No. 23-

IN THE

# Supreme Court of the United States

LAURA JORDAN AND MARK JORDAN,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

I.

Whether an appellate court's harmless-error analysis of constitutional alternative theory error in jury instructions must decline to find the error harmless when (1) the defendant at trial contested the legally valid theory of guilt and (2) the evidence at trial, when viewed in a light most favorable to the defendant, allowed a rational jury to acquit the defendant of the valid theory but convict him of the invalid theory.

II.

Whether, for the reasons stated in Justice Scalia's dissenting opinion in *Neder v. United States*, 527 U.S. 1 (1999), this Court should overrule *Neder* and treat jury instructions that contain alternative theory error as structural error.

III.

Whether applying 18 U.S.C. § 666(a) to proscribe corrupt conduct by a state or local governmental official is a permissible exercise of Congress's authority under the Spending Clause and Necessary and Proper Clause when the evidence at trial did not prove that the corrupt conduct caused or was intended to cause the state or local government to spend *any* funds and, thus, necessarily did not put any *federal* funding provided to the state or local government agency at risk.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Laura and Mark Jordan, as defendants-appellants in consolidated appeals, and the United States, as plaintiff-appellee. Supreme Court Rule 12.4 provides: "Parties interested jointly, severally, or otherwise in a judgment . . . may join in a [single] petition." Because the questions presented implicate both petitioners in this case, they join in this petition.

There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

## RELATED PROCEEDINGS

*United States v. Laura Jordan & Mark Jordan*, No. 4:18-CR-00087, U.S. Court of Appeals for the Eastern District of Texas. Judgment entered August 5, 2022.

*United States v. Laura Jordan and Mark Jordan*, No. 22-40519, United States Court of Appeals for the Fifth Circuit. Judgment entered October 18, 2023.

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## OPINIONS BELOW

The unpublished decision of the Fifth Circuit, which affirmed petitioners' judgments of conviction (App. 1a-44a), is available at 2023 WL 6878907. The Fifth Circuit's prior unpublished decision on original submission, which was "withdrawn" and "superseded" in response to a petition for rehearing *en banc*, is not included in the appendix but remains available at 2023 WL 5521059. The district court's written order denying petitioners' motion for a new trial (App. 45a-118a) is unreported but is available at 2022 WL 3088372.

## JURISDICTION

The Fifth Circuit, which had jurisdiction over petitioners' consolidated direct appeals of the final judgments in their criminal cases under 28 U.S.C. § 1291, issued its substituted opinion on rehearing and entered its final judgment on October 18, 2023. App. 1a.[1] The petitioners' joint petition for rehearing *en banc* was denied

1. The Fifth Circuit affirmed all of petitioners' convictions and sentences challenged in this petition. The Fifth Circuit did "vacate" a single conviction (Count Eight, a tax-related conspiracy conviction) but did not remand for further proceedings. App. 2a, 34a, 44a. Yet the court's vacating that single conviction (based on insufficient evidence) will not result in any additional proceedings of substance in the district court except, presumably, the entry of an amended judgment that simply will delete the "vacated" conviction and sentence for Count Eight but otherwise not disturb the finality of the remaining convictions and sentences (including the lengthiest prison sentences imposed on each petitioner for affirmed convictions).

on the same day. App. 1a-2a.[2] This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The pertinent constitutional and statutory provisions involved are U.S. Const. art. I, § 8, cl. 1; U.S. Const. art. I, § 8, cl. 18; U.S. Const. amend. X; and 18 U.S.C. § 666(a). They are set forth at App. 119a-121a.

## STATEMENT OF THE CASE

### A. District Court Proceedings

The superseding indictment charged Petitioner Laura Jordan (hereafter "Laura"),[3] the former mayor of Richardson, Texas, with (1) "honest services" fraud and conspiracy under 18 U.S.C. §§ 1346 and 1349 (Counts One and Four) and (2) bribery and conspiracy under 18 U.S.C. § 666(a)(1) (Counts Five and Six). ROA 67414-40.[4] The superseding indictment also charged Laura with failing to include alleged bribe payments as taxable income (Counts Nine and Ten) and conspiring with Petitioner Mark Jordan (hereafter "Mark"), a real estate developer (and Laura's

2. The Fifth Circuit did not issue a separate order denying rehearing *en banc*.

3. The opinions of the Fifth Circuit and district court sometimes refer to her as Laura Maczka, her name prior to her marriage to co-petitioner Mark Jordan.

4. The Fifth Circuit's record on appeal is cited as "ROA" followed by the pagination assigned by Fifth Circuit's clerk of the court.

future husband), to file false tax returns (Count Eight). ROA.67441-43. The superseding indictment similarly charged Mark with (1) "honest services" fraud and conspiracy under 18 U.S.C. §§ 1346 and 1349 (Counts One and Three) and (2) bribery and conspiracy under 18 U.S.C. § 666(a)(1) (Counts Five and Seven). ROA 67414-38, 67441. The superseding indictment also charged Mark with deducting the alleged bribe payments as taxable income (Counts Eleven and Twelve) and conspiring with Laura to file false returns (Count Eight). ROA.67441, 67444-45.

At trial, the government introduced evidence and argued that Laura exchanged her four votes on Richardson's City Council (of which she was an *ex officio* voting member as mayor) that amended the city's zoning ordinance and authorized Mark's company to proceed with a planned mixed-use residential-commercial development (called "Palisades")—including hundreds of apartments opposed by neighboring subdivisions—in exchange for monetary and other benefits provided by Mark. App. 2a-18a (Fifth Circuit's discussion of the prosecution's evidence at trial).

Petitioners, however, also presented evidence that there was no *quid pro quo*:

> • Laura supported apartments at the Palisades before the first vote and before any relationship with Mark. During her mayoral campaign in the spring of 2013, Laura had expressed support for rezoning the Palisades for apartments, so long as they were not located "in," "near," or

"adjacent" to the surrounding neighborhoods.[5] She supported the Palisades believing its apartments would be separated from the nearest neighborhood (Prairie Creek) by a 360-foot "buffer" of single-family homes.[6]

• Before the first vote, the City Planning Commission (CPC)—on which Laura did not sit and over which she had no influence—independently recommended the Palisades development to the city council.[7]

• All four city council votes favored the Palisades development by a margin of at least 5-to-2 (and the last vote was unanimous). The prosecution offered no evidence that any council member was influenced or rewarded by Laura or Mark. Instead, a majority of city councilors even without Laura believed that the mixed-use development of Palisades was in the best interest of the city.[8]

• Laura received no benefits of monetary value from Mark before the first vote in December 2013.[9]

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5. ROA. 1125-17, 11833, 11904-18, 12695-96, 13738, 13771, 13943, 13964-65, 13972-76, 14029, 14039,14077, 14084-89, 14097; *see also* ROA.15146 (government exhibit of campaign literature).

6. ROA. 14046, 14120.

7. ROA. 12603, 12634, 12635-36, 12674-75, 12683, 14106-07.

8. ROA.12425, 12479-85, 12679; *see also* ROA.15410, 15530 (official minutes of CPC votes in favor of rezoning for Palisades to allow for apartments).

9. ROA. 12862-65, 12864-65.

- Mark's gifts between the first and final (fourth) vote, during which the two of them were in a romantic relationship, were minimal—consisting of flight upgrades, hotel rooms they shared, and some meals.[10]

- Significant benefits were given *after* the final vote (and after which Laura took no more action regarding Palisades) and after Laura had separated from her first husband and was in a lasting romantic relationship with Mark. At that point, Laura had no means of support—making only $50 per week as mayor.[11] Mark provided her monetary assistance. For example, the carpeting in her house needed repair, and Laura accepted it as a "gift" after her divorce from her first husband.[12]

The district court erroneously instructed the jury that § 666(a)(1) permits conviction for mere *post hoc* "rewards" given (and accepted) in recognition for an official act but without any *quid pro quo*. ROA.67955-57, 67958-59. Petitioners objected to this jury instruction and unsuccessfully requested instead an instruction that § 666(a)(1) requires a *quid pro quo* for conviction even if a person gives a "reward" to a state or local official because of some official action taken. ROA.67764-67, 67931.

Although it acquitted petitioners of the "honest services" fraud charges, the jury convicted petitioners of

10. ROA.13082-83, 13659.

11. ROA. 11930.

12. ROA. 14158.

the charges related to § 666(a)(1) and the corresponding tax counts. ROA.67976-77.

Petitioners filed joint post-trial motions for judgment of acquittal and a new trial that contended, among other things, that: (1) the district court had erred by not requiring a *quid pro quo* element in its jury instructions concerning the indictment's "reward" theory of guilt; and (2) the evidence of the § 666(a)(1) convictions was insufficient because the government offered no evidence that any federal funding to the City of Richardson was put at risk by the alleged bribery insofar as no city money was to be spent as a result of the city council's zoning decisions allowing the Palisades development. The district court denied those motions. App. 45a-118a. In the district court's discussion of the error in the jury instructions, the court found its own assumed error to be harmless beyond a reasonable doubt. In making that assessment, the court considered whether there was sufficient evidence supporting the *quid pro quo* element rather than assessing whether, in a light most favorable to the petitioners, a rational jury could have acquitted petitioners of the *quid pro quo* bribery theory and instead convicted them of the mere "reward" theory. App. 82a-89a.

### B. Appeal to the Fifth Circuit

Regarding the issue in the first Question Presented, petitioners' Fifth Circuit briefs contended that the district court's jury instructions erroneously defined the charged § 666(a) bribery offenses because the instructions did not require a *quid pro quo* for the "rewards" provided by Mark to Laura. Petitioners further contended that this alternative theory error[13] was not harmless beyond a reasonable doubt

13. This Court has defined an "alternative theory error" as jury instructions that contain "multiple theories of guilt, one

because the evidence at trial contained a significant amount of evidence that would permit a rational jury to acquit of the legally-valid *quid-pro-quo* bribery theory but convict based on a legally-invalid "reward" theory (not involving a *quid pro quo*).

Relying on the court's recent decision in *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022), the Fifth Circuit held that the district court's jury instructions were erroneous because they permitted a conviction for a mere "reward" not involving a *quid pro quo.* App. 18a, 20a. However, the Fifth Circuit found the alternative theory error harmless beyond a reasonable doubt. Initially, the Fifth Circuit "agree[d]" with the district court's finding in its order denying petitioners' motion for a new trial, which found that any alternative theory error was "harmless":

> The government concedes that the district court committed a *Hamilton* error when instructing the jury on the § 666 charges but asserts that the error was harmless. The government is correct. The district court made an explicit finding that it was concluding beyond a reasonable doubt that Mark and Laura would have been convicted even under the correct instruction. We agree with that finding.

App. 20a.

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of which is [legally] improper." *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (*per curiam*). The district court's jury instructions contained alternative theory error because they permitted conviction on the § 666(a)(1) charges for either *quid pro quo* bribery or a *post hoc* "reward" not involving a *quid pro quo.*

The Fifth Circuit then engaged in its own harmless-error analysis:

> As stated previously, "[e]rroneous jury instructions are harmless if a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." [*United States v.] Stanford*, 823 F.3d [814,] 828 (5th Cir. 2016) (internal marks and citation omitted). In other words, a reviewing court "asks whether the record contains evidence that could rationally lead to [an acquittal] with respect to the [valid theory of guilt]." [*United States v.*] *Skilling*, 638 F.3d [480,] 482 [(5th Cir. 2011)] (quoting *Neder* [*v. United States*], 527 U.S. [1,] 19 [(1999)]).
>
> Our review of the record leads us to agree with the district court that the jury verdict would have been the same regardless of the error. Laura points to some evidence in the record that she argues makes the question of quid pro quo bribery contested. For example, she asserts that there is evidence that she supported the Palisades development before meeting Mark. *But we are not persuaded that this evidence, when viewed against all the other evidence in the voluminous record, would lead a rational jury to acquit [on the quid-pro-quo theory but convict of the "reward" theory] even when given the correct quid pro quo instruction.* Thus, any error in the district court's failure to

> explicitly instruct on quid pro quo [concerning the "reward" theory] was harmless.

App. 21a (emphasis added).

Regarding the third Question Presented in this petition, Mark's opening Fifth Circuit brief contended that:

> [T]he Government failed to introduce sufficient evidence that any funds, federal or local, were put at risk by the alleged bribery scheme, and thus there is no possible federal interest implicated. Accordingly, the application of § 666 to Mr. Jordan was unconstitutional and the district court's denial of Mr. Jordan's motion for entry of a judgment of acquittal should be reversed. . . . There is insufficient evidence that any federal or local funds were implicated by Mr. Jordan's conduct [in allegedly bribing Petitioner Laura Jordan], thus the conduct falls outside of the reach of Congress's powers. The [Richardson City Council's] votes in this case concerned local land use regulation [and involved no spending of money].

Brief of Appellant Mark Jordan, *United States v. Jordan*, No. 22-40159, 2022 WL 17731862, at *32, *35 (filed Dec. 7, 2022). Laura adopted this argument raised in Mark's brief, also contending that the evidence was insufficient. *See* Appellant's Opening Brief, *United States v.* Jordan, No. 22-40519, 2022 WL 17731863, at *2 n.2 (filed Dec. 7, 2022).

The Fifth Circuit rejected the insufficient-evidence argument as lacking merit. App. 28a-29a.[14] The court specifically held that this Court's decision in *Sabri v. United States*, 541 U.S. 600 (2004) foreclosed petitioners' argument:

> In *Sabri*, the Supreme Court answered the question of "whether 18 U.S.C. § 666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution" by concluding that it is. *Id.*,

14. Although the district court held that a purely legal argument challenging the constitutionality of § 666(a)(2) as applied to them should have been raised in a pretrial motion to dismiss, it recognized that if the argument was a challenge to the sufficiency of the evidence, it was properly raised in a motion for judgment of acquittal. App. 68a ("[I]f the Jordans challenge only the sufficiency of the evidence on this count, the argument is not waived and the Court will analyze the sufficiency of the evidence . . . ."). In their post-trial filing, petitioners specifically contended that the argument was one related to whether the government had presented sufficient evidence. ROA.75399-75404. The Fifth Circuit recognized that petitioners had properly raised the issue of § 666(a)(2)'s constitutionality as applied to them in a post-trial motion contending that the evidence at trial was insufficient to prove the charge because no federal funds were implicated by the alleged bribery. App. 26a ("After they were retried and convicted a second time, they argued in post-verdict motions that . . . their conduct involved only a city zoning issue that did not put any federal funding at risk. . . . [T]o the extent that Mark and Laura were not challenging the indictment but rather the sufficiency of the evidence at trial, the district court rejected the argument on the merits."). The Fifth Circuit did not find that the insufficient-evidence argument had been waived or forfeited, but rejected it on the merits. App. 29a ("This issue has no merit.").

> 541 U.S. at 602. . . . [T]he Court said that the $10,000 threshold alone satisfies Article I without any requirement that the federal money be directly connected as an element to the offense. *Id.*; *see also United States v. Franco*, 632 F.3d 880, 883 (5th Cir. 2011). While *Sabri* involved a facial challenge, the Court gave clear indications that an as-applied challenge would not have fared any better. *Sabri*, 541 U.S. at 609. The record and the applicable authority support the district court's findings [that there was sufficient evidence]. This issue has no merit.

App. 29a.

## REASONS FOR GRANTING THE PETITION

### I.

### The Fifth Circuit's Harmless-Error Analysis Is Inconsistent with the Harmless-Error Standard Required by *Neder v. United States*, 527 U.S. 1 (1999), and Conflicts with Decisions of Several Federal and State Appellate Courts.

As discussed below, the Fifth Circuit's harmless-error analysis in petitioners' case was contrary to this Court's decision in *Neder* and also conflicts with the decisions of several other lower appellate courts. Although *Neder* addressed a complete omission of an element from jury instructions, this Court subsequently equated such an error with alternative theory error, which permits a jury to convict of a legally invalid theory even though the jury instructions also contain a legally valid theory of guilt.

*Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (*per curiam*) ("[D]rawing a distinction between alternative-theory error and the instructional error[] in *Neder* . . . would be patently illogical . . . .") (citation and internal quotation marks omitted).

### A. The Fifth Circuit's Harmless-Error Analysis Failed to Consider Whether the Evidence, in a Light Most Favorable to the Petitioners, Would Permit a Rational Jury to Acquit of the *Quid Pro Quo* Bribery Theory and Convict of the "Reward" Theory (without a *Quid Pro Quo*) and Also Improperly Weighed Competing Evidence on Appeal.

As discussed above, the Fifth Circuit found the alternative theory error harmless because, in the appellate judges' assessment, there was such overwhelming evidence of *quid-pro-quo* bribery that no rational jury could have acquitted petitioners of such bribery but convicted them under the legally invalid "reward" theory.

There are two significant problems with that analysis. First, despite at one point claiming to view the evidence in a light most favorable to petitioners, App. 12a, the Fifth Circuit also expressly agreed with the district court's harmless-error analysis, which clearly viewed the evidence in a light most favorable to the government. App. 20a.

Second, regardless of whether the Fifth Circuit actually considered the evidence in a light most favorable to petitioners, the court explicitly weighed the competing evidence presented at trial in deciding that no rational

jury could acquit petitioners of the *quid pro quo* bribery theory and convict them of the "reward" theory. The Fifth Circuit stated:

> Laura points to some evidence in the record that she argues makes the question of quid pro quo bribery contested [and that would support a convict on the 'reward' theory]. . . . *But we are not persuaded that this evidence, when viewed against all the other evidence in the voluminous record, would lead a rational jury to acquit [on the quid pro quo theory but convict of the "reward" theory] even when given the correct quid pro quo instruction.*

App. 21a (emphasis added).

Laura's opening brief on appeal[15]—the relevant portion adopted by Mark[16]—specifically set forth the portions of the trial record that would permit a rational jury to have a reasonable doubt about whether a *quid pro quo* existed (but find that Mark did intend to "reward" Laura for her votes).[17] Among the evidence that she pointed to:

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15. Appellant's Opening Brief, *United States v. Jordan*, No. 22-40519, 2022 WL 17731863, at *17, *27-*29 (filed Dec. 7, 2022).

16. Brief of Appellant Mark Jordan, *United States v. Jordan*, No. 22-40159, 2022 WL 17731862, at *4 n.1 (filed Dec. 7, 2022).

17. Laura's brief stated:

> At trial, Laura and the government presented starkly different versions of the benefits that Mark bestowed. . . . As set out below, Laura presented her own testimony and other evidence that she received

> • Laura texted a friend, Michelle Altom, that Laura took money from Mark only after the city council voting was finished (implying that there was no *quid pro quo* agreement): "Bottom line is having an affair is not . . . criminal. The only thing that would fall in that category which would get me . . . in legal trouble is if I was taking money prior to the [city council's votes]" (ROA.11814).
>
> • Mark told Sarah Catherine Norris, his business partner and former paramour, in 2015 and 2016 that he had exercised no "influence" over Laura's voting for the Palisades development (ROA.12235-45).
>
> • Mark told his ex-wife, Karen, that paying for Laura's home renovations was "the least [he] could do for her help . . . in getting the Palisades vote approved" (ROA. 11955-56).[18]

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> financial, travel-related, or tangible benefits without a *quid pro quo*, and that she had sex with Mark out of love or desire—not in exchange for her votes. Because a rational jury viewing the evidence in a light most favorable to her could have accepted her version but also found at least one *post hoc* "reward" "for" her acts but no *quid pro quo* agreement, a new trial on all charges is required.

Appellant's Opening Brief, *United States v. Jordan*, No. 22-40519, 2022 WL 17731863, at *9-*10 (filed Dec. 7, 2022).

18. This final statement strongly supports a *post hoc* "reward" rather than a *quid pro quo* "bribe." In common usage, the expression "the least I can do" implies providing another person something in

Laura's brief also pointed out that she explicitly testified at trial that none of the benefits provided by Mark had influenced any of her four votes (which, if believed, would defeat the prosecution's *quid pro quo* theory). ROA. 14043-44.[19]

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recognition of a prior beneficial act - a moral duty that one feels to reward another person after the fact rather than a prearranged, *quid pro quo* exchange. *See, e.g.*, "Idiom: The Least You Can Do," https://www.oysterenglish.com/idiom-the-least-you-can-do.html; "The Least (One) Can Do," https://idioms.thefreedictionary.com/the*least*we*can*do; *Cambridge Dictionary* (Online), https://dictionary.cambridge.org/dictionary/english/it-s-the-least-i-can-do.

19. Laura specifically testified as follows:

> Q. Did you corruptly accept anything of value from Mark Jordan with the intent you be influenced regarding any vote on the Palisades zoning case?
>
> A. Absolutely not.
>
> Q. Did anything you received from Mark Jordan influence you in the ultimate decisions you made regarding the Palisades zoning case?
>
> A. It did not.
>
> Q. I'm going to ask you one more question. Can you say without reservation that everything you received from Mark Jordan was received by you on account of a loving personal relationship, independent of your status as the mayor of Richardson?
>
> A. I can absolutely say that's true.

ROA. 14043-44. At another point in her testimony, Laura testified that "[m]y mind had been made up on Palisades long before I even knew Mark." ROA.14142.

Based on that testimony, when combined with the other evidence discussed above, a rational jury certainly could have acquitted petitioners of *quid-pro-quo* bribery but still convicted them under a "reward" theory. Indeed, in its response to petitioners' post-trial motion for judgment of acquittal—filed before the Fifth Circuit's *Hamilton* decision—the government acknowledged: "[T]he jury could reasonably have found that the defendants engaged in a *quid pro quo* ***or*** that they intended to reward or be rewarded, as the case may be[,] for [Laura's] votes in favor of Palisades." ROA.75316-17 (emphasis on "or" in original).

### B. The Fifth Circuit's Harmless-Error Analysis Conflicts with *Neder*.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that most constitutional violations found on appeal are subject to demanding harmless-error analysis. *Id.* at 24 ("[The Court] require[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). At another point, the Court phrased the harmless-error inquiry as asking whether the prosecution on appeal had shown beyond a reasonable doubt that the constitutional error did "not contribute to petitioners' convictions." *Id.* at 26.

In 1999, in *Neder*, this Court addressed how to apply the *Chapman* standard to the type of constitutional error in petitioners' case—jury instructions' omission or misstatement of an element of the charged offense

(in violation of the Sixth Amendment right to a jury finding of each element of the charged offense beyond a reasonable doubt).[20] In *Neder*, the district court omitted the "materiality" element from the jury instructions' listing of the elements of 26 U.S.C. § 7206(1), a tax offense. This Court applied *Chapman* to this specific type of error and concluded that the error in Neder's case was harmless.

The Court initially noted that Neder had not contested the materiality element at trial:

> At trial, the Government introduced evidence that Neder failed to report over $5 million in income from the loans he obtained. The failure to report such substantial income *incontrovertibly establishes* that Neder's false statements were material to a determination of his income tax liability. *The evidence supporting materiality was so overwhelming, in fact, that Neder did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial.* Instead, he defended against the tax charges by arguing that the loan proceeds were not income because he intended to repay the loans, and that he reasonably believed, based on the advice of his accountant and lawyer, that he need not report the proceeds as income. . . .

*Id.* at 16 (emphasis added).

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20. This Court has recognized that misstatement of an element (permitting the jury to convict without actually finding the element, i.e., an alternative-theory error) is functionally equivalent to omission of an element. *Neder,* 527 U.S. at 2; *see also Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam).

The Court then concluded that the error in Neder's case was harmless:

> *In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.* We think it beyond cavil here that the error "did not contribute to the verdict obtained." *Chapman*, [386 U.S.] at 24. . . .

*Id.* at 17 (some citations and internal quotation marks omitted; emphasis added).

