16-1618(L)

16-1697(CON)

To Be Argued By:
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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

REPLY BRIEF FOR DEFENDANT-APPELLANT DEAN SKELOS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Other Authorities

INTRODUCTION

The government could have pursued a single theory: its claim that benefits for Adam were exchanged for legislation. It chose not to, and instead opted for a broad "official action" definition encompassing merely arranging or attending meetings. The government insisted on an instruction covering anything a legislator might do in his official capacity; introduced extensive evidence about meetings that Skelos arranged or attended; called witnesses whose only testimony concerned AbTech's meeting with DOH (which it now concedes was not official action); and repeatedly invoked the challenged instruction, all in order to invite conviction based on meetings alone.

The risks of such a strategy were manifest. Months before trial, the Supreme Court granted a stay to Governor McDonnell, who argued that the "official act" instruction at his trial was impermissibly overbroad because it encompassed virtually anything a defendant does in his official capacity. This exceedingly rare injunction was a clear signal that at least five justices would likely vote to reverse. The government could have chosen a cautious approach focused exclusively on its legislative theory. Instead, it elected to roll the dice. Citing the Fourth Circuit's *McDonnell* decision, it persuaded the district court to give an instruction nearly identical to the one before the Supreme Court, and played it to the hilt in closing.

Now faced with the consequences of its losing bet, the government resorts to dissembling and diversion. It pretends that Skelos did not preserve his objection. But the district court found Skelos's objection crystal clear, and rejected the forfeiture argument when it granted bail pending appeal.

The government's legal arguments about the *McDonnell* error are equally spurious. The Supreme Court's unanimous opinion plainly invalidates the nearly identical official acts instruction given at Skelos's trial. The government cannot salvage the flawed instruction by pointing to other language in the charge.

The *McDonnell* error requires at least a new trial, because it is possible that the jury convicted on the government's legally invalid "meeting" theory. The government's *post-hoc* account of the trial is squarely at odds with the record. It claims that it merely presented meetings as evidence of legislative action, but it repeatedly contended—in the indictment and its closings—that meetings were themselves official action. The government deliberately sought and took advantage of a flawed jury instruction to ensure conviction regardless of whether the jury agreed with the valid theory of guilt.

The government also fails to point to any evidence that Skelos intended to trade his official acts in a *quid pro quo*. It makes factual assertions that find no support in the record, attempts to devalue Skelos's decades-long history of consistent voting, and trumpets facts that have no bearing on Skelos's state of

mind. The evidence also was legally insufficient to prove any official act as to AbTech.

The government is unable to defend Avella and Reid's unfairly prejudicial testimony. Avella's denunciation of Skelos is not "materiality" evidence; the government's trial theory was that Skelos defrauded *the public*—not other Senators. And rather than try to defend Reid's detailed recitation of the New York Ethics Laws, the government simply pretends that it did not happen.

Finally, Skelos joins the arguments in Points Two and Three of Adam's reply, as well as Part B of Point One. *See* Fed. R. App. P. 28(i).

I. AT A MINIMUM, SKELOS IS ENTITLED TO A NEW TRIAL UNDER *MCDONNELL*

The erroneous jury instruction on "official action" requires at least a new trial on all counts, because the jury may have convicted Skelos for conduct that is not illegal.

A. Skelos Preserved His Objection

The government's attempt to bury the *McDonnell* error by crying forfeiture contravenes the record and the controlling law.

Skelos preserved his claim by "inform[ing] the court of [his] specific objection and the grounds for the objection." Fed. R. Crim. P. 30(d). (DS.Br.21-23). In their motion to dismiss, defendants argued that "the term 'official act' should be read narrowly," because "not every action taken by a public official,

even in his or her official capacity constitutes an 'official action.'" (Dkt.21 at 10-11 (citing, *e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999))). Instead, official action must involve a "decision or action" on a "question, matter, cause, suit, proceeding or controversy" that is pending or may be brought before a public official. (*Id.* at 11 (quoting 18 U.S.C. §201(a)(3))). Skelos contended that he could not be convicted for "merely arranging meetings, consulting with constituents and other private citizens, and monitoring the status of a project," because those activities "do not involve a 'decision or action'" of the relevant sort. (*Id.* at 11-13; *see also* Dkt.36 at 8-10; SPA-4). If the corruption laws reached such activities, they would be "unconstitutionally vague." (Dkt.21 at 13-14).

Relying on the Fourth Circuit's *McDonnell* decision, the government countered that "official action" included *any* act "under color of official authority." (Dkt.33 at 26 & n.9, 32-33). The district court agreed, citing *McDonnell* and circuit precedent to hold that acts like arranging meetings qualified as official action. (SPA-6-7 & n.1).

In requests to charge, the government again cited the Fourth Circuit's *McDonnell* opinion, as well as the opinion denying the motion to dismiss. (A-194-95). The defendants objected for the reasons raised in that motion. (A-195, A-251). Although the opinion denying the motion was not a "final adjudication of

the legal instruction" (US.Br.47), the court subsequently relied on it to resolve the parties' dispute over the jury instruction. (A-515/2129).

