

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

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

**BRIEF IN SUPPORT OF MOTION OF QUINTON T. ROSS, JR.,
TO DISMISS REGARDING “HONEST SERVICES” CHARGES
(18 U.S.C. §§1341, 1343, 1346, AND 2)**

Quinton T. Ross, Jr., respectfully submits this brief in support of his motion to dismiss all the charges against him under “honest services” law, 18 U.S.C. 1341, 1343, and 1346, as Counts Twenty-Three through Thirty-Three purport to allege. The Indictment’s allegations do not come within the coverage of that law, as properly construed in light of the holdings and principles of *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010). Furthermore, application of the “honest services” law to the allegations of the indictment would be unconstitutional, and the Court should interpret the law in a way that would avoid such constitutional issues.

1. Introduction and Summary

The Indictment alleges that Senator Ross and others took part in a scheme to deprive the government and the public of the “honest services” of State Legislators and legislative staff. Indictment, ¶ 234. While “honest services” under § 1346 used to be something of a wild-card doctrine, the Supreme Court

has now clearly limited the statute to cases of “bribes and kickbacks.” *Skilling*, *supra*.

The Government has tried to bring the Indictment within *Skilling* by adopting, as part of the “honest services” charges, the factual allegations of prior portions of the Indictment. See ¶ 233. Those incorporated factual allegations demonstrate that the Government is relying on two sorts of allegations, and trying to term them as “bribes” within the meaning of *Skilling*: (1) primarily, campaign contributions or in-kind campaign support, and (2) to a much lesser extent, personal payments such as alleged payments to defendant Crosby.¹

This brief demonstrates that neither of those sets of allegations actually makes out an “honest services” charge, even if the Government’s allegations are accepted as true for present purposes.

First, campaign contributions (and in-kind campaign support) do not constitute “bribes” for purposes of “honest services” law – not even when it is alleged that the contributions were too-closely connected to some official action.

Second, payment to an individual personally (as distinct from a campaign contribution or in-kind support) cannot constitute “honest services” bribes after *Skilling*, unless it is alleged and proven that the payment was made to influence a specific act. The Indictment here does not allege such a thing, and indeed the Indictment’s allegations plainly do not allow such an interpretation.

For these and other reasons explored herein, including constitutional concerns under the First, Fifth and Tenth Amendments, the Court should hold

¹ Senator Ross is not alleged to have received any personal payment, or indeed anything other than campaign contributions.

that the “honest services” law does not encompass the allegations of the indictment, and the Court should dismiss these charges.²

2. “Honest services” bribery does not include campaign contributions.

The offering or giving of campaign contributions, or in-kind campaign support, does not constitute a violation of “honest services” law – not even if it is alleged that there was a connection between such contributions and some official action. This conclusion follows from the Supreme Court’s holding in *Skilling*, as well as from relevant constitutional considerations (including both the due process doctrine discussed in *Skilling*, and the First Amendment).

As Justice Scalia noted, in a dissent from denial of certiorari in *Sorich v. U.S.*, ___ U.S. ___, 129 S.Ct. 1308 (2009), the “honest services” law has been a dangerous one in the hands of aggressive prosecutors. “[T]his expansive phrase [“honest services”] invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.” *Id.* at 1310. Justice Scalia pointed out the fundamental unfairness of convictions gained under such a

² There are also various other arguments, that Senator Ross may make at appropriate times, about other aspects of the law under 18 U.S.C. §§ 1341, 1343, and 1346. By focusing the present motion on the arguments made herein, Senator Ross of course does not waive any other argument.

Senator Ross notes also that the indictment alleges that the “honest services” violation consisted of “bribery and concealment of material information.” Doc. 3, ¶ 234. If the prosecutors’ theory is that concealment could be an “honest services” offense without “bribery,” that would be contrary to the holding of *Skilling*. We trust that the prosecutors are not trying to ignore *Skilling*, and that they therefore realize that they must at least prove *both* “bribery” and “concealment of material information” in order to support any honest services theory.

vague, malleable, and unsettled legal standard. “It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.” *Id.*

In *Skilling*, the Court’s approach echoed the concerns that Justice Scalia had raised in *Sorich*: the concern about the possibility of prosecutorial abuse, and the concern that the criminal laws must be clear in advance (so that people can know, before they act, what the law forbids), rather than being developed after the fact through prosecutorial advocacy. Both of those concerns, as the Court recognized in *Skilling*, are a matter of constitutional due process.

