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**

MEMORANDUM IN SUPPORT OF MOTION OF GREG E. LINDBERG TO DISMISS THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE

The government's entire case against Greg E. Lindberg turns on a legally flawed understanding of what constitutes an "official act." According to the government, requesting a personnel move is an official act giving rise to federal criminal liability even when the defendant in no way requested an ultimate outcome on any matter or proceeding that may in the future be pending before the government.

The government's theory is foreclosed by the logic of two recent decisions of the Supreme Court: *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and *Skilling v. United States*, 561 U.S. 358 (2010). And the government's theory raises the full range of constitutional issues that the Court identified in those decisions. Most notably, prosecutions of this nature will inhibit the rights of all Americans to make demands of their elected representatives—and vote and contribute accordingly. Because the charges against Mr. Lindberg are legally infirm, this Court can—and should—dismiss the indictment against him.[1]

[1] Not only is granting the motion to dismiss legally proper; it is also the most efficient use of judicial resources, because it would allow the Fourth Circuit to immediately resolve the legal questions posed by the government's aggressive assertion of what constitutes an official act. The government has an automatic right to appeal. *See* 18 U.S.C. § 3731. The defense does not. It would be wasteful to have a three or four week trial when the primary contested issue between the parties is not factual, but legal, and granting the motion could permit the Fourth Circuit the opportunity to resolve that issue without the need for a costly and time-consuming trial.

In *McDonnell*, the Supreme Court narrowed the scope of federal bribery laws by circumscribing the conduct that counts as an "official act." Specifically, the government must first 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." *McDonnell*, 136 S. Ct. at 2372 (quoting 18 U.S.C. § 201(a)(3)). Next, the government must show a decision or action *on* that question, matter, cause, suit, proceeding, or controversy. *Id.* Under *McDonnell*, "setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)" is not enough to constitute an official act. *Id.* at 2370.

The facts alleged in the indictment fail both steps of *McDonnell*. According to the indictment, the Commissioner of Insurance demanded, and Mr. Lindberg ultimately agreed to provide, a campaign contribution in exchange for reassigning a new deputy commissioner to assume responsibility for future regulatory oversight of Mr. Lindberg's business. *E.g.*, Indictment ¶¶ 4, 14, 38. But a staffing change is not an official act within the meaning of *McDonnell*'s first step—because a personnel move is not like a "lawsuit, hearing, or administrative decision." *McDonnell*, 136 S. Ct. at 2368-69.

Even if the government characterizes the "official act" as the Department's decision on a future periodic examination of Mr. Lindberg's company, the indictment still fails. The second step of *McDonnell*'s test demonstrates why—a personnel move is not a decision or action *on* the future examination, because such a decision or action requires a concrete step meant to secure a particular outcome. *Id.* at 2368. Critically, Mr. Lindberg did not request any outcome regarding the Department's past or future examinations of his company. Instead, he simply sought a fair and reasonable regulatory examination by a competent and neutral decision-maker. Indictment ¶ 14, 31. That is the "basic compact underlying representative government"—that constituents may vote and contribute based on the responsiveness of their elected officials. *McDonnell*, 136 S. Ct. at 2372. The indictment thus fails under *McDonnell*.

Skilling provides another analytical path that leads to the same conclusion. There, the Supreme Court limited honest-services fraud to cases involving "core" bribery or kickbacks. *Skilling*, 561 U.S. at 408-09. *Skilling* therefore requires an "official [who] conspired with a third party so that both would profit from" the alleged scheme. *Id.* at 410. But here, Mr. Lindberg did not profit from the alleged scheme, because his request for a personnel move did not affect the outcome of any matter pending before the Department of Insurance. *Skilling* therefore reinforces the conclusion that the indictment fails to state an offense as a matter of law.

The government's case against Mr. Lindberg is not simply legally deficient; it also implicates the three important policies that animated the Supreme Court's decisions in *McDonnell* and *Skilling*: the First Amendment, federalism, and vagueness.

As explained below, the government's prosecution of Mr. Lindberg will "cast a pall of potential prosecution" over citizens' demands for better government. *McDonnell*, 136 S. Ct. at 2372. As a real-life example, anyone who pledges to contribute to a senator based on her support for a particular nominee now risks prosecution under the government's theory. *See* Eli Rosenberg, *Collins blasted 'dark money' groups in Kavanaugh fight. One just paid to thank her for her vote*, WASH. POST, Oct. 12, 2018, https://tinyurl.com/y6rkm2jh. And as another real-life example, the common practice of patronage appointments—even at the federal level—will now open constituents and officials to potential federal criminal exposure. *See, e.g.*, Max Fisher, *This Very Telling Map Shows Which U.S. Ambassadors Were Campaign Bundlers*, WASH. POST, Feb. 10, 2014, https://tinyurl.com/yyo9hegw.

