UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
QUINTON T. ROSS, JR.	)	

DEFENDANT QUINTON ROSS' BRIEF IN SUPPORT OF MOTION TO DISMISS FEDERAL PROGRAMS BRIBERY CHARGES (18 U.S.C. §§666(a)(1)(B), 666(a)(2), AND 18 U.S.C. §2) AND CONSPIRACY TO COMMIT FEDERAL PROGRAMS BRIBERY (18 U.S.C. §371)

Defendant, Quinton T. Ross. Jr., respectfully submits this brief in support of his motion to dismiss regarding Counts One, Eleven, and Twelve. These are the charges against Senator Ross that are premised (either directly, or in the case of Count 1, through an allegation of "conspiracy") on 18 U.S.C. §§ 666 (a)(1)(B) and 666(a)(2).

1. Introduction and Summary

Section 666 is not a general-purpose, catch-all "bribery" statute covering every aspect of State government. Most important for the present case, it does not cover State Legislators' votes on, or the drafting of, State regulatory legislation (especially not legislation to allow a popular vote that would amend the State Constitution). The Court should so conclude, based on the language of section 666 in light of its history, as well as other guidelines for statutory interpretation. This contention, we emphasize, is different from other contentions that the Supreme Court has rejected about the reach of, or constitutionality of, section 666.

Section 666, which was enacted under the Congress's "spending clause" power, was enacted with an eye towards the ways in which state and local government, and private beneficiaries of federal assistance, use their funds and other property. As we will show, section 666 is about the use of funds – about the business and transactions by which covered entities (state and local government, and private recipients of federal funds), spend money or otherwise take part in commerce. As the Supreme Court put it, "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain," *Sabri v. United States*, 541 U.S. 600, 608, 124 S.Ct. 1941, 1947 (2004) (emphasis supplied).[1] So, the archetypal § 666 case is – for instance – about allegations of bribery in the awarding of government contracts. *See*, *e.g.*, *U.S. v. McNair*, 605 F.3d 1152 (11th Cir. 2010).

This case involves something very different. Here, the supposed object of the alleged "bribes," the thing supposedly to be influenced or rewarded, was not a decision about how the state government would use money or other property (in public contracting or otherwise). The supposed object of the alleged "bribes" in this case was instead an act at the very core of the process of State sovereignty: the decision of State Legislators, as to how they would vote on a matter of regulatory legislation, and indeed on legislation to allow a popular vote that would amend the State Constitution.

The crucial questions of statutory interpretation, for purposes of this motion, are (a) whether State Legislators and legislative staff are "agents" of the

[1] The actual funds involved can be local funds rather than federal funds, since money is fungible. *Sabri*, 541 U.S. at 606, 124 S.Ct. at 1946.

State of Alabama, in regard to the matters at issue in this case, within the meaning of this statute; and (b) whether the allegations of the Indictment come within the statute's coverage in terms of "any business, transaction, or series of transactions of such … government … involving anything of value of $ 5,000 or more." As we will show, this case – even on the allegations of the Indictment – does not come within this statute's scope.

Even if the Court has doubt about the correctness of these arguments about the scope of § 666, the governing law requires that those doubts be resolved in Senator Ross' favor. Among the reasons for this conclusion is the doctrine of "fair warning" or "fair notice," regarding the scope of federal criminal laws. As the Supreme Court has explained, that doctrine is essentially equivalent to the familiar – and extremely protective – "clearly established law" doctrine that is the basis for qualified immunity in civil cases against government officials. Under that standard, Senator Ross cannot be subjected to charges under § 666 where there is (to say the least) a set of serious and unresolved questions about whether that statute even applies to the allegations set forth in the Indictment.

For these and other reasons explained at more length below, the Court should dismiss all charges against Senator Ross that are based on § 666.[2]

2. The statute's language, in light of the history leading to its enactment, confirms that it does not apply here.

[2] There are also various other arguments, which Senator Ross may make at appropriate times, about other aspects of the law under 18 U.S.C. § 666. By focusing the present motion on the arguments made herein, Senator Ross of course does not waive any other argument.

Based on the language that Congress used in § 666, together with the history leading up to the enactment, the best understanding is that the statute simply does not reach the situation alleged in the Indictment: alleged attempts to influence State Legislators and legislative staff, in matters that are purely a matter of the State's sovereign role as regulator (i.e., drafting and voting on legislation, indeed legislation that would amend the State Constitution).

This interpretation of the statute is supported by the same interpretive tools that the Supreme Court and the Eleventh Circuit have used to answer other questions about § 666: (a) the natural and most common meaning of the words that the Congress used in the statute, *see McNair*, 605 F.3d at 1178 & n.40 (interpretation begins with the words that Congress used in the statute); (b) the history of what led the Congress to write § 666 (specifically involving a concern over the existing coverage of the federal-sector "bribery" statute,18 U.S.C. § 201), *see Sabri*, 541 U.S. at 606-07, 124 S.Ct. at 1946-47 (relying on this history), *Salinas v. U.S.*, 522 U.S. 52, 58-59, 118 S.Ct. 469, 474 (1997) (same); and (c) a comparison between the language of § 666 and the language of § 201, noting that Congress chose to use different words on critical aspects of § 666 than it had used in § 201, *see McNair*, 605 F.3d at 1190-91 (relying on the difference in language used in the two statutes, as a guide to interpreting § 666).

A. The starting point: the statute's language, and the common meaning of its words.

Turning first to the language of the statute and the common meanings of the words used, section 666 provides in pertinent part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> …
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or
>
> (2) 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;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(emphasis supplied). The statute further provides a definition of "agent," in Section 666(d)(1): "the term 'agent' means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."

The first striking thing about this statutory language, in terms of the present argument, is its limitation to efforts to influence people in connection with "business" or "transaction[s]" of the entity receiving federal funds (here, allegedly, the State of Alabama). Those words – "business" and "transaction" – call up in the mind of a reasonable reader the understanding of an exchange involving the purchase or provision of goods or services. That is the ordinary meaning of those words. *See*, *e.g.*, *Hawthorne v. Mac Adjustment*, 140 F.3d 1367, 1371 (11th Cir. 1998) ("The ordinary meaning of 'transaction' necessarily implies some type of business dealing between parties. … In other words, when we speak of 'transactions,' we refer to consensual or contractual arrangements …"); *Flava Works, Inc. v. City of Miami*, 609 F.3d 1233, 1239 (11th Cir. 2010) ("This seems to comport with the common definition of a business, which is '[a] commercial enterprise carried on for profit.' Black's Law Dictionary 211 (8th ed. 2004)").[3]

In this regard, the words "business" and "transaction" naturally echo a fundamental and legally-recognized distinction between two sorts of roles that a government (including the State of Alabama) occupies. This is the distinction between government as regulator (writing and enacting rules, i.e., laws, to govern citizens' conduct) and government as market-participant (buying, selling, and otherwise providing or obtaining goods and services). As market-participants, governments buy goods and services, just like private entities do; and sometimes they sell or otherwise provide goods and services, just like

[3] Even if one omitted the "for profit" aspect of this common understanding of the word "business," still the core would remain: business is commerce in goods or services.

private entities do. There is a settled legal understanding that this role as market participant is conceptually different from the role as regulator, in various ways, with various legal consequences. *See*, *e.g.*, *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 128 S.Ct. 1801 (2008) (exploring this distinction, in terms of its effect on Commerce Clause doctrine); *Building Trades Council v. Associated Builders*, 507 U.S. 218, 113 S.Ct. 1190 (1993) (exploring this distinction, in terms of its effect on labor law preemption doctrine).

By using the words "business" and "transaction" to describe the category of decisionmaking topics in which § 666 prohibits corrupt attempts to influence, Congress was using words that point towards the market-participant side of this distinction. Voting on legislation to amend the State Constitution, and drafting such legislation, simply do not constitute a "transaction" or "business" of the State of Alabama, in that normal sense of those words. (It should be noted, in this regard, that an alleged "bribe" is not itself the sort of "transaction" that can trigger the statute's applicability. The "transaction" or "business" must be "of" the entity that is receiving the federal funds, not just a "transaction" or "business" of the allegedly influenced person him- or herself.)

