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12 *Hon. Jeffrey Lane Fortenberry*

13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16 UNITED STATES OF AMERICA,
17
18 *Plaintiff,*

19 v.

20 JEFFREY FORTENBERRY,
21
22 *Defendant.*

Case No. 2:21-cr-00491-SB
Hon. Stanley Blumenfeld, Jr.

**HON. JEFFREY LANE
FORTENBERRY’S NOTICE OF
MOTION AND MOTION TO
DISMISS THE INDICTMENT FOR
FAILURE TO ALLEGE
MATERIALITY**

Hearing Date: December 7, 2021
Hearing Time: 8:00 a.m.
Time Estimate: 20 minutes

Indictment: October 19, 2021
Pretrial Conference: December 7, 2021
Trial: December 14, 2021
Last Day: December 29, 2021

1 **TO THE HONORABLE COURT, ALL PARTIES, AND COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** at the above time and date, in the courtroom of
3 the Honorable Stanley Blumenfeld, Jr., United States District Court Judge, located at 350
4 West 1st Street, Los Angeles, California, 90012, Courtroom 6C, by and through his
5 attorneys of record, the Honorable Jeffrey Lane Fortenberry will move, and hereby does
6 move, to dismiss the indictment because it fails to allege that his statements or omissions
7 were material. This motion is based on this Notice, the Memorandum of Points and
8 Authorities concurrently filed herewith, the files and records in this case, and any evidence
9 and argument that may be presented at the hearing on this matter.

10 Counsel for the parties met and conferred by telephone on November 8, 2021,
11 regarding the contentions presented in this motion but were unable to resolve their
12 differences.

13
14 Date: November 9, 2021

BIENERT KATZMAN
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17 By: _____

John L. Littrell

Ryan V. Fraser

Attorneys for Hon. Jeffrey Lane Fortenberry

1 MEMORANDUM OF POINTS & AUTHORITIES

2 **I. INTRODUCTION**

3 The government’s investigation revealed that Congressman Fortenberry was
4 unaware of any illegal foreign or conduit contributions to his 2016 campaign. With no
5 basis to charge the Congressman with a crime, the government instead concocted one.

6 This was a setup. The government proceeded in three steps.

7 First, in 2018 it directed an informant to *tell* Congressman Fortenberry that he had
8 received an illegal conduit contribution in 2016 and that the money was “*probably*” from
9 Gilbert Chagoury, a foreign national. Dkt. No. 1 at ¶ 15(b) (emphasis added).

10 Second, nearly a year later, the government sent an FBI agent to Congressman
11 Fortenberry’s home to ask him if what the informant said in 2018—uncorroborated by
12 anything else—was actually true, which Congressman Fortenberry allegedly denied.

13 Third, months after that, Assistant United States Attorney Mack Jenkins asked
14 Congressman Fortenberry if anyone had *told him* what the informant said during the 2018
15 call. When Congressman Fortenberry could not recall the precise details of the
16 informant’s call, the government charged him with the crime of making false statements.

17 This prosecution is the actualization of Justice Ruth Bader Ginsburg’s grave
18 concern regarding prosecutorial overreach in Section 1001 cases: that “an overzealous
19 prosecutor or investigator—aware that a person has committed some suspicious acts, but
20 unable to make a criminal case—will create a crime by surprising the suspect, asking
21 about those acts, and receiving a false denial.” *Brogan v. United States*, 522 U.S. 398,
22 416 (1998) (Ginsburg, J., concurring). Because Congressman Fortenberry’s statements
23 to investigators were not material, the Indictment should be dismissed.

24 **II. RELEVANT FACTS**

25 In 2016, the government was investigating political campaign contributions made
26 by Gilbert Chagoury, a foreign national, using other individuals as conduits, to
27 Congressman Fortenberry’s 2016 congressional campaign. The government was
28 allegedly concerned with whether Congressman Fortenberry was aware of the illegal

1 foreign contributions, and whether any person sought to impermissibly influence him in
2 exchange for them. Dkt. No. 1 at ¶ 1. The government does not allege that Congressman
3 Fortenberry *knew* about the illegal contributions when they were made in 2016, and it did
4 not charge the Congressman with any substantive offense related to those contributions.¹

5 On June 4, 2018, the government directed its informant, “Individual H,” who had
6 hosted a fundraiser for Congressman Fortenberry in 2016, to place a surreptitiously
7 recorded phone call. During the 2018 call, which lasted about ten minutes, and spanned
8 multiple topics unrelated to the 2016 fundraiser, the informant told Congressman
9 Fortenberry something that he did not know before: that his campaign had received an
10 illegal contribution from a foreign national in 2016.

