FILED
2018 Mar-16 PM 04:51
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	**Case 2:17-cr-00419-AKK-TMP**
	)	
JOEL IVERSON GILBERT	)	
STEVEN GEORGE MCKINNEY	)	
DAVID LYNN ROBERSON	)	

UNITED STATES' RESPONSE TO DEFENDANTS' JOINT MOTION TO DISMISS THE INDICTMENT

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SUMMARY

The defendants move to dismiss the Indictment on the theory that its factual allegations are insufficient to charge the defendants with the bribery scheme that underpins every charge they face. But the defendants' arguments depend on the wrong definition of "bribery," and their claims of legal innocence ultimately rest on questions of fact that cannot be settled on the face of the Indictment. Rather than give reason to cut this case short, the defendants' arguments underscore the need for a trial. The defendants' joint motion to dismiss the Indictment (Doc. 55) should be denied.

All of the charges here—bribery, honest-services fraud, conspiracy to commit those offenses, and conspiracy to commit money laundering—rest on proof of federal-program bribery under 18 U.S.C. § 666(a)(2). That statute makes it a crime to bribe a state agent in connection with state business or transactions worth at least $5,000. The Indictment charges the defendants with bribing Oliver L. Robinson, Jr., the state representative for District 58 in north Birmingham, to use his official position to pressure or advise federal and state environmental agencies on whether to expand and whether to raise the priority of a Superfund site near Robinson's district. Specifically, it alleges that, over a two-year period, the defendants paid Robinson nearly $360,000 for his support, using his non-profit foundation as a vehicle to launder their payments to him. In return, Robinson took a variety of

official actions to support their agenda. He helped move forward in the state legislature a resolution drafted by one of the defendants; he advocated for the defendants' positions in a meeting with the EPA, using bullet points they had drafted and secretly recording the meeting for them; and he met with a state environmental agency, urging them to narrow the list of parties responsible for the site's cleanup.

In the defendants' view, these allegations are insufficient to charge them with federal-program bribery because, as a matter of law, Robinson did not act in his official capacity when he took the actions described in the Indictment. The defendants start with the premise that federal-program bribery means the same thing as bribery under 18 U.S.C. § 201, the bribery statute applicable to federal officials. Accordingly, the defendants assume, the interpretation of Section 201's "official act" element that the Supreme Court adopted in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), carries over to Section 666 and to honest-services fraud charges that depend on it. Under *McDonnell*, the defendants conclude, the Indictment must be dismissed because it does not allege that the defendants paid Robinson to vote on binding legislation. Instead, the defendants supposedly hired Robinson's foundation to engage in constitutionally protected issue advocacy.

Every step of the defendants' argument is invalid. *First*, the statutory definitions of Section 201 bribery and Section 666 bribery are markedly different, with Section 666 omitting any reference to "official act." In *United States v. McNair*,

605 F.3d 1152 (11th Cir. 2010), the Eleventh Circuit recognized that Section 666 does not require proof of an official act, and *McDonnell* did not abrogate *McNair*.

Second, even if *McDonnell* did inform the statutory interpretation of Section 666, it still would not require the government to allege that Robinson engaged in any specific official acts, however defined. Section 666(a)(2) does not require the government to allege a *quid pro quo* between an illicit payment and a specific official act. The relevant inquiry is not what Robinson actually did for the defendants' payments, but why the defendants paid him in the first place. Read in the light most favorable to the government, the facts in the Indictment allege that the defendants bribed Robinson to secure a comprehensive level of influence over his exercise of his official duties—a level of influence that would extend to any official acts should the opportunity arise.

Third, the Indictment does allege that Robinson committed "official acts" under the definition set forth in *McDonnell*. Robinson's actions for the defendants go well beyond the simple arrangement of meetings or the hosting of events that the Supreme Court excluded from the definition of "official act." His vote on a resolution in the legislature certainly was an official act. So too was Robinson's advocacy before the EPA and state environmental agencies, for the Supreme Court has long recognized that legislators' official duties are not limited to their exercise of legislative power but also include their advocacy before executive agencies.

Finally, the defendants' other challenges to the Indictment cannot prevail. Their claim that Robinson was not an agent of the state is defeated by the plain language of Section 666. Their assertion that the First Amendment protected their conduct rests on factual assumptions at odds with the allegations in the Indictment. And the defendants' arguments based on the rule of lenity are foreclosed by *McNair*.

FACTUAL ALLEGATIONS

At the time of the events alleged in the Indictment, two decisions were pending before the EPA that directly implicated the defendants and their interests. First, in July 2014, the EPA decided to consider expanding the Birmingham-area 35th Avenue Superfund Site to two new areas of north Birmingham, Tarrant and Inglenook. Indictment ¶ 8. Second, in September 2014, the EPA proposed adding the site to the National Priorities List, a listing of the nation's Superfund Sites requiring priority attention. *Id.* ¶ 10. The EPA's consideration of these two specific proposed actions continued into 2016. *Id.* ¶ 12.

The defendants had a keen interest in ensuring that the EPA decided against either action. Defendant David Roberson worked as a lobbyist at Drummond Company, and the EPA had identified the ABC Coke division of Drummond as a company "potentially responsible for the pollution in north Birmingham," and therefore potentially responsible for "tens of millions of dollars in cleanup costs and fines." *Id.* ¶¶ 2, 7. Defendants Joel Gilbert and Steve McKinney were partners at

Balch & Bingham who represented Drummond in "respond[ing]" to the EPA's "actions," including "by working to prevent EPA from listing the 35th Avenue Superfund Site on the National Priorities List and expanding the Superfund site into Tarrant and Inglenook." *Id.* ¶¶ 1-2, 14.

As part of their strategy, the defendants paid Robinson, a state representative whose district was adjacent to Tarrant and Inglenook, to take official action favorable to the defendants' interests in matters related to EPA's actions in north Birmingham. *Id.* ¶ 14. Robinson operated several for-profit and non-profit entities and, in November 2014, the defendants discussed entering into a contract with one of the entities. *Id.* ¶ 31. Balch would sign the contract, pay Robinson's organization, and invoice Drummond for the same amount. *Id.* ¶¶ 25-26. The defendants then discussed Robinson's appearing before the Alabama Environmental Management Commission (AEMC)—the state commission responsible for setting Alabama environmental policy and for overseeing the Alabama Department of Environmental Management (ADEM)—to publicly pressure and advise the AEMC and ADEM to take a position favorable to Balch and Drummond. *Id.* ¶ 31.

