No. _____

IN THE

Supreme Court of the United States

SHELDON SILVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

NBCUNIVERSAL MEDIA, LLC,
THE NEW YORK TIMES COMPANY,

Intervenors-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Can a public official be convicted of bribery absent proof of an agreed exchange with the alleged bribe payor, based solely on his unexpressed, unilateral state of mind when receiving a benefit?

(2) Can a conviction for Hobbs Act extortion be based on a theory of simple bribery?

(3) If the Government elects not to argue harmless error, may a court of appeals raise harmless error *sua sponte*, without providing the defendant any opportunity to be heard on the issue?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. Petitioner's first trial 3

B. Petitioner's first appeal 5

C. Petitioner's second trial 5

D. Petitioner's second appeal 10

REASONS FOR GRANTING THE WRIT 11

I. Whether bribery requires an agreement divides appeals courts and is exceptionally important 13

A. The Second Circuit's decision conflicts with this Court's precedents 13

B. The courts of appeals are divided on whether an agreement is required 16

C. This question is exceptionally important 18

II. *Evans v. United States* deserves fresh consideration 19

A. Justices of this Court continue to question *Evans* 20

TABLE OF CONTENTS
(continued)

Page

B. *Evans* was wrongly decided 22

C. Stare decisis should not preserve *Evans* 24

III. Whether an appeals court can engage in *sua sponte* harmless-error analysis divides the Circuits..26

A. Nearly every other circuit disagrees with the Second Circuit's approach to harmless error...27

B. The Second Circuit should not have engaged in harmless-error analysis and got it wrong anyway 30

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Fulminante,
499 U.S. 279 (1991) 27

Bond v. United States,
572 U.S. 844 (2014) 24

Chapman v. California,
386 U.S. 18 (1967) 27

Citizens United v. FEC,
558 U.S. 310 (2010) 18

Evans v. United States,
504 U.S. 255 (1992) .... *passim*

Gamble v. United States,
139 S. Ct. 1960 (2019) 22

Gover v. Perry,
698 F.3d 295 (6th Cir. 2012) 29

Hohn v. United States,
524 U.S. 236 (1998) 25

Janus v. Am. Fed'n of State, County, & Mun. Emp., Council 31,
138 S. Ct. 2448 (2018) 22

Johnson v. United States,
135 S. Ct. 2551 (2015) 25

Kelly v. United States,
140 S. Ct. 1565 (2020) .... *passim*

Kimble v. Marvel Entm't, LLC,
576 U.S. 446 (2015) 22, 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Lufkins v. Leapley,
965 F.2d 1477 (8th Cir. 1992)..............................29

McCormick v. United States,
500 U.S. 257 (1991).................................14, 15, 22

McDonnell v. United States,
136 S. Ct. 2355 (2016).................................*passim*

McNally v. United States,
483 U.S. 350 (1987)..1, 13

Ocasio v. United States,
136 S. Ct. 1423 (2016).............................21 ,23, 26

Patterson v. McLean Credit Union,
485 U.S. 617 (1988) (per curiam) 25

Ramos v. Louisiana,
140 S. Ct. 1390 (2020)..24

Skilling v. United States,
561 U.S. 358 (2010)..1, 14

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018)..22

Suhl v. United States,
885 F.3d 1106 (8th Cir. 2018)........................18, 19

United States v. Brewster,
408 U.S. 501 (1972)..14

United States v. Dolah,
245 F.3d 98 (2d Cir. 2001) 29

United States v. Giovanetti,
928 F.2d 225 (7th Cir. 1991) (per curiam) 27, 28

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Gonzalez–Flores,
418 F.3d 1093 (9th Cir. 2005) 29

United States v. Jennings,
160 F.3d 1006 (1998) 16

United States v. Mason,
692 F.3d 178 (2d Cir. 2012) 30

United States v. Neuroth,
809 F.2d 339 (6th Cir. 1987) 32

United States v. Pryce,
938 F.2d 1343 (D.C. Cir. 1991) 28, 29

United States v. Ring,
706 F.3d 460 (D.C. Cir. 2013) 17

United States v. Rose,
104 F.3d 1408 (1st Cir. 1997) 29

United States v. Samaniego,
187 F.3d 1222 (10th Cir. 1999) 28

United States v. Silver,
864 F.3d 102 (2d Cir. 2017) .... *passim*

United States v. Sun-Diamond Growers of Cal.,
526 U.S. 398 (1999) 19

United States v. Taylor,
210 F.3d 311 (5th Cir. 2000) 32

United States v. Terry,
707 F.3d 607 (6th Cir. 2013) 14, 17

United States v. Whitfield,
590 F.3d 325 (5th Cir. 2009) 17, 18

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Whitman,
887 F.3d 1240 (11th Cir. 2018) 17

United States v. Wright,
665 F.3d 560 (3d Cir. 2012) 17

STATUTES

18 U.S.C. § 201 22

18 U.S.C. § 666 22

18 U.S.C. § 1951 22

18 U.S.C. § 1957 4

28 U.S.C. § 1254(1) 3

N.Y. Pub. Off. Law § 74(3)(a) 4

OTHER AUTHORITIES

4 W. Blackstone, COMMENTARIES 139 (1769) 23

Note, *Who Put the* Quo *in* Quid Pro Quo*?: Why Courts Should Apply* McDonnell*'s 'Official Act' Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1799 (2017) 26

Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005) 24

Kate Stith, *No Entrenchment: Thomas on the Hobbs Act, the* Ocasio *Mess, and the Vagueness Doctrine*, 127 YALE L.J. 233 (2017) 26

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(continued)

Page(s)

Dan K. Webb *et al.*, *Limiting Public Corruption Under the Hobbs Act: Will* United States v. Evans *be the Next* McNally*?*, 67 CHI.-KENT L. REV. 29 (1991)............................23

INTRODUCTION

Despite repeated admonitions by this Court, federal prosecutors have frequently found irresistible the temptation to use vague federal criminal laws to impose "standards of ... good government" on "local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Earlier this year, this Court yet again was faced with, and unanimously rejected, an effort by federal prosecutors to "use the criminal law to enforce (its view of) integrity" in state government. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020).

As this case against former New York State Assembly Speaker Sheldon Silver shows, some federal prosecutors continue to chafe at this Court's restriction of federal bribery law to "*quid pro quo* corruption—the *exchange* of a thing of value for an 'official act,'" *McDonnell*, 136 S. Ct. at 2372 (emphasis added); and they remain determined to broadly criminalize any provision of benefits to state officials, even those permitted by state law. And, the lower federal courts too often hesitate to apply this Court's constraints for the benefit of public officials pilloried in the press as corrupt.

Here, faced with a "bribery" case in which the Government's own witnesses testified that there was no *quid pro quo* exchange—*i.e.*, that they provided benefits to generally curry favor with an important legislator, but there was never any agreement (implicit or explicit) that he would provide official acts in return—the Second Circuit simply dispensed with the element of an agreement or exchange. Instead it held, in conflict with this Court's opinions and other

Circuits, that it suffices if the official receives what would otherwise be lawful benefits with what a jury later determines to be the wrong internal, unexpressed intent.

Perhaps worse, the court below went to unusual lengths—again in conflict with other Circuits—to avoid vacating the conviction in this highly-publicized case. Despite acknowledging that the jury instructions were erroneous under *McDonnell*, the court of appeals *sua sponte* deemed the error harmless—even though the Government never argued it was harmless, Petitioner was given no opportunity to argue the issue of harmlessness, and the panel on Petitioner's earlier appeal had already held on the same facts that an equivalent error could *not* be deemed harmless.

The judgment is worthy of this Court's review three times over. First, the court's holding that an official can be guilty of bribery even without an agreement conflicts not only with this Court's precedents but with decisions from other courts of appeals. More troubling, and in conflict with this Court's repeated admonitions, it places every state official at the mercy of federal prosecutors seeking to criminalize lawful political conduct that offends them, with only a jury's speculation about the official's inner thoughts standing between the official and a federal penitentiary. This Court should again reject the use of federal criminal law to set standards of good state government.

Second, as Justices of this Court have previously suggested, the Court should reconsider its atextual and ahistorical holding that bribery amounts to

"extortion" under the Hobbs Act. The time has come to correct that error.

Finally, the Second Circuit's permissive approach to *sua sponte* harmless error review diverges from that of every other Circuit to address the issue, and raises untenable fairness and due process problems.

These questions are exceptionally important to criminal defendants and the Government alike. The first and third divide courts of appeals and the second has been raised by members of this Court. The Court should grant the petition.

OPINIONS BELOW

The court of appeals' opinion is reported at 948 F.3d 538 and reproduced in Appendix A. The court of appeals order denying rehearing and rehearing *en banc* is not reported but is reproduced in Appendix B. The district court's judgment is not reported but is reproduced at Appendix C.

JURISDICTION

The court of appeals affirmed the district court's judgment in relevant part on January 21, 2020. App 1a, 59a. The court of appeals denied rehearing and rehearing *en banc* on February 21, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory appendix contains the relevant statutory provisions.

STATEMENT OF THE CASE

A. Petitioner's first trial

Sheldon Silver was first elected to the New York State Assembly in 1976. *United States v. Silver*, 864

F.3d 102, 106 (2d Cir. 2017) (*Silver I*). From then until 2015, he represented much of lower Manhattan. In 1994, he was elected Speaker of the body and served in that position until 2015 as well. Throughout that time, Petitioner earned outside income as an attorney in private practice, as permitted by New York law. *Id.* at 106 & n.5; N.Y. Pub. Off. Law § 74(3)(a). Nonetheless, in the view of the Government, Petitioner used his law firm work "to exploit his elected position for unlawful personal gain." Pet. App. 5a.

In 2015, the Government indicted Petitioner, charging that some of his law practice income amounted to bribes, in violation of the honest services fraud statute and the Hobbs Act. CA JA-72. These charges meant "the Government had to prove" that Petitioner "entered a *quid pro quo* agreement" to receive "something of value in exchange for an official act." *Silver I*, 864 F.3d at 111. The Government also charged him with laundering the proceeds of those offenses, in violation of 18 U.S.C. § 1957.

