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**

DEFENDANT GREG E. LINDBERG'S SUPPLEMENT TO HIS ORAL MOTION FOR JUDGMENT OF ACQUITTAL IN ACCORDANCE WITH RULE 29 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

This brief supplements Defendant Greg E. Lindberg's Rule 29(a) motion that was made orally on February 27, 2020. Mr. Lindberg reserves the right, in a potential subsequent motion for acquittal, to expand on the arguments made orally and below and to raise further arguments. *See* Fed. R. Crim. P. 29(a), (c).

LEGAL STANDARD

"Entry of judgment of acquittal is appropriate where 'the evidence is insufficient to sustain a conviction.'" *United States v. Mallory*, 842 F. Supp. 2d 854, 857 (E.D. Va. 2010) (quoting Fed. R. Crim. P. Rule 29(a)). "The test for deciding a [Rule 29] 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).

ARGUMENT

I. Mr. Lindberg Is Entitled to a Judgment of Acquittal Because the Government Has Not Shown that the Campaign Contributions Were Made in Exchange for an "Official Act."

As explained in Mr. Lindberg's Motion to Dismiss (Dkt. Nos. 64, 64-1), incorporated herein by reference, the Supreme Court narrowed the scope of federal bribery laws in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), by circumscribing the conduct that counts as an "official act." Specifically, in attempting to redress First Amendment, vagueness, and federalism concerns, the Supreme Court cabined honest-services fraud by importing into the honest-services fraud statute the "official act" requirement from the federal bribery statute, 18 U.S.C. § 201. *McDonnell*, 136 S. Ct. at 2365. The Court then interpreted the definition of an 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. *McDonnell*, 136 S. Ct. at 2367, 2369, 2372 (quoting 18 U.S.C. § 201(a)(3)).

Here, the government does not dispute that "official act" as defined in *McDonnell* is an element of honest-services fraud. And though *McDonnell* involved honest-services fraud, the *McDonnell* court's reasoning applies equally to federal-program bribery under 18 U.S.C. § 666(a)(2), which requires an influence on or reward for "any business, transaction, or series of transactions." That phrase should be read to have the same meeting as "official act." The Fourth Circuit's decision in *United States v. Jennings* supports this conclusion. There, the court affirmed the defendant's conviction under Section 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." 160 F.3d 1006, 1018 (4th Cir. 1998). Moreover, Sections 666(a)(2) and 1346 define "similar crimes," *Skilling v. United States*, 561 U.S. 358, 412 (2010), and Section 666 is a direct outgrowth of Section 201, *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."). Not reading "any business, transaction, or series of transactions" in this manner would also mean that federal law proscribes state officials' conduct more broadly than it does federal officials' conduct. That result would violate the federalism principles discussed in *McDonnell*.

Whether the "official act" element has been met is a question for the jury. *See United States v. Van Buren*, 940 F.3d 1192, 1204-05 (11th Cir. 2019) (vacating conviction for honest-services fraud and remanding for new trial because erroneous jury instruction did not ensure that the jury had properly found that the conduct at issue was an official act); *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 *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). And here, the evidence is not sufficient for a reasonable juror to find beyond a reasonable doubt that the campaign contributions at issue were made in exchange for an "official act." Thus, the government's entire case against Mr. Lindberg fails.[1]

[1] Over Mr. Lindberg's objection, the Court rejected Defendants' Proposed Jury Instruction No. 73 (Dkt. No. 163-1), and has indicated that it plans to instruct the jury that "that the removal or replacement of a Senior Deputy Commissioner by the Commissioner would constitute an official act." For the record, Mr. Lindberg respectfully submits that Defendants' proposed instruction on official act correctly states the law and the jury should be instructed in accordance with that instruction, including that a personnel move, or reassignment or transfer of tasks, that is not similar in nature to a lawsuit, agency determination, or hearing before a committee is not an official act, and that "a public official performs an official act if he does something that requires private citizens to do something, prohibits private citizens from doing something, or changes the laws that govern private citizens' conduct."

The government's theory is that a personnel move, or the mere reassignment of a task from one employee (Senior Deputy Commissioner Jackie Obusek) to another, is the official act. This is the theory that was alleged in the indictment (Dkt. No. 3 ¶ 14) and the theory that the government has attempted to prove at trial. However, even the government has noted that this case does not involve a clearly established, obvious official act. Tr. of Mot. to Dismiss at 15:14-23, Dkt. No. 84 (acknowledging that there is a spectrum of honest-services fraud cases, that "[t]here are very few cases that fall into the middle of the spectrum"—between what is clearly proscribed by the statute and what is not—"like this case does"). And indeed, the government has been unable to prove at trial that the personnel move "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. It therefore has failed to prove an official act.

