No. 23-2200

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

MARK RIDLEY-THOMAS

*Defendant-Appellant.*

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On Appeal from the United States District Court for the Central District of California, The Honorable Dale S. Fischer, Presiding.
CR No. 2:21-cr-00485-DSF

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**APPELLANT'S REPLY BRIEF**

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Paul J. Watford
WILSON SONSINI GOODRICH & ROSATI
*953 East Third Street, Suite 100*
*Los Angeles, CA 90013*

Erwin Chemerinsky
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
*Law Building 215*
*Berkeley, CA 94720*

Alyssa D. Bell
Michael V Schafler
Neil S. Jahss
COHEN WILLIAMS LLP
*724 South Spring Street, 9th Floor*
*Los Angeles, CA 90014*
*(213) 232-5160*
*abell@cohen-williams.com*

*Attorneys for Mark Ridley-Thomas*

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# INTRODUCTION

In a telling about-face, the government has chosen on appeal not to defend the foundational theories of its case. Instead, it seeks to recast or abandon the theories alleged in the indictment and argued to the jury throughout trial. That tactic amounts to a concession: Dr. Mark Ridley-Thomas's convictions are indefensible.

From indictment through post-trial motions, the government asserted that Ridley-Thomas exchanged a vote in favor of the Telehealth amendment for what prosecutors dubbed "secret funneling"—Marilyn Flynn's agreement to move "$100,000 from [Ridley-Thomas's] campaign committee account through USC to a nonprofit Sebastian Ridley-Thomas was spearheading." (6-ER-1019.) In acquitting Ridley-Thomas on twelve of nineteen counts, the jury returned a verdict that—as the government admitted and the district court found—rests solely upon the alleged "funneling"/Telehealth exchange. (1-ER-8-9; 6-ER-1037-38.) That lone-surviving, contorted *quid pro quo* theory is unprecedented in the history of the federal bribery and honest services fraud statutes and untethered to federal law.

Recognizing as much, the government now disclaims all reliance on its "secret funneling" theory and asserts—for the first time—that Ridley-Thomas solicited a cash bribe: a $100,000 donation of *USC's* funds to PRPI. Its newly-minted claim was *never* presented to the jury and finds no support in the record.

The "funneling" *was* the "thing of value" prosecutors alleged Ridley-Thomas exchanged for his vote, and its "value" was the avoidance of nepotistic optics. That non-traditional *quid* has no corollary in the pre-*McNally* paradigm and falls outside § 1346's post-*Skilling* boundaries.

The government's honest services fraud theory also urged that Ridley-Thomas could be convicted for deceiving USC and third parties involved in Ridley-Thomas's donation about matters material only *to them*. The "funneling" broke USC's internal rules, and a parade of its employees testified they would have wanted to know that Flynn had agreed to use the University as a pass-through entity. But the government failed to call a single witness to establish that the "funneling" was material to the Board of Supervisors or the residents of Los Angeles County. On appeal, the government admits that § 1346 penalizes only schemes to deceive and cheat the victim, and once again disclaims reliance on the third-party-deception theory it pleaded and argued. Because prosecutors presented an *admittedly* invalid theory to the jury, Ridley-Thomas's convictions cannot stand.

Finally, the government argued for Ridley-Thomas's conviction on the theory that he "monetized" his public service by taking "a reward" that was in "any way connected with" official action. But that would be a gratuity, not a bribe, and neither § 1346 nor § 666 encompasses gratuities. Because the evidence showed

Ridley-Thomas agreed to support the Telehealth amendment months *before* the "funneling" was conceived, prosecutors could secure Ridley-Thomas's convictions only by distorting the definition of *quid pro quo* exchanges. On appeal, the government again attempts to recast its trial theory, claiming prosecutors argued only that Ridley-Thomas was guilty of bribery even if the Telehealth amendment was good for the community and his support required no inducement. The record belies that claim.

As to each of the government's foundational theories, the record squarely refutes the revisionist history presented to this Court. Because the government cannot escape its prosecution theories, its refusal to defend them is effectively a concession of legal invalidity.

Ridley-Thomas's trial was fundamentally flawed in yet another respect. Prosecutors violated Ridley-Thomas's right to equal protection by striking all Black women from the jury. The government discounts the unique discrimination that Black women face based on their race *and* gender, and claims that Black men and other minority jurors were an adequate substitute. These arguments reflect the very bias *Batson* prohibits, and the district court's denial of Ridley-Thomas's *Batson* challenges resulted in a miscarriage of justice. What is more, prosecutors claim on appeal that the struck jurors had defense-friendly views—assertions they never made at trial. Their post-hoc rationalizations are pretextual.

Ridley-Thomas's convictions are fatally deficient and neither subterfuge nor backpedaling can salvage the verdict. His convictions must be reversed.

# ARGUMENT

## I. RIDLEY-THOMAS'S HONEST SERVICES FRAUD CONVICTIONS MUST BE REVERSED.

### A. Ridley-Thomas's honest services fraud convictions are predicated on a legally invalid bribery theory.

The government's "funneling" theory was at the heart of its case. The government alleged that theory in the indictment and argued a staggering 66 times that Ridley-Thomas "funneled" his *own* funds through USC. (*See* 6-ER-1128-29, 1139 (Indictment); 1-ER-124, 129, 167, 171, 177, 180-81, 186, 190, 193, 196, 198, 200-01; 2-ER-329; 3-ER-496; 9-ER-1752-54, 1766, 1768, 1770-72; 10-ER-2044; 15-ER-2904; 17-ER-3248; 23-ER-4537-38, 4543-44, 4546-49, 4551-52 (Trial); 6-ER-1019, 1030, 1032-33, 1043-44, 1047, 1054, 1057, 1061, 1062, 1064 (Post-trial motions).) Prosecutors never—not once throughout twelve days of trial—argued that Ridley-Thomas solicited a cash bribe from USC, either for himself or his son.

On appeal, the government reverses course. It contends that the *quid* upon which the jury's verdict rests is *not* the "funneling" urged as the basis for conviction 66 times, but cash—a $100,000 payment of *University funds* to

Sebastian's non-profit. (GAB[1]-49.) Were those the facts, this would be a different case. But they are not. As the government itself repeatedly asserted, the undisputed evidence shows Flynn donated Ridley-Thomas's *own* funds—not USC's—to PRPI.

The government cannot escape the legal implications of the invalid theory it pleaded, argued, and proved. After *Skilling*, § 1346 applies only to paradigmatic bribery cases—those involving personal enrichment in exchange for official action. (AOB-34-37.) Per the government's theory, however, Flynn's "funneling" offered Ridley-Thomas perceived reputational benefits, not personal enrichment. It had "value" insofar as it avoided nepotistic "optics" and "political fallout," both of which could tarnish Ridley-Thomas's "family brand" and impede a run for mayor. (1-ER-122; 6-ER-1128-29; 9-ER-1759; 23-ER-4549.)

Because the honest services fraud statute does not extend to the receipt of perceived reputational benefits—a point the government does not dispute—there was a complete failure of proof on an essential element of the offense. Ridley-Thomas's convictions must be reversed and the case remanded for entry of a judgment of acquittal.

[1] GAB refers to the government's answering brief. AOB refers to Appellant's opening brief.

### 1. This Court's review is *de novo*.

The government contends that the Court must review Ridley-Thomas's claim of legal invalidity for plain error. (GAB-44.) That is wrong. Review of "whether the Government's theory of fraud at trial was legally valid" is "de novo." *United States v. Milheiser*, 98 F.4th 935, 941 (9th Cir. 2024) (citing *United States v. Yates*, 16 F.4th 256, 264 (9th Cir. 2021)); *accord United States v. Sarkisian*, 197 F.3d 966, 984 (9th Cir. 1999). Plain error has no role to play.

Even if it did, the government argues only that it committed no error at all, "plain or otherwise" (GAB-54), because it proceeded upon a valid theory. It makes no claim that Ridley-Thomas cannot satisfy the third and fourth prongs of the plain error standard. Nor could it. Plain error review of a sufficiency-of-the-evidence challenge is only "theoretically more stringent" than the standard for a preserved sufficiency claim, *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011), and "[w]hen a conviction is predicated on insufficient evidence, the last two prongs of the [plain-error] test will necessarily be satisfied." *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009) (describing the "practical" differences between plain-error and sufficiency-of-the-evidence review as "minuscule, if not microscopic").

### 2. The government's attempt to wash its hands of its invalid "funneling" theory is self-defeating.

The government's wholesale abandonment of its trial theory effectively concedes that the *quid* upon which the jury's verdict rests falls outside § 1346's post-*Skilling* boundaries. The government made clear to the jury that "funneling"—not cash—was the alleged *quid* at issue here. (1-ER-129 ("[T]he thing of value in this case that's at issue … [is] the *funneling* of the $100,000.") (emphasis added).) Yet now, for the first time on appeal, the government asserts that USC "was entitled to keep" Ridley-Thomas's donation (GAB-52), and that USC made "an equivalent payment" of its own funds to PRPI (GAB-61)—*i.e.*, that there was no *funneling* at all. The government adduced *no* evidence at trial to support that claim and argued the opposite—that Ridley-Thomas "concealed" the "fact" that his ballot committee's donation funded PRPI. (6-ER-1116-17.)

