UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. [2] ARIEL GUTIERREZ-RODRIGUEZ, Defendant.	CRIM. NO. 20-19 (FAB)

MOTION TO DISMISS COUNTS 1, 3, 5 AND 7
FOR FAILURE TO CHARGE SANCTIONABLE *QUID PRO QUO*

TO THE HONORABLE COURT:

The defendant, ARIEL GUTIERREZ-RODRIGUEZ, through the undersigned counsel, respectfully requests the dismissal of Counts 1, 3, 5, and 7 in the above-captioned indictment. As set forth in this motion, those counts do not sufficiently or adequately charge violations to the wire fraud statute.

SUMMARY OF THE ARGUMENT

Counts 1, 3, 5, and 7 must be dismissed because they fail to adequately charge constitutionally sufficient violations to the honest services modality of the wire fraud statutes, 18 U.S.C. §§ 1343, 1346, and 1349. The indictment fails to charge any "official act" in exchange for anything of value.

Honest services fraud under § 1346 covers ***only*** bribery and kickback schemes. *See United States v. Skilling*, 561 U.S. 358, 368 (2010). In this context, "bribery" takes its meaning from the federal bribery statute, where it is unlawful for a "a public official ... directly or indirectly, [to] corruptly demand[ ], seek[ ], receive[ ], accept[ ], or agree[ ] to

receive or accept anything of value ... in return for [ ] being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A). The bribery statute further defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

Critically, such question, matter, cause, suit, proceeding or controversy "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell v. United States*, --- U.S. ---, 136 S.Ct. 2355, 2373 (2016). The words "pending" and "may by law be brought" require the issue in question to be "specific and focused"—"the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." 136 S.Ct. at 2369, 2373. Furthermore, "may by law be brought" means "something within the specific duties of an official's position—the function conferred by the authority of his office." 136 S.Ct. at 2369. The public official charged with honest services fraud must have "made a decision or [taken] an action ***'on'*** that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." 136 S.Ct. at 2368. (Emphasis added.) Finally, the decision or action requirement may also be fulfilled by "exert[ing] pressure on another official to perform an 'official act,' or [ ] advis[ing] another official, knowing or intending that such advice will form the basis for an 'official act' by another official." 136 S.Ct. at 2372.

The only and single potentially official action taken by co-defendant Keleher, as claimed in the indictment , is her signing a letter dated July 17, 2018 in which she states that the Puerto Rico Department of Education ("PR DOE") had no objection to Company C's proposed expansion of a road affecting 1,034 square feet of the Padre Rufo School. **Pursuant to the principles established by the above-cited caselaw, such a statement from the PR DOE Secretary did not comprise an "official act."** Instead, it was a mere statement of no opposition to Company C's projected road expansion affecting 1,034 square feet of land adjacent to Padre Rufo School, land that *did not belong to the PR DOE* and for which the issuance of the permit to construct was properly before another agency. While another agency (not the PR DOE) might have had before it the "decision" on the "question, matter, cause, suit, proceeding, or controversy" as to whether Company C should acquire the land or whether Company C should do a projected road expansion, the PR DOE had no say in it. Consequently, the letter and what it stated constituted no "official act."

Conspicuously, the letter neither purported to give nor assented to cede anything to Company C, much less 1,034 square feet of the Padre Rufo School's land. Even if this letter was "related" to the projected road construction, it was not a formal exercise of governmental power similar in nature to a "cause, suit, proceeding or controversy," nor was it a decision or action "***on***" a "question" or "matter" "pending" before the PR DOE, nor was it one that could have been brought by law before the PR DOE. *McDonnell*, 136

S.Ct. at 2370. Finally, such a statement was not "something within the specific duties of [Keleher's] official position." 136 S.Ct. at 2369.

Failing to state a sanctionable "official act," the indictment does not properly charge a *quid pro quo* constituting honest services fraud through bribery in violation of the charged wire fraud statutes.