11 Specifically, the government alleges that during the 2018 call, “Individual H” told
12 Congressman Fortenberry that “prior to the 2016 Fundraiser, [Toufic] Baaklini provided
13 Individual H with ‘\$30,000 cash’ to give to defendant FORTENBERRY’s campaign.”
14 Dkt. No. 1 at ¶ 14. During the same call, “Individual H,” also allegedly told
15 Congressman Fortenberry that he had “distributed the \$30,000 cash to other individuals
16 to contribute to defendant FORTENBERRY’s campaign at the 2016 Fundraiser,” and
17 that the money “*probably* did come from Gilbert Chagoury because he was so grateful
18 for your support [for] the cause.” *Id.* at ¶ 15a (emphasis added).

19 On March 23, 2019—nearly ten months later—the government sent agents to
20 Congressman Fortenberry’s home to interrogate him. *See Id.* at ¶19a. Congressman
21 Fortenberry invited the agents into his home and tried to help them. He was not asked
22 about the 2018 call from Individual H. But according to the government, Congressman
23 Fortenberry’s responses were false, because Congressman Fortenberry stated that he
24 was not aware of Baaklini making illegal contributions or directing others to do so, *id.*
25 at ¶19a(i), and he stated that “the individuals who contributed to the 2016 Fundraiser

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¹ The \$30,200 in alleged illegal conduit contributions represents approximately
3.7% of the total money Congressman Fortenberry raised for his 2016 campaign. *See*
Federal Election Commission 2016 Financial Summary for Honorable Jeffrey L.
Fortenberry, available at <https://www.fec.gov/data/candidate/H4NE01064/?cycle=2016>.

1 were all publicly disclosed.” *Id.* at ¶20b. He also stated that “every campaign that he
2 had received was publicly disclosed.” *Id.* at ¶ 20c.

3 On July 18, 2019—more than one year later—Congressman Fortenberry was
4 questioned again, this time by Assistant United States Attorney Mack Jenkins himself.
5 *Id.* at ¶19b. Again, Congressman Fortenberry cooperated with the government and tried
6 to help. This time, Congressman Fortenberry was asked about the 2018 call from
7 Individual H. *See id.* at ¶ 19b(i). According to the government, Congressman
8 Fortenberry made false statements when he denied that he had been “told by Individual
9 H during the 2018 call that Baaklini had given Individual H \$30,000 cash to help fund
10 the 2016 Fundraiser,” *id.* at ¶ 21(a), and stated that he was “not aware of any illicit
11 donation made during the 2016 Fundraiser.” *Id.* at ¶ 21(b). The Congressman also
12 allegedly said that he ended the 2018 call with Individual H after Individual H made a
13 concerning comment, and that he would have been “horrified” if he learned illegal
14 campaign contributions were made. *Id.* at ¶ 19(b)(i)-(iv); *id.* at ¶ 21.

15 Notably, the government does not accuse Congressman Fortenberry of lying
16 about the real facts surrounding his 2016 fundraiser. This case is entirely about
17 Congressman Fortenberry’s failure to accurately repeat back to the government the
18 content of the ten-minute phone call that the government’s informant placed to him.

19 **III. ARGUMENT**

20 The government’s theory makes several unsupportable assumptions. First, the
21 government baselessly assumes that Congressman Fortenberry perfectly recalled the
22 informant’s 2018 statements when he was questioned about them nearly a year later.
23 Second, the government baselessly assumes that Congressman Fortenberry accepted and
24 believed the informant’s assertions as true. And third, the government baselessly posits
25 that Congressman Fortenberry’s 2019 statements about a 2016 event the government had
26 ***finished investigating*** could influence any required determination yet to be made by the
27 government. *See United States v. Weinstock*, 213 F.2d 699, 701 (D.C. Cir. 1956)
28 (explaining that a materially false statement must have the capacity to influence a

1 determination required to be made). Because Congressman Fortenberry’s 2019
2 statements and alleged omissions were not material, the Indictment should be dismissed.

