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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ENRIQUE FAUSTINO AGUILAR NORIEGA, ANGELA MARIA GOMEZ AGUILAR, LINDSEY MANUFACTURING COMPANY, KEITH E. LINDSEY, and STEVE K. LEE, Defendants.	CASE NO. CR 10-1031(A)-AHM **REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST SUPERSEDING INDICTMENT** Date: March 24, 2011 Time: 9:30 a.m. Place: Courtroom 14

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Defendants Lindsey Manufacturing Company, Keith E. Lindsey, and Steve K. Lee, by their counsel of record, hereby submit their reply to the Government's Opposition to Defendants' Motion to Dismiss the First Superseding Indictment.

DATED: March 17, 2011

Respectfully submitted,

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DATED: March 17, 2011

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I. INTRODUCTION

The text and legislative history of the Foreign Corrupt Practices Act ("FCPA") establish that Congress had numerous opportunities to make clear that "foreign officials" (to whom bribes are prohibited under the FCPA) include employees of state owned corporations. On each occasion, Congress declined to do so, and nothing in the legislative history indicates it believed the Act implicitly established this. As a result, it is apparent that Congress either did not intend to incorporate into the FCPA the concept of state owned corporations or may have intended to do so but failed to make its intent sufficiently clear so that the average citizen could understand what conduct the FCPA prohibits. In either case, the First Superseding Indictment ("FSI") is invalid as a matter of law because it rests on allegations of payments to employees of state owned corporations. The government tries to overcome these silences in the statute and history with exaggerated invocation of canons of construction and reliance on non-precedent such as uncontested jury instructions and plea agreements. The government's efforts fail and the Court should accordingly grant defendants' motion to dismiss.

II. ARGUMENT

A. The Defendants' Motion is Timely

The government misconstrues the defendants' position that the Court should rule on its motion now, pretrial. First, the government addresses Federal Rule of Criminal Procedure 7(c)(1), notwithstanding the fact that defendants have not objected to the sufficiency of the allegations in the FSI. Opposition to Defendants' Motion to Dismiss the First Superseding Indictment (Docket No. 250) ("Gov't Opp.") at 6-7; 8. Second, the government claims that the defendants have asked the Court to rule, "before the presentation of any evidence, that the government has not met its factual burden." *Id.* at 8. The government suggests that facts it intends to prove at trial, the description of which take up a great deal of space, could alter

the landscape for purposes of this dispute. *Id*. at 3-4; 5-8. The government's factual claims are of no moment, however. For purposes of their motion, defendants Lindsey Manufacturing Company ("LMC"), Keith E. Lindsey and Steve K. Lee *do not dispute the factual allegations in the FSI*, but instead accept that the Mexican Comisión Federal de Electricidad ("CFE") is a government owned corporation as the indictment alleges. The motion raises the purely legal argument that this characteristic of CFE – no matter what else may be true about the entity – disqualifies it as an entity properly addressed by an FCPA indictment. Thus, the question before the Court is a pure question of law rather than of fact, and is appropriate for pretrial determination. *United States v. Covington*, 395 U.S. 57, 60 (1969); Defendants' Notice of Motion and Motion to Dismiss the First Superseding Indictment (Docket No. 220) ("Def. Mot.") at 5-6.

The Court should dismiss the indictment because "the specific facts alleged . . . fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella,* 277 F.3d 678, 685 (3d. Cir. 2002).

B. <u>The Government's Textual and Contextual Arguments About the Meaning of "Instrumentality" Are Unavailing</u>

The government argues that Congress intended the definition of "foreign official" to include employees of state owned corporations. To support this argument, it makes textual and contextual arguments derived from the "foreign official" definition as a whole, other parts of the FCPA, and other parts of the U.S. Code. Nothing to which the government points actually supports its interpretation of the term.

