UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SHELDON SILVER,

Defendant.

No. 15 Cr. 93 (VEC)

ORAL ARGUMENT REQUESTED

DEFENDANT SHELDON SILVER'S REVISED MOTION TO CONTINUE BAIL AND TO STAY FINANCIAL PENALTIES PENDING APPEAL

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July 11, 2016

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INTRODUCTION

Defendant Sheldon Silver respectfully submits this revised motion to continue his bail pending appeal pursuant to 18 U.S.C. § 3143(b)(1). A critical issue in this case is whether the acts charged by the Government constitute "official acts" within the meaning of the Hobbs Act and the honest services statute. This Court rejected Mr. Silver's proposed jury instruction and motion for acquittal on that issue, applying the broad understanding of that term reflected in prior Second Circuit precedent. But as Mr. Silver explained in his original bail motion filed May 13, 2016 (Dkt. 299), the Supreme Court stood poised to radically restrict the scope of the official act requirement in *McDonnell v. United States*, No. 15-474 (argued Apr. 27, 2016). On May 18, 2016, this Court adjourned briefing on Mr. Silver's motion pending the Supreme Court's decision in *McDonnell*. Dkt. 304.

The Supreme Court has now done precisely what Mr. Silver predicted. In a sweeping unanimous decision, the Court severely restricted the scope of the official act requirement. An official act, the Court held, must involve a "***formal exercise of governmental power***" akin to a "lawsuit, hearing, or administrative determination." *McDonnell v. United States*, No. 15-474, 2016 WL 3461561, at *13-14 (U.S. June 27, 2016) (emphasis added). Merely "[s]etting up a meeting, talking to another official, or organizing an event" is not enough. *Id.* at *17.

In light of that decision, there is plainly a substantial question whether the jury was properly instructed on the official act requirement in this case. The improper instructions create a substantial likelihood that the Second Circuit will reverse Mr. Silver's conviction and remand for a new trial. Many of the "official acts" the Government alleged do not survive the Court's decision in *McDonnell*, and even assuming some do, the Government cannot show beyond a reasonable doubt that the jury would have reached the same result if properly instructed.

Mr. Silver also moves to stay the Court's fine and forfeiture order pending appeal pursuant to Fed. R. Crim. P. 38(c) and 32.2(d). Those financial penalties would all but require Mr. Silver to liquidate the residences he jointly owns with his wife. Imposing those penalties now, despite Mr. Silver's meritorious grounds for appeal, would impose irreparable harm and needless hardship on Mr. Silver and his wife. Accordingly, the Court should continue Mr. Silver's bail and stay his financial penalties pending appeal.

ARGUMENT

I. THE COURT SHOULD CONTINUE MR. SILVER'S BAIL PENDING APPEAL

Under 18 U.S.C. § 3143(b), a district court "***shall*** order the release" of a defendant pending the appeal of his conviction if two conditions are met. 18 U.S.C. § 3143(b)(1) (emphasis added). First, the Court must find by clear and convincing evidence that the defendant "is not likely to flee or pose a danger to the safety of any other person or the community." *Id.* § 3143(b)(1)(A). And second, the Court must find that "the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . reversal [or] . . . an order for a new trial." *Id.* § 3143(b)(1)(B). Both requirements are met here.

A. Mr. Silver Poses No Risk of Flight or Danger to the Community

Mr. Silver poses no flight risk or danger to others. From the outset of this case, Mr. Silver has been released on his own recognizance without incident. There is no reason to expect any departure from that course of conduct now.

On January 22, 2015, Magistrate Judge Maas ordered Mr. Silver released on his own recognizance upon execution of an unsecured personal recognizance bond of $200,000. Dkt. 6. Mr. Silver's conditions of release included surrendering his passport, restricting his travel to the continental United States, and providing advance notice of certain travel. Dkts. 6, 7. At Mr. Silver's arraignment, the Court continued his release and permitted modification of the notice

requirement should the parties so agree. *See* Feb. 24, 2015 Hr'g Tr. 14:9-19 (Dkt. 18). At his arraignment on the Superseding Indictment, the Government consented to that modification, and the Court approved it. *See* Apr. 28, 2015 Hr'g Tr. 13:15-23 (Dkt. 37). Following the jury's verdict on November 30, 2015, the Court continued Mr. Silver's bail with the same conditions, with no opposition from the Government. Trial Tr. 3232:4-9. More than seven months have now passed without incident.

In short, Mr. Silver has fully complied with all conditions of release throughout the case, and there is no reason to doubt he will continue to do so. Even the Probation Office recognized that Mr. Silver is "not viewed as a flight risk or a danger to the community" given his "compliance with all terms and conditions of his pretrial release." PSR at 38. Mr. Silver's unbroken track record of compliance with those conditions supports continuing his bail pending appeal. *See United States v. Quinn*, 416 F. Supp. 2d 133, 135 (D.D.C. 2006) (granting release pending appeal where defendant "was released on bond shortly after his arrest in December 2004 and remained free pending trial (and then pending sentencing) in his home state of Kentucky in full compliance with the bond conditions").

Mr. Silver's personal circumstances make him a singularly unlikely flight risk. Mr. Silver has no criminal history and is 72 years old. PSR ¶¶ 61-67, 83. He also has deep ties to the Orthodox Jewish community in which he actively participates, and to the countless residents, constituents, neighbors, and friends who wrote the Court seeking leniency on his behalf. *See* Dkts. 262-3 to 262-18. Finally, Mr. Silver's health condition confirms that he presents no risk of flight or danger to anyone. *See* Jan. 20, 2016 Letter of Michael J. Zelefsky, MD, Professor of Radiation Oncology (Dkt. 262-19). The record is thus more than sufficient to establish by clear and convincing evidence that Mr. Silver is not a flight risk or danger to others.