The evidence at trial has shown that the personnel move did not involve a formal exercise of governmental power. Mr. Causey testified that switching personnel within the Department of Insurance requires only a conversation. February 25, 2020, Morning Trial Tr. 93:20-95:5.[2] Former Department of Insurance employee Scott Wicker testified, with regard to his own reassignment away from supervising Global Bankers Insurance Group, that his reassignment resulted from a simple conversation about assignments. February 27, 2020, Afternoon Trial Tr. 66:19-67:19. Further, Ms. Obusek testified that her assignments were within Mr. Causey's discretion, and that assignment changes did not require any formal process, approval, or writing. February 19, 2020, Morning Trial Tr. 93:1-9. In fact, Ms. Obusek's role *was* changed with respect to Global Bankers Insurance Group

[2] Citations to the trial transcript are based on rough draft transcripts. Official transcripts are forthcoming but have not yet been provided. Thus, pagination and line numbers may change in the official transcripts.

(before any of the alleged unlawful conduct at issue here), and that change was effectuated by a mere conversation with Mr. Causey. *See id.* 96:24-97:6.

The lack of formality and lack of a signed writing with respect to employee reassignments within the Department of Insurance demonstrate that a personnel move is not an official act. North Carolina law specifically requires a writing signed by the Insurance Commissioner for determinations of the sort that the *McDonnell* Court recognized as official acts. *See* 136 S. Ct. at 2372 (explaining that an official act requires something similar to "a lawsuit before a court, a determination before an agency, or a hearing before a committee"). Specifically, "the Commissioner is authorized to grant any approval, authorization or permission or to make any other order affecting any insurer, insurance agent, insurance broker or other person or persons subject to" the Insurance Code, but only if the order is "made in writing and signed by the Commissioner or by his authority." N.C. Gen. Stat. § 58-2-45. But the testimony from Mr. Causey, Mr. Wicker, and Ms. Obusek shows that nothing needed to be signed in order for the reassignment of Ms. Obusek to occur.

All of this makes the Third Circuit case on which the government chiefly relies, *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019), distinguishable. Unlike in *Fattah*, where the Third Circuit classified as an official act a congressperson's decision to hire an outside individual, *id.* at 154, this case does not involve a hiring decision. It does not even involve a formal change in job titles or responsibilities among Department of Insurance employees. Rather, it involves an informal personnel move, or reassignment of tasks, from Ms. Obusek to another employee of the Department of Insurance. This theory of official act does not satisfy *McDonnell* because personnel moves or staffing reassignments like this are not like a "lawsuit, hearing, or administrative determination." *McDonnell*, 136 S. Ct. at 2368.

The government cannot rescue its case by pointing to something else as the official act—specifically, that Mr. Causey briefly contemplated hiring Mr. Palermo to replace Ms. Obusek. That is

not the theory charged in the indictment, and the evidence at trial does not support that theory as the official act. Mr. Causey testified that he did not consider hiring Mr. Palermo for Ms. Obusek's position. February 25, 2020, Afternoon Trial Tr. 87:7-90:24, 98:7-13. Rather, he only briefly considered Mr. Palermo for a financial analyst position that would have been below Ms. Obusek's position as senior deputy commissioner. *Id.* Thus, the hiring of Mr. Palermo is inconsistent with the government's theory that campaign contributions were made in exchange for the removal of, or reassignment of tasks from, Ms. Obusek. And ultimately, Mr. Causey decided against hiring Mr. Palermo. February 25, 2020, Morning Trial Tr. 24:5-7; Lindberg Ex. 60Q. So even if a decision to hire Mr. Palermo would be akin to "a lawsuit before a court, a determination before an agency, or a hearing before a committee," and therefore satisfy *McDonnell's* first step, it would fail the second step of *McDonnell* because Mr. Causey ultimately did not make a decision to hire Mr. Palermo. *McDonnell*, 136 S. Ct. at 2369.

