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	§	

Motion to Dismiss Counts 15 Through 20 of the Indictment

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Motion to Dismiss Counts 15 Through 20 of the Indictment

The Court should dismiss counts 15 through 20 of the Indictment. These counts charge violations of 18 U.S.C. §§ 1001(a)(2) and 1519 for allegedly causing false reports to be filed with the Federal Election Commission ("FEC") by mischaracterizing several political committee expenditures. Under the facts alleged in the Indictment, Mr. Prall did not have an obligation to file, and did not file, the reports with the FEC[1]—a necessary requirement to establish a violation. As such, the charges under 18 U.S.C. §§ 1001(a)(2) and 1519 must be dismissed.

Moreover, the statements at issue were technically true—even assuming the validity of the government's allegations—and cannot, therefore, legally support a false-statement count. This is particularly apparent in light of relevant FEC regulatory guidance and administrative rulings, which demonstrate that a defendant could not, as a matter of law, have knowingly and willfully misreported in the alleged manner.[2]

[1] As noted below, this particular argument applies with respect to counts 15, 16, 19, and 20 only, as Mr. Prall served as treasurer only of the HC4 President committee.

[2] *United States v. Garber*, 607 F.2d 92, 98-99 (5th Cir. 1979) ("the uncertainty created by [existing authorities] as a matter of law precluded a demonstration of 'willfulness,' without regard to the defendant's actual state of mind with respect to his knowledge or reliance on [such authorities];" "It is settled that when the law is vague or highly debatable, a defendant actually or imputedly lacks the requisite intent to violate it.") (quoting *United States v. Critzer*, 498 F.2d 1160, 1162-63 (4th Cir. 1974)).

Finally, the FECA's ambiguity with respect to a political committee's obligations to report the category and "purpose" of expenditures from its account requires that the provisions at issue be resolved in favor of lenity. This conclusion is underscored by the fact that, at the time of the alleged violations, there was not a single criminal case charging a false-statement charge for alleged FECA reporting violations of this nature. The theories set forth in the Indictment thus raise novel questions that stretch the provisions under §§ 1001(a)(2) and 1519 well beyond their intended scope, forging new legal ground. Criminal proceedings are emphatically not the proper place to develop such legal theories.

I. The Counts Must be Dismissed Because Mr. Prall Did Not have a Duty to File the FEC Reports and Did Not Make the Statements at Issue Directly to the Government.

A. The Counts at Issue Require that a Defendant Have a Duty to File the Report

i. Mr. Prall did not have a Legal Duty to File the FEC Reports[3]

The duty to file all reports at issue with the FEC is placed solely upon the treasurer of a political committee. 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a); FEC Form 3X Instructions, p. 4 ("Treasurer's Responsibilities"). *See also United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) ("[T]he government concedes that the duty to disclose the [information] to the Federal Election Commission was that of the campaign treasurers, not that of defendant."). The Indictment does not allege that Mr. Prall was designated as a treasurer of any political committee at issue.[4] Indeed, Mr. Prall was *not* designated as a treasurer of two of the political committees at issue. Mr. Prall thus did not have a duty to file the reports at issue with the FEC for those political committees.

[3] As noted below, the arguments in this regard based upon a lack of duty to file the FEC reports apply to Counts 15, 16, 19, and 20 only.

[4] Mr. Prall served as treasurer of the HC4President political committee. Thus, the arguments in this section only apply to counts 15, 16, 19 and 20.

ii. A Charge Under § 1001(a)(2) Requires that There Be a Duty to Report

The government alleges that Mr. Prall *concealed* the personal nature of three expenditures at issue through reports that were filed by the political committee's treasurer. (*E.g.,* Indict. ¶ 14 ("It was a purpose of the scheme for the defendant . . . to conceal from the . . . FEC"); ¶ 15 (same); ¶ 28). The Indictment alleges that Mr. Prall conveyed a false statement to the treasurer, and that the treasurer made a false statement to the FEC based upon Mr. Prall's allegedly false statement. The payments at issue were made from the political committees' respective bank accounts—there is no dispute about this. Thus, there was an obligation to report them. The government, however, alleges that the "expenditures were purely personal in nature" (*E.g.,* Indict. ¶¶ 55, 57, 59, 61, 63, 65) and that the reports reflecting them therefore violated § 1001 and 1519 because they concealed the allegedly personal nature of the expenditures.

