

office violated campaign spending limits. The prosecution attempts to contort the program fraud statute to fit these facts, but its effort fails for two reasons.

First, program fraud applies only against an agent of an organization or of a government who abuses his position to steal from the organization or government, but all of the charged conduct occurred while Mr. Acevedo Vilá was a mere candidate for office and *before* he could ever have been an agent of the Commonwealth government. 18 U.S.C. § 666(a)(1)(A); *United States v. Cruzado-Laureano*, 404 F.3d 470, 483-84 (1st Cir. 2005). There is not one paragraph of the Indictment alleging that Mr. Acevedo Vilá took any action as an agent of the Commonwealth related to the alleged fraud, and numerous paragraphs that make clear he could not have. *Second*, any conduct within the charged time frame – i.e., 2005 disbursements to vendors – falls squarely within a statutory provision that makes “bona fide...expenses” not subject to the criminal prohibition. 18 U.S.C. § 666(c); *United States v. Cornier-Ortiz*, 361 F.3d 29, 33 (1st Cir. 2004) (“‘bona fide...expenses paid or reimbursed, in the usual course of business’ are exempted from the statute’s coverage”). That describes precisely the expenditures from the Voluntary Fund.¹⁸

A. As A Matter Of Law, Mr. Acevedo Vilá Was Not Acting As An Agent Of The Commonwealth When The Alleged Fraud Occurred.

“Program fraud” is a special and limited variety of fraud. Its purpose is to punish agents of federally funded governmental entities and organizations who abuse their inside positions to steal from or defraud the recipients of federal funds. *See United States v. Abu-Shawish*, 507 F.3d 550, 556 (7th Cir. 2007); *see also* S. Rep. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. The plain language of § 666 “contemplates a situation where an in-

¹⁸ Additionally, if this Court concludes that the Commonwealth holds no cognizable property interest in the disbursements made from the Voluntary Fund, *see supra* Section II.A., the program fraud count must be dismissed for the same reason, as § 666 likewise requires that the Commonwealth be deprived of property. *See* 18 U.S.C. § 666(a)(1)(A).

sider in an organization that receives federal funds has fraudulently siphoned away funds from this organization.” 507 F.3d at 556. Specifically, the statute requires that the defendant, while “being an agent” of an organization or government, 18 U.S.C. § 666(a)(1)(A), stole or defrauded property “owned by, or...under the care, custody, or control of such organization, government, or agency,” *id.* § 666(a)(1)(A)(ii); *see Cruzado-Laureano*, 404 F.3d at 483-84. As a simple grammatical matter, Congress’s use of the present participle in the phrase “being an agent” makes clear that the statute requires a direct temporal connection between the defendant’s status as an agent and the alleged unlawful conduct.¹⁹

The Indictment does not and cannot satisfy this requirement. It is undisputed that the entire campaign took place in 2004. Mr. Acevedo Vilá was entitled to \$11 million in public financing in 2004, *see* P.R. Laws Ann. tit. 16, § 3117a, and that is when all the campaign expenditures were made, *see* Certification of the Department of Treasury, Central Accounting Office, Accounts Bureau (May 13, 2008) (Ex. H), and all reimbursement forms submitted. The expenditures were made in service of Mr. Acevedo Vilá’s gubernatorial campaign, which ended on Election Day – November 2, 2004. By law, those expenditures had to be reimbursed within five days of being submitted. P.R. Laws Ann. tit. 16, § 3117(d). During that entire time, Mr. Acevedo Vilá was not an “agent” of the Voluntary Fund, the Treasury, or any relevant entity of the Commonwealth. He was acting as a *candidate* when he requested disbursements from the Voluntary

¹⁹ The legislative history explains that Congress intended to “reach thefts and bribery in situations of the types involved in” certain prior decisions, in each of which the defendants abused positions of trust as agents of the entities that received federal funds when they engaged in theft or bribery. S. Rep. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511 (citing *United States v. Del Toro*, 513 F.2d 656, 658 (2d Cir. 1975); *United States v. Mosley*, 659 F.2d 812, 816 (7th Cir. 1981); *United States v. Hinton*, 683 F.2d 195, 196 (7th Cir. 1982)); *see United States v. LaHue*, 170 F.3d 1026, 1030 (10th Cir. 1999) (“In all three cases, ...each [defendant] was charged with the responsibility for administering or spending the federal grant monies to benefit the intended beneficiaries” and for violating that trust.).

