IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
DOCKET NO. 5:19-cr-22-MOC-DSC

UNITED STATES OF AMERICA,	)	
	)	**MEMORANDUM IN SUPPORT OF MOTION OF JOHN D. GRAY TO DISMISS THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE**
v.	)	
	)	
JOHN D. GRAY, et al.	)	
	)	
Defendants.	)	

A constituent's request for a staff reassignment is not a request for an "official act" because it involves no "matter" or "question" as the Supreme Court defined those terms in *McDonnell v. United States*, and no action on such a question or matter. 136 S. Ct. 2355, 2368 (2016). Therefore, the government's indictment of John D. Gray must be dismissed because it fails to allege an "official act" as required under the federal bribery statutes.

The "official act" requirement applies to both charges made against Mr. Gray. In *Skilling v. United States*, the Supreme Court limited prosecutions under § 1346 to "core" bribery and kickback schemes to save the statute from unconstitutional vagueness and concerns of arbitrary enforcement. 561 U.S. 358, 409 (2010). Section 1346 is not unconstitutionally vague, the Court held, because it draws content from statutes defining similar crimes—including 18 U.S.C. § 201(b)'s "official act" requirement. *See id.* at 412; *see also United States v. Renzi*, 769 F.3d 731, 744 (9th Cir. 2014) (honest services fraud requires an "official act"). Similarly, the Fourth Circuit has held that § 666(a)(2) requires an intent to "influence or reward an official act." *United States v. Jennings*, 160 F.3d 1006, 1020 (4th Cir. 1998).

Courts have made it clear that "official act" is to be defined narrowly. First, the government must allege a "question" or a "matter" involving the "formal exercise of governmental power . . .

similar in nature to a lawsuit pending before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S. Ct. at 2368. And the question or matter must be "pending" or "may by law be brought" before the public official, and it must be "focused and concrete." *Id*. at 2369. Second, the official must make a decision or take an action *on* the relevant matter or question—taking action *related to* a pending matter is insufficient. *Id.* at 2370.

Applying that test here, the indictment is deficient. The government alleges a scheme to bribe North Carolina Department of Insurance ("NCDOI") Commissioner Mike Causey to "take official action favorable to Lindberg's companies," and specifically to seek reassignment of oversight of Mr. Lindberg's companies from a Senior Deputy Commissioner. Indictment ¶¶ 12, 14, 86. But a staff reassignment is not a "question" or "matter" involving a formal exercise of governmental power similar in nature to a lawsuit, agency determination, or committee hearing. Nor is it similar to the activities found to be "questions" or "matters" by cases that have engaged with *McDonnell*'s narrowed definition.

The indictment alleges no other relevant question or matter "pending" before Mr. Causey. The government's recent attempt to rebrand the "official act" as the replacement of a staff member with a specific person of Mr. Lindberg's choosing does not correct these deficiencies.

The indictment does not plead facts sufficient to allege an "official act." Therefore, this Court must dismiss the indictment for failure to state an offense.

THE FACTS ALLEGED IN THE INDICTMENT

The indictment alleges that John Gray worked as a consultant for Greg Lindberg.[1] Indictment ¶ 5. Mr. Lindberg is the founder of Eli Global and owner of Global Bankers Insurance Group ("GBIG"), the latter of which is regulated by NCDOI. *Id.* ¶¶ 3–4. GBIG was subject to an

[1] Mr. Gray treats the facts alleged in the indictment as true solely for purposes of this motion.

NCDOI examination, which began in September 2017 and ended in February 2018. *Id*. ¶ 4. Mr. Lindberg, Mr. Gray, and certain GBIG staff met with Mr. Causey in November 2017 to discuss regulation of GBIG. *Id*. ¶ 23.

Around that same time, Mr. Lindberg, Mr. Gray, and others began to have concerns about the Senior Deputy Commissioner's bias against Mr. Lindberg and his companies. *See id*. ¶ 22. Mr. Lindberg and Mr. Gray met with Mr. Causey on February 14, 2018 to discuss, among other things, the fact that the Senior Deputy Commissioner had been "deliberately and intentionally and maliciously hurting [Mr. Lindberg's] reputation with other regulators." *Id*. ¶ 31. The Senior Deputy Commissioner was also "lying to Mr. Causey" to hurt Mr. Lindberg's reputation. *Id*. Mr. Lindberg and Mr. Gray suggested one way to deal with this problem would be to hire an associate, John Palermo, either as a replacement for, or as a supervisor of, the Senior Deputy Commissioner. *Id*. ¶ 32.

