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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

OBJECTION TO "RECOMMENDATION OF THE MAGISTRATE JUDGE" (DOC. 863), RECOMMENDING DENIAL OF MOTIONS TO DISMISS REGARDING "HONEST SERVICES" (DOCS. 208, 450)

Milton McGregor hereby respectfully objects to the recommendation of the Honorable Wallace Capel, Jr., in which Judge Capel recommended denial of Mr. McGregor's motions to dismiss the charges that are based on "honest services" mail- and wire-fraud under 18 U.S.C. § 1341, 1343 and 1346. Mr. McGregor's motions were Docs. 208 (with supporting brief, Doc. 209, and reply brief, Doc. 246) and Doc. 450. Judge Capel's recommendation is Doc. 863.

The Indictment's allegations do not come within the coverage of "honest services" 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.

Even if the Court concluded that there are some factual allegations in the

Indictment that might be a permissible basis for a differently-pleaded and much-narrowed valid "honest services" charge, it would remain true that "honest services" charges are based on many allegations that are outside of the scope of the law as properly construed. These charges, as pleaded in the Indictment, cannot stand. Dismissal is the appropriate remedy.

This objection is timely made under Fed. R. Crim. P. 59 and 28 U.S.C. § 636, Because of the nature of the arguments on the motions to dismiss, Judge Capel was not in the position of making any factual findings. There was no hearing on these motions. Judge Capel's recommendation was based on legal analysis, which Mr. McGregor respectfully submits was incorrect and which is subject to this Court's *de novo* review.

Introduction and Summary

The Indictment alleges that McGregor 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, Doc. 3, pp. 57-58, ¶ 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* Indictment, Doc. 3, p. 57, ¶ 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.

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, if campaign contributions (and other campaign support) could be the premise for an "honest services" charge, it would be necessary to charge and to prove beyond a reasonable doubt an "explicit *quid pro quo*" within the meaning of *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991). The indictment fails to do that, and the Government has wrongly denied that it must prove that.

Third, 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.

Fourth, in addition to all of these points, the Indictment is simply too vague on the "honest services" charges. It is too vague on the question of whose honest services were the object of the fraud, too vague on what (if any) material false statements or fraud-type material omissions were made, too vague in general to allow the conclusion that the grand jury concluded anything about how the elements of the crime were allegedly met.

For these and other reasons explored herein, including constitutional concerns under the First, Fifth and Tenth Amendments, the Court should hold that the "honest services" law does not encompass the allegations of the indictment, and the Court should dismiss these charges.

1. "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 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. In recent years, 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.

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).[1] 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."

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." *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 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,

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

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.[2]

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[2] 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 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

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*.[3] The "bribery and 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.

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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).

[3] Prosecutorial reliance on cases dealing with the possibility of prosecutions based on campaign contributions under *other* statutes, such as the Hobbs Act, would miss the mark. Such an argument 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.

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.

Furthermore, under the legislative-intent reasoning of *Skilling*, it is implausible to attribute to Congress an intention to regulate campaign contributions under "honest services" law. The regulation of campaign contributions is a difficult and sensitive matter, full of constitutional concerns, as well as being a matter on which reasonable people could differ as to where the line between crime and politics should be drawn. There is no reason to believe that the Congress – a body made up of people who depend every day on their ability to raise campaign contributions from people and industries whom they regulate – meant to create a crime covering this highly difficult area, and meant to do so without even telling themselves or anyone else what the standard was. Such a view of Congressional intent is not credible; and legislative intent was the

cornerstone of *Skilling*. "Honest services" does not cover this area.

Judge Capel did agree in his Recommendation that, in order to make out an "honest services" charge, the Government must demonstrate a "personal benefit" to the offender (i.e., the person whose "honest services" are in question). *See* Doc. 863, p. 8. However, Judge Capel also indicated that campaign contributions could amount to such a personal benefit, perhaps depending on whether additional facts were proven. *Id.*, p. 9. Mr. McGregor submits that these aspects of Judge Capel's recommendation underscore the lack of clarity in the law, as to how (if at all) campaign contributions are covered. Because of that lack of clarity, the proper answer is that they are not covered at all.

