16-1618(L)

16-1697(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

DEAN SKELOS, ADAM SKELOS,

Defendants-Appellants.

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

BRIEF FOR DEFENDANT-APPELLANT DEAN SKELOS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Dean Skelos served in the New York State Senate for over three decades. This appeal arises from a prosecution that ended his lengthy, productive public service. The government persuaded a jury to convict him of federal corruption charges based in significant part on an expansive theory of "official action." The government pushed for and obtained an erroneous instruction that swept in everything a senator does, including attending or setting up meetings, or contacting other government officials. It then played that instruction to the hilt in its closing arguments. But the Supreme Court subsequently and unanimously invalidated that expansive theory of official action in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Under *McDonnell*, only formal exercises of governmental power can support conviction under the federal corruption laws.

This prosecution also represents an effort to manufacture public corruption crimes out of conduct that amounted, at worst, to undisclosed conflicts-of-interest. The government never suggested that Skelos abused his office or changed any vote for personal enrichment. It could not prove that he promised his vote for anything of value or threatened anyone with adverse legislative action. The charges arose from Skelos's efforts to assist his son Adam to obtain work. The government maintained that it was criminal to ask a longtime friend and acquaintances who were executives at prominent companies if they could help Adam. Eventually they

referred Adam some business, hired him or helped him find a job with an environmental services company. There was no evidence that Skelos ever linked these requests to any legislation, or even hinted at a connection between assistance for Adam and any vote. To the extent the government relied on the companies' interests in certain state legislation, Skelos's votes were never in doubt; he had supported that legislation throughout his entire Senate career. Skelos also had no substantive contacts with anyone at the environmental company; at most, he helped it obtain a meeting with a state agency and spoke to local officials about the status of the company's post-Sandy stormwater cleanup proposal.

If Skelos's convictions can stand on these facts, then virtually any scenario in which a state or local official's relative receives a benefit from someone with interests in government affairs could be subject to criminal prosecution, regardless of whether there was a *quid pro quo.* This would raise grave federalism concerns, interfering with the States' "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 136 S. Ct. at 2373. It may have been unwise for Skelos to ask people with significant interests in state public policy to help his son find work, or to contact other officials concerning his son's employer, but it was not a federal crime.

First, the evidence was insufficient to show a *quid pro quo* on any count. No rational juror could conclude that Skelos intended Adam's work success to

influence his Senate votes, or that he had any reason to think those who paid Adam thought they were influencing Skelos's longstanding legislative positions, rather than simply helping a friend or maintaining goodwill.

Second, the evidence of official action was insufficient under *McDonnell* as to the charges about the environmental company. Those charges were based entirely on Skelos's having helped set up meetings, talked to other officials, or advocated longstanding legislative positions. *McDonnell* specifically held that each of these activities is not "official action."

Third, at a minimum, a new trial is required on all counts because the jury instruction defining "official action" was erroneous under *McDonnell*. The instruction was nearly identical to—and in fact broader than—the instruction that the Supreme Court held constitutionally overbroad in *McDonnell*. The government fully exploited its legally flawed theory, arguing repeatedly that everything a State Senator does is "official action." As a result, the jury may have convicted based on acts that are not legally sufficient official acts. Under controlling Supreme Court precedents, this requires vacatur.

Fourth, the district court erroneously admitted irrelevant evidence about state conflict-of-interest rules, including the personal opinions of another State Senator. This evidence, which the government exploited in closing, could easily have misled the jury into erroneously equating possible violations of state rules

with federal crimes. The district court compounded these errors by refusing to permit the defense to counter with evidence indicating that Skelos had not even violated the state rules—a blatant violation of his due process rights.

Finally, Skelos joins the arguments in Points Two and Three of Adam's brief, which apply equally to Skelos. *See* Fed. R. App. P. 28(i).

The judgment should be reversed, or at least vacated with the case remanded for a new trial.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. Judgment was entered on May 16, 2016. (SPA-37).[1] Skelos timely appealed. (A-977). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether Skelos is entitled to acquittal on all counts because the evidence was insufficient to prove that he solicited or accepted payments in exchange for official action.

2. Whether Skelos is entitled to acquittal on Counts Four and Seven because there was insufficient evidence of any legally valid "official act" under *McDonnell*.

[1] "A" refers to the Appendix and transcript page, if any. "SPA" refers to the Special Appendix.

3. Whether Skelos is entitled to at least a new trial on all counts because the jury instructions erroneously permitted conviction based on conduct that is not an "official act" under *McDonnell*.

4. Whether Skelos is entitled to a new trial on all counts because the district court erroneously admitted evidence that invited the jury to convict on the ground that Skelos acted "inappropriately" or "unethically."

STATEMENT OF THE CASE

A. Procedural History

Skelos appeals a judgment of conviction entered by the United States District Court for the Southern District of New York (Wood, J.), following a jury trial. (SPA-37).

The indictment charged defendants with conspiracy to commit extortion under color of official right under 18 U.S.C. §1951 ("Hobbs Act") (Count One); substantive Hobbs Act offenses (Counts Three-Five); conspiracy to commit honest services fraud under 18 U.S.C. §1349 (Count Two); and solicitation of bribes under 18 U.S.C. §666 (Counts Six-Eight). (A-170-79).

Trial began on November 9, 2015 and lasted approximately four weeks. After the government rested, Skelos moved for a judgment of acquittal. (A-560/2463-64, A-626-31/2837-56). The district court denied the motion. (A-631/2856).

On December 11, 2015, the jury returned a verdict of guilty on all counts. (A-631/2857-58).

On January 25, 2016, the defendants renewed their motions for acquittal. The district court denied them on April 14, 2016. (SPA-25).

On May 12, 2016, the court sentenced Skelos to 60 months' imprisonment, one year of supervised release, a $500,000 fine and forfeiture of $334,120 (jointly and severally with Adam). (SPA-37-43).

B. Factual Background

Skelos was a New York State Senator from 1985 to 2015, representing parts of Nassau County. (A-507/2078). A Republican, he served as Senate Majority Leader between 2011 and 2015. (A-280/258).

Skelos adopted Adam, his only child, when Adam was an infant, and served as Adam's primary caregiver for most of his childhood. Skelos has a very close relationship with Adam. (PSR ¶¶ 93-94, 98). During the relevant period, Adam was in his early 30s, had a wife and two young children, and held various sales and consulting positions to support them. The government's theory was that Skelos corrupted his office by asking people he had known for years—executives at Physicians' Reciprocal Insurers ("PRI") and Glenwood Management ("Glenwood")—to refer business to Adam or help Adam find work, and through

dealings with a third company, AbTech Industries ("AbTech"), that employed Adam.

The government conducted a 13-month investigation using every conceivable technique: wiretaps, secretly recorded conversations, cooperating witnesses, and grand jury subpoenas. Nonetheless, it was unable to unearth any evidence of a *quid pro quo*. Viewed in the light most favorable to the government, the evidence failed to show that Skelos ever promised anything, threatened anyone, or suggested (even with "winks and nods") that his Senate votes were in any way tied to help for Adam. The government relied entirely on cooperating witnesses' speculation that there "could be" some connection between Skelos's requests and his official acts.[2] (*E.g.*, A-335/627).

Lacking any link between Skelos's legislative votes and Adam's employment, the government tried to draw a connection to various routine activities that are not "official acts" under *McDonnell*. The government presented much proof that Skelos communicated with lobbyists, spoke to other public officials, and helped set up meetings. It also elicited from multiple witnesses that senators act in their "official capacity" when they perform these functions. (*E.g.*, A-279-80/253-55, A-465.1-65.2/1851-52, A-532/2236). The government

[2] The alleged extortion "victims"—sophisticated businessmen—testified pursuant to non-prosecution agreements. (A-334/622, A-390/1079, A-438/1477-78, A-467/1891).

emphasized these activities in closing argument, maintaining that "official acts run[] the whole gamut" and that the defense was "[f]lat wrong" to dispute this, and urged the jury to convict based on non-legislative acts. (*E.g.*, A-566/2487-88, A-594/2700).

1. *PRI.*

PRI is one of two major medical malpractice insurers in New York and has 27% of the market. (A-466/1885-86). Anthony Bonomo, PRI's CEO, was Skelos's longtime personal friend and knew Adam for decades. (A-466/1884, A-468-69/1892-96, A-805).

Starting in December 2010, Skelos sporadically asked Bonomo if he could help Adam find work. (*E.g.*, A-473/1914-15, A-475-76/1920-25). PRI is involved in malpractice cases, and Adam and his then-girlfriend did work for a court reporting service. In response to Skelos's requests, around March 2011, PRI began occasionally using that company for depositions. (A-474/1917-18). Nearly two years later, in late December 2012, PRI hired Adam as a salesperson in its marketing department. (A-477/1930-32).

The government argued that Bonomo hired the court reporting service, and later Adam, in exchange for Skelos's support of "extender" legislation that renews certain state insurance-law provisions every three to four years. (A-590/2581-82). But there was no evidence of any connection—direct or indirect—between

Skelos's requests and the extenders. Skelos never threatened Bonomo or promised his vote in exchange for helping Adam. (A-490-91/1982-84, A-491/1987, A-492/1990). Nor was there any coded language or veiled signals—verbal or non-verbal—that Skelos would not support the extenders, which he had supported consistently since the mid-1980s, unless Bonomo helped Adam. (A-490/1982).

