No. 20-A-____

IN THE SUPREME COURT OF THE UNITED STATES

SHELDON SILVER,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

EMERGENCY APPLICATION TO RECALL AND STAY THE MANDATE, OR IN THE ALTERNATIVE RELEASE ON BAIL, PENDING DISPOSITION OF CERTIORARI PETITION

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TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Sheldon Silver moves for an emergency recall and stay of the Second Circuit's mandate, or in the alternative for release on bail, pending the disposition of his forthcoming petition for certiorari. On April 1, 2020, the Second Circuit denied Mr. Silver's motion to stay the mandate and immediately issued the mandate. Without relief, Mr. Silver will be resentenced and likely have to report to prison before this Court rules on his certiorari petition, which will present substantial questions; he therefore requests expedited consideration of his application.

An individual Justice is authorized to issue a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). Such action is proper if there is "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 564 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). Similarly, any judicial officer—including a Circuit Justice—"shall order" release on bail pending disposition of a certiorari petition, so long as (i) the applicant is not likely to flee or pose any danger, and (ii) his appeal presents a "substantial question of law" that, if decided in his favor, is "likely to result in … reversal" or "a new trial." 18 U.S.C. § 3143(b). In applying that standard, Justices have looked to whether there exists "a reasonable probability that four Justices are likely to vote to grant certiorari." *Julian v. United States*, 463 U.S. 1308 (1983) (Rehnquist, C.J.).

Whether framed as a stay under 28 U.S.C. § 2101(f) or release on bail under 18 U.S.C. § 3143(b), the legal standard is materially the same: Is there a reasonable probability of certiorari and do the equities favor maintenance of the status quo until this Court has an opportunity to consider the certiorari petition?

The answer to both questions is yes. Mr. Silver's certiorari petition will present three questions independently warranting this Court's review. In addition, absent a stay or release, Mr. Silver will be resentenced and may well complete a substantial portion of his prison sentence before this Court considers whether some or all of his convictions were contrary to the law. On the other hand, if this Court grants relief and then denies review, the Government will not be harmed. Mr. Silver would still be resentenced and serve his entire sentence. Moreover, he is not a flight risk or a danger to the public

Mr. Silver was a longtime assemblyman and, for twenty years, Speaker of the New York State Assembly. According to the Government, Mr. Silver used his law firm work to exploit his elected position for unlawful personal gain. At trial, Mr. Silver was convicted of honest-services fraud, Hobbs Act extortion, and money laundering. On appeal, the Second Circuit overturned some of those convictions. But in affirming the other convictions, the court raised several vitally important questions, questions that merit this Court's attention.

First, the opinion pioneered a novel definition of bribery that eliminates the key line this Court has drawn between unlawful bribery and lawful (if not always admirable) actions by state officials that federal criminal law does not reach. *Second*,

by affirming Mr. Silver's conviction under the Hobbs Act, the opinion conflated extortion and bribery, an approach Justices of this Court have long questioned. *Third*, the panel engaged in a *sua sponte* harmless error analysis despite the Government electing not to argue harmless error and Mr. Silver having no opportunity to address it (and despite the conclusion of a prior panel on an earlier appeal that the same error was not harmless). These issues will likely attract attention from this Court and there is at least a fair prospect that the Court would reverse the panel's holding on one or more of those questions.

STATEMENT

A. The Government's Theory.

Sheldon Silver was first elected to the New York State Assembly in 1976. From then until 2015, he represented much of lower Manhattan. In 1994, he was also elected Speaker and served in that position until 2015. According to the Government, Mr. Silver used his law firm work "to exploit his elected position for unlawful personal gain." Slip op. 5. In particular, the prosecution emphasized referral fees Mr. Silver earned when a real estate developer, Glenwood Management, hired the Goldberg law firm for tax work. Glenwood's in-house counsel testified that Glenwood did not retain Goldberg in order to get any official action from Mr. Silver, and that Mr. Silver never "communicate[d] in any way" that he would take official action in return for using the Goldberg firm. JA 870. The Government nonetheless alleged that Glenwood's use of Goldberg was a *quid* for two official acts.

One alleged "official act" was "influence on provisions of the Rent Act of 2011." Slip op. at 47. Glenwood's lobbyist met with Mr. Silver in June 2011 to suggest changes to ensure the bill's passage, at a time when "both [the lobbyist] and the leadership of Glenwood were unaware ... that Silver received referral fees from" the law firm. *Id.* at 46. The lobbyist testified that Mr. Silver's response was "noncommittal," and that the bill as passed differed from Glenwood's proposal and contained provisions that were "not what Glenwood wanted." JA 727, 872-73.

