18-2380

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,
NBCUNIVERSAL MEDIA, LLC,
THE NEW YORK TIMES COMPANY,
Intervenors,
v.

SHELDON SILVER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT SHELDON SILVER

Meir Feder
Samidh Guha
James Loonam
Conor Reardon
JONES DAY
250 Vesey Street
New York, NY 10281
Telephone: 212-326-3939
Facsimile: 212-755-7306
Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment of conviction on July 30, 2018. JA-0342. Mr. Silver timely appealed. JA-1845. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Mr. Silver is entitled to a new trial on the bribery counts because the district court's instructions omitted the essential element of an agreement to exchange a thing of value for official acts, and informed the jury that it was irrelevant why the alleged bribe payor provided benefits to Mr. Silver.

2. Whether Mr. Silver's conviction must be reversed because he was convicted under a "stream of benefits" theory of bribery that did not survive the Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

3. Whether—assuming that "stream of benefits" bribery survives *McDonnell*—Mr. Silver is entitled to acquittal on the bribery counts because no reasonable jury could have concluded, beyond a reasonable doubt, that there was any agreement within the limitations period to provide a stream of "official acts" in exchange for a thing of value.

4. Whether Mr. Silver's conviction for money laundering must be vacated or reversed if his conviction on the bribery counts is vacated or reversed.

STATEMENT OF THE CASE

Mr. Silver appeals a July 30, 2018 judgment of conviction entered after jury trial on four counts of honest services fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1346; two counts of Hobbs Act extortion, in violation of 18 U.S.C. § 1951; and one count of money laundering, in violation of 18 U.S.C. § 1957. JA-0342–44.[1] The district court imposed a sentence of seven years' imprisonment, a fine of $1.75 million, and $3.7 million in forfeiture. JA-0344, 0348–49.

On September 17, 2018, the district court denied Mr. Silver's motion to continue his bail and stay the financial penalties pending appeal, holding that Mr. Silver had not shown that the appeal presents "substantial issue[s] of law" "likely to result in reversal or a new trial." JA-0350, 0352–53. Mr. Silver sought emergency relief from this Court, and on October 3, 2018, after briefing and oral argument, this Court granted Mr. Silver's motion.[2] JA-2137.

[1] "JA" refers to the Joint Appendix (with transcript page, if any), "SA" to the Special Appendix.

[2] The stay will expire seven days after the merits panel deems this matter submitted for decision, without prejudice to further action by the merits panel at that time. JA-2137. For the reasons set out in this brief, Mr. Silver is likely to prevail in his appeal, and accordingly respectfully requests that the Court extend the stay through a decision on the merits.

I. Mr. Silver's First Trial

Mr. Silver is the former Speaker of the New York State Assembly, and he served in that body, representing a district embracing much of lower Manhattan, from 1976 until 2015. *United States v. Silver*, 864 F.3d 102, 106 (2d Cir. 2017). Throughout that time, Mr. Silver earned outside income as an attorney in private practice, as permitted by New York law. *Id.* at 106 & n.5; N.Y. Pub. Off. Law § 74(3)(a).

In February 2015, the Government indicted Mr. Silver, charging that some of that law practice income amounted to bribes, in violation of the honest services fraud statute and the Hobbs Act. JA-0072. As this Court explained on Mr. Silver's prior appeal, these charges meant that "the Government had to prove" that Mr. Silver "entered a *quid pro quo* agreement" to receive "something of value in exchange for an official act." *Silver*, 864 F.3d at 111. The Government's theory was that referrals of legal work by a Columbia physician and two large real estate developers were bribes paid in exchange for Mr. Silver providing what the Government contended were "official acts" under the federal bribery statute, 18 U.S.C. § 201.

There were two sets of charges. One concerned fees for referring clients to Weitz & Luxenberg, a personal injury firm specializing in asbestos litigation where Mr. Silver was "of counsel." *Id.* at 106–07. These clients were referred to Mr.

Silver by Dr. Robert Taub, an oncologist at Columbia-Presbyterian Hospital who specialized in treating mesothelioma (a cancer caused by asbestos). *Id.* at 107. Dr. Taub provided Mr. Silver "with names and contact information of unrepresented mesothelioma patients"—"mesothelioma leads"—and Mr. Silver referred the patients to Weitz & Luxenberg for legal representation. *Silver*, 864 F.3d at 107.

The Government contended that these leads were the *quid* given "in exchange for an official act." *Id.* It identified a handful of purported "official acts" said to be the *quo*, though much of its proof concerned acts that were well outside the statute of limitations—primarily state grants for Dr. Taub's research in 2005 and 2006. The only alleged acts within the limitations period were a job recommendation for Dr. Taub's son; an offer to have Mr. Silver's staff help Dr. Taub "navigate the process" of getting a permit for a charity race; and a ceremonial Assembly resolution and proclamation honoring Dr. Taub's contributions to cancer research. *Id.* at 107–08, 121.

The second set of charges involved fees from tax certiorari matters for which two real estate developers—Glenwood Management ("Glenwood") and the Witkoff Group ("Witkoff")—retained Goldberg & Iryami ("Goldberg"), a firm in which Mr. Silver's friend Jay Arthur Goldberg was a partner. *Id.* at 109. Although both developers sent such business to Goldberg for many years without even knowing that Mr. Silver earned fees from it, *id.*, the Government nonetheless

contended that that business was a *quid* in exchange for: Mr. Silver's opposition to locating a methadone clinic near a Glenwood building in his district; votes by Mr. Silver's designee on routine approvals of tax-exempt financing for Glenwood; a meeting between Mr. Silver and Glenwood representatives; and Mr. Silver's vote on 2011 rent legislation. *Id.* at 109–10, 122.

The trial occurred before *McDonnell v. United States* clarified that an "official act" supporting an honest services or Hobbs Act conviction "must involve a formal exercise of governmental power" and rejected the Government's position that "nearly anything a public official does" is an "official act." 136 S. Ct. 2355, 2372 (2016). The district court instructed the jury that an "official act" included "any action taken or to be taken under color of official authority." *Silver*, 864 F.3d at 118. So instructed, the jury convicted.

II. *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017)

This Court vacated and remanded in light of *McDonnell*'s holding that an "official act" "must involve a formal exercise of governmental power" and that most of the commonplace acts undertaken by officials to benefit constituents—"[s]etting up a meeting, talking to another official, or organizing an event"—do not qualify. *McDonnell*, 136 S. Ct. at 2372; *see Silver*, 864 F.3d at 115–17.

Under that rule, the district court's instruction was in error, and the error was not harmless. Some of the acts identified by the Government—such as Mr.

Silver's meeting with Glenwood representatives—were plainly not "official." *Silver*, 864 F.3d at 123. Others—such as approving research grants for Columbia University—were well outside the statute of limitations. *Id.* at 119–20. Still others—such as the resolution and proclamation honoring Dr. Taub—were so "perfunctory" that they could be regarded as "*de minimis quos* unworthy of a *quid*." *Id.* at 121. The Court accordingly vacated and remanded.

III. Retrial

At retrial, the Government presented the same basic theory. Notwithstanding this Court's recognition that the Government had to prove "a *quid pro quo* agreement" to exchange benefits for "official acts," *id.* at 111, and extensive testimony from the alleged bribe payors, the Government presented no direct evidence of any such explicit or implicit agreement. To the contrary, there was substantial direct evidence of the absence of any such agreement.

A. Asbestos Charges

The asbestos charges centered on Mr. Silver's relationship with Dr. Taub. The two men met in 1984, well before the alleged scheme began, and remained socially connected over the years. JA-0444–45/244–4. They stayed with their families at the same hotel for Passover, and Mr. Silver attended a dinner celebrating the wedding of Dr. Taub's daughter. JA-0500/317–18, 0523/407.

Dr. Taub began referring mesothelioma patients to Mr. Silver in 2003 and ultimately referred 48 patients to him. JA-0489/272, 1839-40. Mr. Silver's firm, Weitz & Luxenberg, was not the only firm to which Dr. Taub referred patients, JA-0504/331, but he regarded Weitz & Luxenberg—the premier firm representing mesothelioma victims in New York City, JA-0438/219–20—as "a very good law firm for representing patients." JA-0512/364–65. Mr. Silver's referral fee for cases he brought to Weitz & Luxenberg was one-third of any fee ultimately earned by the firm, which was standard at Weitz & Luxenberg. JA-0429/182, 0439/223–24.

1. Alleged Acts by Mr. Silver

The Government asserted that Mr. Silver accepted referrals from Dr. Taub in exchange for official favors. Notwithstanding that the statute of limitations required proof of crimes occurring on or after February 19, 2010,[3] much of the Government's evidence related to an alleged *quo* that began and definitively ended well prior to that period—perhaps because the alleged acts within the limitations period were a grab-bag of minor favors like a ceremonial proclamation and an employment recommendation for Dr. Taub's son.

The Government identified the following acts:

[3] Mr. Silver was indicted in February 2015, and the charges have a five-year statute of limitations. *Silver*, 864 F.3d at 119–20; 18 U.S.C. § 3282.

Health Care Reform Act ("HCRA") Grants Prior to The Limitations Period. In 2005 and 2006, pursuant to his authority as Speaker under the HCRA, Mr. Silver approved Dr. Taub's applications for two $250,000 grants to support mesothelioma research at Columbia University. JA-0489/271, 0528/427–29, 0530/435–36, 0533/447–49. Dr. Taub proposed to use the funds to study asbestos exposure resulting from the September 11 attacks, which occurred in Mr. Silver's district. JA-0497/304–05, 0515/376–77. Mr. Silver approved the first grant to Columbia in July 2005, the second in November 2006. JA-0496–97/302–03, 0530/435–36, 0533/477–79.

