No. 20A-____

IN THE
Supreme Court of the United States

GREG E. LINDBERG,

Applicant,

– v. –

UNITED STATES OF AMERICA,

Respondent.

On Application from the United States Court of Appeals for the Fourth Circuit

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APPLICATION TO THE CHIEF JUSTICE FOR BAIL PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND REQUEST FOR ADMINISTRATIVE STAY

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Greg E. Lindberg respectfully requests bail pending his appeal to the United States Court of Appeals for the Fourth Circuit. His is among those rare applications that a Circuit Justice should grant under 18 U.S.C. § 3143(b).

There is also an urgency to this request. Although Mr. Lindberg currently remains free on bail under 18 U.S.C. § 3143(a), the Bureau of Prisons has just ordered him to report to prison by October 20, 2020. As a result, Mr. Lindberg respectfully requests a decision on his application before that time or an administrative stay to preserve the status quo while his application is adjudicated.

Introduction

The District Court denied Mr. Lindberg's application for bail pending appeal on a single ground—that no reasonable jurist could extend *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), to apply to federal program bribery under 18 U.S.C. § 666(a)(2). The Fourth Circuit denied a similar application without explanation.

Although a Circuit Justice accords great deference to the decisions of district courts with respect to bail, Mr. Lindberg's entitlement to relief is plain. Under 18 U.S.C. § 3143(b), a judicial officer "shall" grant bail pending appeal if, among other requirements, the defendant's appeal will present (1) a "substantial question of law" and (2) the "likely" remedy is reversal or a new trial if that question is resolved in the defendant's favor. The District Court held that Mr. Lindberg had not raised a "substantial question" related to § 666(a)(2), but that standard simply requires a question that "*could* be decided either way," *United States* v. *Steinhorn*, 927 F.2d 195,

196 (4th Cir. 1991) (per curiam) (emphasis added)—*i.e.*, one that is "close," *United States* v. *Giancola*, 754 F.2d 898, 901 (11th Cir. 1985), or "fairly debatable," *United States* v. *Smith*, 793 F.2d 85, 89 (3d Cir. 1986). Mr. Lindberg's application easily clears this low threshold.

A reasonable jurist could conclude that the constitutional vagueness, federalism, and free-speech concerns that led this Court in *McDonnell* to limit the honest-services fraud statute to an "official act" would require a court to impose the same limitation on 18 U.S.C. § 666(a)(2). The statute at issue in *McDonnell* refers only to "the intangible right of honest services," not an "official act." 18 U.S.C. § 1346. Yet the Supreme Court left little doubt that a robust "official act" requirement was necessary to save that statute from constitutional infirmity. 136 S. Ct. at 2372-75. Section 666(a)(2) raises similar concerns. It broadly prohibits bribery involving "any business, transaction, or series of transactions" of a state government or agency. Like the "intangible right of honest services," the phrase "business, transaction, or series of transactions" provides no meaningful limitation on the statute's bribery prosecutions and makes the statute constitutionally infirm. Thus, reasonable jurists could conclude that they must limit § 666(a)(2) in the same way that this Court limited the honest-services fraud statute in *McDonnell*—to "official acts."

Absent an "official act" requirement, § 666(a)(2) will render *McDonnell* a dead letter. Most state agencies receive $10,000 in federal funding—the threshold for a prosecution under § 666. If that statute does not impose an "official act" requirement, then the government could avoid *McDonnell*'s reach simply by prosecuting the bribery

of a state official under § 666(a)(2) instead of the honest-services fraud statute. This alone is more than enough to show a "substantial question" under § 3143(b)(1)(B).

There are no other impediments to bail pending appeal. The District Court twice found by clear and convincing evidence that Mr. Lindberg is neither a flight risk nor a danger to the safety of any person or the community under 18 U.S.C. § 3143(a). The District Court also correctly assumed that Mr. Lindberg had raised two substantial questions with respect to his only other count of conviction (for conspiracy to commit honest-services fraud). First, the District Court improperly directed a verdict on the "official act" element of honest-services fraud—an error that even the government objected to at trial. Second, the honest-services conviction was based on the mere reassignment of tasks from one government employee to another, which is not like a lawsuit, hearing, or administrative determination and therefore not an "official act" under *McDonnell*. Finally, if a court were to decide these issues in Mr. Lindberg's favor, then the remedy would be reversal or a new trial on all counts for which the District Court ordered his imprisonment.

Mr. Lindberg's application for bail is unlike those that Circuit Justices have denied over the years. His entitlement to relief is plain even after giving great deference to the District Court. And although not required by statute or rule, there are serious questions concerning the validity of his conviction—a circumstance that has previously warranted intervention by a Circuit Justice.

Mr. Lindberg's application for bail pending appeal should be granted on the same conditions of release imposed previously by the District Court.

Statement of Jurisdiction and Authority of a Circuit Justice

Mr. Lindberg was convicted of two offenses against the United States: (1) conspiracy to commit honest-services fraud under 18 U.S.C. §§ 1343, 1346, 1349, and (2) federal program bribery under 18 U.S.C. § 666(a)(2). The United States District Court for the Western District of North Carolina (Cogburn, J.) entered a final judgment on September 4, 2020. A.2-8. Mr. Lindberg timely noticed an appeal to the United States Court of Appeals for the Fourth Circuit after that judgment was announced but before it was entered by the District Court. A.10; *see also* Fed. R. App. P. 4(b)(2). The Fourth Circuit's jurisdiction is secured by 28 U.S.C. § 1291.

Mr. Lindberg promptly sought release pending appeal from the District Court and the Fourth Circuit under 18 U.S.C. § 3143(b). Both courts denied that relief. A.14; A.23-24 (Sentencing Hearing Tr. 84:12-85:15); A.29.