As relevant now, one set of charges involved referral fees for legal work.[1] A real estate developer, Glenwood Management, retained the law firm Goldberg & Iryami to work on tax matters. 864 F.3d at 109. Petitioner's friend, Jay Arthur Goldberg, was a partner in that firm and the firm sent Petitioner referral fees based on the Glenwood work. Although

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[1] Much of the Government's evidence at trial related to a separate set of honest services and Hobbs Act charges as to which the Second Circuit ultimately directed a judgment of acquittal. Those charges are no longer at issue.

the developer sent such business to Goldberg for many years without knowing Petitioner earned fees from it, the Government nonetheless contended that business was a *quid* in exchange for: (1) routine approvals of financing for Glenwood by a state board that included a designee of Petitioner; (2) a meeting between Petitioner and Glenwood representatives; and (3) Petitioner's vote on 2011 rent legislation. *Id.* at 109–10, 122. The jury convicted Petitioner of all charges and Petitioner appealed.

B. Petitioner's first appeal

While that appeal was pending, this Court decided *McDonnell v. United States*, 136 S. Ct. 2355 (2016). That decision clarified that an "official act" supporting an honest services or Hobbs Act conviction "must involve a formal exercise of governmental power" and rejected the Government's position that "nearly anything a public official does" is an "official act." *Id.* at 2372.

Based on *McDonnell*, the Second Circuit held that the trial court had not properly instructed Petitioner's jury, and it rejected the Government's argument that the instructional error was harmless. The court thus vacated those convictions and remanded the case for a new trial. *Silver I*, 864 F.3d at 112.

C. Petitioner's second trial

On retrial, the Government presented the same theory. The prosecution again focused on referral fees that Petitioner received from the Goldberg law firm on tax business that Glenwood had brought to that firm. The evidence showed that Glenwood began using Goldberg for tax certiorari work in 1997, after Jay Goldberg (not Petitioner) requested it. CA JA-727–28,

783. Petitioner received standard referral fees from Goldberg for this business. CA JA-889, 893–94.

1. Petitioner's alleged acts

According to the Government (though contrary to testimony from its own witnesses), Petitioner performed a series of acts in exchange for the referrals:

First, prosecutors highlighted financing approvals by the Public Authorities Control Board (PACB). That board approves financing for tax-exempt Housing Finance Agency bonds on which Glenwood depended. CA JA-921. Petitioner had a seat on the three-member PACB, but approvals for tax-exempt financing of the kind Glenwood relied were "typically pro forma," *Silver I*, 864 F.3d at 109 n.18. In fact, a Government witness was unaware of any such financing ever being denied. CA JA-926.

Petitioner sent a designee to PACB meetings, CA JA-921, and that designee participated in this rubber-stamping by voting to approve financing for seven Glenwood properties over more than a decade. CA JA-923-26. There was no evidence Petitioner ever intervened with his designee regarding Glenwood financing or even spoke with him about Glenwood, or that he ever discussed PACB financing with Glenwood.

Second, prosecutors pointed to a June 2011 meeting Petitioner hosted with Glenwood representatives. That year, the 421-a program—which provided tax breaks for developers who provided affordable housing—was up for renewal, as were provisions related to rent stabilization. CA JA-724–26. Both issues were important to Glenwood, which favored renewal of the 421-a program and relaxed rent stabilization. *Id.*

In June 2011, Petitioner met with Glenwood's in-house counsel, Richard Runes, and Glenwood's lobbyist, Brian Meara. CA JA-726-27. Mr. Runes proposed that certain rent stabilization provisions in the real estate bill be made more tenant-friendly to ensure passage of a full bill that renewed 421-a, but Petitioner was "noncommittal." *Id.* At Petitioner's trial, Mr. Meara testified that the renewal of 421-a was not "a subject of controversy." CA JA-764. And the head of the pro-landlord Rent Stabilization Association testified that renewal was inevitable, CA JA-880.

Third, the prosecution focused on Petitioner's vote for the 2011 Rent Legislation, which passed. The Act renewed 421-a, but contained various rent stabilization provisions that were more pro-tenant than Mr. Runes had proposed and were "not what Glenwood wanted." CA JA-727, 872-73. There was no evidence that Petitioner agreed with Glenwood to vote in any particular way, or to do anything with respect to the legislation to accommodate Glenwood.

2. The alleged exchange

The Government tried—in the face of contrary testimony from its own witnesses—to portray the developer's use of Goldberg for tax work as a *quid pro quo* agreement. But the testimony established that Glenwood started using Goldberg in 1997 and it was only in 2012 that anyone at Glenwood learned about the referral fees. Even in 2011—when the Rent Act was passed—Glenwood was unaware of the fees. Six of the seven PACB approvals likewise occurred before Glenwood learned of the fees in December 2012. CA JA-803, 872, 1843.

