No.

IN THE
Supreme Court of the United States

SHELDON SILVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1957 of Title 18, United States Code, prohibits "knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a). The questions presented are:

1. Whether § 1957 requires the Government to trace funds in a transaction involving a withdrawal from a commingled account, precluding a conviction where the account contains sufficient clean funds to cover the transfer.

2. Whether the court of appeals contravened this Court's decisions in *Sekhar* v. *United States*, 133 S. Ct. 2720 (2013), and *Skilling* v. *United States*, 561 U.S. 358 (2010), by finding sufficient evidence to support Mr. Silver's convictions for extortion and honest services fraud.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Sheldon Silver was defendant in the district court and appellant in the court of appeals.

Respondent United States of America was plaintiff in the district court and appellee in the court of appeals.

NBCUniversal Media, LLC and The New York Times Company were intervenors in the district court but were not parties to the appeal below.

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Sheldon Silver respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-47a) is reported at 864 F.3d 102 (2d Cir. 2017). The district court's order denying Mr. Silver's post-trial motions (App., *infra*, 48a-82a) is reported at 184 F. Supp. 3d 33 (S.D.N.Y. 2016).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 13, 2017. App., *infra*, 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title 18, United States Code, are set forth in the Appendix (App., *infra*, 83a-100a).

PRELIMINARY STATEMENT

This case involves an acknowledged circuit conflict over the proper construction of one of the principal federal money laundering statutes, 18 U.S.C. § 1957. Section 1957 prohibits "knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a). The circuits disagree over what the Government must prove when a defendant transfers funds from a commingled account that contains both "clean" and criminally derived funds.

The Fifth and Ninth Circuits both require the Government to trace the charged transaction to criminally derived proceeds. The practical effect of that construction is to preclude the Government from obtaining a conviction where a commingled account contains sufficient clean funds to cover the withdrawal: In those circumstances, there is simply no way to know whether the particular funds withdrawn are clean or criminally derived. By contrast, other circuits have held that no such tracing is required.

The Second Circuit expressly acknowledged that circuit conflict below, citing numerous cases for both the "minority" and "majority" views. App., *infra*, 20a-21a & nn.52-53. Ultimately, the court sided with the latter camp, stating that "[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds." *Id.* at 21a.

That circuit conflict—acknowledged, longstanding, and entrenched—warrants review in this case. The question presented has broad implications. The Government charges money laundering more than a thousand times per year. What the Government must prove when a transaction involves commingled funds is a key issue in a substantial number of those cases.

The statute's sheer breadth heightens the need for review. Section 1957 is an avowedly prophylactic statute that dispenses with any requirement to show an intent to conceal or promote unlawful activity—the hallmarks of money laundering as traditionally understood. Precisely because the statute is so broad, this Court should ensure that its limitations are strictly enforced.

This Court has repeatedly granted review in recent years to pare back broad interpretations of the ever-expanding web of federal criminal laws. The Second Circuit's erroneous construction of § 1957 falls squarely within that mold. The court's erroneous rulings on the remaining counts only aggravate the error, expanding other federal criminal statutes beyond their terms in a way that conflicts with this Court's precedents. This Court should grant the petition.

STATEMENT

I. STATUTORY FRAMEWORK

Congress enacted 18 U.S.C. § 1957 in the Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I(H), 100 Stat. 3207-18. The purpose of that statute was to "combat organized crime." S. Rep. No. 99-433, at 2 (1986). Congress was concerned that "[t]he growth of money laundering has been a corollary of the spread of profitable illegal enterprises," and that "[t]he criminals involved in these enterprises have devised complex schemes to disguise the illegal nature and true source of

their income." *Ibid.* "The existence of modern, sophisticated, often international services of financial institutions has contributed to the frightening financial successes of organized crime in recent years," and "[w]ithout the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does." President's Commission on Organized Crime, Interim Report to the Attorney General, *The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 3 (Oct. 1984).

The Act contains two provisions, codified at 18 U.S.C. §§1956 and 1957. Section 1956 addresses money laundering as commonly understood. It prohibits conducting a financial transaction "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity," or "to promote the carrying on of specified unlawful activity," where the "property involved * * * represents the proceeds of some form of unlawful activity." 18 U.S.C. §1956(a)(1).

Section 1957 is a broader provision that omits any requirement of intent to conceal or promote unlawful activity. That provision makes it unlawful merely to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. §1957(a). "Criminally derived property" is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense," *id.* §1957(f)(2), and "specified unlawful activity" includes violations of more than 100 different federal criminal statutes that run the gamut of the U.S. Code, *id.* §§1957(f)(3), 1956(c)(7), 1961(1).

Congress acknowledged—and touted—the prophylactic nature of § 1957. "[E]very person who does business with a drug trafficker, or any other criminal, does so at some substantial risk if that person knows that they are being paid with the proceeds of a crime * * *." H.R. Rep. No. 99-855, at 13 (1986). In Congress's view, "[t]he only way we will get at this problem is to let the whole community, the whole population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds." *Ibid.* Congress "d[id]n't have any problem whatsoever holding the grocer accountable if he sees [a trafficker] outside dealing in drugs and takes cash and walk[s] into his store." *Id.* at 14. "If you know that person is a trafficker and has this income derived from the offense, you better beware of dealing with that person." *Ibid.*

II. Proceedings Below

A. Background

Sheldon Silver is the former Speaker of the New York State Assembly. App., *infra*, 1a. Throughout his tenure, Mr. Silver also worked part time as a practicing lawyer, as permitted by New York law. *Id.* at 3a; N.Y. Pub. Off. Law § 74(3)(a). This case concerns referral fees that Mr. Silver earned for bringing in new clients for his law practice—in one case, mesothelioma patients with asbestos claims, and in the other, real estate developers with tax certiorari claims. App., *infra*, 3a-4a, 9a.

The asbestos referrals came from Dr. Robert Taub, a highly regarded physician and researcher at Columbia-Presbyterian Hospital who was a friend of Mr. Silver. App., *infra*, 4a-5a. Years ago, Mr. Silver helped Dr. Taub obtain funding for his research by securing state grants for his work. *Id.* at 5a-6a. More recently, Mr. Silver extended other political courtesies, including recommend-

ing Dr. Taub's daughter for an unpaid internship with a state judge, recommending Dr. Taub's son for a job at a non-profit organization, offering to help Dr. Taub "navigate" the permit process for a charity race he was organizing, and obtaining a resolution and proclamation honoring Dr. Taub at a charity event. *Id.* at 7a-8a.

The tax certiorari work came from two real estate developers, Glenwood Management and the Witkoff Group. App., *infra*, 9a. At various points, Mr. Silver or his designee voted on rent legislation and bond approvals relevant to the developers' business. *Id.* at 10a-11a. Mr. Silver also met with the developers to discuss pending legislation, and expressed opposition to a methadone clinic that was opening near one of their buildings. *Ibid.*

B. Proceedings in the District Court

1. *The Charges*

In February 2015, the Government obtained a three-count indictment charging Mr. Silver with honest services fraud and extortion, alleging that he had exchanged official acts for referrals. Dkt. 9 (citing 18 U.S.C. §§ 1341, 1343, 1346, and 1951). Mr. Silver moved to dismiss, based in part on improper and inflammatory comments the U.S. Attorney made during his press conference announcing the charges. The district court, while refusing to "condone the Government's brinksmanship relative to the Defendant's fair trial rights or the media blitz orchestrated by the U.S. Attorney's Office," denied the motion. Dkt. 31 at 1-2.

Two weeks later, the Government obtained a superseding indictment that contained substantially the same honest services fraud and extortion charges but also added a new charge under § 1957. Dkt. 32. That charge alleged that Mr. Silver had committed money laundering by investing the referral fees he earned in "private, high-

yield investment opportunities." *Id.* ¶¶29-30. The Government charged eight specific transfers in which Mr. Silver had drawn checks greater than $10,000 from his bank account to pay for the investments. *Id.* ¶¶44-45.

2. *The Trial*

A three-week jury trial followed. The Government presented testimony from both Dr. Taub and the developers, who all repeatedly denied any quid pro quo to exchange official acts for referrals. See C.A. Br. 13-14, 19-20 (collecting testimony).

The Government introduced substantial evidence on the money laundering count. Paul Cody, president of Counsel Financial, testified in detail about the size and frequency of Mr. Silver's investments, including the interest rates, amounts, and maturities of various promissory notes. 11/18/15 Tr. 2314-2357 (Dkt. 158). Jordan Levy, Mr. Silver's investment advisor, gave similar testimony, highlighting the "very solid returns" in the "lower to mid 20s" that Mr. Silver earned. 11/18/15 Tr. 2397-2434 (Dkt. 158). The Government introduced not only the checks that formed the basis for its charges, Gov't Exs. 968, 1025, 1039 (C.A. App. 803-812), but also thousands of pages of other exhibits, including an investor questionnaire identifying Mr. Silver as a high net worth individual with a "net worth * * * in excess of $1,000,000," an "individual income * * * in excess of $200,000," and "net worth * * * in excess of four times the proposed investment." Gov't Ex. 952 (C.A. App. 801-802); see also Gov't Exs. 950-982, 1007-1061, 1229, 1511-1513.

The Government then presented testimony from a case agent who purported to connect those investments to the referral fees Mr. Silver earned from his law practice. That testimony showed that Mr. Silver had drawn the checks for his investments from the same account

where the referral fees had been deposited, and that for each check, there had been one or more deposits of referral fees over the weeks or months preceding the withdrawal. See 11/18/15 Tr. 2526-2538 (Dkt. 158); Gov't Exs. 1511-1513 (C.A. Gov't App. 1422-1424). But the case agent did not analyze what *other* funds were *also* in the account, nor did she analyze whether the account contained sufficient "clean" funds to cover each withdrawal.

Bank statements showed that more than $8.3 million had been deposited into Mr. Silver's account from 2004 through 2014, including his monthly salary, tax refunds, flex spending payments, health insurance, and countless other receipts that the Government never claimed to be criminally derived. Gov't Ex. 1229 (C.A. App. 814-952). That commingled account contained more than enough clean funds to cover every one of the charged transactions. See C.A. Reply Br. 25-26 & n.10 (setting forth analysis); Gov't Ex. 1229 (C.A. Reply App. 1-29).

For example, one of the Government's charges was for a $19,005 withdrawal that Mr. Silver made on April 23, 2013. Dkt. 32 ¶45(g). The Government's case agent testified that Mr. Silver had deposited $27,278 in referral fees into his account one week earlier. 11/18/15 Tr. 2532-2533 (Dkt. 158); Gov't Ex. 1511 (C.A. Gov't App. 1422). But the total balance in the account at the time was $248,588—more than *nine times* either the deposit or the withdrawal. Gov't Ex. 1229 (C.A. Reply App. 24). The case agent made no effort to show that any of those *other* funds were criminally derived.

3. *Closing Arguments and Verdict*

In closing, the Government urged the jury to convict Mr. Silver for honest services fraud and extortion based on the acts he had performed for Dr. Taub and the developers. It did not focus solely on the formal acts such as

the state grants and rent legislation, but instead affirmatively invited the jury to convict based on the meetings and other political courtesies. See 11/23/15 Tr. 2857 (Dkt. 162) ("Each one of these is an official action, each one by itself would be enough for you to convict."); *id.* at 2892 ("That meeting, ladies and gentlemen, that is official action."). The Government also highlighted the lucrative nature of Mr. Silver's investments. See *id.* at 2873-2874 ("Look at all those transactions with Jordan Levy, these private investments in an Australian satellite company, a private real estate fund, an exclusive lender that paid him absolutely unbelievable interest rates."); *id.* at 3063 ("He took his [c]rime proceeds and invested it in exclusive accounts with guaranteed returns * * * .").

Mr. Silver requested a jury instruction that, "[t]o prove an 'official act,' the government must prove the exercise of actual governmental power, the threat to exercise such power, or pressure imposed on others to exercise actual government power." App., *infra*, 14a. The district court denied that instruction and instead adopted the Government's proposal—that "[o]fficial action includes *any action* taken or to be taken under color of official authority." *Ibid.* (emphasis in opinion). Following three days of deliberations, the jury convicted Mr. Silver on all counts. *Id.* at 15a.

4. *Post-Trial Motions and Sentencing*

Mr. Silver moved for a judgment of acquittal. Among other things, he argued that the Government had failed to prove money laundering beyond a reasonable doubt because the charged withdrawals were drawn from a commingled account that also contained clean funds. App., *infra*, 58a.

The district court denied the motion. App., *infra*, 48a-82a. The court recognized that some circuits require the

Government to "trace the criminally derived proceeds when they have been commingled with funds from legitimate sources," but it characterized that approach as a "minority view." *Id.* at 77a. The court instead followed the "majority view," holding that "the Government was not required to prove that funds transferred from Silver's bank account to the investment vehicles offered through Jordan Levy were the actual dollars derived from Silver's illegal schemes." *Id.* at 77a-78a.

Mr. Silver's conviction for money laundering increased the applicable sentencing guideline range by more than two years. PSR ¶¶53, 115 (Dkt. 227); U.S.S.G. sentencing table. The court imposed a below-guideline sentence of 12 years' imprisonment plus substantial financial penalties. 5/17/16 Tr. 59-60 (Dkt. 300); C.A. App. 1071-1077.

Soon after, this Court decided *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), holding that "official acts" under the honest services and extortion statutes include only "formal exercise[s] of governmental power." *Id.* at 2372. Recognizing that *McDonnell* created a substantial question over the adequacy of the "official act" instruction, the district court granted Mr. Silver bail pending appeal. Dkt. 325.

C. The Court of Appeals' Decision

The court of appeals vacated Mr. Silver's convictions based on the *McDonnell* error but affirmed the denial of Mr. Silver's motion for judgment of acquittal. App., *infra*, 1a-47a.

The court of appeals agreed with Mr. Silver that "the District Court's jury instruction defining an official action in its honest services fraud and Hobbs Act extortion charges was erroneous under *McDonnell*." App., *infra*, 26a. "Like the improper instruction in *McDonnell*, the

plain language of the instruction at Silver's trial captured lawful conduct, such as arranging meetings or hosting events with constituents." *Ibid.* Moreover, the court could not "conclude, beyond a reasonable doubt, that a rational jury would have found Silver guilty if it had been properly instructed on the definition of an official act." *Id.* at 29a. "While the Government presented evidence of acts that remain 'official' under *McDonnell*, the jury may have convicted Silver for conduct that is not unlawful, and a properly instructed jury might have reached a different conclusion." *Ibid.*

By contrast, the court of appeals rejected Mr. Silver's challenge to the sufficiency of the evidence on the money laundering count. App., *infra*, 19a-21a. The court acknowledged that "the Fifth and Ninth Circuits * * * both require the Government to trace criminally derived proceeds when they have been commingled with funds from legitimate sources to prove money laundering under Section 1957." *Id.* at 20a (citing *United States* v. *Loe*, 248 F.3d 449 (5th Cir. 2001); and *United States* v. *Rutgard*, 116 F.3d 1270 (9th Cir. 1997)). But like the district court, the court of appeals rejected that approach as a "minority" view. *Ibid.*

The court of appeals instead "adopt[ed] the majority view of our sister Circuits—that the Government is not required to trace criminal funds that are commingled with legitimate funds to prove a violation of Section 1957." App., *infra*, 21a. "Because money is fungible," the court explained, "once funds obtained from illegal activity are combined with funds from lawful activity in a single account, the 'dirty' and 'clean' funds cannot be distinguished from each other." *Ibid.* For that reason, "[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-

criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds." *Ibid.* The court thus "reject[ed] Silver's sufficiency challenge to his money laundering conviction." *Ibid.*

The court likewise rejected Mr. Silver's sufficiency challenges to the remaining counts. On the extortion counts, the court rejected the argument that the Government failed to prove a "deprivation" of property as required by *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 (2013). In the court's view, Mr. Silver was "said to have deprived Dr. Taub, the Developers, and other law firms of property." App., *infra*, 18a. On the honest services counts, the court rejected the argument that the Government failed to prove a paradigmatic bribe or kickback as required by *Skilling* v. *United States*, 561 U.S. 358, 411 (2010). The referral fees, it opined, were in fact "bribes or kickbacks within the meaning of *Skilling*." App., *infra*, 19a.

The court of appeals vacated and remanded for further proceedings on all counts in light of the *McDonnell* error. App., *infra*, 38a-40a. Neither party sought rehearing. On August 3, 2017, the court stayed its mandate so Mr. Silver could seek this Court's review of the denial of his motion for judgment of acquittal. C.A. Dkt. 116.

REASONS FOR GRANTING THE PETITION

This case presents a longstanding and widespread circuit conflict over the proper construction of 18 U.S.C. § 1957. The courts of appeals disagree over whether the Government must trace funds to criminally derived proceeds where a defendant transfers funds from a commingled account.

The court below expressly acknowledged the conflict. The Fifth and Ninth Circuits, it recognized, have both held that the Government cannot obtain a conviction where a commingled account contains sufficient "clean" funds to cover the transfer. Section 1957 applies only to transactions "in" criminally derived property, and the Government cannot prove such a transaction beyond a reasonable doubt where the funds could be either clean or criminally derived. By contrast, other circuits reject any requirement that the Government trace funds to obtain a conviction. By endorsing that approach here, the Second Circuit further entrenched that well-established conflict.

The issue is important and recurring. Section 1957 is a sweeping statute that reaches a wide range of otherwise innocent conduct. The Government charges § 1957 offenses hundreds of times each year. And the statute's sheer expanse implicates all the concerns of the federalization of criminal law that have motivated this Court's intervention in other recent cases—concerns only amplified by the court of appeals' erroneous rejection of Mr. Silver's other sufficiency challenges.

I. THE DECISION BELOW DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT OVER THE PROPER CONSTRUCTION OF § 1957

To prove that a defendant engaged in money laundering in violation of § 1957, the Government must show that the defendant "knowingly engage[d] * * * in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a). The courts of appeals disagree sharply over whether that statute requires the Government to trace proceeds where funds are withdrawn from a commingled account.

A. The Fifth and Ninth Circuits Require the Government To Trace Funds

Two courts of appeals have held that § 1957 requires the Government to trace funds, precluding a conviction where a commingled account contains sufficient clean funds to cover the transaction.

In *United States* v. *Loe*, 248 F.3d 449 (5th Cir. 2001), cert. denied, 534 U.S. 974 (2001), the jury convicted the defendant under § 1957 for transferring $776,742 from a commingled account that contained $2.2 million, only $470,790 of which was criminally derived. *Id.* at 467. The Fifth Circuit reversed. "[W]here an account contains clean funds sufficient to cover a withdrawal," the court held, "the Government cannot prove beyond a reasonable doubt that the withdrawal contained dirty money." *Ibid.* "Since there was enough clean money in the account to cover the $776,742 transfer," that rule "mandate[d] reversal." *Ibid.* "No reasonable juror could conclude that these money laundering convictions were warranted beyond a reasonable doubt." *Ibid.*

The Ninth Circuit took a similar approach in *United States* v. *Rutgard*, 116 F.3d 1270 (9th Cir. 1997). In that case, the defendant made two transfers of $5.6 million and $1.9 million from a commingled account that contained $8.5 million, only $46,000 of which was criminally derived. *Id.* at 1290, 1292. "These transfers," the court noted, "did not necessarily transfer the $46,000 of fraudulent proceeds." *Id.* at 1292. The court refused to adopt "a rule or presumption that, once criminally-derived funds were deposited [into a commingled account], any transfer from the account would be presumed to involve them for the purpose of applying § 1957." *Ibid.* "As the government did not prove that any fraudulently-derived proceeds left the account [in the challenged transfers],

the monetary transfer counts * * * were not proved beyond a reasonable doubt." *Id.* at 1293.

Those decisions respect the plain language of the statute. Section 1957 applies where a defendant engages in a monetary transaction "in" criminally derived property. 18 U.S.C. §1957(a). The plain meaning of that provision is that the *transaction itself* must consist of criminally derived proceeds. Where a commingled account contains sufficient clean funds to cover the transaction, the Government cannot prove beyond a reasonable doubt that the defendant transacted "in" criminally derived property. There is no way to know or say whether the particular funds withdrawn correspond to an earlier deposit of criminal proceeds.

