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VIA ECF

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *United States v. Dean Skelos*, No. 16-1618(L), 16-1697(CON)

Dear Ms. Wolfe:

United States v. Silver, No. 16-1615-CR, 2017 WL 2978386 (2d Cir. July 13, 2017), and *United States v. Boyland*, 862 F.3d 279 (2017), further demonstrate why Dean Skelos was deprived of a fair trial. The jury instructions below, like those in *Silver* and *Boyland*, failed to convey crucial limits on "official action" that the Supreme Court imposed in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), for constitutional reasons that apply to all the charges in this case. As in *Silver*, the government's evidence and summations provide no assurance that the jury convicted under a valid theory of "official action." On the contrary, the jury was repeatedly told that it did *not* need to find any constitutionally valid official action to convict, and was never instructed to even consider the dispositive question—whether Skelos' vote was for sale. The judgment should be vacated in its entirety.

I. THE "OFFICIAL ACT" INSTRUCTION WAS ERRONEOUS

Silver and *Boyland* confirm that the "official act" instruction at Skelos's trial was fatally overbroad. This Court vacated Silver's convictions for honest services fraud and Hobbs Act extortion because the relevant jury instructions did not "comport with *McDonnell*"; instead, they told the jury that official action encompassed "*any action* taken or to be taken under color of

official authority." *Silver*, 2017 WL 2978386, at *2, *12-13. The instruction in Skelos' trial was nearly identical to that erroneous *Silver* instruction, as it also covered "any act taken under color of official authority." (A-619/2798). In fact, the Skelos instruction was worse: as in *McDonnell*, it went to say that "official acts" can include acts "customarily performed" by a public official—language that the government concedes "minimized the necessary substance and significance of the official act requirement." Br. of U.S., *Silver*, No. 16-1615, ECF No. 52, at 29.

Silver also rejected the argument, repeated here, that instructions referring to "official influence" and "official decisions" cured the error, as these instructions lacked the "requisite specificity," and any "limiting effect" was "undone" by the "broad instruction that an official action included '*any action* taken under color of official authority.'" 2017 WL 2978386, at *13. Similarly, *Boyland* found that language regarding the "'specific exercise of…official powers'….did not sufficiently inform the jury as to the nature of the power" that must be "exercised" to qualify as an official act. 862 F.3d at 290-91. The same is true here, as none of the language the government relies upon correctly explains the limits *McDonnell* imposes on official action.

II. THE *MCDONNELL* ERROR WAS NOT HARMLESS

Like Silver, Skelos is entitled to a new trial despite some "evidence of acts that remain 'official' under *McDonnell*," because it is plainly "possible" that "the jury may have convicted [him] for conduct that is not unlawful." *Silver*, 2017 WL 2978386, at *13, *15-16. Silver's case is particularly instructive because, like Skelos, he was accused of accepting payment in exchange for meeting with Glenwood lobbyists to discuss (the same) real estate legislation and then voting for that legislation. *See id.* at *5, *15-16. The Court held that even if a lobbyist meeting was "circumstantial evidence" of a "*quid pro quo* for legislative votes," "the jury could have

concluded easily, but mistakenly, that the meeting itself sufficed to show an official act, *and gone no further*." *Id.* at *16 & n.114 (emphasis added). This scenario was especially "*probable*[] in light of the Government's argument during its summation that this meeting, by itself, was an official action." *Id.* at *16. It was even more probable in Skelos's trial, where the invalid theory of official action was more repeatedly and "emphatically urged upon the jury." *Stromberg v. California*, 283 U.S. 359, 368 (1931). (*Compare* DS.Br.44-48, *with* Def.'s Br., *Silver*, No. 16-1615, ECF No. 32, at 22-24).[1]

It bears emphasis that Silver met with Glenwood lobbyists "to discuss the terms of" legislation that was up for a vote "later that month." 2017 WL 2978386, at *5, *16. *Silver* therefore answers this Court's questions at oral argument about whether personally attending meetings as a "decision-maker" with a hand in framing legislation is different from arranging meetings with third parties. In either case, the meeting is not, by itself, an official action, and urging the jury to convict on the basis of that meeting entitles the defendant to a new trial. Under *Silver*, the fact that Skelos's legislative votes were consistent with his decades-long positions—and that the insurance extender legislation, at least, was non-controversial (DS.Br.27-29)—provides a further reason why the error was not harmless. This Court held that a jury "could reasonably conclude" that Silver's consistent, non-"controversial" official acts—such as votes to approve Glenwood's requests for tax-exempt financing—were "too perfunctory to be regarded as