The extenders exempt insurers from having to carry reserves that they could never amass while charging state-capped premiums that keep doctors' insurance rates affordable. This allows doctors to continue practicing in-state and thereby ensures patients' access to quality doctors in New York. (A-470-71/1903-07, A-489/1979). The extenders must periodically be renewed, but a failure to renew them would wreak havoc on New York's health care system by forcing PRI to liquidate, leaving 27% of doctors without a carrier and the State with only a single dominant insurer. (A-492/1988). Accordingly, *each and every* time the legislation has come up for renewal, it has been approved by Skelos and majorities of both parties, usually by overwhelming votes. (A-471-72/1907-10, A-490/1980-82, A-492-93/1991-92, A-632-36, A-713-21). As Bonomo testified, "senate support for the extender[s] has always been substantial." (A-490/1982).

Bonomo testified that he referred the court reporting work to Adam "out of respect for the Senator," after Skelos casually asked Bonomo at social events to "look into the possibility" of using Adam's company. (A-473/1914, A-474/1917-

18). At a fundraiser in mid-2012, Bonomo and Skelos caught up on many topics—horse racing, legislation, "what was going on in the state" and their families. (A-475/1923). Skelos mentioned that Adam was trying to find a job with health benefits and asked Bonomo if he "could give [Adam] more [court reporting] work." (*Id.*). Bonomo instead decided to offer Adam a job at PRI, because he wanted to "help [Adam] out," "it would please the senator," and it would maintain "good will," which Bonomo tried to develop with "a lot of legislators." (A-476/1924-25, A-490/1983, A-500/2029-30). Skelos had already voted for the extenders, which were not due for renewal again until long after Adam's relationship with PRI ended. (A-488/1973, A-490/1983).

In January 2013, Adam's attendance lagged and he clashed with his supervisor. (A-271-72/106-10, A-276/170). When Skelos learned about these issues, he asked Bonomo to "just work this out"; he did not raise the extenders or any legislation. (A-482/1949, A-483/1952).[3] Bonomo testified that he continued to employ Adam because he "had a cordial relationship [with Skelos] and...did not want this to be a wedge in a relationship that was very important to me in Albany." (A-485/1961; *see* A-484/1956, A-501/2035). He did not want there to be a

[3] In mid-2013, the tension between Adam and his supervisor boiled over, and Bonomo relegated Adam to a consulting role for substantially less money and no health benefits. (A-273/151-52, A-486/1964). Neither Skelos nor Adam complained. (A-486/1964, A-486/1967, A-501-02/2036-39).

"problem" between himself and Skelos that could impair PRI's legislative interests down the road. (A-484/1956, A-484/1959). Bonomo never thought that there was anything criminal about employing Adam. (A-494/1997-98). He testified that Skelos never "linked" anything he "might do [for] Adam to any of his legislative positions." (A-490-91/1982-84, A-491/1987, A-492/1990). The best the government could extract from Bonomo was an oblique reference to "legislative issues [PRI] had" on redirect. (A-506/2065).

Perhaps to overcome its difficulty tying Skelos's requests to any legislation, the government maintained that access to Skelos's staff was the "quo." The government elicited testimony that PRI's lobbyists met and emailed Skelos and his staff in 2011, 2012 and 2013. (A-533/2239-41, A-556-59/2355-67; *see also* A-723-25). Although such contacts were routine throughout Skelos's long relationship with Bonomo (A-488/1972), the prosecution argued that they occurred because of PRI's payments to Adam. (A-591/2588, A-595/2702). The government argued that "meetings with lobbyists are always taken in the senator's official capacity," and thus legally valid "official acts." (A-591/2588; *see also* A-595/2702, A-597/2711).

2. *Glenwood*.

Glenwood is a prominent Long Island-based real estate company that operates over 30 high-rise rental apartment buildings in Manhattan. (A-289/337-

38, A-299/420). Leonard Litwin, the founder, and Charles Dorego, the General Counsel, had a "cordial" and "friendly" relationship with Skelos. (A-289/337-338, A-295/379, A-298/417). Dorego testified that Skelos frequently asked if they "could help [Adam] find something to do" and often mentioned title insurance, since Adam had recently entered that field. (*E.g.*, A-300/424, A-306/460, A-314/514, A-317/529-30, A-319/551). Glenwood did not refer any title business to Adam at those times. (A-302/433, A-305/445). But Dorego thought that there might be an opportunity for Adam at AbTech—a company in which Dorego and Litwin had invested. (A-307-08/466-68). In August 2012, Dorego introduced Adam to Glenn Rink, AbTech's president, and asked Rink to determine if Adam would be a good fit. (A-313/495, A-372-73/979-80, A-784). AbTech ultimately decided to hire Adam as a consultant. (A-376/999).

AbTech, however, did not finalize that arrangement for several months. (A-377/1006). As a result, in late September and early October 2012, Dorego reached out to Adam, and they discussed Glenwood referring some title insurance work to Adam or a company he had a connection to, ERealty Title. (A-327-28/591-94, A-330-31/601-04, A-345-46/691-92, A-358/751, A-788-93). Separately, Dorego asked Glenwood's regular title company, American Land Services, Inc. ("ALS"), to "refer some business to Adam on a deal or two" or "give [Adam] a piece of business," and ultimately arranged for ALS to give Adam

$20,000 "to get him a referral." (A-327/590, A-330/601, A-332/608).[4] Adam did not receive the check until February 2013. (A-780).

The government contended that Glenwood gave these benefits to Adam in exchange for Skelos's votes on "421-a" and rent regulation laws. (A-572-73/2514-15). 421-a gives substantial tax abatements to developers who build residential properties that reserve at least 20% of their units for low-income housing. (A-291-92/366-68, A-293-94/374-75). Dorego testified that developers could not make a return on rental property or obtain financing without these abatements, so 421-a is an "absolute necessity" to all developers, including Glenwood. (A-292/367-68). The rent regulation laws allow landlords to raise the rent in rent-regulated apartments under certain circumstances. (A-293/371-73). Repealing these regulations "would be the worst-case scenario" for landlords of rent-stabilized buildings, like Glenwood. (A-293/374). Both 421-a and the rent regulation laws expire every four years, and must be periodically renewed. (A-293/371, A-293/373).

Skelos's position with respect to 421-a and rent regulation was never in doubt. He consistently supported 421-a throughout his public life and was a well-

[4] Tom Dwyer, ALS's COO, testified that the payment was unrelated to any title work. (A-363/856). But there was no evidence that Skelos knew this. (A-331/606-07). Nor was there any evidence that Adam knew that ERealty did not perform the work.

known supporter of the real-estate industry's position on these laws. (A-339/653, A-340/659, A-342/665, A-343/670, A-359/753; *see also* A-300/423 (Skelos told developers in 2010 that "he was going to be a stalwart friend to the industry and continue to carry the banner on our issues, and these things would get resolved in a way that the industry would expect.")). Dorego acknowledged that Skelos had supported 421-a for as long as he had known him; there was "no doubt," "no question" that Skelos supported 421-a; and he and Litwin understood exactly where Skelos stood on 421-a and rent regulation. (A-339/653, A-340/659, A-342/665, A-343/670, A-359/753). Skelos's long-held positions also were fully consistent with those of his Republican party, which is a strong ally of the real-estate industry; its Senators' votes on this legislation is "predictable." (A-294/376, A-296/399, A-337/647, A-338/649-50). Moreover, 421-a and the rent regulation legislation were renewed in March 2011 (and thus secured until 2015)—well before Dorego introduced Adam to AbTech or arranged for the title payment. (A-637-712).

There was no evidence of any *quid pro quo* between Skelos and Litwin or Dorego. Skelos never made any statement, threat or promise to Glenwood that tied his votes on 421-a or rent regulation to requests for Adam, or any benefits Adam received from Glenwood or AbTech. (A-339/652, A-339/654, A-340/656-57, A-340-41/659-60, A-341/662-63, A-342/666, A-343/669-70, A-344/682-83). Nor

was there any evidence that Skelos intended Litwin or Dorego to believe that his votes depended on any favors for Adam. Dorego testified that he arranged for the title insurance referral and introduced Adam to AbTech because he thought "there *could be* a connection" between Skelos's request and this legislation, and he "assumed" that there was "a possibility" that Skelos could get "angry" if Glenwood did not help Adam. (A-310/486, A-335/627). But Dorego made no attempt to explain how there could reasonably be any connection given Skelos's long-held positions, nor was there evidence corroborating Dorego's speculation or showing that Skelos intended Dorego to assume any link.

Again, the government did not rely on Skelos's votes alone to supply the supposed "official acts." Instead, it showed that Skelos met with Glenwood's lobbyists (*e.g.*, A-310/483-84), and urged the jury to convict based on these meetings (even though such meetings had occurred routinely long before Skelos mentioned Adam's work to anyone at Glenwood (A-290/362, A-297/403)). The government argued: "Every time the senator met with one of [Glenwood's lobbyists] on a lobbying meeting for Glenwood, that's official action." (A-573/2516-17).