Consistent with this ignorance, the Glenwood witnesses testified that—although they were aware that Petitioner was a "powerful man" who held authority relevant to their industry—they did not retain the Goldberg firm in order to procure official action. CA JA-798. When asked whether "Glenwood retained Goldberg & Iryami in order to get official action from Petitioner," Glenwood's lawyer responded, "No, sir." CA JA-870. He also testified that, during the alleged scheme, Petitioner voted against Glenwood's interests "[a]lmost without exception." CA JA-874.

3. The jury instructions

At trial, Petitioner sought to build his defense on the absence of any *quid pro quo* agreement with the alleged bribe payors, but the district court shut down that defense. The court refused to require an agreement to exchange something of value for an official act, and instead instructed the jury that it could convict even if Glenwood made referrals without intending to obtain "official acts" in return.

In particular, the portion of the honest services charge addressing the *quid pro quo* requirement not only failed to require an agreed exchange of benefits for official acts, but instructed the jury that the intent of the payors was irrelevant. The judge told the jury that the Government "only has to prove that Petitioner—not the alleged bribe giver—understood that, as a result of the bribe, he was expected to exercise official influence or take official action." CA Special App. 30 (SA).

The Hobbs Act instruction, though convoluted, also departed from the exchange requirement, and

consistently conflated benefits provided because of Petitioner's *position*—what federal law deems lawful gratuities—with benefits provided in exchange for an agreement to perform official *acts*. The beginning of the Hobbs Act *quid pro quo* charge stated that the element was satisfied if the payors gave Petitioner property "because of Petitioner's official position" (rather than for "official acts"). CA SA-32. When the court did subsequently refer to an exchange of property for "official acts," it explained that requirement was satisfied unless the property was provided for reasons entirely "unrelated to Petitioner's public office," and went on to say it was enough if the payors wished to procure "official influence or decision making," CA SA-32–33. After that, the court returned to the idea that the payors' intent was irrelevant. It told the jury that "if you find that Petitioner accepted the property intending, at least in part, to take official action in exchange for those payments as the opportunity arose, then this element has been satisfied." *Id.* Near the end, the district court stated that it was necessary for the payors to be motivated by "a belief that Petitioner would take official action in exchange for the property"—but still omitted any requirement of an agreement to take official action in exchange for property. *Id.*

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." CA SA-53. The jury convicted Petitioner on all counts.

D. Petitioner's second appeal

The Second Circuit ordered a judgment of acquittal on three counts that are not at issue, but upheld Petitioner's convictions based on the "real estate scheme." The court rejected Petitioner's first argument that the jury instructions had erroneously omitted the required "agreement" element. App. 7a–16a. 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." App. 72a-73a (emphasis added). Likewise, by approving the Hobbs Act instructions, the court effectively held that only the official's motivation matters—an exchange is not required.[2]

The court 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*." App. 53a. But, despite the Government's election not to argue harmless error—after arguing and losing that precise issue, on essentially identical facts, on the first appeal—the court, *sua sponte*, found that error harmless as to the "real estate scheme." App.

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[2] At times, the court seemed to suggest that for extortion the official must convey this understanding to the bribe payor. *E.g.*, App. 9a–10a. But that is not what the jury instructions said. They required at most that the benefit be provided "because of Petitioner's official position," CA SA-32—which describes lawful efforts to curry favor.

60a. Without affording Petitioner any opportunity to argue the evidence refuting harmlessness—or so much as mentioning the contrary holding on Petitioner's first appeal—the court deemed it "clear beyond a reasonable doubt that a rational jury would have found that Silver accepted referral fees with the belief that he was expected to influence a *particular matter*, namely the relevant tax abatement and rent stabilization programs, absent the [instructional] error." App. 58a (emphasis added).

Although recognizing that Petitioner and Glenwood themselves never "focused on a particular question or matter forming the subject of the *quid pro quo* in advance," the court reasoned that a "'side letter' provides strong evidence of a *quid pro quo* between Silver and [Glenwood] on a focused and concrete question or matter." App. 59a. In December 2011, Glenwood learned for the first time that Petitioner had been receiving the referral fees. Glenwood insisted on signing a letter with Petitioner regarding the continued referral fees. App. 43a. The court held that based on the "circumstantial evidence of the timing" of the letter and Petitioner's votes on the PACB board, it was clear beyond a reasonable doubt that a properly instructed jury would have concluded Petitioner accepted referral fees in return for influence on a particular matter. App. 46a.

The court subsequently denied Petitioner's petition for rehearing and rehearing *en banc*. App. C.

REASONS FOR GRANTING THE WRIT

This case presents three questions of national importance. *First*, this case asks whether bribery

requires an agreed-upon exchange. The Second Circuit approved jury instructions that allowed a state official to be convicted of federal bribery on a jury's after-the-fact finding that the official had an unexpressed, unilateral understanding (or misunderstanding) that he was being bribed. That holding eviscerates the crucial limitation this Court has placed on the federal bribery laws. *McDonnell*, 136 S. Ct. 2355. And it places every official at the mercy of federal prosecutors, dismantling this Court's work at reining in federal prosecutors. *E.g.*, *Kelly*, 140 S. Ct. at 1574.