The federal government's prosecution of Mr. Lindberg also "raises significant federalism concerns." *McDonnell*, 136 S. Ct. at 2373. States have "the prerogative to regulate the permissible scope of interactions between state officials and their constituents." *Id.* But here, the indictment would 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)). This is particularly

problematic because the indictment reveals that Mr. Lindberg's legitimate requests for better government were met with demands by the Commissioner: "What's in it for me?" *E.g.*, Indictment ¶ 38. The federal government now seeks to hold Mr. Lindberg responsible for responding to the repeated demands of the State official charged with defining what is legally permissible for Mr. Lindberg and his business.

Finally, the government's prosecution of Mr. Lindberg raises significant vagueness concerns. In *McDonnell*, the Supreme Court held that setting up a meeting between a constituent and an official capable of resolving a pending matter was not an official act. 136 S. Ct. at 2370. And yet, under the government's theory here, a constituent crosses the line if he requests that a particular official *not* be assigned to a matter that may be pending in the future. The distinction between these two scenarios is not obvious, and for that reason, the government's conception of "the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 2373.

The government's theory is fundamentally flawed. The indictment against Mr. Lindberg should be dismissed.

BACKGROUND[2]

Mr. Lindberg is a successful entrepreneur and businessman. For the past three decades, he has been engaged in business activities in a variety of industries, including publishing, healthcare, and insurance. Mr. Lindberg now owns two businesses headquartered in Durham, North Carolina: Eli Global LLC and Global Bankers Insurance Group. Eli Global is an investment firm that grew from a company that Mr. Lindberg founded as a college student. Indictment ¶ 3. Global Bankers Insurance

[2] The facts discussed herein are drawn from either the indictment or publicly available records, of which this Court may take judicial notice. *United States v. Brehm*, 691 F.3d 547, 553 n.8 (4th Cir. 2012).

Group manages insurance and reinsurance companies that were acquired by Mr. Lindberg over the past several years. *Id.*

Mr. Lindberg participates in the political process, as is his First Amendment right. In 2016, Mr. Lindberg supported Wayne Goodwin against Mike Causey in a hotly contested and aggressively unpleasant race for North Carolina Insurance Commissioner.[3] Mr. Lindberg's support of Mr. Goodwin included helping to sponsor negative ad campaigns against Mr. Causey, which was a publicly known fact. Ultimately, Mr. Causey won the election and took office as the North Carolina Insurance Commissioner on January 1, 2017.

The North Carolina Department of Insurance regulates Mr. Lindberg's company, Global Bankers Insurance Group. *Id.* ¶ 4. And almost immediately following Commissioner Causey's election—in a move seemingly motivated by political animus—the Department of Insurance began regulating Mr. Lindberg and Global Bankers Insurance Group in an unfair and improper manner. *See id.* ¶ 31. Among other things, Jacqueline Obusek, a Senior Deputy Commissioner of Insurance, appeared to be "deliberately and wrongfully and maliciously hurting [Mr. Lindberg's] reputation" in the insurance industry, including "lying . . . to hurt [Mr. Lindberg's] name." *Id.*

At around the same time, Commissioner Causey began cooperating with the FBI and convinced it to initiate a criminal investigation into Mr. Lindberg and his business. *Id.* ¶ 2. Notably, Mr. Causey reached out to the FBI *before* any of alleged conduct occurred that forms the basis of the charges set forth in the indictment.[4]

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[3] *Transaction Search by Entity*, North Carolina State Board of Elections (last accessed May 24, 2019), https://cf.ncsbe.gov/CFTxnLkup (name search for "Greg Lindberg").

[4] In explaining that he rejected a donation from Mr. Lindberg in 2017, Commissioner Causey has publicly stated that Mr. Lindberg "was a man that was not on my team when I was running," and "[h]e was a major fundraiser for my opponent." David Larson, *Chairs of Major Political Parties at Center of Insurance Scandal*, North State Journal (Apr. 10, 2019), https://tinyurl.com/y3hzwja6.

Thus, while Mr. Lindberg was meeting with the Commissioner in an effort to ensure fair regulation of his company, and to work through the unjustified difficulties that Ms. Obusek had been creating, the Commissioner was recording their conversations. *See, e.g., id.* ¶¶ 31, 36-39, 46-48. As alleged in the indictment, Mr. Lindberg proposed in these meetings that the Commissioner rearrange the Department so that a regulator other than Ms. Obusek would oversee periodic examinations of Global Bankers Insurance Group. *Id.* ¶ 32. As an option for achieving the desired personnel change, Mr. Lindberg suggested that the Commissioner hire John Palermo—the Vice President of Special Projects of Eli Global and then-Chair of the Chatham County Republican Party. *Id.* In a subsequent meeting a few weeks later, the Commissioner indicated that hiring Mr. Palermo was a possibility, but did not definitively agree to hire him. *Id.* ¶ 36. The Commissioner—who, again, was cooperating with the FBI—then asked Mr. Lindberg, "What's in it for me?" *Id.* ¶ 38. Only after the Commissioner's prompting did Mr. Lindberg offer to create and fund an independent expenditure committee to support the Commissioner's reelection. *Id.* No periodic examinations of Mr. Lindberg's company were pending when Mr. Lindberg acquiesced to the Commissioner's demands. *Id.* ¶¶ 4, 38.

