UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- CHUCK CONNORS PERSON and RASHAN MICHEL, Defendants.	17-CR-683 (LAP) Oral Argument Requested

DEFENDANT CHUCK CONNORS PERSON'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE SUPERSEDING INDICTMENT

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After Defendants moved to dismiss each of the charges against them, the government filed a Superseding Indictment, which abandoned the original wire fraud conspiracy theory and presented an entirely different wire fraud charge against Mr. Person. The revised wire fraud theory in the Superseding Indictment does not fix any of the problems that were fatal to the original indictment, and the government has failed to advance any persuasive arguments in its opposition brief that its federal criminal charges against Mr. Person are viable.[1] On the contrary, to the extent there were any lingering question as to whether this prosecution had a purpose apart from enforcing the NCAA's amateurism rules,[2] the government's brief in opposition to the motions to dismiss and its Superseding Indictment finally resolve that question – there is not.

What is the misrepresentation for purposes of wire fraud? An undisclosed violation of the NCAA rules. What is the duty breached for purposes of honest services fraud? The duty to comply with the NCAA rules. And what is the business at issue for purposes of federal funds bribery? The business of complying with the NCAA rules. Yet vindication of these NCAA rules is the province of the NCAA, a private member organization, and is not a proper purpose of a federal criminal prosecution. Straining to charge the alleged NCAA rules violation as a federal crime, without any conceivable federal interest at stake in doing so, the government has concocted unworkable legal theories that lack any basis in the statutory language and exceed the

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[1] As explained below, the Superseding Indictment amended only Count Five. Therefore, Mr. Person respectfully requests that his arguments in support of the pending motion to dismiss the original indictment "be applied to the charges raised in the . . . Superseding Indictment." *United States v. Viertel*, No. 01 Cr. 571 (JGK), 2002 WL 1560805, at *4 (S.D.N.Y. July 15, 2002). Mr. Person addresses the new Count Five, as well as the government's arguments in opposition to the pending motion, in this reply brief.

[2] It bears emphasizing that the NCAA rules largely serve two principles – the goal of "amateurism" in college sports and the ideal of a "student-athlete" – that themselves have been described as "cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes." Taylor Branch, *The Shame of College Sports*, The Atlantic, Oct. 2011, *available at* https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

constraints of due process. The federal government has no business policing the NCAA rules, and the Superseding Indictment should be dismissed.

ARGUMENT

I. IT IS NOT A FEDERAL WIRE FRAUD TO VIOLATE THE NCAA RULES AND THEN FAIL TO DISCLOSE THAT VIOLATION

The government's original theory of wire fraud was premised on the alleged facilitation and concealment of payments to Auburn men's basketball players in violation of the NCAA rules, which purportedly harmed Auburn because the university would have unwittingly provided scholarships to ineligible athletes. (*See* Indictment ¶ 48.) This alleged scheme did not depend upon Auburn suffering any deprivation of money or property – a fundamental problem readily identified by Judge Easterbrook in the factually similar case of *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). The government's original theory also depended on unreasonably broad definitions of the statutory elements and criminalized virtually every undisclosed violation of the NCAA rules.

The government has jettisoned its original theory and now advances a new one. Count Five is no longer a conspiracy charge against both defendants based on the unindicted players' alleged rules violations, but is instead a substantive charge against Mr. Person alone based on the theory that Mr. Person received his assistant coach's salary by allegedly making "material misrepresentations to Auburn University, including in written agreements and certification forms submitted to Auburn University," that failed to disclose payments made to Mr. Person by the government's cooperator Marty Blazer. (*See* Superseding Indictment ¶ 54; *see also id.* ¶¶ 4, 23–26.) This new theory does not cure any of the defects in the original charge, and instead highlights how deeply flawed the government's case is against Mr. Person.