Second, this case offers this Court the opportunity to correct its atextual interpretation of Hobbs Act extortion. *See Evans v. United States*, 504 U.S. 255 (1992). For too long, Hobbs Act extortion has been applied to voluntary payments that may constitute bribes but fit no part of the statutory definition of "extortion"—"actual or threatened force, violence, or fear, or under color of official right"—or its common-law understanding. The Court should take this case and return the statute to its correct meaning.

Third, this case implicates a circuit split over when and whether an appeals court can engage in *sua sponte* harmless-error analysis. In practically every other Circuit, Petitioner would have prevailed because the Government did not argue harmless error. In a case as complex as this one and where the question of harmlessness is at least debatable—as demonstrated by the conflict between the opinion from Petitioner's first appeal (finding the error was harmful) and his second (finding it was not)—an appeals court should not engage in its own, unaided harmless-error review, with the defendant deprived of

even an opportunity to be heard on the issue. This Court should bring the Second Circuit in line with the other Circuits.

I. Whether bribery requires an agreement divides appeals courts and is exceptionally important

The Second Circuit approved instructions that allowed the jury to convict Petitioner of bribery based solely on his unilateral and unexpressed belief that he was being bribed. The court thus eliminated any requirement that there be an agreed-upon exchange between the bribe payor and the person being bribed. That cannot be reconciled with this Court's precedents or the decisions of numerous other courts of appeals. And because this question is exceptionally important, this Court should grant a writ of certiorari.

A. The Second Circuit's decision conflicts with this Court's precedents

1. Just months ago, this Court once again chided the Government for attempting to use vague federal criminal laws "to set standards of disclosure and good government for local and state officials." *Kelly*, 140 S. Ct. at 1574 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). To guard against that type of prosecutorial overreach, this Court has strictly limited federal bribery law to "*quid pro quo* corruption—the *exchange* of a thing of value for an 'official act,'" *McDonnell*, 136 S. Ct. at 2372 (emphasis added). The provision of benefits to an official to curry favor is thus lawful—both to give and receive—unless made in exchange for official action. Unsurprisingly, numerous cases from this Court 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 and for honest-services fraud. *See McCormick v. United States*, 500 U.S. 257, 272 (1991); *Skilling v. United States*, 561 U.S. 358, 404, 412 (2010).

"[A]n agreement is the key component of a bribe." *United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2013) (per Sutton, J.). "To hold otherwise," this Court has explained, "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable." *McCormick*, 500 U.S. at 272. Without an exchange requirement, federal bribery law would cast a "pall of potential prosecution" over all officials. *McDonnell*, 136 S. Ct. at 2372. It would be far too easy to allege that any benefit provided to an official by lobbyists or others was received by the official with improper intent.

2. The court of appeals in this case, however, rejected the core exchange requirement, and held that it is enough if the jury finds that the official unilaterally "understood [a benefit] to be a payment in exchange for official influence on some specific … matter involving the formal exercise of governmental power." App. 72a-73a. This transformation of bribery from a crime of exchange to one of one-sided thoughts erases this Court's key distinction between lawful and unlawful 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, is now 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 will turn on a jury's speculation about the official's unexpressed state of mind—effectively inviting juries to convict officials for non-criminal conduct they find scandalous or unethical. That presents "a sweeping expansion of federal criminal jurisdiction." *Kelly*, 140 S. Ct. at 1574; *see also McDonnell*, 136 S. Ct. at 2372–73 (courts do not "construe a criminal statute on the assumption that the Government will use it responsibly").

In rejecting the traditional requirement of an agreement, the Second Circuit rebutted only a strawman version of such a requirement—specifically, that an agreement must be a "meeting of the minds" between the payor and the official, *e.g.*, App. 3a—one Petitioner never advanced. Indeed, Petitioner expressly disclaimed any such argument. Reply Br. 9 (2d Cir.) ("Bribery does not require a subjective 'meeting of the minds.'"). The required agreement or exchange is not a meeting of the minds: two parties can agree to a course of action even without a meeting of the minds, as when one of the parties intends not to honor the bargain. What is required is an objective, agreed-upon exchange. Whether one calls it a promise, an agreement, or an understanding, there must be an express or implicit tit for tat. *McCormick*, 500 U.S. at 273. That is the essence of bribery.

This case highlights the dangers of the Second Circuit's elimination of the requirement of an agreement. The Government's own witnesses uniformly testified that Petitioner never agreed to take or refrain from any official action. And the only official acts at issue were routine ones like the rubber-stamp PCAB approvals. Yet by eliminating the

requirement of an agreement, the Government was free to present to the jurors referral fees that were lawful under state law but were certain to anger them; and to invite them to find that Petitioner received them with ill intent. Under the Second Circuit's standard, any official who scratches the back of a lobbyist, friend, or constituent who once scratched his can do so only under the pall of potential prosecution.

That standard eliminates the dividing line between legal, routine politics and bribery. It conflicts with numerous decisions of this Court and needs correction.

B. The courts of appeals are divided on whether an agreement is required

Not only does the Second Circuit's opinion contravene this Court's precedents, it also deepened a split among the courts of appeals.