First, the government concedes that in order to discern the plain meaning of "instrumentality," the Court should interpret the term "in context with the provision as a whole." Gov't Opp. at 24. The government also does not dispute that the *ejusdem generis* doctrine (a variant of the *noscitur a sociis* doctrine) should

guide the Court's analysis of that issue. *Id*. To support its argument that "instrumentality" includes any tool of a foreign government, however, the government misconstrues the *ejusdem generis* doctrine, and mischaracterizes (and selectively quotes) defendants' arguments about the effect of the doctrine on the interpretation of "instrumentality." The government wrongly suggests that defendants argued that if state owned corporations share *any* qualities with departments or agencies, then these entities are within the definition of "instrumentality." Gov't Opp. at 24-25. In fact, the defendants actually argued that the doctrine of *ejusdem generis* demands that the term "instrumentality" be interpreted not in light of *any* characteristic of departments and agencies, but rather in light of what is *consistent between* and what *defines* "departments" and "agencies." Def. Mot. at 8. That is, only entities that have characteristics like those that are the *sin qua non* of both agencies and departments qualify as "instrumentalities." Def. Mot. at 7-9.

Foreign government agencies and departments exist *only* when created by governments, and are *always* funded solely by governments or by exercise of their power to enforce government policies and laws. They *always* and *only* exist to execute, administer and enforce government policies. These characteristics unite and define agencies and departments. In contrast, corporations, even corporations in which governments have an interest, are not always created by governments (some are bailed out by governments, or expropriated by governments, for example). Such corporations are not always funded solely by governments (some, like CFE for example, earn revenue by charging customers for their commercial services).[1] Such corporations often do more than execute policy (some, like the

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[1] The government describes CFE as simply providing electricity as a public service, Gov't Opp. at 2, omitting that it provides the electricity for *sale*. *See* http://www.cfe.gob.mx/lang/en/Pages/thecompany.aspx (describing the distribution of its sales to customers).

CFE, operate commercial enterprises). In every country, agencies and departments (and ministries and bureaus, and other entities which share defining characteristics with agencies and departments) have defined meanings, and each such entity (that is, each agency, or each bureau) shares certain defining qualities with others with the same status (that is, other agencies, or other bureaus, respectively). In contrast, in every country, corporations take myriad forms and are created and operated in myriad ways, for myriad and variable purposes.

In *Circuit City Stores, Inc. v. Adams*, the Supreme Court applied the *ejusdem generis* principle to construe Section 1 of the Federal Aviation Act, which "provides the Act shall not apply 'to contracts of employment of *seamen, railroad employees*, or any other class of workers engaged in foreign or interstate commerce.'" 532 U.S. 105, 112 (2001) (quoting 9 U.S.C. § 1) (emphasis added). Over the argument that the § 1 exception "exclude[s] all contracts of employment from the reach of the FAA," *id.,* the Court held that the clause "exempts from the FAA *only contracts of employment of transportation workers.*" *Id.* at 119 (emphasis added). The Court wrote that:

> Construing the residual phrase ["or any other class of workers engaged in foreign or interstate commerce"] to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in ... commerce" residual clause. The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."

Id. at 114-115 (citations and quotations omitted). Likewise, here, for the Court to construe "instrumentality" to include *any* tool a government might use (which *per se* would include agencies and departments) would fail to give independent effect to the specific categories of the tools that precede the term "instrumentality" (agencies and departments). Accordingly, the Court should look for defining similarities between agencies and departments and consider only entities that share these qualities to fall within the definition of "instrumentality."

Likewise, the government's arguments about the use of the term "any" are unavailing. The government argues that because "any" appears before "department, agency or instrumentality," the court should interpret "instrumentality" broadly. *See* Gov't Opp. at 19-21. However, "any" does not modify just "instrumentality" standing alone in the FCPA. If it did, perhaps the government's argument that "instrumentality" should encompass any and all tools of the government would be more persuasive. One could read "any instrumentality" to include agencies, departments, and *any* other tool of the government. "Any" modifies the entire list within which "instrumentality" falls, however, so its appearance does not suggest that the broadest reading of instrumentality should apply. All the use of the word signals is that, once the limits of "instrumentality" are discerned, anything within those limits is within the statute.

Second, the government is wrong that the further context provided by the "routine governmental action" exception in the FCPA is evidence that Congress contemplated corporations as "instrumentalities." *See* 15 U.S.C. § 78dd-2(b) (permitting payments to foreign official and others to "secure the performance of a routine governmental action by a foreign official," among others); *see* Gov't Opp. at 12-14. The provision provides that routine governmental action "means only an action which is ordinarily and commonly performed by a foreign official in" among other things, "providing phone service, power and water supply[.]" 15

U.S.C. § 78dd-2(h)(4). The government implies that the latter text proves that Congress believed that entities that provide power supply can be foreign officials. Gov't Opp. at 14. But the Court need not disagree with this in order to also conclude that *commercial corporations* that provide power supply are nevertheless not "instrumentalities," and their employees not "foreign officials." The focus of the "foreign official" definition is not the *nature of the service* provided by the entity in question. The focus of the statute, and thus the appropriate focus for the Court, is *the nature of the entity* in question. In sum, there is nothing in the text of the FCPA that suggests state owned corporations can be instrumentalities – no matter what their business is.

