IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 09-5130

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UNITED STATES OF AMERICA,

*Appellee*

v.

WILLIAM J. JEFFERSON,

*Appellant*

---

Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria
*The Honorable T.S. Ellis, III, District Judge*

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# BRIEF OF THE UNITED STATES

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## ISSUES PRESENTED

I. Whether the district court properly instructed the jurors on the "official act" definition where it twice read the statutory definition to them and, consistent with the Supreme Court's interpretation of that language, further instructed them that an act could be "official" even if not prescribed by law so

long as the activity was clearly established by settled practice to be part of the official's position?

II. Whether the district court properly instructed on § 201(b)(2)(A)'s *quid pro quo* element where, in strict adherence to this Court's precedents, the court instructed the jury that it could be satisfied by a showing that defendant accepted things of value in exchange for performing specific official acts on an as-needed basis?

III. Whether any *Skilling* instructional error was harmless because, *inter alia*, there was overwhelming evidence of bribery as charged in both conspiracy counts, all three wire fraud counts, and the racketeering count; and defendant's convictions of two substantive bribery counts concomitantly showed the jury convicted him of the bribery object of Count One, the bribery conduct underlying Counts Six, Seven, and Ten, and the requisite two racketeering acts of Count Sixteen?

IV. Whether the government adduced sufficient evidence of venue for the Count Ten wire fraud charge where it showed defendant committed the essential conduct of participating in the fraudulent scheme in the Eastern District of Virginia?

## STATEMENT OF CASE

In 2007, an Eastern District of Virginia grand jury returned a sixteen-count indictment charging William J. Jefferson with conspiracy to solicit bribes by a public official, deprive citizens of honest services by wire fraud, and violate the Foreign Corrupt Practices Act (18 U.S.C. § 371) (Count One); conspiracy to solicit bribes by a public official and deprive citizens of honest services by wire fraud (18 U.S.C. § 371) (Count Two); solicitation of bribes by a public official (18 U.S.C. § 201) (Counts Three and Four); deprivation of honest services by wire fraud (18 U.S.C. §§ 1343, 1346) (Counts Five through Ten); violation of the Foreign Corrupt Practices Act (15 U.S.C. § 78dd-2(a)) (Count Eleven); money laundering (18 U.S.C. § 1957) (Counts Twelve through Fourteen); Obstruction of Justice (18 U.S.C. § 1512(c)(1)) (Count Fifteen); and violation of the Racketeer Influenced Corrupt Organization Act (18 U.S.C. § 1962(c)) (Count Sixteen).

Following a multi-week jury trial before the Honorable T.S. Ellis, III, the jury convicted defendant of all counts except Counts Five, Eight, Nine, Eleven, and Fifteen. Judge Ellis sentenced defendant to concurrent terms of imprisonment: 60 months on Counts One and Two; 156 months on Counts Three, Four, Six, Seven, Ten, and Sixteen; and 120 months on Counts Twelve through Fourteen.

## STATEMENT OF FACTS

### A. Introduction

From 2000 through 2005, defendant, William J. Jefferson, a then-Member of the U.S. House of Representatives from Louisiana's 2nd Congressional District, participated in numerous bribe schemes in order to unjustly enrich himself and his family. Those bribery schemes followed a common pattern: defendant solicited various forms of bribe payments from constituent companies and businesspersons in return for performing a stream of official acts designed to promote the companies' and businesspersons' interests. In return, defendant and his family received hundreds of thousands of dollars, expected more than $100 million, and received millions of shares of stock.

### B. The Counts One, Three, and Four Bribe Schemes

#### *(i) Defendant's Solicitations of Bribes from iGate's Jackson and NDTV*

Defendant's most far-reaching bribe scheme related to numerous official acts he performed to advance the business interests of iGate, Inc., a Kentucky-based telecommunications firm. iGate's founder, Vernon Jackson, developed a technology that permitted video, data, and audio to be transmitted through copper wire at high-speed (JA346-48). When, in 2000, Jackson wanted to pursue

government-sector contracts for his technology, he was introduced to defendant (JA350-54). At his first meeting with Jackson, defendant described how he could bring iGate's technology to the attention of other lawmakers (JA354).

Defendant thereafter began promoting iGate in his official capacity. For example, when Jackson was told that, before iGate's technology could be used by the Army, it had to be tested at Fort Huachuca, defendant arranged a meeting at his congressional office with General James Hylton, who oversaw the Army's information services (JA849-53;JA358-59). Defendant told General Hylton that iGate's product could save the government money and that it needed to get tested at Fort Huachuca (JA359;JA855-60). General Hylton understood defendant to be representing a constituent whose product could benefit the Army (JA859).[1] Soon thereafter the Army asked iGate to send its product to Fort Huachuca (JA362-63;JA859-61).

After Jackson informed defendant of the testing's favorable preliminary results, defendant told Jackson that iGate needed someone to market iGate's technology to corporate and government decisionmakers; defendant recommended that iGate hire his wife's consulting firm, The ANJ Group, which, unbeknownst to

[1] Defendant devoted a significant amount of his congressional office's resources to constituent services (JA3281-83;JA4205-06;JA5913-14).

Jackson, had just been formed in the names of defendant's wife and daughters (JA364;JA378-79;GEX15-1). Defendant provided Jackson with a contract whereby iGate agreed to pay ANJ a $7,500 monthly retainer, a percentage of gross profits, and options for up to one million shares of iGate stock (JA369-78;JA5307-11;JA5959-63).

It soon became clear to Jackson that defendant, not his wife, was promoting and marketing iGate in return for the payments iGate was making to ANJ (JA387-88). Although Jackson knew this was "flat-out wrong," Jackson continued to make payments so defendant would continue "promoting iGate's products and services from his congressional offices" (JA389).[2] And defendant continued to do so.

In July 2001, for example, defendant issued a congressional inquiry to the Army for a status update on the iGate testing (JA1569-72). The Army sent Colonel Joseph Brown, the Army manager in charge of iGate's product, and an Army Congressional Liaison representative to defendant's congressional office (JA1569-72). There, Colonel Brown delivered a powerpoint presentation, which had been reviewed and approved by two generals, and answered defendant's

[2] Jackson pleaded guilty to conspiracy and bribery of a public official for his role in bribing defendant (JA343;GEX28-2).

iGate-related questions (JA1571-95;JA5322-35). Defendant expressed interest in the Army's testing and use of iGate's technology, reiterating that iGate's technology "could be of a lot of value to the Army" (JA1575-76).[3]

Further, defendant introduced Jackson to Congressman Billy Tauzin, the Chairman of the Subcommittee on Telecommunications, Trade, and Consumer Protection (JA403-05;JA1499;JA5343). At a meeting in Congressman Tauzin's office, defendant told him that iGate's technology "would be good for the government in terms of reducing cost and expediting access to services" for their constituents and asked Congressman Tauzin to evaluate the technology for himself (JA404-06). Congressman Tauzin instructed a committee staffer, Howard Waltzman, to assess the iGate technology; Waltzman did this by attending iGate demonstrations in D.C. and Georgia (JA1504-08).

Defendant later contacted Waltzman to ask about a letter endorsing iGate's technology (JA1511-13;JA1518). Waltzman, who understood defendant to be acting on behalf of a constituent, prepared a letter for Congressman Tauzin's signature endorsing iGate's technology (JA1509-18;JA406-10;JA5343). This

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[3] Similarly, in 2004, defendant's office contacted the House Armed Services Committee and asked a committee staffer to bring iGate to the attention of Department of Defense officials, which that staffer did (JA1532-36;JA1538-39).

endorsement was extremely beneficial to iGate because of Congressman Tauzin's committee chairmanships and his influence with major telecommunications companies (JA409-10;JA1515).[4]

While defendant was performing constituent services for iGate in 2001 and 2002, Jackson was issuing hundreds of thousands of shares of iGate stock to ANJ. By September 2002, Jackson had transferred 650,000 shares of iGate stock to ANJ (JA413-17;JA5970-84).

In July 2003, in Nigeria, defendant met Dumebi Kachikwu, the founder of Netlink Digital Televison (NDTV), a Nigerian-based, direct-to-home satellite broadcast service (JA1192;JA1201-02;1207). When Kachikwu told defendant that NDTV was trying to establish satellite service in Nigeria, defendant told him iGate's technology was better (JA1203). Defendant further informed Kachikwu that he had already helped iGate "gain a lot of inroads . . . with government agencies in the U.S." (JA1203).

When Kachikwu and his NDTV partner, Ahmed Vanderpuije, met Jackson and defendant in London three days later, Jackson confirmed for Kachikwu how

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[4] *See also* JA1179-84 (defendant attended meeting of iGate shareholders in April 2002 and said he was there to "endorse Vernon Jackson and iGate" and "hoping to solicit additional support for iGate and for Mr. Jackson from his congressional colleagues").

defendant had been "very instrumental" in getting iGate "access" to, *inter alia*, the Army (JA1205-08;JA417-18). Defendant echoed this by outlining the numerous ways he could help an iGate/NDTV venture in his capacity as a congressman: assisting NDTV in obtaining Ex-Im Bank[5] financing; securing for NDTV, through legislation, the rights to U.S.-based content; and helping NDTV obtain approval from NASA or the Pentagon to use iGate's product in Nigeria (JA1209-11;JA1244). Moreover, defendant explained, his "good relationship[s]" with Nigeria's President, Vice-President, and members of the Nigerian Communications Commission would be "helpful" to make any iGate/NDTV project "go" since the Nigerian telephone company (NITEL) was government-owned and NDTV would need access to NITEL's copper wires (JA428).

While still in London, NDTV and iGate signed a Memorandum of Understanding and defendant separately solicited a bribe from NDTV's Kachikwu (JA420-26;JA1214-29;JA1249;JA5429-31). The two agreed defendant would receive $5 for every converter box NDTV purchased from iGate, which meant defendant stood to make at least $1 million from this arrangement (JA1227-28). Kachikwu conveyed this bribe solicitation to Vanderpuije, who agreed to it

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[5] The Export-Import Bank of the United States is the official credit agency of the U.S. Government. 12 U.S.C. § 635.

because he "was excited about the fact that he could have a U.S. congressman in his pocket" (JA1240).

Although defendant did not reveal his NDTV-bribe scheme to Jackson, he sought additional iGate-based bribery profits from him. Within the month, defendant sought an increase in ANJ's compensation from 5% to 35% of profits (JA432-33;JA5994). Jackson agreed to this because he expected that, in return, defendant would provide further official assistance, including arranging "meetings with the heads of state and heads of the government in Nigeria" (JA435-36).

In August 2003, NDTV and iGate reached a formal agreement whereby NDTV agreed to pay iGate approximately $44 million (with a down payment of $6.5 million) for the right to use iGate's technology in Nigeria (JA442-43;JA445-46;JA1255-56). While NDTV's Vanderpuije and Otumba Fashawe were in the U.S., defendant sought an NDTV ownership share from them (JA1250-52;JA1271-94;JA5915-17). And, although Kachikwu had restricted NDTV's bribe payments to $5 per converter box, Fashawe agreed to provide defendant a 2% ownership interest in NDTV's cable-television operation and other things (JA1285-89;JA5916).

In accordance with the bribe agreements he had struck with NDTV officials and Jackson, defendant arranged a meeting for the iGate/NDTV venture

participants at Ex-Im Bank (JA439). Ex-Im Bank funding was critical to the iGate/NDTV venture because Ex-Im Bank could fund 85% of the venture (JA439). Defendant participated in this meeting in his congressional capacity, talking "about trade issues between America and Nigeria companies" and the need to support "these kinds of projects and activities" (JA440). Fashawe and Vanderpuije later reported to Kachikwu that defendant had gotten them an "excellent reception" at Ex-Im Bank and that they believed they had received "same-day approval in principal for the NDTV project" (JA1253).

Defendant also arranged a meeting for Vanderpuije, Fashawe, and Jackson with Nigerian Vice-President Atiku Abubakar at the VP's Maryland residence (JA453-54). At this meeting, defendant promoted the iGate/NDTV venture to VP Abubakar, who had direct authority over the Minister of Communications, telling him that the venture "would be good for U.S. trade overall, between the countries" (JA454-55;JA1311-12;JA1316-17).

As part of its $6.5 million down payment, NDTV paid iGate $1.5 million in late-August 2003 (JA458-62;JA1307-09). Soon thereafter, defendant's wife, who had performed no work for iGate, sent iGate an ANJ bill for $240,000, which reflected 23 overdue monthly installments of $7,500 (JA462-63;JA5367). Jackson understood this payment request was for "the services that the congressman had

provided" iGate (JA463). In late-December 2003, upon learning that NDTV would soon be paying the remaining $5 million, defendant again reminded Jackson of past-due payments and sent Jackson an ANJ invoice for $262,500 (JA473-80;JA5369-70). Three days after NDTV paid the additional $5 million to iGate in late-January 2004, Jackson wired $230,000 to ANJ (JA480-87;JA6318;GEX1-46A;GEX1-48;GEX1-54;GEX1-55).

In February 2004, defendant and his staff arranged a trip to Nigeria and Cameroon to assist in moving the iGate/NDTV venture forward (JA471-72;JA501-03;JA1312-13;JA4064-70;JA4256-66). In Nigeria, Jackson needed defendant's assistance to obtain government approval for, *inter alia*, right-of-ways on NITEL's telephone lines (JA472-73). Melvin Spence, defendant's Senior Policy Advisor, assisted in trip preparations for the participants and coordinated with State Department personnel, who requested meetings with high-level government officials, including Nigerian President Olusegun Obasanjo and ministers in the telecommunications, oil, and trade areas (JA4236-37;JA1617-19;JA1620-32). When James Maxstadt, a Nigeria-based U.S. Embassy officer, asked Spence what defendant wanted to discuss with these officials, Spence

pointed out defendant's Nigeria and Africa-Trade caucus positions[6] and told Maxstadt that defendant "has been actively engaged in an effort to promote the Gulf of Guinea region as an area of strategic significance to the United States" (JA1628-29).

In his subsequent meetings with VP Abubakar, the Minister of Communications, and the Nigerian Communications Commission, defendant "came in his full apparatus as a U.S. Congressman, with embassy security, embassy vehicles, [and] introduced himself as a U.S. Congressman in charge of overseeing affairs of Nigeria or Africa" (JA1313). Further, he stated that "in his capacity as a congressman overseeing African affairs and Nigerian affairs, he was promoting an American company that had an innovative product and a new technology that would do miracles in the telecom space in Nigeria" (JA1313-14). In his meeting with the Nigerian Communications Commission, defendant asked that iGate be provided access to NITEL's infrastructure and suggested NITEL would benefit "tremendously" from the project (JA1321-22;JA505-07). Similarly, during his meeting with VP Abubakar, after first discussing the congressional

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[6] At all times relevant to this case, defendant was a Member of the Committee on Ways and Means, Subcommittee on Trade; a Member of the Congressional Black Caucus; Co-Chair of the Africa Trade and Investment Caucus; and Co-Chair of the Congressional Caucus on Nigeria (JA353;JA355; JA382;JA504;JA1628;JA2051-52;JA2074-75;JA2216;JA2364;JA5912).

committees he served on and his interest in "promoting trade and investment from the United States into Africa," defendant asked VP Abubakar to ensure NITEL would grant right-of-ways to iGate's product (JA504-06). Finally, defendant met with President Obasanjo at his presidential palace, having been driven there with the highest-ranking U.S. diplomat in Nigeria in an armored black limousine with an American flag on the front bumper; in this meeting, defendant described iGate's technology "as a way of improving telecommunication infrastructure in poor countries, such as those in Africa" (JA1640;JA4268;JA4270).

