18 U.S.C. §§ 666, 1343, and 1346) are reproduced in relevant part at Pet.App.40a.

STATEMENT

Petitioner David Roberson was charged with two varieties of bribery (honest-services bribery under 18 U.S.C. § 1346 and federal-programs bribery under 18 U.S.C. § 666), along with related offenses of conspiracy and money laundering. All of the charges arose out of a contract that Drummond's outside counsel at Balch entered with Oliver Robinson's non-profit for grassroots outreach opposing EPA's agenda. The jury convicted Roberson (and Balch partner, Joel Gilbert) (Pet.App.2a), but the district court granted release pending appeal (Doc.308 at 2). The Eleventh Circuit affirmed the convictions on May 27, 2021. Pet.App.1a-2a. That court then denied a timely petition for rehearing on August 12, 2021. Pet.App.38a.

A. CERCLA, the Superfund Program, and the Roles of the EPA and the States.

Under the federal CERCLA statute, the EPA may initiate the cleanup of land upon determining that it is contaminated by hazardous waste. 42 U.S.C. § 9604(a)(1). To help fund the cleanup, the EPA can designate private entities as Potentially Responsible Parties (or "PRPs") who are then presumptively obligated to perform (or reimburse for) the cleanup. *See id*. §§ 9604, 9606(a), 9607(a).

The EPA also has authority to list certain sites on the National Priorities List ("NPL"), a registry of the most hazardous sites in the country. When a site is listed on the NPL, it becomes eligible for funding from the Superfund Trust to conduct long-term remedial actions, subject to reimbursement by responsible parties. 40 C.F.R. § 300.425(b)(1).

The EPA has unilateral authority to decide whether to list a site on the NPL, but Superfund monies cannot be spent unless the State where the site is located gives "assurances" that it will cover 10% of costs that cannot be recovered from other parties. *Id.* § 300.510(a); 42 U.S.C. § 9604(c)(3); Pet.App.4a. As a practical matter, then, the State's concurrence in a proposed NPL listing carries some weight.

B. The EPA's Efforts in North Birmingham.

"North Birmingham" is home to the "35th Avenue site." Pet.App.3a. The EPA originally "found the Walter Coke Company responsible for the pollution" there. *Id.* But as Walter Coke neared bankruptcy, the EPA began looking for other deep pockets. Doc.280 at 2309; Doc.283 at 3239-41. This led to three regulatory actions that form the background of this case.

First, the EPA asserted that Drummond was an "additional" PRP "for the site's soil contamination" (Pet.App.3a), even though the agency had previously found no significant pollution in the Tarrant neighborhood where Drummond actually operated (Doc.253-44). The EPA invoked the novel theory (later rejected as a matter of law by the Ninth Circuit) that pollutants from Drummond's facility had traveled two miles by air and were deposited at the site.

Second, the EPA "proposed adding the 35th Avenue site to the [NPL]." Pet.App.4a; *see* 79 Fed. Reg. 56,538-02 (Sept. 22, 2014)). To decide Alabama's position on the listing, the "Governor … delegated" authority "to the Alabama Department of Environmental Management ('ADEM')." Pet.App.4a. ADEM is a state agency whose director is hired by the Alabama Environmental Management Commission ("AEMC"), a multi-member body that hears "regulatory appeals from ADEM" and "implements applicable rules and regulations" (*id.*), but had "[n]o official role" in the Superfund issues. Doc.281 at 2749-50.

Third, in response to pressure from an environmental advocacy group, the "EPA … began to consider whether the" 35th Avenue "site should be expanded into nearby Tarrant, where" Drummond operates. Pet.App.3a-4a.

C. The Advocacy Campaign.

Having spent millions of dollars on environmental compliance, Drummond believed it was not responsible for contaminating the 35th Avenue site and that both EPA's theory of liability and underlying science were faulty. *See* Doc.277 at 1394-96; Doc.283 at 3241-43; Doc.280 at 2245-48.

Drummond hired Balch & Bingham, "one of the top law firms in the state of Alabama," to defend it against the EPA's onslaught. Doc.277 at 1395; *see also* Doc.282 at 2866; Pet.App.5a. At Drummond, Balch worked with (among others) mid-level executive Roberson, a vice president of government relations. Doc.277 at 1386, 1432; Pet.App.2a, 4a-5a. Drummond's CEO called him "honest," "trustworthy," and "a man of integrity." Doc.277 at 1435-36. There was no evidence Roberson had any personal financial stake in Drummond. Doc.289 at 4530.

Balch recommended Drummond pursue a community-outreach program to counter initiatives by the EPA and an environmental group. Doc.277 at 1400. Balch considered the "highly respected" part-time state legislator Oliver Robinson to be a logical choice for this effort. Doc.278 at 1848; Doc.260-20. Roberson knew Robinson from his lobbying work. Doc.284 at 3474-75; Pet.App.4a-5a. A former basketball star who served in Alabama's House of Representatives, Robinson's district was near the 35th Avenue site. Doc.278 at 1669, 1675-76. Like most part-time legislators, he made a living on outside work. Doc.279 at 2004. He did consulting work and was also president of the Oliver Robinson Foundation, which taught financial literacy to underprivileged communities. Doc.278 at 1685-86, 1844-48.

