**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:10-cr-186-MHT**
	)	
THOMAS E. COKER,	)	
	)	
Defendant.	)	

**DEFENDANT TOM COKER'S BRIEF
IN SUPPORT OF FIRST MOTION TO DISMISS,
REGARDING CHARGES PREMISED ON 18 U.S.C. § 666**

Defendant Tom Coker respectfully submits this brief in support of his first motion to dismiss, regarding Counts 1, 8 and 10. These are the charges against Coker that are premised (either directly, or in the case of Count 1, through an allegation of "conspiracy") on 18 U.S.C. § 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 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

[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.

how they would vote on a matter of regulatory legislation, and indeed on legislation 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 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 Mr. Coker's 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, Mr. Coker 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 Mr. Coker 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.

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,

[2] There are also various other arguments, that Coker will 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, Coker of course does not waive any other argument.

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--
>
> (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

[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.

services, just like private entities do; and sometimes they sell or otherwise provide goods and services, just like 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 decision-making 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

[4] In addition to the allegation that Coker 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.

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 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 Section 666(a)(2) that applies only to payments made with the intent to influence or reward, "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 case law rejecting these arguments. This is dispositive in Mr. Coker's 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 are 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.

The First Amendment, Tenth Amendment, and federalism concerns mentioned above are discussed at more length in Mr. Coker's brief in support of his second motion to dismiss, regarding the 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 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*.

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 decision-making 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.”).

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.

Respectfully submitted,

/s/ David McKnight

David McKnight
BAXLEY, DILLARD, DAUPHIN
MCKNIGHT & JAMES
2008 Third Avenue South
Birmingham, Alabama 35233
Telephone: 205.271.1100
Fax: 205.271.1108
Email: dmcknight@baxleydillard.com

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 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/ David McKnight
Of Counsel