The second "official act" involved the Public Authorities Control Board (PACB). That board approved financing for tax-exempt bonds, which Glenwood depended on. Slip op. at 48. Mr. Silver had a seat on the board, but approvals for the type of financing Glenwood relied on were "typically *pro forma*"—the Second Circuit previously termed them "perfunctory"—and Mr. Silver sent a designee to meetings. *United States v. Silver*, 864 F.3d 102, 109 n.18 (2d Cir. 2017) (*Silver I*); JA-921.[1] There was no testimony that Mr. Silver and Glenwood ever discussed PACB approvals.

The Government charged Mr. Silver with two counts of honest services fraud, one count of Hobbs Act extortion, and one count of money laundering.

[1] The Witkoff Group, which also hired Goldberg, is irrelevant because it did not learn of Silver's fees until 2014 and no "official acts" were tied to Witkoff's fees. *See* slip op. 50. Mr. Witkoff also testified that Witkoff did not use Goldberg "in order to get Mr. Silver to take some official action" or "in anticipation of" any such action. JA-803.

B. The Jury Instructions.

Mr. Silver sought to argue that there was never any *quid pro quo* agreement, but the court told the jury it could convict even if Glenwood made referrals without intending to obtain "official acts" in return.

In particular, the honest-services charge not only failed to require an exchange, but instructed the jury that "the Government only has to prove that Mr. Silver—not the alleged bribe giver—understood that, as a result of the bribe, he was expected to exercise official influence or take official action." SA-30.

The Hobbs Act instruction, though convoluted, likewise departed from an exchange requirement, stating that the *quid pro quo* element was satisfied if the payors gave Mr. Silver property "because of Mr. Silver's official position" (rather than in exchange for "official acts"). SA-32. When the court subsequently referred to an exchange, it said that requirement was satisfied unless the property was provided for reasons entirely "unrelated to Mr. Silver's public office." SA-32-33. The court added that it was enough if the developers wished to procure "official influence or decision making." SA-33.

If the jury had any doubt about what the instructions meant, the Government dispelled it in summation: "[T]he only question for you, ladies and gentlemen, is if any part of Sheldon Silver's motivation in taking these official actions was because of the money." SA-53. The jury convicted Mr. Silver on all counts.

C. The Second Circuit Opinion.

The Second Circuit ordered a judgment of acquittal on three counts that are not at issue, but upheld Mr. Silver's convictions based on the "real estate scheme." The court rejected Mr. Silver's first argument that the jury instructions had erroneously omitted the required "agreement" element. Slip op. 9-21. For honest services fraud, the court held, "the Government has met its burden" if it shows the official "*understood* [the payment] to be a payment in exchange for official influence on some specific, focused, and concrete matter involving the formal exercise of governmental power." *Id.* at 84 (emphasis added). Likewise, by approving the Hobbs Act jury instructions, the Second Circuit effectively held that only the official's motivation matters—an exchange is not required.[2]

The Second Circuit next held that the jury instructions were erroneous under *McDonnell*, because they did not tie "official action" to a "*specific and focused question or matter*." *Id.* at 61. But the court found that error harmless as to the "real estate scheme." *Id.* at 69.

D. Petition for Rehearing and Motion to Stay the Mandate.

Mr. Silver petitioned for rehearing and rehearing *en banc*. Dkt. No. 135 (Feb. 4, 2020). After that petition was denied, Mr. Silver moved to stay the mandate pending disposition of Mr. Silver's forthcoming certiorari petition. Dkt. No. 140

[2] At times, the Second Circuit suggested that for extortion the official must convey this understanding to the bribe payor. *E.g.*, slip op. 13. But that is not what the jury instructions said: they required at most that the benefit be provided "because of Mr. Silver's official position," SA-32—which describes lawful efforts to curry favor.

(February 27, 2020). Mr. Silver's motion identified the same substantial questions as this application. The panel denied that motion on April 1, 2020 and immediately issued the mandate even though under the normal course, the mandate should not have issued for seven days following the denial of Mr. Silver's motion. Dkt. Nos. 153, 154; *see* Fed. R. App. P. 41(b) ("The court's mandate must issue … 7 days after entry of an order denying a … motion for stay of mandate ….").

REASONS FOR GRANTING THE APPLICATION

A motion to stay the mandate pending a certiorari petition is appropriate if there is a "reasonable probability" of certiorari, a "fair prospect" of reversal, and a "likelihood" of irreparable harm. *King*, 564 U.S. 1301; *see also Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers). Justices will also grant release, under 18 U.S.C. § 3143(b), if there is "a reasonable probability that four Justices are likely to vote to grant certiorari," *Julian*, 463 U.S. at 1308, and the applicant is neither a flight risk nor a public threat.