Fund to pay election expenses during 2004. The certification that he submitted in July 2003 to opt into the Voluntary Fund expressly stated that it was being submitted in his capacity as a candidate. *See* Sworn Statement Concerning the Voluntary Fund (Ex. F) (“en mi capacidad de aspiracion” [in my capacity as an aspiring candidate]). Indeed, the Indictment itself recognizes that the disbursements were made because of actions taken by Mr. Acevedo Vilá acting in his capacity as a candidate. Indictment at 37 ¶ 12 (“the Puerto Rico Treasury Department disbursed funds for all campaign expenditures and debts through the filing of periodic official and certified forms *by the candidate*” (emphasis added)). And it specifically alleges in the wire fraud counts that the very same fraud scheme involving the same \$7 million *ended* in February 2005, and depended on communications that occurred no later than October 2004. *Id.* at 38 ¶ 1, 42-45 ¶ 4.

The Indictment seeks to gloss over this fatal deficiency by asserting that between February 11, 2005 and November 2, 2005, Mr. Acevedo Vilá “obtained by fraud...approximately \$7,000,000 in money from the Voluntary Fund maintained at the Government Development Bank.” *Id.* at 46 ¶ 2. The theory appears to be that a few final disbursements to vendors may not have occurred until 2005; that, once Mr. Acevedo Vilá was sworn in as Governor on January 2, 2005, *id.* at 35 ¶ 4, he was *ipso facto* an agent of the Commonwealth with respect to those disbursements; and that conduct and disbursements from 2004 when he was not an agent of the Commonwealth can somehow be imported into 2005. But the mere fortuity that Mr. Acevedo Vilá had been sworn into office before the Voluntary Fund made its final payments to vendors is insufficient to rescue this plainly deficient charge. If indeed the Commonwealth happened to issue certain disbursements to vendors in 2005, those outlays occurred as a result of filings submitted by Acevedo Vilá and his campaign in 2004, when he was a candidate and assuredly *not* an agent of the Commonwealth. They cannot be transformed into statutory violations based upon

the timing of the Treasury Department's ministerial act of mailing checks.

As noted above, § 666 requires a connection between the defendant's status as an agent and the alleged wrongdoing – that is, an indictment must allege that the defendant committed the unlawful act while “being an agent.” *Id.* §§ 666(a)(1), (a)(1)(A); *see also Abu-Shawish*, 507 F.3d at 556. Past or future agency status is immaterial: A defendant who steals government property before he becomes an agent of that government cannot be prosecuted under § 666 any more than a defendant who steals government property years after he was an agent. The program fraud law requires that the criminal conduct be contemporaneous with agency status. For this reason, courts have rejected similar efforts to bootstrap allegedly fraudulent conduct from periods of non-agency into periods of agency. In *Abu-Shawish*, the Seventh Circuit affirmed the dismissal of a program fraud indictment, and in so doing rejected

the government's interpretation [which] would [have] require[d] a temporal leap of logic. In particular, the statute punishes an agent who fraudulently obtains property that is owned by their organization. There is no change of tense in the statute: only one time frame is contemplated. ...We see no reason to interlineate...an additional time frame into the plain text of the statute.

507 F.3d at 556 (citing *United States v. Crozado-Laureano*, 404 F.3d 470, 483-84 (1st Cir. 2005)). Here, the complete disconnect between the agency period (February to November 2005) and the period of supposed wrongdoing (before February 2005) mandates dismissal. It cannot be cured by the happenstance of any late disbursements from the Voluntary Fund, at least absent allegations of conduct by the Governor connected to those disbursements. There are none.

Because program fraud by its nature involves federal criminal oversight of state-run programs, its elements were carefully designed “[t]o differentiate between those cases to be handled in the federal system and those cases to be prosecuted in state court,” recognizing that “many such transgressions are best left to state judicial systems for prosecution, conviction, and pun-

ishment.” *United States v. Mills*, 140 F.3d 630, 634 (6th Cir. 1998). Interpreting § 666 to transform “every act of fraud...into a federal offense” would “upset[] the proper federal balance,” *Fischer v. United States*, 529 U.S. 667, 681 (2000), so it is critical that the statutory requirements be strictly adhered to and enforced. Count 22 accordingly must be dismissed.

B. Count 22 Fails Because It Concerns Expenses Paid Or Reimbursed In The Usual Course Of Business.

The program fraud allegation fails for the additional reason that it falls within an express statutory exclusion. Section 666(c) provides that the program fraud prohibition “does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.” 18 U.S.C. § 666(c). Such expenditures “are exempted from the statute’s coverage.” *Cornier-Ortiz*, 361 F.3d at 33.

In *United States v. Mills*, 140 F.3d 630 (6th Cir. 1998), which the First Circuit relied upon in *Cornier-Ortiz*, the Sixth Circuit recognized that transactions within § 666(c) are not cognizable under the statute, and it did so in circumstances that are instructive here. Defendants were county sheriffs who collected slightly less than \$4000 in kickbacks for hiring people as deputies. The government sought to rely on the deputies’ salaries to satisfy the statute’s \$5000 threshold. The Sixth Circuit affirmed the dismissal of the indictment. The indictment made no allegation that the payment of the salaries was not in the usual course of business, regardless whether some misdeed led to the deputies’ hiring in the first place; because the salaries were bona fide, § 666(c) barred their consideration. 140 F.3d at 633 (“[T]he indictment does not allege that the jobs in question were unnecessary or that the individuals who obtained those employment positions did not responsibly fulfill the duties associated with their employment.”).