In order to convict under a section 1001(a)(1) charge,[5] courts require that the government show that a defendant had a legal duty to disclose or report the facts at the time that they were reported. *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994). ("[T]he government concedes that the duty to disclose the [information] to the Federal Election Commission was that of the campaign treasurers, not that of defendant. Hence, because there was no duty on the part of defendant to disclose these facts to the Commission, he cannot be guilty of concealment directly under section 1001.");[6] *United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987) ("The government concedes that Gimbel had no duty to inform the Treasury Department of his structured transactions. He therefore lacked the legal capacity to violate § 1001 in this case."); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir. 1987) ("Generally, a defendant cannot be prosecuted under § 1001 for concealing material facts unless he had a duty to disclose the material facts at the time he was alleged to have concealed

[5] The charges at issue here fall under § 1001(a)(2).
[6] The language of the cases cited in this section does not necessarily differentiate between section 1001(a)(1) and (a)(2). However, the cases cited here deal with charges under § 1001(a)(1).

them."); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986) ("It is clear that in order to support a section 1001 concealment conviction there must be a legal duty to disclose the facts the defendant was convicted of concealing."); *United States v. Larson,* 796 F.2d 244, 246 (8th Cir.1986) ("Since criminal laws are strictly construed and any ambiguity is to be resolved in favor of lenity, *United States v. Enmons,* 410 U.S. 396, 411 (1973), we hold that Larson cannot be guilty [under section 1001] of concealing material facts unless there was a duty to disclose the facts."); *United States v. Anzalone,* 766 F.2d 683, 767 (1st Cir. 1985); *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008) ("there must be a legal duty to disclose in order for there to be a concealment offense in violation of § 1001(a)(1)").

As the Third Circuit has held in the FEC context:

> The government concedes that the false statements at issue here were . . . submitted by various campaign treasurers to the Federal Election Commission. Defendant did not prepare or file such reports, and consequently, he did not make the false statements to the Commission. The defendant's conduct, therefore, did not fall directly within the scope of section 1001.

United States v. Curran, 20 F.3d 560, 567. While the Fifth Circuit does not appear to have addressed this (duty-to-file) requirement, it is recognized in the Fifth Circuit's Pattern Jury Instructions, *see* Pattern Crim. Jury Instr. 5th Cir. 2.45 (2015) ("This instruction does not cover violations of 18 U.S.C. § 1001(a)(1), falsely concealing or covering up by trick. To charge concealment, most circuits hold that the prosecution must prove that the defendant had a duty to disclose the information to the government."), and courts in this circuit have so commented. *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 638 (E.D. Tex. 2006), *rev'd sub nom. United States v. Jho*, 534 F.3d 398 (5th Cir. 2008).

This (duty-to-file) requirement should apply to charges under § 1001(a)(2) as well. The text of § 1001 does not support the application of a different, lesser requirement for § 1001(a)(2) than the standard required to establish a violation of § 1001(a)(1). The requirement is also consistent with the essence of the government's charges—concealing information about the expenditures.

The relevant text of 18 U.S.C. § 1001 provides as follows:

> **(a)**Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> **(2)** makes any materially false, fictitious, or fraudulent statement or representation

There is no textually-based distinction between subsection (a)(1) and subsection (a)(2) to support requiring a duty to report under subsection (a)(1) but not under (a)(2). If anything, the language of subsection (a)(1) is less susceptible of being read to require a duty to report, implying that the obligation stems from § 1001 more generally—and thus extends to subsection (a)(2), or to a charge that is, in effect, based on a concealment theory.

Moreover, imposing this (duty-to-file) requirement here is consistent with the essence of the government's charges. In effect, the government has alleged that Mr. Prall concealed the true nature of the expenditures at issue, which it claims were "entirely personal in nature." (E.g., Indict. ¶ 28). The law requires a duty to file before a defendant can be found guilty on a section 1001 concealment charge. *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994). ("[T]he government concedes that the duty to disclose the [information] to the Federal Election Commission was that of the campaign treasurers, not that of defendant. Hence, because there was no duty on the part of defendant to disclose these facts to the Commission, he cannot be guilty of concealment directly under section 1001."); *United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987) ("The government concedes that Gimbel had no duty to inform the Treasury Department of his structured transactions. He therefore lacked the legal capacity to violate § 1001 in this case."); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir. 1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986); *United States v. Larson,* 796 F.2d 244, 246 (8th Cir.1986); *United States v. Anzalone,* 766 F.2d 683, 767 (1st Cir. 1985); *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008). That requirement cannot be side-stepped through a subsection that, again, provides no textual basis on which to find that something less is required. The substance of the charge, not its form, should govern.

iii. The False Statement Must be Made Directly to the Government

In a similar vein, the § 1001 charges must be dismissed because the allegedly false statements were not made with respect to "a matter within the jurisdiction" of the FEC, as courts have interpreted that phrase and as the earliest precedent in this Circuit has interpreted that phrase. Here, with respect to counts 15, 16, 19 and 20, the Indictment alleges that Mr. Prall conveyed a false statement to the treasurer, and that the treasurer made a false statement to the FEC based upon Mr. Prall's allegedly false statement. In other words, the Indictment does not allege that Mr. Prall directly made a false statement to the FEC. Instead, it alleges that he caused an intermediary to make a false statement.