Under either standard, Mr. Silver is entitled to relief. For starters, there is no dispute that he is not a flight risk or threat to public safety. Dist. Ct. Op. 5-6 (Sept. 17, 2018). Nor can there be any doubt that "irreparable harm" would result without relief: If Mr. Silver, who is in his late 70s, is resentenced immediately, he will likely be required to report to prison in short order, meaning that he would potentially be in dangerous proximity to other individuals during a pandemic, and the time spent in prison will be irrecoverable if this Court later invalidates his conviction. On the

other hand, if this Court grants a stay and denies review or affirms the Second Circuit, Mr. Silver will serve out his sentence in due course.

The only real questions, then, are whether there is a "reasonable probability" that this Court will grant certiorari and a "fair prospect" the Court will reverse. The answer to both questions is "yes" for three reasons.

First, the Second Circuit's novel holding on bribery—eviscerating the dividing line between normal politics and bribery—is unprecedented and conflicts with decisions of this Court and other circuits. Because this Court continues to actively police this area of law to prevent federal prosecutors from using vague federal criminal laws to impose standards of "good government for local and state officials," there is at least a fair possibility the Court will side with Mr. Silver. *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Kelly v. United States*, 139 S. Ct. 2777 (2019).

Second, the court of appeals conflated Hobbs Act extortion with simple bribery. While that was required under this Court's precedent, *Evans v. United States*, 504 U.S. 278 (1992), two current Justices (and more former Justices) have expressed doubt that Hobbs Act extortion covers simple bribery. Because this case presents the current Court with the chance to reexamine that important question, there is a reasonable probability that the Court will do so. And there is a fair prospect at reversal. When Congress enacted the Hobbs Act, it adopted the meaning of common-law extortion. *Id.* at 278 (Thomas, J., dissenting). And common-law extortion did not include simple bribery. *Id.*

Third, the Second Circuit stands alone in conducting *sua sponte* harmless error analysis without asking first *whether* it was appropriate to engage in that analysis—and make necessarily intricate factual determinations—when the Government forfeited the issue and Mr. Silver accordingly had no opportunity to argue the relevant factual details. The court of appeals nonetheless forgave that failure by doing the Government's work for it. In nearly every other circuit, however, the Government's forfeiture would have ended the case because those courts do not engage in *sua sponte* harmless-error review when the record is complex and harmlessness is debatable. This Court is likely to grant certiorari to resolve that split, and the Court is likely to adopt Mr. Silver's position.

I. MR. SILVER IS NEITHER A FLIGHT RISK NOR THREAT AND THE EQUITIES FAVOR A STAY.

Mr. Silver is not a flight risk or a danger to the community, Dist. Ct. Op. 5-6 (Sept. 17, 2018), so the threshold requirements for release under § 3143(b) are plainly satisfied. In addition, absent a stay the parties and district court will have to engage in resentencing, efforts that may well be for naught if the Supreme Court agrees with Mr. Silver. If Mr. Silver is resentenced before the Court grants review, then Mr. Silver will likely have to report to prison, potentially losing months of freedom before the Court decides the case—and will have to do so at a time when prisons present heightened dangers of coronavirus exposure for individuals of Mr. Silver's age. That would be unjust. *See United States v. McManus*, 651 F. Supp. 382, 383-84 (D. Md. 1987) ("There seems little point to an appeal if the defendant will serve his time before a decision is rendered."). Mr. Silver should not be imprisoned "before he has a fair

opportunity to seek Supreme Court review." *Mickens v. Taylor*, 243 F.3d 870, 871 (4th Cir. 2001) (Michael, J., joined by Motz & King, JJ., dissenting from denial of stay). Finally, if this Court grants a stay and then denies review, there is no harm done. If Mr. Silver is due to serve time in prison, whether he serves it starting now or in a few months is immaterial. The equities thus favor preserving the status quo.[3]

II. THE CERTIORARI PETITION WILL PRESENT THREE SUBSTANTIAL QUESTIONS.

The "substantial question" standard is not onerous. It does not require courts to find "exceptional circumstances," or even to conclude that the applicant is likely to succeed on the merits. *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528–29 (9th Cir. 1989). Instead, "the applicant must show a reasonable probability that four justices will vote to grant certiorari and a reasonable possibility or 'fair prospect' that five justices will vote to reverse the circuit court's judgment." 20A Moore's Federal Practice - Civil § 341.14[2]; *see also King*, 561 U.S. at 1301. Mr. Silver easily meets this low standard.

