IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Case No. 19 CR 322
Plaintiff,	)	
	)	
v.	)	
	)	Judge Virginia M. Kendall
EDWARD M. BURKE, et al.,	)	
	)	
Defendants.	)	

DEFENDANT EDWARD M. BURKE'S MOTION FOR
JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

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INTRODUCTION

Edward Burke was convicted at trial on a number of counts which, given the Court's instructions and the evidence, no rational jury could have found him guilty beyond a reasonable doubt. Mr. Burke is entitled to judgment of acquittal on those charges.

First, Mr. Burke is entitled to a judgment of acquittal on the Field Museum Episode counts. No rational jury could have found that Mr. Burke attempted to extort the Field Museum of property in the form of a full-time position for his goddaughter, Ms. Gabinski. This Court aptly observed at the conclusion of the government's case that the Field Museum Episode is "an extremely odd attempt extortion count." (TR. 4367). The Court's skepticism was well founded. The Hobbs Act requires an attempt to extort "property," but there was no property here, only a potential job interview with the museum, and one which was never requested by Mr. Burke.

Second, Mr. Burke is entitled to acquittal on each of the Pole Sign Episode counts, because no rational jury could have sustained the official action element of those convictions where Mr. Burke placed two telephone calls referring Mr. Cui to public officials with knowledge of the relevant processes, each of whom explicitly denied being pressured by Burke to take official action. In both cases, he simply asked for someone to look at the situation, which is does not amount to official action.

Third, there was no evidence from which a rational jury could have found the official action requirement of two of the components of the Post Office Episode counts—Mr. Burke's outreach to Amtrak and the Water Department—because both

instances involved permissible phone calls, meetings, and referrals that are not official acts. Mr. Burke is entitled to acquittal on the standalone Amtrak charges, and he should be granted a new trial on the remaining Post Office offenses because those offenses involved four forms of official action—the two Class L and TIF votes and the Amtrak and Water Department outreach—and there is no way of determining whether the jury convicted him on these counts solely based on the votes on the Class L tax break and TIF funding.

Fourth, Mr. Burke is entitled to judgment of acquittal on the racketeering charges in Count One, or in the alternative is entitled to a new trial, because the government failed to prove that Mr. Burke conducted or participated in a pattern of racketeering activity involving two or more separate racketeering acts, particularly in light of the counts as to which a judgment of acquittal is warranted.

Pursuant to Fed. R. Crim. P. 29(c), the Court should grant judgment of acquittal on Counts One, Three, Four, Eleven, Fifteen, Sixteen, Eighteen, and Nineteen. Pursuant to Fed. R. Crim. P. 33, the Court should grant Mr. Burke a new trial on Count Two. Alternatively, the Court should also grant a new trial on Count One.

BACKGROUND

Following a six-week jury trial, on December 21, 2023, the jury returned guilty verdicts on thirteen of the fourteen counts of the superseding indictment against Mr. Burke, and one verdict of not guilty on Count Six. Specifically, Mr. Burke was convicted of:

Count One: Racketeering, 18 U.S.C. § 1962(c)
Acts 1(a)–(d) – Post Office
(a) state bribery – Amtrak, Water, Class L, TIF
(b) official misconduct – Amtrak, Water, Class L, TIF
(c) Travel Act (official misconduct, commercial bribery) – Amtrak
(d) Travel Act (official misconduct, commercial bribery) – Amtrak
Acts 2(a)–(b) – Post Office
(a) Travel Act (official misconduct, commercial bribery) – TIF
(b) official misconduct – TIF
Acts 3(a)–(g) – Burger King
Acts 4(a)–(c) – Pole Sign
Acts 5(a)–(b) – Field Museum
Count Two: Federal program bribery, 18 U.S.C. § 666(a)(1)(B) (Post Office – Water Dept., Class L, TIF)
Count Three: Travel Act, 18 U.S.C. § 1952(a)(3) (Post Office – Amtrak)
Count Four: Travel Act, 18 U.S.C. § 1952(a)(3) (Post Office – Amtrak)
Count Five: Attempted extortion, 18 U.S.C. § 1951(a) (Burger King)
Count Seven: Travel Act, 18 U.S.C. § 1952(a)(3) (Burger King)
Count Eight: Travel Act, 18 U.S.C. § 1952(a)(3) (Burger King)
Count Nine: Travel Act, 18 U.S.C. § 1952(a)(3) (Burger King)
Count Eleven: Federal program bribery, 18 U.S.C. § 666(a)(1)(B) (Pole Sign)
Count Fifteen: Travel Act, 18 U.S.C. § 1952(a)(3) (Pole Sign)
Count Sixteen: Travel Act, 18 U.S.C. § 1952(a)(3) (Pole Sign)
Count Eighteen: Attempted extortion, 18 U.S.C. § 1951(a) (Field Museum)
Count Nineteen: Travel Act, 18 U.S.C. § 1952(a)(3) (Field Museum)

(Dkt. 392).

LEGAL PRINCIPLES

I. Federal Rule of Criminal Procedure 29.

Under Federal Rule of Criminal Procedure 29(a) and (c), a district court, upon a defendant's motion or on the court's own initiative, "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction," either after the government has closed its evidence or after a jury has rendered a verdict or been discharged. In applying Rule 29, the district court must determine whether a reasonable jury considering the evidence in the light most favorable to the government could have found each element of the charged offense beyond a

reasonable doubt. *United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013); *Cf. In re Winship*, 397 U.S. 358, 364 (1970) (the Due Process Clause protects a defendant from conviction except upon proof "beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

A "Rule 29 judgment of acquittal is a substantive determination that the prosecution has failed to carry its burden." *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005). To prevail, a defendant "must show that no rational trier of fact could have found that the government proved the essential elements of the crime beyond a reasonable doubt." *United States v. Griffin*, 684 F.3d 691, 694 (7th Cir. 2012). This determination depends directly on the strength of the government's evidence at trial. *United States v. Garcia*, 919 F.3d 489, 496–97 (7th Cir. 2019). "[A] sufficiency of the evidence standard does not require the defendant to demonstrate that no evidence at all supports the conviction, but rather that the evidence cannot support a finding of guilty beyond a reasonable doubt." *United States v. Rahman*, 34 F.3d 1331, 1337 (7th Cir. 1994). The government cannot satisfy its burden with a "mere modicum" of evidence." *Id.*

In evaluating the evidence, a defendant's Rule 29 motion "calls on the court to distinguish between reasonable inferences and speculation." *United States v. Jones*, 713 F.3d 336, 340, 352 (7th Cir. 2013) (affirming judgment of acquittal where "[t]he jury's verdict . . . relied on several such speculative inferences"); *see also*, *United States v. Murphy*, 406 F.3d 857, 861–62 (7th Cir. 2005) (affirming judgment of

acquittal under Rule 29(c) because "a vital link between the evidence and the charge in the indictment [was] missing").

