UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

- v. -

Dean Skelos and Adam Skelos,

Defendants.

S1 15 Cr. 317 (KMW)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO CONTINUE BAIL AND STAY FINANCIAL PENALTIES PENDING APPEAL

Alexandra A.E. Shapiro
Shapiro Arato LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

G. Robert Gage, Jr.
Joseph B. Evans
Gage Spencer & Fleming LLP
410 Park Avenue, Suite 900
New York, New York 10022
(212) 768-4900

Attorneys for Dean Skelos

Christopher P. Conniff
Ropes & Gray LLP
1211 Avenue of the Americas
New York, New York 10036
(212) 596-9000

Attorneys for Adam Skelos

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INTRODUCTION

The only question before this Court is whether Dean and Adam Skelos should remain at liberty while the Second Circuit decides whether their convictions are valid. The Court need not decide whether their convictions should be reversed, or even whether reversal is the most likely outcome on appeal. Bail depends on a much simpler question: does the appeal present a "substantial question"? The answer is plainly yes, as the government's lengthy opposition brief itself illustrates. In fact, the *McDonnell* issue is so substantial the government felt it needed 42 pages to respond to defendants' 17-page motion.

The substance of the opposition, like its form, confirms that the principal issue on appeal is obviously substantial. The government resorts to distortions of the trial record and the case law to avoid the consequences of *McDonnell*—precisely because it has no persuasive response.

The government strains to rewrite the trial record. It pretends that defendants did not preserve their objection and that its theory at trial (and the defense's response) was laser-focused on legislation. The record tells a different story. At the charge conference the prosecutor told the Court one of the "main things" in dispute was the "definition of official action," and the Court acknowledged that "I understand the [defense's] objection and again overrule it." Likewise, the government opted to maximize its chance for a conviction even if the jury didn't buy its legislation theory, playing the broad official act instruction to the hilt. It urged the jury to disregard the "argument that the defendants have made throughout this trial about official action that completely ignores the law," and repeatedly argued that merely meeting with lobbyists or arranging meetings with, or contacting, other government officials was official action.

The government's legal arguments about the *McDonnell* error are equally strained. It trots out the usual boilerplate about considering the charge "as a whole," but none of the other

parts of the charge that the government relies upon addresses the critical issue—what counts as an official act. And the government paints the Supreme Court's unanimous decision in *McDonnell* as a virtual non-event, when in fact it plainly represents a much narrower interpretation of the federal corruption statutes than the previously prevailing law in this Circuit.

The government spends the bulk of its opposition re-hashing its spin on the facts, and previewing its position on why the evidence is sufficient under *McDonnell*. We obviously disagree, but that dispute is irrelevant at this juncture, as the only issue is bail. The government takes us to task for supposedly ignoring the facts, but what it fails to address is far more pertinent to bail: the unbroken line of controlling authority holding that a new trial is required when a jury was presented with two alternative theories of guilt, and one is legally invalid. The government cannot escape its own words, and its repeated use of the erroneous instruction in closing, or the case law requiring a new trial in these circumstances.

At a minimum, the Supreme Court's unanimous intervening decision in *McDonnell* presents a substantial issue that, if resolved in defendants' favor, will likely result in a new trial on all counts. That is all the statute requires defendants to show. The Court should grant bail pending appeal and stay the financial penalties.[1]

ARGUMENT

1. *The bail standard.* As a preliminary matter, the government apparently agrees that the sole issue is whether there is a substantial question on appeal, and that a "close" or "debatable" issue is substantial. (Opp. at 18-19). It wrongly suggests, however, that at this stage there is a "presumption in favor of detention," quoting *United States v. Abuhamra*, 389 F.3d 309,

[1] The government apparently concedes that if the Court finds a substantial question a stay of the fine and forfeiture order would be warranted. (Opp. at 42 n.8).

319 (2d Cir. 2004). There is no such presumption in cases like this, where all agree the defendants pose no risk of flight or danger. *Abuhamra* involved a dispute about whether a defendant released on conditions before trial should be remanded after the guilty verdict because he posed a flight and danger risk. The Court held that a different provision of the bail statute, 18 U.S.C. § 3143(a), creates a presumption in favor of detention after a guilty verdict, but if the defendant rebuts it "with clear and convincing evidence that he is not a risk of flight or a danger to any person or the community," as is undisputed here, the "statute establishes a right to liberty that is not simply discretionary but mandatory." 389 F.3d at 319. In other words, here the statute *requires release* pending appeal if the appeal presents a substantial question.

2. *Defendants preserved their objection*. The government contends that defendants' objection to the official act instruction, which they made in the joint requests to charge and repeated at the charge conference, was unpreserved because they incorporated arguments they had made in the motion to dismiss and did not propose any specific alternative language. (Opp. at 21 & n.3). This is frivolous, and borders on disingenuous.

