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

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL J. MADIGAN and MICHAEL F. McCLAIN, Defendants.	No. 22 CR 115 Hon. John Robert Blakey

DEFENDANT MICHAEL J. MADIGAN'S RESPONSE TO THE GOVERNMENT'S MOTIONS *IN LIMINE* TO ADMIT CERTAIN EVIDENCE AS DIRECT EVIDENCE OF THE RACKETEERING ENTERPRISE OR, IN THE ALTERNATIVE, UNDER FEDERAL RULE OF EVIDENCE 404(b)

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Respectfully submitted,

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Defendant Michael J. Madigan, through his attorneys, pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution, Federal Rules of Evidence 401-404, and the authority cited below, responds to the *Government's Motions In Limine to Admit Certain Evidence as Direct Evidence of the Racketeering Enterprise Or, In the Alternative, Under Federal Rule of Evidence 404(b)* (Dkt. 104)[1]. Madigan states the following in support:

Introduction

With relentless pretrial publicity[2] already undermining Madigan's right to receive a fair trial, the government now seeks to compound the problem by asking the Court's permission to admit a laundry list of inadmissible, irrelevant, and unduly prejudicial evidence. (Dkt. 104). Allowing the government to elicit testimony about irrelevant controversial topics like gaming legislation, sexual harassment allegations in Springfield, and the so-called "Metra scandal" will dispel any prospect of Mike Madigan receiving a fair trial. The government's kitchen sink approach, if this Court accepts, would result in unfair prejudice to Madigan, allowing the jury to decide this case based upon emotion, bias, and persuasive propensity inferences, and will inevitably lead to several "mini-trials" independent of the wide-ranging allegations

[1] Defendant Madigan hereby incorporates, joins, and adopts, to the extent they are applicable to him, Defendant Michael J. McClain's responsive filings to the government's motions *in limine* (Dkt. 104).

[2] Most recently, the *Chicago Tribune* ran a front-page article in yesterday's Sunday edition, with the headline "OUR CULTURE OF CORRUPTION: Dishonest politicians at all levels of Illinois government make a mockery of public service." The *Tribune*'s front-page spread is accompanied by several pages of articles on political corruption in Chicago and Illinois, with articles that include "Boodlers, bandits and notorious pols" by Rick Kogan and "The Dishonor Roll," listing Chicago and Illinois politicians tarnished by allegations and criminal convictions for political corruption. Madigan features, of course, in this overwhelmingly negative publicity.

contained in the 117-page superseding indictment in this case.

This Court should deny the aggressive and overzealous evidentiary requests in the government's motions *in limine*. While the government asks this Court to disregard Judge Leinenweber's thoughtful consideration and ultimate rulings on many similar issues presented in its motions *in limine*, Judge Leinenweber's rulings were spot-on and undoubtedly the correct ones. Acknowledging the inevitable impact of the prior rulings on the pertinent issues contained in its motions *in limine*, the government seeks to point to a distinction that does not carry the day – that the so-called "ComEd 4" defendants in *United States v. McClain et al.*, No. 20 CR 812 (McClain, Pramaggiore, Hooker, and Doherty) – were charged with *conspiracy*, but not *RICO* conspiracy. Legally and practically, the government's charging decision does not place the government's motions *in limine* in this case against Madigan and McClain on different footing than in its related prosecution in the "ComEd 4" case. The proffered evidence that the government seeks to admit in its case-in-chief is not intricately connected direct evidence of the purported RICO conspiracy charged in the superseding indictment in this case. It is irrelevant and highly prejudicial propensity evidence masquerading as "enterprise evidence." If admitted, admission of this evidence will violate Madigan's right to a fair trial, and result in speculation, confusion, and cajole the jury into finding guilt for improper reasons.

The Court should deny the government's motions *in limine* (Dkt. 104) in their entirety.

Legal Standard

Only relevant evidence is admissible. Fed. R. Evid. 402. Evidence is relevant and may be admissible only if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "where the fact is of consequence in determining the action." Fed. R. Evid. 401, 402.

Further, evidence may be excluded where there is a significant danger that the jury may base its decision on emotion or where it would distract reasonable jurors from the real issues in the case. *United States v. Reese*, 666 F.3d 1007, 1016 (7th Cir. 2012). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. *Old Chief v. United States*, 519 U.S. 172, 184-85 (1997). Applying Rule 403 to determine if evidence is unfairly prejudicial also requires a fact-intensive, context-specific inquiry. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008).

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977). "Rule 404(b) provides that evidence of other bad acts is not admissible to show that a defendant has the propensity to commit a crime." *United States v. Conner*, 583 F.3d 1011, 1021 (7th Cir. 2009). This evidence may, however, be admissible in limited circumstances for other purposes, such as to demonstrate knowledge, intent, or absence of mistake. *Id.* Seventh Circuit precedent has "long stressed the need for careful evaluation of other-acts evidence." *See United States v. Lee*, 724 F.3d 968, 978 (7th Cir. 2013) (collecting cases). There must be a principled

exercise of discretion in identifying the purported applicable exceptions and evaluating whether the evidence "is sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or an inference via blackening of the defendant's character." *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987).

In *United States v. Gomez*, the Seventh Circuit limited the reach of a prosecutor's use of other-acts evidence and articulated a framework for analyzing whether evidence is admissible under 404(b). *Id.*, 763 F.3d 845 (7th Cir. 2014) (en banc). As summarized by the Seventh Circuit, the framework set forth is as follows:

> First, the proponent of the other acts evidence must show, through a chain of propensity-free inferences, that the evidence is relevant for a reason other than propensity. Second, the court must determine under Federal Rule of Evidence 403 whether the probative value of the evidence is substantially outweighed by the prejudicial effect of the evidence on the defendant, paying close attention to whether the fact the evidence helps establish is disputed.

