UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff	§	
	§	
v.	§	Crim. No. A:19-CR-013 RP
	§	
KYLE GERALD PRALL	§	
	§	
Defendant	§	

Defendant's Reply to Government's Response to Motion to Dismiss

Defendant, Kyle Prall, files this Reply to the Government's Response to his Motions to Dismiss. (Doc. No. 21).

I. Preemption Applies

The government asserts that "[n]either 52 U.S.C. § 30109 nor 52 U.S.C. § 30124 . . . nor any other provision of FECA addresses the [alleged] fraud scheme." (Gov't Resp. at 5 (Doc. No. 21)). Thus, it argues, because FECA does not provide a basis to charge the alleged scheme, preemption cannot exist. (*Id.* at 7) ("There is no conflict or overlap between FECA and the mail and wire fraud charged here, and thus preemption is not implicated."). This premise, however, is incorrect; and the government's central argument is, therefore, flawed.

First, 52 U.S.C. § 30109(d)(1)(A) provides that "[a]ny person who knowingly and willfully commits a violation of **any provision of this Act** which involves the making, receiving, or reporting of any contribution, donation, or expenditure" commits a criminal act if the amounts at issue exceed $2,000. (emphasis added). The alleged violations involve the "reporting of . . . expenditure[s]," the "making . . . of . . . expenditure[s]," and the "receiving . . . of . . . donation[s]." Indeed, all of the reporting requirements that the government alleges to have been violated are contained in 52 U.S.C.

§ 30104, a "provision of th[e] Act."[1] 52 U.S.C. § 30102, also a "provision of th[e] Act," proscribes the unauthorized use of a political committee's funds. Other provisions of the Act are relevant as well. Thus, 52 U.S.C. § 30109(d)(1)(A) unequivocally proscribes the alleged conduct, and is implicated where there is any violation that "involves" the "reporting of . . . expenditure[s]," the "making . . . of . . . expenditure[s]," or the "receiving . . . of . . . donation[s]."

Nonetheless, the government characterizes § 30109 as "proscrib[ing] no misconduct" whatsoever and as "[a] mere penalty provision," not a criminal statute. (Resp. at 6). It further argues that "[a] mere penalty provision cannot implicitly supplant the mail and wire fraud statutes." (*Id.* at 6). That characterization, however, is belied by § 30109(d)(1)(A)(i), which provides for a five-year term of imprisonment for a violation of § 30109(d)(1)(A); and § 30109(d)(2), which provides that, "In any criminal action brought for a violation of any provision of this Act . . . any defendant may evidence their lack of knowledge or intent to commit the alleged violation [through certain evidence] . . ." In short, § 30109 *is*—unequivocally—a criminal statute. And it proscribes not only certain specific violations, but a knowing and willful violation of *any* provision of FECA.[2] Indeed, far from a "mere penalty provision" that cannot logically support preemption, § 30109 is a unique type of criminal statute that implies preemption, given that it proscribes a violation of *any* provision in the Act—thus centralizing, and creating a uniform structure and standard for imposing, criminal sanctions in this context.

Second, 52 U.S.C. § 30124(b), captioned as governing the "[f]raudulent solicitation of funds," applies to anyone who "willfully and knowingly participate[s] in . . . any plan [or] scheme" to "fraudulently misrepresent the [political committee] as speaking, writing, or otherwise acting for or on

[1] 52 U.S.C. § 30104(a)(1) provides that "Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection;" subsection (a)(4) thereof imposes filing obligations on non-authorized political committees; and subsection (b) thereof sets forth the required contents of the reports.

[2] Notably with respect to preemption, the latter quoted provision above indicates that Congress gave special significance to the "knowing and willful" requirement by providing a specific avenue to evidence a lack of knowledge or intent.

behalf of any candidate or political party . . . for the purpose of soliciting contributions or donations." *That* is exactly what the government alleges. It alleges that Mr. Prall participated in a scheme to fraudulently misrepresent that each of the political committees at issue was acting to promote a particular candidate for the purpose of soliciting donations.[3] That is the fundamental essence of the allegations: That the political committees at issue were nothing more than a pretext for soliciting donations, and that Mr. Prall, therefore, fraudulently misrepresented them as acting to promote a candidate. Indeed, the very first substantive allegation in the Indictment alleges that Mr. Prall "solicited contributions from the general public for multiple political committees . . . based on misrepresentations . . . that the money contributed by donors would be used to support candidates for the Office of the President of the United States. . . ." (Indict. ¶ 12).