The objection plainly preserved the issue under the governing law. Federal Rule of Criminal Procedure 30(d) requires only that "[a] party who objects to any portion of the instructions . . . must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." *See also United States v. Hassan*, 578 F.3d 108, 129 (2d Cir. 2008) (defendant preserved objection to jury instruction because he "made it clear to the trial court" that he objected to the charge and the basis for his objection, even though he did not propose alternative language); *United States v. Masotto*, 73 F.3d 1233, 1238 (2d Cir. 1996) (defendant's reference to Supreme Court decision in his objection was "sufficient to direct the district court to his contention" and thus preserve his objection, even though he did not

specifically object to the absence of the language at issue). Indeed, the government concedes that Rule 30(d) "does not specifically require that a defendant propose alternative language to preserve an objection." (Opp. at 21 n.3) (citing *Hassan*, 578 F.3d at 129).

The objection and the grounds for it were quite specific. In their motion to dismiss, defendants argued, *inter alia*, that:

- the term "official acts" should be read narrowly;
- the two AbTech-related counts should be dismissed because the government "conceded it would no longer be arguing" that Senator Skelos had taken "specific legislative action to ensure that Nassau County could fund" the AbTech contract;
- "not every action taken by a public official, even in his or her official capacity constitutes an 'official action'";
- "merely provid[ing] access" is not official action; that official action must be a "'decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity'";
- "merely arranging meetings, consulting with constituents and other private citizens, and monitoring the status of a project" "do not involve a 'decision or action'" and thus "fall outside the realm of 'official acts'"; and
- a broader definition would violate the Constitution.

(Dkt. 21 at 1-3, 10-14 (citing, among other authorities, *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Skilling v. United States*, 561 U.S. 358 (2010); and 18 U.S.C. § 201)).

At the outset of the charge conference the government advised the Court that one of the two "main" issues in dispute was "the definition of official action, which we have . . . proposed consistent with your Honor's decision earlier in this case" and that defense counsel had "noted their objection" to the government's proposed definition. (Tr. 2127:13-16, 2129:2-12 (referring

to Dkt. 59 at 76)).[2] The Court then asked if defense counsel "have anything you wish to add to the objection you made earlier regarding the motion to dismiss and my ruling then on the definition of official act." (Tr. 2129:13-15). Mr. Conniff responded, "we're preserving that issue that your Honor ruled on. That was the nature of the objection that we had . . . ." (*Id.*:16-18). The Court responded: "Thank you. *I understand the objection and again overrule it*." (*Id.*: 19-20 (emphasis added)).

Thus, the "specific" grounds for the objection were those set forth in the motion, which relied on some of the same authorities that the Supreme Court cited in *McDonnell*, and the Court plainly understood the nature of the objection. Nothing more is required. *See Masotto*, 73 F.3d at 1237-38 (under Rule 30, the objection must merely "direct the trial court's attention" to the defendant's argument so that the court can "correct any error in the jury instructions"); *United States v. Dinome*, 86 F.3d 277, 282 (2d Cir. 1996) (where the court had already rejected defendant's legal arguments, "[i]t would have been superfluous . . . for counsel to have specified the particulars in which the court's instructions diverged from counsel's view of the governing law").

3. *The instruction is erroneous under* McDonnell. As explained in the Motion, the instruction defining official action for purposes of all counts was virtually identical to—and indeed broader than—the instruction the Supreme Court unanimously found fatally overbroad in *McDonnell*. (*See* Motion at 3-9 & n.3). There is no credible way around this; the instruction cannot be salvaged. The government cannot spin a silk purse out of a sow's ear.

[2] In the Joint Requests to Charge, defendants stated that they "recognize the ruling by Your Honor regarding the motion to dismiss, and, specifically, the Court's ruling on the definition of an official act. The defendants respectfully maintain their objection to this charge related to the definition of an official act for the reasons set forth in their motion to dismiss." (Dkt. 59 at 76).

First, the government suggests that the Motion somehow takes the erroneous language out of context, but it is the government that cobbles together unrelated snippets of charge language that is irrelevant to the *McDonnell* issue. The language defendants challenge is not an "incomplete quotation." (Opp. at 1). The Motion quotes the *entire* definition of "official act" (*see* Motion at 4), and this is the only definition of "official act" *anywhere* in the jury instructions. The Court cross-referenced this definition at other points in the charge and made clear that this was the definition the jury should apply for all the Counts. (Tr. 2754:11-17, 2767:19-2768:9, 2770:6-2772:13, 2778:1-13, 2780:3-2783:14, 2793:8-2795:12, 2798:9-18).

Second, the Court's language "on the concept of influence" cannot save the charge. (Opp. at 24-25). To begin with, instructions such as, "[t]he official action can either be actually performing an act himself, or exerting influence over an act performed by another person" (Opp. at 25 (quoting Tr. 2783); *id.* at 24-25 (quoting other similar language)), cannot be reconciled with *McDonnell*. The Supreme Court mentioned exerting "pressure," but specifically rejected as "significantly overinclusive" an instruction that "official action" can include "a series of steps to exercise *influence* or achieve an end." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (emphasis added).[3] In addition, the government's reliance on the instruction about "exerting influence over an act performed by another person" merely begs the question. The issue is what types of "acts" count—not whether they are performed by the public official himself, or through influence over another public official's acts. Instructing the jury that exerting "influence" over

[3] Similar to the charge given here, the *McDonnell* jury charge also instructed that it is enough if "the alleged bribe payor reasonably believes that the public official had *influence*, power or authority over a means to the end sought by the bribe payor." (Shapiro Decl. Ex. A at 6103:7-10 (emphasis added)). But, contrary to the government's arguments (Opp. at 24), the Supreme Court did not find that this language adequately communicated *McDonnell*'s core concepts or otherwise saved the charge's defective definition of "official action."

another official's act does not solve the problem when the jury has been given a definition so overbroad that the "act" by the second official could encompass merely participating in, or arranging, meetings (as was the case with the Department of Health ("DOH")).

