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

HEARING REQUESTED

REPLY 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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ARGUMENT

I. The Government Has Not Rehabilitated the Errors Afflicting the "Official Act" Element, Which Require the Court to Set Aside the Jury's Verdicts on Both Counts.

Mr. Lindberg explained previously that the verdicts were infected by at least four errors related to the requirement of an "official act"—errors that necessitate the entry of a judgment of acquittal on both counts or, at a minimum, a new trial. Mem. in Support of Def. Greg Lindberg's Mot. for Judgment of Acquittal Under Rule 29(c) or, Alternatively, for a New Trial Under Rule 33 at 2-28, Dkt. No. 213-1 (hereinafter "Lindberg Mem."). First, the Court's instruction on "official act" had the effect of directing a verdict for the government. *Id.* at 2-15. Second, because the reassignment of a task from one employee to another does not constitute an "official act," no reasonable juror could have found that Mr. Lindberg conspired to commit honest-services wire fraud. *Id.* at 15-20. Third, the requirement of an "official act" applies with the same force to federal-program bribery under 18 U.S.C. § 666, requiring the Court to set aside the verdict on that count as well. *Id.* at 20-28. Finally, even if § 666 includes no "official act" requirement, the Court must still set aside the verdict on that count, because it was infected by the Court's erroneous instruction on "official act." *Id.* at 28.

The government fails to offer a cogent response to any of these arguments. Instead, it resorts to distortion—misstating its prior position to this Court, relying on a half-reading of *McDonnell* and incomplete quotes from the Court's ruling on Mr. Lindberg's motion to dismiss the indictment, and ignoring binding decisions that reject its position. The fact that the government cannot offer a colorable defense of the verdicts serves only to reinforce the serious errors highlighted above.

A. The Government's Defense of the "Official Act" Instruction Contradicts Binding Precedent, and Mr. Lindberg is Therefore Entitled to a New Trial.

An instruction violates the Constitution if it has the effect of directing a verdict on an element of the offense. *Id.* at 3-15. Here, after reciting the law generally, the Court explained:

> *In this case* the charge is that the question or matter is the removal and replacement of the senior deputy commissioner in charge of overseeing the regulatory review of

> Defendant Lindberg's insurance companies. *You'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 Court's instruction contradicted at least two decisions of the Supreme Court. In *McDonnell v. United States*, 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. 2355, 2371 (2016). And in *United States v. Gaudin*, the Supreme Court held 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." 515 U.S. 506, 514 (1995).

In response, the government offers three arguments. First, the government argues that, under *McDonnell*, a jury is not required to find an "official act," only an *agreement* to commit an act that the court determines to qualify as an official act. Gov't's Opp'n to Defs' Mots. For Judgment of Acquittal or, Alternatively, for a New Trial at 4, Dkt. No. 218 (hereinafter "Opp'n"). Second, even if "official act" is an element that the jury must find, the government argues, "a court may instruct a jury that a matter has been established by law." *Id.* Finally, the government argues that even if the Court's instruction amounted to error, it was harmless beyond a reasonable doubt. *Id.* at 7-10.

These arguments are unpersuasive. Among other things, they rely on an incomplete reading of *McDonnell*, fail to acknowledge the Supreme Court's contradictory holding in *Gaudin*, and misstate the government's prior position to this Court. They should be rejected.

1. *McDonnell* Held that a Jury Must "Find" an Official Act.

According to the government, *McDonnell* held that a jury must resolve "whether there was a corrupt offer or agreement, not whether the act at issue was an 'official act.'" *Id.* at 4. The government purports to derive support for this argument from the same statement in *McDonnell* upon which Mr. Lindberg relied—specifically, 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*.'"

Id. (quoting *McDonnell*, 136 S. Ct. at 2371) (emphasis removed). The government simply places emphasis on "agreed." *Id.* In the process, the government acknowledges that it had previously expressed reservations about this Court's instruction. But, the government continues, it had merely "discouraged the Court from defining 'official act' so specifically." *Id.* at 2-3.

That is a misrepresentation of the government's prior position to the Court. In its supplemental memorandum in support of its proposed jury instructions, the government explained that "the *McDonnell* Court admonished that the question of whether *alleged conduct constitutes* an 'official act' is a factual question for the jury to determine: '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*.'" Gov't's Mem. in Support of Proposed Jury Instructions at 1, Dkt. No. 186 (hereinafter "Gov't Supp. Mem. on Jury Instructions") (quoting *McDonnell*, 136 S. Ct. at 2371). And the government suggested that "official act" is an "element of the crime with which [Mr. Lindberg] is charged." *Id.* at 2 & n.1. Thus, the government summarized: "Whether something *qualifies* as an 'official act' *is an issue for a properly instructed jury*, so long as it is not something the Supreme Court held categorically insufficient to constitute official action . . . ." *Id.* at 2 (emphasis added).

The government was right then. It is wrong now.

Even if the Court were to ignore the portion of *McDonnell* that Mr. Lindberg and the government quote—that "[i]t is up to the jury," *McDonnell*, 136 S. Ct. at 2371—the Chief Justice's opinion would make no sense if, as the government now contends, an "official act" is simply "a matter of statutory interpretation" for the Court to decide. Opp'n 6. True, the Supreme Court spent several pages interpreting the statute that defined "official act." *McDonnell*, 136 S. Ct. at 2367-73. But when it came to identifying error in the case before it, the Court explained that Governor McDonnell's "convictions must be vacated because the jury was improperly instructed on the meaning of 'official act.'" *Id.* at 2373.

Moreover, if there was any confusion on this point, the Supreme Court repeatedly found fault in the jury instructions at issue in *McDonnell* because they "did not adequately explain to the jury how to identify" the three legal components of an official act. *Id.* at 2374. Specifically, it explained that "[t]he problem with the District Court's instructions [was] that they provided no assurance that the jury reached its verdict after *finding* those questions or matters" that make up the alleged official act. *Id.* (emphasis added). It also explained that "the District Court did not instruct the jury that to convict Governor McDonnell, it had to *find* that he made a decision or took an action—or agreed to do so—*on* the identified 'question, matter, cause, suit, proceeding or controversy.'" *Id.* (first emphasis added). And because the district court's instructions lacked these details, the Supreme Court lamented the "possib[ility] that the jury convicted Governor McDonnell *without finding* that he agreed to make a decision or take an action on a *properly defined* 'question, matter, cause, suit, proceeding or controversy.'" *Id.* at 2375 (emphasis added).

Finally, the remedy that the Supreme Court ordered makes no sense if, as the government now argues, the existence of an official act is solely a legal issue for a court to decide. After explaining that the jury instructions were defective in *McDonnell*, the Supreme Court remanded the case to the Fourth Circuit to determine whether there was "insufficient evidence that he committed an 'official act,' or that he agreed to do so." *Id.* Under well-settled law applying the Double Jeopardy Clause, if there was insufficient evidence, then the Fourth Circuit would have had to enter a judgment of acquittal, because the government would have been precluded from retrying Governor McDonnell after it failed to offer sufficient proof on the first go-round. *See id.* But—and this is critical—even if the Fourth Circuit "determine[d] that there [wa]s sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,'" the Supreme Court stated that the case should then be set "for a new trial." *Id.* That's because, in the end, a properly instructed jury must "find[ ]" an official act. *Id.* at 2374.

The government's new position on "official act" does not account for any of this. *McDonnell* makes plain that a jury must "find[ ]" an official act. *Id.* And here, the government does not otherwise dispute that the Court's instruction had the effect of directing a finding that the removal or replacement of the senior deputy commissioner constituted an official act.

2. Contrary to the Government's Argument, a Court May Not Instruct a Jury that an Element Has Been Established as a Matter of Law.

As a fallback, the government argues that a court "may instruct a jury that a matter is established by law." Opp'n 4. The government implies that, even if an official act is a question of fact, there is nothing wrong if the Court instructs the jury that this fact has been established. *See id.*

But here again, the Supreme Court has rejected the government's argument—this time in *United States v. Gaudin*, 515 U.S. 506 (1995). There, the Supreme Court clarified 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." *Id.* at 514. In *Gaudin*, the district court had instructed the jury that, to convict the defendant of making false statements, the government was required to prove that the defendant made the statement at issue. *See id.* at 508, 512. But, the district court continued, "You are instructed that the statements charged in the indictment are material statements." *Id.* at 508(internal quotation mark omitted). A unanimous court reversed. *Id.* at 522-23.

