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 UNITED STATES OF AMERICA
 12

13 UNITED STATES DISTRICT COURT
 14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
 16 Plaintiff,
 17 v.
 18 JEFFREY FORTENBERRY,
 19 Defendant.
 20

Case No. 2:21-cr-00491-SB
GOVERNMENT’S TRIAL
MEMORANDUM

Indictment: 10/19/2021

Pretrial Conference: 3/15/2022 at 8:00 a.m.
 Trial: 3/15/2022 at 8:00 a.m.

22 Plaintiff United States of America, by and through its counsel of record, the
 23 United States Attorney for the Central District of California and Assistant United States
 24 Attorneys Mack E. Jenkins, Susan S. Har, and J. Jamari Buxton, hereby submits its trial
 25 memorandum.

26 //

27 //

1 The government respectfully requests leave to file additional memoranda as may
2 become appropriate during the course of trial.

3
4 Dated: February 15, 2022

Respectfully submitted,

5 TRACY L. WILKISON
6 United States Attorney

7 SCOTT M. GARRINGER
8 Assistant United States Attorney
9 Chief, Criminal Division

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TRIAL MEMORANDUM

I. STATUS OF THE CASE

A. Trial Status

Defendant is charged in the Indictment with the following three counts:

- Count One – Scheme to falsify or conceal material facts, in violation of 18 U.S.C. § 1001(a)(1)
- Count Two – Making a false statement to a government agency, in violation of 18 U.S.C. § 1001(a)(2)
- Count Three – Making a false statement to a government agency, in violation of 18 U.S.C. § 1001(a)(2)

Jury trial against defendant is set for March 15, 2022 at 8:30 a.m. Defendant is on bond.

B. Length of Trial and Number of Witnesses

The estimated time for the government’s case-in-chief (with a reasonable allotment for cross-examination) is approximately four days. The government plans to call the following seven witnesses in its case-in-chief in the below expected order:

Witness Name	Government Time Estimate	Defense Cross-Examination Estimate
(1) FBI Special Agent Todd Carter	2.5 hours	5.0 hours
(2) Toufic Baaklini	2.5 hours	1.25 – 2.5 hours
(3) Alexandra Kendrick	1.5 hours	0.75 – 1.5 hours
(4) Individual H	3.0 hours	1.5 – 3.0 hours
(5) Jessica Furst Johnson	0.5 hours	0.25 – 0.5 hours
(6) IRS-CID Special Agent James O’Leary	1.5 hours	.75 – 1.5 hours
(7) FBI Special Agent Edward Choe	3.0 hours	1.5 – 3.0 hours

The defense estimates that presenting its case will take two days.

1 **C. Motions in Limine**

2 The parties have filed the following nine joint motions in limine:

- 3 1. JMIL No. 1 – Government’s Motion to Exclude Improper Argument
- 4 Regarding Materiality
- 5 2. JMIL No. 2 – Government’s Motion to Exclude Improper Reference or
- 6 Evidence Regarding Alleged Political Prosecution
- 7 3. JMIL No. 3 – Government’s Motion to Admit Evidence of Defendant’s
- 8 Motive
- 9 4. JMIL No. 4 – Government’s Motion to Exclude Dr. Alan Castel
- 10 5. JMIL No. 5 – Defendant’s Motion to Exclude “Other Acts” Evidence
- 11 6. JMIL No. 6 – Defendant’s Motion to Exclude Evidence of Irrelevant Texts,
- 12 Phone Calls, and Emails
- 13 7. JMIL No. 7 – Defendant’s Motion to Preclude Evidence or Argument that
- 14 Fortenberry Had Reason Other Than the June 4, 2018 Call to Believe His
- 15 2016 Fundraiser Received Illegal Donations
- 16 8. JMIL No. 8 – Defendant’s Motion to Admit His Statements
- 17 9. JMIL No. 9 – Defendant’s Motion for Attorney Conducted Voir Dire

18 The Court took preliminary information regarding several of the nine motions
19 during a hearing on February 11, 2022.

20 **II. THE CRIMES AND THEIR ELEMENTS**

21 **A. Count One**

22 Count One charges defendant with a scheme to falsify or conceal material facts, in
23 violation of 18 U.S.C. § 1001(a)(1). The elements of this offense are as follows:

24 First, the defendant had a duty to disclose material information; a duty to disclose
25 arises when a defendant responds to specific questions posed by a government agency on
26 a particular topic;

27 Second, the defendant falsified, concealed, or covered up such a fact by trick,
28 scheme, or device; to falsify, conceal, or cover up by a trick, scheme, or device means

1 any deliberate plan or course of action, or any affirmative act, or any knowing omission
2 designed to deceive others by preventing or delaying the discovery of information;

3 Third, the falsified, concealed, or covered up fact was material to the Federal
4 Bureau of Investigation (“FBI”), the Internal Revenue Service – Criminal Investigations
5 (“IRS-CI”), or the United States Attorney’s Office (“USAO”); that is, it had a natural
6 tendency to influence, or was capable of influencing, the decisions or activities of a
7 government agency;

8 Fourth, the falsification and/or concealment was knowing and willful; that is, the
9 defendant acted deliberately and with knowledge both of the falsification and/or
10 concealment and that his conduct was unlawful; and

11 Fifth, the material fact was within the jurisdiction of the executive branch of the
12 Government of the United States, namely, the FBI, IRS-CI, or USAO.

13 18 U.S.C. § 1001(a)(1); United States v. White Eagle, 721 F.3d 1108, 1116-17 (9th Cir.
14 2013); O’Malley, Grenig & Lee, 2A Fed. Jury Prac. & Instr. § 40:04 (6th ed.); Ninth
15 Circuit Model Jury Instructions, No. 24.10 (2022 ed.) [False Statement to Government
16 Agency].

17 **B. Counts Two and Three**

18 Counts Two and Three charge defendant with making a false statement to a
19 government agency, in violation of 18 U.S.C. § 1001(a)(2). The elements of this offense
20 are as follows:

21 First, the defendant made a false statement;

22 Second, the statement was made in a matter within the jurisdiction of the FBI,
23 IRS-CI, or the USAO;

24 Third, the defendant acted willfully; that is, the defendant acted deliberately and
25 with knowledge both that the statement was untrue and that his or her conduct was
26 unlawful; and

27
28

1 Fourth, the writing was material to the activities or decisions of the FBI, IRS-CI,
2 or the USAO; that is, it had a natural tendency to influence, or was capable of
3 influencing, the agency's decisions or activities.

4 The jury must unanimously agree as to which statement or statements were false
5 and material.

6 See Ninth Circuit Model Jury Instructions, No. 24.10 (2022 ed.) [False Statement to
7 Government Agency (18 U.S.C. § 1001)].