THE INDICTMENT

Ariel Gutierrez and Julia Keleher are charged in Counts 1, 3, 5 and 7 with a conspiracy to commit honest services fraud, along with several substantive counts of honest services fraud, all in violation of 18 U.S.C. §§ 1349, 1343 and 1346. It is alleged that they devised and intended to devise a scheme to defraud the people of Puerto Rico of their right to Ms. Keleher's faithful and honest services as Secretary of the Department of Education, through bribery.[1]

The government claims that Mr. Gutierrez allegedly facilitated Keleher's receipt of financial benefits in connection with her lease and purchase of an apartment in Ciudadela, and that this was supposedly "in exchange" for Keleher signature on a letter "purporting to give 1,034 square feet of the Padre Rufo School to Company C." Indictment, *Dkt.* 3, ¶ 21. Throughout the indictment, the government avers that by signing the letter on July 17, 2018, Keleher "puport[ed] to **give** 1,034 square feet of [land of] the Padre Rufo School

[1] For purposes of this motion, the allegations in the indictment are taken at face value, but only *arguendo*. *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (for pretrial motion purposes, the court "must presume the truth of the allegations in the charging instruments.")

to Company C" and "authoriz[ed] Company C to **acquire** 1,034 square feet of [land of] the Padre Rufo school to Company C for its business-related purpose." *Dkt*. 3, ¶¶ 21, 29. (Emphasis added.)

DISCUSSION

Counts 1, 3, 5 and 7 fail to adequately charge a violation to the honest services wire fraud statute, since there is no allegation of any "decision" or "action" constituting an "official act" taken in exchange for anything of value.

Applicable Standard

To be "sufficient under the Constitution," an indictment must "fairly plead[] all of the essential elements of the offense." *United States v. McLennan*, 672 F.2d 239, 242 (1st Cir. 1982); *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir. 1982) ("It is well settled that an indictment must charge all of the essential elements of the crime in question"); *United States v. Barbato*, 471 F.2d 918, 921 (1st Cir. 1973). Procedurally, in relevant part, Fed. R. Crim. P. 7(c) provides that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

It is immaterial that the indictment gives the defendant notice of the offense charged simply by citing the purported applicable statute: an indictment must *both* charge all the essential elements of the offense *and* give the defendant sufficient notice of the offense charged. *See Russell v. United States*, 369 U.S. 749, 763 (1962); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *McLennan*, 672 F.2d at 242. These two requisites of a sufficient indictment derive from separate constitutional provisions. "The requirement of notice

derives from the defendant's Sixth Amendment right to be informed of the nature and cause of the accusation. The inclusion of all elements also derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present."[2] *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988) (en banc).

The indictment in the instant case grossly fails to meet this standard. As required by *McDonnell*, honest services fraud committed through bribery requires an intent to influence or to be influenced in the performance of "an official act." No official act is alleged nor can one be inferred from the indictment, rendering it insufficient and fatally flawed.

The honest services wire fraud statute

Generally

Title 18 U.S.C. § 1343 provides, in pertinent part, that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, […] by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire […] communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. §1349 provides that it is also a crime to attempt or conspire to violate § 1343.

[2] Accordingly, a bill of particulars or subsequent informative or explanatory government pleadings do not cure an insufficient indictment. *See United States v. Russell*, 369 U.S. 770 ("[I]t is a settled rule that a bill of particulars cannot save an invalid indictment.")

McNally

In 1987, the Supreme Court held in *McNally v. United States*, 483 U.S. 350, (1987), that § 1343 did not penalize a scheme to defraud citizens of their intangible rights to the honest and impartial services of their officials and that it was limited to the protection of property rights. *McNally* made clear that the statute did not "refer to the intangible right of the citizenry to good government." 483 U.S. at 356. The Supreme Court found such a prohibition vague in the statute and chose to "read § 1341 [and § 1343] as limited in scope to the protection of property rights" instead of "constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials […]" 483 U.S. at 360.

In response to *McNally*, Congress enacted 18 U.S.C. § 1346 adding that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." No further meaning to "honest services" was provided in the legislation.

Skilling

Later, the Supreme Court interpreted the meaning of "honest services" in *United States v. Skilling*, 561 U.S. 358 (2010). There, the ex-CEO of Enron was charged under the theory that he deprived the company and its shareholders of his honest services by manipulating the company's financial situation and, in so doing, inflating the stock's price, in order to continue receiving his salary and bonuses. Skilling argued that § 1346 was

unconstitutionally vague, lacking a definition of "honest services." The Supreme Court acknowledged that the statute was constitutionally problematic and choose to limit its application to the "core" of cases "involving offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." 561 U.S. at 405-407. The Court held that Skilling incurred in a self-dealing conflict of interest, constituting neither bribery nor a kickback scheme, which was not prohibited by the wire fraud statute. Pursuant to *Skilling*, the wire fraud statute does not penalize "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." 561 U.S. at 412.