No one was "sandbagg[ed]" (US.Br.48). The prosecutors themselves said at the charge conference that one of the "main" disputed issues was "the definition of official action." (A-515/2127). They acknowledged that the government's proposal was "consistent with [the] decision earlier on in this case"—and that the defendants had "noted their objection" to that definition. (A-515/2127, 2129). The court asked whether the Skeloses had anything "to add to the objection [they] made earlier regarding the motion to dismiss and [the court's] ruling then on the definition of official act." (A-515/2129). The Skeloses renewed their objection, and the court stated that it "underst[ood] the objection and again overrule[d] it." (*Id.*). The court also later granted bail pending appeal (Dkt.221), thus rejecting the argument that Skelos failed to preserve his objection.

Skelos's repeated objections were plainly "sufficient to direct the district court to his contention" and preserve his claim. *United States v. Masotto*, 73 F.3d 1233, 1238 (2d Cir. 1996). Where, as here, the district court has rejected legal arguments, "[i]t would [be] superfluous" to further "specif[y] the particulars in which the court's instructions diverge[] from [the defendant's] view of the governing law." *United States v. Dinome*, 86 F.3d 277, 282 (2d Cir. 1996).

The government maintains that Skelos should have proposed an alternative instruction (US.Br.41-43, 47-49), but this Court has flatly refused to impose any such requirement. In *United States v. Hassan*, 578 F.3d 108, 129 (2d Cir. 2008), this Court held that the defendant preserved his instructional challenge even though he "failed to propose alternative language." The government does not even try to distinguish *Hassan*, much less cite a single Second Circuit case holding otherwise. The cases it does cite are entirely inapposite. They involve, *inter alia*, defendants who requested erroneous instructions,[1] objected to the issuance of an instruction but not its language,[2] or affirmatively accepted the instruction.[3]

The notion that the court could have "fashioned compromise language" (US.Br.48) is wrong and beside the point. The court had rejected Skelos's proposed limits on official action in its opinion (SPA-4-8) and "again" rejected them at the charge conference (A-515/2129). These rulings left no opening for acceptable compromise. Indeed, the "compromise" the government envisions would have excluded only "acts of a strictly ceremonial or educational nature" (US.Br.48), not the meetings, statements, or calls that it argued were official acts.

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[1] *United States v. Wilkerson*, 361 F.3d 717, 733-34 & n.9 (2d Cir. 2004).

[2] *United States v. Ghailani*, 733 F.3d 29, 52 (2d Cir. 2013); *United States v. Nektalov*, 461 F.3d 309, 313-17 & n.8 (2d Cir. 2006); *United States v. Skelly*, 442 F.3d 94, 99 (2d Cir. 2006).

[3] *United States v. Weintraub*, 273 F.3d 139, 146 (2d Cir. 2001); *United States v. Carson*, 464 F.2d 424, 432 & nn.9, 10 (2d Cir. 1972).

If any party made an improper "strategic decision" (US.Br.48), it was the government. The Supreme Court granted McDonnell a stay of the mandate in August 2015—before Skelos's motion to dismiss was filed. *McDonnell*, 136 S. Ct. 23 (2015). The government therefore knew, well before trial, that a reversal in *McDonnell* was likely. *See Maryland v. King*, 133 S. Ct. 1, 2 (2012) (stay requires fair prospect of reversal). It nevertheless sought and persistently deployed a broad instruction on official action to maximize the chances of conviction. Having opted for this aggressive approach, the government must now live with the consequences.

B. The Jury Instructions Were Erroneous

The official act instruction was virtually identical to, indeed patterned on, the *McDonnell* instruction that the Supreme Court unanimously rejected as overbroad—except that the Skelos instruction was *even more expansive*. (DS.Br.22, 36-37 n.10, 43). There is no credible way to salvage the instruction. That is why the district court found that the appeal raised a substantial question. The government therefore ignores the elephant in the room—the nearly identical language—and instead resorts to obfuscation and misdirection.

For instance, the government insists that *McDonnell* did not find certain key portions of the instruction below incorrect (US.Br.50), but that is just false. The language the government quotes regarding "acts customarily performed by a public official" and "series of steps" towards "longer-term goals" was *in* the erroneous

McDonnell instruction. And contrary to the government's argument, the Supreme Court held that official action does not "include[] any act taken under color of official authority." (A-619/2798). The Court expressly held that "[s]etting up a meeting, talking to another official, or organizing an event…does not fit th[e] definition of 'official act'" even when such actions are taken in the defendant's official capacity, as was the case with McDonnell. 136 S. Ct. at 2372. *McDonnell* therefore expressly overruled the law in this Circuit endorsing the "official authority" formulation the court below employed.[4]