Responsive to Justice Scalia's dissent, which contended that the majority's harmless-error analysis wrongly invaded the province of the jury, the majority stated:

> A reviewing court making this harmless-error inquiry does not . . . become in effect a second jury to determine whether the defendant is guilty. . . . Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not reflec[t] a denigration of the constitutional rights involved.

*Id.* at 19-20 (some citations and internal quotation marks omitted).

The Fifth Circuit's harmless-error analysis in petitioners' case was contrary to this Court's approach in *Neder*. Unquestionably petitioners "contested" the government's allegation that they had entered into a *quid-pro-quo* bribery scheme, yet the Fifth Circuit failed meaningfully to assess "whether the record contains evidence that could rationally lead to a contrary finding with respect to the [misdefined reward] element." *Neder*, 527 U.S. at 19. The Fifth Circuit believed that, notwithstanding the fact that Laura testified that she and Mark did not enter into a *quid-pro-quo* scheme and other evidence supporting a lack of a *quid pro quo* (as opposed to a *post hoc* "reward"), there was overwhelming evidence of a *quid pro quo.* App. 21a. Such a harmless-error analysis involved the improper weighing on appeal of the competing evidence introduced at trial.

Although at one point in the Fifth Circuit's opinion, the court stated it "'construe[s] the evidence and make[s] inferences in the light most favorable to the defendant,'" App. 12a (quoting *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009)), the Fifth Circuit also expressed agreement with the district court's harmless-error analysis conducted in the court's order denying petitioner's motion for a new trial. App. 21a. The district court's harmless-error analysis clearly did not consider the evidence in a light most favorable to petitioners and, instead, considered the evidence in a light most favorable to the government.[21]

21. Notably, the district court's analysis of the sufficiency of the evidence supporting a *quid pro* quo and the jury instruction error occurred in the same portion of the court's memorandum opinion. The court gave no indication that it was assessing the insufficient-evidence claim in a light most favorable to the government while

In addition, the Fifth Circuit's opinion lacks a "principled explanation" of whether, when considering the evidence in a light most favorable to petitioners, the prosecution proved beyond a reasonable doubt that the constitutional error did not "contribute" to the guilty verdicts. *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) ("An appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion."). Particularly notable is the Fifth Circuit's perfunctory assessment of the extensive evidence set forth in the petitioners' briefs that, when viewed in a light most favorable to them, would permit a rational jury to have a reasonable doubt about the *quid pro quo* element but find proof beyond a reasonable doubt that Mark gave Laura "rewards" for her votes. Appellant's Opening Brief, *United States v.* Jordan, No. 22-40519, 2022 WL 17731863, at *9-*10 (filed Dec. 7, 2022).

The Fifth Circuit's erroneous harmless-error analysis in petitioners' case is not an aberration. For instance, in *United States v. Greenlaw*, 84 F.4th 325 (5th Cir. 2023)—decided just one week before petitioners' case—the Fifth Circuit engaged in the same type of appellate weighing of competing evidence at trial in determining that erroneous definitions of elements in the jury instructions were harmless:

> Having thoroughly examined the record in this case, this court is convinced that a rational jury would have found the defendants guilty absent

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assessing the harm from the jury instruction error in a light most favorable to petitioners. *See* App. 82a-89a.

> the erroneous instruction[s]. *Cf. United States v. Skilling*, 638 F.3d 480, 483-88 (5th Cir. 2011) (holding that one erroneous jury instruction was harmless error because multiple pieces of "overwhelming" evidence proved guilt under a valid instruction). Accordingly, even if the jury had been properly instructed, . . . we are certain beyond a reasonable doubt that the jury would still have found that Appellants [are guilty of] the 'scheme to defraud' and 'intent to defraud' elements [that were improperly defined in the jury instructions].

*See id.* at 352 (some citations and internal quotation marks omitted).

### C. This Court Should Resolve the Division Among the Lower Federal and State Appellate Courts Concerning How to Apply *Neder* to Jury Instructions that Omit or Misdefine Elements.

After *Neder*, the lower courts have grappled with applying the *Chapman* standard to erroneous jury instructions that omitted or misdefined an element when the defendant-appellants (unlike Neder himself) "contested" the correctly defined element at trial. Unlike other lower courts that correctly have interpreted *Neder*, the Fifth Circuit in petitioners' case did not mention this Court's clear focus on the fact that Neder did *not* "contest" the omitted element in finding the error harmless under *Chapman* (*Neder*, 527 U.S. at 16-17). *See, e.g.*, *United States v. Legins*, 34 F.4th 304, 322 (4th Cir. 2022) (holding that "the proper way to perform harmless-error analysis" under *Neder* "is to ask whether proof of the missing

element is 'overwhelming' and 'uncontroverted'"); *United States v. Miller*, 767 F.3d 585, 594 (6th Cir. 2014) ("On the one hand: If 'a defendant did not, and apparently could not, bring forth facts contesting the omitted element,' that would establish the harmlessness of the error. [*Neder*, 527 U.S. at] at 19."); *id.* ("On the other hand: If the court 'cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error harmless.' *Id.*").[22]

22. *See also State v. Draper,* 261 P.3d 853, 869 (Idaho 2011) (refusing to find error harmless where the "case [did] not satisfy the requirement pronounced in *Neder*—that 'the omitted element was uncontested' "); *State v. Bunch*, 689 S.E.2d 866, 869 (N.C. 2010) ("[T]he harmless error analysis under *Neder* is twofold: (1) if the element is uncontested and supported by overwhelming evidence, then the error is harmless, but (2) if the element is contested and the party seeking retrial has raised sufficient evidence to support a contrary finding, the error is not harmless."); *United States v. Upham*, 66 M.J. 83, 87 (U.S. Ct. App. Armed Forces 2008) ("When an erroneous instruction raises constitutional error, *Neder* requires a reviewing court to assess two factors: whether the matter was contested, and whether the element at issue was established by overwhelming evidence."); *State v. Price*, 767 A.2d 107, 113 (Conn. App. 2001) ("*Neder* requires the reviewing court to conclude beyond a reasonable doubt that the element omitted from the charge was uncontested and supported by overwhelming evidence."); *State v. McDonald*, 99 P.3d 667, 670 (N. Mex. 2004) ("In *Neder*, which involved a failure to instruct the jury on an element of the crime . . . the court focused its harmless error analysis upon whether the omitted element was uncontested and whether it was supported by overwhelming evidence. *Neder*, 527 U.S. at 17."); *Wegner v. State,* 14 P.3d 25, 30 (Nev. 2000) ("Where a defendant has contested the omitted element and there is sufficient evidence to support a contrary finding, the error

Although some lower appellate courts interpret *Neder* to require, before finding harmless error, that *both* (1) the correctly-defined element was "uncontested" at trial (despite the jury instructions' failure either to include it or correctly define it) *and* (2) the evidence of the element (or portion of the element) missing from the trial court's jury instructions was "overwhelming," others have not. The latter courts have reasoned that this Court's discussion of the "uncontested" materiality element at Neder's trial was not an essential part of this Court's application of the *Chapman* standard. Those courts believe that appellate courts should declare that the error was harmless because of perceived "overwhelming" evidence of guilt (based on the properly-defined element, despite being omitted or improperly defined at trial), notwithstanding that the defendant-appellant had "contested" the element at trial and offered some defensive evidence. *United States v. Freeman*, 70 F.4th 1265, 1281-83 (10th Cir. 2023); *United States v. Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022); *United States v. Boyd*, 999 F.3d 171, 179-82 (3d Cir. 2021); *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999); *United States v. Jackson*, 196 F.3d 383, 385-86 (2d Cir. 1999).

This division, although it has grown deeper in recent years, is long-standing. A decade ago, First Circuit Judge

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is not harmless."); *see also People v. Aledamat*, 447 P.3d 277, 290 (Cal. 2019) (Liu, J., concurring in part and dissenting in part) ("Like the United States Supreme Court, to date we've found instructional error harmless only when we can conclude 'beyond a reasonable doubt' either that the jury necessarily relied on a valid legal theory or that the element omitted or misdescribed 'was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error' (*Neder*, supra, 527 U.S. at p. 17.") (citing California Supreme Court decisions).

Lipez noted the intra- and inter-circuit split on the issue that then existed:

> In analyzing the complex issues in this case, I became aware of the significant inconsistency in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime. I write separately to express my concern regarding this inconsistency, which exists within my circuit and in other courts, and the potentially unconstitutional applications of *Neder* . . . that have resulted from it.

*United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring) (discussing cases); *see also United States v. Brown*, 202 F.3d 691, 700-01 & n.19 (4th Cir. 2000). In *Brown*, the Fourth Circuit noted that that the "Second Circuit has construed *Neder* to require an additional step [in harmless-error analysis: 'If [there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element, we must determine] whether the jury would nonetheless have returned the same verdict of guilty.'") (quoting *Jackson*, 196 F.3d at 385-86). The Fourth Circuit stated that, "[w]e do not believe that *Neder* requires this additional inquiry." *Id.*[23]

The Fifth Circuit, along with the Second, Third, Ninth, Tenth, and Eleventh Circuits, are in conflict with

23. *See also Monsanto v. United States*, 143 F. Supp.2d 273, 289 n.12 (S.D.N.Y. 2001) (noting the conflict between the Second and Fourth Circuits), *aff'd*, 348 F.3d 345, 350-51 (2d Cir. 2003) ("We are bound by *Jackson* . . . unless and until that case is reconsidered by our court sitting in en? banc (or its equivalent) or is rejected by a later Supreme Court decision.").

the Fourth and Sixth Circuits and the state appellate courts cited above. Perhaps the starkest difference between the former group and the latter group appears in the Ninth Circuit's decision in *United States v. Saini*, 23 F.4th 1155, 1163 n.7 (9th Cir. 2022) (rejecting the defendant-appellant's argument that *Neder* "requires us [i.e., appellate judges] to believe his evidence *and draw all reasonable inferences in his favor* . . . in conducting our harmless error review") (emphasis added).[24] That statement is directly contrary not only to the other courts' approaches but also to this Court's decision in *Neder*. *See Neder*, 527 U.S. at 19-20 ["A] court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.").

Significantly, when an omitted or misdefined element is the error being reviewed on appeal, appellate judges' own beliefs that the prosecution's evidence of the omitted or correctly-defined element was "overwhelming" compared to the defendant's contrary evidence is irrelevant, at least when the defendant "contested" the element and there was *any* evidence contrary to the prosecution's evidence. In an analogous context, many appellate courts, including this Court, have held that, in order to avoid infringing on a jury's authority, a trial court should submit a defendant's requested jury instruction on a lesser-included offense or

24. The Ninth Circuit's decision in *Saini* was not cited in the court's subsequent decision in *Sansing v. Ryan*, 41 F.4th 1039, 1054-55 (9th Cir. 2022), which agreed that, in a conducting a *Chapman/Neder* harmless-error analysis, an appellate court must view the evidence in a light most favorable to the criminal defendant. Therefore, an intra-circuit division exists in the Ninth Circuit.

an affirmative defense if there is *any* evidence supporting such an instruction, even if the evidence cutting in the opposite direction is "overwhelming." *See, e.g.*, *Stevenson v. United States*, 162 U.S. 313, 314 (1896) ("The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the act of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be [a] matter of law for the decision of the court."); *United States v. Gibbs*, 904 F.2d 52, 58 (D.C. Cir. 1990). For the same reason, in conducting a *Neder*-type harmless-error analysis, an appellate court should reverse the conviction if there is *any* evidence in the record on which a jury could possess a reasonable doubt about the omitted element (when viewing the evidence in a light most favorable to the defendant), even if the appellate court considers the prosecution's evidence "overwhelming" compared to the defendant's evidence.

A decade ago, Judge Lipez encouraged this Court to resolve the division among the lower courts that arose after *Neder*. *Pizarro*, 772 F.3d at 303 (Lipez, J., concurring) ("Given that the Sixth Amendment right to a jury trial is at stake, I urge the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element."). The division among the lower courts has grown significantly in the past decade. This Court should grant certiorari now and resolve it. The division may not be new, but it is growing and unquestionably important—and responsible in many parts of the country for people remaining in prison despite *conceded constitutional errors* at their trials.

## II.

### This Court Should Overrule *Neder* and Hold that Omission or Misstatement of an Element of the Charged Offense in Jury Instructions is "Structural Error."

Alternatively, petitioners urge this Court to reconsider *Neder*, overrule it, and adopt the position advocated by Justice Scalia in his dissent in that case joined by two other justices. In *Neder*, a majority of the Court held that jury instructions that omit an element are not "structural error" and, instead, are amenable to harmless-error analysis. *Neder*, 527 U.S. at 8-9. Conversely, focusing on the fundamental Sixth Amendment right to a jury trial, Justice Scalia contended that omission of an element from jury instructions is structural error:

> The Court . . . acknowledges that the right to trial by jury was denied in the present case, since one of the elements was not—despite the defendant's protestation—submitted to be passed upon by the jury. But even so, the Court lets the defendant's [conviction and] sentence stand, because we [appellate] judges can tell that he is unquestionably guilty. Even if we allowed (as we do not) other structural errors in criminal trials to be pronounced "harmless" by judges . . . it is obvious that we could not allow judges to validate this one. The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, the Constitution does not trust

> judges to make determinations of criminal guilt.

*Id.* at 31-32 (Scalia, J., dissenting, joined by Souter & Ginsburg, JJ.).

Justice Scalia was particularly concerned that, despite the majority's assertion that a "reviewing court making this harmless-error inquiry does not . . . become in effect a second jury to determine whether the defendant is guilty," the majority effectively did that by endorsing a harmless-error analysis that "ask[s] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 16-17, 19-20 (some citations and internal quotation marks omitted; emphasis added).

Justice Scalia was correct. If a *trial court* is not permitted to direct a guilty verdict on any element of the charged offense based on the belief that the evidence is "overwhelming,"[25] then an *appellate court* conducting harmless-error review likewise should be prohibited from effectively doing so. *See United Broth. of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 407-08 (1947) ("No matter how strong the evidence may be of [a particular element], there must be a charge to the jury setting out correctly [that element]. For a judge may not direct a verdict of guilty no matter how conclusive the evidence."); *see also Connecticut v. Johnson*, 460 U.S. 73, 85-86 (1983) (plurality op.) ("The fact that the reviewing court may view the evidence of intent as overwhelming

25. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.").

Since *Neder*, numerous judges and commentators have criticized the majority opinion. *See, e.g.*, *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022) ("[T]here is something deeply unsatisfying about this result [i.e., applying *Neder*'s harmless-error test]. As Justice Scalia observed in his partial dissent in *Neder*, it is bizarre that a deprivation of the jury right, which reflects a distrust of judges to adjudicate criminal guilt, can be set aside as harmless when we judges find the result sufficiently clear."); *State v. Kousounadis*, 986 A.2d 603, 616 (N.H. 2009) ("*Neder* . . . has been widely criticized, and we decline to follow it with regard to our interpretation of the New Hampshire Constitution."); *Harrell v. State*, 134 So.3d 266, 271 (Miss. 2014) ("Taking the strong historical precedent that directs against the *Neder* . . . , we now hold that the [*Neder*] Court's holding violates our state constitution . . . to the extent that it allows appellate courts to engage in harmless error analysis when trial courts fail to instruct juries as to elements of the crime charged."); *Freeze v. State*, 827 N.E.2d 600, 605 (Ind. App. 2005) ("We believe the validity of *Neder* might be short-lived, in light of the seismic shift in the Supreme Court's Sixth Amendment [right-to-a-jury-trial] jurisprudence since 1999."); *see also* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027 (2008).

The court in *Freeze* was insightful. This Court decided *Neder* shortly before a series of decisions that elevated the Sixth Amendment right to a jury trial in our constitutional order. Beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and continuing with several other landmark Sixth Amendment right-to-a-jury-trial decisions with sweeping effects,[26] this Court has demonstrated its commitment to "the Sixth Amendment right to a jury trial [as] fundamental to the American scheme of justice," *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (citation and internal quotation marks omitted), and recognized the "surpassing importance" of that right. *Apprendi*, 530 U.S. at 476.

By permitting an appellate court to decide how a "rational jury" would act based on the evidence at trial and a correct jury instruction on all elements, the majority in *Neder* encroached on the province of the jury. Appellate judges—who, unlike trial judges, are not even present at trial to see and hear witnesses—violate the right to a jury trial by attempting to assess the harm caused by erroneous jury instructions on the defendant-appellant's actual jury.

Two decades before *Chapman*, this Court stated that, in conducting appellate harmless-error analysis based on a cold record, a court should not put itself in the role of the jury:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be

26. *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369 (2019); *Alleyne v. United States*, 570 U.S. 99 (2013); *Blakely v. Washington*, 542 U.S. 296 (2004).

> supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

*Bollenbach v. United States*, 326 U.S. 607, 614 (1946) (discussing the former, pre-*Chapman* statutory harmless-error standard); *see also Weiler v. United States*, 323 U.S. 606, 611 (1945).

Finally, another reason exists for overruling *Neder* and treating the omission or misdefinition of an element in jury instructions as structural error: when a trial court fails to properly instruct the jury on an element of the offense and the jury convicts, it is impossible to know how the defense would have proceeded differently at trial (both in the presentation of evidence and in closing arguments) if the jury instructions had been correct. Over seven decades ago, this Court recognized this possibility in refusing to find a jury instruction that misdefined an element to be harmless. *United Broth. of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 407-08 (1947) (noting "[t]he evidence in any new trial [with proper jury instructions] may be quite different").

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The time has come to reconsider *Neder*'s approach to harmless-error analysis, which wrongly permits appellate judges to invade the sacred province of the jury room.

## III.

### This Court Should Grant Certiorari and Reverse the Fifth Circuit's Unconstitutional Expansion of Federal Government Authority to Prosecute State and Local Officials for Corruption When No Federal Funds Were at Risk as the Result of Allegedly Corrupt Activity by State and Local Officials.

At trial, the prosecution's evidence at trial did not prove that petitioners' alleged bribery caused or was intended to cause the City of Richardson to spend *any* city funds and, thus, necessarily did not put any *federal* funding provided to the city at risk. The four votes by the city council concerned local land use regulation—a quintessential area of state and local government regulation.

The Fifth Circuit rejected petitioners' argument—just as the government had done in its brief[27]—by simply relying on this Court's decision in *Sabri v. United*

27. Brief for Appellee United States of America, *United States v. Jordan*, No. 22-40519,2023 WL 2039154, at *68-*71 (filed Feb. 10, 2023) ("As the Jordans note, Mark Br. 32-33, *Sabri* rejected a facial challenge, not an as-applied one, 541 U.S. at 604, 608-10. But the distinction does not matter here. *Sabri*'s broad rationale leaves no room to claim that § 666 is invalid as applied to a bribe that is not connected to federal money. 541 U.S. at 605 . . . . But that's what the Jordans claim: that the bribes were not sufficiently connected to *local* money and thus not sufficiently connected to the *federal* money with which the local money was fungible, so there could not have been a sufficient federal interest. Mark Br. 32-36. They cannot escape *Sabri* by repackaging the very argument it rejected.").

*States*, 541 U.S. 600 (2004), which had rejected a "facial" constitutional challenge to § 666(a)(1). *Id.* at 604. *See* App. 28a-29a. This Court reasoned that, pursuant to Congress's authority to spend federal funds (and Necessary and Proper Clause), Congress could criminalize corrupt conduct that implicated only local funds because "[m]oney is fungible" and "money can be drained off here because a federal grant is pouring in there." *Id.* at 605-06.

However, *Sabri's* rejection of a facial challenge turned on the effect a bribe *might* have on federal funds in cases in general. What *Sabri* did not hold, and could not have held (because it was decided in a pretrial posture and only concerned the "facial" validity of the statute), was that § 666(a)(1) can be constitutionally applied to a specific case where *no money*, local or federal, was implicated by a state or local officials' bribery scheme and, thus, federal funds were necessarily not placed at risk.

*Sabri* makes clear that Congress has authority to regulate local government affairs when they affect funds, without a showing that the funds affected were federal, since money is fungible, federal funds *might* be affected. Yet, as the Fifth Circuit itself noted in another federal prosecution of a local official for bribery, a "broad reading of § 666" raises "a hoard of constitutional problems," because "when § 666 is used to 'prosecute purely local acts of corruption,' it is arguably unconstitutional because it is not 'necessary and proper to carry into execution [Congress's] spending power." *Hamilton*, 46 F.4th at 398 n.3 (quoting *United States v. Lipscomb*, 299 F.3d 303, 364-77 (5th Cir. 2002) (Smith, J., dissenting)); *see also Fischer v. United States*, 529 U.S. 667, 689 n.3 (2000) (Thomas, J., dissenting, joined by Scalia, J.) (stating that "[i]if Congress

attempted to criminalize acts of theft or bribery based solely on the fact that—in circumstances unrelated to the theft or bribery—the victim organization received federal funds," such a statute would be unconstitutional). This Court has expressed similar concerns about a "ballooning of federal power" when "every lie a state or local official tells" becomes a federal offense, *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020), "turn[ing] almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer*, 529 U.S. at 681.

Because Congress does not have unlimited power to regulate local affairs in the absence of some genuine federal interest at stake, as this Court repeatedly has cautioned, § 666(a)(1) cannot constitutionally be applied to petitioners' case, where no funds of any sort—local, state, or federal—were placed at risk by the conduct. This Court should interpret § 666(a)(1) to require that an act of bribery cause *some expenditure* of funds by a state or local government that receives at least $10,000 of federal funding, lest "almost every act of fraud or bribery [be turned] into a federal offense, upsetting the proper federal balance." *Fischer*, 529 U.S. at 681.[28]

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28. This Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997) does not contradict petitioners' argument. In *Salinas*, this Court interpreted the language of § 666(a) to "not require the Government to prove the bribe in question had any particular influence on federal funds," *id.* at 61, but did not address the situation (present in petitioners' case) when the alleged bribe did not implicate the expenditure of *any* funds—local, state, or federal. *See id.* at 59 ("We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves.

The district court thus should have granted petitioners' motion for judgment of acquittal in view of the government's failure to prove that any federal funds possessed by the city were at risk from petitioners' alleged bribery scheme.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the Fifth Circuit's judgment.

December 13, 2023

Respectfully submitted,

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And that relationship is close enough to satisfy whatever connection the statute might require.").

# APPENDIX

## TABLE OF APPENDICES

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 18, 2023**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-40519

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

versus

LAURA JORDAN, MARK JORDAN,

*Defendants—Appellants.*

Appeal from the United States District Court for the Eastern District of Texas. USDC No. 4:18-CR-87-1.

October 18, 2023, Filed

Before HIGGINBOTHAM, GRAVES, and DOUGLAS, *Circuit Judges.*

**ON PETITION FOR REHEARING EN BANC**

PER CURIAM:*

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

*Appendix A*

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED. The opinion issued August 25, 2023, is withdrawn by the panel and the following is substituted in its place.

The appellants, a Texas developer and a former mayor of Richardson, Texas, appeal their convictions for bribery and tax fraud, asserting that the bribes were merely gratuities and the district court failed to properly instruct the jury. For the reasons stated herein, we AFFIRM in part and VACATE in part.

## FACTS AND PROCEDURAL HISTORY

Laura Maczka (Laura) was elected to the Richardson, Texas city council in 2011. She was elected mayor of Richardson in 2013 after running largely on the platform of not allowing any new apartments near neighborhoods. Laura's term as mayor began on May 20, 2013.

Mark Jordan (Mark) is a commercial real estate developer with ownership interests in various business entities including, but not limited to, Sooner National Property Management, JP Realty Partners/JP-Richardson, LLC, and JP-PAL IV MM, LLC. In 2011, JP Partners purchased 43 acres of land and two office towers, known as the Palisades, on the west side of

Interstate 75 in Richardson. The property adjoined the Prairie Creek neighborhood, which is where Laura lived with her husband and children. At the time of purchase, the Palisades was zoned for retail use, office use, 121 townhomes and 300 condominiums.