In all these meetings, defendant held himself out as a "U.S. Congressman interested in trade between the United States and Africa" (JA508).[7] This was consistent with defendant's use of his official passport, which is limited "to the discharge of the bearer's or sponsor's official mission" (JA5880). Indeed, defendant and Spence filed travel disclosure forms certifying that this trip was in connection with their respective duties as a Member and employee of the U.S. House of Representatives (JA1703-04;JA1716;JA1718-22;JA6172-73).

In mid-2004, defendant was coordinating another official trip to Africa, including visits to Cameroon and Nigeria, for the purpose of promoting iGate

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[7] *See also* JA1649 (Maxstadt understood defendant was "acting as a U.S. Congressman, on an official visit" promoting constituents); JA4271 (Spence understood defendant was acting in his capacity as "a congressman").

(JA541-42;JA1333-34;JA6114-15). As was the case with the February 2004 trip, defendant's congressional staffers were extensively involved in making arrangements for this trip, including arranging the itinerary (JA4285-92;JA6090-91). Defendant traveled to Cameroon on his official passport (JA5878;JA5885). There, he met with officials of CAMTEL, the government-owned telephone company (JA543). In his role as a congressman promoting U.S. trade and products, defendant recommended that these officials look at iGate's products for installation in CAMTEL's infrastructure (JA542-44). Defendant then traveled to Nigeria in a failed attempt to meet with President Obasanjo to move the iGate/NDTV venture forward (JA547;JA1333-34;JA5433-36). He did, however, meet with the Minister of Communications and promote the iGate venture in his capacity "as a U.S. Congressman," "promot[ing] American interests" (JA1339-41). By this time, ANJ had received bribe payments totaling $267,000 and 775,000 shares of iGate stock (JA580;JA5970-88).

*(ii) Defendant's Solicitations of Bribes from Lori Mody*

Ultimately, the iGate/NDTV venture foundered and iGate agreed to re-pay NDTV $3.5 million (JA608-611). iGate was able to reach this settlement because defendant found an investor to replace NDTV (JA611-12;JA1367). Brett Pfeffer, one of defendant's former legislative aides, introduced defendant to Lori Mody, a

wealthy Northern Virginia businesswoman (JA1914-15;JA1928-30). Pfeffer was president of Mody's business-development company, W2 (JA1922-24). Pfeffer, Mody, Jackson, and defendant met at defendant's congressional office in late-June 2004 and defendant pitched the venture, explaining that W2 would have the right to market and distribute iGate's products in Nigeria (JA613-15;JA1930-39). Defendant explained that Ex-Im Bank could finance 85% of the venture and that he would "make sure" W2's Ex-Im Bank application "got approved" (JA1935-36;JA1941-45;JA5438-42). Defendant further represented that he "would work with" Nigerian government officials – including the President – to help get NITEL on-board (JA1936).

Defendant's pitch succeeded and, in July 2004, iGate and W2-IBBS (the Nigerian company created for the venture) entered into an agreement whereby W2-IBBS agreed to pay iGate $44.9 million for the Nigerian distribution rights of iGate products, with W2-IBBS putting up $3.5 million and Ex-Im Bank financing the rest (JA5381-83;JA1939;JA1951-52;JA615-22). The agreement required a $1.5 million payment by late-July and another $2 million two months later (JA619;JA1952;JA5381-83). Days after Mody (on behalf of W2-IBBS) paid the $1.5 million to iGate, Jackson paid $50,000 to ANJ (JA5401;GEX1-89). In like fashion, after Mody paid the $2 million, iGate funneled another $50,000 to ANJ

(JA656-64;GEX1-101). In August 2004, Jackson issued 30 million iGate shares to ANJ at defendant's request, although ANJ still paid nothing for them and performed no work for iGate (JA496-501;JA643-44;JA5374-75;JA5990). ANJ now owned 24% of iGate's outstanding stock (JA645).

Also in August 2004, defendant met with Mody, Pfeffer, Jackson and Suleiman Yahyah in New Orleans (JA1965-67;JA647-49). Yahyah owned a Nigerian internet-service-provider company called Rosecom; defendant recommended Yahyah to Pfeffer and Mody as a local partner for W2-IBBS (JA1965-66). Just before the meeting, defendant approached Pfeffer alone and explained that he "would need between five to seven percent of the company, of W2-IBBS, for his family" (JA1969). Defendant simultaneously mentioned his belief that "this company, W2-IBBS, and this opportunity would make hundreds of millions of dollars" (JA1969). Pfeffer understood that, in return for this ownership interest, defendant would see the deal through by, among other things, working with Nigerian government officials on NITEL's cooperation and endeavoring to secure an Ex-Im Bank loan for W2-IBBS (JA1971-72;JA1986). Although Pfeffer knew what defendant was asking "was illegal," Pfeffer agreed to

talk to Mody about it (JA1970-71). This was, Pfeffer later recalled, "the worst decision in my life" (JA1970).[8]

Progress on the iGate/W2-IBBS joint venture, however, stalled in Fall 2004 (JA664-65;JA1990). In March 2005, Mody approached the FBI and reported she was the victim of fraud and said defendant had solicited a piece of her company (JA2893-94;JA2224-27). The FBI asked her to reinitiate discussions with defendant about the iGate/W2-IBBS venture and, with the FBI's supervision, record their conversations (JA2229-35).

Soon thereafter, defendant had a meeting with Pfeffer and Mody where he advised them that he would likely not seek another congressional term but was committed to advancing the iGate/W2-IBBS venture while he remained in office: "So, I'm gonna get your deal out of the way and I probably won't last very long after that" (JA6181).

In May, defendant solicited Mody for an increased ownership share of W2-IBBS. Defendant first referred to his "[o]ld deal" for 7% of W2-IBBS, but when Mody suggested defendant brought significant value to the venture, defendant increased his demands (JA2313;JA6195;JA6199;GEX106-3).

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[8] Pfeffer pleaded guilty to conspiracy and bribery of a public official for his participation in defendant's bribery scheme (JA1905-06;GEX28-4).

Understanding the illegal nature of these discussions, defendant spoke cryptically and wrote numbers and letters on a piece of paper using rough code (JA5444;JA6193-6201;JA2313-21). By this coded discussion, defendant solicited an 18-20% ownership interest in W2-IBBS for his children: "[T]his 'C' is like for children. I wouldn't show up in there. I make a deal for my children. It wouldn't be me." (JA6195;JA5444;JA2313-21).[9] Three days later, defendant again upped his bribe demand, faxing Mody a document in which he described the "Original Deal" as a 7% ownership interest in Mody's company and the new "Deal for Discussion" as a 30% ownership interest (JA2328-30;JA5445). Defendant identified "Global" as the recipient of this interest (JA5445), which he later explained was Global Energy and Environmental Services, a company held in the name of his five daughters (JA6205;JA2380-83). Later that same day, when defendant and Mody talked, he declared that they could pursue similar iGate ventures in Ghana and other West African countries; defendant bragged he knew the "president of every country in West Africa" (JA2333;GEX107-1;JA2401).

In late May, defendant gave Mody a ledger reflecting the distribution of W2-IBBS's 5 million shares, which – consistent with his demand for 30% of W2-

[9] During the awkward note-writing process, defendant laughed and said "[a]ll these damn notes we're writing to each other as if we thought . . . the FBI's watching us" (JA2321;GEX106-6).

IBBS – showed Global receiving 1.5 million shares (JA5467;JA2376-79;JA2437-48).[10] During several of his meetings with Mody, defendant also brought up projected earnings, which forecast Global receiving over $145 million dollars within the first five years of the iGate/W2-IBBS venture in Nigeria (JA2415-16;JA2773-74;JA5627;GEX3-51G).

And to earn this $145 million dollars, defendant understood that he was expected to perform official acts for the benefit and success of the iGate/W2-IBBS venture. Accordingly, in the summer of 2005, defendant prepared and sent congressional correspondence as well as participated in meetings with U.S. and foreign government officials to ensure that the telecommunications ventures in Nigeria and Ghana would get the foreign government approvals and Ex-Im Bank financing necessary for success. For example, when defendant learned that Rosecom's Yahyah was having trouble securing vital right-of-way agreements, defendant – through official correspondence – reached out to VP Abubakar and asked him to support the joint venture's request for access to NITEL's

[10] Pursuant to defendant's directives, on June 8, Mody provided defendant certificates reflecting 1.5 million shares of W2-IBBS stock issued to Global (JA2437-46;JA6219-21;JA6008-11). In addition, as he had indicated to Mody that he would be content with Global receiving a 30% equity share in Mody's Ghanaian company (IBBS) (JA5617-18;JA6300;JA2763-66), on August 1, 2005, Mody gave defendant a certificate reflecting the transfer of 1.5 million (of a total of 5 million) shares of IBBS to Global (JA5639-40;JA6025; JA2843-48).

infrastructure, noting that it "would be a huge step forward on building a stronger reputation for the business climate in Nigeria, bring great benefits to the Nigerian economy, and bring an extraordinary amount of recurring revenue to NITEL" (JA726-31;JA2589-90;JA2597;JA6031-33;JA6012-14;GEX112-4;GEX144-1).

Around that time, defendant was also preparing for an early-July official trip to Ghana for the purpose of acquiring the necessary government authorizations for the telecommunications project with IBBS, Mody's new company in Ghana (JA6239-40;JA6244).[11] When in late June, Mody called defendant to discuss the specific agreements and approvals she expected him to obtain from government officials in Ghana and Nigeria, defendant said, "I'm gonna give it a thousand percent as you, as you might imagine I will. I'm gonna try my very best to ah, ah, deliver for you and not disappoint you" (JA6249-51).

Meanwhile, defendant was growing apprehensive about Jackson. For example, when Jackson indicated he thought Mody should be replaced by another investor, defendant warned Jackson about how that might lead to a lawsuit, angrily adding, "[w]e've got to do this shit right . . . otherwise, we're going to all be in the

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[11] In addition, before departing on the trip, defendant had his legislative assistant, Angelle Kwemo, contact the U.S. Embassy in Ghana, the State Department, and the Ghanaian Embassy in the U.S. to get visas for the participants and arrange meetings with the President, Communications Minister, and other high-ranking officials (JA3206-31;JA2027-33).

goddamn pokey somewhere" (JA783-84;GEX144-2). At another point, defendant remarked to Mody about Jackson, "I'm not going to let him let me use my good offices, whatever they are . . . and then blow it up" (JA6222-24). Indeed, apparently because of these concerns about Jackson, defendant asked Mody to "financ[e his] acquisition" of iGate *via* ANJ (JA6236-38;JA2500-02;JA2556). Ultimately, in late-June 2005, Mody agreed to contribute $3.5 million to the capital of ANJ to support defendant's takeover of iGate and, in return, defendant agreed to "keep grinding away" at getting "signed written agreements from Nigeria" and "some from Ghana" (JA2551-53;GEX114-5;JA5519-46;JA2561).[12]

In early-July 2005, using his official passport, defendant traveled to Ghana with Pfeffer, Eddie Kufuor (the Ghanaian President's son), an iGate representative, Torey Bullock (defendant's son-in-law), and staffer Kwemo (JA2032-34;GEX18-2). During the next four days, in order to secure the agreements necessary for the telecommunciations venture, defendant met with

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[12] To keep iGate afloat before Mody made the $3.5 million payment to ANJ, defendant asked Mody to wire $59,200 to ANJ to pay for some of iGate's immediate expenses (JA5501-03). Before leaving for Ghana, defendant asked Mody to send ANJ an additional $30,000 for one of iGate's employees (GEX116-10). At the FBI's direction, Mody wired the $59,200 and the $30,000 to ANJ, which forwarded the money to iGate in three separate transactions (GEX34-5;GEX31-125;GEX30-72;GEX30-79;GEX30-81). These formed the basis for defendant's money-laundering convictions.

high-ranking Ghanaian officials, including the Vice-President, the Minister of Communications, the Minister of Energy, and the Chairman of the National Communications Authority, which was the government entity that regulated communications in Ghana (JA5594-95;JA2039-54). At these meetings, defendant described "what he was doing in Congress" and how the proposed iGate/IBBS venture would "help the government and business and their constituency" (JA2039-40;JA2048-54;JA2653-61;JA2666-67).[13] After returning from Ghana, defendant and Kwemo filed travel disclosure forms certifying the trip was in connection with their respective duties as a Member and employee of the U.S. House of Representatives (JA6174-75;JA3269-74).

Upon his return, defendant also turned his attention to securing Ex-Im Bank financing for the Nigerian venture, explaining to Mody that they needed to arrange a meeting with Ex-Im Bank's new Director, Joseph Grandmaison, and get any W2-IBBS loan application "on a fast track" (JA2663-65;GEX118-1). Defendant accompanied Mody and Pfeffer to this meeting to show congressional interest and support for the loan guarantees (JA2059-67;JA2068;JA2676). At this

[13] While Pfeffer was in Ghana, he provided regular email reports to Mody (JA5596-5603), but when defendant found out about these emails, he cautioned Pfeffer to "be careful," noting that was how "Jack Abramoff got in trouble, because of what he was writing in e-mails" (JA2045-46;JA2058-59).

meeting, Director Grandmaison also asked defendant to speak with Ex-Im Bank's Credit Committee to convince it to approve a separate Nigeria-project loan that Grandmaison believed the committee might reject (JA2060-69;GEX119-1A). Defendant agreed, and later described to Mody what he had said to the committee members:

> I say, "I'm William Jefferson," . . . "I'm on the Nigerian Caucus." I tell them all it's very important, just like that. So, I tell them that we're very concerned about the slowdown in Nigerian approvals . . . and Ex-Im is very important to Nigeria.

(JA6287;JA2748-49). Pfeffer considered this significant because if defendant "could get a project that we had no interest in . . . approved, certainly he could get our project approved" (JA2069). And, indeed, defendant later boasted to Mody that his intercession had saved this separate Nigerian project (JA6284;JA2743-44).