In December 2014, Robinson told Gilbert that "we will need $7000 per month," and that payments should go "to the Oliver Robinson Foundation. It was decided the Foundation is best because all types of corps support [Robinson's] foundation." *Id.* ¶ 35. A few hours later, Gilbert informed Robinson that Drummond

had approved his request. *Id.* ¶ 37. One day later, Robinson met with and advised EPA officials on the "issues related to north Birmingham." *Id.* ¶¶ 38, 64. In preparation for the meeting, Gilbert gave Robinson "a list of talking points consistent with" the defendants' position on the EPA actions, and "instructed him to secretly record the meeting." *Id.*

In early February 2015, Gilbert and McKinney met to discuss an upcoming AEMC meeting that they wanted Robinson to attend. *Id.* ¶ 42. Gilbert and his associate drafted a letter for Robinson's signature, requesting permission for the appearance. *Id.* ¶ 43. Robinson printed the letter on his official letterhead, signed it, and, in the letter, explained that, "As a state legislator and representative of a district adjacent to the North Birmingham superfund site, it is my duty to ensure that the North Birmingham community is adequately represented to relevant State organizations such as AEMC." *Id.* ¶ 43.

Afterwards, Robinson told Gilbert "he needed to think about the politics of it before he would commit to providing comments to the AEMC," and Gilbert asked Roberson to "follow[] up with [Robinson] on this issue." *Id.* ¶ 44. Gilbert then drafted a contract between Balch and Robinson; requested that Balch's accounting department write a $14,000 check to the Foundation; obtained McKinney's approval for that request; and invoiced Drummond for the same amount. *Id.* ¶¶ 50-52. Two days after that, Gilbert gave Robinson the $14,000 check, and the two signed the

agreement, which mandated that even its "existence" be kept "confidential" by Robinson. *Id.* ¶ 54.

Four days later, Robinson appeared at the AEMC meeting. *Id.* ¶ 58. There Robinson pressured and advised AEMC and the ADEM Director to take and maintain a position on behalf of the State of Alabama favorable to the defendants' interests on the two proposed EPA actions—listing the Superfund Site on the National Priorities List, and expanding it into Tarrant and Inglenook. *Id.* ¶ 64. At the meeting, Robinson stated that he was "really here today to try to protect the residents of north Birmingham," and that the AEMC should help narrow the list of potentially responsible parties if no reports or tests implicated them. *Id.* ¶ 58.

A few months later, Gilbert wrote a Joint Resolution for consideration by the Alabama Senate and House of Representatives urging "the Attorney General and ADEM to combat the EPA's overreach." *Id.* ¶ 60. Robinson, a member of the House Rules Committee, voted in committee to send the resolution to the floor of the House with the recommendation that the resolution be adopted. *Id.*

In mid-2015, Gilbert took further steps to conceal the arrangement among Balch, Drummond, and the Foundation, telling Balch's accounting department to remove references to the Foundation in its past invoices to Drummond and to avoid references to the Foundation in its future invoices. *Id.* ¶ 61.

ARGUMENT

The Indictment sufficiently alleges federal-program bribery. The "sufficiency of a criminal indictment is determined from its face." *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). An indictment is sufficient if it "contain[s] the elements of the offense intended to be charged, and sufficiently apprise[s] the defendant of what he must be prepared to meet." *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006) (internal quotation marks omitted). A court may not make a "pre-trial determination of sufficiency of the evidence"; there "is no summary judgment procedure in criminal cases." *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004) (internal quotation marks omitted). Indeed, on a motion to dismiss, a court may not "look[] beyond the face of the indictment" even to consider "facts proffered by the *government*." *Critzer*, 951 F.2d at 307-08 (emphasis added). The indictment's factual allegations are taken to be true and are read in the

light most favorable to the government. *See United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987).[1]

The Indictment is sufficient on its face. It "charges [each offense] in the language of the statute," *Critzer*, 951 F.2d at 307, identifies the elements of those offenses, and makes ample factual allegations to apprise the defendants of the charges they will face at trial. The defendants' contrary arguments disregard the language and elements of the statutes charged, and depend on factual assertions that are inconsistent with the Indictment, wrong, and, at this stage, premature.[2]

[1] Thus, the defendants here have a heavier burden than did the defendants in the cases that form the basis for the "official act" arguments in the Motion to Dismiss. *See* Def. Mot. 10-23 (discussing *McDonnell*, *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008), and *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017)). The defendants in those cases successfully challenged their jury instructions, and their convictions were overturned because of the possibility that their juries convicted them for lawful conduct. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2374. But as long as an indictment states an offense when read in the light most favorable to the government, it is sufficient notwithstanding the possibility of contrary interpretations.

[2] This brief addresses the defendants' objections to Counts Two, Three, Four, and Five of the Indictment—the federal-program bribery and honest-services wire fraud charges. The brief does not separately address Counts One and Six, because the defendants make no freestanding objections to those counts. The defendants only note (at 9 n.2) that Counts One and Six are "derivative" of the other counts, and fall if the others fall.

I. The Indictment States the Offenses of Federal-Program Bribery and Honest-Services Wire Fraud

A. Federal-Program Bribery

Count Two of the Indictment charges the defendants with federal-program bribery in violation of 18 U.S.C. § 666(a)(2). A person violates this provision if he:

> corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

18 U.S.C. § 666(a)(2); *see also McNair*, 605 F.3d at 1186 (defendants violated the statute if "(1) they gave to a [state agent] anything of value; (2) with the corrupt intent to influence or reward [that agent]; (3) in connection with any business, transaction, or series of transactions of [the state] involving anything of value of $5,000 or more").