3 **A. Materiality is an Essential Element of the Offense**

4 Congressman Fortenberry has been charged with one count of falsifying and
5 concealing material facts, 18 U.S.C. § 1001(a)(1), and two counts of making a false
6 statement, 18 U.S.C. § 1001(a)(2). These crimes require a statement or omission to be
7 not simply false, but “materially” false with respect to a matter under investigation.
8 Materiality requires more than mere “relevance” or relatedness to the matter being
9 investigated by the government. To be material, a statement or omission must be
10 “reasonably likely to influence the tribunal in making a determination *required to be*
11 *made.*” *Weinstock*, 213 F.2d at 701 (emphasis added). In other words, it must “ha[ve] a
12 natural tendency to influence, or was capable of influencing, the decision of the decision-
13 making body to which it was addressed.” *Kungys v. United States*, 485 U.S. 759, 770
14 (1988); *United States v. Beltran*, 136 F. App’x 59, 61 (9th Cir. 2005).

15 The materiality requirement ensures that misstatements to investigators are
16 criminalized only when linked to the particular “subject of [their] investigation.” *United*
17 *States v. Kim*, 808 F. Supp. 2d 44, 59 (D.D.C. 2011); *cf. Kungys*, 485 U.S. at 774 (false
18 date and birthplace statements in immigration application were not “material” as they
19 were not “relevant to his qualifications [for citizenship]”). The requirement prevents law
20 enforcement from fishing for falsehoods merely to manufacture jurisdiction over any
21 statement—true or false—uttered by a subject. Because materiality is an essential
22 element of all three counts in the indictment, it must be adequately pled as to each one.

23 **1. Count One – Concealment of Material Facts**

24 Count One alleges that Congressman Fortenberry “falsified, concealed, and
25 covered up . . . material facts.” Dkt. No. 1 at ¶ 18. The specific facts the government
26 accuses Congressman Fortenberry of concealing were (a) that Congressman
27 Fortenberry’s campaign had “received illicit contributions at the 2016 fundraiser”; (b)
28 that Congressman Fortenberry had “become aware” of that fact; (c) that Toufic Baaklini

1 had provided \$30,000 cash to Individual H for Individual H and his associates to
2 contribute to Congressman Fortenberry's campaign at the 2016 fundraiser; (d) that
3 Congressman Fortenberry had "become aware" of that fact; and (e) that Gilbert Chagoury
4 was the source of the money. Dkt. No. 1 at ¶ 18(a-e).

5 Even if one assumes that Congressman Fortenberry was aware of those facts, and
6 even if one assumes that he willfully concealed those facts from the government, that
7 concealment was not material to the investigation because all five of those facts were
8 either already known by, or affirmatively manufactured by, the government.

9 As to alleged omissions (a), (c), and (e), those facts were already known to the
10 government as of September 2016, when the government recruited Individual H as an
11 informant. See Dkt. No. 1 at ¶ 13. As the government admits in the indictment,
12 "Individual H informed the FBI of the conduit contributions Individual H and others
13 made to defendant FORTENBERRY's campaign at the 2016 Fundraiser." *Id.*
14 Therefore, by September 2016, the investigation's goal was met: the government
15 ascertained that Chagoury had illicitly donated to Congressman Fortenberry's 2016
16 congressional campaign using other individuals as conduits. *Id.* at ¶ 13. The government
17 also knew that Congressman Fortenberry was unaware of the illicit contributions, and
18 therefore, no one could have attempted to impermissibly influence him because of them.

19 As to alleged omissions (b) and (d), which accuse the Congressman of concealing
20 his knowledge of the facts alleged in (a) and (c), the conclusion is even stronger because
21 the government ***manufactured those facts***. After all, the government does not contend
22 that Congressman Fortenberry knew of the illicit donations to his campaign in 2016 when
23 they were made. It alleges only that he had "become aware" of those illicit contributions
24 no later than the 2018 call placed to him by a government informant. See *Id.* at ¶ 20(a).