It is now clear that § 1346 is ***limited*** to schemes to deprive others of honest services ***only*** by participating in bribery or a kickback scheme when there is a violation of a fiduciary duty fixing the honest services that are owed. 561 U.S. at 405-407. "Interpreted to encompass ***only*** bribery and kickback schemes, § 1346 is not unconstitutionally vague." 561 U.S. at 412. (Emphasis added.)

Answering the concern that § 1346 was still vague because it did not define "bribery" either, the Supreme Court held that the § 1346 "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. *See e.g.*, 18 U.S.C. §§ 201(b); 666(a)(2); 41 U.S.C. § 52(2)." 561 U.S. at 413. (Emphasis added). The *Skilling* Court cited with approval *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.)

(examining honest services fraud involving bribery in light of elements of bribery under other federal statutes such as 18 U.S.C. § 201); *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (applying 18 U.S.C. § 201 definition of "bribery" to honest services fraud); *United States v. Kemp*, 500 F.3d 257, 281-286 (3rd Cir. 2007) (same).

McDonnell

Six years later, the Supreme Court confronted another vagueness attack to the honest services fraud statute, in *McDonnell v. United States*, -- U.S. ---, 136 S.Ct. 2355 (2016). McDonnell was a former governor of Virginia who was charged with honest services fraud for accepting payments in exchange for his influence in organizing university studies of the payor company's product. Seemingly following *Skilling*'s directive, the parties agreed that the definition of "bribery" provided by § 201 – the general bribery statute – should be applied to determine if the former state governor had committed honest services fraud through "bribery." This is so since § 1346 does not define what "honest services" are, nor what constitutes "bribery" in violation of that statute. 136 S.Ct. at 2365.

The federal bribery statute, 18 U.S.C. § 201, provides that it is unlawful for a "a public official ... directly or indirectly, corruptly [to] demand[ ], seek[ ], receive[ ], accept[ ], or agree[ ] to receive or accept anything of value ... in return for [ ] being influenced in the performance of any official act." 18 USC § 201(b)(2)(A). This same bribery statute further provides that:

> "the term 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be

> pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3).

Interpreting § 201(a)(3)'s definition of "official act," as applied to honest services fraud, the *McDonnell* Court set forth the following critical holding:

> The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act."

136 S.Ct. at 2371-2372.

Regarding the meaning of the terms "question" or "matter," the Court concluded that "a 'question' or 'matter' must be similar in nature to a cause, suit, proceeding or controversy.'" 136 S.Ct. at 2369. The Supreme Court expressly declined to define "question" or "matter" as including a decision or action on "any 'subject or aspect that is in dispute, open for discussion, or to be inquired into,'" or a decision or action on "any 'subject' of 'interest or relevance,'" instead ruling that "[u]nder a more confined interpretation, … 'question' and 'matter' may be understood to refer to a formal exercise of governmental power that is similar in nature to a 'cause, suit, proceeding or

controversy,' but that does not necessarily fall into one of those prescribed categories." 136 S.Ct. at 2368-2369.

In another critical holding, the Court found that, because § 201(a)(3) required that to qualify as an "official act," the "question" or "matter" had to be "pending" or "may by law be brought" before "any public official," "suggesting something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." 136 S.Ct. at 2369. The reference to "may *by law* be brought" was understood to "convey[] **something within the specific duties of an official's position—the function conferred by the authority of his office,"** something that could be "pending either before the public official who is performing the official act, or before another public official." 136 S.Ct. at 2369 (Italics in original and bold added.)

The facts in *McDonnell* make the relevance of its holding to the instant prosecution pellucidly clear. The prosecution alleged that the former governor had received thousands of dollars in payments and gifts from a company that developed and marketed a nutritional supplement named Anatabloc, derived from anatabine. The company aimed to obtain Federal Drug Administration approval for Anatabloc as an anti-inflammatory drug and needed independent research studies on that use. According to the indictment, the company paid the former governor in exchange for his efforts to get the state's public universities to conduct that research. The prosecution claimed that McDonnell had committed at least five "official acts," including: arranging meetings for representatives of the payor company with state government officials, who were subordinates of the governor, to discuss and

promote Anatabloc; hosting and attending events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients; contacting other government officials as part of an effort to encourage Virginia state research universities to initiate studies of anatabine; promoting the company's products and facilitating its relationships with Virginia government officials by allowing the company to invite individuals to exclusive events at the Governor's Mansion; and recommending that senior government officials meet with the company's executives to discuss ways that the company's products could lower healthcare costs. 136 S.Ct. at 2365-2366.