The Court's instruction that Senator Skelos must have "exercise[d] official influence or decision making" (Opp. at 25 (quoting Tr. 2781)), does not help the government either. This instruction did absolutely nothing to inform the jury that arranging or attending meetings *did not qualify* as "influence or decision making." And it is mystifying that the government cites instructions concerning whether Mr. Skelos himself was "influenced" by bribe payments. (Opp. at 24-25 (quoting Tr. 2791, 2792)). Whether payments "influenced" Mr. Skelos is a completely separate question from the type of "influence" Mr. Skelos supposedly wielded as a result.[4]

Third, it is simply not credible for the government now to maintain that language about *other* issues somehow transformed the broad and unqualified instruction on "official acts"—which encompassed "*any* act taken under color of official authority," regardless of whether it was "described in any law, rule, or job description," and included *all* "acts customarily performed" by such an official—into a much narrower definition that comports with *McDonnell*. The government's post-*McDonnell* spin is irreconcilable with its own prior statements—both to the Court when insisting on the erroneous language, and to the jury in its closing arguments.

The government previously told the Court that the language it now grudgingly admits is "similar to the instructions found to be incomplete in *McDonnell*" (Opp. at 23) was necessary

[4] Nor does the "goodwill" instruction (*see* Opp. at 26) help the government. An instruction that the government had to prove the payments were made for "official action" rather than mere "goodwill" nevertheless violates *McDonnell* where, as here, "official action" is defined so that it includes arranging and attending meetings. Perhaps the government wishes that "goodwill" meant the same thing as "meetings," but that is not what the Court said, and it is certainly not what the government argued.

because "official acts" is a very broad term and *can* encompass meetings. *See* Gov't Opp. to Mot. to Dismiss, Dkt. 27 at 26 & n.9 (describing facts of *McDonnell* and arguing that "as the Fourth Circuit has explained, . . . official action includes settled practices of public officials, which include 'speaking with aides and arranging meetings'"); *id.* at 32 (arguing that the indictment alleged "official acts" because in "striking resemblance to the facts of *McDonnell*," Senator Skelos "direct[ed] members of his staff to arrange a meeting between [AbTech] and the Department of Health," and "it is a settled practice of State legislators to assist private parties in obtaining meetings with Executive agencies"); *id.* at 33 ("Dean Skelos's conduct in setting up a meeting between [AbTech] and the Department of Health meets any definition of official action. Using his senior staff to set up the meeting with a State agency shows his conduct was 'under color of official authority,' which is the applicable standard in this Circuit . . . ."). And the government repeatedly, and emphatically, told the jury that under the Court's instruction, Senator Skelos' arrangement of the meeting between AbTech and the DOH was "devastating, devastating evidence" of official action, and that every meeting he had with lobbyists was official action as well. (Motion at 10-11; *see also infra* at 12-18 (quoting extensively from government's jury arguments)).

Fourth, the government's efforts to contrast the facts of this case to those in *McDonnell* ring hollow. Contrary to the government's glib assertions about what each case "was about" (Opp. at 26), *both* cases involved some official actions that pass muster under the Supreme Court's standard, and others that plainly do not.[5] The government in *McDonnell* did not

[5] The government's assertion is particularly disingenuous given that, in its rebuttal in this case, the government emphasized to the jury that "*[t]his is a case about each and every one of those pieces of official action that the senator gave*," including "setting up the meetings" and "calling the county." (Tr. 2700:6-10 (emphasis added)).

characterize the Governor's actions as "routine courtesies," and it certainly argued that he had "exercised governmental power" in exchange for payment. (Opp. at 26). The government's principal theory at trial was that Governor McDonnell solicited and accepted payments from Jonnie Williams in exchange for efforts to pressure other state officials to conduct medical studies of Williams' product and add it to the state health plan. *See, e.g.*, Brief for United States, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 1358962, at *41-47. Indeed, the Supreme Court noted that the jury could have found that Governor McDonnell "agreed to exert pressure on [other] officials." *McDonnell*, 136 S. Ct. at 2374-75.