1. Before the Second Circuit decided this case, the circuits already disagreed about whether bribery requires an agreement.

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 plainly erroneous. *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.

Numerous other courts of appeals have similarly recognized that bribery requires the government to prove an agreement. For example, the Sixth Circuit in *Terry*, in an opinion by Judge Sutton, 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 613. "*What is needed is an agreement, full stop*, which can be formal or informal, written or oral." *Id.* (emphasis added). The conviction in *Terry* was upheld only 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 *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013), 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, e.g.*, *United States v. Wright*, 665 F.3d 560, 567–568 (3d Cir. 2012); *United States v. Whitman*, 887 F.3d 1240, 1247 (11th Cir. 2018).

By contrast, the Fifth and Eighth Circuits have approved instructions that do not include an exchange requirement. *United States v. Whitfield,* 590 F.3d 325

(5th Cir. 2009); *Suhl v. United States*, 885 F.3d 1106 (8th Cir. 2018). In *Whitfield*, the Fifth Circuit upheld honest-services fraud convictions even though the trial court failed "to include the actual phrase *quid pro quo* in the jury charge." 590 F.3d at 353. The appeals court held that the instructions sufficed because they required a finding that the defendant "provide[d] the [public official] with things of value specifically *with the intent to influence* [his] action or judgment." *Id.* Unexpressed, unilateral intent to bribe (or be bribed) was sufficient. *Id.*

Similarly, in *Suhl*, the Eighth Circuit upheld bribery convictions even though the jury instructions failed to convey that an agreement was required. 885 F.3d at 1114. The court recognized that when it came to honest-services bribery, "the phrase 'in exchange for' [was] not in the instruction as given." *Id.* The court nonetheless concluded the instruction was sufficient because the jury was told the defendant bribe payor had to have "the intent" that the official would take actions that would benefit the defendant. *Id.*

The decision below deepens this divide.

C. This question is exceptionally important

If permitted to stand, the decision below will allow federal prosecutors practically free rein when it comes to policing public officials. Every public official risks indictment if they show any favoritism to a donor or a constituent who has taken the official out to lunch. And imprisonment will turn on a jury's post-hoc determination of what that official secretly believed. But as this Court has repeatedly recognized, "[f]avoritism and influence are not avoidable in representative politics." *Citizens United v. FEC,* 558

U.S. 310, 359 (2010). For that very reason, this Court has rejected the "standardless sweep" of broad interpretations of the federal bribery laws. *McDonnell*, 136 S. Ct. at 2373; *see also Kelly*, 140 S. Ct. at 1574.

This question matters not just to officials but the public as well. Those who pay bribes are subject to indictment and conviction just as the receiver is. *E.g.*, *Suhl*, 885 F.3d at 1114. Thus, the Second Circuit's decision threatens ordinary citizens with potential prosecution if they participate in the political process. Citizens routinely interact with politicians in the hopes of influencing them, and this Court has made clear that benefits provided to generally curry favor with a politician, unless in exchange for official acts, are not bribes; they are lawful gratuities. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405–06 (1999). Yet the decision below subjects such interactions to the threat of prosecution, even if there was no agreed *quid pro quo*. That specter could cause many "citizens with legitimate concerns" to "shrink from participating in democratic discourse." *McDonnell,* 136 S. Ct. at 2372.

This Court's intervention is needed both to correct the Second Circuit's erosion of the limits on federal criminalization of state official conduct, and to resolve the deep disagreement among the Circuits on the elements of federal bribery prosecutions.

II. *Evans v. United States* deserves fresh consideration

In *Evans v. United States*, this Court interpreted the Hobbs Act's color-of-official-right provision to cover "the rough equivalent of what we would now

describe as 'taking a bribe.'" 504 U.S. at 260. That interpretation was not only atextual and counter to the common law heritage of "extortion"—the actual statutory term—it also launched "a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials." *Id.* at 290 (Thomas, J. dissenting). It is time to revisit that decision.

A. Justices of this Court continue to question *Evans*

In *Evans*, the defendant was an elected official who had 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 needed to have "induced" payment to constitute 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. *Id.* The Court concluded that "his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver." *Id.* The Court then held 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 266.

Three justices dissented. Writing for the three, 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*." *Id.* at 279. In other words, 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.* 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.*

More recently, Justice Breyer opined that *Evans* "may well have been wrongly decided." *Ocasio v. United States*, 136 S. Ct. 1423, 1437 (2016) (Breyer, J., concurring). Other Justices, too, have highlighted the question whether *Evans* should be overruled. *Id.* at 1434 (majority opinion) ("Petitioner does not ask us to overturn *Evans*, and we have no occasion to do so."); *id.* at 1437-38 (Thomas, J., dissenting) (reiterating that *Evans* "wrongly equated extortion with bribery"); *id.* at 1440 n.1 (Sotomayor, J., dissenting, joined by Roberts, C.J.) ("No party asks us to overrule *Evans* in this case and so that question is not considered here.").

Given that numerous Justices of this Court have disagreed with *Evans*' holding conflating extortion and bribery and that only one member of the current Court has considered the question (and agreed with Petitioner's position), this Court should grant review.