These statutory provisions are applicable to the allegations. Nonetheless, the government further asserts that Mr. Prall's arguments "on the basis of the 2002 amendments to FECA . . . [are] of no avail" because "[n]othing in the Bipartisan Campaign Reform Acts of 2001 or 2002 criminalizes the charged fraud scheme [involving the solicitation of political contributions]" or supports Mr. Prall's arguments. (Resp. at 7 n. 2).[4] To the contrary, however, the 2002 Act directly amended *both* of the foregoing statutes: § 30109(d)(1)(A) and § 30124(b). The 2002 Act specifically added and created § 30124**(b)**—that statutory provision, which is directly on point and covers the "fraudulent solicitation of funds," did not exist prior to the 2002 Act. Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, § 309, 116 Stat. 81 (2002) ("BCRA"). The 2002 Act also specifically amended § 30109(d)(1)(A) to provide for a new, enhanced five-year term of imprisonment, thereby specifically creating a felony

[3] *E.g.,* the Indictment alleges that Mr. Prall "register[ed] political committees with the FEC for the stated purpose of soliciting contributions and making expenditures in support of candidates for the Office of the President of the United States." (Indict. ¶ 17).

[4] The government's own manual for the prosecution of election offenses provides to the contrary: "As amended by BCRA, FECA applies to virtually all financial transactions that impact upon, directly or indirectly, the election of candidates for federal office." Donsanto, Craig, *U.S. Department of Justice Manual on Federal Prosecution of Election Offenses*, at xiii, 4 (7th ed. 2007).

offense under FECA. BCRA § 312. Critically, though, this language also created a cap, providing that a defendant who violates FECA shall be "imprisoned for *not more than* 5 years," *id.* (emphasis added)—reflecting a Congressional intent to place limitations in this constitutionally-sensitive area.

As set forth in Mr. Prall's Motion to Dismiss, in addition to these amendments, Congress specifically instructed the U.S. Sentencing Commission to issue guidelines for "penalties for violations of the Federal Election Campaign Act of 1971 and related election laws," evidencing a Congressional intent that FECA would, from that point forward, provide a uniform standard governing criminal conduct in that context. *Id.* § 314. In response to Congress's 2002 mandate, the Sentencing Commission promulgated a new sentencing guideline, U.S.S.G. § 2C1.8, which was accepted by Congress, *see* 28 U.S.C. § 994(p), and was considered mandatory at that time. Congress thus evidenced its intention to create a uniform criminal framework governing FECA violations. The government's arguments that nothing in the 2002 Act supports Mr. Prall's arguments are, therefore, incorrect.[5]

Likewise, the government dismisses Mr. Prall's arguments that First Amendment concerns favor preemption. The government cites almost exclusively to *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003), for the proposition that the First Amendment does not impose any constraints where it charges a criminal fraud action. The validity of its First Amendment arguments thus hinges on the applicability of *Madigan*.

Madigan, however, is not applicable here. To begin with, *Madigan* did not involve a criminal prosecution. But criminal statutes that potentially inhibit the exercise of First Amendment rights "must be scrutinized with particular care." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)); *see also Reed Enters. v. Corcoran*, 354 F.2d 519, 521 (D.C.

[5] Moreover, while the government alleges that this case is not about a violation of FECA, the very route of the prosecution of this case belies this argument. One cannot ignore the obvious fact that the case is being prosecuted by DOJ's Public Integrity Unit. That unit is not charged with pursuing violations of general criminal provisions. It is specifically constituted to pursue election law violations. *See, e.g.*, Report to Congress on the Activities and Operations of the Public Integrity Unit, *available at* https://www.justice.gov/criminal/file/1015521/download.