An exercise of Congress's power under the Spending Clause, Section 666 was enacted to protect federal funds from bribery at the state and local level after Section 201 "had proven inadequate to the task" in the wake of lower court decisions limiting Section 201 to federal officials. *Sabri v. United States*, 541 U.S. 600, 606 (2004). Rather than amend Section 201, or create a substantially similar offense applicable to state and local officials, Congress defined an entirely new crime, one written in "expansive, unqualified language," *Salinas v. United States*, 522 U.S. 52, 56 (1997),

"to 'protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.'" *Sabri*, 541 U.S. at 606 (quoting S. Rep. No. 98–225 at 370 (1983)).

In *McNair*, the Eleventh Circuit further distinguished Section 666(a)(2) from Section 201. While Section 201(b) "requires that a bribe be given or received to influence an 'official act' or 'in return for' an 'official act,'" Section 666 does not require proof "that a specific payment was solicited, received, or given in exchange for a specific official act." *Id.* at 1188. "The intent that must be proven is an intent to corruptly influence or to be influenced 'in connection with any business' or 'transaction,' not an intent to engage in any specific *quid pro quo*." *Id.* Section 666, the court said, "sweeps more broadly than either § 201(b) or (c)." *Id.* Rather than use the term "official act," Section 666 uses the term "any business, transaction or series of transactions." *Id.* Rather than "say 'in return for' or 'because of,' [Section 666] says 'in connection with.'" *Id.*

The Indictment properly alleges that the defendants committed Section 666 bribery. It "tracks the language of the statute and provides a statement of facts that gives notice of the offense to the accused." *Id.* at 1186; *see* Indictment ¶¶ 63-64. The Indictment alleges that the defendants "corruptly gave, offered, and agreed to give a lucrative contract and monthly payments to the Oliver Robinson Foundation intending to influence and reward Representative Oliver L. Robinson for using his

official position to" take official action on their behalf, regarding specific EPA proposals they opposed. Indictment ¶ 64. The Indictment further alleges three specific actions Robinson took. He "pressure[d] and advise[d] AEMC to take and maintain a position on behalf of the State of Alabama" in relation to proposed EPA actions. *Id.* He "me[t] with and advise[d] EPA officials" to take that same position. *Id.* And he voted to send an anti-EPA resolution authored by defendant Joel Gilbert to the floor of the Alabama House "with the recommendation that the resolution be adopted." *Id.*

The Indictment thus states the offense of Section 666 bribery.

B. Honest-Services Wire Fraud

The Indictment adequately alleges honest-services wire fraud for similar reasons. Counts Three, Four, and Five of the Indictment charge the defendants with honest-services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. As clarified in *United States v. Skilling*, 561 U.S. 358 (2010), this crime occurs where a person devises or intends to devise a "scheme or artifice to defraud" others "of the intangible right of honest services," 18 U.S.C. § 1346, through "bribes or kickbacks," *Skilling*, 561 U.S. at 412, and uses an interstate wire transmission "for the purpose of executing such scheme or artifice," 18 U.S.C. § 1343. An honest-services wire fraud prosecution after *Skilling* therefore rests on, and "draws content" from, a bribery or kickback offense defined elsewhere in federal law. *Skilling*, 561 U.S. at 412. Here,

Section 666, the bribery statute charged in the Indictment, is the statute that gives content to the Indictment's honest-services wire fraud counts.

The Indictment properly pleads these counts. It charges in the language of the statute, *see* Indictment ¶¶ 66-69, and, consistent with *Skilling*, makes clear that the predicate for the honest-services counts is "bribery" as alleged in Count Two, *id.* ¶ 66. The Indictment also puts the defendants on notice of the particular executions of the fraud scheme charged in Counts Three, Four, and Five: specifically, the three "Balch & Bingham checks described [in paragraph 69], payable to the Oliver Robinson Foundation, [and] deposited into the Oliver Robinson Foundation account at Regions Bank." *Id.* ¶ 68.

The Indictment thus states the offense of honest-services wire fraud.

II. *McDonnell* Does Not Bar This Prosecution

The defendants' principal contention is that "the government must show that [they] paid a public official in exchange for 'official action'" as defined under Section 201 and *McDonnell v. United States*. Def. Mot. 10. Yet in seeking to export the requirements of Section 201 to Section 666, the defendants do not address *McNair* or grapple with the statutory text of Section 666. *Cf. id.* at 23 (asserting that, while Section 666 "uses different words," it "targets the same basic misconduct" as Section 201). Nothing in *McDonnell* allows them to surmount those hurdles. And,

in any event, Robinson's actions for the defendants do meet *McDonnell*'s definition of "official act."

A. *McDonnell* and Section 201

In *McDonnell*, the Supreme Court addressed the meaning of "official act" for purposes of Section 201 bribery. 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.

18 U.S.C. § 201(a)(3). Former Virginia Governor Robert McDonnell stood trial for Hobbs Act extortion and honest-services fraud after he accepted roughly $175,000 in loans, gifts, and benefits from, and helped set up meetings and events for, an owner of a pharmaceutical business who wanted the state to sponsor research studies for a new drug. *McDonnell*, 136 S. Ct. at 2361. The government and Governor McDonnell agreed that the jury had to find he committed "official acts" under Section 201 to be convicted. *Id.* at 2365.

Although it considered Governor McDonnell's actions "distasteful" or "even worse than that," the Supreme Court vacated Governor McDonnell's convictions because the jury instruction for "official act" had been too broad. *Id.* at 2375. The Court specified that the "question, matter, cause, suit, proceeding or controversy" provision of Section 201(a)(3) had to involve "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," "something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.* at 2372 (quoting 18 U.S.C. § 201(a)(3)). In addition, "the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so." *Id.*

The definition of "official act" does not include "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more." *Id.* at 2372. But it does include, for example, a public official's "decision or action to initiate a research study—or a decision or action on a qualifying step, such as narrowing down the list of potential research topics"; or a statement of support at a meeting with the intent "to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'" *Id.* at 2370-71.