Second, the statute requires the Government to prove that the person to be influenced or rewarded was an "agent" of the entity that receives federal funds. Both the common understanding of the word "agent," and the statute's particular definition of that term, lead to the understanding that a State Legislator, when voting or deciding how to vote on a regulatory Act to amend the State Constitution, is not an "agent" of the State. *See Single Moms, Inc. v. Montana*

Power Co., 331 F.3d 743, 747 (9th Cir. 2003) (noting, in a different context, that State Legislators are not "agents" of the State when they draft and vote on bills).

The statute uses the word "agent" in a way that parallels its focus on "business" and "transaction" that has been discussed above: an agent is one who acts on behalf of the entity receiving funds, with regard to "business" or "transaction" in the normal sense of those words. This is the ordinary meaning of the first part of the statutory definition of "agent" in § 666(d): "the term 'agent' means a person authorized to act on behalf of another person or a government." A State Legislator, when voting or deciding how to vote on a statute, is not acting "on behalf of" the government of the State of Alabama. If he or she is acting "on behalf of" anyone, it is his or her constituents – not the State itself.

Similarly, the second half of the statutory definition of "agent" in 666(d) confirms its focus on agency in the "business" or "transaction" sense, and confirms that State Legislators are outside that focus. That is, the statute goes on to say that the word "agent," "in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." A Legislator is not a "servant" of the State. Similarly, a Legislator is not an "employee" of the State. A Legislator is not a "partner" of the State; that term has a specific use in the context of organizations, and Legislators are not within that. A Legislator is also not a "director" of the State; that term, too, has a specific understood meaning in the context of organizations. Similarly, a Legislator is not a "manager" of the State. And a Legislator is not a "representative" of the State, either; the Government may try a sort of linguistic

trick to bring Legislators within this word, but the fact is that Legislators are representatives of their constituents or of their Districts, not representatives of the State itself. This leaves only the word "officer," as the Government's only possibility for treating State Legislators as "agents" of the State when they draft and vote on legislation. But that word should not be stretched so far in this context. Instead, it should be understood according to the time-honored interpretive canon of "*noscitur a sociis*": a word in a list should be interpreted in line with all the other words in the list, rather than receiving an interpretation that would make it an outlier on the list. *See*, *e.g.*, *Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir. 2010). So, "officer" in this sense should be understood in the same vein as all the other aspects of "agent" in § 666(d): it has to do with people who act on behalf of entities in their business or transactions, rather than referring to the sovereign activity of Legislators voting on regulatory legislation.[4]

Furthermore, the interpretation that we are addressing here is confirmed by another part of the statute's text: the requirement of proof that the "business, transaction, or series of transactions," in connection with which the agent was intended to be influenced, "involv[ed] anything of value of $ 5,000 or more." When the statute is applied to things that naturally come within the words "business" or "transaction" – such as government contracts for sewer

[4] In addition to the allegations that various private defendants had the intent to influence Legislators, the Indictment also alleges the intent to influence legislative staff in the process of legislative drafting. But those persons, too (including defendant Crosby) were not "agents" of the State of Alabama when helping the Legislature draft bills. As we have shown above, the "agency" concept of § 666(d) is limited to those who act on behalf of the entity receiving federal funds, in regard to business or transactions. Legislative staff are not agents in that sense.

rehabilitation work, as in *McNair*, *supra* – that monetary-valuation element makes sense. But what is the "value," in monetary terms, of the drafting or enactment of a statute? It is true that the Government has, in the Indictment in this case, tried to plead its way to an answer to this conceptually baffling question. But prosecutorial creativity in that regard cannot obscure the fact that if Congress had meant to be criminalizing attempts to influence State Legislators in their votes, then including an "at least $5000 value" element to describe the thing influenced would be an extraordinarily strange way of writing such a statute. This is further textual confirmation, based on the normal understanding of the words used in § 666, that the statute simply does not apply to a situation as alleged in the Indictment.

B. The history leading to the enactment of § 666.

The understanding that comes from a close attention to the language of § 666, as explained above, is confirmed by the history of what led Congress to enact the statute. This history confirms that Congress meant to use the words "business," "transaction," and "agent" in the normal ways that we have described above – as having to do with the ways that recipients of federal funds use money or property in securing or providing goods or services – and that Congress was not attempting to reach things at the core of State sovereignty such as Legislators' votes or the drafting of a regulatory laws.

The Supreme Court has repeatedly explained, and has drawn guidance from, the history of § 666's enactment. *Sabri*, 541 U.S. at 606-07, 124 S.Ct. at

1946-47; *Salinas*, 522 U.S. at 58-59, 118 S.Ct. at 474. This Court can, and should, do the same in this instance.

The history was as follows. It begins with a "bribery" statute that was already on the books, 18 U.S.C. § 201, which covered only people acting on behalf of the federal government.

> Before § 666 was enacted, the federal criminal code contained a single, general bribery provision codified at 18 U.S.C. § 201. Section 201 by its terms applied only to "public officials," which the statute defined as "officers or employees or persons acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch." § 201(a).

Salinas, 522 U.S. at 58, 118 S.Ct. at 474.

Prosecutors – and then Congress – perceived a problem, when some courts rejected prosecutorial efforts to prosecute some people who worked for state and local recipients of federal funds. Prosecutors argued that those people were acting "on behalf of" the United States and could be prosecuted under § 201. But some courts disagreed. And this is what led Congress to enact § 666. *Salinas*, 522 U.S. at 58, 118 S.Ct. at 474; *Sabri*, 541 U.S. at § 606-07, 124 S.Ct. at 1946-47.

There were three cases in particular that came to the attention of Congress, as representing this perceived problem with the coverage of § 201. The three cases were *U.S. v. Del Toro*, 513 F.2d 656, 661-662 (2nd Cir. 1975); *U.S. v. Mosley*, 659 F.2d 812, 814-816 (7th Cir. 1981); and *U.S. v. Hinton*, 683 F.2d 195, 197-200 (7th Cir. 1982), *aff'd sub nom. Dixson v. United States*, 465 U.S. 482, 104 S. Ct. 1172 (1984). The Supreme Court has recognized this, *see*

Salinas, 522 U.S. at 58, 118 S.Ct. at 474. It is clearly reflected in the legislative history of the statute, wherein these three cases are mentioned by name. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 1983 ("The concept [to be enacted in the new provision, § 666] is not unlimited. … It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases cited herein.")

Looking then to those cases – representing the "types" of "situations" that Congress meant to cover in the new and "not unlimited" statute, § 666 – we find confirmation that the Congress was intentionally focusing on the very sorts of situations that are encompassed within the ordinary meaning of the statutory words "business," 'transaction," and "agent," as we have explained above. Congress was intending to cover the activities of recipients of federal funds, when those activities had to do with the expenditure of funds or other use of property in a business- or transaction-like sense. Congress was not trying to, and did not, create a broader statute that would cover *all* activities – such as the purely sovereign and regulatory activities of State Legislators voting on laws, or the drafting of State legislation.

Del Toro, for instance, involved a bribe to influence a real estate deal – a classic sort of business transaction – where the bribed person was an employee of a municipal entity that received federal funds.

> Evidence introduced by the Government allowed the jury to find that Del Toro and Kaufman had conspired to bribe Pedro Morales, Assistant Administrator of the Harlem-East Harlem Model Cities Program. Kaufman, a lawyer and a real estate broker, hoped that Morales would use his official position to secure for Kaufman a lease by Model Cities of significant office space in one of the

> buildings for which Kaufman was the renting agent. The benefit to Kaufman would be a lucrative commission. Del Toro, the Executive Director of an East Harlem anti-poverty agency, Massive Economic Neighborhood Development, Inc. (MEND), acted as a middle man in the transaction.

Del Toro, 513 F.2d at 658. *Hinton*, likewise, involved bribery to influence the awarding of contracts, to housing rehabilitation contractors; again this sort of government contracting is a classic sort of "transaction" or "business."

> The appellants, Arthur Dixson and James Lee Hinton, were found guilty by a jury of … soliciting money in exchange for the award of housing rehabilitation contracts funded under the Housing and Community Development Act of 1974 … Dixson and Hinton were, respectively, the Executive Director and Housing Rehabilitation Coordinator of a community-based, non-profit corporation called United Neighborhoods, Inc. (UNI). … During 1979 and 1980, the city of Peoria received a Community Development Block Grant and Metro Reallocation Grant from HUD. The purpose of these grants was community development, including the rehabilitation of residential structures. … [T]he city contracted with UNI to administer the grant funds. For housing that met the statutory and regulatory criteria for the funds, UNI had the responsibility of soliciting bids from contractors to perform the housing rehabilitation. After the receipt of bids, the Housing Committee of UNI was responsible for awarding the contract to the successful bidder.