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[1] In *Boyland*, by contrast, the defendant did not point to any remotely similar government arguments in summation. *See* Def.'s Supp. Br., *Boyland*, No. 15-3118, ECF No. 74, at 6-7. More importantly, his claims of plain error were foreclosed because the official acts were decisions on permits, licenses, grants, and the like—clearly within *McDonnell*'s definition. *See* 862 F.3d at 282-86, 291-92; *Silver*, 2017 WL 2978386, at *13-14 nn.92, 98. Here, the error was plainly preserved; the government's forfeiture argument is belied by the record and foreclosed by controlling precedent, including but not limited to *United States v. Hassan*, 578 F.3d 108, 129 (2d Cir. 2008). *See generally* Reply 3-7.

a *quo*" sold by Silver. 2017 WL 2978386, at *16; *see also id.* at *14 (discussing "routine, *pro forma* [resolutions] rubber stamped by Assembly members"). For the same reason, had the jury been properly instructed to focus only on legally adequate "official acts," it could very well have found that Skelos did not sell his votes. Charles Dorego testified repeatedly that there was "no doubt" that Skelos already supported Glenwood's legislative positions. (DS.Br.14). Rather than resolve the more difficult question of whether Skelos accepted benefits in exchange for votes on legislation, the jury may well have taken the easy way out and found a quid pro quo for meetings and "gone no further." *Silver*, 2017 WL 2978386, at *16 n.114.[2]

Silver also shows that Skelos's statements in favor of legislation desired by AbTech do not help the government. (US.Br.20-21, 71-72 & n.11; Reply 14). The government argued that Silver's opposition to a methadone clinic near Glenwood property was an official act and also evidenced his intent to take official action to relocate the clinic. But this Court held that "[t]aking a public position on an issue…[is] not an 'official act,'" and that a jury "might" not find that Silver "intended to take some action to oppose the clinic," since "there was no evidence presented that Silver took any action…other than publicly stating his opposition." *Id.* at *15 & n.111. Similarly, there was no evidence that Skelos took any action to advance AbTech's preferred legislation beyond mere statements of support. (Reply 26-27).

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[2] Contrary to the government's assertions at oral argument, its summations did not merely identify lobbyist meetings as "official action" and leave it at that; they also forcefully and repeatedly argued that such meetings were the "quo" in an illicit quid pro quo. (*See* DS.Br. 44-45, 47).

III. THE §666 CONVICTIONS ARE EQUALLY INVALID

Boyland does not salvage the §666 convictions.

1. The government has waived any argument that "official action" is broader for §666 than for the Hobbs Act or honest services fraud. From the inception of this case through its appellate brief and argument, the government consistently maintained that the same definition of "official action" applies to all three statutes. The indictment contained a list of "[o]fficial [a]ctions," including lobbyist meetings, applicable to all counts. (A-166-68). The government requested and obtained §666 instructions clearly defining the crime by reference to "official act[s]." (A-247-48). By contrast, in *Boyland*, the §666 instructions contained only a "stray reference to an 'official act.'" 862 F.3d at 287. And, as in *McDonnell*, at the Skelos trial the prosecution requested and obtained a single "official act" definition applicable to all counts (A-194-95, A-251), which it repeatedly invoked as to all counts in its summations (DS.Br.44-48). Most importantly, the government never suggested in its brief that *McDonnell* applies to some counts but not others (*see* ECF No. 127 (citing waiver cases)), nor did it propose "any alternative definition" as to §666 that would allay the constitutional concerns identified in *McDonnell*. *Silver*, 2017 WL 2978386, at *11 n.67. The filing of a supplemental brief does not excuse such a waiver. *See Wilmer v. Johnson*, 30 F.3d 451, 454-55 (3d Cir. 1994) (Becker, J.); *cf. Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 209 n.9 (2d Cir. 2006); *United States v. Handakas*, 286 F.3d 92, 112 n.11 (2d Cir. 2002), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003).