Dismissal is warranted here for precisely the same reason. The disbursements from the Voluntary Fund were legitimate reimbursements of campaign expenses made in the normal

course, and the Indictment does not allege otherwise. On the contrary, the Indictment affirmatively suggests that these were routine payments made to legitimate vendors, and characterizes as “bona fide” the campaign services rendered by vendors who allegedly received off-the-book payments. Indictment at 41 ¶ 3(d) (“vendors of the Comité Aníbal....had rendered *bona fide* services”); *id.* at 41 ¶ 3(e) (“These employees and vendors also had rendered *bona fide* services.”). If these allegedly improper campaign expenses were bona fide, the expenses actually reported to and reimbursed by the Fund were *a fortiori* bona fide. There is no dispute that the reimbursement vouchers submitted to the Treasury Department were accurate statements of campaign expenses actually incurred. There was nothing unorthodox, unusual, unnecessary or in any way improper about the payment of these expenses. Even if the Indictment were correct that the statutory spending cap was exceeded and that the campaign misled the Treasury Department into believing that it had not, these bona fide payments are excluded from the statute’s reach.

IV. THE TAX CHARGES IN COUNTS 26 AND 27 ARE DEFECTIVE AND MUST BE DISMISSED.²⁰

Finally, the Indictment charges three related tax counts: Counts 26 and 27 charge that Mr. Acevedo Vilá filed false tax returns for tax years 2003 and 2004 by omitting certain expenses that were paid by his campaign or political party, and Count 25 charges a conspiracy to impede the IRS’ functions in “the ascertainment, computation, assessment, and collection of federal income taxes.” Indictment at 50 ¶ 2. The tax allegations, perhaps more than anything in the Indictment, lay bare the government’s unrestrained pursuit of the Governor. Setting aside for the moment the manifest legal errors described below that require these counts to be dismissed, it is impossible to ignore the extraordinary overreaching entailed in recasting customary expenses of the sort commonly incurred by elected officials and universally regarded as appropriate cam-

²⁰ Eneidy Coreano Salgado joins in the argument made in this section.

paign expenditures into criminal tax violations.

Consider the trips cited in the Indictment. It alleges, for instance, that the Committee “pa[id] air fare for a family trip to Miami, Florida.” *Id.* at 52 ¶ 8. This so-called “family trip” was taken to attend official Fourth of July functions in Washington, D.C. in 2003. The prosecutors know this because many of the details surrounding this trip and others were discussed and made known to the Department of Justice prior to indictment. We acknowledged there, and do so again, that the round-trip flights were routed through Miami, but that does not transform this official trip into an unofficial family trip. Similarly, the “family vacation” alleged in paragraph 6 was a trip to attend an official dinner for a Resident Commissioner staff member who was departing his staff, and the “trip for his children to China” alleged in paragraph 9 was an official congressional delegation to Taiwan (not China), that included other members of Congress. *Id.* at 52 ¶¶ 6, 9. These are official functions, and the tax laws – of course – do not treat them as income.²¹ Nor does reimbursement for expenses associated with travel by an officeholder’s wife or children give rise to taxable income in circumstances such as these, because campaign funds can be used to defray the expenses of family members when they accompany the officeholder for official purposes.²² It is hard not to conclude that the continuing misportrayal of the facts is part

²¹ Money spent by political organizations for “exempt functions” is not treated as income to a political official. 26 U.S.C. § 527(d); 26 C.F.R. § 1.527-5(a). “Exempt functions” include items “allowable as a deduction under § 162(a),” *see* 26 U.S.C. § 527(e)(2), and section 162(a) in turn permits deductions for “ordinary and necessary expenses paid or incurred...carrying on any trade or business,” *id.* § 7701(a)(26). Here, the relevant “trade or business” is campaigning for and carrying out the functions of public office. *Id.* § 7701(a)(26). In short, in-kind contributions for “exempt functions” are not taxable income, and in this context, that term includes the broad range of expenses associated with running for and exercising the duties of public office.

²² *See* 26 C.F.R. 1.527-2(c)(5)(ii); I.R.S. Tech. Adv. Mem. TR-32-60052-85, 1986 WL 377380, at *2, *5 (June 30 1986) (travel expenses for family members are for an exempt function when travel has a political purpose). Federal election law is likewise. *See* A.O. 1995-20 (Hoosiers for Tim Roemer may pay for children’s travel so that they may participate in campaign events or “remain near their parents”); A.O. 2005-09 (approving the use of campaign funds for dependent

of a deliberate effort to taint the Governor in an election year.