Cir. 1965) ("[P]rosecutions involving possible collision with First Amendment rights are not subject to the routine consideration given prosecutions under ordinary criminal statutes."). The potential chilling effect from a criminal prosecution is significantly more pronounced than that from a civil enforcement action.

Madigan is also inapplicable for a fundamental doctrinal reason. That case applied *intermediate scrutiny* to the civil case before it, which involved charitable solicitations—it never invoked strict scrutiny;[6] the case before this Court, however, requires a *strict-scrutiny* analysis, as it arises in the context of the exercise of core political speech. That distinction alone takes this case out of the *Madigan* paradigm urged by the government.

Madigan did not involve speech that was, from an *objective* standpoint, core political speech,[7] speech that has received the highest level of First Amendment protection. Instead, it involved the solicitation of charitable donations—activity that is certainly protected, but not to the degree of core political speech. This explains why the *Madigan* court only applied intermediate scrutiny and did not purport to apply strict scrutiny. As a result, one simply cannot extrapolate broad propositions from *Madigan* to the particular context at issue here.

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[6] The *Madigan* Court appears to have applied an intermediate-scrutiny test. While the test (level of review) applied by the *Madigan* court is not entirely unambiguous, courts have largely interpreted it as having applied intermediate scrutiny. *See Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 338 n.2 (4th Cir. 2005) (noting the ambiguity as to whether the standard at issue in the Supreme Court's charitable solicitation cases is intermediate scrutiny or strict scrutiny); *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) (describing applicable First Amendment standard with respect to charitable solicitations as "an intermediate level of scrutiny" and citing *Schaumburg* and *Riley*); *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 597 (8th Cir. 2005) ("The test appropriate for regulation of professional charitable solicitation is derived from *Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 636 (1980). Although the Supreme Court has not specified whether the *Schaumburg* test is an intermediate scrutiny review of a content-neutral regulation, we have interpreted it as such."); *Nat'l Fed. of the Blind of Ark. v. Pryor*, 258 F.3d 851, 855 (8th Cir. 2001) (equating the *Village of Schaumburg* standard to the lower level of scrutiny applicable to a time, place, and manner test); *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, UNIVERSITY OF ILLINOIS LAW REVIEW 783, 798 (2007) ("In a recent Fourth Circuit decision authored by Judge Wilkinson, the court recognized that there has been some confusion on this subject in the lower courts, but also recognized that many appellate courts are treating the *Village of Schaumburg* test (named after the first of the Court's 1980s decisions) as converging with the general intermediate scrutiny analysis.") ("[I]t would appear that the test for regulations of charitable solicitation has indeed largely merged into the general, intermediate scrutiny test.").

[7] Notably, as demonstrated below, the Supreme Court determines whether speech is core political speech from an objective, rather than subjective, test/viewpoint.

In *Madigan*, the Supreme Court canvassed three of its prior decisions that had arisen in the context of allegedly fraudulent charitable solicitations. Going back to the first case in that trilogy, the Court recognized that it had previously found "that fraud prevention ranks as 'a substantial governmental interes[t].'" *Madigan*, 538 U.S. 600, 613 (2003) (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980)). The Court applies an "intermediate scrutiny" test in the context of government actions related to justifying a "substantial governmental interest." The strict scrutiny standard, however, which applies here, is the highest standard of review for evaluating whether a governmental action comports with the First Amendment. Under the strict-scrutiny standard, the government's action must be narrowly tailored to serve a "compelling interest." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007). In the context of strict scrutiny, and unlike under an intermediate-scrutiny analysis, a law is not "narrowly tailored" if there is a less-restrictive alternative available (as here, where FECA is such an alternative). *E.g., Boos v. Barry*, 485 U.S. 312, 329 (1988).

Indeed, the Supreme Court has made clear that although both "strict scrutiny" and the "intermediate scrutiny" tests require "narrow tailoring," "the same degree of tailoring is not required" under the two; critically, under the intermediate-scrutiny test, the "least-restrictive-alternative analysis is wholly out of place," whereas it applies in the context of strict scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 n.6 (1989). That is a critical distinction where, as here, the government's charging approach is subject to strict scrutiny, and the government has a less restrictive alternative available: FECA.