The Chief Justice of the United States, as Circuit Justice for the Fourth Circuit, has the authority to grant bail pending appeal under 18 U.S.C. § 3143(b). *See also* Sup. Ct. R. 22.3, 22.5. The Chief Justice is a "judicial officer of a Federal appellate court" authorized to grant release under Chapter 207 of Title 18. 18 U.S.C. § 3141(b). A "judicial officer" is defined to include "any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States." *Id.* § 3156. Section 3041, in turn, authorizes "any justice or judge of the United States" to order the release of a person for "any offense against the United States." *Id.* § 3041.

Background

1. In late 2017, Mike Causey, the Commissioner of Insurance of North Carolina, approached federal authorities about investigating Mr. Lindberg. A.34. In an initial FBI interview, Mr. Causey noted that Mr. Lindberg had supported his political opponent in the last election. A.76-77 (Trial Tr. 1410:20-1411:8). Despite this revelation and the fact that the government had no reason to believe Mr. Lindberg had committed a crime, the FBI agreed to investigate him and use Mr. Causey as a confidential informant. A.34-35.

In early 2018, Mr. Lindberg and a codefendant, John Gray, began talking to Mr. Causey about issues Mr. Lindberg's companies were having with the North Carolina Department of Insurance. *Id.* The conversations focused mainly on an employee within the Department whom Mr. Lindberg felt was treating his companies unfairly. A.35-36. In these meetings, Mr. Lindberg, Mr. Gray, and another codefendant, John Palermo, discussed ideas for resolving this issue, including reassigning oversight of Mr. Lindberg's companies to someone else in the Department. A.36-37. They also discussed having Mr. Causey hire Mr. Palermo, but the parties quickly abandoned that idea. A.36-43. At the same time, no one—not Mr. Lindberg or anyone else—raised the idea that the staffing change would secure a predetermined outcome on the Department's review of Mr. Lindberg's businesses.

Despite repeated opportunities, involving nearly 30 FBI recordings, A.61-63, Mr. Lindberg and his associates never offered anything of value to Mr. Causey or suggested anything improper. Dissatisfied, the FBI pressed Mr. Causey to solicit a bribe. A.55, 60 (Trial Tr. 538:17-21, 1094:14-18).

Thereafter, in a meeting in March 2018, after observing that he would "get pushback" for reassigning work within the Department, Mr. Causey asked Mr. Lindberg: "[W]hat's in it for me?" A.113, 115.[1] In response, Mr. Lindberg said they wanted Mr. Causey "to be the commissioner that creates the best industry in the state," and they would "do whatever it takes" to support his "re-election." A.116. Mr. Lindberg then raised the idea of an independent expenditure committee. A.116.

Over the next few months, Mr. Causey continued to apply pressure to Mr. Lindberg and Mr. Gray. For example, in one conversation with Mr. Gray, Mr. Causey mentioned that Mr. Lindberg had given "millions of dollars" to other politicians and that, since Mr. Causey was "the insurance commissioner," he should be "high on" Mr. Lindberg's "radar list." A.121. Mr. Causey tied that pressure to his agreement to reassign regulatory oversight of Mr. Lindberg's companies to a different deputy commissioner—one who had not been accused of treating Mr. Lindberg's businesses unfairly. Mr. Causey told Mr. Lindberg that once he had "money in the bank," he would "go forward" with reassigning oversight of Mr. Lindberg's businesses. A.126. Mr. Causey further pressed Mr. Lindberg for a payment to his personal checking account. A.131. In response, Mr. Lindberg questioned the legality of such a contribution, A.131, and Mr. Causey's solicitation went nowhere. Rather, Mr. Lindberg emphasized that he was only prepared to make campaign contributions, and only within "the bounds of North Carolina election law." A.133. Ultimately, Mr.

[1] The exhibits at trial consisted of audio recordings, but the parties prepared transcripts for the jury. This application cites to government transcripts.

Lindberg made contributions to an independent expenditure committee and the North Carolina Republican Party. A.138-39.

In the end, there was no evidence that Mr. Lindberg's campaign contributions were tied to an outcome on any regulatory matter. Just the opposite, undisputed witness testimony showed that reassigning oversight of Mr. Lindberg's companies from one deputy to another was not intended to achieve a predetermined outcome. A.70, 72 (Trial Tr. 1306:13-16, 1308:4-8). Moreover, Mr. Lindberg, while secretly being recorded by the FBI, told Mr. Causey that he had no problem with "thorough" and "rigorous" regulation. A.127. He simply expressed the view that the assigned regulator did not understand his businesses and was treating them unfairly, A.162-63, and he emphasized that the Department should enforce the law without bias and on "an even playing field," A.132. Notably, Mr. Causey admitted at trial that Mr. Lindberg "continually told me how [he] wanted fair and tough regulation." A.54 (Trial Tr. 508:18-19).

2. A grand jury indicted Mr. Lindberg, Mr. Gray, Mr. Palermo, and another codefendant on two counts: (1) conspiracy to commit bribery under the honest-services fraud statute, 18 U.S.C. §§ 1343, 1346, 1349; and (2) bribery under 18 U.S.C. § 666(a)(2). A.137-38, 153. It alleged a *quid pro quo* based on Mr. Lindberg's contributions to the independent expenditure committee and the North Carolina Republican Party in exchange for the reassignment of regulatory oversight of Mr. Lindberg's companies from one deputy commissioner to another.

A. At trial, Mr. Lindberg argued that 18 U.S.C. § 666(a)(2), like the honest-services fraud statute, needed to be limited to an "official act" to save it from constitutional defect. *E.g.*, A.96 (Trial Tr. 1584:20-25). Mr. Lindberg based his argument on *McDonnell*. *Id.*

The District Court rejected Mr. Lindberg's argument. It refused to limit § 666 to an "official act" that involves a formal exercise of government authority similar to a lawsuit, hearing, or administrative determination. Instead, at the government's request, the court merely instructed the jury that a § 666 violation could not be premised on "[s]etting up a meeting, hosting an event, talking to another official, sending a subordinate to a meeting, or simply expressing the support for a constituent." A.101 (Trial Tr. 1784:16-18). Beyond that short list of limitations, the District Court required the government to prove only that Mr. Lindberg intended to influence "any business, transaction, or series of transactions" by the North Carolina Insurance Department.