Third, the Foreign Sovereign Immunities Act (FSIA) and the Economic Espionage Act (EEA) do not support the government's interpretation of "instrumentality." The government purports to rely on the "premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other[,] [i]t is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005), *cited in* Gov't Opp. at 21. It claims that this means that Congress must have intended the term "instrumentality" in the FCPA to have the same meaning it has in the FSIA and EEA.

The government overstates the *Smith* premise. In *Smith*, the statutory language the Court compared to the language at issue was almost exactly the same, and the statutes the Court compared had identical purposes – the elimination of certain discrimination in employment. *Smith,* 544 U.S. at 233 (analyzing statute that prohibited "otherwise adversely affect[ing a person's] status as an employee, because of such individual's age," in light of interpretations of earlier statute that prohibited the same conduct, using the same terms, because of a person's "race, color, religion, sex, or national origin . . ."). The same was true in *Northcross, et*

al. v. Bd. of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973), the case cited by the Supreme Court in *Smith* for the proposition the government seeks to apply here. 412 U.S. at 428 (comparing two attorney fees statutes with identical language and a "common *raison d'être*"). The government does not even argue – nor could it – that the FSIA and EEA are analogously similar to the FCPA or analogously driven by the same goal. Moreover, Congress passed the EEA after the FCPA; it has no relevance to Congress' thinking in 1977, except that, like the FSIA, it demonstrates that Congress is capable of clearly defining "instrumentality" to include state owned corporations when it wants to. The premise upon which the government relies is far overstated and inapposite.

If Congress believed "instrumentality" *per se* included state owned entities, it would have had no reason to state so explicitly in the FSIA and EEA. Clearly, Congress presumes that state owned entities should be understood as something different from "instrumentalities," unless Congress explicitly states otherwise. The recent Dodd-Frank Act confirms this, given that, in that Act, Congress explicitly distinguished "instrumenatlit[ies]" from "compan[ies] owned by a foreign government," a development the government completely ignores in its brief. *See* Def. Mot. at 9 n.8.

The government seeks to put words into Congress's mouth and read terms into the FCPA that do not exist. The FSIA and EEA demonstrate that Congress is perfectly capable of defining terms for itself. The Court should leave it to Congress to further define instrumentality if Congress believes the FCPA should address payments intended to influence state owned corporations.

C. The *Charming Betsy* Canon Is Inapposite

The government suggests that the Court should find that "instrumentality" includes state owned corporations because that interpretation is more consistent with the OECD Convention, which defines "foreign public official" to include a person "exercising a public function for a foreign country, including for a . . .

public enterprise." Gov't Opp. at 14-16 (quoting Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 (hereinafter "OECD Convention"), art. 1.4.a).[2] The government argues that Congress intended for its 1998 amendments to bring the FCPA into perfect conformity with the OECD Convention. Given that intent, the government concludes that the failure to explicitly add language to the effect that payments to employees of "public enterprises" are prohibited by the FCPA suggests that Congress believed the FCPA already *implicitly* prohibited such payments by way of the "instrumentality" definition. Gov't Opp. at 17-19.

First, the government's *Charming Betsy* argument fails to account for a key element of that doctrine. Although it is true that a court should strive to interpret ambiguous statutes "so as not to conflict with international law or with . . . an international agreement of the United States," Gov't Opp. at 15, quoting Restatement (Third) of Foreign Relations Law § 114, this is only true "*where fairly possible*." Restatement (Third) of Foreign Relations Law § 114 (emphasis added); *Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations *if* any other possible construction remains[.]") (emphasis added). As the Ninth Circuit has explained, courts may "invoke the *Charming Betsy* canon only where conformity with the law of nations is relevant to considerations of international

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[2] Commentary 15 to the Convention, discussed below, provides definition to the phrase "exercising a public function." Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," adopted by the Negotiating Conference on Nov. 21, 1997 (hereinafter "OECD Convention Commentaries"), Commentary 15. The text of the Convention and the Commentaries are available at http://www.oecd.org/dataoecd/4/18/38028044.pdf.

comity and only 'where it is possible to do so *without distorting the statute*.'" *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) (emphasis added) (citing *Arc Ecology v. United States Dep't of the Air Force,* 411 F.3d 1092, 1102-03 (9th Cir. 2005) and quoting *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003)); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that courts should "endeavor to construe [statutes and treaties] so as to give effect to both, *if that can be done without violating the language of either*") (emphasis added).