B. Mr. Silver's Appeal Will Raise Substantial Questions Likely To Result in Reversal or a New Trial

Mr. Silver also satisfies the second condition for bail pending appeal because his appeal "is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . reversal [or] . . . an order for a new trial." 18 U.S.C. § 3143(b)(1)(B).

As the Second Circuit explained in *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985), the requirement that an appeal be likely to result in reversal or a new trial does ***not*** mean the defendant must be likely to prevail. *Id.* at 125. Rather, that condition refers to the likely impact ***if the defendant's appeal succeeds***: The defendant must show that, "***if*** th[e] substantial question is determined favorably to [the] defendant on appeal, that decision is likely to result in reversal or an order for a new trial." *Id.* (emphasis added). Bail therefore is ***not*** conditioned "upon a district court's finding that its own judgment is likely to be reversed on appeal." *Id.* at 124; *see also United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003) (defendant "need not show a likelihood of success on appeal").

As to the probability of success on appeal, the statute requires only a "***substantial question*** of law or fact." 18 U.S.C. § 3143(b)(1)(B) (emphasis added). That is a low threshold. "[A] substantial question 'is one of ***more substance than would be necessary to a finding that it was not frivolous***. It is a "***close***" question or one that ***very well could be decided the other way***.'" *Randell*, 761 F.2d at 125 (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)) (emphasis added). Mr. Silver's anticipated appeal easily satisfies that standard.

1. *Mr. Silver's Appeal Will Raise Substantial Questions Regarding the Official Act Requirement Under* **McDonnell**

Mr. Silver expects to raise on appeal a substantial issue regarding the "official act" requirement – an element of both honest services fraud and extortion. The scope of that

requirement has now changed dramatically due to the Supreme Court's decision in *McDonnell v. United States*, No. 15-474, 2016 WL 3461561 (U.S. June 27, 2016).

At trial, this Court instructed the jury that "[o]fficial action includes ***any action*** taken or to be taken under color of official authority." Dkt. 135 at 17:22-23 (emphasis added). As the Government pointed out during the charge conference, that instruction was supported by existing Second Circuit precedent. *See* Nov. 19, 2015 Hr'g Tr. 2785:8-2786:9 (Dkt. 160) (citing *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013)). The defense nonetheless asked the Court to instruct the jury that, "[t]o prove an 'official act,' the government must prove the exercise of actual governmental power, the threat to exercise such power, or pressure imposed on others to exercise actual governmental power." Dkt. 298 Ex. A; Nov. 19, 2015 Hr'g Tr. 2784:23-2785:1 (Dkt. 160). The defense acknowledged that this instruction was supported only by out-of-circuit authority but nonetheless contended that it was a "correct statement of the law." Nov. 19, 2015 Hr'g Tr. 2786:10-12 (Dkt. 160). The Court opined that the existing instruction adequately stated the law, but the defense objected, stating "I'm not sure we agree." *Id.* at 2786:13-15. The Court – bound by existing precedent – denied the requested instruction. *Id.* at 2786:16.

Mr. Silver renewed his "official act" argument in his Rule 29 motion. Dkt. 179 at 13, 20. "Most of the 'acts' the Government alleged were not 'official' in any conceivable sense," he urged, and the few that arguably were failed for other reasons such as the statute of limitations. *Id.* at 13. The Court rejected that argument too, again relying on an expansive conception of official acts. Dkt. 294 at 23-25. Among the acts the Court deemed sufficiently "official" were Mr. Silver's alleged "offer[ ] to use his Assembly position and staff to assist a mesothelioma fundraiser . . . to obtain necessary City permits," his "recommend[ation] [of] Dr. Taub's son (using his official Assembly letterhead) to a prospective employer," his "oppos[ition] [to] the relocation

of the methadone clinic," and the fact that he "met privately with Glenwood and its lobbyist to confirm that Glenwood was satisfied" with pending rent legislation. *Id.* at 23-24.

Whatever the merits of those rulings at the time, there is clearly a "substantial question" whether they survive *McDonnell*. In that case, former Virginia Governor Robert McDonnell was convicted of public corruption under the same statutes the Government invoked here – the honest services statute and the Hobbs Act. 2016 WL 3461561, at *9. The Government alleged that the CEO of a nutritional supplement company had provided gifts, loans, and other benefits to McDonnell in the hope that public universities would undertake studies on its products. *Id.* at *6-8. The Government alleged that McDonnell performed multiple "official acts" in return, including "arranging meetings . . . with Virginia government officials . . . to discuss and promote" the products, "hosting, and . . . attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies," and "contacting other government officials . . . as part of an effort to encourage Virginia state research universities to initiate studies." *Id.* at *10. The trial court instructed the jury that an "official act" encompassed any "acts that a public official customarily performs." *Id.* The jury convicted, and the court of appeals affirmed. *Id.* at *11-12.

The Supreme Court reversed. The Government argued – much as it does here – that the term "official act" includes " '***any*** decision or action, on ***any*** question or matter, that may at ***any time*** be pending, or which may by law be brought before ***any*** public official, in such official's official capacity.' " 2016 WL 3461561, at *12. But the Supreme Court "reject[ed] the Government's reading . . . and adopt[ed] a more bounded interpretation." *Id.*

To interpret the "official act" requirement, the Court looked to the federal bribery statute, which defines the term as " '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.' " 2016 WL 3461561, at *12 (quoting 18 U.S.C. § 201(a)(3)). As the Court noted, that language sets forth two requirements: "First, the Government must identify a ***'question, matter, cause, suit, proceeding or controversy'*** . . . before a public official." *Id.* (emphasis added). "Second, the Government must prove that the public official made a decision or took an action ***'on'*** that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *Id.* (emphasis added).