The government has no answer for *Gaudin*. Although that decision featured prominently in Mr. Lindberg's opening memorandum, the government simply pretends it does not exist. *See* Opp'n 4-7 (nowhere analyzing, let alone mentioning, *Gaudin*).

Instead, the government represents the law as "mixed on the question of whether a court may instruct a jury that a matter is established by law"—before implying that the Fourth Circuit is firmly in its camp. *Id.* at 4-5. The government is mistaken.

As an initial matter, the Fourth Circuit expressly rejected the government's argument in *United States v. Lovern*, 293 F.3d 695 (4th Cir. 2002), and *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995)—

two cases that the government addresses in its harmless-error analysis, Opp'n 8-9 & n.5, but ignores when advancing its defense of the Court's instruction, *id.* at 4-7. The omission of *Lovern* from the government's defense is particular striking, because it had previously (and correctly) summarized *Lovern* as holding that a "district court's instruction in a federal threats case"—"that the threatened federal agent was acting in the course of his official duties at the time he was threatened"—"was erroneous as it deprived the jury of the opportunity to make the finding," Gov't Supp. Mem. on Jury Instructions 2 n.1 (citing *Lovern*, 293 F.3d at 699-700). *Johnson* is similar. *See* Lindberg Mem. 5, 12-13. There, 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. *Johnson*, 71 F.3d at 141. 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 set aside the verdict, holding that the instruction violated the defendant's right to have a jury determine the facts of each element and apply the law to those facts. *Id.* at 142-43.

Lovern and *Johnson* were both decided after *Gaudin*. More importantly, they foreclose the government's argument that a court within the Fourth Circuit "may instruct a jury that a matter is established by law." Opp'n 4.

In contrast, the government's lead case, *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993), was decided before *Gaudin*. Thus, even if *Aragon* had held that "a court may instruct a jury that a matter is established by law," Opp'n 4, *Gaudin* would have abrogated that contradictory holding.

In the end, though, there is no conflict between *Aragon* and *Gaudin*. In *Aragon*, the Fourth Circuit simply affirmed that it was the province of the court to determine whether a predicate offense qualifies as a "crime of violence" under the Travel Act, 18 U.S.C. § 1952(a). In that case, the defendants had been convicted of conspiring to effect a prison escape in violation of 18 U.S.C. §§ 371 and 752. 983 F.2d at 1308. But they also had traveled across state lines with the intent to bring about that

escape. As a result, the government also charged them with a violation of the Travel Act, *id.* at 1308, 1311, which makes it a federal crime to travel in interstate commerce with the intent to commit a "crime of violence," 18 U.S.C. § 1952(a). The district court held that a violation of § 752 was a crime of violence that qualified under the Travel Act, but it did not direct a verdict on that element. *Id.* at 1311. Rather, it had instructed the jury properly on a violation of § 752, *id.* at 1310, and there was no dispute that the court had otherwise instructed the jury properly on the additional elements of a violation of the Travel Act, *see id.* at 1311-15. Thus, the district court did not instruct the jury that an element of the offense had been established as a matter of law; it simply held that the government had properly charged a violation of the Travel Act where the defendants had crossed state lines with the intent to effectuate a prison escape. *See id.*

Aragon's limited holding is in keeping with another decision cited by the government, *United States v. Hale*, 69 F.3d 545 (9th Cir. 1995) (table), *available at* 1995 WL 638256. In that case, the defendant was charged with, among other things, possession of a firearm by a person previously convicted of a felony in violation of 18 U.S.C. § 922(g)(1). *Id.* at *1. The government introduced into evidence a certified copy of the defendant's prior felony conviction for possession of phencyclidine for sale in violation of California Health and Safety Code § 11378.5, and the district court had "instructed the jury that they could not find [the defendant] guilty unless they found that he had been convicted in California of possession of phencyclidine for sale," *id.* at *3. The limited issue that the district court reserved for itself was whether a violation of California Health and Safety Code § 11378.5 was a felony. *Id.* The Ninth Circuit found no error. The court's ruling on the legal eligibility of an underlying offense did not direct a verdict: "A question that can be answered solely by examining the statute and does not require an examination of extrinsic facts is a question of law for the judge." *Id.*

The same cannot be said about an "official act." Like the meaning of "materiality" at issue in *Gaudin*, an official act is a mixed question that ultimately requires that the application of facts to the

law. Under *McDonnell*, the jury was required to "find": (1) that Mr. Lindberg intended to influence a "'question, matter, cause, suit, proceeding or controversy' involving the formal exercise of governmental power"; (2) that "the pertinent 'question, matter, cause, suit, proceeding or controversy'" is something that is "specific and focused that is 'pending' or 'may by law be brought before any public official'"; and (3) that a government 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 2374. Yet the Court's instruction had the effect of directing the jury to resolve these three factual matters in the government's favor. Tr. 1781:1-7.

Nor does the government derive any support for its argument from *United States v. Williams*, 164 F.3d 627 (4th Cir. 1998) (table), *available at* 1998 WL 726761—the only other decision of the Fourth Circuit upon which it relies. In *Williams*, the defendant was charged with causing the presentation of false claims to the government in violation of 18 U.S.C. § 287. *Id.* at *2. The district court instructed the jury that, as a matter of law, a "claim" would include a signed tax return for a refund. *Id.* On appeal, the defendant argued that this instruction directed a verdict, but the Fourth Circuit disagreed. In a non-precedential opinion, the Fourth Circuit explained that the district court did not apply facts to the law for the jury; it simply defined a legal term:

> The district court's instructions defining for the jury what constitutes a "claim" under § 287 did not direct a verdict as to whether Williams had filed a claim. Rather, the instructions merely defined a legal term. The jury was left to decide the factual components of the first element of the offense: whether Williams caused returns to be filed with the IRS, whether the IRS received the returns, whether the returns were signed, whether the returns contained claims for refunds, whether the claims for refund were false, and whether Williams knew the claims were false.

Id. Here, in contrast, the jury was not free "to decide the factual components" of the element of an official act. Rather, as explained just above, the Court instructed the jury that the removal or replacement of the senior deputy commissioner was an official act, Tr. 1781:1-7, thereby resolving for the jury in government's favor the three factual components of an official act that *McDonnell* held the

jury must "find[ ]," 136 S. Ct. at 2374. Finally, *Williams* was resolved through a non-precedential opinion, and *Lovern* and *Johnson* squarely reject the government's argument that a court "may instruct a jury that a matter is established by law," Opp'n 4. *See Lovern*, 293 F.3d at 699-700; *Johnson*, 71 F.3d at 142-43. Thus, even if the facts of *Williams* were not distinguishable, this Court would be precluded from following *Williams* over *Lovern* and *Johnson*.

The government's remaining cases are all out of circuit, *see* Opp'n 4-6, and therefore cannot be read to support an outcome contrary to *Lovern* and *Johnson*. In any event, none of the cases decided after *Gaudin* clearly holds that a court may instruct a jury that an element is established by law. And the government concedes that at least one of its pre-*Gaudin* cases, *United States v. Hocking*, 860 F.2d 769 (7th Cir. 1988), is contrary to *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997), *see* Opp'n 5 n.2, which held that the district court committed reversible error when it instructed the jury that it should regard two unions as a single enterprise under RICO, *see DeFries*, 129 F.3d at 1311.

Because of the prominence the government assigns to it, only one of government's remaining cases warrants further discussion here: *United States v. Hastie*, 854 F.3d 1298 (11th Cir. 2017). *See* Opp'n 5-6. In *Hastie*, the defendant, a county official, was charged with the unauthorized transmission of "personal information" in violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2721(a). 854 F.3d at 1300.