In late July, defendant instructed Mody to make several wire transfers totaling nearly $9 million to different bank accounts – all of which were controlled by his family members (JA5631-32;JA2795-2800;JA2808-14). The money was to be divided between start-up costs for the Nigerian and Ghanaian projects, operating costs for Multimedia (a company defendant had formed to substitute for iGate), and $1 million to be reserved for "other project costs," which was code for bribes to foreign government officials (JA5631-32;JA2769-81;JA2808-14;

GEX14-1).[14] Indeed, one such bribe payment had, by that time, already been decided upon.

*(iii) Defendant's Bribe to the Nigerian VP*

When it seemed the W2-IBBS/iGate venture might not get access to NITEL's infrastructure, defendant devised a plan to bribe Nigerian government officials. As early as April 2005, defendant explained to Mody that VP Abubakar, whom he described as "really corrupt," could ensure the venture's success for a percentage of the proceeds (JA6183-89), but that they would not need to bring Abubakar's "hands into the pot" if Yahyah could secure NITEL's cooperation (JA6190-91). Defendant explained that Yahyah would bribe the lower-level government officials, but if "the elected people" and "big shots" needed to be bribed, defendant would do it (JA6208-09).

And, indeed, when problems arose with NITEL in June 2005 (JA695-735;GEX140-1;GEX144-1), defendant told Mody they would have to pay a bribe to get VP Abubakar's assistance (JA6226;JA6241-43). Defendant thereafter sent Abubakar a letter on congressional letterhead asking for his assistance in securing NITEL approvals (JA6031-33). Defendant also enclosed iGate/W2-IBBS

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[14] These transfers never took place as the FBI executed multiple search warrants and conducted a series of interviews in early-August 2005 (JA2849-50).

financial projections – estimating a five-year $717 million cash flow – so that Abubakar could "salivate over what opportunities [were] there" (JA6030-68;JA6247).

On July 18, 2005, defendant and VP Abubakar had a private meeting at the VP's Maryland home (JA2707-16;JA2729;JA6275-78;GEX121-4;GEX121-5). Following this meeting, defendant explained to Mody they had "a deal" whereby VP Abubakar would intercede with NITEL on their behalf (JA2726-32;JA2751-58;JA6289-91;GEX122-1;GEX122-2).[15] In return, they would pay the VP a "goodwill" "front-end" payment of $500,000 and a "back-end" payment of 50% of Rosecom's share of the joint venture (JA2752-57;JA6289-91). They agreed to make a partial up-front payment to VP Abubakar before he left the U.S., and on July 30, 2005, Mody delivered $100,000 in cash to defendant for this purpose (JA6303-08;JA2792;JA2815-18). Defendant, however, was unable to deliver the cash before the VP left the country, and on August 5th, FBI agents found $90,000 of this cash concealed in defendant's freezer (JA2836-37;JA6309-10;JA2822; JA5937-49;JA3240-61).

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[15] Indeed, the day after defendant visited him, VP Abubakar's staff forwarded to NITEL the defendant's letter to the VP on congressional letterhead promoting the iGate/W2-IBBS venture as good for both Nigeria and NITEL (JA5620-24).

C. The Count Two Bribe Schemes

During this same 2000-2005 time period, defendant pursued a number of other bribe schemes:

*(i) Sugar Plant*

In Fall 2000, Arkel, a Louisiana company, was pursuing a sugar-plant feasibility study and construction contract in Jigawa State, Nigeria worth $100-$150 million (JA2977-78;JA2992-94;JA2997). To advance these efforts, Arkel's President, George Knost, turned to defendant (JA2982-83). Knost met with defendant, defendant's brother (Mose Jefferson), and the Governor of Jigawa State, as such a contract depended on the Governor's approval (JA2993-96). After defendant promoted Arkel to the Governor, defendant demanded of Knost: "You need to hire my brother, Mose, as a consultant . . . to handle this deal" (JA2995-97). Knost understood that hiring Mose Jefferson was a "prerequisite requirement to getting the assistance" of the congressman (JA2997;JA3000-01;JA3011). Accordingly, in late-January 2001, Arkel executed a contract to pay a commission to Mose Jefferson's nominee company, Providence Lake (JA3013-17;JA3715-16;JA5664-67).

Knost never expected Mose Jefferson to do any work for Arkel, and Mose never did (JA3021;JA3038-39;JA3731;JA3749;JA3762-63;JA3769-79). But

defendant and his congressional staff assisted Arkel by securing visas and invitation letters from Jigawa State officials, acting as go-betweens in contract negotiations between Jigawa State and Arkel, inquiring about payments from Jigawa State, and facilitating possible Ex-Im Bank funding (JA5730-31;JA3021-30;JA3060-63;JA3620-24;JA3721-28). Indeed, in February 2001, defendant arranged a meeting at his congressional office among Ex-Im Bank Chairman and staff, Arkel officials, the Governor of Jigawa State, defendant, and congressional staff. The meeting's purpose was to find a way to structure financing for the sugar plant (JA3621-22;JA3632;JA3722-23;JA5685-86). Defendant participated in this meeting as "an advocate for his constituent" (Arkel) (JA3623;JA3645). Subsequently, defendant arranged another meeting so that Arkel representatives (along with defendant's congressional staff) could meet with Ex-Im Bank's project-finance officers to discuss whether Ex-Im could "do this deal" and, if so, how to structure it (JA3628;JA3632-35;JA3747-48;JA5685-86).

Although Arkel never built the sugar plant, Arkel received payments totaling over $533,000 from Jigawa State for its feasibility study (JA3763-77;JA6326). Consistent with his contract, Mose Jefferson received approximately $21,000 of that amount into an account that was later used to pay defendant's daughter's $7,621 tuition bill and his wife's $8,593.73 credit card bill (*id.*).

*(ii) Marginal Oil Fields*

In August 2001, defendant suggested Knost pursue a marginal oil field deal in Nigeria (JA3046-3048). At a meeting among Knost, defendant, and Mose Jefferson, defendant discussed his "ability to be able to influence African leaders to be able to get Arkel in a position to be awarded marginal fields" (JA3050;JA3075-77). Knost and defendant also discussed "that Mose would have to be compensated to get the Congressman's assistance" in exchange for defendant "deliver[ing] an oil field" through "his relationship" with the Governor of Akwa Ibom State, Victor Attah (JA3048;JA3050;JA3055;JA3075;JA3085-86;JA3089;JA3660).

On August 30, 2001, Knost signed an agreement whereby Arkel agreed to pay yet another Mose Jefferson nominee company (BEP) a bonus of no less than $200,000 per marginal oil field and a 1/6 interest in all revenue derived therefrom (JA3080-82;JA5750-53). Had the oil fields been developed, they would have been "worth a lot of money" – "tens of millions of dollars" (JA3084). Once this contract was signed, defendant introduced Knost to Governor Attah and promoted Arkel in his capacity as a congressman (JA3085).

Ultimately, however, Knost could not pursue the development of any oil fields because of a business conflict (JA3087-90). Nonetheless, Knost pitched the

deal to John Melton, who later formed a Louisiana company (TDC-OL) to pursue the deal (JA3090-94;JA3488;JA3528). Knost informed Melton of the bribe angle: "I told him that if he wanted to do this deal and get the marginal oil fields, that [Melton] had to enter into an agreement with Mose Jefferson, the . . . congressman's brother because the congressman delivered the relationships and the ability to get the deal done" (JA3093;JA3457-61;JA3464-66).

*(iii) Fertilizer Plant*

Melton agreed to pursue this and certain other Nigerian projects (JA3472-74). Jim Creaghan was a Louisiana-lobbyist who acted as a "liaison" between Melton and defendant (JA3473-74). In December 2001, a meeting was held among Melton, Creaghan, defendant, Mose Jefferson, and others to discuss an upcoming Nigeria trip with defendant (JA3478-80). Before the meeting started, Creaghan informed Melton that the "Congressman wants you to do a deal with his brother" (JA3481). During the meeting, defendant looked to his brother and "indicated that we needed a deal for Mose before we go on this trip" (JA3484). Melton knew that defendant "was asking for a bribe" (JA3484;JA3994-95). Following a moment of "dead silence," Melton agreed to draft an "engagement document for Mose" to present to defendant (JA3485;JA5788-89).

The day before defendant led his delegation to Nigeria, defendant called Melton about this agreement (JA3489-90;JA3515). Melton had prepared an agreement for BEP, though this deal was less lucrative than the prior one offered by Knost (JA3494;JA5788-89;JA3496). Melton understood the agreement's import: "I was basically breaking the law and paying a bribe by giving this to the Congressman" (JA3495;JA3572-73). When Melton proffered this less-lucrative bribe deal to defendant, defendant coldly declared, "This won't do" (JA3497-98). Fearing defendant would cancel the Nigeria trip, Melton promised him that Melton would maintain Mose Jefferson's interest in the Nigerian projects (JA3504). Defendant's mood immediately lightened, and he proposed that Melton pursue another project, a fertilizer plant in Akwa Ibom State with Governor Attah (JA3504-05). Melton knew that he had agreed "to pay a bribe" to defendant (JA3505).

Defendant and his delegation traveled to Nigeria, where they received VIP treatment at the airport and, as arranged by defendant, met with the U.S. Ambassador (JA3517-24;JA3996-4005;JA4013-14). Defendant arranged for Melton to meet with Governor Attah to discuss the fertilizer-plant project (JA3524-26). Following this meeting, Melton immediately received an Akwa Ibom government letter-of-intent to develop a fertilizer plant (JA3526-30).

Melton then sought funding for the fertilizer-plant project with the U.S. Trade and Development Agency (USTDA) (JA3534;JA4017-18).[16] Over the next several months, defendant and his staff facilitated Melton's USTDA application process (JA3538-55;JA3925-57;JA4219-35;JA5793-96). Indeed, as USTDA's Thomas Hardy remarked, he had never before seen a congressional office as involved in the USTDA application process as defendant's was in this matter (JA3946;JA5793).

After USTDA had approved a $450,000 grant for the fertilizer-plant feasibility study, the project hit a snag (JA3561-63;JA3948-55;JA5798-800). Defendant thus set up a meeting in September 2002 with Hardy, Melton, and Governor Attah (JA3556-58;JA3953-54). At this meeting, defendant "was there clearly representing his constituents and his constituents' interest in trying to push [Governor Attah] to move forward with finding some solution necessary to signing the contract for the feasibility study to commence" (JA3956).

Over the next several months, defendant continued to advocate on behalf of Melton to USTDA, including summoning USTDA officials to his congressional office in July 2003 for a meeting with Governor Attah (JA5797). Defendant

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[16] USTDA is an independent, congressionally-funded U.S. foreign assistance agency. 22 U.S.C. § 2421.

wanted an update on "where the project stood" and a sense of "what was going to need to happen to move this project forward" because "it was of great importance to him to see this project move forward" (JA3962-64;JA3973;3565-68). Defendant's intervention caused USTDA to re-review the application and re-approve the grant (JA3968-71). Ultimately, however, despite defendant's efforts, the project was abandoned (JA3974;JA3569-70).

*(iv) Oil Drilling Rights*

In late 2001, Creaghan and Florida businesswoman Noreen Wilson approached defendant to secure his assistance in resolving a dispute relating to highly lucrative oil drilling rights off the coast of Sao Tome & Principe (JA4341-44;JA4363-64). Defendant agreed to discuss the matter with Wilson, but defendant told Creaghan that "his family would have to have an interest" (JA4028). Creaghan conveyed this to Wilson, who knew that any assistance from defendant meant that Mose Jefferson "would be involved in the transaction" (JA4346). Wilson understood she would be "[b]ribing" defendant so that he would "work with the government" of Sao Tome "to get the government to help solidify the settlement of the outstanding issues" (JA4346-47). In January 2002, Wilson suggested to Creaghan that Mose Jefferson's company be provided an oil

block, which could be worth "hundreds of millions of dollars" (JA4355-61;JA4364;JA5802-03).

Ultimately, a deal was struck when defendant told Wilson "he was going to be able to help" as he had upcoming meetings scheduled with Sao Tome government officials (including the President) (JA4363-64;JA4034-35). Defendant simultaneously handed Wilson a copy of a signed agreement that provided yet another newly-created Mose Jefferson nominee company (PIPCO) with 25% percent of any income derived from a settlement of the drilling-rights dispute (JA4364-70;JA4035-39;JA5804-10;JA5807-09;GEX15-5). As Wilson understood, she "was bribing a congressman" (JA4370). Specifically, Wilson expected defendant would use "his political access to the president of Sao Tome . . . to see if a negotiated settlement" of the oil-rights dispute could be reached (JA4370-71;JA4039). Indeed, defendant later phoned Wilson from Sao Tome and told her that "they were there and they had meetings" (JA4374;JA4040). Defendant was ultimately unsuccessful in this endeavor, however, and defendant and his family never received the millions in bribe money he had sought (*id.*).[17]

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[17] Wilson also agreed to pay a bribe to defendant in 2005 when she sought his assistance in obtaining access to NASA officials on behalf of E'Prime Aerospace (JA4431-32). Like the other schemes, Wilson agreed to pay a commission on sales of E'Prime's satellite system to a company controlled by defendant's family (JA4432-46). In return, defendant wrote a letter to NASA's

D. The RICO Count

Defendant was also convicted of conducting a pattern of racketeering activity as charged in Count Sixteen. Specifically, the jury found defendant operated his congressional office as a criminal enterprise (JA5193;JA227). At trial, the government thus proved defendant's use of his congressional office to advance nine different bribe schemes (Racketeering Acts 1-6, 8, 10-11) and a series of money-laundering transactions (Racketeering Act 12). Besides those discussed in Parts B and C, as part of Count Sixteen, the government proved two additional bribe schemes: First, defendant solicited bribes from Noah Samara, a founder of a satellite company called WorldSpace in return for promoting WorldSpace to various high-ranking government officials in Africa (JA3347; JA3357-69;JA3400-02;JA5867). Defendant proposed benefits from this scheme should be funneled through ANJ (JA3421-22;JA5867). Second, defendant solicited bribes from Samara in return for defendant's efforts to secure an oil

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Administrator on Congressional Black Caucus letterhead, identified himself as a Member of Congress, and asked NASA to give "close consideration of E'Prime Aerospace" (JA4437-42;JA5876). This scheme was presented as "other crimes" evidence as it was interrupted by the FBI's execution of search warrants in early-August 2005. In addition, there was evidence supporting two other bribery schemes charged in Count Two (involving a factory in Kaduna State and the promotion of "Biospheres" in West Africa) but such evidence is not repeated here because the jury found these schemes "not proven" (JA228).

concession from the President of Equatorial Guinea (JA3374-77;JA3384-94;JA3435-37;JA5860-63). Defendant proposed that benefits from this scheme would be provided to his daughter (JA3435-36).