With respect to the first requirement, the Court noted that "[t]he last four words in that list – 'cause,' 'suit,' 'proceeding,' and 'controversy' – connote a ***formal exercise of governmental power***, such as a lawsuit, hearing, or administrative determination." 2016 WL 3461561, at *13 (emphasis added). Although the terms "question" or "matter" could be construed more broadly, the Court invoked the *noscitur a sociis* canon to hold that those terms likewise required a formal exercise of governmental power "similar in nature to a 'cause, suit, proceeding or controversy.' " *Id.* "Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a 'question' or 'matter' under § 201(a)(3)." *Id.*

The Court next addressed whether "arranging a meeting, contacting another official, or hosting an event may qualify as a 'decision or action' ***on*** a different question or matter." 2016 WL 3461561, at *14. It emphasized the importance of carefully identifying "what counts as a question or matter." *Id.* The statutory phrase "may ***by law*** be brought," it noted, "conveys something within the specific duties of an official's position – the function conferred by the authority of his office." *Id.* The "question or matter," the Court added, must be "focused and concrete." *Id.*

The Court acknowledged that a public official could take action on a question or matter pending before ***another*** official. 2016 WL 3461561, at *15. But it carefully limited the scope of

that principle. The Court explained that "[a] public official may . . . make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy' by using his official position to ***exert pressure*** on another official to perform an 'official act.'" *Id.* (emphasis altered). And it explained that, "if a public official uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official, that too can qualify as a decision or action for purposes of § 201(a)(3)." *Id.* As an example in that category, the Court cited *United States v. Birdsall*, 233 U.S. 223, 234 (1914), which had found "'official action' on the part of subordinates where their superiors 'would necessarily rely largely upon the reports and advice of subordinates . . . who were more directly acquainted with' the 'facts and circumstances of particular cases.'" 2016 WL 3461561, at *15.

By contrast, merely "[s]etting up a meeting, hosting an event, or calling an official . . . to talk about a research study . . . does not qualify as a decision or action on the pending question of whether to initiate the study." 2016 WL 3461561, at *16. Moreover, "[s]imply expressing support for the research study at a meeting, event, or call – or sending a subordinate to such a meeting, event, or call – similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'" *Id.*

The Court emphasized the powerful constitutional considerations driving its decision. "The basic compact underlying representative government," it explained, "***assumes*** that public officials will hear from their constituents and act appropriately on their concerns." 2016 WL 3461561, at *18. For that reason, "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time." *Id.* Under the Government's erroneous definition, "citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.*

McDonnell thus significantly restricted the "official act" requirement. The narrow definition it adopted bears no resemblance to the one this Court gave in jury instructions over Mr. Silver's objection – namely, that "[o]fficial action includes ***any action*** taken or to be taken under color of official authority." Dkt. 135 at 17:22-23 (emphasis added). If anything, this Court's instruction bears far more resemblance to the one given in *McDonnell* that the Supreme Court rejected – that an "official act" includes any "acts that a public official customarily performs." 2016 WL 3461561, at *10. Both instructions are deficient for the same reason: They fail to make clear that the official act must involve an ***actual exercise of government authority*** and fail to provide any guidance about what level of involvement the defendant must have in taking the action. At a minimum, *McDonnell* raises a "substantial question" over the issue – which is all Mr. Silver needs to show at this stage.

2. *Resolution of the Official Act Issue in Mr. Silver's Favor Would Likely Result in Reversal or a New Trial*

If the Second Circuit agrees that the jury instructions and Rule 29 order cannot be reconciled with *McDonnell*, that holding is "likely to result in . . . reversal [or] . . . an order for a new trial." 18 U.S.C. § 3143(b)(1)(B); *see Randell*, 761 F.2d at 125.

It is well-settled that " '[a]n erroneous instruction, unless harmless, requires a new trial.' " *United States v. Bah*, 574 F.3d 106, 114 (2d Cir. 2009). "The burden of establishing harmlessness is on the government." *United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006). An instruction that fails to describe an essential element of the offense is harmless only if it is " '***clear beyond a reasonable doubt*** that a rational jury would have found the defendant guilty absent the error.' " *United States v. Carr*, 424 F.3d 213, 218 (2d Cir. 2005) (emphasis added).

The Supreme Court vacated the conviction in *McDonnell* for precisely that reason. "Because the jury was not correctly instructed on the meaning of 'official act,' " the Court

explained, "it may have convicted Governor McDonnell for conduct that is not unlawful." 2016 WL 3461561, at *21. "For that reason," the Court ruled, "we cannot conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)); *see also United States v. Mahaffy*, 693 F.3d 113, 135-36 (2d Cir. 2012) (honest services instruction that omitted *Skilling*'s bribes or kickbacks requirement required new trial because it was "not clear beyond a reasonable doubt that the Defendants' convictions rested on unanimous findings of bribes or kickbacks"); *Quattrone*, 441 F.3d at 181.

This case is no different. Whether or not the jury instructions were correct before *McDonnell*, the Government cannot carry its burden of showing harmlessness beyond a reasonable doubt in light of that decision. Most of the "official acts" alleged, even if they satisfied prior Second Circuit law, do not constitute official acts under the more restrictive standard adopted in *McDonnell*. At the very least, a properly instructed jury easily could have reached that conclusion. And even if the Government argues that some of the charged acts still qualify as "official" under *McDonnell*, it cannot show beyond a reasonable doubt that the jury would have rendered the same verdict if those acts alone had been submitted for consideration.

a. *Most of the Alleged Acts Are Not "Official" Under* McDonnell

Asbestos Charges. On the asbestos counts, the Government urged the jury to convict Mr. Silver because "he recommend[ed] Dr. Taub's son for a job with the organization OHEL"; "on official Assembly letterhead he recommend[ed] Dr. Taub's daughter to Judge Schoenfeld"; and "he me[t] with Dr. Taub in his office and sen[t] Dr. Taub a letter offering his official assistance with this race to raise money for mesothelioma research." Trial Tr. 2858:13-2859:4 (summation). None of those acts qualifies as "official" under *McDonnell*.