About two weeks later, the Commissioner declined to hire Mr. Palermo. *Id.* ¶ 42. Mr. Lindberg agreed with the Commissioner's decision and suggested that, instead, the Commissioner simply switch Ms. Obusek with the head of a different division of the Department of Insurance. *Id.* ¶ 43.

Over the ensuing weeks, the Commissioner repeatedly inquired about the independent expenditure committee to support his reelection. *Id.* ¶¶ 46, 51, 56, 65, 69. As alleged in the indictment, the Commissioner agreed to switch Ms. Obusek with another division head if Mr. Lindberg contributed to his campaign. *Id.* ¶ 58. Ultimately, an independent expenditure committee was funded in support of the Commissioner, *id.* ¶ 60, but the Commissioner was unsatisfied because he believed that establishing the independent expenditure committee had taken too long, and also posed the

possibility of bad publicity, *id.* ¶ 69. According to the indictment, to appease the Commissioner, Mr. Lindberg agreed to contribute money to the North Carolina Republican Party, with the understanding that it would be transferred to the Commissioner's campaign. *Id.* ¶ 71.[5]

Based on these alleged facts, the government claims that Mr. Lindberg's campaign contributions were in fact bribes paid in exchange for an official act—that is, the switching of Ms. Obusek with the head of a different division of the Department of Insurance. As a result, it convinced a grand jury to charge Mr. Lindberg with one count of conspiracy to commit honest-services fraud, in violation of 18 U.S.C. § 1349, and one count of federal-funds bribery, in violation of 18 U.S.C. § 666(a)(2). Critically, the indictment nowhere alleges that Mr. Lindberg sought a particular outcome on the Department's past or future periodic examinations of Global Bankers Insurance Group.[6]

LEGAL STANDARD

Rule 12(b)(3)(B)(v) of the Federal Rules of Criminal Procedure allows a defendant to move to dismiss an indictment for failure to state an offense. Under that rule, a district court may dismiss an indictment "where there is an infirmity of law in the prosecution." *United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012); *see also United States v. Carlisle*, 693 F.2d 322, 324 (4th Cir. 1982) (per curiam) (holding that the indictment should have been dismissed because "check-kiting is not an offense

[5] The evidence at trial will show that Mr. Lindberg was concerned with ensuring that any donation was compliant with the laws and regulations governing campaign contributions, and that Mr. Lindberg in fact rejected Mr. Causey's request that funds be deposited into Mr. Causey's personal account.

[6] Though omitted from the indictment, the evidence at trial will show that Mr. Lindberg knew that the switch of Ms. Obusek with the head of a different division would not lessen his company's regulatory obligations, and that Mr. Lindberg expressly discussed this understanding with Commissioner Causey. As just one example, Mr. Lindberg told the Commissioner: "We are not asking you for anything special. In fact, we are willing to submit ourselves to tighter standards than the law allows." Mr. Lindberg sought fairness, not favoritism. He is not averse to tough regulation, and he told the Commissioner as much; he takes issue only with the unfair and retaliatory use of regulatory oversight.

within the terms of [18 U.S.C.] § 1014"). In considering whether to dismiss an offense charged in an indictment, the district court considers only the allegations contained therein. *Engle*, 676 F.3d at 415.

ARGUMENT

I. The Indictment is Legally Infirm Because It Fails to Allege an "Official Act."

The indictment charges Mr. Lindberg with two offenses: (1) conspiracy to commit honest-services fraud, in violation of 18 U.S.C. § 1349, and (2) federal-program bribery, in violation of 18 U.S.C. § 666(a)(2). These charges are based on the same underlying conduct—that Mr. Lindberg allegedly made campaign contributions to the Commissioner in exchange for, or to influence, the transfer of Ms. Obusek. Indictment ¶¶ 14, 86. Both charges require allegations of an "official act."

In *McDonnell* and *Skilling*, the Supreme Court narrowly circumscribed the definition of "official act" and the corresponding conduct that constitutes federal bribery. The indictment here does not allege conduct that meets this narrow definition. Moreover, the government's wide-ranging theory implicates the very constitutional problems that the Supreme Court sought to avoid by cabining the scope of federal bribery in *McDonnell* and *Skilling*. In short, the indictment against Mr. Lindberg is legally deficient and must be dismissed.

A. An "Official Act" is an Element of 18 U.S.C. §§ 666(a)(2) and 1349.

It is settled law in the Fourth Circuit that the government must plead and prove an "official act" to sustain convictions under both 18 U.S.C. §§ 666(a)(2) and 1349. *McDonnell* and *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), make that much clear.

In *McDonnell*, the Supreme Court defined honest-services fraud by looking to the federal bribery statute, 18 U.S.C. § 201. *McDonnell*, 136 S. Ct. at 2365. Section 201 makes it a crime to "directly or indirectly, corruptly give[ ], offer[ ] or promise[ ] anything of value to any public official . . . with intent to influence any official act." 18 U.S.C. § 201(b)(1). An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be

pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *Id.* § 201(a)(3).