First, new Count Five does not resolve the core problem identified in Mr. Person's opening brief – namely, that the alleged harm to Auburn was, at most, an "inadvertent consequence" of the charged scheme. *See United States v. Regan*, 713 F. Supp. 629, 637 (S.D.N.Y. 1989) ("The money or property deprivation must be a goal of the plot, not just an inadvertent consequence of it."). As Your Honor instructed the jury in *United States v. Davis*, wire fraud requires "the specific purpose of causing some financial harm or deprivation of property to the [victim]." Tr. of Jury Charge at 1135:10–14, *United States v. Davis*, No. 13 Cr. 923 (S.D.N.Y. Aug. 10, 2016), ECF No. 88. But none of the allegations in the Superseding Indictment supports the notion that the charged scheme was designed to obtain employment and a salary under false pretenses. Instead, as alleged repeatedly, the purpose of the scheme was for Mr. Person to obtain money from Mr. Blazer, and for Mr. Blazer to obtain money from players if and when they entered the NBA. (*See*, *e.g.*, Superseding Indictment ¶¶ 1–3, 27–40.) The facts in the Superseding Indictment (and common sense) make clear that Mr. Person's continued employment and receipt of a salary from Auburn were strictly incidental to that scheme. Among other things, Mr. Person had been employed by Auburn for several years before he allegedly received any payments from Mr. Blazer in and around November 2016; his most recent employment agreement had been executed on August 24, 2016. (*See id.* ¶ 23.) Further, Mr. Person did not apply for or secure any promotions or raises after he allegedly met with and agreed to accept payments from Mr. Blazer.

This case contrasts starkly with out-of-circuit decisions upholding fraud convictions where individuals deliberately lied in a job application or cheated on a qualification examination

for the purpose of obtaining a job.[3] In *United States v. Granberry*, for instance, the Eighth Circuit permitted a fraud prosecution of a defendant who had obtained a job as a bus driver for a Missouri school district by fraudulently concealing on his job application that he had been convicted of first-degree murder. *See* 908 F.2d 278, 279–80 (8th Cir. 1990). Similarly, in *United States v. Doherty*, the First Circuit affirmed mail fraud convictions for defendants who had conspired to cheat on a Massachusetts civil service examination in order to obtain promotions within the state police department. *See* 867 F.2d 47, 56 (1st Cir. 1989). In both *Doherty* and *Granberry*, the defendants fraudulently induced their employers to hire or promote them. Obtaining a salary or a raise in these cases was not an "inadvertent consequence" of the charged scheme; it was the scheme.

Second, although the Superseding Indictment references misrepresentations in "agreements," a breach of contract – committing a rules violation even though one's employment agreement contains an obligation not to do so – does not, in and of itself, constitute wire fraud. *See United States v. D'Amato*, 39 F.3d 1249, 1261 n.8 (2d Cir. 1994). "[W]here allegedly fraudulent misrepresentations are promises made in a contract, a party claiming fraud must prove fraudulent intent at the time of contract execution; evidence of a subsequent, willful breach cannot sustain the claim." *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 658 (2d Cir. 2016). For this reason, Mr. Person's August 24, 2016 employment agreement with Auburn cannot form the basis of a wire fraud charge, since it was signed months

[3] The Second Circuit has explicitly declined to decide whether the salary theory, "where a defendant fraudulently obtains a position and therefore also receives the salary and benefits that come with that position," is even good law in this Circuit. *See United States v. Coppola*, 671 F.3d 220, 237 n.11 (2d Cir. 2012). Indeed, Judge Karas recently rejected the theory in the context of a civil RICO action alleging a scheme to rig a local election. *See Westchester Cnty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 602–07 (S.D.N.Y. 2015) (citing *United States v. Ratcliff*, 488 F.3d 639, 645 (5th Cir. 2007); *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006); *United States v. Goodrich*, 871 F.2d 1011, 1013–14 (11th Cir. 1989); *United States v. George*, No. 86-CR-123, 1987 WL 48848, at *2 (W.D. Ky. Oct. 20, 1987)).