Hinton, 683 F.2d at 196-97. And the last of the three, *Mosley*, also had to do with "business" or "transactions" in the normal sense of those words; it concerned bribery to influence the decisions of a federally-funded agency that acted as an employment referral service (i.e., a classic sort of multi-lateral contractual "business" arrangement engaging in "transactions," by arranging for the connection between particular job applicants and particular employers).

> Appellant Jerry Mosley was found guilty by a jury of violating 18 U.S.C. § 201(g) and 18 U.S.C. § 665(b) by soliciting through threats and receiving money in exchange for giving preferential treatment to certain individuals seeking jobs under the Comprehensive Employment and Training Programs Act, 29 U.S.C. § 801, et seq.

> (CETA). Mosley was employed in Chicago, Illinois as a CETA Intake and Eligibility Officer by the State of Illinois Bureau of Employment Security (IBES) which acted as the "prime sponsor" of the Chicago CETA program. Mosley's CETA job title was Employment Section Manpower Representative II, and his duties were to interview applicants for CETA jobs, evaluate their CETA eligibility, and, if appropriate, refer them to employers offering CETA-funded jobs.

Mosley, 659 F.2d at 813.

All of these examples are extremely far removed from what we allegedly have at issue in this case, which is an exercise of the State Legislature's core, and sovereign, regulatory law-making function. Congress chose the words of § 666 – especially the words "business," "transaction" or "agent" – because they cover the types of situations that the Congress was avowedly intending to cover. As the Supreme Court has stated, the Congress had those cases in mind, as what it wanted to cover – and those cases were all situations in which entities that received federal funds were using money or property in a commercial or business-transaction-like sense. The Congress did not intend to write, and did not write, a statute that speaks to the very different sort of things alleged in this case. The legislative history confirms, quite clearly, what the ordinary meaning of the statutory words suggest: the limitation of § 666 to "business" or "transactions" was an intentional choice, a choice with meaning, a choice not to cover the purely regulatory and sovereign exercise of State power such as voting on and drafting legislation.

C. Comparison of the text of 18 U.S.C. § 201 to the text of § 666.

The argument above, that § 666 does not cover things so close to the core of State sovereign legislative action as the Indictment alleges, is further confirmed by a comparison between the language of § 666 and the language of 18 U.S.C. § 201. The Eleventh Circuit has instructed that it is important to recognize the distinctions in language, as between § 666 and § 201, when interpreting § 666. *U.S. v. McNair*, 605 F.3d 1152, 1190-91 (11th Cir. 2010). If it is important to note the difference in language when it points towards a more expansive interpretation of § 666 in some respects, as it did in *McNair*, it is equally important to note the difference in language when – as in the present matter – it points towards a narrowing of § 666 in another respect.

A comparison between § 201 and § 666 is especially important because, as we have shown above, Congress was reacting to a perceived problem in the reach of § 201, when it enacted § 666. If Congress had wanted to write § 666 in a way that would reach as broadly as § 201 in all respects – if Congress had wanted merely and simply to make the same anti-"bribery" mandate of § 201 applicable to every aspect of the operations of every recipient of federal funds – that would have been easy enough to write. The fact is, instead, that Congress chose to do something pointedly very different from that. Congress had § 201 in mind, when writing § 666. Thus differences in language between the two statutes are a direct insight into the intended, and actual, meaning of § 666.

The first difference to note is that Section 201(b)(1) speaks of prohibiting the payment of things of value to federal officials "with intent – (A) to influence any official act." But Section 666, by contrast, was not written that broadly at all.

It was not written to cover "any official act" of any nature whatsoever. It could have been; Congress could have made that choice. But Congress chose not to. Instead Congress chose to make a prohibition in Sections 666(a)(1)(B) and 666(a)(2) that applies only to payments made with the intent to influence or reward, or payments solicited or accepted intending to be influenced or rewarded, "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." Congress spoke only to influencing or rewarding in connection with "business" or "transaction" of the governmental or private entity that receives federal funds. This Court should recognize, and give effect to, this Congressional choice. The restriction to "business" or "transaction" – the decision *not* to cover all "official acts" – must have meaning. It has the meaning that we have explained above.

The second difference to note is that, when defining the range of public officers and employees who are covered by the statute, Section 201 specifically and pointedly identifies Members of Congress in its definition of "public official," § 201(a)(1). It was not enough, Congress concluded, to set out a broad and general definition and assume that Members of Congress would come within that; recognizing the importance of speaking clearly when creating crimes touching the legislative branch of government itself, Congress made a clear statement in that instance. But turning to § 666, we find no such clear indication that State Legislators are covered at all. Here again, the Court should recognize and give effect to this Congressional choice. It is still further indication that

Congress did *not* mean that, by giving federal grant moneys, the Government of the United States was buying the right to police the ethics of State Legislatures and of citizens who advocate for legislative action.

In short, all available indicia of statutory meaning show that this case is outside the scope of § 666. Prosecutors want it to be a general and boundless statute, covering every aspect of state and local government; but it is not.

3. This interpretation of § 666 is confirmed by applicable rules of interpretation, and by Constitutional requirements and concerns.

The understanding of § 666 that we have explained above is further bolstered by several rules guiding the courts in the interpretation of criminal statutes. The Court should conclude that the interpretation we have offered is so clearly correct that it is unnecessary to turn to the following considerations; but still these considerations provide confirmation of our point, if the Court finds it anything less than obviously correct at this point. The rules of interpretation, requiring doubts to be resolved in our favor in this regard, include the following:

* Due process requirements under the Fifth Amendment, as well as the related doctrine of the "rule of lenity," require the narrow construction of criminal laws where there is ambiguity. As the Supreme Court recently explained in *Skilling v. U.S.*, ___ U.S. ___, 130 S.Ct. 2896, 2927-28 (2010), due process in the interpretation of criminal laws has two crucial components: the laws must be clearly written in order to provide fair warning as to what is prohibited, and the laws must also be clear enough to reduce the danger of prosecutorial arbitrariness in the choice of targets. *See also id.* at 2933 (again noting these

twin requirements of due process); *id.* at 2932 (relying on the related "rule of lenity" in the same vein).

* The related doctrine of "fair notice" or "fair warning." As the Supreme Court has explained, that doctrine is equivalent to the familiar civil-law protection of qualified immunity, which shields against suits under 42 U.S.C. § 1983 unless the defendant violated "clearly established law." *See United States v. Lanier*, 520 U.S. 259, 270-71, 117 S.Ct. 1219, 1227 (1997); *Hope v. Pelzer*, 536 U.S. 730, 739-40 & n.10, 122 S.Ct. 2508, 2515 & n.10 (2002). This is an extremely important point, which is particularly striking to those who are familiar with how strong the protection of "qualified immunity" is, in this Circuit. *See*, *e.g.*, *Rehberg v. Paulk*, 611 F.3d 828, 846 n.15 (11th Cir. 2010) (describing the limited ways in which previously-untested questions of law can become "clearly established"). It is not "clearly established," in the qualified immunity sense, that § 666 applies to legislative acts of the sort alleged in the Indictment. There are (to say the least) reasonable arguments that it does not apply, as set forth earlier in this brief; and there is no binding caselaw rejecting these arguments. This is dispositive in Senator Ross' favor, under the "fair warning" doctrine and its equivalence to qualified immunity.

* The "clear statement" rule of statutory interpretation, based on the understanding that Congress will not be assumed to have encroached on matters that are at the core of State sovereign functions, through the enactment of generally-phrased laws. Congress is expected to speak clearly and plainly when it has an intent to alter the state/federal balance of power in such a way. *See*,

e.g., *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543, 122 S.Ct. 999, 1006 (2002) ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotation marks omitted).