B. *McDonnell* Does Not Require Proof of an Official Act in a Section 666 Case

In *McNair*, the Eleventh Circuit declared that, although "many § 666 bribery cases will involve an identifiable and particularized official act, . . . that is not required to convict." 605 F.3d at 1188. This remains true after *McDonnell*.[3] *See,*

[3] The contrary authority cited (at 24) by the defendants, *Waste Mgmt. of La. LLC v. River Birch, Inc.*, 2017 WL 3279455 (E.D. La. Aug. 2, 2017), discusses *McDonnell* and Section 666 in the context of quashing a subpoena in a civil case where the plaintiffs alleged that the defendants conspired to violate Section 666. But that case

e.g., *United States v. Boyland*, 862 F.3d 279, 290-91 (2d Cir. 2017) ("We do not see that the *McDonnell* standard applied to" defendant's federal-program bribery counts because Section 666 "is more expansive than [Section] 201[.]"); *United States v. Porter*, 2017 WL 1095040, at *3 (E.D. Ky. Mar. 22, 2017) (*McDonnell* did not create an "official-act" requirement for purposes of Section 666); *see also* Eleventh Cir. Pat. Jury Inst. (Crim.) O24.2 cmt. ("Depending upon the facts of a particular case, *McDonnell* could be applicable to a § 666 prosecution."). Indeed, *McDonnell* did not even hold that the offenses at issue in the case, Hobbs Act extortion and honest-services fraud, categorically required proof of an official act; instead, the term became part of the case after the parties agreed to use it in the jury instructions. *See* 136 S. Ct. at 2365; *see also United States v. Percoco*, 2017 WL 631416, at *4 (S.D.N.Y. Dec. 11, 2017) ("*McDonnell* in no way states or implies that all federal bribery statutes that implicate the conduct of government officials are *required* to have such an element to be constitutional. The Court clarified the definition in section 201(a)(3) because the parties had elected to use that statutory definition.")

As noted above, after its experience with Section 201 prosecutions, Congress chose to create a separate bribery offense for state and local officials, one that

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relies on *McDonnell* only for the proposition that "public officials should not be subject to prosecution under the law without fair notice," not to argue that "official acts" are elements of Section 666 offenses. *Waste Mgmt.*, 2017 WL 3279455, at *5.

forgoes use of the term "official act." *See Salinas*, 522 U.S. at 58-59; *Sabri*, 541 U.S. at 606; *McNair*, 605 F.3d at 1188. *McDonnell* does not discuss Section 666 or identify any reason to downplay the considerable differences in the statutory text and purpose between Section 201 and Section 666 identified in *Salinas*, *Sabri*, and *McNair*.

Nor does Section 666 raise the constitutional concerns about vagueness and federalism that guided the Supreme Court's statutory interpretation of "official act." *See McDonnell*, 136 S. Ct. at 2372. The Supreme Court worried about the consequences for criminal defendants and state politics if the federal government had the authority to prosecute state politicians for accepting anything "from a campaign contribution to lunch" and, in exchange, doing anything "from arranging a meeting to inviting a guest to an event." *Id.* But Section 666's closest analog to "official act"—the requirement that an agent be influenced "in connection with any business, transaction, or series of transactions"—does not allow for prosecutions based on *de minimis* conduct. Instead, the business or transactions must "involv[e] anything of value of $5,000 or more," 18 U.S.C. § 666(a)(2), and must be "of [an] organization, government, or agency" that receives more than $10,000 annually in federal funds, *id.* § 666(b). *See also United States v. Nelson*, 712 F.3d 498, 507-510 (11th Cir. 2013) (rejecting as-applied vagueness challenge to Section 666). And unlike the offenses at issue in *McDonnell*, Section 666 was designed specifically to

target corruption at the state level. As such, the Supreme Court has already upheld the statute as a necessary and proper exercise of Congress's Spending Clause power, and rejected the notion that it imposes "unduly coercive" or "impermissibly sweeping" conditions on the states, or otherwise infringes upon state sovereignty. *See Sabri*, 541 U.S. at 605-608 (rebuffing defendant's attacks on Section 666 under the unconstitutional-conditions doctrine, *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)).

C. *McDonnell* Does Not Require That a Section 666 Indictment Allege Specific Official Acts

Regardless of whether *McDonnell* affects the proof required for a federal-program bribery conviction, it does not require the government to allege specific official acts in the Indictment. As noted, *McNair* held that Section 666 prosecutions do not need proof of a *quid pro quo* for any specific action. *See* 605 F.3d at 1188 ("[T]he government is not required to tie or directly link a benefit or payment to a specific official act[.]"); *United States v. Langford*, 647 F.3d 1309, 1331 (11th Cir. 2011). Instead, they require proof of a "corrupt" intent—"dishonestly seeking an illegal goal or a legal goal illegally"—and a defendant could thus violate the statute by paying a public official for "a future, as yet unidentified favor." *McNair*, 605 F.3d at 1188.

Similarly, *McDonnell* itself explained that, for Section 201 prosecutions predicated on an agreement to perform an official act, "the public official need not

specify the means that he will use to perform his end of the bargain," and need not actually intend to perform an "official act" in return, so long as he received the "thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." 136 S. Ct. at 2371. To determine the existence of an agreement, the "jury may consider a broad range of pertinent evidence, including the nature of the transaction." *Id.* While not necessarily official acts themselves, an official's "setting up a meeting, hosting an event, or making a phone call . . . on a question or matter that is or could be pending before another official" could still "serve as evidence" of an agreement to perform official acts. *Id.*

Even if *McDonnell* covered Section 666 cases, then, the Indictment alleges what it must. The defendants paid Robinson with the "corrupt[] . . . inten[t] to influence and reward [him] for using his official position" to take official actions on two specific pending agency determinations. Indictment ¶ 64. The Indictment provides ample factual support for that allegation. To take one example, the Indictment alleges that the defendants finalized their contract with Robinson's foundation, and made their first, $14,000 payment, just days before the AEMC meeting in February 2015 that the defendants wanted Robinson to attend but where he had expressed reservations over the "politics" of providing comments. *Id.* ¶¶ 42-58. The Indictment also alleges that the defendants, aware that their arrangement with Robinson was illegal, sought to conceal it. They routed payments to the Oliver

Robinson Foundation through Balch, and defendant Joel Gilbert told Balch's accounting department to stop "referenc[ing] the Oliver Robinson Foundation on invoices sent to Drummond Company," and "to remove references to the Oliver Robinson Foundation on the two invoices" that Balch had already sent. *Id.* ¶ 61. The defendants' concealment illuminates their intent. The "corrupt usually don't advertise their corrupt ways," and " 'the extent to which the parties . . . conceal their bribes is powerful evidence of their corrupt intent.' " *United States v. White*, 663 F.3d 1207, 1214 (11th Cir. 2011) (quoting *McNair*, 605 F.3d at 1197).