In this case, the interpretation the government claims is more consistent with the OECD Convention is not supported by the text of the statute, and there is no legislative history suggesting Congress intended to adopt this interpretation when it amended the FCPA. Indeed, the interpretation the government proffers distorts the statute and its history, rendering the *Charming Betsy* canon inapplicable. *Munoz,* 339 F.3d at 958 (refusing to apply the *Charming Betsy* doctrine because the statute in question could not be fairly construed consistently with the treaty the plaintiff cited because "[t]he language of the statute provides absolutely no support for such a construction" and "Congress never suggested or hinted that" it meant for the statute to conform).

In addition, the government's interpretation of the 1998 amendments fails to take account of the fact that the only legislative history on point indicates that Congress appeared uncertain about whether the FCPA applied to payments to employees of state owned corporations. During a hearing on H.R. 4353 (the House analogue to S. 2375, which would ultimately become the Public Law amending the FCPA in 1998, the Associate Director of the SEC's Division of Enforcement, Paul Gerlach, discussed the bill with Representative Thomas Manton. Rep. Manton asked Mr. Gerlach, "The [FCPA] doesn't cover bribes to non-governmental people; is that correct?" *The International Anti-Bribery and Fair Competition Act of 1998*: *Hearing Before the Subcomm. on Finance and Hazardous Materials of the Comm. on Commerce*, 105th Cong. 22 (1998) (Testimony of Paul V. Gerlach,

Associate Director, Division of Enforcement, Securities and Exchange Commission). Mr. Gerlach responded that that was correct, and that "[f]oreign official is a defined term." *Id.* Rep. Manton responded, "And that's a public official. It's not someone who simply doesn't hold an official position but is a decisionmaker within a foreign company that some U.S. Company might want to do business with." *Id.* Mr. Gerlach did not disagree, as one might have expected him to were Rep. Manton's statement clearly contradicted by the language and history of the FCPA. Instead, he only responded:

> Well there are some *interesting legal issues* if what you're talking about is a foreign state operated enterprise where the foreign government perhaps has substantial ownership of the company. I can imagine certain scenarios where substantial government involvement in commercial enterprise *could* provide us *the basis for arguing* that an official of that enterprise qualifies as a foreign government official.

Id. at 23 (emphasis added).[3]

Finally, the government fails to note that article 1.4.a. is not the only part of the OECD Convention at issue. The OECD did not intend to target payments to *all* employees of state owned entities. Instead, article 1.4.a. of the Convention targets

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[3] In the end, whether Congress intended to or successfully did adopt everything in the Convention is an open question. The government has not demonstrated that all other Convention clauses are captured by the FCPA. Indeed, one court, though it acknowledged the *Charming Betsy* doctrine, nevertheless noted that there may be "some variation in scope between the Convention and the FCPA." *United States v. Kay*, 359 F.3d 738, 755 n.67 (5th Cir. 2004); *see United States v. Aguilar*, 883 F.2d 662, 679 (9th Cir. 1989) ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law"). If Congress wishes to amend the statute to be in greater conformity with the OECD Convention, it may, but foreign policy concerns in the meantime do not overwhelm the right of LMC, Dr. Lindsey and Mr. Lee to be prosecuted only pursuant to a statute that adequately gave them notice that their conduct was illegal.

only payments to such employees performing a "public function," which is a defined term. Specifically, Commentary 15 to the Convention provides that:

> [a]n official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a purely commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