* The doctrine of constitutional avoidance – in other words, the rule that statutes will be read when possible so as to avoid serious constitutional concerns. That rule is important here because, if § 666 were read as imposing a federal norm on the operations of State Legislatures (and of citizens who engage in political advocacy in matters before State Legislatures), it would raise serious questions under the Tenth Amendment, and under the substantive boundaries of Congressional power to make laws. *See*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-63, 111 S.Ct. 2395, 2400-02 (1991) (discussing the States' authority, reserved to them under the Tenth Amendment, to control the structures of their own governments).

* First Amendment concerns, particularly in regard to cases (like this one) where the allegation is that the "thing of value" consisted primarily or even solely of campaign contributions. Campaign contributions are political speech that is protected under the First Amendment. Section 666 would violate the First Amendment if it were applied to cases involving campaign contributions as alleged attempts to "influence" or "reward" legislative action. As to this issue, the statutory term "corruptly," in § 666, is of particular importance and is unconstitutionally vague, as applied to this sort of case. There is no settled

understanding as to what connection between a campaign contribution and a legislative vote or other action must be proven, in order to constitute a crime. Thus the prospect of criminal prosecution, in an area where the standard is unsettled and where there is such room for prosecutorial discretion, will chill constitutionally-protected political speech.

4. The statute does not cover campaign contributions or other campaign support

Although this brief touches on this point above, we make it here explicitly: Section 666 does not cover campaign contributions or other such support. Accordingly, the Court should dismiss Count One and all other §666 counts that are premised, to any degree, on campaign contributions or other campaign support. This would include, at least, Counts One, Ten, Eleven, and Twelve as to Senator Ross.

The premises for this argument are simple. (1) Criminal laws must be written clearly, so as to clearly define what is lawful and what is criminal. *See*, *e.g.*, *Skilling*, 130 S.Ct. at 2927-28. (2) It is Congress, not the Courts, that is supposed to define the federal criminal laws. *See*, *e.g.*, *United States v. Santos*, 553 U.S. 507, 523, 128 S.Ct. 2020, 2030 (2008). (3) If the Executive thinks that there should be a law to cover something, the Executive has plenty of strength to press Congress to enact such a law; so it is not appropriate or necessary for the Courts to read existing laws to cover things that the Executive believes should be covered. *See*, *e.g.*, *Santos*, 553 U.S. at 514, 128 S.Ct. at 2025. (4) The Courts will not presume that the Congress has meant to do something of monumental importance, or something that touches deeply on core constitutional concerns,

unless the Congress does it explicitly. *See*, *e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25, 121 S.Ct. 365, 373 (2000) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.")

The legislative history of § 666, recounted above, shows that the statute was not designed to cover campaign contributions. And the text of the statute is hopelessly vague about what legal standard would separate a lawful campaign contribution from an unlawful one, if the statute were read to cover campaign contributions at all. After all, one could say that vast numbers of campaign contributions are made in order to "influence" (*see* § 666) incumbent officials in, or to "reward" (*id.*) them for, their decisionmaking about official acts.[5] The word "corruptly" in the statute would therefore do all the work, in dividing lawful campaign contributions from unlawful ones, if the statute were read to cover campaign contributions. And the word "corruptly" is too vague to bear all that weight, in a context that is so rich with First Amendment implications.[6] If

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[5] For instance, every time that a person gives a contribution to an incumbent's reelection campaign because of actions the incumbent has taken while in office, there is an intent to "reward" in some sense.

[6] And the definition of "corruptly," as the courts have elucidated it, offers little hope of curing the vagueness in this context. In *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009), involving charges of bribery in the awarding of sewer and wastewater treatment contracts, the Eleventh Circuit found no plain error in the trial court's jury instruction that defined acting "corruptly" as:

> "an act 'performed voluntarily, deliberately, and dishonestly for the purpose of accomplishing an unlawful end or result, or for the purpose of accomplishing some otherwise lawful end or lawful result by an unlawful means or unlawful method.'"

Id. at 1213; *see* Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Offense Instruction 24.1, at 187-88 (2010) (similarly defining "to act 'corruptly'").

Congress had ever wished to write a statute explaining where the dividing line lies between routine campaign-finance practices and crimes, the Congress could have and should have done that. Since Congress has not written such a law, the Courts should not struggle to find a standard in a law, like § 666, that was not written for that purpose.

Senator Ross recognizes that, in a case that did not involve campaign contributions (but instead involved a cash payoff to a corrections officer in exchange for increased pretrial-release privileges), the Eleventh Circuit recently emphasized the breadth of the phrase "any thing of value" in § 666. *See United States v. Townsend*, ___ F.3d ___, 2011 U.S. App. LEXIS 655 (11th Cir. 2011). There are sentences in that opinion that could be cited to support the Government's opposition to this argument; the Government will emphasize that campaign contributions are a thing of value, and that the statute covers "any" such thing. *Id.*, *14-17. But in *Townsend* the Eleventh Circuit was not presented with, and therefore did not decide anything about, the unique and constitutionally significant matter of campaign contributions. Accordingly, *Townsend* does not contain any holding, and does not even actually contain any *dicta*, answering the specific question about § 666 raised in this motion.[7]

How that definition offers meaningful, practical guidance to distinguish lawful from unlawful campaign contributions – much less provides the constitutionally-required clear demarcation between them -- is anyone's guess. And, guessing violates the "fair notice" or "fair warning" function of constitutional due process. In addition, this judicial construction of the word "corruptly" is developed in cases ***not*** having to do with campaign contributions -- another reason why the word is not enough guidance for campaign-contribution cases.

[7] The questions in *Townsend* were whether freedom was a thing of value that could meet the statute's $5000 valuation element, or whether only tangibles were

The First Amendment, Tenth Amendment, and federalism concerns mentioned above are discussed at more length in Senator Ross' brief in support of his motion to dismiss regarding the "honest services" charges under 18 U.S.C. §§ 1341, 1341 and 1346. That discussion will not be repeated at length here, to avoid duplication. In summary, it would be unconstitutional to apply § 666 to matters that are so close to the heart of State sovereign authority, especially in regard to campaign contributions or in-kind campaign support.

The Government likely will argue, in response, that other people making other arguments about § 666 have been unsuccessful in relying on the rule of lenity, federalism considerations, and the like. *See Salinas*, 522 U.S. at 59-60, 118 S.Ct. at 473-74. And the Government will likewise argue that the Supreme Court has read the statute broadly in certain respects and has upheld it against constitutional attack, in *Salinas* and *Sabri*.

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things of value, *id.*, *13-17; and whether the amount of a bribe could be used as a proxy for valuation of an intangible, *id.*, *17-20. *Townsend* does not address the meaning of the word "business" in § 666 (in particular, whether drafting and voting on legislation is "business"), does not address the meaning of the word "agent" in § 666, does not address the sovereignty concerns that are implicated in a case about State legislative activity, and does not address the legislative history of § 666 (history which demonstrates that the statute was not meant to cover a case such as this). Even if *Townsend* had addressed the legal issue of whether enforcing conditions of pretrial release was "business" within the meaning of § 666, that would not answer the question whether writing and voting on legislation is "business" too. Enforcing conditions of pretrial release is much closer to the sort of service function that can be covered by § 666's term "business," than to the purely regulatory/sovereign function of creating legislation. *Townsend* was a victory for the Government, but it was a victory only on the questions presented there, not every other question that will ever be presented in any § 666 case.

In response to those Government arguments, it is important to understand again two things that make this case so very different from *Salinas* and *Sabri*: (1) the argument presented here is one that was not made or considered in *Salinas* or *Sabri*; and (2) this case involves concerns that are right at the very heart of State sovereignty, whereas *Salinas* and *Sabri* did not.

The issue in *Salinas* was: "[I]s the federal bribery statute codified at 18 U.S.C. § 666 limited to cases in which the bribe has a demonstrated effect upon federal funds?" 522 U.S. at 54, 118 S.Ct. at 472. The question was whether there had to be an effect on *federal* funds, as opposed to state, local or private funds, in particular. The case was not about the "business," "transaction," or "agent" aspects of § 666. In fact, the Supreme Court went out of its way to note that it was not addressing such other questions, and therefore was not addressing every possible question about whether the behavior at issue came within the scope of § 666. *Salinas*, 522 U.S. at 61, 118 S.Ct. at 475. The Court was addressing a limited question, which was essentially an effort to read into the statute a limitation that did not appear in the words of the statute (and that was, the Court said, directly contrary to the words of the statute). The Eleventh Circuit has recognized that *Salinas* addressed that one particular issue, and that *Salinas* does not answer other different questions about the scope of § 666. *U.S. v. Copeland*, 143 F.3d 1439, 1442 n.5 (11th Cir. 1998). The issue here is very different from that in *Salinas*, and our argument is squarely based on the meaning of the words of the statute as we have shown.

