IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Statesville Division

UNITED STATES OF AMERICA, v. GREG E. LINDBERG, *et al.,* *Defendants.*	**No. 5:19-cr-22-MOC-DSC**

MEMORANDUM IN SUPPORT OF DEFENDANT GREG LINDBERG'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29(c) OR, ALTERNATIVELY, FOR A NEW TRIAL UNDER RULE 33

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INTRODUCTION

Under Federal Rules of Criminal Procedure 29(c) and 33, Defendant Greg E. Lindberg moves for a judgment of acquittal for the reasons stated below and renews all his prior motions for a judgment of acquittal. Tr. 1253:24-1266:23, 1269:1-20, 1272:18-19, 1277:4-10, 1508:24-1509:5; Def. Greg E. Lindberg's Suppl. To Oral Mot. For Judgment of Acquittal, Dkt. No. 192 ("Rule 29 Suppl."). In the alternative, Mr. Lindberg moves for a new trial for the reasons stated in this memorandum and for the reasons stated in support of prior motions for a judgment of acquittal. *See* Tr. 1253:24-1266:23, 1269:1-20, 1272:18-19, 1277:4-10, 1508:24-1509:5; Rule 29 Suppl.[1]

LEGAL STANDARD

A "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). "The test for deciding a motion for a judgment of acquittal is whether there is substantial evidence (direct or circumstantial) which, taken in the light most favorable to the prosecution, would warrant a jury finding that the defendant was guilty beyond a reasonable doubt." *United States v. MacCloskey*, 682 F.2d 468, 473 (4th Cir. 1982). Notably, "[s]ubstantial evidence" does not mean merely "a scintilla" of evidence. *United States v. Taylor*, 800 F.3d 701, 711 (6th Cir. 2015) (quoting *United States v. Martin*, 375 F.2d 956, 957 (6th Cir. 1967)). Rather, "substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996).

[1] As the defendants informed the Court in a February 19, 2020, filing, the government began producing hundreds of thousands of pages of discovery that it deemed could be potentially relevant to the case just days before trial. Dkt. No. 161. The government continued producing documents until February 18, 2020, the date of jury voir dire and arguments on the motions in limine. Given the volume of discovery, Mr. Lindberg has been unable to review all these documents. Mr. Lindberg thus reserves the right to bring a motion under 28 U.S.C. § 2255 or the Federal Rules of Criminal Procedure if continued review of the documents reveals *Brady* or other material whose earlier disclosures were required.

If the Court denies a motion for judgment of acquittal, it may nonetheless "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. Various circumstances satisfy this standard. "When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial." *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). A court may also order a new trial where "a defendant was unduly harmed or his trial made unfair by the erroneous admission or exclusion of evidence." *United States v. Fuentes*, No. 13-cr-0125, 2015 WL 144409, at *3 (E.D. Wash. Jan. 12, 2015) (citing *United States v. Johnson*, 337 F.2d 180, 203 (4th Cir. 1964)), *aff'd sub nom. United States v. Alarcon*, 682 F. App'x 556 (9th Cir. 2017) (non-precedential); *see also United States v. Lis*, 120 F.3d 28, 29 (4th Cir. 1997) (ordering a new trial based on the erroneous exclusion of evidence); *United States v. Stapleton*, 730 F. Supp. 1375, 1380 (W.D. Va. 1990) (ordering a new trial when the admission of evidence was "improper" and created "unfair[ ] prejudice[ ]"). Improper jury instructions also justify a new trial. *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).

In deciding whether to order a new trial, "the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence." *Arrington*, 757 F.2d at 1485. For example, "the district court is not constrained by the requirement that it view the evidence in the light most favorable to the government," and it "may evaluate the credibility of the witnesses." *Id.*

ARGUMENT

I. A Properly Instructed, Reasonable Jury Could Not Have Found the Existence of an "Official Act," an Essential Element of the Offenses.

The Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), points up three deficiencies in the verdicts rendered by the jury—all related to the required element of an "official act." As explained below, these deficiencies require the Court to set aside the verdicts in their entirety and, ultimately, enter a judgment of acquittal on both counts brought against Mr. Lindberg.

First, the Court's instruction to the jury on "official act" had the effect of relieving the government of proving this critical element beyond a reasonable doubt. In *McDonnell*, the Supreme Court held that "[i]t is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*." 136 S. Ct. at 2371. And the Supreme Court has held elsewhere that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *United States v. Gaudin*, 515 U.S. 506, 514 (1995). Here, however, after informing the jury that the government's theory of official act was premised on "the removal and replacement of the senior deputy commissioner in charge of overseeing the regulatory review of Defendant Lindberg's insurance companies," the Court applied the law to the facts for the jury:

> You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner would constitute an official act.

Tr. 1781:2-7. As explained below, this instruction had the effect of taking the element of an official act away from the jury. At a minimum, then, the Court must order a new trial on Count One, which charged conspiracy to commit honest-services wire fraud.

Second, the Court is required to enter a judgment of acquittal on Count One because, even viewing the evidence in the light most favorable to the government, no reasonable jury could have concluded that the removal and replacement of the senior deputy commissioner constituted an official act. As the Supreme Court clarified in *McDonnell*, the jury was required to find, among other things, that the defendants intended to influence "a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing." 136 S. Ct. at 2370. Here, however, there was undisputed evidence that the Commissioner reassigned matters through informal conversation. Tr. 593:6-594:2; *id.* at 1216:13-24; *id.* at 95:3-14. And North Carolina law clarifies that any formal exercise of the Commissioner's authority had to be "made in writing and signed by the Commissioner or by his authority." N.C. Gen. Stat. § 58-2-45. Critically, the evidence undermined the basis upon

which the Court saved the indictment at the motion-to-dismiss stage. At that time, the Court referenced the Commissioner's statutory authority to "appoint" and "employ" new deputies, N.C. Gen. Stat. § 58-2-25, analogizing it to the congressional hiring decision at issue in *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019). *See* Mot. to Dismiss Order at 8, Dkt. No. 120. At trial, however, it became apparent that the removal and replacement of a senior deputy commissioner did not involve the same level of formality as the hiring of a new employee at the Department. Thus, as explained in further detail below, because the act that the government sought to prove at trial is neither formal nor similar to a "lawsuit, hearing, or administrative determination," *McDonnell*, 136 S. Ct. at 2368, the Court must enter a judgment of acquittal on the Count One—conspiracy to commit honest-services wire fraud.

Finally, the requirement of an official act applies with the same force to the second count of the indictment—federal-program bribery under 18 U.S.C. § 666. That outcome is dictated by the logic of *McDonnell*. There, the Supreme Court was able to avoid three constitutional infirmities—implicating the First Amendment, vagueness, and federalism—only because it read into honest-services wire fraud the "official act" element of the federal anti-bribery statute, 18 U.S.C. § 201. *Id.* at 2372-73. As explained below, because § 666 would otherwise implicate the same constitutional infirmities, the Court must read § 666 to also require proof of an official act. Yet, over Mr. Lindberg's objection, the Court refused to instruct the jury that it must find an official act to convict under § 666. At a minimum, then, a new trial is required on Count Two. And for the reasons explained above and below, because no reasonable jury could have concluded that the removal and replacement of the senior deputy commissioner was an official act, the Court must also enter a judgment of acquittal on this count.

A. The Instruction on "Official Act" Deprived Mr. Lindberg of His Right to Have a Jury Determine this Critical Element of the Charged Offenses.

The Fifth Amendment guarantees that no one will be deprived of liberty without "due process of law," and the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amends. V, VI. These

guarantees include "the right to have a jury determine, beyond a reasonable doubt, [the defendant's] guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23.

Thus, although the Court is responsible for instructing the jury "on the law applicable to the issues raised at trial," the "next two steps are strictly for the jury: (1) determining the facts as to each element of the crime, and (2) applying the law as instructed by the judge to those facts." *United States v. Johnson*, 71 F.3d 139, 142 (4th Cir. 1995). Here, the Court's instruction failed both steps.[2]

Moreover, as explained further below, because these errors were structural—that is, "they 'defy analysis by "harmless-error" standards"'—the verdicts are *per se* invalid. *United States v. Ramirez-Castillo*, 748 F.3d 205, 214-16 (4th Cir. 2014) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)); *see also Johnson*, 71 F.3d at 144-45 (holding that, where an instruction relieved the jury of its obligation to find an essential element of the offense, the error was structural and harmless-error analysis did not apply). At a minimum, then, this Court must order a new trial.

1. The Court's Instruction Did Not Require the Jury to Find All of the Facts Necessary to Find an Official Act.

As an initial matter, the Court's instruction relieved the jury of its obligation to find all of the facts necessary to determine whether the defendants intended to influence an "official act." According to the Court, the jury was simply required to determine whether the defendants intended to secure "the removal and replacement of the senior deputy commissioner in charge of overseeing the regulatory review of Defendant Lindberg's insurance companies." Tr. 1781:2-4. The Court made clear

[2] Mr. Lindberg preserved this objection at the charge conference, Tr. 1579:13-1580:3, 1583:2-12, 1584:20-25, and through a supplemental filing objecting to the Court's proposed instruction, *see* Defs.' Response in Support of Gov't's Mem. Regarding the Jury's Right to Decide Official-Act Element, Dkt. No. 190. In addition, Mr. Lindberg's proposed instructions preserving the issue of an official act for the jury. *See* Defs.' Joint Proposed Jury Instructions 88-90 (Proposed Instruction No. 74); *see also* Resp. to Gov't's Preliminary Objection to Defs. Proposed Jury Instr., Dkt. No. 159. Mr. Lindberg also preserved objections to the other parts of the instruction for both honest-services wire fraud and § 666(a)(2) that excluded the defendants' proposed instructions. Tr. 1579:13-1580:3, 1584:20-25; *also* Resp. to Gov't's Preliminary Objection to Defs. Proposed Jury Instr. 10-11.

that, once the jury resolved that issue, its inquiry was at an end: "You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner would constitute an official act." *Id.* at 1781:4-7; *see also id.* at 1465:12-16 ("The thing I'm not going to allow is that – it's not going to do you any good to get up there and argue this was not an official act when I'm going to tell the jury during the charge it is an official act."); *id.* at 1466:5-8 (explaining that "if somebody argues to the jury that this is not an official act, then I'll have to step in and say the Court's going to rule that it is an official act.").

This was error. *McDonnell* makes clear that a jury must resolve much more than whether the defendant intended to influence the government action that is said to constitute the official act. As such, a jury must be instructed that, before finding an official act, it is obliged to—

- identify a "'question, matter, cause, suit, proceeding or controversy' [] involv[ing] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee";
- decide that "the pertinent 'question, matter, cause, suit, proceeding or controversy'" is "something specific and focused that is 'pending' or 'may by law be brought before any public official'"; and
- find that the public official "made a decision or took an action—or agreed to do so—*on* the identified 'question, matter, cause, suit, proceeding, or controversy.'"

McDonnell, 136 S. Ct. at 2371-72, 74-75; *accord United States v. Van Buren*, 940 F.3d 1192, 1204 (11th Cir. 2019). Equally important, the Supreme Court clarified that it is "up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*." *McDonnell*, 136 S. Ct. at 2371.

Thus, under *McDonnell*, the issue whether the Senior Deputy Commissioner was removed and replaced was just one component of the jury's fact finding. The jury also had to find that the removal and replacement of the Senior Deputy Commissioner amounted to an "official act."

And yet, here, the Court instructed the jury that it need not resolve the three issues that the Supreme Court held were essential to the charge at issue in *McDonnell*. Specifically, after reciting the

law generally, the Court said that, "*[i]n this case*," the relevant "question or matter is the removal and replacement of the senior deputy commissioner," and "[y]ou're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner *would constitute an official act*." Tr. 1781:1-7 (emphasis added). The instruction therefore relieved the jury of its obligation to find critical facts that, the Supreme Court has held, are "up to the jury" to decide. *McDonnell*, 136 S. Ct. at 2371.

At least two cases illustrate the error in the Court's instruction. In *Medley v. Runnels*, after a defendant allegedly used a flare gun during the commission of a crime, he was charged with a violation of a California statute that included an enhancement for using a "firearm." 506 F.3d 857, 864 (9th Cir. 2007) (en banc). A State court had allowed the jury to determine whether the defendant used the flare gun, but it instructed the jury that a flare gun was a firearm within the meaning of the statute under which he was prosecuted. In a federal habeas action, an en banc panel of the Ninth Circuit held that this instruction violated the defendant's "clearly established" Fifth and Sixth Amendment rights: "By instructing the jury that a flare gun is a firearm, the court did not permit the jury to make the factual determination as to whether the object used by [the defendant] was designed to be used as a weapon and expels a projectile through a barrel by the force of an explosion." *Id.* at 864, 867.

As a second example, in *United States v. DeFries*, two former union officials were charged with, among other things, violations of the Racketeer Influenced and Corrupt Organizations Act. 129 F.3d 1293, 1296-97 (D.C. Cir. 1997) (per curiam). On the enterprise element, the district court had explained that the indictment alleged that the enterprise was a specific union and its successor union. It then instructed the jury "'that, for purposes of this element of counts one and two, you should regard the two unions as a single enterprise.'" *Id.* at 1310 (emphasis omitted). The District of Columbia Circuit reversed: "The district court's RICO instruction did not obligate the government to prove the existence of an enterprise. Instead the instructions on the enterprise element concluded with the admonition that the jury 'should regard the two unions as a single enterprise.'" *Id.* at 1311; *see also id.*

("Rather than permitting the jury to determine whether an enterprise existed, and, if it did, which unions it included, the instruction removed those questions from the jury's consideration.").