As a **first** step in the analysis to determine if any part of that course of conduct constituted "an official act" under § 201(a)(3), the Supreme Court examined **whether there was a "question" or "matter" at issue**. 136 S.Ct. at 2370. It listed three potential "questions" or "matters": (1) whether researchers at any of Virginia's state universities would initiate a study of Anatabloc; (2) whether the State of Virginia would allocate grant money for the study of anatabine; and (3) whether the health insurance plan for state employees would cover Anatabloc. The Court concluded that "those qualify as questions or matters under § 201(a)(3)" since they are "focused and concrete, and **each involves a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing**." 136 S.Ct. at 2370. (Emphasis added.)

Secondly, the Court focused on **whether McDonnell's conduct "qualifie[d] as a decision or action on any of those three questions or matters."** 136 S.Ct. 2370

(Emphasis added). The Court found that McDonnell had not made a "decision" or taken an "action" "within the meaning of § 201(a)(3), **even if the event, meeting, or speech [was] related to a pending question or matter**. … **Instead, something more [was] required: § 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so."**[3] 136 S.Ct. at 2370 (Italics in original; bold and underlining added.)

The Supreme Court concluded that McDonnell's actions or decisions were not "of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee," nor did they "count as a 'question' or 'matter' under § 201(a)(3)." 136 S.Ct. at 2358-2359. Accordingly, McDonnell did not commit honest services fraud.

The *McDonnell* Court explicitly rejected the government's more expansive reading of § 201's definition of "official act" based on several constitutional concerns including that "bribery" was limited to "*quid pro quo* corruption—the exchange of a thing of value

[3] The Court further explained that:

> For example, a decision or action to initiate a research study—or a decision or action on a qualifying step, such as narrowing down the list of potential research topics—would qualify as an "official act." A public official may also make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy" by using his official position to exert pressure on *another* official to perform an "official act." In addition, if a public official uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an "official act" by another official, that too can qualify as a decision or action for purposes of § 201(a)(3).

McDonnell, 136 S.Ct. at 2370.

for an "official act." "In the government's view [advanced in *McDonnell*], 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. The Court was also concerned that "the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement,'" which also required a more "constrained interpretation." 136 S.Ct. at 2373. "Significant federalism concerns" warranted this interpretation as well since "[a] State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority[],' including the prerogative to regulate the permissible scope of interactions between state officials and their constituents." 136 S.Ct. at 2373 (Citations omitted).

Finally, in its interpretation of "official act" in *McDonnell*, the Supreme Court "decline[d] to 'construe the statute in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards' of 'good government for local and state officials.'" 136 S.Ct. at 2373, *citing McNally*.

The definition of "official act" and the charges in this case

Here, from the face of the indictment, there is no alleged "official act" sanctionable under § 1346. The single supposed governmental action or decision referenced is the letter signed by Keleher on July 17, 2018. *Dkt.* 3, ¶¶ 20, 21 and 29. This document merely contains, at most, a statement of no opposition by the PR DOE to proposed road

construction by Company C involving 1,034 square feet of land adjacent to Padre Rufo School. This land was not property of the PR DOE. The statement in the letter conferred no authorization nor did it consent to Company C doing any construction or acquiring anything. This document was not a formal exercise of the PR DOE's governmental power ***on*** any "question" or "matter" ***pending*** before the agency similar in nature to a lawsuit before a court or a determination before the agency itself.

Whether Company C could be authorized to expand the road or acquire the 1,034 square feet of land was a "question" or "matter" that may have been before another agency, but there is nothing in the indictment either suggesting that Keleher exerted pressure on another official to perform an "official act," nor that she advised another official, knowing or intending that such advice will form the basis for an "official act" by another official. Just as in *McDonnell*, the indictment falls fatally short of charging that honest services fraud was committed through bribery, since it cannot support even an inference of a ***quid*** **for an "official act" that would be the *quo***. The honest services fraud charges must be dismissed.

