IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. JULIO M. HERRERA-VELUTINI, Defendant.	CRIMINAL NO. 22-342 (RAM)

MOTION TO DISMISS COUNTS FIVE, SIX, AND SEVEN OF THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE

TO THE HONORABLE COURT:

COMES NOW the defendant, Julio M. Herrera-Velutini ("the Defendant" or "Mr. Herrera"), through his undersigned attorneys, and pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v), respectfully request dismissal of Counts Five, Six and Seven of the Indictment for the Government's failure to plead an essential element of the charged offenses.

INTRODUCTION

Mr. Herrera, aware of the high hurdle defendants face when attacking the sufficiency of an indictment, would not bring this motion if the facts and controlling legal precedent were not clearly on his side. Aside from its failed attempt to criminalize Mr. Herrera's lawful campaign contributions to former Governor Wanda Vazquez Merced ("Governor Vazquez"),[1] the Government also targeted Mr. Herrera through an undercover operation relating to purported campaign contributions to Governor Pedro Pierluisi ("Governor Pierluisi"). As set forth in greater detail below, the Indictment's claims against Mr. Herrera with respect to alleged contributions to

[1] As articulated in Governor Vazquez's Motion to Dismiss and Memorandum of Law in support thereof (Dkt. Nos. 193 and 193-1) which Mr. Herrera joined and incorporates by reference herein.

Governor Pierluisi fare no better than do its claims relating to alleged contributions to Governor Vazquez, and – accordingly – should be dismissed in their entirety.

For years, the Federal Bureau of Investigation (the "FBI") purposely interfered with the operations of Bancrédito International Bank & Trust (the "Bank"), a United States corporation where Mr. Herrera was the Chairperson, including surreptitiously intervening in and subverting privileged relationships with Bank counsel who were negotiating with Puerto Rico's Office of the Commissioner of Financial Institutions ("OCIF"). And yet, after having failed to establish that the Bank committed any crimes, and in recognition that Mr. Herrera had not engaged in any criminal activity concerning Governor Vazquez, the FBI ultimately resorted to engaging in a five-month sting operation, by tasking Joseph Fuentes ("Mr. Fuentes"), a confidential informant who *had* engaged in campaign-related crimes,[2] with masquerading as a person with access to Governor Pierluisi and making repeated, unrequested overtures to representatives of the Bank – including Frances Diaz ("Ms. Diaz"), the Bank's President[3] – with the false representation that Mr. Fuentes could assist the Bank in its negotiations with OCIF. In so doing, Mr. Fuentes requested a contribution not for Governor Pierluisi, but to an independent expenditure committee (a "Super PAC") that Fuentes controlled. As with its prior efforts, the FBI's five-month sting operation ultimately failed. Undeterred, the Government nonetheless filed charges against Mr. Herrera.

[2]The sheer, unfettered degree of Mr. Fuentes's misconduct as a confidential informant for the FBI cannot be understated and should be judicially noticed by this Court. Such misconduct included but was not necessarily limited to: (i) purchasing and concealing "burner" phones following receipt of a Government warrant; (ii) secretly informing third-parties of the Government's investigation, in an effort to aid them in avoiding scrutiny; and (iii) refusing to provide cooperative assistance against certain individuals who were highly relevant – if not utterly integral – to the Government's claims, including most notably Governor Pierluisi himself. That Mr. Fuentes engaged repeatedly in this conduct, yet remains the lynchpin of the Government's claims, calls into question the *entirety* of the allegations raised in the Indictment.

[3] The FBI engineered such an introduction between Mr. Fuentes and Ms. Diaz.

In Count Five, the Government purports to charge a conspiracy between Mr. Herrera, John Blakeman ("Mr. Blakeman") and Ms. Diaz to offer and give a bribe to Governor Pierluisi, in the form of a campaign contribution, in return for a promise by Governor Pierluisi to use his influence to ensure a favorable outcome for the Bank from an ongoing examination by OCIF, in violation of 18 U.S.C. § 666(a)(2) and in violation of 18 U.S.C. § 371. The Indictment also charges, in Count Six, a substantive violation of Section 666(a)(2) and, in Count Seven, a violation of the wire fraud and honest services fraud statutes, 18 U.S.C. §§ 1343 and 1346, based on the payment of the alleged bribe through a wire transfer. Each one of these counts are contingent on the bribery scheme described in Count Five.[4]

Nonetheless, and contrary to how the Government may seek to characterize the involvement of Mr. Fuentes and/or the alleged actions of the Bank, the Indictment fails entirely to allege any actual *quid pro quo* arrangement between Mr. Herrera and Governor Pierluisi. In fact, Governor Pierluisi — the lone "public official" of the purported bribery and wire-fraud scheme, and therefore the *only* person who could have manifested the required mutual understanding to exchange money for favor — was entirely unaware of Mr. Fuentes's actions and representations. Relatedly, the Indictment fails to even allege – because it cannot – that Mr. Fuentes *ever* even met or otherwise spoke with Mr. Herrera, or that Mr. Herrera *ever* actually requested that anything of value be provided to Governor Pierluisi, which is the explicit agreement mandated by governing precedent.

Moreover, and what the Government has consistently refused or otherwise failed to recognize, are that campaign contributions are constitutionally protected expressions of free speech. Recognizing the threat unfounded charges of bribery can pose to free speech, controlling

[4] Any reference to the allegations in the Indictment herein refers to the allegations in support of Counts Five, Six, and Seven.

precedent imposes a heightened evidentiary standard and requires the Government – where it alleges a bribery scheme predicated upon campaign contributions – to prove that such campaign contribution was part of an explicit and contemporaneous agreement, between the donor and public official, to exchange monies for official action (or inaction) and that the contribution actually controlled that action. *See McCormick v. United States*, 500 U.S. 257, 273 (1991) ("The receipt of such contributions is … vulnerable under the [Hobbs] Act as having been taken under the color of official right, but only if the payments are made *in return for an explicit promise or undertaking by the official to perform or not to perform an official act.* In such situations the official conduct *will be controlled* by the terms of the promise or undertaking") (emphasis added); *United States v. Sun–Diamond Growers*, 526 U.S. 398, 404–05 (1999).

As such, to permit the Government to proceed with the charged offenses, without pleading the "explicit *quid pro quo*" that *McCormick* requires, would chill democratic participation and cut against a fundamental-tenant of the U.S. political system—that private citizens can, and should to maintain a healthy democracy, be able reach out to their public officials on matters of concern. That outreach, whether direct or by-and-through third-parties – even those third-parties that exercise (or purport to exercise) "very strong influence over government decisions" – does not rise to the level of a crime. *See Percoco v. United States*, 598 U.S. ---, S.Ct. ---, 2023 WL 3356527, at *7 (May 11, 2023).[5]

Faced with this fatal flaw, and as set forth below, the Government is forced to rely upon on a series of false and legally invalid claims to charge the criminal violations. Such allegations

[5] Although the Court's examination in *Percoco* related to jury instructions, its underlying assessment is no less applicable here, particularly considering that the *Percoco* Court found that the jury instructions were – much like the Indictment against Mr. Herrera – "too vague," *id.* at *7, and that the standard they set "could also be used to charge particularly well-connected and effective lobbyists" as well. *Id.* (emphasis added.)

are insufficient to plead an essential element of the offenses charged in Counts Five, Six and Seven of the Indictment, and to inform Mr. Herrera of the facts upon which the charges rest, *see United States v. Troy*, 618 F.3d 27, 34–35 (1st Cir. 2010); therefore, the Indictment must be dismissed.