Mr. Lindberg also planned to argue to the jury that Mr. Causey's agreement to reassign the task of overseeing Mr. Lindberg's companies to another employee within the Insurance Department was not an "official act" under the honest-services fraud statute. But the district court held that the "official act" element is a legal question that the court—not the jury—decides: "I'm going to tell [the jury] that it's an official act." A.73 (Trial Tr. 1346:7-8).

Mr. Lindberg and the government repeatedly objected to the District Court's decision to forbid the jury from deciding the "official act" element. *E.g.*, A.83, 86,

92-93, 95 (Trial Tr. 1453:13-24, 1456:9-14, 1548:24-1549:19; 1579:13-19). The government, for its part, "beg[ged]" the court not to give the instruction. A.73 (Trial Tr. 1346:10). And the government warned the court: "Whether something qualifies as an 'official act' is an issue for a properly instructed jury, so long as it is not something the Supreme Court held categorically insufficient to constitute official action . . . ." A.166.

Nevertheless, the District Court instructed the jury to find an "official act" as long as it found an agreement to reassign tasks among deputy commissioners:

> *In this case* the charge is that the question or matter is the removal and replacement of the senior deputy insurance commissioner in charge of overseeing the regulatory review of Defendant Lindberg's insurance companies. *You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner would constitute an official act.*

A.100 (Trial Tr. 1781:1-7) (emphasis added). The court was concerned that if it did not do so, then different juries could reach different results on similar sets of facts. A.91-92 (Trial Tr. 1547:19-1548:3). The court forbade Mr. Lindberg from offering certain evidence on this element and barred him from arguing this point to the jury: "if someone argues to the jury that this is not an official act, then I'll have to step in and say *the Court's going to rule that it is an official act*." A.89 (Trial Tr. 1466:5-8 (emphasis added)); *see also* A.80-81, 88 (Trial Tr. 1450:11-1451:22, 1465:12-25).

B. The jury convicted Mr. Lindberg and Mr. Gray on both counts. It acquitted Mr. Palermo. A.106-07 (Trial Tr. 1829:21-1830:6).

After the jury's verdict, the government moved to remand Mr. Lindberg into custody immediately, but the District Court refused. Applying 18 U.S.C. § 3143(a),

the District Court found by clear and convincing evidence that Mr. Lindberg was neither a flight risk nor a danger to any person or the public. It did so based on Mr. Lindberg's longstanding compliance with his conditions of release and his commitment to seeing the judicial process through. A.108 (Trial Tr. 1836:12-15, 21-25).

Thereafter, Mr. Lindberg timely moved for a judgment of acquittal or a new trial. His motion raised three significant issues: (1) whether § 666(a)(2) must be limited to "official acts" to preserve its constitutionality; (2) whether the district court improperly directed a verdict on the "official act" element of honest-services fraud; and (3) whether substantial evidence supported a finding of an "official act." Mem. of Law in Support of Mot. for Judgment of Acquittal or New Trial, *United States* v. *Lindberg*, No. 5:19-cr-22 (W.D.N.C. Apr. 2, 2020), Dkt. No. 213-1. The district court denied the motion. *See* A.31-32.

The District Court sentenced Mr. Lindberg to more than seven years in prison—almost three times Mr. Gray's two-and-a-half-year sentence. App. A (Final Judgment). Another codefendant, who had pled guilty before trial, received no prison time. Final Judgment, *United States* v. *Lindberg*, No. 5:19-cr-22 (W.D.N.C. Aug. 28, 2020), Dist. Ct. Dkt. No. 257.

3. Following sentencing, the District Court denied Mr. Lindberg's motion for release pending appeal. A.14. "Assuming Lindberg raised a substantial question on the official act instruction as to honest services fraud," the court reasoned, "he has not raised a substantial question as to the official act instruction as to" § 666. A.23

(Sentencing Hearing Tr. 84:18-22). The court based its reasoning on decisions in other circuits and the lack of an explicit reference to an "official act" in the text of § 666. A.23-24 (Sentencing Hearing Tr. 84:22-85:5). It did not address the fact that the honest-services fraud statute similarly lacks an explicit reference to an "official act." Nor did it address the fact that the Fourth Circuit had granted release pending appeal to Governor McDonnell, who made a then-novel and similar argument about limiting the honest-services fraud statute.

At the same time, the District Court denied a motion by the government to remand Mr. Lindberg into custody immediately following sentencing. A.20-21 (Sentencing Hearing Tr. 81:11-82:7). In so ruling, the court necessarily reaffirmed its finding that Mr. Lindberg is neither a flight risk nor a danger to any person or the public under 18 U.S.C. § 3143(a). The District Court did not set a report date for Mr. Lindberg, deferring instead to the Bureau of Prisons to set that date. A.25 (Sentencing Hearing Tr. 86:4-9).

4. Mr. Lindberg timely noticed an appeal to the United States Court of Appeals for the Fourth Circuit. A.10. Immediately upon the docketing of the appeal, Mr. Lindberg moved the Fourth Circuit for an order granting bail pending appeal. Mot. for Release Pending Appeal, *United States* v. *Lindberg*, No. 20-4470 (4th Cir. Sept. 10, 2020), Dkt. No. 5.

On September 23, 2020, the Fourth Circuit entered a one-sentence order at the direction of Judge Motz denying Mr. Lindberg's motion for bail pending appeal. A.29.

The order does not offer an explanation for the denial. A.29. Judges Keenan and Thacker concurred. A.29.

5. On September 30, 2020, the Bureau of Prisons designated Mr. Lindberg to serve his sentence at the Bureau's facility in Montgomery, Alabama, and directed him to report by October 20, 2020. In the interim, Mr. Lindberg remains free on bail, and he has continued to comply with the conditions of his release, which include GPS monitoring and periodic reporting to his probation officer. He has never violated any condition of his release, and he is vigorously pursuing his appellate rights.