3. *AbTech.*

AbTech is an environmental technology company. (A-368/954). Its flagship product is "Smart Sponge," an industrial-sized filter that removes

hydrocarbons, bacteria, metals and other pollutants from contaminated water. (A-368/954, A-369/962-63). The vast majority of AbTech's customers are counties and municipalities. (A-370/966, A-411/1239).

AbTech relied on consultants with political connections to market its products and help it obtain public sector contracts. (A-372/977, A-412/1242, A-445/1626). Adam was therefore well-suited to its business model. Rink and AbTech's Executive Vice President, Bjornulf White, each interviewed Adam and concluded that he was thoughtful and well-prepared, and that his connections, name recognition and prior work with municipalities made him "a very good fit" for AbTech. (A-374-75/991-94, A-376/996, A-379/1022, A-413/1248-49, A-447/1637-38). They hired Adam as a "government relations" consultant to focus on obtaining public contracts for projects in New York and New Jersey. (A-376/999, A-392/1093). Rink testified that Adam was "very professional and very considerate and kind," and was a "sincere" and "enthusiastic" advocate for AbTech. (A-401/1143-44; *see* A-811-18).

The government's focus was a Nassau County contract that Adam helped AbTech secure. In October 2012, Hurricane Sandy devastated parts of Long Island. (A-380/1026). This presented an opportunity because the hurricane damaged drainage systems, highlighted the need for stormwater control, and brought federal funding to the area. (A-380/1026-27, A-416/1259). Through

Adam, AbTech presented Smart Sponge to Nassau County and, after the county issued a formal request for proposals ("RFP"), submitted a detailed project proposal. (A-383-85/1051-60, A-407-08/1181-84, A-440-41/1565-69, A-858-96). Nassau County selected AbTech over two other bidders. (A-390/1081, A-442/1573, A-527-28/2206-07).

Adam's contract set his monthly salary at $4,000, even though AbTech paid other consultants $10,000, and Rink had initially wanted to pay Adam $10,000 too. (A-404/1168, A-410/1235, A-415/1255, A-446/1633, A-897-98). Adam's contract contained various incentive payments, but none contemplated a project as large as the Nassau County contract. (A-381/1033-35, A-898). In April 2013, Rink increased Adam's monthly compensation to $10,000, which AbTech began paying him that July after it won the contract. (A-389/1078, A-391/1089).

The government's theory was that Skelos used the Nassau County contract to "extort" AbTech into increasing Adam's compensation. (A-561/2468). But there was no evidence that Skelos asked AbTech to raise Adam's salary. Skelos met Rink only once, by chance, in a hotel elevator several months *after* Rink raised Adam's pay. (A-397-98/1126-27). Skelos's only prior contact with White was many months earlier, when Adam briefly conferenced Skelos into a call. (A-417/1262-63). The government made much of hearsay in an April 10, 2013 email from Dorego to Link, in which Dorego wrote that Adam was "hesitant (and

his dad called)" to work on the Nassau County contract "with the engineer's making more money than him" and, Dorego wrote, "I think they don't think it's worth pushing through" AbTech's bid unless Adam received a higher compensation. (A-795). But Dorego testified that he had not spoken to Skelos before sending that email (A-347/696), and Rink never thought that there was anything wrong with hiring Adam or increasing his pay (A-401-01.1/1143-48).

Moreover, there was no evidence that Skelos did anything to "push[] through" AbTech's proposal during the bidding process. The evidence established that stormwater treatment was a real and pressing need in Nassau County, and that AbTech's product was a useful solution. (A-408/1186, A-526/2202, A-528/2207, A-529/2213). The government even had Rink perform an in-court demonstration to show Smart Sponge's effectiveness in treating polluted stormwater. (A-370/964-66). AbTech devoted extensive resources to its RFP response, and the County made its own independent, methodical assessment—requiring review and sign-off by nine different departments—before awarding AbTech the contract. (A-408/1184, A-426-27/1301-03, A-441-42/1570-71, A-526-28/2199-2207, A-913-56). Rob Walker, the Chief Deputy County Executive, testified that AbTech's proposal "was thoroughly and professionally reviewed" and "[w]ithout a doubt" in the "best interests of the county." (A-528/2207). As Rink testified,

AbTech "won fair and square" because it had "the superior product for a specific need." (A-408/1186).

The government argued that, even after the contract was awarded to AbTech, Skelos engaged in "official acts" to benefit AbTech by communicating with other public officials about AbTech. (*E.g.*, A-575/2523, A-579/2542, A-582/2551). The government asserted that in January 2015 the senator asked Nassau County Executive Ed Mangano to "speed up payments to AbTech." (A-575/2523; *see* A-582/2551-52). But these were payments for work that AbTech had already completed and billed—invoices that county officials had already approved. (A-523.1/2181-82, A-528/2207-09, A-530-31/2217-20). In one conversation, Skelos asked Mangano if another county project would interfere with AbTech's, and Mangano confirmed that it had "nothing to do with it." (A-806-09). In the other, Skelos asked Mangano "where [the county was] in the process to get [AbTech] paid." (A-524/2184). Mangano's deputy, Walker, overheard that conversation and—without identifying Skelos—made an inquiry and learned that AbTech "had or would be getting paid very soon." (A-524/2185).

The government also stressed a meeting that Skelos arranged so AbTech could explain its technology to the New York Department of Health ("DOH"). (A-575/2523-24). The prosecutors argued that this meeting was "devastating, devastating evidence" of "[o]fficial action from Senator Skelos in exchange for

payments to Adam." (A-581/2549-50; *see also* A-594/2699 ("[I]t was an official action for Senator Skelos to have that meeting set up.")). But the government conceded post-trial that under *McDonnell*, this was not "official action." (Dkt.218 at 39).[5]

The government could not tie Skelos's acts on any relevant state legislation to Adam's AbTech employment. It cited Skelos's comments supporting fracking and State funding of "[i]nfrastructure, sewers, bridges...economic development... stormwater, that type of thing" in a December 2014 media interview and his comments in March 2015 that he would support "design-build" legislation if the governor did. (*See* A-464-65/1787-91, A-525/2187).[6] But Skelos made these statements years after AbTech had decided to hire Adam and raise his salary. There was no evidence that Rink or White ever spoke to Skelos about this legislation or focused on it at those earlier times. Rink specifically disclaimed the government's suggestion that Skelos's positions on these issues were "important to [his] consideration of whether to continue paying Adam Skelos":

> I think they were great that he had those positions and support of it. They were great. But our position with Adam was...he was doing great things and he was working on a variety of things for us. So I was very pleased on all of those fronts....But as far as any alteration or

[5] "Dkt." refers to the district court docket, S.D.N.Y. No. 15-cr-317.

[6] In a "design-build" arrangement, a public entity contracts with a single private vendor for all aspects of a public works project. (A-370/967-69).

> any change to his agreement or stop paying him, I wouldn't have considered that.

(A-394/1113). Moreover, Skelos's statements were consistent with his long-held public positions and his district's needs. (*See* A-288/313, A-393/1107, A-394/1113, A-465/1788).

C. The Jury Instructions On "Official Action" And The Supreme Court's Decision In *McDonnell*

1. In connection with each Count, the government was required to prove that Skelos performed or agreed to perform "official acts" in exchange for payment. *McDonnell*, 136 S. Ct. at 2361; *see also United States v. Ganim*, 510 F.3d 134, 141-42 (2d Cir. 2007). The defendants moved to dismiss the AbTech-related counts on the ground that the allegations of "official action" were insufficient. They argued that "activities outside the formal legislative process—such as arranging or attending meetings, [or] speaking to third-parties on behalf of a constituent" are not official action. (SPA-4).

The district court denied the motion, holding under then-binding Second Circuit precedent that "any act taken 'under color of official authority'" qualified as an "official act" under the anti-corruption laws. (SPA-5 (quoting *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013))). The district court also cited, *inter alia*, *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015), for the proposition that, because "'mere steps in furtherance of a final act or decision may constitute

an official act,'" even "scheduling and conducting meetings" could qualify. (SPA-6). The court concluded that directing staff to arrange meetings was precisely "the type[] of conduct that courts have previously held to constitute official action." (SPA-6-7).

The government then sought a jury instruction defining "official act" broadly so it could exploit the meetings and other routine activities it had endeavored to prove. (A-194-95). For the reasons set forth in their motion to dismiss, the defendants objected to the government's proposal, both in the joint requests to charge and at the charge conference. (A-195, A-251, A-515/2129).

The district court stated that it "underst[ood] the objection and again overrule[d] it." (A-515/2129). The court read the government's "official act" instruction verbatim in its jury charge:

> I have used the term "official act" in describing the crimes charged in Counts One through Eight. The term "official act" includes any act taken under color of official authority. These decisions or actions do not need to be specifically described in any law, rule, or job description, but may also include acts customarily performed by a public official with a particular position. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

(A-619/2798). This was the only definition of "official act" in the jury instructions. The court cross-referenced it at other points in the charge and told the jury to apply this definition for all Counts. (A-608/2754, A-612/2767-68,

A-612-13/2770-72, A-614/2778, A-615-16/2780-83, A-618-19/2793-95, A-619/2798).