8 Although the government charged multiple false statements in Counts Two and
9 Three, the government need only prove one false statement in each Count for defendant
10 to be found guilty. Moreover, although a unanimity instruction is not required, in the
11 abundance of caution the government will propose the supplemental instruction that the
12 jury unanimously agree on which statement(s) it found were false. See id., Comment;
13 see also Ninth Circuit Model Jury Instructions, No. 6.27 (2022 ed.) [Specific Issue
14 Unanimity].

15 Defendant disagrees with the government concerning what the elements are, as
16 reflected in the parties' prior filings and defendant's opposing proposed jury instructions
17 and objections to proposed jury instructions.

18 **III. DETAILED SUMMARY OF FACTS**

19 The government expect that the evidence at trial will establish the following facts,
20 among others¹:

21 **A. Background and Overview of the Federal Investigation**

22 Under federal law, it is illegal to knowingly accept campaign contributions from
23 foreign nationals. It is also a violation of federal law to knowingly accept campaign
24 contributions from conduit donors. From 2015 to 2016, the contribution limit for an
25 individual to contribute to a political candidate committee was \$2,700 per election. The
26 Federal Election Commission ("FEC") is the entity charged with ensuring transparency
27 in federal elections by administering and enforcing federal campaign finance law. Each

28 ¹ The defense respectfully declines to adopt the government's statement of facts. The defense disputes every element of every charge.

1 United States federal political campaign is required to submit regular reports to the FEC
2 with information about donors contributing more than \$50. If a campaign receives a
3 questionable donation, the FEC prescribes specific procedures the campaign must
4 follow, including that the “committee must keep a written record noting the reason why a
5 contribution may be prohibited and must include this information when reporting the
6 receipt of the contribution.”

7 Since 2015, the FBI, IRS-CI, and the USAO for the Central District of California
8 (“CDCA”) have been investigating illegal foreign and conduit contributions and foreign
9 influence schemes orchestrated by Gilbert Chagoury and aided by several subjects,
10 including Toufic Baaklini and Individual H (the “Federal Investigation”).

11 **Gilbert Chagoury** is a Nigerian-born, billionaire businessperson of Lebanese
12 descent. Because he is a foreign national, Chagoury is prohibited from making
13 contributions directly or indirectly in support of any candidate for federal elected office
14 in the United States. As early as 2010, Chagoury was the subject of various news
15 articles reporting that he had ties to an international criminal entity.² In 2015 and 2016,
16 the reporting intensified and became more widespread. In particular, the reporting
17 focused on then-presidential candidate Hillary Clinton and her and her foundation’s
18 controversial (but legal) financial connection to Chagoury as a “top Clinton Foundation
19 donor.”

20 Chagoury was a key (but silent) initial financial backer for the non-profit
21 organization In Defense of Christians (“IDC”), which was founded in 2014.

22 Defendant personally met with Chagoury twice.

23 **Toufic Baaklini** is a United States citizen of Lebanese descent. Baaklini has
24 consistently served as a proxy for Chagoury and has assisted him with financial and
25 political dealings in the United States. Baaklini is the founder of IDC and, until he
26 resolved the criminal allegations against him in this case, served as its President.

27
28 ² Specifically, Chagoury was publicly alleged to have financially supported a
terrorist organization, namely, Hezbollah, and was, for a time, also on the U.S.
government’s “No Fly List” and “Terror Watchlist.” Chagoury was never charged with
any terrorism-related offenses and was later removed from the “No Fly List.”

1 **Individual H** is a United States citizen of Lebanese descent. He is a Los Angeles-
2 based physician with ties to both Chagoury and Baaklini. Individual H has served as a
3 board member with IDC.

4 Through the Federal Investigation, investigators learned that Chagoury had
5 funneled his money to the campaigns of U.S. political candidates whom Chagoury
6 believed would be supportive to his cause. The Federal Investigation ultimately revealed
7 that from 2012 to 2016, Chagoury provided approximately \$180,000 in illegal political
8 contributions to four political candidates—including defendant—with the assistance of
9 Baaklini, Individual H, and others. The Federal Investigation also revealed that
10 Chagoury separately routed \$50,000 to then-United States Secretary of Transportation
11 Ray LaHood, in the form of a purported “loan” that LaHood never disclosed as required
12 on government ethics forms.

13 As part of the investigation, federal investigators sought to learn whether and
14 when any of the recipient politicians were aware of the illicit contributions to their
15 campaigns; whether any person sought to impermissibly influence the recipient
16 politician in exchange for the contribution; and whether any recipient politician took any
17 official acts in connection with the illicit contributions. In short, federal agencies were
18 investigating whether the payments were linked to bribe attempts or bribe solicitations.

19 **B. Defendant and His Relationship to Baaklini**

20 Defendant is a U.S. Representative for Nebraska. In 2014 and 2015, defendant led
21 efforts to obtain the passage of two resolutions (H. Res. 683 and H. Con. Res. 75)
22 publicly condemning the persecution of Christians and other religious minorities in the
23 Middle East.

24 In 2014, Baaklini founded IDC to advocate for the protection of Christians in the
25 Middle East. One of the aims of IDC was to get more U.S. Congressional involvement
26 surrounding these issues, and defendant became an important political ally for Baaklini
27 and his organization. As a result, defendant developed a close working relationship and
28 friendship with Baaklini. Defendant’s communications with Baaklini starting in 2014,

1 including through text messages and emails, reflect this close friendship. Through
2 Baaklini, defendant also came to know Chagoury based on their shared commitment to
3 IDC and the “cause,” and the two personally met twice: once in Washington D.C. and
4 once in Paris. Defendant would periodically pass on his regards to Chagoury through
5 Baaklini.

6 In late 2015, following defendant’s introduction of H. Con. Res. 75, defendant
7 asked Baaklini to assist him in identifying supporters who would contribute to his re-
8 election campaign. Baaklini advised defendant that he had a group of Lebanese donors
9 in Los Angeles who wanted to support defendant, and defendant, in turn, directed his
10 fundraising consultant, Alexandra Kendrick, to coordinate the event with Baaklini.
11 Around the same time, Baaklini directed Individual H to host the Los Angeles fundraiser
12 for defendant’s re-election.

13 **C. 2016: Defendant’s Campaign Receives Illegal Contributions at a**
14 **Fundraiser in Los Angeles**

15 In 2016, Chagoury arranged to funnel \$30,000 of his money to defendant’s
16 campaign through Baaklini. Baaklini, in turned, arranged to provide that money in cash
17 to Individual H to fund defendant’s campaign. Specifically, in January 2016, Baaklini
18 provided \$30,000 of Chagoury’s money in cash to Individual H at a restaurant in Los
19 Angeles with instructions that Individual H (1) host a fundraiser for defendant, and
20 (2) recruit other individuals (conduits) to contribute Chagoury’s money to defendant’s
21 campaign. Individual H agreed.