A similar infirmity plagues the instructions at issue here. The Court allowed the jury to determine whether the defendants intended to influence the removal and replacement of the senior deputy commissioner, but on the critical issue of whether that action constituted an official act, the Court concluded with an admonition: "You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner *would constitute an official act*." Tr. 1781:4-7 (emphasis added). That was error.[3]

Because the jury was not instructed to find every fact necessary on the element of an official act, the Court must set aside the jury's verdict on this ground alone. The Court's decision to treat "official act" as beyond the province of the jury violated bedrock principles of constitutional law.

2. The Court's Instruction Relieved the Jury of Its Obligation to Apply the Law to the Facts.

The Court's instruction also deprived the jury of its duty to apply the law to the facts as it found them. As the Supreme Court recognized in *United States v. Gaudin*, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." 515 U.S. 506, 514 (1995). "Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not

[3] The Court's instruction also assumes that the removal and replacement of a senior deputy commissioner is a fixed process that cannot change over time or vary among insurance departments. This, in turn, shows that the Court was engaged in fact-finding reserved for the jury. For example, an insurance department might assign its deputies to review insurers with the same formality that a federal agency assigns administrative law judges to adjudicate administrative disputes, whereas another department might assign deputies through informal conversation (as was the case here). By instructing the jury that the removal or replacement of a senior deputy commissioner would constitute an official act in every instance, the Court was determining a factual issue that only the jury could resolve. *See, e.g.*, *United States v. Uchimura*, 125 F.3d 1282, 1285 (9th Cir. 1997) (explaining that, on the mixed question of materiality, the answer "in each case is necessarily different").

direct a verdict for the [government]"—even a partial verdict—"no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *see also DeFries*, 129 F.3d at 1311-12 ("The court may never direct a verdict for the government on an element of a criminal offense, 'no matter how overwhelming the evidence.'" (quoting *Sullivan*, 508 U.S. at 277)). And yet, that is exactly what the Court did here.

On the ultimate question of whether the contemplated action amounted to an "official act," the Court resolved that question for the jury: "You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner would constitute an official act." Tr. 1781:4-7. And the Court was clear that it erroneously viewed this inquiry as the province of the Court: "So what it is down to is the Court making a determination, the Court believes, legally as to whether something is an official act under the statute." *Id.* at 1451:2-4.

Once again, two cases illustrate the error in this aspect of the Court's instruction. In *Gaudin*, for example, the district court instructed the jury that, to convict the defendant of making false statements, the government was required to prove that the defendant made the statement in question. *See* 515 U.S. at 508. But, the district court continued, "You are instructed that the statements charged in the indictment are material statements." *Id.* (internal quotation mark omitted). Writing for a unanimous court, Justice Scalia explained that this instruction amounted to reversible error, because the Constitution guarantees the "right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." *Id.* at 513; *see also, e.g.*, *United States v. DiRico*, 78 F.3d 732, 736 (1st Cir. 1996) (explaining that the Constitution "requires the jury to apply the legal definition of materiality to the particular facts of a given case").

As a second example, in *United States v. Ramirez-Castillo*, the Fourth Circuit recognized that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and *draw the ultimate conclusion of guilt or innocence*." 748 F.3d 205, 214 (4th Cir. 2014) (quoting *Gaudin*,

515 U.S. at 514 (internal quotation mark omitted). In that case, the defendant was charged with two counts of possession of a prohibited object while in prison in violation of 18 U.S.C. § 1791. The district court gave the jury a special verdict form that asked it to determine whether the government's exhibits were prohibited objects within the meaning of the statute, but it never asked the jury to resolve the ultimate question of guilt. *Id.* at 208-09, 213-14. The Fourth Circuit vacated the defendant's conviction, explaining that "the district court erred when it treated the jury as a mere fact finder with respect to the elements the court considered to be in dispute, and thereby prevented the jury from making the ultimate, indispensable conclusion of whether [the defendant] was guilty." *Id.* at 214.

A similar error occurred here. The Court decided for itself the elements of "official act" that it considered to be in dispute, and thereby prevented the jury from determining whether the contemplated action amounted to an official act. Tr. 1781:4-7.

Notably, even the government raised concerns about the Court's instruction. In a highly unusual exchange in which the government pleaded with the Court to reconsider its instruction, the prosecutor explained: "My only concern is that the way that the Supreme Court has come down, *McDonnell* – with *McDonnell* and the courts post-*McDonnell* is with respect to a jury instruction and leaving it up to the jury." Tr. 1453:20-23; *id.* at 1456:15-19 (responding to the Court that official act is a "jury question"). And the government submitted a supplemental memorandum highlighting its concern with the Court's proposed instruction. *See* Dkt. No. 186.

In response to the government's plea for an amended instruction, the Court offered two rationales. Neither is correct.

First, the Court stated that "the Supreme Court [wa]s not saying [in *McDonnell*] that [an official act is] a jury question." Tr. 1454:9-10. But that view runs contrary to the Supreme Court's admonition in *McDonnell*: "It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*." 136 S. Ct. at 2371. And it

also contradicts the procedural posture of that case. After finding the district court's instruction deficient, the Supreme Court remanded to the Fourth Circuit for a determination whether the evidence was sufficient to sustain the conviction against Governor McDonnell. *Id.* at 2375. But even if the Fourth Circuit held that the evidence was sufficient under the new standard for an "official act," the Supreme Court recognized that Governor McDonnell still would have been entitled to "a new trial" precisely because only a jury can apply the facts to the correct legal standard and render guilt. *Id.*

As a second rationale for its instruction here, the Court stated that "it cannot be that a jury in the same state can find an act to be unofficial and another jury find it to be official when it's the same act." Tr. 1454:21-23. But *Gaudin* and *Sullivan* hold otherwise: "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the [government], no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277; *see also Gaudin*, 515 U.S. at 513 (holding that, where a defendant invokes his right to trial by jury, only the jury may apply "the law to the facts" and decide guilt). Indeed, under the Constitution, two juries could—and sometimes do—hear the *exact same evidence* and render *contradictory verdicts*. But that is the bargain the framers struck when they refused to "entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

To be sure, the public and elected officials need some level of certainty so that they can comport their conduct to what the law requires. *See* Tr. 1452:21-23 (lamenting that the law needs to provide elected officials with certainty otherwise the public would not know what the law forbids). But that certainty is not secured by the right to a trial by jury. It is secured instead by the Due Process Clause and its mandate that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A court can enforce that definiteness in a case where the indictment fails to allege a violation of the

offense, or where the government fails to submit evidence sufficient to sustain a conviction beyond a reasonable doubt. But once the court determines that the facts alleged and proved could constitute an offense, it is up to the jury to decide guilt. Otherwise, the court's ruling would have the effect of directing a verdict for the government—something it can never do. *Sullivan*, 508 U.S. at 277.

3. The Court's Error is Structural, But Even if It Were Not, the Government Cannot Sustain Its Burden of Demonstrating that the Error Was Harmless Beyond a Reasonable Doubt.

The Fourth Circuit has held that where, as here, an instruction relieves the government of its burden to prove an element beyond a reasonable doubt, that error is structural and not susceptible to harmless error analysis. In these situations, the court has an obligation to aside the verdict.

In *United States v. Johnson*, for example, the defendant was charged with, among other things, one count of armed robbery of a credit union in violation of 18 U.S.C. § 2113. 71 F.3d 139, 141 (4th Cir. 1995). On this count, the district court instructed the jury: "'You are told that the [Arlington Schools Federal Credit Union] is a credit union within the terms of [the charged] statute.'" *Id.* The Fourth Circuit held that this instructed violated the defendant's constitutional right to have a jury determine the facts of each element and apply the law to those facts. *Id.* at 142-43. The court of appeals then turned to the question of remedy. Relying on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Fourth Circuit held that, where the jury was relieved of an element, "the entire premise of harmless error review" is "absent": "'There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.'" *Johnson*, 71 F.3d at 143-44 (quoting *Sullivan*, 508 U.S. at 280).

The Fourth Circuit reached a similar result in *United States v. Ramirez-Castillo*, 748 F.3d 205 (4th Cir. 2014). There, as discussed above, the Fourth Circuit held that the district court violated the defendant's constitutional rights by giving the jury a special verdict form that asked whether the

government's exhibits amounted to prohibited objects under 18 U.S.C. § 1791, but never asked the jury to render a verdict of guilty. *Id.* at 213-14. According to the Fourth Circuit, because "the district court in effect directed a guilty verdict for the Government," the error was "structural" and a harmless-error analysis did not apply. *Id.* at 216.[4]

The same outcome is compelled here. As explained above, the Court's instruction had the effect of directing a partial verdict for the government on the element of an official act. It both deprived the jury of its obligation to resolve every fact necessary to find an official act and prevented the jury from exercising its duty to apply the law to the facts. As a result, the remedy is automatic: the Court must, at minimum, order a new trial.

In opposition, the government might argue that this Court should nonetheless apply a harmless-error analysis. But that will get the government nowhere. Even if the Court's error were susceptible to such an analysis, the government cannot establish that the Court's instructional error was harmless beyond a reasonable doubt. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 15-16 (1999) (holding that, under a traditional harmless-error analysis, the government bears the burden of showing that the error was harmless beyond a reasonable doubt).[5]

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[4] *See also DeFries*, 129 F.3d at 1312 n.13 ("The district court's failure to allow the jury to decide the enterprise element was, *per se*, a reversible error."); *DiRico*, 78 F.3d at 737 ("Here, because the jury did not determine whether the government had proved, beyond a reasonable doubt, the existence of an essential factual element of the crime of false subscription (*i.e.*, materiality), there was 'no jury verdict within the meaning of the Sixth Amendment;' and harmless error analysis is inapplicable."); *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988) ("Nevertheless, not only does the harmless-error doctrine not apply when the error consists in directing a verdict against a criminal defendant; it also does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime—such as guilty knowledge in this case—has been proved beyond a reasonable doubt, so the jury needn't worry its collective head over that one." (citation omitted)).

[5] In *Neder*, the Supreme Court held that where a court does not direct an outcome on an element, but instead neglects to instruct the jury on the existence of that element, the error is subject to harmless-error analysis. 527 U.S. at 8-9; *see also Van Buren*, 940 F.3d at 1204 (holding that the failure of the court to properly instruct the jury on the element of official act, like a failure to instruct the jury on the existence of an element, is subject to harmless-error analysis, and holding that the improper instruction was not harmless). In contrast, in *Ramirez-Castillo* and *Johnson* (as here), the district court's instruction

Here, the Court's instruction had the effect of instructing the jury to disregard evidence that the "replacement and removal of the senior deputy commissioner" did not amount to an official act, because it was not "a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing," *McDonnell*, 136 S. Ct. at 2370; *see* Tr. 1781:4-7 ("You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner would constitute an official act."). Thus, even though formal actions of the Commissioner are not effective unless they are "made in writing and signed by the Commissioner or by his authority," N.C. Gen. Stat. § 58-2-45, the jury was told to ignore undisputed evidence that the Commissioner can reassign a senior deputy commissioner through an informal conversation, Tr. 593:6-594:2 (testimony of Commissioner Causey agreeing that it took a simple conversation to reassign a deputy insurance commissioner from one matter to the next); *id.* at 1215:23-1216:24 (testimony of former Department employee Scott Wicker that his reassignment resulted from a simple conversation); *id.* at 95:3-14 (testimony of Senior Deputy Commissioner Obusek explaining that the reassignment of matters did not require any formal process, approval, or writing).

Compounding the effect of that error, the Court ruled that it would not allow the defendants to put on additional evidence about the informality of the Department's reassignment process. *Id.* at 1450:6-1456:25; *see also id.* at 1457:6-1465:6 (offer of proof of a witness testifying that a reassignment could occur based on a conversation or e-mail). Thus, the Court excluded what would have amounted to Mr. Lindberg's principal defense to the charges—that he did not intend to influence an official act.

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relieved the jury of its obligation to find an element of the offense. As a result, there is no inconsistency between *Neder*, on the one hand, and *Ramirez-Castillo* and *Johnson*, on the other. *Ramirez-Castillo*, 748 F.3d at 215-16 (mentioning *Neder* but deeming it inapplicable because the error before it was structural); *Johnson*, 71 F.3d at 143-44 (decided before *Neder* but invoking the same distinction at issue in *Ramirez-Castillo*).

See id. at 1451:21-22 (explaining that the Court's ruling "will drastically reduce our day"—and that the defense would have "one witness only").

Finally, the Court warned counsel that if they argued "to the jury that this is not an official act, then [the Court will] have to step in and say the Court's going to rule that it is an official act." *Id.* at 1466:3-8; *see also id.* at 1465:12-16 ("The thing I'm not going to allow is that – it's not going to do you any good to get up there and argue this was not an official act when I'm going to tell the jury during the charge it is an official act."). In this regard, the Court was clear that it was treating official act as a matter for the Court to resolve: "So what it is down to is the Court making a determination, the Court believes, legally as to whether something is an official act under the statute." *Id.* at 1451:2-4; *cf. Van Buren*, 940 F.3d at 1204 (noting that the district court's improper instruction was not harmless because it deprived the defendant of any "effective way to highlight the government's failure to identify an appropriate 'question,'" and the defendant "very well could have successfully made that argument").