Contrary to the government's argument, *Hastie* did not approve an instruction that applied fact to law on an element of the offense. *See id.* at 1306. Rather, in *Hastie*, the district court instructed the jury on a generic statement of law—that the statutory definition of "personal information" in the Driver's Privacy Protection Act, 18 U.S.C. § 2725(3), includes email addresses. *Id.* at 1305. The Eleventh Circuit explained that "[t]he district court would have erred if it had instructed the jury that the emails *provided by [the defendant]* constitute 'personal information,' but the district court did not do so." *Id.* at 1306. "The district court instead provided the jury a definition at a higher level of generality

when it explained that "'personal information" means information that identifies an individual, including an individual's E-mail address.'" *Id.* According to the Eleventh Circuit, "[t]he district court did not 'appl[y] the facts to the law, leaving nothing for the jury to determine,' because the jury was still responsible for deciding whether [the defendant] shared information that met that legal definition." *Id.* at 1307 (citation omitted).

Here, unlike in *Hastie*, the Court did not provide a generic statement of the definition of an official act. It applied the facts to the law:

> *In this case* the charge is that the question or matter is the removal and replacement of the senior deputy commissioner in charge of overseeing the regulatory review of Defendant Lindberg's insurance companies. *You'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). True, the Court used the indefinite article—"a senior deputy commissioner." *Id.* But *Hastie* recognized that a definition would violate the Constitution if it is "so specific that it essentially directs the verdict." 854 F.3d at 1307. That is what happened here. The Court's decision to incorporate the title of the government official at issue—the "senior deputy commissioner"—was so specific that it essentially directed a verdict on the element of an official act.

In short, there is no valid support for the government's argument that a court "may instruct a jury that a matter is established by law." Opp'n 4. The Court's "official act" instruction is erroneous under *Gaudin* and binding circuit precedent.

3. A Directed Verdict on an Element is a Structural Error that Renders the Verdicts *Per Se* Invalid, But Regardless, the Government Has Not Shown that the Error is Harmless Beyond a Reasonable Doubt.

Lastly, the government argues that even if the Court's instruction amounted to error, it is subject to harmless-error review. In support of this argument, the government implies that all instructional errors are subject to such review: "[I]nstructional error[s] are not structural but instead trial errors subject to harmless-error review." Opp'n 7 (quoting *Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008) (per curiam)) (alterations added by government) (internal quotation marks omitted). But that

quote is incomplete. In *Hedgpeth*, the Supreme Court explained "that *various forms* of instructional error are not structural but instead trial errors subject to harmless-error review." *Hedgpeth*, 555 U.S. at 60 (emphasis added).

The Supreme Court has held that an instruction that relieves the government of its burden of proving guilt beyond a reasonable doubt constitutes a structural error not susceptible to harmless-error review. *Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993). In contrast, the Supreme Court has held that an instruction that misstates the law—or that omits an element altogether—is subject to harmless-error review. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

Picking up on this distinction, 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. *Johnson*, 71 F.3d at 143-44. Just as critically, because *Neder* is distinguishable—it involved the omission of an element, not a directed verdict—*Johnson* remains controlling.

In response to *Johnson*, the government clings to the mistaken view that all instructional errors are subject to harmless-error review, *see* Opp'n 9 n.5—even though *Sullivan* necessarily rejected that approach. To that end, the government argues that *Johnson* was a case about "instructional error," and as such, it "was necessarily overruled by the Supreme Court's later decision on the very same point in *Neder*." *Id.* But that is plainly not the case. Whereas *Neder* involved the omission of an element, 527 U.S. at 8-9, *Johnson* involved a directed verdict on an element, 71 F.3d at 142-44.

As a fallback, the government suggests that the Fourth Circuit has recognized that *Neder* necessarily overruled *Johnson* in its non-precedential opinion in *Odom v. Adger*, 716 F. App'x 185 (4th Cir. 2018). Opp'n 9 n.5. But the Fourth Circuit did nothing of the sort. In *Odom*, a state court had taken judicial notice of the defendant's age, an element of the offense at issue. 716 F. App'x at 188. On direct appeal, the Supreme Court of South Carolina had held that the error at issue in *Odom* was

closer to *Neder* than *Sullivan* and therefore subject to harmless-error review. *See id.* at 187-88. The Fourth Circuit's review of that holding was constrained by the Antiterrorism and Effective Death Penalty Act. As the Fourth Circuit explained, "because the issue arises in the context of a § 2254 petition, the narrow question before us is whether the state supreme court's resolution of that issue—that a trial court's judicial notice of an element is subject to harmless-error analysis—is contrary to or an unreasonable application of clearly established Supreme Court precedent under [28 U.S.C.] § 2254(d)(1)." *Id.* at 188-89. Thus, "[t]he only question before [the Fourth Circuit was] whether the Supreme Court of South Carolina 'unreasonably' concluded that this case is closer to *Neder* than to *Sullivan*, so that harmless review applies." *Id.* at 190. The Fourth Circuit held that the state court's reliance on *Neder* over *Sullivan* was not "'objectively unreasonable' under 28 U.S.C. § 2254(d)(1)." *Id.*

Notably, given the posture of *Odom*, the Fourth Circuit was precluded from relying on *its* prior holdings, including *Johnson*; it could only measure the state court's ruling against decisions of "the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). For that reason, the Fourth Circuit was careful to clarify that it left "for another day the status of *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995), treating as structural error what was effectively a directed verdict on an element of an offense, in light of the Supreme Court's subsequent decision in *Neder*." *Odom*, 716 F. App'x at 190 n.2.

Thus, *Odom* did not hold that *Neder* overruled *Johnson*. And because the issues in *Neder* and *Johnson* are distinguishable, this Court remains bound by *Johnson* unless and until the Fourth Circuit or the Supreme Court says otherwise.

Finally, the government claims support for its position from *Lovern*, *see* Opp'n 8, but that case did not purport to overrule *Johnson*'s structural-error analysis, *see Lovern*, 293 F.3d at 700-01. Rather, in the absence of briefing on the issue, the Fourth Circuit applied a harmless-error analysis to an instructional error that directed a verdict for the government on an element of the offense. *See Lovern*, 293 F.3d at 700-01 & n.7; *see also* Br. of Appellant at 18-20, *United States v. Lovern*, No. 01-4728, 2001

WL 34385809 (4th Cir. Dec. 13, 2001) (failing to address the application of harmless-error analysis); Br. of Appellee at 15-17, *United States v. Lovern*, No. 01-4728, 2002 WL 32361555 (4th Cir. Jan. 25, 2002) (arguing only that there was no error). The panel that decided *Lovern* was not free to overrule *Johnson* without first analyzing whether *Neder* superseded it, but *Lovern* did nothing of the sort. *See id.* at 700-01; *see also McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court."). And following *Lovern*, the Fourth Circuit reaffirmed *Johnson*'s central holding—that a jury instruction that "in effect directed a guilty verdict for the Government" is "structural error." *United States v. Ramirez-Castillo*, 748 F.3d 205, 216 (4th Cir. 2014).[1]

In the end, however, this Court need not wade into the thicket of *Sullivan* and *Neder*, and a possible intra-circuit conflict between *Johnson* and *Ramirez-Castillo*, on the one hand, and *Lovern*, on the other. That's because the government has failed to establish that the Court's "official act" instruction was harmless beyond a reasonable doubt.

As Mr. Lindberg explained in his opening memorandum, the Court's instruction handicapped the defense in three respects. *First*, it "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,

[1] The government argues that *Ramirez-Castillo* is distinguishable because, there, the district court gave the jury a special verdict form that asked whether certain facts were established, but never asked the jury to render a verdict of guilty. Opp'n 9 n.5. But the Fourth Circuit saw a direct analogy between those facts and the directed verdict at issue in *Johnson*: "Instead of asking the jury to determine whether Appellant was guilty, beyond a reasonable doubt, of each element of the charged offense, the district court instructed the members of the jury that they need not concern themselves with certain elements of the crime. . . . In giving these instructions, the district court invaded the jury's province by declaring that certain facts essential to conviction had been conclusively established." *Ramirez-Castillo*, 748 F.3d at 213-14 (citing *Johnson*, 71 F.3d at 142).

administrative determination, or hearing.'" Lindberg Mem. 14 (quoting *McDonnell*, 136 S. Ct. at 2370). There was ample evidence that the Department's reassignment process was anything but formal. *See id. Second*, the Court "would not allow the defendants to put on additional evidence about the informality of the Department's reassignment process." *Id.* In response, the government claims that the "the Court expressly offered to allow the defendants to present to the jury" an additional witness on this point, but the defendants declined. Opp'n 10 n.6 (citing Tr. 1464:15-1466:20). That, however, is not a fair characterization of what happened. The Court ruled that the proffered witness could testify as to Mr. Lindberg's "entrapment defense," but he would not be permitted "to tell the jury about what an official act is." Tr. 1464:18-21; *see also id.* at 1465:11-15 (explaining that "some" of the witness's proffered testimony could come in "as part of another argument somewhere," but the Court was not going to allow counsel "to argue this was not an official act"). *Finally*, Mr. Lindberg explained that the Court prevented defense counsel from arguing to the jury that the removal and replacement was not an official act, which deprived him "of any 'effective way to highlight the government's failure to identify an appropriate'" question that was part of an official act. Lindberg Mem. 15 (quoting *United States v. Van Buren*, 940 F.3d 1192, 1204 (11th Cir. 2019)). The government never addresses this point. *See* Opp'n 9-10.