On November 5, 2013, Mark requested a zoning change before the City Planning Commission that would allow the construction of 750 apartment units on the property. On November 19, Mark amended the request to allow for 600 apartments. The commission unanimously recommended that the zoning plan be approved by the city council.

Residents opposed to the rezoning began organizing and started a petition drive. On December 2, 2013, the Prairie Creek homeowners' association issued a statement that it did not support the proposal.

Meanwhile, behind the scenes in the months prior to that, Laura and Mark were secretly meeting, exchanging personal emails and calls, and working together to obtain the rezoning. Laura and Mark were documented on email chains for the Palisades project as far back as May 9, 2013, the same month that Laura was elected mayor. In October of 2013, Laura and Mark also set up a meeting to discuss the development project with another city councilmember, Steve Mitchell, who had endorsed Laura for her campaign promise not to support the development of apartments in or adjacent to neighborhoods.

On November 21, 2013, prior to the city council's first vote, Laura forwarded Mark an email with the subject

"CCHA Update: Palisades Statement to City Planning Commission" from her personal email account and said: "FYI . . . And FTR, good thing I had such a fun afternoon yesterday. Because last night the prairie creek mob hit me hard! You were probably enjoying barbecue and chillaxing. I was taking bullets for you! :-)" Later that day, Laura and Mark made plans to meet at one of his buildings and go to the mall.

Around that same time, Mark's wife, Karen, discovered the emails between Laura and Mark, who had a history of infidelity. When Karen confronted Mark, he said nothing was going on and he was only flirting with the mayor to get what he wanted. Laura's husband, Mike, and Mark's former paramour, Sarah Norris (Norris), who was also his business partner in Sooner National Property Management, also began to suspect that Mark and Laura were having an affair. When Mike confronted Laura, she denied anything other than a friendship.

On December 9, 2013, the city council held a hearing on the Palisades rezoning. A large number of residents who opposed the rezoning were in attendance. The measure passed by a vote of five, including Laura, in favor and two opposed. But the city also requested that the matter be brought back with a plan for phasing the construction, leaving the vote with no legal effect.

In January of 2014, Norris hired a private investigator to follow Mark. The investigator obtained photos and video of Mark and Laura walking arm-in-arm out of a restaurant and going to a Holiday Inn Express. After Mike later

found the hotel invoice in his car, Laura admitted she was having an affair but claimed it was with someone other than Mark. In mid-January, Laura told her husband she was going to Salt Lake City, Utah for a mayor's convention. She was actually meeting Mark at a $3400 per night ski resort. About ten days later, Mark signed a contract for the option to purchase an additional 20 acres of Palisades land if it was rezoned to allow for additional apartments. Mark then asked the city to approve a rezoning plan to allow for 1,400 apartments on the property. On January 27, 2014, the city council held a second vote on the rezoning and approved it by the same vote of five to two, with Laura again voting in support.

Around the middle of April, Laura took a city business trip to San Jose, California. Once the official business concluded, Laura stayed behind to meet up with Mark, who was also in California on business, for a few nights at luxury hotels at his expense. After Laura returned home from California, Mike found additional evidence of the affair and Laura said she wanted a divorce.

Meanwhile, Norris discovered numerous purchases by Mark on the company credit card for restaurants, resorts, limousines, a burner phone, and a charge for him upgrading Laura to first class for their return trip from California. Mark told Norris he was just using Laura to get approval for his rezoning plan. Mark later admitted to Karen that he and Laura had a relationship. But he insisted that they had only kissed, claiming he was not physically attracted to Laura.

The city council scheduled the third vote on Mark's plan regarding the proposal to add 1,400 new apartments. Numerous residents showed up to voice opposition to the proposal, and the number of apartments was reduced to 1,090. But on June 9, 2014 the rezoning passed again with Laura's support yielding another five to two vote.

In August 2014, Mark sent a letter to the city on behalf of his partnership seeking reimbursement for the construction of public infrastructure for the Palisades. Mark estimated that the value of the Palisades would be $686,300,000 by 2024. Shortly thereafter, Laura opened a bank account in her own name and with herself as sole signatory. A series of transactions followed wherein Mark would withdraw money and Laura would deposit money. As one example, on September 9, Mark withdrew $1,000 from his bank account and Laura deposited $300 in her account. Two days later, Laura deposited $1,000 in her account while on a birthday trip with friends to Florida. Laura also abruptly left her friends to go stay with Mark in Rosemary Beach, Florida at his expense.

Shortly thereafter, on September 22, 2014, the city council voted unanimously to authorize negotiations with Mark and his business partners to reimburse them for various construction and infrastructure expenses connected to the Palisades. Over the next several months, Mark worked with city staff, including Laura, to reach an agreement. During that time, Mark also continued to provide financial benefits to Laura, including multiple cash payments, a $40,000 check, home renovations after Laura's husband moved out of the family home, various

trips, luxury hotel stays, etc. Mark had the $24,030.02 in home renovations done by one of his contractors, and had it billed as "carpet stock" for one of his own buildings, MacArthur Plaza. He also asked the contractor to "keep it on the down low." When Karen confronted Mark about why he was doing the remodeling work on Laura's home, he replied: "Because, Karen, we owe her. We owe her a lot. She's made us a lot of money."

Laura and Mike divorced in January 2015. Mark also filed for divorce from Karen on January 15, 2015. Laura filed to run for a second term as mayor the following month. Around that same time, Mark hired Laura as a leasing agent at Sooner National Property Management for $150,000 per year with a signing bonus of $15,000. Laura had no real estate experience and was not a licensed agent. The person who had previously held the position had left because the position only paid $70,000 per year. The media attention generated by Laura's involvement with the developer behind the Palisades resulted in an ethics investigation by the city. However, neither Laura nor Mark disclosed the sexual relationship, cash payments, luxury hotel stays, various trips, home renovations or the $40,000 check. Thus, the investigator found no wrongdoing, and the city entered into an agreement to reimburse Mark some $47 million for construction and infrastructure work. Laura voted in favor of the agreement to pay Mark the $47 million on September 22, 2014. In fact, in December of 2014, Laura was still denying to members of the city council that she and Mark were having an affair. Laura claimed that her parents paid for her house to be remodeled.

*Appendix A*

Around April or May of 2015, the FBI received a tip about the transfer of money, trips and other items of value between Laura and Mark and began an investigation. On May 18, 2015, Laura announced that she was declining another term as mayor for the 2015-17 term.

In July of 2015, Mark had lunch with Norris, who no longer worked with him. She was wearing a wire for the FBI. Mark said he had hired a retired federal judge as his criminal defense attorney. He also said that the attorney had advised him to get engaged to Laura, but Mark denied to Norris that he would ever marry Laura. After Mark found out that the FBI was aware of him paying for Laura's home renovations, he started telling people that he and Laura were getting married and that he loved her. Norris also recorded a meeting with Mark in October 2016 wherein Mark again denied that he would marry Laura.

Mark and Karen finalized their divorce on August 16, 2016. On May 30, 2017, the district court held a hearing as part of the grand jury's investigation of the bribery case. The following day, Laura told her friend, a reverend, that she and Mark wanted to get married right away rather than wait to have a family event in July 2017. Mark and Laura obtained their marriage license the very next day, June 2, and were married three days later on June 5, less than a week after the hearing. Laura also told another friend, "[o]ur lawyers have told us we have to get married, and hopefully we'll marry some day because we choose to."

Mark and Laura were indicted in 2018 on the following seven counts: Four counts of honest services wire fraud

and conspiracy in violation of 18 U.S.C. §§ 1343, 1346, 1349; one count of conspiracy to commit bribery concerning a program receiving federal funds in violation of 18 U.S.C. § 371; one count of bribery concerning a program receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(B); and one count of bribery concerning a program receiving federal funds in violation of 18 U.S.C. § 666(a)(2).

Following a nearly month-long jury trial in early 2019, Mark and Laura were convicted on all but one count, Count 2, of honest services wire fraud. After the district court was informed of a conversation a court security officer had with a distraught juror, the district court granted the defendants' motion for a new trial. The government appealed because the district court did not hold a hearing before granting a new trial, and a panel of this court affirmed. *See United States v. Jordan*, 958 F.3d 331, 338 (5th Cir. 2020).

On December 9, 2020, the grand jury returned a superseding indictment that included the original counts but also added five additional charges, as follows: one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371; two counts of willfully aiding and assisting in the preparation and presentation of materially false tax returns in violation of 26 U.S.C. § 7206(2); and two counts of willfully aiding and assisting in the preparation and presentation of materially false tax returns in violation of 26 U.S.C. § 7206(2).

Following the second trial, which was held July 2 to July 23, 2021, the jury found Mark and Laura not

guilty on counts 1 and 4 (honest services wire fraud and conspiracy) but found them guilty of the bribery and conspiracy charges, and the tax and conspiracy charges. Laura was found guilty on counts 5, 6, 8, 9 and 10 of the superseding indictment. Mark was found guilty on counts 5, 7, 8, 11 and 12.

Mark and Laura filed various post-trial motions and asked the district court to postpone sentencing until this court decided *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022). The district court denied all of the motions. The district court also concluded that, even if this court were to determine, as it ultimately did in *Hamilton*, that § 666 did not extend to gratuities, the convictions would stand because it found beyond a reasonable doubt that the jury verdict would have been the same even if the jury had been instructed that a quid pro quo was required.

The total statutory maximum sentence for each defendant totaled 312 months. The district court granted a downward variance of 240 months and sentenced each defendant to a total of 72 months of imprisonment. Specifically, Laura received 60 months on count 5, 72 months on count 6, 60 months on count 8, 36 months on count 9, and 36 months on count 10, all to run concurrently. Mark received 60 months on count 5, 72 months on count 7, 60 months on count 8, 36 months on count 11, and 36 months on count 12, all to run concurrently. Each defendant was also ordered to pay a fine of $100,000 to the United States, a special assessment of $500, and they were jointly and severally liable for restitution of $34,275. Each defendant also received 3 years of supervised release

on each count, to run concurrently. Thereafter, Mark and Laura appealed.

## STANDARD OF REVIEW

This court reviews a district court's denial of a motion for judgment of acquittal de novo. *United States v. Garcia-Gonzalez*, 714 F.3d 306, 313 (5th Cir. 2013). This court must "affirm a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (internal marks and citation omitted).[1] This court's "review of the sufficiency of the evidence is highly deferential to the verdict." *United States v. Moreno-Gonzalez*, 662 F.3d 369, 372 (5th Cir. 2011) (internal marks and citation omitted). The standard of review is the same for both direct and circumstantial evidence. *Id.*

1. Mark concedes the application of this standard but asks that this court reconsider "to allow for a judgment of acquittal to be entered when the evidence is in equipoise, which was the rule in this circuit before it was rejected by the full court in *Vargas-Ocampo* in 2014." Mark argues that *Vargas-Ocampo* makes this circuit an outlier, and that the majority of other circuits apply the equipoise rule because "where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury must necessarily entertain a reasonable doubt." He cites *Winfield v. O'Brien*, 775 F.3d 1, 8 (1st Cir. 2014), and *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010), as authority. However, the evidence here is not equipoise, and the en banc court has already spoken in *Vargas-Ocampo*.

This court typically reviews jury instructions for an abuse of discretion. *See United States v. Garcia-Gonzalez*, 714 F.3d 306, 312 (5th Cir. 2013). However, "when, as here, a jury instruction hinges on a question of statutory construction, this court's review is de novo." *Id.* (internal marks and citation omitted). This court has said that a failure to instruct a jury on every essential element is error. *See United States v. Stanford*, 823 F.3d 814, 828 (5th Cir. 2016). Erroneous jury instructions are subject to a harmless error standard.[2] *See United States v. Skilling*, 638 F.3d 480, 482 (5th Cir. 2011); *see also Neder v. United States*, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "Erroneous jury instructions are harmless if a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Stanford*, 823 F.3d at 828 (internal marks and citation omitted). This court has also said that "we construe the evidence and make inferences in the light most favorable to the defendant." *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009).

This court reviews a sentencing challenge under a deferential abuse-of-discretion standard regardless of whether the sentence is inside or outside the Guidelines range. *See Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). We "must first ensure that the district court committed no significant procedural error," and then "consider the substantive reasonableness

2. Though conceding its application, Mark also objects to the harmless error standard, arguing that some other circuits require more.

of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51; *see also United States v. Hudgens*, 4 F.4th 352, 357-58 (5th Cir. 2021). Additionally, "[t]his court reviews the district court's interpretation and application of the Guidelines de novo and its factual findings for clear error." *United States v. Castelo-Palma*, 30 F.4th 284, 286 (5th Cir. 2022).

## DISCUSSION

### I. Bribery convictions

#### A. Quid pro quo evidence

Mark asserts that his convictions for the bribery counts should be reversed or, at a minimum, vacated and remanded for a new trial because there was insufficient evidence of a quid pro quo and because the district court failed to properly instruct the jury. Mark cites *Hamilton*, 46 F.4th at 398, for the proposition that a quid pro quo is an element of a § 666 violation. Mark says that there was insufficient evidence, as summarized by the district court, and the convictions on the bribery counts must be reversed.

Mark argues that the "heart" of the prosecution's case for a quid pro quo was Laura's change of mind on the Palisades. Further, he says that Laura voting in an inconsistent manner is not evidence of a quid pro quo. Mark also asserts that the "lead FBI case agent testified at trial that there was no evidence [Laura] received a bribe

prior to the first vote."[3] Mark says the emails between he and Laura also are not evidence of a quid pro quo. Additionally, Mark says the fact that the affair happened in the same timeframe as the votes does not support an inference that there must have been a quid pro quo agreement. He quotes *United States v. Menendez*, 291 F. Supp. 3d 606, 624 (D.N.J. 2018), as follows: "A close temporal relationship between political contributions and favorable official action, without more, is not sufficient to prove the existence of an explicit quid pro quo." Mark asserts that this is particularly so because, after the first vote, the subsequent votes were a "foregone conclusion." Notwithstanding the fact that *Menendez* is a lower court case from New Jersey and not controlling authority, it does not apply because "without more" was not the case here.

Mark argues that the payments he made to Laura were made after the final vote and, thus, were mere gratuities in reward for votes because Laura had made him a lot of money. Notably, Mark did not reward any of the other "yes" votes. Mark also says the facts that he and Laura hid their relationship, repeatedly lied, destroyed documents and emails, and got married on the advice of counsel after the FBI launched its investigation had nothing to do with a quid pro quo, "as opposed to a

3. Mark is quoting part of an exchange during cross examination while ignoring the rest of the agent's testimony and other evidence in this case. Also, Laura's counsel acknowledged at sentencing that Laura received "time, attention and affection" prior to the first vote. The Guidelines specifically say that "payment" means "anything of value" and "need not be monetary." U.S.S.G. § 2C1.1 cmt. n. 1.

gratuity, a conflict of interest, or even a perfectly lawful but embarrassing affair." Mark also explicitly admits that he paid for votes, saying: "There was insufficient evidence of a quid pro quo bribery agreement, rather than, at worst, *the payment of gratuities as a reward for votes*, to allow a jury to find a quid pro quo beyond a reasonable doubt." (Emphasis added).

Laura asserts that she presented substantial evidence that no quid pro quo agreement existed, and the jury may have wrongly convicted her of receiving a "reward" without a quid pro quo. She also asserts that only the first vote mattered, the affair did not begin until after the first vote, and the money, home improvements, trips, luxury hotel stays, job, etc., were all just mere gratuities. Laura also explicitly admits payment for votes. But Laura maintains that, as a city official rather than a federal official, she was free to accept "rewards" or "gratuities" on federally funded projects under § 666(a)(1) and *Hamilton*. Laura argues that all four votes she made for Mark's Palisades project would have passed anyway without her vote. The problem with that argument is that Laura met with other city council members ahead of the first vote to try to get them on board. Additionally, the record reflects that Laura and Mark had planned for her to vote against him on one of the votes in an attempt to avoid the possible appearance of a conflict of interest. But prior to that vote, they realized they needed her vote and ditched the plan. Laura also adopts Mark's briefing on this and other issues and instead focuses on jury instructions.

The government asserts that there was sufficient evidence of a quid pro quo. Further, the government points to the district court's conclusion that this is a bribery case and "[f]rom the outset, the government centered its theory of prosecution on quid pro quo bribery" and the defense "sought to hold the government to proving a quid pro quo beyond a reasonable doubt." The government further relies on the fact that the jury was repeatedly told during voir dire and the trial that the government had to prove a quid pro quo.

The district court filed its Memorandum Opinion and Order on August 3, 2022. The order disposed of multiple motions, including the defendants' motions to dismiss and for a new trial.

Mark focuses on three pages of the order to argue that there was insufficient evidence of a quid pro quo. However, neither the record nor the order support his assertions. The record establishes that Mark and Laura were involved long before the first vote, that Laura was "taking bullets" for Mark over the project before the first vote, and that Mark told multiple people he was merely using Laura to get what he wanted. The record also indicates that multiple people, including but not necessarily limited to Norris, Karen, and the contractor who worked on Laura's house, warned Mark about his inappropriate involvement with the mayor to get his zoning passed and his attempts to cover it up. Mark also told Karen that he owed Laura (money, renovations, etc.) because she made them a lot of money.

The record reflects evidence of ongoing communications between Mark and Laura long before the first vote that clearly indicate they were working together to get the project approved. Laura even had Mark answering questions from her constituents, and they found great humor in some of his responses. They were also secretly meeting and spending time alone together prior to the first vote, despite claiming that the affair did not start until after the first vote.[4] Also, the first vote basically had no effect because the city requested that it be brought back with a plan. The argument that only the first vote counted lacks merit.[5] Further, once the first request was approved, Mark kept asking for more. He bought additional land, sought approval of more apartments, requested reimbursements, and used his influence over Laura to advance his pecuniary interest. Clearly, the first vote was not the only one that mattered.

Moreover, even *Hamilton* did not go so far as to say that payments are not bribes as long as you make them after an initial vote. Instead, in *Hamilton*, this court adopted the First Circuit's interpretation of § 666 that "reward" is included "to prevent a situation where a thing of value is not given until *after* an action is taken." 46 F.4th at 397 (citing *United States v. Fernandez*, 722 F.3d 1, 23 (2013) (emphasis original)). In *Fernandez*, the

4. Mark and Laura do not explain why they were keeping their involvement a secret at that point if they were neither conspiring to get the rezoning approved nor having an affair yet.

5. Laura dismisses the three votes after the first vote as "*faits accomplish*" or having already been decided.

First Circuit said that the term reward serves to clarify "that a bribe can be promised before, but paid after, the official's action." 722 F.3d at 23 (internal marks and citation omitted).

A review of the record in this matter establishes that there was sufficient evidence of a quid pro quo, and that distinguishes this case from *Hamilton*, as discussed more fully below.

**B. Quid pro quo instruction**

This case basically comes down to whether the district court's failure under *Hamilton* to instruct the jury as to quid pro quo is harmless error. In *Hamilton*, a panel of this court decided that 18 U.S.C. § 666 only applies to quid pro quo bribery. 46 F.4th at 397. In doing so, the panel determined that § 666 does not apply to "mere gratuities," vacated Hamilton's convictions and remanded. *Id.* at 398.

Mark asserts, in the alternative, that the bribery convictions should be vacated and remanded for a new trial because the district court failed to instruct the jury on the need to find a quid pro quo agreement as an element of a § 666 offense as required by *Hamilton*, and that the error was not harmless. Mark says that the instructions here were like the instructions in *Hamilton* that this court found insufficient.[6] *See id.* at 398. In other words, Mark

6. In his initial brief, Mark acknowledged that the government had filed a petition for rehearing in *Hamilton* in which it argued that the instructions did require the jury to find a quid pro quo to convict. However, Mark then argued that the district court here

says, "the instructions in both cases permitted the jury to convict a defendant for a gratuity or reward without finding a preconceived quid pro quo."

Mark says that, because the district court found that its instructions were in error under *Hamilton*, the only issue before this court is whether the error was harmless. He further says the government acknowledged in its response to post-trial motions that the jury could have reasonably found either a quid pro quo or a reward. Mark asserts that the evidence in this case plainly establishes that the jury could have acquitted of a quid pro quo. He argues that, even if this court finds that the evidence was sufficient, it still must find that the failure to properly instruct the jury was not harmless because the district court's analysis did not draw all inferences in favor of acquittal as required. Also, Mark asserts that the district court erred in relying on the statements of counsel in opening and closing arguments to conclude that the case was argued as a bribery case and the jury must have found a quid pro quo.[7]

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did not give the same instructions as *Hamilton*. Thus, he asserted that, even if the rehearing was granted, it would not affect this case. En banc rehearing was denied in *Hamilton* on February 17, 2023, with seven judges voting in favor of rehearing and nine against. *United States v. Hamilton*, 62 F.4th 167 (5th Cir. 2023). Regardless of whether *Hamilton* was correctly decided, there are key distinctions between the two cases, as discussed herein.

7. Mark concedes that the jury was properly instructed that statements of counsel were not evidence and irrelevant to the harmless error determination.

Laura largely argues the same.

The government concedes that the district court committed a *Hamilton* error when instructing the jury on the § 666 charges but asserts that the error was harmless. The government is correct. The district court made an explicit finding that it was concluding beyond a reasonable doubt that Mark and Laura would have been convicted even under the correct instruction. We agree with that finding.

Mark and Laura conceded that the payments were for votes but that under *Hamilton* they were merely "gratuities" or "rewards," and she was not a federal official.

In *Hamilton*, the panel said that "Ruel Hamilton gave money to members of the Dallas City Council. *He received nothing tangible in return*." *Id.* at 391 (emphasis added). That was because the low-income-housing tax credits Hamilton sought were ultimately not granted by the Texas Department of Housing and Community affairs after the local officials voted to recommend them. *Id.* The panel also said, in instructing the jury, "the district court (over Hamilton's objections) told the jury that neither a quid-pro-quo exchange nor any 'official act' by the councilmembers was required." *Id.* at 393. The panel said that "it *is* an abuse of discretion 'to apply an erroneous view of the law.'" *Id.* at 394 (quoting *United States v. Ayelotan*, 917 F.3d 394, 400 (5th Cir. 2019)) (emphasis original). The panel then concluded "that § 666 does, in fact, require a quo; a quid alone will not suffice. And the

jury instruction that the district court gave did not convey that." *Id.* at 394.

Here, Mark received much in return, as discussed previously herein. While there was not a specific instruction, the jury was told repeatedly that it was a quid pro quo case, and the evidence clearly supported a quid pro quo. The parties agree that the dispositive issue is whether the district court's error was harmless.

As stated previously, "[e]rroneous jury instructions are harmless if a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Stanford*, 823 F.3d at 828 (internal marks and citation omitted). In other words, a reviewing court "asks whether the record contains evidence that could rationally lead to [an acquittal] with respect to the [valid theory of guilt]." *Skilling*, 638 F.3d at 482 (quoting *Neder*, 527 U.S. at 19). Our review of the record leads us to agree with the district court that the jury verdict would have been the same regardless of the error. Laura points to some evidence in the record that she argues makes the question of quid pro quo bribery contested. For example, she asserts that there is evidence that she supported the Palisades development before meeting Mark. But we are not persuaded that this evidence, when viewed against all the other evidence in the voluminous record, would lead a rational jury to acquit even when given the correct quid pro quo instruction. Thus, any error in the district court's failure to explicitly instruct on quid pro quo was harmless.

### C. Motive instruction

The district court instructed the jury, in relevant part, as follows:

> During the trial, evidence was presented regarding the defendants' possible motives for their actions. The fact that an action may have been motivated, in part, by friendship or a romantic interest is no defense. Actions taken with a dual motive constitute bribery so long as one of the motives is to influence or reward a public official, or, in the case of the public official, to be influenced or rewarded. On the other hand, if actions were entirely motivated by legitimate reasons, like romantic interest, then they do not constitute bribery.