B. Other Circuits Hold That Tracing Is Not Required

Several courts of appeals have ruled to the contrary that the Government need not trace proceeds where a defendant transacts in commingled funds.

In *United States* v. *Moore*, 27 F.3d 969 (4th Cir. 1994), cert. denied, 513 U.S. 979 (1994), the defendant was charged with depositing $37,000 from the sale of condominiums into his bank account. *Id.* at 976. He appealed on the ground that the condominiums had been purchased with both $100,000 of clean funds as well as $926,000 of criminal proceeds. *Id.* at 976-977. The Fourth Circuit affirmed. "Money is fungible," it noted, "and when funds obtained from unlawful activity have been combined with funds from lawful activity into a single asset, the illicitly-acquired funds and the legitimately-acquired funds * * * cannot be distinguished * * * ." *Ibid.* "As a consequence, it may be presumed in such circumstances * * * that the transacted funds, at least up to the full amount originally derived from crime, were the pro-

ceeds of the criminal activity or derived from that activity." *Id.* at 977. "A requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds." *Ibid.*

The Tenth Circuit took the same approach in *United States* v. *Johnson*, 971 F.2d 562 (10th Cir. 1992). The defendant there challenged his conviction under § 1957 because "the government did not show that the funds that he wired out of his account were the proceeds of wire fraud, stating 'It is entirely possible that the funds paid out * * * came from sources other than [criminal proceeds].'" *Id.* at 570. The court was unpersuaded: "Once proceeds of unlawful activity have been deposited in a financial institution * * * [t]he 'tainted' funds may be commingled with 'untainted' funds * * * ." *Ibid.* "[T]he portion of § 1957 requiring a showing that the proceeds were in fact 'derived from specified unlawful activity' could not have been intended as a requirement that the government prove that no 'untainted' funds were deposited along with the unlawful proceeds." *Ibid.* "Such an interpretation would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime." *Ibid.*

Other courts of appeals agree, holding that the Government need not trace funds in a commingled account to prove money laundering under § 1957. See *United States* v. *Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999) ("The government need not trace funds to prove a violation of § 1957."); *United States* v. *Sokolow*, 91 F.3d 396, 409 (3d Cir. 1996) (no "legal requirement that the government trace the funds constituting criminal proceeds when they

are commingled with funds obtained from legitimate sources"), cert. denied, 519 U.S. 1116 (1997); cf. *United States* v. *Haddad*, 462 F.3d 783, 792 (7th Cir. 2006) (finding "the Ninth Circuit's approach to Section 1957 cases [in *Rutgard*] * * * untenable").

The Second Circuit widened that conflict below. The court recognized that "the Fifth and Ninth Circuits * * * both require the Government to trace criminally derived proceeds when they have been commingled with funds from legitimate sources to prove money laundering under Section 1957." App., *infra*, 20a. But the court rejected that approach as the "minority" view. *Ibid.* The court instead "adopt[ed] the majority view of [its] sister Circuits—that the Government is not required to trace criminal funds that are commingled with legitimate funds to prove a violation of Section 1957." *Id.* at 21a. Quoting the Fourth Circuit's decision in *Moore*, the court opined that "'[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds.'" *Ibid.* (quoting 27 F.3d at 977).

C. The Circuit Conflict Is Well-Recognized, Longstanding, and Entrenched

The circuit conflict is ripe for this Court's review. The Second Circuit recognized below that it was choosing sides in a longstanding division of authority, citing the Fifth and Ninth Circuit decisions for the "minority" view and various other cases for the "majority" one. App., *infra*, 20a-21a & nn.52-53. Other courts have similarly noted the existence of this conflict. See, *e.g.*, *United States* v. *Braxtonbrown-Smith*, 278 F.3d 1348, 1354 (D.C. Cir. 2002) (noting that "[*Rutgard*'s] holding * * * is a mi-

nority view" and citing contrary cases); *United States* v. *Stinson*, 734 F.3d 180, 186 n.5 (3d Cir. 2013) (observing that "different courts of appeals have different requirements"); *United States* v. *Weisberg*, No. 08-CR-347, 2011 WL 4345100, at *5 (E.D.N.Y. Sept. 15, 2011) (opining that "the approach taken by the Ninth and Fifth Circuits is more consistent with the allocation of the burden of proof in criminal cases than that taken by the Third and Fourth Circuits"). The very cases that pick sides in this conflict often expressly reject the cases going the other way. See, *e.g.*, *Rutgard*, 116 F.3d at 1292 (declining to follow *Moore*); *Haddad*, 462 F.3d at 792 (rejecting *Rutgard* and following *Moore* instead).

The divide is also entrenched. Both the Fifth and Ninth Circuits have rejected opportunities to reconsider their positions despite the diverging approaches of other circuits. The Fifth Circuit reaffirmed its approach in *United States* v. *Fuchs*, 467 F.3d 889 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007), upholding a conviction only because "the total amount of the financial transactions * * * exceeded the amount of clean funds" in the account. *Id.* at 907 (citing *United States* v. *Davis*, 226 F.3d 346 (5th Cir. 2000), cert. denied, 531 U.S. 1181 (2001), the earlier Fifth Circuit case on which *Loe* relied).

The Ninth Circuit has reaffirmed *Rutgard* multiple times. In *United States* v. *Hanley*, 190 F.3d 1017 (9th Cir. 1999), the court confirmed that "tracing of criminally derived funds [is] generally required under *Rutgard*." *Id.* at 1024-1027. And in *United States* v. *Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013), the court cited *Rutgard* yet again for the point that, "[g]enerally, a conviction under §1957 requires that the government be able to trace the money transactions at issue to a criminal act." *Id.* at 980.

The Fifth and Ninth Circuits thus show no signs of reconsidering their positions, despite the proliferation of cases adopting the contrary view. The circuit conflict is ripe for this Court's intervention.

II. The Proper Construction Of § 1957 Is A Recurring And Important Issue

Section 1957 is an oft-used weapon in prosecutors' arsenal—and for good reason: It imposes significant penalties and is particularly easy to prove under the construction adopted below. Moreover, the evidence of a defendant's financial dealings can be highly inflammatory and prejudicial. Precisely because of the statute's breadth and effect, the limitations Congress imposed should be strictly enforced.

A. The Question Presented Routinely Arises in Money Laundering Cases

The proper construction of § 1957 is a frequently recurring issue. According to the Bureau of Justice Statistics, "[b]etween 1994 and 2001 about 18,500 defendants were charged in U.S. district court with money laundering." Bureau of Justice Statistics, *Special Report: Money Laundering Offenders, 1994-2001*, at 1 (July 2003). Of those, 10,610 were charged with money laundering as the most serious offense. *Ibid.* Those prosecutions accounted for 1.8% of *all cases* filed in U.S. district courts as of 2001. *Ibid.*

The Government continues to charge money laundering more than a thousand times per year on average. See Internal Revenue Service, *Statistical Data—Money Laundering & Bank Secrecy Act* (Sept. 29, 2017) (average of 1,045 cases from 2014 to 2016). Prosecutions under § 1957 make up roughly 20% of that total. See U.S. Dep't of Treasury *et al.*, *2007 National Money Laun-*

dering Strategy 94 (May 3, 2007) (884 out of 4,592 convictions from 2002 to 2005).

The question presented by this petition routinely arises in those cases. A defendant's bank account regularly contains both proceeds from some underlying offense as well as funds whose origin the Government does not challenge. In those cases, the Government's burden of proof is critical. Whether the Government must trace proceeds—thus foreclosing a conviction whenever the account contains sufficient clean funds to cover the transfer—will often be dispositive.

Courts regularly confront this question. Several courts of appeals have addressed the issue, in addition to the cases already cited above.[1] District courts confront the issue even more often.[2] The issue thus routinely re-

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[1] See, *e.g.*, *United States* v. *Rivera-Izquierdo*, 850 F.3d 38, 45 nn.6-7 (1st Cir. 2017) (citing *Moore* and *Johnson*), cert. denied, 137 S. Ct. 2204 (2017); *United States* v. *Shafer*, 608 F.3d 1056, 1067 (8th Cir. 2010) ("[T]he Government is not required to trace funds to prove a violation of § 1957."); *United States* v. *Pizano*, 421 F.3d 707, 723 (8th Cir. 2005) (same), cert. denied, 546 U.S. 1204 (2006); *United States* v. *Mooney*, 401 F.3d 940, 946 (8th Cir. 2005) (similar), on reh'g en banc, 425 F.3d 1093 (8th Cir. 2005); *United States* v. *Battles*, 745 F.3d 436, 456 (10th Cir. 2014) ("The government need not meticulously trace the funds involved in a monetary transaction offense or prove that the funds could not have come from a legitimate source."), cert. denied, 135 S. Ct. 355 (2014); *United States* v. *Dazey*, 403 F.3d 1147, 1163 (10th Cir. 2005) (same).

[2] See, *e.g.*, *United States* v. *Yagman*, 502 F. Supp. 2d 1084, 1087 (C.D. Cal. 2007) ("Where the transaction involves criminal proceeds that have been commingled with innocent funds, the Ninth Circuit imposes a tracing requirement; the government must trace each of the alleged monetary transactions to criminally-derived proceeds."); *United States* v. *Jedynak*, 45 F. Supp. 3d 812, 821 (N.D. Ill. 2014) (adopting the Fifth Circuit's view that, "where an account contains clean funds sufficient to cover a withdrawal, the Government cannot prove beyond a reasonable doubt that the withdrawal contained dirty

curs in the hundreds of § 1957 cases the government prosecutes each year.

B. Section 1957's Breadth Underscores the Importance of Enforcing Its Limitations

The sheer breadth of § 1957 enhances the importance of the question presented. Unlike § 1956, which requires an intent to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds" or to "promote the carrying on of specified unlawful activity," 18 U.S.C. § 1956(a)(1), § 1957 is an overtly prophylactic statute that dispenses with any mens rea requirement beyond simple knowledge that the funds derived from another offense, *id.* § 1957(a). The statute allows prosecutors to tack on gratuitous money laundering charges in any case in which a defendant engages in a moderately sized financial transaction with the proceeds of some other offense—as virtually any defendant does in a financial offense worth prosecuting at the federal level. Section 1957 effectively applies to "any transaction by a criminal with his bank." *Rutgard*, 116 F.3d at 1291.

As the Department of Justice acknowledges, § 1957 applies even to "receipt and deposit" cases—situations where "a person obtains proceeds from specified unlawful activity" and then "deposits the proceeds into a bank

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money"); *United States* v. *Weisberg*, No. 08-CR-347, 2011 WL 4345100, at *5 (E.D.N.Y. Sept. 15, 2011) (holding that "the Government may not rely on a presumption that a withdrawal from a commingled account is a transaction 'in' dirty money"); *United States* v. *Ahmed*, No. 14-CR-277, 2017 WL 3149336, at *9-13 (E.D.N.Y. July 25, 2017) (following decision below); *United States* v. *Jefferson*, No. 07-CR-209, 2009 WL 2447850, at *5 (E.D. Va. Aug. 8, 2009) (following *Moore*); *United States* v. *Afremov*, No. 06-196, 2007 WL 3237630, at *7 (D. Minn. Oct. 30, 2007) (following *Pizano*); *United States* v. *Long*, No. 08-CR-043, 2009 WL 10675289, at *2 (N.D. Ga. Sept. 10, 2009) (no tracing requirement).

account." U.S. Attorneys' Manual § 9-105.330 (2007) (requiring internal consultation before charging such offenses). The Department all but admits that such cases "create[ ] little or no additional harm to society above that which was caused by the commission of the underlying offense." *Ibid.* The same is true here: There was no "additional harm to society" merely because Mr. Silver put his savings in investment vehicles rather than leaving them in his bank account. But the Government charged those investments as money laundering nonetheless.

While transactions like these cause no conceivable harm to society, the charges threaten serious prejudice to defendants. Proving a § 1957 violation requires the Government to put on evidence of the defendant's transactions of more than $10,000—evidence that inevitably injects wealth issues into the case and prejudices the jury against the defendant. That prejudice is only aggravated in a case like this, where the Government affirmatively exploits the evidence by introducing inflammatory details about the defendant's net worth and rates of return and then urging the jury to convict because "an exclusive lender * * * paid [the defendant] absolutely unbelievable interest rates." 11/23/15 Tr. 2873-2874 (Dkt. 162).

Precisely because § 1957 is so broad, courts should rigorously enforce the statute's limitations. Congress dispensed with any requirement of intent to conceal or promote criminal activity, but it still required that the defendant transact "in" criminally derived proceeds. The circuits that have dispensed with any tracing requirement disregard that design and expand an already sprawling statute even further.

C. This Case Implicates Broader Concerns over the Federalization of Criminal Law

Section 1957's far-reaching scope—and the expansive construction some circuits have given to the statute—implicate broader concerns over the dramatic federalization of criminal law.

This Court has recognized that "preventing and dealing with crime is much more the business of States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977). Over the past several decades, however, federal criminal law has undergone a massive expansion. See ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 10 (1998) (noting that "the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades"). As of 2007, Congress was enacting 56.5 new federal crimes per year on average, for a total of 4,450. John Baker, Heritage Foundation, *Revisiting the Explosive Growth of Federal Crimes* (June 16, 2008); see also Neil M. Gorsuch, *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743, 747 (2014) ("[T]oday we have about 5000 federal criminal statutes on the books, most added in the last few decades. And the spigot keeps pouring * * * ." (footnotes omitted)).

That expansion makes it all the more imperative to strictly enforce the limitations Congress does enact. In *United States* v. *Santos*, 553 U.S. 507 (2008), for example, this Court granted review to resolve a conflict over whether §1956 (as then in force) required the Government to show that the "proceeds" charged in a money laundering offense were *profits* from another offense as opposed to mere gross receipts. *Id.* at 509 (plurality). Adopting the narrower construction, the Court empha-

sized the rule of lenity, which "not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain" but also "keeps courts from making criminal law in Congress's stead." *Id.* at 514; see also *id.* at 528 (Stevens, J., concurring in judgment).

The Court has taken a similar approach in numerous other cases as well. See, *e.g.*, *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372-2373 (2016) (rejecting broad construction of "official act" requirement that failed to provide "fair notice" and "raise[d] significant federalism concerns"); *Skilling* v. *United States*, 561 U.S. 358, 405-411 (2010) (rejecting broad interpretation of honest services statute to avoid vagueness problems); *Scheidler* v. *Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (rejecting interpretation of Hobbs Act that would "federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution"); *Cleveland* v. *United States*, 531 U.S. 12, 24 (2000) (rejecting "sweeping expansion of federal criminal jurisdiction" under mail fraud statute). In some cases, the Court has found a statute's overbreadth irremediable. See, *e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015) (striking down residual clause of the Armed Career Criminal Act). The Second Circuit's expansive construction of § 1957—which allows prosecutors to tack on gratuitous money laundering charges based on utterly routine financial transactions—raises precisely those same concerns.

III. THE SECOND CIRCUIT'S CONSTRUCTION OF § 1957 IS INCORRECT

The decision below is also wrong. By its terms, § 1957 applies only where a defendant "engages * * * in a monetary transaction *in* criminally derived property." 18

U.S.C. § 1957(a) (emphasis added). Accordingly, the *particular funds transferred*—the "property" in the transaction—must be "criminally derived." That language unambiguously compels a tracing requirement. There is no way to prove that funds are "criminally derived" without tracing them to some unlawful source.

Where a defendant transfers funds from a commingled account, that tracing requirement precludes a conviction where the account contains sufficient clean funds to cover the withdrawal. In those circumstances, the Government cannot prove beyond a reasonable doubt that the defendant transacted "in" criminally derived property. The jury can only speculate whether the particular funds withdrawn correspond to an earlier deposit of criminal proceeds or an earlier deposit of some other funds. The commingled nature of the account makes it impossible to distinguish between the two.

The Second Circuit offered no persuasive basis for its contrary holding. The sum total of its analysis was that "[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the noncriminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds." App., *infra*, 21a. But that is not an interpretation of the *text* of the statute—it is simply a view that the Government should win *regardless* of what the statute says. Section 1957 unambiguously requires a transaction in criminally derived property. A commingled account may make it more difficult for the Government to prove that element. But in criminal cases, the Government's inability to meet its burden of proof means that the defendant is acquitted—not that the Government is relieved of that burden.

This Court rejected the exact same form of reasoning in *Santos*. In that case, the Government urged the Court to interpret §1956 to require only a transaction in *receipts* from criminal activity, not *profits*, because the contrary construction would "hinder[ ] effective enforcement of the law." 553 U.S. at 514 (plurality). This Court rejected that argument out of hand:

> The Government * * * argues for the "receipts" interpretation because—quite frankly—it is easier to prosecute. Proving the proceeds and knowledge elements of the federal money-laundering offense under the "profits" interpretation will unquestionably require proof that is more difficult to obtain. Essentially, the Government asks us to resolve the statutory ambiguity in light of Congress's presumptive intent to facilitate money-laundering prosecutions. That position turns the rule of lenity upside down. We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.

Id. at 519; see also *id.* at 528 (Stevens, J., concurring in judgment). If the risk of defeating prosecution was not sufficient to overcome the rule of lenity that applied to the ambiguous statutory language in *Santos*, it certainly is not sufficient to justify disregarding the unambiguous statutory text here.

Besides, the Government's concerns about defendants "defeat[ing] prosecution for money laundering" are overwrought. A defendant can "defeat prosecution" just as easily by keeping the clean funds and the criminally derived funds separate and using only the clean funds for the charged transactions. The Fifth and Ninth Circuits' approach merely requires that a commingled account be treated the same way, on the ground that the Government's burden of proof prevents it from showing which

particular funds in the account are criminally derived. The only defendants spared by that approach are ones who could have insulated themselves from prosecution even under the majority rule simply by ordering their finances in a slightly different way to keep their funds separate. That hardly amounts to a glaring gap in the Government's power to prosecute.

Finally, it bears emphasis that, even where a defendant commingles funds, the Government can still obtain a conviction where the account does not contain sufficient clean funds to cover the withdrawal. The Government routinely obtains convictions for money laundering in the Fifth and Ninth Circuits despite the more stringent standard those circuits apply. See, *e.g.*, *Fuchs*, 467 F.3d at 907; *Hanley*, 190 F.3d at 1024-1027; *Chao Fan Xu*, 706 F.3d at 980. Thus, even if preserving the Government's ability to prosecute were a valid basis for disregarding statutory text, it would not justify the court of appeals' decision here.

IV. THIS CASE IS AN APPROPRIATE VEHICLE

This case squarely presents the proper construction of § 1957. The court of appeals addressed the issue in a published opinion following a full trial on the merits. App., *infra*, 19a-21a. The court recognized that the sufficiency of the evidence turned on whether the court adopted the "minority" Fifth and Ninth Circuit approach or the "majority" view of other circuits. *Ibid.* The court's selection between those competing standards was thus dispositive.

Moreover, the Government never disputed, in either the district court or the court of appeals, that its evidence was insufficient to support a conviction under the Fifth and Ninth Circuits' interpretation. Mr. Silver deposited more than $8.3 million into his account, including more than enough clean funds to cover every one of the

charged transactions. See p. 8, *supra*. While the Government's case agent testified that each transaction was preceded by deposits of referral fees over the weeks or months beforehand, she never analyzed what clean funds were *also* in the account and thus did not "trace" funds in the sense that the Fifth and Ninth Circuits require. See *ibid.* And regardless, the Second Circuit's decision in no way turned on the details of that testimony. The court ruled categorically that there *was no requirement* that "the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity." App., *infra*, 21a.

The interlocutory posture of the case does not weigh against review. It is well-established that a case may be "reviewed despite its interlocutory status" where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013). That is the situation here. The court of appeals vacated and remanded for a new trial based on the *McDonnell* error. App., *infra*, 38a-39a. Had the court adopted the Fifth and Ninth Circuits' interpretation of § 1957, however, it would have granted a judgment of acquittal on the money laundering count, precluding any retrial. See *Burks* v. *United States*, 437 U.S. 1, 18 (1978) (double jeopardy precludes retrial following reversal for insufficient evidence). The question presented is thus clearly "fundamental to the further conduct of the case"—it will determine whether the Government may retry the money laundering charge at all.