before any of the charged conduct. Thus, it is impossible, and not alleged, that Mr. Person harbored the required "contemporaneous intent to defraud." *Id.*

Finally, even if the government's almost limitless definition of wire fraud were correct as a matter of statutory interpretation, due process would prohibit the government's attempt to turn Mr. Person's alleged undisclosed NCAA rules violation into a federal crime. In this case, it is no exaggeration to say that the government's new wire fraud theory (like its original theory) would criminalize nearly all undisclosed NCAA rule violations because every college coach and staff member routinely certifies compliance with the NCAA rules.[4] (*See* Superseding Indictment ¶ 17.) Take, for example, a coach who consumes tobacco products during practice. Although this conduct is otherwise lawful, that coach has violated Section 11.1.4 of the NCAA Manual. Under the government's theory, if that coach fails to disclose his rules violation on his annual certification, he has not simply breached the NCAA rules and the terms of his employment, but he has also committed a federal felony. What is more, under the government's theory where a false certification equals wire fraud, a coach who knows of someone else's rules violation but fails to disclose it on his annual certification has also committed a federal wire fraud. The wire fraud statute does not remotely give fair notice that it sweeps so broadly as to criminalize the NCAA's rules against otherwise lawful personal conduct. Allowing such "routine" conduct to form the basis of a federal criminal case presents a very real and impermissible risk of arbitrary and selective prosecution. *See McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (holding that prosecution of public official for "the most prosaic interactions" would violate due process). One need not be a careful student of college basketball to appreciate the number of

[4] The new wire fraud theory narrows the original one only insofar as it is no longer premised on a player's rules violations, but is instead premised on a coach's supposedly false certification.

coaches or athletic department employees who have failed to disclose known violations of the NCAA rules but who have not been prosecuted for federal wire fraud.[5]

II. A PAYMENT IN VIOLATION OF THE NCAA RULES IS NOT HONEST SERVICES FRAUD

Although the honest services fraud statute is broadly written, the Supreme Court has narrowed its reach to the "solid core" of cases involving defendants who, "in violation of a fiduciary duty, participated in bribery or kickback schemes." *Skilling v. United States*, 561 U.S. 358, 407 (2010). The Second Circuit had previously identified such schemes as those in which "a defendant who has or seeks some sort of business relationship or transaction with the victim secretly pays the victim's employee (or causes such a payment to be made) in exchange for favored treatment." *United States v. Rybicki*, 354 F.3d 124, 139 (2d Cir. 2003) (en banc).[6]

At bottom, the charge against Mr. Person improperly collapses the *quid* and *quo* elements essential to honest services fraud. In all honest services fraud cases, the *quid* is the bribe or kickback, and the *quo* is the independent violation of a fiduciary duty. *See Skilling*, 561 U.S. at 407. Logically, the *quid* and the *quo* cannot be one and the same; otherwise, for instance, every

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[5] As Dr. Condoleeza Rice, chair of the Commission on College Basketball, recently observed: "The crisis in college basketball is first and foremost a problem of failed accountability and lax responsibility . . . . 'Everyone knew what was going on.'" Condoleeza Rice, Remarks (As Prepared) on the Independent Commission on College Basketball's Formal Recommendations (Apr. 25, 2018), *available at* https://www.ncaa.org/sites/default/files/2018CCBRemarksFinal_webv2.pdf.