In October 2007, Dr. Taub sought a third grant. JA-0499–0500. But Mr. Silver responded by telling Dr. Taub that he would not approve the third grant, or any future grants. *Id.*

Shalom Task Force Grant Prior to the Limitations Period. In 2008 (still outside the limitations period), Mr. Silver co-sponsored a smaller ($40,000) grant to Shalom Task Force, an organization that fights domestic abuse in the Orthodox Jewish community. JA-0501–02/321–23, 0540–41/476–79. Dr. Taub's wife served on the organization's board, JA-0501/321, but Dr. Taub did not request the grant, never discussed the Shalom Task Force with Mr. Silver, and did not even know whether Mr. Silver was aware that his wife was a board member. JA-0516–17/382–83.

Recommendations for Dr. Taub's Daughter and Son. In January 2007, outside the limitations period, "somebody from Mr. Silver's office" called Judge Martin Schoenfeld of the New York Supreme Court (a friend of Mr. Silver's) to request that he consider Dr. Taub's daughter, Aimee Bandler, for an unpaid summer internship. JA-0650–51/782–86. In March 2012, Mr. Silver recommended Dr. Taub's son, Jonathan Taub, to the CEO of a non-profit organization called OHEL Children's Home and Family Services. JA-0695–96/820–21, 826.

Ceremonial Resolution and Proclamation. In May 2011, the American Cancer Society honored Dr. Taub and two other practitioners at a fund-raising event. JA-0505–06/338–39, 341. Mr. Silver sponsored Assembly resolutions and proclamations honoring all three for their contributions to medicine. JA-0507/343–45, 0708/872–73. According to the Government, Mr. Silver decided to do this "at the last minute." SA-0049/1909. Dr. Taub did not know about his resolution and proclamation until Mr. Silver presented them at the event. JA-0517/383.

Assembly resolutions—commonly issued to high school sports teams or individuals celebrating "[m]ilestone birthdays"—are typically voted on en masse and are not read by the legislators who approve them. JA-0706/866, 0708/872–73.

The American Cancer Society resolutions were no different. JA-0707–08/871–73. Honorary proclamations do not even require a vote. JA-0704/858.

"Miles for Meso." In fall 2011, Dr. Taub was helping to organize a charity race, "Miles for Meso," to be held in Mr. Silver's district in honor of September 11 responders exposed to asbestos. JA-0508–09/349–52. Mr. Silver met with Dr. Taub and the other organizers about the permit process. JA-0509/354.

After the meeting, Mr. Silver sent Dr. Taub a letter explaining that the race would require a parade permit from either the mayor's office or the local police precinct, and advising Dr. Taub to be ready to discuss the event with the local community board. JA-1774. The letter closed, "My office can help you navigate this process if needed." *Id.* There was no evidence that Mr. Silver did anything further related to the race, which never happened. JA-0510/355.

2. The Alleged Corrupt Exchange

The Government attempted to link these acts with mesothelioma leads in an ongoing *quid pro quo* agreement, in the face of testimony by its own witness that there was no such agreement. On the Government's telling, the agreement began in 2003, when Dr. Taub asked Mr. Silver whether he thought Weitz & Luxenberg would be willing to donate money for mesothelioma research. SA-0041/1874–75. A mutual friend, Daniel Chill, later suggested that Dr. Taub refer patients through Mr. Silver, and Dr. Taub began to do so. JA-0446/249–50. Months later, Dr. Taub

had dinner with Mr. Chill, and the two discussed asbestos exposure at the World Trade Center site. JA-0446–47/252–54. Mr. Chill then told Dr. Taub that he should seek state funding from Mr. Silver to perform research on that topic, and Dr. Taub applied for his first grant. JA-0447/254–55. This, the Government argued, showed guilt "[p]lain as day." SA0041/1876.

However, Dr. Taub—who was protected by a non-prosecution agreement—testified that there had been no agreement to exchange mesothelioma leads for official acts. JA-0493/287. When he made his first referral, he "had not even thought of the idea of seeking state money to support [his] research." JA-0514/371. And when Dr. Taub applied for state funding, he did not believe Mr. Silver had the authority to approve funds himself. JA-0496/299–300.

Nor, according to Dr. Taub, did a *quid pro quo* relationship develop later. Instead, Dr. Taub felt he benefited from what he called a "business relationship" with Mr. Silver, in which he provided patients with medical help, and "Mr. Silver . . . provid[ed] them with legal help." JA-0490/276. Because of this relationship, Dr. Taub "felt" that he had "access to Mr. Silver," *id.*, whom he knew to be a "powerful man," JA-0648/775. In Dr. Taub's view, that "access" could provide him an opportunity to "incentivize" Mr. Silver "to be an advocate for mesothelioma research." JA-0502/325. Dr. Taub testified, for instance, that his relationship with Mr. Silver might have enabled him to discuss hypothetical

legislation with the Speaker, such as "laws relating to asbestos production" and "legislation to help support research in cancer in general." JA-0489/272; *see* JA-0489–90/273–76.

But Dr. Taub sharply distinguished between his desire to maintain a relationship with Mr. Silver and the notion that there was any agreement between them to exchange referrals for official acts, which Dr. Taub emphatically denied: When he made referrals to Mr. Silver, he "did not expect [Mr. Silver] to give [him] anything in return." JA-0514/372.

B. Real Estate Charges

The real estate charges again focused on referral fees that Mr. Silver received from Goldberg & Iryami on tax certiorari business that Glenwood and Witkoff brought to that firm. The evidence showed that Glenwood began using Goldberg for tax certiorari work in 1997, JA-0783/1080, after Jay Arthur Goldberg (not Mr. Silver) requested it. JA-0727–28/950–52. Witkoff started using Goldberg in 2005 after Mr. Silver suggested to Steven Witkoff that Mr. Goldberg was "a good, decent man" who could use the work. JA-0803/1159; *see* JA-0798–99/1138, 1143–44. Mr. Silver received standard referral fees from Goldberg for this business. JA-0889/1358, 0893–94/1376–79.

1. Alleged Acts by Mr. Silver

According to the Government (though contrary to the testimony of its own witnesses), Mr. Silver performed a series of acts in exchange for these referrals:

Public Authorities Control Board ("PACB") Financing Approvals. The PACB approves financing for tax-exempt Housing Finance Agency ("HFA") bonds on which Glenwood depended. JA-0921/1488. Mr. Silver had a seat on the three-member PACB, but approvals for tax-exempt financing of the kind Glenwood relied on were "typically *pro forma,*" *Silver*, 864 F.3d at 109 n.18—a Government witness was unaware of *any* such financing being denied in the PACB's four-decade existence, JA-0926/1507—and Mr. Silver sent a designee to meetings. JA-0921/1489.

Mr. Silver's designee participated in this rubber-stamp process by voting to approve financing for seven Glenwood properties over more than a decade—on a board that approved some 200 such financings each year. JA-0923–24/1495–99, JA 0926/1507. There was no evidence that Mr. Silver ever intervened with his designee regarding Glenwood financing, or spoke with his designee about Glenwood at all.

June 2011 Meeting. Real estate legislation in New York expires every four or six years. JA-0725/942. In 2011, the 421-a program—which provided a tax break for developers who set aside 20 percent of their units as affordable

housing—was up for renewal, as were provisions related to rent stabilization. JA-0724–26/938–40, 944. Both issues were important to Glenwood, which favored renewal of the 421-a program and relaxed rent stabilization. JA-0724–25/938–41.

In June 2011, Mr. Silver met with Glenwood lobbyist Brian Meara and Richard Runes, Glenwood's in-house counsel. JA-0726–27/947–48. Mr. Runes proposed that certain rent stabilization provisions in the new real estate bill be made more tenant-friendly to ensure passage of a full bill that renewed 421-a. JA-0726–27/946–48. Mr. Silver was "noncommittal." JA-0727/949. Mr. Meara testified that the renewal of 421-a was not "a subject of controversy," JA-0764/1005, and the head of the pro-landlord Rent Stabilization Association testified that renewal was inevitable: In addition to benefiting developers, 421-a created affordable housing and thousands of jobs. JA-0880/1324.

2011 Rent Legislation. Mr. Silver voted in favor of the Rent Act of 2011, which passed. The Act renewed 421-a, but contained various rent stabilization provisions that were more pro-tenant than Mr. Runes had proposed, JA-0727/949–50, and were "not what Glenwood wanted," JA-0872–73/1292–94.

Opposing a methadone clinic. In December 2011, Mr. Meara contacted Mr. Silver about a methadone clinic planned to open near a Glenwood property in Mr. Silver's district. JA-0819–20/1225–29. The clinic did not open, and Mr. Silver's office asked Glenwood to share with its tenants a letter praising Mr. Silver for

expressing his "strong opposition" to the clinic, which "residents [had] emphatic[ally]" opposed at a community meeting. JA-0820–21/1229–32; JA-1780. There was no evidence at trial concerning what, if anything, Mr. Silver did to oppose the clinic.