Importantly, a court must grant a Rule 29 motion if the government's evidence gives "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," because in that situation, "a reasonable jury must necessarily entertain reasonable doubt." *United States v. Cassese*, 428 F.3d 92, 98–99 (2d Cir. 2005); *see also United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971) ("Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence *necessarily fails* to establish guilt beyond a reasonable doubt.") (emphasis added); *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010) ("In this situation, the evidence is essentially in equipoise; the plausibility of each inference is about the same, so the jury necessarily would have to entertain a reasonable doubt."); *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (finding the government must "do more than introduce evidence [that is] at least as consistent with innocence as with guilt") (internal quotations omitted).

II. Federal Rule of Criminal Procedure 33.

Federal Rule of Criminal Procedure 33 permits a court to "vacate any judgment and grant a new trial if the interest of justice so requires." The decision to grant a new trial is committed to the sound discretion of the trial judge. *United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996). Courts have interpreted Rule 33 to require a new trial in a variety of situations in which trial errors or omissions have

jeopardized the defendant's substantial rights. *United States v. Reed*, 986 F.2d 191, 192 (7th Cir. 1993); *see also Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

A court may properly consider the credibility of the witnesses and may grant a new trial if the verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice. *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999); *United States v. Ferguson*, 246 F.3d 129, 133–34 (2d Cir. 2001); *United States v. Robinson*, 303 F. Supp. 2d 231, 233 (N.D.N.Y. Jan 22, 2004) (trial court did not abuse its discretion in granting motion for new trial where government witness' "dubious testimony [was] exceedingly weak support for the jury's finding of guilty."); *United States v. Crittenden*, 2022 WL 363857,*2 (5th Cir. 2022).

In reviewing a motion for a new trial, the court must consider the weight of the evidence and grant a new trial if that evidence "preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.* at 657–58 (quoting *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989)); *United States v. Morales*, 902 F.2d 604, 606 (7th Cir. 1990).

ARGUMENT

I. The Court Should Grant Judgment of Acquittal on the Field Museum Counts and Related RICO Acts.

Mr. Burke was convicted in Count Eighteen and RICO Act 5(a) with attempted extortion, which required proof beyond a reasonable doubt that Mr. Burke "(1) knowingly [took] a substantial step toward committing extortion, (2) with the intent to commit extortion." (Dkt. 384, p. 309). The jury was instructed that "[t]he substantial step must be an act that *strongly* corroborates that the defendant

intended to carry out the extortion." *Id.* (emphasis added). Mr. Burke was also convicted in Count Nineteen and RICO Act 5(b) with using a facility in interstate commerce to promote his commission of extortion.

As a matter of law, a threat alone is not extortion unless it is designed and intended to obtain property. 18 U.S.C. § 1951(b)(2) ("[t]he term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right"). Yet the jury inexplicably convicted Mr. Burke of attempting to extort a full-time position at the Field Museum (*not* the paid internship) for his goddaughter Molly Gabinski when: (1) he did not know that there was a job at the time of the purported threat; (2) he expressly said on tape to Field Museum President Richard LaRiviere that he did not want a job or anything else for Ms. Gabinski; (3) the idea of offering Ms. Gabinski anything was a subsequent creation of Field Museum staff; and (4) there was never an offer of a job, only an interview. No rational trier of fact could have found beyond a reasonable doubt that Mr. Burke knowingly and intentionally attempted to obtain property from the Field Museum by means of extortion in these circumstances, much less that the evidence "strongly corroborates" the government's theory.[1] (Dkt. 384, p. 309).

[1] Mr. Burke incorporates the arguments previously raised in his Rule 29 Motion submitted on December 12, 2023 prior to the start of jury deliberations. (Dkt. 378).

A. Mr. Burke Did Not Attempt to Obtain "Property" During the September 8th Phone Calls.

Mr. Burke neither asked nor demanded that the Field Museum hire Ms. Gabinski in his September 8th phone call with Ms. Bekken or during his phone call with Mr. LaRiviere shortly thereafter.

In the Bekken call, he complained about not having heard back from the museum, but did not ask for anything at all. (TR. 461–62; GX. 91T, p. 2). The call ended with Ms. Bekken indicating that she would follow up with the president's office to find out what went wrong with the application process. Ms. Bekken testified that Mr. Burke did not ask or demand that the Field Museum provide Ms. Gabinski with a job (TR. 549), and that to her knowledge, Mr. Burke never asked the Field Museum to provide a job or even a job interview for anyone. (TR. 555).

Mr. Burke spoke with Mr. LaRiviere a few minutes later. The tape recording shows that: (1) Mr. Burke did not so much as ask that the museum hire Ms. Gabinski; and (2) to the contrary, he told Mr. LaRiviere unequivocally that Ms. Gabinski was *not* interested in a position, informing him "that ship has already left the dock" because Mr. Burke had hired Ms. Gabinski himself. (TR. 623; GX. 92T, p. 2). Mr. LaRiviere testified that there was no need for Mr. LaRiviere to do anything at all after the call "[b]eyond finding out what happened" to Ms. Gabinski's internship application. (TR. 623–24). In fact, Mr. LaRiviere testified that at no point ever did Mr. Burke ask, let alone demand, a job or even a job interview for Ms. Gabinski. (TR. 626, 658).

Because there was no ask for anything and no property at issue, the September 8th calls cannot amount to extortion.

B. No Rational Jury Could Have Found That Mr. Burke's Actions After the September 8th Phone Calls Were Unlawful.

At trial during its Rule 29 arguments and in closing, the government heavily focused not on the allegedly extortionate calls on September 8th, but instead on innocuous contacts in the succeeding days which it says somehow relate back to the alleged September 8th extortion.

This theory does not avail the government at all. First of all, the job-interview possibility raised by museum staff does not amount to "property" under the Hobbs Act. "[P]roperty" must be "capable of passing from one person to another," *i.e.*, it must be "obtainable" or "transferable." *Sekhar v. United States*, 570 U.S. 729, 734 (2013); *see also Scheidler v. NOW, Inc.*, 537 U.S. 393, 410 (2003). An interview cannot be so transferred to a third party.

Second, what matters is Mr. Burke's intent when he made the supposedly extortionate statements on September 8th. It makes no sense to contend that he could be guilty for an intent that the evidence unequivocally shows he did not harbor at the time he made the calls. The evidence demonstrated only that he was angry and annoyed at the museum's perceived snub, not that he wanted anything from the museum.

And third, the notion that any of the follow-up events demonstrates his intent to extort property through fear or anything else is fantastical. The government cited an email of September 11th at 9:53 a.m., in which Mr. Burke's assistant said: "I just

wanted to follow up regarding Molly Gabinski. She has not heard anything from the Museum so the Alderman asked me to check in." (TR. 414; GX. 295). This email says absolutely nothing about any intent to obtain the interview for the paid position; indeed, nobody on Mr. Burke's side was even aware that the museum was considering offering such an interview to her until three hours later. (TR. 609–10; GX. 294). Similarly, the 9:53 a.m. email was nothing more than Mr. Burke closing the loop with the museum on what happened to Ms. Gabinski's original application. It too occurred hours before anyone on Mr. Burke's side had heard anything about a new possibility.