The government largely argues that because the Court was convinced that the removal and replacement of the Senior Deputy Commissioner was an official act, "the jury would have found the same." Opp'n 9. But that is not the test for harmless error. The test is whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. The government walks through what it believes is its best evidence. Opp'n 9-10. But a jury was not required to view those facts the same way, and but for the Court's instructional error, the jury would have been free to reject the government's theory. For example, the jury might have viewed the requested act as the informal reassignment of a task from one employee to another. And the jury

might not have viewed that act as something that could be fairly "described as a matter 'pending' before a public official—or something that may be brought 'by law' before him." *McDonnell*, 136 S. Ct. at 2369. On this point, the jury was entitled to consider evidence—and argument—that a 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.

In response, the government predicts that the defendants "can point to no case holding that an act can only be 'official' if it is written and signed." Opp'n 10. But that is not Mr. Lindberg's argument. Rather, Mr. Lindberg argued that "[t]his 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*." Lindberg Mem. 17.

There is ample support for Mr. Lindberg's argument. *McDonnell* recognized that the authority conferred by State law is relevant to the jury's official-act analysis. *McDonnell*, 136 S. Ct. at 2369 (explaining that "'may *by law* be brought' conveys something within the specific duties of an official's position—the function conferred by the authority of his office"). The fact that the Commissioner did not need to enter a signed order to reassign tasks among the Department's employees suggests that the Commissioner was not being asked to engage in a formal exercise of governmental power. The jury was entitled to weigh that evidence.

Because it is not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," *Neder*, 527 U.S. at 18, Mr. Lindberg is entitled to at least a new trial. The government has not sustained its burden here.

B. The Informal Reassignment of Tasks Among Employees Does Not Qualify as an "Official Act," Entitling Mr. Lindberg to a Judgment of Acquittal on the Count of Conspiracy to Commit Honest-Services Wire Fraud.

Separately, Mr. Lindberg is entitled to a judgment of acquittal. As he explained in his opening memorandum, no reasonable jury could have concluded that the informal (and strictly internal) process at issue here for reassigning tasks among government employees amounted to "'a formal exercise of governmental power' akin to a 'lawsuit, hearing, or administrative determination.'" Lindberg Mem. 16 (quoting *McDonnell*, 136 S. Ct. at 2368).

For its part, the government never responds to the substance of Mr. Lindberg's argument. Instead, it claims that this argument is "the very same argument the defendants made in their motions to dismiss, which this Court denied." Opp'n 11.

Anticipating this, Mr. Lindberg explained that, in ruling on the defendants' motions to dismiss, the Court had invoked "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 *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019). Lindberg Mem. 15-16 (citing Mot. to Dismiss Order at 8, Dkt. No. 120). But "the evidence at trial fell short of that standard." *Id.* at 16. "As a result," Mr. Lindberg continued, the 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.'" *Id.* (quoting *McDonnell*, 136 S. Ct. at 2368).

In response, the government distorts and half-quotes the Court's prior decision to suggest that the Court relied on more than the Commissioner's "authority to appoint or employ new deputies." Opp'n 11. Specifically, it omitted the underlined text from its quote of the Court's prior decision:

> Like the congressman in *Fattah*, the Commissioner of the North Carolina Department of Revenue is empowered by statute to "appoint or employ such . . . employees that the Commissioner considers to be necessary for the proper execution of the work of the Department." N.C. Gen. Stat. § 58-2-25. *Thus*, staffing decisions generally—and

> the decision to assign an employee to regulate GBIG in particular—are a formal exercise of official power. Moreover, these staffing decisions are akin to 'a lawsuit, agency determination, or committee hearing,' as they require the Commissioner to evaluate current and prospective employees to determine whether they are 'necessary' for the Department's work.

Compare Dkt. No. 120 at 8 (emphasis added) (footnotes omitted) (ellipses in original), *with* Opp'n 11.

The full quote makes plain that the Court was relying on the Commissioner's authority to appoint or employ *new* employees—something that the government did not prove up here. Indeed, after invoking that authority, the Court uses "Thus"—a word omitted from the government's quote—to show that the remaining points follow from this initial proposition. Dkt. No. 120, at 8. All of this shows that the government's proof at trial fell short of the standard that the Court invoked to save the indictment.

More critically, the government has never explained how the informal reassignment of a task from one employee to another qualifies as an official act. When pressed elsewhere, the government equates task reassignment to a "personnel move, such as the hiring, firing, or reassignment of an employee," and it invokes *Fattah* in this regard. Opp'n 6. But the reassignment of tasks among employees is not a "personnel move." It does not involve a demotion or loss of title; it simply sends a project from one employee to another. To be sure, the government alludes elsewhere to the would-be hiring of John Palermo to "replace[ ]" Jackie Obusek. Opp'n 10. But the government did not charge the hiring of Mr. Palermo as an official act, Indictment ¶ 14, Dkt. No. 3, the Court did not charge the jury on this theory, Tr. 1781:1-13; and Mike Causey testified that the parties simply discussed the idea of hiring Palermo as a financial analyst under Ms. Obusek, not as replacement for her, *see id.* at 700:5-20; *see also id.* at 708:2-5 (explaining that Palermo never told Causey that he was interested in "removing or replacing Jackie Obusek").

Mr. Lindberg also explained 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.'" Lindberg Mem. 18 (quoting 18 U.S.C. § 201(a)(3)); *see also McDonnell*, 136 S. Ct. at 2369 (noting the formality of these terms). "Deciding that one government employee is going to take on a task once assigned to another employee does not rise to that level." Lindberg Mem. 18. And Mr. Lindberg explained that a contrary approach offers no limiting principle. *Id.* The government has no answer for any of this.

The upshot is that no reasonable jury could have found that the informal reassignment of tasks among employees at the Department of Insurance constituted an official act. As such, the Court must enter a judgment of acquittal.

C. Because Section 666 Must Be Read to Include an "Official Act" Requirement in Cases Involving Public Officials, the Infirmities in the Jury's Verdicts Extend Beyond the Honest-Services Wire Fraud Count.

Mr. Lindberg explained previously that 18 U.S.C. § 666 must be read to include an "official act" requirement in cases involving public officials. Lindberg Mem. 20-27. Otherwise, § 666 would implicate the same constitutional and practical concerns that the Supreme Court avoided only by reading an "official act" requirement into honest-services wire fraud. *See id.* at 24; *see also McDonnell*, 136 S. Ct. at 2372-73, 2375. Indeed, a contrary ruling would mean that "the government could have convicted Governor McDonnell under [§ 666] based on the same constitutionally problematic theory that the Supreme Court rejected in *McDonnell*" when he was prosecuted under the honest-services fraud statute and the Hobbs Act. Lindberg Mem. 24.