Indeed, this Court has granted review numerous times when the question presented is whether to overrule prior precedent and multiple Justices have questioned the precedent's correctness. *See, e.g.*, *Gamble v. United States*, 139 S. Ct. 1960 (2019); *Janus v. Am. Fed'n of State, County, & Mun. Emp., Council 31*, 138 S. Ct. 2448 (2018); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446 (2015). The Court should do the same here.

B. *Evans* was wrongly decided

Evans was wrong when it was decided for at least three reasons.

First, the Court's interpretation was divorced from the statute's text. The Hobbs Act criminalizes extortion, which is the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951. Despite that clear definition, *Evans* said "extortion" also included "the rough equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. at 260. Had Congress intended to cover bribery, it would have said so. *See McCormick*, 500 U.S. at 279–80 (Scalia, J., concurring) ("where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion"). Indeed, other provisions of the U.S. Code explicitly criminalize "bribery." *See, e.g.*, 18 U.S.C. § 201 ("Bribery of public officials and witnesses"); 18 U.S.C. § 666 ("Theft or bribery concerning programs receiving Federal funds"). Thus, *Evans* was not grounded in the statute's text. *Evans*, 504 U.S. at 287 (Thomas, J.,

dissenting) (explaining that the majority disregarded "well-established principles of statutory construction").

Second, *Evans* contravened the common law. Extortion at common law was different from bribery. *See* 4 W. Blackstone, COMMENTARIES 139 (1769) (describing the offense of "bribery"); *id.* at 141 (describing the offense of "extortion"). Extortion under color of official right required that the official obtained the property "*under the pretense that the officer was entitled thereto by virtue of his office*." *Evans*, 504 U.S. at 279 (Thomas, J., dissenting). But *Evans* eviscerated the pretense requirement, leading to the absurd proposition that the person extorted is also guilty. *See Ocasio*, 136 S. Ct. at 1437 (Breyer, J., concurring) ("The present case underscores some of the problems that *Evans* raises."). That is not the statute Congress intended. Congress enacted the Hobbs Act in 1946. And "the overwhelming weight of authority in 1946—the case law, the treatises, the official commentary of the Field Code, and scholarly commentary—distinguished official extortion from bribery by the existence [of] an element [of] coercion, duress, or inducement. It was this understanding of official extortion that Congress enacted into law through the Hobbs Act in 1946." Dan K. Webb *et al.*, *Limiting Public Corruption Under the Hobbs Act: Will* United States v. Evans *be the Next* McNally*?*, 67 CHI.-KENT L. REV. 29, 45 (1991).

Third, *Evans* caused a dramatic shift in our system of federalism. *Evans*, 504 U.S. at 290 (Thomas, J. dissenting). States and localities have a keen interest in protecting their citizens from extortion by state and local officials. "Perhaps the clearest example of

traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014). But *Evans* supplants those state and local efforts with a cudgel wielded by federal prosecutors. If Congress intended such a disruption in the federal-state balance, it surely would have said so.

Moreover, using the Hobbs Act to target state and local bribery makes little sense. Violating the Hobbs Act can net the defendant twenty years in prison. That "is considerably higher than the penalty Congress authorized for bribery involving federal officials and state officials acting on behalf of the federal government (fifteen years) and twice the penalty Congress provided for state and local officials under the federal program-bribery statute (ten years)." Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 907 (2005). It is doubtful that Congress viewed bribery at the state and local level as worse than bribery at the federal level. But even if that were true, "there is absolutely no reason to believe that Congress would have deemed state and local bribery in state and local matters to be so much worse than state and local bribery in federal programs as to warrant double the punishment." *Id.*

It is time to abandon *Evans* and return the Hobbs Act to its proper sphere. The statutory text, the common law, and principles of federalism all require it.

C. *Stare decisis* should not preserve *Evans*

The doctrine of *stare decisis* should not deter this Court from overruling *Evans*. *Stare decisis* "isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 140

S. Ct. 1390, 1405 (2020). Instead, "[t]he doctrine of *stare decisis* allows [this Court] to revisit an earlier decision where experience with its application reveals that it is unworkable." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). And though *stare decisis* is stronger for cases involving statutory interpretation, when there is "special justification" for overruling the precedent, *stare decisis* yields. *Kimble*, 576 U.S. at 465. Indeed, this Court has overruled "statutory precedents" in a "host of cases." *Patterson v. McLean Credit Union*, 485 U.S. 617, 618–19 (1988) (per curiam).

Beyond the fact that *Evans* is clearly wrong, two special justifications warrant overturning it: *Evans* (1) was decided without full briefing and (2) has proven unworkable in practice.