The government next grossly misapplies the principle of evaluating the charge "as a whole." The other language it points to is either invalid under *McDonnell* or fails to rectify the flaws in the "official action" definition. The instructions "on the concept of influence" (US.Br.51-52), for instance, are legally erroneous. *McDonnell* rejected as "significantly overinclusive" an instruction that "official action" can include "a series of steps to exercise *influence* or achieve an end." 136 S. Ct. at 2373-74 (emphasis added). Indeed, the *McDonnell* charge also instructed that the bribe giver must "reasonably believe[] that the public official had *influence*, power or authority over a means to the end sought by the bribe payor," but that did not save it. (DS.Br.36 n.10). Similarly, telling the jury that

[4] The government defiantly asserts that the "official authority" language here is no broader than the 18 U.S.C. §201 definition in *McDonnell*. (US.Br.53 n.9). But the words of §201 are self-evidently more precise, which is presumably why the government vociferously resisted applying §201 below. (Dkt.33 at 24 n.8, 33).

honest services fraud involves payment for "particular kinds of influence" (US.Br.52 (quoting A-613/2771)) does not help, since not all "kinds of influence" satisfy *McDonnell*. Further, the instruction that extortion involves "official influence or decision making" (US.Br.50, 52 (quoting A-615/2781)) did nothing to inform the jury that arranging or attending meetings *did not qualify* as "influence or decision making." And the instruction that "official action can either be actually performing an act himself, or exerting influence over an act performed by another person" (US.Br.52 (quoting A-616/2783)) is irrelevant. The issue is what types of "acts" count—not who performs them.

Nor was the error cured by the instruction that §666 covers acts relating "to a *transaction* of the State of New York." (US.Br.51 (quoting A-618/2791)). A juror could easily view a meeting as an official "transaction" or infer that a meeting about legislation was action "with respect to" such a "transaction" (A-618/2791)—especially since the government repeatedly told the jury that mere meetings were official acts. And requiring proof that payments were made for "official action" rather than mere "goodwill" (US.Br.53) does not satisfy *McDonnell* where, as here, "official action" is defined to include arranging and attending meetings.

It is indisputable that the instructions used the same definition of "official action" for all the offenses, and that that definition allowed the jury to convict for

conduct that is not illegal. (DS.Br.22-23 (citing charge)). The government lobbied for the erroneously expansive definition, and cannot now credibly claim that the instructions were more limited than what it requested.

C. The Error Was Not Harmless

The government must show "beyond a reasonable doubt" that the verdict "was surely unattributable to the error." *United States v. Reed*, 756 F.3d 184, 190 (2d Cir. 2014). The Court must vacate if it is "*possible*" the jury "*may* have convicted…for conduct that is not unlawful," *McDonnell*, 136 S. Ct. at 2375 (emphasis added), such as when the government "intertwine[s]" a valid theory of conviction with an invalid alternative, *United States v. Botti*, 711 F.3d 299, 311 (2d Cir. 2013).

It is plainly possible that the jury rested its verdict on conduct that is not official action, because that is what the government repeatedly and emphatically invited it to do. The government (1) presented evidence that Skelos set up meetings, talked to other officials, and met with lobbyists; (2) elicited testimony that this conduct was done in an "official capacity"; (3) told the jury that, in light of the broad "official act" instruction, Skelos could be convicted solely for this conduct; (4) criticized the defense for arguing otherwise; and even (5) urged the jury to consider "each and every one" of these purported official acts, rather than

"focus[ing] specifically" on legislation. (DS.Br.7-8, 11, 15, 19-20, 44-48 & nn.13-14).

The government "concedes" that it went too far in arguing that the DOH meeting "standing alone" proved that Skelos was guilty. (US.Br.70-71). This is dispositive, because the government made the same argument about "the whole gamut" of Skelos's activities, "[n]o matter how big" or "how small." (A-566/2488, A-594/2700). As the government said about the DOH meeting, this "case is pretty much right there. Over." (A-575/2524).

1. The Government Argued That Arranging Or Attending Meetings Was Official Action, Not Merely Evidence Of Official Action.

The government offers up revisionist history—claiming its "theory" was "never" that Skelos accepted bribes for attending or arranging meetings. (US.Br.59-60, 64-65, 72). But that was its theory, from day one through its closing arguments. It charged the meetings that Skelos attended and arranged as separate "official acts" in the indictment. (A-166-68 ¶ 27(a), (f), (h)). It repeatedly told the jury that these meetings were official action, and that each one was a standalone basis for conviction. (A-566/2487-88, A-573/2516-17, A-591/2588, A-594/2699-2700, A-597/2711). The prosecution also told the jury in both closings to disregard defense arguments that meetings were not official action, claiming this "completely ignore[d] the law" and the jury instructions, and that jurors should not

"cabin [their] consideration" to votes "on particular legislation" because "official acts runs the whole gamut." (A-566/2487-88, A-594/2699-2700).