McDonnell thus makes clear that honest-services fraud is defined by reference to Section 201, and therefore requires an official act. *McDonnell*, 136 S. Ct. at 2365. Here, the indictment acknowledges as much. The charge of honest-services conspiracy is repeatedly presented in terms of an "official action." Indictment ¶ 14 ("The defendants corruptly gave, offered, and promised things of value to the Commissioner . . . in exchange for official action favorable to [Mr. Lindberg's company]"—specifically, "the removal of the Senior Deputy Commissioner . . . responsible for overseeing the regulation, including the periodic examination, of [Mr. Lindberg's company]"); *id.* ¶ 12 ("The purpose of the scheme was for defendants to unlawfully cause the Commissioner to take official action favorable to Lindberg's companies through bribery of the Commissioner.").

An "official act" also is required to sustain a conviction for federal-program bribery under 18 U.S.C. § 666(a)(2). The Fourth Circuit so held in *United States v. Jennings*—a case that was decided prior to *McDonnell*. There, the defendant challenged the sufficiency of the evidence supporting his conviction under Section 666(a)(2). In deciding that issue, which considers the minimum proof necessary to sustain a conviction, the Fourth Circuit repeatedly explained that Section 666 requires an "official act" or "official action." 160 F.3d at 1012-14. Indeed, it affirmed the defendant's conviction precisely 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 [defendant's] companies." *Id.* at 1018 (emphasis added). *Jennings* thus compels the conclusion that Section 666 requires an "official act."

Even if *Jennings* were not binding, its outcome makes sense. Sections 666(a)(2) and 1346 define "similar crimes," *Skilling*, 561 U.S. at 412, and *McDonnell* imported Section 201's definition of "official act" into Section 1346. If anything, it is even more natural to read Section 201's definition of "official

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

A contrary construction—reading Section 666 differently than Sections 201 and 1346—is nonsensical. If *McDonnell* does not apply equally to Sections 201, 666, and 1346, then federal bribery laws would risk regulating *State* officials more strictly than *federal* officials. But the federalism concerns that animated *McDonnell* require the opposite—that the federal government has *less* authority to define and curtail the relationship between State officials and their constituents. *McDonnell*, 136 S. Ct. at 2373.

To be sure, a handful of other courts have declined to apply *McDonnell*'s "official act" requirement to Section 666, but those decisions are foreclosed by *Jennings*. And even if this Court were free to ignore *Jennings*, the reasoning of these other decisions is not persuasive.

The handful of courts that have held that Section 666 does not embrace an "official act" component have done so for two reasons. *First*, they note that Section 666 "does not include the term 'official act.'" *United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018). But this is wholly unpersuasive. Section 1346 also does not include the term "official act," yet the Supreme Court relied on Section

201 to inform the meaning of Section 1346 and require an official act. And as noted above, given that Section 666 is a direct extension of Section 201, it makes even more sense to rely on Section 201 to define Section 666's scope.

Second, the reluctance of other courts to apply *McDonnell* to Section 666 is really an outgrowth of a debate over whether Section 666 requires a *quid pro quo*—and not about whether Section 666 requires an official act. Historically, there has been uncertainty over whether Section 666 requires a *quid pro quo*—with some courts holding that a *quid pro quo* is not required. *See United States v. Morgan*, 635 Fed. App'x 423, 452 (10th Cir. 2015) (non-precedential) (Holmes, J., concurring) (noting that "[t]here is some uncertainty in the law as to what type of *quid pro quo*, if any, is necessary to satisfy" Section 666, and attempting to reconcile circuit court decisions on that issue). After *McDonnell*, some courts have read precedent discussing *quid pro quos* to say that an official act is also not required. *See, e.g.*, *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018) (declining to apply *McDonnell* because "[w]e have held that the text of § 666(a)(1)(B) 'says nothing of a quid pro quo requirement to sustain a conviction'"). This reasoning is not persuasive, however, because it effectively conflates the *quid pro quo* issue with the official-act issue. And in any event, the Fourth Circuit held that a *quid pro quo* is required under Section 666. *See Jennings*, 60 F.3d at 1015 (affirming defendant's conviction under Section 666 because he "intended to engage in a quid pro quo"). The Fourth Circuit has thus foreclosed reliance on *quid pro quo* cases to eschew the official-act requirement of Section 666.[7]

In sum, both of the charges against Mr. Lindberg require an official act. *McDonnell* and *Jennings* demand as much.

[7] In *United States v. Boyland*, 862 F.3d 279 (2d Cir. 2017), the Second Circuit held that *McDonnell* does not apply to Section 666 because that section is more expansive than Section 201. *Boyland*, 862 F.3d at 291. But the Second Circuit has since retreated from that position, noting that in *Boyland*, "the § 666 counts were not charged in terms of official acts," which is why the court concluded "that *McDonnell* did not apply to the § 666 counts in that case." *United States v. Skelos*, 707 Fed. App'x 733, 738 (2d Cir. 2017) (non-precedential).