The government does not take on the substance of this argument. Instead, it cites a handful of out-of-circuit cases. Opp'n 12. Yet the government never explains why the reasoning of these cases is persuasive. *Id.* And Mr. Lindberg previously explained why they are not. Lindberg Mem. 25-26. Most notably, the courts in these cases stated that *McDonnell*'s reasoning should not apply to § 666 because that statute "does not include the term 'official act.'" *United States v. Suhl*, 885 F.3d 1106, 1112

(8th Cir. 2018); *see also United States v. Ng Lap Seng*, 934 F.3d 110, 130, 133 (2d Cir. 2019) (similar), *petition for cert. filed*, No. 19-1145 (U.S. Mar. 16, 2020); *United States v. Porter*, 886 F.3d 562, 565-66 (6th Cir. 2018). But the fact that § 666 makes no mention of an "official act" is no impediment; the same could have been said about the statutes at issue in *McDonnell*. *See* Lindberg Mem. 25-26. In the end, the government has provided no reason why this Court should follow these decisions.

As a fallback, the government contends that, through its instructions on § 666, "this Court took care to avoid any of the potential constitutional concerns implicated by *McDonnell*." Opp'n 12. Here, the government emphasizes, the Court instructed the jury that the following actions are "'not sufficient" to establish a violation of § 666: "setting up a meeting, hosting an event, talking to another official, sending a subordinate to a meeting, or simply expressing support for a constituent." *Id.*

But this instruction allowed the jury to find Mr. Lindberg guilty on constitutionally impermissible grounds. The jury was not asked to "find" the three components of an "official act" that preserved the constitutionality of the *McDonnell* prosecution. *Cf.* 136 S. Ct. at 2374-75. Instead, it was given a list of insufficient acts that had no relevancy to the evidence before the jury.[2]

The Court's unwillingness to read § 666 as embracing an "official act" requirement has two consequences. Because the Court did not instruct the jury that § 666 requires an official act, *see* Tr. 1782:14-1786:2, Mr. Lindberg is 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 commissioner constituted an official act, Mr. Lindberg is entitled to a judgment of acquittal on this count as well. *See supra* Section I.B.

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[2] And even if the jury had been instructed on an "official act," the Court directed a verdict for the government on that point. *See supra* Section I.A.

D. The Court's Error in Directing a Verdict on "Official Act" Infected the § 666 Count Even if that Statute Does Not Embrace an Official Act Requirement.

Even if § 666 does not include an official act requirement, the Court's instruction on "official act" still infected this count. The Court told the jury that the "business, transaction, or series of transactions" element excluded certain actions listed in *McDonnell*, like setting up a meeting, but did not instruct the jury on the other elements of *McDonnell*. Thus, the Court's instruction effectively told the jury that the government needed to meet a lower threshold to prove the "business, transaction, or series of transactions" element than it did to prove an official act. Under these circumstances, a reasonable jury that had just been instructed to find an official act would have also assumed that the less onerous "business, transaction, or series of transactions" element was met.

Although the government contends that an instruction on one count affects another only when the instructions are identical, this rule should also cover this situation. Just as a criminal conviction, which requires proof beyond a reasonable doubt, is "conclusive as to an issue arising against the criminal defendant in a subsequent civil action," which requires proof only by a preponderance, a command to find a more burdensome element would be treated by a jury as conclusive on a less burdensome element. *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983).

II. The Government Did Not Prove, Beyond a Reasonable Doubt, that Mr. Lindberg Was Predisposed to Commit a Crime Prior to Mr. Causey's Inducement and, Therefore, Failed to Negate Mr. Lindberg's Defense of Entrapment.

The government's argument on entrapment ignores the defendant's low burden to show inducement. It also fails to reveal substantial evidence of predisposition. Thus, the Court should find that the government had insufficient evidence to establish Mr. Lindberg's guilt.

A. More than a Scintilla of Evidence of Inducement Was Introduced at Trial.

The government's inducement analysis appears to rely on an overstated standard of proof for the defendant. Opp'n 13-15. As Judge Luttig explained in his majority opinion in *United States v. Sligh*, the defendant has only "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." 142 F.3d 761, 762 (4th Cir. 1998) (emphasis added) (citation omitted); *accord United States v. Jones*, 976 F.2d 176, 179 (4th Cir. 1992) ("Once a defendant meets his initial burden of presenting evidence that the government induced him to commit the crime, the government has the burden of proving 'beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.'"). Thus, Fourth Circuit precedent clarifies that the defendant's burden is low: he must introduce only some evidence of inducement before the burden shifts to the government.[3]

In this case, there was far more than a scintilla of evidence of government inducement. The evidence included not only Mr. Causey's "What's in it for me?" question but also his repeated attempts to link business conversations with campaign contributions and his independent proposals to transfer money to him. *See* Lindberg Mem. 30-34; *see, e.g.*, Gov't Ex. 119 at 4; Gov't Ex. 120B at 3-4; Gov't Ex. 121 at 9; Gov't Ex. 127A at 5. Mr. Causey's efforts were done in coordination with FBI agents, who directed him to ask something to the effect of "What's in it for me?" and worked with him to bring

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[3] Other federal courts of appeals agree that the defendant must meet only this low threshold before the burden shifts to the government. *E.g.*, *United States v. Flores*, 945 F.3d 687, 717 (2d Cir. 2019) ("When a defendant has presented credible evidence of inducement by a government agent, the government has the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime."); *United States v. Zimmermann*, 509 F.3d 920, 927-28 (8th Cir. 2007) ("In order to be entitled to an entrapment instruction, a defendant must produce some evidence that the government induced him to commit an offense. If the defendant makes this showing, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime, and entrapment may become a question of fact for the jury to decide." (citations omitted)); *United States v. Gifford*, 17 F.3d 462, 467-68 (1st Cir. 1994) ("While the necessary level of evidence is not 'so substantial to require, if uncontroverted, a directed verdict of acquittal . . . it must be more than a mere scintilla.' It is only when and if a defendant successfully carries this entry-level burden that the entrapment defense secures a foothold in the case. . . . [W]hen entrapment is genuinely in issue—meaning that the defendant has met his entry-level burden . . . —'the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.'" (quoting *United States v. Pratt*, 913 F.2d 982, 988 (1st Cir. 1990), and *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (citations omitted)).

the case to a close. *See* Tr. 538:7-21; 595:6-14. This evidence also shows that, contrary to the government's assertion, Mr. Causey "suggested both the corrupt conduct and the bribe." Opp'n 15.

Mr. Lindberg was not required to do more to meet his burden, such as proving inducement beyond a reasonable doubt. "[I]t is important to note that" the defendant's burden to show some evidence of inducement "in no way shifts the ultimate burden of proof, which remains on the prosecution" and that "the law places no burden on any defendant to prove an affirmative defense beyond a reasonable doubt." *United States v. Dallmann*, No. 19-cr-253, 2020 WL 239589, at *3 (E.D. Va. Jan. 15, 2020) (quoting *United States v. Gonzales*, 58 F.3d 506, 512 (10th Cir. 1995)) (internal quotation marks omitted). "[T]he defendant need only produce 'more than a scintilla of evidence' regarding such a defense, while the burden remains on the government to prove beyond a reasonable doubt every element of the offenses charged." *Id.* (quoting *Sligh*, 142 F.3d at 762).

B. The Government Did Not Introduce Substantial Evidence of Predisposition.

The key inquiry in this case is not inducement. Rather, as the government correctly recognizes later in its brief, the "essential element of the entrapment defense is the defendant's lack of predisposition to commit the crime charged." Opp'n 15 (quoting *United States v. Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984)). The government has the burden of proving this predisposition.

For three reasons, the evidence cited by the government in its response is not substantial evidence that establishes, beyond a reasonable doubt, that Mr. Lindberg was predisposed to committing the charged crimes prior to Mr. Causey's inducement. Opp'n 15-18.

First, Mr. Lindberg's response to "What's in it for me?" is not evidence of criminal predisposition because Mr. Lindberg did not link the idea of an independent expenditure committee (IEC) directly to the hiring of Mr. Palermo or the reassignment of tasks from Ms. Obusek. *See*, Gov't Ex. 113C at 9-14. Because Mr. Lindberg did not make the idea of an IEC contingent on any official action, Mr. Lindberg's suggestion was not a criminal act. At most, it was an attempt to ingratiate

himself with Mr. Causey, which is not bribery. *See United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (holding that something given with a "generalized hope or expectation of ultimate benefit" is not "a bribe"); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (noting that ingratiation and access are not corruption).