The alleged fraud arises in the context of speech that is, on its face, an exercise of core political speech protected by the First Amendment and that is, therefore, subject to strict-scrutiny analysis. The attached exhibits of archives of the political committees' websites (the political committees that Mr. Prall is alleged to have been associated with), and the speech at issue, from the period at issue

demonstrate this. (Exh. A - J).[8] They demonstrate that the committees at issue produced substantial and substantive advocacy and educational information on candidates and some of the most pressing political issues of the day in soliciting donations.

As the Supreme Court has recognized, the "[d]iscussion of public issues and debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution[.]" *Buckley v. Valeo*, 424 U.S. 1 (1976). "The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.,* 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971)).). It is precisely "[f]or *these* reasons" that the Supreme Court held in *Citizens United* that:

> political speech must prevail against laws that would suppress it, **whether by design or inadvertence.** Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (emphasis added.). As applied here, the laws at issue (those charged in the Indictment) burden political speech. They are, therefore, subject to strict scrutiny. *Id.*; *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007) ("Because [the statute, as applied] burdens political speech, it is subject to strict scrutiny.")

Importantly, the Supreme Court has held that whether speech constitutes core political speech turns, not on the speaker's subjective intent, but on an objective test. The Supreme Court has refused to look to the intent behind the speech or its effect to determine "the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which [is not]." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 467 (2007). As it has elaborated:

> For the reasons regarded as sufficient in *Buckley,* we decline to adopt a test for as-applied challenges turning on the speaker's intent to affect an election. The test to

[8] The attached exhibits are from web.archive.org, also known as the Wayback Machine, a well-known internet archiving service.

> distinguish constitutionally protected political speech from speech that [a statute] may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" A test turning on the intent of the speaker does not remotely fit the bill.
>
> Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech . . . . An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." The FEC does not disagree. In its brief filed in the first appeal in this litigation, it argued that a "constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation."

Id. at 467–68 (internal citations omitted) (citing M. Redish, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001) for the proposition that "under well-accepted First Amendment doctrine, **a speaker's motivation is entirely irrelevant to the question of constitutional protection.**") (emphasis added).

Indeed, "the proper standard for an as-applied challenge to [the statutes charged] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469 (2007).[9] "In short, it must give the benefit of any doubt to protecting rather than stifling speech." *Id.* at 469. Critical to, and embedded in, this reasoning is the fact that this approach is designed to protect, not just the present speaker, but against a chilling effect on others—future would-be speakers.

This Supreme Court precedent, which came after *Madigan*, demonstrates why—as argued in Mr. Prall's Motion to Dismiss—the unique context of this case differentiates it from cases that do not arise in the context of core political speech. The speech at issue is quintessential core political speech.

[9] The government's approach, by asserting that allegations of "fraud"—which would require an "intentional lie" or subjective *mens rea*—thereby remove all First Amendment barriers, is simply inconsistent with this precedent, which, in the context of core political speech, looks to whether the speech is *objectively* political speech. Where, as here, that is the case, a position (like the government's) that necessarily ascribes an improper subjective intent to the objectively political speech at issue in order to completely remove First Amendment scrutiny is contrary to Supreme Court precedent and is improper.

As long as this threshold characterization turns on an objective standard, the speech undeniably falls into this category. Only the application of a subjective standard could change this. But, again, the Supreme Court has held that the test is an objective one.

Under strict scrutiny, the government must prove that applying the law at issue furthers a compelling interest and is narrowly tailored to achieve that interest. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007). And under a strict-scrutiny analysis, the concept of "narrowly tailored" requires that the government also demonstrate that a less restrictive alternative is not available. *Boos v. Barry*, 485 U.S. 312, 329 (1988) ("[The law] may serve a[compelling] interest . . . but it is not narrowly tailored; a less restrictive alternative is readily available."). This burden is the government's, not the defendant's. And, in any event, the government cannot fulfill it because a less restrictive alternative exists: FECA.[10] Indeed, the government has not cited, and the defendant is not aware of, any case specifically holding that its charging approach is sufficiently narrowly tailored, under a strict-scrutiny analysis and in light of FECA, in the context of objectively core political speech.