To satisfy due process, “a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Skilling, 130 S.Ct. at 2927-28.

In the end, the Supreme Court in *Skilling* did not go so far as to hold the “honest services” law unconstitutionally vague. Instead the Court saved the law by dramatically cutting back its scope.

In narrowing “honest services,” the Supreme Court looked back to the development of the doctrine. “Honest services” doctrine was, at first, a judicial and prosecutorial creation that developed through caselaw; it was a way of broadening the mail- and wire-fraud statutes to cover cases in which no one was defrauded of money or property, by asserting that the defendant had defrauded someone (the public, or a private-sector union or employer) of its intangible “right to honest services.” But in 1987, the Supreme Court put a stop to this, and held

that the fraud statutes were limited to the protection of property rights, not such intangible things as “honest services.” *McNally v. U.S.*, 483 U.S. 350, 107 S.Ct. 2875 (1987). Congress responded by enacting § 1346, giving new statutory life to the “honest services” doctrine; but the statute itself offered practically no detail or clarity about what was covered. And then, over the next couple of decades, prosecutors argued and courts held that an astounding variety of situations were covered by the doctrine. This led to *Sorich* and ultimately to *Skilling*.

In dramatically narrowing the scope of “honest services” in *Skilling*, the Supreme Court declared that the statute could be saved from concerns about unconstitutional vagueness by “par[ing]” the statute’s coverage down to its pre-*McNally* “core.” This, the Court said, was “bribes or kickbacks,” of the sort that formed the bulk of pre-*McNally* reported decisions.

We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase “the intangible right of honest services.” Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

Skilling, 130 S.Ct. at 2928. The Court said that it had “surveyed” “the body of pre-*McNally*” caselaw, *see Skilling*, 130 S.Ct. at 2929. The Court described the results of its survey:

While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes -- schemes that were the basis of most honest-services prosecutions -- there was considerable disarray over the statute's application to conduct outside that core category.

Id. at 2929. The Court pointed to a catalog of dozens of pre-*McNally* cases that appeared in the Government's brief; this catalog reflected what the "solid core" of pre-*McNally* law consisted of.

The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States v. Runnels*, 833 F.2d 1183, 1187 (CA6 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).

Skilling, 130 S.Ct. at 2930.

Thus, the Court concluded, "Congress' reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications." *Id.* at 2931.

The Court expressly tied this, again, to the due process concerns of providing fair notice, and confining prosecutorial discretion, that the Court had discussed earlier in its opinion.

Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

Id., 130 S.Ct. at 2931 (emphasis in original, footnotes omitted); see *also id.* at 2933 (again noting the dual concerns of due process: "(1) fair notice and (2) arbitrary and discriminatory prosecutions.") Likewise, the Court tied its decision to the longstanding "rule of lenity" in the interpretation of unclear criminal laws.

Id. at 2932.

The Court understood that there were *some* pre-*McNally* cases that did not fall within that “solid core,” *Skilling*, 130 S.Ct. at 2930. The Court did not ratify *every* pre-*McNally* case, because there was “considerable disarray” about the doctrine’s pre-*McNally* content outside the solid core. *Id.* at 2929. For instance, the Court knew that there were some “relative[ly] infrequen[t]” pre-*McNally* cases based on conflicts of interest; but the Court did not allow that part of the doctrine to survive. *Id.* at 2932. The Court allowed only the true “solid core” to survive, the area in which – as reflected by the “dozens” of cases that the Government had cited in its brief to the Court, *id.* at 2930 – there was broad pre-*McNally* consensus as developed through consistent and repeated application. This was “bribes and kickbacks” of the sort reflected in case after case before *McNally*.