2. The Alleged Corrupt Exchange

As with the asbestos charges, the Government tried—in the face of testimony to the contrary by its own witnesses—to portray the developers' use of Goldberg for tax certiorari work as a *quid pro quo* agreement. But the testimony established that Glenwood started using Goldberg in 1997, Witkoff in 2005, and it was only years later that anyone at either company learned that Mr. Silver received referral fees as a result. Even in 2011—when the Rent Act was passed—neither developer knew that Mr. Silver was receiving fees, and six of the seven PACB approvals likewise occurred before Glenwood learned of the fees in December 2012. JA-0803/1159, 0872/1290, 1843.

Consistent with this unawareness, the Glenwood and Witkoff witnesses testified that—although they were aware that Mr. Silver was a "powerful man" who held authority relevant to their industry, JA-0798/1140—they did not retain Goldberg in order to procure official action. Mr. Runes, asked whether "Glenwood retain[ed] Goldberg & Iryami in order to get official action from Mr. Silver," responded, "No, sir." JA-0870/1282. He also testified that, during the alleged

scheme, Mr. Silver voted against Glenwood's interests "[a]lmost without exception." JA-0874/1298. Mr. Witkoff was asked whether he used Goldberg "in order to get Mr. Silver to take some official action," or "in anticipation of Mr. Silver taking some official action." JA-0803/1161. Each time, his answer was the same: "No." *Id.* Instead, referring tax certiorari business was "an easy favor to do," *id.*, given that Goldberg "could do good work." JA-0802–03/1155, 1161.

C. "Lies and Deception" Evidence

In the absence of testimony that there was any *quid pro quo* agreement, the Government introduced—and, in summation, relied heavily on—evidence purportedly demonstrating that Mr. Silver tried to hide his conduct through lies. SA-0061/1956. The Government asserted, for instance, that Mr. Silver "lied to the press" by "saying he only represented, quote, little people," when he was on "retainer to a real estate giant," Glenwood. SA-0042/1881. It likewise contended that he lied when he said that he spent Fridays reviewing case files. *Id.*[4] Although there was no dispute that Mr. Silver always disclosed his full income on legislative disclosure forms, the Government contended that he lied on those forms by failing to identify Glenwood, Witkoff, or Goldberg as a source of income. *Id.*; JA-1136/2014.

[4] Mr. Silver's statement about who he represented in his law practice was accurate. He did not "represent" Glenwood. JA-0786/1093, 0867/1270, 0902/1411, 1119.

The Government offered no evidence, however, that any nondisclosures reflected a belief by Mr. Silver that his conduct was criminal, as opposed to reflecting a reluctance to publicly air financial relationships that might have proved politically embarrassing. In any event, Government witness Lisa Reid, executive director of the Legislative Ethics Commission, testified that Mr. Silver was not required to disclose Glenwood or Witkoff as income sources. JA-0929/1521, 1021/1678–79. Ms. Reid testified at Mr. Silver's first trial that he was not required to disclose Goldberg, either, JA-0377–78, 1022/1684, but the district court precluded that testimony at the second trial, JA-1023/1685–87, questioning whether Ms. Reid—despite heading the Legislative Ethics Commission—was an expert on disclosure requirements. *Id.*

D. The District Court's Rulings and Jury Charge

1. The Need for an Agreement

Mr. Silver sought to build his defense on the absence of any *quid pro quo* agreement with the alleged bribe payors. But he was stymied by the district court's position that no agreement was required, beginning at the inception of the trial, when the defense opening statement sought to emphasize the need for proof of a corrupt agreement, and the district court sustained the Government's objection. JA-0397/56.

Later—following consistent testimony that no agreement existed—Mr. Silver sought instructions (on both honest services fraud and Hobbs Act extortion) that the jury had to find at least an "implicit agreement" to convict, arguing that this requirement embodied the fundamental dividing line between criminal bribery and lawful conduct. JA-0279, 0293. The Government opposed, contending that no such agreement need be proved, JA-0941/1568, and the district court refused to give the instruction. JA-0942/1570–72.

Instead of requiring an agreement to exchange something of value for an official act, the district court instructed the jury that it could convict even if Dr. Taub, Glenwood, and Witkoff made referrals without intending to obtain "official acts" in return. In particular, the portion of the honest services charge addressing the *quid pro quo* requirement not only failed to require an agreed exchange of benefits for official acts, but instructed the jury that the intent of the payors was *irrelevant*:

> [T]he Government only has to prove that Mr. Silver—not the alleged bribe giver—understood that, as a result of the bribe, he was expected to exercise official influence or take official action.

SA-0030/2044.

The Hobbs Act instruction, although somewhat less clear, likewise departed in multiple places from the requirement of an exchange for "official acts," and instead permitted conviction even if the jury found that the alleged bribe payors

merely sought to curry favor with, or obtain access to, a powerful politician. The very beginning of the Hobbs Act *quid pro quo* charge stated that the element was satisfied if the payors gave Mr. Silver property "because of Mr. Silver's official position" (rather than in exchange for "official acts"). SA-0032/2053. When the court did subsequently refer to an exchange of property for "official acts," it explained that requirement as being satisfied unless the property was provided for reasons entirely "unrelated to Mr. Silver's public office," SA-0032–33/2053–54, and went on to say it was enough if the payors wished to procure "official influence or decision making." SA-0033/2054.

And after that, the court returned to the idea that the payors' intent was irrelevant:

> [I]f you find that Mr. Silver accepted the property intending, at least in part, to take official action in exchange for those payments as the opportunity arose, then this element has been satisfied.

Id. Near the close of the charge, the district court stated that it was necessary for the payors to be motivated by "a belief that Mr. Silver would take official action in exchange for the property"—but still omitted any requirement of an implicit or explicit *agreement* to take official action in exchange for the property. SA-0033/2055.

Hamstrung by these instructions (and the knowledge that any reference to an agreement element in summation would draw a sustained objection, JA-

0942/1572), Mr. Silver was prevented from arguing to the jury that he did not enter any agreement with Dr. Taub or the developers to exchange benefits for official acts.

In its own summation, the Government repeatedly drove home these departures from requiring an agreement to exchange property for official acts. It seized particularly on the notion that the jury could convict if the payors gave Mr. Silver property "because of Mr. Silver's official position." SA-0032/2053. The Government repeatedly invoked Dr. Taub's statement that he referred cases because Mr. Silver was "the most powerful man in New York State," arguing that the asbestos charges were "over" if the jury believed Dr. Taub. SA-0042/1878. Similarly, on the real estate charges, it emphasized that Glenwood and Witkoff were "aware" that Mr. Silver was "powerful." SA0054/1927; *see* SA0043/1882, SA0051/1914, SA0061/1956.

In addition, unconstrained by any requirement to prove the parties agreed to exchange benefits for official acts, the Government told the jury that all that was needed to convict (regardless of the circumstances under which any benefits were provided) was a finding that Mr. Silver had the referral fees "in any part of his mind" at a time he took official acts. SA0044/1889, SA0061/1956–57. This argument—that even benefits provided with no *quid pro quo* agreement became unlawful bribes if Mr. Silver later took actions that he was aware favored his

benefactors—was not a slip of the tongue, but the central thrust of the Government's closing, which variously described this issue as "[t]he point" of the case, "the core" of the charges, and "the only question" for the jury:

> So the only question for you, ladies and gentlemen, is if any part of Sheldon Silver's motivation in taking these official actions was because of the money. SA-0053/1924.
>
> [T]he core of all these offenses is the same. . . . When Sheldon Silver took all of those official acts to the benefit of Dr. Taub and developers or when future opportunities for action would come up, was Sheldon Silver influenced, even in part, by the money? SA0060/1952.
>
> As Judge Caproni will instruct you[,] if Silver had the money from Dr. Taub in any part of his mind as he took these actions, it doesn't need to be his only motivation, just a part, then he is guilty. SA0044/1889.
>
> The point is when he did it, was he doing it at least in part for the money? Yes. SA0066/2016.
>
> [A]sk yourselves . . . did it really have nothing to do with the money? [T]he defense needs you to believe that no part of Silver's motivation was about the money. SA0061/1956–57.

See also SA-0043/1882, SA0043/1883, SA0051/1915, SA0058/1945.

2. "Stream of Official Acts" Instruction

Prior to *McDonnell*, this Court recognized a "stream of benefits" theory of bribery—*i.e.*, accepting things of value not in exchange for any specific act, but for a pledge to "exercise . . . influence" as "opportunities arise." *United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007) (internal quotation marks omitted). Mr. Silver was indicted and tried on this theory. JA-0108–09, 0146–47.

Mr. Silver argued on retrial that *McDonnell* did away with "stream of benefits" bribery by establishing that an official has not committed bribery unless he agrees to perform a "specific and focused" official act at the time of the alleged exchange. JA-0109, 0282. The district court denied his motion to dismiss the superseding indictment on this ground. SA0007–08. Later, Mr. Silver requested an instruction pursuant to *McDonnell* that the jury was required to find that he "agreed with the payor at the time the bribe was paid" to perform "a specific official act." JA-0282, 0287. But the district court disagreed, and instructed the jury that it could convict if it found that Mr. Silver accepted payment intending to take unspecified official actions as "opportunities arose." SA-0030/2044.

E. Verdict and Post-Trial Proceedings

The jury convicted Mr. Silver on all counts, and his post-trial Rule 29 and Rule 33 motions were denied. SA0070/2. The district court sentenced him principally to seven years' imprisonment. Mr. Silver sought bail pending appeal in district court, but the court denied his motion. JA-0350.