All told, defendant's bribery-focused criminal conduct resulted in defendant and his family receiving these things of value: $449,300 (through ANJ); approximately $21,000 (through BEP); 30.7 million shares of iGate stock (issued to ANJ); 1.5 millions shares of W2-IBBS stock (issued to Global); and 1.5 million shares of IBBS stock (issued to Global) (Dkt. Entry 555).

## ARGUMENT SUMMARY

In instructing the jury on § 201(a)(3)'s "official act," the district court carefully hewed to the statutory definition and the Supreme Court's clarification of that language. Thus, Judge Ellis twice read the statute's definition to the jury and then further instructed that an act could be "official" even if not expressly prescribed "by law," as long as it had been shown to be "clearly established by settled practice as part [of] a public official's position." Despite the court's strict adherence to the statute and Supreme Court precedent, defendant argues its instruction was erroneous because it permitted conviction for "official acts" other than those "confined to the formal *legislative* process," such as instigation of a

legislative vote. This cramped reading of "official act" cannot be squared with the statute's plain – broad – language, its legislative history, or its purpose.

In adherence to this Court's precedents (both pre- and post-*Sun-Diamond*), the district court correctly instructed that § 201(b)(2)(A)'s *quid pro quo* element could be satisfied by proof defendant accepted bribes in exchange for "performing official acts on an as-needed basis, so that [whenever] the opportunity presented itself, he would take specific action on the payor's behalf." Contrary to defendant's claim, these precedents have not been "abrogated" by *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999). Indeed, because they insist that *quid pro quo* requires something of value in exchange for a specific official act, they are consistent with *Sun-Diamond*.

Any *Skilling* instructional error was harmless because the jury convicted defendant of two substantive § 201(b)(2)(A) bribery counts – Three and Four. Because the bribery conduct in these counts was coextensive with the bribery object of the Count One conspiracy, the jury necessarily found defendant committed that bribery object. And, because Racketeering Acts 1 and 3 of Count Sixteen were identical to Counts Three and Four, the jury necessarily convicted defendant of the legally-valid bribery theory of those acts. Further, Counts Six, Seven, and Ten alleged wire communications in furtherance of the same exact

bribery scheme outlined in Counts Three and Four, thus mandating affirmance of those honest-services wire fraud counts. Finally, although the bribery schemes outlined in Count Two were not coextensive with the bribery schemes of Counts Three and Four, the evidence of the Count Two bribery scheme was overwhelming.

The government's Count Ten evidence was sufficient to prove venue as it showed defendant committed essential conduct – participating in the fraudulent scheme to deprive citizens of honest services – in the Eastern District of Virginia.

## ARGUMENT

## I. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF § 201'S "OFFICIAL ACT"

### A. Procedural History

The bribery statute defines an "official act" as follows:

> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3). Judge Ellis twice repeated this statutory definition to the jury. First, he quoted the definition when identifying the "third" element of the bribery offense (JA5148). Second, he quoted the definition again when he

instructed that a defendant violates the statute by corruptly receiving a thing of value in return for being influenced in his performance of an official act (JA5148-49). In addition, consistent with the Supreme Court's interpretation of similar language in *United States v. Birdsall*, 233 U.S. 223 (1914),[18] Judge Ellis clarified the scope of an "official act" as follows:

> An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.

JA5149. Thus, in adherence to *Birdsall*, the court admonished the jury not to exclude an act from the "official" category simply because that act was not prescribed by statute or a written rule or regulation. 233 U.S. at 231.

Defendant now contends (at 33) that the court's "official act" instruction was erroneous because it permitted the jury to consider official acts that were not "legislative acts." Defendant claims (at 27, 32) that, in the context of a congressman, "'official act' covers only legislative conduct," "such as the

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[18] At the time of *Birdsall*, the Court was construing this language: "'whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof,' accepts money, etc., 'with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby,' shall be punished as stated." 233 U.S. at 230 (quoting statute).

initiation of a bill in committee or the instigation of a vote on the floor." Further, defendant repeatedly (at 18-19, 21-22) distills the "official act" instruction down to two words – "settled practice" – and charges (at 14) the instruction rendered the bribery statute "unconstitutionally vague." Defendant is mistaken on all counts.

B. Standard of Review

"Whether the district court has properly instructed a jury on the statutory elements of an offense is a legal question that [this Court] reviews *de novo*." *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007). "However, in reviewing the propriety of jury instructions, [this Court] do[es] not review a single instruction in isolation; rather [it] consider[s] whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996).

C. The District Court's "Official Act" Instruction Is Consistent with the Text, History, and Purpose of § 201(a)(3).

Although he contends (at 26) that his "legislative act" reading of § 201(a)(3) is mandated by the "text, history, and purpose of the bribery statute," defendant cannot cite to a single case that has so held. This is not surprising because defendant's cramped "legislative act" construction does not follow from any of these sources.

*(i) The Statute's Plain Text Does Not Confine "Official Acts" to "Legislative Acts."*

The statute's definition of "official act" is expansive, encompassing "any" decision or action on "any" question, matter, cause, suit, proceeding or controversy, which may "at any time" be pending, or which may by law be brought before "any" public official, "in such official's official capacity." 18 U.S.C. § 201(a)(3). The repetition of the word "any" is telling. "The word 'any' is a term of great breadth. Read naturally, [it] has an expansive meaning." *United States v. Ickes*, 393 F.3d 501, 505 (4th Cir. 2005) (citation omitted). In construing the nearly identical language of § 201(a)(3)'s statutory predecessor,[19] this Court noted that, "[i]f this statute be viewed solely from the standpoint of grammar and phraseology, it is quite striking how many broadening words are used in the statute . . . ." *Wilson v. United States*, 230 F.2d 521, 524 (4th Cir. 1956).

Defendant's conduct fits comfortably within the statute's plain text: he took "action[s]" on "pending" matters or questions. First, over the course of five years, defendant took many "action[s]," *e.g.*, he repeatedly invoked his position

[19] *Compare* 230 F.2d at 524 *with* 18 U.S.C. § 201(a)(3).

and congressional interest on behalf of constituents in meetings with, and in correspondence to, U.S. and foreign officials, including the following:

- Soon after Jackson agreed to pay ANJ a monthly retainer and percentage of iGate's gross profits, defendant issued a congressional inquiry to the Army for an update on its iGate product testing and, during the Army's briefing and powerpoint presentation at defendant's congressional office, promoted iGate's technology as a valuable product for the Army.

- After securing the ANJ/iGate consulting agreement, defendant promoted iGate's product to Congressman Tauzin, the Chair of the House's telecommunications subcommittee. Congressman Tauzin sent Jackson a letter on subcommittee letterhead endorsing iGate's product after defendant inquired about such a letter.

- Days after defendant solicited from NDTV executives at least $1 million from the sale of converter boxes and a 2% ownership interest in NDTV in return for his official assistance, defendant arranged a meeting at Ex-Im Bank for NDTV executives who, by the end of the meeting, believed that Ex-Im Bank had agreed in principal to finance their project.

- Weeks after Jackson wired $230,000 to ANJ, defendant led an official delegation to Nigeria and participated in numerous meetings with high-level Nigerian government officials where defendant – in his capacity as a congressman – lobbied the officials to ensure NITEL would grant iGate access to its infrastructure.

- After Mody agreed to give defendant a 30% share of her Nigerian company in exchange for his official assistance in securing Ex-Im Bank financing and necessary approvals from

> Nigerian officials, defendant took Mody and Pfeffer to meet with Ex-Im Bank's Director to get the loan application "on a fast track" and, while there, defendant spoke directly to the Credit Committee to advise that he and other members of the Nigerian Caucus were concerned about the committee's slowdown in the approvals of Ex-Im Bank loans for Nigerian projects.
>
> • After receiving stock certificates providing his nominee company Global with 30% ownership in W2-IBBS, defendant sent official correspondence urging the Nigerian Vice-President to support the venture's request for NITEL's cooperation. In return for a similar 30% ownership interest in Mody's Ghanaian company IBBS, defendant traveled to Ghana and, in his role as a congressman promoting U.S. businesses, met with Ghana's Vice-President and other high-ranking government officials to secure the authorizations needed to launch the IBBS/iGate project there.

Second, these "action[s]" were certainly on "question[s]" or "matter[s]," *e.g.*, constituent requests to intercede with federal agencies, high-ranking foreign officials, and even another Member of Congress. As Jackson declared, he wanted defendant to "[p]romot[e] iGate's products and services from his congressional offices" (JA389), because defendant was "very effective and resourceful in getting things done for" him (JA387). For example, Jackson explained, the Congressman Tauzin letter was a "tremendous[] endorsement" of iGate's product that Jackson planned to use as part of iGate's "marketing strategy" (JA410). Similarly, as Pfeffer noted after defendant had convinced Ex-Im Bank's Credit Committee to

approve a Nigerian loan, this was significant because if defendant "could get a project that we had no interest in . . . approved, certainly he could get our project approved" (JA2069). Or, as Arkel's Knost bluntly put it, defendant, as "a Congressman, his relationships and his ability as the office to have those relationships," could "further our business" (JA3000).

Third, such requests were questions or matters that "may at any time be pending, or [that] may by law be brought before" defendant in his "official capacity [or] place of trust or profit." Certainly that was how defendant perceived the scope of his job. On his congressional website, defendant "urge[d]" constituents to bring their "problems" to him for resolution as, in his view, the "most important thing we do is solve problems for local residents and businesses" (JA5913-14). Further, as part of the website's "Constituent Services Guide," defendant noted that "we are here to help constituents deal with federal agencies," including "help[ing] [constituents] obtain assistance from federal agencies that promote U.S. exports" (JA5913). Thus, defendant himself defined his office's purpose as, *inter alia*, assisting constituents "deal" with government agencies. And, consistent with this invitation, defendant exerted his congressional influence to help, for example, Jackson, Mody, Knost, and Melton "deal" with the Army,

Ex-Im Bank, and USTDA. But, as the jury found, he did it corruptly and unlawfully, in return for bribes.

Defendant essentially concedes (at 26) that such constituent-based services on behalf of iGate, W2-IBBS, Arkel, and TDC-OL fit within the plain language of the statute's first two criteria – "action[s]" on a "question" or "matter." He maintains (at 26-29), however, that his "legislative acts" version of "official acts" is dictated by the phrases "pending" and "may by law be brought," which – he asserts – "contemplate questions or matters" that may only be "resolved through the formal legislative process."

*Birdsall*, however, precludes limiting "official" actions to such formalities. Willis Birdsall was indicted for giving bribes to Interior Department special officers who advised the Commissioner of Indian Affairs concerning clemency recommendations in liquor-trafficking cases. 233 U.S. at 227-29. Specifically, Birdsall was charged with giving money to two special officers to influence their clemency advice. *Id.* The Court explained the special officers' acts could be "official" even though they had not been "prescribed by statute." *Id.* at 231. It is "sufficient" that the official action is "governed by a lawful requirement of the department under whose authority the officer was acting." *Id.* And, in turn, it is not even "necessary" that this "requirement should be prescribed by a written rule

or regulation." *Id.* Rather, it "might also be found in an established usage which constitute[s] the common law of the department" because in "numerous instances, duties not completely defined by written rules are clearly established by settled practice." *Id.* Thus, *Birdsall* makes clear, there is no necessary formality attendant to those questions or matters which may by law be brought before a public official. Actions on such questions or matters need not be defined by formal rules or regulations, but may be delineated by "settled practice."[20]

As to the phrase "pending," defendant cites a number of statutory provisions (at 27-28 & nn.8-13) and contends "pending" typically modifies only "things that are resolved through formal, institutional processes" (whatever that precisely means). Defendant ignores several facts: First, although it certainly would have been easy for Congress to confine "pending" to formal causes, suits,

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[20] Defendant contends (at 39-40) *Birdsall* "was focused" only on "the concept of *duty*," and the "defendants in that case had a clear '*duty*' to make sentencing recommendations." In contrast, he asserts, he "has not been accused of being influenced in the performance of any Congressional *duty*, such as passing on legislation." However, as Congressman Matthew McHugh testified, there is no legal requirement that a Member draft legislation, designate earmarks or, even, vote on legislation (JA3820;JA3905). Contrary to defendant's assertion, then, voting on legislation is not necessarily a "duty." Therefore, by defendant's own – counterintuitive – logic, a congressman could not be prosecuted for voting on a piece of legislation as a bribe-derived *quid pro quo* because such a vote is not a "duty." Said differently, defendant's construction renders the bribery statute conveniently meaningless as applied to him.

or proceedings, it did not. Instead, front and center in the list of potential "pending" things are any "question[s]" or "matter[s]." Second, contrary to defendant's suggestion, it is just as easy to troll the United States Code and find any number of instances where Congress has deployed "pending" in its conventional – informal – sense, as meaning simply "not yet decided or settled." *Merriam-Webster's Collegiate Dictionary* at 858 (10th ed. 1999).[21] And, in that regard, a constituent's request of a Member for assistance with a government agency is obviously a "pending" question or matter. Certainly those constituents who took defendant at his word and asked for his help (as his "Constituent Services Guide" encouraged them to do) would be surprised to learn that their requests were never "pending" before him.

At any rate, even assuming the validity of defendant's premise, a constituent's request for assistance can be something "resolved through formal, institutional processes." Defendant, for example, advertised on his website that he "solve[d] problems" for constituents. Further, his office assigned staff members to handle such requests. *See, e.g.,* JA4205-06;JA3281-82. Thus, at least within the confines of defendant's congressional office, there was an "institutional"

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[21] *See, e.g.*, 2 U.S.C. § 2006; 5 U.S.C. § 5534a; 10 U.S.C. § 702; 12 U.S.C. § 1747k.

"process" in place to solicit, and facilitate the resolution of, constituent problems. Indeed, as Congressman McHugh testified, Members generally refer to such constituent services as "casework" (JA3872-73).

Defendant's narrow – legislative-acts only – interpretation of the statute's plain terms has been rejected by the federal courts. *See, e.g.*, *United States v. Biaggi*, 853 F.2d 89, 97 (2d Cir. 1988). In *Biaggi*, Congressman Biaggi took official actions to help a ship repair firm, Coastal Dry Dock and Repair Corporation, resolve rent-payment disputes with the City of New York and secure contracts from the U.S. Navy. *Id.* at 92-94. For example, Congressman Biaggi wrote the Mayor of New York on congressional stationary urging the City to work out accommodations with respect to Coastal's outstanding payments. *Id.* at 92. And, Congressman Biaggi "sought to assist Coastal with the Navy" by informing Senator Alphonse D'Amato that "Coastal was being treated unfairly" and asking him to contact the Navy. *Id.* at 93. Further, Congressman Biaggi phoned "the Commandant of the Coast Guard in an attempt to get more work for Coastal." *Id.* at 94.