Reasons for Granting the Application

I. Mr. Lindberg is Entitled to Bail Even After Giving Great Deference to the District Court.

Circuit Justices have "a responsibility to make an independent determination on the merits" of an application for bail. *Mecom* v. *United States*, 434 U.S. 1340, 1341 (1977) (Powell, J., in chambers). Although they have accorded "'great deference'" to decisions of district courts with respect to bail, *id.* (quoting *Harris* v. *United States*, 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers)), there are limits on the discretion of judicial officers to deny bail pending appeal.

The Bail Reform Act of 1984 provides, in relevant part, that a person "shall" be entitled to bail pending appeal if the judicial officer finds "(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and "(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in" either "reversal" or "a new trial." 18 U.S.C. § 3143(b)(1).

As explained below, § 3143(b)(1)(B) does not erect a high bar: A defendant need only show that his appeal raises a question that "could be decided either way" and that, "if decided in favor of the [defendant]," the "likely" remedy is "reversal or a new trial on all counts for which the district court imprisoned the defendant." *Steinhorn*, 927 F.2d at 196; *accord United States* v. *Miller*, 753 F.2d 19, 23 (3d Cir. 1985).

Mr. Lindberg's application plainly satisfies each of the necessary requirements. His appeal will raise at least three substantial questions of law, and if a court resolves those questions in his favor, the remedy will be reversal or a new trial on every count for which imprisonment was imposed. In addition, the District Court twice found by clear and convincing evidence that Mr. Lindberg is neither a flight risk nor a danger to any person or the public under 18 U.S.C. § 3143(a).

A. Mr. Lindberg's Appeal Raises Substantial Questions—*i.e.*, Questions that a Reasonable Jurist Could Decide Either Way.

The courts of appeals have described a "substantial question" as one that a reasonable jurist "*could*" decide "either way." *Steinhorn*, 927 F.2d at 196 (emphasis added). In other words, it "is one of more substance than would be necessary to a finding that it was not frivolous." *Giancola*, 754 F.2d at 901. A "substantial question" could include issues that are "novel" or have "not been decided by controlling precedent." *Miller*, 753 F.2d at 23. It simply has to be "fairly debatable." *United States* v. *Garcia*, 340 F.3d 1013, 1021 n.5 (9th Cir. 2003) (quoting *United States* v. *Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985)).

Mr. Lindberg's application plainly satisfies this requirement. As explained, below, in light of *McDonnell*, it is at least debatable whether 18 U.S.C. § 666(a)(2)

must embrace an "official act" requirement. The resolution of this question in Mr. Lindberg's favor would imperil his conviction for federal program bribery, and it was *the sole basis* on which the District Court denied bail pending appeal. Indeed, the District Court assumed (correctly) that Mr. Lindberg's appeal will raise two substantial questions related to his other conviction for conspiracy to commit honest-services fraud: (a) whether the District Court improperly directed a verdict on the "official act" element of honest-services fraud, and (b) whether the mere reassignment of tasks from one government employee to another—without any agreement on a regulatory outcome—is sufficient to qualify as an "official act" under *McDonnell*.

1. A Substantial Question Exists As to Whether, in Light of *McDonnell*, 18 U.S.C. § 666(a)(2) Must Be Limited to "Official Acts" to Preserve Its Constitutionality.

Jurists could fairly debate whether, to avoid 18 U.S.C. § 666(a)(2)'s unconstitutionality, a court must interpret that statute to embrace 18 U.S.C. § 201's "official act" requirement. *McDonnell* plainly supports Mr. Lindberg's side of that debate.

In *McDonnell*, the government agreed to give meaning to the vague phrase "the intangible right of honest services," used in 18 U.S.C. § 1346, by limiting it to § 201's definition of an "official act." 136 S. Ct. at 2365. And the government agreed to extend that same limitation to Hobbs Act extortion. *Id.* In the government's view, however, an "official act" encompassed "*any* decision or action, on *any* question or matter, that may at *any time* be pending, or which may by law be brought before *any* public official, in such official's official capacity." *Id.* at 2367.

The Supreme Court rejected the government's interpretation of an "official act" because it raised three "significant constitutional concerns." *Id.* at 2372. First, the Court noted that the government's proposed definition would cast a "pall" over constituents' efforts to seek redress from their elected officials. *Id.* The proposed definition was so broad that "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.* Second, despite the government's effort to replace a vague phrase—"the intangible right of honest services"—with a more concrete one, the Court explained that, under the government's proposed definition, "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." *Id.* at 2373. Finally, the Court noted the "significant federalism concerns" raised by the government's broad definition, which intruded on a state's "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *Id.*

To mitigate these concerns, the Supreme Court adopted three components that make up an "official act": (1) the matter must involve a "formal exercise of governmental power" akin to "a lawsuit, administrative determination, or hearing"; (2) the matter must have been "pending" or "may by law be brought" before a public official; and (3) there was a "decision" or "action" on the matter. *Id.* at 2370-72. Indeed, the Court declined to invalidate the honest-services fraud statute and Hobbs Act extortion as "unconstitutionally vague" precisely because the parties had defined those statutes "with reference to § 201." *Id.* at 2375.

The same constitutional concerns at the heart of *McDonnell* exist with § 666(a)(2). That statute punishes anyone who gives a thing of value to a government agent "in connection with any business, transaction, or series of transactions of such organization, government, or agency." 18 U.S.C. § 666(a)(2).

In its broadest sense, "any business, transaction, or series of transactions" goes beyond the unconstitutional definition proposed by the government in *McDonnell*. 136 S. Ct. at 2367 (explaining that the government had proposed to define an "official act" to mean "any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official's official capacity" (emphases removed)). By reaching "*any* business, transaction, or series of transactions," Section 666(a)(2) could criminalize commonplace interactions between officials and constituents that fall short of "official acts." 18 U.S.C. § 666(a)(2) (emphasis added). It would also turn federalism on its head by subjecting state officials and constituents to stricter standards under § 666(a)(2) than federal officials face under § 201 or the honest-services fraud statute. To avoid these constitutional issues, § 666(a)(2) should be defined with reference to § 201 and limited to bribery for "official acts" as articulated in *McDonnell*.