Furthermore, the government's claim that its presentation "overwhelmingly focused" on legislation, and that the defense "focused entirely" on the lack of a quid pro quo (Opp. at 26), is belied by the record—including its own repeated admonition to the jury to ignore defense arguments about meetings and mere contacts with other officials. (*See* Tr. 2487:12-14 ("Now, there's a related argument that the defendants have made throughout this trial about official action that completely ignores the law."); 2487:25-2488:3 ("So the defense wants you to think that things like setting up meetings . . . don't really count as official actions. It's just wrong. Flat wrong. An attempt to distract you."); 2615:12-22 (defense arguing that when Bjornulf White attended a meeting "in Senator Skelos' office," it was "an unremarkable conversation" without any promise of legislation, so "nothing inappropriate happen[ed]"); 2623:5-2624:3 (defense arguing that the "Department of Health meeting" was completely "appropriate," and "nothing improper occurred"); 2699:20-2700:2 (government arguing that the defense was trying to "get you to focus specifically on yes or no votes on legislation. . . . As you'll hear in the instructions, official acts runs the whole gamut."). Moreover, having fought, but *lost* the battle to narrow the instruction, it would not have made sense for defendants to place greater emphasis in

their closing arguments on the defects in the government's proof of official action than on its argument that the government failed to prove a link between the alleged quids and the alleged quos. The "focus of this case was the existence of a *quid pro quo*, rather than whether the Government had established that Dean Skelos took official acts" (Opp. at 27), precisely because the instructions validated the government's argument that meetings counted as "official acts."

Fifth, contrary to the government's assertion (Opp. at 27), the *McDonnell* instructions were narrower than the instructions at the Skeloses' trial, because the *McDonnell* language included the statutory definition of "official act" in 18 U.S.C. § 201. (*See* Motion at 6 n.3). The government claims that the Court's instruction in this case that an official act "includes any act taken under color of official authority" somehow encompasses § 201's definition, but obviously that very broad language does not incorporate the more precise words of § 201. The omission of the § 201 definition, moreover, was fully consistent with the Court's express rejection of defendants' § 201-based arguments in the motion to dismiss. In its decision denying that motion, the Court specifically concluded that § 201 "may not be imported as a new requirement into the Hobbs Act context to categorically exclude conduct that does not fall within its terms." *United States v. Skelos*, No. 15 Cr. 317 (KMW), 2015 WL 6159326, at *4 (S.D.N.Y. Oct. 20, 2015).[6]

Finally, the government argues that the "Second Circuit has long interpreted 'official act' . . . in a manner that is consistent with *McDonnell*." (Opp. at 28). This is both irrelevant and

[6] The government also appears to suggest that the § 201 definition of "official action" imposes no limits on prosecutions under other corruption statutes. (Opp. at 27). Of course, the Supreme Court's narrowing construction of "official act" in *McDonnell* was informed by constitutional concerns that apply in *all* corruption prosecutions of state officials. (Motion at 8 n.4). The government appears to concede this. (Opp. at 27). Thus, in all such prosecutions, the government must prove an "official act" of the sort that falls within § 201 as construed by *McDonnell*. Indeed, § 201 by its terms does not even apply to state officials, *see* § 201(a)(1), so the Supreme Court's holding would make no sense if it were limited to § 201 prosecutions.

untrue. It is irrelevant because the issue here is whether *McDonnell* calls into question the instructions at *this* trial. It is also untrue because, as this Court itself recognized, the Second Circuit has held that "[t]he official acts necessary to sustain a charge of extortion or bribery 'include[] any act taken under color of official authority.'" *Skelos*, 2015 WL 6159326, at *3 (quoting *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013)). That is now an egregiously incorrect statement of the law. The fact that the government can point to other, narrower Second Circuit decisions that may survive *McDonnell* is unsurprising (Opp. at 28), and suggests perhaps they should have advocated a narrower instruction on "official acts" in line with those decisions.

4. *The* McDonnell *error is likely to require a new trial on all counts.* The government spills quite a bit of unnecessary ink on the purported sufficiency of the evidence and the Court's prior ruling on that topic. (Opp. at 29-40). That is not the issue here. Sufficiency will be disputed on appeal, but wading into those weeds is unnecessary to resolve this motion. Bail must be granted if there is a substantial question likely to lead to a new trial. Defendants do not have to show that they are entitled to an acquittal under *McDonnell*.

a. Under the controlling authority defendants are entitled to bail because a re-trial is likely if the Court of Appeals finds error under *McDonnell*. The government largely ignores this authority, which establishes that "the proper rule . . . requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978); *see also* Motion at 12-14 (citing numerous cases); *Neder v. United States*, 527 U.S. 1, 19 (1999) (jury instruction error not harmless where defendant contests the evidence on the issue). The government's burden in trying to salvage a verdict in this type of case is very heavy. Reversal is required unless *it is not possible* that the

jury relied on the invalid theory. *See Skilling*, 561 U.S. at 414 ("constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that *may* rest on a legally invalid theory") (emphasis added). As the Supreme Court explained in *McDonnell*: "Because the jury was not correctly instructed on the meaning of 'official act,' it *may* have convicted Governor McDonnell for conduct that is not unlawful. For that reason, we cannot conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'" 136 S. Ct. at 2375 (emphasis added) (quoting *Neder*, 527 U.S. at 16).