If the government means to allege that layovers in Florida on the way to or from Washington incrementally increased the cost of flights, the Indictment has descended into self-parody. As every air traveler knows, the price of a given flight fluctuates daily, and connecting flights are often *less* expensive. If the government intends to conduct a criminal trial over whether Mr. Acevedo Vilá intentionally deceived the tax man by failing to calculate and disclose as income the marginal price difference between non-stop flights and those with a layover, we eagerly await a jury's reaction. Such an allegation is an embarrassing waste of taxpayer resources.

Not only do the tax counts seriously overreach as a factual matter, they are legally defective on their face and must be dismissed. We begin for reasons of clarity with the substantive tax counts – Counts 26 and 27 – and then discuss the conspiracy count in Section V. The counts charging that Mr. Acevedo Vilá filed false tax returns do not adequately set forth the basis for the charges, because they do not identify or describe in any way the items or categories of income that are allegedly unreported. And even if the allegations of unreported income separately described in the conspiracy count could be incorporated into Counts 26 and 27, those counts still would have to be dismissed, because they fail to allege any material omission. Finally, even if the proper interpretation of the relevant reporting rules were subject to reasonable dispute, that very dispute would preclude the required finding of willfulness as a matter of law.

A. Counts 26 And 27 Fail To Provide Constitutionally Adequate Notice.

Standing on their own – as each count must, *see United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993) – Counts 26 and 27 fail to “‘apprise[] the defendant of what he must be prepared to meet,’” and therefore are fatally deficient. *Russell v. United States*, 369 U.S. 749, 763

children's travel when the trip is related to a Member's duties); A.O. 1997-2 (authorizing the use of campaign funds to pay the travel expenses for a Bipartisan Congressional Retreat to a resort hotel for Members, spouses, children, and congressional staff).

(1962). Rule 7(c) requires the indictment contain “a plain, concise and definite written statement of the essential facts constituting the offense charged.” The Sixth Amendment likewise mandates that the facts be alleged in sufficient detail to allow the defendant “properly to defend against the accusation.” *United States v. Tomasetta*, 429 F.2d 978, 979 (1st Cir. 1970). And under the Fifth Amendment, the government can try the defendant only on those charges on which the grand jury voted. *United States v. Santa-Manzano*, 842 F.2d 1, 2 (1st Cir. 1988).

Counts 26 and 27 of the Indictment, however, are so devoid of specifics that they fail to serve these essential constitutional purposes. To prepare any meaningful defense, it is critical to have “at least some indication of the identity” of the “conduct which the grand jury has deemed adequate to support an indictment” – here, allegedly taxable but unreported income. *United States v. Murphy*, 762 F.2d 1151, 1154 (1st Cir. 1985). “The indictment may incorporate the words of the statute to set forth the offense, but the statutory language ‘must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.’” *Yefsky*, 994 F.2d at 893. Here, the income allegedly omitted from Mr. Acevedo Vilá’s tax returns is the “core of criminality” under 26 U.S.C. § 7206, and so must be alleged in the indictment. *See Russell*, 369 U.S. at 764. Moreover, in a case alleging omissions in a tax return, an indictment is defective unless it alleges the critical facts giving rise to the duty to disclose the items that were allegedly omitted. *United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000).

Yet these counts provide no clue as to what items of income the grand jury believed Mr. Acevedo Vilá improperly failed to report on his tax returns, or why he was obligated by law to report them. They do little more than mirror the statutory language, and specify the year at issue and the total income reported on Mr. Acevedo Vilá’s tax returns. They provide no detail to

quantify or explain in what fashion the income stated on those returns was purportedly in error. The items of allegedly unreported income are not described in even general terms. Nor does the Indictment even allege an approximate amount of underreporting. Mr. Acevedo Vilá is simply left to guess at what transactions, if any, the grand jury genuinely believed amounted to a criminal default of his tax reporting obligations.²³ When, as here, “guilt depends so crucially upon... *a specific identification of fact*...an indictment must do more than simply repeat the language of the criminal statute.” *Hamling*, 418 U.S. at 118 (emphasis in original) (internal quotation marks omitted). Counts 26 and 27 utterly fail to do this, and so must be dismissed.

B. Counts 26 And 27 Do Not Allege Material Falsehoods In The Federal Return.

The only conceivable basis for the charges in Counts 26 and 27 are the categories of unreported income alleged in Count 25. Although the tax conspiracy count provides a general description of categories of allegedly unreported income, principally consisting of a political wardrobe and certain travel expenses paid for by Mr. Acevedo Vilá’s campaign committee, that count is not incorporated into Counts 26 or 27. Even if it were permissible to import those descriptions into Counts 26 and 27 – which it is not, *see Yefsky*, 994 F.2d at 894 (“each count must be sufficient without reference to other counts unless the allegations of those counts expressly are incorporated”) – they would be insufficient to sustain the false tax return counts because those categories of alleged income are simply immaterial to the federal return.

