No. 20-60

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

REPLY BRIEF FOR PETITIONER

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

The government's Opposition yet again seeks to avoid review of a flawed federal prosecution of a public official by painting the case as a factbound one that need not trouble this Court. *E.g.*, Br. in Opp. 14, *Kelly v. United States*, 140 S. Ct. 1565 (2020) (No. 18-1059); Br. in Opp. 12, *McDonnell v. United States,* 136 S. Ct. 2355 (2016) (No. 15-474). But this case, like the other prosecutions of state officials this Court has reviewed, is no one-off. If the decision below stands, federal prosecutors will be free to "use the criminal law to enforce ([their] view of) integrity" in state government, something this Court has repeatedly admonished against and intervened to correct. *Kelly*, 140 S. Ct. at 1574. Worse, under the decision below, every routine official action that benefits—even coincidentally—a donor may be criminalized if a prosecutor can convince a jury that the official secretly believed he was being bribed.

As the Petition explained, the Second Circuit approved jury instructions that allowed Petitioner to be convicted of bribery—in the face of testimony by the government's witnesses that there was no agreement—on a jury's *post hoc* finding that he secretly and unilaterally understood he was being bribed. Pet. 14-16. The government does not dispute that such a holding would eviscerate the crucial limits this Court has placed on federal bribery laws. Nor does the government contest that this rule would allow prosecutors to transform any official's conflict of

interest into federal bribery. Instead, the government jumps ship. It now claims there was an exchange, and that the jury was properly instructed. That does not hold water.

1. Before the district court, the government never claimed an exchange between Petitioner and the supposed bribe payors. The government's theory was that Petitioner had a conflict of interest because he had received referral fees from Glenwood and yet took official action that benefited the company. At the charging conference, the government unequivocally said, "It is not our allegation that Mr. Silver entered into a quid pro quo arrangement with Glenwood … with regard to bribery. That is just not our theory." CA JA-941. The trial court agreed, "I don't think … there has to be an agreement, in the sense of an actual agreement." *Id.* Based on the government's representation, the court told the jury that it need not find that Petitioner and the alleged payors agreed to exchange official acts for benefits. Pet. 8-9. And the Second Circuit affirmed Petitioner's conviction based on those instructions.

Recognizing how dangerous this legal theory is, the government now shifts to claiming that there *was* an exchange—though it points to no evidence, ignores its own witnesses' testimony to the contrary, and omits that it repeatedly told the jury that Petitioner was guilty if the referral fees were "any part of [his] motivation in taking these official actions." CA SA-53. Most importantly for present purposes, the jury instructions made clear that there need not be any agreed exchange. All that was required was that Petitioner *believed* he was being bribed. *See id.* That contravenes blackletter law. The provision of benefits

to an official to curry favor is lawful unless made *in exchange* for official action. *See United States v. Brewster*, 408 U.S. 501, 526 (1972). Any other rule would create a federal conflict-of-interest code—backed by imprisonment—because any action performed under a conflict-of-interest can be spun to a jury as a unilaterally understood bribe.

Although the government now cherry-picks isolated references by the district court to the word "exchange," Opp. 9-10, the instructions, in context, made clear an agreed exchange was not required. For honest-services fraud, the court said that the government "only has to prove that [Petitioner]—not the alleged bribe giver—*understood* that … he was expected to … take official action." CA SA-30 (emphasis added).

As to the Hobbs Act instruction, the government highlights the statement that "the government had to prove that petitioner 'obtained property … knowing that it was given in return for official acts … rather than being given voluntarily and unrelated to [petitioner's] public office.'" Opp. 9 (emphasis omitted). But that statement itself highlights the problem: by instructing that a benefit is a bribe unless it is "unrelated to [Petitioner's] public office," it erroneously treats a gratuity to curry favor as a bribe. It is not bribery to give an official gifts "to build a reservoir of goodwill that might ultimately affect … unspecified acts." *United States v. Sun–Diamond Growers of California*, 526 U.S. 398, 405 (1999). It is only gifts given in exchange for promised official action that are unlawful. And the court further eradicated the critical line between lawful benefit and unlawful bribe by saying the element was satisfied if "Mr. Silver accepted the property intending, at least

in part, to take official action in exchange for those payments." CA SA-33. Under these instructions, there need not be any exchange. All that matters is what the jury believes the official secretly and unilaterally thought. That gives prosecutors free rein to convince juries that any seemingly unethical gift actually amounted to bribery.

What is worse, the government exploited the absence of any exchange requirement—a strategy born of necessity, because, as the government's own witnesses testified, there was no agreement. Contrary to the government's current depiction, there was no evidence that "petitioner accepted thousands of dollars from [Glenwood] *in exchange* for taking official action." Opp. 2 (emphasis added). The government expressly disavowed that theory at trial. Pet. 8-9. Indeed, an agreed exchange was near-impossible, as Glenwood was not even aware Petitioner was receiving any fees for most of the relevant time. Pet. 7. In any event, the "official acts" were not performed "in exchange" for fees. The government points to two acts—ensuring the passage of legislation and "votes" on the Public Authorities Control Board. *See* Opp. 3. But there was no evidence Petitioner agreed to vote a particular way. Pet 6-7. And as to the board, Petitioner was represented by a designee who rubber-stamped the financing that came before the board; there was no evidence Petitioner even spoke about Glenwood with the designee. Pet 6.