Mr. Lindberg, Mr. Gray, and Mr. Causey met again on March 5, 2018, this time accompanied by Mr. Palermo. *Id*. ¶ 35. The parties again discussed NCDOI hiring Mr. Palermo, and Mr. Causey told the others he might do so by April 1. *Id*. ¶ 36. Still concerned by the Senior Deputy Commissioner's conduct with other state regulators, Mr. Gray suggested that Mr. Causey have her report to Mr. Palermo. *Id*. ¶ 37.

At the end of the meeting, Mr. Causey requested a private conversation with Mr. Lindberg. Mr. Causey asked, "What's in it for me? What can you do to help that's not gonna be . . . under the radar screen?" *Id*. ¶ 38. In response to Mr. Causey's demand, Mr. Lindberg offered to establish an independent expenditure committee with funding of at least $1,000,000. *Id*. ¶ 38. NCDOI's examination of GBIG had concluded before Mr. Causey made his demand. *Id.* ¶ 4.

According to the indictment, later that month, Mr. Causey raised concerns that the press would associate Mr. Palermo with Mr. Lindberg, were he given a position at NCDOI. *Id.* ¶ 41. Mr. Lindberg agreed and suggested that Mr. Causey instead either recruit someone with a similar skillset to Mr. Palermo's or move Division Head 1 into the Senior Deputy Commissioner's position. *Id.* ¶ 43. In later meetings, Mr. Lindberg and Mr. Gray alternatively suggested Mr. Causey leave Division Head 1 in her current position, but allow her to handle any matters related to GBIG instead of the Senior Deputy Commissioner, viewing the reassignment as "some improvement" over the unfairness and hostility from the Senior Deputy Commissioner. *Id.* ¶ 46, 57, 62, 65.

The indictment does not allege that any of the defendants asked Mr. Causey to direct any outcome on any examination or regulatory function. Nor does it allege any lack of cooperation with the examination process or any effort to weaken, suspend, or terminate any examination. And there is no allegation that any defendant had any contact with Division Head 1 regarding an examination or otherwise.

Over the subsequent weeks, Mr. Causey would make numerous inquiries about the independent expenditure committees. *Id.* ¶ 46, 51, 56, 65, 69. And, in a May 29 meeting, Mr. Causey complained that Mr. Lindberg was not contributing enough money and that he planned to contribute to the state political party, rather than directly to Mr. Causey. *Id.* ¶ 56. When Mr. Gray asked about the staff realignment, Mr. Causey said he would "make the switch" after Mr. Lindberg contributed money to his campaign. *Id.* ¶ 58.

The government contends these alleged facts show that the defendants entered into a conspiracy to bribe Mr. Causey through campaign contributions in exchange for the "official action" of moving or replacing the Senior Deputy Commissioner at a time when the examination

was no longer pending. Twice in the indictment the government calls this staff reassignment an "official action." *Id.* ¶ 12, 14. Ultimately, however, the "reassignment" allegedly sought was simply a switch in oversight of the companies from one official to another who was less biased, not a complete reassignment of all duties or termination of the first official. *Id*. at ¶ 46. Nonetheless, the grand jury charged Mr. Gray with one count of conspiracy to commit honest services wire fraud in violation of 18 U.S.C. § 1349 and one count each of federal program bribery and aiding and abetting in violation of 18 U.S.C. §§ 666(a)(2) and (2).

LEGAL STANDARD

Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a defendant may move before trial to dismiss an indictment that fails to state an offense. An indictment must contain every element of the offense. *See United States v. Hooker*, 841 F.2d 1225, 1228 (4th Cir. 1988) (citing *Hale v. United States*, 89 F.2d 578, 579 (4th Cir. 1937)). The indictment may describe the offense in the language of an unambiguous statute, but the general description of the offense "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling v. United States*, 418 U.S. 87, 117–18 (1974) (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)). In reviewing the sufficiency of the indictment, the statement of facts controls. *Hooker*, 841 F.2d at 1227. The court considers only the allegations contained in the indictment. *United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012).