Let's begin with the indictment. It alleged that Flynn "agreed to funnel a $100,000 payment from the Mark Ridley-Thomas Committee for a Better L.A. through the University/Social Work School" to PRPI "in order to … avoid any political fallout for defendant Ridley-Thomas" that a direct donation to his son's organization might cause. (6-ER-1128-29.) Nowhere does it allege that Flynn bribed Ridley-Thomas with USC's money.

Consistent with that theory, prosecutors argued throughout trial that Ridley-Thomas "funneled" his ballot committee funds through USC to "clean" his

connection to the otherwise nepotistic donation. (1-ER-180 ("This is nepotism. It looks bad…. So he's going to funnel the money to clean his connection to it, and he enlists Marilyn Flynn and … Flynn begins working tirelessly to move *that hundred thousand dollars* through USC ….") (emphasis added); 23-ER-4549 ("[Ridley-Thomas] understood now that there would be political optics around funneling or sending $100,000 to an organization that impacted his son…. He did not directly donate. He did it in a circuitous way."); 1-ER-124 ("[Ridley-Thomas] knew he needed a way to more covertly, more secretly, get money from his campaign account to a nonprofit that his son was going to head. And that's where USC came in."); 9-ER-1769 ("[T]he hundred thousand dollars funding PRPI came from the defendant's Ballot Committee.").)

Prosecutors presented no evidence that USC donated its own funds to PRPI, or that it had discretion to spend Ridley-Thomas's donation as it saw fit. They argued the opposite: that Ridley-Thomas's donation to USC was a "sham," that USC had no discretion over Ridley-Thomas's funds, and that Flynn moved Ridley-Thomas's donation through the University at his direction. (*See*, *e.g.*, 9-ER-1768 ("[T]hat letter said that Dean Flynn could use the money at her discretion. But as you'll learn, there was nothing discretionary about the hundred thousand dollars."); 1-ER-188 ("Remember that donation letter…? This is a sham letter to paper over

the true purpose of why this hundred thousand dollars is coming into the School of Social Work.”).)

Prosecutors also argued that United Ways was deceived about the “true source” of the funds received on PRPI’s behalf.[2] (1-ER-200.) United Ways’ employees believed PRPI had received a “grant from USC”—“not that the money was coming from [Ridley-Thomas’s] Ballot Committee, but that USC was giving a nice donation to [Sebastian’s] nonprofit.” (1-ER-177.) But on appeal, the government claims that *USC* was in fact the “true source” of the donation to PRPI. (GAB-61; 1-ER-200.) Its two positions are fundamentally incompatible.

As for the “value” of Flynn’s “funneling”—which was otherwise far from obvious—the government called two witnesses (Paul Vandeventer and Sheri Dunn-Berry) to show that Ridley-Thomas’s circuitous donation was designed to avoid the nepotistic optics that derailed his initial donation to Community Partners. (12-ER-2465-66, 2479-80; 13-ER-2568-70, 2576.) The negative “political optics” of “sending $100,000 to an organization that impacted [Sebastian]” (23-ER-4549) were unacceptable to Ridley-Thomas, prosecutors argued, given his “political ambitions.” (1-ER-122.)

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[2] Because PRPI lacked tax-exempt status, United Ways administered its funding. (7-ER-1204-06.)

To support the false claim that it presented a cash-bribe theory at trial, the government grossly distorts the record. Ridley-Thomas did not "repeatedly acknowledge[]" that cash, not the "funneling," was the alleged *quid*. (GAB-47.) Ridley-Thomas argued the opposite—that the alleged "bribe" was "the 'secret funneling' of the $100,000." (6-ER-1082.) Nor did the district court instruct the jury that the *quid* at issue was a payment of USC's funds to PRPI. (GAB-47.) While a supplemental instruction described the "funneling" as "a $100,000 payment *from* the University to [United Ways]" (5-ER-910), that language described the movement of the funds—not their source. Prosecutors' persistent repetition of the terms "funneling" and "sham" donation left no room for doubt that Ridley-Thomas's own money, not some other money, funded PRPI. The district court certainly harbored no such doubt—in denying Ridley-Thomas's post-trial motions, the court found that the jury's verdict rested upon what "the government argued" was "an agreement to have USC help move money between [Ridley-Thomas's] campaign fund and a nonprofit headed by [his] son," not a bribe of USC's own funds. (1-ER-8.)

The record is clear: Ridley-Thomas's fraud convictions are predicated upon the "funneling," not a cash bribe. Because the "funneling" afforded Ridley-Thomas perceived reputational benefits that are not "things of value" under § 1346, the government failed to prove an essential element of the offense, and the Court

must reverse and remand for entry of a judgment of acquittal. *See United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The Court may not affirm based on a "different [mail or] wire fraud theory" not presented to the jury—even if it is possible to "cherry-pick facts presented to [the] jury" that could support it. *Ciminelli v. United States*, 598 U.S. 306, 316-17 (2023). Here, the government's request is even more egregious: it asks the Court not only to adopt a theory that it never argued, but to assume facts it did not prove. The Court should refuse.

**3. The government's arguments in defense of a theory that it neither pleaded nor proved are meritless.**

Because the government neither indicted nor tried Ridley-Thomas on the theory that he solicited a cash bribe from USC for his son's benefit, its arguments in defense of that theory's validity are irrelevant.

Citing *Yates*, the government contends that Ridley-Thomas's "concerns about [his] reputation" and "political brand" "explained his motive"—not the "basis of the charge."[3] (GAB-49.) But *Yates* is of no aid to the government. There, this Court vacated the defendants' convictions following the government's presentation of two legally invalid theories that—like here—"were the focus of the

[3] The government's citation to the district court's discussion of Ridley-Thomas's "motive for entering into the bribery agreement" is misleading. (GAB-49.) The district court rejected Ridley-Thomas's argument that the government's "funneling" theory permitted his conviction for an undisclosed conflict of interest, in violation of *Skilling*—a claim Ridley-Thomas does not present on appeal. (1-ER-14.)

entire prosecution from beginning to end." *Yates*, 16 F.4th at 269. The court rejected the defendants' contention that the government had also presented yet another legally invalid theory, reasoning that the prosecutor's five-word "passing comment" was not a separate theory of liability, but "was offered merely as an explanation of the motive for some of the defendants' conduct …." *Id.* at 264. Here, "funneling" was no stray comment—it was the core prosecution theory charged in the indictment and argued at trial. *Yates* supports Ridley-Thomas, not the government.

Moreover, to the extent there is overlap between the value of the alleged *quid* (avoiding nepotistic optics) and Ridley-Thomas's alleged motive for the scheme (securing "prestigious … landing spots" for Sebastian following his resignation from the State Assembly (1-ER-123)), that overlap only underscores the invalidity of the government's theory. The value of traditional bribes requires no explanation. Cash, commissions, and miscellaneous financial perks are measured in dollars and cents. Flynn's assistance offered perceived reputational benefits, but no ascertainable value to Ridley-Thomas. While PRPI received a $100,000 contribution, Ridley-Thomas's own ballot committee was the source of that funding. Given the poor fit of its contorted theory with the traditional bribery paradigm, the government was forced to articulate why Flynn's assistance had any "value" at all. The explanation it offered—that the "funneling" avoided nepotistic

"optics" and was therefore valuable to "the Ridley-Thomas family political brand" (9-ER-1749; 23-ER-4549)—is unique in the history of the honest services doctrine and bears no resemblance to the personal enrichment that is the hallmark of traditional bribery.

The government's reliance upon *United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014), is equally misplaced. (GAB-53-54.) Renzi, an Arizona congressman, contended that the $200,000 cash bribe he received in exchange for official action was not a "thing of value" because it went to pay a "large private debt," and the "net value" to him was therefore "zero." *Renzi*, 769 F.3d at 744, 757. The court rejected that argument, reasoning that the bribe was both objectively valuable because "it was a $200,000 payment," and subjectively valuable to Renzi because it was "an early repayment" of his outstanding debt. *Id.* at 744. *Renzi* thus stands for the non-controversial proposition that cash is a traditional bribe, even when it does not increase the bribe-recipient's bank account balance. It says nothing about perceived reputational benefits, which have no corollary in the pre-*McNally* paradigm.

The government nonetheless maintains that Ridley-Thomas committed traditional bribery because the "benefits in bribery schemes can flow to someone other than the public official," *i.e.*, to family members. (GAB-51.) That is true,

but irrelevant here. For purposes of the honest services fraud statute, perceived reputational benefits are not "things of value" at all, no matter to whom they flow.

The government's strained analogy to "a loan that the official must repay and thus results in no loss to the bribe-payor" fares no better. (GAB-53.) A loan personally enriches the bribe-recipient by affording immediate use of the cash provided, even if it must later be repaid. The "funneling" afforded Ridley-Thomas perceived reputational benefits, not personal enrichment in any form.