The government is simply unable to make this showing. It is plainly possible that the jury rested its verdict on conduct that is not official action under *McDonnell*, because that's what the government—repeatedly—invited it to do. The government tries to minimize the significance of its arguments in closing, but it told the jury that it did not need to find that Senator Skelos took legislative acts to find the requisite quid pro quo, but instead could rely on conduct like "meetings with lobbyists," "setting up meetings," or "calling the county" because these all qualified as "official acts" under the Court's instruction. (*See, e.g.*, Tr. 2588:24, 2699:20-2700:11).[7] These assertions were not mere "isolated statements" as the government protests. (Opp. at 30). Rather, they were the product of the prosecution's deliberate tactical decision to deploy a broad definition of "official act" so that it could maximize its chances for a conviction, even if the jury did not find a sufficient quid pro quo as to any legislative acts.

It started with the government's charging decision. The Indictment alleges eight specific "official actions taken by Dean Skelos in return for payments to Adam Skelos," at least three of

[7] Thus, the fact that "it was never the Government's argument that the only action Dean Skelos took . . . was merely attending these meetings" (Opp. at 35) is completely beside the point, since the government told the jury that the meetings were the "only action" it even needed to *consider*.

which, in whole or in part, are legally insufficient under *McDonnell*. *See* Superseding Indictment ¶ 27(a) (alleging Dean Skelos "met with representatives of [Glenwood] and discussed legislative matters of importance to [Glenwood]"); ¶ 27(f) (alleging Dean Skelos "assisted [AbTech] in its ultimately unsuccessful attempt to secure the issuance of hydraulic fracturing regulations by the New York State Department of Health sought by [AbTech], including by directing members of his Senate staff to arrange a meeting between [AbTech] and the Department of Health"); ¶ 27(h) (alleging, *inter alia*, that Dean Skelos "met with lobbyists for [PRI]"). Next, at trial the government opted to seek, obtain, and take full advantage of a broad jury instruction defining official action consistent with its allegations in the Indictment, as explained further below. The government made that strategic decision even though the substantial possibility of a reversal in *McDonnell* was already clear. By majority vote, the Supreme Court had granted Governor McDonnell a stay of the Fourth Circuit's mandate, effectively continuing his bail pending certiorari, in August 2015—even before the motion to dismiss was filed. *See* 136 S. Ct. 23 (2015). The government could have taken a more conservative approach and relied solely on its legislative theory, but having opted not to do so, it must now accept the consequences of that decision.

b. The trial record belies the revisionist history in the government's opposition.

First, the government introduced extensive evidence about meetings that Senator Skelos had with lobbyists, as well as meetings he or his office arranged, and elicited copious amounts of testimony from multiple witnesses to the effect that such meetings, as well as state legislators' interactions with local officials, were "official" actions by the legislator. (*See*, *e.g.*, Tr. 253:11-255:21 (Avella); 1850:16-1852:2 (Garvey); 2236:1-6, 2241:10-18 (Barella)).

Second, the government told the jury *in no uncertain terms* that all of these types of activities were "official action" that could, by themselves, count as a "quo." In its initial closing argument, the prosecution told the jury that it should ignore the defense's arguments that "some of Senator Skelos' official actions were run-of-the-mill" because this "ignores the law" and "[y]ou can't take bribes or kickbacks or extortion payments for *any action* under color of official authority." (Tr. 2487:12-2488:5 (emphasis added)). The government expressly invoked the erroneous instruction, and said that conduct such as setting up meetings was "another reason to find the defendants guilty." (Tr. 2488:20). The full quotation of this extensive argument speaks for itself:

> Now, *there's a related argument that the defendants have made throughout this trial about official action that completely ignores the law*. So this one, pay close attention to. Remember the defense has suggested time and time again that some of Senator Skelos' official actions were run-of-the-mill. Like calling Mangano to get AbTech paid. Or having his staff set up a meeting for AbTech with the Department of Health. You heard question after question on cross-examination. Aren't these the sort of things that are pretty common?
>
> The defense makes this argument because Senator Skelos is dead to rights on calling Mangano from the funeral and on having his staff get AbTech meetings. There is no question he did these things. *So the defense wants you to think that things like setting up meetings or making calls about a few thousand dollars don't really count as official actions. It's just wrong. Flat wrong*. An attempt to distract you.
>
> *You can't take bribes or kickbacks or extortion payments for any action under color of official authority. And I expect Judge Wood is going to tell you that official actions include acts customarily performed by a public official.*
>
> Remember when Tony Avella, the senator, and others talked about when state legislators call other government officials about issues, when they make public statements, when they set up meetings with agents, when they meet with lobbyists, that they do all of that in their official capacity. The point of that testimony shows that all of those actions are official because senators like Dean Skelos do them all the time. They're official actions.
>
> *If your official actions are bought and paid for, that is the crime. No matter how big, how small those actions are. So this defense that Senator Skelos only took*

> *official actions that weren't a big deal is no defense at all. It's just another reason to find the defendants guilty.*

(Tr. 2487:12-2488:20 (emphasis added)).