ARGUMENT

I. Under both 18 U.S.C. §§ 666(a)(2) and 1349, the Government must prove an "official act."

The government has charged Mr. Gray with conspiracy to commit honest services wire fraud under 18 U.S.C. § 1349 and bribery in connection with a federal program under 18 U.S.C. §

666(a)(2). Both charges require proof of an "official act." The indictment is facially deficient on this requirement, and thus the indictment must be dismissed.

A. Section 1349 requires proof of an official act.

Since the Supreme Court's 2010 decision in *Skilling v. United States*, 561 U.S. 358, courts have repeatedly held (and the government has repeatedly conceded) that honest services fraud under 18 U.S.C. §§ 1346 and 1349 requires proof of an official act. *See, e.g.*, *Renzi*, 769 F.3d at 744 ("Under 18 U.S.C. § 1346, an official is guilty of honest-services fraud if he accepts something of value in exchange for an official act.") (citing *Skilling*); *United States v. Terry*, 707 F.3d 607, 612–14 (6th Cir. 2013) (citing §§ 201(b) and 666(a)) (explaining honest service bribery requires proof of an agreement "that payments will influence an official act"); *Ring*, 706 F.3d at 465 ("[c]onsistent with *Skilling*," a "bribery theory of honest services fraud" requires the government "to prove the major elements of bribery," including an official act).[2] These holdings are unsurprising—they follow directly from *Skilling*'s reasoning.

In *Skilling*, the Court held that to avoid constitutional vagueness concerns, § 1346 must be interpreted to encompass "*only* the bribe-and-kickback core" of prior honest services cases. 561 U.S. at 409. The Court explained that, when limited to this "core" misconduct, honest services fraud is not unconstitutionally vague because it "draws content" from statutes "proscribing—and defining—similar crimes," including §§ 201(b) and 666(a)(2). *Id*. at 412. In other words, honest services fraud is constitutionally permissible *because* its elements are proscribed by other federal bribery statutes. It follows that those statutes' official act requirement must apply to honest

[2] *See also United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018) ("[Section] 201 also defines the elements of honest-services bribery."); *United States v. McDonough*, 727 F.3d 143, 152 (1st Cir. 2013) (quoting § 201 to define honest services bribery under § 1346 as "receipt of anything of value . . . in return for . . . being influenced in the performance of any official act"); *United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012) ("An honest services fraud prosecution for bribery after *Skilling* thus requires the factfinder to . . . conclude 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.").

services fraud. Indeed, as the Fourth Circuit said in *Jennings* in the context of § 666(a)(2), "a payment made to corruptly influence or reward an official act" is not just an element of bribery, it is "the gravamen" of the offense. 160 F.3d at 1020; *accord United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976) ("The crucial distinction between 'goodwill' expenditures and bribery is . . . criminal intent that the benefit be received by the official as a quid pro quo for some official act."). Thus, under the Supreme Court's saving construction in *Skilling*, § 1346 (and therefore § 1349) also requires proof of an "official act."

B. Section 666(a)(2) requires proof of an official act.

As the Fourth Circuit recognized in *Jennings*, a bribery charge under § 666(a)(2) requires proof of an "official act." Specifically, the "corrupt intent" required by § 666(a)(2) is an intent to "influence or reward an *official act* (or omission)." 160 F.3d at 1020 (emphasis added). Thus, the Fourth Circuit held in *Jennings* that the trial court erred by instructing the jury that the government needed to prove only that Jennings made payments to influence or reward a public official's "business or transactions."[3] *Id.* at 1022. This was "too general," the court explained, because it did not describe "specific *official acts*" that the defendant "intended to induce with his payments." *Id.* (emphasis added).

Jennings did not use the term "official act" informally or merely in passing. To the contrary, the court repeatedly stated that § 666(a)(2) requires the government to tie the payment at issue to a specific official act or set of official acts. A bribe, the court explained, is a corrupt payment "with intent . . . to influence *any official act*." *Id*. at 1013 (quoting 18 U.S.C. § 201(b)) (emphasis added). And the court found the evidence sufficient to prove bribery *because* it showed

[3] The conviction was nonetheless upheld under the harmless error doctrine.

that "[Jennings] intended to influence [a civil servant's] *official acts* by paying him money." *Id.* at 1015 (emphasis added).