Second, Mr. Lindberg and his co-defendants' continued conversations with Mr. Causey are not evidence of predisposition. It is unsurprising and sensible that Mr. Lindberg and his codefendants would want to continue discussing his insurance businesses with Mr. Causey, the head regulator of the state's insurance department. But it was Mr. Causey who repeatedly injected the idea of campaign contributions into conversations and attempted to link a *quid* and a *quo*. *See, e.g.*, Gov't Ex. 120B at 3; Gov't Ex. 121 at 9; Gov't Ex. 123; Gov't Ex. 123A at 2-3; Gov't Ex. 124 at 6. Thus, contrary to the government's argument, these subsequent conversations show that Mr. Causey attempted repeatedly to induce Mr. Lindberg to commit a crime—a factor that cuts against the idea that Mr. Lindberg possessed criminal predisposition prior to Mr. Causey's inducement. *See United States v. Skarie*, 971 F.2d 317, 321 (9th Cir. 1992) ("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.'" (quoting *Jacobson v. United States*, 503 U.S. 540, 553 (1992))).

Moreover, although evidence arising after a government agent's first contact with a defendant may show predisposition in some cases, this is not one. Certainly, "evidence of independently motivated behavior that occurs after government solicitation begins, can be used to prove that the defendant was predisposed." *United States v. Byrd*, 31 F.3d 1329, 1336 (5th Cir. 1994). This concept is displayed in *United States v. Garcia*, 182 F.3d 1165 (10th Cir. 1999), a case cited in *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000)—the government's principal authority for bolstering its post-

inducement evidence. Opp'n 17-18. In *Garcia*, it was the *defendant* "first suggested to [the informant] that he should sell cocaine" and, during his conversations with the informant, displayed a "vocabulary and manner of dealing with [the informant] that demonstrate[d] knowledge and experience in illicit drug trades." 182 F.3d at 1169. This "independently motivated behavior" proved predisposition. In contrast, it was Mr. Causey, not Mr. Lindberg, who repeatedly attempted to establish a *quid pro quo*. The record lacks substantial evidence of Mr. Lindberg's independently motivated attempts to commit bribery.

Finally, Mr. Lindberg's prior 2017 campaign contributions do not establish predisposition because they were not criminal. The predisposition that the government must show is the "predisposition to commit an *illegal* act." *Jacobson v. United States*, 503 U.S. 540, 550 (1992) (emphasis added). The government does not argue that these contributions constituted an illegal *quid pro quo* or other crime—and correctly so. At most, the contributions were intended to establish ingratiation and access and thus fell under the protection of the First Amendment. *McCutcheon*, 572 U.S. at 192. The government's argument invites the Court to treat First Amendment-protected conduct as criminal activity. Supreme Court precedent requires the Court to decline that invitation.

The government has not sustained its burden to show criminal predisposition beyond a reasonable doubt. Given the lack of evidence, acquittal, or at least a new trial, is required. In addition, Mr. Lindberg believes that the entrapment instruction requested by the defendants would have provided the necessary detail to the jury to reach this same conclusion. Lindberg Mem. 55-56. Thus, a new trial should be ordered for this independent reason, and Mr. Lindberg's proposed instruction should be given.

III. The Government Offers An Overly Broad Interpretation of "Benefits" Under Section 666 in an Attempt to Salvage the Deficient Evidence at Trial.

The government and Mr. Lindberg agree that "not all federal funds qualify as federal 'benefits'" under § 666. Opp'n 19. But the government then draws an incorrect distinction purporting

to delineate what is and what is not a benefit. According to the government, federal funds "receive[d] in furtherance of a broader goal" qualify as benefits, while federal funds received "merely as payment in a commercial transaction" do not. *Id.* at 20. The government's definition of "benefit" is more expansive than allowed by the Supreme Court's decision in *Fischer v. United States*, 529 U.S. 667 (2000), and it draws the line between what is and is not a benefit too far in the government's favor.[4]

In reality, the inquiry is more nuanced. It requires examination of the "structure, operation, and purpose" of the federal program under which the funds were issued, including "the conditions under which the organization receives the federal payments." *Fischer*, 529 U.S. at 681. Critical to this inquiry in *Fischer* was the "comprehensive series of statutory and regulatory requirements" for participants in the federal program at issue (Medicare). *Id.* at 671-72. As the Supreme Court explained, participants' compliance with these requirements was monitored to ensure that the federal funding was used to fulfill Medicare's purposes. *Id.* at 672. Indeed, a linchpin of the Court's conclusion—that Medicare funding to health care providers is a benefit—was the fact that "the Government does not make the payment unless the hospital complies with its intricate regulatory scheme." *Id.* at 679.

The government also ignores that though § 666 is intended to expansively "ensure the integrity of organizations participating in federal assistance programs," Opp'n 18 (quoting *Fischer*, 529 U.S. at 678), the statute must apply to the organization in the first place. And as *Fischer* plainly held, careful construction of the term "benefit" is key to limiting § 666 so as to avoid "upsetting the proper federal balance." 529 U.S. at 681.

Moreover, in response to the cases cited in Mr. Lindberg's opening memorandum, *see* Lindberg Mem. 36-40, the government merely points to factual differences between those cases and the circumstances here, Opp'n 19. But the government does not explain how those factual differences

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[4] Notably, the government does not dispute that whether federal funds qualify as a benefit under § 666 is a question for the jury. *See* Lindberg Mem. 36.

bear on the ultimate analysis of what constitutes a benefit under § 666—for example, that the cited cases involved different federal programs, or that the organization at issue received federal funding indirectly. *Cf. United States v. Bravo- Fernández*, 913 F.3d 244, 249 (1st Cir. 2019) ("[T]he reach of *Fischer* is not limited to only those cases involving indirect receipt of federal monies."). And all of the cases cited by Mr. Lindberg stand for the propositions that "to merit characterization of funds as benefits," the government must prove that the funds were part of a federal program "defined by a sufficiently comprehensive 'structure, operation, and purpose,'" and "[t]he conditions under which an entity receives federal payments" are critical to this inquiry. *United States v. McLean*, 802 F.3d 1228, 1236-37 (11th Cir. 2015) (quoting *Fischer*, 529 U.S. at 681, and *United States v. Edgar*, 304 F.3d 1320, 1327 (11th Cir. 2002)); *see also United States v. Pinson*, 860 F.3d 152, 166 (4th Cir. 2017) ("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.'" (quoting *Fischer*, 529 U.S. at 680)); *United States v. Doran*, 854 F.3d 1312, 1319-20 (11th Cir. 2017) (Jill Pryor, J., concurring in the judgment) ("[T]o sustain a § 666 conviction, the government must 'show a relationship between the structure, operation, and purpose of the federal scheme authorizing the distribution of funds and their ultimate use at the relevant local level.'" (quoting *McLean*, 802 F.3d at 1244)).

The evidence at trial did not meet this standard. The evidence did show at some level that grants under the State Health Insurance Assistance Program (SHIP) aim to educate senior citizens about government health care. *E.g.*, Tr. 875:11-14, 880:4-10. And the government is correct that there was some testimony that conditions, reporting requirements, and metrics surround the receipt of SHIP grants. Opp'n 20-21 (citing Tr. 880:11-15, 880:23-881:11, 883:18-21, 884:1-3; 885:1-4, 885:7-13, 887:10-18; 888:6-18). But that testimony failed to show what the reporting requirements and metrics entailed, "the conditions under which [NCDOI] receives the federal payments," or specifically how

the federal program structure and oversight linked up to NCDOI's use of the funds. *Fischer*, 529 U.S. at 671-72, 679, 681; *see also Bravo- Fernández*, 913 F.3d at 247 ("The government has the burden of producing adequate evidence for this examination to occur."). Rather, the jury was left with broad and general testimony that NCDOI's program needed to "be in accordance with what the program is about," Tr. 880:14-15; "the division has to do a program-type report" that does not include substantive requirements, *id.* at 880:25-881:11; and that "[t]hey have certain metrics they have to meet," *id.* at 881:2-3. Such "broad and general" testimony is insufficient to prove the existence of benefits under § 666. *See Doran*, 854 F.3d at 1322 (Jill Pryor, J., concurring in the judgment). In addition, the evidence at trial showed that that the State itself defines the contours and requirements of its participation in SHIP, Tr. 880:10-22, 883:18-25, 885:5-9, undercutting any inference that the federal government imposes significate conditions or regulatory or reporting requirements such that the SHIP grant may rise to the level of a benefit.[5]

Finally, given that "benefits" is a legal term of art that differs from a colloquial meaning, the Court should have instructed the jury on the definition of "benefits" under § 666. Dkt. No. 189 at 4 (Defendants' proposed jury instruction); Tr. 1595:9-1597:9. Contrary to the government's assertion, the proposed instruction did not contain an inaccurate statement of the law. *See* Opp'n 21. In *Fischer*, the Supreme Court ultimately concluded that "[w]e must construe the term 'benefits,' . . . in a manner consistent with Congress' intent not to reach the enumerated class of transactions," *Fischer*, 529 U.S.