The upshot is that, even if harmless-error analysis applies, the government cannot satisfy its burden under that standard. At a minimum, then, the Court must order a new trial on Count One.

B. A Judgment of Acquittal Is Required on the Count of Conspiracy to Commit Honest-Services Wire Fraud Because No Reasonable Jury Could Have Found that Task Reassignment Is an Official Act.

But Mr. Lindberg is entitled to more than a new trial; he is entitled to a judgment of acquittal on the count of conspiracy to commit honest-services wire fraud. That's because, even accepting the evidence in the light most favorable to the government, no reasonable jury could have concluded that the removal and replacement of the senior deputy commissioner constituted an official act.

Here, Mr. Lindberg is reviving a prior argument, but under changed circumstances. Although the Court denied Mr. Lindberg's motion to dismiss the indictment, which was also premised on the lack of an official act, the Court did so by invoking the Commissioner's statutory authority to "appoint" and "employ" new deputies, N.C. Gen. Stat. § 58-2-25, which the Court analogized to the

congressional hiring decision at issue in *Fattah*, 914 F.3d at 155-59. Mot. to Dismiss Order at 8, Dkt. No. 120. But the evidence at trial fell short of that standard. Indeed, as previously mentioned, the jury heard undisputed evidence that the Commissioner carried out the removal and replacement of existing employees through informal conversation. Tr. 593:6-594:2; *id.* at 1216:13-24; *id.* at 95:3-14; *cf.* N.C. Gen. Stat. § 58-2-45 (explaining that a formal exercise of the Commission's authority had to be "made in writing and signed by the Commissioner or by his authority").

As a result, this Court is now presented with a fundamentally different question—whether a reasonable jury could have found, based on substantial evidence, that an informal (and strictly internal) assignment process is "a formal exercise of governmental power" akin to a "lawsuit, hearing, or administrative determination." *McDonnell*, 136 S. Ct. at 2368. Because what the government offered does not satisfy that standard, this Court must enter a judgment of acquittal.

In *McDonnell*, the Supreme Court substantially narrowed the scope of federal bribery laws. There, the Court imported the definition of "official act" from 18 U.S.C. § 201 as a limitation on the scope of honest-services wire fraud under 18 U.S.C. § 1346. *McDonnell*, 136 S. Ct. at 2365. That step, the Court explained, saved honest-services wire fraud from three potential constitutional infirmities—implicating First Amendment, vagueness, and federalism concerns. *Id.* at 2372-73, 2375.

The Supreme Court then interpreted the definition of official act to impose three requirements—the government must: (i) identify a formal "question, matter, cause, suit, proceeding or controversy" that is "similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee," (ii) prove that the relevant "question, matter, cause, suit, proceeding, or controversy" was one that "may at any time be pending, or which may by law be brought before any public official," and (iii) show a decision or action *on* that question, matter, cause, suit, proceeding, or controversy. *Id.* at 2367, 2369, 2372. Under this definition, not every action taken by a government official is an "official act." As the Supreme Court explained in *United States v. Sun-Diamond Growers*,

some "actions [taken by government officials]—while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of" the federal anti-bribery statute. 526 U.S. 398, 407 (1999).

Here, what the government ultimately proved up at trial—the mere reassignment of a task from one employee to another—fell far short of the statutory definition of an "official act." Most notably, the government failed to prove that such a reassignment "involve[d] a *formal* exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S. Ct. at 2372 (emphasis added). Mr. Causey testified that switching assignments within the Department of Insurance requires only an informal conversation. Tr. 593:6-594:2. Scott Wicker, a former employee of the Department, testified that he was reassigned away from Global Bankers Insurance Group based on a simple conversation. *Id.* at 1216:13-24. And Jackie Obusek, the senior deputy commissioner at the center of this case, testified that her assignments were within Mr. Causey's discretion and that assignment changes did not require any formal process, approval, or writing. *Id.* at 95:3-14. In fact, before any of the alleged unlawful conduct at issue here, Mr. Causey changed Ms. Obusek's role in regulating Global Bankers Insurance Group, and he made that change through a simple conversation with Ms. Obusek. *Id.* at 98:25-99:6. None of this shows a formal exercise of government power akin to a lawsuit, agency determination, or committee hearing.

Notably, when the Insurance Commissioner takes formal action—action that can affect an "insurer, insurance agent, insurance broker or other person" subject to the Insurance Code—the Department is required to issue an order "in writing and signed by the Commissioner or his authority." N.C. Gen. Stat. § 58-2-45. This State-law requirement only serves to reinforce that the act the government proved up here—the informal reassignment of tasks from one employee to another—does not qualify as a formal exercise of government power within the meaning of *McDonnell*.

Beyond that, it would seem odd to describe the informal reassignment of a task from one employee to another—a chore strictly internal to the Department of Insurance—as a "decision or action on" a "matter" that is "*pending*, or which may by law be *brought before* any public official, in such official's official capacity." 18 U.S.C. § 201(a)(3) (emphasis added). Pending, as an adjective, denotes some level of formality. Merriam-Webster Dictionary, *Pending*, https://www.merriam-webster.com/dictionary/pending ("the case is still *pending*"); *accord* Cambridge Dictionary, *Pending*, https://dictionary.cambridge.org/us/dictionary/english/pending ("the appeal is still pending"). And a matter that "may by law be *brought before*" a public official suggests a formal request for a decision that the public typically requests of a government official. *See McDonnell*, 136 S. Ct. at 2367, 2369 (emphasis added). Thus, a matter or decision is pending—or might be of the type that is brought by law before a public official—if it bestows some benefit upon or take some right away from private citizens, requires private citizens to do something, prohibits private citizens from doing something, or changes the law that governs private citizens' conduct. Deciding that one government employee is going to take on a task once assigned to another employee does not rise to that level. For example, no one would describe a judge's contemplation of whether to reassign cases among his law clerks as a "matter" that "may be brought by law before" the judge, but on which his decision is still "pending."

A contrary approach offers no limiting principle. There are any number of actions by government officials that are taken in some form of official capacity. For example, a chief judge might reallocate courtroom deputies, or an agency head might modify intake procedures for government benefits. But the Supreme Court has been clear that not all government action rises to the level of an official act within the meaning of the federal anti-bribery statutes. *McDonnell*, 136 S. Ct. at 2370; *accord Sun-Diamond Growers*, 526 U.S. at 407.

As a secondary basis for finding an "official act" here, the Court noted that, under *McDonnell*, "[a] decision or action on a qualifying step" would constitute an official act. *See* Tr. 1580:6-7. But to

constitute a "qualifying step," a decision or action must be a step in a larger decision or action that would, in turn, constitute an "official act." *McDonnell*, 136 S. Ct. at 2370. Thus, in *McDonnell*, the Supreme Court explained that "a decision or action to initiate a research study—or a decision or action on a qualifying step, such as narrowing down the list of potential research topics—would qualify as an 'official act.'" *Id.* Here, in contrast, there is no evidence that the removal and replacement of the senior deputy commissioner was part of some larger "official act" that Mr. Lindberg sought to influence—and the government has never sought to prove otherwise. There was no evidence, for example, that Mr. Lindberg sought to bring about a particular outcome on a review of his companies. Just the opposite, Debbie Walker, a Department of Insurance employee whom Mr. Lindberg suggested as a regulator for his companies, testified that there was no "side deal" with Mr. Lindberg or his company, that neither Mr. Lindberg nor his company ever approached her "about doing something inappropriate," and that there was no "type of guaranteed financial benefit" that would come from her "looking over these files" instead of Ms. Obusek. Tr. 1306:13-16, 1306:24-1307:4, 1308:4-8.

Finally, in addressing the meaning of "official act" throughout this case, the Court has expressed concern that if a reassignment of tasks among agency employees is not an official act, then the door will be opened to a corrupt government. But this concern is overridden by three considerations. First, the Supreme Court has made clear that not all acts by a public official are "official acts" that justify a criminal conviction under the federal anti-bribery statutes. *Id.* at 2369-70; *Sun-Diamond Growers*, 526 U.S. at 407. A broad reading of the federal anti-bribery statutes would ignore this critical point and risk the constitutional infirmities that the Supreme Court sought to avoid in *McDonnell*. 136 S. Ct. at 2372-73, 2375. Second (and relatedly), the federal anti-bribery statutes are not meant to "set[ ] standards of good government for local and state officials." *Id.* at 2373 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)) (internal quotation marks omitted). Thus, even if

the conduct at issue is not proscribed by a federal statute, the State of North Carolina—as the sovereign most affected by the alleged conduct—certainly has the authority to regulate interactions between the public and its elected officials. *See id.* (noting that a State's authority "includes 'the prerogative to regulate the permissible scope of interactions between state officials and their constituents.'"); *see also Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of cert.) (noting the serious federalism concerns posed by allowing the federal government to "define the fiduciary duties that a town alderman or school board trustee owes to his constituents"). And third, the Court's concern overlooks other federal statutes that could apply in this scenario. For example, 18 U.S.C. § 600 punishes anyone who "promises any employment, position, compensation, contract, appointment, or other benefit . . . made possible . . . in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity." This statute appears broad enough to punish officials of federally funded State agencies who offer a position in exchange for a campaign contribution. And liability also would attach to aider and abettors of this offense. *See* 18 U.S.C. § 2.

This Court may view the conduct at issue here negatively. But as the Second Circuit warned, "viewing something negatively is not the same as finding that the elements of a crime have been met." *United States v. Silver*, 864 F.3d 102, 121 (2d Cir. 2017). Because no reasonable jury could have concluded that reassignment of tasks among employees at the Department of Insurance constituted an official act, the Court must enter a judgment of acquittal on Count One of the indictment.

C. Because the Element of "Business, Transaction, or Series of Transactions" in 18 U.S.C. § 666 Must be Read to Have the Same Meaning As "Official Act" to Avoid the Constitutional Infirmities Identified in *McDonnell*, the Court Must Also Set Aside the Verdict on the Second Count.

The second count of the indictment is based on an alleged violation of the federal-program-bribery statute, 18 U.S.C. § 666(a)(2), which punishes one who intends to influence a State agent "in connection with any business, transaction, or series of transactions of such organization, government,

or agency." This statutory language, like the balance of the federal anti-bribery statutes (specifically, 18 U.S.C. §§ 201 and 1346), must be read as limited to "official acts." Because the Court refused to instruct the jury that this element required an official act, *see* Tr. 1782:14-1786:2, Mr. Lindberg is, at minimum, entitled to a new trial on this count. And beyond that, because no reasonable jury could have found that the removal and replacement of the senior deputy commission constituted an official act, Mr. Lindberg is entitled to a judgment of acquittal on this count as well.[6]

1. Section 666 Must Be Read to Include an "Official Act" Requirement in Cases Involving Public Officials.

Over the years, the Supreme Court has narrowed the scope of the federal anti-bribery statutes to avoid serious constitutional and practical concerns. The latest attempt was, of course, in *McDonnell*. There, with the government's consent, the Supreme Court interpreted honest-services wire fraud and Hobbs Act extortion, 18 U.S.C. §§ 1346, 1951(a), to incorporate the "official act" requirement from 18 U.S.C. § 201(a)(3). The Court did so because, otherwise, honest-services fraud raised a trident of constitutional infirmity—involving the First Amendment, vagueness, and federalism. *McDonnell*, 136 S. Ct. at 2372-73, 2375.

As the Supreme Court recognized in *McDonnell*, an overly broad view of the federal anti-bribery statutes "would likely chill [public] officials' interactions with the people they serve and thus damage their ability effectively to perform their duties." 136 S. Ct. at 2372 (quoting Br. for Former Fed. Officials as *Amici Curiae* 6) (internal quotation mark omitted). That's because "conscientious public officials" perform services for their constituents. *Id.* Indeed, "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the

[6] Mr. Lindberg preserved his objection to the Court's instruction omitting an "official act" requirement from the charge on § 666 at the charge conference, Tr. 1584:20-25, and through his proposed jury instructions, Dkt. No. 163-1, and his trial brief, Dkt. No. 164.

homeowners who wonder why it took five days to restore power to their neighborhood after a storm." *Id.* For these reasons, the Court rejected the government's reading of "official act"—under which virtually any action taken by a public official would qualify—because it would "cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame." *Id.*

Separately, an overly broad view of the *quo* necessary to sustain a federal bribery conviction would raise significant vagueness concerns. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. Where a statute fails to provide such definiteness, it could permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 357-58 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)) (internal quotation marks omitted). And that risk is heightened in the political sphere, because there is real concern that prosecutors might use overly broad statutes to punish political rivals or seek headlines in "pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of cert.). For that reason, *McDonnell* rejected the government's reading of official act, under which "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." 136 S. Ct. at 2373.

Finally, an overly broad view of the federal anti-bribery statutes would "raise[ ] significant federalism concerns." *Id.* at 2373. In *McDonnell*, for example, the Court expressed serious doubt about the federal government's authority to establish ethical practices for State and local governments. *See id.* (explaining that the States have "the prerogative to regulate the permissible scope of interactions between state officials and their constituents."). Because "a more limited interpretation of 'official

act'" was available, the Court "decline[d] to 'construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'" *Id.* (quoting *McNally*, 483 U.S. at 360).