Mr. Silver promptly sought emergency relief in this Court, JA-1849, which required him to demonstrate that his appeal "raises a substantial question of law . . . likely to result" in reversal or a new trial. 18 U.S.C. § 3143(b). This Court granted the motion. JA-2137.

SUMMARY OF ARGUMENT

Mr. Silver's trial was fundamentally flawed by errors that invited the jury to convict him for entirely lawful conduct, by eliminating two of the critical elements that separate criminal bribery from permissible conduct by state officials.

First, the district court refused to instruct the jury on the settled requirement that bribery requires an *agreement* to exchange things of value for official acts. This bedrock requirement that benefits be exchanged for official acts is the essential element that distinguishes *quid pro quo* bribery from an array of lawful conduct that federal bribery law does not reach. The district court compounded this error by telling the jury that it could convict even if the payors provided benefits to Mr. Silver intending nothing more than to curry favor with a powerful politician—payments that federal law regards as lawful gratuities—without any agreement to obtain official acts in return. This not only misstated the core element of the offense, but was deeply prejudicial to Mr. Silver in a trial in which even the Government's witnesses uniformly testified that there was no agreement to obtain official acts in exchange for benefits.

Second, the district court gave a "stream of benefits" bribery instruction that effectively neutered the requirement of *McDonnell* that only a narrow category of formal governmental actions are "official acts" that can be the basis of a bribery conviction. The court's instruction told the jury that it could convict if Mr. Silver

accepted payment in return for performing as-yet-unidentified official acts "as opportunities arose." But the "stream of benefits" theory of bribery was coherent only in a pre-*McDonnell* world in which essentially everything an official did was an official act. Under *McDonnell*, an agreement to perform favors is not an agreement to perform official acts unless those favors are identified, at the time of the alleged exchange, with sufficient specificity to demonstrate that they qualify as "official acts." In addition, the text of the federal bribery statute, 18 U.S.C. 201, requires the identification of specific official acts.

This error, too was deeply prejudicial, in that it freed the jury of the need to find an agreement to undertake specific official acts in a case in which the only alleged official act of any substance—the approval of state research grants—occurred well outside the limitations period, and the evidence of any agreement to perform official acts *within* the limitations period was essentially nonexistent. Without a "stream of benefits" theory, the lack of evidence of any *quid pro quo* agreement in exchange for an official act entitles Mr. Silver to a judgment of acquittal.

Third—even if *McDonnell* permits a "stream of benefits" theory—it requires, at a minimum, that the official agree at the time of the *quid pro quo* to provide a stream of favors specific to *official acts*. On the asbestos charges, there was no evidence of any such agreement within the limitations period. The

Government's theory was that Mr. Silver's alleged agreement in 2005 and 2006 to disburse HCRA research funds for referrals reflected a scheme that continued unabated for a decade. But Mr. Silver unequivocally terminated any agreement to provide grants well outside the limitations period, and the paltry favors for Dr. Taub within the limitations period provide no basis on which a jury could have found any ongoing provision of official acts—let alone an agreement to do so in exchange for referrals. And as for the real estate charges, the Government offered no evidence at all that the developers' longstanding use of the Goldberg firm for tax certiorari work—when the developers were unaware that Mr. Silver received any fees from that work—was in exchange for any of the routine business the Government identified as official acts.

There was insufficient evidence for a rational jury to find the necessary elements of the offense, and a judgment of acquittal should be entered. But at a minimum, the district court's fundamental and prejudicial errors entitle Mr. Silver to a new trial.

ARGUMENT

I. THE DISTRICT COURT'S REFUSAL TO REQUIRE PROOF OF A *QUID PRO QUO* AGREEMENT REQUIRES A NEW TRIAL ON ALL COUNTS

"[O]n a bribery theory of honest services fraud and Hobbs Act extortion, the Government ha[s] to prove, beyond a reasonable doubt, the existence of a *quid pro*

quo agreement." *Silver*, 864 F.3d at 111. When an official is charged with accepting a bribe, this necessarily requires that the official and the alleged bribe payor agree to exchange a thing of value for an official act.

The district court refused to instruct the jury that such a *quid pro quo* agreement was required for conviction. Worse, it told the jury that it could convict even if Mr. Silver's alleged bribe payors never believed they were exchanging things of value for official acts—i.e., the unlawful exchange could exist solely in (what the jury inferred was in) Mr. Silver's mind. In so instructing, the court eliminated the key dividing line between unlawful bribery and the broad range of lawful (if not uniformly admirable) interactions between state officials and their contributors, clients, employers, and other constituents—a line without which officials would have no protection against prosecution for lawful political favors that prosecutors or juries may find distasteful. Those errors were not harmless. Mr. Silver is entitled to a new trial on the bribery counts.

A. A Bribery Theory of Honest Services Fraud or Hobbs Act Extortion Requires Proof of a *Quid Pro Quo* Agreement

Federal bribery law is not a code of "good government for state and local officials." *McDonnell*, 136 S. Ct. at 2373 (internal quotation marks omitted). It does not prohibit attempts "to buy favor or generalized goodwill from a public official." *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007). It permits officials to make decisions that benefit citizens who contribute to their campaigns

or provide them with gifts. *See Skilling v. United States*, 561 U.S. 358, 409–10 (2010). It does not reach many practices—"favoritism following the receipt of a benefit," "one hand washes the other"—that many regard as objectionable. Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 Fordham L. Rev. 463, 481 (2015) (hereinafter *Criminal Corruption*).

What federal bribery law does reach is narrow and specific: an *exchange* of something of value for an official act, *quid pro quo*. Federal law thus adopts what one commentator has termed an "illegal contract" definition of bribery: An official may not enter an *agreement* to perform an official act in exchange for something of value. *Id.* at 474–76. The district court's refusal to instruct that such an agreement is required was a basic error that goes to the heart of what divides lawful from unlawful official conduct.

1. Settled Precedent and Statutory Text Require Proof of an Agreement

The Supreme Court adopted this definition of bribery as requiring an agreement to exchange property for official favors nearly fifty years ago in the context of the federal bribery statute, 18 U.S.C. § 201. In *United States v. Brewster*, a U.S. Senator was charged with accepting a bribe in return for a vote. 408 U.S. 501, 502 (1972). He argued that the Speech or Debate Clause shielded him from prosecution for voting, a legislative act. *Id.* at 503–04. The Court

disagreed. Section 201 punishes "illegal bargain[s]"—accepting money "for a promise to act in a certain way." *Id.* at 526. The violation was not voting, but making the "illegal promise." *Id.*

The Court has adopted this same "illegal contract" theory for Hobbs Act bribery cases.[5] In *McCormick v. United States*, the alleged bribe was in the form of a campaign contribution. 500 U.S. 257, 265–66, 272 (1991). In that context, the Court held, an *explicit* agreement is required, explaining that an official who makes "an explicit promise" to perform an official act "asserts that his official conduct will be controlled by the terms of the promise," justifying criminal liability. *Id.* at 273. The Court was mindful that blurred lines in this area would raise federalism and vagueness issues, but reasoned that this "formulation define[d] the forbidden zone of conduct with sufficient clarity" to avoid those concerns. *Id.* at 271–73.

This same requirement of an agreement governs in non-campaign contribution cases, with the modification that an *implicit* agreement suffices. In his concurring opinion in *Evans v. United States*, Justice Kennedy reasoned that "the

[5] Mr. Silver respectfully preserves the argument that Hobbs Act extortion does not extend to bribery, but rather can occur only when an official obtains property "under the pretense that the officer [is] *entitled* thereto by virtue of his office." *Ocasio v. United States*, 136 S. Ct. 1423, 1438 (2016) (Thomas, J., dissenting) (emphasis added). Mr. Silver acknowledges that this argument is foreclosed under current law, *see id.* at 1434.

rationale underlying the Court's holding" in *McCormick*—that criminality occurs when an official agrees that his conduct will be controlled by the terms of a corrupt promise—applied in all Hobbs Act bribery prosecutions, "not only in campaign contribution cases." 504 U.S. 255, 277–78 (1992) (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy would not require an *explicit* agreement, so that that law would not be "frustrated by knowing winks and nods." *Id.* at 274. But an implicit agreement is, of course, an agreement nonetheless.

This Court has embraced Justice Kennedy's reasoning in both Hobbs Act and honest services fraud cases, "harmoniz[ing] *McCormick* and *Evans*" by "[d]rawing on Justice Kennedy's concurrence" to conclude that "a *quid pro quo* [is] required to sustain a conviction in the non-campaign context, but that *the agreement* may be implied from the official's words and actions." *United States v. Ganim*, 520 F.3d 134, 143 (2d Cir. 2007) (emphasis added) (Hobbs Act); *see United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013) (in an honest services fraud case, rejecting the defendant's argument that an explicit agreement was required on the ground that outside the campaign contribution context, "an agreement 'may be implied from the defendant's words and actions'" (quoting *United States v. Bruno*, 661 F.3d 733, 744 (2d Cir. 2011)). These cases make clear that the difference between campaign contribution cases and other bribery cases is

the difference between an explicit and an implicit agreement—not an explicit agreement and no agreement at all.

The requirement of an implicit or explicit agreement between the payor and the official necessarily requires that the payor intend to exchange his payment for official acts. Accordingly, in bribery cases involving defendant officials, this Court has analyzed not just the official's intent, but that of the alleged bribe payor. *See, e.g.*, *Bruno*, 661 F.3d at 744–45. No decision of this Court supports the district court's view that an official can be convicted of bribery without regard to whether the payments were intended to be in exchange for official acts.