The issue in *Sabri* was likewise very different from the issue in this case; it was whether the lack of a required connection to federal funds made the statute unconstitutional on its face. *Sabri*, 541 U.S. at 604, 124 S.Ct. at 1945 ("Sabri raises what he calls a facial challenge to § 666(a)(2): the law can never be applied constitutionally because it fails to require proof of any connection between a bribe or kickback and some federal money.") In rejecting that facial challenge, the Court spoke of § 666 in the sort of terms we have been discussing here: as a law that covers decisionmaking in the use of public funds for contracting and the like – i.e., the administration of "business" or "transactions." *Id.*, 541 U.S. at 606, 124 S.Ct. at 1946 ("Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."); 541 U.S. at 608, 124 S.Ct. at 1947 ("Congress was within its prerogative to protect spending objects from the menace of local administrators on the take."); *id.* ("Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain …") (emphasis supplied).

The Court did not suggest in *Sabri*, and certainly did not hold, that the statute covers the very different sorts of things at issue in this case. The Court even emphasized that the sort of "facial attack" that Sabri was making was disfavored, 504 U.S. at 608-10, 124 S.Ct. at 1948-49, thus leaving open the possibility that some applications of § 666 would go beyond the constitutional boundaries of Congressional power. The Eleventh Circuit, in upholding § 666 against a facial attack before *Sabri*, recognized the same thing: even though the

statute as a whole was not struck down on constitutional grounds, there could be particular cases where its application would be unconstitutional. *See U.S. v. Edgar*, 304 F.3d 1320, 1324 (11th Cir. 2002) ("We are persuaded that the [Supreme] Court's reference to 'the proper federal balance' demonstrates its cognizance of potential constitutional limitations upon the application of § 666."); *id.* at 1327 ("[T]he Necessary and Proper Clause provides Congress with the requisite authority to enact § 666, even if some prosecutions under the statute may require reversal."); *id.* at 1329 ("Whatever further elucidation may be required to identify the point at which § 666's application will transgress the outer boundary of Congress's spending power, *Fischer* clearly vindicated § 666's constitutionality as applied to the defrauding of entities funded under Medicare.").

5. The indictment's allegations against Senator Ross don't allege conduct illegal under the statute.

The statutory construction and constitutional arguments above assert , and we believe demonstrate, that campaign contributions cannot constitutionally be prosecuted under § 666. But, even under a construction that allows some room for valid application of § 666 to such contributions, the specific conduct alleged against Senator Ross fails to enter that room. Stated differently, the acts of which the indictment accuses Senator are not illegal under § 666.

The only conduct the indictment charges against Senator Ross is requesting and accepting campaign contributions from persons said to have financial or other interests in the outcome of a legislative vote, i.e., the vote on SB380, or other asserted pro-gambling legislation.

There are no factual allegations accusing Senator Ross, unlike many of his co-defendants, of requesting, being offered, accepting, or agreeing to accept anything other than "pure" campaign contributions – no fundraising help, no campaign appearances by country music stars, no political polls, no media buys, no offers to pay money to any candidate opposing him to withdraw from the race, no promises of business patronage, no other "thing of value" or benefit of any kind.

The indictment likewise is devoid of any ***factual*** allegations showing or supporting a conclusion that Senator Ross enriched himself, or had any purpose to enrich himself (¶30), through any such campaign contribution – or that any such contribution was treated, by either the asserted donor or Senator Ross, as anything but a campaign contribution. (*See, e.g.,* ¶¶ 118-123, 125-127, 131) (all referring to "campaign contribution" or "campaign contributions"). Indeed, as best as can be determined from the language of the indictment[8], every contribution credited to Senator Ross is treated as what it was – a campaign contribution. Likewise, nowhere does the indictment state any facts to show or suggest that Senator Ross benefited personally or in any way from any campaign contribution, other than (inferably) by increasing his campaign fund.

And, not only does the indictment allege ***only*** that Senator Ross asked for, received, or was offered campaign contributions ***only***, with no hint of any personal benefit attached. The indictment's non-conclusory factual allegations

[8] And as can be confirmed from Senator Ross' campaign filings under the Alabama Fair Campaign Practices Act. *See* http://arc-sos.state.al.us/cgi/elcdetail.mbr/detail?&elcpass=34856, last accessed Feb. 1, 2011.

likewise fail to show that any contribution was supported by an explicit *quid pro quo*, i.e., a specific promise or agreement by Senator Ross in response to perform or not perform an official act, specifically an explicit promise or undertaking by Senator Ross to vote for or support SB380 or even "pro-gambling legislation" in return for the campaign contribution.[9] (*See* ¶¶119, 128-129, 131).

Reversing a conviction in a case arising under the Hobbs Act, 18 U.S.C. §1951, the Supreme Court has stressed that where an elected official, such as Senator Ross (Indictment, ¶13), receives a campaign contribution or campaign contributions (*see, e.g., id.*, ¶¶118, 120-123), conviction of the same charge requires proof that the quid pro quo is ***explicit***. That is, the Government must show that "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."

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[9] The indictment alleges Senator Ross "demanded" contributions (¶119; *see* ¶35), or "solicited and … pressured" potential contributors "under the color of official right" to provide contributions. (¶¶222, 224). It further alleges in conclusory form that Senator Ross accepted the contributions "intending to be influenced and rewarded in connection with" the vote on SB380 specifically or pro-gambling legislation generally (¶¶28, 210, 212; *see* ¶¶30, 208), or "corruptly" (¶¶28, 31, 208, 210, 212) or "to enrich [him]sel[f]" (¶30); that the contributions were "not due to Ross" (¶¶222, 224); and that Senator Ross and the other defendants "knowingly devised and intended to devise a scheme and artifice to defraud and deprive" the State of Alabama and its citizens "of their right to the honest services of elected members … of the Legislature." (¶234). But, the indictment is woefully lacking in factual allegations that show or even support these conclusory assertions regarding Senator Ross' purported *malum* intent.

Senator Ross denies that he "demanded" contributions (and probably also that he "pressured" contributors, hesitating only because of the ambiguity of the Government's chosen word "pressured"). And, he ***vehemently*** denies requesting or accepting contributions with any of the alleged prohibited intents or states-of-mind, or in return for his vote or support for SB380 or any other "pro-gambling legislation," or in any way other than as a legitimate, lawful campaign contribution.

McCormick v. United States, 500 U.S. 257, 273 (1991). Certainly, conduct not prohibited by one statute may nonetheless be criminalized under another. But, given the clearly-implied First Amendment and explicit Due Process concerns on which that ruling was founded, *id.* at 272-73, the *McCormick* Court's line-drawing between lawful and unlawful campaign contributions – which was based little, if at all, on interpretation of the Act's statutory language, much less the Act's (unmentioned) legislative history – applies equally to prosecutions under other federal criminal statutes for giving and receiving campaign contributions, including the conspiracy, federal programs bribery, and "honest services" fraud laws invoked here.[10]

Recognizing that the ***facts*** alleged in the indictment show ***only*** conduct by Senator Ross within the legitimate sphere of political activity -- and ***not*** the exchange of his "explicit promise or undertaking" to vote for SB380 specifically, or even vote for or otherwise support "pro-gambling legislation" generally, in return for the payments -- is critical. That is the difference between alleging conduct that is criminal, and alleging conduct (as this indictment does as to Senator Ross) that is ***not.*** The Government's failure to allege conduct by

[10] In reviewing the convictions of former Alabama Governor Don Siegelman and HealthSouth founder and former CEO Richard Scrushy on federal funds bribery (§ 666(a)(1)(B)) and "honest services" fraud (18 U.S.C. §§ 1341, 1346) charges, the Eleventh Circuit cited approvingly the application of the *McCormick* explicit *quid pro quo* standard to campaign contributions prosecuted under the conspiracy, federal funds bribery, and honest services mail fraud statutes. *United States v. Siegelman*, 561 F.3d 1215, 1225 (11th Cir. 2009). The Eleventh Circuit's affirmance of defendants' convictions was vacated and remanded by the Supreme Court for further consideration in light of the Court's decision in *Skilling.* ___ U.S. ___, 130 S.Ct. 3542 (2010).