2. If "honest services" could cover campaign contributions, it would require allegation and proof of an "explicit quid pro quo," a standard that the Government has not met in the Indictment.

If "honest services" did cover cases premised on campaign contributions or similar campaign-related matters, the law would at least require pleading and proof of an "explicit *quid pro quo*" as enunciated (for the Hobbs Act) in *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991). Mr. McGregor made this point in his third motion to dismiss, Doc. 450, pp. 6-7.

Judge Capel recommended denial of the motion in this respect, on two grounds (Doc. 863, p. 11): that "honest services" does not require a "quid pro quo", (*id.*, citing *United States v. Nelson*, 2010 U.S. Dist. LEXIS 118363 (M.D. Fla. 2010)), and that even if one were required, it would not have to be an "explicit" *quid pro quo* in the sense of that word meaning "express" (*citing United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994). Judge Capel did not recommend holding that the Indictment was sufficient if

a truly "explicit *quid pro quo*," meaning "express," is required.

As Judge Capel relied on very similar reasoning in regard to the charges under § 666 (Doc. 862), and as Mr. McGregor is simultaneously filing an objection to Judge Capel's recommendation in that regard, this brief will address the matter somewhat briefly. This set of issues will also likely be discussed in some depth in Mr. McGregor's trial brief, and in proposed jury instructions.

The Government has even agreed, in this very case, that "honest services" incorporates the *McCormick* standard for campaign contributions. The Government took the position that the adoption of the *McCormick* standard is one of the things that helps make "honest services" doctrine constitutionally permissible. *See* Doc. 237, p. 10 n.6 ("That *Skilling* incorporated this heightened showing for campaign contribution bribe payments blunts defendant McGregor's claim that applying § 1346 in this context somehow impermissibly would implicate First Amendment concerns."). Given this statement by the Government, it would certainly be wrong to deny that the *McCormick* "explicit *quid pro quo*" standard applies to honest services cases involving campaign contributions. Such a denial would be contrary to the principle of "fair warning" that is so important to due process.

If "honest services" does not require an "explicit *quid pro quo*" in the true and undiluted sense of the word "explicit" – meaning express, or actually stated – then the law is even more hopelessly unclear about what the standard for a campaign-contribution "honest services" case is. The law would then be even more clearly demonstrated to be unconstitutionally vague. The law would allow an enormously dangerous amount of

prosecutorial discretion, and would give no real guidance to campaign contributors or to officials as to where the line is between politics and crime. The Supreme Court's adoption of the "explicit *quid pro quo*" standard in *McCormick* was based on the recognition that there must be a clear line between politics and crime in regard to campaign contributions. Those same concerns exist under "honest services" law, at least as much as in the Hobbs Act context that was involved in *McCormick*. Indeed, the need for clarity is even greater here, under a law that targets citizen contributors as well as elected officials. There must be a line, and it must be clear in advance where the line is.

It is true that the "honest services" statute does not include the words "quid pro quo." But that fact tells us very little, other than reminding us of the intolerable vagueness of the law insofar as it impacts campaign contributions. The Hobbs Act, which was at issue in *McCormick*, does not include the term "*quid pro quo*" either. But the Supreme Court adopted the "explicit *quid pro quo*" standard in *McCormick* for the Hobbs Act, and the standard should apply for the very same reasons under other (even more troublingly vague) statutes such as "honest services." *Nelson*, *supra*, does not refute this point, because *Nelson* was not a campaign-contribution case.