B. "Official Act" is Narrowly Construed.

In *McDonnell*, the Supreme Court narrowly construed the term "official act" for purposes of federal bribery statutes. There, Robert McDonnell, the former Governor of Virginia, had been convicted of honest-services fraud and Hobbs Act extortion related to his acceptance of approximately $175,000 in gifts from the Chief Executive Officer of a nutritional supplement company. *McDonnell*, 126 S. Ct. at 2365. The government alleged that these gifts were given in exchange for the Governor's promotion of the nutritional supplements by (1) contacting and arranging meetings with Virginia government officials, (2) hosting events at the Governor's Mansion, and (3) hosting individuals key to the company's success at exclusive events at the Governor's Mansion. *Id.* at 2365-66. The key issue was whether these events were official acts giving rise to federal criminal liability. The Supreme Court ultimately held that they were not.

As noted above, in construing the scope of honest-services fraud under 18 U.S.C. § 1346, the Court relied upon the definition of "official act" in 18 U.S.C. § 201. Under that definition, an "official act" is "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The Supreme Court read two requirements into the definition of an official act. "First, the Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official." *McDonnell*, 136 S. Ct. at 2368. "Second, the Government must prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *Id.* (citing 18 U.S.C. § 201(a)(3)); *United States v. Conrad*, 760 F. App'x 199, 207-09 (4th Cir. 2019) (per curiam) (non-precedential) (applying *McDonnell*'s two-part test to a public bribery prosecution).

In *McDonnell*, the government took the position that an "'official act' encompasses nearly any activity by a public official," including "arranging a meeting, contacting another public official, or hosting an event." *McDonnell*, 136 S. Ct. at 2367. The Supreme Court disagreed. As to the first prong, the Court explained that a "question, matter, cause, suit, proceeding or controversy" "connote[s] a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination," or something similar. *Id.* at 2368-69. As to the second prong, the Government must prove that a public official "made a decision or took an action 'on'" the identified "question, matter, cause, suit, proceeding, or controversy." *Id.* at 2368. "[H]osting a meeting, contacting another official, meeting with other officials, or speaking with interested officials is not, standing alone, a 'decision or action,'" "even if that event, meeting, or speech is related to a pending question or matter." *Id.* at 2370. Further, "[s]imply expressing support" is not a decision or action "on" a matter. *Id.* at 2371. Rather, "support" rises to the level of an official action only if the official "us[es] his official position to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'" *Id.*; *accord United States v. Pinson*, 860 F.3d 152, 168-69 (4th Cir. 2017) (per curiam) (noting that under *McDonnell*, "an 'official act' needed to be something more than "[s]etting up a meeting, hosting an event, or calling an official,' and instead was a decision or action on a 'question, matter, cause, suit, proceeding or controversy' which involves 'a formal exercise of governmental power'").

Following *McDonnell*, courts have grappled with which activities are like a "lawsuit, hearing, or administrative determination" such that *McDonnell*'s first prong is satisfied. The following activities have been found to satisfy *McDonnell*'s first prong:

- charging decisions, *United States v. Lee*, 919 F.3d 340, 354 (6th Cir. 2019);
- judicial monetary awards, *United Staes v. Malkus*, 696 Fed. App'x 251, 252 (9th Cir. 2017) (non-precedential);
- the passage of legislation, *United States v. Skelos*, 707 Fed. App'x 733, 737 (2d Cir. 2017) (non-precedential);

- the awarding and maintainance of Government contracts, *United States v. Conrad*, 760 Fed. App'x 199, 208 (4th Cir. 2019) (per curiam) (non-precedential) ("The awarding of a [government] contract is not only akin to an agency determination – it is an agency determination." (quoting *United States v. Repak*, 852 F.3d 230, 253 (3rd Cir. 2017)); *United States v. Pinson*, 860 F.3d 152, 168-69 (4th Cir. 2017); *United States v. Spellissy*, 710 Fed. App'x 392, 395 (11th Cir. 2017);

- an increase in Medicaid reimbursements and a geographic referral area to benefit the defendant's companies, *United States v. Suhl*, 885 F.3d 1106, 1113 (8th Cir. 2018); and

- the allocation of state funds, *United States v. Halloran*, 664 Fed. App'x 23, 28-29 (2d Cir. 2016) (non-precedential).

Thus, following *McDonnell*, courts have not strayed far from literal lawsuits, hearings, or administrative determinations in evaluating *McDonnell*'s first prong.

As to the second prong—which requires a decision or action *on* a "question, matter, cause, suit, proceeding, or controversy"—the decision or action must at a minimum meaningfully influence the outcome of the identified matter. Here, it is not enough for the decision or action to simply "*relate*[ ] to a pending question or matter." *McDonnell*, 136 S. Ct. at 2370 (emphasis added). Instead, the *quid pro quo* element of Section 201 requires that a thing of value be given with the intent to *influence* an official act, 18 U.S.C. § 201(b)(1)(A), or be accepted in return for *being influenced* in performance of an official act, *id.* § 201(b)(2)(B). The same holds true for Section 666, which requires an "intent to influence." *Id.* § 666(a)(2). It is therefore consistent to define "official act" to require actual influence on the identified matter. Hence, the Supreme Court's explanation that "[s]imply expressing support" is not sufficient, but "exert[ing] pressure" or "provid[ing] advice knowing or intending such advice to form the basis for an 'official act'" is sufficient. *McDonnell*, 136 S. Ct. at 2371.