Even further afield is the government's reliance on Mr. Burke's September 12th phone call with Ms. Gabinski's mother (which it charged as the underlying use of a facility in interest commerce under the Travel Act), in which Mr. Burke simply passed along the information about the new coordinator position. (TR. 478–79, GX. 94). This says nothing at all about his supposed extortionate intent, nor could it possibly serve as a means for promoting or establishing extortion.

Finally, the government pointed out in closing that Ms. Synowiecki sent a September 12th email to the museum asking how Ms. Gabinski could apply for the paid position. The government did not establish that this email was sent at the direction of Mr. Burke, and if it was not, it cannot possibly bear on *his* intent. In any case, it says nothing at all about an intent to extort. The Field Museum staff had concocted the idea of offering this paid position on its own, and there was nothing unlawful about inquiring how to apply for it.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Burke attempted to extort the Field Museum. A judgment of acquittal must therefore be entered on Count Eighteen. A judgment of acquittal is also necessary on Count Nineteen, as the predicate conduct did not, as a matter of law, constitute attempted extortion in violation of § 1951(a), and Mr. Burke did not possess the specific intent to promote his own commission of the offense of attempted extortion.

II. The Court Should Grant Judgment of Acquittal on The Pole Sign Episode Counts and Related RICO Acts.

The Pole Sign Episode charges (Counts Eleven, Fifteen, and Sixteen, and RICO Acts 4(a)–(c) in Count One) required proof beyond a reasonable doubt that Mr. Burke either agreed to take, or did take, or acted with the intent to take, official action in exchange for property tax appeal work. (Dkt. 384, pp. 39, 146, 152, 160, 236, 273, 285).

At trial, the Court provided the jury with a uniform definition for the official action elements contained in the charged federal and state bribery offenses which narrowly defined the official action element. (Dkt. 311, 320, 373, 384; TR. 4059–69, 4223–29). Specifically, the jury instructions recited the relevant statutory language describing the quo of the particular federal and state bribery statutes charged, and referred uniformly to these phrases as "official action."[2] The instructions provided

[2] In particular, the jury instructions uniformly defined the following phrases describing the quos of the federal and state bribery statutes charged: "in connection with some business, transaction, or series of transaction" (federal program bribery, 18 U.S.C. § 666); "an act or function of a public officer or public employee" (state bribery, 720 ILCS 5/33-1(e)); an act "related to the employment or function of a public officer or public employee" (state bribery, 720 ILCS 5/33-1(d)); an "act" in his "official capacity" (official misconduct, 720 ILCS 5/33-3(a)(4)); "conduct in relation to his employer's or principal's affairs"

that "official action" requires "a formal exercise of governmental power."[3] The instructions then defined official action as follows:

> A public official engages in an "official action" when he uses his official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that the advice will form the basis for an official act by another official.
>
> In addition, the government does not need to prove that the government official had the power to or did perform the act for which he was given or received something of value.
>
> *However, a public official does not take official action if he does no more than set up a meeting, host an event, or call another public official*.

(Dkt. 384, pp. 39, 236, 273, 285) (emphasis added). These instructions were modeled on the Seventh Circuit Pattern Jury Instructions, and were crafted to comport with the constitutional limitations on official action articulated by the Supreme Court in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). (TR. 4059–69, 4223–29).

In *McDonnell v. United States*, the Supreme Court made clear that "typical" phone calls and meetings do not qualify as official actions, nor do public officials' "myriad decisions to refer a constituent to another official." *McDonnell*, 136 S. Ct. at 2368, 2371. In fact, not even a public official's expression of support for a particular outcome of a matter constitutes official action, "as long as the public official does not

(commercial bribery, 720 ILCS 5/29A-1, A-2); and, "official action" (extortion under color of official right, 18 U.S.C. § 1951(a)). (Dkt. 384, pp. 39, 170, 236, 273, 285).

[3] The official action elements for all state and federal bribery charges were uniform with one exception. In the official action instructions contained in the federal program bribery charges in Counts Two (Post Office Episode) and Eleven (Pole Sign Episode), the instructions provided, in addition to the requirement that the act involve a "a formal exercise of governmental power" that it must also be "a formal exercise of governmental power *on behalf of the City of Chicago*." (Dkt. 322, pp. 146, 236) (emphasis added).

intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an "official act.'" *Id.* at 2371. In addition, the Court held that the proper scope of the underlying subject matter of an "official action," must involve "a formal exercise of government power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee[,]" and "must also be something specific and focused[.]" *Id.* at 2372 (internal quotations omitted).

In summary, the Supreme Court distinguishes between a public official pressuring or advising another public official to take official action, and a typical phone call, meeting, expression of support, or constituent referral. Post-*McDonnell* decisions demonstrate that criminal pressure is exemplified by a public official's "repeated," "heav[y]," or sustained involvement in pushing another public official to take an official action, and characterized by actions including "continuous[] monitor[ing]," numerous phone calls, in person meetings, inquiries, and requests. *United States v. Jefferson,* 289 F. Supp. 3d 717, 742–43 (E.D. Va. 2017) ("if 'exerting pressure' is to have any force, it must at least include repeated actions by a public official to push and promote a project").

On the other hand, when "the overwhelming weight of the government's case … was focused on constituent services" such acts do not constitute official action and cannot form the basis of a bribery conviction. *Jefferson,* 289 F. Supp. at 740 (vacating convictions on counts of conviction where government failed to prove official action within the meaning of *McDonnell,* but denying relief on counts of conviction where

proof pressure was satisfied); *see also, United States v. Lee*, 919 F.3d 340, 359-360 (6th Cir. 2019) (affirming denial of motion for acquittal where defendant, a city councilwoman, took extensive steps to intervene in an assault case which went beyond "routine constituent services").

A. The Government's Evidence of "Official Action" On the Pole Sign Episode Counts Involved Two Phone Calls Referring Mr. Cui to Other Public Officials, Both of Whom Denied Being Pressured By Mr. Burke.

Mr. Burke did only two things in connection with the Pole Sign: he spoke to Building Commissioner Judy Frydland by phone and he spoke to Zoning Administrator Patti Scudiero by phone. Neither action involved anything more than making an anodyne phone call referring the matter to another official with knowledge of the relevant processes. And neither involved any pressure at all.

On August 23, 2017, Mr. Burke received an email from Mr. Cui explained that he had "applied to reuse the existing pole sign" but was "denied by zoning." (TR. 2019–21; TR. 4596). Mr. Cui asked: "Can you look into the matter and advise how to proceed?" (TR. 2021; TR. 4596).[4]

On August 30, 2017, Mr. Burke asked his assistant Meaghan Synowiecki in a recorded telephone call to contact Building Commissioner Judy Frydland regarding "the Binny's liquor store and the pole" to "see if she'd review it" and "see if there is any way that they can uh, help him." (TR. 2039–40; GX. 88). Ms. Synowiecki tried reaching Frydland, who was not available. (TR. 4600).

