CASE NOS. 20-4470 (L) & 20-4473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

GREG E. LINDBERG and JOHN GRAY
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of North Carolina, Statesville Division, Max O. Cogburn Jr., District Judge

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 20-4470 (L) & 20-4473 Caption: United States of America v. Greg E. Lindberg and John Gray

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(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: Henry W. Asbill Date: 1/28/2021

Counsel for: National Association of Criminal Defense Lawyers

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has approximately 40,000 direct and affiliate members nationwide. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL submits this brief in support of Appellants Lindberg and Gray because an issue presented in this case—whether a district court can usurp the jury's role and determine as a matter of law that the government has proved an element of the offense beyond a reasonable doubt—is an area of great concern to criminal defendants throughout the country.[1]

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4), amicus curiae certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or

SUMMARY OF ARGUMENT

A defendant's right to a jury trial is fundamental to the American justice system. In *United States v. Gaudin*, the Supreme Court confirmed that the right to a jury trial includes the right to have a jury—not a judge—decide whether the government has proven beyond a reasonable doubt all disputed offense elements, including specifically elements that involved mixed questions of law and fact. 515 U.S. 506, 513 (1995). The jury—not the judge—must apply the law to the historical facts and must make the ultimate determination of whether the government has proven each element. *Id.* In *McDonnell v. United States*, the Supreme Court—by defining the scope of the law and providing guidance on how to instruct the *jury* on how to apply the law—determined that what conduct constitutes an "official act" for honest services fraud under 18 U.S.C. § 1346 is such a mixed question of law and fact reserved for the jury. 136 S. Ct. 2355, 2374-75 (2016).

The district court failed to follow this unequivocal Supreme Court authority, and instead itself decided that the challenged conduct (the reassignment of tasks previously handled by a deputy insurance commissioner) constituted an "official

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submitting this brief, and no person—other than amicus or its counsel—contributed money that was intended to fund preparing or submitting this brief. This brief is filed with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a).

act." J.A. 1881; *see also* J.A. 84-85. In doing so, it wrongly concluded that what constituted an "official act" was a matter of statutory interpretation because a jury in Philadelphia in a different case decided that a congressman's hiring of an employee was an "official act." J.A. 88-89.

The impact of this case is not limited to those involving honest services fraud. Permitting the district court to decide a disputed element of a charge under the guise of statutory interpretation flouts *Gaudin* and creates a dangerous precedent for criminal defendants in both white collar and street crime cases.

The court's error was structural and is not harmless. Under *Rose v. Clark*, a directed verdict against a criminal defendant on a disputed element is structural error. 478 U.S. 570, 578 (1986). Moreover, *Neder v. United States*, 527 U.S. 1, 17 (1999), compels the same outcome. While under *Neder*, the failure to submit an element to the jury can be considered harmless if the element is uncontested and supported by overwhelming evidence, here, the Appellants disputed the element, elicited testimony to support their position on cross-examination, and were prohibited from presenting evidence in support of their position. *See* Brief of Defendants-Appellants Greg. E. Lindberg and John Gray (Jan. 22, 2021), ECF No. 27 ("App. Br.") at 23-25. Where a defendant identifies any evidence in support of its interpretation, the reviewing Court cannot weigh its sufficiency. *See Neder*, 527 U.S. at 17 n.2. To find to the contrary, would contravene black letter law that no

matter how overwhelming the evidence, the Court cannot direct a verdict for the government. *See Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

Finally, the court's error in directing a verdict on the official act element also requires reversal of the convictions under 18 U.S.C. § 666, because the court's faulty instruction infected all of the jury's deliberations. The Supreme Court has implicitly recognized that an improper instruction is not harmless, *even if* the defendant is acquitted of the particular charge with the erroneous instruction, when it cannot be established beyond a reasonable doubt that it did not affect the jury's verdict on another charge. *See Connecticut v. Johnson*, 460 U.S. 73, 87 (1983) (recognizing an instruction containing an improper presumption would be harmless only in "rare situations" such as "if the erroneous instruction was given in connection with an offense for which the defendant was acquitted ***and*** if the instruction had no bearing on the offense for which he was convicted") (emphasis added). Here, the Section 666 charge required that the government prove the reassignment of tasks constituted a "business, transaction, or series of transactions"—which required either that the government prove the reassignment constituted an "official act" (as NADCL and Appellants contend) or a broader course of conduct easier to prove than the "official act" limitation (as the District Court held). Thus, when the district court instructed the jury that the "official act" element was satisfied with respect to Count One (honest services fraud) (J.A.