First, *Evans* decided an issue that had not been "briefed or argued" by the parties. *Evans*, 504 U.S. at 272 (O'Connor, J., concurring in part and concurring in the judgment). This Court is "less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998). As Justice O'Connor explained in *Evans*, the Court "would be far more assured of arriving at the correct result were we to await a case in which the issue had been addressed by the parties." 504 U.S. at 272 (O'Connor, J., concurring in part and concurring in the judgment). Indeed, determining whether Hobbs Act extortion includes bribery "requires a detailed examination of common law extortion cases, which in turn requires intensive historical research." *Id.*

Second, time has shown that *Evans* is unworkable. Just recently, this Court had to deal with an

outgrowth of *Evans* in *Ocasio*, 136 S. Ct. 1423. This Court's experience with that case "underscore[d] some of the problems that *Evans* raises." *Id*. at 1437 (Breyer, J., concurring). And the confluence of *Evans* and *Ocasio* now means that "innocent victims of extortion" can be charged with "conspir[ing] with their extorter whenever they agree to pay a bribe." *Id.* at 1445 (Sotomayor, J, dissenting).

Moreover, this issue is not going away. Prosecutors often charge Hobbs Act extortion in corruption cases. Over the last 30 years, the statute "has served as the lead charge in 1,629 federal prosecutions of state and local official corruption—more than 20 percent of all federal prosecutions of such conduct by state and local officials." Note, *Who Put the* Quo *in* Quid Pro Quo*?: Why Courts Should Apply* McDonnell*'s 'Official Act' Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1799 (2017).

It is time to "cut out" the "tumor" that is *Evans* to avoid "fouling adjacent areas of criminal-law doctrine." Kate Stith, *No Entrenchment: Thomas on the Hobbs Act, the* Ocasio *Mess, and the Vagueness Doctrine*, 127 YALE L.J. FORUM 233, 239 (2017). This case presents the ideal opportunity to do just that. The Court should thus grant certiorari and overturn *Evans*.

III. Whether an appeals court can engage in *sua sponte* harmless-error analysis divides the Circuits

The Second Circuit's decision also creates a split among the circuits over whether and when an appeals court can engage in un-asked for harmless-error analysis. 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. But not the Second Circuit. In this case, even though the Government never argued harmless error on the *McDonnell* issue or the money laundering charge—even as it did argue harmless error on other issues—the Second Circuit nonetheless undertook that analysis without any briefing or notice to Petitioner. And the court offered no justification for relieving the Government of its burden. That conflicts with decisions from multiple Circuits.

A. Nearly every other circuit disagrees with the Second Circuit's approach to harmless error

In *United States v. Giovanetti*, 928 F.2d 225 (7th Cir. 1991) (per curiam), 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 *Giovanetti* 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.* 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 1352 (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 Petitioner's motion for a stay, the Second Circuit claimed that it does follow the approach of other circuits. CA ECF No. 150, at 9. But the Second Circuit's sole statement on the issue is: "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 in any way. And this case proves the point, in that the court below did not engage in any analysis of *whether* it should perform an unasked-for harmless error analysis—let alone identify any factors that would justify undertaking such a crucial inquiry without even giving Petitioner an opportunity to be heard on what was a necessarily complex review of the trial record and the applicable law. This lack of any threshold or required justification for undertaking *sua* sponte harmlessness review conflicts with at least five other courts of appeals.

B. The Second Circuit should not have engaged in harmless-error analysis and got it wrong anyway

As the majority of circuits hold, engaging in *sua sponte* harmless-error analysis is not appropriate in a complex case where harmlessness is debatable. This case proves the wisdom of that position. The record is thousands of pages comprising days of testimony and myriad exhibits. Moreover, it is obvious that harmlessness is (at best) debatable in this case *even without resort to the underlying evidence*. The Government has tried Petitioner 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. But the second panel came to a diametrically opposed conclusion—without even acknowledging the prior

holding.[3] At the very least, this disagreement shows that harmlessness was debatable, meaning the Second Circuit should have found the issue inappropriate for *sua sponte* resolution.

Further, though this Court need not review the evidence to decide the question presented, even a peek displays why the Second Circuit was wrong to proceed with a harmless-error analysis unaided by the parties. Had Petitioner had a chance to brief the issue, he would have shown that the jury could have convicted only 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 Petitioner. That testimony included:

- When Glenwood's lobbyist met with Petitioner, Petitioner was "noncommittal"—he did not promise anything—and the Rent Bill as passed differed from what Glenwood wanted. CA JA-727, 872-73.
- Glenwood witnesses testified that Petitioner 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

[3] The court of appeals may have overlooked that the prior appeal addressed—and reached the opposite conclusion on—an essentially identical harmlessness issue. But if so, that is only because it reached out to decide the issue without notice to or briefing by the parties, who would surely have pointed out that the prior panel had already resolved the issue.

did not retain Goldberg in order to get official action from Petitioner. CA JA-870.

- Petitioner "generally vote[d] against Glenwood's interests," "[a]lmost without exception." CA JA-874.

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 Second Circuit's money-laundering holding—also premised on harmless error—is similarly flawed. But again, this Court need not wade into the analysis to hold that the analysis should not have occurred in the first place.

The Government never argued harmless error. In practically any other circuit, that would have been fatal in the prosecution. The Court should take this case to decide whether and when *sua sponte* harmless error analysis is appropriate.

CONCLUSION

The Court should grant the petition for writ of certiorari.

July 20, 2020 Respectfully submitted,

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