BACKGROUND

The Indictment charges Mr. Herrera with engaging in a bribery scheme involving Governor Pierluisi, in an attempt to attain a positive resolution of an OCIF examination and avoid filing certain reports under the Bank Secrecy Act. *See* Indictment at ¶¶ 135-180. Taken as true solely for purposes of the instant Motion to Dismiss,[6] the allegations in Counts 5 through 7 constitute a bare recitation of a timeline of events, engineered by the FBI and largely steered by persons *other than* Mr. Herrera or Governor Pierluisi, that culminated in an entirely legal campaign donation. Importantly, at no point does the Government allege, because it cannot, that Governor Pierluisi was aware of Mr. Fuentes' activities; that Mr. Herrera met with Mr. Fuentes during the relevant times; or that Mr. Herrera reached any agreement whatsoever with Governor Pierluisi.

Instead, the Government tries to manifest a bribery scheme by haphazardly connecting events that took place over the course of five months and that is supported only by the Government's fictional attempt to conjure Mr. Fuentes, who has never been a public official, into someone with the ability to speak and act on behalf of one. Notably, the only statements detailed in the Indictment which explicitly call for or otherwise reference a "bribe" derive from Mr. Fuentes himself—the FBI informant posing as a person with the ability to convey Mr. Herrera's valid concerns vis-à-vis OCIF's (and, unbeknownst to Mr. Herrera, the FBI's) overreach to Governor Pierluisi. *See* Indictment at ¶¶ 152, 155, 167. At no point does Mr. Herrera or even persons the

[6] Mr. Herrera disputes the accuracy of the allegations in the Indictment and does not waive any objections to the accuracy or completeness thereof by this filing. He accepts them as true for purposes of this motion because the law so requires.

Government would allege were acting on Mr. Herrera's behalf agree to accept the "bribe" arrangement sought by Mr. Fuentes or otherwise transfer the $50,000 requested by him.

Instead, the Government tries to paint a payment made almost two months later, and for an entirely different amount, as the culmination of the purported "scheme." Specifically, the Indictment alleges that, in July 2021, Mr. Herrera agreed to make a $25,000 payment to Fuentes's SuperPAC 2, *id*. at ¶ 168, and a Bank employee caused that amount to be transferred from the Bank's holding account to Fuentes's SuperPAC 2. *Id*. at ¶ 174. Inferences from course of conduct, for the reasons explained below, do not constitute an explicit *quid pro quo,* and even the acts the Government does attribute to Mr. Herrera, when substantively reviewed, reveal no illegal conduct.

LEGAL STANDARD

A. Standard for a Motion to Dismiss

An indictment must be "a plain, concise, and definite written statement of the essential facts constituting the offense charged[.]" Fed. R. Crim. P. 7(c)(1). Parroting the statutory text of the charged offense, although generally sufficient, will not stand absent a direct and express statement of the relevant facts that, "without any uncertainty or ambiguity, sets forth all the elements necessary to constitute the offence intended to be punished." *United States v. Carll,* 105 U.S. 611, 612 (1882); *see United States v. Savarese*, 668 F.3d 1, 6 (1st Cir. 2012); *United States v. Parigian*, 824 F.3d 5, 9 (1st Cir. 2016); *United States v. Miller,* 471 U.S. 130, 136 (1985) ("An indictment must include all of the essential elements of the crimes alleged therein, and each basis for conviction must be 'clearly set out in the indictment.'").

The importance of providing adequate notice to the accused cannot be understated; as sufficiency of information provided is key to a defendant's ability to craft their defense and "enter a plea without fear of double jeopardy," *United States v. Yefsky* , 994 F.2d 885, 893 (1st Cir. 1993)

(citing *Hamling v. United States* , 418 U.S. 87, 117 (1974)); *see United States v. Stepanets*, 879 F.3d 367, 372 (1st Cir. 2018), and is a basic tenant of an accused's Sixth Amendment rights. Thus, an indictment that fails to provide adequate notice is legally insufficient, *see Stepanets*, 879 F.3d at 372, and must be dismissed.

By extension, indictments that rely on speculation to establish an essential element of the charged offense must also fail. Specifically, an indictment cannot rely on "speculation" regarding "a fundamental part of the charge," *United States v. Bobo,* 344 F.3d 1076, 1083–84 (11th Cir. 2003), or otherwise "fail[ ] to allege the implicit element [of the charged offense,] explicitly[.]" *United States v. Pirro,* 212 F.3d 86, 93 (2d Cir. 2000). It is not enough for an indictment to possibly or even plausibly imply an essential element. Rather, the element must be "necessarily implied." *U.S. v. Palumbo Bros., Inc.,* 145 F.3d 850, 860 (7th Cir. 1998) ("The indictment must be "read to include facts which are necessarily implied" and "construed according to common sense.") (citations omitted); *accord Gov't of Virgin Islands v. Moolenaar,* 133 F.3d 246, 249 (3d Cir. 1998); *United States v. DeSalvo,* 41 F.3d 505, 513 (9th Cir. 1994).

Allowing innuendo, speculation, and the like, to form the basis of a fundamental or constituent element of the charged offense undermines the validity of the grand jury process and, importantly, undercuts the accused's fundamental right to avoid double jeopardy and formulate his or her defense. *See Pirro,* 212 F.3d at 92 ("[I]f the indictment does not state the essential elements of the crime, the defendant cannot be assured that he is being tried on the evidence presented to the grand jury or that the grand jury acted properly in indicting him."). Furthermore, ensuring the grand jury considered whether the *quid pro quo* element alleged is explicit is "anything but a technicality;" it is crucial to protecting constitutionally protected campaign finance

activities and required by *McCormick's* controlling precedent. *See United States v. Donagher*, 520 F. Supp. 3d 1034 (N.D. Ill. 2021).

An element of the offense is a fundamental (or constituent) part thereof if, to convict, the jury must find it to be true / have occurred. *See King v. United States,* 965 F.3d 60, 66 (1st Cir. 2020) ("An element is a 'constituent part[ ] of a crime's legal definition' that a jury must find to be true to convict the defendant."); *see also Elements of Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "elements" as the "constituent parts" of the crime "the prosecution must prove to sustain a conviction.").

In federal bribery and honest services cases involving campaign contributions and brought under 18 U.S.C. §§ 666(a)(2) and 2 and 1343 and 1346, the Government must prove the agreement to exchange money for political action (or inaction) was explicit, precedes the official conduct, and controls the terms of the undertaking or promise. *See McCormick*, 500 U.S. at 274; *McDonnell*, 579 U.S. 550; *Sun–Diamond Growers*, 526 U.S. at 404–05. Proof of an implicit or unspoken agreement is insufficient to meet the heightened evidentiary standard; instead, the "*pro*" or action linking the contribution and associated promise must be "be clear and unambiguous — and characterized by more than temporal proximity, winks and nods, and vague phrases[.]" *United States v. Benjamin*, No. 21-CR-706 (JPO), 2022 WL 17417038, at *10 (S.D.N.Y. Dec. 5, 2022). Given that proof of an "explicit" act is necessary to sustain a conviction of bribery or honest services wire fraud (or conspiracy to engage in the same), it is an *an essential element of those offenses* and must be pled, in clear and unambiguous terms, in the underlying indictment. For the reasons further developed below, Counts Five, Six, and Seven fail to allege any such explicit *quid pro quo*, an essential element of the charged offenses, and therefore must be dismissed.