1881), "there is no reason to believe that the jury would have deliberately undertaken the more difficult task" of evaluating whether the "business, transaction, or series of transactions" element was satisfied as to Count Two (Section 666). *See Johnson*, 460 U.S. at 85.

ARGUMENT

I. The District Court Impermissibly Directed a Verdict on the Existence of An Official Act.

A. The Jury Decides Whether the Defendant Is Guilty of Each Contested Element of the Charged Offense.

The right to a "trial by jury in criminal cases is fundamental to the American scheme of justice[.]" *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Not only does the importance of the right date back to English common law, its enshrinement in the Bill of Rights was also critical to the passage of the United States Constitution. *Id.* at 151-53 (detailing the history of the right to a trial by jury in criminal cases); *United States v. Gaudin*, 515 U.S. 506, 510-11 (1997) ("[The right to trial by jury] was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.") (quoting 2 J. Story, Commentaries on the Constitution of the United States 5401-41 (4th ed 1873)). The right is predicated on "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges" and thus mandates "community participation in the determination of guilt or innocence." *Duncan*, 391 U.S. at 156.

The right to a trial by jury is not limited to the ultimate question of guilt or innocence. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of ***all the elements*** of the crime with which he is charged[.]" *Gaudin*, 515 U.S. at 511 (emphasis added); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) ("Taken together [the Due Process Clause and the Sixth Amendment] indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'") (quoting *Gaudin*, 515 U.S. at 510).

The right to a trial by jury also includes the right to have the jury decide mixed questions of law and fact, *i.e.*, to have the jury apply the law to its findings of facts and "make the ultimate determination of guilt" on each and every element. *Gaudin*, 515 U.S. at 513-515. In *Gaudin*, the government argued the right to a jury trial on all elements of a criminal offense applied to "*only the factual components* of the essential element." 515 U.S. at 511. The Court flatly rejected the government's position, reasoning that if the right to a jury trial applied only to the factual component of an element "the lawbooks would be full of cases, regarding materiality and innumerable other 'mixed-law-and-fact' issues, in which the criminal jury was required to come forth with 'findings of fact' pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of 'guilty' or 'not guilty.'" *Id.* at 512-13. The Court

knew of no such cases and thus concluded where an element involves applying a legal standard to historical facts, it is a mixed question of law and fact reserved for the jury. *Id.* at 513.

A necessary corollary to the right to a trial by jury is that—no matter how overwhelming the evidence—a judge may never direct a verdict, including on any individual element, for the government. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."); *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) ("The Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict… regardless of how overwhelmingly the evidence may point in that direction.'") (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)). Indeed, a jury always has a right to nullify a conviction—render a verdict of acquittal that is contrary to the law—and that right was deemed by Justice Chase to be "a sacred part of [American] legal privileges." *Gaudin*, 515 U.S. at 513 (quoting 1 S. Smith & T. Lloyd, Trial of Samuel Chase 34 (1805)).

B. The District Court Usurped the Jury's Exclusive Role.

1. Under *Gaudin* and *McDonnell* the Question of Whether Alleged Conduct Constitutes An Official Act is a Mixed Question of Law and Fact Reserved for the Jury.

The district court failed to follow the *Gaudin* rule that the jury decides all disputed elements with factual components. Here, in order to obtain a guilty verdict on the honest services fraud charge, the government needed to prove that Appellants conspired to make a campaign contribution "with intent…to influence an[] official act." J.A. 84. Appellants disputed that the reassignment of tasks performed by a deputy insurance commissioner was similar to the "lawsuit, hearing, or administrative determination" required by *McDonnell* to show an "official act." Yet the district court refused to allow Appellants to argue to the jury that the reassignment was not an official act. J.A. 1443-44; *see also* J.A. 1881 ("You are hereby instructed that the removal or replacement of a Senior Deputy commissioner by the Commissioner would constitute an official act"); App. Br. at 11-12. This plainly contravenes the Constitutional jurisprudence discussed above, which mandates that every disputed element with a factual component be submitted to the jury. *Supra* at § 1.A; *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The government must prove beyond a reasonable doubt every element of a charged offense.").