The crucial point, in terms of the present argument, is this: that the term “bribery,” as that word is used in *Skilling* to refer to the remaining “solid core” of “honest services” doctrine, does not encompass political contributions or in-kind political support. It encompasses only personal self-enrichment, not campaign contributions or other political support. This is the best understanding of what “bribery” means in this particular context, because of (a) pre-*McNally* history, as relied upon in *Skilling*, (b) the due process concerns identified in *Skilling*, and (c) the important First Amendment implications of political contributions and political advocacy, as contrasted with the absence of First Amendment concerns in the context of true bribery.

Campaign contributions and other political advocacy expenditures are protected by the First Amendment to the Constitution. Just this year, the Supreme Court emphasized and expanded the First Amendment protections for political spending. *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010). This is not to say that the First Amendment protection of political spending or contributions is absolute; but it is to say that there are vital First Amendment interests at stake in cases involving campaign contributions and issue-advocacy contributions, issues that make such cases very different from cases involving payments to officials personally. (This brief will turn back to this point, in conjunction with Tenth Amendment issues concerning the proper boundaries of federal power over state election matters and in conjunction with Fifth Amendment due process concerns, in the final section below.)

It is also instructive to note that courts have often distinguished between campaign contributions and actual “bribes,” even in situations where it is alleged that the campaign contributions were linked too closely with some official actions. *See, e.g., Green Party of Conn. v. Garfield*, 616 F.3d 189, 199-200 (2nd Cir. 2010) (“the Connecticut General Assembly enacted the CFRA’s ban on contractor contributions in response to a series of scandals in which contractors illegally offered bribes, ‘kick-backs,’ and campaign contributions to state officials in exchange for contracts with the state.”); *McComish v. Bennett*, 605 F.3d 720, 724 (9th Cir. 2010) (“A sting operation caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support

gambling legislation.”) In other words, the word “bribe” in its most natural usage does not include campaign contributions.

Given this very large and well-recognized distinction between personal enrichment and campaign contributions, it is unsurprising to find that cases involving campaign contributions are not encompassed within *Skilling*’s “solid core” of pre-*McNally* “honest services” doctrine. There was no pre-*McNally* settled understanding that an official or a citizen contributor could be charged with mail- or wire fraud based on an alleged connection between true campaign contributions and an official action.

Even the Government, in its brief to the Supreme Court in *Skilling*, framed its suggested understanding of “honest services” bribery doctrine in terms of *personal enrichment* of officials – without any hint that campaign contributions were at the core of what the doctrine covered. The Government argued in *Skilling*, “Schemes to deprive others of ‘the intangible right of honest services’ require that a public official, agent, or other person who owes a comparable duty of loyalty breaches that duty by secretly acting in his own financial interests while purporting to act in the interests of his principal.” See Government Brief in *Skilling*, p. 39 (emphasis supplied).³ At the same page of the Government’s brief, the Government described the impermissible motivation as a “personal financial interest.” *Id.* (emphasis supplied). And on the next page: “his [i.e., the defendant’s] own interests,” *id.*, p. 40. And page 42: “whether the office-holder has placed his self-interest above that of the public.”

³ <http://www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1394.mer.aa.pdf> .

And at page 51 of the Government's brief, and perhaps most strikingly given the way the Supreme Court ultimately disposed of the case, the Government conceded: "the vast majority (if not all) pre-*McNally* honest-services cases did involve self-enrichment schemes." (emphasis supplied). The Government thus admitted that the pre-*McNally* caselaw was almost entirely, and maybe even literally entirely, about "self-enrichment schemes."⁴ *Id.* This would make up the "core" as the Supreme Court described it in *Skilling*. That is what "bribery" means within the core of *Skilling*. Even according to the Government's own description, there was no settled pre-*McNally* understanding that an official or campaign contributor could be jailed on account of a connection between a campaign contribution and an official act. Most, if indeed not literally all, of the

⁴ 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, 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, 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.

pre-*McNally* “bribery” cases were about personal “self-enrichment” of officials; they were not about campaign contributions.

This is further borne out by the long footnote in the Government’s *Skilling* brief, which the Supreme Court then expressly invoked in its discussion of the pre-*McNally* “bribery” caselaw. In the words of the Supreme Court, the Government “cit[ed] dozens of examples” of pre-*McNally* “bribery or kickback” honest services cases. *Skilling*, 130 S.Ct. at 2930, citing Government Brief p. 42 and n.4. This, according to the Court, was a reflection of the doctrine’s “solid core,” which is what the Court allowed to survive. *Skilling*, 130 S.Ct. at 2930.