[6] The government does not dispute that the conduct alleged in the Superseding Indictment falls completely outside the *Rybicki* definition of bribery and kickback cases, as the government's cooperator never sought to do any business with Auburn. Instead, citing *United States v. Nouri*, 711 F.3d 129 (2d Cir. 2013), the government argues that *Rybicki* does not reflect the outer limits of private sector honest services fraud. But *Nouri* is not, as the government contends, inconsistent with *Rybicki*. In *Nouri*, executives of a publicly traded company bribed a brokerage firm employee to purchase the company's stock on behalf of the brokerage firm's customers. There was no question in that case that the broker had a fiduciary duty to his employer to act faithfully when he bought and sold stock for his customers, and that he breached that duty when he bought and sold the company's stock in exchange for payments from the company's executive. *Nouri* thus presented a classic honest services fraud case in which the defendants secretly paid bribes to an employee of that brokerage firm for the purpose of getting the employee to perform a key aspect of his job – buying stocks for clients – faithlessly. *See id.* at 133–36, 144–45. In other words, the *Nouri* defendants wanted something from the broker-dealer (execution of transactions for customers) and required a corrupt employee to obtain it.

violation of an employer's prohibition on outside income would be a federal crime.[7] But that is precisely how honest services fraud is charged here. According to the Superseding Indictment, Mr. Blazer paid Mr. Person in exchange for Mr. Person's agreement to recommend Mr. Blazer's services to Auburn basketball players. (*See* Superseding Indictment ¶ 52.) This theory does not work because the alleged payment to Mr. Person did not induce him to act in a way that violated his fiduciary duty to his employer. Mr. Person's acceptance of payments from Mr. Blazer was itself the breach of his duty to Auburn. The conduct Mr. Blazer sought in exchange – steering Auburn basketball players to him – is not alleged to be the violation. This is because the NCAA rules do not prohibit a college coach from recommending financial advisors for his players to use if and when they entered the NBA; the rules prohibit only the acceptance of the payment. (*See id.* ¶¶ 9–22 (alleging NCAA rules).) Thus, even if Mr. Person should not have accepted money from Mr. Blazer under applicable NCAA rules, Mr. Blazer's payments did not induce Mr. Person to perform his job in a way that was contrary to Auburn's interests because Auburn had no independent interest in recommending financial advisors. In other words, Mr. Blazer's payments did not corrupt the services Mr. Person performed for Auburn.

The government's error seems to be based on the notion that Mr. Person was a fiduciary of Auburn for all purposes. But Mr. Person's duties to Auburn were necessarily limited by the scope of his employment relationship with Auburn. *See, e.g.*, *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999) (defining breach of fiduciary duty in private sector honest services fraud as conduct that "contravene[s] – by inherently harming – the purpose of the parties' relationship"). For honest services fraud, it is essential to look at the services Mr. Person was

[7] Consider, for instance, a lawyer whose firm prohibits her from receiving outside income. The lawyer secretly runs a side business building websites. The lawyer has not committed honest services fraud because the outside income has not induced her to violate any independent fiduciary duty to her firm; the outside income itself is the only violation.

obligated to provide to Auburn to determine whether bribes or kickbacks corrupted those services. Recommending financial advisors to players was not part of Mr. Person's job, and neither Mr. Person nor Auburn was (or was alleged to be) a fiduciary to any of the players. Mr. Person was, instead, simply a basketball coach, with duties like recruiting players, running basketball practices, teaching basketball skills, developing basketball strategies, and coaching during games. There is nothing in the Superseding Indictment that suggests that Mr. Person failed to perform these services faithfully.

The government invokes the NCAA rules to counter that Mr. Person nevertheless committed honest services fraud because he supposedly violated his obligation to follow the NCAA rules. But the NCAA rules do not define the scope of Mr. Person's services. Rather, the rules are an all-encompassing code of conduct regulating nearly every aspect of a college coach's life; because they are designed to further the goals of amateurism and the ideal of student athletes, the rules in many instances prohibit or regulate conduct that has nothing to do with the services that a coach has been hired to perform.[8] Perhaps it is unethical or immoral for a coach to receive referral fees for introducing a player to a financial advisor for that player potentially to use in the future, but such an introduction has nothing to do with the coach's job duties.