[5] The First Circuit's decision in *United States v. Bravo-Fernández*, 913 F.3d 244 (1st Cir. 2019), is not to the contrary. *Cf.* Opp'n 20 n.9. *Bravo-Fernández* involved an appeal of defendants' convictions after a second trial (the defendants had successfully challenged their convictions from their first trial, but were then retried and reconvicted). *Bravo-Fernández*, 913 F.3d at 246. On appeal following the second trial, the First Circuit noted that in the first trial, § 666's jurisdictional element had been satisfied, but found that it was not met in the second trial. *Id.* at 247-48. But as the First Circuit recognized, any statements about the first trial—the statements upon which the government relies here—are *dicta* because "defendants did not argue about the funds-benefits distinction in their first appeal," and the sufficiency of the evidence at the first trial was not at issue in the subsequent appeal. *Id.* at 249.

at 679, meaning "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business," 18 U.S.C. § 666(c). The Defendants' proposed jury instruction accurately reflected this statement of the law. Dkt. No. 189 at 4 ("The term ["benefits"] does not include certain payments made in the usual course of business, such as compensation like salaries, wages, or fees, or the reimbursement of expenses."). The jury should have been instructed accordingly, and this error was not harmless beyond a reasonable doubt.

IV. Incorrect Evidentiary Rulings Require a New Trial.

A. Extrinsic Evidence and Cross-Examination Relevant to Mr. Causey's Bias and Credibility Should Have Been Admitted.

Extrinsic evidence and further cross-examination exploring Mr. Causey's bias should have been permitted—specifically, deposition testimony in which Mr. Causey was warned about a potential FBI investigation and evidence of Mr. Causey's misstatements at a farmer's market. Lindberg Mem. 41-45; Opp'n 21-25. The government's argument against the deposition evidence disregards the principle that relevant evidence of bias is what "the *witness* understands he or she will receive" by cooperating with the government. *Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir. 1983). Even if the objective reality were that the FBI would not have investigated Mr. Causey—a fact that the government has not established anyway—Mr. Causey's subjective understanding of his benefit by cooperating with the government was relevant to the jury's assessment of his testimony. Because the deposition testimony was probative of Mr. Causey's bias, it should have been admitted. *See United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996) ("[I]t [i]s permissible for evidence on [bias] to be extrinsic in form.").

This exclusion was not remedied by the limited cross-examination permitted by the Court. The cross-examination did not reveal that the deposing lawyer warned Mr. Causey that he could be investigated by the FBI before the Court cut it off. Tr. 438:23-439:4. At minimum, cross-examination on this issue should have been permitted since Mr. Causey was the government's most important

witness. *See United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1133 (4th Cir. 1991) ("Where [the cross-examination] involves the government's most crucial witness, the constitutional concerns are especially heightened."). This cross-examination, combined with the introduction of the deposition testimony, could have undermined Mr. Causey's credibility to the jury.

Given the importance of Mr. Causey's testimony to its case, cross-examination about his false representations at a farmer's market should have also been allowed. Though the incident occurred more than ten years ago, the jury should have been permitted to hear relevant cross-examination on events that bore on Mr. Causey's truthfulness. Fed. R. Evid. 608.

B. Expert Testimony Was Necessary for the Jury to Understand The Alleged *Quid Pro Quo.*

Expert testimony would have helped the jury assess one of the elements it needed to consider: whether something of value was offered to Mr. Causey by a defendant. Lindberg Mem. 45-48; Opp'n 25-27. This element is a jury question. *See Jennings*, 160 F.3d at 1019. A jury is not required to find that anything offered by anyone is sufficient to constitute a *quid*. If the jury had understood the structure of the political entities at issue, it may have concluded that these third-party entities had independent authority over disbursing their funds and thus the contributions were not things of value. Expert testimony would have helped the jury understand these entities.

As it has in previous filings on this issue, the government claims that this evidence would have been irrelevant because the defendants were not charged with tax-code provisions and campaign-finance laws. Opp'n 26. But the government did not need to charge the defendants with these violations to make relevant an explanation of how the North Carolina Republican Party and IECs operated. After hearing this explanation, the jury would have been free to conclude that the contributions at issue were not things of value—just as it would have been free to conclude that they were. But the jury should have been allowed to hear this critical testimony to decide which conclusion to reach.

C. Evidence of John Palermo's Suggested Hiring Should Have Been Excluded Because It Was Not Part of Either Ultimate Offense.

Evidence of the suggested hiring of Mr. Palermo was not relevant to either the § 666 charge or honest-services wire fraud, and its presence only served to distract the jury from the key issues. Lindberg Mem. 48-50; Opp'n 28-29. Although the government's response brief contends that Mr. Palermo's suggested hiring was a "step in the plot" or "incident to an essential part of the scheme," the brief ignores what constitutes the "plot" and "scheme." Opp'n 29. In an honest-services wire fraud case, the plot or scheme is only the *quid pro quo* that involves an official act. *McDonnell*, 136 S. Ct. at 2365. The 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, it was not part of the scheme or plot shown at trial for the removal or transfer of Ms. Obusek. The fact that the relevant wire transfers—which are supposed to "further" the alleged scheme—occurred after the suggestion had been rejected also shows that it was not part of the scheme or plot that was charged in the indictment. Lindberg Mem. 49. A wire transfer logically cannot further a "scheme" that has already been rejected. Instead, evidence of the suggested hiring distracted the jury from the real issue—whether Mr. Lindberg tried to influence the official act or transaction charged in the indictment—and it was therefore improperly admitted under Federal Rules of Evidence. Fed. R. Evid. 401-02; Fed R. Evid. 403 & Advisory Committee's Note; *see Old Chief v. United States*, 519 U.S. 172, 180 (1997).

V. Errors in Jury Instructions Beyond Those in the "Official Act" and "Benefits" Instructions Require a New Trial.

A. The Definition of "Corruptly" Given by the Court Contradicts the Superfluity Canon and Appears Inconsistent with Supreme Court Guidance.

The superfluity canon requires courts to "give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). Here, the Court's (and the *Jennings*'s) definition of "corrupt" intent defied this canon. Section 666(a)(2) already requires a defendant to "give[ ]" or

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"offer[ ]" something of value with "intent to influence or reward" an agent of a covered entity in connection with "any business, transaction, or series of transactions" of that entity. Based on this language, a defendant already must attempt give something in order to get something in return—that is, intend to enter into a *quid pro quo*. It cannot be that the word "corruptly"—which modifies the above language—simply reiterates this requirement. Instead, it is not only possible but preferable to interpret "corruptly" to require consciousness of wrongdoing or a bad or evil state of mind. Lindberg Mem. 50-53. Although this Court likely felt bound by *Jennings*, intervening Supreme Court precedent supports this definition. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005). This definition will also avoid the criminal prosecution of unwitting donors who believe that they are simply exercising their First Amendment rights.[6]

Contrary to the government's contention, the defendants' proposed definition does not require the government to prove that the defendant requested official action that "was lawful or otherwise good." Opp'n 30. It simply requires the government to show that, even if the defendant's requested official act was lawful or good, the defendant knew he was doing something wrong or was acting with a bad or evil state of mind when he offered a contribution.

B. The Government's Case Failed to Establish a Violation of a Fiduciary Duty that Would Have Justified the Court's Instruction on a Concealment of a Bribe.