Balch "established a consulting relationship" with the Foundation to conduct a "'community outreach program' aimed at garnering public support for Drummond's position." Pet.App.4a-5a. The contract required Robinson "to abide by all applicable laws and ethical rules." Pet.App.5a. Robinson testified that he was "expected ... to obey federal law." Doc.278 at 1862.

Under the leadership of Robinson and his daughter, the Foundation launched an "all-out public relations campaign"—canvassing neighborhoods, distributing flyers, speaking at churches and meetings, and writing letters to officials, all pushing back against the EPA's regulatory overreach. Doc.260-27 at 1.

In the wake of the public-advocacy campaign, opposition to the EPA continued to mount until the agency's regulatory efforts ultimately fizzled. Doc.277 at 1589, 1609. The 35th Avenue site was never added to the NPL or expanded into Tarrant, and Drummond was never deemed responsible for the pollution.

D. The Criminal Indictments and Theory.

Unbeknownst to Defendants, Robinson became the target of a criminal investigation for unrelated tax fraud and misappropriation. After repeatedly denying accepting any bribes, Robinson later struck a plea deal, agreeing to accuse Defendants in exchange for a reduced sentence recommendation. Doc.278 at 1672-75, 1799-1800; Doc.279 at 2040-44, 2080-87.

Federal prosecutors then indicted Roberson and his counsel at Balch on charges of honest-services bribery, federal-programs bribery, and derivative offenses for conspiracy and laundering the bribes. Pet.App.2a-3a. Their theory: "The contract to do community outreach is the bribe." Doc.288 at 4431. Although it was undisputed that the Foundation did real advocacy work and community outreach (*id.*), the government argued that the contract was an effort to "kill two birds with one stone" and have Robinson "communicate in his official capacity as a state legislator with other public officials." Doc.273 at 397-98. Robinson supposedly took three "official acts."

First, "Robinson attended an EPA meeting," Pet.App.6a, at which he asked EPA officials "two or three" questions Balch prepared; he was primarily "in sort of an information-receiving mode" and "[j]ust wanted information." Doc.278 at 1815-17; Doc.279 at 2072; Pet.App.3a, 6a. Some of his questions "displayed a pro-business stance" and "at worst telegraphed" that the EPA faced local opposition. Pet.App.6a. Robinson admitted that he did not "try to get EPA to do anything." Doc.279 at 2073; Doc.278 at 1816-17.

Second, "Robinson spoke at a public meeting of the AEMC," which as noted above had no direct role in EPA's decisions on the 35th Avenue site. Pet.App.3a-4a, 7a. In his statement, Robinson "expressed concern regarding the EPA's efforts," "remarked that he did not think expansion of the 35th Avenue site was supported by scientific evidence," and worried "that finding additional companies liable for the cleanup would harm residents given the 'decades of litigation that will occur.'" Pet.App.7a. He also expressed "hope[]" that AEMC "can let us know through testing or whatever can be done to find out who is culpable." Doc.253-20 at 32-34. The government's own witnesses described Robinson's presentation as "balanced" and noted he did not "ask [AEMC] to make a decision about anything." Doc.281 at 2786; Doc.282 at 2816.

Third, "Robinson helped vote" SJR-97, a non-binding "resolution" opposing the EPA's plans, "out of the House Rules Committee." Pet.App.3a, 7a-8a & n.7. The resolution "stated that the EPA was operating on the basis of faulty science" and "urged the EPA to reconsider its action." Pet.App.8a. It "eventually passed both houses of the Legislature and was signed by the Governor." *Id.* It is undisputed that

neither Balch nor Roberson *ever communicated* with Robinson about this resolution, and he had repeatedly promised *not* to vote on anything presenting a conflict of interest. Doc.278 at 1886-87; Doc.286 at 3929-30; Doc.260-71. Robinson did not know Balch had drafted the resolution, and had no "advance notice" it "might even be coming up." Doc.278 at 1886-87.

E. The Jury Instructions.

At trial, Roberson argued that Balch paid Robinson for lawful public advocacy, and requested two jury instructions to ensure that he would not be convicted for that First Amendment activity.

First, Roberson asked for an instruction that the advocacy payments to Robinson's foundation could not be treated as an unlawful bribe absent an "explicit" link to official action. Pet.App.25a-26a. That First Amendment safeguard, rooted in this Court's decision in *McCormick*, would ensure that Defendants were not convicted for constitutionally protected advocacy expenditures just because Robinson happened to vote for SJR-97, on his own accord and months later. The district court not only refused to give that instruction, it told the jury exactly the opposite: "The agreement need not be explicit." Doc.288 at 4376.

Second, Roberson asked for an instruction, based on this Court's decision in *McDonnell*, confirming that a public official does not take official action by merely "expressing support" for a policy. Pet.App.26a-28a. That instruction was designed to prevent the jury from convicting based on Robinson's meetings with the EPA or the AEMC, absent a finding that Defendants had paid Robinson to exercise *official powers* at those meetings. Again, the court refused. Pet.App.27a. It

recited part of *McDonnell*'s holding, but not its ruling that merely "expressing support" is not official action, which was a key disputed issue in this case.

F. The Panel Decision.

The panel affirmed in an opinion by Judge Restani, visiting from the U.S. Court of International Trade.