2. Six months after the verdict, the Supreme Court reversed the Fourth Circuit's *McDonnell* decision. In a unanimous opinion, the Court rejected the government's broad interpretation of "official act" and held that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" 136 S. Ct. at 2367-68. Instead, an official takes an "official act" only when he or she formally exercises governmental power, or advises or pressures another to exercise such power. *Id.* at 2371-72.

3. On August 4, 2016, the district court granted the Skeloses' application for bail pending appeal and stayed the financial penalties. It found that defendants' "appeals present a substantial question regarding whether [the] jury instructions were erroneous in light of" *McDonnell*. (SPA-51).

ARGUMENT

I. THE CONVICTIONS SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF A *QUID PRO QUO*

This Court reviews the sufficiency of the evidence *de novo*, and must reverse if "no rational trier of fact could have found [Skelos] guilty beyond a reasonable doubt." *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (quotation marks omitted). "[I]t is not enough that the inferences in the government's favor are permissible....If 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." *United States v. Valle*, 807 F.3d 508, 522 (2d Cir. 2015) (quotation marks omitted).

To the extent the government's theory was based on Skelos meeting with lobbyists, contacting other officials, or arranging meetings, it was legally deficient because those activities are not "official acts" under *McDonnell*. *See infra* Point II. The evidence was also insufficient under the government's alternative theory of legislative acts. There was no evidence from which a rational jury could conclude beyond a reasonable doubt that Skelos exchanged his votes on specific legislation, or any other legally sufficient official acts, for financial benefits for Adam. At best, the evidence showed that Skelos asked people he had known for years, including a personal friend, if they could help Adam find work. He did not promise anything in return and continued to promote the same legislative programs he had supported for decades. That is not a crime.

A. Each Of The Charges Requires A *Quid Pro Quo*

For each charge, the government had to prove an illegal *quid pro quo*—that Skelos "committed or agreed to commit an 'official act' in exchange for" a payment or other benefit. *McDonnell*, 136 S. Ct. at 2365; *see Ganim*, 510 F.3d at 141 (each statute "criminalize[s]...a quid pro quo agreement—to wit, a government

official's receipt of a benefit in exchange for an act he has performed, or promised to perform, in the exercise of his official authority"). A *quid pro quo* requires more than "simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be at some unknown, unspecified later time,...in a position to act...favorably to the giver's interests." *Ganim*, 510 F.3d at 149. The *quid pro quo* must relate to an official act on "something specific and focused that is 'pending' or 'may by law be brought' before a public official." *McDonnell*, 136 S. Ct. at 2372.

To be guilty of federal bribery or honest services fraud, a public official must have formed "a specific intent to...receive something of value *in exchange* for an official act." *United States v. Ford*, 435 F.3d 204, 212-13 (2d Cir. 2006) (quotation marks omitted) (§666); *see United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013) (honest services fraud). That is, he must have had the intent "to be influenced in an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (quotation marks omitted); *see Ford*, 435 F.3d at 213 ("[I]t is the recipient's intent to make good on the bargain, not simply her awareness of the donor's intent that is essential to establishing guilt under Section 666."). Similarly, the Hobbs Act requires proof that the public official "obtained a payment to which

he was not entitled, *knowing* that the payment was made *in return for official acts*." *Evans v. United States*, 504 U.S. 255, 268 (1992) (emphasis added).[7]

B. PRI And Glenwood

The government's evidence as to PRI and Glenwood was similar, and similarly deficient. Skelos was friendly with both companies' principals, who were powerful businessmen. From time to time he asked if they could help Adam to find work. In response, they referred or provided business or employment opportunities to Adam. Both PRI and Glenwood had interests in certain state legislation, but Skelos had always been a stalwart supporter of that legislation. He had supported it unwaveringly for decades, and his future votes were never in doubt. A sudden about-face would have harmed his political career and his constituents. Furthermore, when these companies hired or paid Adam, or referred him to AbTech, the legislation they sought had already been renewed, and was not due for further renewal until several years later. And it was undisputed that Skelos never mentioned legislation when he discussed Adam, nor remotely suggested that

[7] Conspiracy requires proof that "the defendant had the specific intent to violate the substantive statute[s]." *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (quotation marks omitted). Accordingly, if the evidence was insufficient to show mens rea for honest services fraud or extortion, the convictions for conspiracy also fall. *E.g.*, *United States v. Newman*, 773 F.3d 438, 455 (2d Cir. 2014).

his vote was suddenly up for grabs or that he was contemplating any change of position. No rational juror could infer an illegal *quid pro quo* on these facts.

1. Skelos—like nearly every other member of the Senate, Republican or Democrat—had supported the extenders consistently since the mid-1980s. (A-490/1982). The extenders are uncontroversial, and essential to the effective functioning of New York's entire health care system. (A-470-71/1903-06, A-489/1979, A-492/1988). They have been continually renewed for over thirty years with the overwhelming support of the Senate, the Assembly and the governors. (A-489-90/1979-80). In the two most recent votes before PRI hired Adam, for instance, the extenders passed the Senate 57-5 and 58-1. (A-634, A-715).

Similarly, 421-a and rent regulation are critical for developers and landlords, and benefit numerous other interested parties, including low-income families, construction workers, and doormen. (A-292/367-68, A-293/374, A-343/669-70, A-344/681-82, A-359/753). Like most other Republicans, Skelos had supported 421-a and the rent regulation laws throughout his service in the Senate. (A-337/647, A-338/649-50, A-339/653, A-340/659, A-342/665, A-343/669-70, A-359/753). In fact, in December 2010, he informed Glenwood and other real estate developers that he would support 421-a before the subject of Adam ever came up. (A-300/423). This legislation passed the Senate easily. The Rules

Committee voted 23-1 for the 2011 Rent Act and the full Senate voted 57-5. (A-638-39).[8]

As a result, Skelos's vote on all of this legislation was secure. There was no realistic possibility that he would—or politically could—vote against PRI's or Glenwood's interests, regardless of whether they helped Adam. But the criminal *quid pro quo* must involve acts that the public official "'would not otherwise take.'" *United States v. Ciavarella*, 716 F.3d 705, 731 (3d Cir. 2013) (quoting *United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012)). This ensures that the payment is "in exchange for" an identifiable official act, *McDonnell*, 136 S. Ct. at 2365, and that the official intends "to be influenced" by it, *Sun-Diamond*, 526 U.S. at 404. *See also United States v. Ring*, 706 F.3d 460, 468 (D.C. Cir. 2013) (briber must intend to "influence official acts" or have the official "alter his official acts") (quotation marks omitted); *Wright*, 665 F.3d at 571 (not bribery if official "intended not to be influenced, but merely to do his job").[9] As a matter of law,

[8] To the extent particular terms were subject to negotiation, Skelos and his fellow Republicans had a long history of promoting policies to benefit the real-estate industry. (A-294/375-76, A-299/421-22, A-309/472, A-337/647). Thus, Glenwood was a longtime and significant political supporter of Skelos's efforts to secure a Republican majority. (A-294/375-77, A-296/399-401, A-331/606, A-336/640, A-338/649, A-342/667, A-726-79).

[9] The government argued below that a public official can be bribed even if he was already committed to taking the same position anyway. (Dkt.167 at 4-5). But the cases it cited do little more than suggest—*e.g.*, in dicta in a civil antitrust case—

Skelos's vote on this legislation was not corrupted. Moreover, given the political pressures and Skelos's track record, no reasonable juror could conclude that Skelos intended the payments to Adam to influence his decision-making, or that the principals of PRI and Glenwood ever reasonably believed that Skelos's vote was in doubt, much less contingent on whether they helped Adam.

United States v. Bryant, 885 F. Supp. 2d 749 (D.N.J. 2012), is instructive. There, a New Jersey state senator was charged with public corruption under the same statutes. The district court rejected the government's argument that the defendant's votes in favor of the alleged bribe payer's interests demonstrated a *quid pro quo*, because the bills had passed overwhelmingly and Bryant (and many others) always supported those positions. *Id.* at 764-65.

Moreover, the PRI and Glenwood witnesses testified unequivocally that Skelos never tied legislation to any discussion of Adam's need for work. (A-339/652, A-339/654, A-340/656-57, A-340-41/659-60, A-341/662-63, A-342/666, A-343/669-70, A-344/682-83, A-490-91/1982-84, A-491/1987, A-492/1990). There was not a shred of evidence that Skelos ever said or did anything—in the many conversations in which he supposedly discussed Adam—to

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that an official cannot avoid bribery charges by arguing that he *might* have taken the same act, and that on certain facts a factfinder could determine that an official's act was not "ensured." *See, e.g., City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 378 (1991); *Rosen*, 716 F.3d at 704.

connect Adam's work prospects to any legislation. There were no demands, veiled threats, coded messages, knowing glances, or winks and nods.