Furthermore, the "explicit *quid pro quo*" required under the *McCormick* standard must really be "explicit" in the ordinary sense of that word, meaning "express" or actually stated. An implicit *quid pro quo*, or state of mind, is not sufficient. Certainly it would not be sufficient in this case, given the standard for *fair warning* in criminal law. As explained in Mr. McGregor's submission regarding the § 666 charges, the due process "fair warning" standard is the same as the "qualified immunity" standard that gives such

strong protection in civil suits. Only if the law is clearly established, before the acts at issue, can there be liability. Here, there was no "clearly established law," and no "fair warning," that one could be convicted in our Circuit on a standard that divorces "explicit" from "express." *Blandford*, which divorced the two words in the Sixth Circuit, was premised explicitly on *rejection* of Eleventh Circuit precedent, and *Blandford*'s *dicta* in this respect are not even followed in the Sixth Circuit anymore. These points are further explained in the Objection regarding the § 666 charges. No one can, in fairness, be convicted based on the (to say the least) questionable *Blandford* gloss on *McCormick*. To allow such a conviction would be unconstitutional as a deprivation 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 third 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 contributions, 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, the Supreme Court invoked § 201 because it helps to give such notice, about the nature of what is a "bribe."

Under § 201, 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's stated position is that *Sun-Diamond*'s requirement of

connection to a specific act was applicable only to the *gratuity* part of § 201, not to the *bribery* part. This, we submit, is an incorrect view. The Supreme Court in *Sun-Diamond* held that a gratuity charge under § 201 requires proof of the statutory connection to a specific official act. The first and foremost reason for that holding – a reason which was then supplemented by other follow-up rationales as well – was based firmly in a particular phrase in the language of the statute. The "gratuity" section, 201(c), requires proof of a thing given "for or because of any official act performed or to be performed by such public official." *Sun-Diamond*, 526 U.S. at 404, 119 S.Ct. at 1406. The Supreme Court focused its attention especially on that phrase "any official act." The Court noted that the Government's theory was that the gift did not have to be tied into anything in particular; the Court said that this could not be squared with the statutory focus on "any official act."

> In our view, [the Government's] interpretation does not fit comfortably with the statutory text, which prohibits only gratuities given or received "for or because of *any official act* performed or to be performed" (emphasis added). It seems to us that this means "for or because of some particular official act of whatever identity" -- just as the question "Do you like any composer?" normally means "Do you like some particular composer?" It is linguistically possible, of course, for the phrase to mean "for or because of official acts in general, without specification as to which one" -- just as the question "Do you like any composer?" could mean "Do you like all composers, no matter what their names or music?" But the former seems to us the more natural meaning, especially given the complex structure of the provision before us here. … <u>The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.</u>

Sun-Diamond, 526 U.S. at 406, 119 S.Ct. at 1407 (underlining emphasis added).

The same principle should be recognized as applicable to the "bribery" part of § 201, i.e., § 201(b), because § 201(b)(1) *also* requires proof of a connection to "any

official act," just as the "gratuity" part does. That was the crucial phrase that drove the Supreme Court's decision as to § 201(c), and it appears in § 201(b)(1) as well. The difference between them is in what *type* of intended connection must be shown, between the payment and the "official act." *See Sun-Diamond*, 526 U.S. at 404-05, 119 S.Ct. at 1406 ("The distinguishing feature of each crime is its intent element. Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a *quid pro quo* -- a specific intent to give or receive something of value in exchange for an official act."). In fact, in *Sun-Diamond* the trial court had correctly agreed that proof of a connection to a specific act is required for bribery, even while wrongly holding that such proof is not required for gratuity. That is the error that the Supreme Court straightened out. "The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*. The point in controversy here is that the instructions went on to suggest that § 201(c)(1)(A), unlike the bribery statute, did not require any connection between respondent's intent and a specific official act." *Sun-Diamond*, 526 U.S. at 405, 129 S.Ct. at 1406.

The Government's position, further, is that the Supreme Court in *Skilling* also invoked § 666 in the same vein, and that § 666 does not include that sort of "specific act" requirement in a case that does not involve campaign contributions. This argument, if accepted, would merely show that there is no 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 McGregor should be dismissed.