Mark asserts that the convictions for the bribery counts should be vacated and remanded for a new trial because the district court's instruction on mixed motive was an error that allowed the jury to convict without finding that his motive was primarily or materially corrupt. He incorporates Laura's arguments in her opening brief in support of the proposition that the instructions improperly allowed the jury to convict even if it did not find that the government proved Mark's motives were not primarily or materially corrupt. Finally, he asserts that the "instructional error merits a new trial on the bribery counts and on the tax conspiracy count that is premised on the bribery counts."

Laura asserts that the jury instructions unconstitutionally shifted the government's burden to her by saying she could be found guilty if at least one of her motives of accepting benefits from Mark was to be influenced or rewarded for official actions and she had the burden of proving the affirmative defense that acceptance of the benefits was entirely motivated by legitimate reasons. Laura says that means that jurors could have interpreted that to mean if only one percent of her motive was corrupt, she was still guilty. Laura also argues that including "or rewarded" in the instruction violated *Hamilton* because she was free to accept "rewards" for votes.[8] Laura also cites inapplicable cases for the proposition that there should be a materiality requirement read into 18 U.S.C. § 666(a)(1). Laura says that would mean a public official's corrupt motive in accepting a bribe would have to be more than incidental or irrelevant at the time she accepted the bribe. She then cites what she says is an analogous case for the proposition that: "Otherwise, the improper motive would not be significant enough to call into question the integrity of the public official's actions." *See United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398, 406-07, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999).

The government correctly asserts that the minor corrupt motive argument was raised for the first time on appeal, and a materiality objection was not raised at trial. Thus, it is reviewed for plain error. With regard to the burden shifting argument, which was raised at trial

8. As discussed herein, *Hamilton* does not establish that rewards for votes are lawful in every circumstance.

pertaining to the instruction defining "corruptly," the government asserts that the district court did not abuse its discretion. *See United States v. Sanjar*, 876 F.3d 725, 740 (5th Cir. 2017). The government also sets out that the district court did not shift the burden of proof. We agree.

Notwithstanding our agreement that the district court did not shift the burden of proof, the cases cited by Laura are inapplicable. For example, in *Sun-Diamond Growers*, the Supreme Court was talking about why 18 U.S.C. § 201(c)(1)(A) does not criminalize token gifts such as a school baseball cap or a replica jersey from a championship team, not large cash payments or anything else of the sort that occurred here. *See id.*, 526 U.S. 406-07. Significantly, *Sun-Diamond Growers* also does not support Laura's argument regarding materiality or motive. Laura acknowledges as much, then asserts alternatively, "the doctrines of lenity and constitutional-doubt require such an interpretation of the statute," citing *United States v. Tucker*, 47 F.4th 258, 261 (5th Cir. 2022). But *Tucker*, which involved the sufficiency of the evidence of convictions for making false statements to a federally licensed firearms dealer and possession, is not analogous and provides no authority for Laura's argument here. *Id.* at 259. In dicta, this court merely mused as to what canons might come into play should it "venture beyond the statute's plain language." *Id.* at 261. Further, there is no "materiality" requirement in § 666(a), and Mark and Laura fail to cite any controlling authority requiring us to insert one now.

This issue has no merit, and the district court did not plainly err or abuse its discretion.

### D. Federal or local funds

Mark asserts that the government failed to establish that the conduct underlying the bribery counts affected federal or local funds as required by § 666. Thus, Mark says that the application of § 666 to him was unconstitutional and the district court's denial of Mark's motion for entry of a judgment of acquittal should be reversed under *Sabri v. United States*, 541 U.S. 600, 604-06, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004); *United States v. Phillips*, 219 F.3d 404, 411 (5th Cir. 2000); and *United States v. Spano*, 401 F.3d 837, 841 (7th Cir. 2005).

Finally, Mark asserts that his constitutional challenge was not untimely in reference to what he says was the district court faulting him for not filing a motion to dismiss the superseding indictment on the basis that § 666 cannot be constitutionally applied because it fails to allege that the conduct had an effect on local funds. Mark cites a nonbinding case from the Northern District of Georgia for the proposition that as-applied constitutional challenges are not appropriately raised in pre-trial motions to dismiss. Mark then concedes that, if he had filed such a motion, the government would have argued that the indictment, on its face, alleged an impact on local funds of $47 million. Further, he says that even if he was required to move on this issue before trial, it was not waived and this court could review his argument for plain error under *United States v. Vasquez*, 899 F.3d 363, 373 (5th Cir. 2018). Mark says his challenge satisfies plain error because "it raises a clear constitutional concern" and would affect his rights "since it invalidates the convictions on the bribery counts." Laura joins Mark's argument on this issue.

The government asserts that the district court did not plainly err in rejecting the untimely Article I challenge as a basis for post-trial dismissal or acquittal. Further, the government points out that precedent forecloses the claim.

Mark and Laura were charged in 2018. They moved to dismiss other counts prior to their first trial. They were convicted the first time in 2020. They moved to dismiss other counts again. After they were retried and convicted a second time, they argued in post-verdict motions that the bribery counts should be dismissed because the application of § 666 was unconstitutional. Mark and Laura argued that their conduct involved only a city zoning issue that did not put any federal funding at risk.

The district court found the Article I claim untimely under Rule 12, which provides that such a motion must be made before trial. *See* Fed. R. Crim. P. 12(b)(3). The district court also found that Mark and Laura did not show good cause for an exception under Fed. R. Crim. P. 12(c)(3). Additionally, to the extent that Mark and Laura were not challenging the indictment but rather the sufficiency of the evidence at trial, the district court rejected the argument on the merits.

As the district court correctly found, the elements of § 666 do not require the government to prove that the conduct is traceable to federal funds. Section 666, in relevant part, states:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists--

> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof
>
> . . .
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

18 U.S.C. § 666(a). Section 666 further says:

> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(b).

Additionally, none of the cases cited by Mark and Laura establish otherwise. In *Sabri*, the Supreme Court answered the question of "whether 18 U.S.C. § 666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution" by concluding that it is. *Id.*, 541 U.S. at 602. As the Court further explained:

> It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant. . . . But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-

> dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers. . . . It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here.

*Id.* at 605-06 (internal citations omitted). In other words, the Court said that the $10,000 threshold alone satisfies Article I without any requirement that the federal money be directly connected as an element to the offense. *Id.*; *see also United States v. Franco*, 632 F.3d 880, 883 (5th Cir. 2011). While *Sabri* involved a facial challenge, the Court gave clear indications that an as-applied challenge would not have fared any better. *Sabri*, 541 U.S. at 609.

The record and the applicable authority support the district court's findings. This issue has no merit.

## II. Tax convictions

### A. Vindictive Prosecution

Mark asserts that the tax counts should be dismissed for vindictive prosecution, or in the alternative, the issue should be remanded to the district court for an evidentiary hearing. Mark says that, because the government added the tax counts only after the district court vacated the

convictions in the first trial and ordered a new trial, the timing is sufficient to trigger the presumption of vindictiveness. He cites *United States v. Dvorin*, 817 F.3d 438, 455 (5th Cir. 2016), as authority.

In *Dvorin*, the government added a forfeiture notice in the second superseding indictment. *Id.* at 454. Dvorin argued that the addition was an act of prosecutorial vindictiveness. *Id.* at 455. In reviewing the matter, this court said, "[t]he defendant must prove prosecutorial vindictiveness by a preponderance of the evidence, and may do so either by showing actual animus or showing sufficient facts to give rise to a presumption of vindictiveness." *Id.* (internal marks and citation omitted). In determining whether a "presumption of vindictiveness" applies, "the court examines the prosecutor's actions in the context of the entire proceedings." *Id.* (internal marks and citation omitted). If "the course of events provides no objective indication that would allay a reasonable apprehension by the defendant that the additional charge was vindictive," then a presumption of vindictiveness applies. *Id.* (internal marks and citation omitted). To overcome the presumption, the government must prove "by a preponderance of the evidence that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion." *Id.* (internal marks and citation omitted). The court concluded that Dvorin had alleged facts sufficient to invoke the presumption and the government had not rebutted the presumption. *See id.*

Here, the government asserted that it had planned to bring the tax counts in the original indictment, but the internal DOJ approval process was too slow. The approval process was apparently restarted when "there was a realistic possibility" the convictions would be overturned.

Mark argues that this does not provide a non-retaliatory explanation for the government's decision. Mark also argues that the district court erroneously believed he had forfeited the issue by not raising it in a pretrial motion to dismiss. Mark says that "[a]llowing a presumptively vindictive prosecution to stand would constitute a clear and obvious error that would affect defendants' substantial rights, and therefore satisfies the plain error standard." (Internal marks and citation omitted). Thus, he says the convictions on the tax counts must be reversed. Mark also argues that, at the very least, the court should remand for an evidentiary hearing, citing the nonbinding case of *United States v. Tingle*, 880 F.3d 850, 856 (7th Cir. 2018). In doing so, Mark again contradicts himself by claiming the government "offered no explanation for its charging decision" even though he already conceded that the government did offer an explanation that he believed was insufficient. Regardless, we conclude that Mark is unable to establish a presumption of vindictiveness because the government offered an explanation sufficient to establish an objective event or non-retaliatory basis for adding the tax counts. *See Dvorin*, 817 F.3d at 455; *see also United States v. Saltzman*, 537 F.3d 353, 358-64 (5th Cir. 2008). Thus, we affirm on this issue.

**B. Insufficient evidence**

Mark asserts that there is insufficient evidence that he possessed the heightened level of willfulness needed to support a conviction on the tax counts. He says that, for him to be found guilty of the tax counts, the jury had to find he had actual knowledge of the pertinent legal duty and violated it. *See Cheek v. United States*, 498 U.S. 192, 200-02, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991). Mark argues that the district court failed to identify the relevant evidence in denying his motion for a judgment of acquittal.

With regard to the tax conspiracy count, Mark argues that the district court failed to identify evidence that he had knowledge of whether Laura reported the benefits he provided her as income on her tax returns. Additionally, Mark argues that, if this court agrees there was insufficient evidence of a quid pro quo, then "there was no evidence Mr. Jordan believed that non-quid pro quo gratuities" are taxable income.

The parties agreed that Laura did not report the benefits she received from Mark as income on her tax returns. However, she asserts that her conviction on these charges is tainted by the same jury instructions that she claims transformed her claimed rewards for votes into illegal bribes. Laura also asserts that she did not report the $52,000 in cash and a check, the $25,030 in home renovations, the travel expenses, and various other payments, including her legal fees from the ethics investigation, from Mark because she considered them all to be gifts. Laura also argues that authority supporting

the proposition that even "rewards" become "income" does not apply to her. For example, Laura says that *Dobbe v. Comm'r*, T.C. Memo 2000-330, 2000 WL 1586383 at *11-12 (U.S. Tax Ct. Oct. 25, 2000), involved a gift from an employer to an employee for no other reason than an employment relationship, as opposed to someone having a romantic relationship with their boss, like her. While one of the deductions in *Dobbe* stemmed from a gift of golf clubs to a salesman, others stemmed from payments for personal benefit of the taxpayers, who were married shareholders of their wholly owned corporation. *Id.* Laura then argues that "Mark could have paid benefits to Laura for reasons other than her economic contribution as an employee, namely, because they had an affair or because of her acts as mayor (without a quid pro quo)." Thus, Laura says, the *Hamilton* error also requires reversal of all of the tax counts.

As we have previously concluded, any *Hamilton* error was harmless. Additionally, the record provides sufficient evidence of willfulness. This issue has no merit.

**C. Conspiracy**

Mark asserts that the tax conspiracy count should be reversed because there is insufficient evidence of an agreement to falsify tax returns to support a conviction. Mark cites one case as general authority, *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir. 1998), then argues, again, that the district court failed to identify the evidence in denying his motion for judgment of acquittal. Mark then discusses the "one paragraph the

district court devoted to this issue," but fails to provide a record citation or any other authority. In the alternative, Mark argues that, if the tax conspiracy count is not reversed, it should be remanded for a new trial. Laura likewise argues for reversal.

The government concedes this issue, acknowledging that evidence of the agreement to commit bribery and attempts at concealment was insufficient to support the conspiracy charge under 18 U.S.C. § 371. We agree, and we vacate the convictions and sentences of Mark and Laura on this count.

## III. Sentence

Mark asserts that his sentence should be vacated and remanded for resentencing. He asserts that the sentence was driven entirely by the bribery counts, with no additional offense levels added based on the tax counts. If the bribery counts are reversed, but any of the tax counts are not, he asserts that the sentence on the tax counts should be vacated and remanded for resentencing. However, we affirm on the bribery counts. Mark asserts that, if the bribery counts stand, the errors in application of the Guidelines tainted the sentencing process and the case should be remanded for resentencing. He says that this resulted in a non-Guidelines sentence being imposed.[9]

9. Mark's counsel agreed at sentencing that a non-Guidelines' sentence was appropriate.

The district court adopted the PSR's calculation of an offense level of 42 and a criminal history category of 1, which provided for a Guideline range of 312 months.[10] Mark argues that the district court declined to follow the Guidelines and ordered a non-Guidelines sentence of 72 months. Mark also argues that the correct Guideline range should have been 33 to 41 months for an offense level of 20 and a Criminal History Category I. Additionally, Mark argues that the PSR did not indicate the total value of the payments Mark made to Laura, the total value of anything obtained by Laura or the total benefit received by Mark. He says, instead, that the PSR based the enhancement under the § 2B1.1 table solely on the $42,777,079 he was to receive.

The PSR set out the following:

> Between October 6, 2011, and September 4, 2014, Mark Jordan (Mark), a commercial real estate developer, and his limited liability company (LLC) partnerships (JP-Richardson, LLC, and JP-PAL IV MM, LLC) formed multiple Limited Liability Company Agreements (JP-KBS Richardson Holdings, LLC; JP-Richardson Holdings II, LLC; and JP-Palisades IV, LLC) (Company Agreements) with equity investors that led to the purchase of Palisades, an 80-acre proposed mixed-use development within Richardson, Texas. The total Palisades project

10. The statutory maximum for a violation of § 666(a)(1) is 120 months.

> was purchased for $54,955,000. Through these Agreements, Mark Jordan acted as the managing partner.

The PSR said that Mark had a ten percent ownership interest in each of JP-Richardson, LLC and JP-PAL IV MM, LLC. With regard to JP-Richardson, LLC, the PSR said:

> JP-Richardson, LLC's 10 percent interest was comprised of 20 percent ownership by 2004 Jordan Family Trust, of which Mark was the Trustee, and 80 percent ownership by JP Richardson Investors Joint Venture, of which the 2004 Jordan Family Trust had 62.33 percent ownership. Therefore, Mark owns 6.233 percent of JP-Richardson.

Mark objected to the PSR's statements regarding his ownership interest in the Palisades development. Mark's objection was largely centered around the fact that he and Karen eventually divorced, which divided his ownership interest. The probation officer's response maintained that, at the time Mark committed the criminal conduct, he held a 6.233 percent interest in the Palisades development, and that amount was consistent with trial evidence.

The PSR divided Mark's convictions into two groups pursuant to U.S.S.G. § 3D1.2. The bribery group, counts five and seven, started with a base offense level of 12 under U.S.S.G. § 2C1.1, and included the following increases: 2 levels under § 2C1.1(b)(1) for multiple bribes; 22 levels

under § 2C1.1(b)(2) for an expected benefit of $42,777,079; 4 levels under § 2C1.1(b)(3) for involving an elected public official; and 2 levels under § 3C1.1 for obstruction by deleting emails. The adjusted offense level for this group was 42.

Specifically, the PSR said: "Based on Mark Jordan's 6.23 percent ownership stake in Palisades and future valuation of Palisades at $686,300,000, as detailed in his Request for Development Incentives submitted to the City of Richardson, his benefit to be received in return for his bribes to Laura Jordan amounts to $42,777,079."

U.S.S.G. § 2C1.1(b)(2) provides that the table in § 2B1.1 applies when the value of the payment or the benefit received exceeds $6,500. For a loss of more than $25 million, the table provides an increase of 22 levels. *See* U.S.S.G. § 2B1.1(b)(1)(L). The commentary to § 2C1.1 states:

> "Loss", for purposes of subsection (b)(2), shall be determined in accordance with Application Note 3 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud). The value of "the benefit received or to be received" means the net value of such benefit. Examples: (A) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (B) A $150,000 contract on which $20,000 profit was made was awarded

> in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

U.S.S.G. § 2C1.1 cmt. n. 3.

Mark argues that the votes would have passed without Laura. But they did not pass without Laura or her influence. He also asserts that Laura supported the Palisades project before she met him. However, there is substantial evidence in the record that she did not, and that she campaigned on her opposition to apartments near neighborhoods. Regardless, Mark says any value received would have been received even without the bribes. In support, Mark cites *United States v. Griffin*, 324 F.3d 330, 367 (5th Cir. 2003) which he summarizes as: "[R]eversing sentence based on Guidelines calculation that included salary negotiated before alleged bribe." But Mark fails to establish how that is applicable here.

Mark also argues that the $42,777,079 did not represent the "net value of the benefit" as required under § 2C1.1 cmt. 3, citing *United States v. Ricard*, 922 F.3d 639, 657-58 (5th Cir. 2019), as authority. He asserts that the amount is based on an incorrect assumption that he held a 6.233 percent share of the future value of the Palisades. Instead, he says, "[t]he 6.233% represented the district court's mistaken understanding of Mr. Jordan's share of

the vacant undeveloped land."[11] Mark also says that he held different percentage stakes in different parcels to be developed.

*Ricard* was a case involving Medicare kickbacks and a guideline range calculated under U.S.S.G. § 2B4.1(b)(1) for commercial bribery. *Id.*, 922 F.3d at 656-57. U.S.S.G. § 2B4.1(b)(1) states, in relevant part:

> If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,500 but did not exceed $6,500, increase by 1 level; or (B) exceeded $6,500, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

U.S.S.G. § 2B4.1(b)(1).

While noting that the commentary to § 2B4.1 cross-references U.S.S.G. § 2C1.1, this court has previously interpreted the meaning of the "value of the improper benefit conferred" and concluded that direct costs, but not indirect costs, should be deducted from the gross value to determine a net value. *See United States v. Landers*, 68 F.3d 882, 884-85 (5th Cir. 1995). This court also concluded that the district court's finding accurately represented the net value because Landers failed to establish any other

11. The record indicates that there were two existing buildings and a parking garage located at the Palisades at the time it was acquired.

direct costs to be deducted. *Id.* at 885. This court also concluded that "net value" does not mean "net profits," and relied on a Third Circuit case for the following: "This concept of 'net value received' has nothing to do with the expense incurred by the wrongdoer in obtaining the net value received. This is clear from the Note's instruction that the value of the bribe is not to be deducted in calculating the 'net value.'" *Id.* (quoting *United States v. Schweitzer*, 5 F.3d 44, 47 (3d Cir. 1993). Further, "[t]he harm caused by a bribe is the value lost to a competing party had the bribe not been paid." *Id.* (citing *United States v. Ford*, 986 F.2d 1423 (6th Cir. 1993)). "That harm is independent of the value of the bribe." *Landers*, 68 F.3d at 885.

Citing *Landers*, this court in *Ricard* concluded that the district court erred by not deducting the direct costs from the value of the treatment provided in calculating the improper benefit conferred. *See Ricard*, 922 F.3d at 658. Importantly, this court did so after concluding that Ricard had "satisfied her basic burden to proffer evidence" showing that patients were receiving legitimate treatment. *Id.* The court also clarified that, while the government has the burden of proving facts in support of a sentencing enhancement, "Ricard's burden was 'to establish that [Progressive] incurred any direct costs.'" *Id.* (quoting *Landers*, 68 F.3d at 885).

Here, Mark did not satisfy his basic burden to establish any direct costs or applicable deductions. *See id.*; *see also Landers*, 68 F.3d at 885. Moreover, the record and the authority support the PSR's calculations,

which were confirmed by Mark's own documents and statements recorded at city council meetings. Further, *Griffin* explicitly reiterated that "[t]he district court need not determine the value of the benefit with precision." *Id.*, 324 F.3d at 366.[12] "In fact, in determining the amount of benefit to be received, courts may consider the expected benefits, not only the actual benefits received." *Id.*, 324 F.3d at 366. Thus, there was no error.

Even if there had been error, it would be subject to a harmless error standard. *See United States v. Halverson*, 897 F.3d 645, 651 (5th Cir. 2018). To satisfy harmless error, the government must show that "(1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." *Id.* (internal marks and citation omitted). The government is easily able to do so here, as the district court explicitly said it would impose the same sentence for the same reasons even if Mark and Laura prevailed on every objection on appeal.

Further, though Mark does not challenge the substantive reasonableness, the sentence was substantively reasonable. *See Hudgens*, 4 F.4th at 358.

**IV. Evidentiary ruling**

Laura asserts that the district court committed reversible error by admitting evidence of a prior marital infidelity for the purpose of proving that she was a liar.

12. Citing *Landers*, 68 F.3d at 884 n.2.

The district court found the evidence admissible pursuant to Rules 404(b), 608 and 403 of the Federal Rules of Evidence.

The government agrees with Laura that the evidence was not admissible under Rule 404(b). With regard to whether it was admissible under 608(b), "the government believes that the better end of the argument is that Laura's prior infidelity was not admissible under Rule 608(b)." However, the government also asserts that any error was harmless.

As Laura and the government state, we review a district court's evidentiary rulings under a deferential abuse of discretion standard, subject to a harmless error analysis. *See United States v. Perry*, 35 F.4th 293, 325 (5th Cir. 2022); *see also United States v. Sanders*, 343 F.3d 511, 517 (5th Cir. 2003).

Laura cites *United States v. Stone*, 472 F.2d 909, 916 (5th Cir. 1973), for the proposition that the trial court there properly refused to allow the defendant to seek to impeach a key prosecution witness with her marital infidelity. She also cites some non-controlling authority for the general proposition that, under Rule 608, a witness' marital infidelity is simply not probative of truthfulness or untruthfulness. In *Stone*, a Georgia case involving a kidnaping, brutal rape, and maiming, the trial court refused to make an *in camera* inspection of the government's files at the defendant's request so that he could discover whether the government had any evidence regarding the marital infidelity of the victim

while her husband was in Vietnam. *Id. Stone* presented a different scenario than we have here, where Laura, neither a prosecution witness nor a victim, claimed she was having an affair and in love, not engaging in bribery or corruption and was cross-examined about it. But we will presume, without deciding, that the evidence was inadmissible for purposes of determining harmless error. Under the doctrine of harmless error, the evidentiary ruling will be reversed only if it affected Laura's substantial rights. *See Adams v. Memorial Hermann*, 973 F.3d 343, 351 (5th Cir. 2020).

Laura asserts that the evidence that she had another extra-marital affair prior to her affair with Mark and lied about it was not harmless because it "invoked a dark image of an immoral woman in search of sex for votes. It went to the heart of the theory of the defense — that Laura accepted benefits from Mark out of love and affection."

The record does not support Laura's argument. The record is replete with evidence of Laura's dishonesty and her extramarital affair with Mark. Additionally, when Laura initially admitted her extramarital affair with Mark to her husband, she lied and said the affair was with someone other than Mark. Moreover, there was no suggestion that the previous affair was with someone who had matters pending before the city council. Because Laura is unable to establish that the evidentiary ruling affected her substantial rights, any error was harmless.

*Appendix A*

## CONCLUSION

For the reasons stated herein, we AFFIRM in part and VACATE in part.

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION, FILED AUGUST 3, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No. 4:18-CR-00087
Judge Mazzant

UNITED STATES OF AMERICA,

v.