Also, contrary to its opposition (at 34-35), the government plainly invited the jury to convict based on the theory that meetings with Glenwood were exchanged for payments to Adam Skelos. In the initial closing, the prosecution said:

> So what other official actions was Glenwood seeking and getting from Senator Skelos during this time frame? Well, you heard that *one of the things that senators do in their official capacity is meet with lobbyists*, and you also heard *Senator Skelos met with Glenwood's lobbyists regularly* during this time period.
>
> There they are, back to back. Mark Lieberman, you heard about him, one of Glenwood's lobbyists, Richard Runes, chief lobbyist. *Every time the senator met with one of them on a lobbying meeting for Glenwood, that's official action*. All these meetings were taken by Senator Skelos in his official capacity. His own staff, Beth Garvey, said those meetings are official meetings.
>
> *Can someone seriously claim there was no connection between Glenwood getting meetings and their ability to continue to get these meetings and the payments to Adam Skelos*? Of course not. They are some of the same meetings where he's asking for the payments.
>
> And how can they claim there's no link to official action and the payments when *Senator Skelos was actually asking for the payments while he was performing the official action, meeting with the lobbyists* to discuss legislation?

(Tr. 2516:25-2517:21 (emphasis added)).

It made the same argument with respect to AbTech, saying the case was "over" based on Dean Skelos asking his staff to set up the DOH meeting, which the government now concedes was not official action under *McDonnell* (*see* Opp. at 39):

> *Dean Skelos also asked his Senate staff to set up a meeting between AbTech and another New York State government agency, the Department of Health, about AbTech's involvement in fracking*. You saw the e-mails in black and white. And the senator's own staff member testified about this.
>
> *So the AbTech case is pretty much right there. Over*.

> Adam Skelos indisputably got paid by AbTech and Dean Skelos indisputably took official actions to help AbTech. Because not even the defendants can seriously claim that Senator Skelos would have taken these actions when he did for this Arizona-based company located thousands and thousands of miles away from his district if it weren't for the fact that the company was paying his son.
>
> Now, the defendants may make a big deal in arguing that Senator Skelos didn't get around to actually passing a state law, giving money to AbTech before the arrest. You heard cross-examination on that. But so what?
>
> *As we said earlier in the opening of this summation, it's not a defense, it's not a defense to say well I didn't really take huge official actions. All official actions count. If Senator Skelos engaged in any official action in return for AbTech's payments to his son, any and all, he is guilty. Full stop.*

(Tr. 2523:25-2524:22 (emphasis added)).

The government then expressly asserted that the DOH meeting was itself "[o]fficial action. Official action from Senator Skelos in exchange for the payments to Adam." (Tr. 2550:21-22). Again, the full text of the prosecutor's words speak for themselves:

> *Now let's go to DOH meeting, because this is just devastating, devastating evidence.* We'll go through the emails. This is Beth Garvey, Senator Skelos' chief counsel, wanting to find out who the technical person is doing the hydrofracking. You know where this heads, to the meeting between AbTech and DOH.
>
> He responds: Find it curious that senate Republican counsel is reaching out to me directly. He testified he had never been contacted by Beth Garvey before about such a request.
>
> Next slide. Mr. Clancy, this is a biggie, that's someone in the governor's office, talking about the request.
>
> Next slide. This is after the phone call Beth Garvey sends to AbTech.
>
> Next slide. This is Mujica, chief of staff, and Beth Garvey, chief counsel, discussing AbTech, Bjornulf White. These are the senator's senior, senior staff, and they're spending their time working on AbTech.
>
> Next slide. Garvey reaching out to Clancy: Contact been made? And you know why she reached out, the senator asked her to.
>
> Next slide. *This is the meeting. They get the meeting. Official action. Official action from Senator Skelos in exchange for the payments to Adam.*

(Tr. 2549:24-2550:22 (emphasis added)).

With PRI as well, just like in the Indictment, the government plainly presented "lobbyist meetings" as an alternative theory by which the jury could find the necessary official action to establish a quid pro quo. Of course, before turning specifically to PRI, the government had already expounded—at length, several times—on why meetings were sufficient to show "official acts." It nonetheless reiterated the point yet again, after discussing its legislative theory:

> And then lobbyist meetings.
>
> Anthony Bonomo told you that the senator was always very good about giving access to his lobbyists. *And you heard the testimony that meetings with lobbyists are always taken in the senator's official capacity*.

(Tr. 2588:21-25 (emphasis added)).

In its rebuttal argument, the government repeated the same invitation to rely on the invalid alternative theory. It urged the jury to disregard defendants' arguments to focus on legislation when ascertaining whether the quid pro quo was established, because *"[a]s you'll hear in the instructions*, official act runs the whole gamut" and can include conduct such as "setting up the meetings, calling Ed Mangano, calling the county and using official power in any of the ways that senators use official powers." (Tr. 2700:1-2, 9-11). Again, the full text of the prosecutor's words to the jury unequivocally demonstrates, yet again, that the government took full advantage of the erroneous instruction and invited the jury to convict based on conduct that is not official action under *McDonnell*:

> Just going to Mr. Gage's argument a little bit today. Their argument, what they try to do is get you to focus specifically on yes or no votes on legislation. *And they need you, for their arguments, to cabin your consideration over whether Senator Skelos would vote yes or no on particular legislation.*
>
> *As you'll hear in the instructions, official acts runs the whole gamut*. You heard evidence in this case. You heard Senator Avella take the stand and tell you all the sorts of things that senators do as official actions. And you heard Beth Garvey describe that as well.