There can be no valid conviction under § 1001 unless the statement at issue is made with respect to "a matter within the jurisdiction of" the agency at issue. *See United States v. Green,* 745 F.2d 1205, 1208 (9th Cir.1984), *cert. denied,* 474 U.S. 925 (1985). Fifth Circuit precedent—as explained by the Eleventh Circuit (which is bound by Fifth Circuit precedent prior to October 1, 1981)—holds that a false statement made to an intermediary, and not directly to the federal government, is not a statement made within the "jurisdiction" of the government agency for the application of § 1001. *Lowe v. United States,* 141 F.2d 1005, (5th Cir.1944) (addressing 18 U.S.C. § 80, the forerunner to § 1001).[7] As the Eleventh Circuit has explained:

> *Lowe* was about the "jurisdiction" element of § 1001 (or, more specifically, 18 U.S.C. § 80, the predecessor to § 1001). The clear, indisputable holding of *Lowe* is that a misrepresentation made to a private company [that will ultimately be reported to the] federal government does *not* constitute a misrepresentation about a matter within the jurisdiction of the federal government.

United States v. Blankenship, 382 F.3d 1110, 1139 (11th Cir. 2004) (emphasis in original). *That*, however, is precisely what the government alleges here in the Indictment. It alleges that Mr. Prall made a false statement to a private entity (the political committee/LLC) via its treasurer, and that the private entity's

[7] But see *United States v. Montemayor*, 712 F.2d 104, 108 (5th Cir. 1983); *United States v. Baker*, 626 F.2d 512 (5th Cir. 1980). However, as set forth in the Eleventh Circuit's analysis, *Lowe* should be viewed as controlling precedent.

treasurer then filed a report with the FEC that was based, in part, upon that alleged misrepresentation. While some subsequent Fifth Circuit precedent may appear inconsistent with this holding, the *Lowe* holding is ultimately controlling in the Fifth Circuit as it is the earliest precedent on the point. *Simon v. Int'l Marine, LLC*, No. CIV.A. 07-0427, 2009 WL 304740, at *7 (W.D. La. Feb. 6, 2009) ("[i]n the event of conflicting panel opinions from [the circuit], the earlier one controls, as one panel of this court may not overrule another"); *Texaco, Inc. v. Louisiana Land and Exploration Co.,* 995 F.2d 43, 44 (5th Cir.1993); *Barrientes v. Johnson*, 221 F.3d 741, 780 (5th Cir. 2000).

Notably, this precedent explains why § 1001(a)(2) imposes a duty-to-file requirement in this context. Indeed, it appears that such a requirement may emanate directly (though not necessarily soley) from the jurisdiction element. This insight is consistent with the textually-based inference above that the requirement is compelled by § 1001 more generally.

iv. The Same False-Statement-Directly-to-the-Government Requirement Applies with Respect to Section 1519

Similarly, section 1519 requires that a false statement influence a "matter within the jurisdiction" of an agency (here, the FEC). 18 U.S.C. § 1519 provides as follows:

> Whoever knowingly **alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object** with the intent to impede, obstruct, or influence the investigation or proper administration of **any matter within the jurisdiction** of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

The precatory language under section 1519 (bolded and underlined above) is synonymous with the statutory language under 18 U.S.C. § 1001(a)(1) ("falsifies, conceals, or covers up"). As discussed above, a defendant cannot be convicted under § 1001(a)(1) unless he has a legal obligation to file the report at issue. *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994). Moreover, *Lowe* requires that a false statement be made directly to the federal agency at issue; the same logic applies with respect to

§ 1519. The combined effect of these authorities is clear: Because Mr. Prall did not have a legal obligation to file the FEC reports at issue, and because the allegedly false statements were not made directly to the government, **Counts 16** and **20**, charging violations of 18 U.S.C. § 1519, must be dismissed.[8]

Indeed, legislative history supports this interpretation. The Senate report, in attempting to define "matter within the jurisdiction," notes "concern" that the phrase "could be interpreted more broadly than we intend." S. Rep. 107-146, at 27 (2002) (add'l views of Sens. Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, McConnell). The phrase applies only to an "investigation, a formal administrative proceeding, or bankruptcy case"—not any "matter within the conceivable jurisdiction of an arm of the federal bureaucracy." *Id.* Congress further noted that the purpose for this limited definition was to expressly limit the types of conduct that a prosecutor could charge under the statute—giving creedence to the legislators' concerns. *See id.*; *see also Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (noting that the headings and titles of Sarbanex-Oxley, and section 1519 in particular, show that Congress did not intend for broad application to all items). Specifically, section 1519 "should not cover the [prohibited conduct] in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter" under a federal agency. *Id.* The *Yates* decision further stated that expanding section 1519 to a broad range of situations would be incorrect absent any "clear[] indication of that intent." 135 S. Ct. at 1083. The Supreme Court's decision in *Yates* demonstrated that Congress did not have such an intent.