OECD Convention Commentaries, *supra* note 2, Commentary 15.[4] The government asks the Court to assume that Congress did not amend the FCPA in 1998 to address state owned corporations because it believed "instrumentality" already encompassed state owned entities addressed by the Convention (despite the absence of a single statement to this effect in the legislative history). But to do so, the Court would have to come full circle and assume that Congress meant to adopt not just that "public enterprise" employees are targeted by the FCPA, but also that they are so *if* they are performing a "public function," which is in turn precisely defined. Not only is it difficult to believe that if anyone in Congress made this nuanced inference, given that no one said anything in the record about it, but the implications of the assumption the government asks the Court to make are broader than it acknowledges. Pursuant to OECD Convention (if it were implied into the FCPA), any "enterprise" receiving "preferential subsidies or other privileges" could trigger the FCPA. This could capture any member of the U.S. farm industry and any number of others that Congress surely did not intend to capture. The Convention is thus potentially more narrow (not all public enterprises are covered) and more broad (enterprises that receive public subsidies are covered) than the

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[4] The Court should interpret the terms of the Convention in accordance with the OECD Convention Commentaries because they were "adopted by the Negotiating Conference[.]" *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31 (May 23, 1969).

government suggests. Nothing in the text or legislative history of the FCPA addresses, much less approves, the adoption of the OECD's nuanced "public enterprises" concept.

Under these circumstances, there is no basis for the Court to "strive to interpret" the FCPA as entirely consistent with the OECD Convention. Instead, as defendants established in their motion to dismiss, the Court should determine that Congress could have but deliberately did not bring the FCPA into perfect conformity with the OECD Convention because it chose *not* to adopt the "state owned enterprise" language from the Convention in 1998, just as it chose not to incorporate these entities in 1977 and 1988. *See* Def. Mot. at 14-19.

D. No Legislative History Supports the Government's Interpretation

The government chides the defendants for not being able to point to direct, explicit proof in the legislative history of the FCPA that Congress intended to exclude state owned companies from the definition of instrumentality. Gov't Opp. at 30. But not only can the government also not point to any direct proof of its own position on the history, the government's citation to a portion of the legislative history is misleading.

The government points to a statement in the record indicating that Congress "stated its intention to address foreign bribery throughout the international economy, including bribery in the sectors of 'drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals[.]'" Gov't Opp. at 31-32 (citing H. Rep. No. 95-640 (1977) at 4-5). The government asserts (without support) that these sectors were "rife with state-owned and state controlled companies when the FCPA was passed in 1977," and concludes that state owned and state controlled entities were thus "within Congress's intended definition of instrumentalities of a foreign government." *Id.*

The government is wrong about the meaning of the legislative history upon which it relies. Every time that Congress addressed these sectors in the FCPA

legislative history, it is apparent that Congress was addressing people and companies in those sectors *who had paid bribes to foreign officials*, not those who had received bribes. There is no indication that Congress had in mind that the *payees* addressed by its bills had any role in these sectors. *See United States v. Carson, et al.*, No. SA CR 09-00077-JVS (C.D. Cal.), Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One through Ten of the Indictment, and Exhibits Thereto (Docket Nos. 305 & 306) at ¶¶ 197, 201, 235, 241-42, 250-51 (quoting in context the instances in which Congress listed these sectors). Moreover, there is no indication in any of these statements that Congress had in mind payments to any *corporate* bodies involved in these industries despite the government's unsupported assertion that these sectors were "rife" with state owned corporations.

In the portion of the record demonstrating that Congress was presented with but decided not to adopt language explicitly bringing state owned entities into the FCPA, the government finds "evidence" that Congress intended to address state owned entities with the FCPA. Gov't Opp. at 32-34; *contra* Def. Mot. at 16-18 (citing the same bills for the opposite proposition). The government argues that in choosing to add "instrumentality" to the list of entities whose employees would be "foreign officials," Congress chose a broad term and rejected using more narrow terms. Of course, there is no evidence of this purported decision and the argument circularly relies on the presumption that "instrumentality" in the FCPA is meant to be as broadly understood as the government says it is, an unsupported proposition. Moreover, the government's point that the Court should find "significant" that Congress chose a single general term over "an enumerated list," Gov't Opp. at 32-34, is completely misplaced. Congress did *not* choose one term to broadly describe all entities that can trigger the "foreign official" element, as the government suggests. To the contrary, Congress placed instrumentality at the end of *an enumerated list* that included "department" and "agency." As set forth here and in

defendants' motion, this does not suggest that instrumentality should be interpreted broadly, but, rather, that it should be interpreted narrowly.