Senator Ross that is criminal as defined by § 666 requires dismissal of the charges against him premised on that statute.

a. Summary of the Indictment

As relevant to the charges premised on § 666, the indictment alleges the following.

Count One, the conspiracy count, alleges that all defendants conspired "to commit federal programs bribery" in that (A) the defendants and others "corruptly gave, offered, and agreed to give money and other things of value to Alabama state legislators and legislative staff … with the intent to influence and reward them in connection with pro-gambling legislation," and correspondingly (B) "Alabama State legislators and legislative staff … corruptly solicited, demanded, accepted and agreed to accept money and things of value from defendants and others, intending to be influenced and rewarded in connection with" such legislation. (¶28)

Purposes alleged for the conspiracy were for a) defendants McGregor and Gilley to provide "payments and campaign contributions," b) legislators, including Senator Ross, and staff to accept those "payments and campaign contributions," and c) the lobbyist defendants (and defendant Senator Smith) to assist McGregor and Gilley in making such "payments and campaign contributions" to legislators, including Senator Ross, in a way to conceal that McGregor and Gilley were the source, "in return for their favorable votes on and support of pro-gambling legislation." (¶¶ 29-31).

Counts Ten through Twelve state the §666 charges against Senator Ross in general terms. Count Ten alleges that defendants "Gilley, Massey, McGregor, Coker, and Lobbyist A promised to give campaign contributions, including promises of $25,000 and other unspecified amounts, to Ross … to influence and reward Ross in connection with an upcoming vote on pro-gambling legislation." (¶208). Counts Eleven and Twelve allege that Senator Ross agreed to accept "campaign contributions," "of at least $20,000 from Gilley, Massey, and Lobbyist A" (Count Eleven) and "an unspecified amount of campaign contributions from McGregor and Coker" (Count Twelve), "intending to be influenced and rewarded in connection with an upcoming vote on pro-gambling legislation." (¶¶210, 212).

Counts Ten through Twelve themselves state minimal factual detail regarding the charges against Senator Ross. Apparently to try to support these sparsely alleged charges with factual detail, the indictment incorporates in both counts the allegations contained in 178 earlier paragraphs (¶¶ 1 through 26 and 39 through 190 of the indictment), 152 of which are listed in Count One and labeled as alleging "overt acts" in furtherance of the conspiracy. Most of them do not mention and have nothing to do with Senator Ross.

Other than one paragraph identifying him as an elected senator, the handful of paragraphs with factual allegations that do mention Senator Ross[11] focuses on an abbreviated history of his actions regarding "gambling legislation,"

[11] Only 17 of the 178 incorporated paragraphs mention Senator Ross. (*See* ¶¶13, 20, 118-132) (mentioning Ross by name). All but 2 of them are listed as "Overt Acts" alleged in support of the conspiracy count, Count One. (¶¶118-132). The only statute the indictment alleges defendants conspired to violate is the federal program bribery statute,18 U.S.C. §§666(a)(1)(B) and 666(a)(2). (¶28).

an abbreviated history of his solicitation of campaign contributions from certain co-defendants, and an abbreviated history of his receipt of campaign contributions from certain co-defendants. Notably absent: any factual allegations showing any intent on Senator Ross' part to exchange his vote (or other support) on SB380 specifically or "pro-gambling legislation" generally for any such contribution, much less any **explicit** *quid pro quo*.

b. Allegations Incorporated by Reference in Counts Ten through Twelve

With respect to Senator Ross, the paragraphs incorporated in Counts Ten through Twelve allege the following: Senator Ross "was serving his second term in the Alabama Senate" and "was a candidate for reelection in the 2010 Senate election cycle." (¶13).

As to certain actions he took regarding "gambling legislation," the incorporated paragraphs allege that in March 2009, Senator Ross introduced a bill in the Senate, Senate Bill 471 ("SB471"), "which proposed amendments to the Alabama Constitution authorizing the operation of electronic bingo at only specified locations in Alabama, including Macon County, home of Victoryland, and Houston County, home of Country Crossing, which was then under construction." (¶20). The bill, and a virtually identical bill introduced in the Alabama House of Representatives, were supported by the "Sweet Home Alabama Coalition," formed to "promote the passage of pro-gambling legislation that would be favorable to the business interests of individuals operating electronic bingo facilities, including [co-defendants] McGregor and Gilley."

(¶¶19-20). Neither bill was put to a vote in either house of the Legislature in 2009. (¶20).

Senate Bill 380 ("SB380") was introduced in the Alabama Senate on February 4, 2010. (Senator Ross did not introduce it, and the indictment does not allege otherwise.) SB380 "proposed an amendment to the Alabama Constitution permitting the operation and taxation of electronic bingo in Alabama," and was supported by "McGregor, Gilley, and other operators of similar gambling enterprises." (¶22). On March 9, 2010, Senator Ross "introduced in the Senate a competing pro-gambling bill," which is not otherwise identified. (¶124). On March 30, 2010, "a revised SB380 passed in the Alabama Senate, receiving 21 votes, the minimum required to pass a constitutional amendment."[12] (¶24). Senator Ross "voted in favor of SB380." (¶130).

As to his soliciting and receiving contributions, the incorporated paragraphs note various contributions made to Senator Ross between September 17, 2009 and April 20, 2010 by a few of the co-defendants, one of which they made directly (¶120) and the others of which are attributed to them (particularly McGregor) as coming from political action committees (PACs) to

[12] SB380 did not "pass a constitutional amendment," but rather proposed a constitutional amendment, and approved (at least with respect to the Senate) submitting the proposed amendment, to the "qualified electors" of the State of Alabama; if also approved by the House for submission to the electorate, the proposed amendment would become valid only "when approved by a majority of the qualified electors voting thereon." Senate Bill 380, § 1 (Reg. Sess. 2010). *see* Constitution of Alabama §284 (1901).

which they (and often, if not always, others) contributed money.[13] (¶¶118, 121-123).

Those incorporated paragraphs also allege one conversation (cursorily) between Senator Ross and "Lobbyist A" (¶119), one conversation (very cursorily) between Senator Ross and co-defendant Jarrod Massey (¶125), and two conversations between Senator Ross and Mr. McGregor (¶¶128-129) in which Senator Ross solicited campaign contributions; as well as three conversations between co-defendants (not Senator Ross) in which those co-defendants discussed either having been solicited by Senator Ross for campaign contributions (¶¶126-127, 131) or making "additional campaign contributions (¶131).

More specifically, as to the conversations in which Senator Ross participated, the incorporated paragraphs allege that in late December 2009 or early January 2010, Ross called Lobbyist A and "demanded" "a campaign contribution from Massey and Gilley" of "approximately $5,000 or $10,000." (¶119). The indictment alleges Ross "stated that he believed that he deserved the campaign contribution" because of an act already taken in the past, i.e., "he had sponsored the pro-gambling legislation in the 2009 legislative session and

[13] The indictment charged as part of the conspiracy alleged in Count One that McGregor, Gilley, and lobbyists working for them "disguise[d] payments made to legislators from whom they sought support by concealing illicit payment through [PACs] and using conduit contributors" (¶36), which the indictment nowhere defined. But, at all times material to the indictment, the practices of making individual and corporate contributions to PACs, and PACs accepting contributions from and making contributions to other PACs, were expressly permitted by Alabama's campaign finance laws, which governed all the contributions at issue in this case. *See* Code of Alabama §§17-5-2(a)(8) and (10), 17-5-7, 17-5-8, 17-5-14.

that he was no longer 'feeling the love.'" (*Id.*) Further, "[I]n or about the middle of March 2010, one or two weeks prior to the vote on SB380, Ross called Massey to ask for an additional $25,000 in campaign contributions." (¶125)

The most extensive conversations in which Senator Ross participated as set out in the incorporated paragraphs occurred on March 29, 2010, "the day before the anticipated vote" on SB380, and March 30, "the day of the vote" on SB380. (¶¶128, 129).