22 In early February 2016, Baaklini introduced Kendrick to Individual H as the host
23 of the Los Angeles fundraiser (the “2016 Fundraiser”). Through a series of emails and
24 text messages, Kendrick and defendant’s campaign team coordinated with Baaklini and
25 Individual H to arrange the 2016 Fundraiser to take place in Los Angeles on February
26 20, 2016. In the lead-up to the 2016 Fundraiser, Kendrick repeatedly emphasized to
27 defendant the potential risk of illegal foreign and conduit contributions with this event.
28 Among other things, she relayed to defendant a “cautionary tale” in which she
coordinated for a different client a fundraiser that similarly had ties with foreign

1 nationals from the same community. Kendrick later learned that the contributions from
2 that event were illegal foreign and conduit contributions. In preparing for the 2016
3 Fundraiser, Kendrick's concerns were further heightened because she was never
4 provided an RSVP list. Despite her requests and even after enlisting defendant's
5 assistance to procure such a list, Kendrick never received a guest list prior to the event.

6 Defendant flew out to Los Angeles for the 2016 Fundraiser, and Individual H
7 picked him up from the airport. Kendrick also traveled to Los Angeles. The 2016
8 Fundraiser was co-hosted by Individual H and his family friends at the family friends'
9 home in Los Angeles. During the event, Kendrick insisted that the donors complete the
10 contribution forms in person at her table, given her concerns about possible conduit
11 contributions. This was an unusual practice for Kendrick, and she made sure defendant
12 was aware that she was taking these cautionary steps.

13 The 2016 Fundraiser raised a total of \$36,000, which by all accounts was a major
14 success for defendant. Of that amount, approximately \$30,200 was contributed by six
15 conduits whom Individual H recruited and reimbursed with Chagoury's money.
16 Defendant's April 15 Quarterly FEC Report for 2016 disclosed the contributors from the
17 2016 Fundraiser, including the six conduits who had contributed Chagoury's money to
18 defendant. The FEC report did not indicate that Chagoury or Baaklini provided any
19 contributions at the 2016 Fundraiser.

20 A short time after the 2016 Fundraiser, defendant saw Baaklini in Washington,
21 D.C. In a private conversation, defendant asked Baaklini if he thought anything was
22 wrong with the 2016 Fundraiser. Baaklini falsely told him no and inquired why
23 defendant was asking. In response, defendant noted that the money had all come from
24 one family. Baaklini again falsely told defendant nothing was wrong with the fundraiser.

25 On March 14, 2016, defendant's resolution (H. Con. Res. 75), which was favored
26 by IDC, Chagoury, Baaklini, and Individual H, passed.

27
28

1 **D. 2018: Defendant Pushes Individual H to Host Another Fundraiser in**
2 **Los Angeles for Him**

3 Following the 2016 Fundraiser, and after being confronted by the FBI, Individual
4 H began cooperating in the Federal Investigation. The scope of the Federal Investigation
5 included determining if and when defendant knew about the illegal funds he received
6 from the 2016 Fundraiser and whether defendant had any communications with
7 Chagoury or Baaklini about the funds he received from that event.

8 Defendant was up for re-election in November 2018. Since the time of the 2016
9 Fundraiser, defendant and Individual H had maintained periodic contact, largely through
10 text messages. In the spring of 2018, defendant reached out to Individual H via text
11 message, asking for a call. On April 9, 2018, defendant called Individual H, which was
12 surreptitiously recorded at the direction of the FBI. After inquiring about how the
13 “community in L.A.” was doing, defendant asked Individual H if he would host another
14 fundraising event in Los Angeles for him. Individual H agreed to speak to one of their
15 mutual acquaintances about it.

16 One week later, on April 17, defendant’s staff aide, Luke Wenz, sent defendant an
17 email stating that he would email Individual H about a possible fundraising event in
18 California. That same day, defendant—having already personally reached out to
19 Individual H just one week prior—instructed Wenz not to contact Individual H.

20 Following up on defendant’s request, on June 4, 2018, Individual H placed a call
21 to defendant, which was surreptitiously recorded at the direction of the FBI. During that
22 nine-minute call, Individual H repeatedly discussed with defendant that Baaklini had
23 given Individual H \$30,000 cash to contribute to the 2016 Fundraiser, which Individual
24 H distributed to conduit donors, and that Chagoury was probably the ultimate source of
25 the money.

26 Defendant did not express surprise or concern or seek clarification about
27 Individual H’s admissions that illegal foreign cash had been funneled to his campaign by
28 people known to him and people who sought his legislative support during the time
period he received the illegal donations. Instead, defendant continued to push for the

1 second fundraiser, explaining that he hoped to “have some continuation of the fine
2 generosity” that he had received from the first (illicitly funded) fundraiser. When
3 Individual H advised defendant that the money “probably did come from Gilbert
4 Chagoury because he was so grateful for [defendant’s] support [for] the cause,”
5 defendant responded with a summary of the efforts he had been making in Congress for
6 “the cause” and praised Baaklini for his respective efforts to “elevate the issue,” before
7 circling back to possible dates for the fundraising event. Defendant also offered to speak
8 with Baaklini—a key facilitator of the illegal contributions to defendant’s campaign—to
9 see if he could again “help” with the fundraiser. The call concluded with defendant
10 noting that he had told Baaklini to deliver his regards to Chagoury, who defendant
11 understood was “still in Paris.”

12 Following the June 4 call with Individual H, defendant sent Baaklini a text
13 message on about June 4, 2018 asking, “Would you have some time to visit later
14 Thursday evening?” Baaklini, who was represented by counsel at the time and aware of
15 the Federal Investigation into him and defendant, responded “sorry can not this week.”

16 Following the June 4 call with Individual H, defendant reached out to an attorney
17 specializing in FEC rules, Jessica Furst Johnson. Defendant did not advise Johnson
18 about the source of the call (the host of the 2016 Fundraiser) or the nature of Individual
19 H’s statements (that Baaklini provided \$30,000 of Chagoury’s cash to Individual H and
20 his friends to donate to defendant). Rather, defendant raised only an unremarkable and
21 unmemorable “concern” about something he heard. Johnson could not get defendant to
22 provide any more details, and she concluded there was nothing more to do done about an
23 unverifiable innuendo or suspicion about a possible “bad check.”