In addressing the meaning of "official act" throughout this case, the Court has expressed concern that if a personnel move or the reassignment of tasks among agency employees is not an official act, then the door will be opened to a corrupt government. But this overlooks two things. First, federal bribery law is 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). 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. Second, the Supreme Court has made clear that not all acts by a public official are "official acts" that justify a criminal conviction under federal bribery statues. *See id.* at 2369; *United States v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999) (explaining that some actions by government officials, "while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of" federal anti-bribery law). A broad reading of federal anti-bribery statutes would ignore this critical point, risking a limitless application to political

speech protected by the First Amendment. *See McDonnell*, 136 S. Ct. at 2372; *accord United States v. Schaffer*, 183 F.3d 833, 844 (D.C. Cir. 1999) (reversing conviction for unlawful gratuities and concluding that a more definitive link between the thing of value and the official act was required because "[t]o hold otherwise would mean that any time a regulated entity became aware of any inchoate government proposal that could affect its interests, and subsequently provided something of value to a relevant official, it could be held to violate the gratuity statute in the event that the inchoate proposal later appeared in a more concretized form"), *vacated as moot following pardon*, 240 F.3d 25 (D.C. Cir. 2001).

II. This Case Should Be Dismissed Because Venue Is Improper in This District.

Both counts against Mr. Lindberg should be dismissed because venue is not proper in the Western District of North Carolina. "Proper venue in a criminal prosecution is a constitutional right." *United States v. Bowen*, 224 F.3d 302, 308 (4th Cir. 2000). The government has the burden of proving venue as to each count by a preponderance of the evidence. *United States v. Mitchell*, 70 F. App'x 707, 711 (4th Cir. 2003) (unpublished). Where, as here, there is no express venue provision in the criminal statute, venue on a count is proper only in a district in which an essential conduct element of the offense took place. *Id.*; *Bowen*, 224 F.3d at 308. Because the evidence at trial has not shown that an essential conduct element of the crimes charged occurred in this district, this action must be dismissed.

First, honest-services fraud is charged as a conspiracy. Thus, 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. *Mitchell*, 70 Fed. App'x at 711. Acts that are not part of the conspiracy at issue cannot be used to establish venue. The Fourth Circuit made this clear in *United States v. Taylor*, where it emphasized that to establish venue, the acts that occurred within the judicial district where the case is tried must be part of the *same* conspiracy that is on trial. 784 F. App'x 145, 153 (4th Cir. 2019) (unpublished).

Here, the evidence does not show that acts that occurred in the Western District of North Carolina were part of, or in furtherance, of the conspiracy that is on trial. The evidence at trial appeared to show that only two acts occurred in this district. The first is a meeting that occurred at the Statesville Regional Airport on March 5, 2018. During that meeting, the potential hiring of Mr. Palermo was discussed. Gov't Ex. 113A-113D.[3] But as explained above, Mr. Palermo's hiring is not the official act at issue here. And indeed, these discussions of potentially hiring Mr. Palermo took place several months before the campaign contributions were made. February 24, 2020, Afternoon Trial Tr. 16:25-17:2; *see infra* Section IV.B (explaining that independent expenditure committees do not constitute anything of value in the context of the allegations here). Thus, the discussions about potentially hiring Mr. Palermo are separate from the conspiracy alleged in the indictment, and separate from the conspiracy that the government has attempted to prove at trial. *Accord Taylor*, 784 F. App'x at 153 (remanding on the issue of venue where there was a question as to "the government's theory that . . . the defendants all participated in the same drug trafficking operation"). The conspiracy at issue here began after the possibility of Mr. Palermo's hiring had been rejected, and in fact, Mr. Causey testified that he never considered hiring Mr. Palermo for Ms. Obusek's position. February 25, 2020, Afternoon Trial Tr. 87:7-90:24, 98:7-13.

The second event that occurred in this district is a meeting that occurred in Asheville on April 19, 2018, which the government did not affirmatively introduce. *See* February 25, 2020, Trial Morning Trial Tr. 70:22-76:15. The government's evidence has not shown that the April 19 meeting was part of or furthered the alleged conspiracy because that meeting furthered neither the alleged *quid* nor the alleged *quo*. Mr. Causey did not make an explicit promise to perform any official act at the meeting. *Id.*

[3] This motion cites transcriptions of the video evidence in this case. As the Court has noted, the video itself is the evidence in the case. However, where a transcription is materially accurate and sufficient for the purposes of an argument, this motion cites to the transcription for the Court's convenience and easy reference.

Though Mr. Causey raised the topic of independent expenditure committees, the evidence at trial did not show that any independent expenditure committee that was part of the conspiracy actually benefitted Mr. Causey. And it was not until months later that Mr. Causey received funding from the State Republican Party (NC GOP), even assuming that this transfer satisfies the quid element of the offenses. In short, the evidence does not show how the April 19 meeting furthered the conspiracy, and venue as to the alleged crime of conspiracy to commit honest-services wire fraud is therefore improper.