On March 29, 2010, Senator Ross called Mr. McGregor; asked McGregor whether "'You feel like you got the twenty-one [votes] in the Senate?,'" to which "McGregor responded that he was 'cautiously optimistic"; and Ross "later in the call … thanked McGregor for recent campaign contributions" and said he "actually [was] calling to see if I can get some more help.'" McGregor was at best non-committal ("'I don't even know where we are'") and at worst dismissive ("'I did my thing in December and [co-defendant Robert] Geddie's been doing his thing and other people since'") toward Senator Ross' request.[14] (¶128)

Then, on March 30, 2010, "the day of the vote … McGregor called Ross and told Ross that he could 'call on some folks' that he had 'relationships with to

[14] Paragraph 128 alleged in its entirety: "On or about March 29, 2010, the day before the anticipated vote on the pro-gambling bill, SB380, Ross called McGregor and asked, "You feel like you got the twenty-one [votes] in the Senate?" McGregor responded that he was 'cautiously optimistic.' Later in the call, Ross thanked McGregor for recent campaign contributions and said, 'I'm actually, uh, calling to see if I can get some more help.' In response, McGregor claimed: 'I don't even know where we are. I've, I've been so wrapped up and, uh, Geddie … he's been keeping up with everything.' After Ross continued to press the issue, claiming that campaign support 'would help [Ross] out tremendously,' McGregor stated, 'I did my thing in December and Geddie's been doing his thing and other people since.'"

help' Ross. McGregor stated further that 'money is tight'" and "told Ross he would work with Geddie to secure additional contributions for Ross." Senator Ross told McGregor he "definitely appreciate[d] … whatever you can do and … what you've already done." Ross noted "'we're just getting down to the wire'" and "'you don't know until you ask, and so … you just make your calls.'" Senator Ross also stated, "we know the window is closing on us fast and so I'm just trying to do everything I can to … make sure I can raise [funds] …,' to which "McGregor promised to help however he could."[15] (¶129).

As to the conversations between others to which Senator Ross was not a party, the incorporated paragraphs set out two conversations, "in about March 2010" and on March 14, 2010, in which others reported or complained that Senator Ross had asked for additional contributions after that party already had given him campaign contributions. (¶¶127-128). Then, on March 31, 2010, "following the successful vote on SB380," co-defendants Coker and McGregor "discussed additional campaign contributions for Ross." McGregor suggested Coker "say [some]thing to any other clients about helping Quinton [Ross]," to which Coker responded, "… I'm gonna give him … a good .. check from the .. medical association and from the soft drink folks." (¶131).

[15] The indictment asserts that "[a]t all relevant times, Ross ran unopposed in his reelection bid." (¶132). But, the deadline for candidates to qualify with political parties to participate in the primary election was just a few days after this reported conversation, on April 2, 1010. FCPA Filing Calendar – 2010 Election Cycle, http://www.sos.state.al.us/downloads/election/2010/2010-FCPA-Filing-Calendar.pdf , last accessed Feb. 2, 1011. Moreover, Alabama law contemplates and permits even candidates running unopposed raising campaign contributions. *See, e.g.,* Code of Alabama §17-5-8(a)(1) (reporting requirements apply to candidates running unopposed).

Conspicuously absent from either the conversations in which Senator Ross participated or the conversations other had regarding Senator Ross, is ***any*** discussion of a) Senator Ross' vote or even position on SB380 or other "pro-gambling legislation," b) any future official action by Senator Ross, c) any request that Senator Ross take any action, specific or otherwise, or d) Senator Ross' intentions regarding SB380 or other "pro-gambling legislation," much less e) even the whiff of any exchange (especially the required explicit *quid pro quo*) of campaign (or other) contributions in return for his vote or other official action.

c. McCormick defines lawful and unlawful campaign contributions

In *McCormick* the Supreme Court considered when, if ever, an elected public official's acceptance of a campaign contribution can be prosecuted as extortion of property under color of official right in violation of the Hobbs Act. 500 U.S. at 259; *see id* at 267 n. 5 (also noting "[w]e do address … the issue of what proof is necessary to show that the receipt of a campaign contribution by an elected official is violative of the Hobbs Act"). Recognizing that campaign contributions are a constant in the real life of politicians, as noted above the Court held that a link between such a contribution and an official act would constitute the crime of extortion only if there was an "explicit *quid pro quo*." *Id.*, 500 U.S. at 271 & n. 9 (formulating the question in that way).

The Court's opinion noted several truths regarding the electoral campaign and election process. First, "serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *Id.,* 500 U.S. at 272. Second, "campaigns must be run

and financed." *Id.* As many elected officials (who must become candidates in order to remain elected officials) are heard to complain, "[m]oney is constantly being solicited on behalf of candidates." *Id.* To obtain financing and other support for their campaigns, candidates "run on platforms and … claim support on the basis of their views and what they intend to do or have done."[16] *Id.*

In view of those hard, cold, sometimes unpleasant (if not unseemly) realities of the electoral process – and particularly apropos as applied to Senator Ross and the conduct alleged in the indictment --, the Court asserted that

> to hold legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

Id.

In contrast to that broad swath of protected conduct, the Court defined illegal conduct as follows:

> The receipt of such contributions is … vulnerable under the Act as having been taken under color of official right, but **only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official**

[16] Indeed, the Eleventh Circuit has read *McCormick* as confirming that "legitimate campaign contributions … often involve expectation of benefit." *United States v. Davis*, 967 F.2d 516, 521 (11th Cir. 1992), *vacated and rev'd o.g. on panel rehearing*, 30 F.3d 108 (11th Cir. 1994). In explaining the Supreme Court's decision in McCormick, the *Davis* court further noted: "Indeed, the fear that routine political service to constituents could be the basis for convictions under the Hobbs Act when limited to campaign contributions appeared to be a major concern of the Court in reversing the decision of the Fourth Circuit." 967 F.2d at 521.

> **conduct will be controlled by the terms of the promise or undertaking.**

Id., 500 U.S. at 273 (emphasis added). The criminally-prohibited situations, said the Court, are those in which there is an "explicit promise or undertaking" by the official to act in exchange for his contribution, in which "the official **asserts** that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* (emphasis added).[17]

And, in rejecting a view that would criminalize as extortion "act[ing] for the benefit of constituents or support[ing]] legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, the Court warned:

> To hold otherwise would open to prosecution not only **conduct** that has **long** been **thought to be well within the law**, but also conduct that, in a very real sense, is **unavoidable** so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id., 500 U.S. at 272 (emphasis added). The Court pointedly added: "It would require statutory language **more explicit than the Hobbs Act contains** to justify a contrary conclusion." *Id.*, 500 U.S. at 272-73 (emphasis added).

Without stating the concerns, the Court's emphatic statement that broader liability could arise only from more-explicit statutory language hints at, and hinges on, two significant constitutional values, protected by the First Amendment and

[17] Although Justice Stevens in dissent would have allowed conviction based on an "implicit" *quid pro quo* linkage between a contribution and a "specific" official action, *id.*, 500 U.S. at 282-83 (Stevens, J., dissenting), the Court rejected that in favor of the stricter requirement of an "explicit promise or undertaking," in which the official "asserts" an overtly and expressly stated *quid pro quo*. *Id.*, 500 U.S. at 273.

Due Process. These values are discussed in greater detail in Senator Ross' brief in support of his motion to dismiss the charges under the Hobbs Act, 18 U.S.C. §1951; we adopt but don't repeat that discussion here.

In the context of prosecuting campaign contributions under § 666, in which the required mental state is either the "intent to influence or reward" (§ 666(a)(2)) or "intending to be influenced or rewarded" (§ 666(a)(1)(B)), the statute's sweeping in (on its face) of lawful campaign contributions, and the special protection (such as *McCormick*'s explicit *quid pro quo* requirement) needed in this context, is encapsulated by the Sixth Circuit's observation about McCormick: "The McCormick Court observed … that the campaign contribution context is unique because almost all lawful contributions are given to influence future legislative or executive actions." *United States v. Abbey*, 560 F.3d 313, 516 (6th Cir. 2009) (§ 666 case not involving campaign contributions).

d. The indictment's allegations against Senator Ross fail to state an offense under § 666

Against this backdrop, it is apparent that Counts One and Ten through Twelve lack any allegation of an essential element of a § 666 charge involving an elected official's receipt of a campaign contribution, i.e., an explicit *quid pro quo* linking any contribution Senator Ross received with his specific official action – as necessary to distinguish prohibited criminal activity under the statute from legitimate campaign fundraising.