Looking to the cited portion of the Government’s brief, we find those dozens of examples, elucidating what the pre-*McNally* “solid core” was. These are the cases that the Government itself chose to identify as representing “bribes or kickbacks” cases prior to *McNally*, see Government Brief p.42; and the Supreme Court relied on this listing. And here is the striking and dispositive thing: none of them was a case charging a campaign contribution as a bribe or kickback. They were, in the phrase quoted above from the Government’s brief, self-enrichment cases – envelope-full-of-cash cases, and the like. Twenty-nine cases, selected by the best minds in the Justice Department as representing bribery and kickback “honest services” cases pre-*McNally* – and none of them held that a true campaign contribution amounts to an “honest services” bribe.⁵

⁵ Some of them mention campaign contributions, but not in ways inconsistent with our statements in the text above. See, e.g., *U.S. v. Pecora*, 693 F.2d 421 (5th Cir 1982) (a brief mention of a conversation about possible contributions regarding a millage campaign, though with no finding or holding of any relationship between that and the \$9,000 cash bribe to the Sheriff and District

If there were any pre-*McNally* “honest services” case premised on a campaign contribution as a supposed bribe, it would have been outside the “core” of honest services bribery as the Government identified it, and as the Supreme Court accepted it, in *Skilling*. After all, the Supreme Court recognized in *Skilling* that there were some pre-*McNally* cases that were outside the “core.” Not every pre-*McNally* case survives *Skilling*; only the “core” survives.

Therefore, based on *Skilling*, the proper holding in this case is that a campaign contribution (financial or in-kind) is just not an “honest services” bribe after *Skilling*. The application of “honest services” law to campaign contribution cases, through the assertion that someone linked an official action too closely to a political contribution, is one of those aggressive post-*McNally* prosecutorial arguments that the Supreme Court buried in *Skilling*.⁶ The “bribery and

Attorney); *U.S. v. Craig*, 573 F.2d 455 (7th Cir. 1977) (tens of thousands of dollars in cash-stuffed envelopes, given to officials in exchange for legislation); *id.* at 494 (reflecting the Government’s theory was that this was *not* campaign contributions, and the Government’s argument to the jury that a defendant’s assertion that he received money as a campaign contribution was a fabrication); *U.S. v. Barrett*, 505 F.2d 1091, 1094-97 (7th Cir. 1974) (reflecting that the case was about payments given to the official personally in valises and envelopes full of cash; there seems to have been a request above and beyond that for a political contribution, followed by the funny retort (met with a smile by the official) that the valises and envelopes full of cash were political contributions); *U.S. v. Isaacs*, 493 F.2d 1124, 1132, 1134 (7th Cir. 1974) (occasionally mentioning campaign contributions, though noting that none of them was charged as having been improper).

⁶ The Government may point to cases dealing with the possibility of prosecutions based on campaign contributions under *other* statutes, such as the Hobbs Act. Any such argument would miss the mark, because it would be an attempt to evade the Supreme Court’s reasoning in *Skilling*. In *Skilling*, the Supreme Court saved the “honest services” statute by attributing to Congress an intent to resuscitate the pre-*McNally* solid core of “honest services” law – not an intent to use “honest services” to cover things that had previously been prosecuted instead under *other* laws.

kickbacks” core of pre-*McNally* law, which the Supreme Court allowed to survive, was a core of cases about personal self-enrichment, not about campaign contributions. And as we have shown, the two types of cases are very different in their legal implications, largely by virtue of the First Amendment interests that are so important in contribution-related cases.