II. The False-Statement Charges Must be Dismissed

A. The Government Has Charged a *Concealment* Theory

The government asserts that it need not demonstrate that Mr. Prall had a "duty" to report in order to establish a violation of § 1001. (Resp. at 10-12). Instead, it argues, it is sufficient if he was aware that *someone*, the treasurer, had such a duty and that he provided inaccurate information to the treasurer that resulted in false reports. (*Id.* at 10). This follows, it says, because while a §1001(a)(1) charge under a concealment theory requires that a defendant have a legal duty to disclose the facts at issue, under § 1001(a)(2), "the government need not prove any duty." (*Id.* at 11). This position,

[10] The First Amendment analysis set forth above and in Mr. Prall's Motion to Dismiss is relevant in at least two ways: First, if the government's charging approach fails under First Amendment analysis on an as-applied basis, the charges must be struck down. Second, it is also relevant as a factor in the preemption argument. That is, it supports the conclusion (which is supported by other doctrines, policies, and interpretive rules) that Congress intended FECA to apply.

however, elevates form over substance and imbues the particular subsection referenced in an Indictment with some sort of talismanic power.

The government's pervading theory is, *in substance*, that Mr. Prall *concealed* the nature of the expenditures. (*E.g.,* Indict. ¶ 14 ("It was a purpose of the scheme for the defendant . . . to conceal from the . . . FEC"); ¶ 15 (same); ¶ 20 ("concealing from the FEC"); ¶ 21 ("Prall concealed the true nature of many of these expenditures by reporting them to the FEC . . ."); ¶ 28). It repeatedly alleges that the expenditures were personal, (*E.g.,* Indict. ¶¶ 55, 57, 59, 61, 63, 65), and that Mr. Prall sought to conceal this on the FEC reports. It has, in other words, alleged that the statements reflected on the reports were false precisely because they concealed the (alleged) fact that the expenditures were personal in nature. The government cannot fundamentally change the substance of its charge merely by citing to § 1001(a)(2) rather than (a)(1). And it cannot sidestep the fact that its false-statement theory ultimately rests on the premise that the reports were false because they *concealed* the personal nature of expenditures. The government has, whether it likes it or not, indicted on a concealment theory.[11]

Moreover, the grand jury did not indict Mr. Prall for a violation of 18 U.S.C. § 2(b) in conjunction with § 1001(a)(2), and he objects to any constructive amendment or variance from the grand jury's theory set forth in the Indictment. Indeed, every single case cited by the government in support of its position involved an indictment charging *both* § 1001 and § 2(b). *See United States v. Neal*, 951 F.2d 630, 633 (5th Cir. 1992) ("Reference to 18 U.S.C. § 2 appears on the face of the indictment"); *United States v. Hopkins*, 916 F.2d 207, 211 n. 3 (5th Cir. 1990); *United States v. Hsia*, 336 U.S. App. D.C. 91, 176 F.3d 517, 521 (1999) ("Counts Two through Six charge that Hsia, by means of her conduit

[11] In a similar vein, it cannot avoid the fact that—as set forth exhaustively in Mr. Prall's Motion to Dismiss—there is simply no duty to report the personal nature of expenditures. As case law cited therein demonstrates, one cannot conceal factual aspects that he does not have a duty to report. Thus, whether the lack of the "duty" at issue runs with respect to the report, itself, or the factual aspects of the reported item, the false-statement charges are improper as framed in the Indictment.

contribution schemes, willfully caused certain recipients of such contributions . . . to make false statements to the FEC in violation of 18 U.S.C. §§ 2 and 1001"); *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) ("The government decided to indict defendant under the felony provisions of 18 U.S.C. §§ 2(b) and 1001."); *United States v. Kanchanalak*, 338 U.S. App. D.C. 200, 192 F.3d 1037, 1040 (1999) ("Counts Two through Fourteen charge that defendants knowingly and willfully caused the DNC and other political committees to file false reports with the FEC, which erroneously identified the sources of contributions and donations, in violation of 18 U.S.C. §§ 2(b), 1001."); *United States v. Braddock*, Crim. No. 12-cr-157, 2013 U.S. Dist. LEXIS 114647, at *30 (D. Conn. Aug. 14, 2013) ("Because Mr. Braddock was charged under both 18 U.S.C. § 1001 and the aiding and abetting statute, 18 U.S.C. § 2, the jury did not need to find that he was directly involved in preparing and submitting the Campaign Committee's reports to the FEC.").