The same requirement of an agreement to exchange benefits for official acts is reflected in the text of the federal bribery statute, 18 U.S.C. § 201, which the Supreme Court has used as the touchstone for defining what constitutes unlawful bribery under the Hobbs Act and honest services fraud statute. *See McDonnell*, 136 S. Ct. at 2366–67; *Skilling*, 561 U.S. at 412. The language of Section 201 contemplates an *exchange*, as it requires that the payment be "*in return for* . . . being influenced" in performing an official act, 18 U.S.C. § 201(b)(2) (emphasis added)—not merely acceptance of a payment "with the intent to" be influenced. As *McDonnell* explains, this means that the statute is limited to "*quid pro quo* corruption—the *exchange* of a thing of value for an 'official act.'" 136 S. Ct. at

2372 (emphasis added). An exchange necessarily involves two parties, not just the unilateral intent of the recipient.

Other federal courts further confirm that bribery requires an agreement. As Judge Sutton has put it, "What is needed is an agreement, full stop, which can be formal or informal, written or oral." *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013).[6] Commentators agree. *See, e.g.*, Alschuler, *Criminal Corruption*, 84 Fordham L. Rev. at 476 ("[T]he Court embraced the 'illegal contract' concept of bribery [in *McCormick*] in 1991.").[7]

Indeed, so does the Department of Justice. Its Criminal Resource Manual explains that the difference between a bribe and a gratuity is that "bribery requires that there have been an express corrupt understanding between the private donor and the public officer." U.S. Dep't of Justice, Criminal Resource Manual § 2045

[6] *See also, e.g.*, *United States v. Fernandez*, 722 F.3d 1, 18–19 (1st Cir. 2013) ("Bribery requires that the government prove . . . an agreement that the thing of value that is given to the public official is in exchange for that public official promising to perform official acts for the giver."); *United States v. Dean*, 629 F.3d 257, 259 (D.C. Cir. 2011) ("[A] quid pro quo necessitates an agreement between the public official and the other party that the official will perform an official act in return for a personal benefit to the official.").

[7] *See also, e.g.*, Deborah Hellman, *A Theory of Bribery*, 38 Cardozo L. Rev. 1947, 1961–63 (2017); George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich*,* McDonnell*, and the Criminalization of Politics*, 91 Notre Dame L. Rev. 177, 219 (2015) (bribery requires "an agreement, explicit or implicit (the pro)").

(1997). It adds that legitimate political contributions are not bribes because they "are not made as part of a quid pro quo agreement with the public officer." *Id.*

The Supreme Court, this Court, other courts, scholars, and the Criminal Resource Manual have it right. Bribery requires proof of a *quid pro quo* agreement.

2. The District Court's Reasoning For Ignoring This Extensive Authority Does Not Withstand Scrutiny.

The district court dismissed all of these cases as merely using "loose language." JA-0361. Not so. The agreement requirement is a foundational rule rooted in principles of federalism, due process, and political participation.

The Hobbs Act and the mail and wire fraud statutes are not targeted prohibitions of state-level bribery. They are broadly worded laws that have been pressed into service by creative prosecutors as anti-corruption tools, *see Skilling v. United States*, 561 U.S. 358, 399–402 (2010), and the Supreme Court has repeatedly recognized that narrow and precise definition of what is unlawful under these statutes is necessary to avoid untenable vagueness and federal intrusion into core state affairs. *E.g., McDonnell*, 136 S. Ct. at 2372–73. The Court has accordingly required that the statutes be construed as a "scalpel," not a "meat axe." *Id.* at 2373 (limiting the scope of "official acts" under each statute); *see Skilling*, 561 U.S. at 404 (holding that honest services fraud includes only bribes and kickbacks, not conflicts of interest).

The agreement requirement is fundamental to this approach. *McCormick* explained that a clear line is crossed when an official asserts, by entering into an explicit or implicit *quid pro quo* agreement, that "his official conduct will be controlled by the terms of [a corrupt] promise." 500 U.S. at 273. Because of that bright-line requirement, *McCormick*'s "formulation defines the forbidden zone of conduct with sufficient clarity." *Id.*

The district court's formulation—which did not require proof of an agreement, or even that the alleged bribe payors understood themselves to be procuring official acts—does not. State officials regularly receive contributions and other things of value, especially in states like New York that permit legislators to have outside employment and income. The sources of those contributions or income will frequently be interested in at least some legislative business. If any income or benefit can be deemed a bribe even without an agreement to exchange the benefit for an official act—subject only to whether a jury can be persuaded the official later acted with less-than-fully admirable motivations—the key constraint required by the Supreme Court is gone, and little more than prosecutorial discretion protects vast numbers of state lawmakers from federal criminal prosecution.

Worse, this case illustrates how easily a one-sided intent standard slips into a "conscious favoritism" standard that criminalizes plainly lawful conduct. Freed

from having to demonstrate an agreement or the intent of Mr. Silver's benefactors, the Government amplified the district court's errors by repeatedly asserting in summation that Mr. Silver was guilty if, at the time he took action that favored Dr. Taub and the developers, he "had the money . . . in any part of his mind." SA-0044/1889. That is not bribery, and for good reason: "If an official were subject to imprisonment whenever a jury could be persuaded that he had acted deliberately to benefit someone who once did a favor for him, only a fool would take the job." Alschuler, *Criminal Corruption*, 84 Fordham L. Rev. at 481.

The agreement requirement is what avoids this result and draws the essential line between criminal bribery and lawful political favoritism. By reserving criminal liability for those officials who cross the line that separates mere favoritism from corrupt bargains, it avoids unconstitutional vagueness and keeps federal bribery law to its proper, narrow sphere.

3. There Is No Other Basis For Dispensing With The Requirement Of An Agreement

None of the district court's other reasons for its position justifies its departure from the requirement of an agreement to exchange benefits for official acts.

The court cited language from *Evans* stating that Hobbs Act extortion occurs when "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts," and treated it as a

comprehensive statement of what is required. JA-0362–63; *see Evans*, 504 U.S. at 268. But as *McDonnell* explained, this language did not describe the *legal standard* for Hobbs Act liability, but merely the *evidence* that might allow a jury to find the required agreement:

> A jury could, for example, *conclude that an agreement was reached* if *the evidence shows* that the public official received a thing of value knowing that it was given with the expectation that the official would perform an "official act" in return. *See* [*Evans*, 504 U.S. at 268.]

McDonnell, 136 S. Ct. at 2371. *McDonnell* thus explains this language from *Evans* and expressly reaffirms the agreement requirement. *See id.*

The district court also pointed to cases holding that a person may be guilty of bribery even if "his attempted target" is "entirely innocent." *United States v. Ring*, 706 F.3d 460, 467 (D.C. Cir. 2013); JA-0359. But that merely reflects that the federal bribery statute, § 201(b), treats a rejected attempt to create a corrupt agreement (by offering or demanding a bribe) as substantive bribery.[8] *See* 18 U.S.C. §§ 201(b)(1), (2). And even the attempt crime requires an attempt to enter into an agreed exchange—an offer of (or demand for) payment in exchange for an official act.

[8] In other words, bribery "includes what might be called attempted agreements—solicitations by a single party and transactions in which one party merely feigns agreement." Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and Speechnow*, 67 Fla. L. Rev. 389, 483 (2015).

Bribery, whether charged as honest services fraud or Hobbs Act extortion, requires proof of a corrupt agreement. The district court was wrong to conclude otherwise.

B. The Jury Instructions Were Erroneous

This Court reviews jury instructions *de novo*. *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014). An instruction is erroneous if it "mislead[s] the jury as to the correct legal standard or do[es] not adequately inform the jury of the law." *Id.* (internal quotation marks omitted). An instruction is considered "in the context of the entire jury charge," and vacatur is required where "the error was prejudicial or the charge was highly confusing." *Id.* (internal quotation marks omitted). An incorrect statement of the law is not "cured" by a correct statement elsewhere in the charge, if the charge as a whole is confusing. *Id.* at 182.

The instructions on honest services fraud and Hobbs Act extortion were fundamentally erroneous. Mr. Silver sought instructions that conviction required proof of a corrupt agreement, and the court refused to give them. JA-0942/1570–72. That alone was error.

The court compounded the error by telling the jury it could convict even if the alleged bribe payors did not offer things of value intending to obtain "official acts" in return—meaning that Mr. Silver could be convicted if the payments were,

on the part of the payors, merely lawful attempts to curry favor.[9] On the honest services fraud charge, the district court expressly stated that the payors' intent was irrelevant. SA-0030/2044. And the Hobbs Act charge—though less clear—was similarly flawed.

There, the district court began by stating that the *quid pro quo* element required proof that property was given "because of Mr. Silver's official position." SA-0032/2053. However, a payment made because of an official's position, not linked to any official act, is not a bribe—it is a lawful gratuity. *Sun-Diamond*, 526 U.S. at 405–06. The court solidified this misstatement by suggesting that a payment for "official acts" meant a payment "unrelated to Mr. Silver's public office." SA-0032–33/2053–54. Then, the court said that the payors must have given property with the expectation Mr. Silver would "exercise official influence or decision-making," rather than with the expectation he would perform "official acts." SA-0033/2054.