This legislative history is consistent with the text of the statute. Indeed, the very caption of the provision refers to its limited scope: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," 18 U.S.C. 1519—a description that does not sweep the alleged

[8] For the reasons stated below, Count 18 should also be dismissed.

conduct at issue here within its scope. The Supreme Court has specifically found § 1519's caption to serve as an interpretive "cue" as to its intended scope. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015). It has also found interpretive cues in "the title of the section of the Sarbanes–Oxley Act in which § 1519 was placed, § 802: "Criminal penalties for *altering* documents." *Id.* (citing 116 Stat. 800) (emphasis added).

Section 1519's caption and section title, describing the intended scope of § 1519, are consistent with the Supreme Court's interpretation of what constitutes a "matter" in a similar context. The Supreme Court has counseled against reading words such as "matter" too broady in the context of similar statutes, favoring a construction that gives the term a "focused and concrete" meaning. *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016). A "matter" requires "a formal exercise of governmental power that is similar in nature to a 'cause, suit, proceeding or controversy." *See McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (construing "matter" in context of similar statute). The Supreme Court's analysis in *McDonnell* further underscores that the context at issue here did not rise to the necessary level to fall within § 1519.

The Supreme Court's analysis in *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015) is also instructive. There, the Supreme Court recognized that "Section 1519 was enacted as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation." *Id.* at 1079. The court cautioned against "cut[ting] § 1519 loose from its financial-fraud mooring." *Id.* The *Yates* court further cautioned that:

> § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. Prior law made it an offense to "intimidat[e], threate[n], or corruptly persuad[e] *another person*" to shred documents. § 1512(b) (emphasis added). Section 1519 cured a conspicuous omission by imposing liability on a person who destroys records himself. See S. Rep. No. 107-146, p. 14 (2002) (describing § 1519 as "a new general anti shredding provision" and explaining that "certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself").

Yates v. United States, 135 S. Ct. 1074, 1081 (2015) (partial internal citations omitted). Building on this legislative purpose, the Court found that the structure of Chapter 78 of Title 18 further evidenced a Congressional intent to limit the scope of § 1519 to specific contexts. *Id.* at 1083. As the court explained:

> Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. See § 1516 (audits of recipients of federal funds); § 1517 (federal examinations of financial institutions); § 1518 (criminal investigations of federal health care offenses).
>
> . . .
>
> **Congress thus ranked § 1519, not among the broad proscriptions, but together with specialized provisions expressly aimed at corporate fraud and financial audits. This placement accords with the view that Congress' conception of § 1519's coverage was considerably more limited than the Government's.**

Yates v. United States, 135 S. Ct. 1074, 1083-84 (2015) (also citing S. Rep. No. 107-146, at 7 (observing that § 1517 and § 1518 "apply to obstruction in *certain limited types of cases*, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud")) (emphasis added). The *Yates* court further noted that "if [this] recourse to traditional tools of statutory construction leaves any doubt about the [scope of section 1519] . . . , we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (citing *Cleveland v. United States,* 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States,* 401 U.S. 808, 812, (1971))).[9]

[9] *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("That interpretative principle is relevant here, where the Government urges a reading of § 1519 that exposes individuals to 20–year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil.") (emphasis in original).

B. In Light of the FECA Reporting Requirements, the Statements at Issue were Technically True, Could Not Serve as the Basis of a Knowing and Willful Misstatement, and the Resulting Ambiguity Must be Resolved in Favor of Lenity

i. Reporting and Use Requirements Under the FECA

The reporting obligations with respect to disbursements from a political committee are set forth under 52 U.S.C. §§ 30104(b), 30114 and under 11 C.F.R. § 104.3. As the political committees at issue were registered as non-"authorized" committees, reporting of disbursements was governed by 11 C.F.R. § 104.3(b)(1). The governing FEC regulations require that all amounts disbursed from the political committee's bank account be reported.

There is, however, no FEC-imposed restriction against using any such amounts for "personal" purposes, nor is there any requirement to indicate that a disbursement had a personal component. To the contrary, the FECA implies that personal uses are permitted for an unauthorized political committee like those at issue here. *Compare* 52 U.S.C. § 30114 (prohibiting personal use of donations by candidates and specified persons that *do not* include unauthorized political committees).

Moreover, the FEC's reporting rules mandate that any disbursement (whether it has a personal component or not) be reported under one of 12 specified categories. FEC guidance provides as follows:

> Along with reporting the purpose of the expenditure as required above, the committee should also **broadly** characterize disbursements by providing the code for each category of disbursement. Examples of the types of disbursements that fall within each of the **broad** categories are listed below.

FEC Form 3X Instructions, p. 13 ("Purpose of Disbursement").