In addition to these constitutional concerns, the Supreme Court highlighted some of the practical concerns associated with an overly broad reading of the *quo* that a government official might be said to provide in exchange for a *quid* under the federal anti-bribery statutes—drawing on its prior decision in *Sun-Diamond Growers*. *Id.* at 2370. In that case, the government had argued that the defendant, a trade association, could be convicted of providing the Secretary of Agriculture with a gratuity under 18 U.S.C. § 201(c)(1)(A) based on the prospect that the defendant might be affected by some future "official act," however ill-defined, that might be taken by the Secretary. *Sun-Diamond Growers*, 526 U.S. at 405-06. In rejecting this argument, the Court explained that a sweeping definition of "official act" would have made it a crime for a sports team to give the President a replica jersey, for the principal of a high school to present the Secretary of Education with a school baseball cap, or for a group of farmers to provide the Secretary of Agriculture with a complimentary lunch after he delivered a speech to them on agricultural policy. *Id.* at 406-07. That's because "the Secretary of Agriculture always has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools." *Id.* at 407. For these reasons, the Court explained that "the existence of such pending matters was not enough to find that any action related to them constituted an 'official act.'" *McDonnell*, 136 S. Ct. at 2370 (citing *Sun-Diamond Growers*, 526 U.S. at 407). Instead, the Court continued, "[i]t was possible to avoid the 'absurdities' of convicting individuals on corruption charges for engaging in such conduct . . . '*through the definition of that term*'"—that is, "by adopting a more limited definition of 'official acts.'" *Id.* (quoting *Sun-Diamond Growers*, 526 U.S. at 408). The point here is that, in both *McDonnell* and *Sun-Diamond Growers*, the Court explained

that it was imperative to give the term "official act" a narrow definition, otherwise all manner of government acts—from attending a ceremony to giving a speech—could trigger criminal liability under the federal anti-bribery statutes.

The same constitutional and practical concerns are implicated in a prosecution under § 666. Indeed, because the Commonwealth of Virginia is a recipient of federal funding, the government could have charged Governor McDonnell with a violation of that statute. He was unquestionably an "agent . . . of a State" that received more than $10,000 in federal funding, and according to the government, he "agree[d] to accept" money and gifts "intending to be influenced or rewarded in connection with [some] business of such [State]." 18 U.S.C. § 666(a)(1)(B). Thus, if, as the Court initially ruled here, *McDonnell* places no limits on the *quo* necessary to sustain a conviction for federal-program bribery under § 666, then the government could have convicted Governor McDonnell under that statute based on the same constitutionally problematic theory that the Supreme Court rejected in *McDonnell* for honest-services fraud prosecutions.

For all of these reasons, § 666 must be read to include § 201's requirement of an official act. And the official act requirement incorporates easily into § 666's element of "any business, transaction, or series of transactions" and provides that vague phrase with much-needed clarity in prosecutions involving public officials. 18 U.S.C. § 666(a)(1)(B). Indeed, the Fourth Circuit's decision in *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), provides support for this conclusion. There, the court affirmed the defendant's conviction under § 666 because "a reasonable juror could have concluded that there was a course of conduct involving" payments of bribes "in exchange for a pattern of *official actions* favorable to [the defendant's] companies." *Id.* at 1018 (emphasis added). And although the Fourth Circuit was not presented directly with the question whether § 666 requires an official act, the court repeatedly read that phrase into the elements of the offense, invoking "official act" or "official

action" *thirty-five* times. *See generally id.* An official act is thus a natural way to describe the type of business or transaction that would qualify as a *quo* under § 666.

Section 666's statutory pedigree likewise supports reading into it the official act requirement from § 201. *McDonnell* has already read § 201's definition of "official act" into § 1346, and the Supreme Court has recognized that §§ 666(a)(2) and 1346 define "similar crimes." *Skilling v. United States*, 561 U.S. 358, 412 (2010). If anything, it is even more natural to read § 201's definition of "official act" into § 666 than it was for *McDonnell* to read the same into § 1346. As the Fourth Circuit explained in *Jennings*, § 666 is a direct outgrowth of § 201. It was enacted to resolve a circuit split over whether § 201 applied to State and local officials. *See Jennings*, 160 F.3d at 1012-13 ("Before § 666 was enacted in 1984, a circuit split raised doubt as to whether state and local officials could be considered 'public officials' under the general statute, 18 U.S.C. § 201."). Section 666(a)(2) thus "make[s] clear that federal law prohibits 'significant acts of . . . bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program.'" *Id.* at 1013 (quoting S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510). In short, because § 666 is a direct outgrowth of § 201, and because it was meant to proscribe only significant acts of bribery, it makes sense that the "official act" requirement applies to § 666 in cases involving public officials.

A contrary construction—reading § 666 differently than §§ 201 and 1346—is nonsensical. If *McDonnell* does not apply equally to §§ 201, 666, and 1346, then federal law would regulate *State* officials more strictly than *federal* officials. The federalism concerns that animated *McDonnell* require the opposite—that the federal government has *less* authority to enact broadly written statutes that curtail the relationship between State officials and their constituents. *McDonnell*, 136 S. Ct. at 2373.

To be sure, a handful of courts have opined that *McDonnell*'s "official act" requirement does not apply to § 666, but their reasoning is not persuasive, and none is binding upon this Court. In *United States v. Suhl*, for example, the Eighth Circuit suggested that *McDonnell* would not apply to § 666

because that provision "does not include the term 'official act.'" 885 F.3d 1106, 1112 (8th Cir. 2018). The court never resolved this issue, however, because it went on to hold that, even if *McDonnell*'s definition of official act applies to federal-program bribery, the indictment alleged an official act—specifically, a requested "increase [in] Medicaid reimbursements" to the defendant's companies. *Id.* at 1112-13. And even if the Eighth Circuit's statement constituted a holding—and thereby declined to apply *McDonnell* to § 666—its rationale is wholly unpersuasive. Like § 666, § 1346 "does not include the term 'official act,'" *id.* at 1112, but the Supreme Court agreed to read that requirement into § 1346 to avoid the serious constitutional and practical issues discussed above. *McDonnell*, 136 S. Ct. at 2372-73, 2375.

Similarly, in *United States v. Ng Lap Seng*, the Second Circuit implied that § 666 does not embrace an "official act" requirement because § 666's language "is more expansive than [§] 201," and "[n]owhere does [§ 666] mention 'official acts." 934 F.3d 110, 133 (2d Cir. 2019) (quoting *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017)), *petition for cert. filed*, No. 19-1145 (U.S. Mar. 16, 2020). As in *Suhl*, this discussion was not necessary to the Second Circuit's decision in *Ng Lap Seng*, because the district court gave an "official act" instruction under § 666, *id.* at 138-39, and the Second Circuit found the evidence sufficient to support the conviction, *see id.* at 140. And like in *Suhl*, the Second Circuit's rationale for refusing to apply *McDonnell* to § 666 is unpersuasive. The fact that § 666's language is "more expansive" than § 201's militates in favor of applying *McDonnell*, not jettisoning it. Otherwise, § 666's expansive reach risks *heightened* constitutional and practical concerns of the nature otherwise tamped down by *McDonnell*'s application. And the fact that § 666 makes no mention of an "official act" is no impediment either, because the same could have been said about honest-services wire fraud and Hobbs Act extortion.

The Second Circuit ignored these issues and instead claimed that § 666 was different, because § 666 invoked Congress's "power to keep a watchful eye on [its] expenditures." *Id.* at 138 (quoting

Sabri v. United States, 541 U.S. 600, 608 (2004)). But while Congress's spending-clause authority might empower it to impose some strings on the recipients of congressional appropriations, the Supreme Court has insisted upon an "unmistakably clear" textual statement before it will infer that Congress intended to "alter the 'usual constitutional balance between the States and the Federal government.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). And nothing in § 666 suggests—let alone unmistakably proclaims—that Congress meant to disregard basic principles of federalism or criminalize "prosaic interactions" between State and local officials and their constituents. *McDonnell*, 136 S. Ct. at 2373.

2. Mr. Lindberg Is Entitled to a Judgment of Acquittal on Count Two Based on the Absence of Sufficient Evidence to Establish an Official Act or, At a Minimum, a New Trial.

That § 666 must be read to include an official act requirement is obvious. The only issue that remains is remedy.

For the reasons explained above, no reasonable jury could have concluded that the removal and replacement of the senior deputy commissioner constituted an official act. *See* Section I.B. As a result, the Court must enter a judgment of acquittal on Count Two.

At a minimum, though, because the Court failed to instruct the jury on the requirement of an official act before it could convict on Count Two, Mr. Lindberg is entitled to a new trial. Unlike the instructional error discussed above, which involved a directed verdict on the official act requirement of Count One, the Court's omission of this element from Count Two is subject to harmless-error analysis. *See Neder*, 527 U.S. at 8-9; *see also supra* note 5. Yet, for reasons similar to those explained above, the omission of this element is far from harmless. First, the error was not harmless beyond a reasonable doubt because, as in *McDonnell*, the jury "may have convicted [Mr. Lindberg] for conduct that is not unlawful." 136 S. Ct. at 2375. And as discussed above, there was compelling evidence to show that the reassignment of tasks between employees is not an official act—significant enough

evidence that acquittal is required. Moreover, the Court's erroneous conception of an official act—that it was a "legal[ ]" issue for the Court to resolve, Tr. 1451:2-4—meant that it excluded additional evidence about the informality of the Department's reassignment process. *Id.* at 1450:6-1456:25; *see also id.* at 1464:19-1465:6. This evidence would have made it even less likely that the jury would have found an official act in this case. Taken together, these points show that the government cannot establish that the omission of an "official act" instruction from Count Two was harmless beyond a reasonable doubt. *See Van Buren*, 940 F.3d at 1204 (holding that the failure to properly instruct the jury on "official act" was not harmless).

D. Even if § 666(a)(2) Has No Official Act Requirement, A New Trial Is Required Because the Court's Erroneous Official Act Instruction Infected this Count.

The Court's erroneous directive on Count One—that "the removal or replacement of a senior deputy commissioner . . . would constitute an official act," Tr. 1781:4-7—infected more than just the verdict on Count One. In the Court's instructions, the jury was told that § 666 required less than an official act; it required proof only of a "business, transaction, or series of transactions," which the instructions suggested was anything other than "setting up a meeting, hosting an event, talking to another official, sending a subordinate to a meeting, or simply expressing support for a constituent." Tr. 1783:6-7, 1784:13-18. A reasonable jury, having been instructed that the removal or replacement of a senior deputy commissioner was an official act, would have automatically assumed that the same removal or replacement constituted a business or transaction within the meaning of § 666. In effect, then, the Court's instruction also partially directed the verdict on Count Two. So even if the Court disagrees that § 666 requires proof of an official act, a new trial is still warranted.[7]

[7] Mr. Lindberg renews and preserves his arguments that § 666(a)(2) and the honest-services wire fraud statutes are unconstitutional, as discussed in his first oral motion for judgment of acquittal, Tr. 1262:9-1266:21, and his written supplement to that motion, Rule 29 Suppl. at 21-23, Dkt. No. 192, and as renewed in his second oral motion for judgment of acquittal, Tr. 1508:24-1509:5.

II. Mr. Lindberg is Entitled to a Judgment of Acquittal or a New Trial on Entrapment.

Mr. Lindberg renews the entrapment argument made at the close of the government's evidence and the close of the defense's evidence, based on the reasoning explained in Mr. Lindberg's Supplement to his Oral Motion for Judgment of Acquittal. Tr. 1258:22-1260:21; Rule 29 Suppl. at 17-21, Dkt. No. 192. "An entrapment defense has two elements: government inducement and the defendant's lack of predisposition to commit the crime." *United States v. Sligh*, 142 F.3d 761, 762 (4th Cir. 1998). Inducement involves "governmental overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *Id.* at 763. "[T]he defendant has the initial burden to 'produce more than a scintilla of evidence that the government induced him to commit the charged offense,' before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *Id.* (quoting *United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993)). Government inducement of the crime includes inducement by "federal, state or local law enforcement officials or their agents." *United States v. Perl*, 584 F.2d 1316, 1321 n.3 (4th Cir. 1978). Once inducement is shown, the government must prove that the defendant's predisposition existed before he was approached by government agents. *Sligh*, 142 F.3d at 762. "Even if the defendant denies one or more elements of the crime," as Mr. Lindberg did in this case, "he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews v. United States*, 485 U.S. 58, 62 (1988).

As discussed in his supplement to his first oral motion for acquittal, Mr. Lindberg met his initial burden of showing evidence of inducement, and the government failed to meet its burden of proving Mr. Lindberg's criminal predisposition beyond a reasonable doubt. Rule 29 Suppl. 17-21. The defense's evidence only bolstered Mr. Lindberg's claim of entrapment. Acquittal, or at minimum a new trial, is warranted.

A. Mr. Causey Induced Mr. Lindberg and the Other Defendants to Commit Bribery.

Mr. Lindberg has met his burden of showing more than scintilla of evidence of inducement. The first inducement occurred on March 5, 2018: After a conversation with Mr. Lindberg about regulatory issues, Mr. Causey asked "what's in it for me?" and suggested that he wanted support that would be "[u]nder the radar screen." Gov't Ex. 113C at 9.[8] This evidence alone was enough to show inducement. *See Sligh*, 142 F.3d at 766 (noting that an entrapment instruction was warranted where, like here, a government agent "invited a bribe more explicitly by asking . . . in essence, 'What's in it for me?'"). And this Court has acknowledged that Mr. Causey's "question can amount to entrapment and thus may entitle a defendant to an entrapment jury instruction at trial." Mot. to Dismiss Order at 14, Dkt. No. 120.