B. The Elements of the Crimes Charged

Count Five of the Indictment purports to charge a conspiracy between Mr. Herrera, Mr. Blakeman, Ms. Diaz, and unnamed "others" to (1) bribe Governor Pierluisi, described as "Public Official A," with the intent to influence Governor Pierluisi in connection with an ongoing examination by OCIF of the Bank, in violation of 18 U.S.C. § 666(a)(2); and (2) willfully violate the Bank Secrecy Act ("BSA") by failing to file Suspicious Activity Reports, in violation of 31 U.S.C. § 5318(g) and 5322 and 31 C.F.R. § 1020.320. *See generally* ¶¶ 135–174.

As a preliminary matter, it is important to consider the language of each of the named statutes and their corresponding elements.

1. *Conspiracy Under Section 371*

Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

According to the First Circuit Pattern Criminal Jury Instructions, to prove the crime of conspiracy under Section 371, the government must prove three elements:

> (1) That the agreements specified in the indictment, and not some other agreements, existed;
> (2) that the defendant willfully joined in those agreements; and
> (3) that one of the co-conspirators committed an overt act in an effort to further the purpose of the conspiracy.

First Circuit Pattern Criminal Jury Instructions § 4.03.

"To act willfully means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed[.]" First Circuit Pattern Criminal Jury Instructions § 4.03 "Proof that [the defendant] joined the agreement must be based upon evidence of [his/her] own words and/or actions." *Id*. The First Circuit, in its Pattern Criminal Jury Instructions, defines an

"overt act" as "any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy." *Id*.

In addition, and in cases such as the matter at bar, where an indictment charges a conspiracy to bribe a public official through campaign contributions, the Government must prove an explicit agreement that the campaign contribution was made in return for the public official performing an official act. *See McCormick*, 500 U.S. at 273. As such, an indictment alleging a conspiracy to commit bribery through a campaign contribution, similar to an allegation of a substantive violation of the bribery statute, must offer proof that the principals explicitly agreed the monies transferred were conditioned upon and controlled the official's act. Inferences or recitations of events that, read together, may imply an agreement was formed, are insufficient to establish a violation of Section 371. Finding otherwise, would violate the defendant's First and Sixth Amendment rights.

2. *Bribery Under Section 666(a)(2)*

Section 666(a)(2) of Title 18 of the U.S. Code provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists[7] –
>
> (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 $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

To prove a violation of Section 666(a)(2), the Government must prove the existence of a *quid pro quo*, or a specific intent to give or receive something of value in exchange for an official act. *United States v. Turner*, 684 F.3d 244, 253 (1st Cir. 2012). When the alleged "*quid*" is a political contribution, however, the Government must satisfy a higher pleading standard to protect crucial

[7] The circumstance referred to in subsection (a) of Section 666(a)(2) 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.

First Amendment rights and prevent prosecutors from chilling democratic participation and punishing conduct that is necessary and central to our system of elective government.

Specifically, when the Government seeks to criminalize political contributions, it "operate[s] in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *see FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (Scalia, J., concurring) ("[C]ontributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections."). These First Amendment principles are at their pinnacle during political campaigns, *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989), and, while the Government may target "*quid pro quo*" corruption in this context, *Buckley*, 424 U.S. at 26–27, it must tread carefully when it does so.

As noted, in recognizing the need for guardrails, the Supreme Court in *McCormick* held that when the Government seeks to criminalize a political contribution, it must allege that the official and the donor engaged in an explicit *quid pro quo*. 500 U.S. at 274. In other words, the Indictment must allege the agreement to exchange campaign contributions for an official action is explicit: *i.e.*, not inferred from ambiguous statements or a circumstantial chronology of events, but *explicit*, meaning an actual, clear, and unambiguous agreement expressed by and between the charged parties. *Id*. at 273. Since then, a number of courts, including this one, acknowledged that the *McCormick* standard applies to 18 U.S.C. §§ 666(a)(1)(B) and 666(a)(2), in circumstances where the indictment alleges bribery in the form of campaign contributions. *See, e.g.*, *United States v. Perez-Otero*, 2023 WL 2351900 at *5 (D.P.R. Mar. 3, 2023).[8]

[8] This Court in *Perez-Otero* ultimately declined to apply the *McCormick* standard in that case, since "[a]s a threshold matter, a careful reading of the indictment against Pérez-Otero show[ed] that the government did not charge him with soliciting, demanding, accepting or receiving a campaign contribution." *Id.* In this case, by contrast, a single alleged contribution to a Super PAC is the *only* alleged *quid* in the charged scheme.

Mere implication of an agreement is insufficient to link an official act taken (or not taken) with monies or benefit received. Instead, as the Southern District of New York recently explained when dismissing an indictment alleging a Section 666(a)(2) violation—criminal liability for bribery, in the campaign contributions context, requires "***a contemporaneous mutual understanding*** that a specific *quid* and a specific *quo* are conditioned upon each other." *Benjamin*, 2022 WL 17417038, at *12 (emphasis added). To allow prosecutions based on anything less would chill constitutionally protected conduct, such as a donor's constitutionally-protected efforts to "garner influence over or access to elected officials" through provision of campaign support, *McCutcheon*, 572 U.S. at 208–09, or a politician's efforts "to be appropriately responsive to the preferences of [her] supporter," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015).

The United States is aware of and has conceded, on numerous occasions, that *McCormick* applies to prosecutions under 18 U.S.C. § 666, 1343, and 1346 that involve campaign contributions. *See, e.g., Pawlowski*, 351 F. Supp. 3d at 849*; United States v. Menendez*, 132 F. Supp. 3d 635, 641-43.

3. *Wire Fraud Under Sections 1343 and 1346*

Section 1343 of Title 18 of the U.S. Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television 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.

Section 1346 of Title 18 of the U.S. Code provides:

> For 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.

According to Section 4.13 of the First Circuit Pattern Criminal Jury Instructions, to establish the crime of wire fraud, the Government must prove three elements:

> First, a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, [defendant]'s knowing and willful participation in this scheme with the intent to defraud; and
>
> Third, the use of interstate [or foreign] wire communications, on or about the date alleged, in furtherance of the scheme.

ARGUMENT

A. The Government has Failed to Allege an Essential Element of the Offense for Each Count of the Indictment

1. *Count Five*

In Count Five of the Indictment, the Government alleges that Mr. Herrera conspired to offer and give a bribe to Governor Pierluisi through a campaign contribution. The Supreme Court has long recognized that – in order to bring charges on campaign contributions – the Government must prove that any such payment was made in connection with an explicit agreement between the parties, and with the promise of the public official to perform or not to perform an official act. *See McCormick, supra,* 500 U.S. at 273. The reasoning behind this explicit requirement is because giving a public official a campaign contribution constitutes speech and conduct protected by the First Amendment, even if made with the intent to influence the public official in helping or furthering a particular political agenda.

Despite invoking **Mr. Herrera's name no less than forty-five times in** Count Five alone, not once does the Government allege (or even purport to allege) an agreement by or between Mr. Herrera and Governor Pierluisi to pay or receive a bribe in exchange for some official act; much less the "explicit" agreement to take or forego some specific action, as required under *McCormick*.

Indeed, Count Five bears only five paragraphs – 145, 146, 147, 164 and 168 – which remotely allege *any* direct conduct by Mr. Herrera. And yet, a substantive examination of these paragraphs reveals that none allege any illegal conduct by Mr. Herrera. More importantly, and as stated above, none of the paragraphs allege any actual, express agreement by Mr. Herrera to bribe a public official, or that public official's awareness that such an agreement exists.

a. Paragraphs Alleging Direct Conduct by Mr. Herrera

Paragraph 145 alleges as follows:

> On or about April 23, 2021, **HERRERA** wrote a text message to Díaz, translated from Spanish to English, "The office of the commissioner must be purged."