[4] Mr. Burke did not answer Mr. Cui's email regarding the pole sign, nor did he ever speak to Mr. Cui regarding the pole sign.

Sometime thereafter, Ms. Frydland testified that Mr. Burke called her, and the "sum and substance" of the telephone call was that Burke simply asked her to "look into" the pole sign issue to see if there was something she could do to help with the permit. (TR. 3542; 3509–10). During the call, which was not recorded, Mr. Burke referred Mr. Cui to Ms. Frydland by providing her with Mr. Cui's name and contact information so she could speak with him regarding the matter. (TR. 3509–10). Ms. Frydland testified that Mr. Burke did not pressure her or direct her to take any particular action. (TR. 3542–43). Ms. Frydland testified that Mr. Burke simply asked her to look into it, and then turned the matter over to her. (TR. 3543–44). Ms. Frydland received calls like this "all the time[.]" (TR. 3542–43).

After looking into the issue and determining there was nothing she could do, *Ms. Frydland* recommended to Mr. Burke's assistant, Ms. Synowiecki, that Mr. Burke refer the matter to Zoning Administrator Patricia Scudiero, who may be able to assist. (TR. 3538–39; GX. 95).[5] Ms. Scudiero testified that she had a single telephone call with Mr. Burke in which he asked her to "look at the zoning review" but did not tell her what he wanted her to do, nor did he "pressure" her to take any particular action. (TR. 3728, 3744). Ms. Scudiero agreed that aldermen called "often" on these kinds of zoning matters such that the Burke call was "not unusual." (TR. 3740–41). Ms. Scudiero did not take any action with respect to the pole sign, and Mr. Burke never followed up with Ms. Scudiero. (TR. 3730–31, 3737–38).

[5] Ms. Frydland told Ms. Synowiecki that she had "a bit of a contentious relationship" with Scudiero, so "it would come better from you." (TR. 3538–39; GX. 95).

B. The Government's Evidence of "Official Action" On the Pole Sign Episode Counts Fails As A Matter of Law.

These two calls are insufficient to constitute "pressure" under *McDonnell* as a matter of law. The calls were, instead, routine calls to assist an individual with the city bureaucracy—a classic form of constituent service.

At the outset, both Ms. Frydland and Ms. Scudiero explicitly denied being pressured by Mr. Burke. (TR. 3542–43; TR. 3744). These denials, from the government's own witnesses, thoroughly negate the "pressure" theory of official action. The government never so much as hinted that there was any reason to disbelieve Ms. Frydland or Ms. Scudiero's testimony.

Nor did Mr. Burke undertake the kind of sustained involvement, "pushing," "continuous monitoring," or other repeated conduct that exemplifies impermissible pressure. *Jefferson,* 289 F. Supp. at 742–43. Mr. Burke did not request updates or demand explanations from Ms. Frydland or Ms. Scudiero when they determined nothing could be done to assist Mr. Cui with the pole sign. Mr. Burke did not continuously monitor Ms. Frydland and Ms. Scudiero, or make repeated phone calls or requests for in person meetings. Mr. Burke did not demand that either official take any particular action—he simply asked them to look into the matter to see if they could help. At *most*, Mr. Burke expressed support for Mr. Cui's situation and the grant of the pole sign permit, which is not criminal pressure under *McDonnell*.

The fact that Mr. Burke referred Mr. Cui to Ms. Frydland by providing her with Mr. Cui's contact information, thereby removing himself from the conversation,

also underscores that Mr. Burke's outreach was akin to a permissible constituent referral, rather than an unlawful attempt to pressure Ms. Frydland.

Ms. Frydland and Ms. Scudiero's actions following the outreach from Mr. Burke also indicate that they were not pressured by him. Neither official attempted to bend the relevant zoning and building rules, or otherwise make any exceptions to the rules in order to grant Mr. Cui a permit in light of Mr. Burke's outreach. Both officials adhered to their respective rules, determined that nothing could be done, and moved on. Indeed, though Ms. Scudiero testified that it would have been her common practice to follow up with an alderman who reached out concerning a zoning issue, she testified she had no recollection of following up with Mr. Burke after looking into the matter and confirming that there was no workaround for Mr. Cui's pole sign issue—further underscoring that she did not feel pressured by Mr. Burke's mere phone call. (TR. 3737–38).

Contrary to the government's theory and the jury's inexplicable verdict, Mr. Burke did not try to "convince" Ms. Frydland to do anything. (TR. 4650). There was no "pressure" within the meaning of *McDonnell* as a matter of law. Rather, Mr. Burke did nothing but "refer a constituent to another official" (*McDonnell*, 136 S. Ct. at 2368, 2371), which is not illegal.

III. The Court Should Grant Judgment of Acquittal on the Old Post Office Episode Counts and RICO Acts Solely Involving Amtrak, and Grant A New Trial On the Remaining Counts and Acts.

At trial, the government argued that Mr. Burke solicited and agreed to accept tax work from the developer of the Old Post Office, Harry Skydell of 601W, in exchange for four forms of his official action: approvals from Amtrak, approvals from

the City of Chicago Water Department, a Class L designation, and tax increment financing ("TIF"). Specifically, in Count One RICO Acts 1(a)–(b), the government pursued all four official action theories in support of the state bribery and official misconduct charges. (Dkt. 30, pp. 29–30; TR. 4641–43). In Count One RICO Acts 1(c)–(d), and Counts Three and Four, the official misconduct, commercial bribery, and Travel Act charges relate only to the Amtrak official action theory. (Dkt. 30, pp. 30–31, 40–41; TR. 4567–70, 4574–75). In Count One RICO Acts 2(a)–(b) the government pursued the TIF official action theory (Dkt. 30, pp. 31–32; TR. 4643); and in Count Two, the government pursued the Water Department, Class L, and TIF official action theories (excluding only the Amtrak theory). (Dkt. 30, p. 39; TR. 4563).

The evidence at trial was insufficient to establish official action on the Amtrak and Water Department theories beyond a reasonable doubt, requiring acquittals on the standalone Amtrak counts. For the remaining counts, since the government failed to prove two key theories of official action, and the remaining counts freely mixed those unsound theories with the Class L and TIF theories of official action, Mr. Burke is entitled to a new trial in the interests of justice.

A. The Government's Evidence of "Official Action" on the Amtrak-Related Counts Involved A Phone Call And A Meeting with Ray Lang, Who is Not a Public Official Under Illinois Law.

The evidence at trial showed that on several occasions Mr. Burke learned from Harry Skydell, the Old Post Office developer, and Alderman Solis that Amtrak was obstructing the redevelopment process. (TR. 1587–89; GX. 5T, p. 11, 18; TR. 1590–91; GX. 7T, p. 1; TR. 1908; GX. 50T, p. 2; TR.1732; GX. 63T, pp. 1–2). Mr. Solis told Mr. Burke in substance that he could get tax business for his firm if he assisted the

developer in getting Amtrak to cooperate with the developer. (TR.1722–23; GX. 38T, p. 2; TR. 1590–91; GX. 7T, p. 1). Mr. Burke also bragged on several occasions about his relationship with a member of the Amtrak board, Jeff Moreland. (TR. 1587–89; GX. 5T, p. 18; TR. 1735; GX.77T, p.1). The only thing asked of Mr. Burke, or that was even contemplated, was helping to obtain cooperation from Amtrak.