Having elected to treat the corruption statutes as interchangeable throughout this case, the government cannot change tack now. *See McDonnell*, 136 S. Ct. at 2365, 2375 (respecting parties' agreement that all counts required same type of "official action").

2. In any event, the government's new argument is meritless. It has long been settled in this Circuit that the corruption laws—including not only the Hobbs Act and the honest services statute, but also §666—forbid exchanging "official acts" for payment. *United States v. Ganim*, 510 F.3d 134, 141-42 (2d Cir. 2007) (Sotomayor, J.); *see also United States v. Rosen*, 716 F.3d 691, 698 n.3, 699-700 (2d Cir. 2013). *McDonnell* narrowed the definition of "official action" for purposes of *all* such laws, including §666. The Supreme Court found it helpful to analyze the definition of "official act" in §201 because the parties had incorporated that definition into their Hobbs Act and honest services instructions. The Court's holding, however, rested on constitutional principles that apply broadly to the concept of "official action" implicated by every anti-corruption statute. The Court held that an expansive interpretation, reaching everything customarily done in an official capacity, would render the corruption laws unconstitutionally vague, chill interactions between officials and the public, and raise serious federalism concerns. *See McDonnell*, 136 S. Ct. at 2372-73.[3] These constitutional problems arise in any prosecution of a state official under any federal corruption statute. Accordingly, *McDonnell*'s definition of "official action" must apply in §666 cases. (DS.Br.38-40). *Cf. United States v. Tavares*, 844 F.3d 46, 56-57 (1st Cir. 2016) (in RICO prosecution, construing state gratuity statute in light of *McDonnell*).

Boyland and *Silver* reinforce this conclusion. In *Boyland*, unlike in *McDonnell*, the Hobbs Act instructions "did not include" the §201 definition of "official act"; instead, they asked the jury whether Boyland accepted payment "in exchange for a specific exercise of [his] official powers." 862 F.3d at 290. The *Boyland* Court acknowledged that *McDonnell* parsed the

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[3] It is evident that *McDonnell* was not merely construing §201: federalism concerns rarely arise in prosecutions under that statute, which primarily covers federal public officials. *See* 18 U.S.C. §201(a)(1).

"official act" definition in §201 "because the parties agreed to use that definition" in their jury instructions. *Id.* The Court observed, however, that "in addition to considering Congressional intent, [*McDonnell*]'s analysis turned upon constitutional concerns stemming from the breadth of the interpretation advanced by the government," such as "the possibility of criminal penalties for innocuous conduct by government officials attempting to serve their constituents." *Id.* at 291. The Court concluded that although the Hobbs Act instructions in *Boyland* did not "explicitly incorporat[e]" the §201 definition of "official act," they "suffered from the same flaws" as those in *McDonnell*, since "[t]he jury could have believed…that merely contacting another government agency sufficed to constitute a misuse of [Boyland's] 'official powers.'" *Id.* The same, of course, is true of the §666 instructions at issue here.

Silver emphasized *McDonnell*'s constitutional analysis as well. The Court noted that in *McDonnell*, the Supreme Court "incorporated §201['s] definition of an official act into the bribery requirement for honest services fraud and extortion" because the parties had agreed to do so. 2017 WL 2978386, at *11 n.67. Thus, *McDonnell* did not hold that §201 "must *necessarily* be the exclusive source for the definition of an official action in every honest services fraud and Hobbs Act extortion case." *Id.* In *Silver*, the parties "did not agree" to use the §201 definition at trial, although they did apply *McDonnell*'s interpretation of that definition on appeal. *Id.* Ultimately, however, because neither party provided "an alternative definition that would allay the constitutional concerns expressed in *McDonnell*," the Court applied *McDonnell*'s definition of an "official act." *Id.* Similarly, the government here has never offered any alternative definition, for any charge, which would solve the constitutional problem posed by the district court's instruction.