Furthermore, allowing “honest services” to cover this sort of case would raise all the due process concerns that the Supreme Court was trying to eliminate in *Skilling*. It would raise the troubling possibility of arbitrary or discriminatory prosecutorial action. And allowing “honest services” prosecutions in this area would subject officials and citizens to criminal jeopardy, in an area where the line between constitutionally-protected activity and crime is still the subject of unsettled debate. Compare *U.S. v. Ganim*, 510 F.3d 134, 142 (2nd Cir. 2007) (Sotomayor, J.) (holding that a case involving political contributions requires proof of an “explicit *quid pro quo*,” meaning “an express promise”), with *U.S. v. Siegelman*, 561 F.3d 1215, 1226, 1228 (11th Cir. 2009) (holding that “explicit” in this sense does *not* mean “express,” and that an inferable state of mind is sufficient), *vacated*, ___ U.S. ___, 130 S.Ct. 3542 (2010). This raises the fair warning concerns that are central to *Skilling*’s discussion of due process.

3. *There is no “honest services” bribe regarding even a personal payment, where it is not alleged that the payment was made with intent to influence a specific official act.*

The second point, and the one that is most directly applicable even to the allegations of payments to defendant Crosby and any other aspects of the

indictment that allege payments other than campaign contributions⁷, is that a payment is not an “honest services” bribe unless the Government alleges and proves that the payment was made with intent to influence a specific official act. If the allegation is only that the payment was made for some other, looser or more general purpose, it does not come within “honest services.” This principle follows from *Skilling*.

As noted above, *Skilling* limits “honest services” to “bribes” and “kickbacks.” This case, according to the Government’s view as stated in the Indictment, is supposedly about alleged “bribes.”

But what is the precise definition of a “bribe” after *Skilling* – even with regard to payments that are not campaign contributions? What must be alleged and proven, in order to make out a “bribe”? The answer is that the Government must allege and prove – among other required elements – at least that the payment was made with intent to influence a specific exercise of official power, a specific official act. A more generalized intent is not enough.

In *Skilling*, the Supreme Court invoked 18 U.S.C. § 201 as one of the statutes that would aid in limiting prosecutorial discretion about what can be prosecuted as a “bribe,” and would aid in giving notice to the public as to what is prohibited, and what is not, under “honest services” law. *Skilling*, 130 S.Ct. at 2933. That discussion was important to the Court’s opinion, because of the due process, “fair warning” and “rule of lenity” aspects of the case that we have described above. The law must give notice, in advance, of what is covered. So,

⁷ As noted above, Senator Ross is alleged to have received only campaign contributions – not any other type of payment. *Supra*, at n. 4.

the Supreme Court invoked § 201 because it helps to give such notice, about the nature of what is a “bribe.”

And the law is clear under § 201 that there is a bribe *only* if a payment is made with the specific intent to influence a specific, identifiable and known act. *U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398, 119 S.Ct. 1402 (1999); *U.S. v. McNair*, 605 F.3d 1152, 1190-91 (11th Cir. 2010) (recognizing and discussing this holding of *Sun-Diamond*). Again, a more generalized intention is not enough; it must be the intent to influence a specific act. That definition therefore transfers over to “honest services,” under *Skilling*. If it did not, then § 201 would not serve the due-process purposes under “honest services” law that the Supreme Court harnessed it to serve, in *Skilling*.

The Government may say that the Supreme Court in *Skilling* also invoked § 666 in the same vein, and the Government may say that § 666 does not include that sort of “specific act” requirement in a case that does not involve campaign contributions. If the Government makes that argument, all it would be doing is destroying the needed clarity about what the law prohibits. If section 666 truly doesn’t require proof of intent to influence a specific act (which is still open to debate, though we recognize that there is adverse Eleventh Circuit precedent, *see McNair, supra*) but section 201 does, then at best there is ambiguity about which of those standards is adopted into “honest services” under *Skilling*. And where there is ambiguity in the criminal law, it must be resolved against the Government, and in favor of liberty. *Skilling*, 130 S.Ct. at 2932-33.

In this case, the Government has carefully framed the Indictment in a way that makes quite clear that the Government does not allege, and is not prepared to prove, that any non-campaign-contribution payment was made to Crosby (or to anyone else) with intent to influence a specific act. The Government seeks instead to use a much broader brush, suggesting that there were various payments over the course of years and various acts – but is never actually willing or able to claim that any payment was intended to influence any act in particular. The Government has therefore not actually alleged any “bribery” in the sense that is encompassed by honest services law after *Skilling*.