24 Following the June 4 call with Individual H, defendant did not amend his FEC
25 disclosures regarding the contributions from the 2016 Fundraiser. Defendant also did
26 not disgorge the funds from the 2016 Fundraiser as required by the FEC and which
27 would have required him to publicly disclose that he had received, or he suspected he
28 had received, illegal conduit contributions from Chagoury.

1 **E. March 2019: Defendant Lies to and Misleads CDCA Investigators**
2 **about the Illegal Contributions He Received**

3 On March 23, 2019, FBI Special Agent Todd Carter and IRS-CI Special Agent
4 James O’ Leary traveled to defendant’s home in Lincoln, Nebraska to see if defendant
5 would agree to a voluntary interview as part of the Federal Investigation. Defendant
6 agreed, and the agents surreptitiously video and audio recorded the interview. At
7 defendant’s request, several local Nebraska police officers were present during the
8 entirety of the interview.

9 At the start of the interview, defendant was openly hostile towards the federal
10 investigators and directed that they listen to his grievances before he would participate in
11 any interview. After they did so, the federal investigators established they were from
12 California, and they advised defendant it was a crime to lie to federal agents. The
13 investigators’ questions focused on Chagoury, Baaklini, Individual H, IDC, and illegal
14 campaign contributions. Defendant repeatedly and falsely denied knowing about any
15 illegal conduit contributions to his campaign, including after being specifically asked
16 about Individual H and Baaklini. Defendant denied receiving money from Chagoury.
17 Defendant also falsely stated that “the only people [he] received money from are on the
18 financial disclosure.”

19 Defendant misleadingly minimized his association with and knowledge of
20 Individual H. Defendant claimed that he had only a vague recollection of Individual H
21 and stated that he “may have” donated to him. When pressed about whether Individual
22 H just donated or held a fundraiser, defendant equivocated, stating he would need to
23 “double check.”

24 The only reference defendant made to the June 4 call with Individual H was in
25 response to questioning about whether he was aware if Chagoury ever directed or gave
26 anybody money to give to his campaign. Defendant vaguely stated, “there was a
27 comment that we would have to ask Gilbert [Chagoury] along the way, but I don’t know
28 what that exactly meant.” But defendant did not provide any details about when that
comment occurred or what he understood its relevance to be to the investigators’ inquiry.

1 Defendant also failed to disclose his conversation with Baaklini after the 2016
2 Fundraiser. Similarly, defendant failed to disclose his conversation with Johnson after
3 the June 4 call.

4 At the conclusion of the interview, defendant asked the federal investigators how
5 to get in touch if he recalled additional information, and they provided defendant with a
6 California phone number.

7 **F. July 2019: Defendant Requests Another Interview with CDCA**
8 **Investigators and Doubles Down on His Lies about Matters Material to**
9 **the Federal Investigation**

10 Following the March 23 interview, defendant (through then-counsel Trey Gowdy)
11 proactively reached out to the government and requested another interview. At the
12 defense's request, a second interview took place in Washington, D.C. on July 18, 2019,
13 at Gowdy's office. FBI Agents Carter and Edward Choe and AUSAs Mack Jenkins and
14 Aron Ketchel were present for the interview. At the time of the interview, defendant was
15 still unaware that his call with Individual H had been recorded or that Individual H was
16 cooperating with the Federal Investigation.

17 AUSA Jenkins repeatedly advised defendant that the interview was voluntary, that
18 he could terminate the interview at any time, that he did not need to answer any
19 questions, and that he could consult with his attorney whenever and as often as he
20 wished. Defendant was also again reminded that it was a crime to lie to the federal
21 government.

22 During the approximately two-hour, consensually recorded interview, defendant
23 admitted the following:

- 24 • Defendant is friends with Baaklini and has worked closely with him and
25 IDC.
- 26 • Defendant understood Baaklini and Chagoury to be friends. Through
27 Baaklini, defendant met Chagoury twice: once in Washington D.C. in late
28 2014 and again in 2015 in Paris. Defendant understood Chagoury to be a
foreign national with an international reputation and a friend of the

1 Clintons, and defendant had researched Chagoury after the Nebraska
2 interview.

- 3 • Defendant believed Chagoury wanted to meet him because of defendant’s
4 work on a cause Chagoury favored.
- 5 • In late 2015, defendant asked Baaklini if there were people in “this broader
6 community” (referring to constituencies who supported the protection of
7 Christians in the Middle East) that would financially support his re-election
8 campaign. It was out of that conversation that the 2016 Fundraiser arose.
- 9 • The 2016 Fundraiser was “very unique”; “substantially bigger”; and a
10 “worthwhile” trip for defendant because of its size and success.
- 11 • Defendant correctly recalled (without having reviewed any records) that he
12 raised between \$30,000 and \$40,000 at the 2016 Fundraiser.
- 13 • Defendant was very familiar with the laws prohibiting political
14 contributions from foreign nationals and conduits and has spent “significant
15 time” in the FEC manual.
- 16 • Defendant understood there is an obligation to return illicit campaign
17 contributions.
- 18 • Defendant personally reviews each FEC report for his campaign two weeks
19 before filing and intentionally reviews it himself “line by line” to make sure
20 mistakes are not made.

21 Defendant made the following false and/or misleading statements:

- 22 • Defendant misleadingly claimed that everything about the 2016 Fundraiser
23 was “standard procedure.”
- 24 • Defendant misleadingly claimed that Individual H made a vague comment
25 that the amounts at a future fundraiser wouldn’t be as large because “Gilbert
26 won’t be involved,” which caused defendant “concern.”

- 1 • Defendant falsely claimed that because of his “concern” following the June
2 4 call with Individual H, he sent an email to his aide, Luke Wenz, not to
3 pursue another fundraiser in Los Angeles.³
- 4 • Defendant misleadingly claimed that he contacted FEC attorney Johnson
5 after the June 4 call because he was concerned and that he told her “what I
6 told you, basically,” i.e., the facts as defendant recalled them from his
7 conversation with Individual H.
- 8 • Defendant falsely claimed that he never had any conversations with
9 Baaklini about any concerns with the 2016 Fundraiser.
- 10 • In response to a question posed by Gowdy, defendant falsely denied being
11 aware that any of the donations from the 2016 California “were from
12 anyone not legally entitled to donate to [defendant].”
- 13 • In response to a question posed by Gowdy, defendant falsely denied being
14 aware that any donations from California were illicit at the time of his call
15 with Johnson.
- 16 • In response to a question posed by Gowdy, defendant falsely claimed he
17 was “absolutely not” aware at any time of any illicit donations and that he
18 was “even now” (the time of the Washington D.C. interview) not aware of
19 any illicit donations.
- 20 • In response to a question posed by Gowdy, defendant misleadingly claimed
21 that if he had been aware of any illicit donations, he would return the
22 money.
- 23 • Defendant falsely claimed that he ended the conversation with Individual H
24 after the “concerning comment” was made.
- 25 • Defendant falsely denied that Individual H told him that Toufic Baaklini
26 had given Individual H \$30,000 cash to fund the 2016 Fundraiser.