Beyond a lot of talk, only three things actually happened between Mr. Burke and Amtrak. First, on December 21, 2016, Mr. Burke set up and hosted a meeting at his City Hall office with Ray Lang, the President of Chicago Union Station Company. (TR. 1646–49). During the meeting, there were a number of topics that Mr. Burke and Mr. Lang discussed, one of which involved the Old Post Office. (TR. 1648). Regarding the Old Post Office, Mr. Lang testified that Mr. Burke said: "[H]e was considering representing the Old Post Office with his law firm and he was doing some research about the issues surrounding the development of that building, and he was curious about our role in working with the developers on the stabilization work at the post office." (*Id.*) Mr. Lang testified that Mr. Burke's "focus" about the Old Post Office during the meeting was that "he was considering representing them." (*Id.* at 1650).

In response, Mr. Lang told Mr. Burke about his "own personal history with the Old Post Office, about the consent decree, and the lawsuit from the previous owners, and that the new owners were embarking on aggressive redevelopment[.]" (TR. 1648). Mr. Lang explained to Mr. Burke that the redevelopment "involved a lot of stabilization work at the building around the plenum, and the underside of the building and the ventilation vents." (*Id.* at 1648–49). Mr. Lang also discussed with

Mr. Burke Amtrak's "permits to enter." (*Id.* at 1649). At one point, Mr. Lang also offered to give Mr. Burke a tour of Chicago Union Station (TR. 1657), which was undergoing a separate, unrelated redevelopment.

During the meeting, Mr. Burke took notes. (TR. 1710–11). Mr. Lang testified that Mr. Burke did not insist that Lang do anything regarding Amtrak's permit to enter process. (*Id.*) Mr. Burke listened to Mr. Lang, and said, "I got it, okay, I understand." (TR. 1711). Lang testified that Mr. Burke did not "deliver any ultimatum" to Lang, or "threaten" Lang, or "tell [Lang] what to do[.]" (TR. 1714). In addition, Mr. Lang testified that he "didn't do one thing differently" because of Mr. Burke's outreach. (*Id.*) Following the meeting, Mr. Lang sent an email to another official, writing: "My meeting with the alderman went very good the other day. He indicated he has been approached by 601 West to represent them but has not decided to do so yet. He was aware of the PTE issue but didn't seem concerned about it or not." (TR. 1653; TR. 1712–13; GX. 227).

Second, on February 10, 2017, Mr. Lang took Mr. Burke and Solis on a tour of Chicago Union Station. (TR. 1657; GX. 12T). Mr. Lang testified that he gives "lots of tours" and that this one was not unusual. (TR. 1714–15). Mr. Solis testified that Mr. Burke did not "put the arm on Mr. Lang" during the tour, and agreed that Burke simply "told a lot of war stories" during the tour. (TR. 4158–59).

Third, on June 22, 2017, Mr. Burke called Mr. Lang (TR. 1718), following up on an email from Mr. Skydell regarding the Amtrak issue. (TR. 1908; GX. 50T; TR. 1663-34; TR. 1908-09; GX. 51T; GX. 254). Mr. Lang testified that Mr. Burke said he

was concerned about the continuing problems with permits to enter. (TR. 1661). Mr. Lang testified that nothing Mr. Burke said in the call "stands out" in his memory, and that he did not threaten him or direct him to take any action. (TR. 1716). Following the telephone call, which was not recorded, Mr. Burke forwarded Mr. Skydell's email to Mr. Lang, writing: "As per our conversation." (TR. 1661–63; GX. 254). Mr. Lang testified that all Mr. Burke did was forward him an email, and that he "didn't do anything at all differently after [he] got that email[.]" (*Id.*) In addition, Mr. Burke never followed up with him after sending the email. (*Id.*)

B. The Government's Amtrak-Related Evidence of Official Action Fails As A Matter of Law.

The government's Amtrak theory of official action fails for several reasons. At the outset, Amtrak is not a City of Chicago-related entity over which Mr. Burke possessed formal governmental power as an alderman. (TR. 1486–87). It is also undisputed that Amtrak employees such as Mr. Lang and Mr. Moreland are not public officers or employees under the various Illinois state predicate acts of bribery.[6] (TR. 5186–87). As a result, Mr. Burke could neither take official action in his own personal capacity with respect to Amtrak, nor could he (under the "pressure" theory of official action) take official action by pressuring Amtrak employees—because those individuals are not public officials under Illinois law.[7] (TR. 1486–87).

[6] *See* Jury Instructions, Dkt. 384, p. 41 ("The term 'public officer' under Illinois law is a person who is elected to office pursuant to statute to discharge a public duty for any political subdivision of the State of Illinois. The term 'public employee' under Illinois law is a person who is authorized to perform an official function on behalf of, and is paid by, any political subdivision of the State.").

[7] Because Mr. Burke was not charged under 18 U.S.C. § 666 with Amtrak-related conduct, it is irrelevant if Amtrak employees are considered public officials under federal law.

The result is the same with respect to the commercial bribery predicate underlying RICO Acts 1(c)–(d) and in Counts Three and Four, because the Court ordered a uniform definition of "official action" for each of the state predicates requiring the formal exercise of governmental power consistent with *McDonnell*—thereby dissolving any meaningful difference between the traditional state bribery predicate and the commercial bribery predicate.[8] (Dkt. 385, p. 39).

Even if Amtrak employees had been public officials under the state statutes, which they were not, the evidence did not demonstrate beyond a reasonable doubt that Mr. Burke intended to pressure, agreed to pressure, or did pressure either individual within the meaning of *McDonnell*.

First, the evidence did not demonstrate that the underlying subject matter of the Amtrak issues facing the Old Post Office developers was "specific and focused" or "similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S. Ct. at 2372. The concerns facing the developers appeared to relate to Amtrak's permit to enter process *in general*, rather than a need for assistance concerning specific Amtrak permits. *See e.g.*, TR. 1710

[8] It is notable that Mr. Burke was convicted under the commercial bribery predicates with respect to Amtrak, while he was acquitted of the traditional bribery predicate. Given the consistency in the proof required for both predicates, the inconsistency in the verdicts suggests that the jury may have misunderstood the instructions, further underscoring the basis of Mr. Burke's Rule 29 motion.