*Biaggi* held these actions – the "congressman's own invocation of his position and of congressional interest in his intercession with others on behalf of a constituent" – constituted official acts. *Id.* at 98. More specifically, when Biaggi

claimed they "were not 'official act[s]' within the meaning of § 201 because they were not legislative acts," the Second Circuit rejected this on plain-language grounds: "The language of the section does not mention legislative acts, and courts have read the section and its predecessors sufficiently broadly to encompass all of the acts normally thought to constitute a congressman's legitimate use of his office." *Id*. at 97.

Similarly, in *United States v. Carson*, 464 F.2d 424 (2d Cir. 1972), Carson was an administrative assistant to a Senator who was a member of the Senate Judiciary Committee. *Id*. at 426, 433. At the behest of (and with the promise of payment from) private individuals who were under indictment, Carson met with the Deputy Attorney General to probe whether the individuals could be helped. *Id*. at 426-27. None of Carson's actions were "legislative acts." Rather, he was paid to "exert influence" on Department of Justice officials with the hope that these officials would "alleviate, if not altogether quash, pending Justice Department action or bring about lenient post-conviction treatment." *Id.* at 434. Still, *Carson* held, his conduct of participating in meetings and talking to executive-agency employees constituted official acts within the meaning of the bribery statute because of the "influence inherent in his official position as a member of the staff of a member of the Senate Judiciary Committee." *Id.*

As was the case in *Biaggi* and *Carson*, in light of the expansive scope of the statute's plain language,[22] a jury could properly find defendant engaged in any number of "official acts." As we argued in our closings below, defendant's official actions equaled his "efforts to influence both U.S. and foreign government officials to further the success" of, for example, the iGate venture by writing "letters on congressional letterhead" and "personally me[eting] with a host of" U.S. and foreign government officials, "all in order to promote the project and obtain government approval or financing that was necessary for the success of the telecommunications projects" (JA4968).[23] Further, the government adduced

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[22] Numerous courts have recognized the "broad" scope of the current definition of § 201(a)(3). *United States v. Moore*, 525 F.3d 1033, 1041 (11th Cir. 2008); *United States v. Parker*, 133 F.3d 322, 326 (5th Cir. 1998); *United States v. Sandoval*, 20 F.3d 134, 137 n.8 (5th Cir. 1994); *United States v. Arroyo*, 581 F.2d 649, 654 (7th Cir. 1978).

[23] *See also* JA4933-34 (describing "official acts" that "Congressman Jefferson perform[ed] for iGate" in 2001-2002 as "congressional inquiries and express[ing] congressional [interest] in the Army's testing"); JA4934-35 (defendant "continue[d] to perform official acts in 2002" by his "efforts to enlist" support of Congressman Tauzin); JA4957 (defendant's "value in the deal was his ability to perform official[] act[s] for the benefit and success of the joint venture, [o]fficial acts that would [e]nsure that the telecommunications ventures in Nigeria and Ghana would get all the necessary foreign government approvals and the necessary Ex-Im Bank financing"); JA4960 (defendant "also performed official acts in efforts to obtain" NITEL's cooperation by writing a "letter on congressional letterhead to" the Nigerian VP); JA5075 (defendant's meeting with President Obasanjo where defendant "promoted iGate" was "an official act"); JA5077 (describing "official act" as defendant's "travel to foreign countries on

copious evidence at trial relating to, among other things, staff-produced travel itineraries, embassy-provided limousines, and staff-assisted visa arrangements to show that "the manner" in which defendant went about unlawfully assisting iGate and W2-IBBS *always* "suggested that his conduct was to be considered official." *Biaggi*, 853 F.2d at 98. Put differently, the government's evidence showed that, throughout the course of his five-year corruption spree, defendant consistently deployed all the trappings of his congressional office – *e.g.*, access to salaried congressional staff members, embassy limos, and House stationary – to ensure that his bribe-paying constituents always got the biggest influence "bang" for their buck.

In sum, this Court should reject defendant's legislative-acts-only reading of the statute. "[M]any non-legislative activities are an established and accepted part of the role of a Member . . . ." *United States v. Brewster*, 408 U.S. 501, 524 (1972). Excising such non-legislative activities from the definition of "official act" would not only blink at reality and contravene the broad language of the statute, but also exempt from the bribery laws all Members, including those such as defendant, who convert their Offices into criminal racketeering enterprises available to the highest bidder. Instead, consistent with *Wilson*'s conception of

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behalf of U.S. businesses and lobbying foreign officials").

§ 201's "broad statutory ambit," 230 F.2d at 524, this Court – like *Biaggi* and *Carson* – should hold that defendant's constituent-based services comfortably fit within § 201(a)(3)'s "official act" definition.

*(ii) The Legislative History of the Bribery Statute Confirms That "Official Acts" Are Not Confined to "Legislative Acts."*

The legislative history demonstrates that, when Congress consolidated all the criminal statutes dealing with bribery in a single statutory section (§ 201), it was Congress's intent to incorporate *Birdsall*'s broad reading of "official action" into the statutory definition of "official act" so it might have "universal application" to all manner of potential bribees, including congressmen. *See* H.R. Rep. No. 87-748, at 17.

"The terms of the written definition of official act have not been altered to any substantial extent since their origin in the Act of July 13, 1866." *Carson*, 464 F.2d at 433. Thus, when, in 1914, the *Birdsall* Court interpreted the scope of "official" action as including those acts clearly established by settled practice, it was essentially interpreting the extant statute. *See supra* note 18. *Birdsall*'s broad formulation of the scope of "official action" was thereafter applied as authoritative in the lower courts. *See, e.g.*, *McGrath v. United States*, 275 F. 294, 298 (2d Cir. 1921). For example, in *Wilson*, in affirming the bribery convictions of an Army General who received bribes from an insurance salesman seeking access to the

post, this Court noted that it could perceive "no reason to find any intent on the part of Congress that the statute must be narrowly construed . . . ." 230 F.2d at 524. This Court added that *Birdsall* – among other federal decisions – had "properly given an extremely liberal interpretation" to § 201's predecessor, noting that in *Birdsall* itself "the recommendations for clemency (for which the bribe was accepted) were not a part of the prescribed duties of the agents in the Bureau of Indian Affairs." *Id.*

This, then, was the judicial backdrop when Congress codified the current definition of "official act" in 1962 and simultaneously declared its intent to "make no significant changes of substance" and, indeed, not to "restrict the broad scope of the present bribery statutes as construed by the courts." S. Rep. No. 87-2213, at 1. Section 201's "official act" was thus broadly "defined to include any decision or action taken by a public official in his capacity as such." *Id.* at 4. The House Report similarly emphasizes that the bill did "not limit in any way the broad interpretation that the courts have given the bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application." H.R. Rep. No. 87-748, at 17; *see also Dixson v. United States*, 465 U.S. 482, 496 (1984) (Congress has a "longstanding commitment to a broadly drafted bribery statute," and the 1962 revisions reflected Congress's "expressed desire to continue that

tradition"); *Arroyo*, 581 F.2d at 655 n.13 (defendants "cite no legislative history supporting a narrow construction [of the bribery statute] and we have found none"). *See generally United States v. Gjieli*, 717 F.2d 968, 975 (6th Cir. 1983) (*Birdsall*'s "judicial qualification of 'action' as 'official action' was codified in subsequent versions of § 201 in the language 'official act,' and is presently found . . . in § 201(a) ('official act').").

Given this history, it makes sense that, since 1962, not a single court has rejected *Birdsall*'s broad reading of "official action." To the contrary, *Birdsall*'s "settled practice" interpretation has been consistently applied in all manner of contexts. *See, e.g.*, *Moore*, 525 F.3d at 1040-41; *Parker*, 133 F.3d at 325-26; *Biaggi*, 853 F.2d at 97; *United States v. Muntain*, 610 F.2d 964, 967 n.3 (D.C. Cir. 1979); *Carson*, 464 F.2d at 434.

Even *Valdes*, upon which defendant places such hope (at 34-36), does not reject *Birdsall*'s construct of "official action." *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). As *Valdes* opines, although *Birdsall* does not "stand for the proposition that every action within the range of official duties *automatically* satisfies § 201's definition," *Birdsall* did make "clear the coverage of activities performed as a matter of custom." *Id.* at 1323. And, as explained, that is precisely what Judge Ellis did here. After twice quoting the statutory

definition of "official act," Judge Ellis then made clear the statute covered activities performed as a matter of custom when he instructed the jury that "official acts include those activities that have been clearly established by settled practice as part [of] a public official's position" (JA5148-49).

Despite this background, defendant maintains (at 30-31) that the legislative history of § 201 supports his reading of the statute. He claims (at 30) that, because the pre-1962 statutes applicable to the legislative branch used the phrase "pending in either House of Congress, or before any committee thereof," this means that, when Congress codified "official act" in 1962, it intended to cover only those questions or matters that may be brought to a Congressman "as part of the legislative process." This argument fails because it ignores Congress's 1962 intent to ensure "universal application" of the courts' "broad" interpretations of the bribery statutes by "enacting one statute using the same terms." H.R. Rep. No. 87-748, at 17. Further, it ignores that, at least by the time of *Birdsall*, the pre-1962 bribery statutes applicable to Members also defined as official acts those questions or matters that could "by law or under the Constitution" be "brought before him in his official capacity." *See* Act of Mar. 4, 1909, ch. 321, § 110, 35 Stat. 1104,

1108. And, as we have demonstrated, such questions or matters are not restricted to legislative acts.[24]

*(iii)* Sun-Diamond *Did Not Overrule* Birdsall

Faced with an unbroken string of § 201 precedents endorsing *Birdsall*, defendant pins his entire argument on *Sun-Diamond*, an authority that interpreted the gratuity – not the bribery – statute and that, unsurprisingly, did not even cite *Birdsall*'s bribery ruling. Nonetheless, defendant erroneously claims (at 24-26), Judge Ellis's "official act" instruction "simply cannot be squared with" the Supreme Court's decision in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999).

Sun-Diamond was a trade association convicted of providing illegal gratuities under 18 U.S.C. § 201(c)(1)(A) for having given tickets, meals and other items to the Secretary of Agriculture. The indictment referred to "two matters" before the Agriculture Secretary in which Sun-Diamond had an interest, but the indictment did not allege a "specific connection" between the two matters and the gratuities conferred and the jury was instructed that it could convict if it found

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[24] Because the statute's plain language and legislative history show defendant's actions were "official," this Court need not invoke the rule of lenity, as defendant suggests (at 33-34). *See*, *e.g.*, *Abbott v. United States*, 131 S. Ct. 18, 31 n.9 (2010).

Sun-Diamond had provided the Agriculture Secretary with unauthorized compensation simply because he held public office. 526 U.S. at 402-03. The issue before the Court, then, was whether a "conviction under the illegal gratuity statute requires any showing beyond the fact that a gratuity was given because of the recipient's official position." *Id.* at 400. And, the Court held, the statute did require a "link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414. Were that not the case, *Sun-Diamond* reasoned, the gratuity provision would criminalize "token gifts" given to officials based on their official positions and not linked to any identifiable act – such as a sports jersey provided to the President during a White House visit or a school baseball cap provided to the Education Secretary on the occasion of his visit to a high school. *Id.* at 406-07.

*Sun-Diamond* additionally expressed concern that its "identifiable act" holding might not wholly solve the hypothesized sports jersey/baseball cap "token gift" problem because such gifts could be regarded as "having been conferred, not only because of the official's position as President or Secretary, but also (and perhaps principally) 'for or because of' the official acts of receiving the sports teams at the White House [and] visiting the high school." *Id*. at 407. "The answer

to this objection," *Sun-Diamond* explained, is that those actions "are not 'official acts' within the meaning of the statute . . . ." *Id.*

Defendant seizes upon this, suggesting (at 25-26, 40 n.16) that it renders *Birdsall* a dead letter and, concomitantly, renders the district court's "official act" instruction erroneous since each of the identified activities are "'activities that have been clearly established by settled practice as part [of] a public official's position.'" He is wrong.

First, if the Supreme Court had intended to overrule *Birdsall*, it would have done so explicitly. Instead, the Court does not address the decision at all, and indeed it had no reason to do so. *Birdsall* says nothing about the need for a link between an official act and a gratuity – the issue that was before the Supreme Court in *Sun-Diamond*.

Second, and more fundamentally, the concerns of *Sun-Diamond* are not implicated here. In the gratuity context, *Sun-Diamond* was concerned about the consequences of reading the identifiable "official act" requirement out of the statute. And, while it may be odd to describe receiving a sports team or visiting a high school as "official act[s]," there is nothing odd about describing defendant's actions as "official." Indeed, defendant himself described them as such. When defendant filed his congressional travel disclosure forms upon his return from

Nigeria and Ghana, for example, he represented this travel had been taken in connection with his duties as a Member of the House of Representatives. Similarly, after the many occasions on which defendant had interceded with the Army, Congressman Tauzin, the Nigerian President, and Ex-Im Bank on Jackson's behalf, defendant complained about the possibility that Jackson might nonetheless derail the iGate/W2-IBBS joint venture: "I'm not going to let him let me use my good offices, whatever they are . . . and then blow it up" (JA6222-24). As defendant himself apparently understood, he was using "his good offices" and taking official actions when he initiated his congressional inquiry of the Army on iGate's behalf, promoted iGate to Congressman Tauzin, lobbied President Obasanjo for iGate access to NITEL's infrastructure, and secured a meeting for iGate's venture participants with Ex-Im Bank's Director. Thus, although the ceremonial gesture of receiving a sports team may not obviously fit into the category of decisions or actions on a "question, matter, cause, suit, proceeding or controversy," defendant's repeated "invocation[s] of his position and of congressional interest in his intercession with others on behalf of a constituent," *Biaggi*, 853 F.2d at 98, quite obviously constitute "official acts."

Finally, as *Sun-Diamond* exhorts, the best way a court can ensure that the statute is not misconstrued and all "absurdities" eliminated is through focus on

"the definition of [official act]." 526 U.S. at 408. As we have shown above, defendant's conduct comfortably fits within that definition's heartland. Moreover, in twice instructing the jury on the definition, Judge Ellis strictly adhered to this *Sun-Diamond* admonition.

*(iv) The Purpose of the Bribery Statute Would Be Subverted by Confining its Scope to Just "Legislative Acts."*

Finally, defendant claims (at 32) that the "purpose of the bribery statute" would be subverted if "official act" were deemed to cover non-legislative-act conduct. Quoting *Muntain*, defendant reasons (at 33) that the bribery statute is only concerned with "'unbiased judgment'" by those who make "'official decisions'" and, in the context of a Member, such a concern is implicated only when the Member "accepts money for being influenced to decide or act on a *legislative* question."

Unfortunately for defendant, Congress does not share his narrow understanding of the statute's purpose: "When a bribe is exchanged, the parties have, in effect, conspired to deprive the United States of the honest services of its official. Such conduct is universally condemned. Nothing is more corrosive to the fabric of good government than bribery . . . ." H.R. Rep. No. 87-748, at 6; *see also Arroyo*, 581 F.2d at 655 n.12 ("The clear purpose of the statute is to protect

the public from the evil consequences of corruption in the public service.") (citation omitted).