On the *McCormick* issue, the panel acknowledged that the alleged bribe was a contract to perform "community grassroots organization of a political nature," which the Foundation in fact performed. Pet.App.5a & n.4, 22a. But it held that no explicit agreement was required by *McCormick* because this advocacy was non-electoral and was not the "sole" or "typica[l]" work done by the Foundation. Pet.App.22a. For the same reasons, the court rejected the challenges based on the failure to instruct the jury about the *McCormick* standard. Pet.App.26a. The panel thus concluded that the jury could infer that the advocacy payments were bribes without *any* First Amendment safeguard. It further held that *McCormick* does not apply to the federal-programs bribery statute, 18 U.S.C. § 666, in any event. Pet.App.23a.

On *McDonnell*, the panel affirmed the trial court's refusal to instruct the jury that merely "expressing support" for a public policy is not enough to constitute official action that can support a bribery prosecution. Alternatively, the panel suggested that any error did not matter because Robinson's vote on SJR-97 was official, even if his other actions were mere "support." Pet.App.30a-32a. The panel did not grapple with the likelihood that the jury had wrongly convicted based on a finding that Defendants paid Robinson to express support at the two meetings. Finally, the panel held

that *McDonnell* was irrelevant to the § 666 convictions too, because *McDonnell* involved a different bribery statute. *See* Pet.App.26a, 9a-15a.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly reined in attempts by overzealous prosecutors to criminalize everything that walks and talks. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 532 (2015) (rejecting attempt to prosecute disposal of fish under Sarbanes-Oxley); *Van Buren v. United States*, 141 S. Ct. 1648, 1652 (2021) (rejecting attempt to prosecute police sergeant's search in a law enforcement database under the Computer Fraud and Abuse Act of 1986); *Bond v. United States*, 572 U.S. 844 (2014) (rejecting attempt to prosecute a wife's use of chemicals to annoy her husband's mistress under the Chemical Weapons Convention Implementation Act). And this overcriminalization concern reaches its apex when prosecutors attempt to "mak[e] everyday politics criminal." *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015). Time and again, this Court has intervened when prosecutors have tried to use federal criminal law to impose their own views of good governance on state and local officials. *See, e.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) (rejecting attempt to prosecute realignment of toll lanes as criminal fraud); *McDonnell*, 136 S. Ct. at 2355 (rejecting attempt to prosecute governor's unofficial promotion of constituent's business as bribery).

This Court must act once again to prevent the criminalization of political advocacy, and to stop the government from diminishing the Court's precedents in this arena through hyper-technical distinctions and arbitrary caveats. The decision below approves those

prosecutorial maneuvers, and in doing so opens the floodgates of partisan political prosecutions, creates or exacerbates conflicts in lower court authority, and condemns an innocent man to prison.

More specifically, the Court should grant review to address two sets of related issues—standards for the *pro* and *quo* aspects of federal bribery, respectively.

First, *McCormick* held that payments otherwise protected by the First Amendment cannot be deemed unlawful "bribes" in the absence of an "explicit" link to official action. The panel limited that rule to campaign donations, to the exclusion of other protected political expenditures. That limitation has no basis in the Constitution, undermines the critical safeguard this Court created for protected political activity, and amounts to open season on anyone who hires a part-time state legislator to engage in lobbying, public relations, or political advocacy. The panel also created a direct conflict with the Seventh Circuit by holding that *McCormick* does not apply *at all* to prosecutions under the federal-programs bribery statute, reducing this Court's precedent to a mere pleading rule.

Second, *McDonnell* ruled that merely "expressing support" for a policy is not an "official act" that can support a bribery charge. That too is an important principle that helps preclude the ready transformation of routine political activity into illicit corruption. Yet the panel held that the jury need not even *be told* of it. Making matters worse, the court then created another conflict by holding that any instructional error did not matter because the official took *other* action that was plainly official—even though there was no way to tell if the jury had rested on it. That contradicts Supreme

Court precedent—including *McDonnell* itself—as the Second and Third Circuits have recognized. Again, the panel also then went even further, deepening an entrenched circuit split, by exempting § 666 bribery from any "official act" requirement whatsoever.

I. THE PANEL WRONGLY REJECTED THE HEIGHTENED BRIBERY STANDARD FOR PROTECTED POLITICAL EXPENDITURES.

The Court should grant certiorari because the lower court's decision defies *McCormick*'s "explicit" *quid pro quo* standard by limiting it to campaign donations, even though issue-advocacy expenditures are entitled to even *greater* First Amendment protection. Plus, the panel created a circuit split—and effectively nullified *McCormick*—by carving federal-programs bribery from its reach altogether. These questions are of great importance, as the *McCormick* rule is often all that prevents juries from "inferring" corruption from routine engagement in the political process.

A. The Panel Artificially Limited The "Explicit" *Quid Pro Quo* Requirement.

1. The First Amendment protects the right to support political causes. To ensure that such activity is not chilled, this Court has held that political expenditures cannot be punished as "bribes" unless they are made "in return for an *explicit* promise or undertaking ... to perform or not to perform an official act." *McCormick*, 500 U.S. at 273 (emphasis added). That means "the *quid pro quo*" must "be clear and unambiguous, leaving no uncertainty about the terms of the bargain." *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992). This heightened proof standard prevents prosecutors from treating political

activity as corrupt based solely on weak inferences from timing or the like. Thus, while giving a $10,000 Rolex to a legislator shortly before a vote might give rise to an inference of bribery, the same cannot be drawn from a $10,000 campaign contribution.