27
28 ³ In fact, that email is dated April 17, 2018, almost two months before the call
with Individual H.

- 1 • Defendant misleadingly claimed that if Individual H had stated such facts,
2 “that would have been horrifying.”
- 3 • Defendant misleadingly claimed that he was “shocked” by what the
4 investigators stated during the interview and falsely stated that he had no
5 reason to believe any of the donations from the 2016 Fundraiser were illicit
6 “up to now” (the time of the Washington D.C. interview).
- 7 • Defendant misleadingly claimed that he relied on Johnson’s advice in
8 deciding not to ask Baaklini about the comment made by Individual H.

9 After the interview, defendant furthered his false claim that he told his aide, Wenz,
10 not to pursue the Los Angeles fundraiser because of defendant’s “concern” by having
11 Gowdy send to the federal investigators defendant’s email exchange with Wenz.

12 **G. Federal Investigation Follow-Up**

13 As a result of defendant’s false and misleading statements during his two
14 interviews, federal investigators took the following steps in connection with the Federal
15 Investigation, among others:

- 16 • Interview Jessica Furst Johnson
 - 17 • Interview defendant’s Chief of Staff, Reyn Archer
 - 18 • Interview Luke Wenz
 - 19 • Interview Alexandra Kendrick
 - 20 • Interview Toufic Baaklini
 - 21 • Request and review documents, communications, and phone from Baaklini
 - 22 • Interview Gilbert Chagoury
 - 23 • Obtain and review cell-site data for Baaklini and defendant’s phones
 - 24 • Interview Andrew Doran
- 25
26
27
28

1 **IV. LEGAL AND EVIDENTIARY ISSUES⁴**

2 **A. Authentication and Foundation**

3 Rule 901(a) simply requires that a proponent of evidence make a prima facie
4 showing of authenticity so that a reasonable juror could find “that the item is what the
5 proponent claims it is.” Fed. R. Evid. 901(a); United States v. Chu Kong Yin, 935 F.2d
6 990, 996 (9th Cir. 1991) (government need make only a prima facie showing of
7 authenticity or identification).

8 This requirement “does not erect a particularly high hurdle, and the proponent of
9 the evidence is not required to rule out all possibilities inconsistent with authenticity, or
10 to prove beyond any doubt that the evidence is what it purports to be.” United States v.
11 Dhinsa, 243 F.3d 635, 658-59 (2d Cir. 2001) (citations omitted). The proponent of
12 evidence need not establish a proper foundation through personal knowledge; a proper
13 foundation “can rest on any manner permitted by Federal Rule of Evidence 901(b) or
14 902.” United States v. Pang, 362 F.3d 1187, 1193 (9th Cir. 2004) (citation omitted).
15 The authenticity of proposed exhibits may also be proven by circumstantial evidence.
16 See United States v. King, 472 F.2d 1, 8-11 (9th Cir. 1972).

17 Once a prima facie showing of authenticity has been made, the credibility or
18 probative force of the evidence offered is ultimately an issue for the trier of fact. Chu
19 Kong Yin, 935 F.2d at 996.

20 **B. Specific Evidentiary Issues**

21 1. FEC Filings and Records

22 The government will seek to introduce relevant FEC Form 3 filings for
23 defendant’s campaign. In particular, the government will seek to introduce the April 15
24 Quarterly Report for 2016 in which the conduit donors from the 2016 Fundraiser are

25 ⁴ Defendant states his position as follows: Major outstanding legal and evidentiary
26 issues include AUSA Jenkins’s participation in the trial as an advocate, the defense’s
27 right to call him to testify, and other matters raised in the pending motions *in limine* and
28 conflicting jury instructions. The jury should not receive the indictment or a “sanitized”
version of the indictment. The defense will meet and confer regarding the possibility of
an exhibit list for the jury. The defense will object to sending copies of any recordings
in this case back to the jury during deliberations. See United States v. Felix-Rodriguez,
22 F.3d 964, 967 (9th Cir. 1994).

1 identified. The government may also introduce certain of defendant's other amended
2 FEC filings, which will show defendant made other amendments to his FEC reports, but
3 not to the April 15 Quarterly Report for 2016. The government will also seek to
4 introduce various printouts from the FEC.gov website explaining the rules regarding
5 who can and cannot contribute, contribution limits, instructions on when a reporting
6 form must be amended, and instructions for a committee that discovers that is received a
7 contribution that is prohibited.

8 All of these documents are publicly available on the FEC government website
9 (www.fec.gov), a source whose accuracy cannot reasonably be questioned. See Fed. R.
10 Evid. 201. The Court may even take judicial notice of these records because they are
11 "official government record[s] from a government website." See Love v. Marriott Hotel
12 Servs., Inc., 2021 WL 810252, at *4 (N.D. Cal. Mar. 3, 2021) (citing Cota v. Maxwell-
13 Jolly, 688 F. Supp. 2d 980, 998 (N.D. Cal. 2010)). One of the case agents who accessed
14 and reviewed these records from the FEC website will authenticate their source and
15 explain their relevance to the Federal Investigation.

16 2. Defendant's Legislation and Press Releases

17 The government will introduce evidence of specific legislative actions taken by
18 defendant and the timing of those acts in relation to the 2016 Fundraiser. This evidence
19 is relevant to show defendant's official work on a political/religious cause shared by
20 Chagoury, Baaklini, and Individual H and reflects a subject of interest to the Federal
21 Investigation.

22 Defendant's legislative activity is public information available on a government
23 website (www.congress.gov) and is admissible for the same reasons as documents and
24 information from the FEC website. Defendant's press releases on the same topic are
25 publicly available on his official website (www.fortenberry.house.gov) and constitute the
26 opposing party's statement. See Fed. R. Evid. 801(d)(2)(A) (statement offered against
27 party and made by the party in individual or representative capacity is not hearsay).
28

1 3. Audio/Video Recordings and Transcripts

2 The government will introduce excerpts of the following audio and/or video
3 recordings:

- 4 • April 9, 2018 audio recorded call between defendant and Individual H
- 5 • June 4, 2018 audio recorded call between defendant and Individual H
- 6 • March 23, 2019 audio/video recorded interview between defendant and
7 FBI/IRS-CI in Lincoln, Nebraska
- 8 • July 18, 2019 audio recorded interview between defendant and FBI/USAO
9 in Washington, D.C.
- 10 • 2018 Annual IDC Dinner video recording

11 A recording is admissible upon a showing that it is “accurate, authentic, and
12 generally trustworthy.” United States v. King, 587 F.2d 956, 961 (9th Cir. 1978). For
13 example, testimony that a recording depicts events that the witness observed is sufficient
14 to authenticate the recording. Fed. R. Evid. 901(b); United States v. Smith, 591 F.3d
15 974, 979-80 (8th Cir. 2010).