The government's strategy was not, as it claims, "fundamentally different" from that in *McDonnell*. (US.Br.60, 65). Its principal theory in *McDonnell* was that the Governor accepted payments in exchange for pressuring other officials to conduct studies of a dietary supplement and add it to the state health plan. That was a valid legal theory, and the Supreme Court acknowledged that the jury could have convicted on that basis. *See* 136 S. Ct. at 2374-75. But because the government also argued that meetings and other routine acts constituted official action, not just evidence of an agreement to sell official action, the Court concluded that the jury might have convicted on improper grounds. *Id.*

The government claims it is implausible that the jury "compartmentalized" meetings and the like as discrete bases for conviction and "ignored" evidence pertaining to legislation. (US.Br.61, 66). The government, however, did the "compartmentalizing" for the jury. It elicited testimony from three different witnesses that senators take meetings in their "official capacity" (A-279-80/252-55 (Avella), A-465.1-65.2/1851-52 (Garvey), A-532/2236, A-533/2241 (Barrella)) and repeatedly highlighted that testimony in its summations (A-566/2488, A-573/2517, A-591/2588, A-594/2700). The government emphasized the breadth of the "official act" instruction and urged the jury to "pay close attention to" its

argument that meetings and other non-legislative acts were enough for conviction. (A-566/2487-88). The government even discouraged the jury from focusing on legislation. (A-594/2699-2700 ("[W]hat the[] [defense lawyers] 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."). Just as in *McDonnell*, the jury easily could have concluded that its job was done if it found that Skelos had set up or attended meetings for payment.

2. The Government's Claim That Meetings Were Official Acts Permeated Its Jury Arguments As To All Counts.

The government contends that Skelos ignores the Hostage Email and other purported evidence of AbTech-related official action. (US.Br.66-72). But the government itself invited the jury to disregard this evidence and treat the AbTech-DOH meeting as the ballgame: "the AbTech case is pretty much right there. Over....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). Characterizing the meeting as "devastating, devastating evidence," the government described each email leading up to it and concluded: "They get the meeting. Official action. Official action from Senator Skelos in exchange for the payments to Adam." (A-581/2449-50). As this Court explained in a similar

situation, "[h]aving told the jury that the photos were 'devastating evidence,' the Government is somewhat disingenuous in now arguing that any error in admitting them was harmless." *United States v. Joseph*, 542 F.3d 13, 21 n.7 (2d Cir. 2008).

The government also tries to minimize the other non-official AbTech-related acts that it paraded before the jury. The government did *not* merely describe Skelos's statements about stormwater funding to Senator Martins and the media as "evidence" of his agreement to pass legislation. (US.Br.71 n.11). It argued that legislators perform "official actions" whenever they "call other government officials about issues" or "make public statements," and that each of these acts was "another reason to find [Skelos] guilty." (A-566/2488). It specifically highlighted both the conversation with Martins and Skelos's media interview as "official act[s]" because senators regularly "advocate [to] their colleagues" and "advocate for public positions." (A-583/2556-57). Having made these arguments, the government cannot credibly assert that the verdict was surely unaffected.

Regarding PRI and Glenwood, the government repeatedly told the jury that Skelos could be convicted for meeting with lobbyists. It reminded the jury of testimony that lobbyist meetings were "official" and argued that every one of these meetings was an "official action[]"—*i.e.*, "just another reason to find the defendants guilty." (A-566/2488; *see also* A-573/2517). The government reiterated that argument when discussing each "scheme" individually. (DS.Br.44-

47). The government described legislation sought by each company, but then identified lobbyist meetings as a separate set of "official actions" that each company obtained—reminding the jury, each time, of testimony that lobbyist meetings were "official." (A-573/2516-17, A-591/2588). In rebuttal, the government invoked that testimony yet again (A-594/2700), arguing that "all of those meetings" with Glenwood and PRI lobbyists "were official actions" (A-597/2711). These were not isolated statements—they were a persistent theme.

3. Meetings Could Satisfy The §666 "Transaction" Requirement.

The government erroneously contends the jury must have convicted based on legislation, because §666 requires payments related to a "transaction" worth at least $5,000. (US.Br.61, 66, 72). But the jury was not instructed that the "official acts" *themselves* had to be worth $5,000, only that "the transaction to which the payment related" or was "in connection with" had to be worth at least $5,000. (A-618/2791, A-619/2796), and there was no definition of "transaction."[5] As a result, the jury easily could have convicted Skelos for any meeting "related" or "connected" to legislation that was worth at least $5,000 to the companies making the alleged bribes.

[5] The government's argument that it was "[f]lat wrong" to suggest that "things like setting up meetings or making calls about a few thousand dollars don't really count as official actions" (A-566/2487-88), confirms that the official acts' monetary value was irrelevant.

If the legislation was worth millions, the jury could also have inferred that the privilege of attending meetings regarding that legislation was worth at least $5,000. And the evidence that Adam was paid more than $5,000 made this inference all the more plausible. (A-605/2742-44 (instructing jury on circumstantial evidence)). The Court cannot be assured that the jury applied the $5,000 requirement as rigidly and counterintuitively as the government suggests.

4. The Government's Cases Are Inapposite.

It is clearly "possible" that the jury convicted defendants on a legally invalid theory, requiring a new trial. *McDonnell*, 136 S. Ct. at 2375. The government does not even try to distinguish the numerous cases granting new trials in similar alternative-theory situations (DS.Br.49-51), and instead relies on easily distinguishable cases (US.Br.55-57).