United States v. Thomas, 986 F.3d 723, 728 (7th Cir. 2021) (citing *Gomez*, 763 F.3d at 860) (internal citations omitted). The Supreme Court has explicitly warned of the prominent danger of unfair prejudice with character evidence and its ability to improperly persuade a jury to find guilt for the wrong reasons. *Old Chief*, 519 U.S. at 181 (citing *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

The Seventh Circuit has made clear that a prosecutor cannot merely point to one of Rule 404(b)(2)'s permitted uses of other-acts evidence to seek admission of evidence that substantively relies on a propensity inference within the chain of reasoning. *See Gomez*, 763 F.3d at 855 ("[I]f subsection (b)(2) of the rule allows the admission of other bad acts whenever they can be connected to the defendant's

knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless"); *see, e.g.*, *Beasley*, 809 F.2d at 1279 ("[I]f applied mechanically, the permitted purposes listed in the rule 'would overwhelm the central principle' of the rule against propensity evidence"); *accord United States v. McMillan*, 744 F.3d 1033, 1038 (7th Cir. 2014) ("[P]ractically anything can be shoehorned into this list of permitted uses if the district court is not careful. A rule of *de facto* automatic admission would wipe out the general rule prohibiting propensity evidence").

The government, in every criminal case, is of course required to prove beyond a reasonable doubt the essential elements of the charged offenses contained in the indictment. Only evidence that is directly applicable and "intricately connected" to the essential elements of a conspiracy charge does not constitute "other crimes" evidence under Rule 404(b). *See, e.g., United States v. Salerno*, 108 F.3d 730, 738 (7th Cir. 1997) (citing *United States v. Jackson*, 33 F.3d 866, 873 (7th Cir. 1994)) (finding no abuse of discretion in admitting evidence concerning defendant's failure to file income tax returns *because* it was "intricately connected" with the charged conspiracy to impede and obstruct the IRS). All evidence, however, must withstand the gatekeeping function of Rule 403, which permits exclusion of even highly relevant evidence, if "its probative value is substantially outweighed by the danger of one of more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Argument

I. Government Motion 1: The Court Should Exclude Any Evidence Concerning Purported Efforts to Assist the Spouse of Public Official E in Obtaining New Employment

A. The Proffered Evidence Is Not Direct Evidence of the Charged Racketeering Enterprise

The government seeks to introduce evidence of intercepted phone calls relating to efforts to assist Public Official E's wife in obtaining a new job, arguing that the calls are "highly relevant direct evidence" of the charged RICO Enterprise and, even if they are not, they are admissible to prove Madigan and McClain's "intent, knowledge, *modus operandi*, and plan" under Rule 404(b). *See* Dkt. 104, at 10-14. These calls, and the government's stated alternative theories of admissibility under Rule 404(b), reveal a significant potential for unfair prejudice to Madigan and McClain. That being the jury will speculate that perhaps they are guilty of the charged RICO conspiracy and subsidiary conspiracies because they hear evidence relating to this and potentially other unrelated instances of Madigan and McClain seeking to assist people with obtaining employment in the private and public sector. The government's explicit reference to *modus operandi* and "method of operation" smacks of propensity evidence plain and simple.

At the end of its 6-page argument in support of Motion *In Limine* 1, the government acknowledges, in a footnote, that Judge Leinenweber previously denied admission of this very same evidence, but that previous ruling, according to the government, "does not apply in this case," since "[t]he indictment in that case did not include a RICO conspiracy count" and opines that Judge Leinenweber's ruling "was

erroneous insofar as its analysis of Rule 404(b) was concerned." (Dkt. 104, at 15 n. 6). The evidence proffered in government motion *in limine* 1 certainly allows the jury to *speculate*—like the government does in its extrapolation of the meaning of the calls—but what it does not provide is direct evidence of any *quid pro quo* bribery offense or of the essential elements of the charged crimes contained within the superseding indictment. If this evidence is admitted, there is a substantial possibility of misleading and confusing the jury and will ultimately result in unfair prejudice to Madigan and McClain.

B. The Evidence is Inadmissible Under Rule 404(b)

The government argues this is evidence of Defendants' intent to conceal and knowledge of the nature of purported corrupt payments in this case. Dkt. 104 at 14. The government further asserts that it "would not rely on the forbidden propensity inference that conspirators must have facilitated the placement of Madigan allies under Jay Doherty's contract with ComEd to funnel money to those Madigan associates because he and Madigan discussed another possible placement with Doherty and pretextual reports justifying the hiring." *Id*. The government states, in conclusory fashion, that the evidence is admissible to prove intent, knowledge, *modus operandi*, and plan. *Id*.

First, the Seventh Circuit has explicitly cautioned that introducing evidence for "intent" is virtually synonymous to arguing: "he intended to do it before, ladies and gentlemen, so he must have intended to do it again.' That is precisely the forbidden propensity inference." *See United States v. Miller*, 672 F.3d 688, 699 (7th

Cir. 2012) (reversing conviction based on improper admission of purported Rule 404(b) evidence to show "intent"). When evidence is offered to prove intent, it is most likely to demonstrate propensity in disguise. *Gomez*, 763 F.3d at 858.

Further, the Seventh Circuit has held that mere use of the evidence for a permitted purpose is insufficient on its own if the evidence also supports an improper propensity inference. *Gomez*, 763 F.3d at 855. Rather, the government must show that the chain of reasoning that connects the disputed evidence to a permitted purpose can be completed without the prohibited propensity inference. *Id.* If not, the evidence is inadmissible. Such is the case here. There is no chain of reasoning that can be completed without the inference that, because Defendants discussed potentially suggesting an individual to work for Doherty in one instance, then Defendants must have done so in regard to the core allegations in the superseding indictment, that Madigan and McClain placed political allies and associates on Doherty's payroll in exchange for official action. The government does not attempt to, nor can it, extricate that inference from the chain of reasoning. As a result, the evidence is inadmissible.

Rule 404(b)(2) does not serve as a work-around to the rule against propensity evidence, rendering it meaningless. If this were the case, practically anything could be manipulated to fit the list of permitted purposes and requires careful scrutiny of the government's purported reasons for admitting the evidence. *McMillan*, 744 F.3d at 1038. Upon careful examination, it is apparent the true value of the evidence is the improper propensity inference – action in conformity with past conduct and character

– it supports.