Mr. Silver's recommendation of Dr. Taub's son for a job at the private non-profit organization OHEL was not an "official act" in any conceivable sense. Mr. Silver's mere act of

making an employment recommendation was not a "***formal exercise of governmental power*** . . . similar in nature to a 'cause, suit, proceeding or controversy.' " *McDonnell*, 2016 WL 3461561, at *14 (emphasis added). That recommendation bears no resemblance to adjudicating a lawsuit or exercising some other formal power. Nor was the act "something within the specific duties of [Mr. Silver's] position" or a "function conferred by the authority of his office." *Id.* There was no evidence that Mr. Silver was ***statutorily charged*** with providing job references. Finally, Mr. Silver cannot be found guilty on the theory that he exerted pressure on ***OHEL*** to take an official act. OHEL is a private non-profit organization. Trial Tr. 1291:20-23 (Mandel); Trial Tr. 643:21-24 (Taub). Its hiring decisions thus are not official acts as a matter of law. *See McDonnell*, 2016 WL 3461561, at *15 (official may be responsible for using "his official position to exert pressure on ***another official*** to perform an 'official act' " (emphasis altered)).

Mr. Silver's alleged recommendation of Dr. Taub's daughter for an internship with Judge Schoenfeld was not an "official act" either. The communication itself was not a "formal exercise of governmental power" for the same reasons as the recommendation to OHEL. That it was purportedly made "on official Assembly letterhead," Trial Tr. 2858:13-2859:4 – even if relevant under prior Second Circuit law – is not sufficient under *McDonnell*.

Nor can Mr. Silver be found guilty on the theory that Judge Schoenfeld's hiring decision was an official act for which he is responsible. For one thing, there was no evidence that Judge Schoenfeld's hiring decision was an "official act" at all: The position was an ***unpaid summer internship***, and there was no evidence that hiring unpaid interns was part of Judge Schoenfeld's official duties under state law. Trial Tr. 1336:19-1337:8 (Schoenfeld). Even if it were, a properly instructed jury readily could have found that ***Mr. Silver*** cannot be held responsible for Judge Schoenfeld's discretionary decision. Although *McDonnell* allows a public official to be held responsible for causing ***another*** official to act on a question or matter in certain

circumstances, that principle applies only where the defendant "***exert[s] pressure*** on another official" or "uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act.'" 2016 WL 3461561, at *15 (emphasis altered). The jury readily could have rejected any such claim here.[1]

Mr. Silver's actions in connection with the proposed mesothelioma race that never took place were not official acts either. The Government accused Mr. Silver of "meet[ing] with Dr. Taub in his office and send[ing] Dr. Taub a letter offering his official assistance with this race." Trial Tr. 2858:23-2859:1 (summation). But merely meeting with Dr. Taub was not an "official act." *McDonnell* made clear that "a typical meeting . . . arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee" and therefore "does not qualify as a 'question' or 'matter'" for purposes of the official act requirement. 2016 WL 3461561, at *13. As a matter of law, Mr. Silver's mere meeting with Dr. Taub is not sufficient under *McDonnell*.

Nor can the Government rely on Mr. Silver's "letter offering his official assistance with th[e] race." Trial Tr. 2858:23-2859:1. That letter merely explained the process for applying for a parade permit and stated that Mr. Silver could "help you navigate this process if needed." GX 525-21. Mr. Silver's mere ***explanation*** of the application procedures was not a "formal exercise

[1] It strains credulity to suggest that Mr. Silver ***exerted pressure*** on Judge Schoenfeld to hire Dr. Taub's daughter. Nor did he provide "advice" that "form[ed] the basis" for the hiring decision. Judge Schoenfeld testified on direct that Mr. Silver's office merely requested that he interview Dr. Taub's daughter and faxed over a copy of her resume. Trial Tr. 1323:13-21 (Schoenfeld) ("Q. When did you first learn of Amy Taub? . . . . A. I received a call, I believe it was from somebody from Mr. Silver's office, requesting that she be interviewed for a position as an unpaid intern. Q. What were you told during that call about why Silver was recommending Amy Taub to you for an unpaid summer internship? A. I wasn't told anything."); GX 440 (fax cover sheet with resume). He also testified that he hired Ms. Taub based on her resume and demeanor – not any "advice" from Mr. Silver. Trial Tr. 1326:10-13 (Schoenfeld) ("Q. After speaking with Amy Taub, did you offer her a job in your chambers as an unpaid summer internship? A. She has quite an impressive resume and she was very personable, and I did.").

of governmental power." *McDonnell*, 2016 WL 3461561, at *13. And even assuming the city's grant or denial of a permit would be an official act, there was no evidence that Mr. Silver offered to "***exert pressure***" on city officials or "use[] his official position to provide advice . . . [that would] form the basis" for the decision. *Id.* at *15 (emphasis added). Mr. Silver's letter offered only to "help you ***navigate this process*** if needed." GX 525-21 (emphasis added). Mr. Silver was thus offering to assist Dr. Taub in understanding the application process – not to ***exert pressure*** on city officials to obtain a permit. That is how Dr. Taub understood the situation. Trial Tr. 399:25-400:12 (Taub) ("Q. Why did you turn to [Mr. Silver]? A. Because it turned out that we would need certain permits from the city to organize that kind of a run on a Sunday morning, and we had to know the state agencies to approach and various other items."). A properly instructed jury could have read the letter that same way.

Real Estate Charges. For the real estate charges, the Government urged the jury to convict Mr. Silver because he "took private, confidential meetings with the developers and their lobbyists in his office where they could spell out for him their confidential positions on the major real estate legislation coming before [him]"; he "let through and approved [financing] before the PACB"; and he "helped shut down the methadone clinic" that "was going to open up . . . near one of the Glenwood buildings." Trial Tr. 2891:7-11, 2893:21-2894:15 (summation). None of those acts qualifies as "official" under *McDonnell*.