The district court rationalized its directed verdict by misinterpreting *McDonnell* to stand for the proposition that "as a matter of statutory interpretation, some actions categorically qualify as official acts." J.A. 88. *McDonnell*, however, holds no such thing. In *McDonnell*, the Supreme Court decided that the question of whether there was an "official act" was a question for the jury, by dictating the instructions a *jury* was required to follow in determining whether the conduct at issue constituted an "official act." *See McDonnell*, 136 S. Ct. at 2373-75; *see also Gaudin*, 515 U.S. at 513 (reaffirming "constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts"). While the Supreme Court gave an example of an official act—"a decision or action to initiate a research study…would qualify as an official act"—the Supreme Court never concluded, as the district court did here, that this means as a general principle some actions "categorically qualify" as official acts such that the facts are no longer submitted to a jury. *See McDonnell*, 136 S. Ct. at 2370-75; J.A. 88. To the contrary, if whether conduct constituted an official act were a pure question of law, the curative instructions in *McDonnell* would have mirrored the district court's instructions here, *i.e.* "did the McDonnell request the initiation of a research study, which is an official act." *See McDonnell*, 136 S. Ct. at 2370. Instead—consistent with *Gaudin*—the Supreme Court's *McDonnell* jury instructions require that the jury

itself identify a "'question, matter, cause, suit, proceeding or controversy' involving the formal exercise of governmental power." *Id.* at 2374. At most, the reference to "research studies" is indicative of conduct that would be sufficient to sustain a conviction on that element, not to direct a verdict in the government's favor, which is strictly prohibited. *See Sullivan*, 508 U.S. at 277 ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.").

The district court's contention that whether conduct constitutes an official act is purely a question of law also cannot be squared with *Gaudin*. As explained *supra*, under *Gaudin* any element that requires the application of a legal standard to a historical fact is a mixed question of law and fact reserved for the jury. 515 U.S. at 513. As explained by Appellants, the Supreme Court in *McDonnell* laid out a three-part test for the *jury* to evaluate whether the official act element was satisfied. App. Br. at 17-18. While the district court ignored the three-part test laid out by the Supreme Court (*see* J.A. 88)—it plainly requires the application of law (*e.g.*, the standard for what constitutes the formal exercise of government power) to historical facts (conduct alleged) to determine the ultimate question (does the conduct alleged meet that standard of the formal exercise of government power). *See McDonnell*, 136 S. Ct. at 2370-72, 2374. Consequently, under *Gaudin*,

whether conduct constitutes an "official act" is a mixed question of law and fact for the jury. *See* 515 U.S. at 513.

In fact, courts post-*McDonnell* have reflexively agreed whether conduct constitutes an official act is a question for the jury. *See, e.g.*, *Dimora v. United States*, 973 F.3d 496, 503 (6th Cir. 2020) (describing what clarifying instructions are needed under *McDonnell* for a jury to find whether the official act element has been satisfied); *United States v. Van Buren*, 940 F.3d 1192, 1204 (11th Cir. 2020) (vacating honest services fraud conviction noting that if jury had been properly instructed with the clarifying instructions of *McDonnell*, jury may not have found the official act element satisfied); *United States v. Silver*, 864 F.3d 102, 119 (2d Cir. 2017) (vacating honest services fraud conviction because a jury that received instructions consistent with *McDonnell* could have determined that the official act element was not satisfied). Indeed, NACDL is not aware of any other courts post-*McDonnell* that held that the question of whether the government proved the existence of an official act beyond a reasonable doubt should be taken away from the jury and instead decided by the court.

2. Neither *Fattah* Nor *Hastie* Justify A Directed Verdict On The Official Act Element.

Not only was the district court's interpretation of *McDonnell* wrong, the court compounded its error by relying on *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019), a Third Circuit case with altogether different facts, to conclude that

reassignment is an official act as "a matter of statutory interpretation." J.A. 88-89. The district court's reliance on *Fattah* violated Appellants' right to a trial by jury. Even if the court could as "a matter of statutory interpretation" determine whether the official act element was met, holding that a jury finding from another case precluded Appellants' jury from finding to the contrary was not an exercise in statutory interpretation. The purpose of statutory interpretation is "'to try to determine congressional intent.'" *Dole v. Un. Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (quoting *NLRB v. Food and Commercial Workers*, 484 U.S. 112 (1987)). This can be accomplished by either (1) utilizing interpretative canons or (2) looking to legislative history. *See, e.g. McDonnell*, 136 S. Ct. at 2368 (utilizing "the familiar interpretive canon *noscitur a sociis*, a 'word is known by the company it keeps'" to assess the meaning of "matter" and "question"). Another jury's evaluation of whether a different set of facts qualifies as an "official act" does not fall into either category and conveys nothing about *congressional* intent.