Lower courts have picked up on the requirement of actual influence. Thus, courts have held that *McDonnell*'s second prong is satisfied where, for example, an official pressured a prosecutor to make certain charging decisions, *Lee*, 919 F.3d at 354, or steered a contract award to a particular company, *Conrad*, 760 Fed. App'x at 207-08, because they influence the identified matter—that is, the

charging decision or administrative determination to award a contract. On the other hand, courts have held that the second prong was *not* satisfied where an official:

- offered to help navigate the city permit process, *United States v. Silver*, 864 F.3d 102, 120 (2d Cir. 2017);
- wrote a letter of recommendation on official letterhead on behalf of a particular individual, thereby using an official position to exert pressure on the hiring decision, *id.* at 120-21;
- publicly opposed an issue (the location of a clinic), *id.* at 122-23;
- attended a meeting with lobbyists prior to voting on legislation, *id.* at 123;
- met with military officials in effort to gain approval for testing of technology, *United States v. Jefferson*, 289 F. Supp. 3d 717, 736-37 (E.D. Va. 2017), or
- contacted another government agency, *Boyland*, 862 F.3d at 290.

Because the foregoing decisions or actions were not sufficiently influential on the underlying issue, they did not qualify as a decision or action *on* a "question, matter, cause, suit, proceeding, or controversy."

C. A Personnel Move Is Not an "Official Act" Under *McDonnell*.

The indictment alleges that Mr. Lindberg conspired to bribe the Commissioner "to take official action favorable to [Mr. Lindberg's] companies." Indictment ¶ 12. But the alleged official act—the transfer of Ms. Obusek—is not a "question, matter, cause, suit, proceeding or controversy," nor is it a decision or action *on* a "question, matter, cause, suit, proceeding, or controversy." *See McDonnell*, 136 S. Ct. at 2368. Thus, the indictment fails to allege an "official act."

More specifically, the indictment fails *McDonnell*'s first prong because a personnel move within an agency is not a "formal exercise of governmental power" akin to a "lawsuit, hearing, or administrative determination." *Id.* As alleged here, Mr. Lindberg requested that a particular official *not* be assigned to regulate his company. But there is very little difference between those allegations and the facts at issue in *McDonnell*. There, the Supreme Court held that setting up a meeting between

a constituent and an official capable of resolving a pending matter was not an official act. 136 S. Ct. at 2370. Thus, in *McDonnell*, the governor had, in essence, selected the *specific* official capable of deciding a constituent's request for official action on a pending matter—*i.e.*, the constituent's request that public universities conduct studies on the constituent's product. Here, Mr. Lindberg sought less than what was asked for in *McDonnell*—that anyone *other* than a particular official be given the authority to take official action on future matters. Under *McDonnell*, Mr. Lindberg's alleged request for a personnel move cannot qualify as akin to a lawsuit or administrative determination.

In any event, the indictment fails *McDonnell*'s second prong. Here, the government might be tempted to argue that the personnel move is a decision or action "on" a different matter—specifically, a decision on a periodic examination of Mr. Lindberg's company. But that argument would also fail. Under *McDonnell*, it is not enough that the personnel move be "*related* to a pending [or future] matter or question." 136 S. Ct. at 2370 (emphasis added). And the indictment does not come close to alleging that in making personnel moves, the Commissioner intended to exert pressure on officials of the Department of Insurance to achieve favorable regulatory outcomes for Mr. Lindberg's company. Nor does the indictment allege that the Commissioner provided advice, "knowing or intending such advice" to result in favorable treatment of Mr. Lindberg's company. In short, there is no indication that the personnel move was meant to corruptly influence the regulatory treatment of Mr. Lindberg's company, and it is therefore not an official act under *McDonnell*'s second prong. To the contrary, the indictment suggests—and the reality is—that Mr. Lindberg sought fairness, not favoritism. *See* Indictment ¶ 31 (alleging that Mr. Lindberg believed Ms. Obusek was "deliberately and intentionally and maliciously hurting" his reputation and "lying" about him).

II. The Indictment Fails Because It Does Not Support "Core" Bribery Within the Meaning of *Skilling*.

The indictment must be dismissed for an additional reason: It does not allege the type of conduct that qualifies as a "core" bribe or kickback scheme. *Skilling*, 561 U.S. at 409.

In *Skilling*, the Supreme Court limited Section 1343 to reach only the "paradigmatic cases of bribes and kickbacks." *Id.* at 411. At issue there was the conviction of Jeffrey Skilling, the former chief executive officer of Enron, for honest-services fraud. The government's theory was that Mr. Skilling had deprived Enron and its shareholders of honest services by misrepresenting the company's fiscal health. The Supreme Court disagreed. Even though Mr. Skilling had profited from the fraudulent scheme, he had not received anything of value from a third-party in exchange for making the misrepresentations. *Id.* at 413. The facts of *Skilling* therefore did not involve "prototypical" bribery, which was fatal to the government's case.