LAURA JORDAN (1) a/k/a Laura Maczka
MARK JORDAN (2)

### MEMORANDUM OPINION AND ORDER

Pending before the Court are the Government's Motion for Findings and Conclusions Regarding Disclosure of Recorded Calls (Dkt. #335); Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #347); Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #348); Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #352); and Defendants' Motion to Stay this Court's Ruling on Their Rule 33 Motion for a New Trial and to Postpone Sentencing Hearing (Dkt. #389).

After consideration of the parties' arguments and of the evidence, the Court finds each of the motions should be **DENIED**.

## BACKGROUND

### I. The Main Characters

Defendant Laura Jordan, previously Laura Maczka ("Laura"), served as Mayor of the City of Richardson, Texas ("Richardson" or the "City") from May 2013 to April 2015. Laura was married to Michael Maczka ("Michael"), but the two separated in October 2014 and divorced on January 8, 2015. Defendant Mark Jordan ("Mark") is a commercial real estate developer and owner of Sooner National Property Management ("Sooner") and Sooner Management, among other entities. Through Sooner, Mark owns a portion of the Palisades Property in Richardson (the "Palisades"). Mark was married to Karen Jordan ("Karen") until the two separated in August 2014 and divorced in August 2016. During his marriage to Karen, Mark had an affair with at least two women. One of these women was Sarah Catherine Norris ("Sarah") who formerly worked as Mark's business partner and held a 50% partnership interest in Sooner Management. The other woman was Laura, the former Mayor of Richardson. After a federal investigation developed against Laura and Mark for activities detailed below, Laura and Mark married each other.

## II. The Political Scene

Laura platformed part of her mayoral campaign on a stance against zoning for or building new apartments near neighborhoods. Laura and her friends went door-to-door on the campaign trail and consistently confirmed Laura's negative stance on apartments as well as her particular aversion to development of the Palisades, which sits adjacent to the Canyon Creek and Prairie Creek neighborhoods (Tr. 482-92; 1230-32). One of Laura's closest friends testified that the neighborhood "worked very hard to get [Laura] elected" with the understanding that "she was not going to allow that development [sic] go in near the neighborhood" (Tr. 1279). As owner of the Palisades, Mark had hopes of developing apartment complexes on the property, which, in turn, would increase apartment complex presence near the Canyon Creek and Prairie Creek neighborhoods (Tr. 488). But the property was not zoned for apartments (Tr. 1392). On November 5, 2013, Mark formally requested that the City Plan Commission rezone the Palisades so he could realize this goal (Dkt. #233 at p. 8).

Laura's role as mayor required her to vote with the Richardson City Council (the "City Council") on whether to approve zoning projects, among other matters. On December 9, 2013, Laura and the City Council convened to vote on the zoning changes proposed by Mark. Hundreds of community members, specifically those residing in Canyon Creek and Prairie Creek, had expressed serious disapproval of Mark's proposal to rezone the Palisades (Tr. 364). In their view, a decision to rezone would directly

contradict Laura's campaign platform (Tr. 361-64). Despite the public outcry and Laura's campaign promises, the City Council—and specifically Laura—voted in favor of the rezoning, thereby allowing Mark to begin the Palisades development (Tr. 365).

On January 27, 2014, Laura and the City Council voted once again to rezone the Palisades for apartment development. Then on June 9, 2014, Laura and the City Council voted to increase the number of apartments that Mark could develop on the Palisades from 600 to 1,090. Finally, on September 22, 2014, Laura and the City Council voted to allow the City Manager to negotiate with Mark on terms for a reimbursement deal. The final terms of the deal indicated that Mark would improve segments of the Palisades in exchange for a $47 million reimbursement from the City.

**III. The Personal Relationships**

Behind these political scenes, Laura and Mark had begun an affair. Prior to the rezoning votes, Mark and Laura had privately emailed about the Palisades. Laura sent many of these emails from her personal account. On multiple occasions, Laura forwarded directly to Mark emails from Prairie Creek and Canyon Creek residents regarding the upcoming vote to rezone. Evidence of an intimate and personal relationship between Laura and Mark first arose in an email from November 11, 2013. In this email, Laura forwarded a constituent's questions to Mark regarding the Palisades. On November 14, 2013, Mark responded at 4:30am, directing Laura to "[s]ee

[his] answer below in RED. Happens to be my favorite color. . . . Don't forward this to anyone. Just put it in your words." That same day, Laura responded, "Ok... Truly LOL on that one! You're fairly clever at 4:31 am. I'll read these responses and will obviously put in my own words. Since we've already discussed the fact that I have some interesting vocabulary words and it's fairly obvious when other people are writing for me . . . ." (Tr. 897-1088).

On November 21, 2013, Laura sent an email to Mark, writing, ". . . good thing I had such a fun afternoon yesterday. Because last night the [P]rairie [C]reek mob hit me hard! You were probably enjoying barbeque and chillaxing. I was taking bullets for you! (smiley face emoji)" (Tr. 897-971). Karen, Mark's ex-wife, found these emails and confronted Mark about whether he was having an affair with Laura, which Mark denied. According to Karen, Mark stated he was flirting with Laura only to get what he wanted. (Tr. 897-971).

The emails continued, and the content confirms that Mark and Laura were meeting in person. A private investigator hired by Sarah snapped photos of Laura and Mark together in public.[1] They were seen sitting closely at restaurants and meeting in parking lots (Tr. 447-60). It wasn't until early January 2014 that Mark confessed to Karen he had engaged in intimate conduct with Laura. This confession came only after Karen had tracked Mark's iPad to Laura's house at around two o'clock in the morning and then confronted him. According to Karen, during

1. *See infra* p. 6.

this confrontation, Mark admitted to kissing Laura, but insisted that he was not attracted to her (Tr. 897-932).

Despite Mark's apparent lack of attraction to Laura, the couple took many extravagant trips together—Mark footing much of the bill. Direct and circumstantial[2] evidence suggests that in 2014, Mark and Laura went to Salt Lake City, Austin, San Jose, Los Angeles, Laguna Bench, and Fort Walton. In 2015, direct and circumstantial evidence suggests Laura and Mark went to Salt Lake City, Las Vegas, Colorado, Beverly Hills, Atlanta, and Tampa. Evidence from these trips shows Mark often upgraded Laura's plane tickets to business class and spent thousands of dollars on hotel rooms at these locations. All the while, Laura concealed the true nature of these vacations from her friends, passing off her frequent travel as "mayor trips" and insisting she was not traveling with Mark (Tr. 1251).

The expenditures did not end at the trips. Evidence also shows that Mark bought furniture and funded a home renovation for Laura in October 2014. Mark told the home renovator that the project was for a friend but asked the renovator to keep news of the project "on the down-low" (Tr. 1098). Laura lied to friends, family, and her then-husband about the price tag, claiming her father was

2. For example, on March 11, 2015, Laura flew from Dallas-Fort Worth to Durango, Colorado (Tr. 612-39). A few days later, Laura flew from Montrose, Colorado to Dallas-Fort Worth on a flight funded by Mark. While there was no testimony on Mark's flight records, the record from Laura's flight reflected that a party of two flew together under Mark's member number.

paying for the renovations. Though Mark had apparently told Karen he was no longer seeing Laura (Tr. 897-932), Mark continued funding this project, never even asking for a quote and instructing the renovator to do "whatever [Laura] wants done" (Tr. 1096-126). When Karen learned of the remodel, she confronted Mark, asking why he was funding a renovation of Laura's home (Tr. 897-932). Again, denying a continued relationship with Laura, Mark responded, "because, Karen, we owe her. We owe her a lot. She's made us a lot of money" (Tr. 897-932).[3]

On top of trips and home renovations, Laura also received a job offer from Sooner. She accepted the position and began in March 2015, replacing a leasing agent who left the company having reached the ceiling of his salary range at $70,000. Laura, who came with less experience and no real estate license, received a $15,000 signing bonus and a $150,000 salary. Not once did Laura ever disclose to any City Council member or the Richardson constituents that she had a personal relationship with Mark, the developer of the Palisades.

As mentioned, Laura was not the first woman with whom Mark carried on an affair. In 2013, Mark and his former business partner, Sarah, began seeing each other while she was in the process of divorcing her husband. Mark took Sarah on trips and bought her gifts. The relationship was, in Sarah's eyes, "very serious" but it ended nonetheless (Tr. 1621). Sarah described Mark in the

3. When Karen later learned of Mark's continued affair with Laura, she went to the media, releasing to a reporter hard copies of the many email chains between Mark and Laura.

aftermath of the relationship as "threatening" (Tr. 1625). Mark indicated to Sarah that the Sooner Management partnership would be at risk if Sarah divorced her husband. According to Sarah, Mark worked with an attorney to "write up an agreement to give [Sarah's] 50 percent partnership to [Mark] if [she] actually got a divorce" (Tr. 1625). Sarah refused to sign, and Mark's vitriol seemed to subside. Sarah's discomfort, however, persisted.

Still working as Mark's Sooner Management business partner, Sarah hired a private investigator in January 2014 to confirm whether Mark was having an affair with Laura. Privy to Mark's accounting, Sarah had seen out-of-the-ordinary credit card statements and emails between Mark and Laura. Sarah worried about her business connections to Mark if he, as a developer, was having an improper affair with a politician. The private investigator confirmed the relationship, finding specifically that Mark and Laura were communicating through a burner phone. This surprised Sarah, who had never communicated through a burner phone when she and Mark had been together romantically. When Sarah confronted Mark about the expenses tied to Laura, Mark (ironically) insisted it was none of Sarah's business. At that point, and "knowing what [she] kn[e]w," Sarah wanted nothing to do with Mark and Laura (Tr. 1657). On June 27, 2014, Mark called Sarah and admitted to having an affair with Laura. In October 2014, Sarah could no longer deal with Mark's "improprieties" and "what was going on with Laura" (Tr. 1665). She resigned from Sooner Management and contacted the FBI.

## IV. The Prosecution

After Sarah's phone call, the FBI launched an investigation into Mark and Laura. Through its investigation, the Government formed a prosecution theory that Laura, as mayor, guaranteed favorable votes on apartment development projects in exchange for cash, sex, and luxury hotel stays, among other items and services from Mark. The Government asserts that, during her tenure as mayor, Laura received from Mark over $131,722.53 in total benefits—the $150,000 Sooner salary not included. The Government charged Mark and Laura (collectively and hereinafter, the "Jordans") each with Conspiracy to Commit Honest Services Wire Fraud under 18 U.S.C. § 1349; Honest Services Wire Fraud under 18 U.S.C. §§ 1343 and 1346; Conspiracy under 18 U.S.C. § 371; and Bribery Concerning Program Receiving Federal Funds under 18 U.S.C. §§ 666(a)(1)(B) and 666(a)(2).

## V. The First Trial

The first trial lasted nearly a month. At the trial's close, the Court instructed the jury to "decide the case for yourself," and "not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." (Dkt. #153 at p. 26). Juror No. 11 had a particularly difficult time arriving at her decision, fearing that her vote would cause a mistrial. Shortly after Juror No. 11 expressed her serious reservations to the Court, the jury reached a unanimous verdict. The jury found the Jordans guilty on nearly all counts.

The Court later learned that a Court Security Officer (the "Officer") had spoken to Juror No. 11 prior to the verdict. Finding her in tears, which he seemingly attributed to her role as a dissenting voter, the Officer told Juror No. 11 to put her emotions aside, not worry about the sentence the Jordans might face, and decide the case solely on whether she believed they were guilty or not. Further, the Officer told Juror No. 11 "that she should not be concerned about any punishment the defendants may receive" (Dkt. #169 at p. 2). If "she did not believe the defendants were guilty, she should vote not guilty" (Dkt. #169 at p. 2). The Court informed the parties of both conversations within twenty-four hours, filed a memorandum on the docket containing separate statements from the Court's law clerks on these events, and made the Officer available for examination, on request. Defense counsel declined the Court's offer and ultimately moved for a new trial (Dkt. #174), which this Court granted on May 2, 2019 (Dkt. #191). The Government appealed this decision, but on May 1, 2020, the Fifth Circuit affirmed.

**VI. The Tax Charges**

The Government brought no tax charges in the first trial. Though it had pursued adding possible tax counts against the Jordans prior to the commencement of the first trial—and before the grand jury returned the original indictment in May 2018—the United States Attorney's Office (the "USAO") decided it would not pursue the tax charges further. The Government asserts that doing so would have required approvals from the Department of Justice that would simply have taken too long.

When the Jordans filed a motion for new trial, the Government recognized "a realistic possibility that the Jordans' convictions would be overturned" and anticipated "that any [new] trial setting would likely be distant [] especially since whichever party lost on the motion for new trial would likely appeal[]" (Dkt. #363 at p. 40). Thus, awaiting the outcome, the Government "reapproached the IRS about the possible pursuit of tax charges" (Dkt. #363 at p. 40).

As mentioned, this Court granted the Jordans' motion for new trial on May 2, 2019. Discussions about potential resolutions and plea deals ensued but were unsuccessful. On May 24, 2019, the Government relayed to Defense counsel that it was the Government's "intent to present to the grand jury a superseding indictment including tax fraud counts related to both defendants" (Dkt. #363 at p. 42). On May 28, 2019, the Government appealed the Court's order granting a new trial. On May 1, 2020, a panel of the Fifth Circuit affirmed the Court's order and potential settlement conversations resumed. Again, these were unsuccessful. The grand jury returned the second superseding indictment adding the tax charges on December 9, 2020. Both sides made final efforts to enter Rule 11(c)(1)(C) plea agreements but to no avail.

## VII. The Second Trial

The second trial commenced in July 2021 and brought further troubles. At trial, the Government examined FBI Special Agent Messer ("Agent Messer") as part of its case-in-chief. During the Defense's cross examination of

Agent Messer, it became clear to both the Government and the Defense that the FBI had failed to turn over to the USAO a recorded phone call between Mark and Sarah (Tr. 2415-18). When presentation of the evidence concluded for the day, the Court instructed Agent Messer to find the recorded phone call and ensure no other evidence existed that the Defense had not received (Tr. 2416).

The following day, the parties reported to the Court that Agent Messer, while searching for the aforementioned recorded call, uncovered an additional recorded call between Mark and Sarah that the FBI had also failed to turn over to the USAO (Tr. 2462). The first call was made on September 28, 2015 and lasted approximately fifteen minutes; the second call was made on October 5, 2015 and lasted approximately two minutes (Tr. 2470, 2491). Sarah, under the direction of FBI Agent Walton ("Agent Walton"), intentionally recorded both calls using the FBI's system and software (Tr. 2476). The parties played both recordings for the Court outside the presence of the jury (Tr. 2466-512).

Having heard the conversations between Mark and Sarah, the Court determined that the tapes "clearly include[d] *Brady* material" and then recessed the trial for the remainder of that Friday, July 16, 2021 to provide the Defense with time to incorporate the late-disclosed recordings into its cross examination of Agent Messer and its case-in-chief (Tr. 2516-26). The Government also gave the Defense the opportunity to examine the Government's discovery files at the USAO over the weekend (Tr. 2516-26). The Court denied the Defense's request for a mistrial

because the Government had not intentionally suppressed the evidence and the Defense had yet to begin its case-in-chief (Tr. 2506-17). Notably, the Defense stated on the record that it did not believe the Government had engaged in any misconduct, and Agent Messer testified that the USAO did not have either recorded call in its possession until July 15, 2021—the same day the Defense received them (Tr. 2472).

When trial resumed on Monday, July 19, 2021, the Defense used the recorded phone calls in its cross examination of Agent Messer, and the Government used them in its re-direct of Agent Messer (Tr. 2536-637). The Defense then used the recorded phone calls in its case-in-chief—specifically, during its examination of Sarah—and referenced them in its closing arguments (Tr. 2648-865, 3804-38). The jury found the Jordans each guilty of Conspiracy to Commit Bribery Concerning a Local Government Receiving Federal Funds; Bribery Concerning a Local Government Receiving Federal Funds; Conspiracy to Defraud the United States; and two counts of Aiding or Assisting in Preparation of False Documents Under Internal Revenue Laws. The jury found the Jordans not guilty of Conspiracy to Commit Honest Services Wire Fraud; and not guilty of Honest Services Wire Fraud (Dkts. #157-58).

## VIII. The Current Procedural Posture

On September 16, 2021, the Government filed a Motion for Findings and Conclusions Regarding Disclosure of Recorded Calls (Dkt. #335), urging this Court to hold that

the Government did not violate *Brady* during the second trial. On September 30, 2021, the Jordans responded (Dkt. #341). On October 14, 2021, the Jordans filed three post-verdict motions: Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #347); Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #348); and Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #352). The Government filed an omnibus response on December 20, 2021 (Dkt. #363). The Jordans replied on January 17, 2022 (Dkt. #373). The Jordans' sentencing is set for August 4, 2022.

However, on July 20, 2022, the Jordans filed a Motion to Stay this Court's Ruling on Their Rule 33 Motion for a New Trial and to Postpone Sentencing Hearing (Dkt. #389) in light of the Fifth Circuit's reconsideration of its order denying bail pending appeal in *United States v. Hamilton*, No. 21-22257 (Case No. 3:19-cr-83 N.D. Tex.). After oral arguments in *Hamilton*, the Fifth Circuit revisited the aforementioned order and decided to grant the defendant-appellant's request, finding that he had raised "significant questions of first impression in this circuit: namely, whether § 666 covers mere gratuities or unofficial acts, and if so, whether his conviction is constitutional in light of certain Supreme Court decisions." *Id.* The Government responded to this motion on July 27, 2022 (Dkt. #391). For all the reasons discussed below, the Court denies each of the motions under consideration here and will sentence the Jordans on August 4, 2022 as scheduled.

*Appendix B*

## LEGAL STANDARD

A defendant may bring a motion for acquittal under Federal Rule of Criminal Procedure 29. A Rule 29 motion for judgment of acquittal "challenges the sufficiency of the evidence to convict." *United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 1998). The issue is "whether, viewing the evidence in the light most favorable to the verdict, a rational [finder of fact] could have found the essential elements of the offense charged beyond a reasonable doubt." *United States v. Boyd*, 773 F.3d 637, 644 (5th Cir. 2014) (first citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); then citing *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009)). "The standard does not require that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Loe*, 262 F.3d 427, 432 (5th Cir. 2001). The factfinder is "free to choose among reasonable constructions of the evidence," and "it retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses." *Id.* (quotations and citations omitted).

Additionally, a defendant may bring a motion for new trial under Federal Rule of Criminal Procedure 33. Rule 33 provides that, on request, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "The decision to grant or deny a motion for new trial or remittitur rests in the sound discretion of the trial judge." *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995). "In this Circuit, the

generally accepted standard is that a new trial ordinarily should not be granted 'unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict.'" *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (quoting *United States v. Wall*, 389 F.3d 457, 466 (5th Cir. 2004)). "Generally, motions for new trial are disfavored and must be reviewed with great caution." *United States v. Smith*, 804 F.3d 724, 734 (5th Cir. 2015). The court will not grant a new trial except in "extraordinary circumstances." *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005); *United States v. Scroggins*, 379 F.3d 233, 253 (5th Cir. 2004). As such, a new trial is proper only where the defendant's "substantial rights" have been harmed—either based on a single error or the cumulative effect of multiple errors. *United States v. Bowen*, 799 F.3d 336, 349 (5th Cir. 2015).

**ANALYSIS**

The Jordans argue the verdict against them cannot stand and that they should be acquitted or granted a new trial for several reasons:

1. 18 U.S.C. § 666 cannot constitutionally be applied to them;

2. The Government did not prove a quid pro quo bribery which § 666(a)(1)(B) and § 666(a)(2) require;

3. The Government did not prove the requisite receipt of federal benefits under § 666(b);

4. The Government did not prove that Laura was a city agent under § 666(a)(1) and (a)(2);

5. The Court improperly instructed the jury on the § 666 charges;

6. The tardily disclosed recorded phone calls constituted a *Brady* violation that requires a new trial;

7. The Court erred in admitting evidence of ethics training that Laura received as a City Council member;

8. The Government's addition of tax counts to the indictment constituted vindictive prosecution; and

9. The Government's evidence was insufficient to sustain a guilty verdict on each tax count.

The Court first takes up whether there was a *Brady* violation that necessitates a new trial. Second, the Court will address the Jordans' legal contentions against the bribery charges under § 666. Third, the Court will determine whether it improperly instructed the jury in any respect. Fourth, the Court will assess whether the Government engaged in vindictive prosecution. Finally, the Court will analyze whether the Government sufficiently proved its case on the tax counts.

*Appendix B*

## I. Brady Violation

As mentioned, the Government has filed a Motion for Findings and Conclusions Regarding Disclosure of Recorded Calls (Dkt. #335), and the Jordans responded. The Jordans also partially base one of their post-verdict motions on the alleged *Brady* violation, urging this Court to grant a new trial on that ground. Because the Court can find no legal basis for issuing findings of fact and conclusions of law in this context—and the Government provides none—the Court will assess this argument pursuant to the Jordans' motion.

Though previously relayed, the Court reemphasizes the follow facts. The Government disclosed Government Exhibits 298 and 299 to the Defense during the Government's case-in-chief. Both the Government and the Defense agree that the timing of the Government's disclosure of Government Exhibits 298 and 299 was the result of mistake and not bad faith or intentional misconduct. The Government disclosed to Defense counsel Government Exhibit 298C, which is a partial written summary of Government Exhibit 298, in advance of trial. The Government's disclosure of Government Exhibits 298 and 299 occurred during the Jordans' cross-examination of Agent Messer and before the Jordans' case-in-chief, which included the examination of Sarah. After the Government disclosed Government Exhibits 298 and 299 to Defense counsel, the Court recessed the trial for three days to afford the Jordans the opportunity to review the calls and to prepare to use the evidence in trial. Further, the Jordans and the Government played Government

Exhibits 298 and 299 for the jury. The Court discusses the legal relevance of these facts below.

By way of background, "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *accord United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir. 1979). "Rather, discovery in criminal cases is narrowly limited and is largely governed by the Federal Rules of Criminal Procedure." *United States v. Ware*, No. 9:18-CR-43, 2019 U.S. Dist. LEXIS 88417, 2019 WL 2268959 (E.D. Tex. May 24, 2019) (citing *United States v. Fischel*, 686 F.2d 1082, 1090 (5th Cir. 1982)). "Rule 16 is a discovery rule designed to protect defendants by compelling the prosecution to turn over to the defense evidence material to the charges at issue." *Yates v. United States*, 574 U.S. 528, 539, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015); *see* FED. R. CRIM. P. 16. Specifically, Rule 16(a)(1)(E) requires the disclosure of all documents and other tangible items "within the government's possession, custody, or control" that (i) are material to preparing the defense; (ii) the government intends to use in its case-in-chief at trial; or (iii) were obtained from or belong to the defendant. FED. R. CRIM. P. 16(a)(1)(E).

In addition to Rule 16 obligations, "[u]nder *Brady* and its progeny, due process requires that the prosecution disclose evidence that is both favorable to the defendant and material to guilt or punishment." *Floyd v. Vannoy*, 894 F.3d 143, 161-62 (5th Cir. 2019) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). "The Fifth Circuit has stated, '*Brady* is not a discovery

rule, but a rule of fairness and minimum prosecutorial obligations.'" *United States v. Serfling*, 504 F.3d 672, 678-79 (7th Cir. 2007) (quoting *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978)). Thus, "[t]he duty to disclose 'exists irrespective of a request from the defense' and applies to 'all evidence known not just to the prosecutors, but to others acting on the government's behalf in the case, including the police.'" *United States v. George*, 2019 U.S. Dist. LEXIS 174403, 2019 WL 4982324 (E.D. La. Oct. 8, 2019) (citing *Floyd*, 894 F.3d at 161-62).

