No. 15-A-218

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT F. MCDONNELL,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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This is an extraordinarily high-profile political prosecution; resting on an aggressive, unprecedented theory of liability; with far-reaching consequences for elected officials; which a broad and diverse coalition of *amici* have risen to decry. There is at least a "reasonable probability" that four Justices will choose to grant review, and certainly a "fair prospect" that the Court will ultimately draw the line between lawful democratic politics and federal criminal corruption with greater care and caution than the Fourth Circuit panel did. Gov. McDonnell should not be compelled to suffer the "irreparable harm" of imprisonment before the Court has the opportunity to do so. *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J.).

Elected officials routinely arrange meetings for donors, give them heightened access to staff, take their calls, politely listen to their ideas, and engage in all sorts of other "customary" actions on their behalf. Under the decision below and the instructions it blessed, these actions are felonies—for the official *and* the donor—whenever a jury finds a connection between them and any contribution. Even the Government admits that cannot be the law, instead offering that "official action" may have a different meaning "where the alleged bribe was in fact a campaign contribution." Opp. 32. But what actions constitute "official" *quo* has nothing to do with the nature of the *quid*; no statute or case hints as much. By refusing to defend the panel decision's legal rule, the Government implicitly concedes the point: The Fourth Circuit's decision will upend the political process, devastate fundamental First Amendment freedoms, and confer vast discretion on federal prosecutors.

Recognizing that the panel opinion cries out for review, the Government tries

to save the conviction on other grounds. It claims there was no need to prove *any* "official action," and regardless, Gov. McDonnell engaged in such action even on his own theory. But the former argument is wrong; the prosecution undeniably "hinge[d]" on whether Gov. McDonnell took official acts. Appl. App. F, at 4. And the latter argument relies on wordplay and rewriting the record. The Government's view—like the panel's—is that officials influence matters whenever they arrange meetings or ask questions that pertain to such matters. That theory is far broader than what Gov. McDonnell has urged and other Circuits have held. And critically, nothing in the instructions *ever told* the jury that it matters whether Gov. McDonnell exercised governmental power or "influenced" official decisions. In both respects, the conflict with decisions from this Court and other Circuits is clear.

As for pretrial publicity, the Government defends the holding that courts need not ask prospective jurors whether admitted exposure to massive, negative pretrial publicity caused them to form opinions about guilt. It claims that "no decision requir[es] that inquiry," Opp. 35—ignoring this Court's decision cited on the very same page. "The relevant question," this Court held, is "whether" potential jurors hold "such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). District courts must therefore *ask* some form of that question. The panel's rejection of that simple rule—along with its holding "that individual questioning" is not required "to alleviate generalized concerns about the pernicious effects of pretrial publicity," Op. 35—is at war with decisions of this Court and the other Circuits. It, too, merits a stay.

ARGUMENT

I. GOV. MCDONNELL IS ENTITLED TO A STAY OF THE JUDGMENT.

The Government contends that this Court's ordinary standards governing stay requests are inapplicable, because they are superseded by the requirements of 18 U.S.C. § 3143(b) for release on bail. Opp. 15-16. That is wrong.

If Gov. McDonnell were currently imprisoned, or required to report to prison, then he would need an affirmative grant of bail to gain meaningful relief. But he is not. The Fourth Circuit granted release pending appeal, Appl. App. D, so he can remain free until the end of the appellate process—*i.e.*, until the mandate issues. This Court therefore need not grant bail. It need only stay the judgment below, to preserve the status quo while it decides whether to grant review. While not routine, that is an action that this Court often undertakes where, as here, the legal issues are substantial and the irreparable harm clear. *See, e.g.*, *Mellouli v. Lynch*, No. 15A137 (Aug. 21, 2015). Gov. McDonnell asks the Court to do the same here.[1]

II. CERTIORARI IS REASONABLY PROBABLE AS TO THE SCOPE OF "OFFICIAL ACTION" UNDER THE FEDERAL CORRUPTION LAWS.

The Fourth Circuit squarely held that "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him" are "official acts." Op. 83. Not surprisingly, the Government tries to downplay and narrow that stunning rule. But it cannot hide from the court's reasoning, the conviction's factual basis, or the jury instructions the panel

[1] Regardless, for similar reasons, Gov. McDonnell also meets the standard for release on bail.

blessed. All of these create a clear conflict with decisions of this Court and three other Circuits, and carry staggering consequences for everyday politics.