16 With respect to the two recorded calls, both Agent Carter and Individual H (a
17 participant of the call) observed the events in real-time while the recordings were made
18 and have familiarity with their contents—both of the conversation and the voices of the
19 individuals depicted in the recordings. Similarly, Agent Carter and Agent O’Leary
20 observed and participated in the events of the recorded March 23, 2019 interview in real-
21 time. And Agent Carter and Agent Choe observed and participated in the events of the
22 recorded July 18, 2019 interview in real-time. These witnesses are therefore familiar
23 with what is depicted in the call and interview recordings and are qualified to testify
24 about them.

25 Baaklini, who was in attendance at the 2018 IDC dinner event, can authenticate
26 the recording of that event. Alternatively, Agent Choe, who obtained the video
27
28

1 recording of the 2018 IDC dinner from C-Span⁵, and is familiar with defendant's
2 appearance and voice, can authenticate the video.

3 While the recording itself is the evidence, the government has also prepared
4 written transcripts of the recordings as an aid to the jury while listening to and watching
5 the recordings. See United States v. Turner, 528 F.2d 143, 167 (9th Cir. 1975) (per
6 curiam) (permitting the transcripts of sound recordings to be used contemporaneously
7 with the introduction of the recordings into evidence); see United States v. Chen, 754
8 F.2d 817, 824 (9th Cir. 1985) (district court has discretion to allow the jury to use
9 written transcripts produced by the government as an aid in listening to the tape
10 recordings). These transcripts can be authenticated by the agents and/or a participant in
11 the call who reviewed them and confirmed their accuracy. The government has provided
12 the defense with its proposed transcripts and solicited input regarding their accuracy.
13 The government intends to display the transcripts simultaneously on a screen while
14 playing the respective audio and/or video files through trial presentation software⁶, and
15 to additionally provide binders with the transcripts to the jury (in case of any technical
16 error with the scrolling text).

17 For the jury to consider the evidence on a recording, it must be played in open
18 court. Allowing jurors to take into the jury deliberation room recordings that were not
19 played in open court is structural error requiring automatic reversal if a defendant objects
20 to allowing the jurors to have the un-played recordings in the jury room. United States
21 v. Noushfar, 78 F.3d 1442, 1445-46 (9th Cir. 1996).

27 ⁵ [https://www.c-span.org/video/?455484-3/defense-christians-annual-dinner-](https://www.c-span.org/video/?455484-3/defense-christians-annual-dinner-members-congress)
28 [members-congress](https://www.c-span.org/video/?455484-3/defense-christians-annual-dinner-members-congress)

⁶ The presentation will also include photographs of the speakers to aid the jury in following who is speaking.

1 4. Summary Charts

2 The government will seek to admit summary evidence of defendant’s FEC filings
3 and defendant’s contacts with Baaklini, and to have a witness testify concerning those
4 summaries.⁷

5 A “proponent may use a summary, chart, or calculation to prove the content of
6 voluminous writings, recordings, or photographs that cannot be conveniently examined
7 in court.” Fed. R. Evid. 1006. “The purpose of the rule is to allow the use of summaries
8 when the documents are unmanageable or when the summaries would be useful to the
9 judge and jury.” United States v. Rizk, 660 F.3d 1125, 1130 (9th Cir. 2011) (citation
10 omitted). Rule 1006 does not require that it be literally impossible to examine the
11 underlying records before a summary or a chart may be utilized. “All that is required for
12 the rule to apply is that the underlying ‘writings’ be ‘voluminous’ and that in-court
13 examination not be convenient.” United States v. Scales, 594 F.2d 558, 562 (6th Cir.
14 1979). A witness may also testify concerning the summaries of voluminous records.
15 Goldberg v. United States, 789 F.2d 1341, 1343 (9th Cir. 1986); see also United States v.
16 Johnson, 594 F.2d 1253, 1255 (9th Cir. 1979) (revenue agent could testify about
17 summaries of voluminous tax records).

18 The summary evidence directly bears on the charged conduct. The government
19 seeks to prove that defendant intentionally failed to file an amended FEC report as part
20 of his scheme to falsify and conceal. The summary evidence will greatly assist the jury
21 by providing a snapshot of the frequency of defendant’s FEC filings, including of his
22 amendments for other filings but not for the April 15 Quarterly FEC Report for 2016.
23 Without this summary evidence, the government would otherwise have to present over
24 30 of defendant’s FEC filings in court to the jury, which would be inefficient and a waste
25 of the jury’s time.

26 The summary chart regarding the frequency of defendant’s contacts with Baaklini
27 is also useful to the judge and jury and summarizes voluminous data from pen registers

28

⁷ The government reserves the right to prepare additional summary charts that may aid the jury and expedite the trial presentation, as it gets closer to trial.

1 from 2016 and 2017. That data is unwieldy and impossible to examine in court. To the
2 contrary, a simple summary chart will provide useful information regarding the nature of
3 defendant and Baaklini's relationship and, specifically, how often defendant and
4 Baaklini were in touch via phone calls and text messages.

5 Because the government's proffered summary charts are based on admissible
6 materials that were made available for inspection to the defense, the charts may be
7 admitted as substantive evidence. See Rizk, 660 F.3d at 1130. Any contention that the
8 chart may contain inaccuracies or omissions goes to the weight of the evidence, not its
9 admissibility. Id. at 1131 n.2.

10 5. Emails and Text Messages

11 The government intends to admit several categories of email communications and
12 text messages in which defendant (or his authorized representatives or employees) was a
13 participant, as well as amongst the key witnesses in the case.

14 a. *Defendant's Statements*

15 Statements by defendant (or his authorized representatives or employees) in
16 emails, text messages, or other written documents are not hearsay and are admissible.
17 When offered by the government, statements by the defendant are admissions by a party-
18 opponent. Fed. R. Evid. 801(d)(2); United States v. Ortega, 203 F.3d 675, 682 (9th Cir.
19 2000). Courts routinely admit electronic evidence, like emails, as party admissions in
20 criminal cases. See, e.g., United States v. Safavian, 435 F. Supp. 2d 36, 43 (D.D.C.
21 2006) ("The statements attributed directly to [defendant] come in as admissions by a
22 party opponent under Fed. R. Evid. 801(d)(2)(A)"); United States v. Siddiqui, 235 F.3d
23 1318, 1323 (11th Cir. 2000) ("Those [emails] sent by [defendant] constitute admissions
24 of a party"); see also United States v. Moran, 759 F.2d 777, 786 (9th Cir. 1985) (holding
25 that letters and deposit slips signed by defendant are express admissions). Moreover,
26 statements in documents that: (1) defendant manifested he adopted or believed to be true;
27 (2) were made by a person whom defendant authorized to make the statements; or
28 (3) were made by defendant's agent or employee on a matter within the scope of that

1 relationship and while it existed, are not hearsay under Federal Rule of Evidence
2 801(d)(2)(B-E).