As in any debate, there are counterpoints, but none suggests that a reasonable jurist could rule only in the government's favor. And that is all a judicial officer is required to determine when considering an application for bail pending appeal.

In denying Mr. Lindberg's post-trial motion, the District Court emphasized that "the official act limitation is nowhere to be found in the federal funds bribery

statute." A.44. But the same could be said about the honest-services fraud statute and the Hobbs Act. 18 U.S.C. §§ 1343, 1346, 1951(a) (nowhere including an "official act" requirement). Still, the Supreme Court read those statutes to embrace an "official act" requirement to avoid the same constitutional issues raised by § 666(a)(2). And there is a stronger case here for reading § 201's "official act" requirement into § 666: The latter statute was enacted to "mend the split" among federal courts of appeals over whether § 201 punishes bribes to "state and local officials." *United States* v. *Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (citing S. Rep. No. 98-225, at 369-70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11).

The District Court also reasoned that, unlike other federal bribery statutes, § 666(a)(2) includes two unique requirements: "(1) the transaction must involve a 'value of $5,000 or more,' *see* 18 U.S.C. § 666(a)(2); and (2) the organization, government, or agency must receive, in any one year period, benefits in excess of $10,000 under a federal program, *see id.* § 666(b)." A.45. Contrary to the District Court's suggestion, these requirements do not address the concerns identified in *McDonnell*. The $5,000 threshold is not a meaningful limitation on the statute's "business, transaction, or series of transactions" element because courts have held that the amount of the bribe payment may be used to determine the value of the governmental service. *See*, *e.g.*, *United States* v. *Marmolejo*, 89 F.3d 1185, 1194 (5th Cir. 1996), *aff'd sub nom. Salinas* v. *United States*, 522 U.S. 52 (1997). As for the $10,000 prerequisite, there is no requirement that "the bribe in question had any particular influence on federal funds." *Salinas*, 522 U.S. at 61.

In addition, the District Court suggested that the Supreme Court had already resolved any vagueness and federalism concerns associated with § 666(a)(2). A.45-46. Again, the District Court was mistaken.

Contrary to the District Court's suggestion, *Skilling* v. *United States*, 561 U.S. 358 (2010), does not have any bearing on § 666(a)(2)'s "any business, transaction, or series of transactions" element. *Skilling* addressed, instead, vagueness concerns associated with proscribing "undisclosed self-dealing" under the honest-services fraud statute. 561 U.S. at 409. And *Skilling* resolved those vagueness concerns by limiting that statute to "only bribery and kickback schemes." *Id.* at 412. *Skilling* is therefore consistent with *McDonnell*'s efforts at constitutional avoidance through statutory construction.

Nor did *Sabri* v. *United States*, 541 U.S. 600 (2004), address whether the "any business, transaction, or series of transactions" element raised federalism concerns. It simply held that § 666(a)(2) was a facially valid exercise of Congress's Article I "power to keep a watchful eye on expenditures and on the reliability of those who use public money." *Sabri*, 541 U.S. at 608. That Congress has this general power does not resolve the full scope of Congress's authority to "'set[ ] standards' of 'good government for local and state officials.'" *McDonnell*, 136 S. Ct. at 2373 (quoting *McNally* v. *United States*, 483 U.S. 350, 360 (1987), *superseded by statute in part*, 18 U.S.C. § 1346); *accord Sorich* v. *United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of cert.) (noting the serious federalism concerns posed by allowing the

federal government to "define the fiduciary duties that a town alderman or school board trustee owes to his constituents").

Finally, the District Court was mistaken in its view that a *quid pro quo* requirement is enough to extinguish any vagueness and federalism concerns posed by a federal bribery statute. A.46. In *McDonnell*, the Supreme Court explained that, under the government's interpretation of an "official act," "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." 136 S. Ct. at 2372. Thus, a *quid quo pro* requirement did not ameliorate the "significant constitutional concerns" posed by the government's "expansive interpretation of 'official act.'" *Id.*

The District Court was not alone in believing that *McDonnell* does not extend to § 666(a)(2); other courts have suggested the same. But each of these decisions recites to varying degrees the same flawed reasoning offered by the District Court. *See United States* v. *Ng Lap Seng*, 934 F.3d 110, 134-41 (2d Cir. 2019) (stating that § 666(a)(2) did not require an "official act" instruction to address constitutional concerns "as applied" to UN ambassadors before holding that there was sufficient evidence to support a conviction even under that standard); *United States* v. *Suhl*, 885 F.3d 1106, 1112-13 (8th Cir. 2018) (noting that § 666's text lacks an "official act" requirement before holding that the government had proven one in any event).[2]

[2] The District Court cited two other decisions in its order denying Mr. Lindberg's post-trial motion, but neither addressed whether § 666 should be read to require an "official act." The first case, *United States* v. *Porter*, held only that § 666(a)(1)(B) has

Critically, the existence of these decisions does not defeat Mr. Lindberg's entitlement to bail pending appeal. None was binding on the District Court, which was presented with no decision on all fours from this Court or the Fourth Circuit. Moreover, the District Court was simply required to determine whether jurists "could" rule "either way" on an issue that "likely" warrants a new trial. *Steinhorn*, 927 F.2d at 196. That low standard is plainly satisfied here.

2. The District Court Correctly Assumed that There Are Substantial Questions Involving Mr. Lindberg's Other Conviction for Honest-Services-Fraud Conspiracy.

The District Court denied bail pending appeal solely on the incorrect view that Mr. Lindberg had not raised a substantial question relating to his conviction for federal program bribery. A.23 (Sentencing Hearing Tr. 84:18-22). It "assum[ed]"—correctly, as shown below—that Mr. Lindberg had raised at least two substantial questions involving his conviction for conspiracy to commit honest-services fraud. *Id.*

a. There is a Substantial Question as to Whether the District Court Impermissibly Directed a Verdict for the Government on the "Official Act" Element.