A. Incredibly, the Government first argues that the definition of "official action" does not matter in this case because prosecutors actually did not need to prove that Gov. McDonnell ever took *any* such action. Opp. 18-19. That is wrong.

Generally, the *agreement* to take "official action" is a crime, even if the official does not follow through. Opp. 19 n.6. But here, the sole evidence of any (implied) agreement was—as the district court held—the "timing of Williams' gifts and McDonnell's official actions." Appl. App. F, at 7. Hence, "[t]his case hinges on the interpretation of an 'official act' and whether McDonnell's actions constitute such." *Id.* at 3. The panel used the same reasoning to uphold the sufficiency of the evidence of a *quid pro quo* agreement, relying exclusively on the temporally "close relationship between Appellant's official acts" and Williams' gifts. Op. 85.

In other words, it was only the *commission* of "official actions" that allowed the jury to infer the *agreement* to provide them. Yet the Government now argues it can rely on proof of the latter to avoid proving the former. That is circular. As the parties and courts below have consistently recognized, Gov. McDonnell's conviction thus "hinges" on whether the specific acts for which he was indicted were "official."[2]

But regardless, even if the jury could have convicted by finding just an

[2] The Government also suggests that the jury could have inferred an agreement to take true, concrete "official action" based solely on Williams' testimony that he *wanted* Gov. McDonnell to advance his product. Opp. 19. That is not enough; Williams' personal desires do not prove anything about Gov. McDonnell's *general* intentions, much less his *specific* intentions as to specific action on a specific pending governmental matter, which is what the law requires for conviction.

agreement, the agreement still must be to take "official action." So that argument does not avoid the question of what "official action" is. That legal question is still squarely presented and deserving of this Court's review.

B. The Government next argues that Gov. McDonnell was convicted for "influencing" actual governmental decisions, such that the decision below merely applies settled law, conflicts with no other cases, and has no serious consequences. That is empty semantics; like the Fourth Circuit, the Government redefines "influence" so broadly that virtually *everything* becomes an "official act."

Gov. McDonnell's view—shared by three other Circuits—is that "official action" is limited to *exercising* government power or *urging others* to do so. Urging an official to make a particular decision seeks to "influence" that decision and is thus official action, *e.g.*, *United States v. Birdsall*, 233 U.S. 223 (1914), while arranging a meeting or asking a question about a general matter exerts no such influence. But the Fourth Circuit's view, which the Government defends, is that arranging a meeting or asking a question about a matter *does* exert "influence" over that matter's resolution. That conflates procedural *access* with substantive *influence*, robbing the crucial demarcation—"influence"—of all meaning. Appl. 30-31. This is a concrete, important legal question that divides the Circuits: Whether ingratiation and access *alone* amounts to official action.[3]

[3] Indeed, the Government's own (distorted) recitation of the facts confirms the breadth of the legal rule adopted below. Of the five allegedly official acts charged below, any one of which might have been the basis for the jury's verdict, the Government focuses on one—Gov. McDonnell's asking two officials "if they would be willing to meet with Star." Op. 84. Because Gov. McDonnell noted in

The Government's distortion of the word "influence" is how it tries to obscure the Circuit split. It argues that the decision below is consistent with the decisions in the First, Eighth, and D.C. Circuits because all three of those courts drew the "official act" line at influencing specific decisions the government actually makes. But that *confirms* the conflict. The specific acts for which Gov. McDonnell was convicted did *not* exercise "influence" over any governmental matter under the clear standards those decisions applied. Just like the introductions in *Rabbitt*, letters on official letterhead in *Urciuoli*, and database searches in *Valdes*, Gov. McDonnell's actions—procedural steps broadly relating to a governmental matter—did not try to inappropriately influence how any governmental matter was resolved. No court has ever before upheld a conviction on such acts. And no court in these Circuits could.[4]