A broad code of conduct like the NCAA rules cannot, standing alone, support an honest services fraud charge. To hold otherwise would mean that every employee with a "morals clause" in his employment contract would commit honest services fraud by receiving payment for outside work that brings disrepute upon his employer. Courts have properly rejected efforts to stretch private sector honest services fraud this broadly. *See, e.g.*, *United States v. Cochran*, 109

[8] In this regard, the NCAA rules are entirely unlike the FINRA rules considered in *Nouri*, which related directly to the duties of a broker.

F.3d 660, 667 (10th Cir. 1997) (holding that "it would give us great pause if a right to honest services is violated by every breach of contract"). Rather than rely on an employee's compliance with a general code of ethics, the focus properly belongs on the services the employee was supposed to provide to his employer. In *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), for instance, the Eighth Circuit reversed a psychologist's conviction for honest services fraud based upon his referral of patients to a psychiatric hospital in exchange for referral fees. The government grounded the defendant's breach of duty in the ethical rules governing psychologists, which prohibited referral fees. *See id.* at 442 & n.3. Although the defendant had violated this ethical rule, the Eighth Circuit rejected the government's theory of prosecution "because the breach did not affect the services rendered." *Id.* at 442. Because the evidence showed that the psychologist had faithfully rendered services to his patients, and the ethical violation "did not affect the quality or cost of his services," the court reversed the honest services fraud conviction. *See id.*

For these reasons, the honest services fraud statute cannot bear the government's strained interpretation. But even if it could, due process would preclude the government from importing the entire NCAA rulebook into the federal criminal code via the honest services fraud statute. Like *McDonnell*, the theory of prosecution in this case raises a significant due process concern about criminalizing "the most prosaic interactions" in the form of routine and otherwise lawful conduct. *See McDonnell*, 136 S. Ct. at 2373. Just as that concern compelled the Supreme Court to cabin the "quo" (*i.e.*, the "official act") in public sector honest services fraud cases, *see id.* at 2372–73, the same concern demands a coherent, limiting principle for "honest services" in a private sector honest services fraud case. *See United States v. Silver*, 203 F. Supp. 3d 370, 379 n.8 (S.D.N.Y. 2016) (observing that "[t]he Supreme Court was clearly seeking to cabin the 'quo'

in the quid pro quo element of honest services fraud and extortion in order to avoid [certain] constitutional concerns," including subjecting individuals to prosecution without fair notice).

III. TAKING A REFERRAL FEE – EVEN IF THAT PAYMENT VIOLATES THE NCAA RULES – IS NOT FEDERAL FUNDS BRIBERY

The government's federal funds bribery theory suffers from many of the same problems as its honest services fraud charge. The bribery statute specifically requires proof that an "agent" of a federally funded organization was influenced or rewarded "in connection with any business, transaction, or series of transactions of such organization." *See* 18 U.S.C. § 666. These elements require a clear focus on whether the employee's conduct was corrupted in connection with the employer's business. Relying entirely on cases outside the Second Circuit, the government contends that the term "agent" and the transactional element ("in connection with any business, transaction, or series of transactions") should be construed "broadly," such that a college basketball coach's agreement to recommend that his players use a particular financial advisor if and when they enter the NBA falls within the ambit of § 666. (*See* Gov't Opp'n at 11–12.)

The government's appeal to construe § 666 "broadly" runs afoul of *McDonnell* and the well settled principle that courts should "construe criminal statutes narrowly." *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015). The government's position is also completely untethered from the statute's goal "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." *Sabri v. United States*, 541 U.S. 600, 606 (2004). Put simply, the federal funds bribery statute was not intended to be "a general anti-corruption statute." *United States v. Frega*, 933 F. Supp. 1536, 1542 (S.D. Cal. 1996).