To make out a violation of 26 U.S.C. § 7206(1), the government must prove (and so an indictment must allege):

- (1) that the defendant made or caused to be made, a federal income tax return for the year in question which he verified to be true;

²³ On May 27, 2008, at the request of the defense, the prosecution produced information regarding the items of unreported income it intended to prove at trial in support of these counts. It is well-settled, however, that, to ensure protection of constitutional rights, such information cannot save an otherwise defective indictment. *See Russell*, 369 U.S. at 770; *Murphy*, 762 F.2d at 1154.

- (2) that the tax return was false as to a material matter;
- (3) that the defendant signed the return willfully and knowing it was false; and
- (4) that the return contained a written declaration that it was made under the penalty of perjury.

United States v. Pesaturo, 476 F.3d 60, 71 (1st Cir. 2007); *United States v. Boulerice*, 325 F.3d 75, 79-80 (1st Cir. 2003). The Indictment alleges that Mr. Acevedo Vilá underreported his income in his “joint United States Individual Income Tax Return for 2003 [and 2004], Form 1040.” Indictment at 54-55. There are two categories of omissions of income from the Form 1040 that are alleged to constitute material falsehoods: (1) that “on line 22 of the Form 1040,” Mr. Acevedo Vilá underreported his federal income, and (2) that he underreported his Puerto Rico income on his Puerto Rico tax returns, which were attached to the federal returns. *See id.*

Neither of these sufficiently alleges a material omission. Assuming that the items of income described in Count 25 are meant to be at issue in Counts 26 and 27, the alleged omissions from line 22 of the Form 1040 could not have been material, because none of the income at issue was federally taxable; all of it was sourced to Puerto Rico and therefore was not reportable on line 22 of the Form 1040. And any alleged omissions from the Puerto Rico returns were not material because those returns were not required to be submitted with the 1040; the income on them does not flow through to the 1040, directly or indirectly; and any understatement of income on the Puerto Rico returns could not have had any impact on Mr. Acevedo Vilá’s 1040.

1. Line 22 Of Form 1040 Was Not False Because No Income Allegedly Omitted Was Federally Taxable.

Section 7206(1) requires that the federal tax return have been “false.” Line 22 of Mr. Acevedo Vilá’s 1040 forms for 2003 and 2004 were not false, however, because none of the income Count 25 alleges Mr. Acevedo Vilá omitted properly belonged on line 22 of the 1040. All of it was sourced to Puerto Rico and as such was not federally taxable or includable as income on the 1040.

The United States tax code establishes a test for determining whether items of income received by Puerto Rico residents are federally taxable: income received by a Puerto Rico resident “shall not be included in [federal] gross income and shall be exempt from taxation under this subtitle” if (1) the “individual...is a bona fide resident of Puerto Rico during the entire taxable year,” and (2) the “income [is] derived from sources therein (except amounts received for services performed as an employee of the United States or any agency thereof).” 26 U.S.C. § 933. Simply put, a Puerto Rican resident’s Puerto-Rico-sourced income is not federally taxable, and does not appear on the federal Form 1040.

As to the first requirement, Mr. Acevedo Vilá plainly was a resident of Puerto Rico during the 2003 and 2004 tax years. He was the Resident Commissioner of the Commonwealth, which is where he maintained his principal residence and filed taxes. *See* Acevedo Vilá Tax Returns for 2003 and 2004 (attached as Exs. I, J); *see also* 26 U.S.C. § 162(a) (establishing, for purposes of certain deductions, that a Member of Congress’s home is his residence within his congressional district). Thus, the only question is whether the alleged items of income were derived from sources within Puerto Rico. They were, and therefore they were not federally taxable.

First, the Indictment alleges that Mr. Acevedo Vilá was reimbursed for certain family travel during the time he served as Resident Commissioner. *E.g.*, Indictment at 52. If these travel reimbursements were income at all, they would be sourced in Puerto Rico. Under rules governing analogous situations, when payments are not tied to the performance of services or to profit from property, the income’s source generally is the location of the payor. *See* Rev. Rul. 89-67, 1989-1 C.B. 233 (the source of payment for a scholarship or prize, where no services were performed for the payor, is the payor’s site); *see also* *Manning v. Comm’r*, 614 F.2d 815, 816 (1st Cir. 1980) (alimony is sourced by reference to the payor’s residence). Here, according

to the Indictment, the trips were paid for by Mr. Acevedo Vilá's Resident Commissioner campaign, the Popular Democratic Party ("PDP"), or "funds withdrawn from the [Lopito] account." Indictment at 52 ¶¶ 6-9. There is no dispute that all these sources were located in Puerto Rico.