In the next paragraph, the court made a bad situation worse. It stated that the *quid pro quo* element was "*satisfied*" if "*Mr. Silver accepted the property intending*, at least in part, to take official action in exchange." *Id.* This definitive

[9] As explained above, the district court *should* have instructed the jury that a *quid pro quo* agreement was required for conviction. But at a minimum, the court was required to instruct the jury that the payors must have intended to obtain "official acts" in exchange for the benefits they provided.

statement that the payors' intent was irrelevant would require vacatur even without the court's earlier missteps. *See DeLima v. Trinidad Corp.*, 302 F.2d 585, 587 (1962).

The charge is not saved by its later statement that the payors must have been motivated by the belief that Mr. Silver would "take official action in exchange for the property." SA-0033/2055. The earlier statement that the payors' intent was irrelevant was "not equivocal," so it does not matter if "other parts of the charge stated the law correctly." *DeLima*, 302 F.2d at 587. Further, given the internal contradictions in the charge, it was "[a]t best . . . likely to leave the jury highly confused." *Id.* And finally, a "correct statement" of the law carries less weight if "set forth . . . near the end of [the] charge," following an "incorrect requirement" set forth "at the outset." *Hudson v. New York City*, 271 F.3d 62, 70 (2d Cir. 2001).

Were there doubt on this score, it is dispelled by the Government's summation. Argument that highlights incorrect statements in a charge is an "aggravating circumstance" that can render even an "innocuous incorrect statement" "extremely damaging." *Chalmers v. Mitchell*, 73 F.3d 1262, 1267 (2d Cir. 1996). Here, the Government exploited the court's errors by repeatedly misinforming the jury that it could convict if property was given to Mr. Silver because he was a "powerful man," *e.g.*, SA-0042/1878—when in fact benefits provided to curry favor with a powerful politician are definitively lawful. *Sun-*

Diamond, 526 U.S. at 405–06. It exploited them further by repeatedly arguing that Mr. Silver was guilty if fees were "in any part of his mind" when he took official action.[10] *E.g.*, SA-0044/1889. This confirms that Mr. Silver's jury was badly misled as to the correct legal standard.

C. The Error Was Not Harmless

An erroneous jury instruction is harmless "only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the Government bears the burden to establish harmlessness. *Silver*, 864 F.3d at 119. On both sets of charges, a rational, properly-instructed jury could easily have found that there was no agreement provide benefits in exchange for official acts. Indeed, the consistent testimony of the Government's own witnesses was that there was no such agreement, and any argument to the contrary—particularly with respect to whether any such agreement existed *within the limitations period*—would have had to rely on a series of inferences that are barely plausible, let alone inevitable.

Dr. Taub, for example, consistently testified that he did not agree to trade mesothelioma leads for official acts, but referred patients for other reasons, and "did not expect [Mr. Silver] to give [him] anything in return" for referrals, JA-

[10] Mr. Silver moved in limine to preclude the Government from making these improper arguments. JA-0173–74. But the district court ruled that this was "fair argument." JA-0309.

0514/372, or make referrals in return for the various acts Mr. Silver performed. Rather, he wanted to "help a friend"; he thought Weitz & Luxenberg "a very good law firm"; and he believed Mr. Silver's status as an "important" person would ensure that his patients were "represented by good counsel." JA-0514/371–72.

In addition, Dr. Taub understood that his "business relationship" with Mr. Silver gave him "access" to the Speaker, JA-0490/276, which meant he would have felt comfortable calling Mr. Silver to discuss asbestos-related legislation had the occasion arisen, and was able to ask for Mr. Silver's help in getting his children job interviews. JA-0489/272, JA-0490/277. But obtaining access—*i.e.*, providing benefits to a powerful official to cultivate a relationship that may later prove useful—is categorically different from agreeing to exchange benefits for an official act. "Ingratiation and access . . . are not corruption." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010).

As for the real estate charges, not only was there no testimony that Glenwood or Witkoff had any agreement with Mr. Silver, but both sent tax certiorari work to Goldberg for years without even knowing that Mr. Silver received fees from it—making it completely implausible that they had an

agreement with Mr. Silver to do so in exchange for official acts.[11] JA-0872/1290; JA-0803/1159. Consistent with this lack of awareness, Glenwood and Witkoff witnesses flatly denied that they had a *quid pro quo* agreement with Mr. Silver. JA-0870/1282; JA-0803/1161. Instead, using Goldberg was "an easy favor to do" for a "powerful man." JA-0798/1140, 0802/1155, 0803/1161.

Nor does what the Government portrayed as "lies and deception" by Mr. Silver—primarily his failure to publicly disclose that he was receiving fees from business referred by Dr. Taub and the developers—affect the harmlessness inquiry. This information could surely have been politically embarrassing, giving Mr. Silver ample reason to avoid disclosing it regardless of whether any agreement was involved. The failure to disclose is therefore not even minimally probative with regard to whether there was an unlawful agreement, let alone a basis for concluding that a properly-instructed jury would have found that such an agreement existed.[12]

Finally, the district court's erroneous conclusion that bribery does not require an agreement did not infect the instructions alone, because Mr. Silver was

[11] Such an agreement was also implausible because the alleged official acts for almost the entire period—rubber-stamp PACB approvals of loan applications—were utterly routine, JA-0926/1507, and cannot plausibly have motivated a bribe.

[12] As explained, the Government's portrayal of purported "lies and deceptions" was also inaccurate.

also precluded from arguing that the Government failed to prove an agreement. Error is not harmless where it prevents the defendant from even *arguing* that the evidence does not show the very thing necessary to make his conduct unlawful. *United States v. GAF Corp.*, 928 F.2d 1253, 1263 (2d Cir. 1991).

For all of these reasons, the instructional error was not harmless.

II. The Honest Services Fraud and Hobbs Act Convictions Must Be Reversed Because They Rest On A "Stream Of Official Acts" Theory That Is Impermissible Under *McDonnell*

Separate and apart from the district court's failure to require a *quid pro quo* agreement, the judgment must be reversed because Mr. Silver was convicted under a "stream of official acts" theory—which permitted the jury to rely on an abstract undertaking to perform unspecified official acts—that is invalid following *McDonnell*.

Prior to *McDonnell*, courts permitted bribery convictions without proof that the parties identified, at the time of the exchange, any particular official act to be performed. It was enough under this so-called "stream of benefits" theory if the official agreed, in exchange for a thing of value, to provide not-yet-identified official favors "as specific opportunities arise." *Ganim*, 510 F.3d at 145 (internal citation omitted). This made sense before *McDonnell*, when "official act" was broadly defined to include all "act[s] taken under color of official authority."

Ganim, 510 F.3d at 142 n.4. An agreement to provide official favors or influence was therefore inherently an agreement to perform official acts.

For multiple reasons, that is no longer true. Most fundamentally, because much of what officials do no longer qualifies as an "official act," a non-specific agreement to provide assistance is *not* necessarily (or even likely) an agreement to perform official acts within the meaning of *McDonnell*. Moreover, *McDonnell* requires "official acts" as defined in 18 U.S.C. § 201, and the text of that statute requires that *particular* official acts be identified and proved. Because Mr. Silver was charged and tried on this now-invalid basis, his conviction should be reversed.

A. *McDonnell v. United States*

Prior to *McDonnell*, the "official act" required for liability in honest services fraud and Hobbs Act bribery cases encompassed all "act[s] taken under color of official authority." *Ganim*, 510 F.3d at 142 n.4. As *McDonnell* noted, this expansive definition swept in routine courtesies that "conscientious public officials" perform for citizens "all the time." 136 S. Ct. at 2372. Such a broad conception of bribery liability would "cast a pall of potential prosecution" over any officials who "arrange meetings for constituents, contact other officials on their behalf, [or] include them in events." *Id.* at 2372.

In part to avoid the federalism and vagueness concerns this conception entailed, *McDonnell* looked to 18 U.S.C. § 201 to impose limits on what "official

act" can support a bribery theory of honest services fraud or Hobbs Act extortion. *Id.* at 2368–72. Applying the definition of "official act" in § 201, the Court significantly narrowed the prior conception, holding that an act is "official" only if it is a "decision or action" taken on a "specific and focused" matter that "involves a formal exercise of governmental power." *Id.* at 2372.

The "decision or action" may include an official's use of "his official position to exert pressure on another official to perform an 'official act,'" or his advising "another official, knowing or intending that such advice will form the basis for an 'official act.'" *Id.* But it does *not* include most of the actions commonly undertaken by public officials to benefit constituents—for instance, "[s]etting up a meeting, talking to another official, or organizing an event." *Id.*

B. *McDonnell* Eliminated "Stream of Benefits" Bribery

In three ways, *McDonnell* makes clear that the "stream of benefits" theory of bribery is no longer tenable. Most fundamentally, *McDonnell*'s re-definition of "official act" renders the theory incoherent. As explained above, "stream of benefits" bribery arose in an age when "official act" meant "nearly anything a public official does." *McDonnell*, 136 S. Ct. at 2372. That meant that any agreement to "exercise . . . influence" was the same as an agreement to perform "official acts." *Ganim*, 510 F.3d at 145, 147 (internal quotation marks omitted).

Now, when only a narrow category of things officials do are "official acts," an agreement to provide a stream of indeterminate favors is *not* an agreement to perform "official acts." It therefore does not violate federal bribery law.