The defendants have demonstrated that the text, context, and history of the FCPA establish that Congress did not intend to address payments to employees of state owned corporations by way of the definition of "foreign official" and specifically the use of "instrumentality" in the FCPA. The government has failed to adequately – let alone conclusively – support its rebuttal that the statute silently makes payments to such employees illegal. There is enough in the record for the Court to decide conclusively that state owned corporations are not "instrumentalities" and the FSI is therefore invalid as a matter of law. However, at a minimum, there is enough ambiguity in the scope of the FCPA to trigger the rule of lenity, requiring the court to dismiss any indictment based on a statute "whose commands are uncertain." *See United States v. Santos*, 553 U.S. 507, 514 (2008); Def. Mot. at 21. In either case, the Court should dismiss the FSI.

E. The Government Fails to Rebut Defendants' Vagueness Arguments

The government does not substantively address the defendants' vagueness argument, which is that the government's interpretation of the FCPA leaves to government authorities the job of deciding to whom the statute should apply. Instead, the government claims defendants misapply the constitutional vagueness doctrine. The Court should disregard this diversion.

As an initial matter, the government overstates the rule that statutes implicating First Amendment freedoms are subject to greater scrutiny under the vagueness doctrine when it suggests that only statutes implicating First Amendment freedoms may be challenged as vague on their face. Gov't Opp. at 37-38. Although it is true that courts do ordinarily entertain facial vagueness challenges to only a limited category of statutes, including those that implicate First Amendment rights, this is not for the reasons the government gives. A court

facing a facial vagueness challenge that does not implicate fundamental rights like the First Amendment typically examines *first* the statute as it is applied because if it is not vague as applied to the complaining party, the court need not void the statute as a whole, a step the courts are loathe to take.

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, *assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications*. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 494-95 (1982) (emphasis added).[5]

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[5] The Supreme Court cited *United States v. Mazurie*, 419 U.S. 544, 550 (1975), for the proposition that "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others" in *Village of Hoffman Estates*. 455 U.S. at 495 n.7. The government relies on the same case to support its argument that a facial challenge is necessarily completely precluded in this case. Gov't Opp. at 37. But the Court immediately explained in *Village of Hoffman Estates* that this statement in *Mazurie* and other similar statements should not be taken so literally as a rule precluding all other facial challenges:

> One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but

This procedure explains the Supreme Court's approach in *Skilling v. United States*, 130 S. Ct. 2896 (2010), although the Supreme Court did not address the issues in exactly the same order suggested in the *Village of Hoffman Estates* case. Skilling challenged an honest services fraud charge leveled at him pursuant to 18 U.S.C. § 1346. *Id.* at 2907. Though the statute did not implicate First Amendment rights, Skilling asked the Court to invalidate the entire statute. *Id.* The Court focused first on whether the statute was vague as applied to Skilling, however, because it preferred, if possible, to "construe, not condemn, Congress' enactments." *Id.* at 2904. After examination of the text and history of section 1346 to discern its "core," the Court found that, at its core, "the statute criminalizes only the bribe-and-kickback core of the pre-*McNally* case law." *Id*. at 2931. It further found that, *thus understood*, the statute satisfied the vagueness standards of *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *Id*. at 2933 (stating that, "[i]nterpreted to encompass only bribery and kickback schemes, § 1346" provides fair notice of prohibited conduct and does not invite arbitrary and discriminatory prosecutions). However, the Court reversed Skilling's conviction because Skilling was never charged with soliciting or receiving a bribe or kickback in exchange for the misrepresentations he was alleged to have made. *Id*. at 2935. This was simply another way of holding the statute vague as applied to the allegations leveled at *Skilling*, although the Court found Section 1346 was not void on its face.

Defendants' argument in the alternative is that, first, the statute is void as a whole because – unlike the situation in *Skilling* – there actually is no discernable core within the broad and vague term "instrumentality." *See* Def. Mot. at 22-23.

> rather in the sense that no standard of conduct is specified at all. Such a provision simply has no core.

Id. (internal quotations and citations omitted).

Second, the vagueness in the statute is not saved by its application to the allegations at issue here. *See* Def. Mot. at 23-24. If the text and legislative history suggest anything in this case, it is that entities more similar to agencies and departments than are corporations (such as government bureaus or ministries) are at the core of what Congress had in mind when it included "instrumentality" in the "foreign official" definition. *See id.* Because the FSI does not allege that the defendants bribed officials of such entities, the FSI is invalid, just as the indictment in *Skilling* was invalid.