> For an indictment to be valid, it must "contain[] the elements of the offense intended to be charged, and sufficiently apprise[] the defendant of what he must be prepared to meet." "An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it

> may follow the language of the statute." Furthermore, if the indictment tracks the language of the statute, "it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged." When the indictment uses generic terms it must state the offense with particularity.

United States v. Bobo, 344 F.3d 1076, 1083 (11th Cir. 2003) (quoting *Russell v. United States*, 369 U.S. 749, 763, 765 (1962)). Even when construed in a common-sense way, the indictment must charge a crime as to the particular offense, i.e., it must be "legally sufficient to charge an offense." *E.g., United States v. Pendergraft*, 297 F.3d 1198, 1205 (11th Cir. 2002); *see also, e.g., Bobo*, 344 F.3d at 1083-85. "An indictment that requires speculation on a fundamental part of the charge is insufficient." *Bobo*, 344 F.3d at 1084.

The indictment fails to allege, even generally, an explicit quid pro quo between any contribution Senator Ross received and any specific official action of his. None of Counts One or Ten through Twelve (including the incorporated paragraphs) allege any ***facts*** that show, or even support, that anyone (identified or unidentified) made a political contribution (specified or unspecified) to Senator Ross in return for his promise to vote or take other specified official action in a particular way. To the contrary, the ***facts*** alleged all show political campaign fundraising activity on the lawful side of the line.

The indictment alleges conversations between Senator Ross and three others (Lobbyist A, Massey, McGregor, and, by hearsay, Coker) concerning campaign contributions. But, out of all those conversations in which Senator Ross was a party, as alleged, ***none*** discussed or addressed in any way 1) his vote or his position on SB380, or even other "pro-gambling legislation; 2) any

future official action by Senator Ross; 3) any request that Senator Ross take any action, specific or otherwise; or 4) Senator Ross' intentions regarding SB380 or even other "pro-gambling legislation." (*See* ¶¶ 119, 125, 128-129). None of those types of facts are alleged in connection with the conversations in which Senator Ross did not participate but his name came up, either. (*See* ¶¶ 126-127, 131) Without alleging such facts, or similar ones, it is difficult (if not impossible) to see how the Government ***could*** sufficiently allege the explicit *quid pro quo* necessary to state a federal programs bribery offense.[18]

In essence, Counts One and Ten through Twelve (including the incorporated paragraphs) allege that Senator Ross solicited campaign contributions, more than once with certain specified persons, once purportedly saying he "deserved" such a contribution because he had sponsored a specific "pro-gambling" bill in the previous legislative session, and sometimes in close proximity to anticipated legislative action on "pro-gambling legislation"; he sponsored two "pro-gambling" bills, in the 2009 and 2010 sessions; he voted in favor of SB380; and he received several contributions from persons who had financial interests in passage of SB380 or other "pro-gambling legislation, both before and after he sponsored "pro-gambling legislation" and voted in favor of SB380.

But, to hold that those allegations are sufficient to prosecute Senator Ross for federal programs bribery would conflict with the area of First Amendment-

[18] And, even if the Government somehow contended Senator Ross received some (unspecified) benefit other than campaign contributions, the facts alleged fail to support even an **implied** *quid pro quo* – and certainly not one sufficient to get out of the area of legitimate contributions.

protected political campaign activity of an elected official carved out by the Supreme Court in *McCormick*. *See* 500 U.S. at 272. It likewise would subject Senator Ross to potential criminal liability without fair advance notice that such conduct violates the law, in violation of his due process rights.[19] *See, e.g., Skilling*, 130 S.Ct. at 2927-28.

And, even if it could colorably be claimed that the conduct alleged *might* come within the coverage of 18 U.S.C. §666, under the rule of lenity the ambiguity regarding the statute's coverage of such conduct, and the absence of law "clearly establishing" such conduct comes within the statute's prohibitions, *see, e.g., United States v. Lanier,* 520 U.S. 259, 271 (1997), would require that any such ambiguity be resolved in Senator Ross' favor and in favor of dismissal. *E.g., Skilling*, 130 S.Ct. at 2932; *United States v. Granderson*, 511 U.S. 39, 54 (1994).

e. The indictment's allegations against Senator Ross fail to state a valid conspiracy claim

An element of a conspiracy offense is "the existence of an agreement to achieve an unlawful objective." *United States v. Hansen*, 262 F.3d 1217, 1246 (11th Cir. 2001). "However, it is essential that the object of the agreement must be illegal." *Id.* (quotations omitted). The ***facts*** alleged by the indictment – i.e.,

[19] The fair notice requirement of due process is especially important where, as here, various factual circumstances the indictment cites in support of Senator Ross having committed illegal activity (such as his receiving contributions from PACs, co-defendants making contributions to PACs which then made contributions to him as a candidate, and his raising money as a candidate even though he ran unopposed) are all permitted under Alabama campaign finance law. *See, e.g.,* Code of Alabama §§17-5-2(a)(8) and (10), 17-5-7, 17-5-8, 17-5-14.

the lack of facts showing the necessary culpable intent through an explicit *quid pro quo* -- show that the only agreement Senator Ross entered into was to accept ***lawful*** campaign contributions. For that further reason, Count One charging conspiracy must be dismissed.

f. The indictment fails to charge Senator Ross with aiding and abetting federal programs bribery

Count Ten alleges that four defendants and Lobbyist A, "aided and abetted by others known and unknown to the Grand Jury," promised to give campaign contributions to Ross "to influence and reward Ross in connection with an upcoming vote on pro-gambling legislation" in violation of 18 U.S.C. §§ 2 and 666(a)(2). (¶208) Both Counts Eleven and Twelve allege that Senator Ross, "aided and abetted by others known and unknown to the Grand Jury" agreed to accept campaign contributions from those four defendants and Lobbyist A, "intending to be influenced and rewarded in connection with an upcoming vote on pro-gambling legislation" in violation of 18 U.S.C. §§ 2 and 666(a)(1)(B). (¶¶210, 212). As best as can be determined, there are no other ways in which Senator Ross is alleged to have aided and abetted federal programs bribery; and apart from the contributions he solicited, he is not alleged to have aided and abetted any other charged instance of federal programs bribery.

To convict of aiding and abetting, the Government must prove: 1) "a substantive offense was committed." 2) "the defendant associated himself with the criminal venture," 3) "he committed some act which furthered the crime," and 4) "the defendant shared the same unlawful intent as the actual perpetrator." *Hansen*, 262 F.3d at 1262.

As demonstrated above, Counts Ten through Twelve (including the incorporated paragraphs) do not allege the required intent for Senator Ross – i.e., the explicit promise to perform or not to perform an official act -- to have committed the charged offense himself. Those counts accordingly could not have alleged a shared unlawful intent to assist someone else to commit that offense. *See id.*

Conclusion

This particular case would be the sort of case where application of § 666 would be unconstitutional. This case is at the core of State sovereign power, a case where the federal "power of the purse" cannot be allowed to buy the right to set the terms of conduct for State Legislators and for citizens who support or oppose them. There may well be other cases that fall into a grayer area, an area in which it is not so clear whether the situation involves "business" or "transactions" within the proper boundaries of federal control. This, however, is the extreme case, the case right at the heart of State sovereign functioning, in which § 666 does not and cannot apply.

Alternatively, Counts One and Ten through Twelve fail to allege the necessary explicit *quid pro quo* or unlawful intent necessary to distinguish prohibited criminal conduct from an elected official's legitimate campaign fundraising activity, for Senator Ross to have either committed or aided and abetted another in committing federal programs bribery. The indictment's failure to allege an essential element necessary to charge the crime of federal programs bribery (including aiding and abetting) requires dismissal of Counts One and Ten

through Twelve as to Senator Ross. *E.g., Bobo*, 344 F.3d at 1086; *Pendergraft*, 297 F.3d at 1208, 1209; *United States v. Adkinson*, 135 F.3d 1363, 1372 n. 23, 1377 n. 37 (11th Cir. 1998) ("The failure to allege the element which establishes the very illegality of the behavior and the court's jurisdiction is fatal to the indictment.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Mark Englehart
OF COUNSEL