Skilling thus requires a payee and payor, and an exchange of value. *See id.* at 413 (finding no violation of Section 1346 because the defendant did not solicit or accept payments in exchange for defrauding Enron's shareholders). The upshot is that, in the context of honest-services fraud predicated on public bribery, the official act must benefit the payor.

But here, the benefit that Mr. Lindberg received from the alleged scheme is illusory because the indictment alleges a staffing change that is divorced from actual regulatory outcomes. To illustrate, this is not a case where a financially unstable company receives a regulatory pass in exchange for campaign donations. Rather, Mr. Lindberg was exercising his right to engage in political speech, to advocate for a robust yet fair regulatory environment for his company.

Thus, even if characterized as a bribery scheme, this case does not involve the type of "core" bribery that *Skilling* requires. The indictment is therefore legally deficient for this reason as well.

III. The Indictment Raises Significant Constitutional Concerns.

Over the years, the Supreme Court has repeatedly limited the scope of honest-services fraud based on concerns about potential constitutional infirmities. It first did so in *McNally*, holding that the mail- and wire-fraud statutes protected only tangible property rights—not the intangible right to honest services. 483 U.S. at 360. *McNally* was based on concerns that a broader construction of the

mail- and wire-fraud statutes could leave their "boundaries ambiguous" and involve the federal government in setting standards of "good government for local and state officials." *Id.*

Disregarding these concerns, Congress responded by enacting 18 U.S.C. § 1346, which clarified that, as used in the mail- and wire-fraud statutes, a scheme or artifice to defraud includes "the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7603(a), 102 Stat. 4181, 4508. This, in turn, invited the very concerns that the Court had previously hoped to avoid. *See Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of cert.) (questioning whether Section 1346, which Justice Scalia referred to as a "terse amendment," "qualifies as speaking 'more clearly' or in any way lessens the vagueness and federalism concerns that produced [the] Court's decision in *McNally*").

In response, the Court was required in *Skilling* to again limit the scope of honest-services fraud—this time to "core" bribery and kickbacks. 561 U.S. at 405-12. And once again, the Court did so out of concern that the statute was otherwise impermissibly vague. *See id.* By this point, the dialogue between Congress and the Supreme Court had been so extended that the Court offered Congress something unusual—unsolicited advice on the issues that it would have to address to criminalize undisclosed self-dealing. *Id.* at 411 n.44.

Still, the problems with the statute persisted, leading to *McDonnell*. By this point, the Court added the First Amendment to the list of constitutional infirmities it saw in adopting a broad construction of honest-services fraud. *McDonnell*, 136 S. Ct. at 2372.

Thus, by the time the Supreme Court decided *McDonnell*, it had identified three potential infirmities associated with prosecutions under the honest-services statutes: the First Amendment, federalism, and vagueness. Here, the indictment must be dismissed because it implicates all three.

First, a citizen has a right to petition the government, ask for changes, and make campaign contributions. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) ("When an individual

contributes money to a candidate, he exercises [the right to participate in the public debate through political expression and political association]"). And yet, the Government's prosecution of Mr. Lindberg will "cast a pall of potential prosecution" over citizens' demands for better representative government. *McDonnell*, 136 S.Ct. at 2372.

Two examples illustrate the problems with the government's theory. First, following the nomination of Brett Kavanaugh to serve as Associate Justice of the Supreme Court, competing organizations pledged millions of dollars in contributions to Senator Collins in exchange for her vote on now-Justice Kavanaugh's nomination. Eli Rosenberg, *Collins blasted 'dark money' groups in Kavanaugh fight. One just paid to thank her for her vote*, WASH. POST, Oct. 12, 2018, https://tinyurl.com/y6rkm2jh. Although these groups of constituents were simply using "money amassed from the economic marketplace to fund their speech," *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905 (2010), the Government's theory here raises serious concerns that they could be prosecuted for conspiring to commit federal honest-services fraud.

The second example involves the practice of patronage appointments, which Justice Powell described as grounded in more than "200 years of American political tradition." *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Powell, J., dissenting as to Part I). The Center for Public Integrity noted that, during his second term, President Obama "named 31 campaign 'bundlers'—supporters who raised at least $50,000 to fund his presidential campaigns—as ambassadors," and "[a]nother 39 of [President] Obama's second-term ambassadors [were] political appointees who either gave his campaign money or are known political allies." David Levinthal and Chris Zubak-Skees, *Barack Obama's Ambassador Legacy: Plum Postings for Big Donors*, Center for Public Integrity (Jan. 4, 2017), https://tinyurl.com/yyu4r9zo; *see also* Lauren Rosenblatt, *Trump's ambassador picks so far include the usual mix of rich donors and loyal supporters*, L.A. TIMES, July 13, 2017, https://tinyurl.com/y6g2jxt9 (explaining that, as of July 13, 2017, eighteen of President Trump's twenty-five appointments for ambassadorships

were so-called "political appointments" (individuals with personal ties to the President and no discernable foreign-policy experience) and "six are known to have made significant financial contributions to the Trump Victory Fund"); *cf.* Emily R. Siegel, *et al.*, *Donors to the Trump inaugural committee got ambassador nominations. But are they qualified?*, NBC NEWS, Apr. 3, 2019, https://tinyurl.com/y6nncfnb (explaining that, by April 3, 2019, President Trump had nominated fourteen political donors to ambassadorships). Under the government's theory, each one of these donors—and even the President of the United States—would be exposed to criminal liability based on the correlation between their donations and appointments. That's because the *quid pro quo* giving rise to criminal liability "need not be explicit," and it may be inferred. *McDonnell*, 136 S. Ct. at 2371.