Mr. Causey's testimony further demonstrates that this question was an inducement. Mr. Causey admitted that he was asked to insert this question "at the direction of the FBI agents" into the "business conversation" that he was having with Mr. Lindberg:

> Q. Okay. And so the FBI told you that at some point during this business conversation that you were having, that they instructed you to interject this phrase in here, "What's in it for me?"
>
> A. Something to that effect.

Tr. 538:7-21. Mr. Causey also agreed that such a question would not have been part of a "typical conversation with somebody [he] regulate[d]," Tr. 539:22-23, and that it was the only time he had asked such a question to someone whom he regulates:

> A. No, it's not a typical conversation. This is not a typical situation.
>
> Q. Okay. How many other – if it's not typical, then have you ever done it before?
>
> A. No, I've never done it before.

[8] This motion uses quotations from transcriptions of any recordings. As the Court has noted, the recordings themselves are what constitutes evidence.

Q. Have you ever done it since?

A. I've never done it since.

Tr. 540:3-9.

Although this evidence would have been sufficient to demonstrate inducement, trial evidence provided other examples. For instance, in a conversation with defendant John Gray, Mr. Causey remarked on Mr. Lindberg's donations to other politicians and suggested that he was worth as much those politicians:

> You know they gave him another twenty-three thousand for his campaign, gave two hundred thousand to the guy running for governor. Gave Dan Forest a million and a half in one pop, and I'm thinking, you know hell I'm the insurance commissioner. I should be as high on his [Mr. Lindberg's] uh radar list as – as Dan Forest or any – or any of these other guys in other states and . . . he's putting millions of dollars out there in – in total . . . .

Gov't Ex. 119 at 4. Mr. Causey later expressed disappointment to Mr. Gray that, despite having begun a discussion with Mr. Lindberg months ago regarding independent expenditure committees, he had not "seen anything that's concrete." Gov't Ex. 120B at 3-4.

Mr. Causey also remarked to Mr. Lindberg, regarding a regulatory issue that he had worked related to Mr. Lindberg's companies, that he had failed to see any benefit from helping Mr. Lindberg:

> You had folks here workin on it, you know they all got bonuses, this that and the other, well I'm a regulator, but as a candidate, as uh, uh commissioner or candidate or whatever. I didn't personally see any benefit from it . . . .

Gov't Ex. 121 at 11.

And in a July 25, 2018, meeting, Mr. Causey asked for money from Mr. Lindberg that he could "control," Gov't. Ex. 127A at 4, such as money in his personal checking account:

> [Mike Causey:] How 'bout, how 'bout some, a deposit in one of my accounts that I can do what I want to with? [OV]
>
> [John Gray:] Your campaign accounts?
>
> [Mike Causey:] Non-campaign account. I'm talking about just a, a non-campaign account.

[John Gray:] Wha-, what account is that?

[Greg Lindberg:] I don't know if we can do that.

[John Gray:] Wha, wha, what account would it be?

[Mike Causey:] I mean, I've got two or three.

[John Gray:] You mean like your personal checking account?

[Mike Causey:] Some, yeah.

Gov't Ex. 127A at 5. At trial, Mr. Causey testified that he talked to the FBI before this meeting about the investigation:

> Q. Mr. Causey, when you're at that meeting with Greg Lindberg on July the 25th, this is – was there a discussion with you and the FBI regarding that you needed to come in there and try to close this whole investigation out on this particular occasion?
>
> A. I don't -- I don't recall that.
>
> Q. You don't recall that.
>
> A. What's your question? You're asking if I had a discussion?
>
> Q. With the FBI about how this thing has gone on for so long and you've asked for money so many times and that you need to finally bring it to a head on this particular occasion. Was there a discussion between you and the FBI?
>
> A. I don't know that it was anything like that. I know we had – had some discussion of it, but I didn't understand it to be, well, this is the final chance or anything like that.

Tr. 595:6-14. This testimony tends to show that Mr. Causey and the FBI were discussing ways to bring the investigation to a close.

Finally, evidence that Mr. Causey had changed Ms. Obusek's role regarding the regulation of Mr. Lindberg's companies in February 2018 further supports a finding of inducement. Tr. 98:25-99:4 ("Q. And then in February of 2018, Mr. Causey actually moved you off of GBIG accounts due to complaints that you were discussing concerns on GBIG with other state regulators, correct? A. That is correct."); *id.* at 110:19-111:12. Yet Mr. Causey continued to invite Mr. Lindberg to offer a *quid* in exchange for a reassignment of tasks away from Ms. Obusek.

These examples from the government's case-in-chief do not represent the full extent of Mr. Causey's inducement, but they are enough to show that Mr. Causey's conduct went beyond mere solicitation.

The defense's evidence only bolstered the showing of inducement. That evidence suggests that Mr. Causey misled the FBI to persuade them to open an investigation into Mr. Lindberg. During trial, Mr. Causey testified that he had talked to his campaign fundraiser, Joyce Kohn, about a donation of $110,000 that Mr. Lindberg had supposedly given to the North Carolina Republican Party, and he testified that he told the FBI about this donation. Tr. 453:1-454:14. FBI Special Agent Michael Scherger testified that this alleged $110,000 offer "was a part of the predication for the reason we opened the case." Tr. 1504:16-17. So did FBI Special Agent Jacqueline Granozio. Tr. 1103:12-14 ("That was one of the reasons that this investigation was opened."). Yet the evidence at trial showed that Mr. Causey was never offered or given $110,000 by the NC GOP on Mr. Lindberg's behalf and that Mr. Causey had never spoken to Ms. Kohn about it. *See* Tr. 1484:3-10 (testimony of Joyce Kohn); *id.* at 1107:18-21 (testimony of Agent Granozio "Q. Isn't it true, ma'am, that there is no wire, no check, no record from the GOP, no record from Mike Causey's campaign, to substantiate receipt, much less return of $110,000? A. Not that I'm aware of."); *id.* at 1374:1-4 (testimony of Agent Scherger: "Q. And isn't it true there's no wire, no check, no record of this $110,000? A. That is true, there is no wire or check of that money given to Mr. Causey at that time."). Taken together, this testimony makes it more likely that Mr. Causey's repeated attempts to talk to Mr. Lindberg about campaign contributions were, in fact, inducements.

Thus, the evidence more than surpassed the "scintilla" necessary to show that Mr. Causey's actions constituted inducement. The government itself implicitly acknowledged that this evidence was sufficient to show inducement, since it proposed a jury instruction to the Court on entrapment. And the fact that the Court ultimately instructed the jury on entrapment shows that Mr. Lindberg met his

burden, since "[a] defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement." *Sligh*, 142 F.3d at 762-63.

B. The Government Has Not Sustained Its Burden of Proving Mr. Lindberg's Predisposition Beyond Any Reasonable Doubt.

Because the evidence adequately demonstrated inducement, the burden shifted to the government to offer evidence of predisposition. For the reasons discussed in Mr. Lindberg's supplement to his first oral motion for acquittal, the government failed to offer sufficient evidence to show, beyond a reasonable doubt, that Mr. Lindberg was predisposed to committing the charged bribery offenses. Rule 29 Suppl. at 20-21.

First, the government cannot argue that Mr. Lindberg's attempted donations to Mr. Causey or other politicians showed a criminal predisposition. The government's evidence must show a "predisposition to commit an *illegal* act." *Jacobson v. United States*, 503 U.S. 540, 550 (1992) (emphasis added). The First Amendment gives Mr. Lindberg the right to donate to causes and candidates that he supports, and the government has offered no evidence that these prior donations were criminal. The government has not shown that any of Mr. Lindberg's attempted contributions to Mr. Causey were illegal before Mr. Causey's first inducement on March 5. Thus, these attempted contributions cannot be used to show criminal predisposition. They merely show that Mr. Lindberg was exercising his First Amendment rights, as every constituent is allowed to do.

Second, for similar reasons, the government also cannot rely on the fact that Mr. Lindberg responded to Mr. Causey's first inducement of "what's in it for me?" with the idea of funding an independent expenditure committee. An offer of a campaign contribution becomes a bribe only if it is made in exchange for an explicit promise to perform an official act. *McCormick v. United States*, 500 U.S. 257, 273 (1991). When this conversation occurred, Mr. Causey had made no explicit promise to perform the official act charged in the indictment: the removal of Ms. Obusek. Gov't Ex. 113C at 7-9. Thus, Mr. Lindberg's response shows only a willingness to contribute to politicians, which is not a

criminal act. At most, viewing the evidence in the light most favorable to the government, Mr. Lindberg raised the idea with a "generalized hope or expectation of ultimate benefit," which does "not constitute a bribe." *Jennings*, 160 F.3d at 1013; *see McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (noting that ingratiation and access are not corruption).

The government also cannot rely on evidence that the idea continued to be discussed in the ensuing months as evidence of criminal predisposition. "[P]redisposition is tested at a time 'prior to the Government acts intended to create predisposition.'" *United States v. Skarie*, 971 F.2d 317, 321 (9th Cir. 1992) (quoting *Jacobson*, 503 U.S. at 553). So the government has the burden of proving that Mr. Lindberg was predisposed to committing the crime *before* Mr. Causey induced him to do so. Predisposition thus cannot be proven through the conversations about independent expenditure committees that occurred after March 5, 2018.

Finally, Mr. Causey's repeated inducements over a series of many months are strong evidence of a lack of predisposition. As the Ninth Circuit observed in *United States v. Skarie*:

> Where evidence of "predisposition" comes only after the government has devoted considerable time and effort to persuading the defendant, "[r]ational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner."

971 F.2d 317, 321 (9th Cir. 1992) (quoting *Jacobson*, 503 U.S. at 553) (internal quotation marks omitted). Here, the evidence shows that a government agent needed to spend over half a year filled with numerous meetings and phone calls before the government felt comfortable charging Mr. Lindberg with a crime. Tr. 1177:2-1178:19. A person with criminal predisposition would not need so many opportunities and repeated inducements to commit the crime.

Because the government has failed to sustain its burden, acquittal is required on both counts. In the alternative, the Court should order a new trial given the significant lack of evidence of

predisposition. *See Arrington*, 757 F.2d at 1485 ("When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial.").

III. The Government Failed to Offer Sufficient Evidence that the Department of Insurance Received Benefits Under a Federal Program, as Required By § 666(a)(2).

To obtain a conviction for federal-program bribery, the government must prove that the organization in question "receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). This requirement is often referred to as the "jurisdictional element" of § 666. *United States v. McLean*, 802 F.3d 1228, 1235 (11th Cir. 2015). Like other elements of the crime, it must be decided by the jury. *See United States v. Taylor*, 754 F.3d 217, 224 (4th Cir. 2014) (affirming a jury finding of the jurisdictional element of an effect on interstate commerce in a Hobbs Act prosecution), *aff'd*, 136 S. Ct. 2074 (2016); *see also* 136 S. Ct. at 2088 (Thomas, J., dissenting) (noting that an effect on interstate commerce, like other elements, "must be proved to a jury"); *see also Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt" (alteration in original) (quoting *Gaudin*, 515 U.S. at 510)); *McLean*, 802 F.3d at 1247 ("[B]ased on our circuit precedent, if we were to address this issue, we would determine that the decision to classify assistance as a federal benefit was properly submitted to the jury.").[9]

"The government has the burden of producing adequate evidence for" the jury to determine whether any federal funds rise to the level of a benefit in excess of what is required by the statute. *United States v. Bravo-Fernandez*, 913 F.3d 244, 247 (1st Cir. 2019); *see also United States v. Doran*, 854 F.3d

[9] Some courts have disagreed that this element is a jury question. *E.g.*, *United States v. Insaidoo*, 765 F. App'x 522, 524 (2d Cir. 2019) (non-precedential) (finding the jurisdictional element to be a legal question), *cert. denied*, 140 S. Ct. 552 (2019); *United States v. Peery*, 977 F.2d 1230, 1233 (8th Cir. 1992) (same). These decisions cannot be correct. For over a century, the Supreme Court has repeatedly made clear that a jury must find "every fact necessary to constitute the crime charged" beyond a reasonable doubt. *Davis v. United States*, 160 U.S. 469, 493 (1895); *In re Winship*, 397 U.S. 358, 363 (1970); *Apprendi*, 530 U.S. at 477; *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016).

1312, 1322 (11th Cir. 2017) (Pryor, J., concurring in the judgment) ("We 'scrutinize the actual evidence' the government presented as to whether federal funds rise to the level of 'benefit.'"); *McClean*, 802 F.3d at 1230 ("To protect against the infringement on the inherent powers of the states by federalizing traditional state offenses, the government is required to prove beyond a reasonable doubt each element of a criminal offense.").

A receipt of federal funds does not automatically equal a receipt of "benefits" for purposes of § 666. *See Fischer v. United States*, 529 U.S. 667, 681 (2000) ("Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term."). Rather, this element requires examination of "the conditions under which the organization receives the federal payments." *Fischer*, 529 U.S. at 681; *see also United States v. Pinson*, 860 F.3d 152, 167 (4th Cir. 2017). And critically, for funds to qualify as "benefits," the government must prove beyond a reasonable doubt the receipt of federal funds "in connection with programs defined by a sufficiently comprehensive 'structure, operation, and purpose.'" *McClean*, 802 F.3d at 1243 (quoting *United States v. Edgar*, 304 F.3d 1320, 1327 (11th Cir. 2002)); *see Fischer*, 529 U.S. at 681.