For these reasons, the Government cannot legitimately rely on its allegations about payments other than campaign contributions, in order to bring this case within the scope of “honest services” law. All the “honest services” counts against Senator Ross should be dismissed.

4. *It would be unconstitutional to apply the vague “honest services” law to the allegations of this Indictment. In order to avoid constitutional issues, the Court should resolve the questions of statutory interpretation in favor of the defense.*

The points made above are confirmed not only by interpretation of caselaw such as *Skilling*, but also by constitutional considerations. The prosecution in this case comes at the intersection of two important limitations on federal power: the First Amendment, and the Tenth Amendment (including, more generally, principles of the division of power between state and federal governments). The prosecution is attempting to impose criminal penalties regarding participation in the political and electoral processes, and regarding advocacy about what the laws should be. And the federal prosecutors are doing

this not as to electoral advocacy in federal elections or advocacy regarding federal lawmaking; the context here is the support or opposition of State elected officials, and advocacy about what State laws and the State Constitution should be. It is highly questionable whether the federal government has any authority to set criminal laws with criminal penalties in this arena, under the law (the law of the First Amendment, and the law of federalism) as the Supreme Court is currently developing it. But it is quite clear, in any event, that if the federal government is to act in this arena, the federal government has an obligation to States, to officials, and to citizen advocates to make the laws clear. The “honest services” law fails to meet that test. For that matter, so does 18 U.S.C. § 666, which Senator Ross has addressed in another brief (in which he adopted by reference this portion of this brief); prosecution under § 666 depends, in this case, on the hopelessly undefined or circularly-defined word “corruption,” which sets no true standard.

The prosecution in this case, which attempts to portray Senator Ross as having stepped over some line between soliciting his supporters to help fund his re-election campaign and committing crime, depends on a prosecutorial vision of some golden ideal of politics – the idea that politics is “supposed” to be some pure exercise whereby political figures and citizens have courtly debates about the issues of the day, and where citizen support or opposition to candidates is based on things other than candidates’ positions on specific issues. That is just not the way politics works, and under the First Amendment prosecutors are not

allowed to demand that politics work that way. Federal prosecutors certainly do not have the authority to demand that politics work that way at the State level.

Imagine a voter who said to his Senator not long ago, “I oppose President Obama’s health care bill, because I believe that it is wrong for our country, and I believe that it will hurt my business as well as other small businesses. From my point of view it is the most important vote you will ever make, Senator. It will speak volumes about your approach to public policy. If you vote for it, I will use every ounce of my energy and resources to ensure your defeat in November. If you vote against it, I will be in your corner.” Would that citizen have committed a crime?

Surely not, because that is what democracy is. It is the passionate clash of people with particular differing interests and beliefs, trying to convince their elected representatives – sometimes through reasoned debate, sometimes not – and trying to support or defeat candidates based on those candidates’ actions and stances on the important issues.

The basic point of our First Amendment is that speech about politics must remain free and unfettered. This speech includes campaign contributions and in-kind campaign support. Those things are nothing more, or less, than an expression of support for the election or re-election of a person. And every politically active person makes the decision whether to support or oppose an official’s reelection, based on the person’s perception of what the official has done while in office – whether the official has taken actions that the voter/contributor supports, or that he or she opposes. The law is evolving in the

direction of much greater recognition of the First Amendment protection for political spending, as reflected by *Citizens United, supra*.

But federal prosecutors may tell us that the voter hypothesized above could go to jail. Or they may, alternatively, tell us that somewhere there is a dividing line, and that if one steps over that line he will go to jail – even if his crime was trying to convince an elected official on an issue of public policy, or if it had to do with a promise of support for officials who were on the right side of the issue or opposition to those on the other side. Somewhere, prosecutors will say, there is a line. It is often hard, though, to get prosecutors to say where the line actually is, with any clarity.