3 While the government may present evidence regarding defendant's statements,
4 defendant's statements offered by him are inadmissible hearsay. Ortega, 203 F.3d at 682
5 (non-self-inculpatory statements, even if made contemporaneously with other self-
6 inculpatory statements, are inadmissible hearsay); see also United States v. Fernandez,
7 839 F.2d 639, 640 (9th Cir. 1988); United States v. Collicott, 92 F.3d 973, 983 (9th Cir.
8 1996) (holding that Fed. R. Evid. 106 does not compel admission of otherwise
9 inadmissible hearsay evidence).

10 Defendant's direct communications with Baaklini, Individual H and others, as
11 offered by the government, are not hearsay. Likewise, communications by defendant's
12 representatives, a person authorized to make a statement on the subject, or
13 agent/employee, are not hearsay; namely, such persons are Alexandra Kendrick, Drew
14 Bowling, and Trey Gowdy.

15 Kendrick's communications with Baaklini, Individual H, and others in her role as
16 defendant's agent or employee (defendant's fundraising consultant), on a matter within
17 the scope of the employment relationship (planning and coordinating the 2016
18 Fundraiser and conducting other fundraising activities on defendant's behalf) during the
19 existence of the employment relationship (late 2015 to late 2018), are not hearsay.⁸ Fed.
20 R. Evid. 801(d)(2)(D). Likewise, Drew Bowling was the Assistant Communications
21 Director and Policy Advisor for defendant. His statements in that capacity, in
22 connection with coordinating the 2016 Fundraiser, publicizing defendant's legislative
23 actions, and relaying direct messages on behalf of defendant (e.g., "Fort told me to tell
24 you..."), are also not hearsay.

25 Finally, communications by Trey Gowdy in his role as defendant's agent or
26 employee (defendant's former counsel), on a matter within the scope of that employment
27

28 ⁸ Baaklini's statements to Kendrick, in turn, would be admitted for a non-hearsay
purpose to show his involvement and role in setting up the 2016 Fundraiser and the
context of relevant steps taken by defendant, Kendrick, and/or Baaklini.

1 relationship (previously representing defendant in connection with the Federal
2 Investigation) during that relationship, are not hearsay. See Fed. R. Evid. 801(d)(2)(A),
3 (d)(2)(C).

4 *b. Other Nonhearsay Statements*

5 The government also intends to introduce text and email communications
6 involving Baaklini, Individual H, and Chagoury. None of these communications are
7 being introduced for the truth of the matters asserted and therefore are not hearsay. For
8 example, the communications (a) provide context for steps taken by Individual H and
9 Baaklini relevant to the 2016 Fundraiser; (b) are relevant to show the relationship
10 between Baaklini, Individual H, Chagoury, and defendant and their respective roles in
11 that relationship, and (c) demonstrate Individual H's understanding of actions taken by
12 Baaklini and Chagoury.

13 6. Photographs

14 Photographs are generally admissible as evidence. See United States v. Stearns,
15 550 F.2d 1167, 1171 (9th Cir. 1977). “[T]he witness identifying the item in a
16 photograph need only establish that the photograph is an accurate portrayal of the item in
17 question.” People of Territory of Guam v. Ojeda, 758 F.2d 403, 408 (9th Cir. 1985); see
18 also Fed. R. Evid. 901(b)(1). A photograph is authenticated if the witness testifies that it
19 is an accurate representation of facts of which the witness has personal knowledge, and
20 “the witness who lays the authentication foundation need not be the photographer, nor
21 need the witness know anything of the time, conditions, or mechanisms of the taking of
22 the picture.” 32 McCormick on Evid. § 215 (7th ed.). “The usual course is for a witness
23 on the stand to identify the photograph . . . as a correct representation of events he saw or
24 of a scene with which he is familiar. In fact he adopts the pictures as his testimony, or,
25 in common parlance, uses the picture to illustrate his testimony.” Fed. R. Evid. 1002
26 advisory committee’s note. “Photographs are admissible as substantive as well as
27 illustrative evidence.” United States v. May, 622 F.2d 1000, 1007 (9th Cir. 1980).

28

1 The government will seek to introduce photographs of the various witnesses at
2 trial, including of defendant, Individual H, Baaklini, Chagoury, Kendrick, Johnson,
3 Bowling, and Gowdy. These photos will be used at various parts of the trial, including
4 during the playing of recordings and during argument, to enhance the jurors' recall of
5 relevant persons and ability to better track their testimony. The government will also
6 introduce photographs of defendant with other witnesses (like Baaklini) or that defendant
7 sent to, or received from, other witnesses (like Baaklini and Individual H). The
8 government witness(es) who will authenticate these photographs have had contacts with
9 each individual depicted in the photograph and therefore has sufficient personal
10 knowledge to authenticate them. See United States v. Beck, 418 F.3d 1008, 1014–15
11 (9th Cir. 2005) (“[A] lay witness may give an opinion regarding the identity of a person
12 depicted in a photograph if that witness has had sufficient contact with the defendant to
13 achieve a level of familiarity that renders the lay opinion helpful.” (citation omitted)).
14 Likewise other witnesses who are themselves in the photographs and/or familiar with the
15 individuals and events depicted therein have sufficient personal knowledge to
16 authenticate them.

17 7. News Articles regarding Gilbert Chagoury

18 Pending the Court's resolution of this related matter, while the government does
19 not seek to affirmatively introduce news articles with negative reporting regarding
20 Chagoury in its case-in-chief, the government seeks the ability to introduce such
21 underlying articles should defendant sufficiently open the door at trial and should the
22 Court find that sufficient foundation has been laid.⁹ (See Dkt. No. 99 (JMIL No. 3 to
23 Admit Evidence of Motive Re: Gilbert Chagoury).)

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⁹ For example, that by the time of defendant's Washington, D.C. interview he had admitted he “researched” Chagoury; thus, foundation would exist to explain why Chagoury's significantly negative public and political reputation led to defendant's false and misleading statements seeking to minimize his knowledge and suspicion of Chagoury's financial role in the 2016 Fundraiser, at least by the time of that second interview.