Venue as to federal-program bribery is improper for similar reasons. Ascertaining venue requires a determination of "(1) the 'nature of the crime'" and "(2) the location of that criminal conduct." *Bowens*, 224 F.3d at 309. As to the location of the criminal conduct, "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. *Id.* Here, the nature of the crime is the corrupt giving, offering, or agreeing to give campaign contributions to Mr. Causey with intent to influence him to effectuate a personnel move or reassignment of tasks as to Ms. Obusek. 18 U.S.C. § 666(a)(2). As explained above, the meetings to discuss the potential hiring of John Palermo are separate from this crime, particularly because Mr. Palermo's hiring is not alleged or proven to be the business or transaction, *id.*, for which the campaign contributions were made. Therefore, discussions surrounding the hiring of Mr. Palermo are not an essential conduct element of federal-program bribery under the government's theory of the case. And for the reasons just explained, the April 19 meeting did not establish that Mr. Lindberg agreed to give Mr. Causey campaign contributions in exchange for an official act from Mr. Causey. Accordingly, venue is improper as to federal-program bribery.

III. The Government Has Not Proven That Mr. Lindberg Intended to Influence a Future Official Action.

The evidence has shown that the purported official act that Mr. Lindberg was seeking in fact occurred well before the campaign contributions at issue were made or even offered. Specifically, the

evidence at trial has shown that Ms. Obusek's role in regulating Global Bankers Insurance Group was greatly reduced as of February 2018. February 19, 2020, Morning Trial Tr. 96:24-97:6. In contrast, the independent expenditure committees or contributions at issue were not mentioned until the next month, in March 2018, Gov't Ex. 113C at 7-10, and were not paid until after that, February 24, 2020, Afternoon Trial Tr. 16:25-17:2. Given this, no reasonable juror could conclude that Mr. Lindberg made the campaign contributions with the intent to influence Ms. Obusek's responsibilities for Global Bankers Insurance Group, as her reassignment had already occurred. The most the government has conceivably established is that the campaign contributions were gratuities. But this case charges only bribery theories. Thus, Mr. Lindberg is entitled to acquittal on the charges against him.

Generally, bribery is forward looking; it is predicated on a quid pro quo that precedes the performance of the official act. *See* 18 U.S.C. § 201(b)(1)(A) (prohibiting any person from "directly or indirectly, corruptly give[ ], offer[ ] or promise[ ] anything of value to any public official . . . with intent . . . *to influence any official act*" (emphasis added)); *see also Schaffer*, 183 F.3d at 841 (explaining that "[b]ribery is entirely future-oriented" and "involves the present giving, promise, or demand of something in return for some action *in the future*" (emphasis added)); *Jennings*, 160 F.3d at 1013 (explaining that "bribes are often paid before the fact"). Gratuities, on the other hand, "differ in their temporal focus," and can be forward- or backward-looking. *Schaffer*, 183 F.3d at 841; *Jennings*, 160 F.3d at 1013 (noting that illegal gratuities "typically follow the act for which they are paid"). Gratuities include rewards for past action, enticements for "a public official who has already staked out a position favorable to the giver to maintain that position," or inducements for "a public official to propose, take, or shy away from some future official act." *Schaffer*, 183 F.3d at 841-42. Similarly, courts have recognized that bribery requires that "the payor provided a benefit to a public official intending that he will thereby take favorable official acts that he *would not otherwise take*." *United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012).

These principles demonstrate that the government's bribery theory fails. The evidence cannot show that Mr. Lindberg made campaign contributions to Mr. Causey with the intent to influence him to do an act when that act had already been performed.[4] Likewise, the campaign contributions were not made to influence Mr. Causey to take an action he would not otherwise take, given that Mr. Causey had already performed the precise action sought without a thing of value being given to him. The most the government's evidence could conceivably show is a backwards-looking campaign contribution. This is not sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that Mr. Lindberg committed any of the crimes with which he is charged.

IV. A Quid Pro Quo Did Not Exist Because There Is No Proof that Any Defendant Gave a Thing of Value to Commissioner Causey in Exchange for an Explicit Promise to Perform an Official Act.