C. The Probative Value of the Evidence is Substantially Outweighed by the Danger of Unfair Prejudice

Prior other-acts evidence is inherently highly prejudicial and carries a significant danger that a jury will convict Madigan and McClain merely because jurors believe they are engaged in unsavory behavior and deserve to be punished. Politicians are at a greater risk of this at trial. *See, e.g., United States v. Oaks*, 285 F.Supp.3d 876, 882 (D. Md. 2018) (a jury may improperly conclude that Defendants are guilty because the jurors believe the allegations caste them as "dirty" or "crooked" politicians, or as individuals with a criminal disposition).

Moreover, the evidence is marginally probative because the recordings fail to demonstrate Madigan's awareness whether *bona fide* services were going to be provided by the spouse of Public Official E (a competent attorney in her native country, who was currently employed by a law firm), nor does it speak to the legitimacy of any reports that might be generated. Notably, the hiring arrangement never materialized and consequently increases the risk that the prior uncharged acts evidence will mislead the jury. Judge Leinenweber appropriately excluded these recordings as propensity evidence and as unfairly prejudicial, and such exclusion is warranted here. *See United States v. McClain, et al.*, 20 CR 812 (N.D. Ill.), Dkt. 161.

II. Government Motion 2: The Court Should Exclude Any Evidence Concerning Individual 13W-4

A. The Evidence Concerning Efforts to Help Individual 13W-4 Supp Following His Widely Publicized Termination for Sexual Harassment Allegations Should Be Excluded as Irrelevant, Unfairly Prejudicial, and to Avoid an Unnecessary Side Show on a Highly Controversial Issue

The government seeks the Court's permission to put into evidence in its case-in-chief intercepted phone calls and other evidence concerning efforts to assist Individual 13W-4, after he was accused of sexual harassment in a highly publicized fashion. Such evidence is an irrelevant and highly prejudicial distraction from the central issues that the jury will need to decide in this case. The efforts to help Individual 13W-4 provide for himself and his family have nothing to do with ComEd, AT&T, the Chinatown Parcel, or any other allegation in the superseding indictment.

Additionally, admission of this evidence has extremely high potential for the jury to decide this case based on improper considerations, emotion, and negative associations they will have if they believe Mr. Madigan and Mr. McClain coordinated an effort to provide financial assistance to an individual accused of sexual harassment. Although they were not accused of harassment themselves, if the jury hears the evidence sought to be admitted by the government, they will associate Madigan and McClain with someone accused of sexual harassment. This will lead to an unnecessary, irrelevant, and deeply unfair side show and "mini-trial" about the accusations, Madigan and McClain's ensuing actions, and the underlying motivations of everyone involved. To allow for the admission of this evidence would prolong the trial, distract and confuse the jury from the key issues in this case, and inject

unnecessary theatrics into the trial that have a high probability of inflaming the jurors' emotional responses to Madigan and McClain because of their association with an accused sexual harasser.

B. The Evidence is Inadmissible under Rule 404(b) and Rule 403

The government argues that evidence of the structure of payments to Individual 13W-4 demonstrates Defendants' intent to use intermediaries and false justifications to conceal the true nature of payments made to Madigan's associates for his purported political benefit. Dkt. 104 at 21-22.

Evidence that McClain attempted to secure financial payments for Individual 13W-4 after he was terminated following accusations of sexual harassment is impermissible propensity evidence that carries a significant risk of unfair prejudice. While the government asserts the evidence is only to show Defendants' intent and knowledge, its effect will improperly and prejudicially tarnish the character of Defendants for their alleged involvement in facilitating payments to an individual accused of sexual harassment. *See Miller*, 673 F.3d at 698 ("We have never approved admission of bad acts evidence solely because it was formally relevant to intent and intent was 'at issue'").

The government's stated reasons for admitting this evidence are unconvincing. Presenting evidence to the jury that McClain allegedly aided an individual who had been accused of sexual harassment leads the jury, through a propensity inference, to conclude that, because McClain assisted Individual 13W-4 with payments through intermediaries, he must have done so with respect to the charges in the superseding

indictment. Yet, even if the propensity inference was absent, no limiting instruction could reasonably cure the profound prejudice caused by the allegations of sexual harassment that roiled Springfield in 2018 because of their inflammatory and controversial nature.

The risk of unfair prejudice is staggering when admitting evidence of sexual harassment allegations and purported efforts to assist Individual 13W-4, the target of those allegations. Injecting sexual harassment allegations into a trial post-MeToo is certainly one of the most efficient ways to elicit an emotional response and irreparably prejudice the jury against Defendants. *See Lopez v. City of Albuquerque*, 2010 WL 11618831, *4 (D. N.M. Oct. 14, 2020) (finding that prior allegations of sexual harassment were substantially outweighed by the danger of unfair prejudice); *see also Roberts v. Tim Dahle Imports, Inc.*, 606 F.Supp.3d 1133, 1137-38 (D. Utah 2022) ("Any limited probative value of using evidence of a past claim of sex discrimination to demonstrate motive, intent, or knowledge … is outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury").

No doubt, issues surrounding sexual harassment are incendiary topics that evoke emotional responses, increasing the risk that the jury returns a guilty verdict for an improper reason. When coupled with Madigan's career as a politician, the chances dramatically increase that the jury may find Defendants guilty for no other reason than because they believe that the allegations caste them as "dirty" or "crooked" politicians, or distasteful or unsavory individuals. *See, e.g., Oaks*, 285 F.Supp.3d at 882.

Moreover, evidence relating to the sexual harassment allegations against Individual 13W-4 creates great risk of confusing the issues and creating a mini-trial. *See United States v. Burnette*, 65 F.4th 591, 608 (11th Cir. 2023) (reasoning evidence properly excluded under Rule 403); *see also United States v. Thomas*, 11 F.3d 1392, 1399 (7th Cir. 1993). If admitted, the veracity of the allegations become an issue at trial. Also placed at issue is the public's reaction to the scandal, what truly led to Individual 13W-4's termination, and any political and/or personal motivations that might be implicated. Defendants would be required to call witnesses to shed light on each of these ancillary issues. *See, e.g.*, *United States v. Shields*, 783 F.Supp. 1094, 1096 (N.D. Ill. 1991) (explaining Rule 403 discourages such side shows). The potential for unwarranted distraction and confusion of the issues charged in the indictment is not only plausible, but inevitable.

