Shapiro Arato Bach LLP

500 Fifth Avenue, 40th Floor New York, NY 10110
phone: 212-257-4880 | fax: 212-202-6417
www.shapiroarato.com

Alexandra A.E. Shapiro
ashapiro@shapiroarato.com
Direct: 212-257-4881

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VIA ECF

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *United States v. Skelos*, Nos. 18-3421(L), 18-3442(CON)

Dear Ms. Wolfe:

Appellants jointly submit this brief reply to the government's supplemental brief.

A. The Government Mischaracterizes The Harmlessness Standard

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court unambiguously held: "[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," a court "should not find the error harmless." *Id.* at 19. "[I]n typical appellate-court fashion," the court "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id*.

The government knows it cannot win under *Neder*'s test. After all, Dean Skelos testified—not just plausibly but believably and truthfully—that he would have supported 421-a and the PRI extenders regardless of any benefits to Adam, and there was ample other evidence to support the defense theory. (DS.Supp.3). Thus, the government does not even attempt to argue that the convictions can be upheld if the *Neder* standard is applied. Unable to win under *Neder*, the government instead argues for a different legal standard of harmlessness. In doing so, it concedes that even in *Silver II*, there was "sufficient evidence to support a contrary theory [of

innocence]." (G.Supp.10-11). Thus, on the government's own reading of the evidence, *Neder* would have required vacatur had Silver brought it to the panel's attention (which he did not). Here, in part due to Skelos's testimony, the defense case was stronger and better supported than it was in *Silver II*. By the government's own admission then, if correctly applied, *Neder* requires vacatur here as well.

And the government's attempt to avoid *Neder* does not withstand the barest scrutiny. Relying on pre-*Neder* law, it says this Court should "determine if a rational jury, absent the error, would have arrived at the same verdict." (G.Supp.3) (quoting *Peck v. United States*, 106 F.3d 450, 455 (2d Cir. 1997)). It argues that the critical language in *Neder* was something like dicta, "merely descriptive of the particular facts of that case." (G.Supp.4).

That is utter nonsense. Four justices in *Neder* believed that failure to submit an element should be structural error, due to the "distinctive character of this constitutional violation." 527 U.S. at 32 (Scalia, J., dissenting in part); *see id.* at 26-27 (Stevens, J., concurring in part). The narrow majority did not dispute that distinctive character, but held that the failure to submit an element could be harmless if the element was undisputed. The "uncontroverted" and "uncontested" language was not merely describing the facts of that case. It was the majority's holding about how courts should handle the failure to submit an element to a jury. The government cannot dispute that *Neder* was establishing a rule of decision when it unequivocally held that a court "should not find the error harmless" if a rational, properly instructed jury could acquit. *Id.* at 19.

Lower courts have quoted and applied the *Neder* standard literally hundreds or perhaps thousands of times. Although the government claims *Jackson* correctly interprets *Neder*, it does not dispute that this Court said otherwise in *Monsanto*, or that *Jackson* flagrantly misquotes

Neder. (G.Supp.4; *see* AS.Supp.2). And while the government insists that *Jackson* is binding, it is unable to refute that *McDonnell* squarely abrogated *Jackson*, and that other binding decisions like *Quattrone*, *Newman*, and *Silver I* applied *Neder*, not *Jackson*. (*See* AS.Supp.3-4). *See also* *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (citing *Neder*, stating that "the failure to submit an uncontested element of an offense to a jury may be harmless"). *Neder* controls here.[1]

B. The Government Cannot Prove Harmlessness

1. The government repeats its argument that the *gratuity* verdict suggests that when considering *bribery*, "the jury convicted based on a 'specific official act,' not an open-ended promise." (G.Supp.4-5). But we already refuted this contention, which ignores that the jury did not have to find a *quid pro quo* to convict for gratuities. (DS.Reply.14-15). And the government has no response. The jury could easily have found that Skelos accepted gratuities for specific past acts, but only agreed to provide open-ended assistance in the future, which is insufficient to support bribery convictions under *Silver II*. Indeed, that is why the government specifically argues that the harmlessness standard does not require it to show that the jury found the functional equivalent of the omitted element. (G.Supp.3 n.4).