Moreover, the fact that Mr. Burke was convicted of official misconduct concerning Amtrak while he was acquitted of bribery concerning Amtrak when those statutes have similar standards of proof suggests that the jury may have understood the statute as a mere gratuity offense (given the statute's use of the word "reward"), rather than an offense involving bribery. As Mr. Burke argued pretrial, the underlying RICO and the Travel Act predicates must involve *bribery*. *See* 18 U.S.C. § 1961(1) ("racketeering activity" means "bribery" chargeable under state law); 18 U.S.C. § 1952(b) ("unlawful activity" means "bribery" that is "in violation of the laws of the State in which committed or of the United States"). If the jurors interpreted the official misconduct statute as being satisfied by a mere *gratuity* rather than a bribe, that is yet another basis on which the jury's verdict cannot stand.

(Lang's meeting with Burke involved explaining the permit-to-enter *process*). Mr. Skydell initially referred to general "problems" with Amtrak, and a desire for better "cooperation[.]" (GX. 5T, pp. 12, 18). In June of 2017 when Mr. Skydell forwarded Mr. Burke a more detailed email about the "primary issues" with Amtrak, that email similarly detailed issues concerning the overall permitting *process*, such as the frequency of submission of permit to enter applications, the time frame for the issuance of a permit, the fees associated with permits, and other general complaints about Amtrak's permitting processes. (GX. 254).

When Mr. Skydell later thanked Mr. Burke for his outreach to Amtrak, Skydell thanked Burke for "opening up … the passageway" to "some normal relations"—describing the changes at Amtrak as "attitudinal," and explaining that he was promised "cooperation" and "better response time" from Amtrak. (GX. 75T, pp. 1–2). These conversations demonstrate that the Amtrak issues facing the Old Post Office were broad, amorphous, and centered around processes and attitudes rather than specific issues similar to a lawsuit as required by *McDonnell*.

Second, and more importantly, there was no evidence that Mr. Burke intended to take, agreed to take, or took any official action with respect to those issues within the meaning of *McDonnell*. With respect his contacts with Mr. Lang, Mr. Burke's conduct fell well within the bounds of the permissible contacts such as phone calls, meetings, and constituent services excluded from the definition of official action under the jury instructions.

Mr. Burke had only three contacts with Mr. Lang involving the Old Post Office—a December 2016 meeting, the February 2017 tour, and the June 2017 phone call and email. None of these, on the government's evidence came close to constituting impermissible pressure. (TR. 4539). At the first informational meeting, it was clear from Mr. Lang's testimony that Mr. Burke simply listened to understand the problem. The second was the standard tour given of Union Station.[9] And in the third, he merely passed on what the developer had told him. This is the stuff of typical services provided by public officials—passing on concerns to people in a position to deal with them.[10]

Mr. Burke's offer to reach out to his personal friend Jeff Moreland at Amtrak similarly fails to demonstrate that he intended to improperly "pressure" Mr. Moreland. To the contrary, Mr. Burke simply explained to Mr. Skydell that if the Old Post ran into a problem, Mr. Moreland could be "helpful" (GX. 5T, p. 11), and that in light of his personal relationship, Mr. Burke could connect Mr. Skydell to him. This represents a classic constituent service in the form of a potential referral—not an agreement to improperly pressure another public official.[11] For example, in *United*

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[9] The February 10, 2017, tour of Union Station Mr. Burke took with Mr. Lang and Mr. Solis does not appear to have related to the Old Post Office, as Mr. Burke simply "told a lot of war stories" during the tour and did not ask Mr. Lang to do anything with respect to the Old Post Office. (TR. 4158–59).

[10] These actions could barely be understood to rise to the level of a permissible expression of support, let alone impermissible "pressure." *See e.g.*, *Jefferson*, 289 F. Supp. at 738–39 (reversing bribery conviction where defendant wrote a letter on congressional letterhead to the U.S. embassy in London in support of a visa application, and also made a phone call to the embassy, because the conduct was a mere "expression of support" for the application, which is not criminal under *McDonnell*).

[11] Similarly, the fact that Mr. Burke, when prompted by Mr. Solis, agreed to "follow up" with his Amtrak contacts (GX. 7T, 38T) is not evidence of any agreement or intention to improperly pressure those individuals.

States v. Jefferson, the district court found that the defendant's agreement to work to obtain financing from Ex-Im Bank (a federal agency), did not amount an official act because even though the defendant agreed to "assist" with obtaining the financing, "testimony at trial [did] not clarify what Jefferson meant by assistance." *Jefferson*, 289 F. Supp. at 739. The district court also noted there was "no evidence that Jefferson agreed to exert pressure on public officials as required in *McDonnell*," "even if it was implied that his role as a Congressman would assist in the effort." *Id.* The district court found that the defendant's actions "amounted to nothing more than making introductions and expressing support, both of which are not criminal under *McDonnell*." *Id.* at 739.

None of Mr. Burke's actions or statements constitute proof beyond a reasonable doubt that Mr. Burke intended, took, or agreed to take official action. As a result, the Court should grant judgment of acquittal on Counts Three and Four which are predicated on the Amtrak official action theory, as well as RICO Acts 1(c)–(d).

C. The Government's Evidence of its Water Department Theory of "Official Action" Involved Mr. Burke's Phone Call With A Former Public Official And Setting Up A Meeting.

Mr. Burke's allegedly "official" action in connection with the Water Department consisted of a single phone and setting up a meeting. On March 9, 2017, Mr. Solis called Mr. Burke, and informed him that the Old Post Office "has an issue with the water department, and they need to get the water commissioner to sign off on something." (TR. 1511–12; GX. 13T, p. 1). Mr. Solis explained that he would forward an email he received concerning the issue, noting "it's a little bit complicated, so you can look at it." (*Id.*) Mr. Solis then said, "I think if we can take care of the water

commissioner, we should be able to get the tax work and even get my consulting from you." (*Id.*) Mr. Burke responded, "Good. Let me take a look at it." (*Id.*)

After receiving the email from Mr. Solis, which detailed the Old Post Office water service issues (GX. 230), Mr. Burke called Solis back, and stated: "It's rather complicated. I don't know how a layman can understand it." (TR. 1512; GX. 14T, p. 1). Mr. Burke suggested that Old Post Office developers should "bring Tom Powers in, who used to be the commissioner" and was working in the private sector engineering similar projects. (*Id.*) Mr. Burke explained: "Nobody knows the uh, the regs and ordinances or the people that'll have to make the decisions better than him." (*Id.*) Mr. Solis suggested a meeting with Mr. Powers, and Mr. Burke replied: "Yeah, if it's okay with you, I'll put this in his hands, and he'll be able to sort through it uh, quicker than Johnny wrote the note." (*Id.*) Mr. Solis asked Mr. Burke to set up a meeting, and Burke agreed. (*Id.* at pp. 1–2). Mr. Solis added "[t]hen we'll meet with the commissioner." (*Id.* at 2).