The Government's effort to reconcile *United States v. Sun-Diamond Growers*

(continued…)

the conversation that Star's product "was working well for him, and that he thought it would be good for … state employees," that query supposedly "used the power of [the Governor's] office to urge other Virginia officials to resolve governmental matters favorably to Williams." Opp. 21. The chasm between the actual, benign facts and the Government's nefarious characterization speaks for itself—and the Government believes that this is the *strongest* of the five allegedly official acts. Regardless, the Government makes no attempt to defend the other four. For example, attendance at the Healthcare Leaders Reception goes unmentioned in the Government's brief, just as it was ignored by the panel below—presumably because that cocktail party lacked even an attenuated nexus to any governmental matter. Yet the jury undisputedly could have convicted based on that act alone.

[4] The Government confirms as much by flagrantly mischaracterizing *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013), rather than reconciling it with the panel's decision. The Government suggests the official took official action merely by asking someone to "look into" a matter. Opp. 30 n.10. In fact, the official "called an INS official's secretary and urged her to expedite" a visa application; the court found that was official action because explicitly urging another official to process the visa more quickly was an effort "to *influence*" the matter's disposition, as the "swift success in procuring expedited review" confirmed. 706 F.3d at 469-70. By contrast, Gov. McDonnell did not "urge" *anyone* to do *anything* other than attend a briefing, and, as the Government admits, Williams never received any assistance, any funding, or anything beyond a friendly ear followed by total inaction. Opp. 23 n.8. That was not because Gov. McDonnell was ineffectual or hapless. It is because he never sought to influence the substantive decisions of any state officials.

of California, 526 U.S. 398 (1999), is similarly unpersuasive. That case, it insists, excluded only "ceremonial" actions that do not relate to pending matters. Opp. 26. But that blatantly misreads *Sun-Diamond*, which observed that the Agriculture Secretary "always has before him or in prospect matters that affect farmers." 526 U.S. at 407. Yet speaking to farmers on such issues is *still* not an official act "within the meaning of the statute." *Id.* This Court's point was plainly that the statute is limited to exercises of government power. By dispensing with that limit, the panel created the very "absurdities" *Sun-Diamond* disparaged. 526 U.S. at 408.

C. Perhaps recognizing the stunning breadth of the panel's rule, the Government periodically hints that this case involved something *more* than just "arranging a meeting" and asking questions—a "concerted effort" to obtain the studies that Williams wanted. Opp. 31. The notion is apparently that an otherwise non-official act (*e.g.*, arranging a meeting) can *become* "official" based on the official's subjective intent (*e.g.*, that the meeting will lead to approval of studies).

This new "concerted effort" theory is wrong and would, in any event, neither avoid the legal conflict with, nor prevent the calamitous results of, the Fourth Circuit's theory. Non-official action cannot be a crime, even if it could lead to official action. Under this theory, if Williams had simply asked the question, "who should I talk to about getting studies done?" and Gov. McDonnell answered, that could be part of a "concerted effort" and thus a crime. But that rule would be in clear conflict with *Sun-Diamond, Valdes, Urciuoli, Rabbitt*, and common sense.

The "concerted effort" theory was not, moreover, pursued below, argued to the

jury, or blessed by the Fourth Circuit. The Government's closing arguments, rather, identified five specific "official acts" that it thought supported criminal liability—limited to attending events and arranging meetings. XI.J.A.7608-11, 7614-17. The district court repeatedly recognized that the case turned on those "five specific actions." Appl. App. F, at 6; *see also* Appl. App. G, at 2. The jury was instructed to convict if it found a *quid pro quo* involving those acts. XI.J.A.7671-72. And the Fourth Circuit affirmed based on those acts. *See* Op. 83.

Nor could the evidence support conviction based on a "concerted effort" by Gov. McDonnell to obtain studies. The Government points to considerable evidence that *Williams* wanted studies (Opp. 3, 6, 7) and gave Gov. McDonnell gifts because he *hoped* to get help on that front (Opp. 9), but none of that speaks to Gov. McDonnell's intentions or actions. And the other "evidence" the Government cites for this assertion (Opp. 22-23) is completely contrary to the record:

- The Government implies that Gov. McDonnell's aide testified that Gov. McDonnell asked him to call universities and "show support for this research." Opp. 22. But that quote is double-hearsay from a different person. The aide's actual testimony was that, after receiving Gov. McDonnell's email asking to see him, he "popped in," told Gov. McDonnell "we didn't need to bother with this," and Gov. McDonnell "never followed back up with [me] or never pushed back or never directed [me] to actually go forward and try to make something happen." V.JA.3218-3219. That is why this supposed directive was never one of the alleged "official acts."