Finally, this case vividly illustrates the breadth of § 1957 and its potential for prosecutorial overreach. The Government did not charge Mr. Silver with money laun-

dering initially—it tacked that charge on only after Mr. Silver moved to dismiss the original indictment. The charged transactions bear no resemblance to the "complex schemes to disguise the illegal nature and true source of * * * income" that motivated Congress. S. Rep. No. 99-433, at 2 (1986). They consist solely of Mr. Silver's investment of his savings in promissory notes and other bona fide investment vehicles. Finally, far from arguing that Mr. Silver's investments caused some incremental harm to society, the Government used the money laundering charge as a platform for overt class-baiting, inviting the jury to convict Mr. Silver because he had made "private investments in an Australian satellite company, a private real estate fund, an exclusive lender that paid him absolutely unbelievable interest rates." 11/23/15 Tr. 2873-2874 (Dkt. 162). The gratuitous use to which the statute was put in this case underscores the need for this Court to confine § 1957 to its proper scope.

V. The Court Of Appeals' Denial Of A Judgment Of Acquittal On The Remaining Counts Likewise Warrants This Court's Review

The court of appeals' sufficiency rulings on the extortion and honest services counts contravene this Court's precedents and likewise warrant this Court's review.

This Court squarely held in *Sekhar* v. *United States*, 133 S. Ct. 2720 (2013), that extortion under the Hobbs Act requires not just an "acquisition" of property but also a "deprivation." *Id.* at 2725; see also *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 (2003) (statute "require[s] not only the deprivation but also the acquisition of property"). The court of appeals deemed that requirement met here. App., *infra*, 18a. But that holding cannot be reconciled with this Court's precedents. Mr.

Silver did not "deprive" either Dr. Taub or the developers of anything.

With respect to the asbestos referrals, even if Mr. Silver obtained leads from Dr. Taub, he never *deprived* Dr. Taub of those leads. Dr. Taub remained free to give the same leads to other lawyers too—and in fact he often did so. See C.A. Br. 47-48. The Government offered no evidence that a lead became worthless to Dr. Taub after he recommended that a patient contact Mr. Silver.

Nor did Mr. Silver deprive the real estate developers of tax certiorari business. There was no evidence that the developers paid any fees for work they would not otherwise have had to obtain from another firm. To the contrary, the developers acknowledged that they paid industry standard rates for high-quality legal work with which they were fully satisfied. See C.A. Br. 48. Those facts do not constitute a "deprivation" of property within the meaning of *Sekhar*.

The honest services convictions are similarly flawed. In *Skilling* v. *United States*, 561 U.S. 358 (2010), this Court limited the honest services statute to "paradigmatic cases of bribes and kickbacks"—cases where a defendant "solicited or accepted side payments from a third party." *Id.* at 411, 413. The court below opined that the referral fees Mr. Silver earned were "bribes or kickbacks within the meaning of *Skilling*." App., *infra*, 19a. That holding cannot be reconciled with this Court's decision.

Mr. Silver never received any illicit side payments from a third party. The only benefits he received were referral fees from the law firms with which he was associated. There was no evidence that those referral fees were a sham or that the amount of the fees was inflated—they were the same referral fees that other lawyers at the firms received when clients they had brought

in achieved successful outcomes. See C.A. Br. 49-51; *United States* v. *Robinson*, 663 F.3d 265, 272 (7th Cir. 2011) ("[C]ompensation paid in the ordinary course shall not be construed as a bribe."). Payments of ordinary compensation pursuant to unexceptional referral fee agreements simply are not the sort of "paradigmatic" bribes or kickbacks that fall within the ambit of *Skilling*.

"A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.5, at 250 (10th ed. 2013); see also Sup. Ct. R. 10(c) (review appropriate where "a United States court of appeals * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court"). That is the situation here: The court of appeals' rulings on the extortion and honest services counts conflict with this Court's governing precedents.

Those questions are important. The Government aggressively prosecutes public corruption, with the U.S. Attorney's Offices in many major cities—and indeed Main Justice itself—having separate units devoted to this area. The honest services statute and the Hobbs Act are the laws that prosecutors most often invoke to bring such cases. See, *e.g.*, *Restoring Key Tools To Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5 (Sept. 28, 2010) (statement of Lanny A. Breuer, Assistant Attorney General) (urging that public corruption is "among the highest priorities for the Department of Justice" and that the honest services statute is "extremely valuable to the Justice Department's efforts to attack corruption").

The court of appeals' expansive construction of those statutes raises the same concerns about the federalization of criminal law as its flawed ruling on the money laundering count. Despite this Court's decisions in *Skilling*, *Sekhar*, *McDonnell*, and other cases, the courts of appeals continue to construe federal criminal statutes broadly in a way that exceeds their terms and disregards this Court's repeated admonitions about the limited sphere of federal law.

This case is an appropriate vehicle for providing further guidance to the lower courts on those important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 16-1615-CR

UNITED STATES OF AMERICA,
Appellee,

v.

SHELDON SILVER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

OPINION

Argued: March 16, 2017
Decided: July 13, 2017

Before CABRANES, WESLEY, Circuit Judges,
and SESSIONS, Judge.*

JOSÉ A. CABRANES, *Circuit Judge*:

In 2015, the United States Government indicted Sheldon Silver, the former Speaker of the New York State Assembly, on charges of honest services fraud, Hobbs

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* Judge William K. Sessions III, of the United States District Court for the District of Vermont, sitting by designation.

Act extortion, and money laundering. The Government alleged that Silver abused his public position by engaging in two *quid pro quo* schemes in which he performed official acts in exchange for bribes and kickbacks, and that he laundered the proceeds of his schemes into private investment vehicles. After a jury trial of nearly one month in the United States District Court for the Southern District of New York (Valarie E. Caproni, *Judge*), a jury found him guilty on all counts. He was sentenced to twelve years of imprisonment, to be followed by three years of supervised release.

After Silver had been convicted and sentenced, the Supreme Court issued its decision in *McDonnell* v. *United States*,[1] which clarified the definition of an "official act" in honest services fraud and extortion charges. The Supreme Court, vacating the conviction of former Governor Robert McDonnell of Virginia, held that "an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy'" involving "a formal exercise of governmental power."[2]

Silver now appeals from his judgment of conviction and argues, primarily, that the District Court's jury instructions defining an official act as "any action taken or to be taken under color of official authority" was erroneous under *McDonnell*.[3] He additionally challenges the sufficiency of the evidence on all counts of conviction, arguing, among other things, that his money laundering conviction under 18 U.S.C. § 1957 required the Government to trace "dirty" funds comingled with "clean" funds.

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[1] 136 S. Ct. 2355 (2016).

[2] *Id*. at 2371-72.

[3] App'x 629.

Though we reject Silver's sufficiency challenges, we hold that the District Court's instructions on honest services fraud and extortion do not comport with *McDonnell* and are therefore in error. We further hold that this error was not harmless because it is not clear beyond a reasonable doubt that a rational jury would have reached the same conclusion if properly instructed, as is required by law for the verdict to stand.

Accordingly, we **VACATE** the District Court's judgment of conviction on all counts and **REMAND** the cause to the District Court for such further proceedings as may be appropriate in the circumstances and consistent with this opinion.

BACKGROUND

I. Offense Conduct[4]

Silver was elected to the New York State Assembly (the "Assembly") in 1976, representing an Assembly District comprising much of lower Manhattan. In 1994, he was elected Speaker of the Assembly ("Speaker")—a position he would hold for more than twenty years until his resignation in 2015. As Speaker, Silver was one of the most powerful public officials in the State of New York, exercising significant control over the Assembly and state legislative matters.

The Government's charges against Silver involve his part-time work as a practicing lawyer.[5] The Government

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[4] The following facts are drawn from the evidence presented at trial and described in the light most favorable to the Government. See *United States* v. *Litwok*, 678 F.3d 208, 210-11 (2d Cir. 2012) ("Because this is an appeal from a judgment of conviction entered after a jury trial, the . . . facts are drawn from the trial evidence and described in the light most favorable to the Government.").

[5] New York allows state lawmakers to pursue part-time employment. See N.Y. Pub. Off. Law § 74(3)(a).

sought to prove that Silver orchestrated two criminal schemes that abused his official positions for unlawful personal gain. Each of these alleged schemes had the same premise: in exchange for official actions, Silver received bribes and kickbacks in the form of referral fees from third-party law firms. In one scheme, Silver performed favors for a doctor in exchange for the doctor's referral of mesothelioma patients to Silver's law firm (the "Mesothelioma Scheme"). In the other, Silver performed favors for two real estate developers who had hired, at Silver's request, a law firm that was paying referral fees to Silver (the "Real Estate Scheme"). Jointly, these alleged schemes produced roughly $4 million in referral fees for Silver. The Government also charged that Silver engaged in money laundering by investing the proceeds of the Mesothelioma and Real Estate Schemes into various private investment vehicles (the "Money Laundering Scheme"). We describe the key aspects of each scheme in turn.

A. The Mesothelioma Scheme[6]

In the fall of 2002, Silver became "of counsel" to the law firm Weitz & Luxenberg ("W&L"), which maintained an active personal injury practice. Lawsuits for mesothelioma, a rare form of cancer caused by exposure to asbestos, were particularly lucrative for W&L.

While he was not expected to and did not perform any legal work for W&L's clients, Silver received a fixed salary for lending his name to W&L, as well as referral fees for any case he brought into the firm. Silver's referral fee was a set percentage of the fees earned by W&L on any case that he referred to the firm.

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[6] For a timeline of the Mesothelioma Scheme, see Addendum A, *post*.

Dr. Robert Taub, an acquaintance of Silver, was a physician and researcher at Columbia-Presbyterian Hospital who specialized in mesothelioma. In the fall of 2003, Dr. Taub encountered Silver at an event and asked him to encourage W&L to donate money to mesothelioma research.[7] Silver, without consulting anyone at the firm, responded that he could not get W&L to do so.

Within two weeks, however, Silver asked Dr. Taub to refer mesothelioma cases to W&L through him.[8] Responding to that request in November of 2003, Dr. Taub started referring mesothelioma patients to Silver for legal representation. He also provided Silver with names and contact information of unrepresented mesothelioma patients seeking counsel. Dr. Taub sought to develop a relationship with Silver that would help him receive research funding, much of which came from state and federal appropriations. Although unaware of the specifics of the financial arrangement between Silver and W&L, Dr. Taub testified that he believed Silver would benefit personally from the mesothelioma leads. And indeed, Silver conveyed to Dr. Taub that he was "pleased with the referrals that he was getting."[9]

Dr. Taub was soon informed that Silver was considering providing him with state funding for his mesothelioma research. Shortly thereafter, in early January 2004, Dr. Taub sent a letter to Silver requesting state funding. While this grant was under consideration, Dr. Taub continued to send Silver mesothelioma leads. And over a

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[7] Dr. Taub believed that firms that profit from mesothelioma cases should donate to support mesothelioma research. And indeed, other law firms had provided such charitable contributions.

[8] Silver conveyed this request through Daniel Chill, a mutual friend of Dr. Taub and Silver.

[9] Trial Transcript ("Tr.") 274.

year later, in March of 2005, Silver received his first referral fee check from W&L in the amount of $176,048.02.

Silver soon secured two $250,000 state grants for Columbia University to support Dr. Taub's research. These grants originated from the New York Health-Care Reform Act ("HCRA") Assembly Pool, a pool of discretionary funds that Silver alone controlled as Speaker. Silver approved the first grant in July of 2005, a few months after receiving his first referral check.[10] Silver approved the second grant more than a year later, in August of 2006.[11] Silver did not publicly disclose the grants or his interactions with Dr. Taub, nor did he ever inquire about the progress of Dr. Taub's research. Dr. Taub assumed that his mesothelioma referrals were a factor in Silver's decision to approve the grants, and sought to receive additional grant money on an annual basis.

In 2007, New York law changed to require public disclosure of HCRA grants, and disclosure of any potential conflicts of interest between legislators and recipients of legislative grants.[12] Responding to this change, Silver informed Dr. Taub that any further requests for state grants would not be approved.[13] Nevertheless, Dr. Taub

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[10] Prior to the first grant approval, Silver invited Dr. Taub to the 2005 State of the State ceremony at the New York State Capitol and put him in touch with a staffer to discuss the status of the grant. Though the Government argued at its summation that these were "official acts" by Silver, it no longer relies on these actions on appeal.

[11] While Silver approved the second grant on August 25, 2006, the grant was actually made on November 30, 2006.

[12] The record does not establish whether any other ethics obligations applying to public officials in New York State required disclosure of potential conflicts prior to the 2007 enactment.

[13] Dr. Taub had previously sent a letter to Silver on October 11, 2007 requesting a third grant of HCRA funding.

continued to send mesothelioma client leads to Silver to maintain their relationship and keep Silver "incentivized."[14]

Silver continued to help Dr. Taub during this time with two other actions:

- In January of 2007, Silver had his office staff call a state trial judge to ask him to hire Dr. Taub's daughter, a student at Fordham University Law School, as an unpaid intern.
- In May of 2008, Silver awarded $25,000 in state grant funding to the Shalom Task Force, a non-profit entity devoted to helping victims of domestic violence, of which Dr. Taub's wife was a board member.

In 2010, Dr. Taub started sending mesothelioma leads to another law firm that had started funding his research. In response, on May 25, 2010, Silver went to Dr. Taub's office to complain that he was receiving fewer referrals. Their conversation prompted Dr. Taub to continue to send referrals to Silver in order to maintain a relationship with him that would possibly lead to future funding for his mesothelioma research. As he noted in an e-mail to a colleague on the day of his meeting with Silver, "I will keep giving cases to Shelly [Silver] because I may need him in the future—he is the most powerful man in New York State."[15]

In fact, Silver would not approve any more grants for Dr. Taub (and he had not done so since August of 2006). Silver did do three additional favors for Dr. Taub, however.

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[14] Tr. 340.

[15] Special App'x 1009.

- In May of 2011, Silver had his staff prepare an Assembly resolution with an official proclamation commending Dr. Taub. Silver sponsored the resolution on the floor of the Assembly and presented it to Dr. Taub at a public event.
- In the fall of 2011, Silver agreed to help Dr. Taub "navigate" the process of securing permits for a proposed New York City charity race in Silver's district to benefit mesothelioma research. Dr. Taub thought at the time that Silver would likely want referrals in return for his help. Ultimately, the law firm working with Dr. Taub to organize the race decided not to pursue the event, and the race never took place.
- In 2012, at the request of Dr. Taub, Silver helped Dr. Taub's son obtain a job with OHEL Children's Home & Family Services ("OHEL"), a non-profit organization devoted primarily to providing social services to Jewish populations,[16] that received millions in discretionary state funding controlled solely by Silver. To help Dr. Taub's son, Silver called OHEL's chief executive officer twice and sent him a letter on Assembly letterhead. Silver had not previously asked, nor did he subsequently ask, OHEL to hire anyone else.

Dr. Taub continued to provide mesothelioma leads to Silver through at least 2013. In total, over the course of ten years, Silver received roughly $3 million in referral fees for cases referred to W&L by Dr. Taub.

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[16] While OHEL engages in many social services, the most prominent service discussed at trial was a summer camp for disabled children.

B. The Real Estate Scheme[17]

Silver's second alleged scheme involved two major New York real estate developers: Glenwood Management ("Glenwood") and the Witkoff Group ("Witkoff") (jointly, the "Developers"). Of course, like other real estate interests, both companies depended heavily on favorable state legislation, including rent regulation and tax abatement legislation. The Developers also depended on tax-exempt financing, which must be approved by the Public Authorities Control Board ("PACB").

Silver held considerable control over legislation covering these issues and over PACB approvals. As Speaker, he had *de facto* veto power over all legislation since he could prevent any legislation that he opposed from coming to a vote. Also, as a voting member on the PACB, Silver had the power to unilaterally prevent the PACB from approving applications for state financing.[18]

As with the Mesothelioma Scheme, Silver allegedly sought to enrich himself through referral fees from a law firm. In this scheme, however, that law firm was Goldberg & Iryami ("G&I"), the firm of Jay Arthur Goldberg, a former staffer and friend of Silver. Goldberg specialized in tax certiorari work, which involves challenges to property owners' real estate tax assessments. The Developers pursued tax certiorari cases to reduce the property taxes of their buildings.

To enrich himself, Silver allegedly induced the Developers to hire Goldberg, who had agreed to pay Silver a

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[17] For a timeline of the Real Estate Scheme, see Addendum B, *post*.

[18] PACB bond approvals for tax-exempt state financing are typically *pro forma* and votes may be cast by a proxy. One Government witness testified that, in his experience, no PACB applications had been denied.

percentage of the resulting legal fees. In 1997, at a time when important real estate legislation was due for renewal, Silver referred Glenwood to Goldberg. In 2005, Silver did the same for Witkoff, stating that his friend Goldberg needed business. In response, Glenwood and Witkoff moved some of their tax certiorari work from other law firms to G&I, which they continued to do over time. Of the fees G&I earned from its Glenwood and Witkoff matters, Silver received a referral fee—twenty-five percent of what G&I earned from Glenwood matters and fifteen percent of what G&I earned from Witkoff matters.

The Developers did not know of Silver's financial arrangement with Goldberg at the time. Neither company, however, wanted to alienate Silver, given their need for Silver's approval of favorable legislation. Both testified that they gave tax certiorari work to Goldberg to influence Silver's legislative work concerning real estate. Witkoff also wanted access to Silver to discuss pending legislation that affected its business.

In return for these alleged kickbacks, Silver took a number of actions to benefit the Developers:

- Through a proxy, Silver repeatedly voted as one of three members of the PACB to approve Glenwood's requests for tax-exempt financing for many of its projects. These votes occurred repeatedly over the course of Silver's tenure as Speaker.
- Silver regularly approved and voted for rent and tax abatement legislation sought by Glenwood. In particular, in June of 2011, Silver met with Glenwood lobbyists in advance of negotiating pending real estate legislation to ensure that Glenwood was satisfied with the terms of the legislation. He then supported and voted in favor of the Rent Act of

2011 and tax abatement renewal legislation later that month, both of which benefited Glenwood.

- Later in 2011, Silver publicly opposed the relocation of a methadone clinic that was to be located near one of Glenwood's rental buildings in Silver's district.

In a late 2011 phone call, Silver informed a Glenwood lobbyist of his fee-sharing arrangement with Goldberg. This disclosure was prompted by G&I's decision to send new retainer agreements to Glenwood that referenced Silver. Silver told the Glenwood lobbyist that he wanted his fee-sharing arrangement with Goldberg to continue, and that the arrangement was not problematic since the fees came from a Glenwood limited liability company. Glenwood, despite its reservations, executed a confidential "side letter" agreement with G&I—separate from the firm's retainer agreement—consenting to the fee arrangement. This letter was kept secret from the public and from Glenwood's own chief financial officer.[19] Witkoff learned of the fee-sharing arrangement in June of 2014 on a call with Goldberg, who had received a grand jury subpoena in connection with the Government's investigation of Silver.

In total, over a period of about 18 years, Silver received approximately $835,000 in fees from G&I for his referral of the Developers.

C. The Money Laundering Scheme

Silver allegedly laundered the proceeds of the Mesothelioma and Real Estate Schemes by investing them in high-yield, private investment vehicles with the help of

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[19] The record does not establish whether Silver was under any legal obligation, as a public official or private lawyer, to disclose publicly this secret side letter with G&I.

Jordan Levy, a private investor.[20] At one point, Silver instructed Levy to place one half of an investment in his wife's name to avoid publicly disclosing the full amount of the investment.

II. Procedural History

A. Indictment

In February of 2015, Silver was indicted for engaging in schemes "to deprive the citizens of [New York State] of his honest services as an elected legislator and as Speaker of the Assembly by using the power and influence of his official position to obtain for himself millions of dollars in bribes and kickbacks . . . ."[21] The charges against him consisted of four counts of honest service fraud, two counts of Hobbs Act extortion, and one count of money laundering.[22]

The Government's theory underlying its honest services fraud and Hobbs Act extortion charges was that Silver had accepted bribes and kickbacks in exchange for official acts.[23] To succeed on a bribery theory of honest

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[20] Levy was unaware of the source of Silver's funds.