First, the government's proposed interpretation of "agent" is improperly expansive. It would capture any employee of a federally funded organization, from the part-time janitor to the

chief executive officer, regardless of whether they control (directly or indirectly) any of the federally funded entity's dollars. This broad definition stretches § 666 well beyond its stated purpose and is particularly troubling in the context of this case, where the government is not seeking to vindicate any federal interest but is instead seeking to enforce a private association's rules. *See United States v. Phillips*, 219 F.3d 404, 415 (5th Cir. 2000) (holding that "the absence of any federal interest in this prosecution militates in favor of our analysis that the statutory term 'agent' should not be given the broadest possible meaning, as urged by the government").

Given the very broad scope of the term "agent" if it is read to be any employee, and particularly in light of *McDonnell*, this Court should follow the Fifth Circuit and adopt a definition for federal funds bribery related to private employers that tracks the statutory language and is consistent with the purpose of § 666: "for an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] *with respect to its funds*.'" *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (quoting *Phillips*, 219 F.3d at 411) (emphasis added). At a minimum, "agent" cannot be read so broadly as to apply to any employee regardless of the circumstances. *See Valle*, 807 F.3d at 528 (cautioning that courts must "construe criminal statutes narrowly so that Congress will not unintentionally turn ordinary citizens into criminals").

Second, contrary to the government's position, § 666 does not apply to conduct performed outside the scope of an individual's duties as an agent of his federally funded principal. Indeed, the statutory definition of the term "agent" is limited to "a person authorized to act *on behalf of*" the federally funded organization. 18 U.S.C. § 666(d)(1) (emphasis added). Consistent with that definition, § 666 requires a nexus between any payment and the "business" or "transaction" of the federally funded organization. *See* 18 U.S.C. §§ 666(a)(1)(B), 666(1)(2).

Taken together, the definition of agency and the nexus requirement make clear that federal funds bribery reaches only conduct performed in an individual's capacity as an agent of a federally funded organization. That is the lesson of *Whitfield*, in which the Fifth Circuit vacated § 666 convictions where the defendants' acceptance of payments had nothing to do with their role as agents of a federally funded organization. *See* 590 F.3d at 346. Indeed, in every successful § 666 prosecution cited by the government (and Defendants), an agent of a federally funded organization was paid *to carry out his duties* corruptly. *See, e.g.*, *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013) (Puerto Rico legislator bribed to pass certain legislation); *United States v. Robinson*, 663 F.3d 265 (7th Cir. 2011) (attempted bribery of police officer to "get the heat off" a drug distribution operation). As in the context of honest services fraud, the Court should consider the scope of Mr. Person's agency as an employee of Auburn in determining whether he can be prosecuted under § 666. Because it was clearly not part of Mr. Person's duties to recommend financial advisors for players to use if and when they entered the NBA, it cannot be said that Mr. Person was bribed to act "on behalf of" Auburn when he allegedly did so.

Third, Mr. Person cannot be charged under § 666 because his alleged conduct was not connected to any "business" or "transaction" of Auburn. The government concedes, as it must, that Auburn is not in the business of recommending financial advisors to basketball players. (*See* Gov't Opp'n at 15–16.) Nevertheless, the government contends that Auburn "is certainly in the business of running an NCAA compliant athletics program." (*See id.* at 16.) The government's reframing of Auburn's "business" in terms of its interest in complying with the NCAA rules is untenable for the same reason discussed above in the context of honest services fraud: the government improperly conflates the *quid* and *quo* elements essential to any bribery charge. Mr.

Blazer's payment to Mr. Person did not induce Mr. Person to violate the NCAA rules; the payment itself was the alleged violation.

The government has not cited to a single case that supports its distorted view of the transactional element where the word "business" means compliance with private rules. Instead, at least in the application of § 666 to the private sector, "business" should be given its ordinary meaning of commercial activity. *See Black's Law Dictionary* (10th ed. 2014) (defining "business" as "commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain"); *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/business (last visited July 27, 2018) (defining "business" as "a usually commercial or mercantile activity engaged in as a means of livelihood"); *see also United States v. Worldwide Indus. Enterprises, Inc.*, 220 F. Supp. 3d 335, 339 (E.D.N.Y. 2016) ("Alongside the statutory context, a court may also consult dictionaries to determine the ordinary, common-sense meaning of the words." (internal citations and quotation marks omitted)).[9] Complying with the NCAA's amateurism rules is not remotely the sort of commercial or economic activity that implicates the integrity of federal funds.