***McDonnell's* two-step analysis and the charges in this case**

The case for dismissal is even more compelling when the two-step legal analysis in *McDonnell* is applied. First, the "question, matter, cause, suit, proceeding or controversy" "pending" before the PR DOE must be identified. 136 S.Ct. at 2368. That question, matter, cause, suit, proceeding or controversy "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency,

or a hearing before a committee. The words "pending" and "may by law be brought" require the issue in question to be "specific and focused"—"the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." Furthermore, "may by law be brought" means "something within the specific duties of an official's position—the function conferred by the authority of his office." 136 S.Ct. at 2369, 2373.

The question or matter in this case, from the face of the indictment, could be identified as:

- Should Company C acquire 1,034 square feet of land adjacent to Padre Rufo School?
- Should Company C construct a road in 1,034 square feet of land adjacent to Padre Rufo School?

None of those questions or matters were "pending" before the DOE. They might have been "pending" before other government agencies such as the Puerto Rico Department of Transportation[4] or the Puerto Rico Permit Management Office.[5] Second, neither the PR DOE nor Keleher could exercise any "formal governmental power" to adjudicate those questions or matters. Keleher ***never*** issued a decision or took any action on those matters, nor did she ***ever*** have any authority to decide or act upon them. The July 17, 2018 letter might have been "related" to those pending questions or matters – pending before another

[4] The Puerto Rico Department of Transportation administers public roads. 19 P.R.L.A. § 411, *et seq*.

[5] The Permit Management Office is in charge of authorizing construction and real estate development projects in Puerto Rico. 23 P.R.L.A. § 9011, *et seq*.

agency – but "**something more is required: § 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so.**" 136 S.Ct. at 2370. The indictment does not charge an "official act" in exchange for anything of value. Therefore, no bribery is alleged nor can it be inferred.

Accordingly, the indictment in this case does not even pass *McDonnell's* first step of identifying (1) any "question" or "matter" (2) "pending" before the DOE (3) that required a "formal exercise of governmental power" and (4) that is "similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." 136 S.Ct. at 2371-2372.

Even if this court could find, for the sake of the argument, a "question" or "matter" pending before the PR DOE, this case would also fail the second step in *McDonnell's* analysis, requiring that Keleher made a decision or took an action "on" that "question, matter, cause, suit, proceeding, or controversy, or agreed to do so," or that she agreed to exert "pressure" on another official to perform an "official act." 136 S.Ct. at 2372. Because the July 17, 2018 letter could not provide any authorization or consent for any government act, and because it was not binding on any of the plans of Company C (nor on any other agency, even if "related" to Company C's plans), it cannot be said that the letter constituted

a "decision" or "action" "*on*" any of those plans.[6] Counts 1, 3, 5 and 7 must therefore be dismissed.[7]

Other support for dismissal

The dismissal of these counts is supported by appellate court caselaw as well. In *Woodward v. United States*, 905 F.3d 40 (1st Cir. 2018), the First Circuit applied *McDonnell's* definition of "official act" under § 201(a)(3) to examine, *via* a writ of *coram*

[6] The July 17, 2018 letter and the language in the indictment stating that Kelleher consented to "give" Company C the 1,034 square feet of land and that she "consented" for Company C to "acquire" that property shows that the government may have misrepresented the facts of the case and/or misconstrued the applicable legal principles before the grand jury, leading to other legal issues that will be raised by separate motion.

[7] In Puerto Rico the DOE is not in the business of ceding public land nor issuing construction permits nor authorizing road expansions. It has no authority for any of those matters according to its enabling act. *See* 3 P.R.L.A. § 9801, *et seq*. Therefore, the very allegations in the indictment show that the letter is not even "related" to the core authority, or purpose, of the Secretary of the DOE and, therefore, was not something that could have been by law brought before the DOE. *See McDonnell*, at 2369 ("'may *by law* be brought' conveys something within the specific duties of an official's position—the function conferred by the authority of his office.")