The Fourth Circuit's reasoning aligns with the purpose of the legislation. Congress drafted § 666 in response to a circuit split over whether state and local officials were "public officials" under § 201. Congress intended to "make clear that 'federal law prohibits significant acts of bribery involving . . . State and local governments.'" *Id*. at 1013. As an outgrowth of § 201—which explicitly requires an "official act"—it therefore makes sense to read § 666's anti-bribery prohibitions as requiring an official act.

II. Courts narrowly construe what constitutes an "official act."

The leading case on the definition of an "official act" is *McDonnell v. United States*, in which the Supreme Court narrowly interpreted the actions that qualify. Former Virginia Governor Robert McDonnell was convicted of honest services fraud after he took several actions to advance the business interests of a constituent who had provided him and his family with significant gifts and loans. 136 S. Ct. at 2364. McDonnell argued that his conviction should be overturned because the actions he undertook in exchange for the payments—"setting up a meeting, hosting an event, [and] calling [another government] official"—did not constitute "official actions." *Id.* at 2359. In response, the government argued that "nearly anything a public official does," including "workaday functions," constitutes official acts. *Id.* at 2368.

The Supreme Court unanimously rejected the government's position. "The basic compact underlying representative government," the Court said, "*assumes* that public officials will hear from their constituents and act appropriately on their concerns." *Id*. at 2372. The government's broad interpretation would have threatened to criminalize even the most basic interactions between officials and their constituents, such that ordinary people would not understand what conduct is

prohibited. *Id.* at 2372–73. The Court could not sanction such a broad reading.[4] *Id.* at 2372; *see also United States v. Silver*, 864 F.3d 102, 117 (2d Cir. 2017) ("The Supreme Court emphasized [in *McDonnell*] that the Government's 'expansive interpretation of official act would raise significant constitutional concerns.'") (citation omitted). Instead, the Court set forth a two-step test to determine whether the government has alleged an "official act." 136 S. Ct. at 2368. That test controls the Court's analysis here.

First, the government must identify a "question, matter, cause, suit, proceeding or controversy," that involves a "formal exercise of governmental power . . . similar in nature to a lawsuit pending before a court, a determination before an agency, or a hearing before a committee." *Id*. While the Court recognized that the terms "question" and "matter" could be interpreted broadly, it rejected this approach. *Id.* Instead, citing the interpretive canon that "a word is known by the company it keeps," the Court held that a "question" or "matter" "must be similar in nature to a cause, suit, proceeding, or controversy." *Id.* at 2369.

And the question, matter, cause, suit, proceeding or controversy at issue must be "pending" (or if not pending, something that "may by law be brought") before a public official and it must be "focused and concrete."[5] *Id.* As the Court explained, this means it must be "relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id*.

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[4] The Court also raised federalism concerns with the government's broad position, saying it is the prerogative of the states to "regulate the permissible scope of interactions between state officials and their constituents." *Id.* at 2373. Thus the Court refused to construe the statute to "leave[] its outer boundaries ambiguous and involve[] the Federal Government in setting standards of good government for local and state officials." *Id*. (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)) (internal quotation marks omitted).

[5] For example, the Court said a general focus on "Virginia business and economic development" was not sufficiently focused. *Id*. at 2369.

Second, the official must make a decision or take an action *on* the relevant question or matter. *Id*. at 2370. That might include taking action on the matter him- or herself or exerting pressure on another official to do so. *Id.* But it is *not* enough to show that the official took or agreed to take action that was merely "*related to* a pending question or matter." *Id.* (emphasis added).

Applying this analytical framework, the Court held that the alleged "official actions" in *McDonnell*—arranging meetings with other officials, hosting events at the Governor's Mansion, encouraging research activities at state universities, contacting other government officials to enlist their support in encouraging those research activities, promoting the company's products, and facilitating relationships with government officials—did not meet the limited definition of "official act." *Id*. at 2372. Indeed, the government's case failed at the first step of the analysis. "[A] typical meeting, call, or event arranged by a public official," the Court said, "is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2358–59.