As a last-ditch effort, the government contends that, "[a]s a legal matter, the $100,000 payment from USC to United Ways involved a thing of value, even if [Ridley-Thomas] arguably provided the seed money for that payment …." (GAB-53.) But again, the government never argued at trial that the $100,000 payment was itself the *quid*, precisely because it was Ridley-Thomas's own money. That absurd theory would have put Ridley-Thomas on both sides of the transaction, as bribe-giver and bribe-taker (the inverse of the theory rejected in *United States v. Abdelaziz*, 68 F.4th 1 (1st Cir. 2023)). It is no surprise that prosecutors never argued Ridley-Thomas bribed himself.[4]

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[4] Ample precedent dooms the government's claim that the "funneling" is a "thing of value" because it "involved" cash. (GAB-53.) Professional benefits—which the government acknowledges are not "things of value" (GAB-57)—oftentimes include financial perks, but that does not convert them to cash bribes. *See United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) ("[A]n increase in official salary, or a psychic benefit such as … thinking one's job more secure" is not "the

#### 4. The government has failed to show that § 1346 extends to a public official's receipt of perceived reputational benefits.

Beyond disowning its trial theory, the government offers little rebuttal. Even its attempts to distinguish controlling precedent demonstrate that the perceived reputational benefits Flynn afforded Ridley-Thomas are not "things of value" under § 1346.

The government concedes that *Skilling* limited the scope of the honest services fraud doctrine to its historic "core"—only the types of bribery and kickback schemes that were criminalized in cases prior to *McNally*. (GAB-55.) Yet the government fails to identify *a single* case where the *quid* in a pre-*McNally* exchange was analogous to the "funneling." Those traditional schemes involved the acceptance of personal, financial benefits in exchange for official action. (AOB-34-37.) None involved a public official's receipt of perceived reputational benefits that enhanced his electability. (*Id.*) That should be the end of the matter.

The government essentially acknowledges as much. It accepts *Abdelaziz*'s conclusion that, post-*Skilling*, "'an indirect professional benefit such as a salary increase or 'psychic' benefit such as approbation from one's superior is not the sort

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sort of 'private gain' that makes an act criminal under [] § 1346"); *United States v. Blagojevich*, 794 F.3d 729, 736-37 (7th Cir. 2015) ( "[A] public job [does not] count[] as a private benefit" for purposes of § 1346, even where it results in "improved chances of election to a paying job such as Governor—or a better prospect of a lucrative career as a lobbyist after leaving office").

of private gain that makes an act criminal under section 1346.'" (GAB-57 (quoting *Abdelaziz*, 68 F.4th at 31; *Thompson*, 484 F.3d at 884).) It argues only that Ridley-Thomas received "monetary benefits"—not the "professional" or "psychic" benefits at issue in *Abdelaziz* and *Thompson*. (GAB-57-58.) But again, that is incorrect. Per the government, by enlisting Flynn's assistance in funding PRPI, Ridley-Thomas sought "peace of mind," *Thompson*, 484 F.3d at 882, that neither nepotistic optics nor political fallout would derail his "political future." (1-ER-1222.) Receipt of such perceived reputational benefits is not honest services fraud.

The government cannot escape the legal implications of the scheme it charged and presented to the jury. *Skilling* is not a "distraction" (GAB-56); it is controlling and dispositive. Because the "funneling" was not a traditional bribe, it falls outside the pre-*McNally* core of the honest services doctrine, *Skilling*, 561 U.S. at 409, and Ridley-Thomas's convictions must be reversed.

#### 5. The government's unprecedented theory dooms *all* of Ridley-Thomas's fraud convictions.

Recognizing the fatal deficiency of its "funneling" theory, the government attempts to salvage Ridley-Thomas's conviction on Count 15, arguing that the "only *quids* tied to" that count "are the USC admission, scholarship, and professorship." (GAB-38, 62.) That contention is baseless.

The jury acquitted Ridley-Thomas on all fraud counts predicated upon Sebastian's admission to USC, scholarship, and professorship: Count 4 (Flynn and

Jack Knott's February 16, 2018 letter formally offering Sebastian a faculty appointment); Count 6 (Sebastian's December 5, 2017 email to Knott requesting a "Practitioner-In-Residence" title and $25,000 salary); Count 7 (Sebastian forwarding Knott's December 9, 2017 email concerning delays in his start-date to Ridley-Thomas); Count 9 (Sebastian also forwarding USC's January 9, 2018 email providing him a formal scholarship offer); Count 10 (Sebastian forwarding Vice Dean Nichol's February 13, 2018 email *re* waiving certain hiring procedures to Ridley-Thomas); and Count 11 (Ridley-Thomas's same-day response to Sebastian's email *re* hiring procedures). (1-ER-27, 29-30, 32-34; 6-ER-1140-42; 7-ER-1160; 2-SER-361, 401; 3-SER-613, 634.)

Post-verdict, the government conceded that the jury had rejected its theories across the board, except for one *quid* and one *quo*: "The Honest Services Fraud counts of conviction involved the mailing and wirings pertaining to the $100,000 payment and amended Telehealth contract." (6-ER-1037-38.) The district court independently reached the same conclusion: "Defendant was acquitted on the fraud charges relating to other County acts [*i.e.*, the Reentry Center and Probation

University] and USC-bestowed benefits [*i.e.*, the admission, scholarship, and professorship]."[5] (1-ER-8.)

The district court's conclusion is not clearly erroneous, *see United States v. Rosas*, 615 F.3d 1058, 1066 (9th Cir. 2010), and there is no basis for this Court to reverse it. The other alleged *quids* had no plausible connection to the Telehealth amendment, and the government took pains to connect Flynn's "funneling" exclusively to Telehealth.[6] (*See, e.g.*, 1-ER-174-75, 180, 186-88, 191-92; 23-ER-4546-48.)

The government's attempt to distort the jury's verdict should be rejected. Ridley-Thomas's honest services fraud convictions, per the government, rest on the "funneling" and the "amended Telehealth contract." (6-ER-1037-38.) The Court need go no further. However, to the extent there is any doubt whether the "funneling" or some other *quid* supports the jury's verdict, Ridley-Thomas's fraud convictions cannot stand because the jury's verdict "*may* rest on a legally invalid

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[5] In denying Ridley-Thomas's post-trial motions, the district court addressed the sufficiency of the government's proof only as to the alleged "funneling"/Telehealth exchange, not Sebastian's admission, scholarship, or professorship. (1-ER-8-22.)

[6] The undisputed evidence showed Sebastian sought admission to USC, was awarded a scholarship, and expressed interest in an adjunct professorship *before* he learned that he was the subject of the sexual harassment investigation that was the alleged motive for Ridley-Thomas soliciting those benefits on his behalf. (7-ER-1147-48, 1149, 1150, 1225; 8-ER-1451; 11-ER-2278-79; 15-ER-2908, 2994-95; 2-SER-345.) The record thus failed to support the government's theory that those alleged benefits were part of a corrupt exchange.

theory." *Skilling*, 561 U.S. at 414 (emphasis added). All of Ridley-Thomas's fraud convictions must therefore be reversed.

### B. Ridley-Thomas's honest services fraud convictions are also predicated upon a legally invalid third-party-deception theory.

At every stage of the trial proceedings, prosecutors relied upon the theory that Ridley-Thomas deprived his constituents of their right to his honest services by deceiving *USC*, and other third parties involved in his donation to PRPI. The government adduced *no* evidence that Ridley-Thomas made misrepresentations or omitted facts material to the residents of Los Angeles County or their representatives on the Board. Instead, prosecutors spent days of trial testimony reviewing USC's internal rules governing nonprofit sponsorships, demonstrating that Flynn (unbeknownst to Ridley-Thomas) broke those rules, and querying whether various USC employees would have wanted to know the full story behind Ridley-Thomas's donation. But USC's byzantine rules governing nonprofit sponsorships were irrelevant to the public's right to unbiased governance, and the University's wish to know that Ridley-Thomas's funds were earmarked for PRPI was no substitute for evidence of deception material to the public.

Although prosecutors relied upon an invalid third-party-deception theory and adduced no proof of materiality to the victim, the government asks the Court to affirm. It claims that (1) Ridley-Thomas's conduct fell within the pre-*McNally* paradigm, without citing a single analogous case; (2) nondisclosure of the alleged

bribe is sufficient proof of material deception, *per se*; and (3) evidence that Ridley-Thomas took non-deceptive material "acts" satisfied its burden. (GAB-63-73.) None of these contentions has merit.

#### 1. The government secured Ridley-Thomas's convictions under an unprecedented third-party-deception theory.

The government concedes that § 1346 covers only schemes to deceive the victim, not third parties, and certainly not the bribe-giver. (GAB-63.) That concession is fatal.

The indictment alleged Ridley-Thomas made misrepresentations and omissions material only to USC. Specifically, prosecutors alleged that Ridley-Thomas made "materially false statements" about the date by which PRPI's fiscal sponsor, United Ways, "intended to expend the entirety of the $100,000 payment"—a fact relevant only to USC's rules governing nonprofit sponsorships. (3-ER-583-84, 606; 6-ER-1139; 14-ER-2786.) They further alleged Ridley-Thomas "conceal[ed] material facts from University officials about the purpose and timing of the University's $100,000 payment," facts which again were relevant to USC's internal policies. (6-ER-1117, 1139.)