- The Government claims that Gov. McDonnell's "questions" to a university researcher were "leading," "not innocuous requests for information." Opp. 23. The researcher's own testimony, however, was precisely the opposite: "I think the Governor's position was more of an interrogative type of a sort of questioning rather than 'Isn't this great?' or 'Isn't it this awful?' if that's what you are asking me." V.J.A.3345-46.

- The Government also proclaims that "state employees who attended the

launch got the message" that Gov. McDonnell wanted the studies, citing a "pro/con list" one UVA official created. Opp. 23. But this official did *not* attend the event, "never spoke with Bob McDonnell about Star," based her list on *internet research*, and agreed that "whatever" she was "referring to" in her list, "it didn't come from" Gov. McDonnell. VI.JA.3156-59, 4323.

D. Even setting aside all of the above, the Government *agrees* that the critical line below was using the "power" of Gov. McDonnell's "office" to exercise "influence" over state decisions. Opp. 2, 5, 21, 22, 26. But here, the jury was never told it *mattered* whether Gov. McDonnell agreed to use the "power of his office" or to "influence" an actual official decision. To the contrary, the district court *refused* to instruct that the jury must find Gov. McDonnell's actions were "intended to or did in fact influence a specific official decision the government actually makes," D.Ct. Dkt. 287, at 79-80—language directly from the D.C. Circuit's *Valdes* opinion. Instead, the court instructed that official action includes acts a public official "customarily performs," and reaches actions "in a series of steps to … achieve an end." *Id.* at 7671-72. Nothing conveyed what the Government *now* admits—with its conviction in hand—is the touchstone of "official action." And prosecutors repeatedly seized on that omission, arguing that posing for "photos" or speaking at a "ribbon cuttin[g]" are "official" acts. "Whatever it was, it's all official action," even if "no one was pressured" to actually do anything. XI.J.A.7439-40, 7611.

The Government's cursory defense of the instructions is wholly unpersuasive. First it attacks a straw-man, objecting that "the laws at issue here did not require proof that applicant *actually* attempted to influence governmental decisions, only that he *agreed* to do so." Opp. 27-28. But the jury was not told that it had to find

either. The critical concept—that "official action" requires influencing governmental decisions—was not conveyed at all. To fill that void, the Government notes that the district court quoted the statutory definition of "official action." Opp. 28. But *reading* that complex statute to a lay jury does not substitute for *explaining* to the jury what it means. That is why *Sun-Diamond* reversed when the instructions quoted the statutory language and included an "expansive gloss." 526 U.S. at 403, 412-13. Here, the district court committed the exact same error, explaining what the jury did *not* have to find without a word clarifying what the jury *does* have to find. The Fourth Circuit's approval of those instructions *alone* provides a clean vehicle for this Court to assess the proper scope of "official action."

E. Finally, the Government ignores the dramatic consequences of the decision below. Elected officials routinely perform "customary" actions for donors. Those political niceties include listening when a donor "extol[s] the virtues of" his company on a six-hour flight (Opp. 3) or arranging a meeting where the donor "reiterate[s] his desire" for some government action while a subordinate politely hears him out (Opp. 7). Under the panel's decision, officials who do these things for donors—and even the donors themselves—can be prosecuted. And the jury must convict if it finds any connection to a contribution. That rule thus authorizes prosecutors to indict, and juries to convict, every official who raises money from any private donor. It will, if left undisturbed, radically reshape politics in this Nation.

The Government's only response is that constitutional "considerations might affect the proper analysis … where the alleged bribe was in fact a campaign

contribution." Opp. 32. But no court has *ever* suggested that the statutory definition of "official action" changes—according to as-yet-unknown standards—depending on whether the official accepted free golf or PAC contributions. To the contrary, officials can be convicted for taking campaign donations just as much as other benefits.[5] The Government's admission that the panel decision would be unworkable for campaign donations implicitly concedes that its rule is badly flawed.