The quoted language, if accepted as true, details an exchange criticizing OCIF, an agency infamous amongst Puerto Rico's financial community for taking measures and initiating investigations that needlessly frustrate private industry and enterprise. Expressing frustration is not a crime and, more importantly, irrelevant here because the alleged conspiracy did not involve a purge of the office of the commissioner. Mr. Herrera's alleged statement, made in April 2021, in no way could have furthered the purpose of the charged conspiracy, much less either of the conspiracies charged in the Indictment.

Paragraph 146 alleges as follows:

> On or about April 29, 2021, Díaz wrote in a text message to **HERRERA**, translated from Spanish to English, "Sorry for the late hour but a meeting has just come up tomorrow at 8 am with the people of the governor." **HERRERA** responded by sending a *praying* emoji, writing "Amen," and "You know what to do."

Nothing in this paragraph describes any illegal conduct on the part of Mr. Herrera. Members of the public can and should, for purposes of a healthy and robust democracy, seek the assistance of public officials. In fact, the Supreme Court recognizes such outreach as the bedrock of our political system, including the necessary existence and involvement of intermediaries who can not only *legally* facilitate such contact but do so while "exercis[ing] very strong influence over

government decisions." *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014); *Percoco*, 2023 WL 3356527, at *7 (recognizing existence of such persons "[f]rom time immemorial."). Private citizens, particularly individuals in sectors subject to substantial government oversight, like the banking sector, regularly seek audiences with public officials for purposes of addressing legitimate grievances.

Moreover, the Indictment makes clear that there was absolutely nothing nefarious about this exchange, and in no way did it further the purpose of either of the charged conspiracies. Indeed, by the Indictment's own timeline, this meeting took place before Ms. Diaz, Mr. Blakeman, and Mr. Fuentes even met, and long before it is alleged that Mr. Herrera transferred the unrelated campaign contribution. Importantly, this paragraph alleges no facts that show (or even purport to show) that Mr. Herrera, by and through intermediaries, intended to offer money in exchange for official action.

Paragraph 147 alleges as follows:

> On or about April 29, 2021, **HERRERA** wrote in a text message to Diaz, translated from Spanish to English, "the snake must be killed by its head." Diaz responded, translated from Spanish to English, "There is no other way."

Once more, this paragraph quotes a colloquial idiomatic expression by Mr. Herrera and characterizes it as an overt act. Such idiomatic expressions are commonly used to express frustration. Even if the Court were to engage in the speculation necessary to give legs to the Government's claims—that the idiom is a veiled reference to the OCIF commissioner—it is not an overt act in furtherance of any conspiracy. To read so much into an informal text exchange would allow the Government to link any expressions of discontent to a bribe (or related conspiracy) if followed, close in time, by a campaign contribution.

Ultimately, as such a simple colloquial expression does not implicate any action and cannot constitute an overt act, this leads only to the inevitable conclusion that the Government included this allegation in the Indictment for no other purpose than to attempt to unfairly prejudice a jury against the Defendant.

Paragraph 164 alleges as follows:

> On or about June 9, 2021, **HERRERA** asked Diaz in a text message if there was anything new. Diaz responded that she was waiting for Blakeman to finish lunch with "a friend." Later that day, Diaz informed **HERRERA** in a text message, translated from Spanish to English, "He already called me … they need help but we reiterated that it will be after what we are waiting for happens." In response, translated from Spanish to English, **HERRERA** wrote, "1000% Committed," and then, "… paid music does not play," a figure of speech meaning that one should not pay for something before receiving it.

Again, the above allegation does not evidence an explicit agreement between Mr. Herrera and Governor Pierluisi. Instead, this paragraph requires the reader engage in impermissible speculation, given there is no information as to what Mr. Herrera is referring to when he says—"1000% Committed" or ". . . paid music does not play[.]" Regardless, nothing in the quoted language establishes an *explicit quid pro quo* necessary to satisfy *McCormick's* and its progeny's heightened pleading standard.

Paragraph 168 alleges as follows:

In or around July 2021, **HERRERA** agreed to make a $25,000 payment to SuperPAC 2."[9]

First, an agreement does not constitute an act. The First Circuit Pattern Criminal Jury Instructions, cited above, clearly distinguish between an act and an agreement, requiring in the case of a conspiracy or unlawful agreement that the defendant first willfully join the conspiracy or unlawful agreement and then that a co-conspirator commit an act in furtherance of the conspiracy.

[9] *See* Indictment ¶ 23 (defining "SuperPac 2" as an "independent expenditure-only political committee," established for the benefit of "Public Official A," understood to be Governor Pierluisi).

Hence, even by allegedly agreeing to make a $25,000 contribution to SuperPAC 2 (which we assume as true solely for purposes of this motion), Mr. Herrera did not commit an act in furtherance of any conspiracy.[10]

Second, agreeing to make a political campaign contribution, in and of itself, is not illegal. In fact, it is constitutionally protected conduct under the First Amendment, even if made with the expectation the public official will assist the donor in some manner. *See McCutcheon*, 572 U.S. at 208–09; *McCormick*, 500 U.S. at 273–74. Importantly, neither this nor in any other allegedly contextualizing paragraph, provide proof that the $25,000 payment was made as part of a *quid pro quo*, that is, **in return for an express promise** by Governor Pierluisi to ensure a favorable outcome for the Bank from OCIF's examination. At best, the Indictment points to vague allusions of future action by the public officials, which have been summarily rejected as a basis for imposing criminal liability for the offenses charged here. *See United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015) (holding that even substantial donations, in hope of influencing a U.S. Senator's future official acts, "as opportunities arose," did not amount to an explicit *quid pro quo*, but were instead a "generalized expectation of some future favorable action barred by *McCormick*."); *see also United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (explaining that vague expectations of future benefit are insufficient to constitute a bribe). In reality, the Indictment is describing only Mr. Herrera's legitimate attempts to engage with the U.S. political system, which is not illegal.

Third, the timing of the campaign contribution undermines the Government's theory, as it confirms that when Ms. Diaz and Mr. Blakeman met with Mr. Fuentes on April 30, 2021 (as alleged in paragraph 148) to purportedly discuss "the four objectives that HERRERA and The Bank wished to accomplish," Mr. Herrera made no commitment to donate, much less to "give

[10] The Government is aware that the Bank had, in fact, made several campaign contributions over the years to candidates from both political parties in Puerto Rico.

things of value, that is, at least $25,000 in funding in support of Public Official A's [Governor Pierluisi's] election campaign, . . . with the intent of influencing . . . Public Official A in connection with … the resolution of the OCIF examination of The Bank on terms favorable to and specified by The Bank[.]" *See* Indictment at ¶ 137(a).) In fact, **neither Mr. Herrera, Ms. Diaz, nor Mr. Blakeman ever offered anything of value to Mr. Fuentes or Governor Pierluisi**.

It is worth reiterating here that the Government does not allege, because it cannot, that Mr. Fuentes **ever spoke** to Mr. Herrera. Rather, all the alleged communications by Mr. Fuentes were with either Ms. Diaz or Mr. Blakeman. And none of the paragraphs that allege communications between Ms. Diaz, Mr. Blakeman and Mr. Fuentes allege an explicit agreement by Mr. Herrera to make any payments in return for any promises by Governor Pierluisi. Moreover, each of the paragraphs that will be discussed below, which purport to allege additional, albeit indirect conduct by Mr. Herrera, also do not allege an explicit agreement by Mr. Herrera to pay any bribe through a political contribution of $25,000, much less the explicit agreement that *McCormick* mandates. Rather, the Government is relying on sequential inferences and speculation in an attempt to prove the charged conspiracies.