Since *McDonnell*, courts have rejected "official acts" that do not fit squarely within *McDonnell*'s description of 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." *Id.* at 2372. Thus, in *Silver*, a former New York Assemblyman was convicted for honest services fraud under § 1346 for, among other things, helping secure a job at a government-funded nonprofit for the son of doctor that had referred many clients to the Assemblyman's law firm. 864 F.3d at 124. Yet, despite evidence that the Assemblyman had used "official Assembly letterhead" for the recommendation and "used his official position to exert pressure" on the nonprofit's CEO, the Second Circuit held this did not constitute an official act. *Id.* at 120–21. The Assemblyman's

actions simply were not a formal exercise of power "on a matter similar to a hearing or lawsuit." *Id.* at 120. And while the court agreed that "hiring should be based solely on 'the merits' rather than the recommendations of successful, powerful, or informed figures," that was "not the same as finding that the elements of a crime had been met." *Id.* at 121; *see also United States v. Skelos*, 707 F. App'x 733, 736 (2d Cir. 2017) (reversing conviction under §§ 666(a)(2) and 1349 because the jury was improperly instructed that official acts would include any "acts that a public official customarily performs").

In contrast, since *McDonnell*, courts have typically found conduct to qualify as "official acts" only when the question or matter is concrete, focused, and similar to a "cause, suit, proceeding or controversy." Thus, in *United States v. Lee*, the Sixth Circuit held that "[a] prosecutor bringing charges against a defendant" was an official act because it involved "a lawsuit before a court [or] a determination before an agency." 919 F.3d 340, 357 (6th Cir. 2019). Similarly, in *United States v. Repak*, the Third Circuit found "a decision by a governmental agency to award money to contractors" satisfied *McDonnell*'s first step because "it was not only akin to an agency determination—it *was* an agency determination." 852 F.3d 230, 253 (3d Cir. 2017); *see also Woodward v. United States*, 905 F.3d 40, 45 (1st Cir. 2018) ("The enactment of legislation certainly qualifies as involving a 'formal exercise of governmental power.'"); *Silver*, 864 F.3d at 123 (2d Cir. 2017) (bringing a resolution to the floor of the Assembly and helping ensure it was passed was a "clear formal exercise of governmental power").

Those few cases finding that acts not obviously "similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee" were sufficient to satisfy *McDonnell* were decided in error. In *United States v. Fattah*, for example, the court held that a candidate's decision to hire his friend's girlfriend was an official act. 914 F.3d 112, 156 (3d Cir.

2019). But the court entirely neglected to examine whether the "matter" was in fact similar to a lawsuit, agency determination, or hearing, as required by *McDonnell*, instead merely reframing the hiring decision as a "question."[6] *Id*. That approach would allow *any* action by a public official to be reframed as a "question" or "matter," including routine decisions to do things like set up a meeting, attend an event, or take a call from a constituent. This cannot be correct because *McDonnell* held that setting up a meeting is *not* an "official act." 136 S. Ct. at 2359. And, if routine acts can simply be reframed as "questions" or "matters," a cloud of potential criminal exposure would settle over citizens and public officials alike. *McDonnell* aimed to avoid these concerns by unambiguously requiring that an official act on a question or matter be "of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2358–59.

Finally, an official act under § 666(a)(2) is even more narrowly constrained than under §§ 201 or 1346. The official act under § 666(a)(2) must be "in connection with any business, transaction, or series of transactions" of the organization, and the business or transaction must "involv[e] anything of value of $5,000 or more." 18 U.S.C. § 666(a)(2). "Business" or "transaction" are not defined by the statute, and the Fourth Circuit has not spoken on the question. Even so, the terms cannot be so broad as to encompass any activity at all. Instead, the conduct alleged must relate to the core "business" of the relevant agency.[7]

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[6] In *United States v. Jones*, the Eastern District of North Carolina similarly found an "official act" without adhering to the *McDonnell* analysis. 207 F. Supp. 3d 576, 582 (E.D.N.C. 2016). There, the court held that the defendant had requested official acts when offering an FBI agent a case of beer and $100 to look up and disclose his wife's text messages. *Id*. As in *Fattah*, the court merely framed the two acts it identified as "questions or matters" involving "focused and concrete formal exercise[s] of governmental power," foregoing a substantive *McDonnell* analysis. *Id*. Thus the *Jones* decision rests on a questionable foundation.

[7] *See, e.g.*, *United States v. Fernandez*, 722 F.3d 1, 14 (1st Cir. 2013) (legislators performing legislative acts constituted a "direct connection with the business . . . of the Commonwealth of Puerto Rico") (internal quotation marks omitted); *United States v. Robinson*, 663 F.3d 265, 266 (7th Cir. 2011) (bribes to police officers to "get the heat off" were in connection with the "law enforcement 'business' of a police department").