There are *only* 12 recognized, "broad" categories for classifying disbursements. They are set forth in the instructions to FEC Form 3X as follows:

> 001 Administrative/Salary/Overhead. Expenses (e.g., rent, staff salaries, postage, office supplies, equipment, furniture, ballot access fees, petition drives, party fees and legal and accounting expenses)

> 002 Travel Expenses—including travel reimbursement expenses (e.g., costs of commercial carrier tickets; reimbursements for use of private vehicles; advance payments for use of corporate aircraft; lodging and meal expenses incurred during travel)
>
> 003 Solicitation and Fundraising Expenses (e.g., costs for direct mail solicitations and fundraising events including printing, mailing lists, consultant fees, call lists, invitations, catering costs and room rental)
>
> 004 Advertising Expenses—including general public political advertising (e.g., purchases of radio/television broadcast/cable time, print advertisements and related production costs)
>
> 005 Polling Expenses
>
> 006 Campaign Materials (e.g., buttons, bumper stickers, brochures, mass mailings, pens, posters and balloons)
>
> 007 Campaign Event Expenses (e.g., costs associated with candidate appearances, campaign rallies, town meetings, phone banks, including catering costs, door to door get-out-the-vote efforts and driving voters to the polls)
>
> 008 Transfers (e.g., to other affiliated/party committees)
>
> 009 Loans (e.g., loans made or repayments of loans received)
>
> 010 Refunds of Contributions (e.g., contribution refunds to individuals/persons, political party committees or other political committees)
>
> 011 Political Contributions (e.g., contributions to other federal committees and candidates, and donations to nonfederal candidates and committees)
>
> 012 Donations (e.g., donations to charitable or civic organizations)

FEC Form 3X Instructions, p. 13 ("Purpose of Disbursement"). *See also* https://www.fec.gov/campaign-finance-data/disbursement-category-code-descriptions/.

Notably, the FEC-prescribed reporting categories do not provide a category for "personal" disbursements. Nonetheless, the FEC regulations require that *all* disbursements be reported, and that they be reported using the FEC-prescribed reporting categories. Thus, a political committee would be required to report disbursements with a personal component, but would be required to report them under the most closely applicable FEC-prescribed reporting category. And if a disbursement had

more than one purpose—for example, personal and travel, a political committee would be required to report that disbursement as a travel expense. See FEC Form 3X Instructions, p. 13 ("Purpose of Disbursement") ("Use only one code for each itemized disbursement. In cases where the disbursement was for several purposes, . . . assign one code according to the primary purpose of the disbursement.").

Indeed, FEC guidance provides that only one of the 12 codes should be used:

> **Use only one code for each itemized disbursement. In cases where the disbursement was for several purposes, the political committee should assign one code according to the primary purpose of the disbursement.**

FEC Form 3X Instructions, p. 13 ("Purpose of Disbursement") (emphasis added).

The FEC also provides the following relevant instructions for reporting the purpose of disbursements:

> **Purpose of Disbursement**. The term "purpose" means a brief statement or description of why the disbursement was made. Examples of adequate descriptions include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses and catering costs. However, statements or descriptions such as "advance," "election day expenses," "other expenses," "expense reimbursement," "miscellaneous," "outside services," "get-out-the-vote," and "voter registration," would not meet the requirement for reporting the purpose of an expenditure.

FEC Form 3X Instructions, p. 13 ("Purpose of Disbursement"). This guidance makes quite clear that descriptions in the nature of "dinner expenses" and "travel"—similar to those alleged to be "false statements" here—are adequate and specifically-prescribed descriptions. If the items at issue fell under one of the prescribed categories, they cannot serve as the basis for a false-statement charge.

ii. The Statements Were Technically True

Even assuming the validity of the allegations for the purposes of this motion, the statements at issue were technically true irrespective of any personal component to the expenditures. They cannot, therefore, support a false-statement count. Moreover, their truth must be judged in light of the FEC's reporting guidance and its interpretive body of law governing political committees, which

indicates that the statements were, in fact, more than just technically true; they were consistent with FEC precedent.

Numerous circuits, including the the Fifth Circuit, have held that a statement that is not facially false (i.e., a literally true statement), even if it is misleading, cannot support a conviction under the false statement prong of 18 USC § 1001. *See, e.g.*, *United States v. Moses*, 94 F.3d 182, 188-189 (5th Cir. 1996) (reversing conviction under 18 U.S.C. § 1001 because defendant's response to question on application for naturalization was not false on its face despite being misleading); *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 is not 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); *but see Peterson v. United States*, 344 F.2d 419, 427-28 (5th Cir. 1965) (holding that a letter sent by a defendant containing a half truth was still a false statement because it also contained a false statement supported by corroborating evidence).

As a result, even assuming the relevant allegations in the Indictment were true, the allegations comprising **Counts 15** through **20** cannot legally be "false" statements in violation of §§ 1001 or 1519. With respect to Counts 15 and 16, the Indictment alleges that Mr. Prall made a statement characterizing expenditures to a night club as "meals and entertainment" and expenditures to a hotel as "travel." With respect to Counts 17 and 18, the Indictment alleges that Mr. Prall made a statement

characterizing expenditures to a hotel as "travel" expenses.[10] In light of the FEC guidance and rules, these statements were technically true—even if the facts are exactly as the government alleges. As a result, these counts should be stricken.