"To establish a *Brady* violation, a defendant must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material." *United States v. Dvorin*, 817 F.3d 438, 450 (5th Cir. 2016). Notably, the Fifth Circuit has consistently held that evidence turned over to the defense during trial "is not considered to have been suppressed." *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008) (citing *e.g., United States v. Williams*, 132 F.3d 1055, 1060 (5th Cir. 1998); *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994); *United States v. McKinney*, 758 F.2d 1036, 1049-50 (5th Cir. 1985)). Rather, in such a situation, the district court looks "to whether [the defendant] was prejudiced by the tardy disclosure." *Williams*, 132 F.3d at 1060. The Fifth Circuit has "held that a defendant is not prejudiced if the evidence is received in time for its effective use at trial." *Powell*, 536 F.3d at 335 (citing *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003)).

The Government urges that it did not suppress any evidence and, therefore, did not violate *Brady* and its

progeny (Dkt. #335 at p. 5). The Jordans contend that this Court already found a *Brady* violation and should not "rescind that finding" (Dkt. #341 at p. 21).

The Court first addresses the Jordans' contention that the Court previously found a *Brady* violation. Although the Court did refer to the late disclosure of the recorded calls as a *Brady* violation, "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called '*Brady* material.'" *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). But, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* The Court could not have known at the time whether the evidence would have produced a different verdict because no verdict had been reached. Indeed, the Jordans had not yet begun their case-in-chief. Accordingly, the Court found only that the recorded phone calls included *Brady* material because the content was favorable to the accused. The Court now reaches the question as to whether there was a *Brady* violation.

As previously stated on the record, the Court finds the evidence was exculpatory because it contained statements favorable to the accused (Tr. 2516-26). Specifically, the recorded conversations include statements by Mark denying any wrongdoing, comparing his relationships between Sarah and Laura, and disparaging his ex-wife in regard to her motives and mental state (Tr. 2466-515).

The Government does not dispute that this evidence was, at least partially, favorable to the defense (*see* Tr. 2464).

The Court also finds that the evidence was not suppressed. As noted, evidence turned over to the defense during trial "is not considered to have been suppressed" so long as the defendant received the evidence in time "for its effective use at trial." *Powell*, 536 F.3d at 335. The Jordans argue that Agent Walton did in fact suppress the evidence and that the Defense was prejudiced by the tardiness (Dkt. #341 at pp. 20-21). Specifically, the Jordans claim they would have carried out markedly different trial tactics had they timely received the two recorded calls: they would have placed a greater focus on Agent Walton; used "a more forceful approach to Karen Jordan as a witness"; and adjusted their opening statement (Dkt. #341 at pp. 20-21). The Government argues that, under Fifth Circuit precedent "evidence that is turned over to the defense *during* trial . . . has never been considered suppressed" (Dkt. #335 at p. 4 (quoting *United States v. Swenson*, 894 F.3d 677, 683 (5th Cir. 2018))).

Because the Jordans effectively used both recorded calls, the tardy disclosure of this evidence did not prejudice them. At the time the recordings were discovered and turned over, the Jordans had yet to begin their case-in-chief. They had not even completed their cross examination of Agent Messer. After the parties played the recordings for the Court, the Court recessed the trial for the remainder of Friday, July 16, 2021. When the trial resumed the following Monday, the Jordans played the recordings for the jury as part of their

continued cross examination of Agent Messer (Tr. 2565-637). Importantly, the Jordans also chose not to examine Sarah during the Government's case-in-chief, instead saving her examination for later in the trial (Tr. 2447). When the Jordans called Sarah to the stand again, the recorded calls had already been discovered. This allowed the Jordans to fully examine Sarah with the benefit of the recorded phone calls, which the Jordans in fact used (Tr. 2648-973).

It is not enough for the Jordans to claim they would have changed some trial tactics had the Government timely turned over the recorded calls. "Mere speculation that a trial might have gone differently is insufficient to show the requisite prejudice from a tardy disclosure." *Swenson*, 894 F.3d at 683 (citing *United States v. Stanford*, 823 F.3d 814, 841 (5th Cir. 2016) (asserting it is "unwise to infer the existence of *Brady* material based upon speculation alone")). Because the Jordans had the opportunity to effectively use the recorded calls during trial, no prejudice occurred. *Id.* Accordingly, the Court finds that the tardy disclosure of the recorded calls was not a *Brady* violation and no "miscarriage of justice" occurred. *See Wright*, 634 F.3d at 775. The Court, therefore, finds no basis for upsetting the verdict under the Rule 33 standard.

## II. Bribery Charges Under 18 U.S.C. § 666

The Jordans challenge their convictions under § 666 for six reasons. First, they assert that § 666 cannot be constitutionally applied to them; second, that § 666(a)(1)(B) and § 666(a)(2) require proof of a quid pro quo bribery,

which the evidence did not support and the Court did not properly instruct; third, that the Government did not prove the requisite receipt of federal benefits under § 666(b); fourth, that the Government did not prove Laura was a city agent under § 666(a)(1) and (a)(2); fifth, that the Court improperly instructed the jury on "corrupt" intent; and sixth, that the Court improperly instructed the jury that sex is a "thing of value." The Court discusses each argument in turn.

### A. Application of 18 U.S.C. § 666

The Jordans broadly claim that this case presents "issues of entirely local concern that have no federal interest at stake" (Dkt. #347 at p. 4). Therefore, the Jordans argue that, in this case, the application of 18 U.S.C. § 666 unconstitutionally exceeds Congress' authority in that it effectively "turns [§] 666 into an all-purpose federal bribery statute" (Dkt. #347 at p. 4). The Government responds that this defense is both meritless and untimely—if the Jordans wished to attack the indictment for failure to state an offense, they must have done so prior to trial. The Jordans reply that they do not challenge the indictment but rather the "sufficiency of the facts proven at trial" (Dkt. #373 at p. 6). The characterization of the argument is meaningful. If the Jordans wish to attack the constitutionality of the § 666 bribery statute, the sun may have already set. *See* FED. R. CRIM. P. 12. However, if the Jordans challenge only the sufficiency of the evidence on this count, the argument is not waived and the Court will analyze the sufficiency of the evidence under the previously discussed standard.

The crux of the Jordans' argument on this point is that a conviction under § 666 must relate to federal interests; otherwise the conviction unconstitutionally "upset[s] the proper federal balance" under the Spending Clause (Dkt. #373 at p. 3). But the elements of § 666 do not require the connection to federal funds that the Jordans insist upon. Section 666(a)(1)(B) requires that the Government have proved beyond a reasonable doubt: (1) Laura was an agent of Richardson; (2) Richardson received more than $10,000 in federal assistance in a one-year period; (3) Laura corruptly accepted or agreed to accept anything of value from Mark with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of Richardson; and (4) the business, transaction, or series of transactions involved anything of value of $5,000 or more (Dkt. #310 at p. 21). Similarly, under § 666(a)(2), the Government must have proved beyond a reasonable doubt: (1) Laura was an agent of Richardson; (2) Richardson received more than $10,000 in federal assistance in a one-year period; (3) Mark corruptly gave, offered, or agreed to give a thing or things of value to Laura with the intent to influence or reward her in connection with any business, transaction, or series of transactions of Richardson; and (4) the business, transaction, or series of transactions involved anything of value of $5,000 or more (Dkt. #310 at p. 24).

Under these elements, the Government need not show a connection between the federal dollars that Richardson actually received and the things of value that Laura accepted from Mark or the business transactions undertaken by the City. Put differently, there is no

nexus between the second and third elements because "the conduct prohibited by section 666 need not actually affect the federal funds received by the agency." *United States v. Moeller*, 987 F.2d 1134, 1137 (5th Cir. 1993); *Salinas v. United States*, 522 U.S. 52, 60, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) ("The text of § 666(a)(1)(B) . . . does not require the Government to prove federal funds were involved in the bribery transaction."). Rather, the nexus exists within the third element itself, i.e., between the acceptance of the thing of value and the business, transaction, or series of transactions of Richardson. *See Moeller*, 987 F.3d at 1137 ("[T]here must be some nexus between the criminal conduct and the agency receiving federal assistance"); *see also United States v. Whitfield*, 590 F.3d 325, 345 (5th Cir. 2009).

To avoid confronting the waiver of their constitutional argument, the Jordans cloak their dissatisfaction with the "expansive, unqualified" statutory language of § 666 as a sufficiency of the evidence argument. *Salinas*, 522 U.S. at 56. They shift attention away from the statutory elements by focusing on how the statute applies to them in this case, but the application argument is an attack on the operation of the statute—not the sufficiency of the evidence. To be sure, the Jordans argue that the prosecution here concerned "a city's regulation of land use regarding property within its confines, through the exercise of its regulatory zoning power and taxation powers, a well-established and delegable sovereign power of the State," which renders the application of § 666 unconstitutional in this case (Dkt. #347 at pp. 8-9).

The Jordans get one thing right: the prosecution did, partially, concern a regulation of local land use—that is the city transaction portion of the third element under § 666. But that characterization only scratches the surface of this case. *See United States v. Richard*, 775 F.3d 287, 293 (5th Cir. 2014) (concluding that the defendant-appellant's "invocation of the state's interest in education, standing alone, fail[ed] to demonstrate that § 666 is unconstitutional as applied to him"). The prosecution also concerned a city that received more than $10,000 in federal assistance each year[4]—that is the second element—and an alleged bribery pertaining to the city's transaction. The city's transactions under the third element need not relate to the federal assistance under the second element. *See, e.g., Moeller*, 987 F.2d at 1137; *Salinas*, 522 U.S. at 60. Accordingly, the Court will construe the Jordans' argument as a constitutional attack on § 666(a)(1)(B).

The Court must now consider whether the Jordans waived this constitutional argument. The Government asserts they did because Rule 12(b)(3) requires that a motion to dismiss for failure to state an offense must be filed prior to trial. FED. R. CRIM. P. 12(b)(3)(B)(v). In support of this contention, the Government cites to case law suggesting that "a constitutional challenge to a criminal charge, or to the statute on which is rests, is a claim that the charge 'fail[s] to state an offense'" (Dkt. #363 at p. 3 (quoting *Al Bahul v. United States*, 767 F.3d

4. While the Jordans do not contest that Richardson received more than $10,000 in federal assistance each year during the relevant time period, they do argue that the statute requires more than this general showing. The Court discusses this argument *infra* pp. 30-33.

1, 79-80, 412 U.S. App. D.C. 372 (D.C. Cir. 2014))). The Jordans do not respond substantively to this argument.

Whether this defense should have been raised specifically in a motion to dismiss for "failure to state an offense" is immaterial. As the Government recognizes, "the claim still had to be raised before trial because it was 'then reasonably available' and could 'be determined without a trial on the merits'" (Dkt. #363 at p. 4 (quoting FED. R. CRIM. P. 12(b)(3))).[5] Since February 26, 2019, the Jordans have been on notice that the Government sought to convict them for § 666 bribery—specifically, that Laura, as mayor, guaranteed favorable votes on apartment development projects in exchange for cash, sex, and luxury hotel stays, among other items and services from Mark. The Jordans had the allegations in the indictment and the statute readily available to them prior to the first trial, much less the second. Further, the Jordans did not need a trial on the merits to make this argument because the Government never intended or needed to prove that the funds Richardson receives from the federal Government are directly tied to the alleged bribes. Put simply, the argument is late.

The Court may still consider an untimely defense when a defendant "shows good cause," FED. R. CRIM. P. 12(d), but the Jordans cannot make this showing, nor do they attempt. As mentioned, the Jordans had the allegations in the indictment and the statute readily available to them

5. *See* FED. R. CRIM. P. 12, 2014 Adv. Comm. Notes (Rule 12(b)(3) provides a "nonexclusive" list of defects to be raised before trial).

as early as May 2018. And the Jordans demonstrated the ability to file pretrial motions with other arguments and defenses. Indeed, the Jordans filed a motion to dismiss prior to the first trial (Dkt. #61) and three motions to dismiss prior to the second (Dkts. #249-51). At no point in these motions did the Jordans assert the defense that the § 666 bribery statute is unconstitutional as applied to them. For these reasons, the Court finds the Jordans have not shown good cause that would allow the Court to consider their untimely constitutional argument.

Even if the Court were to consider the merits of the Jordans' constitutional argument, this Court's hands would be tied. The Jordans aver that the Spending Clause does not permit "Congress to reach conduct with no effect on local funds" but that § 666's statutory scheme allows for just that, thereby disturbing the Tenth Amendment. Though the Supreme Court has long wrestled with interpreting the proper scope of the wire fraud statutes,[6] the Court has never supplanted a nexus in the § 666 bribery statute where none exists. In fact, the Supreme Court has explicitly rejected this argument. In *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed.

6. *See McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987); *Salinas*, 522 U.S. at 60; *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004); *Sorich v. United States*, 555 U.S. 1204, 129 S. Ct. 1308, 173 L. Ed. 2d 645 (2009) (Scalia, J., dissenting) (denying petition for certiorari); *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *McDonnell v. United States*, 579 U.S. 550, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016); *Kelly v. United States*, 140 S. Ct. 1565, 206 L. Ed. 2d 882 (2020).

2d 891 (2004), the Court considered "whether 18 U.S.C. § 666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution." In no unequivocal terms, the Court "h[e]ld that it is." *Id.* at 602.[7]

The Jordans recognize *Sabri*'s broad holding but distinguish it as a rejection of a facial attack on § 666 that does not foreclose an as-applied attack. As a general matter, there is certainly a meaningful distinction between a facial and an as-applied attack on a statute. But the distinction makes no difference in this context. Again, whatever name the Jordans ascribe to their defense—be it a sufficiency of the evidence argument or an as-applied constitutional attack—the substance of what the Jordans argue is directed at the construction of § 666. In the Jordans' view, there simply must be a nexus between the "conduct prohibited by section 666" and "the federal funds received by the agency." *Moeller*, 987 F.2d at 1137. Under current Supreme Court and Fifth Circuit precedent, there is not. "[C]orruption does not have to be that limited to affect the federal interest." *Sabri*, 541 U.S. at 606. At bottom, "[i]t is [] enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest." *Id.*

In a last-ditch effort to salvage this argument, the Jordans contend that the conduct at issue in this case

7. The Court recognizes that the Jordans assert at least a portion of this argument to preserve it for appeal (Dkt. #347 at p. 9, n.7).

actually implicated "no funds" whatsoever because "[t]he City of Richardson and its citizens sustained no monetary loss in this case" (Dkt. #373 at pp. 4-5 (quoting Dkt. #358 ¶ 20)). Therefore, according to the Jordans, § 666 cannot be constitutionally applied to them. This argument again attempts to contravene the statute.

As previously discussed, the Government had four elements to prove under both § 666(a)(1)(B) and § 666 (a)(2). Only the latter two elements are relevant here: that Laura corruptly accepted or agreed to accept anything of value from any person with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of Richardson[8] and that the business, transaction, or series of transactions involved anything of value of $5,000 or more (Dkt. #310 at p. 21). These elements do not require an implication of "funds." The language, rather, is "anything of value," which is "broad in scope" and not restricted in "application to transactions involving money, goods, or services." *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996), *aff'd sub nom., Salinas*, 522 U.S. 52. The statute does not even "require that the organization, government, or agency or the person giving the agent the bribe, valued the transaction at $5,000 or more." *Id.*

Under the proper reading of the statute, the Jordans' sufficiency of the evidence argument is irrelevant. To be

8. And under § 666(a)(2), that Mark corruptly gave, offered, or agreed to give a thing or things of value to Laura with the intent to influence or reward her in connection with any business, transaction, or series of transactions of Richardson (Dkt. # 310 at p. 24).

sure, the Jordans do not claim that the Government failed to prove a series of transactions involving anything of value of $5,000 or more. Nor can they. They submit that "[G]overnment did not prove that the vote on the economic development agreement misused [G]overnment funds" (Dkt. #373 at p. 6). With this theory, the Jordans would have the Court rewrite the statute. But only Congress can do that.

For all these reasons, the Court rejects the Jordans' argument that the application of § 666 in this case is unconstitutional.

**B. Bribery Under § 666**

Next, the Jordans assert that their convictions under § 666 cannot stand because the bribery statutes require the Government to prove a quid pro quo bribery, and, in this case, the Government proved only that the Jordans engaged in "after-the-fact gratuities" (Dkt. #347 at p. 10). The Government responds that this argument is "way late," as well as "legally and factually flawed" (Dkt. #363 at p. 10).

Importantly, the Jordans notified the Court of a development in the Fifth Circuit that warrants consideration in this case. The Fifth Circuit recently heard oral arguments in *United States v. Hamilton*, No. 21-22257 (Case No. 3:19-cr-83 N.D. Tex.), and subsequently revisited its order denying bail pending appeal. The panel found that the defendant-appellant had raised "significant questions of first impression in this circuit: namely,

whether § 666 covers mere gratuities or unofficial acts, and if so, whether his conviction is constitutional in light of certain Supreme Court decisions." *Id.* Accordingly, the Fifth Circuit granted the defendant-appellant's request for bail. The Jordans contend that a ruling in favor of Hamilton "will require this Court to grant a new trial to the Jordans on Counts Five, Six, and Seven," (Dkt. #389 at p. 2), creating reason for a stay of this matter. For the reasons discussed below, the Court finds that § 666 covers both quid quo bribery and gratuities, but in any case, concludes that the Government proved a quid pro quo. Accordingly, the Court will deny the request for a stay of this matter and deny acquittal or a new trial on these grounds.

**1. Scope of § 666**

The Jordans argue that § 666 requires "proof beyond a reasonable doubt of quid pro quo bribery" but claim the Government "only proved offer and receipt of a 'reward'" (Dkt. #347 at p. 10). The Government responds that "[t]he Court should reject th[is] invitation" and "stay true to the statutory language" of § 666, which criminalizes both quid pro quo bribery and gratuities (Dkt. #363 at pp. 10, 12).

"Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify departure from that language." *Marmolejo*, 89 F.3d at 1188 (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985) (citations

omitted)). As mentioned, § 666(a)(1)(B) requires that the Government have proved beyond a reasonable doubt that Laura corruptly accepted or agreed to accept anything of value from any person with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of Richardson. Under § 666(a)(2), the Government must have proved that Mark corruptly gave, offered, or agreed to give a thing or things of value to Laura with the intent to influence or reward her in connection with any business, transaction, or series of transactions of Richardson.

Given this language, the majority of circuit courts "have interpreted § 666 to impose criminal liability for both kinds of crime proscribed by [18 U.S.C.] § 201: bribery and illegal gratuities."[9] *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007); *see also, e.g.*, *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010); *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) (finding "the statute does not require the government to prove . . . a specific act" associated with the bribe because "the text says nothing of a quid pro quo requirement to sustain a conviction, express or otherwise"); *United States v. Zimmerman*, 509 F.3d 920 (8th Cir. 2007) (concluding that under § 666(a)(1)(B) "[t]he government [] was not required to prove any quid pro quo"); *United States v. Hawkins*, 777 F.3d 880 (7th Cir. 2015) (Easterbrook, J.) ("[Section] 666 forbids taking gratuities as well as taking bribes."); *United States v. Jennings*, 160 F.3d 1006, 1013-14 (4th Cir. 1998) (finding "all that must be shown is that payments

9. 18 U.S.C. § 201 is the federal bribery statute that criminalizes conduct involving federal officials.

were made with the intent of securing a specific type of official action or favor in return. For example, payments 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").[10] "[F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999).[11] However, "[a]n illegal gratuity . . . may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id.* at 405.

Given the statutory text, the Second Circuit has held that both bribery and gratuities must be implicated by § 666, given "that a payment made to 'influence' connotes bribery, whereas a payment made to 'reward' connotes an

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10. The First Circuit sits alone in its interpretation, taking the "statutory context" of § 666 into account "before looking at its specific language." *United States v. Fernandez*, 722 F.3d 1, 20 (1st Cir. 2013). This analysis led the court to conclude that "gratuities are not criminalized under § 666." *Id.* at 26.

11. In *Sun-Diamond*, the Supreme Court held that § 201 requires proof of a quid pro quo. But that case's "heightened quid pro quo standard is inapplicable to . . . § 666," *Abbey*, 560 F.3d at 521, given the "significant differences in the text" of each statute. *McNair*, 605 F.3d at 1190. Specifically, § 666 does not "contain[] the 'official act' language that the *Sun-Diamond* Court found 'pregnant with the requirement that some particular official act be identified and proved.'" *Abbey*, 560 F.3d at 521 (quoting *Sun-Diamond*, 526 U.S. at 406).

illegal gratuity." *Ganim*, 510 F.3d at 150 (citing *United States v. Bonito*, 57 F.3d 167 (2d Cir. 1995)). The Eleventh Circuit has held the same, highlighting that neither subsection of § 666 "contain[s] the Latin phrase quid pro quo" nor "language such as 'in exchange for an official act' or 'in return for an official act.'" *McNair*, 605 F.3d at 1187. Indeed, "nothing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a specific official act." *Id.* at 1187-88.

The Jordans aver that the Supreme Court's curb of the wire fraud statutes suggests the § 666 bribery statutes must also be tailored in scope. This argument falls short for two reasons. First, striking illegal gratuities from the scope of the statute's implications "would permit a person to pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating § 666." *Id.* at 1188. This result is inconsistent with the statutory text and Congress' broad intent "in enacting § 666"—that is, "to safeguard 'the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.'" *Marmolejo*, 89 F.3d at 1192 (quoting *United States v. Westmoreland*, 841 F.2d 572, 576 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S. Ct. 62, 102 L. Ed. 2d 39 (1988)).

Second, "[t]he requirement of a 'corrupt' intent in § 666" on its own "narrows the conduct that violates § 666," *McNair*, 605 F.3d at 1188, in a way that differentiates the bribery statutes from the wire and mail fraud statutes. *See also, e.g., Abbey*, 560 F.3d at 521 ("[T]he [Supreme]

Court's concern with not criminalizing legal gratuities is not relevant here because § 666 contains [] a corrupt intent requirement."); *Hawkins*, 777 F.3d at 882 ("The mail-fraud statute is not as detailed as § 666"). Put differently, "by requiring that the Government prove the existence of a corrupt exchange, the bribery statutes obviate[] the need to demonstrate a direct link between the payments and a particular official act." *Whitfield*, 590 F.3d at 352 (discussing the Second Circuit's holding in *Ganim*, 510 F.3d at 146-47).

The Fifth Circuit's holding in *Whitfield* suggests that the word "corrupt" in § 201 may carry with it the requirement of a quid pro quo. *See* 590 F.3d 325 at 353 ("[T]he jury's finding that there was a corrupt agreement necessarily entailed a finding of an exchange of things of value."). But *Whitfield* did not hold that a quid pro quo bribe is required under § 666. *See id.* As mentioned, the language of § 201 and § 666 differ dramatically. To apply the same treatment to the word "corruptly" in § 666 as that applied in § 201 would "effectively remov[e] the statute's prohibition of taking money as a 'reward.'" *Hawkins*, 777 F.3d at 882.[12] Even in the absence of a quid pro quo requirement, inclusion of the word "corruptly" creates "a triple safeguard against criminalizing innocent acts." *Id.* With this construction, the Jordans "could be convicted only if (a) [Laura] intended to be influenced (that is, to perform some quid pro quo) or rewarded; (b)

12. In their reply brief, the Jordans contend that *Hawkins* is irrelevant because it "fails to acknowledge that Congress amended [§] 666 to remove the gratuity provision" (Dkt. #373 at p. 8). But Congress has never amended § 666 to remove the word "reward."

[Mark] intended to influence or reward [Laura], and (c) [Laura] knew [Mark's] intent." *Id.* For all these reasons, the Court finds that § 666 does not require proof beyond a reasonable doubt of a quid pro quo; the statute also criminalizes corrupt gratuities.