III. The indictment fails to allege an "official act" and therefore should be dismissed.

Because §§ 666(a)(2) and 1349 require proof of an official act, the indictment must include facts that would meet *McDonnell*'s requirements. *See Hooker*, 841 F.2d at 1229–30. Here, the indictment attempts to do so by alleging a bribery scheme designed to cause Mr. Causey to "take official action favorable to [GBIG]," specifically, the "transfer of Senior Deputy Commissioner A" or the reassignment of responsibility for GBIG oversight from one official to another thought to be less hostile. Indictment ¶¶ 12, 14, 46, 86. There is no allegation that the defendants sought to avoid or suspend any oversight of GBIG, nor does the indictment allege any other relevant official act. This Court must therefore dismiss the indictment for failure to state an offense.

A. A staff reassignment is not a "question" or "matter."

A staff reassignment is not a "question" or "matter" involving a "formal exercise of governmental power . . . similar in nature" to a lawsuit, agency determination, or committee hearing. *See McDonnell*, 136 S. Ct. at 2372. *McDonnell* gave examples of questions or matters fitting this rubric, including decisions on whether to allocate state grant funding and whether a state insurance plan would cover a specific drug. *Id*. at 2370. These examples conform to the Court's definition of questions or matters as involving a "formal exercise" of governmental power akin to a lawsuit, administrative determination, or hearing. Grant funding decisions, for example, typically involve lengthy, detailed application, review, and award processes. *See, e.g.*, *Fire-Rescue Grants and Relief Funds*, N.C. Dep't of Ins. Office of State Fire Marshal, https://www.ncdoi.com/OSFM/Fire_Rescue_Grants_and_Relief_Funds/Default.aspx?field1=Volunteer_Rescue,_EMS_Fund_-_Facts&user=Volunteer_Rescue,_EMS_Fund (last visited Sept. 30, 2019) ("Applications are reviewed and scored using an objective algorithm . . . . The system awards each application in order of rank until all available funds are exhausted."). Similarly, state-wide health plan coverage decisions would typically involve multiple government officials, hearings,

and substantial impact to tens of thousands of state employees. *See, e.g.*, Rose Hoban and Taylor Knopf, *On State Health Plan Changes, Folwell Hits Gas While Lawmakers Threaten to Tap Brakes*, North Carolina Health News (Feb. 20, 2019), https://www.northcarolinahealthnews.org/2019/02/20/on-state-health-plan-changes-folwell-hits-gas-while-lawmakers-threaten-to-tap-brakes/ (last visited Sept. 30, 2019).

The reassignment of the staff member at issue here, on the other hand, is not a "question" or "matter" within the meaning of *McDonnell*.[8] It was not a lawsuit, agency determination, or committee hearing. It did not implicate a substantial outlay of public funds, require a hearing, or impact more than a few people. Nor did it involve a court, a judge, testimony, discovery, compulsory process, documentary evidence, public meetings, constitutional actors, notice and comment, or any of the other traditional trappings associated with lawsuits, agency determinations, or committee hearings. The reassignment in question here would not have involved any "official" action, but instead reassigning someone—*anyone*—else to regulate Mr. Lindberg's companies in light of mistreatment and bias. There is no allegation that the defendants sought to terminate or weaken any regulatory oversight of the insurance companies in question, much less any allegation that they contacted or tried to influence Division Head 1. This type of staff reassignment cannot

[8] At oral argument on Mr. Lindberg's motion to dismiss, this Court queried whether the offer of money in exchange for a repetitive set of staff reassignments might satisfy the "official act" requirement of *McDonnell*. Respectfully, the answer would turn on whether what happened as a result of those reassignments ultimately met the two-prong definition of "official act" in *McDonnell*. One could imagine a scenario where one reassignment followed by another would not satisfy that requirement. One could imagine a different scenario, more implausible perhaps, where multiple reassignments designed to thwart altogether regulatory oversight of a defendant's company could do so. The latter scenario could take on sufficient focus and concreteness to itself become a question or matter involving a formal exercise of governmental power similar in nature to an agency determination sufficient to satisfy *McDonnell*'s first step—that is, a question of whether to regulate Mr. Lindberg's companies at all. No such allegations are present here.

be plausibly described as similar in nature to a lawsuit, administrative determination, or committee hearing, and thus it cannot be a "question" or "matter" under *McDonnell*.[9]

In recent oral argument, the government appears to have walked back its prior position that "[d]ecisions to hire, fire, assign, and reassign government employees are *core* official acts under *McDonnell*." Dkt. 69 at 1 (emphasis added). The government observed that a staff reassignment falls somewhere on a continuum between those actions deemed by the Supreme Court *not* to be official acts and those actions explicitly identified as official by statute. Although the government's partial concession does not go far enough under *McDonnell*, it recognizes the possibility that routine administrative tasks such as the assignment of a matter to one career employee versus another may not satisfy the "official act" standard.