Moreover, the indictment does not imply that this letter entailed an "adjudication" of any right or obligation of any party to any process, nor could it have been subjected to any review – judicial or otherwise. *See* 3 P.R.L.A. §§ 2102(b), (g) and (l), and 2171. The allegations evidence no order or resolution by the DOE adjudicating any right or obligation nor "any specific decision or action" by the DOE. *See* 3 P.R.L.A. § 2102(g). In fact, the July 17, 2018 letter was a mere statement with no binding effect on anyone nor on any entity, nor was it related to any issue that needed by law to be brought before the DOE. *See Unlimited v. Mun. de Guaynabo*, 183 D.P.R. 947, 973-975 (2011) (an "endorsement" to a construction project is not binding upon the agency that is considering the construction permit of that project); *Comunidad Especial Las Calandrias v. Junta de Planificación*, 2009 WL 1438156 (TCA) (page 12) (the agency with jurisdiction to issue constructions permits is not required to consider other agencies' comments or endorsements before granting permits and may only do so discretionally); *Unigold Development Corp. v. Mun. Autónomo de Cayey*, 2018 WL 7079189 (TCA) (same); *Capó López v. Departamento de Recursos Naturales y Ambientales*, 2005 WL 16660371 (TCA) (an "endorsement" is not an administrative order or resolution subject to judicial review).

nobis, the conviction of a former member of Massachusetts House of Representatives' for honest services fraud. The court concluded that leading the opposition to certain bills and actively promoting other bills to benefit a third party who is making payments or giving rewards, under circumstances showing that but for the legislator's action the bills would have reached different results in the legislative process, constituted "official acts.[8] *See also United States v. McDonough*, 727 F.3d 143 (1st Cir. 2013) (pre-*McDonnell* case applying § 201(a)(3) to honest service fraud); *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017) (finding that a legislative resolution and proclamation honoring a doctor was an "official act," for purposes of honest services fraud where defendant was a state legislator who received benefits and rewards for that doctor and as Speaker of the state assembly exercised formal governmental power, but vacating conviction because the jury instruction, defining official act as *any* action taken or to be taken under color of official authority, was overbroad under *McDonnell*); *United States v. Boyland*, 862 F.3d 279 (2d Cir. 2017) (applying § 201(a)(3) and *McDonnell's* interpretation of honest services fraud under § 1343 and agreeing with the defendant and the government that the jury instruction stating an official act encompassed "decisions o[r] actions generally expected of a public official, *including but not limited to contacting or lobbying other governmental agencies,* and advocating for his constituents" was erroneous); *United States v. Van Buren*, 940 F.3d 1192

[8] The First Circuit cautioned that its holding in *Woodward* responded to the nature of the collateral attack of the conviction through the extraordinary writ of a *coram nobis* and clarified that, on a direct appeal under *de novo* review standard, the jury instruction stating that "any decision or action in the enactment of a legislation" might "not precisely comport with *McDonnell*." 905 F.3d at 45.

(11th Cir. 2019) (vacating conviction for honest services fraud under *McDonnell's* interpretation of "official act").

Should this court engage in any other interpretation of honest services fraud through bribery as charged in this case under § 1346, without contemplating *McDonnell*'s definition of "official act," that would constitute the application of a constitutionally vague statute. *McDonnell*, 136 S.Ct. at 2373 ("'Invoking so shapeless a provision to condemn someone to prison' for up to 15 years raises the serious concern that the provision 'does not comport with the Constitution's guarantee of due process.'").[9] *McDonnell's* interpretation of "official act" and its application to provide meaning to honest services fraud under Section 1346 "avoids this 'vagueness shoal.'" 136 S.Ct. at 2373, *citing Skilling*, 561 U.S. at 368.

CONCLUSION

The indictment in this case does not identify: (1) any "question" or "matter" (2) "pending" before the DOE (3) requiring a "formal exercise of governmental power" (4) that is "similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S.Ct. at 2368-2372. Nor does it allege that any public official made a "decision" or took any "action" "*on*" any "question" or

[9] Given the application of § 201(a)(3) to define honest services fraud under § 1346, and given the limitation imposed on the meaning of "official act," the Supreme Court declined to invalidate § 1346 as unconstitutionally vague. *McDonnell*, 136 S.Ct. at 2375, *citing Skilling* ("Because we have interpreted the term "official act" in § 201(a)(3) in a way that avoids the vagueness concerns raised by Governor McDonnell, we decline to invalidate those statutes under the facts here.")

"matter" that was pending before the DOE. *McDonnell*, 136 S.Ct. at 2370. Because no inference can be drawn from the indictment that Keleher performed any "official act" in exchange for anything of value, Counts 1, 3, 5 and 7 fail to charge honest services fraud through bribery and must be dismissed.

WHEREFORE, defendant ARIEL GUTIERREZ-RODRIGUEZ requests the dismissal of Counts 1, 3, 5 and 7.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico, this 27th day of May, 2020.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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