Without any evidence of an exchange, the government was forced to argue that the jury could convict if it found the Petitioner had committed a thought crime. This Court need look no further than

the government's 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 thus convicted Petitioner based solely on its assessment that he harbored an unexpressed belief he was being bribed. If that theory stands, prosecutors can prosecute any official who acts under a conflict of interest. That would turn federal bribery into a good-government code, nullifying this Court's decades-long effort avoid that outcome.

2. The decision below is irreconcilable with this Court's precedents. The government highlights *Evans v. United States*, 504 U.S. 255 (1992), and *Ocasio v. United States*, 136 S. Ct. 1423 (2016), which dealt with Hobbs Act extortion, to argue that the proper "test focuses on what the public official kn[ew]—not on whether the extorted party agreed with the public official to undertake … action." Opp. 10. That is wrong: both cases make clear there must be proof of an exchange, which the official knew was a bribe. Indeed, in *Evans*, the commissioner accepted thousands of dollars after an undercover agent asked for help on rezoning. 504 U.S. at 257. The example from *Ocasio* also proves the point. Though the restaurant owner does not share the inspector's "corrupt intent," Opp. 10, he nonetheless agreed to the exchange and "reluctantly pa[id] the bribe," 136 S. Ct. at 1436.

The government's discussion of honest-services fraud is even wider of the mark. The government identifies two ways to commit bribery: "[r]eaching an agreement" or "unilaterally asking for a bribe." Opp. 11. The government never argued Petitioner asked for

a bribe, so the only theory left is "reaching an agreement"—the very thing the trial court refused to instruct on. And the government misleads with its quote from *McDonnell*. Opp. 11. This Court actually said that a jury could "conclude that *an agreement was reached* if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act'." 136 S. Ct. at 2371 (emphasis added). The official's knowledge can be *proof* of an agreement, but *the jury still must find an agreement*.

3. The government also errs in arguing that the decision below does not deepen a circuit conflict. Notably, the government ignores one side of the split, *i.e.*, the Fifth and Eighth Circuits' approval of instructions that do not include an exchange requirement. *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009); *United States v. Suhl*, 885 F.3d 1106 (8th Cir. 2018). Instead, the government concentrates on the cases that (rightfully) required an exchange. Those cases are irreconcilable with the decision below (or *Whitfield* and *Suhl*).

United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998), held that failing to instruct the jury that there must be an agreed-upon exchange for bribery was clearly erroneous. The government makes much of the fact that Jennings was a bribe payor, rather than the recipient. That makes no difference. The Fourth Circuit reversed the conviction because the instruction allowed conviction without proof of an exchange. *Id.* at 1021. As a result, it "can be said with confidence that [the Fourth Circuit] would [have] decide[d] [Petitioner's] case differently." *See* Stephen

Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013).

The same goes for *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013) (Sutton, J.). *Terry* affirmed a conviction precisely because the instructions explained that there had to be an agreement. *Id.* at 613. Here, the instructions did not. And in the remaining cases Petitioner identified, the courts made clear that an exchange was required. Pet. 17.

4. Finally, this case is far from a "rare factual scenario." Opp. 13. It is common for a constituent to curry favor with a politician—taking her to lunch, or providing some other benefit—and sometime later the constituent benefits from official action. Pet. 14-15. That is routine and "[f]avoritism and influence are not avoidable in representative politics." *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). But under the decision below, every official is at the mercy of federal prosecutors seeking to criminalize such relationships, with only a jury's speculation about the official's inner thoughts standing between the official and prison. This Court cannot countenance such a "standardless sweep" when it comes to federal bribery. *McDonnell*, 136 S. Ct. at 2373. The Court should thus grant certiorari, as it has in the past, and rein in prosecutors who seek to turn the federal criminal law into an ethics code for state officials. *See id.*

II. *Evans* deserves fresh consideration

This case also presents an ideal occasion to revisit *Evans*, 504 U.S. 255. The government never defends *Evans*' holding that the Hobbs Act's color-of-official-right provision covers simple bribery. Instead, the

government contends there are no "special justification[s]" to overrule it. Opp. 15. That is not the test. It is true that on the merits Petitioner must present adequate reasons for overturning *Evans* (there are plenty). Right now, however, the question is simply whether the Court should engage in that analysis. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 451 (2015) ("We granted certiorari, to decide whether … we should overrule *Brulotte*."). There are strong reasons to revisit *Evans*.

First, Justices of this Court continue to question the correctness of *Evans*. *Ocasio*, 136 S. Ct. at 1437 (Breyer, J., concurring); *id.* (Thomas, J., dissenting). The government offers no answer to this.