The government has also argued in opposition to Mr. Lindberg's pending motion to dismiss that the relevant official act was the "replacement of the senior deputy commissioner—not with 'anyone'—but with a person of [Mr. Lindberg's] choosing," namely, Mr. Palermo. Dkt. 69 n.4. *See also id*. at 1, 10. That argument is misplaced for three reasons. First, according to the indictment itself, the relevant "official action" was the *removal* of the Senior Deputy Commissioner at NCDOI, not the replacement of the Senior Deputy Commissioner with Mr. Palermo. *See* Indictment ¶ 14. Second, even if the indictment had alleged the replacement as the relevant official act, a replacement of the Senior Deputy Commissioner is not an "official act" under *McDonnell* for the same reasons that a staff reassignment is not an "official act." Third, the

[9] There are, however, many examples of Mr. Causey exercising his power in the ways contemplated by *McDonnell*. *See, e.g.*, *Special Agents Accuse Seven Springs Man of Insurance Fraud*, N.C. Dep't of Ins. (Sept. 24, 2019), http://www.ncdoi.com/media/news2/year/2019/092419a.asp ("North Carolina Insurance Commissioner Mike Causey today announced the arrest . . . ."); *Commissioner Causey Disagrees With Insurance Companies' Proposed Homeowners' Rate Increase: Sets Hearing Date*, N.C. Dep't of Ins. (Feb 7, 2019), http://www.ncdoi.com/media/news2/year/2019/020719a.asp (press release reporting on Mr. Causey setting a hearing on proposed homeowners' insurance rate increases); Order of Rehab., *Causey v. Cannon Surety, LLC*, No. 17 CVS 11692 (N.C. Sup. Ct. 2019) (court order appointing Mr. Causey Rehabilitator of bail bond agency).

indictment alleges that in the end, what the defendants wanted was reassignment of GBIG oversight to another official at NCDOI perceived to be less hostile. *See id*. ¶ 46.

B. No other relevant "question" or "matter" was "pending" before Mr. Causey.

The government also cannot point to any other "question" or "matter" "pending" before Mr. Causey that would be relevant to the conduct alleged in the indictment. The government cannot argue, for instance, that the staff reassignment related to a pending NCDOI financial examination because the GBIG financial examination ended in February 2018, *before* the March 5, 2018 meeting at which the government first alleges Mr. Causey demanded a benefit in exchange for the staff reassignment.[10] *Id*. ¶¶ 4, 35.

Nor can the government argue that some future, but as-yet undefined, financial examination was the "matter" "pending" before Mr. Causey. First, any such future examination was uncertain and would therefore fail *McDonnell*'s requirement that the matter be "focused" and "concrete." *McDonnell*, 136 S. Ct. at 2369. Second, even if it were sufficiently concrete (and it is not), a staff reassignment would not be a decision *on* the matter as required by *McDonnell*'s second step.[11] A staff reassignment might be plausibly described as *relating* to a future financial examination, but it is certainly not an action *on* that examination, which had not even begun. And as *McDonnell* explained, it is not enough for an action to be *related* to a matter. *Id.* at 2370. "Otherwise, if every action somehow related to [the matter] were an 'official act,' the requirement

[10] Any argument that prior requests for a staff reassignment implicate an official act would criminalize core constitutionally protected conduct because, per the indictment, such requests would be independent of any demand for or offer of payment. As the Fourth Circuit said in the context of § 666, "the gravamen of a bribery offense is a payment made to corruptly influence or reward an official act (or omission)." *Jennings*, 160 F.3d at 1019. Absent an alleged demand of payment or an offer to pay, therefore, any request for a staff reassignment before March 5, 2018 cannot be criminal conduct. The government alleged no such demand or offer of payment.