The Court should recognize that there is no line, not a line of the sort that the criminal law can draw. Voters are free to draw their own lines – to punish at the polls those officials who seem to be “too close” to their contributors, whatever each voter thinks that means. But the law cannot draw an effective line, between the normal course of politics and the supposedly improper use of campaign contributions or the supposedly improper advocacy of legislative action. Any attempt to draw that line will end up trampling a great deal of advocacy that is protected by the First Amendment. Imagine, again, the voter/contributor in our hypothetical above. Is that person to be prosecuted next? If not, what is the line?

The line-drawing problem becomes all the more difficult when the officials in question are State officials rather than federal ones. In this context, the First Amendment problem is compounded with federalism concerns, Tenth

Amendment concerns, and concerns about the substantive boundaries of affirmative Congressional authority to enact laws.⁸ If one State wishes to draw the line between politics and crime in one way in terms of the State's own official operations, and another State wishes to draw it slightly differently, does the Congress really have the authority to set a mandate for all fifty States' own operations?

If the Congress has that power, it is a power that must be exercised with clarity – clarity that this is in fact what Congress is intending to do, and clarity about where the line is. *See Cleveland v. United States*, 531 U.S. 12, 27, 121 S.Ct. 365, 374-75 (2000) (“Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.”) This, too, is a concern of constitutional dimensions under the Fifth Amendment's due process clause, as we have discussed above. It is a matter not only of fairness to defendants, but also of separation of powers in the federal government. The Congress must make the laws, and must not leave it up to prosecutors and judges to make them.

The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. ... This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

⁸ *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”)

United States v. Santos, 553 U.S. 507, 514, 128 S.Ct. 2020, 2025 (2008)

Applying the “honest services” law (and § 666) to Senator Ross based on the allegations of the indictment would run straight into all of these constitutional concerns. Any conviction would be unconstitutional, as it would take the “honest services” law (and § 666) beyond the substantive powers of the federal government under the Constitution, and would violate constitutional rights. But at least the Court should recognize that these are serious constitutional concerns, and that the Court should read the laws with an appropriately narrow view in order to avoid these difficult issues. If the Congress wants to impose a uniform federal ethical standard on state campaign finance law, or on how citizens may advocate for legislative change, let Congress do that with clarity – and if Congress does that, then the courts can determine whether the contours of that clear law are consistent with the First, Tenth, and Fifth Amendments. But until and unless Congress does that, the prosecutors and the courts should not take it upon themselves to police the ethics of state-level politics or legislative advocacy by imprisoning certain selected people for violating vaguely-written laws.

5. *The indictment’s allegations against Senator Ross don’t allege conduct that constitutes illegal deprivation of “honest services”*

The statutory construction and constitutional arguments above assert , and we believe demonstrate, that campaign contributions cannot constitutionally be prosecuted under §§ 1341, 1343, and 1346. But, even under a construction that allows some room for valid application of §§ 1341, 1343, and 1346 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 those sections as a deprivation of “honest services.”

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.

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.” *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.⁹

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 Senator Ross that is criminal as defined by §§ 1341, 1343, and 1346 requires dismissal of the “honest services” charges against him premised on those statutes. The failure of the indictment to allege the necessary *quid pro quo* is set forth in detail at pages 26-44 of Senator Ross’ brief in support of his motion to dismiss the federal programs bribery charges, and we adopt and incorporate those arguments by reference here.

6. *None of Counts Twenty-Three through Thirty-Three Allege “Honest Services” Fraud by Senator Ross*

⁹ 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).

Counts Twenty-Three through Thirty-Three are alleged to be governed by a scheme, in which Senator Ross and all other defendants, along with Lobbyist A, “knowingly devised and intended to devise a scheme and artifice to defraud and deprive” the State of Alabama and others of “their right to the honest services of elected members and employees of the Legislature” through “bribery and concealment of material information.” (§234) Paragraph 235 sets out five mailings of checks (comprising Counts 23 through 27) that Senator Ross and all other defendants, along with Lobbyist A, “aided and abetted by each other, and by others known and unknown to the Grand Jury,” for the purpose of carrying out the above fraudulent scheme, “placed and caused to be placed” for delivery. Paragraph 236 lists six telephone calls (comprising Counts 28 through 33) that, again, Senator Ross and all other defendants, along with Lobbyist A, “aided and abetted by each other, and by others known and unknown to the Grand Jury,” for the purpose of carrying out the above fraudulent scheme, “transmitted and caused to be transmitted by means of wire communication.”