In this regard, immediately following the allegation in paragraph 168, the Government further alleges that "Mr. Blakeman sent a text message to Witness 1 [i.e., Fuentes], asking—"Where do I send the half of what **we** talked about?" *See* Indictment at ¶ 169. Here, the Government is clearly attempting to rely upon bare inference and innuendo to purportedly connect the events described by paragraphs 168 and 169, and suggest that the payment Mr. Herrera, purportedly, agreed to make to SuperPAC 2 as described in paragraph 168 is "the half of what **we** talked about" alleged in paragraph 169, and, thereby, provide an implicit agreement between Mr. Herrera and Governor Pierluisi. But this is *precisely* what the Supreme Court prohibited in *McCormick*. Where

a bribe is alleged to have been paid to a public official through a political campaign contribution in exchange for the public official performing an official act, **the agreement must be explicit**.

In sum, the Indictment makes clear that Mr. Herrera never committed an overt act in furtherance of the charged conspiracy.

b. Paragraphs Purporting to Allege Indirect Conduct by Mr. Herrera

Similarly, none of the paragraphs in the Indictment which purport to detail Mr. Herrera's *indirect* conduct establish any overt acts sufficient to support the Government's claim.

Paragraph 157 alleges as follows:

> At the May 27, 2021 meeting, in response to Witness 1's [Fuentes] question about whether **HERRERA** was aware of what Witness 1, Diaz, and Blakeman were discussing, Diaz responded that **HERRERA** was knowledgeable of what Diaz and Blakeman were requesting.

At most, and as confirmed by the Indictment's choice of words, the quoted text alleges only that Ms. Diaz *claimed* that Mr. Herrera "*was knowledgeable of what Diaz and Blakeman were requesting[,]*" that is, assistance from Governor Pierluisi with respect to OCIF; *not* that he was aware of, much less endorsed, any statements or requests from Mr. Fuentes. *See* Indictment at ¶ 157 (emphasis added). Significantly, at no point during the alleged conspiracy, including during the May 27, 2021, meeting, did Ms. Diaz or Mr. Blakeman offer anything of value to Mr. Fuentes, and certainly not to Governor Pierluisi. Similarly, at no point does the Indictment provide proof that Mr. Herrera conditioned a campaign contribution on a favorable resolution of the OCIF matter, either in communications with Mr. Fuentes or Governor Pierluisi.

Paragraph 160 alleges as follows:

> In or around May or June 2021, Diaz informed **HERRERA** of Witness 1's [Fuentes's] representation that in exchange for **HERRERA**'s $50,000 payment to SuperPAC 2, Public Official A would ensure that 1) The Bank would not need to sign a Memorandum of Understanding with OCIF; 2) The Bank would not need to file SARs for certain transactions; and 3) OCIF's examination of The Bank would be resolved on terms favorable to The Bank.

Here, the inference the Government is suggesting is that Mr. Herrera agreed to Mr. Fuentes' proposal, notwithstanding that it had allegedly been made to Ms. Diaz and Mr. Blakeman. In reality, the paragraph merely alleges that Ms. Diaz conveyed Mr. Fuentes' proposal to Mr. Herrera – nothing more. Indeed, this paragraph offers no proof that Mr. Herrera accepted Mr. Fuentes' offer; to the contrary, the Indictment makes clear that Mr. Herrera ultimately did not transfer the funds requested or explicitly agree to condition his financial support on Governor Pierluisi resolving the OCIF examination on terms favorable to the Bank.

A defendant must "willfully join" the conspiracy, "with the specific intent that the underlying crime be committed." *See* First Circuit Pattern Criminal Jury Instructions, § 4.03. Assuming, again, *arguendo*, the interaction the Government describes actually occurred and on the terms, it alleges, Ms. Diaz's conveyance of Mr. Fuentes's offer does not attribute action to Mr. Herrera; must less show Mr. Herrera willfully joined an unlawful conspiracy. In fact, the Indictment is wholly-absent of any evidence as to Mr. Herrera's state-of-mind upon receiving Ms. Diaz's communication; let alone any indication that Mr. Herrera understood Mr. Fuentes's offer as anything more than a fee to advance a lobbying effort; a perfectly legal recourse under applicable case law.[11]

Paragraph 170 alleges as follows:

> On or about July 21, 2021, Diaz wrote in a text message to **HERRERA**, translated from Spanish to English, "Hello, the payment we are talking about is a super pac. Therefore, the money can be sent." The following morning, **HERRERA** responded, translated from Spanish to English, "perfect."

The allegation in paragraph 170 merely mentions a payment to a SuperPAC, it makes no mention that the payment is contingent on Governor Pierluisi resolving the OCIF examination on

[11] Lack of proof as to how Mr. Herrera interpreted the offer is particularly relevant here given the language barrier; many of the Government's allegations are, in fact, translations into English.

terms favorable to the Bank. Again, mere inference is insufficient to establish the explicit *quid pro quo* that *McCormick* requires; let alone form the "contemporaneous mutual understand that a specific *quid* and a specific *quo* are conditioned upon each other[,]" that the *Benjamin* court ruled was necessary to establish criminal liability for bribery cases involving campaign contributions. *Benjamin*, 2022 WL 17417038, at *12, 15 (rejecting the Government's theory that an "explicit *quid pro quo*" can be "inferred from a course of conduct or the surrounding circumstances").

However, even if it was, paragraph 170 describes a conversation about the logistics of making a campaign contribution that occurred almost two months *after* Mr. Fuentes' offer. The reasonable inference, even if it could be made and assuming, *arguendo*, the Government is accurately contextualizing the exchange, is not that Mr. Herrera willfully joined a conspiracy. It is that Mr. Herrera continued to be concerned about OCIF's examination and, as is typical for actors in heavily regulated industries, like banking, decided to donate to a SuperPAC he understood benefited Governor Pierluisi in the hope the Governor would be responsive to Mr. Herrera's concerns. Private citizens have a right to request assistance from public officials and officials' responsiveness to those concerns does not constitute bribery. *See McCutcheon*, 572 U.S. at 192. Therefore, Mr. Herrera's alleged agreement to make a campaign contribution to SuperPAC 2, alone, cannot form the basis of a bribery prosecution.

Paragraph 171 alleges as follows:

> On or about July 22, 2021, Diaz asked **HERRERA** in a text message, "tell me what account please," and **HERRERA** responded, "It will be that we can send it from my personal account from London."

The Government provides no substantive context whatsoever to the above allegation. Thus, the allegation is reduced to Ms. Diaz, as President of the Bank, asking the Bank's owner—Mr. Herrera—about an account; which is a routine scenario. Again, the Government seeks to rely upon – at best – an inference, based on circumstantial evidence, that Ms. Diaz and Mr. Herrera were (i)

discussing the campaign contribution, and (ii) the impetus for payment was to comply with Mr. Fuentes' demands. And yet, proof of an explicit *quid pro quo* "must be shown by something more than mere implication" or recitation of a litany of events from which the grand jury would need to infer a course of conduct. *See Benjamin*, 2022 WL 17417038, at *12, 15.