At trial, the government called multiple witnesses who, prosecutors later argued in closing, "did [not] know the nature and the scope of the relationship between [Ridley-Thomas] and Marilyn Flynn," but for whom it would have been "a problem." (23-ER-4516-17.) Those witnesses were all employees of USC (*e.g.*,

John Clapp) or United Ways (*e.g.*, Peter Manzo), both of which had idiosyncratic policies pertaining to the donation. (9-ER-1928-29; 14-ER-2778-79; 15-ER-2865-66; 19-ER-3659-60; 20-ER-3747.)

Prosecutors did not call a single County witness to testify that Ridley-Thomas's funding of PRPI in a manner that avoided nepotistic optics would have been "a problem" for *them*. No witness testified that the perceived reputational benefits Flynn allegedly bestowed upon Ridley-Thomas were "capable of leading a reasonable [decisionmaker] to change [his or her] conduct." *United States v. Milovanovic*, 678 F.3d 713, 727 (9th Cir. 2012) (en banc). When the government asked to put on a rebuttal case to plug the gap—by asking of Supervisor Hahn, "[i]f you had known this, if you had known that, would you still have voted?"—the district court refused because prosecutors had the chance to elicit such testimony in their case-in-chief but chose not to. (2-ER-383-84.)

With no evidence of deception material to the public before the jury, the government doubled down on its third-party-deception theory in closing, highlighting Ridley-Thomas's alleged "lies and deceit": "The lying to USC officials." "The Pete Manzo not telling him about the true source of the funds." "All of it." (1-ER-200; *see also* 1-ER-202 ("All those lies to USC. All those lies to United Ways. All of the efforts to clean the defendant's connection to the hundred thousand dollars when it reaches United Ways."); 1-ER-190 ("There's a

lot of concealment…. Defendant and Flynn tell no one that this hundred thousand dollars is to be funneled through USC to Sebastian Ridley-Thomas' nonprofit…. Defendant never tells Peter Manzo …. Marilyn Flynn doesn't tell her USC staff either.").)

The government's summation could not highlight any evidence of false statements or omissions material to Ridley-Thomas's constituents or fellow Board members because it had presented none. Prosecutors made a single, somewhat inscrutable argument that Ridley-Thomas's "acts were material" because "[e]verything he's doing, it's generating outcomes." (GAB-68; 1-ER-203.) But they did not say how or why the acts "generating outcomes" were deceptive, and failed to identify any evidence of the *public's* detrimental reliance on a misstatement or omission—only USC's and United Ways's.

Post-trial, when Ridley-Thomas moved for a judgment of acquittal on the ground that the government had adduced fatally deficient proof of materiality, the government defended its third-party-deception theory. (*See*, *e.g.*, 6-ER-1047 ("[T]he government offered dozens of emails from defendant that … were capable of influencing [Flynn] and thereby USC's actions."); 6-ER-1047-48 ("With his $100,000 check to USC, defendant also sent a sham donation letter. This too was material…. [T]he letter was capable of inducing USC to accept his money."); 6-ER-1048 ("Defendant also made numerous representations to United Ways and

Manzo (the CEO) to induce United Ways to accept the $100,000 payment from USC and hire Smith to work for defendant's son."). The government did not claim, as it does now, that "[a]mple evidence established numerous material acts by defendant capable of influencing the County, its employees, and the public." (GAB-64.) Nor could it, because it presented none at trial.

On appeal, the government's about-face is like "déjà vu all over again." *United States v. Depue*, 912 F.3d 1227, 1229 (9th Cir. 2019). Having pleaded and argued a legally invalid third-party-deception theory of honest services fraud, the government's only hope of defending Ridley-Thomas's convictions is to yet again convince the Court that it argued some other theory—one that fits the pre-*McNally* paradigm. (GAB-72.) But the record yields one conclusion: Ridley-Thomas's fraud convictions rest upon a non-traditional theory that does not survive *Skilling,* and those convictions are therefore fatally deficient. *Abdelaziz*, 68 F.4th at 27 (reversing defendants' honest services fraud convictions where government's theory found no support in "core" pre-*McNally* case law).

### 2. The government adduced fatally deficient proof of materiality.

The government argues that evidence of Ridley-Thomas's "concealment of the bribe"—*i.e.*, the "funneling"—was "sufficient" to meet its burden of proving material deception. (GAB-64, 70.) None of its authority supports the sweeping proposition that non-disclosure of the alleged *quid* is material *per se*.

The government argues *United States v. Jacobs*, 506 F.App'x 558 (9th Cir. 2013), holds that "knowledge of a bribe can lead uncorrupted decisionmakers to change their conduct." (GAB-64.) *Jacobs* says no such thing. There, the defendant deprived his employer (Customs and Immigration Services) of its right to his honest services by accepting cash bribes in return for falsifying immigration documents. *Jacobs*, 506 F.App'x at 559-60. The court found that § 1346's materiality element was satisfied because the defendant's document tampering not only "had a natural tendency to influence CIS," but "in one instance, his scheme did in fact influence CIS …." *Id.* at 560. *Jacobs* thus held that evidence of detrimental reliance upon a false statement is sufficient proof of the statement's materiality. *Id.* at 560. It did not address the materiality of undisclosed bribes.

The government's reliance on *United States v. Foxworth*, 334 F.App'x 363 (2d Cir. 2009), fares no better. *Foxworth* involved a cash-for-votes scheme where the defendant, a businesswoman, paid cash bribes to a state senator who "coer[ced]" other decisionmakers to award contracts to her business. *Id.* at 366. The court rejected the defendant's claim that the government had failed to adduce sufficient proof of material deception, reasoning that "non-disclosure of a $3000 bribe was material in that, had the public at large or the relevant decisionmakers … known that the state senator who was coercing them was being bribed to do so, that knowledge would have had a natural tendency to influence their behavior." *Id.*

Ridley-Thomas did not take a cash bribe in return for "coercing" other officials to act. The "funneling" was not equivalent to cash, and Supervisors Kuehl and Hahn testified that Ridley-Thomas exerted no pressure on them at all. (2-ER-269-70, 339-40.) More importantly, there is no evidence in the record that *any* Supervisor would have found the "funneling" to be material. But that is precisely the kind of evidence the government was required to introduce. *Foxworth*, 334 F.App'x at 366 (under § 1346, government must present evidence that misstatement or omission was "capable of influencing the public at large and such relevant decisionmakers as are members of the public to change their behavior'") (cleaned up)). While the government derides that requirement (GAB-70 ("there is no requirement that the government call a random member of the public or a County official")), its own authority—and its attempt to call Supervisor Hahn (to no avail) on rebuttal—make clear that prosecutors could not meet their burden without presenting *some* evidence establishing that knowledge of the "funneling" was "capable of influencing" the Board (and thereby, the public). *See Foxworth*, 334 F.App'x at 366; *see also United States v. Jennings*, 487 F.3d 564, 582 (8th Cir. 2007) ("The government would be hard pressed to prove [materiality] without asking whether the undisclosed information would have affected the decision maker's analysis.").

Proof that Ridley-Thomas did not publicly disclose every detail of his plan to fund PRPI was insufficient to meet § 1346's materiality element. Ridley-Thomas used his own ballot committee funds in a manner fully compliant with state campaign finance laws and public disclosure requirements. (2-ER-303-05, 328-29; 7-ER-1271.) It is not at all obvious that any Supervisor would have found his failure to disclose something *more* than state law required to be material to their vote.[7]

No matter how unseemly prosecutors believed the so-called "funneling" to be, they were required to *prove* its relevance to good governance. The government tacitly concedes as much, agreeing that some bribes are *de minimis*—*i.e.*, so insignificant that they would not surpass § 1346's materiality threshold—though it maintains that the "funneling" "was not a '*de minimis*' bribe." (GAB-73.) The government cites no evidence to support that proposition because it presented none at trial. Perhaps the Supervisors would have found Ridley-Thomas's donation to PRPI even less problematic than a "modest Christmas present" or "luncheon invitation," *United States v. Rybicki*, 354 F.3d 124, 146 (2d Cir. 2003), given

[7] Because the "funneling" was not a cash bribe, cases holding that a public official commits honest services fraud when he is "paid" for his vote are inapposite. (GAB-65 (citing *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980) (§ 1346's "fraud element" is satisfied when a public official is "paid" for his vote); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (public official "commits honest-services fraud when she sells her vote").)

Ridley-Thomas's full compliance with California's complex regulatory framework.[8] There is no way to know because the government never asked (perhaps because it feared the answer), and the Court should reject the government's wishful assumption that the Supervisors would have equated the "funneling" with a cash bribe.[9] (GAB-73.)

No authority supports the sweeping proposition that non-disclosure of the alleged bribe satisfies § 1346's materiality element *per se*, and the government failed to adduce evidence sufficient to meet its burden of proving the "funneling" was material to Ridley-Thomas's constituents.