The next day, on March 10, 2017, Mr. Burke's assistant forwarded the email to Tom Powers, writing, "[b]elow is information Alderman Burke would like to speak to you about[,]" and asked if Mr. Powers could give Burke a call. (TR. 1513–14; GX. 230). Mr. Powers responded to the email, writing: "Of course[.]" (TR. 1517). Mr. Powers testified that sometime after receiving the email, he spoke with Mr. Burke by telephone, and "the conversation was there were some challenges with some technical aspects of the Old Post Office redevelopment, and he was asking my opinion on how to move forward." (*Id.*) Mr. Powers testified that the totality of the conversation

involved Mr. Burke asking, "Do you have advice on this water situation[?]" and Mr. Powers responding, "Let me call Barrett Murphy and see." (TR. 1532). Mr. Powers testified that Mr. Burke never tried to intimidate, threaten, or otherwise be aggressive with him. (TR. 1529–30). Nor did Mr. Burke tell Mr. Powers to "put the arm on Barrett Murphy" regarding the water situation. (TR. 1532).

Mr. Powers then reached out Water Commissioner Murphy. (TR. 1520–21). Mr. Powers told Murphy that he had received a call from Mr. Burke, who was concerned about some issues at the Old Post Office redevelopment. (TR. 1521). Murphy suggested that Mr. Powers should "get in front of it." (*Id.*) Mr. Murphy testified that during the call, Mr. Powers did not provide any specifics concerning the water issues, did not make any "requests," and was merely giving Murphy a "heads up." (TR. 1572–73).

Mr. Murphy testified that during the call, Mr. Powers said there was "heat" from "City Hall." (TR. 1570). Mr. Powers left "City Hall" undefined, and Mr. Murphy understood "City Hall" to mean the Mayor's office—though he testified that Powers had specifically mentioned that Mr. Burke was "interested in" it. (TR. 1547–48, 1570). Mr. Murphy testified that he understood "heat" to mean "pressure to finally get this building back on the tax rolls, get it productive, and that there would be a lot of—you know, you want to make sure that we worked as expeditiously as possible to assist the developer in bringing water service in." (TR. 1548). However, Mr. Murphy testified that the call from Mr. Powers did not cause him to do anything differently

than he otherwise would have done (TR. 1572–73), and that Mr. Burke never did anything to intimidate him concerning the Old Post Office project. (TR. 1561).

In the meantime, on March 20, 2017, Building Commissioner Judith Frydland sent Mr. Murphy and Alderman Solis an email, writing:

> Buildings, Law, and planning have been meeting regularly with the developers of the Old Post Office. They have some water service issues they have been trying to work out … However, they have hit some roadblocks that they need to discuss at a higher level. I am happy to set up the meeting here at DOB if that is helpful.

(TR. 1550–51; GX. 235). Mr. Murphy testified that Greg Prather (the Old Post Office general contractor) had also reached out to his office to set up an appointment. (TR. 1552). The outreach to the Water Department culminated in the setting of a March 22, 2017, meeting between Water Department officials and the Old Post Office contractors, including Mr. Prather. (TR. 1553; GX. 515). Mr. Murphy testified that it was actually Commissioner Frydland's email that "spurred" him into action to hold the meeting. (TR. 1574).

Mr. Murphy ultimately attended two Old Post-office related meetings, the purpose of which were to "determine how we could best bring in the new water service to the building." (TR. 1553). After the March 22, 2017 meeting, Mr. Murphy sent Mr. Powers a text, saying that he had a meeting and that they were working through the issues. (TR 1554; GX. 470).

D. The Government's Water Department Theory of "Official Action" Fails As A Matter of Law.

No rational jury could have concluded that Mr. Burke's telephone call to a non-public official, Tom Powers, to *ask* Mr. Powers his opinion on how to handle technical

aspects of the Old Post Office's water service issues, constituted official action under the jury instructions.

First, it is inescapable from the evidence that Mr. Burke was not pushing any particular resolution of the water service issues. Indeed, he confessed to not understanding them.[12] It is bizarre to claim that a public official who has no resolution of an issue in mind is unlawfully pressing for a particular resolution. Making the government's case doubly bizarre, everyone agrees that Mr. Burke simply asked Mr. Powers for advice on how to handle the situation. And, as a result, the only thing that Mr. Murphy did was to attend a pair of meetings. This is not "pressure" under *McDonnell*.

As is permissible under *McDonnell*, Mr. Burke referred the matter to someone with the proper expertise. *See* GX. 14T (Burke: "I'll put this in his [Powers'] hands[.]"). This is exactly like one of the "myriad decisions to refer a constituent to another official" that is permissible under *McDonnell*—though here Mr. Powers is a *former* public official. *McDonnell*, 136 S. Ct. at 2368, 2371.

Mr. Powers also confirmed that Mr. Burke did not impermissibly pressure him to take any action, refuting the government's theory. (TR. 1529–30). Instead, Mr. Burke simply asked Powers for his advice in connection with the complicated water

[12] It is undisputed that the water service issues were extremely complicated. *See e.g.*, TR. 1569 (Comn'r Murphy testifying that the water service issues were the "most complicated" he had ever dealt with in his career). When Mr. Burke viewed the email Mr. Solis forwarded to him regarding the water issues, Mr. Burke explained that he did know how a "layman" (*i.e.*, a non-engineer) would understand it. (GX. 14T). In addition, Mr. Murphy testified that when Mr. Powers talked to him, Powers did not provide any "specifics" from Mr. Burke concerning the water service. (TR. 1573). Given this complexity, these issues, at least to Mr. Burke, were not "specific and focused" within the meaning of *McDonnell.*

service email he received—which is not "pressure" to take a particular action. In turn, it was Mr. Powers who suggested that he would reach out to the then-Water Commissioner, Barrett Murphy. (TR. 1519).

Ultimately, a meeting was set up between the Old Post Office general contractors and Mr. Murphy's office, though Murphy testified it was *not* the outreach from Mr. Powers that "spurred" the meeting. (TR. 1574). But even if Mr. Burke was the catalyst of the meeting, under *McDonnell* setting up a meeting is not an official act. In other words, no one contemplated that Mr. Burke should do anything improper to obtain a resolution of the water issues.

The government is sure to point out Mr. Murphy's testimony that Mr. Powers used the term "heat" from "City Hall" regarding the water service, but that does not compel a different result because Powers was unequivocal that *Mr. Burke* did not pressure him to take any particular action. The fact that Mr. Powers may have characterized Mr. Burke's outreach as "heat" does not speak to Mr. Burke's intentions, because Mr. Burke never asked or suggested that Mr. Powers put any "heat" on Mr. Murphy. At most, Mr. Burke may have expressed general support for resolving the water service issues, which is not an official act under *McDonnell*. *See Jefferson*, 289 F. Supp. at 737 (no official action where defendant simply made "encouraging statements" about a technology project during a meeting with a U.S. general and never "ordered" the general to admit those products for testing at the U.S. Army installation).

As set forth below, because the Water Department theory of official action fails, but it served as a basis for several counts of conviction, the Court should order a new trial.

E. The Court Should Grant Acquittals On Counts Three and Four, and RICO Acts 1(c)-(d), And Order a New Trial on Count Two and RICO Acts 1(a)-(b) and 2(a)-(b).