[3] In its opinion declining to stay the mandate, the Second Circuit opined that "none of the questions Silver intends to raise address his conviction under Count 7s for money laundering, making it all but certain that he would serve at least some time in prison even in the unlikely event that he were to succeed before the Supreme Court on the other counts of conviction." Dkt. 150, at 11. That is incorrect. The money-laundering charge, as the Second Circuit recognized on Mr. Silver's first appeal (864 F.3d at 124), is derivative of the extortion and fraud charges, so it necessarily fails if he is right on any of the questions presented to this Court.

A. There is A Substantial Question Whether Bribery Requires an Exchange.

Mr. Silver's petition will present the substantial question whether bribery requires an exchange rather than being satisfied by the official's unexpressed unilateral intent. The panel opinion effectively held that an official commits bribery (in violation of both the honest-services fraud statutes and the Hobbs Act) any time he secretly believes he was given a gift to perform an official act. Decisions of this Court and other courts of appeals support Mr. Silver's position that bribery requires an agreed exchange, not mere unilateral understanding on the official's part. Those decisions make this a paradigmatic substantial question.

1. This Court, warning against using vague federal criminal laws to impose standards of "good government for local and state officials," *McNally v. United States*, 483 U.S. 350, 360 (1987), has strictly limited federal bribery law to "*quid pro quo* corruption—the *exchange* of a thing of value for an 'official act,'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (emphasis added). The provision of benefits to an official to curry favor is therefore lawful—both to give and to receive—unless made in exchange for official action.

Countless cases therefore describe bribery as requiring an implicit or explicit "agreement" or "promise" to undertake an official action in exchange for the benefit. *E.g.*, *United States v. Brewster*, 408 U.S. 501, 526 (1972). This holds under both the Hobbs Act, *see McCormick v. United States*, 500 U.S. 257, 272 (1991), and honest-services fraud, *see United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013). "[A]n

agreement is the key component of a bribe." *United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2013) (Sutton, J.).

Indeed, the bribery-without-a-bribe view is so novel that it contradicts even the Government's own requested jury charges in other bribery prosecutions. In *United States v. Percoco*, for instance, the Government's Hobbs Act charge request expressly focused on the payor's motivation for the alleged bribe: "The Government's burden is to prove that the promise or performance of *official action* was at least part of *the motivation for the extorted party to give over the property*." Government's Requests To Charge 22, *United States v. Percoco*, No. 1:16-cr-0776-VEC (S.D.N.Y. Dec. 8, 2017), ECF No. 379 (emphasis added). Similarly, in *United States v. Skelos*, the Government requested an honest services fraud instruction that likewise focused on whether the alleged payment was *provided* in exchange for official action: "the Government must prove that the thing of value was *provided, at least in part, in exchange for* the promise or performance of Dean Skelos's *official actions*." Government's Proposed Jury Instructions 26, *United States v. Skelos*, No. 1:15-cr-0317-KMW (S.D.N.Y. June 8, 2018), ECF No. 339-1 (emphasis added).

Without an exchange requirement, federal prosecutors would be free to use bribery charges to "se[t] standards of good government for local and state officials." *McDonnell*, 136 S. Ct. at 2373. Eliminating an exchange requirement would also cast a "pall of potential prosecution" over all officials, *id.* at 2372, given the ease of alleging that any benefit provided to an official by lobbyists or others was received with by the official with improper intent.

The court of appeals in this case, however, rejected the core exchange requirement, and held that it is enough if the jury finds the official unilaterally "understood [a payment] to be a payment in exchange for official influence on some specific … matter involving the formal exercise of governmental power." Slip op. 84. This transformation of bribery from a crime of exchange to one of unilateral thoughts erases this Court's key distinction between lawful and criminal conduct. The councilman who votes for a pro-business resolution after the Chamber of Commerce takes him to a ballgame, or the mayor who hires a friend after receiving a birthday present from her, would be subject to indictment if a federal prosecutor suspected the official drew a connection, *solely in her own mind*, between the benefit and the official action. And imprisonment would turn on a jury's after-the-fact speculation about the official's unexpressed state of mind—allowing a jury to convict based on unethical, but non-criminal conduct. Those are precisely the outcomes this Court has worked so hard to avoid. *Id.* at 2372-73 (courts do not "construe a criminal statute on the assumption that the Government will use it responsibly").

The Second Circuit's erroneous decision derived in part from a misreading of Mr. Silver's argument as contending that that there must be a "meeting of the minds" between the payor and the official. *E.g.*, slip op. 9. Mr. Silver expressly disclaimed any such argument. Reply Br. 9 (2d Cir.) ("Bribery does not require a subjective 'meeting of the minds.'"). But in rejecting this strawman, the panel failed to address what the law does require, which is an agreed *exchange* of a payment for actual or promised official action. Whether one calls it a promise, an agreement, or an

understanding, there must be a tit for tat. *McCormick*, 500 U.S. at 273. That is the essence of bribery.