> *This is a case about each and every one of those pieces of official action that the senator gave in exchange for the money that his son was getting the whole time. It runs the gamut, again, from setting up the meetings, calling Ed Mangano, calling the county and using official power in any of the ways that senators use official powers*.

(Tr. 2699:20-2700:11 (emphasis added)).

These transcript excerpts demonstrate the falsity of the government's newly minted claim that the meeting "was not presented as a standalone *quid pro quo*." (Opp. at 39). There is simply no way to reconcile these jury arguments, and particularly the claim that the DOH meeting was "devastating, devastating evidence," with the government's harmless error position. *Cf. United States v. Joseph*, 542 F.3d 13, 21 n.7 (2d Cir. 2008) ("Having told the jury that the photos were 'devastating evidence,' the Government is somewhat disingenuous in now arguing that any error in admitting them was harmless."), *abrogated on other grounds by United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011).[8]

c. In sum, the government charged conduct that does not satisfy *McDonnell* as "official action" in the Indictment; sought and obtained an overbroad jury instruction covering such conduct; and repeatedly invoked that instruction in arguing that the jury could convict on that conduct alone. As in *McDonnell*, it is clearly "possible" that the jury convicted defendants on a legally invalid theory, requiring a new trial. *McDonnell*, 136 S. Ct. at 2375. The government does not even try to distinguish the numerous cases granting new trials in similar alternative theory situations (Motion at 13-14), and none of the cases it cites (Opp. at 40-41) provide any basis for a different result here.

[8] The government at several points suggests that the conduct that does not qualify as official action under *McDonnell* was merely evidence of, or part of, a valid theory based on legislative action. (*E.g.*, Opp. at 35, 39). But a conviction must be reversed when the government relies on an invalid theory that was "intertwined" with the valid alternative. *United States v. Botti*, 711 F.3d 299, 311 (2d Cir. 2013).

The Fifth Circuit's decision on remand in *Skilling* involved a very different situation. Skilling was convicted of one count of conspiracy in which honest services fraud was one of multiple alleged objects, and 18 substantive counts for *other* types of offenses (securities fraud, false statements to auditors, and insider trading). *See United States v. Skilling*, 638 F.3d 480, 481 (5th Cir. 2011). In its jury addresses, the government did not make multiple "references" to an invalid theory in closing, as the government asserts. (Opp. at 41). It mentioned "the honest-services theory in relation to Skilling only once," and "never argued that the jury should convict Skilling solely on the honest-services theory, nor did it tell the jury that it should disregard the evidence of securities fraud." 638 F.3d at 483. Those circumstances are a far cry from what transpired here—multiple prosecution arguments that all the jury had to find for official action was that Dean Skelos met with lobbyists or arranged a meeting with, or contacted, other government officials.

United States v. Nouri, 711 F.3d 129 (2d Cir. 2013), is similarly inapposite. The convictions were reviewed for plain error, as there was no objection, *id.* at 138, and the Court's finding that there was no plain error relied on, among other things, guilty verdicts on substantive commercial bribery offenses (the valid theory) "based on the same facts," *id.* at 140. There is no suggestion in *Nouri* that the government had argued to the jury that it could convict based on the invalid theory alone, as it repeatedly did here. Nor did the government make any such argument in *Bereano v. United States*, 706 F.3d 568 (4th Cir. 2013), which also provides no succor for the government. The Court there affirmed the denial of a petition for a writ of *coram nobis*, in which the defendant had also executed a fraudulent scheme involving money or property that was unaffected by *Skilling*. As the Court explained, the valid pecuniary gain fraud theory was "necessarily accepted by the jury," because the jury "could not have found Bereano guilty of

mail fraud under either" theory without finding mailings that established pecuniary fraud. *Id.* at 579. Here, by contrast, the jury could have convicted the Skeloses based on conduct that was not valid official action—indeed, that is precisely what the government invited it to do.[9]

A final note. The government repeatedly argues that it was "legally impossible" for the jury to convict based on Dean Skelos' arranging or attending meetings because the § 666 charges required the jury to find "that the corrupt payments related to a transaction of the State of New York worth at least $5,000," and the government presented no evidence on the value of the meetings. (Opp. at 32; *see also id.* at 36, 40). This is absurd. The Court did not instruct the jury that the "official acts" *themselves* had to be worth $5,000; the Court instructed the jury generally that "the value of the transaction to which the payment related [must be] at least $5,000." (Tr. 2791:5-6, 2796:5-6). The Court further stated that "the government must prove that Dean Skelos intended to be influenced or rewarded in connection with any business or transaction or series of transactions of the State of New York involving anything of value of $5,000 or more." (Tr. 2796:7-11). Assuming the jury found the requisite quid pro quo, the jury could easily have convicted the Skeloses for arranging or attending meetings that were "related" or "connected" to New York legislative business that was worth at least $5,000 to the companies making the alleged bribes. *Cf.* Gov't Opp. to Mot. to Dismiss, Dkt. 27 at 33 (arguing that the DOH meeting "was related to a decision or action on a pending matter before the State, *i.e.*, the review of fracking and [AbTech's] efforts to advocate for regulations that would favor its technology").