The "confidential meetings with the developers" are precisely the sort of constituent meetings that *McDonnell* held insufficient. "[A] typical meeting . . . arranged by a public official," the Court held, "is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee" and therefore "does not qualify" as an official act. 2016 WL 3461561, at *13. Nor does "[s]etting up a meeting . . . to talk about" a particular question "qualify as a decision or action on th[at] pending question." *Id.* at *16. As

the Court explained, "[t]he basic compact underlying representative government ***assumes*** that public officials will hear from their constituents and act appropriately on their concerns." *Id.* at *18. "[C]onscientious public officials" thus "arrange meetings for constituents . . . all the time." *Id.* The Government's attempt to prosecute Mr. Silver for those routine constituent services rests on the same flawed view of democratic discourse that the Government pursued in *McDonnell*, and it should be rejected for the same reasons.

Nor can Mr. Silver be found guilty for having "let through and approved [financing] before the PACB." Trial Tr. 2893:21-23. Even assuming ***the PACB's*** funding decisions constituted a "question" or "matter" under *McDonnell*, there was no evidence that ***Mr. Silver*** took any action or decision "on" those questions, as *McDonnell* requires. Mr. Silver never voted on ***any*** of the PACB's approvals. Trial Tr. 1945:19-1946:2 (Putnam) ("Q. . . . Mr. Silver wasn't present at any of those PACB meetings where those matters were discussed, correct? A. Not to my knowledge."). While this Court opined that Mr. Silver could be found guilty because he sent a "proxy" to the meetings, Dkt. 294 at 7, under *McDonnell* that is not enough. The Government had to show that Mr. Silver "exert[ed] pressure" on the proxy or "use[d] his official position to provide advice . . . [that would] form the basis" for the proxy's vote. 2016 WL 3461561, at *15. There was no evidence of that at all. To the contrary, witnesses admitted that Mr. Silver never took any position on PACB matters. Trial Tr. 1816:13-1816:22 (Runes) ("Q. To your knowledge, Mr. Silver never intervened in any way for your applications for that PACB approval? A. Neither for nor against.").[2]

[2] The Government also pointed to Mr. Silver's authority to remove items from the PACB agenda in advance of a vote. Trial Tr. 2890:4-8 (summation); Trial Tr. 1929:15-22 (Putnam). But it offered no evidence that Mr. Silver ever even considered exercising that authority – much less refrained from doing so in exchange for referral fees. The jury reasonably could have dismissed this theory as complete speculation.

Finally, there was no evidence that Mr. Silver committed any official act in connection with the methadone clinic. The Government urged that Mr. Silver "helped shut down the methadone clinic" (which he was already planning to oppose in any event). Trial Tr. 2893:25-2894:15; *see* Trial Tr. 1645:2-14 (Meara) ("Q. And [Judy Rapfogel] told you save your breath, we're already on it; is that right? A. Yes."). But the only thing the evidence showed was that Mr. Silver "sprung into action" by "express[ing] his strong opposition." GX 788. "Simply expressing support" – or opposition – "does not qualify as a decision or action on [a question], as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.' " *McDonnell*, 2016 WL 3461561, at *16. There was no evidence that Mr. Silver took those additional steps here. At a minimum, a properly instructed jury reasonably could have reached that conclusion.[3]

b. *The Government Cannot Show Beyond a Reasonable Doubt That the Jury Would Have Reached the Same Verdict Based Solely on the Remaining Acts*

Even if some of the other alleged "official acts" may present closer calls, those acts cannot support a finding of harmless error. To sustain the conviction, the Government must show that it was ***clear beyond a reasonable doubt*** that the jury based its conviction on acts that are still "official" under the narrower *McDonnell* standard rather than those that are not. The Government cannot make that showing.

[3] The Government also claimed that Mr. Silver performed an official act by "us[ing] his official authority to move the developer business from other law firms that they were using, that they were perfectly satisfied with, to his buddy Jay Goldberg." Trial Tr. 2891:2-6. That theory never made any sense even under pre-*McDonnell* law. To the extent Mr. Silver had any influence over what law firms the developers used, that clearly was not a "formal exercise of governmental power" or a "function conferred by the authority of his office." 2016 WL 3461561, at *13-14. The referral fees are benefits that Mr. Silver allegedly received ***in return for*** the official acts – not the official acts themselves.

Many of the alleged acts cannot support the verdict as a matter of law because they are outside the five-year limitations period. 18 U.S.C. § 3282. For example, even assuming the two HCRA grants to Columbia University and the $25,000 grant to the Shalom Task Force were official acts, they are clearly time-barred. Mr. Silver approved the HCRA grants on July 5, 2005, and November 30, 2006. GX 367-1; GX 284. And the Shalom Task Force grant was awarded in May 2008. GX 389-1, 389-2. Mr. Silver was not indicted until February 19, 2015 – almost seven years later. Dkt. 9; *see also* Dkt. 294 at 23 (acknowledging that Mr. Silver "was not indicted until . . . almost ten years" after the HCRA grants). Those acts thus clearly cannot support the conviction. *See United States v. Fuchs*, 218 F.3d 957, 963 (9th Cir. 2000) (reversing conviction where "[o]f the ten overt acts alleged in the indictment, the acts that most strongly support a finding of conspiracy fell outside the statute of limitations," so that the jury "could have found [defendants] guilty based on acts [that] were barred by the statute of limitations").