#### 3. Evidence that Ridley-Thomas took various non-deceptive actions is insufficient to meet the government's burden.

The government concedes that the charged scheme "must have been materially deceptive" to the public, but paradoxically relies upon evidence that Ridley-Thomas took numerous non-deceptive "acts" to meet that burden. (GAB-

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[8] That Supervisor Kuehl is the co-signatory of an amicus brief arguing that it offends due process to subject local officials to federal prosecution for conduct that complies fully with state law is a strong indication that Kuehl *would not* have found the "funneling" to be material. (Brief (Dkt. 22).)

[9] The government is wrong that Karly Katona's testimony "suffices" to establish materiality. (GAB-71.) Prosecutors asked Katona only if she would "recuse herself" under hypothetical circumstances that bore no resemblance to the "funneling," not about the actual facts of the case. (21-ER-4039.)

63-64.) Unsurprisingly, the government fails to cite a single case that supports its contradictory position.

As this Court held, sitting en banc, § 1346 requires proof that the defendant "misrepresent[ed] or conceal[ed] a material fact." *Milovanovic*, 678 F.3d at 726 (citation omitted).[10] Section 1346's materiality element is separate and distinct from its "official act" requirement—the former involves deception while the latter does not. (AOB-53, n.12.) The government admitted as much below: "few, if any, official acts would ever qualify as evidence of intent to defraud in and of themselves since such acts are exercises of official government authority, not … deceptive conduct." (6-ER-1107.)

On appeal, the government offers a litany of non-deceptive "official" acts, from votes to phone calls, that it contends were "material" because they were "capable of influencing County officials and the public." (GAB-66-67.) But § 1346's materiality element provides a threshold for the alleged deception, and assures that inconsequential half-truths or nondisclosures do not subject public

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[10] *United States v. Woods*, 335 F.3d 993 (9th Cir. 2003), does not relieve the government of its burden to prove deception material to the public. (GAB-70.) *Woods* explained that although fraud does not require proof of a "specific" false statement, "the statements made or the facts omitted as part of the scheme" must "be material." *Id.* at 999.

officials to criminal prosecution. *See Milovanovic*, 678 F.3d at 726; *Rybicki*, 354 F.3d at 146. Non-deceptive conduct cannot meet that threshold.[11]

*Jacobs*, the sole authority the government can muster to support its erroneous interpretation of § 1346, held only that the defendant's deception—his false statements on immigration forms—was material, *not* that his non-deceptive conduct "satisfied materiality." (GAB-66 n.10.)

The government's construction of § 1346 also runs afoul of basic principles of statutory construction. Conflating § 1346's materiality and "official act" requirements renders the former "mere surplusage" and effectively lowers the government's burden of proof. *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Bailey v. United States*, 516 U.S. 137, 146 (1995).

At base, the government asks the Court to disregard its failure to offer a single witness to meet its burden on an essential element of the offense, and to assume that witnesses never called would have testified in its favor. But where "there is a 'total failure of proof of [a] requisite' element," the Court must instead

[11] Ridley-Thomas's "advising other officials" was no more deceptive than his vote. (GAB-68.) Neither Ridley-Thomas's forwarding of Flynn's email regarding the Telehealth amendment with an "FYI" months before the "funneling," nor his call with Sherin (Director of the Department of Mental Health) days prior involved a material misstatement or omission. Sherin's "voicemail" to Flynn, which the government claims Ridley-Thomas "prompted" (GAB 67), is not even in evidence. (1-SER-29.)

reverse and remand for entry of a judgment of acquittal. *Nevils*, 598 F.3d at 1167 (citation omitted, alteration in original).[12]

### C. At a minimum, Ridley-Thomas deserves a new trial.

#### 1. The jury instructions permitted Ridley-Thomas's conviction absent evidence he intended to deceive and cheat the public.

The government concedes that it was required to prove Ridley-Thomas acted with "deceptive intent." (GAB-76.) Yet it maintains no instruction explaining that basic tenet of fraud was required. (GAB-75-76.) Not a single case supports that dubious proposition.

##### *i. Honest services fraud requires both bribery and deception.*

The government contends that the jury instructions' *quid pro quo* requirement "incorporated the requirement of deceptive intent." (GAB-75.) The cases it relies upon say no such thing.

In *Bohonus*, this Court held that, in an honest-services-fraud bribery case, the government must prove the public official acted with "specific intent" to devise a scheme "reasonably calculated to deceive persons of ordinary prudence and

[12] At a minimum, the government's presentation of an *admittedly* invalid third-party-deception theory (GAB-63) entitles Ridley-Thomas to a new trial because the jury's verdict "may rest on [that] legally invalid theory." *Skilling*, 561 U.S. at 414. The government's third-party-deception theory was pervasive and the jury instructions—which did not require proof Ridley-Thomas intended to deceive his constituents (rather than some third party)—did nothing to preclude jurors' reliance upon it. *See Yates*, 16 F.4th at 269.

comprehension." 628 F.2d at 1172. *Bohonus* did *not* hold that proof of a *quid pro quo* suffices. (GAB-65.) It held the opposite—that the government must "of course" allege and prove "the requisite" deceptive intent in addition to a *quid pro quo*. *Bohonus*, 628 F.2d at 1172.

The same holds true for *Kincaid-Chauncey*. Nothing in that opinion suggests that a *quid pro quo* instruction adequately conveys the requirement of deceptive intent. (GAB-76.) The opposite is true. The court observed that an instruction requiring the acceptance of something of value with the intent to be influenced was "sufficient to convey the idea of an implicit *quid pro quo*." *United States v. Kincaid-Chauncey*, 556 F.3d 923, 945-46 (9th Cir. 2009). But the court relied on *different* instructions explaining deceptive intent in concluding that § 1346's intent to defraud requirement was adequately conveyed to the jury. *Id.* at 946 ("To satisfy the specific intent to defraud, the instructions required the government to prove … 'that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.'… [C]onviction required 'fraudulent and deceptive conduct.'"). The district court gave no comparable *mens rea* instruction here.

*United States v. Hernandez*, 2021 WL 3579386 (9th Cir. 2021) (unpublished), also does not hold that a *quid pro quo* implies the deceptive intent required for honest services fraud. There, the court found that the instructions,

which required the intent to "deprive" the victim of honest services, adequately conveyed the *cheat* component of the intent to defraud—not the *deceive* component. *Id.* at *1. *Hernandez* did not hold that the *quid pro quo* instruction adequately conveyed the requisite *mens rea*.

No authority supports the government's assertion that § 1346's deceptive intent and bribery elements collapse into one. Because the instructions conveyed only the requirement that Ridley-Thomas intend to cheat his constituents, not deceive them, they omitted an essential element of the offense.

***ii. The error was not harmless beyond a reasonable doubt.***

The government devotes a mere two sentences to arguing harmless error, albeit under the incorrect standard. It is irrelevant that the instructions permitted Ridley-Thomas to assert he "did not engage in any *quid pro quo*." (GAB-77-78.) The Court must consider "what the evidence showed regarding [Ridley-Thomas's] intent to defraud," and determine beyond a reasonable doubt whether "the jury verdict would have been the same absent the error." *United States v. Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022). To meet that exacting standard, evidence of Ridley-Thomas's deceptive intent must be "overwhelming." *Id.*

The government does not cite even a single piece of evidence that demonstrates Ridley-Thomas's intent to deceive the public. Its argument should be deemed a waiver. *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573 (9th

Cir. 2016) (government waives harmless error review when it "fails to advance a developed theory about how the errors were harmless").

It is impossible, in any event, to conclude that the record reflects overwhelming evidence of Ridley-Thomas's intent to deceive his constituents. Ridley-Thomas's defense rested upon his "good faith." (9-ER-1772-73.) He presented undisputed expert testimony that his donation to PRPI fully complied with state public disclosure requirements, negating deceptive intent. (2-ER-303-05, 332.) Because Ridley-Thomas "contested the omitted element and raised evidence sufficient to support a contrary finding, the court should not find the error harmless." *Neder v. United States*, 527 U.S. 1, 19 (1999).

Moreover, Ridley-Thomas's proposed instruction was necessary to ensure that jurors understood they had to find he intended to "deceive *and* cheat—in other words, to deprive the victim of [his honest services] by means of deception." *United States v. Miller*, 953 F.3d 1095, 1103 (9th Cir. 2020). The government argued vociferously for Ridley-Thomas's conviction if he deceived USC or United Ways, and no instruction informed the jury that *only* deception of the public was "actionable fraud." *Neder*, 527 U.S. at 22.

Because the jury "may have" convicted Ridley-Thomas for "conduct that is not unlawful," this Court "cannot conclude" the instructional error was "harmless beyond a reasonable doubt." *McDonnell v. United States*, 579 U.S. 550, 579-80

(2016); *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1989) (reversing wire fraud conviction "[b]ecause the jury instructions permitted conviction for" deception of third parties, which is "conduct not within the reach" of the mail fraud statute); *United States v. Barona*, 56 F.3d 1087, 1098 (9th Cir. 1995) (reversing convictions where "there were no instructions directing the jury to exclude" legally invalid evidence offered to satisfy an element).

Whether Ridley-Thomas intended to deceive his constituents was a matter for a properly instructed jury to decide. At the very least, Ridley-Thomas deserves a new trial.