D. The Indictment Alleges Official Acts

The defendants are wrong not only that the Indictment needs to allege official acts, but also that the Indictment fails to do so.

First, the Indictment alleges a pending "question, matter, cause, suit, proceeding, or controversy." In *McDonnell*, the Supreme Court defined this set of terms as a "formal exercise of governmental power," such as a "determination before an agency." *McDonnell*, 136 S. Ct. at 2372. During the events alleged in the Indictment, two such determinations were pending before the EPA: whether to "expand the 35th Avenue Superfund Site into the Tarrant and Inglenook areas of north Birmingham," and whether to "add[] the 35th Avenue Superfund Site to the National Priorities List, a listing of the nation's Superfund Sites requiring priority attention." Indictment ¶¶ 8, 10. During that same timeframe, the determination of

how Alabama would respond to these EPA proposals was before a state agency, ADEM, and the state commission (AEMC) that oversees it. *See id.* ¶¶ 9, 11, 12.

Second, the Indictment alleges that Robinson took action on these agency determinations. In *McDonnell*, the Supreme Court made clear that a "public official may . . . make a decision or take an action . . . by using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." 136 S. Ct. at 2372. The Indictment alleges at least one official act that Robinson performed himself: he took a vote. Indictment ¶ 60. The Indictment also alleges at least two ways in which Robinson used his official position to pressure or advise other officials to perform an official act: he met with EPA officials, *id.* ¶ 38, and he appeared before the AEMC to advocate for the defendants' position, asking AEMC to narrow the list of parties responsible for any cleanup, *id.* ¶¶ 22-23, 31, 42-49, 54, 56-59.[4]

The defendants' attempts to relegate these actions to the realm of legally protected "advocacy" are misplaced. Factually, the defendants' claims are wrong; the Indictment alleges, and the evidence at trial will show, that Robinson was paid

[4] The defendants claim that, in addition to these three "categories of 'official action,'" the Indictment "identifies" a fourth: Robinson's communication to north Birmingham residents that he opposed the EPA's actions. Def. Mot. 8. But the Indictment identifies that conduct as an "overt act" in furtherance of the conspiracy—not an "official action" Robinson took. *See* Indictment ¶ 62.

to use his official position to influence other officials, not to engage in protected issue advocacy. To the extent the defendants assert (at 20) that Robinson could not have been paid to pressure and advise ADEM and AEMC because they had already stated their opposition to the EPA's plans, the evidence at trial will show that the defendants wanted to use Robinson's support to intensify the level of Alabama's opposition. In any event, the defendants' view of the evidence has no bearing on the sufficiency of the Indictment or their motion to dismiss it.

Legally, the defendants' arguments are also wrong: the Indictment properly alleges that Robinson's vote was an official act, and that he pressured and advised agency officials to take action on the defendants' behalf.

1. Robinson's Vote Was Official Action

The Indictment alleges that Robinson took a vote to send a resolution—authored by Gilbert, and favorable to the defendants' position on proposed EPA actions in north Birmingham—out of committee to the floor of the Alabama House, with a recommendation that it be adopted. Indictment ¶ 60. The defendants assert (at 20-21) that this vote could not be "official action" because the "non-binding" resolution did not make law. But a legislator's vote on a matter before his own legislative body "clearly remains an 'official act' under *McDonnell*." *Silver*, 864 F.3d at 108, 120; *see also United States v. Stevenson*, 660 F. App'x 4, 7 n.1 (2d Cir. 2016) (under *McDonnell*, "[p]roposed legislation is necessarily a matter brought

before a public official," and "a legislator who proposes legislation undoubtedly takes an action on the matter"). In *Silver*, a case on which the defendants themselves rely (at 17-19), the Second Circuit recognized that a vote even on a symbolic "official proclamation commending [the alleged briber]" is "clearly" an "official act." *Silver*, 864 at 120.

The defendants also argue (at 21-22) that the vote could not have been an "official action" because the Indictment fails to allege that the defendants paid Robinson a specific *quid* for this specific *quo*. But as discussed above, that argument imposes a burden that *McDonnell* does not, and would do away with the well-accepted proposition that bribery can happen by putting a public official on retainer with the understanding that the public official will "exercise particular kinds of influence" or "do certain things connected with his office *as specific opportunities arise*." *United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017) (emphasis added and citations and internal quotation marks omitted). *McDonnell* did nothing to disturb this theory, which targets bribery in its most egregious forms—pervasive corruption that involves more than a single gift or act and can span months or years. *See Percoco*, 2017 WL 6314146, at *4 (rejecting argument that *McDonnell* "overruled the 'as-opportunities-arise' or 'retainer theory' of bribery").

2. Robinson Pressured and Advised Agency Officials

The Indictment alleges that Robinson "pressure[d] and advise[d] AEMC and the ADEM Director to take and maintain a position favorable to" the defendants "in relation to" two determinations pending before the EPA, and that Robinson "me[t] with and advise[d] EPA officials" to do likewise. Indictment ¶ 64. Robinson even asked AEMC to help "narrow" the list of potentially responsible parties for Superfund site cleanup if no reports or tests implicated them, *see id.* ¶ 58—action that *McDonnell* specifically identified as an "official act." *See* 136 S. Ct. at 2370 (an "official act" includes a "decision or action on a qualifying step, such as narrowing down the list of potential research topics").

The defendants argue that Robinson could not have pressured or advised either category of officials "because he had no control over what these agencies would do." Def. Mot. 16. But such control is not necessary. Indeed, in the ordinary case, acting in an advisory capacity normally implies a lack of control. *See, e.g.*, *E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287-88 (11th Cir. 2004) ("[T]here is no indication . . . [the EEOC] served in anything other than an advisory capacity to the plaintiffs. The EEOC's representatives did not . . . exert any control over the plaintiffs' decisions."). Nor did the Court in *McDonnell* impose any such control requirement. Instead, it explained that, "if a public official uses his official position to provide advice to another official, knowing or intending that such advice

will form the basis for an 'official act' by another official, that too can qualify as a decision or action." *McDonnell*, 136 S. Ct. at 2370 (citing *United States v. Birdsall*, 233 U.S. 223, 234 (1914)).