Second, the Court decided the key issue in *Evans* without full briefing. In *Evans* itself, Justice O'Connor wrote that 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). And the government admits that the petitioner did not brief "whether the common law supported the Court's definition of extortion." Opp. 16. The government complains that *Hohn v. United States*, 524 U.S. 236 (1998), which noted the lessened force of precedence where "the opinion was rendered without full briefing," *id.* at 251, was addressing "a per curiam opinion," Opp. 16. The government never explains why that matters and this Court has said the same of signed opinions. *Johnson v. United States*, 576 U.S. 591, 606 (2015). And despite the government's speculation that it "is unlikely that additional briefing would have changed the result" in

Evans, Opp. 16, the question whether the common law supports *Evans*' definition "requires intensive historical research." 504 U.S. at 272 (O'Connor, J., concurring in part and concurring in the judgment). The Court should grant certiorari so that research can finally be presented.

Third, *Evans* was indeed wrongly decided, as three Justices recognized in *Evans*. *Evans*' treatment of bribery as a form of extortion does violence to the text—in no ordinary usage is a voluntary bribe payor the victim of extortion—contravenes the common law, and caused a dramatic shift in our federalism. Pet. 22-24. The government claims that the majority in *Evans* already considered the arguments, but does not defend *Evans'* conclusion, or provide any reason to believe the current Court would not reach a different one. After all, the only Justice currently on the Court who has considered this issue agrees with Petitioner. *Evans*, 504 U.S. at 278 (Thomas, J. dissenting).

Finally, *Evans* has proved unworkable. The government discounts *Ocasio*, 136 S. Ct. 1423, because that case dealt with the "unusual context of *conspiracy* to commit extortion." Opp. 17. But the Court would never have had to wade into that thicket were it not for *Evans*. The government also contends that "Petitioner cites no evidence that *Evans*'s application has led to arbitrary or unjust results." *Id.* This very case belies that claim. And given that twenty percent of federal prosecutions of state and local officials for bribery include Hobbs Act extortion charges, Pet. 26, Petitioner is not alone.

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

The government recognizes that, in general, "the parties, rather than judges, are responsible for framing the issues for decision." Opp. 17. And the government concedes that did not happen here. *Id.* Nonetheless, the government calls the Second Circuit's *sua sponte* harmless-error review a "modest" departure and equates it with a court's dismissal of an untimely complaint. *Id.* Not only is that apples to oranges, but even when it comes to untimely complaints, "before acting on its own initiative, a court *must* accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006) (emphasis added). That is all the more true when a criminal conviction hangs in the balance.

This case proves that the Second Circuit, unlike other Circuits, imposes no constraint on its discretion to address harmless error *sua sponte*. This was not a case where the court could have deemed the harmlessness question obvious or easy. Indeed, the prior appellate panel in Petitioner's case—on the same facts, and likewise addressing *McDonnell* error—reached precisely the opposite conclusion, expressly rejecting the government's argument that the error was harmless. *United States v. Silver*, 864 F.3d 102, 106 (2d Cir. 2017). But the second panel—without acknowledging the prior holding—came to the opposite conclusion. That alone demonstrates this was not a case where harmlessness was so obvious that adversary argument was unnecessary; it bespeaks, at best, an *ad hoc* approach to *sua sponte*

analysis. That unbridled approach turns harmless error into a too-easily-available escape valve for courts faced with the need to reverse convictions of unpopular defendants like Petitioner. And it mirrors and exacerbates the broader problem of prosecutors straining the law to sanction conduct they find distasteful.

The government claims the "court of appeals had sound reasons for exercising its authority to consider harmlessness *sua sponte*." Opp. 17-18. The single reason it offers, however, is that the error was "an error on which the parties' briefs had not focused." Opp. 18. Even if true (it is not) that would only compound the court's error. That the court (in the government's view) reached one issue without full briefing would not excuse the court reaching even further to affirm a faulty conviction.

There can be no dispute that had Petitioner been convicted in nearly any other circuit, the appeals court would have at least afforded him an opportunity to brief harmless error, if not reversed altogether. Pet. 27-30. The fact is, the Second Circuit has never adopted the test that nearly every other circuit has. And this case proves that court does not consider the necessary factors. Had it done so, it would not have affirmed without notice to Petitioner. *Id.*

Finally, the government errs in arguing that this is a "factbound challenge to the court of appeals' exercise of discretion." Opp. 20. This question is legal: *when* can an appeals court engage in unasked-for harmless-error analysis? This Court need not wade into the facts because it is obvious that harmlessness is (at least) debatable, as confirmed by the flat disagreement on the issue by the first and second

appellate panels. But if the Court were to review the harmlessness analysis, it would find that the Second Circuit used implausible inferences to reach a conclusion that was not only refuted by the direct testimony of the government's own witnesses, but disavowed by the government itself. Pet. 31-32.

CONCLUSION

The Court should grant the petition.

November 16, 2020

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