The only arguable counts—on this score, at least—are Counts 19 and 20, which allege that Mr. Prall made a statement characterizing a withdrawal as "advertising and promotion."[11] With respect to the particular arguments put forward in this subsection, such a charactrization would appear to present a factual question with respect to Counts 19 and 20 and would not require dismissal of those counts on these particular grounds (although, for reasons set forth herein, those counts should be dismissed for other, stand-alone reasons).

Moreover, absent some clear guidance as to the appropriate category to describe the payments, the category/purpose label alone cannot be grounds for criminal liability. A defendant cannot—as a matter of law—knowingly and/or willfully mislabel an expenditure when the very rules that govern the classification of that expenditure are ambiguous or do not provide for such a category. *United States v. Garber*, 607 F.2d 92, 98-99 (5th Cir. 1979) ("the uncertainty created by [existing authorities] as a matter of law precluded a demonstration of 'willfulness,' without regard to the defendant's actual state of mind with respect to his knowledge or reliance on [such authorities];" "It is settled that when the law is vague or highly debatable, a defendant actually or imputedly lacks the requisite intent to violate it.") (quoting *United States v. Critzer*, 498 F.2d 1160, 1162-63 (4th Cir. 1974)). The obligations at issue are unconstitutionally vague in this respect,[12] and to hold otherwise would violate the notice required by due process.

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[10] See Category 2, Instructions to Form 3X, defining "Travel" expenses as including "lodging."
[11] This count is with respect to a $103 expenditure. It fails to satisfy the materiality element.
[12] The concerns raised here are a large part of the reasons that the contours of vague obligations like those at issue here (with respect to reporting categories) should not be forged through criminal proceedings. *See United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979) ("the tax question was completely novel and unsettled by any clearly relevant precedent. A criminal proceeding pursuant to section 7201 is an inappropriate vehicle for pioneering interpretations of tax law.").

Indeed, due process demands notice of exactly what the law requires. *United States v. Harriss*, 347 U.S. 612, 617 (1954); *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 626 (1946). In a criminal case, that notice must come from the text of the statute and cannot be the creation of an agency or the product of judicial gloss. *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("although clarity at the requisite [civil] level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."). If anything, though, the regulatory guidance reinforces the lack of notice.

In a similar vein, a statement under the definition of § 1001 may possess more than one meaning, and it is the meaning attributed by the defendant that determines if the statement is false. *See United States v. Lozano*, 511 F.2d 1, 5 (7th Cir. 1975); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). If the alleged statement is reasonably susceptible to more than one meaning, and one such meaning is accurate, the defendant cannot be convicted under 18 U.S.C. § 1001. *Diogo*, 320 F.2d at 905; *Seymour v. United States*, 77 F.2d 577, 582-84 (8th Cir.1935). And when the government created the ambiguity relied upon by the defendant, the government will ordinarily be unable to refute the defendant's interpretation. *United States v. Race*, 632 F2d 1114, 1120 (4th Cir. 1980); *United States v. Johnson*, 937 F.2d 392, 399 (8th Cir. 1991); *United States v. Manapat*, 928 F.2d 1097, 1099-102 (11th Cir. 1991). Here, the statute, regulations, and FEC instructions have created an ambiguity with respect to reporting that renders the charges at issue in this motion unconstitutional.

iii. The Statements Were Not Material

Each of the counts also charges misstatements that, particularly when viewed against the FEC's reporting regime, were not material. For example, the allegations of a misstatement with respect to a $103 expenditure in counts 19 and 20 were not material. Section 1001(a)(2) explicitly includes a materiality element, and the Fifth Circuit has held that "materiality is an essential element

of every § 1001 violation,"*United States v. McGough*, 510 F.2d 598, 602 (5th Cir. 1975), and it is a mixed question of law/fact. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995). According to the Supreme Court:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts.

Id. at 512. Moreover, the statement "must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 509 (quoting *Kungys v. United States*, 485 U.S. 759 (1988)). Materiality is a "rigorous" and "demanding" requirement. *See Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989, 2001-04 (2016).

Here, the Indictment alleges that Mr. Prall "caus[ed] the Trump Victory political committee to falsely record in a report to the Federal Election Committee dated November 8, 2016, a *$103 cash withdrawal*, as advertising and promotions expenses of the committee . . . ." (Indict., ¶ 63) (emphasis added). This amount was *de minimis*; it was immaterial. The Indictment itself recognizes that political committees were only "required to report to the FEC . . . expenditures of $200 or more," (Indict. ¶ 6), thereby setting a *minimum* level of materiality. Given that this item fell below that threshold, it was not even required to be reported and was, therefore, immaterial to the FEC. When a defendant makes an affirmative false statement to an agency, the standard for materiality is whether the agency's decision might have changed if the defendant had made a true statement. *See, e.g., United States v. Johnson*, 530 F.2d 52, 55 (5th Cir. 1976) (asking what would have happened "[h]ad the . . . affidavit been true"). Only in a hypertechnical sense could this reported item have been capable of impacting a decision the FEC "was trying to make," particularly in light of the fact that it was not even required given that it was below $200. Indeed, FEC guidance (below) makes this abundantly clear.