Both Section 666(a)(2) and honest-services wire fraud require proof of a quid pro quo. *See Skilling*, 561 U.S. at 409 (honest-services wire fraud); *United States v. Tanner*, 942 F.3d 60, 65 (2d Cir. 2019) (honest-services wire fraud); *Jennings*, 160 F.3d at 1013 (Section 666(a)(2) bribery). In a case involving campaign contributions, a quid pro quo consists of the offering or giving of something of value in exchange for an explicit promise to perform an official act. *See McCormick v. United States*, 500 U.S. 257, 273 (1991) (requiring explicit promise for Hobbs Act violation); *McDonnell*, 136 S. Ct. at 2365 (applying same requirements to Hobbs Act violations as to honest-services wire fraud); *Jennings*, 160 F.3d at 1013 (discussing quid pro quo and official acts under Section 201 in context of Section 666(a)(2)). "[A] good will gift to an official to foster a favorable business climate, given simply

[4] In analyzing the distinction between bribery and illegal gratuity in a case brought under 18 U.S.C. § 666, the Fourth Circuit in *Jennings* discounted the probative weight of the timing of payment in relation to the official act for which it is made, and the intent of the payee. *Jennings*, 160 F.3d at 1014, 1017. But as discussed herein, both factors are strong indicia of whether the defendant acted with corrupt intent to influence an official act, and whether bribery occurred. Moreover, an official's intent is critical to whether "depriv[ation] . . . of the intangible right of honest services" actually occurred, *see* 18 U.S.C. § 1346, as there can be no such deprivation if the official never intended to be influenced by a defendant's actions.

with the generalized hope or expectation of ultimate benefit on the part of the donor, does not constitute a bribe." *Jennings*, 160 F.3d at 1013 (quoting *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir.1980)) (internal quotation marks omitted).

The government has failed to prove the existence of a quid pro quo because the evidence does not show that Mr. Causey made an explicit promise to perform an official act or that the defendants offered or gave anything of value to Mr. Causey.

A. Commissioner Causey did not make an explicit promise regarding Senior Deputy Commissioner Obusek.

The evidence does not show that Mr. Causey made an explicit promise to remove or transfer Ms. Obusek, as alleged in the indictment. The government points to a March 5, 2018, meeting as the first evidence of a quid pro quo. But the video recording of that meeting reveals no explicit promise made by Mr. Causey during this meeting. After Mr. Causey notes that he might receive "pushback" for moving people and that he wants to "help" Mr. Lindberg, he asks "What's in it for me?" When Mr. Lindberg begins discussing independent expenditure committees, he does not do so in response to any explicit promise by Mr. Causey. Thus, the recording of this meeting is not evidence of a quid pro quo. Gov't Ex. 113C at 7-10.

Indeed, the existence of subsequent meetings between the defendants and Mr. Causey is evidence that Mr. Causey *did not* make an explicit promise to remove or transfer Ms. Obusek's on March 5. During those meetings, the evidence shows, some or all defendants continued discussing regulatory issues, including Ms. Obusek's role. If Mr. Causey had made an explicit promise to take official action regarding Ms. Obusek's position on March 5, then she would not have continued to be a topic of discussion in later meetings.

Nor did Mr. Causey make an explicit promise about Ms. Obusek during the final meeting with Mr. Lindberg on July 25, 2018. *See* Gov't Ex. 127A. That fact is made clear by a subsequent call between John Gray and Mr. Causey on August 2, 2018. In that call, Mr. Gray inquires about changes

to Ms. Obusek's role. Ex. 128A at 2. That inquiry would have been unnecessary if Mr. Causey had made an explicit promise on July 25. And in response to Mr. Gray's inquiry, Mr. Causey still does not make an explicit promise. Instead, Mr. Causey continues hedging: he says that he "think[s] it can happen in the next thirty days" and that he will "continue working on the realignment" if he sees further money transferred to his campaign account. Ex. 128A at 2, 5. This kind of uncertain language is not sufficiently explicit to form the basis of a quid pro quo. This evidence, viewed in the light most favorable to the government, shows that the defendants at most had a "generalized hope or expectation," which is insufficient to prove bribery. *Jennings*, 160 F.3d at 1013.

Because Mr. Causey made no explicit promise, the quid-pro-quo element cannot be met for either charge against Mr. Lindberg. Thus, Mr. Lindberg's acquittal is required for both counts for this reason as well.

B. No defendant gave anything of value to Commissioner Causey in exchange for a promise to perform an act.

This case presents atypical allegations of bribery. In a typical bribery prosecution, the "quid" of a quid pro quo is fulfilled when a defendant gives money or another valuable thing directly to a politician in exchange for an explicit promise to perform an official act. The government has not shown that here. Instead, the government contends that the things of value are the establishment of an independent expenditure committee or contributions to the NC GOP. Neither of these actions should be deemed to constitute anything of value to Mr. Causey.