The government asserts that "[a]ll relevant evidence is prejudicial." Dkt. 104 at 23. Yet, the government provides no explanation or reasoning of how allegations of sexual harassment do not pose substantial risk of unfair prejudice. The topic is inherently controversial, inflammatory, prejudicial, and presenting evidence that Defendants purportedly assisted Individual 13W-4 after his ouster will most certainly evoke the emotions of jurors, prejudicing Madigan. Ameliorating this predictable emotional response with the government's proposed limiting instruction would prove futile because it cannot realistically suppress a juror's emotional responses to this type of evidence. It should accordingly be excluded.

III. Government Motion 3: The Court Should Exclude Any Evidence Concerning Purported Efforts to Have a Gas Utility Hire an Individual Characterized as a "Madigan Associate"

In the same fashion that it addressed Judge Leinenweber's adverse ruling concerning the admissibility of the evidence at issue in government motion *in limine* 1, the government briefly mentions, in a footnote, that Judge Leinenweber previously denied admission of the very same evidence at issue in government motion *in limine* 3 as inadmissible propensity evidence. (Dkt. 104, at 28 n. 9). According to the government, Judge Leinenweber's ruling is not dispositive here, however, because "the indictment in [the 'ComEd 4' case] did not include a RICO conspiracy charge and "was erroneous insofar as its analysis of Rule 404(b) was concerned." (Dkt. 104, at 15 n. 6). It was not, and the government's motion *in limine* concerning the same evidence previously ruled to be inadmissible propensity evidence by Judge Leinenweber should similarly be denied by this Court.

The government seeks to admit evidence of uncharged conduct that McClain purportedly attempted to have a gas utility company hire an individual, described as "a Madigan associate." Dkt. 104 at 23. Specifically, the government requests to admit evidence of a recording between Fidel Marquez and McClain, where Marquez related that he had a phone call with a representative of a gas utility. Session #3204 (5/23/2018). Marquez explained that the representative was questioning Marquez about a prospective new hire and his qualifications. Session #3204 (5/23/2018). The representative purportedly stated to Marquez that she was receiving pressure to hire the individual. Session #3204 (5/23/2018). Marquez explained to McClain he told the

representative "[m]aybe one day you'll have an ask, and this will be remembered." McClain responded, "Right, exactly."

The government requests to admit another recording between McClain and a relative of Madigan, where McClain relayed the aforementioned conversation with Marquez to the relative of Madigan. In that call, McClain explained, "I mean that's how this is, you can't be offended with that." Session #3282 (5/23/2018). Nowhere does the Government connect these discussions about the eligibility of this competent individual to pressure from Madigan or McClain to hire him. In fact, when questioned about these calls, both Marquez, and the gas utility representative said that they did not believe that Madigan or McClain were the ones applying any purported pressure upon the utility to hire him.

A. The Government's Proffered Evidence Concerning the Gas Utility is Not Relevant or Direct Evidence of a Criminal Enterprise

The government argues that these two recordings are direct evidence of the charged enterprise. Dkt. 104 at 25. The government's proffered evidence is not relevant, and it does not prove the existence of a criminal enterprise. First, nothing in the government's proffered evidence indicates that Madigan or McClain attempted to receive or solicit bribes from a regulated utility company as the government posits. Nor is there anything in the recordings indicating their involvement in this individual seeking a job with the utility. Rather, the government created and injected that notion into its proffered evidence without support of its assertion.

Similarly, the government incorrectly asserts that hiring the individual

resulted from the efforts of Madigan or McClain, but there is nothing in the recordings supporting the assertion. Indeed, the government's proffered evidence shows that Marquez allegedly talked with the representative for the gas company, but it does nothing to establish Madigan or McClain were involved. There is no indication that either Marquez was receiving or soliciting bribes, or that there was any connection between the job sought with any legislation or other decision affecting the utility. To the contrary, the government's tendered discovery shows that the representative informed the government that another lobbyist recommended the individual for a job.

Nothing in the government's proffered evidence implicates Madigan, his involvement, or his knowledge of this, and yet, the government moves to admit the calls against Madigan as evidence of a criminal enterprise, and terms the individual a "Madigan associate." The charged enterprise, however, alleges that Defendants solicited and received bribes for unlawful personal financial advantage. Dkt. 104 at 25. Noticeably absent from the government's proffered evidence is a scintilla of evidence to support bribery or any other charged offense.

Last, the government asserts that the proffered evidence establishes McClain's role as Madigan's trusted agent and advisor within the alleged enterprise. This too fails. Nothing in the government's proffered evidence indicates McClain is acting on behalf of Madigan, advising Madigan, or attempting to benefit Madigan. The government is taking a recording between Marquez and McClain, where Marquez discusses a phone call he had with the gas utility representative about a prospective

hire who was recommended by an entirely different lobbyist, and arguing, with no support, that this was done at the behest of Madigan. It is unreasonable and the evidence should be excluded as irrelevant, unfairly prejudicial, and cumulative.

B. Evidence Concerning the Gas Utility is Inadmissible Under Rule 404(b)

The government argues that evidence concerning the gas company is permissible under Rule 404(b)(2) because "Defendants' efforts to shake down another regulated entity and McClain's laughter about it—as well as his acknowledgement that such payments are calculated for the purpose of receiving official action in exchange—is proof of McClain's understanding of the corrupt purpose and the intent underlying payments solicited from and made by ComEd [and AT&T] … at Madigan's request." Dkt. 104 at 27.

The government further asserts in the form of a generic list that this evidence is admissible for the purpose of proving "intent, knowledge, *modus operandi*, and plan." *Id*. Yet, the government bears the burden, as the proponent of the evidence, to explain how it is not relying on a propensity inference within its chain of reasoning. *Gomez*, 763 F.3d at 860. Merely pointing to the permitted purposes listed under Rule 404(b)(2)[3] is woefully insufficient and renders the rule against propensity evidence meaningless. *Id.*; *Beasley*, 809 F.2d at 1279.

There is no evidence from the cited recordings that indicates in any way whatsoever that Madigan or McClain attempted to "shake down" a regulated entity. Additionally, a different lobbyist recommended the individual to the gas utility

[3] *Modus operandi* is not included in the list of permitted purposes under Rule 404(b)(2).

representative. These recordings are overtly devoid of any *quid pro quo* agreement concerning official action in exchange for hiring recommended individuals for jobs.