Fattah itself involved a jury verdict on the official act element, and the facts at issue there are readily distinguishable. The congressman hired the girlfriend of a lobbyist for two months so that she could qualify for government retirement benefits, with little evidence as to any work she performed to justify her compensation. *Fattah*, 914 F.3d at 156-57. Whatever superficial factual similarities there may have been—and as Appellants' brief makes clear, there were

no actual ones (App. Br. at 44-46)—they were not enough to justify the district court deciding that the reassignment of tasks previously performed by one deputy insurance commissioner was an official act as a matter of law.[2]

Nor does *United States v. Hastie* rescue the district court's erroneous ruling. *See* J.A. 87 (citing *Hastie*, 854 F.3d 1298 (11th Cir. 2017)). In *Hastie*, the court concluded that personal email addresses fit the statutory definition of "personal information," based on the examples of personal information listed in the statutory and dictionary definitions of that term, not based on conclusions drawn by a different jury deliberating on a different set of facts. 854 F.3d at 1303-04. And it was still up to the jury in *Hastie* to decide whether the specific email addresses at issue fit within the statutory definition—the court did not direct a verdict in favor of the government on this element. *Id.* at 1306 (holding the "district court would have erred if it had instructed the jury that the emails *provided by Ms. Hastie* constitute 'personal information[.]'").

[2] Key facts that the *Fattah* jury may have considered material that are not present here include: (1) the congressman used additional government funds to hire the employee, and (2) he vested a member of the public with governmental authority. *See Fattah*, 914 F.3d at 156-57. Both stand in contrast to the reassignment at issue here which did not involve either additional government funds or new personnel.

3. That Different Juries May Reach Different Verdicts Based on Similar Facts is Inherent in the Jury System—It Is Not a Basis to Abrogate The Jury's Right to Render a Verdict.

Finally, the district court's misguided concern at trial that different juries could reach different conclusions on similar facts—a concern explicitly rejected by the Supreme Court in 2015—does not remedy its error. J.A. 1553-55. In *Hana Financial, Inc. v. Hana Bank*, the defendant asserted a "tacking" defense to a trademark infringement case and maintained that the judge rather than the jury should have decided whether it applied, in order to ensure predictability in the trademark system. 574 U.S. 418, 421, 424-45 (2015) (defendant argued tacking involved "application of a legal standard," the jury decision would "create new law that [would] guide future tacking disputes," and the trademark system would be unpredictable if different juries reached different outcomes based on similar facts.)

The Supreme Court rejected the defendant's contentions, ruling that the fact that juries may disagree was irrelevant:

> [As in tort, contract, and criminal cases], juries answer often-dispositive factual questions or make dispositive application of legal standards to facts. ***The fact that another jury, hearing the same case, might reach a different conclusion may make the system 'unpredictable,' but it has never stopped us from employing juries in these analogous contexts.***

Id. at 424 (emphasis added). The Supreme Court's teaching applies with even greater force here where the defendants have a constitutional right to have a jury determine each element beyond a reasonable doubt. *See Sullivan*, 391 U.S. at 156.

The Supreme Court in *Hana Financial, Inc.* also rejected other purported concerns about submitting mixed questions of law and fact to the jury, which further support reversal here. Specifically, the Supreme Court ruled that if there are concerns about a jury improperly applying the legal standard, the solution "is to craft careful jury instructions that make that standard clear," not to take that element from the jury. 574 U.S. at 424. And the Supreme Court also rejected the defendant's contention that jury verdicts regarding tacking would create new law, finding that the jury verdicts would not create binding precedent that dictate the outcome of subsequent cases "any more than will a jury verdict in a tort case, a contract dispute, or a criminal proceeding." *Id.*

C. The District Court's Error If Uncorrected Will Impact Other Criminal Defendants.

The *Gaudin* rule applies across criminal cases—whether white collar or street crimes—and the district court's mistaken interpretation of *Gaudin* will potentially impact all criminal defendants. For instance, below are several examples of cases that could have been decided differently based on the district court's reasoning:

- *United States v. McKye*, 734 F.3d 1104, 1107-10 (10th Cir. 2013) (reversing securities fraud conviction and remanding for new trial for jury to determine whether a note constituted a security under the "family resemblance" test, i.e. a mixed question of law and fact)

- *United States v. Parkes*, 497 F.3d 220, 227 (2d Cir. 2007) (Hobbs Act requires jury determination of "[w]hether a robbery affects interstate commerce [because it] is a mixed question of fact and law[.]")
- *United States v. Garcia-Ochoa*, 607 F.3d 371 (4th Cir. 2007) (question of materiality under 18 U.S.C. §§ 1001, 1546(a) is at least a "mixed question of law and fact" to be resolved by the factfinder)

II. The District Court's Error Warrants A New Trial

A. A Directed Verdict for the Government On a Disputed Element Can Never Be Harmless.

Although the government asked the district court to find its directed verdict on the official act element was harmless error, the district court did not do so, and never ruled that it was harmless error. J.A. 85-92. In fact, the error was not harmless.

A directed verdict against a criminal defendant is structural error and cannot be harmless. *Rose v. Clark*, 478 U.S. 570, 578 (1986). Thus, the district court committed structural error in directing a verdict against Appellants on the official act element. *See id.*; J.A. 1881. Further, even under harmless-error analysis, where a defendant identifies evidence in support of a disputed element, the failure to submit that element to a jury is not harmless. *See Neder v. United States*, 527 U.S. 1, 17 (1999). In *Neder*, the Supreme Court held that the failure to submit an element to the jury is subject to harmless-error review, but recognized that such an

error would be harmless in a "narrow class of cases" where the "court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." 527 U.S. 1, 15-17, 19 (1999) (emphasizing that in *Neder*, the defendant did not and could not contest the omitted element). Where a defendant has contested the omitted element and proffered evidence to support a contrary finding, the error is not harmless. *Id.* at 19.

As detailed in Appellants' brief, and as the government has conceded, Appellants sought to adduce evidence that the requested reassignment was not "a formal exercise of governmental power" as required under *McDonnell* and were precluded from presenting evidence on the matter. App. Br. at 11-12; 24-25. This is more than enough to preclude the Court from "conclud[ing] beyond a reasonable doubt that the jury verdict would have been the same absent the error[.]" *Neder*, 527 U.S. at 19. Indeed, in *Rose v. Clark*, the Court explicitly recognized that the harmless-error test could not be applied to a directed verdict against a defendant in a criminal case: "Where [the right to a jury trial] is altogether denied, ***the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt***; the error in such a case is that the wrong entity judged the defendant guilty." 478 U.S. 570, 578 (1986) (emphasis added). In *Neder*, the Court **explicitly reaffirmed *Rose* and this constitutional principle** (527 U.S. at 17 n.2), reiterating that the error in *Neder* was harmless only because

the defendant "did not, and apparently could not, bring forth facts contesting the omitted element." *Id.* at 19; *see also id.* at 15 ("[Defendant] did not contest the element…at trial" and "does not suggest that he would introduce any evidence bearing upon the issue [of the omitted element] [at trial]."); *id.* at 16 ("[Defendant] did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial."). Accordingly, because Appellants sought to introduce evidence on the "official act" element, this case does not fall within the "narrow class of cases" where a failure to submit an element to the jury can be harmless. *Neder*, 527 U.S. at 17 n.2; *Rose*, 478 U.S. at 578.

B. The Improper Directed Verdict on the Official Act Element Also Negates the Convictions on the Section 666 Charge.

As explained persuasively by Appellants, the district court also erred by failing to instruct the jury that the Section 666 charge required an "official act." Such an instruction is necessary because without it, the statutory requirement that the defendants have intended to influence some "business, transaction, or series of transactions" is unconstitutionally vague. *See* App. Br. at 26-32. Like the two federal statutes addressed by the Supreme Court in *McDonnell*, without the "official act" element, Section 666 could be used to prosecute or chill lawful behavior. *See McDonnell*, 136 S. Ct. 2370-74 (expressing vagueness and overbreadth concerns regarding the honest services fraud statute, 18 U.S.C. § 1346, and extortion under the Hobbs Act, 18 U.S.C. § 1951); App. Br. at 28-29. Since