[21] App'x 97.

[22] See 18 U.S.C. §§ 1341, 1343, 1346 (honest services fraud); *id.* § 1951 (Hobbs Act extortion); *id.* § 1957 (money laundering). Specifically, Counts One and Two charged Silver with honest services mail fraud and wire fraud, respectively, in connection with the Mesothelioma Scheme. Counts Three and Four did the same as to the Real Estate Scheme. Counts Five and Six charged Silver with Hobbs Act extortion in connection with the Mesothelioma Scheme and Real Estate Scheme, respectively. And Count Seven charged Silver with money laundering.

[23] See *Skilling* v. *United States*, 561 U.S. 358, 404 (2010) (construing honest services fraud to forbid "fraudulent schemes to deprive another of honest services through bribes or kickbacks"); *Evans* v. *United States*, 504 U.S. 225, 260 (1992) (construing Hobbs Act extortion to include "taking a bribe").

services fraud and Hobbs Act extortion, the Government had to prove, beyond a reasonable doubt, the existence of a *quid pro quo* agreement—that the defendant received, or intended to receive, something of value in exchange for an official act.[24]

B. Trial and Jury Instructions

Before trial, Silver and the Government presented proposed jury instructions to the District Court on how to define an "official act." Silver's initial proposed instructions sought to define "official act" by quoting 18 U.S.C. § 201(a)(3), the federal bribery statute: "[a]n 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity."[25] The Government's proposed instruction, in contrast, sought to define an official act more broadly as "any act taken under color of official authority."[26]

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[24] See *United States* v. *Bruno*, 661 F.3d 733, 743-44 (2d Cir. 2011) (in a prosecution of honest services fraud under a bribery theory, "[t]he key inquiry is whether, in light of all the evidence, an intent to give or receive something of value in exchange for an official act has been proved beyond a reasonable doubt"); *United States* v. *Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) ("[T]he offense [of Hobbs Act extortion] is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts . . . ." (quoting *Evans*, 504 U.S. at 268)); see also *id.* at 141 (honest services fraud and Hobbs Act extortion "criminalize[ ], in some respect, a *quid pro quo* agreement—to wit, a government official's receipt of a benefit in exchange for an act he has performed, or promised to perform, in the exercise of his official authority").

[25] App'x 188 (tracking verbatim the language of 18 U.S.C. § 201(a)(3)).

[26] *Id.* at 190.

Silver's trial began on November 2, 2015, and lasted nearly a month. At the charge conference on November 19, 2015, the parties once again addressed the definition of an "official act" in the jury instructions. This time, Silver proposed a new "official act" instruction: "To prove an 'official act,' the government must prove the exercise of actual governmental power, the threat to exercise such power, or pressure imposed on others to exercise actual government power."[27] The Government urged a broader instruction—that "[o]fficial action includes *any action* taken or to be taken under color of official authority."[28]

The District Court declined to include Silver's proposed instructions and ultimately adopted the Government's official act language in its final jury charge.[29] The District Court instructed the jury that to prove honest services fraud, the Government must "prove, beyond a reasonable doubt, . . . that Silver received bribes or kickbacks as part of a scheme to defraud."[30] The District Court explained:

> To satisfy this element, the Government must prove that there was a *quid pro quo*. *Quid pro quo* is Latin, and it means "this for that" or "these for those." The Government must prove that a bribe or kickback was sought or received by Mr. Silver, directly or indirectly, in exchange for the promise or performance of official action. Official action includes *any action taken or to be taken under color of official authority*.[31]

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[27] *Id.* at 591.

[28] Tr. 2785-86 (emphasis added).

[29] *Id.* at 2786.

[30] App'x 629.

[31] *Id.* (emphasis added).

In its Hobbs Act extortion instructions, the District Court also instructed that the Government must prove a *quid pro quo*—specifically, that "property was sought or received by Mr. Silver, directly or indirectly, in exchange for the promise or performance of official action."[32] The District Court did not redefine official action in its extortion charge, but did explicitly reference the earlier honest services fraud charge when setting forth the *quid pro quo* requirement as an element of extortion.[33]

The District Court also provided the following charge regarding the five-year statute of limitations for honest services fraud and Hobbs Act extortion:[34]

> The statute of limitations for each of the charged crimes is five years. If you find that Mr. Silver engaged in a scheme to commit honest services fraud, extortion or money laundering, but no aspect of the particular scheme occurred after February 19, 2010, then you must acquit on that charge because it is barred by the statute of limitations. If, on the other hand, you find that any aspect of the crime you are considering continued on or after February 19, 2010, then the statute of limitations as to that charge has been complied with.[35]

After three days of deliberation, on November 30, 2015, the jury found Silver guilty on all seven counts. Silver timely moved for a judgment of acquittal or, in the alternative, a new trial pursuant to Rules 29 and 33 of the

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[32] *Id.* at 635.

[33] *Id.*

[34] 18 U.S.C. § 3282.

[35] App'x 644.

Federal Rules of Criminal procedure.[36] The District Court denied those motions in a written opinion on May 3, 2016.[37]

C. Sentencing and Post-Sentencing Motions

On May 4, 2016, the District Court sentenced Silver to twelve years of imprisonment, to be followed by three years of supervised release. It also imposed $5.4 million in forfeiture, and a $1.75 million fine. The court entered its final judgment on May 10, 2016.

On May 13, 2016, Silver moved to continue bail and stay the financial penalties pending appeal. Silver relied largely on arguments raised in *McDonnell*, which was then pending before the Supreme Court and would address the definition of an "official act" for honest services fraud and Hobbs Act extortion violations.[38] On June 27, 2016, the Supreme Court decided *McDonnell*. Soon thereafter, on August 25, 2016, the District Court grant-

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[36] Under Rule 29, after the Government closes its case, "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Rule 33 states, in relevant part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Here, Silver moved for a judgment of acquittal at the close of the Government's case, and the District Court reserved decision until after the jury verdict. Silver renewed his Rule 29 motion after the verdict, and moved for a new trial, pursuant to Rule 33, based on various evidentiary rulings made by the District Court. See *United States* v. *Silver*, 184 F. Supp. 3d 33, 37, 52 (S.D.N.Y. 2016).

[37] *Silver*, 184 F. Supp. 3d at 54.

[38] The District Court initially adjourned Silver's deadline to begin paying the fine and forfeiture to August 15, 2016, adjourned Silver's surrender date to August 31, 2016, and moved briefing on Silver's bail motion to after the Supreme Court decided *McDonnell*.

ed Silver's motion for bail pending appeal.[39] In a thoughtful opinion, the District Court concluded that while Silver's case is "factually almost nothing like *McDonnell*[,] . . . there is a substantial question whether, in light of *McDonnell*, the [jury] charge was in error and, if so, whether the error was harmless."[40]

DISCUSSION

On appeal, in addition to various arguments challenging the sufficiency of the evidence against him, Silver primarily argues that the District Court's jury instructions on the definition of an "official act" in its honest service fraud and extortion charges were erroneous under *McDonnell*.[41] He thus contends that we should vacate and remand the honest services fraud and extortion counts against him for a new trial. Silver also argues that if we vacate those counts, we necessarily must vacate the money laundering count against him.[42]

I. Sufficiency of the Evidence

"We review *de novo* challenges to the sufficiency of evidence, but must uphold the conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[43] To conduct this review, "we view the evidence in the light most favorable to the government, crediting every inference that could

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[39] *United States* v. *Silver*, 203 F. Supp. 3d 370 (S.D.N.Y. 2016).

[40] *Id.* at 380.

[41] Silver also claims that the District Court improperly admitted certain evidence. Because we vacate and remand Silver's judgment of conviction on all counts due to erroneous jury instructions, we do not reach this additional argument.

[42] Def. Br. at 45 n.2; see also *Silver*, 203 F. Supp. 3d at 376 n.6.

[43] *United States* v. *Vernace*, 811 F.3d 609, 615 (2d Cir. 2016) (internal quotation marks omitted).

have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence."[44] Silver raises three challenges to the sufficiency of the evidence against him, none of which have merit.

A. Hobbs Act Extortion

First, Silver claims that the Government failed to prove Hobbs Act extortion because there was no evidence that that he deprived anyone of property. This argument is belied by the record.

The Hobbs Act defines extortion, as applicable here, as "obtaining . . . property from another, with his consent, induced . . . under color of official right."[45] The "property" at issue in a Hobbs Act extortion violation must be "something of value from the victim that can be exercised, transferred, or sold."[46] Here, the evidence supports a deprivation of property as to both schemes.[47] Specifically, both the mesothelioma leads and the tax certiorari business from which Silver profited were valuable and transferable property (albeit intangible property). By engaging in the alleged schemes, Silver is said to have deprived Dr. Taub, the Developers, and other law firms of property.

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[44] *United States* v. *Babilonia*, 854 F.3d 163, 174 (2d Cir. 2017) (internal quotation marks omitted).

[45] 18 U.S.C. § 1951(b)(2).

[46] *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013)

[47] The Government further contends that a deprivation of property is not an essential element of a Hobbs Act extortion violation. Because a deprivation of property occurred on the record before us, we do not reach that question here.

B. Honest Services Fraud

Second, Silver argues that he engaged in mere "undisclosed self-dealing," and that, accordingly, the Government failed to prove a "paradigmatic bribe or kickback" for its honest services fraud charges, as required by *Skilling* v. *United States*.[48] This argument is likewise contradicted by the record.

In *Skilling*, the Supreme Court in 2010 clarified that honest services fraud "does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks," and includes instances where a defendant "solicited or accepted side payments from a third party."[49] Here, both the mesothelioma leads and tax certiorari business indisputably came from Dr. Taub and the Developers, which resulted in payments to Silver from other third parties, W&L and G&I. These payments, solicited by Silver, were thus bribes or kickbacks within the meaning of *Skilling*, not mere "undisclosed self-dealing by a public official" as Silver argues.[50]

C. Money Laundering

Lastly, Silver argues that the Government failed to prove its money laundering count because the proceeds of his two schemes had been commingled into an account with untainted funds. To convict Silver of money laundering under 18 U.S.C. §1957, the Government was re-

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[48] 561 U.S. 358, 409-11 (2010).

[49] *Id.* at 411, 413.

[50] *Id.* at 410. "In . . . self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." *United States* v. *Rybicki*, 354 F.3d 124, 140 (2d Cir. 2003) (en banc). The evidence at trial demonstrated that Silver's proven conduct, in colluding with Dr. Taub and the Developers, went far beyond undisclosed self-dealing.

quired to prove that Silver "knowingly engage[d] or attempt[ed] to engage in a monetary transaction in criminally derived property of a value greater than $10,000," and that the property was "derived from specified unlawful activity."[51] Silver thus argues that because he deposited the proceeds of his schemes into an account with legitimate funds, the Government could not prove that the funds at issue were criminally derived.

We have not yet addressed whether the Government must trace "dirty" funds comingled with "clean" funds in order to prove money laundering under Section 1957. Silver relies on the view of the Fifth and Ninth Circuits, which both require the Government to trace criminally derived proceeds when they have been commingled with funds from legitimate sources to prove money laundering under Section 1957.[52] This view, however, is a minority one.[53]

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[51] 18 U.S.C. § 1957(a).

[52] See *United States* v. *Loe*, 248 F.3d 449, 467 (5th Cir. 2001) ("[W]here an account contains clean funds sufficient to cover a withdrawal, the Government can not prove beyond a reasonable doubt that the withdrawal contained dirty money."); *United States* v. *Rutgard*, 116 F.3d 1270, 1292-93 (9th Cir. 1997) (Section 1957 "does not create a presumption that any transfer of cash in an account tainted by the presence of a small amount of fraudulent proceeds must be a transfer of these proceeds").

[53] See *United States* v. *Braxtonbrown-Smith*, 278 F.3d 1348, 1354 (D.C. Cir. 2002) (*Rutgard*'s "holding that tracing is required under § 1957 is a minority view" (citing *United States* v. *Sokolow*, 91 F.3d 396, 409 (3d Cir. 1996); *United States* v. *Moore*, 27 F.3d 969, 976 (4th Cir. 1994); *United States* v. *Johnson*, 971 F.2d 562, 570 (10th Cir. 1992))); see also *United States* v. *Haddad*, 462 F.3d 783, 792 (7th Cir. 2006); *United States* v. *Pizano*, 421 F.3d 707, 723 (8th Cir. 2005); *United States* v. *Richard*, 234 F.3d 763, 768 (1st Cir. 2000).

We, on the other hand, adopt the majority view of our sister Circuits—that the Government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of Section 1957. Because money is fungible, once funds obtained from illegal activity are combined with funds from lawful activity in a single account, the "dirty" and "clean" funds cannot be distinguished from each other.[54] As such, "[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds."[55] Accordingly, we reject Silver's sufficiency challenge to his money laundering conviction.

II. *McDonnell* v. *United States*

Having determined that the evidence was sufficient to prove the counts of conviction against Silver, we now turn to Silver's challenge to the District Court's jury instructions under *McDonnell*.

The Supreme Court in *McDonnell* addressed what qualifies as an "official act" in an honest services fraud or Hobbs Act extortion *quid pro quo*. Robert McDonnell, the former Governor of Virginia, was charged with, among other things, honest services fraud and Hobbs Act extortion.[56] While McDonnell was in office, he and his wife accepted $175,000 in loans, gifts, and other benefits from businessman Jonnie Williams, who was the chief executive officer of Star Scientific, a Virginia-based company that developed a nutritional supplement made from

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[54] *Moore*, 27 F.3d at 976-77.

[55] *Id.* at 977.

[56] *McDonnell*, 136 S. Ct. at 2361.

antabine, a compound found in tobacco.[57] Williams sought to have Virginia's public universities conduct research on the nutritional supplement, and sought McDonnell's help to make these studies happen.[58] At trial and on appeal, the Government argued that McDonnell performed certain official acts to help Williams in exchange for William's loans and gifts.[59] These official acts included arranging meetings with state government officials to discuss the supplement, hosting and attending events at the Governor's Mansion for Star Scientific, and contacting other government officials to encourage antibine studies at Virginia state universities.[60]

The parties in *McDonnell* agreed that the jury charge should define an "official act" by quoting the federal bribery statute, 18 U.S.C §201(a)(3), which defines an official act as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[61] The *McDonnell* district court defined "official act" accordingly for the jury,[62] and further instructed it that official acts "encompassed acts that a public official customarily performs, including acts in furtherance of longer-term goals or in a series of steps to exercise influence or achieve an

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[57] *Id.*

[58] *Id.*

[59] *Id.* at 2365.

[60] *Id.*

[61] This is the same statute quoted by Silver in his proposed "official act" jury instructions. App'x 188; see also text accompanying note 25, *ante*.

[62] *McDonnell*, 136 S. Ct. at 2365-66.

end."[63] The jury convicted McDonnell of honest services fraud and extortion, and the U.S. Court of Appeals for the Fourth Circuit affirmed.[64]

The Supreme Court, however, unanimously vacated the Fourth Circuit's judgment and remanded the case.[65] The Court ruled that the jury was incorrectly instructed on the meaning of an "official act," and that this error was not harmless because it may have convicted McDonnell for conduct that is not unlawful.[66]

Relying on the federal bribery statute's definition of "official act," the Court held that "an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.'"[67] The Court set forth a two-part test to meet this definition.

First, "[t]he 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of gov-

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[63] *Id.* at 2366 (internal quotation marks omitted).

[64] *Id.* at 2366-67.

[65] *Id.* at 2375.

[66] *Id.*

[67] *Id.* at 2371. With its holding, the Supreme Court did not hold that § 201(a)(3) of the federal bribery statute must *necessarily* be the exclusive source for the definition of an official action in every honest services fraud and Hobbs Act extortion case. Since "the parties agreed that they would define honest services fraud with reference to the federal bribery statute," the Court incorporated § 201(a)(3)'s definition of an official act into the bribery requirement for honest services fraud and extortion without explanation. See *McDonnell*, 136 S. Ct. at 2365-67. In this case, however, while the parties did not agree to apply § 201(a)(3)'s definition of "official act" at trial, they each apply the "official act" definition from *McDonnell* in support of their arguments on appeal. Neither party argues for an alternative definition that would allay the constitutional concerns expressed in *McDonnell*. Accordingly, we apply *McDonnell*'s definition of an "official act," as derived from § 201(a)(3).

ernmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[68] The Court further clarified that this question, matter, cause, suit, proceeding or controversy "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official."[69]

Second, "to qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so."[70] Such an action or decision "may include using [an] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official."[71] Without more, "setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)," are not official acts.[72]

The Supreme Court emphasized that the Government's "expansive interpretation of 'official act' would raise significant constitutional concerns."[73] Those concerns included the criminalization of virtually all actions taken on behalf of constituents, subjecting public officials

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[68] *Id.* at 2372.

[69] *Id.* The Supreme Court interpreted "pending" and "may by law be brought" as "something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 2359. In addition, the Supreme Court understood "may by law be brought" to connote "something within the specific duties of an official's position." *Id.*

[70] *Id.* at 2372.

[71] *Id.*

[72] *Id.*

[73] *Id.*

to prosecution without fair notice due to the vagueness of the Government's definition, and setting standards of good government for local and state official in contravention of federalism principles.[74]

Applying these principles to McDonnell's case, the Supreme Court found that the district court's jury charge did not include three instructions that should have been given. Specifically, the Court held that the district court should have instructed the jury:

- that it "must identify a 'question, matter, cause, suit, proceeding or controversy' involving the formal exercise of governmental power"[75];
- that "the pertinent 'question, matter, cause, suit, proceeding or controversy' must be something specific and focused that is 'pending' or 'may by law be brought before any public official'"[76]; and,
- that "merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter."[77]

III. Honest Services Fraud and Hobbs Act Extortion Counts under *McDonnell*

Based on *McDonnell*, Silver now challenges the District Court's jury instructions on the definition of "official act" in its honest services fraud and Hobbs Act extortion charges. Where a defendant has timely objected, as Silver did below, "we review a district court's jury charge *de novo*, and will vacate a conviction for an erroneous charge

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[74] *Id.* at 2372-73.

[75] *Id.* at 2374.

[76] *Id.*

[77] *Id.* at 2375.

unless the error was harmless."[78] It is well settled that "[a]n erroneous instruction, unless harmless, requires a new trial."[79]

We first consider whether the instructions were indeed in error, before turning to whether the Government met its burden of proving beyond a reasonable doubt that any such error was harmless.

A. The Jury Instruction under *McDonnell*

We consider a jury instruction erroneous "if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law."[80] When conducting this review, "we examine the charges as a whole to see if the entire charge delivered a correct interpretation of the law."[81]

Upon review of the jury charge in this case, we conclude that the District Court's jury instruction defining an official action in its honest services fraud and Hobbs Act extortion charges was erroneous under *McDonnell*. The District Court's charge, encompassing "*any action* taken or to be taken under color of official authority,"[82] was overbroad. Like the improper instruction in *McDonnell*, the plain language of the instruction at Silver's trial captured lawful conduct, such as arranging meetings or hosting events with constituents. Further, the District Court's charge did not contain any of the three instructions specified in *McDonnell*.

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[78] *United States* v. *Nouri*, 711 F.3d 129, 138 (2d Cir. 2013).

[79] *United States* v. *Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (internal quotation marks omitted).

[80] *United States* v. *Finazzo*, 850 F.3d 94, 105 (2d Cir. 2017) (internal quotation marks omitted).

[81] *Quattrone*, 441 F.3d at 177 (internal quotation marks omitted).

[82] App'x 629 (emphasis added).

It bears recalling that the purpose of a proper charge is to give the jury guideposts as to what would qualify as criminal wrongdoing under the law. Here, the instructions did not convey to the jury that an official action must be a decision or action on a matter involving the formal exercise of government power akin to a lawsuit, hearing, or agency determination. Nor did the instructions prevent the jury from concluding that meetings or events with a public official to discuss a given matter were official acts by that public official. The Government's own summation confirms that the jury instructions conveyed an erroneous understanding of the law as clarified by *McDonnell*. The Government expressly urged the jury to convict because an official act "*is not limited* to voting on a bill, making a speech, passing legislation, *it is not limited to that*," but rather, includes "*any action* taken or to be taken under color of official authority."[83] The Government thus directly argued that the District Court's instruction defining an official act was broader than the formal exercise of government power described in *McDonnell*. Accordingly, the jury could not have received a correct interpretation of the law.[84]

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[83] Tr. 2857 (emphasis added).