Notably, *Silver* reiterated these "constitutional concerns" when discussing *Boyland*. The Court "reject[ed] the official act instructions given at Silver's trial because of the 'constitutional concerns stemming from the breadth of the interpretation advanced by the government.'" *Id.* at *12 n.84 (quoting *Boyland*, 862 F.3d at 291). Those instructions did nothing to "prevent the jury from concluding that meetings or events with a public official…were official acts." *Id.* at *12. The official act instructions at Skelos's trial raised precisely the same constitutional concerns and similarly applied to *all* counts, including those under §666. (A-619/2798).

3. The *Boyland* panel did suggest in a conclusory, fleeting passage that a different standard applies to §666. It said §666 "is more expansive than §201," since it is not "limited to acts on pending 'question[s], matter[s], cause[s], suit[s], proceeding[s], or controvers[ies]'" and forbids soliciting payments "'*intending to be influenced* or rewarded *in connection with any* business, transaction, or series of transactions of [an] organization, government, or agency.'" 862 F.3d at 291. The panel advised: "We do not see that the *McDonnell* standard applied to these counts." *Id.* These comments are neither correct nor binding.

True, §666 does not expressly include §201's definition of "official act." But neither does the honest services statute or the Hobbs Act. Indeed, none of the three statutes even contains the words "official act" or "official action." *See* 18 U.S.C. §1346 (defining fraud to include deprivation of "intangible right of honest services"), §1951(b)(2) (extortion "under color of official right"); *Ganim*, 510 F.3d at 146 (these statutes lack §201's "express statutory requirement" of "official act[ion]"). Yet these textual differences were immaterial to the Supreme Court in *McDonnell*, and to the *Boyland* panel when it held that the honest services fraud and the Hobbs Act instructions were "erroneous." 862 F.3d at 291. In fact, the panel expressly acknowledged that the Hobbs Act differs from §201 and nevertheless held that

McDonnell's "constitutional concerns" required jury instructions on *McDonnell*'s definition of official action. *Id.* This reasoning applies just as forcefully to §666, but the *Boyland* panel inexplicably failed to consider this issue.

Silver likewise underscored the need to "allay the constitutional concerns expressed in *McDonnell*" even though §201's official action definition is not in the corruption statutes underlying that prosecution. 2017 WL 2978386, at *11 n.67. Although *Silver* did not directly address §666, its reasoning demonstrates that textual differences between §666 and §201 are irrelevant to whether a jury must be instructed in accordance with *McDonnell*. There is no valid reason to treat §666 any differently from the honest services fraud or Hobbs Act crimes when it comes to *McDonnell*; such a distinction would be arbitrary, irrational, and inconsistent with the constitutional principles underpinning *McDonnell*.

In any event, this Court is not bound by the *Boyland* panel's erroneous understanding of §666, which cannot be reconciled with *McDonnell*. *First*, the panel focused exclusively on differences in statutory text (even though the other statutes' language also differed markedly from §201) and did not actually consider whether *McDonnell*'s constitutional concerns applied to §666. That question remains unresolved. This Court is free to consider it, and should do so by applying *McDonnell*'s limitations on official action to §666 in order to ensure that the law in this Circuit is consistent with binding Supreme Court precedent. *See Macktal v. U.S. Dep't of Labor*, 171 F.3d 323, 328-29 (5th Cir. 1999) (considering the "very same argument [that] was unsuccessfully argued before this court" in a prior case because "the court did not specifically address the argument," and a "prior panel's silence on a particular issue...is not binding").

Second, even if *Boyland* had stated that *McDonnell*'s constitutional concerns were irrelevant to §666 (which it did not), that would be non-binding dicta. The panel's finding that

there was overwhelming evidence of *McDonnell*-type official action made it unnecessary to determine whether §666 required such official action.[4] The §666 discussion is therefore dicta, and this Court should analyze the issue independently. *See Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 56 & n.11 (2d Cir. 2003) ("A court that knows that it will rule against the [appellant] at the second stage of the inquiry may fail to be as careful in its analysis of the first question as it would if the answer to that question was determinative."); *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988) (Posner, J.) (same); *OXY USA, Inc. v. Babbitt*, 230 F.3d 1178, 1185 (10th Cir. 2000) (conclusion was dicta "because we could have assumed *arguendo* that [it was true] and still found in the government's favor"), *vacated on other grounds*, 268 F.3d 1001 (10th Cir. 2001) (en banc).