Further, the proffered evidence has no bearing on Madigan's intent or knowledge because the conversation between Marquez and McClain contained no mention or inference that Madigan had any knowledge of the request, much less a corrupt intent. Nothing suggests Madigan was involved and nothing suggests there was anything corrupt about the job application. The proffered evidence has no bearing on Madigan's intent or knowledge concerning the charges against him.

Evidence concerning the gas company is only relevant insofar as it relates to inadmissible propensity evidence. Judge Leinenweber denied the government's motion excluding these exact recordings in the "ComEd 4" trial and found that these recordings "lean[ed] heavily towards propensity." Trial Tr. at 2199:6-22. Judge Leinenweber explained that McClain's comments on the recordings are akin to his approval of requests or recommendations to hire competent individuals to "'create a reservoir of goodwill,' which was allowed by the Supreme Court in *United States [v.] Sun Diamond*, 1999." *Id*. Thus, the propensity evidence should be barred.

C. The Probative Value is Substantially Outweighed by the Danger of Unfair Prejudice

The danger of unfair prejudice is extremely high if this evidence is admitted due to the language, tone, and demeanor of the participants in these calls. The jury will no doubt find the calls distasteful but will be provided absolutely no probative value from the proffered evidence.

The probative value of this evidence is non-existent in light of the fact that

there is no factual or logical relationship between these recordings and Madigan. The government's belief that these two recordings are relevant is based on its mistaken belief that Madigan or McClain were involved in this purported job request for the individual. However, the government has already been made aware by Marquez and the representative that another lobbyist recommended the individual to the gas company. An objective listening to the recordings demonstrates that neither Madigan nor McClain had a role and would only serve to unnecessarily confuse the jury.

Moreover, the government concedes that even if these two recordings were to prove what the government argues they prove, these two recordings are needlessly cumulative. The government reasons "these two calls are of a similar nature to the other recordings the jury will hear … the jury will hear all of these calls, and the prejudicial effect of two additional, highly probative calls should not shift the balance in favor of exclusion." Dkt. 104 at 29. Not only are the two recordings inescapably propensity evidence, but the government admits that it intends to present a significant amount of evidence on the issue. The probative value is thus even further outweighed by the danger of unfair prejudice considering it is in the form of prejudicial prior uncharged acts evidence and it is cumulative. The Court should accordingly exclude it like Judge Leinenweber appropriately did.

IV. Government Motion 4: The Court Should Exclude Any Evidence Concerning the Purported Decision to Cease Payments to Individual MA-1

The government requests to present evidence of a phone conversation between McClain and Fidel Marquez where McClain explained to Marquez that he had to call

a high-level employee at a Chicago-area hospital to tell him he could terminate Individual MA-1. Session #17803 (12/5/2018). Individual MA-1's physical condition deteriorated so significantly that he could no longer perform his job duties at a Chicago-area hospital. In light of his physical decline, McClain informed a high-level employee that he would let Individual MA-1 go because he could hardly talk anymore. The government argues that McClain's conduct is direct evidence against both Defendants proving the existence of a criminal enterprise. Specifically, the government explains Count One "expressly references the multiple third parties from which the defendants sought to solicit bribes, and in no way limited the description of the charged enterprise to ComEd and AT&T." Dkt. 104 at 30-31.

A. Evidence Concerning the Retirement of Individual MA-1 is Not Relevant nor Direct Evidence of a Criminal Enterprise or a Pattern of Racketeering Activity

The government's proffered evidence outlines action that McClain took that is wholly dissimilar to the charges in the superseding indictment. Count One of the superseding indictment purports to charges Defendants with soliciting and receiving bribes in exchange for official action. Here, however, the government's motion fails to allege McClain committed any wrongdoing. Indeed, the recording does not indicate bribery, any type of *quid pro quo*, or any sort of benefit for official action taken within the Illinois General Assembly for legislation affecting a Chicago-area hospital.

Additionally, the superseding indictment alleges Defendants recommended no-work jobs for purported "Madigan allies." Yet, the government fails to allege that Individual MA-1 did not do any work. Nor could the government allege as much. The

recording the government cited to (Session #17803 (12/5/2018)) indicates the opposite, that Individual MA-1 performed legitimate work for a Chicago-area hospital and performed it well, and only when Individual MA-1 could no longer perform his job did McClain purportedly suggest or acquiesce that a high-level employee could end Individual MA-1's employment. Thus, nothing about McClain's purported job recommendation and subsequent reference to letting Individual MA-1 go resembles the charges in the superseding indictment. The patently obvious distinctions render the evidence marginally probative at best. It certainly does not possess "any tendency to make" the existence of a criminal enterprise, or a pattern of racketeering "more or less probable than it would without the evidence." *See* Fed. R. Evid. 401.

B. Evidence Concerning Individual MA-1's Employment at a Chicago-Area Hospital is Inadmissible Under Rule 404(b)

The government argues that evidence concerning Individual MA-1's employment at a Chicago-area hospital is admissible under Rule 404(b)(2)'s permitted purposes as evidence of Defendants' intent, knowledge, *modus operandi*, and plan. Dkt. 104 at 31-32.

First, it certainly is not evidence of *modus operandi*. Courts traditionally limit admitting *modus operandi* evidence for the purpose of proving identity through *modus operandi*. *See United States v. Edwards*, 26 F.4th 449, 453-54 (7th Cir. 2022); *United States v. Carson*, 870 F.3d 584, 599 (7th Cir. 2017) (acknowledging that, although *modus operandi* evidence is not strictly limited to identity, it should rarely be used outside of that context) (citing *Nelson v. City of Chicago*, 810 F.3d 1061, 1071 (7th Cir. 2016) and *United States v. McGuire*, 627 F.3d 622, 626-27 (7th Cir. 2010) as

rare examples of *modus operandi* in non-identity cases); *but see Chavez v. City of Albuquerque*, 402 F.3d 1039, 1046 (10th Cir. 2005) ("proof of a 'modus operandi' is only relevant when there is an issue regarding the defendant's identity")). Identity is not at issue in this case.