[84] In *United States* v. *Boyland*, we recently rejected overbroad jury instructions that did not comport with *McDonnell*. No. 15-3118, — F.3d —, 2017 WL 2918840 (2d Cir. July 10, 2017). Specifically, we rejected an honest services fraud instruction defining an official act as "decisions o[r] actions generally expected of a public official, including but not limited to contacting or lobbying other governmental agencies, and advocating for his constituents," and a Hobbs Act extortion instruction stating that the jury needed to find that the defendant "knew that any money he accepted was offered in exchange for a specific exercise of [the defendant's] official powers." *Id.* at *6, *8-*9. We similarly reject the official act instructions given at Silver's trial because of the "constitutional concerns stemming from the

The Government argues that the District Court's charge, taken as a whole, was consistent with Silver's proposed additional instructions and with *McDonnell*. To salvage the District Court's instructions, the Government points to language requiring that Silver "intend[ed] to be influenced in the performance of his public duties"; "was expected to exercise official influence or make official decisions" as a result of bribes or kickbacks; and "intended to do so as specific opportunities arose."[85] We are not persuaded that the terms "public duties," "official influence," and "official decisions" convey the requisite specificity that, to qualify as an "official act," the given "question, matter, cause, suit, proceeding or controversy" must involve the *formal exercise* of governmental power; nor do these terms specify that the "question, matter, cause, suit, proceeding or controversy" must be specific and focused like a hearing or lawsuit.[86] Moreover, whatever limiting effect this language may have had was undone by the District Court's broad instruction that an official action included "*any action* taken under color of official authority."[87]

Though we conclude that the jury instructions at Silver's trial were erroneous, we do not ascribe fault to the District Court or to the Government. The instructions at the trial, given prior to the Supreme Court's decision in *McDonnell*, were consistent with our precedent at the

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breadth of the interpretation advanced by the government." *Id.* at *9.

[85] App'x 629-30.

[86] See *McDonnell*, 136 S. Ct. at 2371-72.

[87] App'x 629 (emphasis added).

time.[88] Indeed, we commend the District Court's forthrightness in acknowledging, after *McDonnell* was decided, that its instructions might have been in error.[89]

B. Harmlessness

The Government contends that even if the jury instructions were in error under *McDonnell*, the error was harmless. We will find an erroneous jury instruction harmless "only if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"[90] The Government bears the burden of establishing harmlessness.[91]

As explained below, we cannot conclude, beyond a reasonable doubt, that a rational jury would have found Silver guilty if it had been properly instructed on the definition of an official act. While the Government presented evidence of acts that remain "official" under *McDonnell*, the jury may have convicted Silver for conduct that is not unlawful, and a properly instructed jury might have reached a different conclusion.[92]

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[88] See, *e.g.*, *United States* v. *Rosen*, 716 F.3d 691, 700 (2d Cir. 2013); see also App'x 599 (documenting that Silver conceded that his proposed instruction was supported only by "out-of-circuit authority").

[89] *Silver*, 203 F. Supp. 3d at 381.

[90] *United States* v. *Sheehan*, 838 F.3d 109, 121 (2d Cir. 2016) (quoting *Neder* v. *United States*, 527 U.S. 1, 18 (1999)).

[91] *Quattrone*, 441 F.3d at 181.

[92] In *Boyland*, we affirmed the defendant's conviction despite finding that the jury instructions were erroneous under *McDonnell*. We note, however, that in addition to the clear factual differences of that case, *Boyland* did not apply a harmless error standard of review because the defendant in that case did not object to the jury instructions. *Boyland*, 2017 WL 2918840, at *6-*7, *9-*10.

1. *Mesothelioma Scheme*

With a *McDonnell* instruction, it is possible that a rational jury would not find that Silver engaged in a *quid pro quo* to exchange official acts for Dr. Taub's referrals.

In this case, the statute of limitations is critical to our analysis. As previously noted, both honest services fraud and Hobbs Act extortion charges have a five-year statute of limitations.[93] Here it only captures conduct occurring after February 19, 2010, five years before the indictment against Silver.[94] Only three acts proven by the Government fall within the statute of limitations: obtaining an Assembly resolution honoring Dr. Taub, agreeing to assist Dr. Taub with acquiring permits for a charity race, and helping Dr. Taub's son secure a job with a non-profit receiving state funding.[95] Of those acts, only the Assembly resolution clearly remains an "official act" under *McDonnell*. As such, the jury may have convicted Silver by relying on acts within the statute of limitations period that are no longer "official" under *McDonnell*. And a rational jury might not have convicted had the charge more fully described an "official act."

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[93] 18 U.S.C. § 3282.

[94] The other acts proven by the Government—approving the HCRA grants, helping Dr. Taub's daughter obtain an unpaid internship with a state court judge, and approving the grant to the Shalom Task Force—all occurred well outside of the statute of limitations and by themselves cannot support Silver's conviction. Silver does not dispute that the HCRA grants and the Shalom Task Force grant are "official acts" as defined by the Supreme Court in *McDonnell*. Silver's intervention on behalf of Dr. Taub's daughter to secure an unpaid internship, however, is not as clearly "official." We need not reach that question since this intervention occurred outside the statute of limitations period.

[95] See Addendum A.

First, a rational jury might have concluded that Silver did not engage in an official act when he agreed to help Dr. Taub with permits for his charity race. The Government's evidence showed that Dr. Taub, along with others, met with Silver at Silver's New York City office regarding the race. Silver then sent Dr. Taub a letter on Assembly letterhead offering to "help navigate the process if needed."[96] To conclude that this act was "official" under the teachings of *McDonnell*, the jury would have to find that Silver sought to "us[e] his official position to exert pressure on another official to perform an 'official act'"—in this case, to issue permits to Dr. Taub.[97] We cannot conclude the jury would have done so. Indeed, a rational jury with a proper jury instruction could have found that Silver's letter offering general assistance with an event occurring in his district—absent any actual "exert[ion] [of] pressure" on other officials regarding a particular matter under their consideration—did not satisfy the standards for an official act as defined by *McDonnell*.[98]

Similarly, a rational jury with a proper *McDonnell* instruction might find that Silver's letter to OHEL on behalf of Dr. Taub's son did not rise to the level of an "official act." In its summation, the Government emphasized that Silver recommended Dr. Taub's son "on official As-

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[96] App'x 706.

[97] *McDonnell*, 136 S. Ct. at 2372.

[98] *Id.* at 2369. In *Boyland*, we affirmed in part because, in exchange for money, "Boyland agreed to ensure that favorable governmental decisions would be made, whether for licensing, work contracts, zoning, or funding." *Boyland*, 2017 WL 2918840, at *10. That agreement, however, was far more explicit than the offer made by Silver here to help Dr. Taub "navigate" the permit process.

sembly letterhead."[99] But using government letterhead is not, by itself, a formal exercise of government power on a matter similar to a hearing or lawsuit. Moreover, even assuming, as the Government contends, that Silver used his official position to "exert pressure" on the chief executive officer of OHEL, there is no evidence in the record that Silver or anyone else threatened to withhold OHEL funding.[100] To be sure, a rational juror might well believe hiring should be based solely on "the merits" rather than on the recommendations of successful, powerful, or informed figures, and thus view negatively recommendation letters of the sort here. But viewing something negatively is not the same as finding that the elements of a crime have been met. We cannot conclude, beyond a reasonable doubt, that the jury would have found that Silver's actions with OHEL met the definition of "official act" as defined in *McDonnell*.

The only proven act remaining within the statute of limitations is thus the resolution and proclamation honoring Dr. Taub. The Government argues, and Silver concedes, that the resolution is an "official act" under *McDonnell*.[101] We agree, but it is not clear beyond a reasonable doubt that a rational jury would have found Silver guilty based on the resolution alone. The resolution honoring Dr. Taub was a clear formal exercise of gov-

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[99] Tr. 2859.

[100] *McDonnell*, 136 S. Ct. at 2369. The District Court, addressing the OHEL issue, stated that using an official position to pressure a non-governmental entity or person could constitute an official act. *Silver*, 203 F. Supp. 3d at 379 n.9, 383-84. We need not address this question here since we merely conclude that, with a proper instruction and on this record, a rational jury could have concluded that Silver's actions with OHEL were not "official" actions.

[101] Gov't Br. at 30, 36; Oral Argument Transcript at 6, 8.

ernment power on a specific matter: it was brought to the floor of the Assembly by Silver and subsequently passed by the Assembly. The evidence at trial, however, established that these honorary resolutions and proclamations were routine, *pro forma* exercises rubber stamped by Assembly members.[102] Indeed, in the past year alone, the Assembly has passed hundreds of honorary resolutions that, among other things, congratulated newly designated Eagle Scouts,[103] celebrated high school sports teams,[104] commended retirees,[105] and commemorated the "retirement" of a jersey worn by a Stony Brook University athlete.[106] A rational jury could thus conclude

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[102] See Tr. 1278-79, 1282-85, 1287, 1289-90.

[103] See, *e.g.*, N.Y. Assemb. Res. 86 (2017) ("Congratulating Bailey Hohwald upon the occasion of receiving the distinguished rank of Eagle Scout . . . ."); N.Y. Assemb. Res. 85 (2017) ("Congratulating Hector Rios, Jr. upon the occasion of receiving the distinguished rank of Eagle Scout . . . ."); N.Y. Assemb. Res. 11 (2017) ("Congratulating Daniel A. Molloy upon the occasion of receiving the distinguished rank of Eagle Scout . . . .").

[104] See, *e.g.*, N.Y. Assemb. Res. 318 (2017) ("Honoring the 2007 Thomas R. Proctor High School Baseball Team upon the occasion of its induction into the Greater Utica Sports Hall of Fame"); N.Y. Assemb. Res. 244 (2017) ("Congratulating the Baldwin High School Girls Basketball Team . . . upon the occasion of capturing the New York State Public High School Athletic Association Class AA Championship . . . .").

[105] See, *e.g.*, N.Y. Assemb. Res. 326 (2017) ("Commending Fire Chief Gerald J. VanDeWalle upon the occasion of his retirement after 40 years of dedicated service to the Newark Volunteer Fire Department"); N.Y. Assemb. Res. 305 (2017) ("Congratulating The Reverend Gary W. Bonebrake, D. Min., upon the occasion of his retirement after 22 years of distinguished service to Main Street Baptist Church in Oneonta, New York").

that, though certainly "official," the prolific and perfunctory nature of these resolutions make them *de minimis quos* unworthy of a *quid*.

The Government, citing the District Court's statute of limitations instruction, primarily argues that it need not prove that Silver committed an official act within the statute of limitations period, only that some aspect of the *quid pro quo* scheme extended into the statute of limitations period.[107] The Government accordingly contends that Silver took action in furtherance of the scheme within the statute of limitations period, including demanding additional referrals from Dr. Taub on May 25, 2010, continuing to receive mesothelioma leads from Dr. Taub, and engaging in various phone calls and mailings in furtherance of the scheme.[108] The Government concludes that, even if the only official actions Silver ever took were the award of the HCRA grants and the Assembly resolution, it is clear beyond a reasonable doubt that the scheme continued into the limitations period.[109]

We agree that the Government need not prove that an official act occurred within the statute of limitations period. The Government need only prove that some aspect of the particular *quid pro quo* scheme continued into the statute of limitations period.[110] Here, however, most of

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[106] See, *e.g.*, N.Y. State Assemb. Res. 46 ("Commemorating the retirement of the No. 20 jersey worn by Stony Brook's Jameel Warney, a three-time America East Player of the Year and the most decorated player in Seawolves basketball history.").

[107] Gov't Br. at 35-36.

[108] *Id.* at 36; see also Special App'x 1425.

[109] Gov't Br. at 36.

[110] See *United States* v. *Rosen*, 716 F.3d 691, 700 (2d Cir. 2013) ("Once the *quid pro quo* has been established, . . . the specific transactions comprising the illegal scheme need not match up this for

the acts relied upon by the Government may no longer be "official." Thus, it is entirely conceivable that a properly instructed rational jury would have viewed the *quid pro quo* scheme as limited to the exchange of referrals *for HCRA grant money*. Assuming that is the case, it is possible that a rational jury could also find that this *quid pro quo* arrangement ended when Silver told Dr. Taub that he would no longer provide him with HCRA grants, which occurred well before the statute of limitations period began to run in 2010. Given this possibility, we cannot say, beyond a reasonable doubt, that a rational jury would have convicted Silver if properly instructed.

2. *Real Estate Scheme*

For the Real Estate Scheme, the Government at trial contended that the following acts by Silver were "official": his PACB proxy votes for bond approvals; his meeting with Glenwood lobbyists prior to the passage of the Rent Act of 2011; his approval of real estate legislation benefiting the Developers, including the Rent Act of 2011; and his opposition to a methadone clinic near a Glenwood property. It is not clear, beyond a reasonable doubt, that a properly instructed rational jury would have found an official act *quid pro quo* based on these acts.

Assuming the jury was properly instructed, it is possible that it would not have considered Silver's opposition to the methadone clinic an official act. The only action Silver took regarding the clinic was to draft a letter to be

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that." (internal quotation marks omitted)); *United States* v. *Smith*, 198 F.3d 377, 384 (2d Cir. 1999) (Hobbs Act extortion is "a continuing offense" in the context of venue); cf. *United States* v. *Rutigliano*, 790 F.3d 389, 400-01 (2d Cir. 2015) (receipt of a payment within the statute of limitations period was an overt act in furtherance of an ongoing conspiracy to commit mail, wire, and health care fraud).

distributed publicly that expressed his strong opposition to the clinic. Taking a public position on an issue, by itself, is not a formal exercise of governmental power, and is therefore not an "official act" under *McDonnell*. The record does not establish that Silver formally used his power as Speaker of the Assembly to oppose the clinic and, accordingly, a rational jury might not have found his opposition to be an "official act."[111]

Similarly, because the District Court's charge did not specifically instruct the jury that a meeting on its own is not official action, it is possible that the jury improperly concluded that the meeting between Silver and Glenwood lobbyists was an official act. This possibility is certainly "reasonable," if not *probable*, in light of the Government's argument during its summation that this meeting, by itself, was an official action.[112] Simply meeting to discuss the terms of the Rent Act of 2011, without more, does not qualify as a "decision" or "action" under *McDonnell*.

The remaining acts proved by the Government—Silver's PACB proxy votes—may not have been enough for a rational, properly instructed jury to conclude that there was a *quid pro quo*. Assuming, *arguendo*, that Silver's PACB and housing legislation votes qualify as "official

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[111] The Government and the District Court both state that there was evidence in the record to suggest that Silver sought to take credit for causing the clinic to be relocated, implying that he did or intended to take some action to oppose the clinic. See *Silver*, 203 F. Supp. 3d at 384 n.14 (citing Tr. 1602-05, 1752-53); Gov't Br. at 43 n.6. While that may be, a rational jury might reach a different conclusion given that there was no evidence presented that Silver took any action to relocate the clinic other than publicly stating his opposition.

[112] Tr. 2892-93.

acts" under *McDonnell*,[113] a rational jury might not view these acts as part of a *quo* exchanged for the Developers' tax certiorari business.

First, a properly instructed rational jury might not have concluded that Silver's legislative votes were part of a *quid pro quo* scheme. There is little else linking Silver's passage of real estate legislation to the Developers' referral fees other than the 2011 meeting between Glenwood lobbyists and Silver. As the District Court rightly noted, the Glenwood meeting was "the most compelling evidence on which a rational jury could have relied to conclude that Silver understood and intended there to be a *quid pro quo*."[114] But even if the jury viewed the Glenwood meeting as circumstantial evidence of a *quid pro quo*, we cannot say beyond a reasonable doubt that a properly instructed jury would have *found* a *quid pro quo* for legislative votes.

Further, a juror could reasonably conclude that the PACB approvals were too perfunctory to be regarded as a *quo*—that is, not part of any fraudulent scheme. There was no evidence adduced that any of the PACB financing approvals were particularly controversial, and one Government witness even stated that, in his experience, the PACB approved *every* financing request.[115]

Accordingly, a rational jury with proper instructions could conclude that Silver's PACB and real estate legisla-

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[113] Silver questions whether votes by a proxy could be official acts performed by him. We need not reach this question of who possessed authority over the acts here.

[114] *Silver*, 184 F. Supp. 3d at 46. Indeed, the jury could have concluded, easily, but mistakenly, that the meeting itself sufficed to show an official act, and gone no further.

[115] Tr. 1957; see also note 18, *ante*.

tion votes were not part of any *quid pro quo* "scheme." The Government characterizes this conclusion—that a rational jury could have concluded that the official acts proven were not part of a *quid pro quo* arrangement—as one necessarily based on sufficiency of the evidence. We disagree. The issue of whether the Government adduced sufficient evidence to support the convictions is distinct from whether it is clear beyond a reasonable doubt that a properly instructed jury would have convicted. We conclude only that, in the matter of the Real Estate Scheme counts against Silver, it is not clear beyond a reasonable doubt that a rational jury would have convicted Silver if given proper instructions under *McDonnell*.

IV. Money Laundering Count

Silver also argues that, were we to vacate his honest services fraud and extortion counts for a new trial, we would necessarily need to vacate his money laundering count as well. As noted above, 18 U.S.C. § 1957 prohibits engaging in monetary transactions in property "derived from specified unlawful activity."[116] Here, the specified unlawful activity charged in the indictment and proven at trial is the honest services fraud and extortion verdict that we now vacate. We therefore must also vacate the conviction of Silver on the money laundering count.

CONCLUSION

We recognize that many would view the facts adduced at Silver's trial with distaste. The question presented to us, however, is not how a jury would *likely* view the evidence presented by the Government. Rather, it is whether it is clear, beyond a reasonable doubt, that a rational jury, properly instructed, would have found Silver guilty. Given the teachings of the Supreme Court in

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[116] 18 U.S.C. § 1957.

McDonnell, and the particular circumstances of this case, we simply cannot reach that conclusion. Accordingly, we are required to vacate the honest services fraud and extortion counts against Silver, as well as the money laundering count.

To summarize, we hold as follows:

(1) the evidence presented by the Government was sufficient to prove the Hobbs Act extortion and honest services fraud counts of conviction against Silver;

(2) the evidence presented by the Government was sufficient to prove the money laundering count of conviction against Silver because the Government was not required to trace criminal funds that were commingled with legitimate funds under 18 U.S.C. § 1957;

(3) the District Court's jury instruction on its honest services fraud and Hobbs Act extortion charge, defining an official act as "any action taken or to be taken under color of official authority," was erroneous under *McDonnell*;

(4) a properly instructed rational jury may not have convicted Silver, and accordingly the District Court's error was not harmless beyond a reasonable doubt; and

(5) the verdict on the money laundering count against Silver was predicated on the verdicts rendered on Silver's honest services fraud and extortion counts and must fall with those verdicts.

Accordingly, we **VACATE** the District Court's judgment of conviction on all counts and **REMAND** the cause to the District Court for such further proceedings as may

be appropriate in the circumstances and consistent with this opinion.

ADDENDUM A: Mesothelioma Scheme Timeline[1]

Date	Event	Official Act or Not, as Argued by the Government[2]
Fall 2002	Silver, Speaker of the New York Assembly since 1994, becomes "of counsel" at W&L.	Not Official
Fall 2003	Dr. Taub, at an event, asks Silver to encourage W&L to donate money to mesothelioma research. Silver responds that he could not get them to do so. Within two weeks, Silver asks Dr. Taub to refer mesothelioma cases to W&L through him.	Not Official
Nov. 2003	Dr. Taub starts providing referrals to W&L through Silver.	Not Official

[1] This timeline summarizes the events supporting Count One (honest services mail fraud), Count Two (honest services wire fraud), and Count Five (Hobbs Act extortion) of the indictment.

[2] This column describes whether the Government argued on appeal that the given event was an "official act." All "official acts" argued by the Government are denoted as "official" and bolded.