McCormick's heightened standard properly applies to this case. The government's theory is that Roberson engaged in bribery by funding political activity—the anti-EPA advocacy effort. Drummond funded an "all-out public relations campaign" on an issue of great public importance. Doc.260-27 at 1. As even the panel noted, Robinson was retained to perform "grassroots" work "of a political nature," which his Foundation proceeded to do. Pet.App.5a n.4, 22a. That is core First Amendment activity. *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-83 (1978). And the government contended that "[t]he contract to do community outreach [was] the bribe." Doc.288 at 4431. That theory threatens the First Amendment in exactly the same way as *McCormick*—it asks the jury to deem otherwise-protected political expenditures as illicit bribes. Heightened proof of corruption was thus necessary, to avoid punishing (and, in turn, chilling) First Amendment activity.

2. The panel, however, approved a jury instruction that *expressly rejected* the heightened standard. Not only did the trial court refuse to impose the "explicit" standard, but it told the the jury exactly the opposite: "The agreement need not be explicit." Doc.288 at 4376. The Eleventh Circuit affirmed, holding that the law did not require an "explicit" agreement. Pet.App.25a-26a.

The panel principally reasoned that *McCormick* applies *only* to electoral campaign donations but not to issue-advocacy contributions. Pet.App.21a-23a. The court thus effectively treated *issue advocacy* as if it were identical to an unprotected *personal gift* to a public official, subject to inferences of corruption under the same standard.

That reasoning cannot withstand minimal scrutiny. After all, *McCormick* was fundamentally based on "concerns about criminalizing politically necessary activity or chilling constitutionally protected conduct." *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013); *see also United States v. Menendez*, 132 F. Supp. 3d 635, 642 (D.N.J. 2015). It is well-established that constitutional protection for issue advocacy is even *stronger* than for the electoral donations in *McCormick*, and certainly not weaker. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70, 478-79 (2007); *see also*, *e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261-62 (1986) ("[T]he Government enjoys greater latitude in limiting contributions than in regulating independent expenditures."); *Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections … simply is not present in a popular vote on a public issue.").

The First Amendment thus squarely protects the right to engage in—and pay for—advocacy like the anti-EPA campaign here, not only to "donat[e]" (Pet.App.21a-22a) to candidates or other speakers. *See, e.g.*, *Belloti*, 435 U.S. at 776-77 (speech on referendum "is at the heart of the First Amendment's protection"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("handing out leaflets in the advocacy of a politically controversial viewpoint … is

the essence of First Amendment expression"). Issue advocacy is thus (at least) equally entitled to the protection of the *McCormick* "explicit" rule. And if there were any doubt, the panel failed to "give the benefit of any doubt to protecting rather than stifling" political activity. *Wis. Right to Life*, 551 U.S. at 469.

The panel further reasoned that *McCormick* did not apply because the Foundation was not "formed" with the "sole purpose" of advocating "on a narrow issue," and it "typically" did other things. Pet.App.22a. None of that has anything whatsoever to do with the First Amendment, and the court cited nothing to support its arbitrary distinctions. There is no doubt that the Foundation's *conduct*—organizing public opposition to the EPA's regulatory initiatives—was fully protected by the Constitution. That is what matters.

Besides, this Court has warned against slicing the baloney so thin. First Amendment freedoms, the Court has warned, should not be subject to "the open-ended rough-and-tumble of factors." *Wis. Right to Life*, 551 U.S. at 469. As this case illustrates, that risks "invit[ing] complex argument in a trial court and a virtually inevitable appeal." *Id.* How is one to determine the "purpose" of an organization that might have many and sometimes-conflicting goals? How "narrow" an "issue" must be at play to evade the *McCormick* standard? How frequently must an organization engage in that particular type of issue advocacy for it to be a "typical[]" activity? What level of generality should be applied in determining these issues? And to do all this *beforehand* so as to feel safe in engaging in First Amendment activity? These questions invite no clear answers. The panel decision eliminates the reassurances *McCormick* provided.

3. Finally, this case is a good vehicle to revisit the scope of *McCormick*, because there is no doubt this instructional error was prejudicial. (Indeed, the government effectively conceded that by not arguing harmless error below. *See* Doc.269 at 35-36.)

At trial, the Government presented no evidence of an explicit agreement that Robinson would perform official acts in return for payments to the Foundation. Robinson—whose testimony was already subject to grave doubt given his serial perjuries on tax returns and shifting story, was hopelessly vague on the details of any supposed criminal agreement: He could not identify any conversation where one was even *alluded* to, much less consummated. Doc.279 at 2011-13. Which is because Defendants never tied the contract to anything beyond the legitimate advocacy work that was performed. Thus, the government's case was built entirely on the type of circumstantial evidence—regarding the timing of the payments and supposed concealment of the contract (Pet.App.15a-18a)—that *McCormick* treats as inadequate.

The panel's contraction of *McCormick* thus directly underpinned its affirmance, underscoring why further review is so important, for this case and beyond.

B. The Panel Created a Circuit Split on Whether *McCormick*'s "Explicit" *Quid Pro Quo* Rule Applies to Section 666.

The panel's artificial contraction of *McCormick* suffices for certiorari. But the additional holding that *McCormick* does not apply *at all* to federal-programs bribery, 18 U.S.C. § 666, creates a circuit split and further confirms that this Court's review is needed if *McCormick* is to have any effect going forward.