For the same reason, the Second Circuit missed the point in saying that Mr. Silver's purported "argument that a *quid pro quo* requires a meeting of the minds" contradicts the "distinction drawn in *Ocasio* [*v. United States*, 136 S. Ct. 1423 (2016)]" between conspiracy (which requires a meeting of the minds) and extortion under color of right (which does not). Slip op. 16. That distinction is precisely the point: bribery does not require a meeting of the minds, but does require an agreed exchange. *Ocasio*'s example illustrates: "[I]magine that a health inspector demands a bribe from a restaurant owner . . . If the owner reluctantly pays the bribe in order to keep the business open, the owner has 'consented' to the inspector's demand, but this mere acquiescence in the demand does not form a conspiracy." 136 S. Ct. at 1436. The owner and inspector do not share the same subjective intent, but they have objectively *agreed* to an exchange of the bribe for the inspector's agreement not to carry out his threat.

In rejecting Mr. Silver's motion to stay the mandate, the Second Circuit again misconstrued Mr. Silver's argument, saying that he was arguing for a "meeting of the minds" requirement. Dkt. 150, at 3. But Mr. Silver has never argued that both sides must have criminal intent. One side can be an informant, one side can secretly intend not to follow through with the bribe. To count as bribery, however, there must be an objective, agreed-upon exchange. Here, there was no agreed-upon exchange and neither the Government nor the Second Circuit has ever said what the supposed

agreement was. For that reason, there is no merit in the court's suggestion that Mr. Silver has taken "cribbed quotations" "out of context" from other cases. Those cases—including this Court's opinions in *Brewster*, 408 U.S. at 526, and *McCormick*, 500 U.S. at 272—make clear that an objective, agreed-upon exchange is required for a bribery conviction.

2. Numerous federal appellate court decisions support Mr. Silver's position as well.

In *United States v. Jennings*, 160 F.3d 1006 (1998), the Fourth Circuit held that a bribery instruction using "intent to influence" language without including a *quid pro quo* requirement was not just erroneous, but plainly so. *Id.* at 1021. The instructions failed to alert the jury that it must find the defendant "ha[d] given money … *in exchange for* some specific official act or course of action." *Id.* at 1022 (emphasis added). As a result, the instruction mistakenly conveyed the impression that the law "prohibits any payment made with a generalized desire to influence or reward (such as a goodwill gift), no matter how indefinite or uncertain the payor's hope of future benefit." *Id.* at 1020.

The decision below is also in tension with the decisions of numerous courts of appeals holding that bribery requires the government to prove an agreement. *See, e.g.*, *United States v. Wright*, 665 F.3d 560, 567-568 (3d Cir. 2012); *Terry*, 707 F.3d at 614; *United States v. Whitman*, 887 F.3d 1240, 1247 (11th Cir. 2018); *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013).

For example, in *Terry*, the Sixth Circuit held that there is a "statutory

requirement" that "the payments were made in connection with an agreement, which is to say 'in return for' official actions under it." 707 F.3d at 612. "What is needed is an agreement, full stop, which can be formal or informal, written or oral." *Id.* The conviction at issue was valid because the jury instructions "accurately conveyed that an agreement is the key component of a bribe" by requiring a finding that the defendant "agreed 'to accept [a] thing of value in exchange for official action.' " *Id.* at 614.

Likewise in *Ring*, the D.C. Circuit explained that the "requirement" for bribery is that "the payor defendant must at least intend to offer … [a corrupt] *exchange*." 706 F.3d at 468 (emphasis altered). "To be sure," the court wrote, "bribing congressmen is illegal, but gifts given by lobbyists to curry political favor do not always amount to bribes." *Id.* at 464. And though "[t]he distinction between legal lobbying and criminal conduct may be subtle," the difference is key: a defendant commits bribery "when [a] gift is given with an 'intent "to influence" an official act' by way of a corrupt *exchange*." *Id.* (emphasis added); *see also* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 481 (2015) ("[F]avoritism following the receipt of a benefit is not bribery . . . . The circumstances must warrant an inference that, at the time the official accepted one or more of the benefits . . . , he agreed at least implicitly to provide something in return.").

In its opinion denying Mr. Silver's motion for a stay, the Second Circuit wrote that at least some of these appellate cases are "distinguishable from Silver's case"

and "consistent with the Opinion." Dkt. 151, at 7 (citing *Terry*, 707 F.3d at 614, and *Ring*, 70 F.3d at 468). That is not so. The appellate cases Mr. Silver identified establish that most circuits follow this Court's lead in requiring an objective exchange. That is particularly true of the cases the panel singled out. *Terry* explained that "an agreement is the key component of a bribe." 707 F.3d at 614. Indeed, in that case the bribe payor "straight up asked [the defendant judge] to deny the bank's motions for summary judgment in the two cases, and with [the judge's] tape-recorded reply ('Got it.'), [the judge] agreed to do just that." *Id.* at 615.