Similarly, the Indictment's allegation that Mr. Prall caused "the HC4President political committee to falsely record in a report to the [FEC] . . . $460.36 in expenditures at the Omni Hotel in Dallas, Texas, as travel expenses," (Indict. ¶ 61), does not satisfy the materiality requirement. To begin with, the amount itself was immaterial. Moreover, FEC instructions specifically *require* that expenditures be classified using one of 12 categories. One such category, and the only applicable category, is "Travel Expenses," which the FEC defines as including "lodging and meal expenses incurred during travel." Instructions to FEC Form 3X. The government alleges that the expenses were incurred in Dallas, and that Mr. Prall lived in Austin, indicating the expenses were incurred during travel. (Indict. ¶¶ 2, 34). A description/statement that complied with the FEC's instruction could not be materially false, and could not have been capable, on its own, of impacting a decision the FEC "was trying to make."[13] FEC guidance (below) further underscores this conclusion.

iv. More on the Background FEC Rulings

As its regulations suggest, the FEC has never required precision in describing the purpose of an expenditure. It has declined—even in the civil context—to take action against multiple campaigns for mislabeling expenses. *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

[13] The same arguments apply with respect to allegations of false statements in counts 15 and 16.

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'").

In *Charles Boustany, Jr. MD for Congress, Inc.*, FEC MUR 6698 (Feb. 25, 2016), a candidate's committee paid for an endorsement, used a third party vendor, and misreported the purpose so as to hide the payments from the FEC. The complainant specifically alleged that the Boustany committee misreported in its FEC filings the committee's expenditures to an entity named United Ballot as a payment to another entity, Campaign Counsel, in an attempt to conceal from the public the Boustany committee's arrangement with United Ballot. *Available at* http://eqs.fec.gov/eqsdocsMUR/16044390076.pdf. The complainant alleged that the expenditure was mislabeled as "door-to-door GOTV" when it was, in fact, for mailer expenses and for the endorsement of thte United Ballot organization. The allegations specifically claimed that Boustany "disguise[ed] the $35,000 payment . . . as a disbursement made to his campaign manager and disclosing it as such to the FEC." *Available at* http://eqs.fec.gov/eqsdocsMUR/16044390081.pdf. The FEC, however, found no violation of 52 U.S.C. § 30104(b)(5)(A).

In 2013, a civil complaint was filed against the campaign committee and its treasurer for U.S. Senator Mark Kirk. *Kirk for Senate*, FEC MUR 6510 (July 16, 2013). The complaint alleged that Senator Kirk's campaign had disguised payments that ultimately went to his girlfriend for her personal expenses by routing them through a third-party vendor and then using a false statement of purpose on the campaign's FEC expenditure reports. *Id.*

The FEC focused exclusively on the issue of whether the campaign should have reported payments that ultimately went to Kirk's girlfriend. Because the Kirk campaign had accurately reported the identity of the third-party who ultimately paid Kirk's girlfriend, the FEC found no violation. *Id.* The FEC did not find any violation with respect to the reporting category or description of the

payments she received, which were for personal expenses such as yoga lessons, and other personal expenses.

The FEC's guidance has likewise blessed conduit reporting, like that allegedly at issue here. The FEC has long advised that committee treasurers need only report the name of the person or entity that campaigns pay directly. FEC Advisory Opinion 1983-25 (*Mondale for President*, 1983 WL 909270, at *2 (DCD. 91-3). In simple terms, 52 U.S.C. § 30104(b)(5)(A) requires a treasurer to report the person or entity to whom the committee makes the expenditure check payable.[14] Federal election laws "are silent with respect to any definition or description of the person to whom an expenditure is ultimately made." FEC Advisory Opinion 1983-25: *Mondale for President*. "Moreover, they do not address the concepts of ultimate payee, vendor, agent, contractor, or subcontractor in this context." *Id.* For this reason, a committee "may report its payment to Consultants as expenditures *without further itemization of payments made by Consultants to others*." *Id.* (emphasis added).

This guidance remains the law, and the FEC has declined to extend reporting requirements further through the regulatory process. *Reporting Ultimate Payees of Political Committee Disbursements*, 78 Fed. Reg. 40625-03, 40626 (July 8, 2013).

Moreover, in *Ready for Hillary PAC*, FEC MUR 6775 (Feb. 11, 2016) the FEC rejected the attempt by its own general counsel's office to impose a higher reporting burden on committees than that required by the plain language of the statute. *See, e.g.,* Statement of Reasons of Commissioner Lee E. Goodman at 4, http://eqs.fec.gov/eqsdocsMUR/16044390002.pdf (explaining that a political committee was not required to disclose an ultimate payee when payment is through a conduit).