Finally, due process forecloses the government's effort to expand the scope of federal funds bribery to fit these circumstances. According to the government's theory in this case, an individual who works for a federally funded organization governed by broad private rules like the NCAA rules has a duty – extending to every aspect of his life – never to give or accept something of value if it results in a violation of those private rules. That approach abolishes any

[9] The government cites to out-of-circuit cases to argue that, for purposes of § 666, the term "business" includes non-commercial activity. But each of those cases involved bribes to influence public officials – a very different context. *See, e.g.*, *Robinson*, 663 F.3d at 274 (bribes paid to police officers); *Fernandez*, 722 F.3d at 14 (bribes paid to legislators). We are aware of no federal funds bribery case involving a private employer where the term "business" was given a similarly expansive meaning, and there certainly is no Second Circuit case construing the statute this way.

meaningful limits to the type of conduct prohibited by § 666 and is inconsistent with the Supreme Court's direction that the "quo" element in a corruption case must be construed narrowly to prevent the "standardless sweep of the Government's reading." *McDonnell*, 136 S. Ct. at 2373.

IV. A SCHEME TO PAY REFERRAL FEES IN VIOLATION OF THE NCAA RULES IS NOT A TRAVEL ACT CONSPIRACY

The Superseding Indictment in this case alleges a Travel Act conspiracy with two Alabama misdemeanors as the predicate offenses: commercial bribery, Ala. Code § 13A-11-120, and receipt of a commercial bribe, Ala. Code § 13A-11-121. Both Alabama statutes, like the New York commercial bribery statute, require the conferral of a benefit upon an employee or agent with the intent to "improperly influence his conduct in relation to his employer's or principal's affairs." Ala. Code § 13A-11-120(a)(1); Ala. Code § 13A-11-121(a)(1). *See also* N.Y. Penal Law § 180.00. Mr. Person has moved to dismiss this charge for failure to allege the requisite nexus between his alleged conduct and his employer's affairs.[10] (*See* Person's Mem. of Law at 13 n.16, ECF No. 46.)

Although we are aware of no decision interpreting the Alabama misdemeanors charged in this case, the Second Circuit has interpreted similar statutory language to mean that "the payment must be made for the purpose of inducing the employee to act contrary to the interest of, and inconsistently with, his duties to his current employer." *United States v. Geibel*, 369 F.3d 682, 699 (2d Cir. 2004) (interpreting New York commercial bribery statute). As with private sector honest services fraud, the quintessential violation of a state commercial bribery statute involves "payment of money to a purchasing agent, to cause him to buy goods for his employer from one

[10] The government mistakenly asserts that Mr. Person did not separately move to dismiss Count Six. (*See* Gov't Opp'n at 33.)

vendor rather than from another." *People v. Jacobs*, 130 N.E.2d 636, 637 (N.Y. 1955) (interpreting New York commercial bribery statute).

Here, just as Mr. Person's conduct did not concern the business or transaction of his employer as required by § 666, *see supra*, Mr. Person's alleged agreement to refer players to Mr. Blazer to use Mr. Blazer's financial advisory services if and when those players entered the NBA was entirely unconnected to Mr. Person's duties as a basketball coach for Auburn. Accordingly, the Travel Act conspiracy against Mr. Person should be dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Person's initial memorandum of law dated March 9, 2018, Chuck Connors Person respectfully requests that the Superseding Indictment be dismissed in its entirety.[11]

Dated: New York, New York
July 27, 2018

Respectfully submitted,

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[11] Mr. Person also joins in the arguments advanced by his co-defendant Rashan Michel and incorporates those arguments by reference herein.