1 **C. Lay Opinion Testimony**

2 Government agents will testify about the appearance, demeanor, and conduct of
3 defendant during the two interviews, including their opinions and impressions of what
4 they observed. Government agents will also testify that defendant’s false statements
5 were material to the Federal Investigation, and that defendant omitted facts material to
6 the Federal Investigation.

7 Federal Rule of Evidence 701 “permits a lay witness to give opinion testimony as
8 long as the opinion is (a) rationally based on the perception of the witness and (b) helpful
9 to a clear understanding of the witness’s testimony or the determination of a fact in
10 issue.” United States v. Pino-Noriega, 189 F.3d 1089, 1097 (9th Cir. 1999) (quotation
11 marks omitted). A non-expert witness “may state his impressions and opinions based
12 upon what he observed.” United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982).
13 That is “[b]ecause it is sometimes difficult to describe the mental or physical condition
14 of a person, his character or reputation, [or] the emotions manifest by his acts; . . .
15 witnesses may relate their opinions or conclusions of what they observed.” Id. A lay
16 witness may also testify as to an ultimate issue of fact, so long as the testimony is
17 otherwise admissible. United States v. Crawford, 239 F.3d 1086, 1090 (9th Cir. 2001)
18 (citing Fed. R. Evid. 704).

19 Based on their direct participation in the Nebraska and DC interviews, Agents
20 O’Leary, Carter, and Choe are in a unique position to explain the events that they
21 observed and participated in, and to describe defendant’s appearance, demeanor, and
22 conduct. Based on their participation in this investigation, they are also familiar with
23 defendant’s behavior and demeanor at various stages of it and can provide context for
24 and comparison of any differences. Their opinion testimony will be helpful to the jury,
25 and their opinions do not require expert knowledge. See United States v. Nelson, 285 F.
26 App’x 491, 493–94 (9th Cir. 2008) (“The officers were in the unique position of
27 observing both the manner in which the vehicle was driven prior to the stop and the
28

1 precise location and position in which the gun was discovered, and their opinions did not
2 require scientific, technical or other specialized knowledge.”).

3 Likewise, all three government agents may provide lay opinions that defendant’s
4 false statements (or omitted facts) were material to the Federal Investigation.

5 **D. Cross-Examination of Defendant**

6 The scope of a cross-examination is within the discretion of the trial court. Fed.
7 R. Evid. 611(b). It should be limited to the subject matter of the direct examination and
8 matters affecting the credibility of the witness. The trial court may, in the exercise of its
9 discretion, permit inquiry into additional matters as if on direct examination. Fed. R.
10 Evid. 611(b).

11 If defendant chooses to testify, he may be cross-examined as to all matters
12 reasonably related to the issues defendant puts in dispute. United States v. Miranda-
13 Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981); see also United States v. Black, 767
14 F.2d 1334, 1341 (9th Cir. 1985) (explaining that a defendant who testifies at trial waives
15 his Fifth Amendment privilege and may be cross-examined on matters made relevant by
16 his direct testimony). Defendant has no right to avoid cross-examination on matters that
17 call into question his claim of innocence. Miranda-Uriarte, 649 F.2d at 1353-54.

18 **E. Affirmative Defenses and Reciprocal Discovery**

19 The government has repeatedly requested notice of any affirmative defenses that
20 defendant intends to raise, including entrapment, mental condition, and duress.
21 Defendant has not identified any affirmative defenses that he intends to assert at trial.
22 Accordingly, the government reserves the right to object to, and move to strike, any
23 affirmative defenses that defendant may raise at trial, and to exclude any evidence
24 related to such a defense that has not been timely disclosed pursuant to Rule 16 of the
25 Federal Rules of Criminal Procedure.

26 Defendant has identified approximately five defense witnesses and indicated he
27 may call additional unnamed witnesses. The government has repeatedly requested
28 reciprocal discovery and Jencks material from defendant. Rule 16 of the Federal Rules

1 of Criminal Procedure creates certain reciprocal discovery obligations on the part of
2 defendant to produce three categories of materials that he intends to introduce as
3 evidence at trial: (1) documents and tangible objects; (2) reports of any examinations or
4 tests; and (3) expert witness disclosure. Rule 16 imposes on defendants a continuing
5 duty to disclose these categories of materials. Fed. R. Crim. P. 16(b)(1) and (c). Where
6 a party fails to produce discovery as required, the rule empowers this Court to “prohibit
7 that party from introducing the undisclosed evidence,” or “enter[ing] any other order that
8 is just under the circumstances.” Fed. R. Crim. P. 16(d)(2).

9 As of the filing of this brief, despite repeated requests, the government has not
10 received any reciprocal discovery from defendant nor has the government received a
11 response to its inquiry as to whether defendant has a timeline for such production (e.g.,
12 first day of trial or first day of defense case) or whether defendant was simply refusing
13 all together to provide any of its witness statements or discovery. To the extent
14 defendant attempts to introduce or use any evidence at trial that has not been produced to
15 the government, such evidence should be excluded. See Taylor v. Illinois, 484 U.S. 400,
16 415 (1988) (defendant’s failure to comply with, or object to, government’s discovery
17 request before trial justified exclusion of unproduced evidence).

18 **F. The Jury Should Have a Trial Indictment During Deliberations**

19 The government will prepare and propose a trial indictment to go back with the
20 jury during deliberations. To the extent necessary, the trial indictment will be sanitized
21 to omit any allegations that were not presented during the trial and will display a clear
22 disclaimer on every page that the indictment is not evidence, which is also set forth in
23 the jury instructions.

24 A trial indictment will be helpful to the jury to guide them in their deliberations,
25 including to cross-reference the indictment in evaluating whether the government has
26 proven certain allegations and, most importantly, the allegations of specific deception
27 and specific false and misleading statements. The parties can meet and confer about the
28 content of the Trial Indictment before it is submitted to the jury.

1 **G. The Jury Should Have an Exhibit List During Deliberations**

2 Consistent with the Court’s standing order, the government will provide the jury
3 with an exhibit list of neutrally described admitted exhibits to aid in its deliberations.
4 The exhibit list would function as an index and would be helpful to the jury in
5 organizing the admitted exhibits. It would also help the jury efficiently locate specific
6 exhibits that they may wish to review; without an exhibit list, the jury would be left to
7 hunt and sort through a pile of loose exhibits with an insufficient understanding of what
8 the documents purported to be. The parties will meet and confer about the content of the
9 Exhibit List before it is submitted to the jury.

10 **V. CONCLUSION**

11 The government respectfully requests leave to file supplemental trial memoranda
12 before or during trial, as may become appropriate.

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