Ring too required an exchange. 706 F.3d at 468. The Second Circuit highlighted the D.C. Circuit's explanation that "'agreement' is used as a synonym for specific intent." Dkt. 150, at 7 (quoting *Ring*, 706 F.3d at 468). That is true—the agreement is what shows the official had the requisite specific intent. In fact, the very next sentence of the D.C. Circuit's opinion stated: "When … a public official is charged with soliciting a bribe, the evidence must show that the official *conveyed an intent* to perform official acts in exchange for personal benefit." *Ring*, 706 F.3d at 468 (emphasis added). The Second Circuit here, by contrast, blessed jury instructions that allowed conviction based on unilateral intent that was never conveyed. The panel thus contradicted the D.C. Circuit (and a number of other courts of appeals).

The decisions of this Court and numerous courts of appeals support Mr. Silver's argument that an agreed upon exchange is required for a bribery conviction. If that understanding is ultimately correct, acquittal (or, at the very least, a new trial) is required. This Court is thus likely to weigh in, reaffirm that an agreed exchange that

is the *sine qua non* of bribery, and reject the notion that unilateral understanding suffices.

B. There Is a Substantial Question Whether Hobbs Act Extortion Covers Bribery.

Mr. Silver's petition for certiorari will also present the substantial question whether a bribery theory can suffice for Hobbs Act extortion. The court of appeals was bound by precedent on that question. *See Evans*, 504 U.S. at 268. But Mr. Silver preserved his argument that voluntary payment of a bribe is not within the meaning of "extortion" under the Hobbs Act, and such extortion occurs only when the victim is actually *extorted*—as when an official obtains property "under the pretense that the officer [is] *entitled* thereto by virtue of his office." *Ocasio*, 136 S. Ct. at 1438 (Thomas, J., dissenting) (emphasis added); *see also* Op. Br. 28 n.5 (2d Cir.).

In *Evans*, this Court held that Hobbs Act extortion extends to bribery. The defendant was an elected official who had passively accepted cash payments, including a check to his campaign, in return for favorable official action. 504 U.S. at 257. In deciding whether the defendant need have "induced" payment under Hobbs Act extortion the Court "assume[d] that the jury found that [the defendant] accepted the cash knowing that it was intended to ensure [his favorable vote] ... his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver." *Id.* The Court determined that the defendant could commit extortion by passively accepting bribes—he need not have "induced" or otherwise demanded payment because "the coercive element [of extortion under color of official right] is provided by the public office itself." *Id.* at 267.

Three justices dissented. Justice Thomas explained that when Congress enacted the Hobbs Act, it adopted the meaning of common-law extortion." *Id.* at 278 (Thomas, J., dissenting). And that common-law crime did not include simple bribery. Instead, "[a]t common law it was essential that the money or property be obtained under color of office, that is, under the pretense that the officer was entitled thereto by virtue of his office. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." *Id.* at 279. Nineteenth- and early twentieth-century cases involving state extortion statutes made "plain that the offense was understood to involve not merely a wrongful taking by a public official, but a wrongful taking under a false pretense of official right." *Id.* at 281-82. When an official takes a bribe, the wrong is to the state, but not to the bribe-payor. Because of that, bribery is not punishable as extortion. For extortion, "[p]rivate and public wrong must concur." *Id.* And more recently, Justice Breyer opined that *Evans* "may well have been wrongly decided." *Ocasio*, 136 S. Ct. at 1437 (Breyer, J., concurring).

In denying Mr. Silver's motion for a stay, the Second Circuit wrote that Mr. Silver had not shown "that *four* justices will vote to grant certiorari." Dkt. 150, at 8. But Mr. Silver does not have to show that there are, in fact, four current Justices that agree with him. *See King*, 564 U.S. at 1301. (That said, over time, three Justices have agreed with Mr. Silver and a fourth has suggested that he agrees as well). Mr. Silver only has to show a reasonable probability that four Justices will vote to consider the question. Given that members of the Supreme Court have written (and continue to

write) on this question, that only one member of the current Court has considered the question (and agreed with Mr. Silver), and that Congress codified the common law definition of extortion when it enacted the Hobbs Act, there is a reasonable probability that the Court will grant Mr. Silver's petition and reverse the panel.

C. There Is a Substantial Question Whether and When an Appeals Court Can Engage in a Harmless Error Analysis If the Government Forfeited the Issue.