**2. The government's legally invalid "monetization" theory permitted Ridley-Thomas's conviction for accepting mere gratuities.**

Following a now-familiar playbook, the government attempts to recast its "monetization" argument as a classic bribery theory when it was anything but.

At trial, the government argued that Ridley-Thomas was guilty on all counts if he "monetized" his public service by accepting something of value in connection with "that thing [he was] already going to do" (1-ER-131)—*i.e.*, official action that he had already determined to take. But that is a gratuity, not a bribe, and receipt of gratuities is not honest services fraud (or federal-programs bribery either, as discussed below).

Because prosecutors' "monetization" theory was invalid and pervasive, and because the jury instructions did nothing to preclude reliance upon it, the Court should grant Ridley-Thomas a new trial. *Yates*, 16 F.4th at 269.

***i. The government's legally invalid "monetization" theory pervaded the trial.***

It is beyond dispute that "a reward for some future act that the public official … may already have determined to take" is a gratuity, not a bribe. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999); *accord United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (gratuities are "reward[s] for actions the public official … is already committed to take"); *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) ("gratuities … may be conveyed before the occurrence of the act so long as the payor believes the official has already committed himself to the action").

To escape the fatal effect of arguing that a gratuity constitutes a sufficient predicate for honest services fraud, the government contends that it presented a *different* theory to the jury: that it was no defense to bribery if Ridley-Thomas claimed he "always planned to" or "'should have'" supported the Telehealth amendment because its passage was "good for the community." (GAB-80-82.)

Not so. In closing, the government argued repeatedly that a public official commits bribery—whether honest-services-fraud bribery, or federal-programs bribery (GAB-80)—by "monetiz[ing]" his public service and accepting benefits

"in any way connected with" official action he has already committed to take. (*See* 1-ER-134 (arguing a public official violates § 1346 if he accepts "benefits and perks … in any way connected with" official action he "already … intend[s] to do"); 1-ER-131 (arguing a public official violates § 666 if he accepts a benefit "in connection with that thing [he's] already going to do"); 23-ER-4491 ("[E]ven if he were going to do certain things, if he did those things and he accepted a reward for those things, it's still bribery.").) Those arguments described gratuities, not bribes.

Jurors relying on the government's theory would have understood they should convict Ridley-Thomas even if he accepted a gratuity (Flynn's assistance) "in any way connected with" official action he had previously determined to take (a vote in favor of the Telehealth amendment). (1-ER-134; 7-ER-1194.) That was by design. It was undisputed that Ridley-Thomas voiced his unequivocal support for the Telehealth amendment months before any discussion of the "funneling" occurred (7-ER-1194 ("Your wish is my command.")), and the government's best hope of securing a conviction was to cast a net broad enough to encompass not only *quid pro quo* exchanges, but rewards for prior commitments.[13]

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[13] Ridley-Thomas's support for the Telehealth program, and the amendment expanding its scope of services, long predated his agreement with Flynn. The two conceived of the Telehealth program four years prior (8-ER-1511; 22-ER-4269, 4273-74), Ridley-Thomas committed to supporting the amendment two months prior (7-ER-1194), and Flynn told a USC colleague that Ridley-Thomas's support was locked-in three weeks prior to any discussion of the agreement (2-SER-412).

The government cannot, yet again, escape the legally invalid theory it presented throughout trial.

#### *ii. The jury instructions did nothing to prevent Ridley-Thomas's conviction for accepting gratuities.*

The government contends that any error was harmless because the district court instructed that § 1346 requires a *quid pro quo*. That is incorrect.

This Court must reverse where, as here, the government presents a legally invalid theory that is "the focus of the entire prosecution from beginning to end," and the jury instructions "d[o] nothing … to preclude conviction," "despite the defendant['s] request for an instruction" that correctly states the law. *Yates*, 16 F.4th at 269.

Ridley-Thomas requested an instruction that would have precluded the government's legally invalid theory, but the district court refused to give it. (5-ER-928 (rejecting proposed instruction stating, "A benefit made to reward a politician for an act he … has already determined to take is not a bribe.").) Absent additional clarification, the instructions' *quid pro quo* requirement was insufficient to preclude Ridley-Thomas's conviction for accepting a gratuity because the government misled jurors about the nature of the *quo*. The *quo* could *not*, under § 1346, be an official act that Ridley-Thomas had already determined to take (*i.e.*, "that thing [he's] already going to do" or "already … intend[s] to do"). (1-ER-131, 134). *See Sun-Diamond*, 526 U.S. at 404-05.

This Court's recent decision in *Milheiser* underscores the conclusion that the jury instructions failed to cure the error because they did not specifically address the government's invalid theory. There, the government presented an overbroad theory of fraud that permitted the defendants' conviction for false statements that did not "deceive the victim about the nature of the bargain." *Milheiser*, 98 F.4th at 945. The court deemed that theory legally invalid and found the jury instructions "did not remedy the problem" because, consistent with the Ninth Circuit's model instruction, they only "stated that a misrepresentation was material if it 'had a natural tendency to influence, or w[as] capable of influencing, a person to part with money or property.'" *Id.* They did not specifically inform the jury that the government's theory—which permitted conviction for misstatements about matters beyond "the nature of the bargain"—was legally deficient. *Id.*

The same is true here. The instructions' *quid pro quo* requirement, without more, did nothing to preclude jurors from concluding (at the government's urging) that Ridley-Thomas committed bribery if he accepted a benefit "in any way connected with" official action he was "already going to do." (1-ER-131, 134 (government's summation *re* § 1346).) That describes Flynn's assistance in funding PRPI, which Ridley-Thomas accepted two months *after* committing to support the Telehealth amendment. (7-ER-1194.)

Because the government's invalid "monetization" theory pervaded the trial and the jury instructions permitted reliance upon it, the error was not harmless. *Yates*, 16 F.4th at 269; *Milheiser*, 98 F.4th at 947.

## II. RIDLEY-THOMAS'S FEDERAL-PROGRAMS BRIBERY CONVICTION MUST BE REVERSED.

### A. Ridley-Thomas's federal-programs bribery conviction is predicated upon a legally invalid theory.

Ridley-Thomas's federal-programs bribery conviction, like his honest services fraud convictions, rests upon a fatally deficient premise.[14] Perceived reputational benefits are not things of value under § 666 either. Because §§ 1346 and 666 must be construed *in pari materia* (AOB-63), the Court need proceed no further. Ridley-Thomas's federal-programs bribery conviction cannot stand.[15]

The government's attempts to salvage its flawed trial theory fare no better when applied to § 666. The government, once again, claims it proceeded on a cash bribe theory that it neither pleaded nor proved. The Court should reject prosecutors' revisionist history, for the reasons already discussed. "Money" was not the alleged "thing of value" and Ridley-Thomas did not solicit a donation from

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[14] As discussed, *see* § I(A)(1), this Court's review is *de novo*. *Milheiser*, 98 F.4th at 941.

[15] It is immaterial that Count 2 alleged Ridley-Thomas's receipt of other benefits because the jury's general verdict may have rested upon the "funneling." (AOB-67-68.) The government does not claim otherwise.

USC's coffers to "provide future employment and income for his son" (GAB-87)—he sought to avoid nepotistic optics by disguising his own donation to PRPI.

The government posits that, even if Ridley-Thomas is correct that his agreement with Flynn was the alleged *quid*—it was—Flynn's "service constituted a 'thing of value' because [Ridley-Thomas] subjectively believed it had value." (GAB-88.) The cases it relies upon do not support that proposition.

As discussed, *Renzi* involved a cash bribe, and held that bribe was a "thing of value" because it had objective value ($200,000) and subjective value (an early repayment of the defendant's outstanding debt). 769 F.3d at 744. Flynn's assistance had no value at all, objective or subjective, beyond the perceived reputational benefits prosecutors identified. As the government admits, Flynn's "services allowed defendant to avoid the unseemly appearance of using his campaign funds to benefit his son directly." (GAB-89.) *Renzi*—which did not address reputational benefits and is not a federal-programs bribery case in any event—does not stand for the sweeping proposition that even reputational benefits can be "things of value" under § 666. No case has so held, ever.

*United States v. Schwartz*, 785 F.2d 673 (9th Cir. 1986), is not a federal-programs bribery case either, and instead involved 18 U.S.C. § 1954, a statute that penalizes improper influence in the operation of employee benefit plans. *Schwartz* involved the merger of two unions, which the defendants conspired to rig "in order

to ensure the financial health" of the unions' then-presidents. *Id.* at 675. The government likens Flynn's assistance to that merger because "her services helped ensure that [Ridley-Thomas's] son actually received the money." (GAB-88.) But unlike in *Schwartz*, where the value of the merger was money ("financial" benefits), the value of Flynn's assistance was the avoidance of nepotistic optics and political fallout, *i.e.*, perceived reputational benefits. *Schwartz* says nothing about such benefits.