Despite its seeming breadth, the phrase "anything of value" does not encompass everything given to anyone. For example, in a tax case involving a quid-pro-quo analysis, the Second Circuit held that a donor's gift to a charitable organization did not constitute anything of value to the donor, "even though the donor may [have] desire[d] to have his gift accepted, and may [have] expect[ed] to derive benefit elsewhere (such as by deductibility of the gift on her income taxes)." *Scheidelman v. Comm'r of Internal Revenue*, 682 F.3d 189, 200 (2d Cir. 2012). Thus, in a generic quid-pro-quo analysis, a mere

subjective desire or an expected benefit is insufficient to form the quid of a quid-pro-quo exchange. The same analysis should apply to honest-services wire fraud and Section 666(a)(2).

The establishment of an independent expenditure committee was, at most, an expected benefit for Mr. Causey. The government has offered no proof that the independent expenditure committee allegedly established in this case spent money in support of Mr. Causey. Moreover, because independent expenditures must be "made without consultation or coordination with a candidate or agent of a candidate" under North Carolina law, Mr. Causey was not guaranteed to benefit from the independent expenditure committee. *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)).

The government has also not offered proof that any contributions made by Mr. Lindberg to the NC GOP were more than an expected benefit for Mr. Causey. Once the funds were given to the NC GOP, the NC GOP, and not any defendant, controlled the funds. Although the government offered evidence of a phone call in which Mr. Gray requested that Robin Hayes, the chairman of the NC GOP, transfer funds to Mr. Causey's campaign, the government offered no proof that Mr. Gray had control over the funds. Gov't Ex. 127A at 10-12. Indeed, Mr. Causey seemed to indicate that the defendants could not control the funds, noting that the funds were "being controlled by Robin Hayes." *Id.* at 6. Accordingly, the government has failed to prove that any defendant "willfully cause[d]" the transfer of the funds to occur. 18 U.S.C. § 2(b).

Although the government charged Mr. Hayes with conspiracy, it did not offer sufficient proof that he was a co-conspirator during trial. For example, it did not offer sufficient proof that Mr. Hayes knew the purpose of the alleged conspiracy—the apparent removal of Ms. Obusek alleged in the indictment—or joined the conspiracy with that knowledge. Thus, Mr. Hayes's control over the funds cannot be imputed against the defendants through the charge of conspiracy. And even if the government had proven that Mr. Hayes was a co-conspirator, the government did not offer evidence

that Mr. Hayes had sole control over where the funds went. So Mr. Lindberg's contributions to the NC GOP were, at most, an expected benefit for Mr. Causey.

Although the NC GOP's transfer of those funds may constitute a "[ ]thing of value" to Mr. Causey, the defendants were not the ones who gave that thing of value. The NC GOP's independent choice to transfer those funds was an intervening event, and the government has not offered evidence that any defendants actually had the power to control it. Thus, the Court should not impute the NC GOP's choice to transfer those funds to the defendants.

V. Mr. Lindberg Lacked the Requisite Intent Because the Government Has Not Shown that He Knew He Was Acting Unlawfully.

As explained in Mr. Lindberg's trial brief, the willful intent required by honest-services wire fraud and the corrupt intent required by both offenses necessitate proof that the defendants knew that they were acting unlawfully or wrongfully. The government has offered no evidence of such knowledge. In fact, the evidence shows the opposite: Mr. Lindberg and the other defendants repeatedly stated their intent to comply with the law. *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"); *id.* 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 (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 proposed trip to DC on Lindberg's plane because of "Board of elections requirements"). The government's failure to offer this evidence means that they have not proven willfulness or corrupt intent, which means acquittal is warranted.

VI. The Government Has Failed to Introduce Sufficient Evidence of False or Fraudulent Pretenses.

Wire fraud requires proof of "false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343; *see Skilling*, 561 U.S. at 361 n.1, 399; *United States v. Mora*, 15 F. App'x 98, 103 (4th Cir. 2001) (unpublished). The same proof of falsity is required when the "scheme or artifice to defraud" is honest-services fraud. *See United States v. DeMizio*, 741 F.3d 373, 378 (2d Cir. 2014); *United States v. Mauney*, 129 F. App'x 770, 776 (4th Cir. 2005) (unpublished). The falsity must be material—that is, it must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)) (internal quotation marks omitted).