Finally, paragraph 172 alleges as follows:

> On or about August 10, 2021, Diaz sent an email to The Bank's Accounting Manager, translated from Spanish to English, "[P]lease transfer $25 thousand from Mr. Herrera's account to the holding account. Mr. Herrera already authorized the same," with **HERRERA** carbon copied to the email.

Here, the Government does not quote the entirety of the email communication alleged above, and the alleged portion of the communication the Government relies upon certainly does not establish that the requested transfer, made almost twenty-days after Ms. Diaz and Mr. Herrera discussed a potential campaign contribution (allegations made in paragraphs 171 and 172) and **almost four months after the Government introduced** Mr. Fuentes to Ms. Diaz and Mr. Blakeman, has anything to do with the charged conspiracy.

Significantly, Mr. Herrera is not copied on the email described in paragraph 173, from the Bank's Senior Vice President of the Treasury Department to a Bank employee, providing instructions to make a payment from the Bank's "Holding account at FirstBank" to the account for SuperPAC 2.

c. Paragraphs Alleging Conduct by Witness #1 / Mr. Fuentes

As demonstrated above, the Indictment fails to charge any express agreement by Mr. Herrera to authorize or direct a bribe in return for a promise by Governor Pierluisi to use his influence with OCIF to ensure a favorable outcome for the Bank in OCIF's ongoing examination.

In fact, what the Indictment instead charges, as evidenced by paragraphs 152, 153, 155–159, 161, and 162, are a series of acts undertaken by Mr. Fuentes, a confidential informant

operating under the direction and control of the FBI in an attempt to coerce Mr. Herrera into a bribery scheme. Importantly, at no point does Mr. Herrera explicitly agree to Mr. Fuentes' terms or condition his political contributions on Governor Pierluisi taking some favorable official action. In fact, there is no allegation that Governor Pierluisi was even aware of Mr. Fuentes' dealings.

Instead, the Indictment is rife with examples, substantively dissected below, of Mr. Fuentes offering to procure the Governor's cooperation in exchange for a fee, and Mr. Herrera, Ms. Diaz, and Mr. Blakeman failing to rise to the bait.

Paragraph 152 alleges as follows:

> During the May 11, 2021 meeting, Witness 1 [Fuentes] told Blakeman that Witness 1 heard that **HERRERA** had previously offered to make a political donation benefitting Public Official A [Governor Pierluisi]. To further the undercover investigation, Witness 1 [Fuentes] suggested to Blakeman that **HERRERA** could make a donation in exchange for Public Official A [Governor Pierluisi] fulfilling The Bank's requests. Blakeman responded that Witness 1 [Fuentes] could count on **HERRERA**'s commitment to donate money as long as The Bank's requests were satisfied.

(emphasis added).

At the outset, the allegation raised in paragraph 152 is one-sided, provides no insight into Mr. Herrera's state-of-mind, and attempts to color Mr. Herrera's prior donation in a negative light, based wholly on innuendo.

Nowhere in the Indictment does the Government allege that Ms. Diaz, Mr. Blakeman, or Mr. Herrera ever offered "to give" anything, much less anything of value, to Mr. Fuentes in exchange for Governor Pierluisi favorably resolving the OCIF matter. To the contrary, the allegation in paragraph 152 makes clear that it was, in fact, Mr. Fuentes, acting at the behest of the FBI, who suggested that Mr. Herrera make a campaign contribution to Governor Pierluisi in return for his promise to assist the Bank with OCIF. In addition, the Government does not allege any communication between Mr. Blakeman and Mr. Herrera, either prior or during the May 11, 2021,

meeting with Mr. Fuentes, to support Mr. Blakeman's alleged representation regarding Mr. Herrera's potential "commitment" to such an arrangement.[12]

Paragraphs 153, 155, and 156, reproduced below, allege

> On or about May 12, 2021, Blakeman sent Witness 1 [Fuentes] a text message asking if Witness 1 [Fuentes] had been able to discuss the matter with "the boss," referring to Public Official A [Governor Pierluisi]. As part of and to further the undercover investigation (even though no such communication had taken place), Witness 1 [Fuentes] responded that he had, and that he would follow up with Public Official A [Governor Pierluisi] regarding the timeline for accomplishing three of The Bank's four objectives. In the same conversation, Witness 1 [Fuentes] reminded Blakeman "to give me a hand with the contribution."
>
> On or about May 27, 2021, Blakeman and Diaz met with [Fuentes] at a restaurant in Guaynabo, Puerto Rico, to discuss **HERRERA** and The Bank's requests to influence the OCIF examination. During the meeting [Fuentes] discussed an agreement with Blakeman and Diaz for a $50,000 payment to benefit [Governor Pierluisi], intending that the payment be in exchange for [Governor Pierluisi] directing and exerting influence on public officials to cause three of the four objectives that The Bank wished to accomplish: 1) that The Bank would not need to sign a Memorandum of Understanding with OCIF regarding The Bank's deficiencies; 2) that The Bank would not need to file SARs for certain transactions involving bank accounts and entities owned or controlled by **HERRERA**; and 3) that OCIF's examination of The Bank would end in terms favorable to The Bank.
>
> During the May 27, 2021 meeting, [Fuentes] stated that **HERRERA**, Blakeman, and Diaz should let [Fuentes] know when they were ready to make a payment to support [Governor Pierluisi]. As part of and to further the undercover investigation, [Fuentes] represented that at that point, [Governor Pierluisi] could move forward with The Bank's requests with respect to OCIF. Diaz and Blakeman each responded that they were already at that point.

(emphasis added).

Again, the conduct alleged across each of these paragraphs does not establish that Mr. Blakeman, Ms. Diaz, or Mr. Herrera offered anything of value to either Mr. Fuentes or Governor Pierluisi, or that Governor Pierluisi was even aware of Mr. Fuentes' dealings. Likewise, these paragraphs provide no context whatsoever regarding Mr. Herrera's, Ms. Diaz's, or Mr. Blakeman's state-of-mind and interpretation of Mr. Fuentes' offer. On the contrary, the allegation in these

[12] Significantly, the Indictment does not allege that Mr. Herrera's prior offer to make a political donation to Governor Pierluisi was made in return for any promise whatsoever by Governor Pierluisi.

paragraphs makes clear that it was Fuentes alone who was demanding a payment in return for the alleged promise of Governor Pierluisi to use his influence with OCIF to ensure a beneficial outcome in OCIF's examination of the Bank.

Paragraph 157 alleges as follows:

> At the May 27, 2021 meeting, in response to [Fuentes's] question about whether **HERRERA** was aware of what [Fuentes], Diaz, and Blakeman were discussing, Diaz responded that **HERRERA** was knowledgeable of what Diaz and Blakeman were requesting.

As aforementioned, this paragraph does not allege any offer of anything of value by either Ms. Diaz or Mr. Blakeman. Nor does it allege an agreement by Mr. Herrera to offer or give anything of value in return for any promises from Governor Pierluisi as charged in paragraph 137.

Instead, it alleges merely that *Ms. Diaz claimed* that Mr. Herrera "was knowledgeable of what Diaz and Blakeman were requesting." The prior allegations make clear that what Ms. Diaz and Mr. Blakeman were requesting was assistance with OCIF**, which carries no nefarious intent.** Moreover, Mr. Fuentes's need to ask if Mr. Herrera was aware of the discussions, is quite telling. It indicates that Mr. Herrera had not been previously mentioned or otherwise involved in Fuentes's discussions with Ms. Diaz and Mr. Blakeman. Instead, and in a desperate attempt to implicate Mr. Herrera, Mr. Fuentes attempts to insert Mr. Herrera in the discussions by telling Mr. Blakeman to "emphasize to **HERRERA** the need for secrecy." *See* Indictment ¶ 158 (emphasis in original). But a confidential informant's reference to an individual, without more, does not even support an inference that Mr. Herrera was ever aware of the proposed agreement raised by Mr. Fuentes, much less that Mr. Herrera willfully agreed to join the proposed agreement.