Moreover, the Seventh Circuit requires "that *modus operandi* evidence bear a 'singular strong resemblance to the pattern of the offense charged.'" *United States v. Moore*, 115 F.3d 1348, 1354-55 (7th Cir. 1997) (quoting *United States v. Jones*, 438 F.2d 461, 466 (7th Cir. 1971)). Yet, as mentioned above in subsection A, the allegations in the superseding indictment and the government's motions *in limine* are overtly distinct. The government does not allege that Individual MA-1 did not perform legitimate work. The government does not allege that Defendants received and solicited bribes from a Chicago-area hospital. In fact, there is virtually no resemblance between the government's proffered evidence and the charges in the superseding indictment, and thus, *modus operandi* is inapplicable.

Further, Individual MA-1's employment with a Chicago-area hospital has no bearing on Madigan's knowledge or intent. Nothing suggests McClain received direction from Madigan to encourage a high-level employee to end Individual MA-1's employment due to his health. Indeed, there is nothing unlawful about recommending a job or suggesting someone terminate that individual's employment at a subsequent date because they were no longer physically capable of performing their duties. It consequently has no bearing on Madigan's participation in the charged enterprise or an alleged pattern of racketeering activity, or the existence of either,

because nothing the government requests to be admitted is inherently unlawful. The inference that Madigan possessed corrupt intent or knowledge regarding Individual MA-1 merely because McClain reiterated a story to Marquez about his discussion concerning Individual MA-1 is unsupported and unreasonable. Merely maintaining his innocence does not put Madigan's intent at issue. *See Miller*, 673 F.3d at 697 ("[I]f a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior bad acts").

Similarly, nothing indicates this evidence demonstrates some plan on Defendants' part. The government fails to detail how this evidence comprised a part of their alleged plan, merely listing 404(b)(2)'s permitted purposes without argument. Nonetheless, McClain's reference to Marquez about Individual MA-1's employment has no bearing on whether a plan existed. McClain's mention of Individual MA-1 in the same conversation that he discusses Moody and Acevedo with Marquez does not support that the purported employment suggestions comprise some illicit plan overseen by Madigan.

Ultimately, the government wishes to present evidence that effectively operates to prove Defendants' propensity to engage in the conduct of recommending jobs. As the Court well knows, this evidence is dangerous and has an undue tendency to influence a jury to find guilt for improper reasons, and it should be excluded. *See Old Chief*, 519 U.S. at 181 (quoting *Michelson*, 335 U.S. at 475-76 (explaining character evidence "is said to weigh too much with the jury and to so overpersuade

them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge")). The chain of reasoning cannot be completed without making an impermissible propensity inference, and under such circumstances, the evidence is inadmissible. *Gomez*, 763 F.3d at 855; *McMillan*, 744 F.3d at 1038.

C. The Probative Value is Substantially Outweighed by the Danger of Unfair Prejudice

McClain's purported actions regarding Individual MA-1 bear no logical nexus to the government's allegations in the superseding indictment. There is nothing to suggest Individual MA-1's employment is factually similar to the government's allegations within the superseding indictment, leaving the probative value marginal and the risk of unfair prejudice prominent. The government may argue that it is evidence proving the existence of the alleged enterprise despite the evidence not supporting the government's assertion. This will require Defendants to rebut the government's allegations on this ancillary issue, which has little relation to the allegations in the superseding indictment.

V. Government Motion 5: The Court Should Exclude Any Evidence Concerning Other AT&T Hires Purportedly Made at the Defendants' Request

A. The Evidence is Not Admissible as Direct Evidence of the Purported RICO Enterprise

The emails that the government seeks admission of in its motion *in limine* 5 in no way constitute direct evidence of the purported RICO Enterprise alleged in Count One of the superseding indictment. The McClain emails are not probative or material

evidence that have any relevance to Count One, other than to improperly attempt to paint Madigan and McClain with the propensity brush, that since they had previously attempted to, in the government's telling, unlawfully obtain jobs, contracts, and financial advantage for their friends, relatives, and associates, they must have also done the same when it comes to the charged conduct relating to ComEd, AT&T, and other entities. A review of the proffered emails demonstrates that they are plainly not direct evidence of the RICO Enterprise charged in Count One. Instead, the emails detail lawful job recommendations and communications about the status of different individuals and companies with AT&T. Job recommendations only become illegal when they are fulfilled *in exchange for* official action by a public official. These emails are not direct evidence of bribery, or the alleged racketeering enterprise charged in Count One, or of any other charge lodged against Madigan or McClain in the 23-count superseding indictment.

B. The Evidence is Not Admissible Under Rule 404(b)

The government argues the evidence is relevant to prove Defendants' intent, without relying on the propensity inference "that the defendants must have solicited a bribe with regard to Individual FR-1 in 2017 because they made similar requests on other occasions." Dkt. 104 at 36. That is precisely an impermissible propensity inference. *See, e.g., Gomez*, 763 F.3d at 855 (holding evidence that goes to a permitted purpose is still inadmissible if at *any point* along the chain of reasoning a propensity inference exists). The government concedes that this propensity potential exists. The evidence is inadmissible under Rule 404(b). *See United States v. Lee*, 724 F.3d at 978

("When one looks beyond the purposes for which the evidence is being offered and considers what inferences the jury is being asked to draw from that evidence, and by what chain of logic, it will sometimes become clear … that despite the label, the jury is essentially being asked to rely on the evidence as proof of the defendant's propensity to commit the charged offense"). When the relevance of the evidence is established only through a propensity inference, the other-acts evidence must be excluded. *Gomez*, 763 F.3d at 856.

C. The Probative Value is Substantially Outweighed by the Danger of Unfair Prejudice

The evidence is not probative. Whether Defendants allegedly made job recommendations in the past to AT&T—which the proffered evidence does not establish—has no bearing on whether they committed the acts charged in the superseding indictment. That is a basic tenet of the rule against propensity evidence. The probative value with this evidence is conditioned upon impermissibly accepting the propensity inference. Thus, under the proper rationale for admitting evidence of past AT&T job recommendations, the evidence is irrelevant.

The particular risk of improperly conveying to the jury that the simple act of making job recommendations is unlawful is present – which is untrue. Merely recommending jobs is not an unlawful act. Any suggestion otherwise would be more than a flawed legal conclusion, it would be incurably prejudicial to Madigan.