Jan. 2004	Dr. Taub sends a letter to Silver requesting state funding for his research after learning that Silver wanted him to apply.	Not Official
Jan. 2005	Silver invites Dr. Taub to attend the State of the State ceremony at the New York State Capitol. He then puts Dr. Taub in touch with one of his staffers to discuss the status of Dr. Taub's grant request.	Not Official
Mar. 2005	Silver receives first referral fee check from W&L for $176,048.02.	Not Official
July 2005	**Silver approves a $250,000 state grant to Columbia University to support Dr. Taub's research, funded out of the HRCA Assembly Pool.**	**Official**
Aug. 2006	**Silver approves a second $250,000 state grant to Columbia for Dr. Taub's research out of the HCRA pool.**	**Official**
Jan. 2007	**Silver has his Assembly staff call a state trial judge to ask him to hire Dr. Taub's daughter as an unpaid intern.**	**Official**

Oct. 2007	Dr. Taub sends Silver a letter requesting a third HRCA grant. Responding to a state law change requiring disclosure of HRCA grants and disclosures of any conflicts of interest, Silver tells Dr. Taub that he cannot approve any more state grants. Dr. Taub nonetheless continues referring patients to Silver.	Not Official
May 2008	**Silver awards $25,000 in state grant funding to the Shalom Task Force, a non-profit of which Dr. Taub's wife was a board member.**	Official
Feb. 19, 2010	Statute of limitations date (5 years from indictment)	
May 25, 2010	Silver appears in Dr. Taub's office to complain he had been receiving fewer referrals. Following this conversation, Dr. Taub continues to provide leads to Silver to maintain the relationship.	Not Official
May 2011	**Silver has staff prepare an Assembly resolution and official proclamation honoring Dr. Taub, which he later presents to Dr. Taub at a public event.**	**Official**

Fall 2011	**Silver meets with Dr. Taub and others to discuss a "Miles for Meso" charity race that Dr. Taub was trying to organize in Silver's district. Silver then sends Dr. Taub a letter offering to help him navigate the permitting process. The race ultimately does not occur.**	**Official**
Winter 2012	**Silver makes two calls and sends a letter to help Dr. Taub's son get a job with OHEL, a non-profit organization receiving millions in state funding controlled by Silver.**	**Official**
Feb. 19, 2015	Indictment	

ADDENDUM B: Real Estate Scheme Timeline[1]

Date	Event	Official Act or Not, as Argued by the Government[2]
1994	Silver is elected Speaker of the Assembly and in that capacity, he becomes one of three voting members of the PACB.	Not Official
1997	Silver refers real estate developer Glenwood to his friend Jay Arthur Goldberg for tax certiorari work. Glenwood hires Goldberg's firm, G&I.	Not Official
2005	Silver tells real estate developer Witkoff that his friend Goldberg needed business. Both Glenwood and Witkoff start to move their tax certiorari work to G&I over time.	Not Official
Feb. 19, 2010	Statute of limitations date (5 years before indictment)	

[1] This timeline summarizes the events supporting Count Three (honest services mail fraud), Count Four (honest services wire fraud), and Count Six (Hobbs Act extortion) of the indictment.

[2] This column describes whether the Government argued on appeal that the given event was an "official act." All "official acts" argued by the Government are denoted as "official" and bolded.

June 2011	**Silver meets with Glenwood lobbyists to discuss pending real estate legislation to ensure that Glenwood is satisfied with the legislation. Later that month, Silver votes for the Rent Act of 2011 and tax abatement renewal legislation, both benefiting Glenwood.**	**Official**
Dec. 2011	**Silver publicly opposes relocation of a methadone clinic proposed to be located near a Glenwood building in Silver's district.**	**Official**
Dec. 2011	Silver informs a Glenwood lobbyist of his fee-sharing arrangement with Goldberg since proposed retainer agreements referencing Silver were sent to Glenwood.	Not Official
Jan. 2012	Glenwood executes secret fee-sharing side letter with Silver.	Not Official
June 2014	Witkoff learns about Silver's fee-sharing during a call with Goldberg, who had received a grand jury subpoena in connection with the Government's investigation of Silver.	Not Official

Feb. 19, 2015	Indictment	

Two Real Estate Scheme events occurred repeatedly both before and during the period of time captured by the statute of limitations period. The Government argues both are "official acts."

- **Silver repeatedly votes, through a proxy, as one of three veto-wielding members of the PACB, to approve Glenwood's requests for tax-exempt financing.**
- **Silver regularly approves and votes for rent and tax abatement legislation sought by, among others, Glenwood.**

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NO. 15-CR-093 (VEC)

UNITED STATES OF AMERICA

v.

SHELDON SILVER,

Defendant.

MEMORANDUM OPINION & ORDER

May 3, 2016

VALERIE CAPRONI, United States District Judge:

After a twelve-day jury trial, twenty-five witnesses, and three days of jury deliberations, on November 30, 2015, Sheldon Silver, former Speaker of the New York State Assembly, was convicted on two counts of honest services mail fraud, 18 U.S.C. §§ 1341, 1346, two counts of honest services wire fraud, 18 U.S.C. §§ 1343, 1346, two counts of extortion under color of official right, 18 U.S.C. § 1951, and one count of money laundering, 18 U.S.C. § 1957. Silver renews his motion pursuant to Rule 29 for a judgment of acquittal and moves pursuant to Rule 33 for a new trial. For the following reasons, Silver's motions are denied.

BACKGROUND[1]

Silver orchestrated two criminal schemes that abused his position as the Speaker of the New York State Assembly and as an elected Assemblyman for unlawful personal gain. The two schemes follow the same basic model: Silver received bribes and kickbacks in the form of referral fees from third party law firms in exchange for official actions. Silver also engaged in money laundering pursuant to which he invested the proceeds of his unlawful schemes into private, exclusive investment vehicles.

I. The Mesothelioma Scheme

The first scheme is the "Mesothelioma Scheme." In the fall of 2002, Silver became "of counsel" to the personal injury law firm Weitz & Luxenberg. Tr. 1181. Silver received a fixed salary for lending his name to the firm (Silver was not expected to and did not perform any legal work for the firm's clients) and received a referral fee for any case he brought into the firm; his referral fee was a set percentage of the fees earned by the firm on any case Silver referred to the firm. Tr. 180-81, 184-86, 1010, 1016, 1182. Mesothelioma cases were particularly lucrative, generating on average hundreds of thousands of dollars in legal fees per case; the firm did not donate to mesothelioma medical research. Tr. 176-77, 262, 273, 1149, 1188, 1206-09.

Dr. Robert Taub, a physician-researcher at Columbia-Presbyterian Hospital, specialized in mesothelioma, a rare cancer caused by exposure to asbestos. Tr. 249-51. Dr. Taub sought funding for mesothelioma medical re-

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[1] The Court assumes the parties' familiarity with the evidence that was introduced at trial and with the procedural history of the case. The Court refers to exhibits by the exhibit number they were given at trial and refers to the trial transcript by "Tr."

search, and, aware of the value of these cases to law firms, he believed that firms that profit from mesothelioma cases should donate to support mesothelioma research. Tr. 262-64. As of 2003, Dr. Taub knew that Weitz & Luxenberg had not donated any substantial sums to mesothelioma research. Tr. 264-65. For that reason, Dr. Taub did not refer his patients to the firm for legal representation. *Id.* In 2003, Dr. Taub, who was an acquaintance of Silver, approached Silver at an event to ask him to encourage Weitz & Luxenberg to donate money to mesothelioma research. Tr. 265, 267-68. Silver, without consulting anyone at the firm, responded that he could not get Weitz & Luxenberg to do so. Tr. 191, 268. But, within two weeks, through a mutual friend (Daniel Chill, who had introduced them), Silver made it known to Dr. Taub that he wanted Dr. Taub to refer mesothelioma cases to Weitz & Luxenberg through him. Tr. 269-70, 273. Responding to that request, Dr. Taub started referring mesothelioma patients who were not represented to Silver for legal representation; Dr. Taub explained that he wanted to develop a relationship with Silver that would help him receive research funding. Tr. 273-74, 276. In addition to referring patients to Silver, Dr. Taub also gave the patients' contact information to Silver. Tr. 284-87. Although Dr. Taub did not know the specifics of the financial arrangement between Silver and the firm, he thought Silver would benefit financially. Tr. 274. Silver made it known to Dr. Taub that he was pleased with the referrals. *Id.* Over approximately ten years, Silver received roughly $3 million in referral fees for cases referred by Dr. Taub. Tr. 276, 1016; GX 1509.

Several months after Dr. Taub began referring patients to Silver, Silver made it known to Dr. Taub that he should request state funding through Silver. Tr. 273-74.

In 2005, a few months after Silver received his first referral fee check from Weitz & Luxenberg for $176,048.02, he approved the first of two $250,000 New York State grants to Columbia University to support Dr. Taub's research. Tr. 275, 661-62, 674-76, 1028-33; GX 115, 284, 514-1. The grants were funded out of the Health-Care Reform Act ("HCRA") Assembly Pool; Silver alone controlled this pool of tax-payer money. Tr. 654-59, 663-64, 672, 674, 897-900. Silver did not publicly disclose the grants. Tr. 100, 654-59, 899. Silver never asked Dr. Taub about the progress of his research or about the connection between any predicted upsurge in mesothelioma cases and the discharge of asbestos particles into the air as a result of the collapse of the World Trade Center on September 11, 2001. Tr. 637. Dr. Taub presumed that his mesothelioma referrals were a factor in Silver's decision to approve the grants. Tr. 639.

In 2007, the law changed, requiring Silver to disclose the recipients of HCRA grants and requiring disclosure of conflicts of interest. Tr. 748-52, 754, 762-63. Although there were sufficient funds available for Silver to continue to support Dr. Taub's research, Tr. 732-33, 752-54, 758-62, after the change in the disclosure requirements, Silver told Dr. Taub, in substance, that further requests for state grants would not be approved. Tr. 339-40, 636-37. Nevertheless, Dr. Taub continued to send mesothelioma leads to Silver in hopes that by incentivizing him, Silver would find a way to support his research. Tr. 340. Starting in 2010, Dr. Taub started sending some mesothelioma leads that he would otherwise have given to Silver to the Simmons Law Firm (another personal injury law firm that handles many mesothelioma cases) because the Simmons Firm began funding his research. Tr. 368, 375-76. As the number of referrals from Dr. Taub waned,

Silver appeared, uninvited, in Dr. Taub's office to complain that he was receiving fewer referrals; Dr. Taub told Silver that he was sending mesothelioma leads to the Simmons firm, which was funding his research. Tr. 376-77. Dr. Taub understood from this conversation that Silver wanted more leads, and he continued to provide some leads to Silver in the continuing hope that Silver would help fund his research as the opportunity arose. Tr. 378.

Although Silver did not facilitate any additional funding for Dr. Taub's research, he did take other official actions on behalf of Dr. Taub. In May 2011, Silver rushed his staff to prepare a New York Assembly resolution and official proclamation so that Silver could present it to Dr. Taub at a public event. Tr. 388-93, 1260-63, 1265-66. In August 2011, Silver agreed to help Dr. Taub secure the necessary permits for a charity run to benefit mesothelioma research. Tr. 401-410; GX 525-21. Dr. Taub thought at the time that Silver would likely want something—probably referrals—in return for his help, which Dr. Taub described as a "pattern" when dealing with Silver. Tr. 401-02, 407. Finally, in February 2012, at Dr. Taub's request, Silver helped Dr. Taub's son get a job with Ohel, a not for profit organization that received substantial discretionary state funding controlled by Silver (including a $2 million grant and a total of $6 million in funding over a ten-year period). Tr. 413-416, 718-26, 1295; GX 316. Silver called Ohel's CEO twice and sent him a letter on Assembly letterhead relative to the younger Taub. Tr. 1533-35, 1538-39; GX 167-3. Silver had never previously nor has he subsequently asked Ohel to hire anyone. Tr. 1534.[2]

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[2] In 2007, Silver had his Assembly office staff call Martin Schoenfeld, a New York State Judge, to ask him to hire Dr. Taub's daughter, who was in law school, as an intern. Judy Rapfogel, Silver's chief of

Silver concealed his arrangement with Dr. Taub from Weitz & Luxenberg. Although the attorneys at Weitz & Luxenberg knew that Silver's mesothelioma referrals were coming from Dr. Taub, Silver did not tell the firm that he was allocating state funding to Dr. Taub's research. Tr. 189, 202-03, 1020, 1154-56, 1183-84, 1186. Silver also did not disclose the fact that he was receiving referral fees for mesothelioma cases sent by Dr. Taub to his press officer, to fellow Assembly members, or to Department of Health officials responsible for administering the grants Silver provided. Tr. 100, 933-35, 965, 2188-89, 2193-94, 2206. Silver asked Dr. Taub not to tell their mutual friend, Mr. Chill, about any further referrals, even though Mr. Chill had facilitated Dr. Taub's introduction to Silver to request research funding. Tr. 288-89. Silver did not include on his financial disclosure forms that his compensation as a lawyer included referral fees for mesothelioma cases. Tr. 2115; GX 913-924, 2009. Finally, Silver's press statements indicated that his law practice consisted of representing individual claimants in personal injury actions, reviewing medical malpractice cases one half day per week, and referring those cases to trial lawyers at Weitz & Luxenberg. Tr. 2224-27; GX 1-3. He said he obtained clients based on his public reputation as a lawyer. *Id.* Although Silver mentioned in passing in one statement to the press that he handled asbestos cases, GX 1, he never disclosed that he received referrals from a doctor whose research was funded by HCRA grants controlled by Silver.

II. The Real Estate Scheme

The second scheme is the "Real Estate Scheme." Glenwood Management and the Witkoff Group are two

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staff, emailed the judge Dr. Taub's daughter's resume. Tr. 277, 1323-26; GX 440.

major real estate developers in New York. Both companies depend heavily on the New York State government for favorable rent regulation, 421-a tax abatement legislation, and tax-exempt financing that must be approved by the Public Authorities Control Board ("PACB").[3] Tr. 1370, 1590-94, 1699-1701, 1705-06, 1707-08, 1730, 1789, 2014-2020. Both companies hired lobbyists and spent millions in political contributions in an effort to ensure that they achieved those goals. Tr. 1353-57, 1362-67, 1595-96, 1708-10, 1714-19, 1725-26, 1745; GX 754. Silver exercised extraordinary control over legislation covering these issues and over PACB approvals. Silver essentially had veto power over all legislation because he could unilaterally prevent any legislation he opposed from coming to a vote, and he could unilaterally prevent the PACB from approving financing. Tr. 78-82, 1595, 1698-1703, 1709-11, 1790, 1902-03, 1929, 1934, 1961-63.

A former staffer and friend of Silver, Jay Arthur Goldberg, specialized in tax certiorari work. Tr. 1597. Both Glenwood and Witkoff pursued tax certiorari cases to reduce the property taxes of their buildings. Tr. 1373-75, 2023-24. In 1997, at a time when important real estate legislation was up for renewal, Silver referred Glenwood to Goldberg at the law firm Goldberg & Iryami for tax certiorari work. Tr. 1427, 1635, 1747. In 2005, Silver told Witkoff that his friend Jay Goldberg at Goldberg & Iryami needed business. Tr. 2021-27. Both Glenwood

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[3] The PACB is a three member board comprised of a representative from the Governor, the Speaker of the Assembly, and the Leader of the Senate. Tr. 1927-28. It must approve, *inter alia*, all state bond issues, including those done on behalf of real estate developers. Tr. 1926. Approval of all items by PACB requires a unanimous vote. Tr. 928, 1701, 1703. Thus, each member, whether directly or through his voting proxy, has absolute veto power.

and Witkoff moved some of their tax certiorari work from other law firms to Goldberg & Iryami, and Glenwood did so increasingly over time. Tr. 1381-84, 1430-38, 2027-35; GX 841. Witkoff agreed to refer some tax certiorari work to Goldberg & Iryami both because Witkoff wanted access to Silver to discuss pending legislation that affected Witkoff's business, including 421-a legislation, and because he did not want to "alienate" Silver, "one of the most powerful politicians in state politics." Tr. 2025-26. Because Witkoff notified Silver that he had hired Goldberg & Iryami, Silver knew Witkoff was willing to do "favors" for Silver. Tr. 2027. Silver received a referral fee for all business Glenwood and Witkoff gave to Goldberg & Iryami—twenty-five and fifteen percent, respectively, of Goldberg & Iryami's fees; over the years, Silver received approximately $835,000 in such fees. Tr. 1441, 2523-24.

Silver took a number of official actions that benefited Glenwood and Witkoff. Silver, through a proxy, voted as one of three members of the PACB to approve Glenwood's request for tax-exempt financing for many of its projects. Tr. 1700-05, 1932-43, 1961-63; GX 1522. Silver officially opposed the relocation of a methadone clinic that was proposed to be located close to one of Glenwood's rental buildings in Silver's district. Tr. 1602-1605, 1749-53, 1783-86. Silver personally signed off on rent and 421-a tax abatement legislation. Tr. 78-82, 1902-03. Tellingly, in advance of supporting the Rent Act of 2011 and the 421-a renewal, Silver met privately with Glenwood and its lobbyist to ensure that Glenwood (which spoke only for itself, not for the larger real estate industry) was satisfied with the terms of that legislation. Tr. 1597-1601, 1741-45.

Just as in the Mesothelioma Scheme, Silver also concealed his arrangement with Glenwood and Witkoff. Silver did not disclose to other New York legislators or PACB members that he was receiving payments from Glenwood and Witkoff via Goldberg & Iryami. Tr. 81-82, 1961-63. Silver did not state on his financial disclosure forms that his compensation as a lawyer included referral fees from Goldberg & Iryami for taxi certiorari work; indeed, he never mentioned Goldberg & Iryami or the real estate industry as a source of income on his disclosure forms. Tr. 2115; GX 913-24, 2009. Silver did not inform his press officer that he received any income from the real estate industry. Tr. 2308. Silver affirmatively misrepresented the situation to the press, telling them that in his work as a lawyer he did not represent big companies or anyone who had business before the State. GX 1, 2, 3, 4. Silver concealed the fee-sharing arrangements while hypocritically telling the press that "disclosure [was] the key" to avoiding corruption because it "prevents activities that may be in conflict" with an official's public obligations. GX 4.

Finally, Silver even hid from Glenwood and Witkoff that he was receiving referral fees from Goldberg & Iryami. Tr. 1391-1402, 1747, 1788, 1793, 2036-39, 2043. The fee sharing arrangement was not disclosed to Glenwood until 2011, when Goldberg & Iryami decided to comply with state bar rules requiring written consent from the client for all fee-sharing arrangements. Tr. 1442, 1445, 1451-56. Silver informed a Glenwood lobbyist of the fee-sharing by phone and asserted that the arrangement was not problematic because the fees came from Glenwood's LLCs rather than from Glenwood directly. Tr. 1605-09,

1615-16.[4] Although seriously alarmed by Silver's arrangement given the obvious conflict of interest, Glenwood, recognizing its dependence on Silver for favorable legislative action, executed a secret side letter with Goldberg & Iryami—separate from the firm's retainer agreement—consenting to the fee arrangement; this letter was kept secret from the public and was even concealed from Glenwood's own financial officer. Tr. 1392-1402, 1456-61, 1608-09, 1616-17, 1787-93, 1800-07, 1898, 1905, 1914; GX 700. In a meeting with Richard Runes, an attorney who supervises Glenwood's lobbying program, Silver agreed to the side letter arrangement and indicated that he wanted the fee sharing arrangement to continue. Tr. 1804. Witkoff was not informed of the fee-sharing arrangement until Jay Goldberg received a grand jury subpoena in connection with this investigation. Tr. 1461-64, 2036-38. When Steven Witkoff, who owns eighty-five percent of the Witkoff Group, learned that its fees to Goldberg & Iryami were being shared with Silver, he was furious because he believed the arrangement could be illegal. Tr. 2038-40; GX 737, 834.