There are sound policy reasons for regulating ethical behavior. But neither the Department of Justice nor the federal judiciary is empowered to do so absent an express authorization from Congress. Otherwise, as Justice Scalia recognized, honest-services fraud is "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of cert.).

Here, the indictment alleges that the Commissioner demanded, and Mr. Lindberg ultimately agreed to make, a campaign contribution in exchange for a personnel move. But from Mr. Lindberg's perspective, the deputy tasked with assessing his companies was incompetent. Indictment ¶ 31. It cannot be a federal crime to ask a State official—through both votes and campaign contributions—to staff matters with individuals who understand the technical and legal intricacies of what they are charged with evaluating.

Second, the prosecution of Mr. Lindberg "raises significant federalism concerns." *McDonnell*, 136 S. Ct. at 2373. In both *Skilling* and *McDonnell*, the Court expressed serious doubt about the federal government's authority to establish ethical practices for State and local governments. *See id.* ("States have 'the prerogative to regulate the permissible scope of interactions between state officials and their

constituents.'"); *see also Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of cert.) (noting the serious federalism concerns posed by allowing the federal government to "define the fiduciary duties that a town alderman or school board trustee owes to his constituents").

Yet that is precisely what the indictment purports to do here—set standards of ethical conduct related to the North Carolina Department of Insurance. Mr. Lindberg's conduct may appear unseemly to some not familiar with the full story, but it falls well short of offering a bribe in exchange for a favorable resolution on a matter or proceeding that may in the future be pending before a State agency. As the Second Circuit warned, "viewing something negatively is not the same as finding that the elements of a crime have been met." *Silver*, 846 F.3d at 121. And in addition to Mr. Lindberg's conduct, a significant issue in this case is the conduct of the Commissioner, who solicited Mr. Lindberg's campaign contribution and repeatedly inquired about it before agreeing to act upon Mr. Lindberg's claims that Ms. Obusek was biased and incompetent. *See* Indictment ¶¶ 31, 38, 46, 51, 56, 65, 69. It should be left to the State of North Carolina—not federal prosecutors—to determine whether the Commissioner's conduct comported with North Carolina's ethical standards. And it should be similarly left to the State of North Carolina to decide whether Mr. Lindberg's alleged role in responding to the Commissioner's repeated demands for donations constituted a crime.

Finally, the government's prosecution of Mr. Lindberg raises significant vagueness concerns. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

"Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement," the Supreme Court has recognized "that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature

establish minimal guidelines to govern law enforcement.'" *Id.* at 357-58. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* And that risk is heightened in the political sphere, because there is a real concern that prosecutors may use overly broad statutes to punish their political rivals or seek headlines in "pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of cert.).

But under the government's conception of federal bribery at issue here, "the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *McDonnell*, 136 S. Ct. at 2373. A union official, for example, could be prosecuted for advocating for an appointment to the local labor board if that advocacy was linked to a contribution from the union to the official who makes that appointment. That is because, as noted above, any claimed agreement between the union and the official "need not be explicit," and it may be inferred. *Id.* at 2371. Thus, under the government's theory, there is a real risk that the government could begin prosecuting individuals simply by pointing to a campaign contribution and a contemporaneous request for something short of a decision on a "cause, suit, proceeding or controversy."

The government cannot respond that it can be trusted to divine the line between what is lawful and what is not. The Supreme Court has emphatically rejected that approach, declining to adopt a broad construction of "a criminal statute on the assumption that the Government will 'use it responsibly.'" *Id.* at 2372-73 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Thus, in *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999), the Court "declined to rely on 'the Government's discretion' to protect against overzealous prosecutions under [18 U.S.C.] § 201, concluding instead that 'a statute in this field that can linguistically be interpreted to be either a meat

axe or a scalpel should reasonably be taken to be the latter.'" *McDonnell*, 136 S. Ct. at 2373 (quoting *Sun-Diamond*, 526 U.S. at 408, 412).

Absent strict adherence to the test that the Supreme Court laid down in *McDonnell* for defining an "official act," there is a real risk that the government's dubious theory for prosecuting Mr. Lindberg would chill elected officials from responding to the demands of their constituents. This includes the reasonable demand that only fair and competent officials should wield the powers of government.

CONCLUSION

For the foregoing reasons, the Court should dismiss in full the indictment of Mr. Lindberg under Federal Rule of Criminal Procedure 12(b)(3)(B)(v).

Dated: September 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2019, I electronically filed the foregoing Memorandum in Support of Motion of Greg E. Lindberg to Dismiss the Indictment for Failure to State an Offense with the Clerk of Court using the CM/ECF system which will send notification to counsel of record.

Dated: September 18, 2019

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