### 2. Sufficiency of the Evidence and Jury Instructions

Along these lines, the Jordans contend that the Government did not prove the requisite quid pro quo and that the jury instructions improperly allowed the jury to convict for mere gratuities. But even if § 666 did not extend to gratuities, the Government presented evidence that established beyond a reasonable doubt the Jordans' "specific intent to give or receive something of value in exchange for an official act." *Sun-Diamond*, 526 U.S. at 404-05. As an initial matter, the Court properly instructed the jury under § 666. The Court's instructions simply reproduced the Fifth Circuit's pattern instructions, which track the statutory language of § 666. *See United States v. Harris*, 740 F.3d 956, 965 (5th Cir. 2014) (holding the district court did not err in submitting jury instructions that tracked the statutory language). Nonetheless, should the Fifth Circuit later conclude that its own instructions were legally erroneous, the Court finds "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *United States v. Cessa*, 785 F.3d 165, 186 (5th Cir. 2015) (internal citations and quotations omitted); *see also Ganim*, 510 F.3d at 151 (finding it "unlikely that including the word ['reward'] had any effect at all, much less one affecting the outcome of the district court proceedings" (internal citations omitted)).

*Appendix B*

This was a bribery case. From the outset, the Government centered its theory of prosecution on quid pro quo bribery, and the Defense sought to hold the Government to proving a quid pro quo beyond a reasonable doubt. In *voir dire*, the Defense told the jury panel that, in this case, the Government "specifically . . . ha[d] to prove . . . there was a quid pro quo" (Tr. 206). The Defense explicitly stated to the panel:

> You heard that fancy word, meaning in exchange for an official act. If you're the mayor, in exchange for your official act I am giving you something and I am receiving in exchange of your official act, your vote. They have to prove bribery. Not just that I gave you a gift. . . . the giver has to give the gift with the specific intent to—a corrupt intent to get your vote. The receiver has to say, I will thank you for that gift, I appreciate that, and I'm going to take it, and I'm going to—in exchange, I'm going to give you my vote. Okay. It has to be that person's intent to receive it corruptly in exchange for their vote"

(Tr. 206-07). In their opening statements, the Defense repeated that the Government "ha[d] to prove quid pro quo, in exchange for. That Laura accepted something from Mark [] in exchange for her vote, and they have to prove that beyond a reasonable doubt, and there wasn't a legitimate reason for her vote" (Tr. 321). The Defense further opined to the jury that "[t]here must be an agreement to exchange something of value for an official act" (Tr. 333).

Closing arguments regurgitated these themes. The Government described how Laura's conduct "shattered" people's "hopes," "expectations," and "trust" as she "took trip after trip after trip, she made deposit after deposit after deposit, she told lie after lie after lie in exchange for vote after vote after vote after vote" (Tr. 3739). Never once did the Government assert that the jury need only find a gratuity, nor did the Court use the word "gratuity" in its instructions (Dkt. #310). In fact, nowhere in the 4,000 page trial transcript does the concept of "gratuities" ever appear. To be sure, the Supreme Court has explained that "[a]n illegal gratuity . . . may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Sun-Diamond*, 526 U.S. at 405. But this Court never instructed the jury on the meaning of the term "reward" as included in § 666's statutory text or the Fifth Circuit's pattern instructions. The Court, therefore "cannot conclude that the charge as given permitted the jury to convict on a gratuities theory," as the "jury would not have understood the word 'reward' to have any particular legal meaning beyond that ascribed to it in the instructions." *Ganim*, 510 F.3d at 151.

Moreover, the Defense argued the "real issue" to the jury in its closing argument: "Was there a bribe? Let's talk quid pro quo . . . quid pro quo is required. . . . That's what they ha[d] to prove, and that's why they f[e]ll short in this case" (Tr. 3779-85). The jury, however, disagreed with Defense that the Government's case fell short, finding both the Jordans guilty under § 666.

The evidence at trial supports this verdict and supports that the jury found a quid pro quo. Laura platformed her mayoral campaign on a stance against zoning for or building new apartments near neighborhoods.[13] Laura received support from constituents partially because of her "no to apartments" platform. Laura became acquainted with Mark, the Palisades developer, some time in close proximity to the first zoning vote. Mark and Laura sent private emails about Mark's zoning proposal and constituents' disapproval of the proposed rezone. Laura forwarded emails to Mark from dissenting constituents, and Mark directed the substance of Laura's responses to such emails. Prior to the first zoning vote, the jury heard evidence that Laura "was taking bullets for" Mark when "the [P]rairie [C]reek mob" vocally opposed the potential rezoning of the Palisades. In total, 126 individuals expressed their opposition to the rezoning, while only nine supported the changes. On December 9, 2013, notwithstanding her campaign platform and the public outcry, Laura voted in favor of rezoning the Palisades to support the development of 600 apartments (Tr. 897-971).

While the Jordans argue that the most favorable reading of the evidence only "demonstrate[s] gratuities given to Laura [] after her votes, with no promised exchange beforehand," this assertion ignores the subsequent City Council votes pertaining to the Palisades (Dkt. #347 at pp. 13-14). The jury heard evidence that, in January 2014,

13. The Jordans object to this fact as it is described in the Presentence Investigation Reports (Dkts. #382, 384), but the evidence at trial supports this statement, including witness testimony and one of Laura's campaign brochures.

Mark began showering Laura with things of value, all while he continued pressing the City to vote in favor of expansive development. On January 14, 2014, Laura and Mark took a weekend trip to a ski resort in Utah during which Mark charged over $7,000 to his Sooner company card. On January 27, 2014, Laura voted in favor of an amended zoning change to the Palisades. In April 2014, Mark and Laura went to Los Angeles and stayed at the CordeValle, where they checked in as "Mr. and Mrs. Mark Jordan" (Dkt. #313, Exhibit 68). The next month, during a meeting with City officials, Mark requested an increase of permissible apartments from 600 units to 1,400 units within the Palisades. On June 9, 2014, the City Council convened to vote on the matter. Only one individual supported the zoning change while 651 individuals expressed their opposition to increasing the number of apartments. Despite the Richardson constituents' clear message, Laura and the City Council voted to increase permissible apartment units on the Palisades from 600 to 1,090.

Between June 25, 2014 and September 18, 2014, Mark and Laura went back to Los Angeles, as well as to Laguna Beach and Destin. Mark charged the hotel stays and certain other costs as business expenses. On September 22, 2014, the City Council, including Laura, unanimously voted to allow the City Manager to negotiate and execute an Economic Development Incentive Agreement ("EDIA") with JP Realty Partners regarding the Palisades. Mark and the City Manager executed the EDIA on April 29, 2015, and May 7, 2015, respectively. The terms of the EDIA allowed for the project to receive $47 million in reimbursements for construction and infrastructure expenses and a 25-year 50 percent tax rebate for infrastructure costs.

*Appendix B*

On March 2, 2015, some weeks prior to the execution of the EDIA and while Laura was mayor, Mark offered Laura a leasing agent position with Sooner that included a signing bonus of $15,000, an annual salary of $150,000, and discretionary and year-end bonuses. The former leasing agent, whose position Laura accepted on March 15, 2015, was licensed by the State of Texas Real Estate Commission and earned a yearly salary of $70,000. Laura, on the other hand, did not have a real estate license, education, or experience relevant to leasing commercial property. Moreover, between September 9, 2014, and February 23, 2015, Mark made $25,900 in cash withdrawals from his bank account and wrote Laura a check for $40,000. Between September 9, 2014, and February 24, 2015, Laura deposited a total of $58,489 into the bank accounts that she kept private from Michael during their marriage, which lasted until January 2015. The jury also heard evidence that Sooner funded Laura's $24,030 home remodeling, which commenced in October 2015. Indeed, the jury heard evidence that Mark told his then-wife, Karen, that he was funding the remodel of Laura's house because they "owe[d] her a lot. She'[d] made [them] a lot of money" (Tr. 932).

At trial, the jury also heard evidence that Laura intentionally deleted incriminating emails between she and Mark which served to disguise the nature of their relationship and would have impacted any investigation into unethical or criminal behavior. The jury also heard testimony that Laura's and Mark's lawyers advised the two to marry after the FBI launched its investigation.

*Appendix B*

The most basic view of the evidence establishes that Mark and Laura began secretly communicating about the Palisades, the zoning votes, and the Richardson constituents before the first vote to rezone on December 9, 2013; that Laura, in handling the outcry from her constituents took bullets "for" Mark; that Mark began providing things of value to Laura in January 2014; that Laura voted in favor of the Palisades development on two subsequent occasions; that Mark continued providing things of value to Laura; that Laura subsequently voted to allow the City Manager to negotiate a reimbursement for the Palisades development; and that Mark believed he and Karen owed Laura a lot because Laura had made them a lot of money. If this were not enough, the evidence also proved that, throughout this entire time period, Mark and Laura directly lied to their spouses, their close friends, and their colleagues about their relationship and their money, and they also concealed the conflict of interest from the people and the local government of Richardson.

Such ample evidence established beyond a reasonable doubt "a specific intent to give or receive something of value in exchange for an official act." *Sun-Diamond*, 526 U.S. at 404-05. Accordingly, the jury found a quid pro quo. Further, this trial revolved around whether there was a quid pro quo between the Jordans with no mention of gratuities at any point. Thus, to the extent that the jury, as instructed, could have convicted the Jordans without finding a quid pro quo, the Court concludes that "the jury verdict would have been the same" even with a specific quid pro quo instruction. *Cessa*, 785 F.3d at 186. Consequently, the Court finds that the Government

sufficiently proved quid pro quo bribery under §§ 666(a)(1)(B) and (a)(2). Further, because the Jordans have not shown that the jury instructions adversely affected any of their "substantial rights," *Wall*, 389 F.3d at 466, the Court finds no "miscarriage of justice" occurred. *See Wright*, 634 F.3d at 775. In sum, the Court finds no basis for upsetting the verdict under the standards of Rule 29 or Rule 33.

### C. Receipt of Federal Benefits Under § 666(b)

Next, the Jordans argue that the Government failed to prove the requisite receipt of federal benefits under § 666(b). Specifically, the Jordans contend that the statute requires more than just a general showing of assistance exceeding $10,000 in a one-year period; rather, the statute requires "benefits" directly connected with "a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of [f]ederal assistance" (Dkt. #347 at p. 17). The Government responds that this argument is not only too late, but also meritless.

Liability under § 666 "is predicated upon a showing that the defrauded organization 'receive[d], in any one period, benefits in excess of $10,000 under a Federal program' . . . in the form of 'a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.'" *Fischer v. United States*, 529 U.S. 667, 676, 120 S. Ct. 1780, 146 L. Ed. 2d 707 (2000); *see also Richard*, 775 F.3d at 293; *Sabri*, 541 U.S. 600. The Jordans argue that *Fischer* tightened the requirements for proving the "benefits" under § 666—that is, "an examination must be undertaken of the program's structure, operation, and

purpose" and the "inquiry should examine the conditions under which the organization receives the federal payments." *Fischer*, 529 U.S. at 681.

In the years immediately following *Fischer*, some courts understood its reasoning to require a type of nexus between the conduct criminalized in § 666 and the federal funds. *See United States v. Suarez*, 263 F.3d 468, 489 (6th Cir. 2001) ("The best reading of the *Fischer* and *Salinas* cases seems to be that the Supreme Court does not want" § 666 to become "a generalized "anticorruption statute under the spending power" (internal citations omitted)). But just four years after *Fischer*, the Supreme Court explicitly determined that no such nexus was required because "proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority." *Sabri*, 541 U.S. at 602. Cases holding otherwise were, thus, abrogated. *See, e.g., United States v. Zwick*, 199 F.3d 672 (3d Cir. 1999); *United States v. Santopietro*, 166 F.3d 88 (2d Cir. 1999).

The legal interpretation of "benefits" directly impacts the scope of § 666 as a whole. *See, e.g., United States v. Keen*, 676 F.3d 981, 990 (11th Cir. 2012) (describing that the Supreme Court's "recognition of [Congress'] ambitious objective . . . has led the Court repeatedly to reject statutory constructions aimed at narrowing § 666's scope, in favor of a broad reading"). Notably, however, the Jordans do not frame their argument regarding "benefits" as a jurisdictional or constitutional attack on the scope of § 666. Instead, the Jordans pursue a sufficiency of the evidence argument, which fails for the following reasons.

First, the Jordans did not object to the jury instructions regarding the definition of the word "benefit."[14] The Court instructed the jury that the Government had to prove beyond a reasonable doubt "[t]hat the City of Richardson was a local government that received in any one-year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, or other form of federal assistance" (Dkt. #310 at p. 21). Further, the Court instructed "[i]t is not necessary to prove that the defendant's conduct directly affected the federal funds received by the agency under the federal program" but that "there must be some connection between the criminal conduct and the local government receiving federal assistance" (Dkt. #310 at p. 22). The Jordans cannot now move the goal post by insisting that the Government must have proved something the jury was not instructed to find.

Second, the jury did not need to find any more than it was instructed to convict under § 666. The Court's instructions simply reproduced the Fifth Circuit's pattern instructions, which properly required the jury to find only what § 666 explicitly demands and Supreme Court jurisprudence calls for. Fifth Circuit Pattern Instructions (Criminal Cases) 2.33B, 2.33C (2019). As

14. The Jordans, in their objections to the jury instructions, "acknowledge[d] the Fifth Circuit caselaw which provides that the 'in excess of $10,000 requirement' is satisfied by proof that the municipality received that amount under a Federal program in any one-year period" but "to preserve the issue for any further review, the Defendants submit[ted] that a connection or tie must be shown between the alleged criminal conduct and a local program receiving the federal funds" (Dkt. #308 ¶ 8).

the Government notes, *Fischer* did not create additional fact requirements that a jury must always consider to find beyond a reasonable doubt that the entity in question received federal benefits in excess of $10,000. To be sure, "*Fischer* turned on . . . whether to characterize certain forms of federal aid as 'benefits.'" *Suarez*, 263 F.3d at 490. The federal aid at issue in *Fischer* was assistance provided to organizations participating in a particular Medicare program. The petitioner in *Fischer* argued "that the Medicare program provide[d] benefits to the elderly and disabled but not to the health care organizations," thereby disqualifying the funds from the reach of § 666. *Fischer*, 529 U.S. at 676. Because of this specific argument, "[t]he nature and purposes of the Medicare program g[a] ve [the Court] essential instruction in resolving" whether funds that are designed to benefit Medicare recipients also "benefit" the Medicare provider. *Id.* at 671.

Here, the Jordans do not contend that Richardson received no federal benefit during a one-year period, so an inquiry into the type of assistance the federal government gave to Richardson is irrelevant. The Government had to prove beyond a reasonable doubt only "[t]hat the City of Richardson was a local government that received in any one-year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, or other form of federal assistance" (Dkt. #310 at p. 21). It did. The Jordans even provide the relevant evidence in their motion: The City's director of finance testified that Richardson received $985,000, $931,000, and $337,000 in federal assistance for fiscal years 2013, 2014, and 2015 respectively (Dkt. #347 at pp. 14-15 (quoting Tr. 440-45)). With this evidence alone, the jury's findings were

reasonable. Accordingly, the Court will not acquit the Jordans or grant a new trial on this ground.

**D. Agent Under § 666**

The Court instructed the jury that, under § 666, it had to find that Laura "was an agent of the City of Richardson," and that the term agent "means a person authorized to act on behalf of another person, or a government and, in the case of an organization or government, includes a servant, employee, or representative" (Dkt. #310 at pp. 21-22, 24-25). The Jordans argue that the Government was required, yet failed, to establish that Laura, as mayor, was an agent of Richardson that had authority to act with respect to funds (Dkt. #347 at p. 18). Specifically, the Jordans submit that the Government "presented no evidence that Laura [] could sign contracts, hire or fire employees, or exercise broad authority over the [C]ity or its funds" (Dkt. #373 at p. 12).

As an initial matter, the Jordans did not object to the definition of "agent" in the jury instructions. The definition in the instructions is not dependent upon a connection between the person authorized to act and control over "funds." Again, the Jordans cannot now insist that the Government have proved something the jury was not instructed to find.

Even if the Jordans had timely objected to the instructions, Supreme Court precedent strongly suggests that § 666 does not require the requisite "agent" have direct or indirect authority over "funds." The Fifth Court held in *United States v. Phillips* that "[w]ithout

an agency relationship to the recipient of federal funds, § 666 does not reach the misconduct of local officials." 219 F.3d 404, 413 (5th Cir. 2000). This holding rests on the same reasoning applied in *Foley* and *Zwick*—the cases abrogated by *Sabri*. As discussed, *Sabri* affirmed that no nexus is required between the conduct prohibited by § 666 and the federal funds received by the agency. Rather, the nexus exists between the conduct prohibited by § 666 and the agency that receives federal funds.

Further, post-*Sabri*, courts have rejected the very argument that the Jordans proffer here, as "[n]either the statutory language nor constitutional principles lead to such a restricted understanding of the provision." *Fernandez*, 722 F.3d at 10; *see also Keen*, 676 F.3d at 989-90 ("Nowhere does the statutory text either mention or imply an additional qualifying requirement that the person be authorized to act specifically with respect to the entity's funds."). Even the Fifth Circuit has declined to apply *Phillips* in more recent cases. *See Whitfield*, 590 F.3d at 345 ("[S]o long as there is a nexus between the criminal conduct and the agency, the lack of a direct connection between the [] funds under the [defendants'] control and the federal funds in question does not preclude them from being considered agents . . . for the purposes of [§] 666.").

Relatedly, the Court rejects any contention that, to be considered an agent, Laura must have exercised authority over city funds. This argument mirrors the Jordans' assertion previously rejected by this Court: that § 666 cannot be constitutionally applied to them because the conduct at issue in this case actually implicated "no funds"

whatsoever. For the same reasons previously discussed, this argument fails. *See supra*, pp. 23-24. Consequently, the Court finds that § 666 "merely requires that the individual be 'authorized to act on behalf of another person or government.'" *Fernandez*, 722 F.3d at 10 (quoting § 666(d)(1)).

Therefore, only one question remains on this point: whether the Government proved that Laura was authorized to act on behalf of Richardson. The jury instructions specifically provided that, in the case of a government, an "agent" includes a servant, employee, or representative. This instruction not only reproduced the Fifth Circuit's pattern instructions but is a direct quote from the statutory text. FIFTH CIRCUIT PATTERN INSTRUCTIONS (CRIMINAL CASES) 2.33B, 2.33C (2019); § 666(d)(1). By its terms, the statute necessarily includes a mayor—who is elected as a representative—in the definition of "agent." To hold otherwise would create "tension with the plain language of the statute." *United States v. Ollison*, 555 F.3d 152, 160 (5th Cir. 2009) (analyzing who qualifies as an "agent" under § 666). Thus, by presenting evidence that Laura was elected mayor of Richardson and represented the City during the relevant time period, the Government sufficiently proved that Laura was an agent of Richardson.

**E. Jury Instructions § 666**

Finally, the Jordans argue that the Court improperly instructed the jury on the elements of § 666 in two ways: (1) by qualifying the definition of "corruptly"; and (2) by including that "sex" constitutes a "thing of value."

*Appendix B*

"District courts enjoy substantial latitude in formulating a jury charge." *United States v. Webster*, 162 F.3d 308, 321-22 (5th Cir. 1998). "It is well-settled that a district court does not err by giving a charge that tracks this Circuit's pattern jury instructions and that is a correct statement of the law." *United States v. Turner*, 960 F.2d 461, 464 (5th Cir. 1992). In reviewing jury instructions, the Fifth Circuit "consider[s] whether the [challenged] instruction, taken as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." *United States v. Ebron*, 683 F.3d 105, 151-52 (5th Cir. 2012) (citing *Whitfield*, 590 F.3d at 347). With this framework, the Court discusses each argument.

**1. The Instruction on "Corruptly"**

On Counts Six and Seven, the Court instructed the jury that:

> An act is "corruptly" done if it is done intentionally with an unlawful purpose. The fact that an act is motivated, in part, by friendship or a romantic interest is no defense. Actions taken with a dual motive constitute bribery so long as one of the motives is to influence or reward the public official. It is no legal defense that the official acts were good for the community or were acts that the public official would have or should have taken without the bribe. On the other hand, if actions were entirely motivated by legitimate reasons, like romantic interest, then they do not constitute bribery

(Dkt. #310 at pp. 22-23, 25). The Jordans contend that this instruction qualified the requisite "corrupt" intent, thereby shifting the burden of proof to the Jordans.

The Court previously rejected this argument when the Jordans raised objections to the jury instructions, as the instruction taken as a whole is a correct statement of the law. The Fifth Circuit pattern instructions only include the first sentence of this Court's instructions: that an act is "corruptly" done if it is done intentionally with an unlawful purpose. 2.33B, 2.33C (2019). The additional instructions are derived from case law in this circuit and in others. The Fifth Circuit has found consistent with precedent instructions that state "[i]t is not a defense to claim that a public official would have lawfully performed the official action in question even without having accepted a thing of value." *United States v. Nagin*, 810 F.3d 348, 351 (5th Cir. 2016); *United States v. Grace*, 568 Fed. App'x 344, 349-50 (5th Cir. 2014), *as revised* (May 22, 2014) (affirming jury instruction on the grounds that "[i]t is enough that [defendant] took the money with the knowledge that it was intended to influence him, even if he would have written the Letters without the payment").

Other circuit courts have found similarly. Reviewing instructions pursuant to a § 666 charge, the Third Circuit indicated that "the [d]istrict [c]ourt thoroughly explained the mens rea required for a 'corrupt intent'" by instructing the jury to "remember that it is the defendant's intent, at least in part, to be influenced or rewarded, which is important." *United States v. Plaskett*, 355 Fed. App'x 639, 643-44 (3d Cir. 2009); *see also McNair*, 605 F.3d at 1193 ("An act is done 'corruptly' if it is performed

voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means."). Further, the Court's instructions align with a well-settled principle regarding specific-intent crimes like bribery: a defendant "may properly be convicted if his intent to commit the crime was *any* of his objectives." *United States v. Technodyme LLC*, 753 F.3d 368, 385 (2d Cir. 2014) (citing *Anderson v. United States*, 417 U.S. 211, 226, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974) (emphasis added)). This is so even if that objective is only "a minor one." *Ingram v. United States*, 360 U.S. 672, 679-80, 79 S. Ct. 1314, 3 L. Ed. 2d 1503, 1959-2 C.B. 334 (1959).

The Court's instructions did not shift any burden to the Jordans. The instructions required the jury to find beyond a reasonable doubt that the Jordans acted with the necessary mens rea. The instructions also provided important guidance consistent with precedent. Without the additional instructions, for example, the jury might have considered whether lawful explanations outweighed the Jordans' unlawful intent. Such a possibility actually places an improper burden on the Government to disprove all possible objectives at play in establishing corrupt intent. That is not the law.

Importantly, the Jordans were free to argue that they had only lawful explanations for their conduct, and the jury instructions permitted the jury to consider such. Indeed, the Court instructed that "actions [] entirely motivated by legitimate reasons, like romantic interest,

. . . do not constitute bribery" (Dkt. #310 at pp. 23, 25). This instruction did not place an improper burden on the Jordans; rather, the instruction ensured the jury hold the Government to its burden of proving corrupt intent. To be sure, if the Jordans had presented *zero* evidence, the instructions on this element would have still allowed for the jury to find the Jordans actions were entirely motivated by legitimate reasons that could not support a guilty verdict under § 666. Because the Court properly instructed the jury on this element, the Court finds no basis to acquit or to grant the Jordans a new trial on this ground.