The panel said, enigmatically, that although one of the Circuit's prior decisions "involved section 666, it did not explicitly extend *McCormick*'s express *quid pro quo* requirement to all convictions made under section 666." Pet.App.23a. The implication: It does not.

That conflicts with the Seventh Circuit's decision in *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993). *Allen* explained that *McCormick*'s heightened "explicit" standard derived from "the realities of the American political system" and the fact that "the Hobbs Act's language did not justify making commonly accepted political behavior criminal." *Id.* And "[g]iven the minimal difference[s] between" the Hobbs Act's prohibition on "extortion under color of official right" and other "bribery" laws, "courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act." *Id.* Namely, "absent some fairly explicit language otherwise," political expenditures "do[] not equal taking a bribe" unless an explicit *quid pro quo* is proved. *Id.* In short, *McCormick* announced "a rule for interpreting federal statutes"—not a rule that is limited to any particular federal statute. *Id.*

There is little doubt that *Allen* is correct, as the government has repeatedly conceded that § 666 requires an "explicit *quid pro quo*" in the campaign-donation context. *United States v. Allinson*, No. 17-cr-390, 2018 WL 3618257, at *5 (E.D. Pa. July 30, 2018); *see also United States v. Pawlowski*, 351 F. Supp. 3d 840, 849 (E.D. Pa. 2018) ("[T]he parties agree that where the 'quid,' … is a campaign contribution, the Government must prove a *quid pro quo* that is explicit."); *United States v. Siegelman*, 640 F.3d 1159, 1170 n.14 (11th Cir. 2011) ("The government points to

no contrary authority."). And courts have taken the government at its word, explaining that a heightened *quid pro quo* standard is required in context of a § 666 prosecution when campaign contributions are involved. *See, e.g.*, *United States v. Donagher*, 520 F. Supp. 3d 1034, 1056 (N.D. Ill. 2021) ("When the government brings § 666(a)(2) charges centered on campaign contributions, it must plead an explicit *quid pro quo*."); *United States v. McGregor*, 879 F. Supp. 2d 1308, 1310 (M.D. Ala. 2012) (similar).

The Court should step in to resolve this conflict in lower-court authority and confirm that *McCormick* is not some easily-circumvented pleading rule.

* * *

The panel's artificial contractions of *McCormick*—as to both the type of conduct it governs, and the laws to which it attaches—pose serious dangers that make this Court's correction important and urgent.

Absent a requirement of an "explicit" exchange, it is simply too easy for prosecutors and juries to infer a corrupt agreement based solely on coincidences of timing. That may not be especially troubling when the *quid* at issue is a personal gift, but it raises concerns of constitutional magnitude when the *quid* constitutes an exercise of First Amendment rights, like a donation to a candidate's campaign. After all, "[i]t is well understood that a substantial and legitimate reason ... to make a contribution to[] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors." *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). Thus, without the "explicit" standard, "[a]mbitious prosecutors and cynical jurors … can easily infer a

corrupt agreement from th[at] common pattern." Albert Alschuler, *Limiting Political Contributions After* McCutcheon, Citizens United, *and* SpeechNow, 67 Fla. L. Rev. 389, 461-62 (2015). An official who appoints a campaign donor to a public office, for example—a practice that dates back to the late-19th century, *see McCormick*, 500 U.S. at 272—could easily be subject to a corruption charge.

McCormick was meant to solve that problem. Yet, under the panel decision below, prosecutors could once again bring charges anytime legislators "support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries," *id.*—so long as they do so under § 666 or another bribery law, rather than the Hobbs Act. As this Court has explained, that is both "unrealistic" and "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable." *Id.* And when "unavoidable" conduct is criminalized, selective prosecution is certain to follow.

Beyond that, by excluding issue advocacy from *McCormick*'s scope, the panel effectively outlawed part-time legislators in the Eleventh Circuit. In many states, legislators are part-time by design—so they remain economically engaged in their communities. Given their skillset, those officials are often hired for lobbying, public-relations, and political advocacy work (subject to state ethics and conflict-of-interest rules). If *McCormick* does not apply to those relationships, however, federal juries can readily infer that the legislator was *really* paid for some official act, even (as here) an act taken months later and with no discussion

between the parties. That hangs a Sword of Damocles over these legislators and everyone who hires them, burdening both the protected advocacy at issue and the method of government these states have chosen.

This Court should grant certiorari to clear up the confusion on *McCormick*'s reach and hold that its heightened standard is indeed a general rule for interpreting all federal corruption statutes.

II. THE PANEL EVISCERATED *MCDONNELL*'S HOLDING THAT MERE "SUPPORT" CANNOT BE THE PREDICATE FOR A FEDERAL BRIBERY CONVICTION.

This Court should also grant certiorari for a second reason. The panel decision erases *McDonnell*'s crucial rule that "expressing support" does not alone rise to the level of "official action." And, again, the panel exacerbated an established circuit conflict by holding that federal-programs bribery is wholly exempt from *McDonnell*'s "official act" framework. Together, these holdings nullify *McDonnell* just as the panel nullified *McCormick*. In the Eleventh Circuit, an official can be convicted for writing an op-ed or giving a speech—exactly what this Court held was untenable.