Section 666 is just as broad as, if not broader than, the honest services fraud statue at issue in *McDonnell*—"business" or "transaction" could refer to virtually any issue the state considers—and therefore Section 666 presents the same constitutional concerns. App. Br. at 30-31. For example, without the "official act" requirement, constituents could be prosecuted for small campaign contributions if they expressed opinions to an elected official on any non-trivial project such as a plant closing or the restoration of power after a storm.[3] *McDonnell*, 136 S. Ct. at 2372; *see also* App. Br. at 27, 30-31. Thus, failing to read Section 666 to embrace an "official act" requirement risks chilling lawful conduct that is at the heart of our democracy. *McDonnell*, 136 S. Ct. at 2372 ("The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns[.]") (emphasis in original).

But even if the Court disagrees, and concludes that Section 666 covers other conduct in addition to "official acts," the convictions must still be vacated because the government cannot establish that the verdict on the Section 666 charge was not attributable to the directed verdict on the official act element for the honest services fraud charge. *See Connecticut v. Johnson*, 460 U.S. 73, 85-87 (1983).

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[3] The low monetary thresholds—*i.e.*, that the transaction need only be valued over $5,000 and the state or local organization need only receive $10,000 under a federal program—effectively sweep all state or local political action within its scope. *See* 18 U.S.C. § 666(a)(2) & (b).

In *Johnson*, the Supreme Court held that while an erroneous presumption on intent was technically subject to harmless error review, it almost always required reversal. *Id.* at 85. It reasoned, "[b]ecause a conclusive presumption eases the jury's task, 'there is no reason to believe the jury would have deliberately undertaken the more difficult task' of evaluating the evidence of intent." *Id.* (quoting *Sandstrom*, 442 U.S. at 526, n. 13). The Supreme Court's teaching in *Johnson*, of course, applies with even greater force where the district court directed a verdict on a disputed element, because the district court did not even permit the jury to weigh the evidence.

While the Supreme Court identified two limited circumstances where a conclusive presumption on intent could be harmless, neither apply here. A conclusive presumption could be harmless: (1) where the element of intent was conceded, or (2) "if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and *if the instruction had no bearing on the offense for which he was convicted.*" *Id.* at 87 (emphasis added). The Court's explicit qualification that, to be harmless, the erroneous instruction could not impact another offense dictates that where, like here, the erroneous charge *does* overlap with another offense, the error is not harmless, and the error requires reversal. *See id.*

Here, it cannot reasonably be disputed that the directed verdict on the "official act" element may have affected the verdict on the "business, transaction, or series of transactions" element of Section 666. In fact, courts have already recognized that—unless the official act requirement is included in jury instructions for Section 666—the "business, transaction, or series of transactions" element in Section 666 is more "expansive" than the "official act" requirement in the honest services fraud statute. *See, e.g.*, *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) (Section 666 is more expansive than Section 201); *United States v. Seng*, 934 F.3d 110, 133 (2d Cir. 2019) (same). Thus, given that the jury was instructed that the official act element was satisfied with respect to honest services fraud, which is more restrictive, "'there is no reason to believe the jury would have deliberately undertaken the more difficult task' of evaluating the evidence" on the business, transaction, or series of transactions element as to Section 666. *See Johnson*, 460 U.S. at 85 (quoting *Sandstrom*, 442 U.S. at 526, n. 13). Indeed, permitting the Section 666 conviction to stand here would effectively permit judges to imprison defendants by entering verdicts on disputed elements as long as they only explicitly direct the element on one of multiple overlapping charges. This does not comport with the Fifth and Sixth Amendment guarantees, and the Section 666 verdict must also be reversed.

CONCLUSION

For the reasons set forth above, the Court should, at minimum, vacate both convictions for both Appellants and remand for a new trial on both counts.

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Respectfully submitted,

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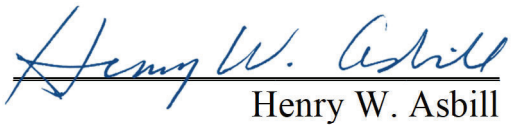

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I hereby certify that I had the foregoing Amicus Brief electronically filed by tendering it to the Office of the Clerk of the United States Court of Appeals for the Fourth Circuit on January 28, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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