[11] *McDonnell* considered and rejected a similarly vague "matter" alleged by the government: the Governor's general focus on economic development. *McDonnell*, 136 S. Ct. at 2374 ("Based on that remark, and the repeated references to 'Bob's for Jobs' at trial, the jury could have thought that the relevant 'question, matter, cause, suit, proceeding or controversy' was something as nebulous as 'Virginia business and economic development,' as the District Court itself concluded.").

that the public official make a decision or take an action on [that matter] . . . would be meaningless." *Id*. at 2371.

Because a staff reassignment is not a "question" or "matter" involving a formal exercise of governmental power similar to a lawsuit, administrative determination, or committee hearing, it cannot constitute an "official act" under *McDonnell*.[12] And because the indictment does not allege an "official act," it does not allege every element of the offenses charged. The indictment is therefore deficient, and this Court should dismiss it for failure to state an offense.

IV. Whether the indictment alleges an official act is a question of law appropriately resolved by the Court.

In its opposition to Mr. Lindberg's pending motion to dismiss, the government has argued that whether the indictment alleges an "official act" is a question for the jury. Dkt. 69 at 4–5. That is wrong. The question this motion presents is purely a question of law appropriate for the Court's determination: are the allegations in the indictment sufficient to state a legally cognizable "official act"? This is clear from the *McDonnell* decision itself, in which the Court determined—*as a matter of law*—that certain actions did not fit the definition of "official act." *See McDonnell*, 136 S. Ct. at 2372. That is the very question at issue here. Nothing in *McDonnell* suggests that it intended to limit other courts from ruling on whether a specific set of facts constitutes a legally cognizable "official act." And nothing in the opinion remotely suggests that a court must send to the jury any

[12] Similarly, a staff reassignment is not "business" or a "transaction" in connection with the core business of NCDOI. According to the indictment, NCDOI's core business is "execution of laws relating to insurance and other subjects." Indictment ¶ 1. At no point does the indictment allege that the defendants requested that Mr. Causey cease executing the laws relating to insurance, prevent NCDOI from providing any regulatory oversight, or in any way interfere with the "business" of NCDOI. Instead, the indictment alleges only a payment "in connection with the transfer of Senior Deputy Commissioner A." *Id*. ¶ 86. And, while such a simple transfer may fall under Mr. Causey's day-to-day duties, it is by no means the "business" of NCDOI.

set of facts different from the three things the Court determined not to be "official acts." Instead, *McDonnell* makes plain that a court can and should rule on this legal question.[13]

The government supports its argument with a single sentence from *McDonnell*, which it divorces from context: "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 *quid pro quo*." *McDonnell*, 136 S. Ct. at 2371. But this sentence is from a paragraph explaining that an official need not *actually* take action on a "question" or "matter" so long as there is an *agreement* to take such an action. *Id.* Read in context, then, the language the government quotes means only that the jury decides the factual question of whether there was an agreement—not whether the facts listed in the indictment constitute an official act.[14]

Finally, in the current procedural posture, the parties are limited to the facts as alleged in the indictment. *Hooker*, 841 F.2d at 1227; *Engle*, 676 F.3d at 415. There is thus no question of fact currently before this Court to send to a jury. In short, this Court can and should rule on the purely legal question of whether the indictment alleges facts constituting a legally cognizable "official act."

CONCLUSION

Because the indictment fails to allege a legally cognizable official act, it fails to state an offense. Therefore, the Court must dismiss the indictment.

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[13] That this Court has the power to decide questions of law is beyond doubt. *See State of Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) ("[O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide.").

[14] A simple hypothetical shows that the government's position is untenable. Under 18 U.S.C. § 922(g)(1), it is unlawful for a felon to "possess in . . . commerce, any firearm or ammunition." Suppose an indictment alleged a defendant was a felon that unlawfully possessed a firearm, "to wit, a toy water pistol." Under the government's theory, this Court would not be able to rule on the legal question of whether the indictment alleges a crime and would instead be forced to put that question to the jury. Such a theory is at odds with the law and common sense.

Respectfully submitted this 18th day of November, 2019.

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CERTIFICATE OF SERVICE

I, Jack M. Knight, hereby certify that a true copy of the of the foregoing Motion of John D. Gray to Dismiss the Indictment for Failure to State an Offense was served upon counsel of record with the Clerk of the Court using the electronic notification of such filing to the following:

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