A. The Panel Nullified *McDonnell*'s Holding That Mere Support Is Not "Official Action."

1. Federal bribery requires proof that an official "committed (or agreed to commit) an 'official act' in exchange for" a thing of value. *McDonnell*, 136 S. Ct. at 2361. Under *McDonnell*, an official act requires two basic elements. *First*, there must be a pending or anticipated "matter" that is "focused and concrete," "the kind of thing that can be put on an agenda,

tracked for progress, and then checked off as complete," and that matter must implicate a "formal exercise of governmental power." *Id.* at 2369, 2371-72. The pursuit of a "broad policy objective," by contrast, is too "nebulous" to qualify." *Id.* at 2374. *Second*, the official must act "on" that matter, either by exercising decision-making power directly—or else by "using his official position" to "exert pressure" on or "provide advice" to the responsible official, "knowing or intending that such advice will form the basis for an 'official act" by that second official. *Id.* at 2370-72.

McDonnell further specified that "expressing support" for a policy is not enough for "official action." *Id.* at 2371. "Taking a public position on an issue, by itself … is therefore not an 'official act.'" *United States v. Silver*, 864 F.3d 102, 122 (2d Cir. 2017). The Court thus drew a line between "expressing support" (which cannot support a bribery conviction) and using one's office to exert "pressure" or provide "advice" (which can). To illustrate the latter scenario, the Court cited *United States v. Birdsall*, 233 U.S. 223 (1914), which involved officials whose job was to make clemency recommendations to more senior officials. *Id.* at 234. Because making those recommendations was their prescribed role in the decisionmaking, taking money to influence those recommendations was a form of official action. *Birdsall* demonstrates that "[s]ubordinates who must advise their superiors as part of their official duties are, in fact, performing 'official acts.'" *United States v. Lee*, 919 F.3d 340, 360 (6th Cir. 2019) (Nalbandian, J., concurring).

In *McDonnell* itself, the Court applied the support-advice distinction in the context of allegations that a Virginia businessman bribed the Governor for help in

obtaining state research studies for one of his products. The Governor had organized meetings with state officials where he asked questions and expressed support for the product and the studies. 136 S. Ct. at 2362-64. That was not enough; the Governor had to do *something more*. "Simply expressing support for the research study at a meeting ... d[id] not qualify" as official action. *Id*. at 2371. He would have had to take the next step: "exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'" *Id*.

2. Given that dichotomy between expressing support (lawful) and providing advice (unlawful), the Second and Third Circuits have recognized that the key issue in many bribery cases will be whether an official's remarks "qualify as permissible attempts to 'express[] support'" or instead reflect "impermissible attempts 'to pressure or advise another official on a pending matter.'" *United States v. Fattah*, 914 F.3d 112, 156 (3d Cir. 2019). It is therefore imperative to instruct the jury about that key distinction.

Accordingly, in *Fattah*, the Third Circuit vacated bribery convictions where "the jury was not instructed that they had to place" the congressman's conduct—emails, letters, and a call in support of an ambassadorial appointment for a benefactor—"on one side or the other of th[at] divide." *Id.* Before sending defendants to prison for supposedly paying for "advice" rather than just "support," obviously the jury had to be *told* about that dispositive dichotomy.

Likewise, in *Silver*, the Second Circuit vacated a former state legislator's convictions where prosecutors had argued that he was bribed in part to "express[] his

strong opposition" to a methadone clinic. 864 F.3d at 122. Had the jury been told that merely expressing support for a policy position is not an official act, it might not have treated this opposition as "official." *Id*.

3. The decision below conflicts with *McDonnell*, *Silver*, and *Fattah*. Given Robinson's meeting with EPA officials and appearance before the AEMC were two of the three alleged official acts—and both involved, in the defense view, expressions of support *at most*—Roberson requested that the court instruct the jury in line with *McDonnell* that "expressing support is not enough" to ground a bribery conviction. The court refused to so instruct.

There is no question that this language was a correct statement of law. *Accord* Pet.App.28a-29a. It came straight from this Court's holding. And it was of central importance, since even the panel did not dispute that a properly instructed jury could have concluded that Robinson's benign remarks at the EPA and AEMC meetings were "simply an expression of support." Pet.App.30a. Yet it affirmed anyway.

The panel reasoned that other parts of the jury instruction "sufficiently covered" the contrast between lawfully expressing support and unlawfully providing advice. Pet.App.29a-30a. That error reflects a misunderstanding of this Court's decision, and effectively erases the distinction *McDonnell* drew. In support of this conclusion, the panel first observed that the instruction said "talking to another official … without more" is "insufficient to constitute an official act." Pet.App.29a. But that language gave no hint that there is a line between official "advice" and "expressing support." The jury thus did not know it

had to put conduct on one side of that line, and could have (wrongly) concluded that expressing support while talking to another official is the "more" that turns innocent talk into criminal "advice."

The panel also noted the instruction urged "the jury to 'consider what the public official actually did, not simply what his title or position was.'" *Id.* Again, that is a completely distinct concept. Nothing in the instructions told the jury that if "what Robinson did" was simply express support for certain policies, there was no "advice" and thus no official act.