[9] *United States v. Halloran*, 821 F.3d 321 (2d Cir. 2016) (cited in Opp. at 41), is equally off-base. The Court there declined to hold the appeal in abeyance pending *McDonnell* because the meaning of "official acts" had "no apparent relevance" to the issues on appeal. *Id.* at 340 n.13. Unlike the non-legislative conduct alleged here, the only alleged official acts that the government had relied on at trial in *Halloran*—"disbursing public funds and issuing a Wilson-Pakula" certificate—were indisputably "official acts." *Id.*

Moreover, if the legislation at issue was worth millions of dollars, the privilege of attending meetings regarding that legislation was worth at least $5,000—especially since the government had presented evidence that the Skeloses were paid more than $5,000.

5. *Second Circuit bail rulings*. It bears repeating that this is just a bail motion. The opposition details, at length, the government's merits arguments on the *McDonnell* issue. The Second Circuit will ultimately resolve the merits. But for now, all defendants have to show is that their appeals present a substantial question. The showing is more than sufficient.

Recent Second Circuit decisions granting bail pending appeal in other white collar cases are also instructive, even though the decisions are brief unpublished orders without explicit analysis of why the Court found the appeal presented a substantial question. The Circuit has often granted bail in complex white collar cases such as this, where there is no flight risk or danger, and the appeal presents a real issue. In some of these cases, the convictions were ultimately reversed or vacated.[10] In other cases, the convictions were ultimately affirmed.[11]

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[10] *See*, *e.g.*, *United States v. Newman*, No. 12-cr-121 (RJS), 2013 WL 1943342 (S.D.N.Y. May 7, 2013) (district court order denying bail); *United States v. Newman*, No. 13-1837, 2013 WL 9825204 (2d Cir. June 21, 2013) (Second Circuit order granting bail); *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (reversing convictions); *see also United States v. Litvak*, No. 13-cr-19 (JCH) (D. Conn. July 23, 2014), ECF No. 272 (district court minute entry reporting denial of bail); *United States v. Litvak*, No. 14-2902 (2d Cir. Oct. 3, 2014), ECF No. 41 (Second Circuit order granting bail); *United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015) (reversing and vacating convictions); *see also United States v. Quattrone*, No. 03-cr-582 (GBD) (S.D.N.Y. Sept. 2004), ECF No. 139 (bail application) & ECF No. 151 (district court judgment setting surrender date); *United States v. Quattrone*, No. 04-5007 (2d Cir. Oct. 20, 2004), docket sheet p.5 (Second Circuit order granting bail); *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006) (vacating convictions).

[11] *See*, *e.g.*, *United States v. Riley*, No. 13-cr-339 (VEC) (S.D.N.Y. Apr. 27, 2015), between ECF Nos. 257 & 258 (district court minute entry reporting denial of bail); *United States v. Riley*, No. 15-1541 (2d Cir. June 24, 2015), ECF No. 34 (Second Circuit order granting bail); *United States v. Riley*, 638 F. App'x 56 (2d Cir. 2016) (affirming convictions); *see also United States v. Bello*, No. 12-cr-84 (AWT) (D. Conn. Sept. 23, 2013), ECF Nos. 300 & 301 (district court orders

Earlier this year, in a still-pending appeal, the Court even ordered the release of a defendant serving his sentence for insider trading, pending the appeal of the denial of his habeas motion, even though the government argued procedural bar.[12]

Put another way, in applying the "substantial question" standard, the Court of Appeals seems to err on the side of liberty while an appeal is pending in cases like this one where it is clear that the appeal raises a meaty issue. As Judge Cabranes indicated at the oral argument on the bail application in *Riley*: "[T]here's some serious questions that have been raised here, and in the nature of things, it might be better to let them be resolved by the Court of Appeals in due course . . . . Let's put it this way: what's the harm? . . . What is the harm in letting in a stay [of the surrender date] pending appeal?" (Shapiro Decl. Ex. B at 13:20-14:1).

CONCLUSION

In sum, the statutory standard is plainly satisfied. There is no legitimate reason to incarcerate Dean and Adam Skelos while they await the Second Circuit's decision. This Court should grant bail pending appeal.

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denying bail); *United States v. Bello (Platt)*, No. 13-3162 (2d Cir. May 7, 2014), ECF No. 157 (Second Circuit order granting bail); *United States v. Platt*, 608 F. App'x 22 (2d Cir. 2015) (affirming conviction but remanding for resentencing).

[12] *See United States v. Whitman*, No. 12-cr-125 (JSR), 2015 WL 9582551 (S.D.N.Y. Dec. 30, 2015) (district court order denying release); *Whitman v. United States*, No. 15-2686 (2d Cir. Feb. 2, 2016), ECF No. 80 (Second Circuit order granting release).

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Respectfully submitted,

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Shapiro Arato LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

G. Robert Gage, Jr.
Joseph B. Evans
Gage Spencer & Fleming LLP
410 Park Avenue, Suite 900
New York, New York 10022
(212) 768-4900

Attorneys for Dean Skelos

Christopher P. Conniff
Ropes & Gray LLP
1211 Avenue of the Americas
New York, New York 10036
(212) 596-9000

Attorneys for Adam Skelos