The Supreme Court's decision in *Fischer* illuminates this element. In *Fischer*, the Court held that hospitals receive "benefits" within the meaning of the statute based on their "*role and regulated status* . . . as health care providers under the Medicare program." *Fischer*, 529 U.S. at 669 (emphasis added). The Court explained that Medicare imposes on hospitals intricate and comprehensive "statutory and regulatory requirements," which serve to assure the government that "participating providers possess the capacity to fulfill their statutory obligation" of providing adequate medical care. *Id.* at 672. For example, participating providers "must satisfy a series of qualification and accreditation requirements," *id.* at 680, and "[p]eer review organizations monitor providers' compliance with these and other obligations," *id.* at 672. The Court drew a distinction between these heavily regulated entities and contractors, which do not receive "benefits" because the government does not "regulate or assist

[them] for long-term objectives or for significant purposes beyond performance of an immediate transaction." *Id.* at 681.

Applying *Fischer*, federal courts of appeals, including the Fourth Circuit, have vacated convictions under § 666 where the receipt of federal funds did not qualify as "benefits." *See, e.g., Pinson*, 860 F.3d at 167-68; *Bravo-Fernandez*, 913 F.3d at 249 (holding that the parties' stipulation that federal funds were received was insufficient to establish "benefits" under the statute, and that the jury could not "exercise[e] common sense and rely[ ] on general knowledge" to reasonably infer that "the federal funds constituted 'benefits'").

The Eleventh Circuit's application of *Fischer* in *McClean* is particularly instructive. In *McClean*, the defendant served on the board of the Margate Community Redevelopment Agency ("MCRA"), which "is a component of the City [of Margate] with a purpose to promote the physical and economic development of the City." 802 F.3d at 1232. The Court found that the MCRA received federal funds during the relevant time period, but that "the government's evidence failed to establish a connection" between those funds and "any identifiable federal program so that its 'structure, operation, and purpose' could be reviewed to permit a determination that the funds qualified as a federal benefit under the jurisdictional element of § 666(b)." *Id.* at 1243. Fatally "absent from the government's proof was any evidence identifying the relationship between the program authorizing a disbursement of federal funds and the ultimate use of those funds at the local level." *Id.* at 1244.

This case law clarifies that the proof of "benefits" under § 666 is not a formality. To the contrary, the careful application of the federal-benefits element is critical to "safeguard[ ] the accused's constitutional rights, ensure[ ] the government does not overreach by prosecuting actions that do not comport with the statutory language, and guarantee[ ] that federal crimes remain distinct from state crimes." *Id.* at 1230-31. This makes sense, since not "all recipient fraud" is covered by § 666. *Fischer*, 529 U.S. at 681. So the meaning of "benefits" in the statute cannot be interpreted to be "limitless"

because "[d]oing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Id.*

Applying the foregoing principles here, the government's evidence fails in two ways.

First, as in *McClean*, the evidence at trial did not show that the federal funds that the North Carolina Department of Insurance received were "part of any program with a sufficiently comprehensive structure, operation, or purpose to meet the requirement under § 666(b) as a federal benefit." *Doran*, 854 F.3d at 1316. The government's sole evidence of the federal-benefits element was the testimony of Laresia Everett, the Department's Controller. Ms. Everett explained at a high level that the Department received federal grants in 2017 and 2018 through the State Health Insurance Assistance Program (SHIP). Tr. 874:17-25. She testified generally that SHIP grants aim to assist States with informing seniors about Medicare. *Id.* at 880:4-10. And she testified as to the dollar amounts of the grants received. *E.g.*, *id.* at 872:17, 872:24, 875:3, 876:89, 876:17. But this high-level testimony did not adequately explain the federal program's structure, operation, or purpose.

Judge Jill Pryor, concurring in *United States v. Doran*, 854 F.3d 1312 (11th Cir. 2017), found similarly general testimony to be insufficient. There, the testimony was the following:

> [Y]ou look at the federal programs that Florida State receives, the National Institute of Health, you know, they are designed—and this is technical, so it's something that I'm not really exactly experienced in, but—the technical side of the National Institute of Health is for disease control, for new drugs. And then, for instance, the National Science Foundation, we get a lot of money from them to advance more of the psychology, the biological sciences, where they are looking at the new discoveries and new technologies to, in other words, help the common good for the public.

Id. at 1323 (Jill Pryor, J., concurring in judgment). Despite the mention of federal entities, Judge Pryor noted that "[s]uch generalized descriptions cannot suffice to demonstrate the existence of a federal program 'defined by a sufficiently comprehensive structure, operation, and purpose to merit characterization of [its] fund[ing] as benefits.'" *Id.* (quoting *McLean*, 802 F.3d at 1237). Mr. Everett's testimony was no more detailed. Therefore, it was not sufficient evidence to show that the funds

received by the North Carolina Department of Insurance were part of a federal program with a "sufficiently comprehensive structure, operation, and purpose." *Id.*[10]

Second, the government did not provide evidence that the federal government retained a meaningful role in supervising how the grant monies are applied, including maintaining an intricate regulatory scheme to control the expenditure of federal funds. *Fischer* and the Fourth Circuit's decision in *United States v. Pinson*, 860 F.3d 152 (4th Cir. 2017), make clear that entities receive a "benefit" for purpose of § 666 when they are the subject of "substantial Government regulation" that helps them achieve "long-term objectives" or policy goals "beyond performance of an immediate transaction." *Id.* at 167 (quoting *Fischer*, 529 U.S. at 680) (internal quotation marks omitted). But here, Ms. Everett testified that the State—and not the federal government—defines the contours and requirements of its SHIP program. Tr. 880:7-881:11. The federal government exercises oversight over the program only through certain reporting requirements as to expenditures and administrative issues, but does not maintain substantive oversight or requirements for the SHIP program. *Id.*; *see also id.* at 883:18-884:3, 885:1-9. Thus, the funds at issue here are more closely aligned with the example of the contractor in *Fischer*, as opposed to the hospitals. Finally, it makes no difference to this analysis that the Department of Insurance is a governmental entity. Although *Fischer* concerned federal funds received by non-governmental entities, the statute does not differentiate between private and governmental entities with regard to the "benefits" element. Thus, the same proof that is required for non-governmental entities should be required for governmental entities.

[10] In *Doran*, the majority reversed the defendant's conviction because, in its view, the government had failed to prove that the relevant local organization received any federal benefits. 854 F.3d at 1316. Judge Pryor concurred separately because she disagreed on the organization relevant to the Court's analysis, but she agreed that the government had not proven the receipt of a federal benefit as to this organization. *Id.* (Jill Pryor, J., concurring).

These two defects each require the entry of a judgment of acquittal on Count Two or, at a minimum, a new trial, since the evidence was far below the sufficiency needed to establish this element.

IV. A Variety of Evidentiary Rulings Justify a New Trial.

Significant and incorrect evidentiary rulings affected the fairness of this trial. To begin with, the Court excluded evidence that the jury needed for assessing Mr. Lindberg's guilt. In addition to the exclusion of official-act evidence discussed above, the Court excluded two other critical categories of evidence. The first category consists of evidence that bore directly on the bias, credibility, and motive to testify of the government's key witness: Commissioner Causey. The second category consists of proposed testimony by the defendants' expert witness, Chris Gober. Because both categories bear materially on the offenses in this case, their exclusion prejudiced Mr. Lindberg's defense. *See Lis*, 120 F.3d at 31. The exclusion of either category justifies a new trial.

The Court also admitted evidence related to a suggestion that Mr. Causey hire defendant John Palermo to the Department of Insurance. This evidence should have been excluded as prejudicial and irrelevant. Because the erroneous admission of this evidence also unfairly prejudiced Mr. Lindberg's defense, a new trial is warranted for this reason as well.

A. The Court Should Have Admitted Evidence of Prior Deposition Testimony of Mr. Causey So That the Jury Could Properly Assess Mr. Causey's Bias and Motivation to Entrap Mr. Lindberg.

For the reasons discussed in Mr. Lindberg's Memorandum Regarding Mr. Causey's Motivation to Testify, Dkt. No. 187, a new trial is warranted because Mr. Lindberg was not allowed to introduce key evidence bearing on Mr. Causey's motivation to cooperate with the government, and he was not allowed to cross-examine Mr. Causey on past untruthful statements—even though Mr. Causey was the most important government witness.

First, defense counsel should have been allowed to introduce extrinsic evidence of prior deposition testimony of Mr. Causey and fully explore the testimony through cross-examination. *See*

Tr. 342:5-354:14, 358:2-373:8; Mem. Re. Causey's Motivation to Testify, Dkt. No. 187. The deposition occurred in a lawsuit filed by an entity regulated by the Department of Insurance. In the deposition, Mr. Causey was questioned about whether he engaged in an illegal "pay to play" scheme by accepting a campaign contribution from a supporter and then punishing a business competitor of that supporter. After Mr. Causey's attorney, Daniel Johnson, objected to that line of questioning, this followed:

> MR. BIBBS: Well, Mr. Johnson, when the FBI asks him these questions, I'm just getting him ready for it.
>
> Q Because it appears, Mr. Commissioner, that you have committed a federal offense, and your lawyer needs to inform you of that, that this appears to be a pattern and a practice, by you, to take campaign money to punish a competitor to campaign supporters of yours' business. That is illegal.
>
> MR. JOHNSON: Object to your ridiculous testimony.
>
> MR. BIBBS: Well, you can call it ridiculous if you want to. You let him explain that to a federal grand jury.

Ex. A at p. 157:12-25. About a month or less later, Mr. Causey first approached federal authorities about Mr. Lindberg and later agreed to work with the FBI to investigate him. Tr. 434:14-441:25.

This evidence should have been admissible because it bore on Mr. Causey's bias. Evidence of bias is admissible as long as it is relevant. *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996) ("The admissibility of evidence regarding a witness's bias, diminished capacity, and contradictions in his testimony is not specifically addressed by the Rules, and thus admissibility is limited only by the relevance standard of Rule 402."). Particularly where a witness "may have some [ ] substantial reason to cooperate with the government, the defendant should be permitted wide latitude in the search for the witness'[s] bias." *Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir. 1983) (quoting *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir.1982)). Since "bias is not a collateral issue," exploration of bias is not limited to cross examination; it is "permissible for evidence on this issue to be extrinsic in form." *Lindemann*, 85 F.3d at 1243.

Counsel may also explore bias through cross-examination. Indeed, "prohibiting a criminal defendant from cross-examining a witness on relevant evidence of bias and motive may violate the Confrontation Clause, if the jury is precluded from hearing evidence from which it could appropriately draw adverse inferences on the witness's credibility." *United States v. Turner*, 198 F.3d 425, 429 (4th Cir. 1999). "Where [the cross-examination] involves the government's most crucial witness, the constitutional concerns are especially heightened." *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1133 (4th Cir. 1991). The Federal Rules of Evidence echo these concerns by authorizing "cross-examination of witnesses on matters affecting their 'credibility.'" *United States v. Smith*, 451 F.3d 209, 221 (4th Cir. 2006); *see* Fed. R. Evid. 607.

This deposition transcript should have been admissible because it revealed a substantial reason for Mr. Causey to cooperate with the government. The testimony showed that the attorney deposing Mr. Causey suggested that he would be investigated by federal authorities for illegal activity. Soon after this deposition, Mr. Causey approached federal law enforcement about Mr. Lindberg and then agreed to serve as an agent of the FBI in investigating Mr. Lindberg. Based on this timeline, a reasonable jury could have inferred that Mr. Causey's cooperation with the FBI was an attempt to avoid investigation into his own activities.

In particular, this inference could have affected how the jury assessed Mr. Causey's testimony with regard to entrapment. Knowing that Mr. Causey had a motivation to cooperate with the government, the jury may have been more likely to find that Mr. Causey's recorded conversations with the defendants and his testimony about those conversations were efforts to entrap Mr. Lindberg. Thus, the Court should have allowed the jury to see the deposition transcript and permitted Mr. Lindberg's counsel to cross-examine Mr. Causey more fully about this deposition transcript.

This conclusion does not change even if federal law enforcement never considered or instituted an investigation of Mr. Causey. *But see* Tr. 361:5-10 (analysis by this Court suggesting

otherwise). When it comes to bias, the question is not whether the government was objectively likely to investigate Mr. Causey. Rather, the question is what "the *witness* understands he or she will receive" by cooperating with the government, "for it is *this* understanding which is of probative value on the issue of bias." *Hoover*, 714 F.2d 301, 305 (4th Cir. 1983) (second emphasis added). So regardless of whether the federal government would have actually instituted an investigation, Mr. Causey's subjective belief that he was in danger of an investigation would have been relevant to his bias. Counsel should have been allowed to explore that subjective belief, and the jury should have been allowed to see the deposition testimony that could have created that subjective belief.