The government has not offered evidence of material falsity in this case. Although the government contends that the evidence shows concealment on the part of the defendants, the record does not support this theory. Presumably, the government is referring to the establishment of an independent expenditure committee and transfers to the NC GOP as an effort to conceal payments to Mr. Causey. But the use of independent expenditure committees are legal; alleging that the use of such committees amounts to unlawful "concealment" would intrude on the First Amendment. *See generally Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 344 (2010). Moreover, payments made to those committees would have been reflected on forms filed with the North Carolina Board of Elections or IRS. *Campaign Finance Manual* 92, NC Bd. of Elections & Ethics Enforcement, www.ncsbe.gov/Portals/0/FilesP/CFFiles/Campaign%20Finance%20Manual%20Version%2018.2.pdf; *Instructions for Form 8872*, https://www.irs.gov/pub/irs-pdf/i8872.pdf; *Instructions for Form 990*, https://www.irs.gov/pub/irs-pdf/i990.pdf. Thus, the payments would not have been "concealed"; they would have been disclosed to government entities.

Similarly, transfers made to NC GOP would be public knowledge. *Campaign Finance Manual* 75. Indeed, in one of the video recordings, Mr. Lindberg acknowledges his transfer to the NC GOP

will result in "another article, Lindberg gives another million and a half to NCGOP, so what." Gov't Ex. 127A at 18. So too would transfers made from the NC GOP to any candidate. In fact, the evidence suggests that the defendants wanted these transfers to be publicly known. *Id.* at 11 (noting that transfers to Causey are meant to "spread the word" about Causey's strength),

The government also cannot rely on the alleged private meetings with Mr. Causey as a basis for concealment. Even if this were a viable theory, it was Mr. Causey, and not the defendants, who requested private meetings. *See* February 24, 2020, Afternoon Trial Tr. at 124; Gray Ex. 10B.

Finally, even if the government had offered evidence of concealment, it has not shown how this concealment would be material. Contributions to independent expenditure committees and political parties are commonplace and legal. It is unclear that contributions through these methods would influence the decision of the relevant decisionmaking body—which is the public.

VII. Mr. Lindberg Was Entrapped Because the Evidence Reveals Inducement But Not Predisposition.

"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). "[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 does here, "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).

The evidence at the close of the government's case constituted far more than a scintilla of evidence that Mr. Lindberg was induced by Mr. Causey to commit the alleged crimes. And the government failed to introduce evidence that would allow a reasonable jury to conclude that Mr. Lindberg was predisposed to committing these crimes. Therefore, acquittal is warranted on all counts.

A. Mr. Causey repeatedly induced Mr. Lindberg and the other defendants to commit bribery.

Mr. Lindberg has met his burden of showing more than scintilla of evidence of Mr. Causey's inducement at the close of the government's case. A few examples from the record will demonstrate this. 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. This evidence alone is enough to show inducement. *See Sligh*, 142 F.3d at 766 (noting that an entrapment instruction was warranted where a government agent "invited a bribe more explicitly by asking . . . in essence, 'What's in it for me?'"). Indeed, 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." Dkt. No. 120 at 14.

Trial evidence showed further examples of inducement. For example, 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 as 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 uh radar list as - as Dan Forest or any - or any of these other guys in other states and [stuttering] he's putting millions of dollars out there in . . . .

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. He also remarked to Mr. Lindberg,

regarding a regulatory issue that he had worked on related to Mr. Lindberg's companies, that he had failed to see 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. Even a few examples—though they do not represent the full extent of Mr. Causey's inducement—show that Mr. Causey's conduct went beyond mere solicitation. Mr. Causey's actions constituted "governmental overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *Sligh*, 142 F.3d at 763. This evidence more than meets Mr. Lindberg's burden to show inducement. Indeed, likely for that reason, the government itself proposed a jury instruction to the Court on entrapment.

B. The government has not sustained its burden of proving Mr. Lindberg's predisposition beyond any reasonable doubt.

Because the evidence shows that Mr. Causey induced Mr. Lindberg to commit a crime, the burden shifted to the government to prove, beyond any reasonable doubt, that Mr. Lindberg was predisposed to committing these crimes before Mr. Causey approached him. The government has failed to sustain that burden.

The government cannot point to Mr. Lindberg's attempted donations to Mr. Causey before March 5 or donations to other politicians to show a predisposition to commit a crime. 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 also cannot point to the fact that Mr. Lindberg supposedly responded "without hesitation" to Mr. Causey's inducement, "What's in it for me?" As discussed above, Mr. Causey made no explicit promise to perform an official act when he posed that question. Thus, Mr. Lindberg's response regarding independent expenditure committees is not evidence of predisposition to commit bribery. Even viewing the evidence in the light most favorable to the government, Mr. Lindberg appears to have suggested an independent expenditure committee with a "generalized hope or expectation of ultimate benefit," which would "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).