The Second Circuit's opinion opens another split among the circuits. This Court has repeatedly stated that the government bears the burden of demonstrating on appeal that an error was harmless. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Chapman v. California*, 386 U.S. 18, 26 (1967). Based on that rule, nearly every circuit has held that when the Government does not argue harmless error, it is rarely appropriate for the appeals court to engage in that analysis. Here, the Government never argued harmless error on the *McDonnell* issue or money laundering—even as it *did* argue harmless error on other issues—thereby effectively conceding that harmless error was inapplicable.[4] The court of appeals nonetheless undertook that analysis without any briefing, and without notice to Mr. Silver. And the court offered no justification for relieving the government of its burden. That conflicts with decisions from a number of circuits.

[4] The likely reason the Government failed to argue harmlessness was that the Second Circuit's opinion regarding Mr. Silver's initial conviction held, on materially identical facts, that the *McDonnell* error could not be deemed harmless. 864 F.3d at 123. No one expected the second panel to violate the law of the case. *See In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991).

In *United States v. Giovanetti*, 928 F.2d 225 (1991), the Seventh Circuit held that because the government had not argued harmless error, the court would not engage in that analysis. After the court reversed the defendant's conviction, the government petitioned for rehearing, asking the court to apply harmless error analysis. The court found that request "troublesome in two respects." *Id.* at 226. It would foremost "place a heavy burden on the reviewing court, deprived as it would be of the guidance of the parties on the question whether particular errors were harmless." *Id.* Second, "it would invite salami tactics." *Id.* The government would be allowed to argue no error on appeal "hoping to get [the court] to endorse its view of the law." *Id.* Then if the government failed, it would be able to file a rehearing petition to get another bite at the apple. "Such tactics would be particularly questionable in a case such as this where the defendant goes out of his way to argue that the error of which he complains was prejudicial, and the government by not responding signals its acquiescence that if there was error, it indeed was prejudicial." *Id.*

To be sure, the court concluded it had discretion to nevertheless "overlook a failure to argue harmlessness." *Id.* at 227. But the court would only exercise that discretion after considering "the length and complexity of the record, whether the harmlessness of the error or errors found is certain or debatable, and whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court." *Id.* Applying that standard, the court "decline[d] to relieve the government from the consequences of its failure to raise the issue of harmless error in its brief on appeal." *Id.*

The Seventh Circuit's test has been adopted (with some modifications) by nearly every court. For example, the Tenth Circuit declined to absolve the government's failure to argue harmless error in *United States v. Samaniego*, 187 F.3d 1222, 1225 (10th Cir. 1999). Applying the same factors as the Seventh Circuit, the court explained, "An unsolicited, unassisted, and undirected harmless-error review of an incomplete record to search for and evaluate independent evidence to support Samaniego's thirty-one separate convictions would be lengthy, complex, and dangerous." *Id.*

In *United States v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991), a divided panel concluded that an appellate court may undertake an unbriefed harmless error analysis, but only when the "relevant portions of the record are reasonably short and straightforward." *Id.* at 1348 (opinion of Williams, J., announcing the judgment of the panel). The lead opinion, however, cautioned that when an appellate court conducts a review of the record on its own initiative, it should err on the side of the criminal defendant. *Id.* at 1348. And dissenting, Judge Silberman wrote that he would never relieve the government's failure to raise harmlessness. "The government's failure (or refusal for reasons not apparent) to argue harmless error puts the judiciary's neutrality at issue because another related tenet of our system of justice is that we recognize an adversary system as the proper method of determining guilt." *Id.* at 1353 (Silberman, J., dissenting).

Other circuits likewise engage in a test akin to the Seventh Circuit's. *See Gover v. Perry*, 698 F.3d 295, 301 (6th Cir. 2012); *United States v. Rose*, 104 F.3d 1408, 1415

(1st Cir. 1997) ("While we find helpful the reasoning of the Seventh Circuit, we do not restrict ourselves to the *Giovannetti* test [because] [t]he exercise of discretion involves the balancing of many elements."); *Lufkins v. Leapley*, 965 F.2d 1477, 1481 (8th Cir. 1992); *United States v. Gonzalez–Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005).

Notably absent from that list is the Second Circuit. In denying Mr. Silver's motion for a stay, the panel claimed that the Second Circuit does follow the approach of other circuits. Dkt. 150, at 9. But the Second Circuit's sole statement on the issue has been: "We have discretion to consider the harmlessness of an alleged error even though the Government has not argued this line of defense." *United States v. Dolah*, 245 F.3d 98, 107 (2d Cir. 2001), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 64 (2004); *see also United States v. Mason*, 692 F.3d 178, 184 (2d Cir. 2012) (same). The Second Circuit has never held that its discretion is cabined in this area. And this case proves the point. The panel did not engage in *any* analysis of whether it should perform an unasked-for harmless error analysis. Given this split in authority, the Supreme Court is likely to review this question.