Contrary to defendant's suggestion, the purpose of the bribery statute would be turned on its head if his unduly narrow reading of "official act" were to prevail. Under defendant's construct, for example, if an executive of an airplane-manufacturing company paid a congressman $1 million to use his office for purposes of influencing the Air Force in awarding a contract, this conduct could not be prosecuted as a bribe under § 201(b)(2)(A). And, defendant's actions were to the same effect: From 2000 through 2005, on behalf of a litany of bribe-paying constituents, defendant never wasted an opportunity to invoke his position and congressional interest with, *inter alia*, the Army, Ex-Im Bank, USTDA, and a host of overseas government officials and agencies. Permitting *these* corrupt actions to go unpunished – as defendant invites this Court to do – would subvert the very essence of the bribery statute. Because nothing in § 201(a)(3)'s plain language or its legislative history supports defendant's constricted "official act" reading, this Court should decline such an invitation.

Recognizing the unpalatable natural consequence of his official-acts-equal-only-legislative-acts argument, defendant suggests (at 31-32) this Court can take solace in the fact that § 203(a)(1) would punish the bribe-receiving

congressman because it punishes those Members "who accept payment in return for trying to influence questions or matters pending before non-legislative federal entities, including executive departments and agencies." Indeed, defendant contends (at 32), with respect to congressmen, § 203 would impermissibly "overlap with the bribery statute if the latter extended to non-legislative questions," thus punishing a congressman with 15 years' imprisonment for "identical" § 203(a) conduct (which authorizes only 5 years' imprisonment). Defendant's premise is wrong.

Section 203(a) does not criminalize "identical" conduct as § 201. Section 203(a) does not require a corrupt intent, as § 201 does. Further, § 201 requires that an official take action in his official capacity, whereas § 203 covers conduct by public officials acting in a representational capacity, such as an agent or attorney for a private person or entity. *See United States v. Kidd*, 734 F.2d 409, 412 (9th Cir. 1984) (§ 203 is an "entirely different offense" from § 201 bribery). And, certainly, in the context of a bribe-receiving congressman corruptly attempting to influence the outcome of an Air Force bidding process, Congress is entitled to authorize a punishment of 15 years' imprisonment, just as it can authorize such a maximum punishment for defendant's bribery conduct. In any event, the "mere fact that two federal criminal statutes criminalize similar conduct

says little about the scope of either." *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005). Thus, even if § 203(a)(1) "overlap[ped]" with our reading of § 201(a)(3), it would say nothing about the correct interpretation of "official act."

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In sum, Judge Ellis's "official act" instruction was consistent with the statutory definition of "official act" and the Supreme Court's clarification of that definition, and should be affirmed. *See Biaggi*, 853 F.2d at 99 ("The trial court read the jury the statutory definition of 'official act[s]' and properly instructed it that 'officials acts are not limited to those set forth in a written job description, but may include as well those duties and activities customarily associated with a particular position.'").

D. The District Court's "Official Act" Instruction Did Not Render the Bribery Statute Unconstitutionally Vague.

"[A] court considering a vagueness challenge must determine if the statutory prohibitions '"are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with."'" *United States v. Whorley*, 550 F.3d 326, 333 (4th Cir. 2008) (citations omitted); *United States v. Morison*, 844 F.2d 1057, 1070-71 (4th Cir. 1988). Moreover, "it is settled beyond controversy that if one is not of the rare 'entrapped' innocents, but one to whom the statute clearly applies, irrespective of any claims of vagueness,

he has no standing to challenge successfully the statute under which he is charged for vagueness." *Morison*, 844 F.2d at 1071.

Defendant lacks standing to raise his present vagueness challenge because, as his own actions and words demonstrate, he knew he was one to whom the statute clearly applied. First, defendant's actions make this point: in return for official acts on behalf of constituents, defendant had them funnel money and stock to nominee companies and used sham "consulting" contracts that consistently omitted his name. Defendant deployed these tactics of concealment for a reason – he knew he was accepting unlawful bribes for his official acts. All the pertinent aspects of defendant's numerous bribe schemes reflect a man engaged in a concerted effort to hide the payments he was receiving in return for the official actions he was taking. Second, defendant's own words similarly defeat any suggestion that he is a "rare entrapped innocent[]." When Jackson discussed pushing Mody out of the iGate/W2-IBBS joint venture, defendant became worried any ensuing lawsuit might reveal his criminal actions. Thus, he angrily declared to Jackson, "[w]e've got to do this shit right . . . . otherwise, we're going to all be in the goddamn pokey somewhere" (JA783-84;GEX144-2; *see also* JA2045-46;JA2059 (admonishing co-conspirator Pfeffer to be "careful" with his emails because that was how "Jack Abramoff got in trouble"); JA2321;GEX106-6

(defendant writing in code and joking the "FBI's watching")). In short, defendant fully understood the illegality of his bribery schemes and thus lacks standing to attack the instruction on vagueness grounds. *See Whorley*, 550 F.3d at 334.

At any rate, even if this Court were to assume that defendant has standing now to pursue it, for a number of reasons defendant is wrong when he claims (at 14) the court's "settled practice" instruction resulted in an unconstitutionally vague "definition of 'official act.'"

First, contrary to defendant's suggestion (at 39), the district court did not deploy the *Birdsall* "settled practice" language as a *substitute* for the statutory definition of "official act." *Cf. Valdes*, 475 F.3d at 1325 (trial "court refused to include either the statutory language . . . or anything comparable"). Rather, the district court twice instructed the jury as to the statutory definition of "official act," (JA5148-49), and then the court appropriately invoked *Birdsall*'s admonition that an act "may be official even if it was not taken pursuant to responsibilities explicitly assigned by law," adding that "official acts" include those "activities that have been clearly established by settled practice as part [of] a public official's position" (JA5149). Thus, in the overarching context of the statutory definition of "official act" – which, of course, with great specificity, instructed the jury that any official act had to be a "decision or action" on "any question [or] matter" which

"may at any time be pending, or which may by law be brought before any public official" in that "official's official capacity" – the district court simply clarified that the label "official" did not require duties assigned by law, but permitted the jury to consider those activities that have been "clearly established by settled practice" as a part of an official's position. Rather than obfuscating the meaning of "official act," the court's instruction clarified it.

Second, the term "settled practice" is "clearly one of common usage" and a "matter of everyday speech." *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 750 (4th Cir. 2010). The dictionary, for example, precisely defines "a settled thing" as "something about which there is considered to be no room for doubt or question." *The Oxford English Dictionary*, vol. XV at 86 (2d ed. 1989). "Practice" is defined as "a habitual way or mode of acting; a habit, custom." *Id.*, vol. XII at 271. A public official such as defendant thus could easily understand that his actions would be deemed "official" within the meaning of § 201(a)(3) if there was no question those actions constituted his customary way of doing his job. *See generally Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1080 (4th Cir. 2006) (citing dictionary definition of "simulate" to defeat claim that statute failed to put persons of ordinary intelligence on notice of prohibited conduct).

Moreover, as even the most cursory search of the Westlaw database shows, the Supreme Court, for example, regularly uses the term "settled practice" without express definition. The Court has used the term to describe the actions of a variety of actors, including trial courts,[25] prosecutors,[26] and, indeed, government agencies.[27] In light of "this everyday use of the term," *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 854 (4th Cir. 1998), this Court should reject defendant's vagueness claim.

Third, although defendant claims (at 19-21) the best evidence that "settled practice" is "hopelessly indeterminate" emanates from the testimony of the government's own expert, the opposite is true. Congressman McHugh, an 18-year Member of Congress, testified that it is the "customary and settled practice" of members of Congress to intercede with government agencies on behalf of individuals and businesses, including those individuals and businesses who reside outside of a given congressional District (JA3826-27; *see also* JA3844 ("customary and settled practice of members of Congress to influence government

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[25] *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 194 (1959).

[26] *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987).

[27] *United States v. I.C.C.*, 337 U.S. 426, 463 (1949) (Interstate Commerce Commission); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 205-06 (1945) (Department of Justice); *Special Equipment Co. v. Coe*, 324 U.S. 370, 377 (1945) (Patent Office).

officials in Federal Government agencies in matters that they are concerned about because of their constituents' interest")). As Congressman McHugh explained, Members – as "national legislators" – represent not just "their own district people," but also "Americans, generally" (JA3831).[28] Indeed, such outside-district requests would often arise because a given Member was "perceived" as "an expert in a particular area" due to, for example, a Member's committee assignment or caucus membership (JA3830;JA3880-81 ("customary" for Members who have an "interest in a particular issue or jurisdiction over particular matters to be in communication with people outside their district")). Thus, Congressman McHugh opined, because of defendant's membership on the Trade Subcommittee of the House Ways and Means Committee, McHugh would expect "people who were concerned about trade and business activities abroad" to seek out defendant's assistance on those topics (JA3835-36).

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[28] *See also* JA3871 (McHugh: Member's "constituency is broader, really, than just those who live in the congressional district"); JA1520 (Waltzman: common for Members to assist citizens who live outside their district); JA3282 (Hopkins: "constituent services" not limited to within-district companies and businesses); JA4252;JA6075 (letter from defendant identifying Creaghan – who lived outside defendant's district – as "constituent"); JA4160;JA5791 (letter from defendant identifying Stolt Offshore – a company headquartered in London and Paris – as "corporate constituent"); JA4221-22;GEX23-7 (letter from defendant identifying TDC-OL – a company outside defendant's district – as "constituent").

Further, Congressman McHugh explained, "many members of Congress do" travel overseas in an effort to influence foreign government officials on behalf of individuals seeking to advance business interests in those countries (JA3856-57). Congressman McHugh reviewed the mandatory travel disclosure forms of other Members and this review "confirmed" his belief that Members regularly traveled overseas – "as part of their official work" – at the behest of U.S. businesses to promote those businesses' interests to foreign government officials (JA3852-55; *see also* JA1654-55 (Maxstadt: "It is fairly common that when members of Congress, both the House of Representatives and Senate, travel, they advocate on behalf of U.S. business interests, plus much broader business."); JA2979-80 (Knost: "regular occurrence" for U.S. businesses to seek congressional help to further interests in foreign countries)).

In sum, there was nothing ambiguous about Congressman McHugh's testimony. In any event, if defendant believed that the government's evidence – either through the testimony of Congressman McHugh or its other witnesses – did not "clearly establish[]" (as the court instructed) that a given constituent service was a matter of "settled practice," defendant was free to argue this to the judge and jury. Indeed, defendant did. Highlighting the very McHugh testimony that appellate counsel now highlights (at 20-21), trial counsel argued that, as a factual

matter, the government had failed to show it was "settled practice" for a congressman to travel overseas on behalf of a constituent. (*See, e.g.*, JA4661-64 (Rule 29 argument); JA5005-06 (closing argument).) And, had defendant so chosen, he could have argued to *this* Court that the government failed to adduce sufficient evidence to show that such activities were "settled practice," but he has not. Contrary to defendant's current claim (at 22), however, simply because "the facts of each case will require a jury to determine whether" an act is clearly established by settled practice does not "suggest that a statute is too vague." *Whorley*, 550 F.3d at 334.

In short, this Court should reject defendant's effort to dress up his sufficiency-of-the-evidence claim in constitutional garb. "Settled practice" is a commonly used term of everyday speech. As was his prerogative, defendant tried to convince the jury that, as a factual matter, the government had failed to meet its burden and show, for example, that overseas congressional trips were "clearly established by settled practice as part [of] a public official's position." Having failed in that effort, defendant now tries to convince this Court that ordinary jurors could not properly assess these arguments and adjudicate what is "settled practice." They could, and they did.

E. Any Instructional Error Was Harmless Because No Jury Could Fail to Find a Number of Qualifying "Official Acts" Beyond a Reasonable Doubt.

"[I]nstructional error[s] are not structural but instead trial errors subject to harmless-error review." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (citations omitted). Defendant's convictions thus may be affirmed if the government can show that "no jury" would have failed to find qualifying "official acts" if properly instructed. *See Neder v. United States*, 527 U.S. 1, 16 (1999).

Defendant is correct when he asserts (at 41) that, if this Court agrees "official acts" can be *only* "legislative acts" and further agrees that the district court's instruction impermissibly allowed the jury to convict defendant of bribery on the basis of non-legislative acts, then his Count Three and Four bribery convictions cannot stand. Defendant is not correct, however, when he further asserts (at 41-42) that, even if this Court adheres to the D.C. Circuit's construction of "official act" – as reflected in *Valdes* – then those convictions must be vacated because "foreign government decisions" cannot form the "predicate" of "official acts" under *Valdes* and, moreover, "the government also relied on large amounts of evidence that indisputably do not meet *Valdes* because they do not involve government decisions at all."

To begin, *Valdes* does not conflict with our definition of "official act." *Valdes* blessed *Biaggi*'s "official act" holding: "our interpretation of the statute easily covers . . . a congressman's use of his office to secure Navy contracts for a ship repair firm." 475 F.3d at 1325. *Biaggi*, in turn, held such congressional-office "intercessions" with federal and local authorities were "official acts" pursuant to § 201(a)(3) because they reflected the "congressman's own invocation of his position and of congressional interest . . . on behalf of a constituent." 853 F.2d at 98. And, just as Congressman Biaggi's own intercessions with *local* New York City authorities constituted "official acts," *id.* at 98-99, so too did defendant's intercessions with *foreign* government officials. As we have explained, what matters is whether it was customary for defendant – the "public official" subject to the mandate of § 201(b)(2)(A) – "to intercede" with such foreign officials, 853 F.2d at 99, not whether such foreign officials were or were not U.S. officials.

At any rate, even if *Valdes* is somehow understood to mean that, in the legislative context, the decision or action may not be the congressman's *own* invocation of his office on behalf of the constituent, but must be the decision or action of a U.S. government entity, this would not assist defendant.

First, *Valdes* is an out-of-Circuit decision that this Court is not bound by. *See Moore*, 525 F.3d at 1041 (rejecting *Valdes* in favor of "broader definition of 'official act'" as "controlling precedent" (citing *Birdsall* and *Biaggi*)). Second, even if this Court were to adhere to defendant's reading of *Valdes*, his bribery convictions would still have to be affirmed. Noticeably absent from defendant's "harmless error" analysis (at 41-43) is *any* mention of the overwhelming, uncontroverted evidence relating to defendant's repeated – bribe-induced – efforts to influence U.S. government decision-making bodies on behalf of constituents, including the U.S. Army (asking it test iGate's products), Ex-Im Bank (encouraging it to approve financing), the House Armed Services Committee (seeking DOD review of iGate's product), and, indeed, even another U.S. congressman (urging Congressman Tauzin, on behalf of the House telecommunications subcommittee, to write an endorsement of iGate). *See* pp. 5-8, 10-11, 23-24 *supra*. Defendant's failure to mention this evidence is understandable because, as Judge Ellis noted, these types of actions constitute "slam dunk" official acts (JA4718). "All of those cases are clearly covered by the statute because they concern inappropriate influence on decisions that the government actually makes." 475 F.3d at 1325. Finally, whereas in *Valdes*, the court was concerned with extending the statute's reach to "officials' moonlighting,

or their misuse of government resources, or the two in combination," *id.* at 1324, defendant obviously was not charged with "moonlighting" activities. Rather, defendant was charged with – and properly convicted of – executing any number of constituent-requested intercessions with a wide variety of U.S. and foreign government officials because of the bribes these constituents paid him.