The Indictment further alleges that "two account executives who worked at [Lopito] and...others connected with defendant Acevedo Vilá's gubernatorial campaign" purchased a campaign wardrobe for him "at high-end clothing stores in Puerto Rico." *Id.* at 51-52 ¶¶ 5, 4(d). As with the travel, there is no dispute that these sources were in Puerto Rico; therefore, if any income actually arose from these transactions, the income would be sourced to Puerto Rico.²⁴ At the time Mr. Acevedo Vilá allegedly received this clothing, he was the head of the PDP. He received the clothes *in Puerto Rico*, on account of his role as leader of a *Puerto Rican political party*.²⁵ Any income, therefore, like the alleged "vacations," can only have been Puerto-Rico-sourced and would not be federally taxable. None of it would have been required to be listed on line 22 of the Forms 1040, and failure to include it could not have rendered those lines false.

2. The Income On The Puerto Rico Tax Return Was Immaterial To The Federal Return.

The second allegation— that the Form 1040 was materially false by virtue of unreported

²⁴ The only other sources of unreported income identified in the Indictment are likewise clearly Puerto Rican. *See* Indictment at 52 ¶¶ 4(a), (b), (c) ("money from Store A," La Tiendita Popular, located in San Juan; "Resident Commissioner campaign account"; "Defendant Inclán Bird"); *id.* at 3 ¶ 8 (identifying Inclán Bird as working and volunteering in Puerto Rico).

²⁵ Mr. Acevedo Vilá was not an employee of the PDP, nor was he a consultant; rather he was "the leader of a group of individuals that exert their constitutional right to be associated." *See Maldonado v. State Elections Comm'n*, No. KPE2007-0853, slip op. at 7-8 (P.R. Dist. Ct. Aug. 30, 2007), *overruled in part on other grounds* (Ex. K). This association had "selected him as their standard bearer and representative before third parties." *Id.* As the Puerto Rican court determined, the "expenses incurred by the P.D.P. for the purchase of clothes for the president of the organization constitute a legitimate representation cost, carried out in the exercise of the freedom of association of its members." *Id.* at 6-7. It was the party that decided to assume these clothing expenses "in the ordinary course of their constitutional existence as a political and private association." *Id.* at 8. The prosecution is fully aware that Mr. Acevedo Vilá never requested any clothing and that these purchases were made for the PDP's own political purposes, not the Governor's personal enrichment.

income on Mr. Acevedo Vilá's *Puerto Rico* tax returns – is likewise defective. The Puerto Rico returns do not make the Form 1040s materially false in any respect, because they are separate documents that are not eligible for prosecution under § 7206, and because their substance does not flow through to the federal return in a manner that could affect federal taxation.

a. Alleged Omissions From The Puerto Rico Returns Are Not Actionable Under 26 U.S.C. § 7206.

The Indictment does not allege that it is a federal crime to falsify a Puerto Rico tax return. Instead, the alleged federal crime is submitting a materially false federal tax return, specifically Mr. Acevedo Vilá's "Form 1040." Indictment at 54. Thus, to successfully rely on alleged underreporting of income on Mr. Acevedo Vilá's *Puerto Rico* tax returns, the Indictment would need to allege, at a minimum, that Mr. Acevedo Vilá was under a legal duty to submit his Puerto Rican returns with his federal returns. It does not, and he was not.

An indictment charging material omissions from a federal tax return must allege the facts giving rise to a legal duty to report the items allegedly omitted. *United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000); *cf. United States v. Safavian*, No. 06-3139, slip op. at 11-13 (D.C. Cir. June 17, 2008) (no § 1001 violation where there was no legal duty to disclose information). *Pirro* upheld the dismissal of an indictment charging a violation of § 7206(1) based on alleged omissions from the taxpayer's return. It explained that "[a]n omission cannot amount to a false statement, which is an essential element of a section 7206(1) violation, without the crucial background fact that gives rise to the duty to disclose the fact that was omitted." 212 F.3d at 93. The Second Circuit made clear that "[o]nly the omission of facts required to be reported constitutes a material falsehood," and that, unless the indictment specifically alleges how an alleged omission was required to be reported on the federal return, it must be dismissed. *Id.*

Counts 26 and 27 fail this test. Section 7206 does not apply to every conceivable docu-

ment filed with the IRS, but only to those that are required to be filed. *See, e.g., United States v. Levy*, 533 F.2d 969, 975 (5th Cir. 1976). The Indictment alleges no statute or regulation that required the Puerto Rico returns to be reported to the IRS, or even generally that they were required to be reported, only that they were attached. Indictment at 54-55. In fact, the Puerto Rico returns were not required to be attached to, and form no part of, the federal return. *See, e.g., 2003 Instructions for Form 1116*, available at <http://www.irs.gov/pub/irs-prior/i1116--2003.pdf>. They are separate documents prepared for the benefit of a separate sovereign. Accordingly, even if his Puerto Rican tax return omitted certain items of Puerto Rican income, that omission is simply not actionable under § 7206. *Levy*, 533 F.2d at 975; *see Pirro*, 212 F.3d at 90-91.

b. Income Figures From The Puerto Rico Return Have No Material Impact On The Form 1040.