While relying on inapposite authority, the government ignores the few cases that *have* addressed analogous prosecution theories, no doubt because each has rejected the government's attempt to "stretch" the federal bribery laws far "out of shape." *Skilling*, 561 U.S. at 412. *See Blagojevich*, 794 F.3d at 737 ("favors" that increase a politician's electability or professional opportunity are not things of value); *Yates*, 16 F.4th at 267 (professional benefits, including salary and regular bonuses, are not things of value); *Abdelaziz*, 68 F.4th at 31 (professional benefits, including opportunities for promotion, are not things of value); *Thompson*, 484 F.3d at 884 (neither psychic benefits nor professional benefits are things of value).

Because § 666, like § 1346, does not extend to a public official's receipt of perceived reputational benefits, the government again failed to prove an essential element of the offense. Ridley-Thomas's federal-programs bribery conviction must be reversed and the case remanded for entry of a judgment of acquittal.

## B. At a minimum, the district court's instructional errors entitle Ridley-Thomas to a new trial.

The government contends that the district court properly instructed the jury and that any error was harmless. (GAB-89-91.) Its arguments misconstrue the law and ignore the jury's role.

### 1. The district court's failure to instruct the jury that § 666 requires a *quid pro quo* was not harmless.

The Supreme Court will decide in short order whether § 666 criminalizes gratuities or instead requires a *quid pro quo*. *See Snyder v. United States*, 144 S. Ct. 536 (No. 23-108). The government's arguments against a *quid pro quo* requirement therefore merit little attention. Suffice it to say that *United States v. Garrido*, 713 F.3d 985 (9th Cir. 2013), held only that § 666 does not require an "official act," *not* that the statute extends to mere gratuities. *Id.* at 1001. Because § 666 covers only bribes (AOB-68-71), and *Garrido* posed no barrier to the *quid pro quo* instruction Ridley-Thomas requested, the district court erred in refusing to give it.

Absent a *quid pro quo* requirement, the jury instructions omitted an essential element of the offense and the Court must vacate the jury's verdict on Count 2 unless the government can prove the error "did not contribute to the guilty verdict" and was harmless "beyond a reasonable doubt." *United States v. Kleinman*, 880 F.3d 1020, 1035 (9th Cir. 2017). It cannot meet that exacting standard.

Flynn agreed to assist Ridley-Thomas in funding PRPI two months *after* he agreed to support the Telehealth amendment. (7-ER-1194; 17-ER-3231.) There was no this-for-that exchange, and the evidence was far more consistent with Ridley-Thomas's receipt of a gratuity for that commitment than his acceptance of a bribe. *See United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996) ("As the word 'gratuity' implies, the intent most often associated with the offense is the intent to 'reward' an official for an act taken in the past or to be taken in the future.").

No doubt recognizing as much, in closing, the government argued vociferously for Ridley-Thomas's conviction on the theory that he "monetized" his public service by accepting "a reward" for official action that he had already determined to take. (*See, e.g.,* § I(C)(2); *see also* 1-ER-129 ("When Marilyn Flynn's reaching out to [Ridley-Thomas] and doling out things … not only is he intending to be influenced but, *my goodness*, *intending to be rewarded* ….") (emphasis added); 1-ER-203 ("There's no question that he acted corruptly, intending to be influenced or *most certainly rewarded* in connection with county business.") (emphasis added).)

It would be illogical to conclude the government's repetitive entreaties to convict Ridley-Thomas for accepting a reward for a past concession "did not contribute to the guilty verdict." *Kleinman*, 880 F.3d at 1035; *see also United States v. Kurlemann*, 736 F.3d 439, 450 (6th Cir. 2013) (district court's erroneous

instruction on an essential element was not harmless beyond a reasonable doubt where instruction allowed for government's presentation of invalid theory that "appeared front and center during [defendant's] trial, including during closing argument").

The district court's *quid pro quo* instruction for the honest services counts does not obviate the error, nor indicate that a properly instructed jury would have voted to convict Ridley-Thomas regardless. (GAB-90.) The government's "monetization" theory encouraged Ridley-Thomas's conviction on *all* counts for accepting a gratuity. (*See* § I(C)(2).) It is therefore entirely unclear that even the jury's honest services fraud verdicts rest upon a *quid pro quo*, let alone that the jury would have convicted Ridley-Thomas of federal-programs bribery if the instructions had required a *quid pro quo* across the board (and precluded the government's "monetization" argument altogether).

*United States v. Wilkes*, 662 F.3d 524 (9th Cir. 2011), is distinguishable. (GAB-90.) There, the defendant sought reversal of his honest services fraud convictions post-*Skilling* because the district court did not instruct the jury that § 1346 was limited to bribes and kickbacks. *Wilkes*, 662 F.3d at 543-44. The court found any instructional error harmless beyond a reasonable doubt because the government had secured the defendant's conviction based on a bribery theory, *not* some other theory of honest services fraud. *Id.* at 544 ("[T]he government proved

… [the] scheme involved both *quid pro quo* bribery and material misrepresentations."). Here, in contrast, the government *did* present a legally invalid alternative theory of conviction (its "monetization"/gratuities theory). Had the same been true in *Wilkes*, the court would have reversed.

Ridley-Thomas presents a case far more analogous to *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), than to *Wilkes*. In *Fernandez*, like here, the district court did not instruct the jury that § 666 requires a *quid pro quo*, and there, like here, the timing of the alleged benefit made it amenable to interpretation as either a gratuity or a bribe. *Id.* at 20 ("The evidence showed that [the defendant] supported the Senate Projects [the "official action"] after the Las Vegas trip [the alleged *quid*] … which is consistent with a *quid pro quo*, and therefore with a bribery theory. However, he first took actions in support of [the] Senate Projects … weeks or months before the trip to Las Vegas, which is consistent with a gratuity theory."). Because a "jury reasonably could have found" the alleged benefit "was a reward for that prior conduct, rather than the *quid pro quo*," the court reversed and remanded for a new trial. *Id.* at 20, 39.

The district court's instructional error compels the same result here. The government cannot establish, "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially

swayed by the error." *Id.* at 27 (citation omitted). Ridley-Thomas deserves a new trial.

**2. The district court's refusal to instruct the jury that gratuities are not bribes, and that goodwill gifts are lawful, warrants *per se* reversal.**

To ensure that Ridley-Thomas was not convicted for conduct outside the scope of § 666, the district court was required to instruct the jury that gratuities are not bribes, and that lobbying and ingratiation are not criminal. The instructions explained neither concept.

Where, as here, the defendant accepts a benefit that could be interpreted as either a gratuity or a bribe, this Court requires an instruction explaining the difference. *United States v. Chen*, 754 F.2d 817, 825 (9th Cir. 1985) (evidence that alleged *quid* was a "tip" "was sufficient to require a jury instruction" differentiating gratuities and bribes).[16] Moreover, only rejected defense instruction 37(d) squarely addressed, and directly refuted, the government's invalid monetization theory, which told jurors that receipt of a gratuity was "still bribery."

[16] The government claims *Chen* is not controlling because § 666, unlike § 201 (the statutory provision at issue there), covers both bribes and gratuities. (GAB-93-94.) Because that is wrong, its argument fails.

(23-ER-4491.) *See Milheiser*, 98 F.4th at 945 (model instruction was insufficient to preclude jurors' reliance on government's "overbroad" theory).[17]

Likewise, no instruction explained to jurors that Flynn's assistance, like any other benefit bestowed to curry favor, was lawful unless it was part of a corrupt exchange. Even considering the instructions "in their entirety" (GAB-96), the concept of lawful ingratiation was simply nowhere to be found. The government's repeated description of Flynn's assistance as "funneling" (a term with nefarious connotations), its derision of Ann Ravel's testimony establishing Ridley-Thomas's compliance with state law as "crazy" (1-ER-190-91), and its reliance on Flynn's lobbying report as evidence of a corrupt exchange (1-ER-180), each gave rise to the need for a "protective instruction." *Sawyer*, 85 F.3d at 741 ("protective instruction" was required to ensure jurors understood that lobbying, "even if deplorable," is "lawful from the standpoint of federal law").

Without a protective instruction, the instructions failed to "distinguish between" corruption and "an elected official responding to legitimate lobbying." *Kincaid-Chauncey*, 556 F.3d at 942-43 (where, as here, the district court refuses to give a *quid pro quo* instruction, "there is no discernible way" "to avoid convicting people for having the 'mere intent to curry favor'"). Because Ridley-Thomas's

[17] The district court's instructional error infected all counts since neither § 1346 nor § 666 extends to gratuities. *See Sun-Diamond*, 526 U.S. at 404-05.

conduct was not "blatantly illegal"—and in fact complied fully with state law—"the jury need[ed] to be told specifically that" Ridley-Thomas had not committed bribery "if his intent was limited to the cultivation of business or political friendship." *Sawyer*, 85 F.3d at 741.

The government claims a protective instruction was not required because "this case … involved a charge of 'straightforward corruption.'" (GAB-97.) But there was nothing straightforward about the government's contorted theory of bribery without personal enrichment or the intent to be influenced.

Because the instructions permitted Ridley-Thomas's conviction for lawful conduct, the district court's refusal to give his proposed instructions "warrants *per se* reversal." *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011) (citation omitted).