A legislator's advocacy before an executive agency can so qualify. Legislators commonly use their official position to provide advice to agencies intending to spur action by another official. In the "realities of the American political system," advocacy before agencies is one of the "many non-legislative activities [that] are an established and accepted part of the role of a" legislator. *United States v. Brewster*, 408 U.S. 501, 512, 524 (1972). Legislators "are constantly in touch with . . . administrative agencies—they may cajole, and exhort with respect to the administration of a . . . statute." *See Gravel v. United States*, 408 U.S. 606, 625 (1972). Such advocacy can cross federal-state lines. *See United States v. Biaggi*, 853 F.2d 89, 99 (2d Cir. 1988) (Congressman's calls to New York City officials were official acts even though they were "directed toward local rather than federal officials"). Whether such advocacy constitutes official action is often a fact-bound inquiry for a jury to decide. *See id*. at 98 (relying on trial testimony to evaluate status of defendant's actions).

Accordingly, courts since *McDonnell* have recognized that "*McDonnell* did not limit the scope of 'official act'" for legislators to exercises of legislative power. *United States v. Menendez*, --- F. Supp. 3d ----, 2018 WL 526746, at *7 (D.N.J. Jan.

24, 2018). In a recent decision in the prosecution of New Jersey Senator Robert Menendez, for example, the court recognized that a legislator can take official action by pressuring or advising officials in the executive branch. *Id.* The court found that the government had presented evidence at trial that Senator Menendez had done just that. He "by phone call or by correspondence interceded with appropriate State Department officials to obtain favorable consideration of visa applications made by [the alleged briber's] friends." *Id.* at *6. He "ma[de] personal phone calls to officials in the Department of Health and Human Services, which has overall direction of Medicare policy, and me[t] with the then-secretary of that agency in August 2012," to try to obtain "a favorable ruling or decision for [the alleged briber]." *Id.* And he "sought through meetings with various State Department officials, including those of ambassadorial rank, to pressure or advise them to take official action which would be beneficial to his friend's contract." *Id.* All of this was evidence "from which a rational juror could conclude [that] official acts arise." *Id.* at *5.[5]

In *Boyland*, the Second Circuit recognized *McDonnell* errors in the jury instructions for a New York state legislator convicted of honest-services fraud and Hobbs Act extortion. 862 F.3d at 291-92. But the court held that the errors were harmless in light of the overwhelming evidence that the legislator had pressured and

[5] Although Senator Menendez sat on Senate committees with oversight of the State Department and HHS (*see* https://ballotpedia.org/Bob_Menendez), the opinion did not identify that fact as a factor in its conclusion.

advised officials in other agencies to approve various decisions to secure grant money, award contracts, and enact zoning changes. *Id.* The court grounded its decision partly on evidence that the defendant had "provid[ed] letters" to an agency that "vouch[ed]" for one briber's character, "expressed" support for proposed permits, and "request[ed]" that the agency "grant them expeditiously." *Id.*

Likewise, in *United States v. Fattah*, a district court found that U.S. Congressman Fattah had exerted pressure on, and advised, the President and a U.S. Senator to appoint a friend as ambassador, even though "as a Congressman he had no role in the naming of ambassadors." 223 F. Supp. 3d 336, 362 (E.D. Pa. 2016). In *United States v. Williams*, a court upheld an indictment alleging that the Philadelphia district attorney had pressured and advised federal officials at the Department of Homeland Security to limit security screenings for one briber, and had written a letter to agency officials in another state for a different briber. 2017 WL 2713404, at *4 (E.D. Pa. June 13, 2017).

And in *United States v. Lee*, a district court upheld the sufficiency of an indictment against a county councilwoman alleging she had sought to influence several matters, including whether a federal agency would elect to pursue federal criminal charges against an individual, and whether a state commission would issue a liquor license. 2016 WL 7336529, at *3 (N.D. Ohio Dec. 19, 2016). The court rejected arguments that the defendant could not "advise" officials over whom she

had no advisory role, and could not "pressure" officials over whom she exerted no coercive authority or leverage. *Id.* As the court noted, *McDonnell* does not draw those artificial lines. *Id.*

Nor does *McDonnell*'s use of the words "pressure" and "advise" carry the technical definitions that defendants ascribe to it. *See United States v. Stitt*, 860 F.3d 854, 878 (6th Cir. 2017) (en banc) (Sutton J., dissenting) (warning of "the mistake of reading an opinion (in truth part of an opinion) like a statute"). As to "pressure," the defendants claim that the Second Circuit's decision in *Silver*, combined with the First Circuit's decision in *United States v. Urciuoli*, 513 F.3d 290 (2008), limit the term to "deliberate exploitation of official powers." Def. Mot. 16-17 (emphasis removed). They do not. In *Urciuoli*, an honest-services fraud case that predated not only *McDonnell* but also *Skilling*, the court "wrestled" with how to cabin the reach of "honest services," a statute that at the time still "prohibit[ed] influence-buying short of formal bribes." 513 F.3d at 294. The court in *Urciuoli* did not purport to define the outer bounds of the term "official action."

Urciuoli is also easily distinguished on its facts. There, the court held that a part-time Rhode Island legislator could not be found guilty of honest-services fraud for "contact[ing] mayors and other local officials urging them to comply with Rhode Island law" on a particular issue—action that Rhode Island law *permitted* the legislator to take "openly for pay." *Id.* at 294-95. Here, Robinson was not paid to

urge compliance with state law, but instead to urge state and federal agency officials to take a particular position on specific pending agency determinations.