VI. Government Motion 6: The Court Should Exclude Any Evidence Related to Gaming Legislation

A. The Proffered Evidence Is Not Direct Evidence of the Charged Enterprise

Evidence of McClain's role in gaming (or gambling) legislation is not direct evidence of the offenses charged in the superseding indictment in this case and Rule 403 weighs in favor of exclusion of this proffered evidence. In the previous prosecution of McClain and the "ComEd 4" defendants, Judge Leinenweber excluded the gaming-related recordings at issue in government's motion *in limine* 6 on that basis. *See* Dkt. 104 at 41 (citing *United States v. McClain et al.*, No. 20 CR 812, Dkt. 161 at 2; Trial Tr. 704-08). Judge Leinenweber, after multiple attempts by the government to admit these recordings—first, under Rule 404(b), then as "direct evidence" of the charged conspiracy—ultimately permitted the government to elicit testimony from Representative Bob Rita about McClain's role in the gaming legislation, but without mention of the legislation dealing with gambling and without admission of any intercepted communications. *Id.*, Dkt. 183 ("For reasons stated on the record on 3/20/23, MOTION by USA to admit evidence of McClain's involvement in directing major gaming legislation as Madigan's agent 169 is denied.")

As was previously acknowledged in Judge Leinenweber's ruling on this topic, the evidence that the government seeks to introduce is propensity evidence that would be unfairly prejudicial to the accused if admitted. The government plans to introduce recordings and evidence that McClain "guided" Representative Rita over several years as the legislature navigated the highly controversial subject of the

expansion of gambling within the State of Illinois. Based on this, the government plans to argue that McClain played a similar role, acting as Madigan's "agent" once again when it came time to pass another major piece of legislation (the "Future Energy Jobs Act," or "FEJA") that is central to the charges in the superseding indictment.

B. The Evidence is Inadmissible Under Rule 404(b) and 403

The government's motion fails to explain why this otherwise inadmissible evidence goes to one of the permitted non-propensity purposes listed in Rule 404(b)(2). Since the government has not explained how it could be admitted, as the proponent, the evidence is inadmissible. *See* Fed. R. Evid. 404(b); *Gomez*, 763 F.3d at 860. Judge Leinenweber wisely excluded this evidence as propensity evidence in the "ComEd 4" trial.

Nonetheless, any other way the evidence may be admitted is foreclosed because the probative value of gaming legislation evidence is substantially outweighed by the significant danger of unfair prejudice. First, irrespective of whether gambling is lawful or unlawful, it carries an unavoidable stigma of degeneracy and debauchery tending to inflame moral prejudice. *See United States v. Cooper*, 286 F.Supp.2d 1283, 1291 (D. Ka. 2003) ("Balancing this evidence under Rule 403, the court concludes that the probative value of [gambling] evidence is substantially outweighed by the unfair prejudice related to class and inflammatory moral issues"); *see also United States v. St. Michael's Credit Union*, 880 F.2d 579, 601-02 (1st Cir. 1989) ("Even were we to afford some minimal probative significance to the gambling evidence, we would still

find its admission to be an abuse of discretion because its 'probative value (if any) is substantially outweighed by the danger of unfair prejudice...'") (quoting *United States v. Kroger*, 646 F.2d 1194, 1998 (7th Cir. 1981)). Vices like gambling are usually associated with prostitution, drugs, violence, pornography, money laundering, etc.

Importantly, the jury would hear evidence that Defendants were involved in efforts to pass gaming legislation. Consequently, the evidence will be inescapably intertwined with inflaming the prejudice of potential jurors who hold religious, moral, and/or personal beliefs that gambling is immoral or associated with degeneracy.

Further, the government posits that this evidence is purportedly for the limited purpose to establish McClain took orders from Madigan. The government could not have done a better job finding more prejudicial and incendiary evidence (aside from the purported evidence containing allegations of sexual harassment (government motions *in limine* 2 and 7)) to enable the jury to find guilt for an improper reason. The government has strategically chosen inflammatory prior uncharged acts evidence concerning controversial topics for the added spillover effect to cast Defendants in a negative light. This may well leverage the moral views of potential jurors against Madigan and McClain.

Further, the evidence is undoubtedly cumulative further compromising any imagined probative value. In the "ComEd 4" trial, the government had no less than twelve exhibits for this purpose. *See McClain*, 20 CR 812 (N.D. Ill.) (Government Exhibits 13, 24, 62, 89, 92, 98, 100, 101, 101, 102, 114, and 137). In this light, any probative value is vanquished considering the substantial risk of unfair prejudice.

Additionally, the sheer volume of the government's proffered evidence will likely confuse the jury. The government is requesting to admit evidence that spans six years (from 2013 to 2019), and has no relation to ComEd or AT&T. The evidence will create a separate "mini-trial" within the course of an already lengthy trial about a topic found nowhere in the superseding indictment except for the government's limited stated purpose. Therefore, the Court should exercise its discretion and exclude this inflammatory and unfairly prejudicial evidence.

VII. Government Motion 7: The Court Should Exclude Any Evidence Concerning McClain's Purported Role in Response to Sexual Harassment Allegations

A. The Government's Proffered Evidence Is Not Direct Evidence of the Charged Enterprise

This Court should not allow the sexual harassment allegations that embroiled Springfield politics in 2018 to feature in the trial of this matter. They are irrelevant, unfairly prejudicial, and would result in litigation of issues that are not material to the ultimate resolution of the central issues in this case. Moreover, the purported purpose for which the government offers this evidence is cumulative and not in dispute. Presenting this inflammatory evidence would result in unfair prejudice to Madigan and McClain and would risk an adverse jury verdict based on emotion, confusion of the issues, and improper considerations.

B. The Evidence is Inadmissible Under Rule 404(b) and Rule 403

Evidence of McClain allegedly responding to sexual harassment allegations is the epitome of overwhelmingly prejudicial uncharged acts evidence that an accused should not be required to contend with at trial. It is a thinly veiled attempt to link

someone who is accused of sexual harassment to Madigan. The incendiary evidence is nearly certain to provoke the jury to respond, possibly in anger, or have another form of emotional response. Whatever probative value the government asserts exists with respect to this evidence, there is simply cannot escape the fact that it will serve as an effective tool to tarnish Madigan's character and result in an unfairly biased opinion of him at trial.