The Court should grant acquittals on the counts of conviction solely predicated on the Amtrak theory of official action: Counts Three and Four, and RICO Acts 1(c)-(d) (Dkt. 30, pp. 30–31, 40–41; TR. 4567–70, 4574–75), because no rational jury could have concluded based on the evidence adduced at trial that Mr. Burke intended to take, agreed to take, or did take, official actions with respect to Amtrak, as narrowly defined by the Court's jury instructions and the strictures of *McDonnell*.

The should also grant a new trial on Count Two, the federal program bribery charge in violation of 18 U.S.C. § 666, in which government pursued a mixed theory of official action—the Water Department, Class L, and TIF official action theories. (Dkt. 30, p. 39; TR. 4563). This is appropriate for several reasons. First, because the verdict form did not differentiate between the three forms of official action, the jury's verdict may well have been based solely on conduct involving the Water Department which is not criminal.

Second, the government's arbitrary exclusion of the Amtrak-related theory of official action—which undergirded the vast majority of the Old Post Office evidence and recordings presented at trial but did not involve Burke's official action—raises legitimate questions that the jury may well have been unable to separate the

intertwined evidence, relying on the discredited Amtrak theory to convict Burke on Count Two.

Third, the government's evidence of its Class L and TIF-related theories of official action was exceedingly weak, such that the interests of justice weigh heavily in favor of retrial. Multiple witnesses testified that the unanimous City Council votes in favor of the Class L and TIF incentives were a virtual foregone conclusion based on the nature of the City's deal with the Old Post Office developers and the fact that the Class L and TIF incentives were a mayoral priority to a powerful Mayor Emanuel. *See e.g.*, TR. 254–57 (Prof. Mixon testifying that the city council was a "compliant rubber stamp" under Mayor Emanuel and the Class L and TIF votes were passed with "no dissenting vote"); TR. 1401–05, 1416–20, 1425–27 (Comn'r David Reifman testifying that the entire basis for the City's redevelopment agreement depended on the passage of a Class L; the Mayor and Refiman were supportive of the incentive from the start; the Class L "sailed through" city council; and the Mayor sponsored the TIF which was not a "big deal" to get through the Finance Committee); TR. 1837, 1856–58 (lawyer Mariah DiGrino testifying concerning the Post Office's agreement with the City, which predated Mr. Burke's involvement, that it was "explicitly understood among everyone that the Class L incentive would be necessary for the rehabilitation"; and, Mayor Emanuel was actively involved in the project); TR. 4098–99, 4193–96, 4200–01 (alderman Daniel Solis testifying that the Old Post Office was a "key project" for Mayor Emanuel; the Class L was unanimously adopted without

opposition; Solis had no doubt the Class L would pass; the TIF deal was done deal before the summer of 2018, and Solis knew it would pass unanimously, which it did).

This evidence substantially undermines the government's argument that Burke voted for the Class L and TIF matters in exchange for legal business. Under Rule 33, the court must consider the weight of the evidence and grant a new trial when the evidence "preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Reed*, 875 F.2d at 113. Counsel submit that the weight of the evidence here—the discredited Amtrak and Water Department theories combined with the weakness of the government's evidence on Class L and TIF theories—heavily weighs against the verdict.

Fourth, the Supreme Court is scheduled to hear oral arguments in *Snyder v. United States* on April 15, 2024, a case in which the Supreme Court is set to decide whether 18 U.S.C. § 666 criminalizes mere gratuities, or whether bribery involving a quid pro quo is required. (S.Ct., No. 23-108). Here, though the government represented at the eleventh hour that it was abandoning the gratuity theory on the 18 U.S.C. § 666 charges in Count Two, the Court rejected Mr. Burke and Mr. Cui's efforts to clarify the jury instructions so that the jury would be explicitly instructed that a *quid pro quo* is required. (TR. 4243-52; TR. 4313-16; Dkt. 375). Given the Supreme Court's certiorari grant and the composition of this Supreme Court—which has repeatedly limited the scope of federal public corruption law—there is a strong possibility that the Supreme Court will limit the scope of § 666 and decide that jury

instructions like ones given here which could permit a jury to convict on a gratuity theory require the grant of the new trial.

The potential that Mr. Burke was convicted on a gratuity theory rather than a bribery theory on Count Two under 18 U.S.C. § 666 is not an academic concern. Mr. Burke executed contingency fee agreements in connection with the Old Post Office developers in the fall of 2018, well after the conduct underlying three of the official action theories presented by the government—Amtrak, Water Department, and Class L. The jury may have concluded on Count Two that Mr. Burke was provided legal business in the fall of 2018 as a *gratuity* for those limited actions, rather than in explicit exchange. For all these reasons, Mr. Burke submits that the grant of a new trial on Count Two is warranted.

For similar reasons, the Court should also grant a new trial on RICO Acts 1(a)–(b), in which the government pursued all four official action theories in support of the state bribery and official misconduct charges. (Dkt. 30, pp. 29–30; TR. 4641–43). These convictions contained undifferentiated forms of official action which included the invalid Amtrak and Water theories. Considering the weight of the evidence and the serious risk that the jury convicted on an official action theory was not criminal, counsel submit that it would be a miscarriage of justice to let the verdict on these RICO Acts stand.

Finally, the Court should grant a new trial on RICO Acts 2(a)–(b), which, at least at face value, appear to relate only the TIF official action theory. (Dkt. 30, pp. 31–32; TR. 4643). But this arbitrary separation of the evidence poses two issues.

First, because the TIF evidence was intertwined with evidence and argument of the other forms of invalid official action (Amtrak and Water), and the evidence that Mr. Burke voted on the TIF exchange for legal business was weak, the interest of justice weigh in favor of new trial. Second, the government's inclusion of the TIF official action theory in RICO Acts 1 and 2 demonstrates that the acts are not sufficiently "separate" under the "pattern of racketeering activity" element in Count One to constitute separate Acts. (Dkt. 384, p.36). For these reasons, a new trial is also warranted with respect to RICO Acts 2(a)-(b).

IV. The Court Should Grant Judgment of Acquittal on Count One, the Racketeering Conviction, or in the Alternative Grant a New Trial.

The "pattern of racketeering activity" element of Count One required proof beyond a reasonable doubt that Mr. Burke committed at least two racketeering acts which were "related to each other" and had "continuity between them" but which were also separate acts. (Dkt. 384, p.30, 36).

As set forth above, (1) the Pole Sign racketeering act failed; (2) the Field Museum racketeering act failed; (3) the Old Post Office racketeering acts based solely on the Amtrak theory of official action failed; and (4) Mr. Burke is entitled to a new trial on Old Post Office RICO Acts 1(a)-(b) and 2(a)-(b).

This leaves only Burger King Episode racketeering Act 3(a)-(g)—which cannot satisfy the "pattern of racketeering activity" element's requirement of two "separate" acts. The Court should therefore grant a motion for acquittal on Count One on the grounds that no rational juror could have found the pattern of racketeering element

beyond a reasonable doubt. Alternatively, the Court should grant a new trial on Count One.

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