As the First Circuit makes clear in its Pattern Criminal Jury Instructions, proof that the defendant joined an unlawful agreement must be based upon evidence of his/her own words and/or actions. *See* First Circuit Pattern Criminal Jury Instructions, Section 4.03.

Paragraph 159 alleges as follows:

> At the May 27, 2021 meeting, [Fuentes] told Blakeman and Diaz that he would send Blakeman the instructions for wiring the money that The Bank was pledging for [Governor Pierluisi]. When [Fuentes] indicated that he did not like to talk or text about "this" on the phone, Diaz responded, translated from Spanish to English, "Exactly," and then, "One doesn't know who might be listening."

The allegation in paragraph 159, reproduced above, makes clear that it was Mr. Fuentes again demanding a payment from Ms. Diaz and Mr. Blakeman in return for the purported assistance of Governor Pierluisi. Per the Indictment, on the next day, May 28, 2021, Fuentes texted Blakeman the instructions. *See* Indictment, ¶ 161.

And yet, despite Mr. Fuentes sending Mr. Blakeman wiring instructions, no payment was sent to SuperPAC 2. Moreover, and as before, the allegation raised in paragraph 159 fails entirely to demonstrate that either Mr. Herrera or Governor Pierluisi were remotely aware of the discussions taking place between Mr. Fuentes, Mr. Blakeman, and Ms. Diaz.

Paragraph 162 alleges as follows:

> On or about June 9, 2021, [Fuentes] met with Blakeman at a restaurant in San Juan, Puerto Rico. During the meeting, and in furtherance of the investigation, [Fuentes] told Blakeman that [Governor Pierluisi] asked [Fuentes] to confirm with Blakeman that, translated from Spanish to English, "their commitment is still on." Blakeman confirmed that "the commitment is still on."

Here again, it is Mr. Fuentes who, at the behest of the FBI, continuously and repeatedly demanded a payment in return for a fabricated agreement by Governor Pierluisi to assist with OCIF.

In sum, rather than a conspiracy to "corruptly give, offer, and agree to give things of value, that is at least $25,000 in funding in support of [Governor Pierluisi's] election campaign," as paragraph 137 alleges, the Indictment describes a Bank's attempt to rectify difficulties with a regulator by lawfully attempting to reach out to the Governor—the regulator's supervisor.

The analysis of the factual allegations in the Indictment set forth above make clear that the Government has failed to allege an explicit agreement by Mr. Herrera to make a campaign contribution in return for a promise by Governor Pierluisi to use his influence to ensure a favorable outcome for the Bank from the ongoing examination by OCIF. As the Government has failed to allege an essential element of the offense, Count Five must be dismissed.

2. *Count Six*

Count Six alleges a substantive violation of Section 666(a)(2) based on an alleged offer to give $25,000 in funding in support of Governor Pierluisi's election campaign, with the intent to influence Governor Pierluisi in connection with the Bank's examination by OCIF. This count largely incorporates the factual allegations made in Count Five and alleges no additional facts. *See generally* Indictment ¶¶ 175–177.

To prove a substantive violation of § 666(a)(2), where the *quid* is a campaign contribution, the Government must allege that the agreement to exchange money for official action (or inaction) is explicit, precedes the official conduct, and controls the terms of the undertaking or promise. The Indictment fails on each prong. Assuming, *arguendo*, the facts are as the Government alleges, it fails to show Mr. Herrera understood Mr. Fuentes' proposal to be a bribe, let alone that Mr. Herrera agreed to be bound by its terms. It, likewise, fails to show that the August 2021 payment was anything but a legitimate campaign contribution. Lastly, there is no evidence that any official conduct occurred as a result of the August 2021 payment, or that Governor Pierluisi was even remotely aware of Mr. Fuentes's dealings.

Instead, the Indictment describes a typical occurrence in U.S. politics—a private person, with ties to a highly-regulated industry, attempts to contact their elected representative to affect change by-and-through a politically-connected person. However, and as noted, "[i]ngratiation and

access . . . are not corruption[,]" *Citizens United Comm'n*, 558 U.S. at 360, but a "central feature of democracy" whereby constituents raise issues to candidates, with the fair and legally permissible expectation, the candidate will be responsive to said concerns. *See McCutcheon*, 572 U.S. at 192. Reliance on lobbyists and fundraisers, similarly, is not abnormal, but a part of U.S. politics since "time immemorial." *Percoco*, 2023 WL 3356527, at *7.

As the Government failed to allege an essential element of the offense Count Six must be dismissed.

3. *Count Seven*

Count Seven alleges that Mr. Herrera devised a scheme to defraud and deprive the citizens of Puerto Rico of the honest services of Governor Pierluisi through bribery and, for the purpose of executing such scheme to defraud, caused $25,000 to be transmitted through wire communications in violation of 18 U.S.C. §§ 1343, 1346, and 2. As above, this count largely incorporates the factual allegations made in Count Five, and alleges no additional facts.

The Indictment fails for the same reasons annunciated above; namely, for failure to allege an "explicit *quid pro quo*" – and essential element of a federal bribery charge involving campaign contributions. The absence of any relevant facts is particularly stark here, as Count Seven implicates Governor Pierluisi without alleging any facts that Governor Pierluisi knew of Mr. Fuentes's alleged actions in furtherance of the purported scheme. Simply put, there can be no *quid pro quo* if the target of the "*quid*" is not aware of its existence. *See Benjamin*, 2022 WL 17417038, at *12.

Moreover, even if an agreement with Mr. Fuentes (a government informant) was possible (and, to be clear, it was not in view of his status as an informant), such an arrangement does not constitute honest services fraud. Specifically, even if the allegations in the Indictment were taken

as true, then Mr. Herrera believed at the time that Mr. Fuentes was a person of influence who could inform and influence Governor Pierluisi concerning Mr. Herrera's legitimate concerns about OCIF's overreach, and on that the law, as reaffirmed by the Supreme Court earlier this year, is clear: engaging, or reaching an agreement with, lobbyists of influence does not alone trigger or create grounds to charge fraudulent conduct. *See Percoco*, 2023 WL 3356527, at *7.[13]

Ultimately, to adopt the Government's position with respect to Count Seven would be to criminalize standard lobbying activities that occur every day in the United States. Therefore, as the Government has failed to allege an essential element of the offense, so too must Count Seven be dismissed.

B. The Government has Failed to Allege the Existence of a *Quid Pro Quo*

The line demarcating prohibited criminal activity from legitimate campaign activity is existence of an *explicit quid pro quo*. The Government cannot meet the "explicit" requirement through innuendo or by reciting a litany of events that suggest a course of conduct. Instead, the Government must describe, with specificity, the evidence purporting to show the accused expressly conditioned his or her campaign contribution on some official action (or inaction); the campaign contribution preceded the official action taken (or not taken); and that both scheme-principals manifested an intent to be bound by the condition. *See McCormick*, 500 U.S. at 274; *McDonnell*, 579 U.S. 550; *Sun–Diamond Growers*, 526 U.S. at 404–05; *Benjamin*, 2022 WL 17417038, at *12 (emphasis added).[14]

[13] If anything, the conduct of Mr. Fuentes is *even more* attenuated than that of the defendant in *Percoco*. Indeed, unlike in *Percoco*, Mr. Fuentes was *never* actually in a position to disburse the purported "bribe" or otherwise influence the actions and/or oversight of Governor Pierluisi.