Third, the parties in *Boyland* did not meaningfully brief whether *McDonnell* applies to §666. The defendant's initial brief on *McDonnell* did not even mention §666. *See* Def.'s Supp. Br., *Boyland*, No. 15-3118, ECF No. 74. The government conceded that *McDonnell*'s "constitutional concerns" applied to the §666 counts, but argued that the §666 instructions "adequately protect[ed] against the concerns raised in *McDonnell*." Br. of U.S., *Boyland*, ECF No. 91, at 54.[5] The *Boyland* panel, however, did not adopt or even mention the government's unpersuasive assertion. In reply, the defendant argued that those instructions were inadequate,

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[4] As Boyland was recorded promising various "formal governmental decisions" in exchange for payment, there was "no reasonable possibility" that any instructional error "affected the outcome of the case." 862 F.3d at 291-92; *see also id.* at 282-86.

[5] The government asserted that §666's federal-funding requirement mitigated federalism concerns, *id.* at 55, but this makes no sense because the Hobbs Act and honest services statute also have jurisdictional elements tied to federal interests. It also asserted, without explanation, that the "corruptly and with the intent to be influenced" language somehow addressed the other concerns, *id.* at 54-55. But §201 also requires that the defendant act "corruptly," and the other statutes also have robust scienter elements, and the Supreme Court still held that a narrow construction of official action was constitutionally required.

but he clearly did not perceive any need to justify why *McDonnell* applied to §666, because he did not address the subject at all. *See* Def.'s Reply Br., *Boyland*, ECF No. 96, at 14. At oral argument, the panel did not ask any questions about *McDonnell*'s applicability to §666. The panel's remarks about §666 therefore do not control here. *See Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) ("cursory conclusion" in prior opinion was not binding where the argument was "treated...as an afterthought" and was "largely unbriefed"); *Crawley*, 837 F.2d at 292-93 (dicta includes issues "not refined by the fires of adversary presentation").[6]

Fourth, perhaps because it was not briefed and was unnecessary to the Court's judgment that the convictions survived plain-error review, *Boyland*'s cursory assessment of §666 is phrased as an expression of the panel's views, rather than a pronouncement that would govern future cases. *See* 862 F.3d at 291 ("*We do not see* that the *McDonnell* standard applied to these counts.") (emphasis added). This emphasis on the panel's perspective, rather than the actual state of the law, is yet another reason to apply *McDonnell* to the §666 charges here. *Cf. Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) ("tentative" wording regarding "*what we view*" does not necessarily "express this Circuit's authoritative position").

Finally, as explained more fully in Adam Skelos' brief, which Dean Skelos joins, if §666 were interpreted to contain no *McDonnell*-compliant "official act" requirement—that is, no formal exercise of government power on a specific question or matter—it would (1) violate the First Amendment by chilling political discourse, (2) be unconstitutionally vague and fail to

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[6] The absence of briefing is a factor, *see Crawley*, 837 F.2d at 292-93, even if not dispositive, *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). In *Pierre*, for example, the conclusion being challenged had not been briefed, but in stark contrast to the tentative language in *Boyland*, began with the words "[W]e Hold." *United States v. Rubin*, 609 F.2d 51, 78 n.13 (2d Cir. 1979) (Meskill, J., dissenting).

provide adequate notice in violation of the Due Process Clause, and (3) undermine federalism. *See*, *e.g.*, *McDonnell*, 136 S. Ct. at 2372-73; *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (overbroad criminal statutes that "'chill' constitutionally protected speech" barred by First Amendment).

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As the Court said of Silver: "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 *McDonnell*, and the particular circumstances of this case, we simply cannot reach that conclusion." 2017 WL 2978386 at *17.

The same is true here. A man should not be deprived of his liberty by a jury that never even had to consider whether his conduct was criminal. Dean Skelos is entitled to a new, fair trial with a properly instructed jury.

Respectfully submitted,

/s/ Alexandra A.E. Shapiro
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Counsel for Appellant Dean Skelos

cc: Counsel of Record (by CM/ECF)