The panel finally relied on "the qualifying language 'knowing or intending that such advice will form the basis for an official act by another official[.]'" Pet.App.30a. That is only half the picture, however: what *does count* as official action, without clarifying what *does not count*. The advice-support distinction is "opaque" (*id.*); without knowing that support does *not* count, a jury could infer that an official gives "advice" merely by conveying support to other officials. But that is wrong. *McDonnell*, 136 S. Ct. at 2371; *Silver*, 864 F.3d at 122; *Fattah*, 914 F.3d at 156.

In short, the panel treated language that nowhere mentioned the exclusion of "expressing support" as somehow conveying that crucial point; that holding renders *McDonnell* a joke. Indeed, this error is also prospectively important because no future jury in the Eleventh Circuit will have the benefit of *McDonnell*'s full guidance if the decision below stands. Notably, the model jury instructions in the Eleventh Circuit also omit the "mere support" clarification, meaning that juries will continue to be deprived of one of this Court's

principal holdings about the scope of bribery law. *See* CA11 Pattern Jury Instrs. (Crim. Cases) O5.1 (2020).

4. Perhaps recognizing the weakness of its attempt to sustain the instructions, the panel offered an alternative holding: Any error was harmless because Robinson's vote on SJR-97 was undeniably official. Pet.App.30a-31a. That analysis is plainly flawed and only creates another set of conflicts with this Court and other circuits warranting certiorari.

To begin, this Court has long held that a new trial is required if there were multiple theories instructed to a jury, one is legally invalid, and it is impossible to tell which theory the jury convicted on. "[A] verdict" 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); *see also Stromberg v. California*, 283 U.S. 359, 368 (1931) (when "it is impossible to say under which clause of the statute the conviction was obtained" "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld").

McDonnell itself straightforwardly applied this rule, remanding for a new trial even though the jury's verdict could have been based on official acts. 136 S. Ct. at 2375. "Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful." *Id.* Thus, the court could not "conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt." *Id.*

The Second and Third Circuits, once again, have both recognized that a new trial is required if a

properly instructed jury could have found that some of the defendants' actions were non-official, and it is impossible to tell whether the verdict rested on those acts. That is true even if other actions—like the vote on SJR-97—were "clearly an official act." *Fattah*, 914 F.3d at 154 (vacating based on *McDonnell* error, despite one clear official act); *see also Silver*, 864 F.3d at 120-21 (same, despite Silver's vote on a resolution).

The panel turned that framework on its head. It reasoned that because the vote was official, any error in the official-act instruction was not prejudicial. But there is no basis to infer that the jury convicted based on the vote. After all, Robinson admitted that he never communicated with Defendants about it, their contract required him to avoid conflicts of interest, and he separately reassured Defendants he would respect that restriction. So it is possible, if not likely, that the jury convicted solely for the EPA and AEMC meetings. And, as explained above, with proper instructions, the jury could reasonably have concluded that those actions were on the innocent side of the line: "simply an expression of support." Pet.App.30a.

Since it is far from certain that a properly instructed jury would have convicted, a new trial is required, and the lower court's alternative justification for nullifying *McDonnell* is no barrier to review. To the contrary, it reflects yet further disregard for this Court's precedent and creates yet another circuit split.

B. The Panel Further Eviscerated *McDonnell* By Exempting Federal Programs Bribery from Any "Official Action" Requirement.

Just as with the *McCormick* error, the panel's errors regarding *McDonnell* are compounded by its sweeping holding that the decision does not apply *at all* to § 666. Pet.App.9a-14a, 26a. If allowed to stand, that would turn *McDonnell* into a dead letter: Since every state and local government accepts federal funds, every state and local official could be prosecuted under § 666 with no official-act requirement, based on any conduct vaguely relating to any policy matter. That absurdity not only conflicts with *McDonnell*'s rationale, but also departs from § 666's text and the precedents of several other Circuits.

McDonnell recognized there would be significant "constitutional" concerns with allowing state and local officials to be prosecuted for federal bribery without a carefully defined "official act" element. States have the primary duty "to regulate the permissible scope of interactions between state officials and their constituents." 136 S. Ct. at 2373. Accordingly, federal bribery laws must not be read in "'a manner that ... involves the Federal Government in setting standards' of 'good government for local and state officials.'" *Id.* Especially given the risk of "overzealous prosecutions" in politics, the federal bribery code must be construed as a "scalpel," not a "meat axe." *Id.* at 2372-73. Otherwise, the federal bribery laws could ensnare any official who receives anything of value (from a free lunch to a campaign donation) while doing anything related to public policy (from giving a speech to writing an op-ed).

These concerns apply *even more strongly* to § 666, which uniquely targets state and local officials. Yet in construing the statute, the panel paid no heed to *McDonnell*'s constitutional demand for a narrowing construction. Instead, it held that *McDonnell* is *irrelevant* and that § 666 forbids receiving anything of value to "influence" state policy—even if the official does not use the powers of his office. Pet.App.20a-21a. Again, that means any official who is paid to make a speech or write an op-ed is a federal felon. Indeed, under the panel decision, Governor McDonnell himself could be convicted for the very meetings and calls the Supreme Court declared off-limits—if only prosecutors charged him under § 666. That is absurd: It reduces *McDonnell*'s constitutional analysis to an empty technicality, and makes federal bribery law stricter for *state* officials than *federal* officials.