In short, if Gov. McDonnell can be imprisoned for giving special access to a gift-giver, any elected official could equally be imprisoned for agreeing to answer a campaign donor's phone call or arrange a meeting for him. Close relationships between business leaders, lobbyists, and public officials are commonplace. Yet nowhere does the Government explain why the Fourth Circuit's opinion does not empower federal prosecutors to investigate, indict, and convict every official in that position. No explanation exists. The Government's unilateral seizure of a broad supervisory power over all levels of American democracy is reasonably likely to attract this Court's attention. And it is fairly probable to earn its repudiation. That is enough to warrant relief under this Court's ordinary standards.

III. CERTIORARI IS ALSO REASONABLY PROBABLE AS TO THE SIXTH AMENDMENT PRETRIAL PUBLICITY ISSUE.

The panel opinion also creates a clear conflict by affirming the district court's refusal to either (1) ask publicity-inundated potential jurors if they had formed

[5] *See, e.g.*, *Evans v. United States*, 504 U.S. 255, 257-58 (1992); *United States v. Derrick*, 163 F.3d 799, 816-17 (4th Cir. 1998) ("[C]ampaign contributions may be the subject of a Hobbs Act violation, no less than any other payments."); *United States v. Hairston*, 46 F.3d 361, 372 (4th Cir. 1995); *United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011).

opinions about guilt, or (2) engage in any individual questioning on exposure to publicity. The conflict over whether trial courts may refuse to question potential jurors about admitted exposure to negative pretrial publicity, or even ask potential jurors whether admitted exposure to negative pretrial publicity had caused them to form opinions about the defendant's guilt, presents a clean, recurring legal issue of critical importance in the modern media age. It, too, satisfies the stay standard.

The panel opinion holds that district courts have discretion to refuse to ask prospective jurors who admit consuming negative pretrial publicity whether they have formed opinions about guilt or innocence. Op. 33 & n.12. The Government defends that holding by asserting that the "application cites no decision requiring that inquiry." Opp. 35. But this Court's decisions on this issue *all* "require" that inquiry by erecting an entire doctrine of jury selection atop that basic question. For example, *Patton* held that "[t]he relevant question is not whether the community remembered the case, but whether the jurors at [the defendant's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant." 467 U.S. at 1035. That presupposes that trial courts *will* ask—and thus requires trial courts *to* ask—whether potential jurors have formed opinions *at all*. It is impossible to know whether an opinion is "fixed" if the court refuses to ask whether the opinion exists in the first place. There is nothing fact-bound about this clean legal issue.[6]

[6] The Government also responds that, "[e]ven if applicant's preferred question had been asked, [ ] it need not have followed that any venire member who answered affirmatively would have been struck." Opp. 35. True enough. But any prospective juror who answered affirmatively would have had to be questioned further to ascertain whether he or she "had such fixed opinions that they

And besides, the panel opinion exacerbates the conflict by refusing to require that voir dire on pretrial publicity "provide [a] reasonable assurance that prejudice w[ould] be discovered." Opp. 36 (quoting *Hill*, 643 F.3d at 836). Rather than apply that simple standard, the panel held "that individual questioning" is not "required to alleviate generalized concerns about the pernicious effects of pretrial publicity," and "that merely asking for a show of hands was not an abuse of discretion." Op. 35. The Government defends this part of the panel's holding by arguing that the district court took additional steps beyond merely relying "on a juror's assertion of impartiality." *United States v. Pratt*, 728 F.3d 463 (5th Cir. 2013). But its examples of curative steps make no sense, particularly in light of the district court's refusal to ask any jurors whether they had formed opinions about guilt. For example, the Government notes that the district court asked "four questions about pretrial publicity" in its jury questionnaire. Opp. 33. But *none* of those tangential questions actually asked whether potential jurors had formed opinions about guilt.