That is not surprising because Skelos had warm relationships with Bonomo, Litwin and Dorego. (A-289/337-38, A-295/379, A-298/417, A-468-69/1892-96). Their conversations—even in meetings to discuss legislation—often touched on personal topics like family, horse racing and golf. (A-315/522, A-475/1923, A-476/1926). When Skelos mentioned Adam he was polite and humble, asking Bonomo to "look into the possibility" of using Adam's company for court reporting and telling Dorego and Litwin "it would be greatly appreciated" "if there was anything that [they] could do" to help Adam in his new title insurance venture. (A-300/424, A-473/1914).

2. The government argued below that Adam's job at PRI and the $20,000 check from Glenwood are proof of a *quid pro quo* because Adam did little or no work for the compensation he received. (Dkt.158 at 12, 23-25). There are two flaws with this argument.

First, Skelos never asked anyone to give Adam a "no-show" job, or to pay him for nothing. Skelos merely asked Bonomo if PRI could give "more work" to Adam's court reporting business. (A-475/1923). And Skelos never had "any type of special arrangement" with Bonomo or anyone else at PRI about Adam's work schedule, responsibilities or pay. (A-481/1946-47). Several weeks after Adam

started and Bonomo told Skelos that Adam was not reporting to work enough, Skelos did not ask PRI to give Adam special treatment; he simply asked Bonomo—Adam's boss—to "work this out." (A-482/1949). Skelos did not push back, let alone threaten to quash the extenders, when Bonomo later demoted Adam. (A-501-02/2037-39). Similarly, Skelos never asked Dorego or Litwin to give Adam money for nothing. He asked if Glenwood could refer title work to Adam's company (*e.g.*, A-300/424, A-306/460, A-317/529), and his emails with Adam show that Skelos believed Glenwood would make a legitimate referral. (A-957 (Skelos: "Following up. Be patient." Adam: "Placing title happens quick. I don't want to lose out...." Skelos: "I know.")). There is no evidence that Skelos thought Glenwood would make—or had made—a payment disguised as a title fee.

Second, the issue is whether the payments were solicited or received *in exchange for official action*, not whether Adam earned them. Even if PRI or Glenwood had given Adam an outright gift, that would not be a federal crime if it was done to maintain Skelos's goodwill and not for a specific official act. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2372 (official act must be "decision or action" on "something specific and focused that is 'pending' or 'may by law be brought' before a public official"); *Skilling v. United States*, 561 U.S. 358, 410 (2010) (honest services fraud does not criminalize undisclosed conflicts of interest); *Sun-Diamond*, 526 U.S. at 405 (it is not illegal to provide benefit to official "to build a

reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future").

3. The lack of any *quid pro quo* is evident from the witnesses' testimony about why they assisted Adam. They had non-prosecution agreements and every incentive to curry favor with the government. They would readily have testified that they offered these opportunities to Adam to obtain Skelos's vote on the extenders, 421-a, and the rent regulation laws, if that was true. But none of them did. Bonomo testified that he acted because of his respect for, and goodwill with, Skelos, and to help Adam; he referred only vaguely to "legislative issues." (A-474/1917, A-476/1925, A-484/1956, A-501/2035, A-506/2065). Similarly, Dorego speculated about a connection to legislation and "just assumed" there was "a possibility" that Skelos could get "angry" if Glenwood did not help Adam. (A-310/486, A-335/627).

Even if a *quid pro quo* need not be explicit, there must be some evidence that the public official and alleged bribe-giver believed the payment was in exchange for official action; it cannot just be a "possibility." *See Sun-Diamond*, 526 U.S. at 404-05 (*quid pro quo* requires "a specific intent to give or receive something of value *in exchange* for an official act"); *Evans*, 504 U.S. at 268 (public official must "know[] that the payment was made in return for official acts"); *United States v. Garcia*, 992 F.2d 409, 415 (2d Cir. 1993) ("not enough"

that benefit was "in connection with" or "reasonably could have affected" official's duties) (quotation marks omitted). Bonomo and Dorego did not think that they were buying Skelos's vote, nor was there reason for Skelos to believe that that was their intention, given his firm and clear position on the relevant legislation.

There was no *quid pro quo*. Perhaps Skelos's requests were ill-advised, but they were not criminal.

C. AbTech

There was no evidence of a *quid pro quo* with AbTech. Skelos had no interactions with Rink and White when they hired his son. He had no contact with them when he supposedly pressured them into increasing Adam's salary. Indeed, throughout the alleged conspiracy, Skelos had only two brief interactions with White—a four-minute call when Adam and White explained AbTech's technology and marketing plan, and a 10-15 minute unplanned meeting when White described potential applications for Smart Sponge. (A-417/1262-63, A-437.1/1370-73, A-439/1553-54). Skelos had only one fleeting interaction with Rink—a chance run-in in a hotel elevator. (A-397-98/1126-27). Rink testified that Skelos did not even recognize Rink's name when he introduced himself, and that the incident was "awkward." (A-398/1127).

It was plain that AbTech hired Adam on the merits and that he worked hard and performed well. Rink and White each vetted Adam thoroughly before hiring

him and valued his abilities and attitude. (A-374-75/991-94, A-379/1022, A-413/1248-49, A-447/1637-38). There would have been no need for such an evaluation if they were hiring Adam merely to get to Skelos. Rink testified that Adam contributed meaningfully to AbTech's business. (A-394/1113, A-401/1143-44). There was no effort to hide that Adam worked there; he regularly represented AbTech before myriad local and state officials.

The government stressed the April 2013 email from Dorego to Rink stating that Adam and his father would not "push[] through" AbTech's bid in response to Nassau County's RFP unless AbTech increased Adam's salary. (A-795). But Skelos did not write or see that email. (A-347/696). The email has no bearing on Skelos's state of mind, and does not support the government's claim that he sought to extract a payment from AbTech in exchange for official action.

Moreover, even after AbTech increased Adam's salary (to the amount other consultants were making), there is no evidence that Skelos did anything to "push through" AbTech's response to the RFP. The AbTech and county witnesses all agreed that AbTech won the contract fair and square because it presented a better proposal than the other bidders and had a product that uniquely suited the county's needs post-Sandy. (A-408/1184, A-408/1186, A-426-27/1301-03, A-441-42/1570-71, A-526-27/2199-2203, A-527-28/2206-07, A-529/2213).

Finally, Skelos did not make the statements about the fracking and design-build legislation or funding until more than two years after AbTech had hired Adam and more than a year-and-a-half after it increased his salary. (A-464-65/1787-91, A-525/2187). The relevant time is years earlier, when the government contends Skelos supposedly entered into an illegal *quid pro quo*. *McDonnell*, 136 S. Ct. at 2371 (no crime unless government proves that "public official agreed to perform an 'official act' *at the time* of the alleged *quid pro quo*") (emphasis added); *Evans*, 504 U.S. at 268 (extortion occurs "at the time when the public official receives a payment in return for his agreement to perform specific official acts"). There was no evidence that AbTech considered Skelos's position on legislation, or that Skelos took positions in AbTech's favor, at that time. Moreover, Rink testified that Skelos's support of relevant state legislation was "great" but not why AbTech had retained or continued to employ Adam. (A-394/1113). AbTech paid Adam because "he was doing great things" for it. (*Id.*).

II. *MCDONNELL* REQUIRES REVERSAL OF THE ABTECH CONVICTIONS AND AT LEAST A NEW TRIAL ON THE REMAINING COUNTS

There was no legally sufficient evidence of any "official act" under *McDonnell* as to the AbTech charges. Furthermore, the jury instructions were fatally flawed under *McDonnell*, requiring at least a new trial on all counts.

A. In *McDonnell*, The Supreme Court Held That "Official Act" Is Narrowly Defined

Virginia Governor Robert McDonnell and his wife were convicted of federal bribery offenses. The charges related to $175,000 in loans, luxury items, and other benefits they received from Jonnie Williams, the founder of a company promoting a dietary supplement. Williams wanted the supplement classified as a pharmaceutical, and he hoped that McDonnell could persuade state universities to conduct the necessary clinical trials and studies. *See McDonnell*, 136 S. Ct. at 2361-62. The "official acts" underlying McDonnell's convictions included "'arranging meetings' for Williams with other Virginia officials," "'hosting' events" for the company at the Governor's mansion, and "'contacting other government officials'" concerning research studies. *Id.* at 2361.

McDonnell maintained that these activities did not qualify as "official acts." *Id.* at 2366-67. The government contended that the term "encompasses nearly any activity by a public official," including these activities. *Id.* at 2367. The jury instructions defined "official act" consistent with the government's broad theory, and in a decision on which the district court here relied, the Fourth Circuit affirmed the resulting convictions. *See id.* at 2366-67.[10]

[10] The *McDonnell* "official act" instruction included much of the same language used here, and indeed provided a narrower definition:

The Supreme Court unanimously reversed. It held that that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" 136 S. Ct. at 2368. Instead, an "official act" occurs when the official formally exercises governmental power, or advises or pressures another official to exercise such power. *Id.* at 2371-72.