The panel's ruling is all the more egregious because § 666's text already builds in the limits *McDonnell* recognized. It forbids any payments "to influence or reward an agent" of the state, meaning an official authorized to "act" on behalf of the state, "in connection with" state business. 18 U.S.C. § 666(a)(2), (d)(1). By its terms, this requires a showing that an official has exerted influence *as a state agent*. An official acts as a state agent in connection with state business when he *exercises the powers of his office—i.e.*, takes official action. Meanwhile, *non-official* action—like asking questions at a meeting—is not the action of a state "agent" who is "authorized to act" "in connection with" state business.

For just this reason, at least three other Circuits demand "official action" in § 666 cases. *See* Lauren Garcia, Note, *Curbing Corruption or Campaign*

Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute, 65 Rutgers L. Rev. 229, 239-43 (2012) (detailing split). The First Circuit has explained that the phrase "with intent to influence or reward an agent of an organization or of a State" requires an "official act." *United States v. Fernandez*, 722 F.3d 1, 22 (1st Cir. 2013). The Fourth Circuit sustained a bribery conviction only because "a reasonable juror could have found that" the payments "were bribes, that is, gifts made with the corrupt intent to induce [the official] to engage in ... *official actions*." *United States v. Jennings*, 160 F.3d 1006, 1018 (4th Cir. 1998) (emphasis added). And the Eighth Circuit has held that § 666 prohibited bribes and gratuities that were "intended to be a bonus for taking *official action*." *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007) (emphasis added).

At least four other circuits—the Second, Third, Sixth, and Ninth—have joined the Eleventh in its (mis)reading of § 666. The Second Circuit has found that "*McDonnell*'s 'official act' standard does not pertain to bribery as proscribed by § 666." *United States v. Ng Lap Seng*, 934 F.3d 110, 134 (2d Cir. 2019). The Third Circuit has held that "no 'official act' is required under § 666." *United States v. Van Pelt*, 448 F. App'x 301, 304 n.3 (3d Cir. 2011). The Sixth Circuit has found that jury instructions for § 666 sufficed because "the jury was only required to find" that the official accepted property "with the corrupt intent to use his official *influence* in [the donor's] favor." *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009) (emphasis added); *see also United States v. Porter*, 886 F.3d 562, 565-66 (6th Cir. 2018)

(reaffirming *Abbey* after *McDonnell*). And the Ninth Circuit has affirmed "bribery convictions under 18 U.S.C. § 666 because such convictions do not require the defendant to be engaged in an official act." *United States v. Garrido*, 713 F.3d 985, 989 (9th Cir. 2013).

The panel here ignored the textual limits on § 666, wrongly transforming it into the ultimate meat axe for prosecutors and taking sides in an entrenched conflict with other circuits that is ripe for review. And in doing so, the panel disregarded states' "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 136 S. Ct. at 2373. The Court should grant certiorari, as it often does, to protect state prerogatives from federal intrusion. *E.g.*, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484-85 (2018); *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019).

* * *

The panel's evisceration of *McDonnell*—ignoring the rule that merely expressing support for a policy is not an official act, and completely dispensing with any official-act requirement for § 666—not only revives the problems *McDonnell* addressed, but worsens them.

Without a clear "official act" requirement, an officeholder could be convicted of a federal crime simply for giving a speech or writing an op-ed in support of a policy that benefits their constituents. "But conscientious public officials" express support for issues that would benefit their constituents "all the time." *McDonnell*, 136 S. Ct. at 2372. Indeed, "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns"

by expressing support for various policies—"whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm." *Id.* If the federal bribery code applied to such non-official expressions of support, it would "cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame." *Id.*

Again, that concern is especially acute in states and localities with part-time officials, who make a living on the side by engaging in public advocacy as lawyers, lobbyists, and public-relations professionals. Under basic principles of federalism, these states and localities should be able to decide for themselves which "expressions of support" cross the ethical line.

McDonnell addressed that problem by making clear that the federal bribery code does not apply to mere expressions of support. But the panel's ruling allows a jury to infer an unlawful official act based on nothing more than officeholder's casual expression of support for a particular policy. Even worse, it eliminates the requirement of proving *any* official act to convict any state or local officeholder under § 666. Based on the panel's reasoning, every state and local official is the "agent" of a government entity that receives federal funding. And everything they say about any public-policy issue (local, state, federal, or otherwise) has a forbidden "connection with" government "business"—even if it has nothing to do with the powers of their office. Pet.App. 9a. This boundless interpretation of § 666 is even more sweeping and intrudes even more deeply on federalism than the one *McDonnell* rejected.

This Court should grant certiorari to make clear that the federal bribery laws are limited to "official action" as fully defined (and limited) by *McDonnell*, and that prosecutors cannot blithely evade those limits simply by filing charges under § 666.

CONCLUSION

This Court should grant the petition.

OCTOBER 2021

Respectfully submitted,

HENRY W. ASBILL
BUCKLEY LLP
2001 M St. NW, Suite 500
Washington, DC 20036

DAVID J. FEDER
JONES DAY
555 S. Flower St., 50th Fl.
Los Angeles, CA 90071

BRETT M. BLOOMSTON
THE BLOOMSTON FIRM
2151 Highland Ave.
Suite 310
Birmingham, AL 35205

YAAKOV M. ROTH
Counsel of Record
ANTHONY DICK
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

DAVID BOUCHARD
FINCH MCCRANIE LLP
225 Peachtree St. NE
1700 South Tower
Atlanta, GA 30303

Counsel for Petitioner