In the government's post-*Skilling* cases, it was truly impossible for the jury to have convicted on an invalid theory. *See United States v. Nouri*, 711 F.3d 129, 140 (2d Cir. 2013) (jury clearly accepted valid honest-services fraud theory because it convicted defendant of commercial bribery); *Bereano v. United States*, 706 F.3d 568, 579 (4th Cir. 2013) (valid theory was "necessarily accepted by the jury" because it "could not have" convicted without finding facts that established that theory); *United States v. Skilling*, 638 F.3d 480, 481 (5th Cir. 2011) (securities-fraud convictions would have supported the conspiracy conviction

irrespective of the honest-services theory). Moreover, there is no suggestion in *Nouri* or *Bereano* that the government invited conviction based on the invalid theory alone, as it repeatedly did here; in *Skilling*, the government mentioned the invalid theory in relation to Skilling "only once," "never argued that the jury should convict Skilling solely on th[at] theory," and never "t[old] the jury that it should disregard the evidence" supporting the other, valid theories. 638 F.3d at 483.

Nor do the post-*McDonnell* cases—which involved unpreserved objections—help the government. Malcolm Smith cited only *one* instance in summations where the government discussed a meeting, and the government argued that the meeting was evidence of Smith's "knowledge," not official action. *United States v. Smith*, No. 15-2351(L) (2d Cir. 2016), ECF 218, 221, 239; *see also Smith*, 2016 WL 6128039, at *4-5 (2d Cir. Oct. 20, 2016) (summary order). This is a far cry from what happened here.

Halloran is equally inapposite. *McDonnell* had "no apparent relevance" there because the only acts relied on at trial—"disbursing public funds and issuing a Wilson-Pakula" certificate—were indisputably "official acts." *United States v. Halloran*, 821 F.3d 321, 340 n.13 (2d Cir. 2016). Similarly, in *Stevenson*, there was no "plain error" because the "action [t]here at issue—proposing legislation—

was an 'official act' as clarified by *McDonnell*." *United States v. Stevenson*, 660 F. App'x 4, 7 n.1 (2d Cir. 2016).[6]

By contrast, the government repeatedly told Skelos's jury that it could—and should—convict him for conduct that is not illegal. Even if this Court were to review only for plain error (which it should not), Skelos would be entitled to a new trial before a properly instructed jury. The "official act" instruction was patently overbroad in light of *McDonnell*. *See Botti*, 711 F.3d at 310 (instructions lacking key limitations were "plainly erroneous"). Given the government's aggressive use of the instruction in its jury addresses, there is (at the very least) a reasonable probability that the error affected the verdict. That the government made a deliberate, tactical choice to gamble on the outcome of *McDonnell* only underscores the fundamental unfairness of this error and the need for a new trial.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE *QUID PRO QUO*

The government takes substantial liberties with the proof, using words nowhere to be found in the record. To the extent its tale comports with the evidence, the conduct is simply not criminal, even if some find it distasteful.

The government concedes it must prove a *quid pro quo* exchange for each charge (US.Br.24) and does not dispute that for bribery the intent to enter into a

[6] The government claims that legislation was not the "only[] official action charged" (US.Br.57), but Stevenson never identified other acts or explained how they failed to satisfy *McDonnell*. *Stevenson*, No. 14-1862, ECF 97.

quid pro quo must be mutual. (*See* DS.Br.25). The size of the benefit, or the alleged bribe-giver's belief that he was purchasing an official act, is not enough. The public official must himself have had the "intent…to be influenced in an official act." *Sun-Diamond*, 526 U.S. at 404; *United States v. Ford*, 435 F.3d 204, 213 (2d Cir. 2006) ("the recipient's intent to make good on the bargain...is essential"). Nor does the government dispute that extortion requires that the public official accepted the benefit *knowing* that his alleged "victim" believed he was buying an official act. (DS.Br.25-26).

But the government is unable to point to any proof that Skelos said or did anything to signal that he intended to trade his official acts for any benefit to Adam. It conveniently sidesteps the well-settled rule that evidence which is at best equivocal is insufficient to support a conviction. It tags Skelos with conduct that he did not undertake, and downplays that Skelos's unwavering voting record gave him no practical ability or incentive to use future votes in a *quid pro quo*. It cites the magnitude of the benefits others gave and their testimony that *they* assumed or "feared" Skelos would take official action, even though neither sheds light on what *Skelos* believed or intended. And it emphasizes Skelos's supposed consciousness of guilt which, as a matter of law, cannot sustain a conviction.

A. The Government Ignores Controlling Law

It is well-settled that where "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," the evidence is legally insufficient to sustain a conviction. *United States v. Valle*, 807 F.3d 508, 522 (2d Cir. 2015); *see also, e.g.*, *United States v. Coplan*, 703 F.3d 46, 72 (2d Cir. 2012); *United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005); *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002). (*See* DS.Br.23-24). This principle indisputably controls because the government relied entirely on circumstantial evidence. (US.Br.24). Yet the government fails to defend sufficiency under that governing standard.