In *Steve Russell for Congress*, FEC MUR 6894 (Oct. 29, 2015), the FEC again found that the statute only requires that the recipient of the expenditure be reported. In the *Steve Russell for Congress*

[14] The language of this statute has not changed since *Mondale* and the FEC specifically declined to extend reporting requirements any further through its regulatory processes. *See Reporting Ultimate Payees of Political Committee Disbursements*, 78 Fed. Reg. 40626 (July 8, 2013).

case, TCI, a media vendor used by the committee, purchased television air time for campaign advertisements. *Steve Russell for Congress*, FL&A FEC MUR 6894 (Oct. 29, 2015). A complaint alleged that the campaign violated FECA by disclosing a payment to TCI, rather than disclosing the purchase of the air time. *Id.* Explaining that the FECA only requires the committee to report the information of "each person to whom it makes . . . disbursements," and that "[t]he Committee disclosed payments it made directly to TCI," the FEC held that there was "no reason to believe that the Committee violated 52 U.S.C. § 30104(b)." *Id.*

There is also strong contextual support for the FEC's position within the FECA itself. For example, its provisions governing receipts expressly prohibit individuals from making campaign contributions in the name of another. 52 U.S.C. § 30122 ("No person shall make a contribution in the name of another person"). In other words, *receipt* reports must disclose "the true source of the money." *United States v. Hsia*, 176 F.3d 517, 524 (D.C. Cir. 1999). As a result, conduit *contribution* schemes are prohibited. *Id.* at 523. The omission of similar language with respect to *disbursements*, however, undercuts any theory of criminal liability based on conduit expenditure reporting. If Congress intended to prohibit conduit expenditure transactions, it knew how to do so expressly. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

In light of this FEC guidance, the reported label or recipient of the expenditures at issue cannot (constitutionally, at least) serve as the basis for a false-statement charge.

v. The Rule of Lenity Applies

Supreme Court precedent, and the Constitution, requires that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity." *United States v. Yermian*, 468 U.S. 63, 77 (1984) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)). This rule of lenity "vindicates the

fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain." *United States v. Santos*, 553 U.S. 507, 514 (2008). *Liparota v. United States,* 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

Moreover, the rule of lenity applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties imposed for particular acts. *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (citing *United States v. Batchelder*, 442 U.S. 114, 121 (1979); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978)). That principle is implicated here, where the government seeks to apply a statute that quadruples the punishment that would otherwise apply under a criminal statute that specifically targets the precise alleged conduct.

Indeed, the Supreme Court has invoked the rule of lenity specifically with respect to § 1519, one of the charges here. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("That interpretative principle is relevant here, where the Government urges a reading of § 1519 that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil."). As it held in that similar context, "[i]n determining the [scope of] § 1519, "it is appropriate, *before we choose the harsher alternative*, to require that Congress should have spoken in language that is clear and definite." *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) (citing *Cleveland,* 531 U.S., at 25 (quoting *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 222 (1952))).

The provisions under FECA govern the requirement to file expenditure reports. They impose a sentence of up to five years in prison for "knowing and willful" violations of these provisions. The government's theory, however, invokes the Sarbanes-Oxley Act (a statute that addresses spoliation of

evidence for financial crimes) and a generalized false-statement provision. The government's invocation of § 1519 quadruples the applicable punishment. The differences between these statutes, on the one hand, and the FECA statutes, on the other, leads to an underlying ambiguity with respect to the applicable penalties for the alleged acts at issue. The rule of lenity prohibits such interpretive ambiguities. *Bifulco v. United States,* 447 U.S. 381, 387 (1980) (The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."). If Congress intended the Sarbanes-Oxley Act to override FECA and quadruple the punishment for filing false expenditure reports, then Congress is required to "make that meaning clear." *Ladner v. United States*, 358 U.S. 169, 178 (1958). If Congress intended this "harsher alternative," it "should have spoken in language that is clear and definite." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015).

Moreover, there is a litany of FEC rulings governing the reporting obligations at issue in this matter that have held that reporting the payee of the expenditure (whether there is a personal component or not) is compliant with the law. *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); *Charles Boustany, Jr. MD for Congress, Inc.*, FEC MUR 6698 (Feb. 25, 2016). This background supports the application of the rule of lenity. That is particularly so here, where the FEC regulations and instructions provide for express categories to classify expenditures and do not even provide a category related to personal expenditures, rendering a defendant's reporting obligation even more ambiguous. Under these circumstances, the rule of lenity requires that the statute be construed in favor of the defendant.

Thus, in the final analysis, if the Court is not fully convinced by the arguments put forward above, the rule of lenity nonetheless requires dismissing the counts at issue.

II. Conclusion

For the reasons stated above, Mr. Prall moves the Court to dismiss counts 15-20 of the Indictment. Those counts cannot serve as a basis for prosecution where Mr. Prall did not have a legal obligation to file the reports at issue and the statements were not made directly to the FEC, nor where the statements were technically true (even assuming the government's allegations). Moreover, in light of the FEC's prior rulings and reporting regime, the rule of lenity requires that the counts be dismissed as the reporting obligations at issue were, at best, ambiguous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 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