The Government also denies that the district court "required something more than exposure to pre-trial publicity as a predicate for [ ] more in-depth questioning." Opp. 34 n.11. That assertion is simply false. The Fourth Circuit explained that the district court "did call other prospective jurors to the bench for one-on-one questioning, but only after the defense singled them out *on the basis of their*

(continued…)
could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035. After all, "[a] juror's assurances that he is equal to this task [of laying aside his opinions and being fair] cannot be dispositive." *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

responses to a jury selection questionnaire." Op. 29 (emphasis added). Again, the questionnaire did not ask whether jurors had formed opinions about guilt. The court thus *did* forbid the defense from questioning jurors based solely on exposure to negative pretrial publicity; rather, it permitted follow-up questioning only of jurors who had answered *other questions* in ways that gave cause for concern.[7]

Finally, the Government seeks to obscure the conflict by delving into the specific facts of appellate decisions that—whatever their precise facts—articulated clear legal rules irreconcilable with the panel decision. For example, the Fifth Circuit's recent decision in *Pratt* emphasized the "great deference to the trial court's determination of impartiality." 728 F.3d at 470. But it nonetheless reaffirmed the Fifth Circuit's established rule that "merely asking potential jurors to raise their hands if they could not be impartial was not adequate voir dire." *Id.* at 470-71. The panel opinion directly rejects that rule: "[W]e have held that merely asking for a show of hands was not an abuse of discretion." Op. 35. That is a clear circuit split.

The Government also tries to distinguish *Silverthorne v. United States*, 400

[7] The record confirms this. The district court refused to individually question each juror who had been exposed to negative pretrial publicity when the Government asked it to. III.JA.1689 ("I'm not going to do what you suggest. I'm just not going to do it."). It refused the same request by the defense. III.JA.1690 ("I'm not asking these questions. I'm not going to do it."). And the Government flatly mischaracterizes the record when it claims the court "accepted each request for questioning made by the defense." Opp. 34 n.11. To the contrary, when the defense asked that one juror be questioned, the Government noted she had answered "no" to the question of whether she had *expressed* opinions about the case, III.J.A.1696; the court then *refused* to question her, *id.* ("I'm sorry, ma'am. We thought there was something on your questionnaire. So you can have a seat."). As for the juror the Government identifies, he gratuitously volunteered that he had *formed* an opinion about guilt in response to the question whether he had *expressed* opinions about guilt. III.J.A.1693 ("Right, and then question 84 and question 86, followed the case very closely, multiple news sources *and has formed an opinion of guilt*." (emphasis added)). Needless to say, criminal defendants should not be required to rely on jurors voluntarily providing information they are not asked about.

F.2d 627 (9th Cir. 1968), on the basis of the specific questions asked there, and *United States v. Denno*, 313 F.2d 364 (2d Cir. 1963) (en banc), because the publicity there "was of an entirely different nature." Opp. 38-39. But *Silverthorne* makes clear that these decisions are not so particularized: "We agree with the language of the en banc majority in … *Denno* … that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient." 400 F.2d at 638. While the many circuit decisions on this issue "differ in their outcomes depending on the facts and circumstances of each case, all of them recognize the principle that relief is required where there is a significant possibility of prejudice plus inadequate voir dire to unearth such potential prejudice in the jury pool." *Jordan v. Lippman*, 763 F.2d 1265, 1275 (11th Cir. 1985).

District courts do not have discretion to dispense with fundamental constitutional rights. But the Fourth Circuit's decision does just that, eradicating basic, established requirements for pretrial publicity voir dire. It creates a Circuit conflict on a critically important, recurring issue that merits this Court's review.

CONCLUSION

Gov. McDonnell respectfully requests a stay of the mandate (or alternatively, release on bail) pending disposition of a timely certiorari petition.[8]

[8] This Court sometimes *sua sponte* construes stay applications as certiorari petitions in order to grant certiorari on the basis of stay papers. *E.g.*, *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006); *Barefoot v. Estelle*, 463 U.S. 880 (1983). Doing so here would enable the Court to resolve this case this Term.

AUGUST 27, 2015

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Noel J. Francisco, a member of the Supreme Court Bar, hereby certify that one copy of the attached Reply was served on August 27, 2015, via electronic mail and by Federal Express on:

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