4. The indictment is too vague, and is insufficient, in regard to such crucial points as identifying the persons whose "honest services" were at stake, and identifying the material misstatements or omissions (if any) that make out the "fraud."

In his third motion to dismiss (Doc. 450, pp. 4-6), Mr. McGregor argued that these charges should be dismissed because the Indictment failed to lay out the elements of the crime; it was too vague in crucial respects. The Court should dismiss these charges on

this basis as well. The indictment does not adequately allege the nature of the alleged scheme. It 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 (Doc. 3, pp. 57-58, ¶ 234), but does not identify who was allegedly to be bribed, or in what way. Therefore there is no identification, by the grand jury, of what the actual "object" of the alleged scheme was. Moreover, the indictment alleges concealment of material information in summary fashion (*Id.*, ¶ 234), but does not identify what information was material or how it was to be concealed. This omission is important, because even an "honest services" fraud scheme is still a fraud scheme, and thus proof of material misstatement or omission is required. *See, e.g., United States v. Jockisch*, 159 Fed. Appx. 145, 2005 U.S. App. LEXIS 27988 (11th Cir. 2005) (unpublished) (recognizing that the requirement of materiality, under *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999), applies in "honest services" fraud cases as well as in traditional money or property fraud cases). Whatever is the "object" of an alleged fraud scheme – whether it is money or property under a traditional charge, or "honest services" in a § 1346 charge, there has to be fraud in the sense of material omission or misstatement. The indictment does not identify what the fraud was.

In response to Mr. McGregor's motion for a bill of particulars on these charges (Doc. 359), the Government emphasized its view that the statement of these charges is sufficient because Paragraph 233 of the Indictment incorporates Paragraphs 1-26, and 29-190, in which the Indictment alleges "overt acts" allegedly in furtherance of a conspiracy. (Doc. 386). Mr. McGregor submits that this is insufficient, and that Counts 23 through

33 should be dismissed on the authority of *United States v. Bobo*, 344 F.3d 1076, 1084-85 (11th Cir. 2003), and *United States v. Adkinson*, 135 F.3d 1363, 1377 (11th Cir. 1998). 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 this was not sufficient, and that the motion to dismiss should have been granted despite this statement of incorporation.

> 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 recognized in this quotation from *Bobo*, the Eleventh Circuit decision in *Adkinson* was to the same effect: adoption of allegations about "overt acts" in support of a conspiracy is no substitute for clarity in an indictment about the nature of an alleged scheme to defraud.

> Government counsel now argues that the missing scheme to defraud the banks can be located among the 227 overt acts remaining in Count I. The overt acts, however, are there to support the allegations of a conspiracy, not to describe an alleged scheme to defraud. United States v. Mercer, 133 F. Supp. 288, 290-91 (N.D.Cal.1955) (indictment charging defendant with wire fraud supported only by overt acts and no particulars of the scheme insufficient).

Adkinson, 135 F.3d at 1377.

Even if the "overt acts" may be relied upon to give notice for trial purposes of

what the Government intends to prove, still this motion to dismiss is not based merely on notice concerns. It is based on also on the concern that the indictment, as written by prosecutors, did not actually have the grand jury making a proper determination as to whether, and if so how, the elements of the alleged crimes were present. In other words, a vague indictment is in derogation of the role of the grand jury, as well as being troubling for "notice" purposes. *See United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (en banc) (requirement that indictment must allege all elements of the crime serves two purposes: (1) notice, and (2) protecting the constitutional role of the grand jury).

5. 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.

The prosecution in this case, which attempts to portray Mr. McGregor as having stepped over some line between political activism and crime, depends on an 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. 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.[4] 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

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[4] *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.")

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.

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

Applying the "honest services" law to Mr. McGregor based on the allegations of the indictment would run straight into all of these constitutional concerns. 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. Application of the "honest services" doctrine in this case would be unconstitutional, because of the statute's vagueness on the points identified herein and because of these

other constitutional concerns as well.

Respectfully submitted,

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