25 If the government is correct, and Congressman Fortenberry had "become aware"
26 of those illicit contributions based on the 2018 call from Individual H, then the
27 government cannot claim that his failure to disclose was material, because the
28 government engineered the 2018 call in the first place and recorded it.

1 **2. Count Two – Affirmative False Statements**

2 Count Two alleges that Congressman Fortenberry falsely stated (a) that he was not
3 aware of Baaklini making any illegal contributions, directing anyone to conduct illegal
4 contributions, or providing money to anyone else to conduct conduit campaign
5 contributions; (b) that the individuals who contributed to the 2016 Fundraiser were all
6 publicly disclosed; and (c) that every campaign contribution that he had received was
7 publicly disclosed. *Id.* at ¶ 20(a-c).

8 As to (b) and (c), Congressman Fortenberry’s statements were literally true, as the
9 government knows. Each of the individual contributors to the 2016 Fundraiser were
10 disclosed to the FEC.² The government contends that those statements were false only
11 because it assumes that Congressman Fortenberry heard, understood, and believed what
12 Individual H told him during the 2018 call, and that he should have accepted as true that
13 Chagoury and Baaklini were the actual sources of the 2016 donations. But even if the
14 government were right, it would not make Congressman Fortenberry’s statements
15 material. FEC records are available to the government just as they are available to the
16 public. Thus, whether a contribution was disclosed to the FEC is not debatable.

17 As to (a), Congressman Fortenberry’s statement that he was not aware of
18 Baaklini’s scheme to funnel illegal contributions to his campaign was not material to the
19 government’s investigation because the government already knew about Baaklini’s
20 scheme based on information it received from Individual H in 2016. *See Id.* at ¶ 13. In
21 fact, the government’s only basis to allege that *Congressman Fortenberry* knew of those
22 facts was the call that that Individual made to him in 2018 at the government’s direction.
23 *See Id.* at ¶ 20(a) (alleging that Congressman Fortenberry knew of the illegal
24 contributions “as of no later than the June 2018 call with Individual H . . .”). Even
25 assuming the government was correct, and Congressman Fortenberry heard, understood,
26 and believed what Individual H told him during the ten-minute call from 2018, those facts
27 were already known to the government because *it staged the call* and recorded it.

28 _____
² *See* <https://www.fec.gov/data/candidate/H4NE01064/?cycle=2016>

1 Congressman Fortenberry’s characterization of the call—to the extent it differed from the
2 actual recording—told the government nothing it did not already know.

3 **3. Count Three – Affirmative False Statements**

4 Count Three alleges that Congressman Fortenberry falsely stated that (a) he “had
5 not been told” by Individual H during the 2018 Call that Baaklini had given Individual H
6 \$30,000 cash to help fund the 2016 Fundraiser; and (b) he “was not aware” of any illicit
7 donation made during the 2016 Fundraiser. Dkt. No. 1 at ¶ 21(a-b).


8 As to (a), Congressman Fortenberry’s statements could not have been material
9 because the government had a recording and transcript of the 2018 Call. Because the
10 government already had objective, verifiable proof of what Individual H said to
11 Congressman Fortenberry in 2018, Congressman Fortenberry’s statement about that call
12 added nothing to what the government already knew. As to (b), the only basis for the
13 government’s claim that Congressman Fortenberry was “aware” of illicit donations to his
14 2016 was the 2018 call that the government staged. *Id.* at ¶ 20(a). And unlike
15 Congressman Fortenberry, who did not know that he was being recorded, the government
16 had a complete recording and transcript of the call. *See Weinstock*, 213 F.2d at 701.

17 **IV. CONCLUSION**

18 When an investigation yields no evidence that a person is culpable of the crime
19 under investigation, bringing freestanding false statements charges against that person
20 “escalate[s] completely innocent conduct into a felony.” *See Brogan*, 522 U.S. at 412
21 (Ginsburg, J., concurring). The government should not be permitted to weaponize
22 Section 1001 in this way. This Court should dismiss the Indictment.

23
24 Dated: November 9, 2021

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25
26 By:  _____
27 John L. Littrell
28 Ryan V. Fraser
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