The government established no fiduciary or other duty to justify the Court's instruction on concealment of a bribe. The government notes that the three cases cited by the government also involved payors who were prosecuted for bribery. Opp'n 32. But the evidence in two of those cases revealed explicit rules that required disclosure. *See United States v. Harvey*, 532 F.3d 326, 334 (4th Cir. 2008); *United States v. Rybicki*, 354 F.3d 124, 127 (2d Cir. 2003) (en banc). In *Harvey*, the non-public-

[6] If the Court disagrees and continues to believe it is bound by *Jennings*, Mr. Lindberg makes these arguments simply to preserve this issue for appeal.

servant defendant was charged with aiding and abetting someone governed by an explicit rule, 532 F.3d at 332, and in *Rybicki*, the court implicitly found that the defendants owed "a duty of loyalty comparable to that owed by employees to employers," 354 F.3d at 142. The other case is an unpublished decision that involved a coconspirator whose position gave rise to a fiduciary duty. *United States v. Foxworth*, 334 F. App'x 363, 365-66 (2d Cir. 2009) (non-precedential); *United States v. Foxworth*, No. 06-cr-81, 2006 WL 3462657, at *1 (D. Conn. Nov. 16, 2006). If the government had introduced evidence of an explicit rule to disclose the contributions at issue, evidence that a coconspirator had a fiduciary duty to disclose the contributions, or evidence that the defendants failed to comply with any explicit disclosure rules, then the instruction may have been appropriate. But the government did not. Notably, the government cannot rely on any fiduciary duty owed by Mr. Causey, since he was an agent of law enforcement and legally could not have been a member of the conspiracy. *See United States v. Hayes*, 775 F.2d 1279, 1283 (4th Cir. 1985); *United States v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967); *Khem Un v. United States*, No. 1:10-cr-446, 2015 WL 5016500, at *7 (E.D. Va. Aug. 19, 2015). And the government did not seek to prove that Mr. Lindberg aided and abetted Mr. Causey in honest-services wire fraud. Indictment ¶ 10.

United States v. Colton does not undermine that Mr. Lindberg's objection to the jury instruction. That case involved bank fraud and did not raise issues of protected political speech. 231 F.3d 890, 894 (4th Cir. 2000). Although concealment of information from a financial institution, even absent a duty to disclose, may suffice for bank fraud, courts should hesitate to find that donors who seek to use campaign-finance vehicles have met the falsity requirement of honest-services wire fraud.

Finally, holding public officials, but not a payor, liable for concealing bribes is not "irreconcilable." Opp'n 32. It makes sense to hold public officials, who owe fiduciary duties to the public, to a higher standard than the constituents whom they serve.

C. Bribery Involving Campaign Contributions Requires Proof of an "Explicit Promise" in Exchange for an Offer of Something of Value.

McCormick v. United States clarifies that an explicit promise must be part of a *quid pro quo* in bribery involving campaign contributions. 500 U.S. 257, 273 (1991). Omitting this requirement would "open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* at 272.

Although the government points to *Evans*'s language about a public official's "implicit promise," Opp'n 33, *Evans* did not overrule this principle from *McCormick* or even squarely address this language. The petitioner's argument in *Evans* was that, in order for a public official to be convicted, he needed to have induced the bribe. *Evans v. United States*, 504 U.S. 255, 259 (1992). And in response to this narrow argument, the Supreme Court held that a public official can be guilty of Hobbs Act extortion even if the donor initiated the bribe. *Id.* This holding does not modify the requirement that, in a scenario where the donor first offers the bribe, the bribe must consist of an offer of a campaign contribution paired at least with a request for an explicit promise from the public official to perform an official act. Thus, the defendants' proposed instruction correctly states the law under *McCormick*. Dkt. No. 163-1 at 73, 85.

D. The Court Should Have Given Instructions on Valuation of the Transaction, Multiple Conspiracies, and the Good-Faith Defense.

The Court should have given the defendants' proposed instructions on valuing the transaction alleged in the § 666 charge, multiple conspiracies, and the good-faith defense. Lindberg Mem. 54-56; *see* Opp'n 34-35. First, the instruction on the valuation of the transaction would have clarified that the jury must focus on the transaction, not the amount of the bribe. Second, the multiple-conspiracy instruction was necessary for the reasons discussed in Section IV.C, which explains that the allegations involving Mr. Palermo's suggested hiring and those involving Ms. Obusek were not part of the same

conspiracy or scheme. A multiple-conspiracies instruction would have informed the jury that it needed to find every element for the same conspiracy—rather than some elements for one conspiracy, and some for another. Finally, the good-faith defense instruction should have been given because the Court's instruction did not mention that good faith is inconsistent with criminal intent and because, even if it had, good faith would have been a defense to the § 666 charge. Lindberg Mem. 55; *see United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994) (noting that "the court did give a variant on the good faith instruction").

VI. The Government Failed to Introduce Substantial Evidence of Corrupt Intent or an Intent to Defraud.

The government claims that Mr. Lindberg's argument on the sufficiency of evidence of intent depends solely on the defendants' proposed definition of "corruptly." Opp'n 30-31. It does not. Mr. Lindberg's argument was also that the government failed to introduce sufficient evidence of an intent to defraud for honest-services wire fraud or corrupt intent, as defined by the Court, for § 666. Lindberg Mem. 56-57.

Moreover, the government's one cited example of criminal intent—in which Mr. Lindberg says that he will "put money in the bank"—leaves out a crucial part of the transcript that shows that *Mr. Causey* invited the defendants to put the proposed contributions in those terms:

> MC: Well here's, here's my position. You know, we, we've talked about all these different things and the numbers are changing. I hadn't seen anything directly to my benefit. And I mean, I can do, I can move Jackie. I can do, do a lot of different things.
>
> GL: Right.
>
> MC: *But I don't want to do anything until, 'til we get something to say, okay…uh, this thing is…*
>
> GL: Solid.
>
> MC: *We're are going forward.*
>
> GL: I getcha. That's a fair point

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MC: *I've got the money in the bank, and we can go, go forward.*

JG: If we want to put in these terms…if you're willing to have Debbie Walker handle everything for Bankers Insurance Group, then, we- we'll…

MC: I…

GL: We'll put the money in the bank.

Gov't Ex. 121 at 9 (emphasis added). Thus, the government's "stark example" of criminal intent, Opp'n 31, is an example of inducement by Mr. Causey, which tends to disprove the origination of criminal intent in Mr. Lindberg. *See United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991).

VII. Venue Was Improper in the Western District of North Carolina Because None of the Acts Occurring in this District Were Part of a Conspiracy to Commit Honest-Services Wire Fraud or a Violation of § 666.

The acts that occurred in the Western District of North Carolina were not part of the scheme or transaction alleged and, therefore, do not establish venue for the reasons discussed in Mr. Lindberg's supplement to his first oral motion for acquittal. Dkt. No. 192 at 7-9. First, venue did not exist for honest-services wire fraud conspiracy. Venue is proper if a conspirator performed, in this district, an overt act that furthered the conspiracy or that effectuated the object of the conspiracy. *United States v. Mitchell*, 70 F. App'x 707, 711 (4th Cir. 2003) (non-precedential). For the reasons discussed in Section IV.C, this standard is not met here. The acts that occurred in the Western District pertained to the suggested hiring of Mr. Palermo, which was not part of the conspiracy at issue. For similar reasons, venue did not exist for the § 666 charge. For this charge, "venue is limited to the place 'where the criminal act is done,'" meaning that venue is proper only where the "essential *conduct* elements of the offense" took place. *United States v. Bowen*, 224 F.3d 302, 309 (4th Cir. 2000) (quoting *United States v. Anderson*, 328 U.S. 699, 705 (1946)). The acts that occurred in the Western District pertained to the potential hiring of Mr. Palermo, but the "essential *conduct* elements of the offense" had to do with the alleged transfer of Mr. Obusek, not with Mr. Palermo's proposed hiring. Because

venue was improper, Mr. Lindberg's guilty verdict should be overturned and the case should be dismissed.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2020, I electronically filed the foregoing memorandum with the Clerk of Court using the CM/ECF system, which will send notification to counsel of record.

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