## III. RIDLEY-THOMAS'S CONSPIRACY CONVICTION MUST BE REVERSED.

The government concedes that Ridley-Thomas's conspiracy conviction cannot stand without a valid object. (GAB-98.) Because the government's legally invalid theories tainted all substantive counts, Ridley-Thomas's conspiracy conviction must also be reversed. (AOB-75.)

## IV. PROSECUTORS' DISCRIMINATORY STRIKE OF ALL BLACK WOMEN JURORS DENIED RIDLEY-THOMAS A FAIR TRIAL.

The government claims it is "irrelevant" whether Black women constitute "a cognizable group" under *Batson* because Ridley-Thomas's jury included Black men and other minority jurors. (GAB-113 n.14 (citation omitted), 121, 126.) Not so. Federal precedent makes clear that Black women face "unique discrimination" because of "their race *and* gender" (Brief (Dkt. 24.1) at 2), and this Court has recently acknowledged the importance of protecting intersectional groups as a separate class. *See Nguyen v. Frauenheim*, 45 F.4th 1094, 1099 (9th Cir. 2022). Prosecutors' wholesale exclusion of Black women "remove[d] from the jury room [distinctive] qualities of human nature and varieties of human experience," in violation of the Equal Protection Clause. *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

### A. Striking Juror 13 was pretextual.

In denying Ridley-Thomas's *Batson* challenge to the strike of Juror 13, the district court failed to apply *Batson*'s burden-shifting framework, reasoning that it was "rather early in the process to make any real analysis." (4-ER-792-93.) Because the district court failed to apply the requisite legal standard, this Court owes it no deference, *United States v. Collins*, 551 F.3d 914, 920 (9th Cir. 2009), and must conduct *Batson*'s "sensitive inquiry" in the first instance. *Green v. LaMarque*, 532 F.3d 1028, 1030 (9th Cir. 2008). Doing so reveals an unrebutted inference of discriminatory intent.

At trial, prosecutors claimed they struck Juror 13 because she "expressed *no opinion* regarding legacy" (4-ER-789) (emphasis added), commenting only that "legacy admissions [were] a current practice." (4-ER-768.) In comparison, Juror 16, a white woman, opined that "legacy *is okay* when determining admission" (4-ER-768-69) (emphasis added), an opinion the government now labels defense-friendly. (GAB-119.) Despite her defense-friendly views, prosecutors did not ask Juror 16 a single follow-up question and allowed her to serve. Prosecutors' disparate treatment of Jurors 13 and 16 demonstrates that their proffered justification was pretextual. *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) ("[F]ailure to engage in any meaningful *voir dire* examination on a subject the [government] alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.").

Given its disparate treatment of similarly-situated prospective jurors, prosecutors urge this Court to apply an amorphous "relevant circumstances" test instead of comparative juror analysis. (GAB-115.) But "comparative analysis is *required* even when it was not requested or attempted" below. *Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006) (emphasis added). That analysis yields one conclusion: Juror 13's neutral view of legacy admissions was not "the *real* reason" for the strike. *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004).

On appeal, prosecutors recast their argument, claiming that Juror 13 made "defense-friendly pronouncements" that "played into the defense narrative at trial." (GAB-43, 119.) That explanation "reeks of afterthought." *Miller-El*, 545 U.S. at 246. At trial, prosecutors claimed that Juror 13 was unfit because she "expressed *no* opinion" (4-ER-789)—not a defense-friendly one. *See Foster v. Chatman*, 578 U.S. 488, 490 (2016) ("shifting explanations" indicate prosecution was "motivated in substantial part by discriminatory intent").[18]

As a last resort, prosecutors urge reliance upon several alternative justifications. But even the proffer of "one pretextual explanation" establishes that discrimination was a substantial motivating factor, *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), and the government's newly proffered alternatives are equally suspect. Although Juror 13 "had experience with budgeting" (GAB-120), Jurors 2, 15 and 16 did too, and prosecutors did not ask them a single question on the subject. (4-ER-755, 757; 1-SER-199.) Juror 13 had advanced degrees (GAB-120), but so did four others—including Juror 16—and prosecutors struck none. (4-ER-744, 757; 1-SER-192-93.) Juror 13 had experience in Ohio's local government,

[18] Prosecutors' contention that they struck Juror 13 because of her opinion about the *legality* of legacy admissions (GAB-119) is specious—she said the opposite. (*See* 4-ER-775 (explaining that her comments on legacy admissions did not reflect her "understanding of the law" but her "understanding of the current practice").)

but Juror 15 worked in LA's local government, "under the purview" of the *Board of Supervisors*, yet prosecutors did not strike him. (4-ER-754, 772-73, 787, 805.)

None of the government's proffered explanations for striking Juror 13 passes constitutional muster. The district court erred in denying Ridley-Thomas's *Batson* challenge.

### B. Striking Juror 1 was pretextual.

The government struck Juror 1 without a single case-specific reason.[19] Instead, prosecutors cited her demeanor—her alleged head-shaking and looking down—and her unemployment. (4-ER-802.) On appeal, prosecutors claim that Juror 1's demeanor indicated she was "hostile to the government" (GAB-123)—a claim never made at trial, for good reason. Her supposed head-shaking, which prosecutors claim occurred while the district court read a joint statement of the case, could have indicated disapproval of Ridley-Thomas's alleged misconduct rather than the government's charging decisions. A single question would have made Juror 1's motivations clear, but the government asked none, giving rise to an inference of pretext. *See Kesser*, 465 F.3d at 364 ("Although [the prosecutor] claimed to be concerned about [the struck juror's] attitude, he did not ask her further questions …. For a *Batson* inquiry, we require more than this."); *Ali v.*

[19] By comparison, the government asked a litany of case-specific questions of other prospective jurors. (4-ER-803-05.)

*Hickman*, 584 F.3d 1174, 1188 (9th Cir. 2009) (when a prosecutor "fail[s] to clear up any lingering doubts about [a struck juror's] objectivity by asking follow-up questions," such failure "supplies a [] reason why the prosecutor's alleged concern with objectivity is implausible").

Prosecutors' unstated assumption that Juror 1's demeanor showed anti-government bias itself indicates pretext. (*See* Brief (Dkt. 24.1) at 16 ("[S]tereotypes of Black women's demeanor and competence have led to further longstanding and inaccurate stereotypes that Black women, *as a specific group*, are more likely to purportedly engage in jury nullification and thus should be peremptorily stricken from potential jury panels.").)

Because the district court essentially rubber-stamped prosecutors' demeanor-based strike (4-ER-811 (finding "no reason to discredit the statements of the two prosecutors of what they observed")), its findings merit no deference. *See Snyder*, 552 U.S. at 479 (trial court must make "a specific finding on the record concerning [the struck juror's] demeanor"). Rather than scrutinize prosecutors' inherently suspect justifications, *see Batson*, 476 U.S. at 106 (Marshall, J., concurring) (unconscious bias may masquerade as demeanor-based justifications); *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) ("Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination."), the

district court ignored clear indicia of Juror 1's competence for jury service. (4-ER-743 (complimenting her "fine job" of answering the court's *voir dire* questions).)

The government relies primarily upon cases predating the Supreme Court's decision in *Snyder* (GAB-124-25), which held that, "where the proffered race-neutral reason for a strike is limited to the juror's demeanor, 'the trial court must evaluate … whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.'" *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011) (quoting *Snyder*, 552 U.S. at 477); *United States v. Thompson*, 735 F.3d 291, 299 (5th Cir. 2013) (*Snyder* requires the district court to state its assessment of demeanor on the record). Cases upholding demeanor-based strikes where (like here) the trial judge simply accepts the prosecution's assessment at face value are no longer good law.[20]

Juror 1's protected characteristics, not her demeanor, bore a relationship to the charges Ridley-Thomas faced. (AOB-83.) The prosecution's use of her race and gender as a "proxy" for "competence and impartiality" violated Ridley-Thomas's constitutional rights. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). Ridley-Thomas deserves a new trial.

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[20] *United States v. Hernandez-Garcia*, 44 F.4th 1157 (9th Cir. 2022), is distinguishable. (GAB-125, 127.) There, the district court observed the struck juror's demeanor and credited the race-neutral explanation that the juror was "a loner" and more likely to nullify. *Hernandez-Garcia*, 44 F.4th at 1168.

## CONCLUSION

Ridley-Thomas's convictions must be reversed and the case remanded for entry of a judgment of acquittal. At a minimum, Ridley-Thomas is entitled to a new trial on all counts.

Dated: June 17, 2024

**COHEN WILLIAMS LLP**

By: */s/ Alyssa D. Bell*

Alyssa D. Bell
Michael V Schafler
Neil S. Jahss

Paul J. Watford
**WILSON SONSINI GOODRICH & ROSATI**

Erwin Chemerinsky
**UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW**

*Attorneys for Mark Ridley-Thomas*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this reply brief is proportionally spaced, has a typeface of 14 points and contains approximately 12,005 words.

Dated: June 17, 2024 **COHEN WILLIAMS LLP**

By: *_____/s/ Alyssa D. Bell_____*
Alyssa D. Bell
Attorneys for Mark Ridley-Thomas