2. The error cannot be harmless because the government repeatedly intertwined valid theories with invalid ones in its summations and urged the jury to convict on both. (DS.Supp.3-5, 7-8). Out of the several examples—which we urge the Court to read—the government attacks only two, conceding the others. (G.Supp.9). Each of the others was an invitation to reach an invalid verdict, which the jury could well have accepted. Regardless, the two examples

[1] This panel may either overrule *Jackson* in a "mini-*en banc*" or on its own, based on *McDonnell*. *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378-79 (2d Cir. 2016); *accord* *Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003) (noting these options for *Jackson*).

addressed by the government are ambiguous, and the jury could have interpreted them as we do.[2]

3. The government ignores the myriad ways in which Dorego and Bonomo's testimony could have led to invalid convictions. (DS.Supp.4-7). It downplays the testimony as going only to "the *victim's* fear," rather than "*Dean Skelos's* state of mind." (G.Supp.10). But it sang a different tune in summations, arguing that the "testimony doesn't just show you what [the victims] intended"—"[i]t is also powerful evidence of the defendants' intent," because "[w]hen one person pays another person there is typically an agreement about what they are paying for." (A6597). If the "victims" did not believe a specific matter was implicated, why would Skelos?

4. The government's analysis of each "scheme" is riddled with holes. To name just a few: The government gives a breathless, date-by-date recitation of the lead-up to the Rent Act (G.Supp.6), then switches to fuzzy imprecision for the aftermath (G.Supp.7) to obscure that Adam got nothing from Glenwood for 18 months (DS.Supp.5). It also claims that Glenwood "promised" Adam a job before the vote, which is false. (G.Supp.11; DS.Supp.5 n.4). As to PRI, the government's newfound laser focus on the extenders (G.Supp.7-8) conveniently ignores the "other pieces of legislation" that both it and Bonomo lumped together as PRI's "legislative pursuits." (DS.Supp.6-7). While the government argues there was "abundant evidence" that Adam knew Glenwood and PRI's legislative interests, its citations merely show that Adam and Dean talked, occasionally about politics. (G.Supp.12). As to AbTech, the government argues that Skelos took all of his official acts on a single overarching "matter"—the "Nassau County

[2] In the first, the government argued that AbTech, Glenwood, and PRI *all* needed "official action," which it did not specify, "as the opportunities presented them[selves]." (A6887-88). It then said that Glenwood and PRI "in particular" were good "targets" because of the recurring extenders. (A6888). But AbTech, of course, had no such extenders. In the second example, the government said "that's an illegal quid pro quo right there" *immediately* after emphasizing Dorego's vague testimony about his fears. (A6596-97). Notably, it did precisely the same thing in the course of emphasizing Bonomo's testimony about unspecified legislation. (A6675-76).

contract" (G.Supp.8-9)—but this is both wrong[3] and irrelevant. The government did not rely solely on the "official acts it identified" in summation (G.Supp.8); it also urged the jury to convict for "little things" that were *not* official acts but supposedly proved an open-ended agreement to help AbTech. (DS.Supp.8).[4]

5. Finally, the government's reliance on *Silver II* (G.Supp.5-6, 10) is misplaced for several reasons. (DS.Supp.5-6). Most significantly, on "as opportunities arise," (1) the parties did not brief harmlessness at all because Silver argued sufficiency instead (AS.Supp.3 n.2), and (2) the parties did not brief harmlessness under *Silver II*'s "specified matter" rule, because Silver advocated for a more stringent rule (agreement on a specified *act*), *see United States v. Silver*, 948 F.3d 538, 552-53 (2d Cir. 2020). This Court should not accept the government's invitation to extrapolate from a portion of the opinion "not refined by the fires of adversary presentation." *United States v. Crawley*, 837 F.2d 291, 293 (7th Cir. 1988).

For these reasons and those in their prior briefs, the Skeloses are entitled to a new trial.

Respectfully submitted,

/s/ Alexandra A.E. Shapiro

Alexandra A.E. Shapiro

cc: All Counsel (via ECF)

[3] Voting for budget legislation, for example, is plainly an official "action *on*" the legislation, not on the contract; the contract is not the official "matter." *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (quotation marks omitted).

[4] Separately, while the government notes that "Skelos had no reason to take action on a county contract for an Arizona-based company other than the fact it was paying his son" (G.Supp.11), it fails to realize that Skelos could have helped Adam's employer for reasons of non-criminal "self-dealing" rather than "bribery." *Skilling v. United States*, 561 U.S. 358, 409-10 (2010).