## II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE *QUID PRO QUO* ELEMENT OF BRIBERY

### A. Standard of Review

*See* part I.A *supra*.

### B. The District Court's Instruction on the Proof Required to Establish the Essential Element of *Quid Pro Quo* Was Proper.

Defendant challenges (at 43-47) his Count 3 and 4 convictions on a separate instructional ground, claiming the district court erred in instructing the *quid pro quo* element could be satisfied by proof that, in exchange for things of value, the defendant agreed to perform specific official acts on an "as-needed" basis. This challenge is without merit.

The offense of bribery under 18 U.S.C. § 201(b)(2)(A) requires that the public official *corruptly* demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of an official act. This Court has consistently held that the "corrupt intent" element of

bribery is the intent to engage in a relatively specific *quid pro quo*, *i.e.*, something of value *in exchange for* an official act. *See, e.g.*, *United States v. Harvey*, 532 F.3d 326, 335 (4th Cir. 2008); *United States v. Quinn*, 359 F.3d 666, 675 (4th Cir. 2004); *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998); *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

This Court has also recognized that what sets bribery apart from gratuities and even legally innocent conduct is the existence of the *quid pro quo*; further, and most critically, this Court has repeatedly declared the requisite *quid pro quo* may involve a pattern of official actions or an agreement to perform official acts on the payor's behalf when the opportunity presents itself: "The crucial distinction between 'goodwill' expenditures and bribery is, then, the existence or nonexistence of criminal intent that the benefit be received by the official as a *quid pro quo* for some official act, pattern of acts, or agreement to act favorably to the donor when necessary." *Arthur*, 544 F.2d at 735; *see also Harvey*, 532 F.3d at 335 ("[I]t is 'sufficient that the gift is made on the condition "that the offeree act favorably to the offeror when necessary."'" (citations omitted)); *Quinn*, 359 F.3d at 673 ("*[Q]uid pro quo* requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor.") (quoting *Jennings*, 160 F.3d at

1014); *Jennings*, 160 F.3d at 1014 ("[A]ll that must be shown is that payments were made with the intent of securing a specific *type* of official action or favor in return . . . . [P]ayments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf.").

Although the district court meticulously adhered to these precedents in describing the *quid pro quo* element of bribery (JA5149-51), defendant argues (at 44-46) that the court's instruction "contravene[d] *Sun-Diamond*" because *Sun-Diamond* requires things of value in exchange for a *specific official act*. Defendant is wrong.

As we have explained, *see* part I.C.iii *supra*, because the lower court's instruction in *Sun-Diamond* did not require the jury to find any connection between defendant's intent and a specific official act (as required by § 201(c)(1)(A)'s "for or because of" language), the instruction erroneously criminalized conduct that was not prohibited by the gratuity statute, such as the giving of a thing of value to "build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future." 526 U.S. at 405. In contrast, here, the court repeatedly admonished the jury that the government had to prove a specific official act or course of conduct: "Thus, you

may convict defendant *only* if you find that [] he solicited or accepted something of value in exchange for some specific official act or course of action" (JA5151) (emphasis added). Indeed, in instructing the jury that the *quid pro quo* requirement could be satisfied by an agreement to accept things of value in exchange for performing official acts on an "as-needed basis," the court explained that this meant the taking of "*specific action*" on the payor's behalf whenever the opportunity presented itself *(id.)*. Therefore, the "as-needed" language did not eliminate or diminish the requirement that the agreement be to perform specific official acts.

Significantly, unlike *Sun-Diamond*, the government here *charged* and *proved* specific official acts and courses of action that defendant undertook in return for money and ownership shares in various business endeavors. Moreover, despite defendant's attempt to equate the two concepts (at 44), soliciting things of value in exchange for agreeing to perform official acts on an as-needed basis is not tantamount to accepting a gratuity that is given because of the official's position. The former constitutes a *quid pro quo*; the latter does not.

And this difference is critical. As the Supreme Court recognized in *Sun-Diamond*, the trial court's instruction that it was sufficient for the government to prove that payments were made to the official *because of his official position* had

the potential of punishing the lawful conduct of providing a gift with some generalized hope or expectation of an ultimate benefit on the part of the donor. In contrast, the "as-needed basis" instruction made it clear that the *quid pro quo* element could be satisfied by proof that the defendant agreed to perform specific official acts when the opportunity presented itself *in return for* things of value. It is this *quid pro quo* that corrupts the official acts ultimately performed. With the requirement that specific acts provided on an as-needed basis had to be *in exchange for* things of value, the district court eliminated the risk presented in *Sun-Diamond* that goodwill gifts would be treated as bribes or gratuities.

Significantly, this Court has never interpreted the "as-needed" language as contravening the principle that *quid pro quo* requires something of value in exchange for a specific official act. To the contrary, this Court has repeatedly endorsed the "as-needed" language while simultaneously acknowledging that *quid pro quo* requires a "specific official act." In *Arthur*, this Court quoted language that is strikingly similar to *Sun-Diamond*'s "specific official act" language upon which the defendant now relies: "There must be more specific knowledge of a *definite official act* for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence." 544 F.2d at 734

(citation omitted; emphasis added). And, nonetheless, immediately after quoting this language with approval, this Court stated:

> This requirement of criminal intent would, of course, be satisfied if the jury were to find a "course of conduct of favors and gifts flowing" to a public official in exchange for a pattern of official actions favorable to the donor even though no particular gift or favor is directly connected to any particular official act. Moreover, as the Seventh Circuit has held, it is sufficient that the gift is made on the condition "that the offeree act favorably to the offeror when necessary."

*Id.* (citations omitted). In addition, in *Jennings*, this Court repeatedly stated that *quid pro quo* requires things of value in exchange for "specific" official acts. *See, e.g.*, 160 F.3d 1018-19, 1021, 1022. But the requirement of a "specific official act" or "specific course of conduct" did not foreclose this Court from recognizing that official acts conferred on an as-needed basis will constitute bribery if they are conditioned upon the receipt of things of value. *Id*. at 1014.

Essentially, defendant reads *Sun-Diamond* as limiting the bribery statute to only those situations where a public official agrees to perform, in exchange for things of value, an official act that is identified with particularity at the very outset.[29] However, as three other circuit courts have recognized, *Sun-Diamond*

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[29] Indeed, under defendant's reading of *Sun-Diamond*, the bribery statute does not prohibit a public official from being kept on retainer to perform official acts benefitting the payor whenever the opportunity presents itself.

does not mandate such a narrow interpretation of the bribery statute. *See, e.g.*, *United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007) (Sotomayor, J.) ("Thus, now, as before *Sun-Diamond*, so long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act."); *United States v. Whitfield*, 590 F.3d 325, 350-53 (5th Cir. 2009) (rejecting defendant's claim that *Sun-Diamond* abrogated *Jennings* and other cases that held that official act need not be identified at time of payment to satisfy *quid pro quo* requirement); *United States v. Kemp*, 500 F.3d 257, 281-86 (3d Cir. 2007) (citing with approval "as needed" basis language of *Jennings* after acknowledging *Sun-Diamond*).

Thus, post- *Sun-Diamond*, this Court has properly never required that the government charge or prove the official act with the particularity the defendant now claims is required by that decision. *See, e.g., Harvey*, 532 F.3d at 335 ("The intent to receive a 'specific benefit,' however, is not as limiting as it first appears; it is 'sufficient that the gift is made on the condition "that the offeree act favorably to the offeror when necessary."'" (quoting *Arthur*, 544 F.2d at 734)); *Quinn*, 359 F.3d 675 n.5 (if issue properly presented, Court would reject defendants' challenge, on specificity grounds, to instruction describing official acts as

"favorable consideration and recommendation" on government contracts). And, it should decline defendant's invitation to begin doing so now as *Sun-Diamond* does not require such and to do so would "subvert the ends of justice in cases – such as the one before [the court] – involving ongoing schemes." *Ganim*, 510 F.3d at 147.[30]

## III. *SKILLING* DOES NOT PROVIDE A BASIS FOR REVERSAL OF ANY OF DEFENDANT'S CONVICTIONS

Counts One and Two each charged a conspiracy with multiple objects, in violation of 18 U.S.C. § 371, with the jury instructed that it need only find that defendant had conspired to commit one of the substantive offenses alleged (JA5128-32). Count One charged defendant with conspiracy to commit bribery, to commit honest-services wire fraud, and to violate the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 *et seq.*, and Count Two charged defendant with conspiracy to commit bribery and honest-services wire fraud. Counts Six, Seven,

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[30] Even if this Court were to find error, any such error would be harmless as there was overwhelming evidence satisfying the remaining and unchallenged portion of the court's *quid pro quo* instruction. The Court instructed, "it is sufficient to show that the defendant intended for each payment to induce him to adopt a specific course of official action" (JA5150). The record is replete with evidence that the defendant solicited payments from numerous businesspersons in return for adopting a specific course of official action, namely, invoking his position and congressional interest in letters to, and meetings with, U.S. and foreign government officials for purposes of advancing the business interests of those individuals and companies.

and Ten charged defendant with honest-services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, under two alternative theories: the solicitation of bribes from Jackson and Mody in exchange for defendant's performance of official acts, and the intentional concealment of conflicts of interest in connection with these bribery schemes and defendant's performance of official acts. Finally, in Count Sixteen, the RICO count, 11 of the 12 racketeering acts charged the defendant under two alternative theories: bribery and/or honest-services wire fraud, in violation of 18 U.S.C. § 1962(c). The court instructed the jury that it had to find that defendant committed two or more of the racketeering acts (JA5193-94;JA5202-04).

Defendant (at 47-52) seeks to overturn all these counts on two principal grounds.[31] First, defendant argues that the district court's bribery instructions on *quid pro quo* and "official act," which he claims were erroneous, taint each of these convictions, along with Counts Twelve, Thirteen, and Fourteen (money laundering). Parts I and II, *supra*, address these challenges to the bribery instructions. Second, defendant wrongly relies on *Skilling v. United States*, 130 S. Ct. 2896 (2010), as a basis to dismiss the conspiracy, honest-services wire fraud,

[31] Notably, defendant does not raise a claim of spillover prejudice by contending that any *Skilling* error on the conspiracy, honest-services wire fraud, or RICO counts tainted his convictions on the money laundering or bribery counts.

and RICO counts. In *Skilling*, the Supreme Court limited the honest-services fraud statute to fraudulent schemes involving bribes or kickbacks, excluding undisclosed conflicts of interest from its ambit. *Id.* at 2931. The court in this case instructed the jury on two alternative honest-services wire fraud theories: bribery and conflict-of-interest (JA5156-59). Defendant asserts (at 48-49) that the alternative conflict-of-interest theory mandates the reversal of his conspiracy, honest-services wire fraud, and RICO convictions. This summary claim should be rejected, because any error in the inclusion of the conflict-of-interest theory was harmless.

A. The Honest-Services Instruction Is Subject to Harmless-Error Review.

As a threshold matter, defendant misstates the applicable standard of review for these convictions and any error that may have been introduced by the conflict-of-interest instruction. Under *Yates v. United States*, 354 U.S. 298 (1957), when a jury's general verdict on a single count rests on a legally valid and a legally invalid instruction, the verdict must be set aside if it is "impossible to tell which ground the jury selected." *Id*. at 312; *see also United States v. Ellyson*, 326 F.3d 522, 531 (4th Cir. 2003). Conversely, defendant asserts (at 49-50, 52) that under *Yates*, a new trial on the conspiracy, honest-services wire fraud, and RICO counts is *required*, because "there is no doubt that the jury could easily have taken

the legally invalid path to conviction (*i.e.*, self-dealing honest-services wire fraud)."

That is not the standard that this Court must employ in evaluating the effect of *Skilling*. Rather, as the Supreme Court held in *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008), a *Yates* error is subject to ordinary harmless-error review, and the relevant inquiry is whether the error was harmless beyond a reasonable doubt. *See also Skilling*, 130 S. Ct. at 2934 & n.46 (harmless-error analysis applies to alternative-theory error cases on direct appeal); *Black v. United States*, 130 S. Ct. 2963, 2970 (2010) (same). Accordingly, a court may not overturn a conviction that could rest on both valid and invalid legal theories if the court can conclude "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. Put another way, a *Yates* error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 15 (internal quotation and citation omitted). Thus, for instance, if the evidence that the jury "necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground, the conviction may be affirmed." *United States v. Hastings*, 134 F.3d 235, 242 (4th Cir. 1998).

Notably, the reviewing court need not attain "absolute[] certainty" that the jury relied on a valid basis for conviction. *See Hedgepeth*, 129 S. Ct. at 533.

In several recent cases, courts have applied the harmless-error test to uphold convictions challenged under *Skilling*. In *United States v. Black*, 625 F.3d 386 (2010), the Seventh Circuit affirmed the defendants' fraud conviction where the jury had been instructed on both a valid pecuniary-fraud theory and an invalid conflict-of-interest honest-services fraud theory. Relying on *Hedgepeth*, the Seventh Circuit explained that "if it is not open to reasonable doubt that a reasonable jury would have convicted [defendants] of pecuniary fraud, the convictions on the fraud counts will stand." *Id.* at 388. The court ultimately affirmed one of the counts after closely examining the underlying facts and finding that "[n]o reasonable jury could have acquitted the defendants of pecuniary fraud on this count but convicted them of honest-services fraud." *Id.* at 393. In so holding, the court also relied on the fact that the evidence at trial and the closing arguments had focused on the pecuniary-fraud theory. *Id.* Similarly, in *Ryan v. United States*, the district court upheld the racketeering, mail fraud, and other convictions of the defendant – former Illinois Governor Ryan – finding that the facts underlying an invalid conflict-of-interest honest-services wire fraud theory would have supported a conviction under a bribery honest-services wire fraud

theory. __ F. Supp. 2d __, 2010 WL 5495015, at *14-15 (N.D. Ill. Dec. 21, 2010); *see also United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010).

B. Defendant's Convictions on Counts Three and Four Establish That Defendant Was Convicted under Legally Valid Bribery Theories as to Counts One, Six, Seven, Ten, and Sixteen.