Even if the Puerto Rican returns were required to be submitted to the IRS and the Indictment had properly so alleged, the alleged omissions from those returns still could have no material impact on the Form 1040, as § 7206 requires. *Pesaturo*, 476 F.3d at 71. This is because Mr. Acevedo Vilá's Puerto Rico income was not required to be disclosed on his federal tax forms and was not subject to any federal tax.

In general, to be material, a “statement must have ‘a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.’” *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (alteration in original). In the tax context, materiality requires that “the alleged false statement at issue could have influenced or affected the IRS in carrying out the functions committed to it by law,” *United States v. DiRico*, 78 F.3d 732, 736 (1st Cir. 1996), or that the alleged false statement is “one that is likely to affect the calculation of tax due and payable,” *Boulerice*, 325 F.3d at 82 n.3. Because the items of income allegedly omitted from the Puerto Rico returns would have been exclusively sourced to and taxed

by Puerto Rico, those omissions could not have affected or influenced federal taxation.

Puerto Rico-sourced income does not flow through to the federal return. A Puerto Rico resident is not taxed on it by the United States, and it is not part of the calculation of income on which federal taxes are owed. There is no line on the Form 1040 requesting it. *See* Anibal Acevedo Vilá Form 1040 (2003 and 2004) (Exs. I, J). The only way in which Puerto Rico income could even theoretically affect the Form 1040 is through computation of a foreign tax credit. Taxes paid on Puerto Rico income can serve to *reduce* the ultimate federal income tax obligation. Mr. Acevedo Vilá claimed, as was his right, a foreign tax credit based on the amount of income taxes he actually paid to Puerto Rico. *See id.* line 44. However, in this case, any higher amount of Puerto Rico income or Puerto Rico taxes could not have resulted in any change to this tax credit, as he already received a 100% credit against his federal income. *See id.*, Forms 1116, lines 3d-3g, 7, 16-18 (Exs. I, J). In other words, if the Indictment's allegations were correct and the income figures on the Puerto Rico return were underreported, the federal Form 1040 upon which these counts are based would have been *exactly the same*. Any unreported income on the Puerto Rico return is thus wholly immaterial.

C. Counts 26 And 27 Could Not Involve Willful Conduct As A Matter Of Law.

Finally, even if the alleged items of unreported income were reportable as federal income and were material to Mr. Acevedo Vilá's tax returns, Counts 26 and 27 still would have to be dismissed because the complexity of the underlying legal questions would preclude willfulness as a matter of law. Willfulness is "'a voluntary, intentional violation of a known legal duty.'" *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Winchell*, 129 F.3d 1093, 1097 (10th Cir. 1997) (*Cheek's* definition of willfulness is the "conclusively established standard" in 26 U.S.C. § 7206(1)). Under § 7206, "neither a careless disregard whether one's actions violate the law nor gross negligence in signing a tax return will suffice." *United States v. Clai-*

borne, 765 F.2d 784, 797 (9th Cir. 1985), *abrogated on other grounds*. Rather, the defendant must fill out the return both knowing that the information is false and with the intent to violate the law. *United States v. Pomponio*, 429 U.S. 10, 11 n.2 (1976) (per curiam).

Here, regardless how the Court ultimately resolves the questions of falsity and materiality discussed above, at a minimum the issues are sufficiently unclear that they preclude willfulness as a matter of law.²⁶ “The element of willfulness *cannot obtain* in a criminal tax evasion case unless the law *clearly prohibited* the conduct alleged in the indictment.” *United States v. George*, 420 F.3d 991, 995 (9th Cir. 2005) (internal quotation marks omitted; emphases added); *see also United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979) (en banc) (“A criminal proceeding...is an inappropriate vehicle for pioneering interpretations of tax law.”). As we have demonstrated, far from “clearly prohibiting” the alleged conduct, the law does not prohibit it at all. Mr. Acevedo Vilá never imagined that these items might be considered taxable income until questions arose in 2006 regarding the PDP’s purchase of suits, and at that time he received advice confirming that those items were not taxable income. *See IRS Discl.* at 17 (Ex. L). Given the complexities of the sourcing rules and the interaction between federal and Puerto Rico tax law, and the even more specialized rules that apply to Puerto Rico’s federal officeholders, willfulness is foreclosed as a matter of law: “when the law is vague or highly debatable” – as it is here at the very worst – “a defendant – actually or imputedly – lacks the requisite intent to violate it.” *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974). “Criminal prosecution for the violation of an unclear duty itself violates the clear constitutional duty of the government to warn citizens whether particular conduct is legal or illegal.” *United States v. Mallas*, 762 F.2d

²⁶ Willfulness in the criminal tax context is susceptible to resolution as a matter of law. *Garber*, 607 F.2d at 99-100 (reversing and remanding a criminal tax conviction where the “tax question was completely novel and unsettled by any clearly relevant precedent”; discussing cases resolving willfulness as a matter of law); *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974).