**2. The Instruction on Sex as a Thing of Value**

The Court instructed the jury that "'value' means the face, par, market value, or cost price, either wholesale or retail, whichever is greater" and that "'[a]nything of value' includes intangible items, such as furnishing sexual services" (Dkt. #310 at pp. 22, 25). The Jordans contend that "'sex as a bribe' . . . is indefinite and far-fetched" and "an inadequate stand-alone basis for conviction" (Dkt. #348 at p. 5).

The Court's instruction correctly stated the law. The Fifth Circuit has found that "intangibles," including sexual services, constitute a "thing of value" under § 666 and can be used to support the $5,000 value threshold the statute requires. *See Marmolejo*, 89 F.3d at 1192-94. Moreover, "sex" did not stand alone as the only "thing of value" for the jury to consider. As the Government recognizes, the sexual relations between Mark and Laura were not the

primary focus of the evidence put on at trial. Indeed, the Government presented evidence that Mark treated Laura to extravagant vacations, remodeled her home, and gave her a job offer with a six-figure salary for a position she was unqualified to fill. In total, Laura received from Mark over $131,722.53 in benefits, the $150,000 salary not included. The jury could reasonably have determined all these benefits established that Mark corruptly gave, offered, or agreed to give a thing or things of value to Laura and that Laura corruptly accepted or agreed to accept anything of value from Mark.

Because the Court properly instructed the jury on this element, the Court finds no basis to acquit or to grant the Jordans a new trial on this ground.

**III. Limiting Instruction**

The Jordans next assert that the Court erred in admitting evidence of ethics training that Laura received without giving a contemporaneous limiting instruction. At trial, the Government began probing Laura about her ethics training on cross examination. The Defense objected on relevancy grounds (Tr. 3596). The Court overruled the objection but, in that moment, instructed the jury that "of course, an ethical violation, if there is one, is not a crime. But I'm allowing the [G]overnment to probe this area" (Tr. 3596). The Defense then asked for a limiting instruction. In response, the Court stated, in the presence of the jury: "Well, I think I—I think I just said that, but I'll repeat it again—is, of course, I have given the [G]overnment the ability to probe any issues of ethical violations. An ethical violation is not a crime" (Tr. 3597).

The Court's final instructions included the Jordans' requested limiting instruction:

> You also heard testimony from witnesses on their personal views of ethical responsibilities. An individual's views of ethical responsibilities are not necessarily the same as legal responsibilities. You may consider testimony about ethical responsibilities for the limited purpose of helping you determine, if it does, the defendants' state of mind. You may not consider such testimony for any other purpose whatsoever

(Dkt. #310 at p. 10). The Jordans deem these instructions insufficient, arguing the Court should have given this exact instruction at the time the evidence was received at trial. The Court disagrees. While the semantics between the Court's instruction and the Jordans' requested instruction may differ, there is no substantive difference between the two. The Court sufficiently instructed the jury that an ethical violation is not a crime at the time the evidence was offered. And in any case, the final instructions were sufficient to prevent the jury from assigning an improper role to the evidence of Laura's ethical responsibilities. Accordingly, the Court finds no basis to acquit or to grant the Jordans a new trial on this ground.

## IV. Vindictive Prosecution

Next, the Jordans ask the Court to dismiss Counts Eight through Twelve because the Government's addition

of these charges constituted vindictive prosecution. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)). "Thus, a prosecutor may not increase the charge against a defendant solely as a penalty for invoking a right, such as pursuing an appeal." *United States v. Saltzman*, 537 F.3d 353, 359 (5th Cir. 2008). "The defendant has the burden of proving, by a preponderance of the evidence, prosecutorial vindictiveness." *Id.* When a defendant meets this burden, the court will apply a "presumption of vindictiveness" that the Government must overcome by showing "objective evidence in the record justifying the increased sentence." *Id.*

Here, the Jordans argue that the Government added the tax charges in retaliation for the Jordans' successful motion for new trial (affirmed by the Fifth Circuit) and engaged in "unreasonably hostil[e]" conduct that "follow[ed] an earlier pattern of overzealous investigation and prosecution" (Dkt. #352 at p. 3). Based on these assertions, the Jordans submit that the Government's conduct is "presumptively vindictive," and, accordingly, it is the Government's burden to present evidence of an "objective event" that justified the subsequent addition of these tax counts (Dkt. #352 at p. 4). The Government responds that the vindictive prosecution claim is untimely and meritless. In reply, the Jordans concede that their argument is late, but, nonetheless, claim the argument is not waived—just that "the plain error standard applies" (Dkt. #373 at p. 14).

As an initial matter, the Court is unsure what to make of the Jordans' suggestion that a plain error standard applies. While the Fifth Circuit will review an "unpreserved claim of prosecutorial vindictiveness for plain error," *United States v. Salazar*, 764 Fed. App'x 424, 425 (5th Cir. 2019), there is no decision for this Court to review. Instead, the Court will consider whether the Jordans show "good cause" for failing to raise vindictive prosecution before trial. *See* FED. R. CRIM. P. 12(b)(3) and 12(c) (including "selective or vindictive prosecution" in the nonexhaustive list of "motions that must be made before trial"). Because the claim was reasonably available to the Jordans prior to the second trial, the Court finds the Jordans cannot show good cause.

As mentioned, the Government added tax charges against the Jordans prior to the second trial. Even the Jordans recognize this decision did not come out of thin air. The Government had pursued adding possible tax counts against the Jordans prior to the commencement of the first trial and before the grand jury returned the original indictment in May 2018. But the USAO decided it would not pursue the tax charges further because approvals from the Department of Justice would have taken too long.

When the Jordans filed a motion for new trial, the Government recognized "a realistic possibility that the Jordans' convictions would be overturned" and anticipated "that any [new] trial setting would likely be distant [] especially since whichever party lost on the motion for new trial would likely appeal[]" (Dkt. #363 at p. 40). Awaiting the outcome, the Government "re-approached the IRS about the possible pursuit of tax charges" (Dkt.

#363 at p. 40). This Court granted the Jordans' motion for new trial on May 2, 2019. Discussions about potential resolutions and plea deals ensued but were unsuccessful. On May 24, 2019, the Government relayed to Defense counsel that it was the Government's "intent to present to the grand jury a superseding indictment including tax fraud counts related to both defendants" (Dkt. #363 at 42). On May 28, 2019, the Government appealed the Court's order granting a new trial. On May 1, 2020, a panel of the Fifth Circuit affirmed the Court's decision. Potential settlement conversations resumed, but to no avail. The grand jury returned the second superseding indictment adding the tax charges on December 9, 2020.

Since December 9, 2020, the Jordans have had all the tools at their disposal to bring a vindictive prosecution claim. But the Jordans made no mention of prosecutorial vindictiveness until October 14, 2021—nearly three months after the jury rendered a verdict against the Jordans and a year and a half after they had all the relevant information to make such a claim. For these reasons, the Court finds that the Jordans forfeited any claim of vindictive prosecution in this matter. Consequently, the Court declines to consider the merits of this argument and denies the Jordans' motion to dismiss on this ground.

## V. Sufficiency and Weight of the Evidence: Tax Charges

In their final post-trial motion, the Jordans request that the Court enter a judgment of acquittal under Rule 29 because the Government did not present sufficient

evidence to uphold the verdict. In the alternative, the Jordans request a new trial under Rule 33 because the evidence related to the tax charges (Counts Eight through Twelve) "weighs against conviction" (Dkt. 373 at p. 27).

As previously iterated, a review of the sufficiency of the evidence assesses "whether, viewing the evidence in the light most favorable to the verdict, a rational [finder of fact] could have found the essential elements of the offense charged beyond a reasonable doubt." *Boyd*, 773 F.3d at 644 (first citing *Jackson*, 443 U.S. at 319; then citing *Miller*, 588 F.3d at 907). "The standard does not require that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *Loe*, 262 F.3d at 432.

However, Rule 33 grants the Court discretion to weigh the evidence in determining whether the "interests of justice" warrant a new trial:

> Setting aside a jury's guilty verdict . . . may be appropriate under circumstances where the evidence brought forth at trial . . . tangentially support[s] a guilty verdict, but in actuality, preponderates sufficiently heavily against the verdict such that a miscarriage of justice may have occurred.

*United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009) (internal citations and quotations omitted)). This

discretion is accompanied with parameters. It is not the Court's role to "entirely usurp the jury's function." *Id.* (quoting *Tarango*, 396 F.3d at 672). To do so would strip "meaning [from] the concept of 'miscarriage of justice.'" *Wall*, 389 F.3d at 466. Rather, the Court weighs the evidence as a "thirteenth juror," *Herrera*, 559 F.3d at 303, under the backdrop that the authority to grant a new trial "be invoked only in exceptional cases." *United States v. Robertson*, 110 F.3d 1113, 1118 n.11 (5th Cir. 1997) (quoting *United States v. Sinclair*, 438 F.2d 50, 51 n.1 (5th Cir. 1971)); *see also, e.g., Smith*, 804 F.3d at 734 (indicating the district court should review a motion for new trial "with great caution"); *Tarango*, 396 F.3d at 672 (stating the court should not grant a new trial except in "extraordinary circumstances"); *Scroggins*, 379 F.3d at 253 (same).

Under these standards, the Court will review the evidence related to the tax charges and, accordingly, determine whether sufficient evidence supports the convictions or, in the alternative, whether the interests of justice warrant a new trial.

As an initial matter, a theme exists in this portion of the Jordans' post-trial motions: blatant disregard of the circumstantial evidence presented to the jury at trial. In the Jordans' view, nothing short of a smoking gun is sufficient to sustain a conviction. But Fifth Circuit "case law makes clear that the standard of review for sufficiency of circumstantial evidence is the same as it normally would be for direct evidence." *United States v. Moreno-Gonzalez*, 662 F.3d 369, 372 (5th Cir. 2011) (citing *United States v. Lage*, 183 F.3d 374, 382 (5th Cir. 1999)). Further,

in weighing the evidence, the Court may consider both direct and circumstantial evidence and draw reasonable inferences therefrom. *See United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993); *Richardson*, 848 F.2d at 511; *United States v. Lorence*, 706 F.2d 512, 518 (5th Cir. 1983)). Applying the applicable legal standards and considering both direct and circumstantial evidence, the Court finds that neither acquittal nor a new trial is appropriate in this case.

The Government presented evidence that Laura did not report certain transfers as income on her 2014 and 2015 tax returns. In her 2014 tax return, Laura did not report as income a $40,000 check from Mark, the $24,000 home renovation that Mark funded, or the approximately $16,000 in cash she deposited into her bank accounts that she had opened without her then-husband's knowledge (Tr. 1407; 1503-28). In her 2015 tax return, Laura did not report as income $1,500 in cash payments from Mark or a $5,250 check made out to her, which was drawn from Sooner's account and recorded on the business' general ledger as a legal expense reimbursement (Tr. 1503-28). Neither did she report a check from Sooner worth $10,000 that Sooner recorded on its ledger as commission.

Laura's ex-husband, Michael, testified that he and Laura were responsible for gathering financial records to send to their accountant (Tr. 1406-08). Moreover, Laura's accountant for fiscal year 2015 testified that it was Laura's responsibility to provide him with "accurate information" for him to prepare her tax return (Tr. 1456). Under penalty of perjury, Laura signed her tax report, confirming that she was the taxpayer, she had reviewed

what the accountant had prepared, and she certified that it was all true, thereby stripping Laura of the opportunity to later say she "didn't know what was in the tax report" (Tr. 1458-59).

At trial, an IRS agent provided explanation regarding "bribes" and how they are treated for tax purposes. The agent testified that anyone receiving a bribe must report it as income and no one giving a bribe may take it as a deduction (Tr. 1506-07). With the caveat that only the jury could determine whether the transactions were "bribes," the agent testified that, if they were bribes, these transactions should have been reported as income in Laura's tax return (Tr. 1510-11). She further explained that "gifts" to an individual in excess of $14,000 must be reported as income (Tr. 1522). Accordingly, the agent testified that, even if the jury did not find that the transactions between Mark and Laura were "bribes," Laura was responsible for reporting anything over $14,000 as income on her tax reports in 2014 and 2015. Laura did not report any of these transfers as income (Tr. 1510-11).

Mark's accountant for tax years 2014 and 2015 testified that Mark, in his capacity as a general partner for Sooner, signed under penalty of perjury that he was the taxpayer on behalf of the partnership, he had reviewed what the accountant had prepared, and he certified that it was all true (Tr. 1461-62). Mark's accountant also testified that an expense is not deductible "[i]f an owner of a business runs an expense through his company that's personal, as opposed to related to his business" (Tr. 1472). Further, the IRS agent testified that "[a] business expense is a

deduction that you get to take as you are earning the income for the business" as compared to a personal expense, which has nothing "to do with the operation of the business or how it's getting money" (Tr. 1519).

The Government presented evidence that Mark paid for hotel stays and flights using his Sooner business card, representing the excessive costs as business expenses on the company's general ledger (Tr. 1516-30). Mark deducted these trips, in their entirety, as business expenses in his 2014 tax report. (Tr. 1516-30). As just one example, Mark charged over $7,000 to his Sooner business card in January 2014 when he and Laura went to a ski resort in Utah. In addition to deducting all of his trips with Laura as business expenses, in his 2015 tax report, Mark also deducted as a business expense the $24,030 spent on the renovation of Laura's home (Tr. 1451-79). As mentioned, Mark had told the renovator that the home project was for a friend but asked the renovator to keep news of the project "on the down-low" (Tr. 1098). And Laura lied to multiple people in her close circle that her father was paying for the renovations (Tr. 1204-06; 1245; 1403).

At some point in late 2016 or early 2017, Mark unexpectedly called his accountant inquiring about the manner in which the home renovation was categorized in his 2015 tax report (Tr. 1451-79). When Mark learned it was filed as a business expense, Mark clarified that the expense should be revised to represent personal expenditure (Tr. 1451-79). But Mark's purported ignorance conflicted with earlier testimony from trial. In a call recorded on October 8, 2015, the home renovator spoke with Mark about Mark's

classification of the costly home renovation as a business expense. On this call, the home renovator relayed to Mark "you remember I told you you could get in trouble," and Mark responded "yeah" (Tr. 1116). To be sure, the jury heard evidence that Mark, knowing he could get in trouble, never corrected the billing of the project (Tr. 1116-17) and, in fact, directed the home renovator to "make up [a] job" through which to bill Sooner for Laura's home renovation (Tr. 1119-20). Despite all of this, Mark still deducted the home renovation as a business expense in his tax report.

Importantly, the IRS agent testified as to what IRS investigators look for when "determining whether or not a taxpayer acts willfully" (Tr. 1520). She indicated they "try to determine what kind of knowledge [the taxpayer] has, their sophistication, education level, what would they have reason to know, if they've had training in particular areas" and whether they engaged in "concealment" of "bank account[s] or books and records" (Tr. 1520).

**A. Convictions Under 26 U.S.C. § 7206(2)**

The Jordans challenge their convictions under 26 U.S.C. § 7206(2), which criminalizes willfully aiding or assisting in the preparation of a document, under the internal revenue laws, which is false or fraudulent as to any material matter. The elements of this offense require the Government to prove (1) the defendant aided and advised in the preparation of a United States income tax return; (2) this return falsely underreported amounts of income; (3) the defendant knew the statement in the return was false; (4) the false statement was material; and (5) the defendant aided in the preparation of this

false statement willfully, that is, with intent to violate a known legal duty. The Jordans assert that the Government did not sufficiently prove falsity, knowledge, willfulness, or materiality on Counts Nine through Twelve. In the alternative, the Jordans argue that the weight of the evidence falls in favor of a new trial.

**1. Falsity**

The evidence supports a finding that the Jordans' 2014 and 2015 tax returns falsely underreported amounts of income. The IRS agent testified that "[a] business expense is a deduction that you get to take as you are earning the income for the business" as compared to a personal expense, which has nothing "to do with the operation of the business or how it's getting money" (Tr. 1519). The Government presented evidence that Mark paid for hotel stays and flights using his Sooner business card, representing the excessive costs as business expenses on the company's general ledger. Mark deducted these trips, including a $7,000 ski trip with Laura, as business expenses in his 2014 tax return. A rational jury could have found that Mark's $7,000 trip with his mistress to a ski resort in Utah was not a business trip. In addition to deducting all of his trips with Laura as business expenses, Mark also deducted as a business expense the $24,030 spent on the renovation of Laura's home in his 2015 return despite knowing he could "get in trouble" for falsely writing the expenses off as "carpet stock" for business purposes.

The Government presented evidence that federal tax laws require anyone receiving a bribe to report it as income and preventing anyone who gives a bribe from

deducting it. Further, the Government presented evidence that tax laws dictate "gifts" to an individual in excess of $14,000 must be reported as income. Accordingly, even if the jury did not find that the transactions between the Jordans were "bribes," Laura was responsible for reporting anything over $14,000 as income on her tax reports in 2014 and 2015. Laura did not report any of the transfers from Mark as income.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that this conduct was evidence of falsity. Further, the Court finds that the weight of the evidence supports a finding of falsity.

**2. Knowledge**

The evidence supports a finding that both Laura and Mark knew their 2014 and 2015 tax reports were false. First, the Jordans are both highly educated and experienced in their respective areas. Mark's accountant testified that Mark was a sharp businessman, and Laura's ex-husband testified that she took a strong leadership role in all of her organizational involvement. Second, both Mark and Laura were responsible for submitting truthful and complete information regarding income and expenses to their accountants for tax purposes.

As mentioned, the Government presented evidence that Mark paid for hotel stays and flights using his Sooner business card, representing the excessive costs as business expenses on the company's general ledger. Mark deducted these trips, including a $7,000 ski trip with Laura, as business expenses in his 2014 tax return.

A rational jury could have found that Mark, a remarkably successful businessman, knew this trip was not a business trip, and, therefore, should not deducted the expenses from his 2014 taxes. In addition to deducting all of his trips with Laura as business expenses, Mark also deducted as a business expense the $24,030 spent on the renovation of Laura's home in his 2015 report.

And as mentioned, Laura was, at the very least, responsible for reporting anything over $14,000 as income on her tax reports in 2014 and 2015. Laura did not report any of the transfers from Mark as income. A rational jury could find that a woman who served as mayor of a city with over 100,000 residents knew that the thousands of dollars Mark transferred to her could not be unaccounted for on her 2014 and 2015 tax reports.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that this conduct was evidence of knowledge. Further, the Court finds that the weight of the evidence supports a finding of knowledge.

**3. Willfulness**

The evidence supports a finding that both Laura and Mark aided in the preparation of this false statement with intent to violate a known legal duty. As the Government proved, Laura and Mark both aided in the preparation of their tax reports. They were responsible for supplying their accountants with truthful and complete information regarding income and expenses so that their accountants could accurately prepare the 2014 and 2015 tax reports.

But neither Mark nor Laura supplied truthful or complete information to their accountants. Mark recorded multiple false entries on Sooner's general ledger. Mark directed the home renovator to disguise the funding of Laura's home renovation as an expense for "carpet stock" at one of Mark's commercial properties. Mark and Laura consistently lied to their friends, families, and colleagues about money, bank accounts, and expenses. Laura told her friends on several occasions that she was at "mayor conferences" when she was actually with Mark at a swanky hotel in a different city. When her then-husband inquired about preparing their 2014 joint tax return, Laura lied about the cost and source of the payment for the home renovations.

A rational jury could have ruled out that these discrepancies were honest mistakes, especially given the substantial amount of money involved. Excluding the trips Mark funded, the most conservative calculation of Laura's *unreported* income from 2014 and 2015 totaled $68,330. If the jury found that the transfers were bribes, Laura's unreported income totaled $96,330, which is more than half of her total reported income of $185,599 from these two years. The evidence suggests that Laura knew she had a legal duty to report such excessive income, especially given her signature under penalty of perjury on her tax report.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that this conduct was evidence of willfulness. Further, the Court finds that the weight of the evidence supports a finding of willfulness.

**4. Materiality**

As the Court instructed the jury, "[a] statement is 'material' if it has a natural tendency to influence, or is capable of influencing, the [IRS] in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer" (Dkt. #310 at pp. 30-33). A rational jury could have found, and the weight of the evidence supports, that the false statements were material.

The false statements in the Jordans' tax reports were certainly capable of influencing the IRS in verifying the tax reports. As stated, Laura's reports between the two fiscal years underreported income by an amount between $68,330 and $96,330. Further, Mark's reports improperly deducted personal expenses (or, if the jury so found, bribes) as business expenses. Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that these statements influenced or were capable of influencing the IRS in its verification processes, and therefore, they were material. Further, the weight of the evidence supports a finding that the false statements were material.

For all these reasons, the Court finds that the Government sufficiently proved Counts Nine through Twelve, and, accordingly, the Court will not acquit the Jordans. Further, the Court finds that the weight of the evidence supports each of the guilty verdicts such that no miscarriage of justice occurred. Thus, the interests of justice do not warrant a new trial on this ground.

*Appendix B*

**B. Conspiracy Under 18 U.S.C. § 371**

The Jordans challenge their conviction on Count Eight for Conspiring to Defraud the United States under 18 U.S.C. § 371. To prove this conspiracy beyond a reasonable doubt, the Government had to show that a defendant and at least one other person made an agreement to defraud the Government or one of its agencies by obstructing the accurate calculation and collection of income tax (Dkt. #310 at p. 27). It is well established that an agreement to be part of a conspiracy need not be explicit and "may be inferred from a 'concert of action.'" *United States v. Mann*, 161 F.3d 840, 847 (5th Cir. 1998).

A rational jury could have found that the Jordans agreed to conceal the many transfers from Mark to Laura for tax purposes. The direct evidence establishes that Mark and Laura began a romantic relationship in 2013 but lied about the nature of their relationship for a significant period of time. At minimum, the direct evidence shows that Mark concealed his funding Laura's home renovation and knew the concealment was problematic. Laura lied to multiple people in her close circle about how the renovations were being funded. Further, direct evidence shows that Laura deposited thousands of dollars into a Wells Fargo account that her then-husband knew nothing about. Finally, the Government presented direct evidence that both Laura and Mark improperly reported or failed to report transactions for their 2014 and 2015 tax filings and that it was their responsibility to turn over information on these transactions to their accountants.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that this conduct was evidence of an agreement between the Jordans to defraud the IRS.

## CONCLUSION

The people of Richardson, Texas elected Laura Maczka Jordan as mayor, entrusting her to serve with integrity and deliver on her promises. But Laura Maczka Jordan abused her position of power, and Mark Jordan profited from it. This betrayal of the public trust was a crime punishable under the law. Neither Mark Jordan nor Laura Maczka Jordan is exempt from facing this punishment. For all the foregoing reasons, the Court will sustain the convictions against the Jordans for Counts Five through Twelve.

It is therefore **ORDERED** that the Government's Motion for Findings and Conclusions Regarding Disclosure of Recorded Calls (Dkt. #335) is **DENIED**.

It is further **ORDERED** that Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #347) is **DENIED**.

It is further **ORDERED** that Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #348) is **DENIED**.

It is further **ORDERED** that Defendants' Post-Verdict Motion to Dismiss, or in the Alternative, for Judgment of Acquittal or for New Trial (Dkt. #352) is **DENIED**.

It is further **ORDERED** that Defendants' Motion to Stay this Court's Ruling on Their Rule 33 Motion for a New Trial and to Postpone Sentencing Hearing (Dkt. #389) is **DENIED**.

**IT IS SO ORDERED**.

**SIGNED this 3rd day of August, 2022**.

/s/ Amos L. Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

## APPENDIX C — STATUTES AND PROVISIONS

U.S. Const. art. I, § 8, cl. 1:

"The Congress shall have Power . . . to provide for the . . . general Welfare of the United States . . . ."

U.S. Const. art. I, § 8, cl. 18:

"Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S. Const. amend. X:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

U.S. Const. amend. X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

*Appendix C*

**18 U.S.C. § 666(a):**

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to

influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

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