The High Court is also likely to reverse on this issue. As the majority of circuits hold, engaging in *sua sponte* harmless error analysis is not appropriate in complex cases where the issue is debatable. This case illustrates the problem in spades. The record is thousands of pages recounting days of testimony and myriad exhibits. Moreover, the Government has tried Mr. Silver twice and twice the Second Circuit found *McDonnell* error and engaged in harmless-error analysis. The first panel, on materially identical facts, held that the error could not be deemed harmless. *Silver I*,

864 F.3d at 123. The second panel came to a diametrically opposed conclusion. At the very least, this disagreement proves that harmlessness is debatable, meaning the second panel should not have taken it upon itself to conduct the analysis.

The second panel's analysis also displayed why a court should not spring a harmless-error analysis on the defendant. Had Mr. Silver had a chance to brief the issue, he would have shown that the jury could only have convicted him by disbelieving the testimony of the Government's own developer-witnesses that there was no connection between the business sent to Goldberg and official acts by Silver. That testimony included:

- When Glenwood's lobbyist met with Mr. Silver, Mr. Silver was "noncommittal"—he did not promise anything—and the Rent Bill as passed differed from what Glenwood wanted. JA-727, 872-73.
- Glenwood witnesses testified that Mr. Silver never "communicate[d] in any way" that he would take action in return for their using the Goldberg firm (and never threatened adverse action if they didn't), and Glenwood did not retain Goldberg in order to get official action from Mr. Silver. JA-870.
- Mr. Silver "generally vote[d] against Glenwood's interests," "[a]lmost without exception." JA-874.
- Witkoff witnesses testified they didn't use Goldberg "in order to get Mr. Silver to take some official action," or "in anticipation of Mr. Silver taking some official action in favor of the Witkoff Group." JA-803.

A court cannot address harmless error without considering evidence that at least arguably supports acquittal. And a conclusion of harmless error can rarely, if ever, be based on the assumption that the jury would disbelieve or disregard express witness testimony. *See United States v. Taylor*, 210 F.3d 311, 315-16 (5th Cir. 2000) (finding non-harmless error in the admission of a chart that showed that the

defendant supplied cocaine to persons who had testified to the contrary); *United States v. Neuroth*, 809 F.2d 339, 346 (6th Cir. 1987) (Ryan, J., dissenting) ("[T]he Court's conclusion that the instructional error was harmless because the jury must have disbelieved the defendant's alibi is unjustified."). The panel's money-laundering holding—also premised on harmless error—is similarly flawed.[5]

The Government never argued harmless error. In practically any other circuit, that would have been fatal in this case. The Supreme Court is thus likely to weigh in. And because the panel's analysis is wrong, the Court is likely to reverse.

Finally, the Second Circuit now insists that Supreme Court review is unlikely "because the Opinion is predicated upon the rare factual scenario presented by Silver's case." Dkt. 150, at 10. There is nothing rare about a politician accepting donations and gifts and later acting to benefit those contributors. What is rare is sending the politician to jail when he never agreed to take action in return for the gifts. In any event, none of Mr. Silver's questions turns on the particular facts of the case. Whether a public official can be convicted of bribery based merely on his unilateral, unexpressed belief that he was accepting a bribe is a purely legal question.

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[5] Here, too, the Government did not argue harmless error, affording Silver no opportunity to brief the issue. But it is not clear the jury would have convicted if it knew Mr. Silver's post-2008 referral fees derived from lawful conduct. Space does not permit a full explanation, but at minimum (1) the jury would not necessarily have found the pre-2008 conduct unlawful; Dr. Taub testified that he sent cases to Mr. Silver for access, not in exchange for official acts, Op. Br. 10-12; and (2) the jury's finding that Mr. Silver "knowingly" moved funds derived from unlawful activity might well have been different if it had understood—in light of the acquitted counts—that only funds received years earlier resulted from even arguably unlawful activity.

Whether Hobbs Act extortion covers simple bribery is a purely legal question. And whether an appeals court can engage in *sua sponte* harmless-error analysis in a complex case where harmlessness is in doubt is a purely legal question. The supposed "rare factual scenario" here is thus no barrier to this Court's review.

CONCLUSION

Mr. Silver respectfully requests that this Court recall and stay the mandate, or grant release on bail, pending disposition of a timely certiorari petition. He also requests a brief administrative stay pending resolution of this application.

April 2, 2020

Respectfully submitted,

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