Because entrapment was one of Mr. Lindberg's key defenses, this exclusion was particularly prejudicial and cannot be considered harmless. Nor was the prejudice cured by the fact that the Court allowed Mr. Lindberg to cross-examine Mr. Causey about some aspects of the deposition. After Mr. Causey reviewed the deposition transcript, Mr. Lindberg's counsel was allowed to ask whether "the counsel conducting that deposition question[ed] the legality of [Mr. Causey's] unrelated campaign finance contributions." Tr. 438:17-20. In response, Mr. Causey testified that the deposing lawyer was trying to show that Mr. Causey "had received money from competitors of Cannon Surety" and that these contributions were "a reason for [Mr. Causey's] going after examining Cannon Surety." Tr. 438:23-439:3. But the cross-examination did not reveal the key fact: that the deposing lawyer warned Mr. Causey that he could be investigated by the FBI. And since the Court told counsel to "[m]ove on" after Mr. Causey gave this answer, *id.* at 439:4, counsel was deprived of the opportunity to explore this topic through further questioning.

B. The Court Should Have Permitted Cross-Examination About Mr. Causey's Prior Untruthful Statements Because Those Statements Bore on His Credibility.

The Court also should have allowed counsel to cross-examine Mr. Causey about his lies related to his activities in a farmer's market. As explained by Mr. Gray's counsel during argument on motions

in limine, the evidence would have shown that Mr. Causey lied to operators of a farmer's market about whether he grew the blueberries that he was selling. February 18, 2020 Tr. 8:4-9:19.[11] Under Federal Rule of Evidence 608, "the court may, on cross-examination, allow" specific instances of a witness's conduct "to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness."

Here, cross-examination would have been probative of Mr. Causey's character for untruthfulness: A jury could conclude that a person who was willing to lie about something as trivial as the growing of blueberries would embellish the truth in other instances. Admittedly, the Court has discretion to disallow such cross-examination. But it should have authorized cross-examination here because Mr. Causey was the key government witness. This cross-examination—when paired with Mr. Causey's motive to cooperate with the government—would have given the jury a substantial reason to distrust Mr. Causey's testimony and may have dissuaded it from finding Mr. Lindberg guilty.

C. Expert Testimony Should Have Been Allowed Because It Was Essential to the Jury's Understanding of the *Quid Pro Quo* Alleged in This Case.

For the reasons stated in the defendants' motion in limine regarding proposed expert testimony, Dkt. No. 133-1, February 18, 2020 Tr. 16:19-20:25, the exclusion of the expert testimony of Christopher Gober on campaign finance was erroneous and prejudicial to Mr. Lindberg.

Federal Rule of Evidence 702 governs the admission of this testimony. It states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

[11] A final certified copy of the transcript on argument on the motions in limine was not available to counsel at the time of filing. Citations to the motion in limine arguments are to the rough transcript.

(d) the expert has reliably applied the principles and methods to the facts of the case.

This rule requires a court to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Belville v. Ford Motor Co.*, 919 F.3d 224, 232 (4th Cir. 2019) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597(1993)) (internal quotation marks omitted).

In its ruling to exclude Mr. Gober's proposed testimony, the Court did not question whether the testimony would be reliable. Nor did the Court rule that the defendants had not complied with expert-notice requirements. Rather, the Court precluded the proposed testimony based on relevance. February 18, 2020 Tr. 16:19-18:5, 19:21-20:10.

But Mr. Gober's proposed testimony was directly relevant to a key issue in the case: whether the defendant gave "anything of value" as part of a *quid pro quo* with Mr. Causey. The government's theory of bribery in this case did not target direct payments from any defendant to Mr. Causey. Rather, the government argued that the defendants gave "[a]thing of value" to Mr. Causey through contributions made to an independent expenditure committee (IECs) and through a contribution made from the North Carolina Republican Party to Mr. Causey, purportedly with funds that Mr. Lindberg had contributed to the Republican Party. The jury was tasked with deciding whether these transfers were things of value that were part of a *quid pro quo*. *See Jennings*, 160 F.3d at 1019.

A jury or other factfinder is not required to find that any transfer of anything to anyone is a *quid pro quo*. For example, the Second Circuit has held in a *quid-pro-quo* analysis under tax law that an expected benefit or subjective desire for something to occur does not always constitute a thing of value. *See Scheidelman v. Comm'r*, 682 F.3d 189, 200 (2d Cir. 2012) ("A donee's agreement to accept a gift does not transfer anything of value to the donor, even though the donor may desire to have his gift accepted, and may expect to derive benefit elsewhere (such as by deductibility of the gift on her income taxes)."). Thus, the jury was not required to accept the government's theory that the transfers alleged by the government constituted "[a]thing of value" given by any defendant.

To properly assess the government's theory, the jury needed to understand the structure of IECs and donations to the North Carolina Republican Party, and the campaign finance law that governs them. Mr. Gober would have provided that information. For example, Mr. Gober would have testified about the rules that govern how these entities receive and spend money on behalf of candidates and whether they are permitted to contribute to candidates. He would have testified about the rules governing how these entities spend money. And he could have clarified who controlled these entities' funds and who had the authority to transfer funds. *See* Defs.' Notice of Intent to Use Expert Witness at Trial, Dkt. No. 133-2.

A reasonable jury that had this information may have decided that the transfer of funds to an IEC, which cannot coordinate spending with or consult a candidate, was at most an expected benefit and not something of value. *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 278 (4th Cir. 2008) (quoting N.C. Gen. Stat. § 163–278.6(9a) (2007)). A reasonable jury may have concluded the same about Mr. Lindberg's contribution to the North Carolina Republican Party. Mr. Gober's testimony could have clarified whether the defendants or the Republican Party controlled the funds once Mr. Lindberg transferred money to the party. If the jury concluded that the North Carolina Republican Party had full control over the funds, it may have concluded that the Party's transfer of funds to Mr. Causey could not constitute "anything of value" given by Mr. Lindberg.

Although the government may argue that the transfer of funds by Robin Hayes, the then-chairman of the North Carolina Republican Party, to Mr. Causey should be attributed to the codefendants, this argument should be rejected. The government did not introduce sufficient evidence to show that Robin Hayes was part of the charged conspiracy. Rule 29 Suppl. 14, Dkt. No. 192. Thus, to convict Mr. Lindberg, the jury needed to conclude that Mr. Lindberg's initial contribution to the North Carolina Republican Party was part of a transfer of something of value to Mr. Causey. And if

the jury found, based on Mr. Gober's testimony, that the Party had full control over the money after receiving it, the jury may have rejected this pivotal conclusion.

Without Mr. Gober's testimony, Mr. Lindberg was unable to fully present one of his main defenses: that neither he nor any coconspirator gave "anything of value" to Mr. Causey. Thus, the Court should grant a new trial that allows this evidence to be admitted.

D. The Admission of Evidence of the Suggestion to Hire John Palermo Warrants a New Trial.

During trial, the government introduced recorded conversations between Mr. Causey and the defendants in which they discussed whether Mr. Causey could hire defendant John Palermo to the Department of Insurance. For the reasons stated in support of Mr. Lindberg's motion in limine, Dkt. 141-1, this evidence should have been excluded.

Evidence is inadmissible if it is not relevant. Fed. R. Evid. 401, 402. Evidence is relevant "only if 'it has any tendency to make a fact more or less probable than it would be without the evidence' and 'the fact is of consequence in determining the action.'" *United States v. Zayyad*, 741 F.3d 452, 459 (4th Cir. 2014) (quoting Fed. R. Evid. 401). Thus, evidence is not relevant if it does "not connect to" an "element of the charged offenses." *Id.* at 460.

Evidence of Mr. Palermo's suggested hiring was both irrelevant and unfairly prejudicial, confusing, and misleading.

First, the evidence related to the suggestion that Mr. Causey hire Mr. Palermo was not relevant because it did not connect to any element of the charges. Although the Court found this evidence "inextricably tied to the conspiracy," February 18, 2020 Tr. 24:20, this analysis was incorrect. The suggested hiring of Mr. Palermo was not part of the "scheme or artifice" to deprive the public of honest services, which was the object of the conspiracy charged in the indictment. In honest-services wire fraud, "scheme or artifice" means a *quid pro quo* involving an official act. *McDonnell v*, 136 S. Ct. at 2365. The official act charged in this indictment was the removal of Senior Deputy Commissioner

Obusek. But trial evidence showed that Mr. Causey never considered hiring Mr. Palermo into Ms. Obusek's position and ultimately declined to hire Mr. Palermo. Tr. 168:4-14, 177:2-16, 698:6-701:25. Thus, Mr. Palermo's suggested hiring could not have been part of the charged "scheme or artifice." For similar reasons, Mr. Palermo's hiring was not relevant to the "business, transaction, or series of transactions" element of § 666(a)(2). The alleged transaction was the transfer of Senior Deputy Commissioner Obusek. Indictment ¶ 86, Dkt. No. 3. Mr. Palermo's suggested hiring had nothing to do with that action. It was thus irrelevant to both offenses.

The dates of the wire transfers relied on by the government also prove that Mr. Palermo's hiring was not part of the alleged scheme or artifice. An essential element of wire fraud is that the defendants "used or caused the use of wire communications in furtherance of" their "scheme to defraud." *United States v. Burfoot*, 899 F.3d 326, 335 (4th Cir. 2018); *see* 18 U.S.C. § 1343. The wire transfers relied on by the government in furtherance of the scheme occurred on various dates from June 11, 2018, to July 26, 2018. Indictment ¶ 84. But the idea of hiring Mr. Palermo was abandoned on March 27, 2018—months before the wire transfers. Tr.750:18-751:11. Based on this timeline, Mr. Palermo's hiring necessarily could not have been part of the charged wire-fraud scheme, since those later wire transfers could not have "further[ed]" an already-rejected idea.

Even if this evidence were relevant, it should have been excluded under Federal Rule of Evidence 403. Under Rule 403, the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Evidence is unfairly prejudicial if it "lure[s] the factfinder into declaring guilt on a ground different from proof specific to the offense charged" or if it "suggest[s] decision on an improper basis." *Old Chief v. United States*, 519 U.S. 172, 180 (1997); Fed. R. Evid. 403, Advisory Committee's Note. For example, a jury cannot be asked to "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged." *Old Chief*, 519

U.S. at 180. Evidence confuses the issues or misleads the jury if it "cause[s] a diversion" from the ultimate issue that it must decide. *Huskey v. Ethicon, Inc.*, 848 F.3d 151, 162 (4th Cir. 2017).

Evidence of Mr. Palermo's suggested hiring wrongly diverted the jury's attention from the relevant official act or transaction—the alleged transfer or removal of Senior Deputy Commissioner Obusek. This evidence also could have only served to imply that Mr. Lindberg tried to influence a separate official act or transaction. The use of this evidence is improper. Given the lack of relevance and the strong prejudicial effect of this evidence, a new trial is warranted.

V. Various Jury Instructions—Beyond the Erroneous "Official Act" Instruction—Justify a New Trial.

In addition to the erroneous "official act" instruction discussed above, multiple other erroneous jury instructions require a new trial. Mr. Lindberg objected, as appropriate, to the Court's jury instruction during the jury-charge conference. Mr. Lindberg renews each objection to the Court's instructions or its failure to give an instruction, including the particular instructions discussed below.[12]

A. The Definition of "Corruptly" Failed to Include a Requirement of Conscious Wrongdoing, a Bad or Evil Motive, or Acting Intentionally with an Unlawful Purpose.

For the reasons discussed at length in Mr. Lindberg's trial brief, Dkt. No. 164 at 4-5, 6, his response to the government's objections to jury instructions, Dkt. No. 159 at 7-8, and at the jury-charge conference, Tr. 1567:2-1569:14, Mr. Lindberg believes that the Court incorrectly defined the word "corruptly" in its instruction on 18 U.S.C. § 666(a)(2) and incorrectly omitted the requirement that the defendant act "corruptly" in its instruction on honest-services wire fraud.

[12] Because Mr. Lindberg objected to jury instructions that he believed were erroneous during the jury-charge conference, no further action, including discussion in this motion, is needed for these objections to be preserved for appellate review. Fed. R. Crim. P. 30(d); Tr. 1510:19-1609:25. Objections that were made at the conference but not discussed in this motion are still preserved for appeal.

First, the defendants' proposed definition of "corruptly" should have been given. This proposed definition read: "An act is 'corruptly' done if it is done intentionally with an unlawful purpose. This involves conscious wrongdoing or, as it is sometimes expressed, a bad or evil state of mind. If a defendant acts with the belief that his purpose was lawful, he does not act 'corruptly.'" Defs.' Joint Proposed Jury Instr. at 72, 83 (Instruction Nos. 59, 69), Dkt. No. 163-1. Instead, the Court defined "corruptly" as follows:

> An act is done "corruptly" if it is done with the intent to engage in some specific *quid pro quo*, that is, to receive a specific benefit in return for the payment, or to induce a specific act. A payment is made with corrupt intent only if it was made or promised with the intent to corrupt the particular official. Not every payment made to influence or reward an official is intended to corrupt him. One has the intent to corrupt an official only if he makes a payment or a promise with the intent to engage in a specific *quid pro quo* with that official. The defendant must have intended for the official to engage in some specific act, or omission, or course of action or inaction in return for the payment charged in the bill of indictment.

Tr. 1785:15-1786:2. This instruction fairly tracked the definition of "corruptly" offered by the Fourth Circuit in *United States v. Jennings*, 160 F.3d 1006, 1019 (4th Cir. 1998).