"To qualify as an 'official act,' the public official must make a decision or take an action" "on a 'question matter, cause, suit, proceeding, or controversy,'"

> The term official action means any 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 such public official's official capacity. Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as 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. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

792 F.3d at 505-06. The underlined language is virtually identical to the instruction at the Skelos trial. *See supra* at 22. The first sentence of the instruction is derived from 18 U.S.C. §201(a)(3) and is significantly narrower than the first sentence here, that "[t]he term 'official act' includes any act taken under color of official authority." (A-619/2798). The only other non-underlined sentence appeared in another portion of the Skelos charge. (*See* A-616/2783).

"similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2371-72 (quoting 18 U.S.C. §201(a)(3)). This "may include using [one's] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Id.* at 2372. However, "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—*does not fit that definition of 'official act.'*" *Id.* (emphasis added). Nor does "deliver[ing] a speech," "speaking with interested parties," or even "expressing support" for an official decision. *Id.* at 2370-71. None of these activities rises to the level of an official act, even if they are "related" to a matter pending before an official decision-maker. *Id.* at 2370.

In arriving at this conclusion, the Supreme Court referred to the definition of "official act" in §201, the bribery statute that covers federal (but not state) officials. *See id.* at 2367-72. It did so because the parties had agreed that the §201 definition applied to the corruption statutes McDonnell was charged with violating, at least for purposes of that case. *See id.* at 2365, 2375. It is clear, however, that the Supreme Court's narrow construction of "official act" applies to *all* corruption laws in *every* case: The Court held that its narrow construction was imperative to

avoid the "significant constitutional concerns" raised by the government's "expansive interpretation of 'official act.'" *Id.* at 2372.

The Court identified three such concerns. First, public officials "arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time" as part of the "basic compact underlying representative government." *Id.* The Court discerned that the government's expansive theory could chill public officials' interactions with the people they serve and thus impair the performance of their civic duties. *Id.* at 2372-73. Second, and relatedly, the government's interpretation of "official act" raised a "serious" due process concern, because it would sweep indefinitely and risk "'arbitrary and discriminatory enforcement.'" *Id.* at 2373 (quoting *Skilling*, 561 U.S. at 402-03). The Court's narrower construction was thus necessary to avoid a finding of unconstitutional vagueness. *Id.* Third, the government's construction raised "significant federalism concerns," which the Court's narrowing construction avoided. *Id.*

These constitutional concerns apply with full force in any federal corruption prosecution of a state official, regardless of which particular statute(s) the government has invoked. Thus, after *McDonnell*, a state official violates federal corruption laws only when he accepts payment in exchange for formally exercising

governmental power, pressuring or advising others to do so, or agreeing to do these things. It is not a crime to arrange or attend meetings, even for payment.

B. The AbTech Convictions Should Be Reversed Because There Was Insufficient Evidence Of Any Legally Valid Official Act

The AbTech charges should be dismissed with prejudice because there was no official act that would qualify under *McDonnell*.

1. The meeting that Skelos helped set up between AbTech and the DOH is insufficient. The government readily conceded post-trial that this was not "official action" under *McDonnell*. (Dkt.218 at 39). *See* 136 S. Ct. at 2372 ("Setting up a meeting...does not fit th[e] definition of 'official act.'").

2. The evidence that Skelos talked to other officials fares no better. The government argued that state legislators perform official acts whenever they "call other government officials about issues." (A-566/2488). But there was no evidence that Skelos ever "exert[ed] pressure on another official to perform an 'official act'" or "advise[d] another official, knowing or intending that such advice w[ould] form the basis for an 'official act,'" as *McDonnell* requires. 136 S. Ct. at 2372. For example, the government cited a phone conversation in which Skelos "talked about stormwater" with Senator Jack Martins. (A-583/2557). The government argued: "Again, official act. This is what senators do, they advocate [to] their colleagues." (*Id.*). But *Senator Martins* initiated that call, and *he* was the one asking Skelos to support funding for water treatment. (A-820 (asking Skelos

to "mak[e]...some sort of a commitment...to improve water quality"), A-958, A-961). Skelos responded that he had already "been talking about that...[that] the infrastructure should be...sewers, storm water." (A-820). Skelos did not pressure or advise Martins in any way.

The government also cited calls and meetings that Skelos had with Nassau County officials. (A-564/2479-80, A-579-81/2542-47). Most of those calls were not recorded and there was no testimony about what was said, so the government asked the jury to speculate that Skelos was pressuring county officials. (A-579-81/2542-47). Such "speculation and surmise" cannot sustain the convictions. *E.g.*, *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012). In the few interactions as to which there was any evidence, it was clear Skelos did not pressure or even advise the officials in any way. He reached out to County Executive Mangano, simply to ask about the status of payments that the county had already approved and what, if any, implications another major infrastructure project would have for AbTech. (A-524/2184-86, A-528/2207-09, A-530-31/2217-20, A-806-09). Merely "speaking with interested parties" or "talking to another official," which is all Skelos did, is not official action. *McDonnell*, 136 S. Ct. at 2370, 2372.

3. The government contended that in 2015 Skelos publicly advocated long-held positions that were also in AbTech's interest. (Dkt.158 at 18, 20). The government told the jury that this was "an official act" because "one of the things

senators do...is advocate for public positions." (A-583/2556). But *McDonnell* held that "expressing support" for positions does not qualify as an official act because it does not "involve a formal exercise of governmental power." 136 S. Ct. at 2371-72. There was no evidence that Skelos ever voted on any legislation that was in AbTech's interest.

Accordingly, Skelos is entitled to acquittal on Counts Four and Seven.

C. At A Minimum, A New Trial Is Required On All Counts Because The Jury Instruction Permitted Conviction On A Legally Invalid Theory Of "Official Action"

Both the district court and the government told the jury that it could convict Skelos solely on the basis of conduct that, after *McDonnell*, is plainly lawful. If the Court does not reverse for insufficiency, the judgment should be vacated and the case remanded for a new trial on all counts.[11]

1. The Supreme Court held that the *McDonnell* jury instructions did not "convey any meaningful limits on 'official act'" and "allowed the jury to convict [him] for lawful conduct." 136 S. Ct. at 2373 (quotation marks omitted). The Court held that key language virtually identical to the language of the instructions here was legally erroneous because it "lacked important qualifications, rendering [the instructions] significantly overinclusive." *Id.* at 2374.

[11] The defendants preserved their objection to the official acts instruction, as explained *supra* at 21-23. Accordingly, the instruction is reviewed *de novo*. *E.g.*, *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006).

The defective language included the statement that "'official actions may include acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'" *Id.* at 2373 (quoting instructions). This language featured prominently in the instructions here. (A-619/2798). The Supreme Court also held fatally overbroad language stating that official action includes "actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law." 136 S. Ct. at 2373 (quoting instructions). Again, the jury instructions here included substantially similar language stating that official "decisions or actions do not need to be specifically described in any law, rule, or job description, but may also include acts customarily performed by a public official with a particular position." (A-619/2798). These instructions also began with a declaration that anything a public official does in his official capacity counts. (*Id.* ("The term 'official act' includes any act taken under color of official authority.")).[12] This language raises precisely the "significant constitutional concerns" the Supreme Court sought to avoid, because it could cover "nearly anything a public official does." 136 S. Ct. at 2372.

[12] As discussed, the *McDonnell* district court instead quoted the narrower language of §201(a)(3). *See* 136 S. Ct. at 2373.

As a result, there can be no serious dispute that the "official act" instruction here was legally erroneous. The instruction allowed the jury to convict Skelos for arranging and attending meetings, talking with other officials, and expressing support for certain policies—conduct that was entirely lawful *even if*, as the government claimed, Skelos did these things in exchange for payments to Adam.

2. Skelos is entitled (at a minimum) to a new trial, so that a properly instructed jury can evaluate the evidence under the correct standard. *See, e.g.*, *Quattrone*, 441 F.3d at 177. For each of the three alleged "schemes," several of the acts that Skelos supposedly traded for payments to Adam involved merely setting up meetings, talking to other officials, or meeting with lobbyists—precisely the types of conduct the Supreme Court held insufficient to establish official action in *McDonnell*. The government highlighted evidence of this innocent conduct in its closing arguments and, citing the erroneous instruction, repeatedly told the jury that it could convict based on this evidence alone—without finding any other official act.

a. *Glenwood.* The government argued to the jury at length that every meeting between Skelos and Glenwood lobbyists was a separate "official act":

> 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.

> ...*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*? Glenwood got exactly what it paid for, official action from Senator Skelos in exchange for payments to Adam Skelos.

(A-573/2516-17 (emphasis added)). The government was, of course, wrong, since meeting with lobbyists is not "official action." *McDonnell*, 136 S. Ct. at 2372.

b. *AbTech.* As discussed, the government relied on the meeting Skelos's staff arranged between AbTech and the DOH, his conversations with Senator Martins and other officials, and his statements to the media as evidence of "official action," and invoked the broad "official action" instruction:

> ...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.