The government is requesting to admit this evidence solely for the "limited purposes" of showing how close Madigan and McClain were and their roles in the alleged enterprise. Dkt. 104 at 48. By its own admission, the probative value is scant, considering the limited purpose of this inflammatory evidence, and it is certainly cumulative. There is no limiting instruction that could reasonably ensure a jury does not consider this evidence for improper reasons. As mentioned above, it is unrealistic to expect a limiting instruction to suppress emotional responses of jurors. Therefore, the impermissible evidence should be excluded.

VIII. Government Motion 8: The Court Should Exclude Any Evidence of Madigan's Purported Efforts to Interfere with Employment Decisions at Metra

For good measure, the government tacks on evidence regarding the widely publicized and controversial so-called "Metra scandal," at the end of its motions *in limine*. (Dkt. 104 at 45-46). Although only comprising approximately one page of its 50-page motions *in limine*, the Metra episode is not a concise footnote in Chicago history that the government can cavalierly put into evidence. Instead, this issue resulted in intense negative media coverage of Madigan, resulted in numerous

investigations including a Governor's panel, and a civil lawsuit against Metra resulting in a $1.3M settlement for the former CEO who made widely publicized accusations of corruption against Madigan.

In 2013, there was a colossal shakeup of Metra and the Regional Transportation Authority, which included the former CEO blaming Mike Madigan for Metra failing to reappoint him as CEO based on his perception that he had crossed Madigan. The "Metra scandal," has featured prominently in the media coverage of Madigan. It is a central feature of documentaries, podcasts, and books about Madigan, but it is not a feature of this case.

The government seeks to admit evidence that Madigan purportedly told a member of Metra's governmental affairs department that Madigan wanted a Metra employee to receive a pay raise and another employee to receive a union job. Dkt. 104 at 45. Specifically, the government argues that this evidence should be admitted because it is direct evidence of the charged RICO enterprise and is the "type of conduct alleged to be within the objectives of the charged enterprise…" Dkt. 104 at 46. The government argues that the probative value is not substantially outweighed by the danger of unfair prejudice because it "demonstrates Madigan's personal efforts to interfere in the internal processes of entities that are subject to government regulation in order to enrich his associates." Dkt. 104 at 46.

A. Madigan's Purported Efforts to Interfere with Metra Employment Decisions Are Not Direct Evidence of the Purported Enterprise

The government incorrectly claims that Madigan's purported efforts to interfere with Metra employment decisions is the type of conduct that is alleged within the objectives of the charged enterprise. Dkt. 104 at 46. The superseding indictment alleges that Defendants solicited and received bribes and unlawful personal financial advantage from persons and parties having business with the State of Illinois and the City of Chicago in exchange for official action regarding certain legislation. Dkt. 37 at 7-8. Yet, the government does not allege anything of the sort concerning Madigan's purported efforts to interfere with Metra employment decisions.

For example, the government never alleged Madigan's purported requests to Metra's governmental affairs department were a part of some *quid pro quo* or that there was any supposed corrupt intent. The government has not alleged that this request was attached to any sort of official action concerning legislation related to Madigan. Nor does the government allege that this purported job recommendation was similar to the "little to no work" job allegations in the superseding indictment.

The government simply alleges that Madigan made a job recommendation and requested an employee receive a pay raise. However, there is nothing unlawful with that nor is it indicative of some sort of corrupt intent. The dissimilarities between Defendants' alleged conduct in the superseding indictment and the government's uncharged allegations concerning Metra seriously belie the government's claim that

this evidence is "highly relevant" to prove the existence of a racketeering enterprise. Dkt. 104 at 46. It is merely another poorly disguised attempt to circumvent the rules against propensity evidence for uncharged conduct.

B. Evidence Concerning Metra is Inadmissible as Prior Bad Acts

The government does not even argue that evidence concerning Metra is admissible under Rule 404(b)(2). Irrespective, the evidence is not admissible under the rule. The only relevant purpose for evidence regarding Metra is so the government can claim that, because Madigan had recommended jobs in other areas for an improper or unlawful purpose, he must have done so with respect to the allegations in the superseding indictment. That is precisely the impermissible propensity inference that renders such evidence inadmissible. Even assuming the evidence's relevance on a contested point, "the court must consider the chain of logic by which the jury is being asked to glean the defendant's knowledge, intent, etc. from proof of prior misdeeds." *Lee*, 724 F.3d at 976-77.

C. The Probative Value of the Evidence is Substantially Outweighed by the Danger of Unfair Prejudice

First, evidence of alleged interference with Metra employment decisions has objectively no relevance. No party disputes that Madigan and McClain made job recommendations in the past. The proffered evidence will not prove something at issue. Additionally, the government does not allege that Madigan's purported interference with Metra employment decisions comprised a component of soliciting and receiving bribes in exchange for official action. The government's motion simply requests to admit evidence that Madigan made a job recommendation and a request

for an employee to receive a pay raise. The evidence provides no probative value in determining the veracity of the allegations in the superseding indictment, which allege that job recommendations were part of soliciting and receiving bribes.

However, the evidence presents the dangerous risk of unfair prejudice because the government is attempting to admit evidence that allegedly "Madigan subsequently complained to Metra's board chairman" regarding the executive director who bucked Madigan's alleged requests, and the executive director's contract was later not renewed. Dkt. 104 at 45-46. Without a way to prove it up, the government would like to stretch this alleged evidence to demonstrate to the jury that Madigan allegedly retaliated against someone who refused his purported requests. While the evidence will not show that occurred, the government will assuredly try to argue that.

It is rather transparent that the government is attempting to admit evidence simply to tarnish Madigan's reputation and character with otherwise inadmissible evidence of uncharged acts. The evidence is not probative nor material to the allegations in the superseding indictment. And it should accordingly be excluded.

Conclusion

Defendant Michael J. Madigan respectfully requests this Honorable Court deny the government's motions *in limine* and grant any other appropriate and equitable relief that this Court deems just and proper.

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Respectfully submitted,

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