In *United States* v. *Gaudin*, the Supreme Court recognized that courts play a critical role in instructing the jury on the law and insisting that the jury follow those instructions, but two functions are solely the province of the jury: (1) "determin[ing] the facts" and (2) "apply[ing] the law to those facts and draw[ing] the ultimate

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no quid-pro-quo requirement. 886 F.3d 562, 565-66 (6th Cir. 2018). And the second, *United States* v. *Maggio*, discussed only whether, in light of *McDonnell*, the government had to prove a nexus between criminal activity and federal funds. 862 F.3d 642, 646 n.8 (8th Cir. 2017).

conclusion of guilt or innocence." 515 U.S. 506, 513-14 (1995). "Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the [government]"—even a partial verdict—"no matter how overwhelming the evidence." *Sullivan* v. *Louisiana,* 508 U.S. 275, 277 (1993).

McDonnell is built on the same foundation: It defined the legal standard for an "official act" but stated that it "was up to *the jury*, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*." 136 S. Ct. at 2371 (emphasis added). At a result, the Court held that, at a minimum, Governor McDonnell was entitled to a new trial because a properly instructed jury was required to "find[ ]" each of the three components that make up an "official act." *Id.* at 2374.

Contrary to *McDonnell*, the District Court believed an "official act" is a legal question solely for the court to resolve: "I'm going to tell [the jury] that it's an official act." Trial Tr. 1346:7-8; *see also id.* 1451:2-4. As a result, it directed the jury on how to resolve that issue:

> *In this case* the charge is that the question or matter is the removal and replacement of the senior deputy commissioner in charge of overseeing the regulatory review of Defendant Lindberg's insurance companies. *You're hereby instructed that the removal or replacement of a senior deputy commissioner by the commissioner would constitute an official act.*

Trial Tr. 1781:1-7 (emphasis added). In addition, the District Court barred the defense from arguing this issue to the jury: "if somebody argues to the jury that this

is not an official act, then I'll have to step in and say *the Court's going to rule that it is an official act*." *Id.* at 1466:5-8 (emphasis added); *id.* at 1465:12-16 (similar).

The government immediately recognized the error in the district court's thinking. It "beg[ged]" the court not to give the instruction. *Id.* at 1346:10. And the government warned the district court: "Whether something *qualifies* as an 'official act' *is an issue for a properly instructed jury*, so long as it is not something the Supreme Court held categorically insufficient to constitute official action . . . ." A.166 (emphasis added). The government's statements at trial are enough to show that this issue "could be decided either way." *Steinhorn*, 927 F.2d at 196.

Undeterred, the District Court lamented that "it cannot be that a jury in the same state can find an act to be unofficial and another jury find it to be official when it's the same act." A.84 (Trial Tr. 1454:21-23). But under the Constitution, two juries could—and sometimes do—hear the *exact same evidence* and render *contradictory verdicts*. That was the bargain struck by the Framers when they refused to "entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968).

To be sure, the District Court recognized correctly that elected officials and their constituents need some level of certainty so that they can comport their conduct to what the law requires. *See* A.82 (Trial Tr. 1452:21-23). But that certainty is not secured by the right to a trial by jury. It is secured instead by the Due Process Clause and its mandate that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in

a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson,* 461 U.S. 352, 357 (1983). A court can enforce that definiteness in a case where the indictment fails to allege a violation of the offense, or where the government fails to submit evidence sufficient to sustain a conviction beyond a reasonable doubt. But once the court determines that the facts alleged and proved could constitute an offense, it is up to the jury to decide guilt. Otherwise, the court's ruling would have the effect of directing a verdict for the government—something it can never do. *Sullivan,* 508 U.S. at 277.

In opposing Mr. Lindberg's application to the Fourth Circuit for bail pending appeal, the government argued that district courts may give "examples of conduct that satisfies a statutory term" so "long as they leave to the jury the prerogative of determining whether the specific conduct on trial meets the definition." Gov't Opp'n 19, *United States* v. *Lindberg*, No. 20-4470 (4th Cir. Sept. 15, 2020), Dkt. No. 10. But that is not what happened here.

No rational jury would view the district court's instruction as inviting consideration of the three components of an "official act" that *McDonnell* says a jury must find: whether (1) it was a "matter" involving a "formal exercise of governmental power" akin to "a lawsuit, administrative determination, or hearing"; (2) the matter was "pending" or "may by law be brought" before a public official; and (3) there was a "decision" or "action" on the matter. 136 S. Ct. at 2370-72, 2374. Instead, the jury was instructed to find an "official act" if it found an agreement to reassign tasks among deputy insurance commissioners. A.100 (Trial Tr. 1781:4-7).

The government's chief authority, *United States v. Hastie*, 854 F.3d 1298 (11th Cir. 2017), is not to the contrary. Gov't Opp'n 19-20, *United States* v. *Lindberg*, No. 20-4470 (4th Cir. Sept. 15, 2020), Dkt. No. 10. In *Hastie*, the district court instructed the jury on a generic statement of law—that the statutory definition of "personal information" in the Driver's Privacy Protection Act, 18 U.S.C. § 2725(3), includes e-mail addresses. 854 F.3d at 1305. Here, in contrast, the District Court reduced a three-part inquiry to whether the jury found that there was an agreement to reassign the tasks "of a senior deputy commissioner by the commissioner." A.100 (Trial Tr. 1781:4-7). And *Hastie* itself warned of the danger where, as here, an instruction is "so specific that it essentially directs the verdict." 854 F.3d at 1307.

In the end, though, the District Court was not required to agree with Mr. Lindberg that its instruction was erroneous when it evaluated his application for bail pending appeal. *See Miller*, 753 F.2d at 23 ("[W]e are unwilling to attribute to Congress the cynicism that would underlie [§ 3143(b)] were it to be read as requiring the district court to determine the likelihood of its own error."). Rather, the court was simply required to find that the point is the subject of fair debate. That low standard is met here, too.

b. There is a Substantial Question as to Whether the Mere Reassignment of Tasks from One Government Employee to Another is Legally Sufficient to Support a Finding of an "Official Act."