(A-566/2487-88). The government underscored this point:

> 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.*

(A-566/2488 (emphasis added)).[13]

Again, the government was wrong. None of this was official action. *See McDonnell*, 136 S. Ct. at 2370 ("deliver[ing] a speech" or "speaking with interested parties"), 2371 ("expressing support" for an official decision), 2372 ("talking to another official" or "[s]etting up a meeting").

c. *PRI*. The government argued that Skelos's meetings with PRI lobbyists were official acts.[14] Before discussing PRI, the government had already expounded at length on why meetings were official acts. It nonetheless reiterated the point yet again:

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[13] The government reiterated this discussion later as well: "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." (A-575/2524).

[14] The government elicited testimony from PRI lobbyist Nicholas Barrella that Skelos had attended these meetings in his "official capacity." (A-533/2241).

> So let's just quickly sum up PRI with a chart. Quid pro quo. Adam gets, pretty straightforward, he gets money, he gets benefits, he gets a consulting contract, he gets court reporting commissions. The senator gives. This is the quo, votes for PRI extenders, there's other legislation you heard about from Nick Barrella that the senator supported and you saw those charts. They have multiple pieces of legislation going on at all times. *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.*

(A-591/2588 (emphasis added)). In rebuttal, the government emphasized that for PRI as well as Glenwood, Skelos "ma[de] the businesses feel like they're getting something for their money" by "granting them official meetings between the senator and their lobbyists." (A-595/2702). It went on to say that "all of that stuff that you heard in trial" regarding "the extenders, *all of those meetings and discussions* about it, those were official actions." (A-597/2711 (emphasis added)).

d. *Attacks on the defense.* The prosecution also repeatedly undermined defense arguments that meeting with lobbyists and the like was not official action. Urging the jury to "pay close attention to" this issue, it maintained that these arguments "completely ignore[d] the law" and were inconsistent with what "Judge Wood is going to tell you." (A-566/2487-88). In rebuttal, the government once again highlighted the flawed jury instruction, told the jury *not* to focus on whether Skelos traded legislation for payments to Adam, and repeated its invitation to convict based on innocent conduct:

> Just going to [Skelos'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.*

(A-594/2699-2700 (emphasis added)).

Thus, for each and every count of conviction, the instruction permitted the jury to convict based on innocent conduct, and the government actively encouraged it to do so.

3. The government will undoubtedly argue that the evidence could have supported a conviction on a valid legal theory of official action, at least as to PRI and Glenwood. But that does not salvage the verdict here, because the jury was also presented with and urged to adopt an invalid legal theory.

The Supreme Court unanimously rejected a similar argument in *McDonnell*. The Court acknowledged that the jury might have found that McDonnell "agreed to exert pressure on [state] officials" to take official action. 136 S. Ct. at 2374-75. The Court nevertheless vacated the convictions because it was also "possible that

the jury convicted McDonnell without finding" a legally valid official act, and therefore the Court could not "conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'" *Id.* at 2375 (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)).

In vacating McDonnell's convictions, the Court was applying the well-settled principle that "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." *Skilling*, 561 U.S. at 414. A verdict must "be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957). In this situation, the conviction may be affirmed only if the government can "show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *i.e.*, that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *United States v. Reed*, 756 F.3d 184, 190 (2d Cir. 2014) (quotation marks omitted).

Cases decided after *Skilling* are particularly instructive. In *Skilling*, the Supreme Court narrowed the scope of the honest services statute, ruling that violations of fiduciary duty involving "undisclosed self-dealing" were not criminal unless the defendant received "bribes or kickbacks." 561 U.S. at 404, 409. In the wake of *Skilling*, the Second Circuit explained that convictions should be "reversed

in cases tried before *Skilling*" where "the Government intertwined an alternative theory with a bribery or kickback scheme theory." *United States v. Botti*, 711 F.3d 299, 311 (2d Cir. 2013); *see also United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012) ("[W]ithout a charge that adequately explained what *Skilling* made clear the law requires, it is not clear beyond a reasonable doubt that the Defendants' convictions rested on unanimous findings of bribes or kickbacks."); *United States v. Bruno*, 661 F.3d 733, 739-40 (2d Cir. 2011) (same).

Vacatur is especially appropriate where the government highlighted the invalid theory in its jury addresses, as it did here. *See United States v. Hornsby*, 666 F.3d 296, 306-07 (4th Cir. 2012) (vacating conviction where "[invalid] theory was 'interwoven' throughout the district court's honest-services fraud instruction to the jury" and the government emphasized the erroneous instruction in its summation); *Wright*, 665 F.3d at 572 (vacating conviction where the "trial environment," including the government's summation, "emphasized the [invalid] theory"); *United States v. Post*, 950 F. Supp. 2d 519, 534 (S.D.N.Y. 2013) (vacating conviction because although invalid theory "was not necessarily the Government's primary theory, it was given individualized attention").

For similar reasons, this Court has vacated other convictions for alternative-theory error as well. *See United States v. Banki*, 685 F.3d 99, 114 (2d Cir. 2012) ("Simply put, looking at the charge in the context of the entire trial, we are

uncertain of the theory on which the jury chose to convict."); *United States v. Joseph*, 542 F.3d 13, 19 & n.5 (2d Cir. 2008) (rejecting argument that it was "overwhelmingly likely" that jury convicted on valid theory because prosecutor "invited the jury to rely *solely* on the [incorrect] alternative [theory] in the charge"), *abrogated on other grounds*, *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011); *Garcia*, 992 F.2d at 413-16 (vacating Hobbs Act extortion conviction because "jury was given three disjunctive bases for conviction, [only] one of which was legally sufficient," and Court could not "tell the basis upon which the jury based its conviction").

It is abundantly clear that the jury may have relied on the invalid theory of "official action." The instructions allowed the jury to convict Skelos solely for arranging and attending meetings, among other innocent conduct, and the government aggressively underscored this theory of guilt for the jury. Accordingly, even if the Court finds that there was sufficient evidence of valid official action, a new trial with a proper instruction is required.

III. THE DISTRICT COURT ERRONEOUSLY ADMITTED EVIDENCE THAT SKELOS ACTED "INAPPROPRIATELY" AND "UNETHICALLY"

In *Skilling*, the Supreme Court cabined honest services fraud to "seriously culpable conduct" and firmly rejected as unconstitutional the government's effort to make public officials' undisclosed conflicts-of-interest a federal crime. 561

U.S. at 404-05, 409-11. The Court confined the offense to its narrow "core": "bribes or kickbacks" in exchange for official action. *Id.* at 408-09. The Hobbs Act and bribery statute are similarly circumscribed. *See supra* at 24-26. Absent a clear statement from Congress, the federal government should not be involved "in setting standards of disclosure and good government for state and local officials." *McNally v. United States*, 483 U.S. 350, 360 (1987).

Nonetheless, the district court permitted the government to suggest through two witnesses—State Senator Tony Avella and Lisa Reid, Executive Director of New York's Legislative Ethics Commission—that Skelos's conduct was "improper," "inappropriate" or "unethical," under state ethics rules. Perhaps worse, the district court prevented Skelos from offering evidence to counter these characterizations, in violation of his due process rights. By allowing the government to misdirect the jury from the charged offenses to other standards, the district court abused its discretion and prejudiced Skelos. *See United States v. Kaplan*, 490 F.3d 110, 120-22 (2d Cir. 2007) (district court abused discretion by permitting government to introduce unfairly prejudicial evidence about whether conduct was lawful with little-to-no probative value of *mens rea*).

A. The Avella And Reid Evidence

1. The government elicited misleading testimony from Senator Avella about which of his routine acts he considers "official." (A-279-80/252-55). It then

asked Avella about the financial benefits that Adam received. Avella testified that he was unaware of those benefits and that Skelos's supposed conflict-of-interest "absolutely" or "greatly" "would have mattered." (A-281/268, A-283/276, A-284/284, A-285/287-88, A-286/294).

For example, Avella asserted that Skelos's supposed requests for Glenwood to help Adam were "improper" and that if Avella had learned of them he would have alerted the media and started "an investigation." (A-281/268-69). Similarly, when asked if he knew that Skelos "had helped arrange" for Glenwood "to direct a $20,000 payment to his son," Avella concluded that Skelos gave "undue influence" to "a particular issue or legislation based upon personal interest." (A-283/275-76). And when asked about AbTech, Avella opined that it was "totally inappropriate" and created at least "the appearance of impropriety" for Adam to benefit from state funding of stormwater projects. (A-284/284; *see also* A-285/287, A-286/294 (castigating other alleged conduct as "inappropriate")).

The district court overruled Skelos's objections to this testimony. (A-282/273-74, A-283/276, A-284-85/286-87, A-285/288, A-286/294, A-287/304).

2. Lisa Reid testified that she had trained Skelos on New York State's "Ethics Laws." (A-513/2115). The government then lectured the jury about the broad, prophylactic prohibitions in those laws. It particularly emphasized provisions that seemed to encompass the allegations against Skelos, but lacked

elements of the federal offenses. The jury learned, for example, that the Ethics Laws forbid a senator from using his position "to secure unwarranted privileges for himself or others" (A-842, A-512/2114), whether or not tethered to any official act. The jury was informed that a senator cannot accept a gift that "could reasonably be expected to influence" an official act (A-833, A-512/2111), even if such influence was not the senator's or donor's intent. And the jury was told that a senator cannot "by his conduct give reasonable basis for the impression that any person can improperly influence him or...that he is affected by kinship," whether or not there is any intent to influence or be influenced, or any official act. (A-842, A-512/2114). The government also established that Skelos regularly took oaths of office to "faithfully discharge" the duties of a Senator. (A-847-57, A-513/2117-18).