In other instances, the Government cannot show harmlessness because of disputes over whether particular acts were part of any quid pro quo. For example, the Government claimed that Mr. Silver exchanged referrals for an Assembly proclamation and resolution honoring Dr. Taub. Trial Tr. 2858:18-22 (summation). But even assuming those acts were "official," it is hardly clear beyond a reasonable doubt that the jury would have convicted based on the resolution and proclamation alone. Dr. Taub did not claim that the honors were part of any quid pro quo. Trial Tr. 460:13-16 (Taub) ("Q. And I take it you would not send patients to Weitz & Luxenberg in exchange for receiving a resolution? A. It was nice to get the plaque."). He did not even know about them beforehand. *Id.* at 393:2-4 (Taub); *see also id.* at 453:20-454:5 (Taub) (acknowledging that he was one of three different honorees at the event). Dr. Taub understood he had received the honors "[b]ecause [Mr. Silver] was acting as a friend, and I valued that." *Id.* at 398:21-399:1 (Taub); *see* GX 327 (thanking Mr. Silver for the "handsome

plaque" and stating, "I greatly value your friendship"). The jury readily could have found that Mr. Silver gave Dr. Taub the resolution and proclamation out of genuine friendship and esteem for his work – whatever it may have thought about the other acts alleged in the case.

The same is true for the Rent Act of 2011. Even assuming the enactment of that legislation was an official act, there was ample evidence from which the jury could have found that the legislation itself was not a quid pro quo. *See, e.g.*, Trial Tr. 1674:7-13 (Meara) ("Q. So, for this period of time, between 2003 and 2011, there had been no improvements to tenants in the rent regulation laws, correct? A. That's correct. Q. But in 2011 there were significant improvements for tenants in the rent regulation law, weren't there? A. I would say so."); *id.* at 1886:13-17 (Runes) ("Q. You believe that Mr. Silver always voted against Glenwood; is that right? A. Uniformly. Q. Uniformly? A. Yes."). The jury could have concluded, for example, that although Mr. Silver gave Glenwood special access in private meetings in the months leading up to the legislation as a result of its support, the ultimate content of the legislation was pro-tenant and not part of any quid pro quo. There is no way to know – which precludes any finding of harmless error.

McDonnell is directly on point. The Supreme Court acknowledged that "[t]he jury may have disbelieved th[e] testimony [tending to exonerate Governor McDonnell] or found other evidence that Governor McDonnell agreed to exert pressure on those officials . . . , but it is also possible that the jury convicted Governor McDonnell without finding that he agreed to make a decision or take an action on a properly defined 'question, matter, cause, suit, proceeding or controversy.' " 2016 WL 3461561, at *20. "Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful." *Id.* at *21. Unable to determine what theory the jury relied upon in reaching its

verdict, the Court refused to find the instructional error " 'harmless beyond a reasonable doubt' " and vacated the conviction. *Id.*

The same result should follow here. There is simply no way to know whether the jury convicted on the basis of all the acts the Government alleged or instead relied on some but not others – and improperly relied on acts that are not "official" under *McDonnell*. As in *McDonnell*, the Government cannot show that the instructional error was harmless beyond a reasonable doubt. The conviction should be reversed.[4]

3. *Mr. Silver's Appeal Will Raise Other Substantial Issues Likely To Result in Reversal or a New Trial*

Although the *McDonnell* issue alone is sufficient to warrant bail pending appeal, Mr. Silver expects to raise several other substantial issues that collectively would likely require reversal or a new trial.

For example, Mr. Silver has contended throughout the case that the Government must prove a ***deprivation*** of property to establish extortion under the Hobbs Act. *See, e.g.*, Dkt. 124 at 3 (proposed instruction); Dkt. 179 at 11-12, 19 (sufficiency challenge). In *Sekhar v. United States*, 133 S. Ct. 2720 (2013), the Supreme Court expressly held that the Hobbs Act "requires 'not only the ***deprivation*** but also the ***acquisition*** of property.' " *Id.* at 2725 (emphasis added). This Court nonetheless ruled that it "does not read the *dicta* in *Sekhar* describing 'deprivation' to add an element to Hobbs Act extortion" but instead merely to "underscore the requirement that

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[4] Because the money laundering charge required the jury to find "criminally derived property" and proceeds "derived from specified unlawful activity," 18 U.S.C. § 1957(a), a new trial on the honest services fraud and extortion counts would necessarily require a new trial on the money laundering count as well. *See United States v. Kamdar*, No. 04-CR-156A, 2010 WL 883685, at *9 (W.D.N.Y. Mar. 8, 2010) (dismissing § 1957 count where Government failed to establish mail fraud from which property allegedly derived). In addition, Mr. Silver's showing that his appeal presents substantial questions likely to result in reversal or a new trial necessarily implies that his appeal "is not for the purpose of delay." 18 U.S.C. § 3143(b)(1)(B).

the victim must transfer the extorted property to the perpetrator." Dkt. 294 at 19; *see also* Nov. 19, 2015 Hr'g Tr. 2708:1-2709:4 (Dkt. 160). The Second Circuit could well disagree with that interpretation, which effectively reads the word "deprivation" out of the opinion. The issue is plainly significant: Mr. Silver did not ***deprive*** Dr. Taub of mesothelioma leads – Dr. Taub remained free to give out the same leads to other law firms as well. Nor did Mr. Silver deprive the developers of legal fees – they would have paid those fees to other law firms regardless.

Mr. Silver likewise objected that the Government could not prove money laundering based on payments from an account with commingled funds, some from the charged unlawful activities, but some untainted. Dkt. 179 at 21-22. This Court disagreed – but only after acknowledging that "[t]he Second Circuit has not addressed" the issue and that the question is the subject of a wide-ranging circuit split in which at least two circuits agree with Mr. Silver's position. Dkt. 294 at 25-27. That issue too presents a substantial question.