Mr. Lindberg's appeal will present a third substantial question: whether a reasonable jury could conclude that the reassignment of tasks among government employees is an "official act." *McDonnell* limited that term to a "decision" or "action"

on "a formal exercise of governmental power that is similar in nature" to a "lawsuit," "hearing," or administrative "determination" that is "pending" or "may by law be brought" before a public official. 136 S. Ct. at 2372.

The District Court's conclusion—that an "official act" includes the "removal or replacement" of an employee on specific tasks—was the first of its kind. No other district or circuit court, let alone the Fourth Circuit, has found that reassigning a task resembles a decision on a lawsuit, hearing, or administrative determination. The lack of "controlling precedent" and "novel[ty]" of this issue reinforce that it is a "substantial question." *Miller*, 753 F.2d at 23.

The District Court highlighted the uncertainty and lack of existing precedent on whether task reassignment is an "official act." *See* A.75 (Trial Tr. 1359:5-7) ("And there's nothing in the Fourth Circuit that directly answers that question yet, but we'll get the answer in this case if we send her up."); *see also* A.81, 82, 83, 85, 86 (Trial Tr. 1451:2-7, 1452:5-11, 1453:1-4, 1455:25-1456:6). The government acknowledged the same during the hearing on Mr. Lindberg's motion to dismiss the indictment. *See* A.172 (Mot. to Dismiss Tr. 15:22-23) (noting "[t]here are very few cases that fall into the middle of the spectrum like this case does"). These acknowledgements underscore that the issue is at the very least "close," *Steinhorn*, 927 F.2d at 196, or "fairly debatable," *Garcia*, 340 F.3d at 1021 n.5.

No out-of-circuit decision removes the uncertainty around this issue. Although the District Court relied on *United States* v. *Fattah*, 914 F.3d 112 (3d Cir. 2019), in denying Mr. Lindberg's motion to dismiss and post-trial motion, that decision does

not address the question in this case. *Fattah* holds only that when a "public official hires an employee to work in his government office, he has engaged in an official act." *Id.* at 157. It does not answer whether an action that does not affect the employment status of an existing employee—here, the reassignment of tasks among employees—constitutes an "official act." Regardless, *Fattah* does not bind the Fourth Circuit, which remains free to disagree with *Fattah*'s conclusory, half-page analysis.

Nor was there any evidence that the reassignment was intended to have a predetermined outcome on the regulation of Mr. Lindberg's companies. Rather, the jury heard undisputed testimony that there was never an agreement to give Mr. Lindberg's companies special regulatory treatment. A.70 (Trial Tr. 1306:13-16, 1308:4-8). Mr. Lindberg also repeatedly stated that he had no problem with "thorough" and "rigorous" regulation. A.127; *see also* A.54 (Trial Tr. 508:18-19). He simply expressed the view that the assigned regulator did not understand his businesses and was treating them unfairly. A.162-63. That is the "basic compact underlying representative government"—that "public officials will hear from their constituents and act appropriately on their concerns." *McDonnell*, 136 S. Ct. at 2372.

In short, whether the reassignment of tasks qualifies as an "official act" is at least debatable. No further showing is necessary to show a "substantial question" under § 3143(b)(1)(B).

B. The Questions Raised by Mr. Lindberg Would Result in Reversal or, at a Minimum, a New Trial on All Counts on Which He Has Been Ordered Imprisoned.

The questions that Mr. Lindberg's appeal raises are also "likely" to result in reversal or a new trial. 18 U.S.C. § 3143(b)(1)(B). Here, "likely" does not mean a

likelihood of success on the merits. *See Garcia*, 340 F.3d at 1021 n.5; *see also Miller*, 753 F.2d at 23. Rather, "likely" means that, assuming the court resolves the merits in the defendant's favor, the "likely" remedy would be "reversal or a new trial on all counts for which the district court imprisoned the defendant." *Steinhorn*, 927 F.2d at 196; *accord Miller*, 753 F.2d at 23.

This step is intended to filter out those issues that, although "close," are not "important enough to warrant reversal or a new trial." *Steinhorn*, 927 F.2d at 196. For example, an evidentiary ruling might be subject to fair debate, but any error associated with it might be harmless beyond a reasonable doubt. *See id.*

The instructional errors identified above—both the failure to give an "official act" instruction for § 666(a)(2) and the directed verdict on the "official act" element of conspiracy to commit honest-services fraud—would result in a new trial on all counts for which the District Court ordered Mr. Lindberg imprisoned. That is the standard remedy for instructional errors of this magnitude. *E.g.*, *McDonnell*, 136 S. Ct. at 2375.

On prior occasions, the government has argued that because, in its view, there was "overwhelming" evidence that "Mr. Lindberg offered a bribe in exchange" for "removing or replacing a senior deputy insurance commissioner," any instructional error was harmless beyond a reasonable doubt. Gov't Opp'n 22, *United States* v. *Lindberg*, No. 20-4470 (4th Cir. Sept. 15, 2020), Dkt. No. 10. But this argument fails. Accepting it would mean ignoring that an "official act" is a separate element of the offense—beyond the existence of a *quid pro quo*.

In any event, the District Court barred Mr. Lindberg from arguing to the jury the absence of an "official act": "The thing I'm not going to allow is that – it's not going to do you any good to get up there and argue this was not an official act when I'm going to tell the jury during the charge it is an official act." A.88 (Trial Tr. 1465:12-16); *see also* A.89 (Trial Tr. 1466:5-8). Moreover, through its instruction, the District Court told the jury that it should ignore any evidence that the Insurance Department did not consider task reassignment a formal exercise of authority. A.100 (Trial Tr. 1781:4-7). Thus, even though the Insurance Department can take formal action only through an order "made in writing and signed by the Commissioner or by his authority," N.C. Gen. Stat. § 58-2-45, the District Court blinded the jury to evidence that the Commissioner regularly reassigned tasks among his deputies through informal conversation, A.51, 56-57, 66-67 (Trial Tr. 95:3-14, 593:6-594:2, 1215:23-1216:24). The District Court's instructional errors were therefore not harmless beyond a reasonable doubt, and here, Mr. Lindberg need only show that they were "likely" not harmless.