Moreover, Mr. Lindberg's actions over the ensuing months after Mr. Causey's first inducement are strong evidence of a lack of 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 v. United States*, 503 U.S. 540, 553 (1992)) (internal quotation marks omitted). Thus, evidence that a government agent needed to spend months convincing a defendant to commit a criminal act shows a lack of predisposition. *See id.* ("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*, 503 U.S. at 553)). As the trial evidence showed, it took repeated attempts by Mr. Causey from early 2018 until about August before the government felt like it had the evidence to charge Mr. Lindberg and his co-defendants. This extended time period of the investigation shows a lack of predisposition.

Thus, the trial evidence would not allow a reasonable juror to find, beyond a reasonable doubt, that Mr. Lindberg had any criminal predisposition. The Court should order acquittal on both charges.

VIII. The Honest-Services Fraud and Federal-Program Bribery Statutes Are Unconstitutionally Vague.

"To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03 (alteration in original) (citation omitted). As the Supreme Court has repeatedly recognized—first in *McNally v. United States*, 483 U.S. 350, 360 (1987), then in *Skilling*, 561 U.S. at 405-12, 412, and next in *McDonnell*, 136 S. Ct. at 2372—extending the mail- and wire-fraud statutes to encompass "the intangible right of honest-services" is an unnatural reading of the statute; indeed, doing so risks constitutional infirmity. Through these decisions, the Supreme Court repeatedly limited the scope of honest-services fraud in an attempt to avoid "striking [the] federal statute as impermissibly vague." *Skilling*, 561 U.S. at 405. Nonetheless, honest-services fraud and federal-program bribery—both of which criminalize similar conduct and contain similar elements—are unconstitutionally vague on their face. And in any event, the government's construction of the statutes in this case invites the very concerns that the Supreme Court has endeavored to avoid.

First, these statutes are facially unconstitutional. The honest-services-fraud statute's language of "a scheme or artifice to deprive another of the intangible right of honest services" is meaningless

given that it contains no definition of the "right of honest services." It is therefore vague. *See Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of cert.) (describing Section 1346 as a "terse amendment," and questioning whether it "qualifies as speaking 'more clearly' or in any way lessens the vagueness and federalism concerns that produced [the] Court's decision in *McNally*"). The same is true of federal-funds bribery: the statutory requirements of an "intent to influence or reward" and a "connection with any business, transaction, or series of transactions" are devoid of discernible meaning. 18 U.S.C. § 666.

Though the Supreme Court has attempted, at least as to honest-services fraud, to divine meaning from the statutory language by importing into the statute requirements,such as "quid pro quo" and "official act," these elements have no basis in the statutory text. And a "statute that is unconstitutionally vague cannot be saved . . . by judicial construction that writes in specific criteria that its text does not contain." *Skilling*, 561 U.S. at 415-16 (Scalia, J., dissenting). Moreover, vagueness concerns are particularly salient here, given that these statutes regulate conduct at the intersection of federalism and the First Amendment. As to federalism, the statutes proscribe the conduct of State and local officials, something that is traditionally regulated by the States. *McNally*, 483 U.S. at 360 (warning against construing bribery laws to "involve the Federal Government in setting standards of disclosure and good government for local and state officials"). And it is well-established that a citizen has a right to petition the government, ask for changes, and make campaign contributions, which is conduct that these statutes conceivably punish. *See McCutcheon*, 572 U.S. at 203-04.

Second, even if these statutes were facially constitutional, the government's expansive view of the meaning of "official act," "corruptly," and "quid pro quo" renders them unconstitutionally vague under the Due Process Clause and overbroad under the First Amendment. If Mr. Lindberg's definitions of those terms are not adopted to appropriately limit and ascribe meaning to the statutes, then the statute will encroach on protected political speech and give the Executive Branch unchecked

discretion to charge virtually anyone with honest-services and federal-program fraud. Indeed, the government's view would potentially criminalize any interaction between a public official and a citizen, including, for example, a mere conversation between a voter and a local official that the voter will donate to the official's campaign if he if he votes for certain laws. That is the kind of activity that allows our democracy to work, and the government's limitless view of the statutes impermissibly criminalizes such conduct and allows the kind of unfettered discretion that runs contrary to the Due Process Clause and the Firth Amendment.

Dated: March 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send notification to counsel of record.

Dated: March 3, 2020

Respectfully submitted,

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