Another substantial question is whether the conduct at issue constitutes a "paradigmatic case[] of bribes [or] kickbacks" as required for honest services fraud under *Skilling v. United States*, 561 U.S. 358 (2010), rather than a mere conflict of interest or self-dealing. Dkt. 39 at 14-18; Dkt. 42 at 6-8; Dkt. 179 at 12-13, 19; *cf.* Dkt. 294 at 22-23 (ruling). Yet another is whether the evidence was sufficient to prove a quid pro quo – or whether the instructions were adequate to convey that concept to the jury. Dkt. 179 at 4-11, 14-19; Dkt. 124 at 2-3; *cf.* Dkt. 294 at 11-18 (ruling); Dkt. 135 at 18 (instruction).

Finally, Mr. Silver made a number of objections to the admission or exclusion of evidence that the Second Circuit could reasonably find grounds for a new trial. Dkt. 180 at 1-15; *cf.* Dkt. 294 at 28-29 & n.10 (ruling). Among other things, Mr. Silver challenged the Government's inflammatory and gratuitous evidence of Glenwood's massive campaign contributions, Mr. Silver's alleged financial privilege and access to private investment vehicles,

and Dr. Taub's exchange of referrals for donations from the Simmons Foundation. Dkt. 180 at 3-6, 10-13. He also challenged the Court's ruling effectively denying him the ability to show good faith in the revisions to his state disclosure forms. *Id.* at 8-10. Any of those rulings could result in a new trial. For all those reasons, the Court should continue bail pending appeal.

C. Bail Pending Appeal Would Be Consistent with Orders in Comparable Cases

Granting bail pending appeal here would be fully consistent with comparable prosecutions. Courts have routinely granted bail in public corruption cases that raised substantial legal issues – even where the issues had not been conclusively resolved in the defendant's favor like the ones here. *See, e.g.*, *United States v. Bruno*, No. 1:09-cr-29 (N.D.N.Y. July 22, 2010) (New York State Senator Joseph Bruno) (honest services fraud after *Skilling*); *United States v. Ring*, No. 08-cr-274, Dkt. 297 at 2-3 (D.D.C. Oct. 26, 2011) (lobbyist and former associate of Jack Abramoff) (scope of *Skilling* and gratuity statute); *United States v. Jefferson*, No. 1:07-cr-209, Dkt. 619 (E.D. Va. Nov. 18, 2009) (Louisiana Congressman William Jefferson) (definition of official act). Circuit courts have done so where district courts have not. *See, e.g.*, *United States v. Siegelman*, No. 07-13163-BB (11th Cir. Mar. 27, 2008) (Alabama Governor Don Siegelman) (quid pro quo requirement under bribery statute); *United States v. Ryan*, No. 06-3528 (7th Cir. Nov. 28, 2006) (Illinois Governor George Ryan) (conflict-of-interest instruction after *Skilling*). The Second Circuit has also granted bail pending appeal in other recent white-collar cases. *See, e.g.*, *United States v. Newman*, No. 13-1917, Dkt. 77 (2d Cir. June 21, 2013); *United States v. Gupta*, No. 12-4448, Dkt. 47 (2d Cir. Dec. 6, 2012). It has done so even when it ultimately affirmed the conviction. *Compare Gupta*, No. 12-4448, Dkt. 47 at 1 (granting bail), *with United States v. Gupta*, 747 F.3d 111, 140 (2d Cir. 2014) (affirming conviction).

Those decisions make clear that a court's certainty in the correctness of its ruling is not a basis for denying bail pending appeal if the question posed is substantial. Judge Ellis's ruling in

Jefferson is instructive. In denying Congressman Jefferson's Rule 29 motion, Judge Ellis rejected the claim that the "government failed to present sufficient evidence that [Jefferson performed] . . . 'official acts'" to support his conviction for bribery and honest services fraud. *Jefferson*, No. 1:07-cr-209, Dkt. 571 at 2 (E.D. Va. Aug. 8, 2009). But the judge nevertheless continued bail pending appeal, explaining:

> I was confident that [Jefferson's conduct] fits within the 'official act' definition. And I so ruled and wrote opinions on it, and the jury was so instructed. . . . ***As I said, I don't have any doubt that my reasoning is correct and that it is soundly based on existing authority*** . . . . I think influence peddling, given the evidence in this case, clearly amounts to a bribe. But I see that as an argument for a substantial question. So I think I do find a substantial question for appeal in these circumstances. By no means do I think that it is likely to result in a reversal. If I did, I wouldn't have ruled that way. ***But as courts have defined substantial question, I think it is a question that could be decided the other way.***

Transcript, *Jefferson*, No. 1:07-cr-209, at 48:24-50:2 (E.D. Va. Nov. 18, 2009), *reproduced as* Ex. B to Dkt. 602 in *United States v. McDonnell*, No. 3:14-cr-12 (E.D. Va. Jan. 5, 2015) (emphasis added).

Courts have been especially likely to continue bail pending appeal when impending or intervening Supreme Court authority casts doubt on the basis for a conviction. In *United States v. Bruno*, No. 1:09-cr-29 (N.D.N.Y. July 22, 2010), for example, Judge Sharpe continued bail pending appeal for New York State Senator Joseph Bruno in light of the Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010), issued nearly six months after his guilty verdict. Judge Sharpe agreed with Bruno that *Skilling* raised a substantial question regarding the instructions permitting the jury to convict on a conflict-of-interest theory. *See United States v. Bruno*, 1:09-cr-29 (N.D.N.Y. July 22, 2010) (text order); *Bruno*, No. 1:09-cr-29, Dkt. 307 (N.D.N.Y. July 2, 2010) (defendant's submission).

Similarly, in *United States v. Antico*, 123 F. Supp. 2d 285 (E.D. Pa. 2000), a zoning inspector was convicted of extortion and honest services fraud for issuing permits in exchange for payments and other benefits. *Id.* at 290. The defendant sought bail pending appeal, arguing that a case decided during trial – *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) – called into question the extortion instructions, while another case decided during appeal – *Cleveland v. United States*, 531 U.S. 12 (2000) – precluded conviction for honest services fraud. 123 F. Supp. 2d at 287-88, 290-91. The district judge continued the defendant's bail pending appeal. *Sun-Diamond*, "although not directly on point," had "certainly enough force" to raise a "substantial question" regarding the extortion instructions. *Id.* at 288. And there was also "some force to defendant's contention that, following *Cleveland*, zoning permits may not be considered property for the purposes of federal wire fraud charges." *Id.* at 290.