The *Curran* case, which arose directly in the context of FEC reports, demonstrates that a § 2(b) theory actually requires proving a different type of intent than a standalone § 1001 charge. *See United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994) ("When a defendant's culpability is based, not on his own communications with the federal agency, but on information furnished to the agency by an intermediary, the element of intent takes on a different cast than it does if a direct violation of section 1001 is asserted."). If two prosecutorial theories require a different type of intent, they are fundamentally different charges. Any case law holding that § 2(b) need not appear in the indictment in any fashion is inapplicable where, as here, it alters the type of intent that the government must prove.

The government summarizes its position on this issue, arguing that the defendant "ignores [a] clear logical difference" between Section 1001(a)(1) and (a)(2) and that, "[s]imply stated," while "one cannot be convicted of *concealing* facts, pursuant to Section 1001(a)(1), if he does not have a duty to disclose them[,]" "if one chooses to make a statement," he can be indicted under Section 1001(a)(2)

"regardless of any duty." (Resp. at 12). The government's position improperly equates falsity with concealing a factual aspect that there was no duty to report (here, the (alleged) personal nature of the expenditures). But one cannot conceal, within the meaning of Section 1001, that which he does not have a duty to report. (Mot. To Dismiss, Doc. No. 20, pp. 3-5) (citing voluminous case law for this proposition). A statement is thus not "false," within the meaning of Section 1001, because it conceals a factual aspect that there was no duty to report. The so-called "logical difference" between the charges is, fundamentally, a proposition that assumes the very thing that it seeks to prove through the convenient mechanism of elevating form over substance—a logical fallacy.

B. The Court Can and Should Dismiss on Materiality Grounds

The government incorrectly argues that the Court cannot dismiss on materiality grounds because that issue involves questions "that are properly left for the jury," (Resp. at 14), citing *United States v. Gaudin*, 515 U.S. 506 (1995), for the proposition that the question of materiality should be submitted to the jury because it is "a mixed question of law and fact." (*Id.*). The government's position, however, overlooks the constitutional dimensions at play. The Court certainly cannot make a factual finding on the issue *against* a defendant without submitting the issue to the jury, given that a defendant has a constitutional right to a jury in a criminal case. That constitutional right is not offended, however, where the court rules *for* a defendant pretrial. In that situation, the defendant would not be deprived of any constitutional right. Where an item is, as the government cites, a "mixed question of law and fact," the Court can certainly dismiss on that ground.[12]

[12] Moreover, the government argues that "[t]he defendant incorrectly asserts that his $103 cash disbursement to himself . . . is immaterial . . . as it falls below the [FEC's] reporting threshold" because it "ignores the FEC's express requirements related to cash disbursements" under 52 U.S.C. § 30102(h). (Resp. at 19 n. 9). That provision, however, **does not contain a single reporting requirement**. This argument is a strawman.

C. Facially Truthful Answers Cannot Be False Statements

The government argues that "any reported expenditures that did not affirmatively disclose its personal nature [thereby] falsely asserted a legitimate connection to the respective political committee." (Resp. at 16). This is, in sum and substance, its theory with respect to the false-statement charges. Its theory and arguments—which ignore the literal and facially truthful nature of the statements—demonstrate exactly why its false-statement charges must be dismissed.