F. Prior Cases the Government Cites are Inapposite Because They Did Not Raise Issues the Court Is Now Asked to Address

The government stretches when it claims that this Court should be persuaded to adopt its position because "every court that has faced the issue has decided that officials of state-owned entities can be foreign officials." Gov't Opp. at 26. Only two courts have arguably "faced" this issue, and the many reasons the Court should give little weight to their decisions (most of which the government ignores) are outlined in footnote 4 of defendants' motion. Def. Mot. at 3-4 n.4 (discussing the *Nguyen* and *Esquenazi* cases). More importantly, no appellate court or court in this Circuit has ever examined the issue.

The government also suggests that the Court should look for guidance to jury instructions in certain cases, which – the government claims – reflect that courts "examining the issue have instructed the jury that the definition of government instrumentality includes companies owned or controlled by the state." Gov't Opp. at 29 (discussing instructions in *United States v. Bourke* in the Southern District of New York and *United States v. Jefferson* in the Eastern District of Virginia). However, the proper instruction on "instrumentality" was not a disputed issue in either *Bourke* or *Jefferson*.

Finally, the government also suggests that plea agreements in unrelated cases serve as precedent. Gov't Opp. at 27-28. Defendants plead guilty for any

number of reasons, as the Court is well aware. Federal Rule of Criminal Procedure 11(b)(3) does require that, "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." However, the government is wrong when it argues that the rule means that a district court must "assess the law" and not accept a guilty plea if it conflicts in any way with the law. *See* Gov't Opp. at 28. Rule 11 does not and never has required that a court take that step. In fact, the drafters of the 1966 amendments to Rule 11 specifically considered and *rejected* a proposal to insert language that would have required courts to assess the validity any legal conclusions that may be built into a plea before accepting a guilty plea, and to be satisfied "that the defendant in fact committed the crime charged." Wright & Leipold, Federal Practice and Procedure: Criminal 4th §170, at 145 (2008), *citing* Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure, Dec. 1962, at 3; *see also, United States v. Giffen*, 326 F. Supp. 2d 497, 505 (S.D.N.Y. 2004) (stating that three indictments reflecting the government's theory "is not the kind or quality of precedent this Court need consider"). Indeed, in the *Nguyen* case the government itself cites, when the defendant pled guilty after the court rejected his motion to dismiss based on the instrumentality definition, the court that accepted his plea stated during sentencing, "When I asked them for an admission of what they did, I wanted to know whether or not they admitted to the facts. I didn't ask them if they

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admitted to the conceded legal conclusions. That [the entity defendant allegedly bribed "was an agency or instrumentality"] is a legal conclusion."[6] *United States v. Nguyen, et al*., No. 08-522-TJS (E.D. Pa.), Transcript of Sep. 15, 2010 Sentencing Proceedings (Docket No. 211, entered Oct. 6, 2010), at 20:19-23.

In sum, the Court should disregard the government's references to other, unrelated, out of circuit, and non-binding decisions or proceedings.

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[6] Surely the government would never agree that its decision to voluntarily dismiss an indictment or accept a plea to a lesser charge in lieu of going to trial in the face of a defendant's arguments in a particular case meant the government agreed with those arguments, or that a court decision condoning such a discretionary decision serves as some sort of precedent. Yet, this is the logical extension of the government's arguments here.

III. CONCLUSION

If Congress had meant to prohibit bribes to any entity "through which a government achieves an end or purpose," as the government would have it, Gov't Opp. at 11, it could have done so clearly and directly in the "foreign official" definition. *See Skilling*, 1130 S. Ct. at 2933 (internal citation and quotations omitted). Instead, as discussed above, it chose to define "foreign official" with two particular terms with defined and recognized meanings, and a more general term that the Court should interpret to include only terms that share key characteristics with the former two. The Court should not allow executive enforcement agencies to be the arbiters of which government tools are within the ambit of the FCPA, and should accordingly dismiss the FSI.

DATED: March 17, 2011

Respectfully submitted,

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DATED: March 17, 2011

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Crowell & Moring LLP at 515 S. Flower Street, 40th Floor, Los Angeles, California 90071. I am over the age of 18 and not a party to the within action.

On **March 17, 2011**, I served the foregoing document described as **REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST SUPERSEDING INDICTMENT** on the parties in this action by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies the following:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 17, 2011**, at Los Angeles, California.

/s/Kristen Savage Garcia
KRISTEN SAVAGE GARCIA