A bribery conviction thus requires more than a simple agreement to provide unspecified favors "as specific opportunities arise." *Ganim*, 510 F.3d at 145 (internal citation omitted). It requires that the official agreed to perform *official* acts "involv[ing] a formal exercise of governmental power." *McDonnell*, 136 S. Ct. at 2372. It is impossible to determine whether what the official agreed to do was such a "formal exercise of governmental power" unless the nature of the (allegedly) promised acts was identified at the time of the exchange. An agreement to undertake a stream of unspecified acts therefore does not satisfy the "official act" element of the offense.

Second, *McDonnell* held that the Government must prove an "official act" within the meaning of 18 U.S.C. § 201, and it is clear that the statutory phrase "any official act" in § 201 requires identification of a specific official act at the time of the exchange.[13]

[13] In *McDonnell*, the parties agreed to use § 201 to instruct the jury on the meaning of "official act." 136 S. Ct. at 2365. This Court has since made clear that proving an "official act" under § 201 is mandatory in honest services fraud and Hobbs Act extortion cases. *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017).

Section 201 uses the phrase "any official act" in defining both bribery, in § 201(b), and illegal gratuities—offering or accepting something of value for or because of "any official act"—in § 201(c). And in § 201(c) gratuities cases, the Supreme Court has interpreted "any official act" to foreclose the "stream of benefits" theory, holding that "the insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some *particular* official act be identified and proved." *Sun-Diamond*, 526 U.S. at 406 (emphasis added). The same phrase in the bribery provision, § 201(b), necessarily contains that same requirement. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). Indeed, this Court has confirmed that "bribery as codified [in] 18 U.S.C. § 201" requires that "a specific act to be completed must be identified at the time of the promise." *United States v. Bahel*, 662 F.3d 610, 635 n.6 (2d Cir. 2011).

Furthermore, a § 201(c) illegal gratuity is a lesser-included offense of § 201(b) bribery. *See United States v. Alfisi*, 308 F.3d 144, 146 (2d Cir. 2002). That could not be so if § 201(c) required identification of a specific official act, and § 201(b) did not. *See United States v. LoRusso*, 695 F.2d 45, 52 (2d Cir. 1982).

In short, the "official act" requirement of § 201(b)—which after *McDonnell* is likewise a requirement of honest services fraud and Hobbs Act bribery—requires a specific official act, identified at the time of the alleged promise.

Finally, the *McDonnell* Court described the basic framework of bribery cases in terms incompatible with the "stream of benefits" theory. The Court explained that the prosecutor must "[f]irst . . . *identify*" a "*specific* and *focused*" matter that "may at any time be pending" or "may by law be brought before a public official." *McDonnell*, 136 S. Ct. at 2368, 2372 (internal quotation marks omitted; emphases added). Then, the Government must prove that the official agreed to "t[ake] an action 'on' *that*" matter "at the time of the alleged *quid pro quo*." *Id.* at 2368, 2371 (emphasis added). An official cannot agree to take action on a "specific and focused" matter at the time of the alleged *quid pro quo* unless that matter is *identified* at that time.

"Stream of benefits" bribery accordingly did not survive *McDonnell*. *McDonnell* requires the Government to prove, at a minimum, that—at the time of the alleged *quid pro quo*—the parties identified acts with enough particularity to permit the determination that those agreed-upon acts were "official" in nature.

C. No Rational Jury Could Find that Mr. Silver Agreed to Perform the Official Acts Alleged at the Time of the Alleged Exchanges

The district court's error under *McDonnell* was not merely prejudicial. Had the district court properly refused to give a "stream of benefits" instruction, no reasonable jury could have convicted on the bribery counts.

A defendant is entitled to judgment of acquittal if "no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States*

v. Cassese, 428 F.3d 92, 98 (2d Cir. 2005) (internal quotation marks omitted). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *Id.* (internal quotation marks omitted). Under this standard, Mr. Silver is entitled to a judgment of acquittal.

1. Asbestos Charges

The Government has argued that its case survives, even if "stream of benefits" bribery does not, because there was "overwhelming" evidence Mr. Silver agreed to provide Dr. Taub with HCRA research grants in 2005 and 2006 in exchange for referrals. JA-2135. That assertion of "overwhelming" evidence is incorrect, but more importantly it is irrelevant: The Government was required to prove an exchange of benefits for official acts *within the limitations period*—i.e., after February 19, 2010. The last research grant was provided in 2006, and it is undisputed both that Mr. Silver made clear to Dr. Taub in 2007 that there would be no more grants, and that in fact Dr. Taub never received any further funding. JA500/316. No rational jury could conclude that any agreement to exchange referrals for state grants existed after 2007.

The Government's reliance on this untimely conduct highlights the complete inadequacy of its proof of any crime within the limitations period. The

Government identified only three, plainly inadequate, acts within that period: (1) recommending Dr. Taub's son Jonathan to OHEL; (2) offering to help "navigate the process" for a "Miles for Meso" race; and (3) sponsoring the Assembly resolution and proclamation.[14] A rational jury could not conclude that any of these was an agreed-upon "official act" in exchange for referrals.

Recommendation. Even if there had been evidence that Dr. Taub and Mr. Silver agreed that Mr. Silver would recommend Jonathan Taub for a job in exchange for referrals—and there was none—merely recommending someone for a job is not "a formal exercise of government power" under *McDonnell*, and the Government does not appear to contend otherwise. SA-0044/1888.

"Miles for Meso." Likewise, no rational jury could find that Mr. Silver agreed to perform an official act in connection with Dr. Taub's proposed "Miles for Meso" race, as the Government's evidence made clear that Mr. Silver offered nothing but advice: He met with Dr. Taub and the other organizers—precisely the type of courtesy that *McDonnell* establishes is not an official act. 136 S. Ct. at 2372. And he then sent Dr. Taub a short letter explaining that the organizers would have to obtain a permit from the mayor's office or the local police precinct,

[14] The unpaid internship recommendation for Aimee Bandler and the grant to the Shalom Task Force—in addition to their other inadequacies—occurred outside the limitations period. *Silver*, 864 F.3d at 120.

advising Dr. Taub to be ready to discuss the race with the local community board, and offering to have his staff "help . . . navigate this process if needed." JA-1774. Explaining how to obtain a permit for a charity race is not even arguably the kind of "formal exercise of governmental power" necessary to establish a violation of federal law. *McDonnell*, 136 S. Ct. at 2372.[15]

Resolution and Proclamation. Sponsoring the resolution and proclamation (though "*de minimis*" and "perfunctory" in nature) was an official act. *Silver*, 864 F.3d at 121. But no rational jury could find that this paltry act was the subject of any *quid pro quo* exchange with Dr. Taub. Dr. Taub did not even know about the resolution and proclamation until they were presented to him, let alone agree to provide Mr. Silver with referrals to obtain it. JA-0517/383. Indeed, *the Government's own theory* was that Mr. Silver decided to sponsor them "at the last minute"—for Dr. Taub and his two co-honorees—after learning that Dr. Taub was to be honored at an American Cancer Society event sponsored by a law firm that competed with Weitz & Luxenberg. SA-0049/1909.

2. Real Estate Charges

The real estate charges fare no better. Mr. Silver's opposition to the methadone clinic and his meeting with Glenwood representatives were clearly not

[15] Here, too, of course, there was no evidence that Dr. Taub and Mr. Silver agreed to an exchange of referrals for this advice.

official acts, as the Government acknowledges. SA-0053/1923–24. That leaves (1) PACB approvals and (2) the Rent Act of 2011.

PACB Approvals. No rational jury could find that Mr. Silver agreed to trade PACB votes for tax certiorari business, for multiple reasons. To begin, there was no evidence that either Glenwood or Witkoff drew any connection between the tax certiorari business they sent to Jay Goldberg and any PACB approvals, let alone that they provided the business to Goldberg in exchange for those rubber-stamp approvals or had any understanding with Mr. Silver about them. Mr. Meara of Glenwood testified that Glenwood sent tax certiorari business to Goldberg at Jay Arthur Goldberg's request, *not* Mr. Silver's, JA-0727–28/950–52, and Glenwood did not learn that Mr. Silver was earning fees from the work until December 2012, *fifteen years* after it started using the firm. JA-0757/977. No reasonable jury could conclude that Glenwood employed Goldberg in exchange for PACB approvals.

What is more, no reasonable jury could conclude that the PACB votes were official acts undertaken *by Mr. Silver*. Although Mr. Silver technically had a PACB seat, he sent a designee to meetings. JA-0921/1489. There was no evidence that Mr. Silver so much as spoke with his designee about Glenwood approvals—still less that he "exerted pressure" on the designee or provided "advice" intended to form the basis of his vote. *McDonnell*, 136 S. Ct. at 2372.

In any event, PACB approvals were so perfunctory that the Government's own witness could not recall *any* tax-exempt financing being denied at any point in the last forty years, JA-0926/1507, making it utterly implausible that a developer would have paid bribes to obtain PACB approvals. And the record is of course barren of evidence that any such thing happened.