Skelos objected to Reid's testimony on the grounds that it was irrelevant, prejudicial and likely to confuse the jury. (A-462/1771, A-463/1773, A-495-96/2007-08, A-498-99/2020-24, A-513/2117-18). The government asserted that it was relevant if Skelos "contravened the training he received," yet sought to preclude him from establishing that he did not actually violate the Ethics Laws—calling that "irrelevant." (Dkt.106 at 2-3). The district court sided with the government on both fronts. It enabled the government to insinuate that Skelos had

violated the Ethics Laws, but precluded Skelos's counsel from asking Reid any questions to rebut that insinuation. (A-495/2007, A-499/2023, A-514/2119-21).

B. The Evidence Was Irrelevant, Prejudicial And Confusing

The district court should not have permitted the government to put Avella's opinions or Reid's ethics testimony before the jury. The testimony was wholly irrelevant to the charged offenses and thus inadmissible under Rule 402. To the extent the testimony had any probative value, it should have been excluded under Rule 403 because of the clear likelihood of prejudice and confusion.

1. Avella's testimony was irrelevant. Whether, in his view, a fellow senator's conduct was "inappropriate" has no bearing on whether it violated federal corruption laws. *See Skilling*, 561 U.S. at 409 ("§1346 criminalizes *only* the bribe-and-kickback core of pre-*McNally* case law."). And the testimony was plainly prejudicial. Rather than "assist the trier of fact," his denunciations of Skelos essentially told "the jury what result to reach." *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005) (quotation marks omitted); *see also Cameron v. City of New York*, 598 F.3d 50, 62 n.5 (2d Cir. 2010) ("clear[ly]" improper to allow witness to testify "in the form of a legal conclusion").

The government argued that Avella's testimony was relevant to "materiality" for purposes of honest services fraud, and the district court agreed.

(A-282/274). But if materiality is an element of the offense,[15] the relevant question is whether Skelos's supposed non-disclosures were material to *his constituents*—the individuals he supposedly defrauded—not a Senate colleague. *See United States v. Rybicki*, 354 F.3d 124, 146 (2d Cir. 2003) (a concealed scheme is material for purposes of honest services fraud when "*the victim's* knowledge of the scheme would tend to cause *the victim* to change his or her behavior") (emphasis added); *see also Bruno*, 661 F.3d at 745 ("New York citizens" were the victims of state senator's honest services fraud); *United States v. Sawyer*, 85 F.3d 713, 732 (1st Cir. 1996) ("[T]he affirmative duty to disclose material information arises out of the official's fiduciary relationship to the public.") (quotation marks and alterations omitted). Thus, Avella's speculation about what would have "mattered" to him as a fellow senator was irrelevant to the §1349 count.[16]

2. Reid's testimony was similarly irrelevant. She described state ethics standards that address the precise conduct that *Skilling* held is *not* honest services fraud, and implied that Skelos violated those rules and was culpable as a result. It is well-settled that the government cannot use civil or state-law violations if their

[15] It may not be after *Skilling*. In *Nouri*, this Court indicated that a bribe is *per se* material. 711 F.3d at 142-43 (failure to disclose a bribe "is, as a matter of law, the omission of material fact"); *see also United States v. Langford*, 647 F.3d 1309, 1321 & n.7 (11th Cir. 2011) (materiality not required post-*Skilling*).

[16] It is also unconvincing. Not surprisingly, Avella never suggested that the information would have affected his vote on any legislation.

"purpose or effect" is to elevate such violations to a federal criminal felony. *United States v. McElroy*, 910 F.2d 1016, 1023 (2d Cir. 1990); *see also*, *e.g.*, *Sawyer*, 85 F.3d at 729 ("reversible error" to allow jury to find defendant "intended to defraud the public of its right to honest services based on proof of gift statute violations"); *United States v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980) (error for government to "bootstrap" civil violations into a felony conviction). The government itself conceded that Ethics Laws violations are "irrelevant." (Dkt.106 at 2-3).

Yet the clear implication (and acknowledged purpose) of the government's evidence was that Skelos had violated the Ethics Laws. The government even argued in closing that the Ethics Laws prohibit "the obvious conflict when a sitting senator asks a business lobbying him for legislation to give gifts to his family." (A-598/2715). Yet Skelos was denied the opportunity to show that he did not violate the Ethics Laws. A trial court cannot allow the prosecution to urge the jury to draw inferences from certain evidence without allowing the defendant to rebut those inferences with the same type of evidence. *See United States v. Murray*, 736 F.3d 652, 659 (2d Cir. 2013) (reversible error to deny defendant "fair opportunity to defend against the government's evidence"); *United States v. Word*, 129 F.3d 1209, 1213 (11th Cir. 1997) (reversible error to preclude defense from "introducing evidence that told a different story" than the inferences the

prosecution was permitted to argue); *United States v. Gambino*, 59 F.3d 353, 368 (2d Cir. 1995) (party should be permitted to rebut "misimpression" created by opponent).

The Ethics Law evidence was highly prejudicial. It invited the jury to convict based on a finding that Skelos violated other rules, and "lure[d] the [jury] into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Morgan*, 786 F.3d 227, 232 (2d Cir. 2015) (quotation marks omitted).

The district court ruled that Skelos's training on the Ethics Laws was probative of his intent. (A-495/2007, A-499/2023). But the federal statutes—unlike the Ethics Laws—require an intent to receive something of value in exchange for an official act. *E.g.*, *Nouri*, 711 F.3d at 139. A legislator's knowing violation of the Ethics Laws—even if proven—has no bearing on whether he possessed the specific intent required to violate the federal corruption laws.[17]

[17] The district court relied on *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), which held that the government could use Pennsylvania ethics rules to prove a state senator's intent to defraud. (A-495/2005-07). But Fumo was charged with traditional (*i.e.*, tangible property) mail and wire fraud for misappropriating state resources. *See* 655 F.3d at 294-96. *Fumo* did not address whether ethics rules are relevant to the specific intent required under to prove federal corruption crimes after *Skilling* and *McDonnell—i.e.*, the intent to accept a bribe in exchange for an official act.

The limiting instructions could only have generated confusion and thus failed to mitigate the prejudice. The district court instructed the jury that it could not find Skelos guilty solely because "he may have violated state ethics laws," but told the jury to consider his ethics training "to the extent that you find it sheds light on whether or not Dean Skelos acted with fraudulent or corrupt intent." (A-511/2102, A-624/2817). The instruction therefore asked the jury to simultaneously (i) ignore the irrelevant ethics standards in assessing whether Skelos acted unlawfully, and (ii) use those same irrelevant standards to decide whether he formed a criminal intent. It is "inappropriate to presume that a district court's limiting instructions were obeyed when such instructions required jurors to perform mental acrobatics." *United States v. Becker*, 502 F.3d 122, 130-31 (2d Cir. 2007) (quotation marks omitted); *see also United States v. Reyes*, 18 F.3d 65, 72 (2d Cir. 1994) (limiting instructions ineffective because they "did not clearly explain the difficult mental task of considering information for one purpose but not for another").

Reid's testimony therefore should have been excluded under Federal Rules of Evidence 402 and 403.

C. The Errors Were Not Harmless

These errors were far from harmless. Intent was the key disputed issue at trial. Given the lack of evidence on that score, the jury may very well have seized

on Avella's assertions and the Ethics Laws' broad mandates in deciding to convict Skelos.

Moreover, the government magnified the prejudicial testimony in its summation, which followed closely on the heels of Reid's testimony. The prosecutor's first words were: "Dean Skelos took an oath. He took it every two years. And every single time he swore that he would faithfully exercise the duties of his office." (A-561/2467-68; *see also* A-596/2707). The government reminded the jury of Avella's testimony and argued that Skelos committed honest services fraud because "it would have mattered a great deal to the votes [Avella] cast and the other choices he made in the Senate" if he had known the truth. (A-592/2591). And it argued that the Ethics Laws supplied the intent element and "explain[ed] why Senator Skelos knew what he was doing was wrong and fraudulent." (A-598/2715). Having focused the jury on this evidence, the government cannot demonstrate "with fair assurance that the evidence did not substantially influence the jury." *United States v. Vayner*, 769 F.3d 125, 133 (2d Cir. 2014) (quotation marks omitted); *see also United States v. Grinage*, 390 F.3d 746, 751-52 (2d Cir. 2004) (evidentiary error not harmless where government offered little other evidence for disputed element and urged jury to rely on improperly admitted evidence).

CONCLUSION

The judgment should be reversed and the case remanded with instructions to enter a judgment of acquittal. In the alternative, the judgment should be vacated and the case remanded for a new trial.

Dated: New York, New York
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1. The undersigned counsel of record for Defendant-Appellant certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 13,871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font of Times New Roman.

Dated: October 7, 2016

/s/ Alexandra A.E. Shapiro
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