As for the remaining question—whether the reassignment of tasks among government employees is sufficient to find an "official act"—a favorable ruling would result in a judgment of acquittal on the honest-services count and, if § 666(a)(2) embraces an "official act" requirement, a judgment of acquittal on the federal-program-bribery count too. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1,

11 (1978). Thus, Mr. Lindberg's appeal raises questions that, if decided in his favor, would likely result in reversal or a new trial.

C. The District Court Has Twice Found by Clear and Convincing Evidence that Mr. Lindberg is Neither a Flight Risk Nor a Danger to Any Person or the Community.

The District Court twice found that Mr. Lindberg is neither a flight risk nor a danger under 18 U.S.C. § 3143(a). That statute requires the immediate detention of a defendant "awaiting imposition or execution of [a] sentence" *unless* "the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released."

After the jury verdict, the District Court applied this standard and rejected the government's argument that Mr. Lindberg required immediate detention as a flight risk. The District Court based this finding on Mr. Lindberg's longstanding compliance with his release conditions and his commitment to seeing the judicial process through. A.108 (Trial Tr. 1836:12-15, 21-25). Moreover, the government has never suggested, much less argued, that Mr. Lindberg is a danger to the safety of any person or the community.

At sentencing, the District Court again rejected the government's argument that Mr. Lindberg was a flight risk who needed to be detained immediately. Although the court observed that Mr. Lindberg "has the wherewithal to go," it nonetheless found that Mr. Lindberg was unlikely to flee because doing so "would certainly impact his business." A.21 (Sentencing Hearing Tr. 82:4-7). Notably, the court made this finding after hearing from Mr. Lindberg's counsel, who cited the probation officers' assessments that Mr. Lindberg was not a flight risk and provided information on Mr.

Lindberg's money transfers, foreign investments, and foreign contacts so that the court could make an informed decision. A.17-20 (Sentencing Hearing Tr. 78:18-79:11, 79:22-81:8). The District Court's finding applied both to its inquiry under § 3143(a) and the inquiry that immediately followed under § 3143(b)(1)(A), which governs bail pending appeal and recites the identical flight-risk standard. A.21, 23-24 (Sentencing Hearing Tr. 82:4-21, 84:12-85:5).

The District Court's finding that Mr. Lindberg is not a flight risk and implicit finding that he is not a danger are reviewed for clear error. *United States* v. *Williams*, 753 F.2d 329, 333 (4th Cir. 1985); *United States* v. *Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004). A reviewing court cannot set aside a finding for clear error unless it harbors the "definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The government cannot make that showing here.

II. Because Mr. Lindberg's Entitlement to Relief is Plain, the Issues Raised are Important, and There are Serious Questions About the Validity of His Conviction, Mr. Lindberg's is Among Those Rare Cases Where a Circuit Justice's Intervention is Warranted.

Although Mr. Lindberg is required to show nothing further to establish his entitlement to bail pending appeal, *see* 18 U.S.C. § 3143(b), it is apparent that Circuit Justices have exercised their authority to grant bail sparingly over the last fifty years. Of the numerous applications that have been tendered, only a handful have been granted. This suggests that something more is required to warrant a Circuit Justice's intervention. It exists here.

Mr. Lindberg's application turns exclusively on issues of law; his entitlement to relief is plain; and his appeal presents "important question[s]" worthy of this Court's time. *See, e.g.*, *Tuong Dinh Hung* v. *United States*, 439 U.S. 1326, 1327 (1978) (Brennan, J., in chambers); *see also In re Lewis*, 418 U.S. 1301, 1301 (1974) (Douglas, J., in chambers) (noting that the applicant's case raised "[s]ubstantial First Amendment claims"). That alone places Mr. Lindberg's application in a rarified category. *Cf. Mecom*, 434 U.S. at 1341-22 (holding that there was no reason to disturb the lower courts' finding that a substantial bond was necessary to secure the applicant's appearance).

Beyond that, Mr. Lindberg's appeal presents "serious questions concerning the validity" of his conviction. *E.g.*, *Brussell* v. *United States*, 396 U.S. 1229, 1230 (1969) (Marshall, J., in chambers) (explaining that the application for bail, which followed the applicant's incarceration for civil contempt, raised "serious questions" under *Curcio* v. *United States*, 354 U.S. 118 (1957), about a corporate custodian's personal right "not to testify" concerning the location of corporate records). In the past, a showing of this nature was considered sufficient to warrant intervention by a Circuit Justice. *E.g.*, *Chambers* v. *Mississippi*, 405 U.S. 1205 (1972) (Powell, J., in chambers) (granting bail pending appeal before the Court set aside the applicant's conviction in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973)). The same holds true here. The District Court's misapprehension of the "official act" element—including its patently wrong directed verdict—casts serious doubt on the validity of Mr. Lindberg's conviction.

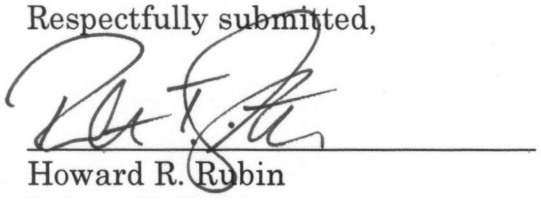
If his conviction is overturned, Mr. Lindberg will never recover the time lost to incarceration. The Bail Reform Act of 1984 guards against this potential injustice by mandating that a judicial officer "shall" grant bail pending appeal in this precise circumstance. 18 U.S.C. § 3143(b)(1).

Conclusion

The application for bail pending appeal should be granted on the same conditions of release imposed previously by the District Court. In addition, because the Bureau of Prisons has ordered Mr. Lindberg—who is currently free on bail under 18 U.S.C. § 3143(a)—to report to prison by October 20, 2020, he respectfully requests a decision on his application before that time or an administrative stay to preserve the status quo while his application is adjudicated.

Dated: October 2, 2020

Respectfully submitted,



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