Moreover, what Robinson was paid to do—and what defendants paid him to do—Alabama law does not permit. *See* Ala. Const. Art. IV § 79 (prohibiting legislators from soliciting bribes for their "vote[s]," "official influence," or influence on "official action"); *id.* § 80 (prohibiting persons from bribing legislators to "influence [them] in the performance of any of [their] public or official duties"); Ala. Code § 36-25-1.1 ("No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency."); *id.* § 36-25-5(a) (prohibiting a legislator from using his "official position or office to obtain personal gain for himself"); *id.* § 36-25-7(a) (prohibiting a person from offering a bribe to a public official "for the purpose of corruptly influencing official action"); *id.* § 36-25-23(a) (prohibiting a "public official" from "represent[ing] a client . . . before any legislative body or any branch of state or local government, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof").

Silver does not aid the defendants, either. The Second Circuit there vacated New York legislator Sheldon Silver's conviction because the jury was not instructed

in accordance with *McDonnell*, and it could not "conclude, beyond a reasonable doubt, that the jury would have found that [Silver's actions] . . . met the definition of 'official act' as defined in *McDonnell*." 864 F.3d at 121. The court did not say, however, that the acts in question—including writing a briber a letter on official letterhead offering to "help navigate the process [of obtaining city permits] if needed," and writing a letter to a local non-profit on behalf of the briber's son—could *not* constitute "official action." *Id.* at 119-20.

As for "advice," the defendants' proposed definition (at 18-19)—advice given by someone whose "official role" is to provide it, to someone who would "necessarily rely" on it—finds no support in the law. *McDonnell* does not create such a limitation, and the defendants apparently find it only in the facts—not holding—of a case that *McDonnell* cited. *See* Def. Mot. 18-19 (describing facts of *Birdsall* and stating that those facts "inform[] *McDonnell*'s holding"). The Court in *McDonnell* used *Birdsall* to illustrate "advice" that would constitute "official action," not to define the boundaries of that term.

Indeed, the Court in *McDonnell* described the facts of *Birdsall* only to show how that case was consistent with *McDonnell*'s interpretation of "official act" despite *Birdsall*'s apparently expansive view that official action covers "*[e]very* action that is within the range of official duty," even if only "established by settled practice." *Birdsall*, 233 U.S. at 230-31 (emphasis added). The Court reconciled

Birdsall because, even there, the "'decision or action' . . . reflected a decision or action to advise another official *on* [a] pending question." *McDonnell*, 136 S. Ct. at 2371 (emphasis in original). The same is true here: the Indictment alleges that Robinson pressured or advised other agency officials on a pending question, action comfortably within *McDonnell*'s definition of "official act."

III. The Defendants' Other Objections Are Unavailing

A. The Substantive Section 666(a)(2) Count Adequately Alleges that Robinson Was an Agent of Alabama

The defendants contend that the Indictment must be dismissed also because Count Two, the substantive federal-program bribery count, fails to plead that Robinson acted as an agent of the legislature, and in connection with business of the legislature. Def. Mot. 23-28. But that is not what Section 666 requires.

As relevant here, Section 666 covers payments made with the intent to influence or reward "an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency . . . ." 18 U.S.C. § 666(a)(2). Count Two of the Indictment tracks that language, alleging that the defendants made payments intending "to influence and reward an agent of the State of Alabama, . . . in connection with any business, transaction, and series of transactions of the State of Alabama . . . ." Indictment ¶ 64.

The defendants argue that this was not enough, because Section 666's application to legislators cannot cover "actions distinct from [their] legislative authority." Def. Mot. 24 (emphasis removed). But Section 666 by its terms does not require that, and the defendants' argument wrongly assumes that legislators act in their official capacity only when they, for example, write bills or take votes. As discussed above, a state legislator's advocacy before a federal or state executive agency remains action taken in his official capacity. *See supra* Part II.D.2.

The defendants also claim (at 25) that the Indictment was required to plead bribery in connection with business of the legislature—not the state—because as an Alabama legislator Robinson was an agent only of a "government agency," not the state. But the text of Section 666 forecloses that interpretation. The statute defines "agent" to include a "representative" of a "government," which Robinson clearly was. 18 U.S.C. § 666(d)(1).

For that reason, at least two circuits have rejected the defendants' reading of Section 666. In *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016), the Third Circuit held that the executive director of the Virgin Islands Legislature—"a territorial legislature [that was] part and parcel of the government of the territory"—was an agent of the territory under Section 666. *Id.* at 167. In *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2017), the First Circuit held that Puerto Rican senators were "properly considered agents of the Commonwealth of Puerto Rico

under [Section] 666." *Id.* at 9. The court reasoned that the "Puerto Rican Senate is a constituent part of the Commonwealth government," and its "members are thus part of the limited category of government officials who represent the 'State' as a whole." *Id.*

Had *Willis* and *Fernandez* been decided the other way, the result would have been to immunize all legislators from Section 666 prosecution because, according to the defendants in those cases, their legislatures did not receive any federal funds as required under Section 666(b); the funds were sent to their respective governments as a whole. *See Willis*, 844 F.3d at 165-166; *Fernandez*, 722 F.3d at 9; *see also* Def. Mot. 26 (Section 666 "operates at the level of discrete state agencies that receive federal funding."). That consequence highlights the shortcomings in the defendants' argument that Robinson was an agent of the legislature but not the state.

The defendants maintain (at 26) that interpreting the statute to mean a state legislator is a state agent would produce "absurd results," because every person who works for the state, even local "school-teachers," would be its agent. But legislators of a state, as members of a constituent part of the state government, created by the state constitution, are categorically different from teachers or other "employees of localities or of agencies at every level of government." *Fernandez*, 722 F.3d at 9. The defendants also suggest (at 26) that treating a state legislator as a state agent would make "the reference to state 'agenc[ies]' entirely superfluous." That is not

true because Section 666 defines "government agenc[ies]" as the "*subdivision[s]*" of each constituent branch, such as "commission[s]," "board[s]," and "bureau[s]." 18 U.S.C. § 666(d)(2) (emphasis added). The defendants' interpretation, by contrast, would make Section 666's reference to "agent . . . of a state" a dead letter in light of Alabama's separation of powers; if a state legislator is not a state agent, no one is. *See* Ala. Const. Art. III § 42 ("The powers of the government of the State of Alabama shall be divided into three distinct departments.").