But intervening Supreme Court precedent and other appellate decisions on similar bribery statutes undercut the Court's definition and support the defendants'. In *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Supreme Court interpreted the word "corruptly" in a federal obstruction statute and observed that "corruptly" is associated with "wrongful, immoral, depraved, or evil" conduct. *Id.* at 705. Therefore, it held that the phrase "knowingly . . . corruptly persuad[e]" limited criminal liability to those who were "conscious of wrongdoing." *Id.* at 706. Other cases have defined "corrupt" intent in a similar way to *Arthur Andersen*. For example, the Fourth Circuit has approved a similar definition of "corrupt" intent in the context of § 201, of which § 666 is an outgrowth. *See United States v. Quinn*, 359 F.3d 666, 674 (4th Cir. 2004) (approving a district court's instruction that corrupt intent involves "conscious wrongdoing or, as it is sometimes expressed, a bad or evil state of mind"). The Ninth Circuit has affirmed a jury finding of "corrupt" intent in a § 201 prosecution because the

evidence showed that the defendant "was aware of the illegality of the transaction" at issue. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir. 1985). And the Fifth Circuit pattern instructions define "corruptly" in § 201 as follows: "An act is 'corruptly' done if it is done intentionally with an unlawful purpose." Pattern Crim. Jury Instr. 5th Cir. 2.09A (2019). "Corruptly" should have a similar definition in the context of § 666(a)(2), given the relationship between § 201 and § 666.

Moreover, the defendants' proposed definition of "corruptly" is supported by cases interpreting "corruptly" in other bribery statutes. *E.g.*, *United States v. Kay*, 513 F.3d 432, 446 (5th Cir. 2007) (stating that "corrupt" in the Foreign Corrupt Practices Act requires "bad purpose or evil motive of accomplishing either an unlawful end or result").

Unlike the Court's definition based on *Jennings*, the defendants' proposed definition of "corruptly" follows the rule that courts "must 'give effect . . . to every clause and word'" in a statute. *Setser v. United States*, 566 U.S. 231, 239 (2012) (quoting *United States v. Menasche,* 348 U.S. 528, 538-39 (1955)). In contrast, the Court's definition mimics the statutory language that requires a defendant to "give[ ], offer[ ], or agree[ ] to give anything of value to any person, with intent to influence or reward" a State agent. 18 U.S.C. § 666(a)(2). Thus, the Court's definition effectively reads the word "corruptly" out of the statute or renders it superfluous. The defendants' proposed definition does not.

This definition of "corruptly" also makes sense in light of the harm that bribery statutes seek to prevent: the violation of a public official's duty to serve the public. *See, e.g.*, *United States v. Jacobs*, 431 F.2d 754, 759 (2d Cir. 1970) ("The evil sought to be prevented by the deterrent effect of 18 U.S.C. § 201(b) is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty."). Liability under federal bribery law should be limited to those who act with an evil motive to subvert the political process. It should not extend to people who lack an evil or bad motive. Nor should it extend to people who do not know that they are procuring a breach of an official's duties or otherwise violating the law. A bribery statute that punished such

people would raise constitutional issues by criminalizing innocent, First Amendment-protected interactions between constituents who donate to politicians based on the politicians' promised actions.

Second, the Court incorrectly failed to include an instruction on "corruptly" for honest-services wire fraud. Honest-services wire fraud should be defined with reference to § 201. *See McDonnell v.*, 136 S. Ct. at 2365. Since § 201 requires corrupt intent, so should this offense.

B. The Instruction on Material Concealment of Fact Was Erroneous.

The Court's instruction on a material misrepresentation or material concealment of fact stated that the "Government may be able to prove this element if you find that the bribe was concealed from the public." For the reasons explained in Mr. Lindberg's objections to the jury instructions, Tr. 1613:21-13, 1628:10-22, Dkt. No. 191 at 1-2, this instruction was incorrect for this case. The Court cited three cases to support its instruction. The first two cases involved public servants or public-servant coconspirators whose positions gave them fiduciary duties to the public: *United States v. Foxworth*, 334 F. App'x 363, 365-66 (2d Cir. 2009) (non-precedential), and *United States v. Harvey*, 532 F.3d 326, 334 (4th Cir. 2008); *see also United States v. Foxworth*, No. 06-cr-81, 2006 WL 3462657, at *1 (D. Conn. Nov. 16, 2006). *Harvey* also involved a situation where the defendant was explicitly required to disclose the payments made to him. *Id.* at 332. So did the third case, which involved private parties who disregarded an explicit rule requiring them to disclose offers of gratuities. *United States v. Rybicki*, 354 F.3d 124, 127 (2d Cir. 2003) (en banc). If this were a situation in which Mr. Lindberg or a coconspirator were under an explicit obligation or fiduciary duty to disclose a payment to the public or some other entity, the Court's instruction may have been appropriate. But the government failed to establish a rule or fiduciary duty that required Mr. Lindberg to disclose the contributions.

C. The Court Failed to Instruct the Jury Fully on the Requirements for a *Quid Pro Quo*, Single or Multiple Conspiracies, the Good-Faith Defense, the Definitions of Benefits and the Value of a Transaction Under § 666, and Entrapment.

The Court also omitted several crucial instructions. First, for both offenses, the Court's instruction on "*quid pro quo*" left out the requirement that a public official must make an *explicit promise* to perform an official act in exchange for a campaign contribution. Defs.' Proposed Jury Instructions 22, 73, 85 (Instruction Nos. 15, 60, 71), Dkt. No. 163-1; Tr. 1569:15-22. This requirement comes from *McCormick v. United States*, 500 U.S. 257, 273 (1991), which made clear that campaign contributions can form the basis of a bribery charge only when a public official explicitly promises action in exchange for the contribution. Without this requirement, federal bribery law risks running afoul of free-speech rights. *Id.* at 272-73. For the same reasons, the Court also erred by failing to instruct the jury that § 666(a)(2) also requires proof of a *quid pro quo*, and not merely the "intent to engage in some specific *quid pro quo*." Without this requirement, innocent constituents could be held liable for campaign contributions that do not deprive the public of any honest-services.

Second, the Court should have instructed the jury that, for § 666(a)(2), "the government must prove beyond any reasonable doubt that the transfer of Senior Deputy Commissioner Obusek off a regulatory assignment was valued at $5,000 or more, not that the alleged bribe offer was $5,000 or more." Defs.' Proposed Jury Instructions 84 (Instruction No. 70); Tr. 1591:9-1592:12. This requested instruction finds support in *United States v. Tillmon*, --- F.3d ---, 2019 WL 921534 (4th Cir. Feb. 26, 2019), which states that "this element requires proof of the value of whatever was exchanged for the bribe." *Id.* at *11-12. The defendants' proposed instruction would have informed the jury that the amount of the bribe is not dispositive evidence of the value of the transaction. Although *Tillmon* observes that the amount of a bribe offer is one valid method of valuing the transaction, *id.* at *11, the defendants' proposed instruction would have assured the jury that it was free to use other methods to value the transaction.

Third, the Court should have instructed the jury about single and multiple conspiracies. Defs.' Proposed Jury Instructions 61 (Instruction No. 49); Tr. 1554:11-1562:1. The conspiracy charged in this case was a *quid pro quo* to remove a Senior Deputy Commissioner. But the evidence at trial also focused on a proposed hiring of another co-defendant, John Palermo, by the Department of Insurance. Because this instruction was omitted, the jury may have wrongfully convicted Mr. Lindberg of this separate alleged conspiracy. *See supra* Section IV.D.

Fourth, the Court should have instructed on the good-faith defense for both offenses. Defs.' Proposed Jury Instructions 92-93 (Instruction No. 75); Tr. 1550:7-1551:23; Dkt. No. 159 at 9. The validity of the good-faith defense is well established in the wire-fraud context, *e.g.*, *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir. 1972) (holding in context of mail fraud that "[g]ood faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element"), and it has been approved in charges brought under § 666*, see United States v. Baroni*, 909 F.3d 550, 582-83 (3d Cir. 2018) (writing approvingly of instruction as to good-faith in context of § 666(a)(1)(A)), *cert. granted sub nom. Kelly v. United States*, 139 S. Ct. 2777 (2019). As explained in Mr. Lindberg's jury-objection response brief, good faith is inconsistent with corrupt intent and an intent to defraud, Dkt. No. 159 at 9.

Fifth, the Court should have provided the jury with a definition of "benefits" under § 666. Dkt. No. 189 at 4; Tr. 1595:9-1597:9. As discussed in Section III of this brief, this issue is a jury question, and the government did not sufficiently prove that the Department of Insurance received "benefits in excess of $10,000 under a Federal program." At minimum, this issue was genuinely disputed and should have been submitted to the jury. An instruction on this element would have guided the jury in its deliberation.

Finally, the Court should have given the defendants' proposed instruction on entrapment, which is adapted from the model Ninth Circuit instruction. Defs.' Proposed Jury Instructions 94-95

(Instruction No. 76); Tr. 1603:24-1605:22. This instruction offers the jury more guidance than the instruction delivered by the Court. The importance of additional guidance was made clear during jury deliberations, when the jury sent the Court a note asking for help distinguishing between inducement and solicitation. Tr. 1816:8-11.

VI. The Government Failed to Introduce Substantial Evidence of Criminal Intent.

Honest-services wire fraud requires proof of an intent to defraud, and § 666(a)(2) requires proof of corrupt intent. Tr. 1776:4-5, 1784:1. A defendant has an intent to defraud if he acts "knowingly and with the intention or the purpose to deceive or cheat." Tr. 1776:22-24. This intent is "accompanied ordinarily by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or purpose to cause some loss to some person." Tr. 1776:24-1777:2. As discussed above, corrupt intent should require proof of conscious wrongdoing, a bad or evil motive, and an intentional act with an unlawful purpose. *Supra* Section V.A. But if it does not, then it requires at least "intent to corrupt the particular official" and "intent to engage in some specific *quid pro quo*, that is, to receive a specific benefit in return for the payment." Tr. 1785:15-20.

Regardless of the definition, the government failed to introduce substantial evidence of Mr. Lindberg's criminal intent. Evidence throughout trial showed Mr. Lindberg's intent to follow the law and act properly. *See, e.g.*, Gov't Ex. 127A at 19 (statement by Lindberg that the "bottom line" was that he would do what was "in the bounds of North Carolina election law"); Gov't Ex. 127A at 18 (statement by Lindberg that he did not "know election law well enough" but that it was "compliant" to give "money to NCGOP" and for the NC GOP to "give money to" Causey); Gov't Ex. 118 at 9 (statement by Lindberg urging, with regard to setting up independent expenditure committee, that they "do this the right way"); Lindberg Ex. 91F (Lindberg noting, on request by Causey for transfer to personal checking account, "I don't think that complies"); Gov't Ex. 128A at 4 (statement by John Gray: "We're not wanting anything outside the rule of law and the rules of…of your department and

want you're comfortable with."); Lindberg Ex. 59B (statement by John Gray that Causey would "have to pay [his] way" on a proposed trip to Washington, D.C., on Lindberg's plane because of "Board of elections requirements"). Thus, as discussed in Mr. Lindberg's prior motions, the evidence does not support a showing of corrupt intent under the proper definition of that term. Rule 29 Suppl. 15. Moreover, in light of this evidence, the government's evidence at trial was not sufficiently "substantial" to support a finding of corrupt intent under the Court's definition or a finding of an intent to defraud. Acquittal, or at least a new trial, is thus required.

VII. The Government Failed to Present Sufficient Evidence of Proper Venue, a *Quid Pro Quo*, False or Fraudulent Pretenses, or Intent to Influence a Future Official Action.

At the close of the government's evidence, Mr. Lindberg moved for judgment of acquittal based on, among other things, insufficiency of evidence of proper venue, a *quid pro quo*, corrupt intent, false or fraudulent pretenses, and intent to influence a future official action. Mr. Lindberg renewed each of these arguments at the close of the defense's evidence in a second oral motion, which was denied. Tr. 1508:24-1509:5. Mr. Lindberg now renews his motion for judgment of acquittal based on these and all other arguments stated in his oral motion at the close of the government's evidence and in his memorandum supplementing his first oral Rule 29 motion. *See* Tr. 1253:20-1266:21, 1268:20-1269:20; *see also* Rule 29 Suppl., Dkt. No. 192. If the Court disagrees that Mr. Lindberg is owed acquittal based on these arguments, it should nonetheless find that the government's failure of evidence supports a new trial.

VIII. The Combined Prejudice of These Errors Requires a New Trial.

Mr. Lindberg is entitled to acquittal based on the arguments set forth above. In the alternative, he is owed a new trial based on each error identified above. Each of the errors discussed above, at minimum, independently justifies a new trial.

But if the Court disagrees, it should still order a new trial based on the cumulative prejudice from these errors. "Pursuant to the cumulative error doctrine, '[t]he cumulative effect of two or more

individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (quoting *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990)). If the Court agrees that it erred in more than one of the crucial rulings discussed above, the Court should find that the combined effect of the errors "violated the trial's fundamental fairness" and order a new trial. *Id.* (quoting *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004)) (internal quotation mark omitted).

CONCLUSION

For the foregoing reasons, the Court should enter a judgment of acquittal on both counts brought against Mr. Lindberg or, in the alternative, order a new trial.

Dated: April 2, 2020

Respectfully submitted,

/s/ Rajesh R. Srinivasan

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, I electronically filed the foregoing memorandum and accompanying exhibit with the Clerk of Court using the CM/ECF system, which will send notification to counsel of record.

Dated: April 2, 2020

Respectfully submitted,

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