III. The Money Laundering Scheme

Silver was also convicted of money laundering. The evidence showed that he invested the proceeds of the Mesothelioma and Real Estate Schemes into high-yield, private, and exclusive investment vehicles through the help of Jordan Levy, a private investor who was friends with many politicians. Tr. 2465-66, 2524-38; GX S-5, 1511-13. Silver did not disclose to Levy the source of the

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[4] Glenwood structured its holdings so that each Glenwood building was owned by a specific limited liability company ("LLC"). Tr. 1348, 1351. All of the LLC's were, in turn, wholly owned by Glenwood, a privately held company owned by the Litwin family. Tr. 1348, 1373, 1700.

funds he sought to invest, and he instructed Levy to divide one of the investments in half, placing one half in his wife's name so that he would not be required to publicly disclose the full amount of his investment. Tr. 2429-30.

DISCUSSION

I. Silver's Motion for a Judgment of Acquittal Is Denied

Silver challenges the sufficiency of the evidence in support of his conviction and moves for a judgment of acquittal on all counts. As to the honest services fraud and extortion counts, Silver contends that, for both schemes, the Government failed to prove an agreement to exchange payments for official acts. Def. Rule 29 Mem. 4-11, 14-19 (Dkt. 179). Silver also argues that he should be acquitted on the extortion charge because the Government failed to prove that transferable property was extorted and on the honest services fraud charge because the Government failed to prove a bribe or kickback under *Skilling* v. *United States*, 561 U.S. 358, 409 (2010). *Id.* at 11-13, 19-20. Regarding the Mesothelioma Scheme, Silver maintains that the Government failed to prove any official acts within the limitations period for both the honest services and extortion counts. *Id.* at 13-14. As to the Real Estate Scheme, Silver asserts that the Government failed to prove any official act at all in support of the honest services and extortion counts. *Id.* at 20. Finally, Silver requests a judgment of acquittal on the money laundering charge because the Government failed to prove that the transferred funds were criminally derived, inasmuch as that they had been commingled with untainted funds before the alleged money laundering transactions. *Id.* at 20-22.

A. Legal Standard

"'A defendant challenging the sufficiency of the evidence that led to his conviction at trial bears a heavy burden,' . . . because [courts] must uphold the judgment of conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States* v. *Vilar*, 729 F.3d 62, 91 (2d. Cir. 2013) (quoting *United States* v. *Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) and *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)) (alteration omitted, emphasis in *Jackson*). "A court examines each piece of evidence and considers its probative value before determining whether it is unreasonable to find 'the evidence in its totality, not in isolation,' sufficient to support guilt beyond a reasonable doubt." *United States* v. *Goffer*, 721 F.3d 113, 124 (2d Cir. 2013) (quoting *United States* v. *Autuori*, 212 F.3d 105, 114 (2d Cir. 2000)). Courts "'resolve all inferences from the evidence and issues of credibility in favor of the verdict.'" *United States* v. *Zayac*, 765 F.3d 112, 117 (2d Cir. 2014) (quoting *United States* v. *Howard*, 214 F.3d 361, 363 (2d Cir. 2000)). "'The jury's verdict may be based entirely on circumstantial evidence.'" *Goffer*, 721 F.3d at 124 (quoting *United States* v. *Santos*, 541 F.3d 63, 70 (2d Cir. 2008)) (alteration omitted). "'A judgment of acquittal' is warranted 'only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *United States* v. *Jiau*, 734 F.3d 147, 152 (2d Cir. 2013) (quoting *United States* v. *Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004)) (alteration omitted).

B. The Government Presented Sufficient Evidence of a Quid Pro Quo for a Rational Jury to Convict Silver of Honest Services Fraud and Extortion Under Color of Official Right

Silver argues that, with respect to both schemes, the Government has failed to prove an agreement to exchange payments for official acts, i.e., a *quid pro quo*, as required for honest services fraud and extortion under color official right. Def. Rule 29 Mem. 4-11, 14-19. The Government maintains that it presented sufficient circumstantial evidence that a rational jury could have found a *quid pro quo* with respect to both schemes. Gov't Opp. 20-24, 26-29 (Dkt. 213).

"[P]roof of a quid pro quo" is "an essential element of a bribery theory of honest services fraud." *United States* v. *Bruno*, 661 F.3d 733, 743 (2d Cir. 2011) (citing United *States* v. *Ganim*, 510 F.3d 134, 148-49 (2d Cir. 2007)). "A quid pro quo is a government official's receipt of a benefit in exchange for an act he has performed, or promised to perform, in the course of the exercise of his official authority." *Id.* (citing *Ganim*, 510 F.3d at 141). The Government must prove that the Defendant intended to receive something of value in exchange for an official act. *Id.* Similarly, extortion under color of official right requires that the "public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992).

The Government does not have to prove that there was an express or explicit agreement that official actions would be taken or that any particular action would be taken in exchange for the bribe or kickback. *United States* v. *Coyne*, 4 F.3d 100, 114 (2d Cir. 1993); see also *Ganim*, 510 F.3d at 147 ("[T]he specific transactions

comprising the illegal scheme need not match up this for that."). "Rather, it is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence—i.e., on behalf of the payor—as specific opportunities arise." *Coyne*, 4 F.3d at 114. Specific "[a]cts constituting the agreement need not be agreed to in advance." *Bruno*, 661 F.3d at 743. Circumstantial evidence, such as the timing of private benefits and favorable official action, *id.* at 745; *United States* v. *Biaggi*, 909 F.2d 662, 684 (2d Cir. 1990), and failure to disclose payments, *United States* v. *Rosen*, 716 F.3d 691, 703 (2d Cir. 2013), can suffice to prove the existence of a *quid pro quo* relationship. Moreover, a *quid pro quo* is illegal even if the public official would have taken the same official action without the bribe or even if the public official did not take an official act, so long as the public official intended to do so. See *Evans*, 504 U.S. at 268; *United States* v. *Alfisi*, 308 F.3d 144, 151 (2d Cir. 2002); *United States* v. *McDonough*, 56 F.3d 381, 390 (2d Cir. 1995); *Coyne*, 4 F.3d at 114.

1. *The Mesothelioma Scheme*

Silver argues that the Government has failed to prove a *quid pro quo* relationship between Silver and Dr. Taub because: (1) Dr. Taub denied that a *quid pro quo* agreement existed and testified that he only sought to incentivize Silver to fund mesothelioma, Def. Rule 29 Mem. 5-7; (2) Dr. Taub sent referrals to Weitz & Luxenberg for legitimate reasons, and Silver gave state grants for legitimate reasons, Def. Rule 29 Mem. 7; (3) no evidence shows that Silver intended to engage in a *quid pro quo*, Def. Rule 29 Mem. 8-9; (4) Dr. Taub continued to refer patients to Silver after he stopped receiving funding from the State, Def. Rule 29 Mem. 9; and (5) Silver's disclosure forms and statements to the press do not show Silver's

consciousness of guilt, Def. Rule 29 Mem. 9-11. Silver was free to, and did, encourage the jury to adopt this view of the evidence, but a rational juror could reject this interpretation after considering the totality of the evidence.

Although Dr. Taub denied that there was any explicit agreement to exchange mesothelioma leads for state grants and other official acts, Tr. 424, 554, 548, 558, 560, there was sufficient circumstantial evidence for a rational juror to conclude that there was an implicit agreement to do so. The timing between Dr. Taub's request for Silver's support for mesothelioma research funding and Silver's initial request for referrals (less than two weeks) and between Dr. Taub's first referral and Silver's instruction to Dr. Taub to apply for state funding (several months) could lead a rational jury to conclude that this was more than a goodwill relationship—it was a *quid pro quo* agreement, and Silver understood as much. Further, it was only after Silver received his first referral payment that he approved the first state grant to Columbia University. Even though Dr. Taub testified that there was no explicit agreement to exchange specific benefits with Silver, he also testified that he understood that there was a pattern in which Silver wanted a personal benefit, specifically mesothelioma leads, in return for taking an official action on Dr. Taub's behalf. That testimony alone could support a reasonable jury concluding that Silver intended and had a *quid pro quo* arrangement with Taub.

Evidence that Dr. Taub referred his patients to a prominent asbestos litigation firm and that the state grants went to worthy medical research does not negate a *quid pro quo* arrangement; virtuous and nefarious motivations can coexist. Evidence that Dr. Taub was otherwise adamantly opposed to referring patients to Weitz &

Luxenberg—because the firm did not financially support mesothelioma research—and evidence that Silver directed Dr. Taub not to tell their mutual friend Mr. Chill about the referrals, never inquired about Dr. Taub's research, ceased funding the research when his involvement with it would have become public, and did not approve the first grant until he had begun to be compensated for Taub-generated leads also support a reasonable jury concluding that Silver intended a *quid pro quo*. The fact that Dr. Taub continued to refer cases to Silver even after the state grants stopped does not undermine the reasonableness of the jury's determination that there was a *quid pro quo*, both because Dr. Taub did not know why Silver had stopped funneling state grants to him and thus could hope Silver would reinitiate them, and because Dr. Taub continued to receive favorable official action from Silver (an honorary resolution and proclamation, an agreement to secure permits for a fundraising event, and employment for his children). Moreover, the fact that Dr. Taub reduced the number of referrals after Silver terminated the state grants is circumstantial evidence that a rational jury could have relied on to conclude that Silver intended there to be and there was a *quid pro quo* link between referrals and official actions. Finally, a rational juror could conclude that Silver's financial forms and disclosures to the press—that he represented individuals in medical malpractice cases, that he was a personal injury lawyer, and a passing comment during a press interview that some of his clients had asbestos claims—were far from forthright and thus were evidence of consciousness of guilt.

2. *The Real Estate Scheme*

Silver argues that the Government has failed to prove a *quid pro quo* relationship between Silver and Glenwood

and Witkoff on the following grounds: (1) Witkoff and Glenwood denied that there was a *quid pro quo* agreement and said that they provided business to Goldberg & Iryami only to foster generalized goodwill, Def. Rule 29 Mem. 14-15; (2) Silver did not act on behalf of Witkoff or Glenwood, whether with respect to the Rent Act of 2011, the PACB, or the proposed methadone clinic, Def. Rule 29 Mem. 15-16; and (3) Silver's disclosure forms, Silver's statements to the press, the Goldberg & Iryami side letter retainer, and Glenwood's and Witkoff's surprise and concern about Silver's referral fees are not evidence of Silver's corrupt intent, Def. Rule 29 Mem. 16-19. Once again, Silver was free to, and did, encourage the jury to adopt this view of the evidence, but a rational juror could reject Silver's arguments given the totality of the evidence.

Just as in the Mesothelioma Scheme, although Glenwood and Witkoff representatives denied that there was any express agreement to exchange tax certiorari business for favorable legislation and PACB financing, Tr. 1686, 1823, 1830-31, 2051, there was sufficient circumstantial evidence for a rational juror to conclude that there was an implicit agreement to do so.[5] The Govern-

[5] Moreover, at least for honest services fraud, the intent of the bribe giver may be different from the intent of the bribe receiver. The Government must only prove that Silver—not the bribe giver—understood that, as a result of the bribe or kickback, he was expected to exercise official influence or make official decisions for the benefit of the giver. See *Rosen*, 716 F.3d at 700 (omitting any requirement regarding the bribe payer's intent in definition of "*quid pro quo*"); *Bruno*, 661 F.3d at 743-44 (same); *United States* v. *Ring*, 706 F.3d 460, 467 (D.C. Cir. 2013) ("[T]hough the offerer of a bribe is guilty of honest-services fraud, his attempted target may be entirely innocent." (citing *United States* v. *Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974))).

ment introduced sufficient circumstantial evidence on which a jury could have relied reasonably to conclude that Silver intended there to be and Glenwood and Witkoff understood there to be a *quid pro quo*: (1) Silver solicited Glenwood's tax certiorari business when important real estate legislation was up for renewal, Tr. 1427, 1635; (2) Glenwood rewarded Goldberg & Iryami with additional tax certiorari business each year after Silver approved real estate legislation that was satisfactory to Glenwood, Tr. 1376-1384, 1601, 1635-39, 1731, 1744; GX. 750; (3) Silver agreed with Glenwood's decision to re-execute the retainer agreements without mentioning that Silver was splitting the fees and to execute a side letter to that effect;[6] (4) Silver intervened to prevent the relocation of a methadone clinic to a location near one of Glenwood's residential rental buildings; and (5) PACB, on which Silver was one of three voting members, approved hundreds of millions in tax exempt bond financing for Glenwood. Perhaps the most compelling evidence on which a rational jury could have relied to conclude that Silver understood and intended there to be a *quid pro quo* was his decision to meet with Glenwood immediately prior to approving the 2011 Rent Act to ensure that the legislation that would ultimately pass would satisfy Glenwood.

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[6] Glenwood reduced the fee arrangement to a side letter that was held separately from Glenwood's books and records (and was not shared with even the financial department of Glenwood) because Glenwood thought that the retainer agreement, in which Goldberg & Iryami had initially disclosed that it was splitting its fees with Silver, might have to be filed publicly. Tr. 1400-01, 1800-01, 1804-06. Glenwood conferred with Silver about preparing a side letter separate from the retainer agreements and received his approval to do so; Silver executed the side letter. Tr. 1804; GX 700.

That Glenwood and Witkoff did not initially know that Silver was receiving referral fees (as opposed to knowing only that their business was benefiting a long-time friend of Silver) does not mean that Silver did not intend there to be a *quid pro quo* arrangement or that Glenwood and Witkoff were not giving tax certiorari business in return for official acts.[7] There is no legal requirement that the payor understand the precise nature of the benefit that is flowing to the public official, and there is no question Glenwood and Witkoff understood that they were transferring their tax certiorari business at Silver's request and for the benefit, at a minimum, of Silver's friend. Glenwood in particular understood that the arrangement was ultimately for Silver's benefit in some, albeit unspecified, way because they were concerned about upsetting and alienating Silver if they took their business away from Goldberg & Iryami. Furthermore, evidence that Glenwood and Witkoff sought to please Silver because they depended on legislation which he predominantly controlled shows that Glenwood and Witkoff were motivated to transfer their business to Goldberg & Iryami for favorable—or, at least, less unfavorable—official action by Silver.

Although Silver argues that the jury's verdict cannot be upheld because there is no evidence that Silver would have acted differently than he did with respect to the Rent Act of 2011, the PACB funding, or the methadone clinic, the law allows a jury to find that there is a *quid pro quo* relationship even if the public official would have

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[7] Unlike honest services fraud, extortion under color of official right does require the Government to prove that the bribe giver was "motivated to make payments as a result of the defendant's control or influence over public officials and that the defendant was aware of this motivation." *McDonough*, 56 F.3d at 388 (citation omitted).

taken the same official action without the bribe, so long as the public official was motivated, at least in part, by the bribe. *Biaggi*, 909 F.2d at 683; *Coyne*, 4 F.3d at 113. Furthermore, while the Rent Act of 2011 may have on the whole been pro-tenant, the jury could have found significant that Silver met with Glenwood to ensure that the legislation was satisfactory to that developer before signing off on it.

Although Silver quibbles with evidence introduced as proof of consciousness of guilt, Def. Rule 29 Mem. 16-19, a rational jury could have relied on that evidence to infer that Silver believed his relationships with Witkoff and Glenwood were unlawful. For example, although the state financial disclosure forms clearly required Silver to state "each source" of income, nowhere on the form did Silver list Goldberg & Iryami as a source of income. A jury could have found that Silver's minor revision to his disclosure in 2010 to state that his law practice income "included" fees from Weitz & Luxenberg, GX 920, was no more forthcoming than his previous disclosures and that the failure to disclose receipt of income from Goldberg & Iryami was calculated to keep his relationship with real estate developers secret. Given that Silver received hundreds of thousands of dollars in referral fees for business that derived from large real estate developers with substantial interests in matters pending before the legislature, a jury could also have reasonably viewed his false statements to the press that he did not represent "corporations" or entities that had any interest in matters pending before the Assembly to be further evidence of consciousness of guilt. Considering all the circumstantial evidence as a whole, a rational juror could conclude that Silver was knowingly engaged in an unlawful *quid pro quo* with Glenwood and Witkoff.

C. The Government Presented Sufficient Evidence to Support the Jury's Conclusion that Each Scheme Involved a Transfer of Property Necessary to Prove a Hobbs Act Violation

Silver contends that the Government's extortion charges also fail because the mesothelioma leads and the tax certiorari business are not transferable property—"'that is, capable of passing from one person to another.'" Def. Rule 29 Mem. 11 (quoting *Sekhar* v. *United States*, 570 U.S. —, 133 S. Ct. 2720, 2725 (2013)), 19. Silver raised this argument not only during trial but also in his motion to dismiss the Superseding Indictment. Dkt. 39.

The Hobbs Act defines extortion as "obtaining [] 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(b)(2). To qualify as property under the Hobbs Act, the property must be "valuable" and "transferable," *Sekhar*, 133 S. Ct. at 2726 n.5, but can be either tangible or intangible, see, *e.g.*, *id.* at n.2 (noting that obtaining good will by threatening a market competitor may be Hobbs Act extortion (citing *United States* v. *Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980))); *United States* v. *Atcheson*, 94 F.3d 1237, 1243 (9th Cir. 1996) (affirming Hobbs Act convictions where defendants, *inter alia*, "extorted from [the victims] information about how much money the[y] had in their accounts").

Silver argues that the Hobbs Act requires both the "deprivation" and "acquisition" of property. Def. Rule 29 Mem. 11 (quoting *Sekhar*, 133 S. Ct. at 2725). As explained in the Court's prior opinion, however, the Court does not read the *dicta* in *Sekhar* describing "deprivation" to add an element to Hobbs Act extortion; instead,

this Court reads the Supreme Court's language in *Sekhar* merely to underscore the requirement that the victim must transfer the extorted property to the perpetrator (or to a third party as directed by the perpetrator). Dkt. 46 at 7 n.8; see *Sekhar*, 133 S.Ct. at 2726 (noting that it rests its decision on the term "obtaining" and announcing the principle "that a defendant must pursue something of value from the victim that can be exercised, transferred, or sold"). In addition, intangible property, such as information, can often be "retained" in some sense even after it has been transferred to another. Cf. *Atcheson*, 94 F.3d at 1243.

1. *The Mesothelioma Scheme*

Silver argues that because the leads for mesothelioma cases were only recommendations to patients to contact Weitz & Luxenberg, they did not qualify as transferable property. Def. Rule 29 Mem. 11-12. As this Court stated when it denied Silver's motion to dismiss the Superseding Indictment, "[i]f Silver's conduct led only to Doctor-1's recommending Weitz & Luxenberg to his patients, such a scenario would not constitute extortion, as Doctor-1's recommendation is not 'transferrable' as defined by *Sekhar*." Dkt. 46 at 6. The evidence, however, showed that Dr. Taub did more than just recommend patients to Weitz & Luxenberg. Dr. Taub provided information regarding mesothelioma patients who needed legal representation directly to Silver, which this Court previously held could satisfy the requirement for transferable property under *Sekhar*, Dkt. 46 at 6-7. The key distinction drawn by the Supreme Court is that restricting someone's freedom of action by force or threat of force is coercion, while forcing someone to transfer something of value is extortion. See *Sekhar*, 133 S. Ct. at 2727; *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S.

393, 405-07, 409. If Dr. Taub had merely recommended his patients to Weitz & Luxenberg, that might have been the former, but under color of official right, Dr. Taub transferred to Silver valuable contact information for potential mesothelioma clients, which is the latter—extortion.

At trial, the Government presented sufficient evidence from which a rational juror could conclude that the mesothelioma leads were valuable and transferable as required to constitute a violation of the Hobbs Act. Testimony showed mesothelioma cases, resulting on average in $400,000 in legal fees per case for the law firm that represents the mesothelioma patient, are the most lucrative of all asbestos cases, and personal injury law firms spend millions in marketing to procure mesothelioma leads, i.e., potential clients. Tr. 1206-1209. The evidence also showed that Silver received approximately $3 million in referral fees for the cases referred from Dr. Taub, indicating the value of those leads. GX 1509.