Rent Act of 2011. Nor could any rational jury conclude beyond a reasonable doubt that tax certiorari work was provided in exchange for Mr. Silver's Rent Act vote, or vice versa. Again, at the time the Act was passed, Glenwood and Witkoff were not even aware that Mr. Silver was receiving fees for the work, and they had been providing such work to Goldberg for years, making the notion that the work was provided in exchange for the Rent Act vote particularly implausible. Nor was there evidence that they ever discussed such an exchange with Mr. Silver—the witnesses uniformly denied any such discussion or agreement—or even that Mr. Silver voted in accordance with the developers' preferences. Indeed, renewal of 421-a—the sole provision in the Rent Act identified as favorable to Glenwood—was, according to Government witnesses, inevitable, and Glenwood disfavored a number of pro-tenant provisions in the Act. The testimony was that Mr. Silver voted against Glenwood's interests "almost without exception." JA-0872–74/1292–98.

To be sure, Mr. Silver performed an official act—voting on the Rent Act—that affected developers whose tax certiorari work had long been a source of income for him. Some might view that as a conflict of interest—albeit of a sort that is inevitable when legislators may earn outside income from a variety of clients—but conflicts of interest do not violate federal anticorruption law. *Skilling*, 561 U.S. at 408–09. What does violate the law is provision of a benefit *in exchange for* the official act, and there was no evidence of that.

In sum, there was no evidence from which a rational jury could have concluded—let alone beyond a reasonable doubt—that within the limitations period there was any *quid pro quo* with Dr. Taub or the developers to refer legal work in exchange for any official act by Mr. Silver. *McDonnell* requires reversal.

III. *McDonnell* Requires Reversal Even if "Stream of Benefits" Bribery Survives

McDonnell requires reversal even if "stream of benefits" bribery survives.

Under *McDonnell*, at least two things are required in any "stream of benefits" case. First, the evidence must be sufficient to show a stream specific to *official acts*, not mere undifferentiated favors. Failing to rigorously enforce this requirement would contravene *McDonnell*'s basic directive that politicians who perform routine courtesies for constituents should not do so under a "pall of potential prosecution." *McDonnell*, 136 S. Ct. at 2372.

Second, the official must agree to provide the stream of official acts *at the time of the alleged quid pro quo*, not later. *McDonnell*, 136 S. Ct. at 2371 (emphasis added). Failing to rigorously enforce *this* requirement would make a criminal of every politician who has ever deliberately favored a benefactor (*i.e.*, every politician).

Taken together, these requirements require reversal on all bribery charges.

A. Asbestos Charges

On the asbestos charges, as explained in Point II.C.1, *supra*, no rational jury could conclude that Mr. Silver agreed to perform any particular official act within the limitations period. Nor could a rational jury conclude, based on conduct occurring within the limitations period, that Mr. Silver agreed to provide a *stream* of official acts at the time of any exchange. The sole timely official act—sponsoring the resolution and proclamation—was a spur-of-the-moment decision. SA-0049/1909.

Instead, the Government's case hangs on the notion that Mr. Silver participated in one overarching scheme to perform a stream of official acts in exchange for referrals, beginning at the time of the HCRA grants and continuing into the limitations period. SA-0035/2063 (jury instruction that Mr. Silver could be convicted if "any aspect" of the alleged crimes occurred after February 19,

2010); SA-0049/1907 ("It was all part of a criminal scheme that spanned over a decade."). But this theory is untenable.

As an initial matter, there was no direct evidence that Mr. Silver agreed to perform a stream of official acts in exchange for referrals; instead, the Government seeks to infer such an agreement from Mr. Silver's performance of official acts in the form of the research grants in 2005 and 2006. Even on its own terms, that inference is questionable: Nothing about the specific official acts of approving the research grants suggests—let alone could prove beyond a reasonable doubt—that Mr. Silver was agreeing to provide a stream of other, unidentified formal exercises of governmental power to Dr. Taub. But in any event, Mr. Silver definitively ended the grants in 2007, and there is no evidence from which a rational jury could find a scheme to exchange benefits for official acts that continued into the limitations period.

In particular, even if a scheme could be inferred entirely from conduct—without any evidence of what Mr. Silver agreed to (indeed, in the face of uniform testimony that there was no agreement)—the elephant in the room is that the relevant conduct during the limitations period *involved no meaningful official acts at all*. As discussed earlier, the only conduct within the limitations period was (1) a letter of recommendation, (2) advice about the permitting process for a charity event, and (3) a last-minute ceremonial resolution and proclamation. On this

record, whatever may have been the case in 2006, it is impossible to conclude that there was an ongoing agreement to undertake *official acts* for Dr. Taub's benefit.

In particular, even if these minor courtesies could be seen as supporting a conclusion that Mr. Silver had agreed to provide an ongoing stream of undifferentiated favors like recommendation letters and advice,[16] such courtesies are not official acts under *McDonnell*. Absent an ongoing agreement to exchange *official* acts for referrals, there is no valid basis for a conviction.

"[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *Cassese*, 428 F.3d at 99. On the asbestos charges, the evidence provides *more* support for a theory of innocence than a theory of guilt. Mr. Silver is entitled to a judgment of acquittal.

B. Real Estate Charges

On the real estate charges, as explained in Point II.C.2, *supra*, the evidence is insufficient to show that Mr. Silver agreed to particular official acts. It is

[16] To be clear, the evidence is much more consistent with Dr. Taub's testimony that there was no agreement to any *quid pro quo*, but rather his referrals created a "relationship" with Mr. Silver, and Mr. Silver later did him favors because that relationship existed. JA-0490/276. But in any event an agreement to provide courtesies that are not "official acts" under *McDonnell* is not unlawful.

likewise insufficient to show that he agreed—at the time of the alleged exchanges—to provide a stream of official acts.

There was no testimony that either Mr. Silver or the developers contemplated the performance of *any* acts, let alone official ones, at the time the developers sent legal work to Mr. Goldberg. Rather, the evidence (such as it was) that Mr. Silver agreed to perform a stream of official acts amounted essentially to this: (1) Mr. Silver was receiving money from the developers during the same period as the PACB approvals and renewal of 421-a in the Rent Act; (2) he performed two *non*-official acts benefiting Glenwood during this time frame; and (3) he did not tell anyone about the money. *See* JA-0326–28.

But simply showing that the PACB approvals and 421-a renewal occurred is not the same as showing that the developers' tax certiorari work was sent to Goldberg in exchange for those things, as *McDonnell* requires. And there was no evidence to support the conclusion that there was any exchange. The developers' use of Goldberg's services for many years without even being aware that Mr. Silver was receiving fees makes the notion that they agreed to provide the business in exchange for official action by Silver particularly implausible. Nothing in the record provides any reasonable basis to conclude that this was a *quid pro quo* exchange.

Nor does it avail the Government anything to point to the two *non*-official acts. The Government argued that Mr. Silver's opposition to the methadone clinic demonstrated guilt because it proved that Glenwood "could call up Sheldon Silver to ask for help." SA-0053/1923. But even the Government described Mr. Silver's presumed action on the clinic as a simple "constituent service[ ]"—the kind of routine favor any Assembly member could be expected to take on behalf of district residents who "call up." JA-0822/1235; SA-0053/1923.

The Government also points to the Glenwood meeting prior to the Rent Act vote, which it bills as "devastating proof of the corrupt relationship between Silver and Glenwood." SA-0056/1934. But even if Glenwood obtained that access by sending work to Goldberg—doubtful, since Glenwood did not then know that its work benefited Mr. Silver—"[i]ngratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. Standing alone, the meeting is innocuous. And it is not made otherwise by the legislation that followed it, which did not suggest corruption either. The Rent Act renewed a provision (421-a) that was virtually certain to be renewed in any case, and was otherwise unfavorable to Glenwood. JA-0727/949–50; JA-0872/1292–94.

Finally, as explained in Point II.C, *supra*, that Mr. Silver did not disclose the fact he was receiving money from Glenwood and Witkoff does nothing remedy the absence of proof of an agreement to exchange benefits for official acts. It is easy

to see why he would not want it publicly known that he received gifts motivated in part by his public office—conduct that may not win any good government awards, but comes nowhere near federal bribery.

Whether or not it permits a "stream of benefits" theory of bribery, *McDonnell* requires reversal of the bribery counts.

IV. If the Honest Services Fraud and Hobbs Act Counts Are Vacated or Reversed, the Money Laundering Count Must Be Vacated or Reversed

Mr. Silver was convicted of money laundering under 18 U.S.C. § 1957, which "prohibits engaging in monetary transactions in property 'derived from specified unlawful activity.'" *Silver*, 864 F.3d at 124 (quoting 18 U.S.C. § 1957). The "specified unlawful activity" is the conduct charged in the honest services fraud and Hobbs Act extortion counts. If those convictions are reversed or vacated, the money laundering conviction must be reversed or vacated, as the case may be, as well.[17] *Id.*

CONCLUSION

For the foregoing reasons, this Court should, at a minimum, vacate the judgment and remand for a new trial.

[17] In Mr. Silver's first appeal, this Court rejected his argument that there must be "trac[ing of] criminally derived proceeds when they have been commingled with funds from legitimate sources." *Silver*, 864 F.3d at 114–15. Mr. Silver respectfully preserves that issue for further review.

Dated: New York, NY
October 26, 2016

/s/ Meir Feder

Meir Feder
Samidh Guha
James Loonam
Conor Reardon
JONES DAY
250 Vesey Street
New York, NY 10281
Telephone: 212-326-3939
Facsimile: 212-755-7306

Attorneys for Defendant-Appellant Sheldon Silver

CERTIFICATE OF COMPLIANCE

1. The undersigned counsel of record for Defendant-Appellant certifies pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 13,816 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface in fourteen-point type.

/s/ Meir Feder
Meir Feder

Dated: October 26, 2016