B. The Government's Misleading Narrative Is Belied By The Record

The government repeatedly tars Skelos with events that never happened and blames him for acts he did not commit.

1. Skelos Never "Demanded" Any Payments To Adam.

The government repeatedly asserts that Skelos browbeat others into "funnel[ing] money to Adam" through "pressure" and "demands." (US.Br.6, 7, 9, 11-13, 15, 18, 19, 28, 30, 31, 34). But its witnesses used no such words, and their testimony paints a different picture.

The PRI and Glenwood witnesses testified that Skelos was humble, polite and unassertive whenever he brought up Adam in conversation. PRI's Anthony

Bonomo testified that Skelos simply asked "was there any way I could look into the possibility of helping" Adam and confided "that any time if I could ever find a way to give [Adam] more [court reporting] work, he would appreciate that." (A-473/1914, A-474/1918. *See also*, *e.g.*, A-300/424, A-317/529). The AbTech witnesses had few interactions with Skelos and never talked to him about Adam. (A-397-98/1126-27, A-417/1262-63, A-437.1/1370, A-439/1552-54).

2. Skelos Never Promised Official Action In Exchange For A Benefit.

The government claims it proved "actions that Dean Skelos...promised to take that favored all three companies." (US.Br.4). But it is unable to point to any such promise.

3. Skelos Did Not Ask PRI To Hire Or Pay Adam.

The government asserts that Skelos "pressur[ed] Bonomo to hire...Adam Skelos as a PRI employee." (US.Br.9). However, Bonomo testified that Skelos *never* asked PRI to hire Adam; the idea was Bonomo's, and he did it to "help [Adam] out" and because "it would please the senator" and maintain "good will." (A-476/1924-25, A-490/1983, A-500/2029-30).

The government also claims that Skelos "made it clear" that PRI had "to keep paying Adam in exchange for Dean Skelos' legislative support for PRI." (US.Br.7). But Skelos never told Bonomo he had to keep paying Adam; he merely asked him to "work...out" the conflict between Adam and his supervisor. And

Skelos never mentioned "legislative support for PRI" in that conversation. (A-482/1949-51).

4. Skelos Had Nothing To Do With The $20,000 Check.

The government asserts that Skelos was "directly involved in soliciting the $20,000 bribe from Dorego" and "fully aware of that payment" (US.Br.14, 30), but that is simply not true. Skelos asked Glenwood to refer actual title work to Adam, and Dorego explored ways to do that. (*E.g.*, A-327/588, A-331/607, A-957). Skelos never asked Glenwood to send Adam a gift or pay him for nothing. Nor is there evidence that Skelos ever learned about the check Adam ultimately received.

5. Skelos Never Extorted AbTech.

The government argues that the April 2013 email that Dorego wrote about AbTech was an "explicitly extortionate threat to do or not do legislation for money." (US.Br.33). But Skelos had nothing to do with that email, and there was no reasonable basis to infer that he was involved in any such threat. Dorego—not Skelos—wrote the email, after his conversation with Adam, and he testified that he never spoke with Skelos about the matter. (A-347/696).

The government cites telephone records to try to link Skelos to the email, but what those records show is that Skelos talked to Adam *after* Adam had talked to Dorego (US.Br.33), and that the two did *not* talk to each other *beforehand*. (GX

101 at USAO_287961). They also show that Adam did not immediately speak to his father but instead called someone else first. (*Id.*).

6. Skelos Did Not Pressure Mangano Or Demand Anything From Him.

The government asserts that Skelos "pressur[ed]" Nassau County Executive Ed Mangano "to release funds" to AbTech, and "demand[ed]...that Abtech receive [those] payments from the County." (US.Br.19, 34). But there was no testimony about "pressure" or "demands." Skelos simply asked about the status of outstanding bills for work that AbTech had performed for the County, which it was already in the process of paying. (A-523.1-24/2182-84, A-528/2209, A-530-31/2217-20). Mangano's deputy merely "made a phone call...to find out where we were in the process," and was told that AbTech "had or would be getting paid very soon." (A-524/2185).

C. Skelos's Longstanding Support For The Legislation Is Critical

There was no rational basis for inferring that Skelos would have threatened to withdraw his legislative support for the extenders, 421-a, or rent regulation—or that PRI or Glenwood could reasonably have believed his vote was in doubt—given his long-established and firmly entrenched positions on those matters and the importance of the legislation to New York State. (*See* DS.Br.9, 13-14, 26-29).

The government contends that this evidence is irrelevant. But the Second Circuit cases it cites (US.Br.25-26) are inapposite. They involved arguments that

an official's decisions were "correct" in hindsight. Here, by contrast, there was no reasonable possibility that Skelos was going to suddenly abandon his longstanding positions, because doing so would have been so detrimental to his constituents and his political career. Courts have agreed that there is no *quid pro quo* in these circumstances. (DS.Br.28-29).[7]

The government describes the extenders and 421-a as more controversial than they were (US.Br.29, 32), but even if true, Skelos's vote for both measures was never in doubt. The government asserts that some believed 421-a was "in jeopardy," but that was because of the Democratic-controlled State Assembly, not the Senate and certainly not Senator Skelos. (Tr. 383, 951).