Accordingly, the case that the defendants discuss, *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), is inapposite. *See* Def. Mot. 26-27. The defendants there were Mississippi state judges convicted of accepting bribes in pending cases and charged as agents of the Mississippi Administrative Office of the Courts (AOC). *Whitfield*, 590 F.3d at 342. The Fifth Circuit reversed their convictions because the AOC's business was expressly "*nonjudicial*" under state law and so the bribes did not carry influence "in connection with any business, transaction, or series of transactions" of the AOC. *See id.* at 346-347. Bribes to influence Alabama's position on the EPA's Superfund determinations, in contrast, are necessarily efforts to influence "any business, transaction, or series of transactions" of the state.

B. The Indictment Does Not Violate the First Amendment

The defendants' First Amendment argument (at 28-30) is wrong on both the facts and the law. Factually, it depends on the incorrect claim that the defendants

hired Robinson solely to engage in constitutionally protected issue advocacy. The Indictment alleges that the defendants paid Robinson not merely to engage in speech, but with the corrupt intent to pressure and advise agency officials to take action beneficial to the defendants on specific determinations pending before an agency. *See Menendez*, 2018 WL 526746, at *10 (finding no First Amendment issue because "the charges in this case concern bribery, not political speech"); *United States v. McGregor*, 2011 WL 1576950, at *3 (M.D. Ala. Apr. 4, 2011) ("If at trial the Government can show that there was a bribery scheme to deprive the citizenry of honest services, then Defendants' conduct, not their speech, will have been regulated by the statute."). The defendants do not acknowledge that crucial difference, which must be resolved in the government's favor for the purposes of evaluating the sufficiency of the Indictment.

To the extent the defendants argue (at 29-30) that the First Amendment requires an "'explicit' or 'specific' *quid pro quo* agreement" for any Section 666 case based on pressuring or advising other officials, that legal argument is also wrong. As explained, the Eleventh Circuit does not require *quid pro quo* agreements to be alleged or proved in Section 666 cases. *See White*, 663 F.3d at 1214 n.6; *Langford*, 647 F.3d at 1331; *McNair*, 605 F.3d at 1188. The statute by its terms distinguishes bribery from ordinary political discourse. It does not prohibit normal constituent services or other protected speech; it prohibits payments made or

received with a corrupt intent "in connection with" a transaction or business of the relevant government or agency. *See Agan v. Vaughn*, 119 F.3d 1538, 1544 (11th Cir. 1997) (rejecting First Amendment challenge to Georgia bribery law because law included corrupt intent as an element).

As support for their explicit-*quid-pro-quo* argument, the defendants cite (at 29) the Supreme Court's decision in *McCormick v. United States*, 500 U.S. 257, 272 (1991), and the Eleventh Circuit decision in *United States v. Siegelman*, 640 F.3d 1159, 1171-72 (11th Cir. 2011). Those cases stand only for the proposition that a *quid pro quo* is required when bribes come in the form of campaign contributions. *See McCormick*, 500 U.S. at 272-74; *Siegelman*, 640 F.3d at 1170-72. The defendants acknowledge that this is not a campaign-contribution case, but they argue that their "independent-advocacy expenditures" merit "even *greater* First Amendment protection" than campaign contributions do. Def. Mot. 29 (emphasis in original). Yet that argument, again, assumes what the Indictment denies about the character of the defendants' payments to Robinson.

In all events, courts have consistently rejected the argument that an explicit *quid pro quo* is required to prove bribery outside the context of campaign contributions. For example, then-Judge Sotomayor explained that, outside the campaign-contribution context, "the government does not have to prove an explicit promise to perform a particular act made at the time of payment." *United States v.*

Ganim, 510 F.3d 134, 144 (2d Cir. 2007) (internal quotation marks omitted); *see also United States v. McDonough*, 727 F.3d 143, 155 n. 4 (1st Cir. 2013); *United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009).

C. The Rule of Lenity Does Not Apply

The defendants invoke (at 30-31) the rule of lenity in support of their motion, but that rule clearly does not apply here. The Supreme Court has emphasized that the rule of lenity can be invoked only if a "grievous ambiguity or uncertainty" exists in the relevant statute. *Muscarello v. United States*, 524 U.S. 125, 128-39 (1998) (internal quotation marks omitted). The "simple existence of some statutory ambiguity" is not enough to warrant application of the rule, "for most statutes are ambiguous to some degree." *Id.* at 138. The defendants have not identified any "grievous ambiguity or uncertainty" in Section 666(a)(2). They cite (at 31) the decision in *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013), but that case applied the rule of lenity to a different phrase—"intentionally misapplies"—in Section 666(a)(1)(A), prohibiting the theft of federal funds. *Id.* at 1309-11.

By contrast, the Eleventh Circuit has already rejected the very argument these defendants make about Section 666(a)(2). In *McNair*, the Eleventh Circuit denied a claim that the rule of lenity required the court to "read a specific *quid pro quo* requirement into [Section] 666." 605 F.3d at 1191-92. The court in *McNair* noted that the defendants "fail to identify a 'grievous ambiguity' in" Section 666, "or to

show that the statutory language criminalizes innocent behavior." *Id.* at 1192. The court also highlighted the fact that Section 666 "criminalize[s] only those acts done 'corruptly.'" *Id.* The "addition of a corrupt *mens rea*" "narrow[s] the conduct that violates" the statute, and ensures that "acceptable business practices" will not be at risk of prosecution. *Id.* at 1188.

CONCLUSION

The defendants' motion to dismiss the Indictment should be denied in full.

Respectfully submitted,

JAY E. TOWN
United States Attorney

/s/ John B. Ward
GEORGE A. MARTIN, JR.
ROBIN B. MARK
JOHN B. WARD
Assistant United States Attorneys
1801 Fourth Avenue North
Birmingham, AL 35203
(205) 244-2001

CERTIFICATE OF SERVICE

I certify that on March 16, 2018, I filed this document electronically with the United States District Court for the Northern District of Alabama using the CM/ECF system and thereby caused a copy to be served on the defendants' counsel of record.

/s/ John B. Ward
JOHN B. WARD
Assistant United States Attorney
1801 Fourth Avenue North
Birmingham, AL 35203
(205) 244-2001