But, none of the mailings in Counts 23 through 27 (the mail fraud counts, under §§1341 and 1346) or telephone calls in Counts 28 through 33 (the wire fraud counts, under §§1343 and 1346) mention Senator Ross at all. Nor does the indictment anywhere allege facts showing or even suggesting any connection by Senator Ross with any of the checks or calls – much less allege facts showing how he “placed [or] caused to be placed” or “transmitted [or] caused to be transmitted” any mailing or any call. Indeed, with one possible exception (Count

26), all but one of the alleged instances of mail and wire fraud on their face involve *only* defendants *other than* Senator Ross.

Having failed to allege, or allege facts to show, the explicit *quid pro quo* necessary in the campaign contribution context to allege Senator Ross' knowing participation in the asserted scheme to deprive the State and others of legislators' "honest services," see, e.g., *Siegelman*, 561 F.3d at 1225, and also having failed in each count to allege how he caused the mailing or telephone call, the indictment failed to allege essential elements of the "honest services" charge as to Senator Ross, requiring that all such charges (Counts 23 through 33) be dismissed as to him.

7. *None of Counts Twenty-Three through Thirty-Three sufficiently charge Senator Ross with aiding and abetting "honest services" fraud*

As best as can be determined, nowhere does the indictment set out for any mailing or telephone call identified in any of the Counts 23 through 33. 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 Twenty-Three through Thirty-Three (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 knowingly participated in the alleged scheme to defraud. Those counts accordingly could not have alleged a shared unlawful intent to assist

someone else to commit that offense. See *id.* And, nowhere does the indictment allege any act by Senator Ross that caused or furthered any of the mailings alleged as mail fraud (Counts 23 through 27) or any of the telephone calls alleged as wire fraud (Counts 28 through 33). Accordingly, for each of Counts Twenty-Three through Thirty-Three, the indictment has failed to allege sufficiently aiding and abetting, requiring dismissal of all those counts as to Senator Ross.

8. The indictment fails to allege sufficiently the nature of the alleged scheme

The indictment does not identify whose “honest services” were the alleged thing of which the State and the public were to be defrauded; it alleges a scheme to bribe (§ 234), but does not identify who was allegedly to be bribed, or in what way. And it alleges concealment of material information (§ 234), but does not identify what information or how it was to be concealed.

Counts 23 through 33 should be dismissed on the authority of *United States v. Bobo*, 344 F.3d 1076, 1084-85 (11th Cir. 2003). In *Bobo*, the Eleventh Circuit reversed the denial of the defendant’s motion to dismiss the indictment, because the fraud scheme had not been adequately alleged. There, as here, the indictment’s statement of the fraud count had incorporated the allegations about “overt acts” from a conspiracy count that preceded it in the indictment. *Id.* at 1084. The Court held that the incorporated acts – the overt acts alleged to have been committed in furtherance of – did not sufficiently define the nature of scheme, as the jury could have found in favor of the existence of the scheme without agreeing on which overt acts constituted the scheme. *Id.* at 1085-86.

Because the government incorporated the paragraphs from Count I of the indictment in Count II, the jury may have believed that the

overt acts alleged to support the conspiracy charge were sufficient to describe the alleged scheme or artifice to defraud. However, we have held that the overt acts are to support the charge of conspiracy, “not to describe an alleged scheme to defraud.” *United States v. Adkinson*, 135 F.3d 1363, 1377 (11th Cir. 1998).

Id. at 1085.

As the Eleventh Circuit noted in *Adkinson*, “all the particulars constituting the offense of devising a scheme to defraud ... are matters of substance, and not of form, and their omission is not aided or cured by the verdict.” 135 F.3d at 1377. Here, failure to define which of the overt acts (the vast majority of the incorporated paragraphs, and all of those that describe acts committed in furtherance of the conspiracy) constituted the means by which the scheme was to be carried out risks violating defendants’ right to a unanimous verdict at trial, and requires dismissal of all the “honest services” charges, Counts 23 through 33, as to Senator Ross. *Id.* at 1377-78.

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