D. The Benefits Adam Received Do Not Establish A *Quid Pro Quo*

The government trumps up certain benefits that PRI, Glenwood, and AbTech gave Adam. (US.Br.27-28, 30-32, 33-34). But their value does not show that Skelos sought them *in exchange* for his official acts.

That sophisticated companies with business before the State chose to confer benefits on the son of one of the most powerful figures in Albany does not mean that they did so in exchange for "specific and focused" official acts, let alone that Skelos intended to enter into such an exchange. *See McDonnell*, 136 S. Ct. at 2372. The benefits are just as consistent with efforts to curry Skelos's goodwill,

[7] *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), was a civil antitrust case, and the quoted statement is mere *dicta*.

which is not a crime. *See United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007). This in itself requires reversal. *See Valle*, 807 F.3d at 522.

E. The Cooperators' Unspoken Beliefs Do Not Establish A *Quid Pro Quo*

The government relies on the supposed unspoken assumptions and "fears" of the PRI, Glenwood and AbTech witnesses. (US.Br.11-12, 14, 27-28, 31, 33, 35-36). But, as it concedes, these witnesses "could not say what was inside Dean Skelos' mind" (US.Br.30), and there was no evidence that Skelos was aware of their unspoken thoughts. To prove a *quid pro quo*, the law requires an understanding on the part of the public official—not just the other party's *ex post facto* statement of what he assumed or feared. *See Ford*, 435 F.3d at 210, 213.

F. Evidence Of Consciousness Of Guilt Is Not Sufficient

Lastly, the government points to evidence that, it contends, demonstrates Skelos's consciousness of guilt. (US.Br.28-29, 36). However, consciousness-of-guilt evidence by itself cannot support a conviction. (*See* AS.Br.36-37).[8]

* * * * *

The circumstantial evidence on which the government relies is equivocal at best, and markedly less than in the cases the government cites. *See United States*

[8] None of the other evidence that the government claims proves a *quid pro quo* (US.Br.28, 31-32) has any bearing on Skelos's intent. For example, Senator Al D'Amato discussed Adam's poor performance at PRI with Skelos, but he did not suggest that Skelos was exchanging his legislative votes for Adam's paycheck or committing a crime. (*See* A-509/2083-86).

v. Blagojevich, 794 F.3d 729, 733-34 (7th Cir. 2015) (governor refused to take official acts without multi-million dollar payments); *United States v. Rosen*, 716 F.3d 691, 702 (2d Cir. 2013) (communications "repeatedly tied the consulting payments to [Assemblyman]'s use of his official influence"); *United States v. Bruno*, 661 F.3d 733, 737 (2d Cir. 2011) (state senator who failed to perform required acts did so promptly after payment was arranged). No rational jury could find beyond a reasonable doubt that Skelos intended to exchange his official acts for a benefit to Adam, without impermissibly "engag[ing] in false surmise and rank speculation." *United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991).

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE ANY OFFICIAL ACT CONCERNING ABTECH

The AbTech convictions also should be reversed because there was insufficient evidence of any legally valid official act. (DS.Br.40-42).

Once again, the government seeks refuge in factual inventions. It asserts that Dorego's April 2013 email was Skelos's "threat to block undisputedly official action on a valuable contract" (US.Br.67), though Skelos had nothing to do with that email (*supra* at 22-23) and the email did not threaten official action (AS.Reply.Pt.I.B). And its claim that Skelos pressured Mangano "to expedite...payments" (US.Br.68), finds no record support. *Supra* at 23.

The government contends that Skelos "agree[d] to help pass New York state legislation" for AbTech (US.Br.69), but the evidence it cites proves no such thing.

(*See* A-464-65/1787-88 (Skelos merely expressing public support for a position); A-819 (*Senator Martins* pressuring Skelos to support funding for water treatment); SA-68-76 (*Adam* talking about legislation)).

The government concedes arranging a meeting between AbTech and DOH was not official action. (US.Br.70-71). It fails to dispute that Skelos's statements about stormwater funding were not official acts. (DS.Br.41-42; US.Br.71 n.11). There is nothing else.

IV. AVELLA'S AND REID'S TESTIMONY WAS INADMISSIBLE

The government fails to justify the substantial prejudice from testimony that Skelos acted "inappropriately" and "unethically," or foreclosing Skelos from proving otherwise.

1. The government says Avella's testimony was relevant to "materiality." (US.Br.74-78). But his testimony went well beyond that narrow issue. Avella repeatedly denounced Skelos's conduct as "inappropriate" or "improper" and concluded that Skelos gave "undue influence" to legislation "based upon personal interest." (A-281/269, A-283/276, A-284/284, A-285/287, A-286/294). The jury should not have been tainted by these gratuitous and damaging comments.[9]

[9] The government's assertion that the defense only once objected to Avella's "opinion," (U.S.Br.77), is patently false. (*See* A-282/271-74, A-283/275-76, A-284/286, A-285/288, A-286/294, A-287/304).