In this case, the jury's guilty verdict on Counts Three and Four, the bribery counts, shows beyond a reasonable doubt that defendant was found guilty under a valid legal theory as to Counts One, Six, Seven, Ten, and Sixteen and thus that any error in the jury instructions was harmless. *See Neder*, 527 U.S. at 15. By convicting defendant on two substantive bribery counts (Counts Three and Four), the jury necessarily found that defendant committed the bribery object of the Count One conspiracy, since – as described in the jury instructions (JA5131-32;JA5146-51) and overt acts (Dkt. Entry 554-4) – this bribery object was co-extensive with the bribery conduct charged in Counts Three and Four.

The same analysis applies to Count Sixteen, in that two of the racketeering acts that the jury found proven were identical to Counts Three and Four. The jury was provided with a verdict form that required it to specify which racketeering acts it found defendant had committed. The jury was further provided with Court's Exhibit 5, which set forth the 12 alleged racketeering acts, 11 of which listed two theories of liability: bribery of a public official (prong "a") and/or

deprivation of honest services by wire fraud (prong "b"). Two of the racketeering acts that the jury found proven were identical to Counts Three and Four. *Compare* JA128-29;JA132-34;JA227 *with* JA116-17;JA225. Because the jury convicted defendant on Counts Three and Four, there can be no reasonable doubt that the jury convicted defendant under the legally valid bribery theory of Racketeering Acts 1 and 3, which is all that is required to sustain defendant's RICO conviction.[32] Finally, Racketeering Act 12, which the jury found proven, described certain monetary transactions in nine separate racketeering acts, including three corresponding to the money laundering counts upon which defendant was convicted, and is not challenged by defendant.

Nor does *Skilling* provide defendant with any basis for relief as to Counts Six, Seven, and Ten, the honest-services wire fraud counts. Although the court instructed the jury on both a bribery theory and a conflict-of-interest theory, the conviction of defendant on Counts Three and Four renders any error harmless beyond a reasonable doubt, because by finding defendant guilty of committing substantive bribery violations, the jury necessarily found the facts and credited the

[32] Further confirmation that the jury convicted defendant under the bribery prong of Racketeering Act 3(a) is found in its acquittal of defendant on Count Eight, which alleged the same June 28, 2005 wire transmission, a facsimile from defendant to Mody, as Racketeering Act 3(b).

evidence that would have supported defendant's conviction under the valid honest-services bribery theory of Counts Six, Seven, and Ten. Counts Six, Seven, and Ten alleged wire communications in furtherance of the same exact bribery scheme outlined in Counts Three and Four as well as Count One – the solicitation of bribes from Jackson/iGate and Mody/W2-IBBS. Put another way, the bribery theory of the honest-services wire fraud counts alleged that defendant deprived the citizens of the United States and the U.S. House of Representatives of their right to his honest services by soliciting bribe payments from Jackson and Mody – conduct that the jury clearly found defendant committed when it convicted on Counts Three and Four.

C. Any Error Introduced Through the Inclusion of an Honest Services Object Is Harmless as to Count Two.

Count Two charged a conspiracy with two separate objects: bribery and honest-services wire fraud. Because the bribery schemes outlined in Count Two were not also charged as substantive bribery counts, a more in-depth examination of the facts and evidence underlying the Count Two conspiracy is warranted. An examination of the record establishes beyond a reasonable doubt that any alternative-theory error resulting from the inclusion of the conflict-of-interest wire fraud instruction "did not contribute to the verdict obtained," *Neder*, 527 U.S. at 15, for two reasons. First, the overarching focus of the government's evidence and

argument – overall and with respect to Count Two specifically – was about bribery, not conflict-of-interest honest-services wire fraud, and the evidence presented in support of the defendant's commission of bribery was overwhelming. Second, any jury that found the defendant guilty of conflict-of-interest honest-services wire fraud necessarily would have found that the defendant conspired to commit either bribery or bribery honest-services wire fraud.

*(i) The Government's Evidence of Bribery Was Overwhelming*

The government's evidence at trial conclusively established that defendant and Mose Jefferson agreed to enter into a bribery scheme whereby defendant solicited bribes from various businesspersons and entities in exchange for the performance of officials acts to benefit those same persons and entities, which included George Knost and Arkel; John Melton and TDC-OL; and James Creaghan and Noreen Wilson. Part C *supra*. Based on the record as a whole and the strength of the evidence presented in support of Count Two, this Court can conclude beyond a reasonable doubt that the jury's conviction on Count Two rests on a finding that defendant conspired to commit the bribery object of the conspiracy or bribery honest-services wire fraud.

This conclusion finds support in every aspect of the case. At its core, the government's case was about bribery. Defendant recognized this – "But at the

heart of all counts and at the heart of the case is one crime: The alleged solicitation or receipt of bribes by the congressman" (Dkt. Entry 689 at 45). As did the district court. In denying the defendant's motion to dismiss the honest-services wire fraud counts, for example, the district court noted that "the honest services fraud allegations contained in Counts 5-10, and referenced in Counts 1, 2, and 16, explicitly frame the alleged deprivation of honest services as a consequence of defendant's alleged solicitation and receipt of bribes" (Dkt. Entry 207 at 7). And, the central thrust of the government's evidence at trial, and its opening and closing arguments, was about the defendant's involvement in multiple bribery schemes. *See, e.g.*, JA258;JA4903.

*(ii) Any Jury That Convicted Defendant of Conspiracy to Commit Conflict-of-Interest Honest-Services Fraud Necessarily Would Have Found a Conspiracy to Commit Bribery or Bribery Honest-Services Fraud*

As the above demonstrates, the government proved in Count Two a conspiracy between defendant, Mose Jefferson, and others in which defendant would perform official acts to benefit certain companies and businesspersons in exchange for payment to shell companies formed in the name of Mose Jefferson. Moreover, the sole reason that defendant's conflict of interest arose was as a means to conceal the bribe payments. Consequently, even if the jury found that defendant had engaged in a conspiracy to conceal his conflicts of interest in

connection with his performance of official acts on behalf of the companies and persons involved in Count Two, it necessarily also found that defendant conspired to commit bribery and/or bribery honest-services wire fraud, because these theories of liability were co-extensive.

Far from being independent of the defendant's bribery schemes, any hidden interests held by him *were* the very bribe payments he had solicited in the first instance. Indeed, as the government repeatedly emphasized in both its opening and closing argument, the hidden "interests" that defendant failed to disclose were the very bribe payments he received in exchange for his actions as a U.S. Congressman.[33] There could be no legitimate purpose or valid explanation for them. Central to the government's evidence and argument on Count Two was the notion that the shell companies and agreements that defendant caused to be set

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[33] *See, e.g.*, JA258 (Defendant "concealed [his] bribe payments from public view by funneling those payments, shares of stock, and other beneficial interests through bogus companies nominally owned and operated by his family members through companies that were set up *for the sole purpose of receiving the bribe payments*"); JA258 ("The evidence will show these sham agreements for what they really were: *A means to conceal bribes*."); JA4903 ("Again and again, you have seen evidence of the shell companies set up by Congressman Jefferson at his direction, frequently by the taxpayer paid staff, *for the sole purpose* of hiding the fact that the congressman was trading his official influence for cash payments and percentages and profits."); JA5083 ("To the casual observer, these agreements looked legitimate. And that, ladies and gentlemen, was *the entire purpose*."); JA5088 ("No matter what shell company or what agreement or what nominee, *the purpose was always the same*: covering up bribes, period.") (emphasis added).

up were at the very core of his bribery scheme with Mose Jefferson, created by him as vehicles to receive the bribe payments he solicited. There can consequently be no reasonable doubt that a reasonable jury would have convicted defendant of conspiracy to commit conflict-of-interest honest-services fraud but acquitted him of conspiracy to commit bribery or bribery honest-services wire fraud. *See Hastings*, 134 F.3d at 242; *Black*, 625 F.3d at 393.

## IV. DEFENDANT'S COUNT TEN CONVICTION SHOULD BE AFFIRMED BECAUSE VENUE WAS PROPER IN THE EASTERN DISTRICT OF VIRGINIA

### A. Standard of Review

Questions of law governing venue are reviewed *de novo*. *United States v. Stewart*, 256 F.3d 231, 238 (4th Cir. 2001).

### B. Sufficient Evidence of Venue Supported Count Ten.

Count Ten charged that on July 6, 2005, the defendant engaged in a wire communication – a telephone call from the defendant in Ghana to Jackson in Kentucky – in furtherance of the iGate bribery scheme. On appeal, the defendant contends (at 52) that the government failed to prove venue because this wire communication did not originate, pass through, or terminate in the Eastern District of Virginia. This challenge is without merit.

The Supreme Court's ruling in *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999), compels the conclusion that venue was proper in the Eastern District of Virginia. In *Rodriguez-Moreno*, the defendant was convicted in the District of New Jersey for kidnaping and using and carrying a firearm in relation to the kidnaping, in violation of 18 U.S.C. § 924(c)(1). 526 U.S. at 277. Although the kidnaping took place in New Jersey, Maryland, and other states, the defendant used and carried a firearm only in Maryland. *Id*. at 276-77. On appeal, the Third Circuit reversed the defendant's § 924(c)(1) conviction on venue grounds, concluding that a violation of § 924(c) is committed only in the district where the defendant "uses" or "carries" a firearm. *Id*. at 278. The Supreme Court reversed, reasoning that the crime of violence, along with the using or carrying element, was an essential conduct element of the offense:

> In our view, the Third Circuit overlooked an essential conduct element of the § 924(c) offense. Section 924(c)(1) prohibits using or carrying a firearm "during and in relation to any crime of violence . . . for which [a defendant] may be prosecuted in a court of the United States." That the crime of violence element of the statute is embedded in a prepositional phrase and not expressed in verbs does not dissuade us from concluding that a defendant's violent acts are essential conduct elements. To prove the charged § 924(c)(1) violation in this case, the Government was required to show that respondent used a firearm, that he committed all the acts necessary to be subject to punishment for kidnaping (a crime of violence) in a court of the United States, and that he used

> the gun "during and in relation to" the kidnaping of [the victim]. In sum, we interpret § 924(c) to contain two distinct conduct elements – as is relevant to this case, the "using and carrying" of a gun and the commission of a kidnaping.

526 U.S. at 280. Thus, *Rodriguez-Moreno* held, in determining whether venue is proper in any given district, courts must look at the essential conduct elements of the charged offense, rather than limit the inquiry to the verbs used in the statute. 526 U.S. at 279-80; *see also United States v. Smith*, 452 F.3d 323, 335 (4th Cir. 2006) (venue was proper in Eastern District of Virginia for murder committed in Washington, D.C., "because the drug conspiracy, an essential element of the [charged] offense, involved acts that were perpetrated in the Eastern District"); *United States v. Bowen*, 224 F.3d 302, 310 (4th Cir. 2000) (describing *Rodriguez-Moreno* as follows: "committing a crime of violence is conduct the defendant himself engages in as part of the gun offense under § 924(c)(1)").

Applying the tenets of *Rodriguez-Moreno*, venue on Count Ten was proper in the Eastern District of Virginia. At trial, the district court instructed the jury on the four essential elements as to Count Ten:

> First, that the defendant knowingly devised or knowingly participated in a scheme to defraud the citizens of the United States and the United States House of Representatives of their intangible right to his honest services;

> Two, that the scheme or artifice to defraud involved a material misrepresentation or concealment of material fact;
>
> Three, that the defendant acted with intent to defraud; and
>
> Four, that in advancing or furthering or carrying out this scheme to defraud, the defendant transmitted or caused to be transmitted any writing, signal or sound by means of a wire communication in interstate and foreign commerce.

(JA5154). Significantly, defendant does not challenge the district court's instruction on these essential elements.

Given this uncontested jury instruction, there can be no question that in addition to the transmittal of a wire communication in interstate or foreign commerce, the defendant's devisal and participation in a scheme to defraud was an essential *conduct* element of the offense. The first essential element defined by the court required proof beyond a reasonable doubt of the defendant's own participation in a fraudulent scheme. As that element required "conduct the defendant himself engage[d] in as part of [the offense]," it constitutes an essential conduct element and venue will lie where such conduct took place. *Bowen*, 224 F.3d at 310.

At trial, there was ample evidence that defendant participated in a scheme to defraud the citizens of his honest services through bribery in the Eastern

District of Virginia. For example, the government proved that on two separate occasions (February 15, 2004, and May 23, 2004), defendant departed from Washington Dulles International Airport ("Dulles Airport") in that district on an iGate-funded trip to Africa for the purpose of performing official acts in exchange for things of value (JA548-49;JA598;JA4068-69;JA4190;JA4192;JA6172-73). In addition, in early July 2005, in exchange for things of value he solicited from Mody and in his capacity as a congressman performing constituent services, defendant traveled from Dulles Airport to meet with Ghanaian government officials to advance Mody's telecommunications venture (JA2032-43;JA2048-54;JA4195). Also in furtherance of his bribery scheme, on July 30, 2005, defendant met with Mody in the Eastern District of Virginia, and directed her to make several wire transfers on August 1, 2005 – in amounts totaling nearly $9 million – to bank accounts controlled by him and his family (JA2795-2800;JA2809-14;JA5631-32). On August 1, 2005, defendant again met with Mody in that district, and received bribe payments from Mody, namely, stock certificates that provided defendant's family (through sham companies) a substantial ownership share of two of Mody's companies (JA2842-48).

Thus, the government adduced sufficient evidence of venue. *See United States v. Pearson*, 340 F.3d 459, 466-67 (7th Cir. 2003) (venue proper in Southern

District of Illinois even though wire transmittal did not touch that district because "wire fraud focused on defrauding" consumers in that district).[34]

## CONCLUSION

For these reasons, the defendant's convictions and sentence should be affirmed.

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[34] Defendant's reliance (at 54-56) on *United States v. Pace*, 314 F.3d 344 (9th Cir. 2002), and *United States v. Ramirez*, 420 F.3d 134 (2d Cir. 2005), is misplaced. Unlike defendant, neither defendant in those cases performed *acts* in furtherance of the fraudulent scheme in the district where the wire or mail fraud charges were brought. *See* 420 F.3d at 144-145; 314 F.3d at 350-351. Even if the decisions in *Pace* and *Ramirez* were not distinguishable, the narrow view of venue espoused in these decisions is contrary to *Rodriguez-Moreno*.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I hereby certify that:

1. This brief contains 20,990 words (as counted by WordPerfect word processing software), excluding the parts of the brief exempted by Fed. R. App. P. complies with 32(a)(7)(B)(iii), and is thus in compliance with the Court's February 11, 2011 Order.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14-point Times New Roman typeface.

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## CERTIFICATE OF SERVICE

This is to certify that on this 10th day of March, 2011, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing and a copy of the brief to the following registered CM/ECF users:

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