A rational juror could also have concluded that Dr. Taub transferred the information about the mesothelioma leads to Silver because he "asked" for them under color of official right. In 2003, one to two weeks after Dr. Taub requested Silver's help in encouraging Weitz & Luxenberg to donate to mesothelioma research—a request Silver rejected out of hand—Silver made known to Dr. Taub that he wanted Dr. Taub to send mesothelioma referrals to Silver at Weitz & Luxenberg. Tr. 273. In response, Dr. Taub started recommending Silver as counsel at Weitz & Luxenberg to his patients *and* providing the names and contact information for those patients to Silver. Tr. 284-87. That is precisely the type of information that law firms spend millions in marketing expenses to obtain. Thus, Dr. Taub transferred valuable, albeit in-

tangible, property to Silver in the form of information. The fact that some patients declined to have Dr. Taub share their contact information with Silver because they wished to obtain different legal representation does not mean that the leads Dr. Taub did provide were not transferable property, as that term is used in the Hobbs Act. Dr. Taub's testimony that he started referring patients and sharing their contact information with the Simmons Firm instead of Silver demonstrates that the information is transferable—Dr. Taub could pass the valuable information to the Simmons Firm or to Silver or to some other law firm. Tr. 368-69, 373-76. Moreover, the fact that Silver sought out Dr. Taub to complain that Dr. Taub was passing fewer leads to him and that he wanted to obtain more leads further confirmed the conclusion the jury reached—Dr. Taub was extorted under color of official right to transfer valuable mesothelioma leads to Silver. Tr. 376-78.

2. *The Real Estate Scheme*

Silver incorporates by reference his argument from his motion to dismiss the Superseding indictment that, just like the mesothelioma leads, tax certiorari business does not qualify as transferable property under the Hobbs Act. Def. Rule 29 Mem. 19. As the Court explained previously, "[o]btaining business (even if, to be paid, the defendant had to perform additional work) meets the Hobbs Act's requirement that the defendant obtain transferable property with the victim's consent." Dkt. 46 at 10 (citing *United States* v. *Cain*, 671 F.3d 271, 282-83 (2d Cir. 2012)); see also *United States* v. *Gotti*, 459 F.3d 296, 326 (2d Cir. 2006).

The Government presented sufficient evidence at trial from which a rational juror could have concluded that the tax certiorari business from Witkoff and Glenwood was

valuable and transferable property as required to constitute a violation of the Hobbs Act. Testimony that Goldberg & Iryami was paid higher fees for Glenwood's and Witkoff's tax certiorari work than for most of its other clients, Tr. 1429, 1438-40, and that Silver received approximately $835,000 in referral fees, Tr. 2523-24, was evidence the jury could rely on to conclude that the tax certiorari business was valuable. A rational juror could also have concluded that the tax certiorari business was transferable based on Dara Iryami's and Steven Witkoff's testimony that Glenwood and Witkoff transferred some of their tax certiorari work from other law firms to Goldberg & Iryami. Tr. 1430, 1431-34, 1436-38.

D. The Government Presented Sufficient Evidence for a Jury Reasonably to Conclude that Each Scheme Involved a Bribe or Kickback as Required for Honest Services Fraud

Silver argues that the Government failed to prove a paradigmatic bribe or kickback, as required to prove honest services fraud under *Skilling* v. *United States*, 561 U.S. at 409, and instead proved only a "routine financial relationship." Def. Rule 29 Mem. 12, 19.

Based on the evidence presented at trial, a rational juror could find that the referral fees paid to Silver were bribes or kickbacks and not "routine" referral fees paid to a lawyer. Silver did not receive referral fees for referring mesothelioma and tax certiorari clients that he legitimately obtained. As explained above, he was able to refer these clients because of pressure he brought to bear using his official position. He got Dr. Taub to give him mesothelioma leads by holding out the hope (and actually delivering) state grants and other officially conferred benefits; he got Witkoff and Glenwood to retain Goldberg & Iryami by manipulating their need for favorable (or

less unfavorable) real estate legislation and PACB approval.

The evidence supports the jury's finding that Silver engaged in more than self-dealing. "In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." *United States* v. *Rybicki*, 354 F.3d 124, 140 (2d Cir. 2003) (en banc); see *Skilling*, 561 U.S. at 409-10. While Silver may have also engaged in self-dealing with respect to Witkoff and Glenwood (for years they did not know Silver was receiving referral fees for their business), Silver simultaneously did more than just self-deal. A rational jury could have concluded that Silver accepted bribes and kickbacks as part of both schemes, as those terms were used in *Skilling*, because he took official action in exchange for the payments, including sending state grants to Dr. Taub, officially recommending Dr. Taub's son for a job, causing the Assembly to pass a resolution in honor of Dr. Taub, securing permits for a fundraiser event in which Dr. Taub had an interest, acting favorably (or less unfavorably) to Witkoff and Glenwood with respect to rent regulation and tax abatement legislation, and approving tax-exempt financing for Glenwood. The fact that the payments Silver received as bribes were funneled through entities in which, unbeknownst to Glenwood or Witkoff, he had an undisclosed interest does not transform the bribery or kickback schemes into mere undisclosed conflict-of-interest schemes. Cf. *United States* v. *DeMizio*, 741 F.3d 373, 381-82 (2d Cir. 2014).

E. The Government Presented Sufficient Evidence for a Rational Jury to Find that Silver Engaged in Official Acts in Exchange for Bribes and Kickbacks

Silver asserts that the Government did not prove an official act required for honest services fraud and Hobbs Act extortion. Def. Rule 29 Mem. 13, 20 (citing *Bruno*, 661 F.3d at 744 and *Evans*, 504 U.S. at 268). Specifically, as to the Mesothelioma Scheme, Silver argues that the Government did not prove an official act within the five year statute of limitations prescribed by 18 U.S.C. § 3282 because the state grants provided on Dr. Taub's behalf were approved by him on July 5, 2005 and November 30, 2005, GX 367-1, 284, but Silver was not indicted until February 19, 2015, almost ten years later. Def. Rule 29 Mem. 13. While that chronology is accurate, the jury was charged that it had to find an official act taken by Silver on behalf of Dr. Taub during the five year statute of limitations period. Tr. 3127. The jury could have reasonably relied on the following evidence to find that element satisfied: Silver procured an official Assembly resolution and proclamation honoring Dr. Taub in May 2011; in 2011, Silver offered to use his Assembly position and staff to assist a mesothelioma fundraiser with which Dr. Taub was involved to obtain necessary City permits; and in 2012, Silver recommended Dr. Taub's son (using his official Assembly letterhead) to a prospective employer that depended heavily on Silver for state funding. Although Silver contends that these were merely "routine personal courtesies," a jury could reasonably have concluded the contrary. Even if these official acts are minor compared to $500,000 in state grants, a jury could nonetheless reasonably determine that they were official acts.

Regarding the Real Estate Scheme, Silver argues that the Government failed to prove an official act because: Silver was not involved in Glenwood's applications for tax-exempt financing submitted to the PACB; Silver did not take an official act to oppose the methadone clinic as requested by Glenwood; and Silver took no official act with respect to the Rent Act of 2011. Def. Rule 29 Mem. 20. The jury could reasonably have found that as a member of the PACB, Silver acted in his official capacity to benefit Glenwood by keeping Glenwood's requests for tax-exempt financing on the agenda and by voting in favor of financing Glenwood's projects, even if a proxy voted on Silver's behalf. A jury could also find that Silver took official action to oppose the relocation of the methadone clinic near one of Glenwood's buildings in Silver's district based on the evidence that showed that Glenwood, at the request of Silver's Assembly Office, prepared a letter for its tenants highlighting Silver's role in successfully blocking the relocation of the clinic. Tr. 1602-04, 1752-53, 1783-86; GX 788. Finally, a jury could find that Silver took official action with respect to rent regulation and the 421-a tax abatement program because he had to sign off on any such legislation in order for the legislation to come to a vote. Moreover, in advance of supporting the Rent Act of 2011 and the 421-a renewal, Silver met privately with Glenwood and its lobbyist to confirm that Glenwood was satisfied with the terms of the legislation. A jury could have relied on that evidence to conclude that Silver, in his official capacity, made sure that the legislation was satisfactory to a large real estate developer that was paying him bribes.[8]

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[8] The majority of the Government's evidence to prove the Real Estate Scheme concerned Glenwood; the Government only introduced one witness to testify about Witkoff's role. In contrast with the evi-

F. The Government Presented Sufficient Evidence for a Rational Jury to Find that Silver Engaged in Unlawful Money Laundering

To convict Silver of money laundering under 18 U.S.C. § 1957, the Government was required to prove that Silver "knowingly engage[d] or attempt[ed] to engage in a monetary transaction in criminally derived property of a value greater than $10,000," and that the property was "derived from specified unlawful activity." 18 U.S.C. § 1957(a); see *United States* v. *Ness*, 565 F.3d 73, 78 (2d Cir. 2009). "[T]he term 'criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2). The only issue Silver raises post-trial is whether the Government adequately proved that the monetary transactions involved criminally derived property. Silver argues for a judgment of acquittal on the money laundering count on the ground that the Government did not prove that the funds at issue were criminally derived because the proceeds of his Mesothelioma and Real Estate Schemes had been commingled in an account with untainted funds. Def. Rule 29 Mem. 21-22 (citing *United States* v. *Loe*, 248 F.3d 449, 467 (5th Cir. 2001); *United States* v. *Rutgard*, 116 F.3d 1270, 1292-93 (9th Cir. 1997)). The Government contends that the Fifth and Ninth Circuit cases on which Silver relies to make this argument represent the minority view, not adopted in this Circuit, and that the Govern-

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dence regarding the methadone clinic, PACB financing, and the private meeting prior to the 2011 Rent Act, the Government did not introduce comparable evidence showing official actions taken by Silver specifically in favor of Witkoff. Nevertheless, a rational jury could conclude that Silver took official action on behalf of Witkoff because Witkoff, as a peer developer to Glenwood, would have also benefited from real estate legislation that was satisfactory to Glenwood, such as the 2011 Rent Act.

ment is not legally required to trace criminally derived funds through a commingled account. Gov't Opp. 33-35.

The Second Circuit has not addressed whether the Government must trace "dirty" funds commingled with "clean" funds to prove money laundering under Section 1957, and "other Circuit Courts of Appeals have reached contradictory conclusions." *United States* v. *Weisberg*, No. 08-CR-347 (NGG) (RML), 2011 WL 4345100, at *2, *3-4 (E.D.N.Y. Sept. 15, 2011) (citing cases). The requirement that the Government must trace the criminally derived proceeds when they have been commingled with funds from legitimate sources is a minority view. *United States* v. *Braxtonbrown-Smith*, 278 F.3d 1348, 1354 (D.C. Cir. 2002) (*Rutgard*'s "holding that tracing is required under § 1957 is a minority view." (citing *United States* v. *Sokolow*, 91 F.3d 396, 409 (3d Cir.), cert. denied, 519 U.S. 1116 (1997); *United States* v. *Moore*, 27 F.3d 969, 976 (4th Cir.), cert. denied, 513 U.S. 979 (1994); *United States* v. *Johnson*, 971 F.2d 562, 570 (10th Cir. 1992))).[9]

The Court finds the logic underlying the majority view far more convincing. Because money is fungible, once funds obtained from illegal activity are combined with funds from lawful activity in a single account, the "dirty" and "clean" funds cannot be distinguished from each other. *Moore*, 27 F.3d at 976-77. "A requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution

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[9] See also *United States* v. *Haddad*, 462 F.3d 783, 792 (7th Cir. 2006) (explicitly rejecting the Ninth Circuit's tracing requirement under Section 1957 as "untenable"); *United States* v. *Pizano*, 421 F.3d 707, 723 (8th Cir. 2005) ("[T]he Government is not required to trace funds to prove a violation of § 1957.").

for money laundering by simply commingling legitimate funds with criminal proceeds." *Id.* at 977 (citing *Johnson*, 971 F.2d at 570 and *United States* v. *Jackson*, 935 F.2d 832, 840 (7th Cir. 1991)). Thus, the Government was not required to prove that funds transferred from Silver's bank account to the investment vehicles offered through Jordan Levy were the actual dollars derived from Silver's illegal schemes given that that money was commingled with legitimately derived funds in Silver's bank account; in other words, the Government did not have to "show that funds withdrawn from the [D]efendant's account could not possibly have come from any source other than the unlawful activity," *Johnson*, 971 F.2d at 570. The Government traced payments from the Mesothelioma and Real Estate Schemes to Silver's bank account and proved transfers from Silver's bank account to investment vehicles made available to Silver by Jordan Levy. Tr. 2526-35; GX 1511-1513. That suffices to prove a monetary transaction in criminally derived property; based on that evidence, a rational trier of fact could have found that this element of money laundering under Section 1957 was satisfied.

II. Silver's Motion for a New Trial Is Denied

"Federal Rule of Criminal Procedure 33(a) provides that 'upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.'" *United States* v. *James*, 712 F.3d 79, 107 (2d Cir. 2013) (quoting Fed. R. Crim. P. 33(a)) (alteration omitted). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States* v. *Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). "To grant the motion, 'there must be a real concern that an innocent person may have been convicted.'" *United States* v. *Aguiar*, 737 F.3d 251, 264 (2d

Cir. 2013) (quoting *Ferguson*, 246 F.3d at 134) (alteration omitted). Particularly "[w]here an evidentiary ruling is the basis of a defendant's Rule 33 motion, the question is not whether there was error in the evidentiary ruling, but whether there is 'manifest injustice' and a real concern that an innocent person may have been convicted." *United States* v. *Soto*, No. 12 CR 556 (RPP), 2014 WL 1694880, at *5 (S.D.N.Y. Apr. 28, 2014), aff'd *sub nom. United States* v. *Ramos*, 622 F. App'x 29 (2d Cir. 2015).

Silver moves, pursuant to Rule 33, for a new trial, challenging a number of the Court's evidentiary rulings. Specifically, Silver argues that the Government introduced irrelevant and unfairly prejudicial evidence regarding the following issues: the state grant process, Dr. Taub's relationship with the Simmons Foundation, Glenwood's political contributions, Silver's financial disclosure forms, and Silver's investments and relationship with Jordan Levy. See Def. Rule 33 Mem. 1-8, 10-12 (Dkt. 180). Silver also argues that evidence regarding Silver's purported effort to make more fulsome financial disclosures and additional statements from Silver's recorded conversations with reporters were wrongfully excluded. See Def. Rule 33 Mem. 8-10, 12-14. Silver contends that the evidentiary rulings about which he complains poisoned the trial and denied him a full defense. Def. Reply 9 (Dkt. 224). Every one of these evidentiary issues was thoroughly litigated before and during trial, and the Court issued rulings at the time the issues were initially raised. Silver does not offer any new arguments for the Court to consider regarding these issues and instead rehashes old arguments that were appropriately rejected at the time. Accordingly, the Court does not disturb its pri-

or evidentiary rulings.[10]

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[10] Silver raises two points that were not specifically addressed at trial, and thus the Court considers them here.

First, in support of his argument that his financial disclosure forms should not have been admitted because they were unfairly prejudicial, Silver points to a November 30, 2015 New York Times article stating that one juror reported to have "changed her mind" and agreed to convict Silver based on the disclosure forms. Def. Rule 33 Mem. 7-8. Silver argues that the article shows that the jury convicted based on a "collateral dispute," i.e., "the details of how Mr. Silver filled out his state ethics forms." *Id.* at 8. How Silver filled out his financial disclosure forms was not, however, a "collateral dispute" nor mere "details." As discussed during trial on several occasions, the forms were relevant as circumstantial evidence of Silver's consciousness of guilt. Moreover, apart from three narrow exceptions that do not apply here, the Court may not consider evidence of a juror's statement about the effect of anything on a juror's vote or the juror's mental processes concerning the verdict. Fed. R. Evid. 606(b)(1); *Munafo* v. *Metro. Transp. Auth.*, 381 F.3d 99, 107 (2d Cir. 2004). Even if the Court were to consider the juror's statements as reported in the media, the article reported that, according to the interviewed jurors, "the 12 took their time re-examining the evidence" and that the juror who "changed her mind" did so because the disclosure forms—specifically the lack of any mention of Goldberg & Iryami—were evidence of Silver "being deceitful" and of "scheming or manipulation." Def. Rule 33 Mem., Ex. 1 at 2-3 (Dkt. 180-1). Thus, the juror found the disclosure forms persuasive evidence of Silver's state of mind, which she was entitled to do.

Second, Silver argues that the Court's ruling regarding certain testimony from Lisa Reid, a state ethics officer, was improper. After much argument from both sides, the Court ruled that, pursuant to the state of mind exception to the hearsay rule, Fed. R. Evid. 803(3), Defense counsel could introduce Reid's testimony that Silver told her in early 2010 during a brief exchange that he was revising an answer on his financial disclosure forms regarding Weitz & Luxenberg fees to make his response "more accurate." But, the Court also ruled that if Silver introduced that out of court statement, it would open the door to evidence that the Government wished to introduce, namely that the change to Silver's disclosure forms followed the sentencing of New York State Assemblyman Anthony Seminerio for

Moreover, the jury's verdict was not against the weight of the evidence. As discussed above, there was sufficient evidence to sustain each of the convictions. The Court is not "'convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.'" *United States* v. *Landau*, 155 F.3d 93, 104 (2d Cir. 1998) (quoting *Smith* v. *Lightning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)).

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federal crimes related to the failure to disclose accurately the nature of his outside income. Tr. 2087. Silver objected and ultimately decided not to introduce the conversation between Reid and Silver.

Silver now contends that the ruling improperly opened the door to inadmissible evidence. According to Silver, the door may only be opened to inadmissible evidence if (a) the opposing party has introduced inadmissible evidence on the same issue, or (b) the evidence is needed to rebut a false impression that may have resulted from the opposing party's evidence. Silver asserts that neither exception applied. Def. Rule 33 Mem. 9-10 (citing *United States* v. *Forrester*, 60 F.3d 52, 60-61 (2d Cir. 1995)). The Government responds that Silver wrongly relies on the "curative admissibility" doctrine instead of the "standard opening the door doctrine" because the curative admissibility doctrine only applies when admitting inadmissible evidence in rebuttal to other inadmissible evidence, and the Lisa Reid conversation was not inadmissible. Gov't Opp. 49-50 (citing *United States* v. *Al-Moayad*, 545 F.3d 139, 169 n.25 (2d Cir. 2008)). Regardless of the doctrine's name, otherwise inadmissible evidence is admissible to rebut a false impression created by the opposing party's evidence, whether the opposing party's evidence was properly admissible or not. See *United States* v. *Vasquez*, 267 F.3d 79, 85 (2d Cir. 2001); *United States* v. *Gambino*, 59 F.3d 353, 368 (2d Cir. 1995); *United States* v. *Bilzerian*, 926 F.2d 1285, 1296 (2d Cir. 1991). Here, the otherwise unfairly prejudicial evidence regarding Seminario's conviction was admissible in order to correct the false impression that may have been created that Silver was motivated to revise his financial disclosures out of a desire to be fully transparent versus being motivated by the fear of getting caught for inadequate financial disclosure.

CONCLUSION

For the foregoing reasons, Silver's Motions are DENIED. The Clerk of Court is respectfully requested to terminate the open motions at docket entries 179 and 180.

SO ORDERED.

Dated: New York, New York
May 3, 2016

/s/Valerie Caproni
Valerie Caproni
United States District Judge

APPENDIX C

RELEVANT STATUTORY PROVISIONS

Title 18, United States Code, provides in relevant part:

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.—

(1) In general.—Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.—For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal

Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.—A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.—

(A) In general.—A court may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.—A Federal Receiver described in subparagraph (A)—

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant—

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary

instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes—

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978);

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving—

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 555 (relating to border tunnels), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting in-

terstate or foreign commerce), section 875 (relating to interstate communications), section 922(*l*) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to ter-

rorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food and Nutrition Act of 2008 [7 U.S.C.A. §2024] (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. §1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons), or section

104(a) of the North Korea Sanctions Enforcement Act of 2016 (relating to prohibited activities with respect to North Korea);

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(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.);

(F) any act or activity constituting an offense involving a Federal health care offense; or

(G) any act that is a criminal violation of subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (1) of section 9(a) of the Endangered Species Act of 1973 (16 U.S.C. 1538(a)(1)), section 2203 of the African Elephant Conservation Act (16 U.S.C. 4223), or section 7(a) of the Rhinoceros and Tiger Conservation Act of 1994 (16 U.S.C. 5305a(a)), if the endangered or threatened species of fish or wildlife, products, items, or substances involved in the violation and relevant conduct, as applicable, have a total value of more than $10,000;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal

penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.—(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as de-

fined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section

1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in

sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

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