Avella's opinions were also irrelevant to materiality. The relevant question is whether Skelos's supposed non-disclosures were material to his constituents. (DS.Br.56). *See United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (a public official's honest services fraud harms "the public"). Avella was not from Skelos's district, and testified solely as a fellow senator, not an ordinary citizen.

And the government never pursued its appellate theory that Skelos defrauded his *employer* (US.Br.75-76) below. It alleged in the indictment and at trial that Skelos defrauded "the public." (*See* A-171 ¶ 35 (object of conspiracy was "to deprive *the public* of its intangible right to Dean Skelos's honest services"); A-561/2468 ("Elected officials have a legal duty to provide honest services to *the public*."); A-603/2734 ("*[T]he public* has a right to expect [honest services] from elected officials and...officials have an absolute duty to give honest services back to *people*.")) (emphases added).

Avella's testimony cannot be passed off as consciousness-of-guilt evidence. (US.Br.77 n.14). Avella did not simply testify that Dean failed to disclose Adam's jobs; he passed judgment on Skelos and invited the jury to do the same.

2. The government's argument that Reid's testimony that Skelos knew about the Ethics Laws was probative of Skelos's "fraudulent and corrupt intent" (US.Br.78-79) is untenable. "The only intent that need be proven in an honest services fraud is the intent to deprive another of the intangible right of honest

services." *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003). After *Skilling*, that intent is only the intent to give or accept a bribe or kickback in exchange for official action. *See Bruno*, 661 F.3d at 744; *United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998). The bribery statute, similarly, requires "a specific intent to...receive something of value in exchange for an official act." *Ford*, 435 F.3d at 210; *cf. United States v. Alfisi*, 308 F.3d 144, 150-51 & n.2 (2d Cir. 2002) (§201 bribery). The district court instructed the jury accordingly. (*See* A-612/2770, A-613/2772-73, A-618/2792-94).

The Ethics Laws are not limited to criminal *quid pro quo* exchanges; they prohibit a Senator from obtaining any "unwarranted privilege[]" or creating even the "impression" of outside influence. (DS.Br.54). They prohibit conduct that *Skilling* held is *not* honest services fraud. Whether Skelos believed his conduct violated the Ethics Laws is thus irrelevant to criminal intent under the federal corruption statutes. Reid's testimony prejudiced Skelos and confused the jury.[10]

The government contends that Reid rebutted Skelos's defenses. (US.Br.78). But Skelos never disputed that his conduct was covered by Senate rules. (*See* Tr. 51). For that reason, the government's reliance on *United States v. Fumo* is inapt. *See* 655 F.3d 288, 302-03 (3d Cir. 2011) (defendant argued that "no rules or laws" barred his conduct but had "represented and omitted facts in a way that made him

[10] The district court's limiting instruction was confusing and improperly suggested that the Ethics Laws had some bearing on Skelos's intent.

falsely appear to be compliance with" state ethics rules). And because *Fumo* did not involve honest services fraud, the Third Circuit had no occasion to consider whether state ethics rules have any bearing on the intent to accept a bribe or kickback in exchange for official acts.

The government downplays Reid's testimony as "limited to the simple fact that she trained Dean Skelos on these laws" to show that he was subject to higher standards, and that Skelos's actual compliance or non-compliance with the Ethics Laws was irrelevant. (US.Br.78, 79). But if that was the point, the government simply would have established that State Senators are subject to special rules on which Skelos was trained. Reid belabored the content of those laws—not the "simple fact" of Skelos's training. (A-512/2111-14). The government evidently introduced the Ethics Laws because it believed they proscribed Skelos's conduct. It even argued that it should have been "obvious" to Skelos that he was violating them: "You know that Senator Skelos knew he was acting corruptly because he had been trained...to avoid *the obvious conflict* when a sitting senator asks a business lobbying him for legislation to give gifts to his family." (A-598/2715) (emphasis added).

At the same time, the district court precluded all cross-examination on whether Skelos violated the Ethics Laws. (A-514/2119-21). If avoiding a "mini-trial" on the Ethics Laws was the goal, as the government contends (US.Br.81),

Reid's testimony should have been precluded. Once the court permitted the government to open the door, due process required providing an opportunity to rebut the government's theory. (DS.Br.57-58).

3. The errors were not harmless. The government contends that Reid's testimony "pertained solely to the issue of Dean Skelos' intent" (US.Br.83), but Skelos's intent was *the central issue* at trial. And the government focused squarely on Avella's testimony when arguing materiality to the jury. (A-592/2591). Accordingly, it cannot be said "with fair assurance that [their testimony] did not substantially influence the jury." *United States v. Vayner*, 769 F.3d 125, 133 (2d Cir. 2014).

CONCLUSION

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

Dated: New York, New York
February 8, 2017

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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 6,992 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.

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Dated: February 8, 2017

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