This case is no different. Mr. Silver is no more a flight risk or a danger to the community than any of those other public officials. He plans to raise substantial questions on appeal based on an intervening Supreme Court decision that significantly restricted the scope of the statutes he was convicted of violating – along with other substantial legal issues. Mr. Silver satisfies the standards for bail pending appeal, and this Court should continue his release.

II. THE COURT SHOULD STAY MR. SILVER'S FINANCIAL PENALTIES PENDING APPEAL

The Court should also stay its fine and forfeiture order pending appeal. Under Federal Rule of Criminal Procedure 38(c), the Court may "stay a sentence to pay a fine" on "any terms considered appropriate." Fed. R. Crim. P. 38(c). By statute, absent exceptional circumstances, the Court must:

> (1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

> (2) require the defendant to provide a bond or other security to ensure payment of the fine; or
>
> (3) restrain the defendant from transferring or dissipating assets.

18 U.S.C. § 3572(g). Similarly, Federal Rule of Criminal Procedure 32.2(d) permits a court to "stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review." Fed. R. Crim. P. 32.2(d).

Whether to stay a fine is a matter "committed to the sound discretion of the court." *United States v. Tallant*, 407 F. Supp. 896, 897 (N.D. Ga. 1975), *aff'd*, 547 F.2d 1291 (5th Cir. 1977). In exercising that discretion, courts traditionally consider the defendant's likelihood of success on appeal. *See, e.g.*, *United States v. Koestner*, No. 4:08-cr-00093, 2010 WL 2595300, at *1 (S.D. Iowa June 22, 2010) ("When considering such a stay, the Court must consider the legal merits of the appeal . . . ."); *United States v. Keifer*, No. 2:08-cr-162, 2012 WL 3878194, at *4 (S.D. Ohio Sept. 6, 2012). Courts also consider the threat of irreparable injury absent a stay. *See United States v. Walker*, No. 07-cr-50097-01, 2008 WL 4808837, at *2 (W.D. La. Oct. 31, 2008) (staying fine based on "the potential for irreparable injury"); *United States v. Bestway Disposal Corp.*, 724 F. Supp. 62, 70 (W.D.N.Y. 1988); *United States v. Coluccio*, No. 87-cr-077, 1993 WL 217133, at *1 (E.D.N.Y. June 15, 1993), *aff'd*, 9 F.3d 1536 (2d Cir. 1993). Similar factors inform a court's decision to stay a forfeiture order pending appeal. *See, e.g.*, *United States v. Ngari*, 559 F. App'x 259, 272 (5th Cir. 2014) (collecting cases); *United States v. Quinones*, No. 06-cr-845-FB, 2009 WL 4249588, at *2 (E.D.N.Y. Nov. 25, 2009).

Those factors warrant a stay here. First, for all the reasons above, Mr. Silver's appeal presents a host of meritorious issues that may well be decided in his favor. For the same reason those issues warrant bail pending appeal, they also warrant a stay of the financial penalties.

Second, absent a stay, Mr. Silver would suffer irreparable injury – particularly from the fine. The judgment directs Mr. Silver to pay $1.5 million. Dkt. 297 at 7. As set forth in the presentence report, however, Mr. Silver has only approximately $2.2 million in assets available to pay that fine. PSR ¶ 107. Of that amount, nearly $794,000 consists of his state deferred compensation – an amount that would be subject to heavy taxation if it were liquidated to pay the fine. *Id.*; *see* 26 U.S.C. § 457(a)(1); N.Y. Tax Law § 612. Of the remainder, more than $850,000 consists of his share of two residences that Mr. Silver owns jointly with his wife, worth $750,000 and $101,000. PSR ¶ 107. Ordering Mr. Silver to pay $1.5 million would thus all but require the Silvers to sell both residences – depriving Mrs. Silver of the home she has occupied for decades. While the Government could refund the fine if Mr. Silver prevailed on appeal, it could not restore their home.

In *United States v. Walker*, No. 07-cr-50097-01, 2008 WL 4808837 (W.D. La. Oct. 31, 2008), the court adopted precisely that reasoning to stay a fine pending appeal to the extent it required the defendant to sell his residences. 2008 WL 4808837, at *2. The court cited "the potential for irreparable injury should Walker prevail in his appeals, particularly . . . his ability to purchase comparable homes in comparable neighborhoods at comparable prices." *Id.* Similarly, in *United States v. Bradley*, 513 F. Supp. 2d 1371 (S.D. Ga. 2007), the court recognized that the threat of irreparable harm from the sale of a jointly owned residence is "magnified where a defendant's wife is ***not*** convicted of any crime, jointly owns a residence with her convicted husband, lives in it, and non-ill-gotten funds figure into the residence's value." *Id.* at 1380.

Accordingly, the Court should stay its fine and forfeiture order pending appeal, subject to terms and conditions it considers appropriate. In particular, Mr. Silver would not object to an order restraining him from transferring or dissipating assets necessary to satisfy the penalties if his conviction is affirmed on appeal. 18 U.S.C. § 3572(g)(3); Fed. R. Crim. P. 32.2(d).

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Silver's motion for continued bail pending appeal and stay the fine and forfeiture order pending appeal. In the event the Court denies this motion, Mr. Silver respectfully requests that the Court further stay his surrender date pending the timely filing and disposition of a renewed motion for bail with the court of appeals.

Dated: July 11, 2016
New York, New York

Respectfully submitted,

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