The Fifth Circuit has held that facially truthful answers to ambiguous questions cannot be the basis for a conviction under § 1001. *See, e.g., United States v. Moses*, 94 F.3d 182, 188-89 (5th Cir. 1996) (reversing conviction under 18 U.S.C. § 1001 because defendant's response to a question on application for naturalization was not false on its face despite being misleading); *see also United States v. Lozano*, 511 F.2d 1, 5 (7th Cir. 1975), *cert. denied*, 423 U.S. 850 (1975) (holding that a literally true statement cannot be a false statement, even if false by implication or omission); *United States v. Hixon*, 987 F.2d 1261, 1266-67 (6th Cir. 1993) (holding that a statement that is not facially false in response to an ambiguous question cannot serve as basis for a false statement conviction); *United States v. Vesaas*, 586 F.2d 101, 103 (8th Cir. 1978) (holding that a true statement could not support a § 1001 conviction); *United States v. Blankenship*, 382 F.3d 1110, 1131-36 (11th Cir. 2004) (reversing conviction under 18 U.S.C. § 1001(a)(3) where the allegedly false subcontracts and equipment leases were not forged or altered and did not contain any factual misrepresentations even though the parties likely never intended to carry through on their promises). These same standards apply to allegations under Section 1519 because the precatory language under Section 1519 is synonymous with the statutory language under 18 U.S.C. § 1001(a)(1), *see* 18 U.S.C. § 1519; *cf.* 18 U.S.C. § 1001, and for the reasons set forth in Mr. Prall's Motion to Dismiss.

To support its theory that "any reported expenditures that did not affirmatively disclose its personal nature falsely asserted a legitimate connection to the respective political committee," the

government draws an analogy to the tax context. (Resp. at 16). It asserts that in the tax context, listing an expenditure "as a business expense when it was purely personal" results in a false statement. (*Id.*). This analogy is, in fact, extremely helpful and enlightening—indeed, it helps to elucidate exactly where the government's theory goes off course. The Internal Revenue Code explicitly and unambiguously prohibits the deduction and mischaracterization of personal expenses as deductible trade or business expenses. 26 U.S.C. § 262(a) ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."); 26 U.S.C. § 162(a) (allowing a deduction only for expenses incurred in "carrying on a trade or business," i.e., non-personal expenses). The FECA and FEC guidance, however, contain no such prohibition, and the government has not cited to any such prohibition. Rather than citing to a prohibition that is clear and unequivocal—like Sections 162 and 262 in the tax context—it appears to invoke a previously unexpressed prohibition that derives from some unstated "spirit of the law."

That underlying "spirit of the law" is not consistent with existing FEC rulings. *See, e.g., Charles Boustany, Jr. MD for Congress, Inc., et al.*, FEC MUR 6698 (Feb. 25, 2016) (declining to pursue a civil action despite an allegation that the expenditure was incorrectly labeled as "door- to-door GOTV" to conceal the campaign's affiliation with a Democratic firm); *Kirk for Senate*, FEC MUR 6510 (July 16, 2013) (no violation where complaint that a campaign misreported payments as "advertising" when they were transferred to the candidate's girlfriend to cover the cost of yoga lessons and other personal expenses); *Ready for Hillary PAC*, FEC MUR 6775 (Feb. 11, 2016) (noting that the description of an expenditure for the rental of a candidate's email list as "online advertising" was not actionable because "the committee does not have an obligation to identify the payment specifically as a 'list rental'").[13] And as set forth in the defendant's motion to dismiss, (Doc. No. 20, pp. 11-13), FECA requires that all amounts disbursed from a political committee that

[13] Notably, the government has not addressed the existing FEC rulings or responded regarding its position on their impact.

are over a particular threshold must be reported, but neither FECA, nor the FEC's reporting guidance, imposes a requirement to report the "personal" nature of any such expenditure.

The government, in its response, does not once assert that the statements at issue were not literally true. In its defense, though, how could it? They were. Indeed, the government appears to even concede this. (Resp. at 18). That should be enough, standing alone, to dispose of these charges. The government cannot pull a reporting requirement out of the proverbial "spirit of the law," nor establish such a requirement through criminal proceedings—at least not in a manner that is consistent with our constitution and the rights afforded to defendants. The Rule of Lenity could hardly be more called for. *United States v. Santos*, 553 U.S. 507, 514 (2008) (The Rule of Lenity embodies "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain.").

III. Conclusion

For the foregoing reasons, Mr. Prall requests that the Court dismiss the charges against him.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2019, I have electronically filed the foregoing document with the Clerk of Court through the CM/ECF document filing system, which sent notification and copies of the filing to all counsel of record.

/s/ Jason B. Freeman
Jason B. Freeman