[14] Whether this Court adopts *Benjamin*'s language is not determinative of how this Motion should be decided because – as aforementioned – the Indictment fails to meet the foundational *McCormick* standard, as nowhere does it allege any "explicit promise or undertaking" made by Governor Pierluisi in return for the "campaign contributions" purportedly provided by Herrera. The *Benjamin* decision simply further highlights the deficiencies inherent in this Indictment.

Here, the Indictment does not allege *any* actual, explicit agreement between Mr. Herrera and Governor Pierluisi relating to the $25,000 campaign contribution. In fact, the Indictment fails to allege *any* instance in which Mr. Herrera communicated with or even knew of the involvement and representations of Mr. Fuentes. Moreover, the Indictment further fails to allege that Governor Pierluisi was *ever* remotely aware that representations were purportedly being made on his behalf by Mr. Fuentes.

Instead, the Indictment relies on obscure text messages and ambiguous statements made by third parties – namely, Ms. Diaz, Mr. Blakeman and Mr. Fuentes – at meetings where neither Mr. Herrera nor Governor Pierluisi were present, to imply an illegal agreement – exactly what the Supreme Court has declared impermissible in a case involving a campaign contribution. Whether these third parties believed an agreement existed is irrelevant. Mr. Herrera can only be held responsible for his own actions. The Government's Indictment, however, fails to allege any facts regarding Mr. Herrera's state of mind. Furthermore, despite devoting more than forty paragraphs to its alleged conspiracy charge, Mr. Herrera remains ignorant of the facts that constitute one of the essential elements of the offense of bribery.

To allow the Indictment to stand is to allow the Government construe federal bribery charges as requiring something less than an explicit *quid pro quo*, or to construe the factual allegations of those Counts as sufficient to allege such a *quid pro quo*, would turn *McCormick* and its progeny on its head, run afoul of First Amendment, and fly in the face of Rule 7(c)(1) and the accused's constitutionally protected rights, under the Sixth Amendment, to understand and respond to the charged conduct.

C. The Government Would Seek to Criminalize Constitutionally Protected Conduct

The right to participate in our democracy through political contributions is conduct protected by the First Amendment. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) (characterizing campaign contributions as an exercise of one's "expressive and associational" rights under the First Amendment); *Buckely v. Valeo*, 424 U.S. 185, 204 (2014) (observing that campaign contributions implicate "the contributor's freedom of political association" under the First Amendment). The Supreme Court recently reiterated this point stating that "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Fed Election Comm'n v. Cruz*, 142 S.Ct. 1638, 1650 (2022) (internal quotation marks omitted).

As noted, "[i]ngratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. Attempts to yield such access, in turn, cannot be used as pre-text to charge a bribery offense. Rather, such conduct "embod[ies] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 572 U.S. at 192. Communications, consultations, and agreements with persons who have (or purport to have) influence over public figures is, likewise, not prohibited. *Percoco*, 2023 WL 3356527, at *7. Therefore, Mr. Herrera's alleged agreement to make a campaign contribution to Mr. Fuentes's SuperPAC 2 was constitutionally protected conduct that cannot alone form the basis of a bribery prosecution.

Ultimately then, the Government's efforts to criminalize what would otherwise be constitutionally protected involvement in the political process would only serve to have a chilling effect on the types of lawful interactions between our elected officials and their constituents that occur every day in this country, and which enable this country's privately funded campaign finance

system to function as intended – *i.e.*, that which the Supreme Court has said are a "central feature of our democracy." *Cruz*, 142 S. Ct. at 1653.

CONCLUSION

Our political system embraces the public's ability to make political contributions in an effort to influence how elected officials benefiting from those contributions will concern themselves with their supporters' needs, interests, and issues. As has been made clear by the Supreme Court, the Government should not unduly target an individual's attempt to gain access to elected officials by offering their support to those officials through campaign contributions: "[i]ngratiation and access ... are not corruption." *Citizens United Comm'n*, 558 U.S. at 360. In fact, in the three decades since *McCormick*, the Supreme Court and other federal courts have repeatedly rejected the Government's efforts to water down the heightened pleading standard mandated in campaign contribution cases, confirming that "explicit" does not, in fact, mean implied, and the judiciary's commitment to ensuring that government regulation does not chill political speech. *See, e.g.*, *Menendez*, 132 F. Supp. 3d at 644; *Benjamin*, 2022 WL 17417038, at *15; *Donagher*, 520 F. Supp. 3d at 1034.

Here, the Government asserts that a bribery scheme exists, but fails to allege any facts that explicitly show that Mr. Herrera conditioned a campaign contribution on Governor Pierluisi taking some official action (or inaction), or that Governor Pierluisi was even aware of the alleged scheme to manifest the requisite intent-to-be-bound. The Government cannot conjure a bribery scheme based on circumstantial evidence and innuendo, but must instead support such allegations by demonstrating an actual, express agreement by and between Mr. Herrera and Governor Pierluisi that would satisfy the standard set by *McCormick*. Accordingly, the Court must dismiss Counts

Five, Six and Seven for failure to charge an essential element of the offense and, as such, charge a crime, or risk criminalizing constitutionally protected conduct.

WHEREFORE, the defendant, Mr. Herrera-Velutini, respectfully requests that this Honorable Court dismiss Counts Five, Six and Seven of the Indictment pending against him.

Respectfully submitted in San Juan, Puerto Rico, on this 6th day of July 2023.

DLA Piper (Puerto Rico) LLC

/s/ ***Sonia I. Torres-Pabón***
Sonia I. Torres-Pabón, Esq.
USDC-PR No. 209310
500 Calle de la Tanca, Ste. 401
Sonia.torres@us.dlapiper.com
San Juan, PR 00901-1969
Tel: 787-945-9101

The LS Law Firm

/s/ ***Lilly Ann Sanchez***
Lilly Ann Sanchez, Esq.
Fla. Bar No. 195677
One Biscayne Tower, Suite 2530
2 South Biscayne Blvd.
Miami, Florida 33131
Email: lsanchez@thelsfirm.com
Telephone: (305) 503-5503
Facsimile: (305) 503-6801

Kasowitz Benson Torres LLP

/s/ Marc E. Kasowitz
Marc E. Kasowitz, Esq.
N.Y. Bar No. 1309871
1633 Broadway
New York, New York 10019
Email: MKasowitz@Kasowitz.com
(Admitted Pro Hac Vice)

/s/ Jason M. Short
Jason M. Short. Esq.
N.Y. Bar No. 5140355
1633 Broadway

New York, New York 10019-6799
Email: JShort@Kasowitz.com
(Admitted Pro Hac Vice)

/s/ Robin Rathmell
Robin Rathmell, Esq.
N.Y. Bar No. 5182001
1401 New York Avenue, NW, Suite 401
Washington, DC 2005
Email: RRathmell@Kasowitz.com
(Admitted Pro Hac Vice)

CERTIFICATE OF SERVICE

It is hereby certified that on this same date the present motion was filed with the Clerk of the Court through the CM/ECF electronic system which will notify and provide copies to all parties of record.

In San Juan, Puerto Rico on this 6th day of July 2023.

/s/ Sonia I. Torres-Pabón
SONIA I. TORRES-PABÓN