361, 363 (4th Cir. 1985). Counts 26 and 27 must be dismissed.²⁷

V. COUNT 25 FAILS TO ADEQUATELY ALLEGE A CONSPIRATORIAL AGREEMENT OR UNLAWFUL PURPOSE AND MUST BE DISMISSED.²⁸

Count 25 alleges that Mr. Acevedo Vilá, Inclán Bird, and “others known and unknown” engaged in a conspiracy to evade taxes – specifically, that they violated the “defraud clause” of 18 U.S.C. § 371 by “impeding, impairing, obstructing and defeating the lawful government functions of the Treasury Department and the Internal Revenue Service in the ascertainment, assessment, and collection of federal income taxes.” Indictment at 50. Given the “broad sweep” of the statute, courts give such “*Klein* conspiracies” careful scrutiny. *See United States v. Barker Steel Co.*, 985 F.2d 1123, 1129 (1st Cir. 1993).

An indictment must set forth a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c). “[E]ach count must be sufficient without reference to other counts [and] ‘is regarded as if it was a separate indictment.’” *Yefsky*, 994 F.2d at 894. Each count must “‘fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.’” *Hamling*, 418 U.S. at 117. Moreover, each count “‘must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.’” *Id.* at 117-18; *see also United*

²⁷ If the Court denies the motion as to Counts 25-27, we respectfully request that the Court certify an immediate appeal pursuant to 28 U.S.C. § 1292(b). Resolution of these counts involves a controlling question of law about which there is a substantial ground for difference of opinion – namely, the federal taxability of certain items of allegedly unreported income. The resolution of this legal question is dispositive of Counts 25, 26 and 27, which is a significant portion of the case and, moreover, involves a subject wholly separate from the remainder of the Indictment and irrelevant to 11 of the 13 defendants. It would thus be fair and efficient to advance to trial on the remaining counts while Counts 25, 26 and 27 are reviewed on appeal.

²⁸ The following Defendants join in the argument made in this section: Eneidy Coreano Salgado and Luisa Inclán Bird.

States v. Brown, 295 F.3d 152, 154 (1st Cir. 2002) (indictment must be “specific enough to notify the defendant of the nature of the accusation against him and to appraise the court of the facts alleged”). This demand for particularity is most keen with respect to a conspiracy charge, which “depends so crucially upon...a specific identification of fact” to alert the defendant to the nature of the charge. *Hamling*, 418 U.S. at 118; *Yefsky*, 994 F.2d at 893.

A conspiracy charge under § 371 requires that the indictment (1) identify an agreement, (2) describe the unlawful objective towards which the agreement was directed, and (3) charge that the defendants committed an overt act in furtherance of the agreement. *United States v. Tarvers*, 833 F.2d 1068, 1075 (1st Cir. 1987); *see also United States v. Brandon*, 17 F.3d 409, 428 (1st Cir. 1994) (conspiracy requires “the existence of an agreement between defendant and another to commit a crime, that each defendant knew of the agreement, and that each defendant voluntarily participated in the conspiracy through conduct that was interdependent with the actions of the other conspirators”). Count 25 fails in several respects.

A. The Indictment Fails To Properly Allege An Agreement.

As an initial matter, Count 25 fails because it does not allege the existence of an agreement sufficient to support the charge. In alleging a conspiratorial agreement, it is not enough for the government simply to posit an agreement or to demonstrate agreement between only *some* of the alleged participants. Rather, “[t]he government must also establish defendants’ participation in the conspiracy with the intent to further the aims of the conspiracy.” *Brandon*, 17 F.3d at 428. Intent is personal to each defendant. *United States v. Cheatham*, 899 F.2d 747, 751-52 (8th Cir. 1990); *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir. 1972). Under § 371, the government must “allege and prove there was an *agreement* whose purpose was to *impede the IRS* (the conspiracy), and that each defendant *knowingly participated* in that conspiracy.” *United States v. Adkinson*, 158 F.3d 1147, 1154 (11th Cir. 1998).

Here, there is no meaningful allegation that Mr. Acevedo Vilá knowingly participated in any conspiracy to conceal income from the IRS. There is a boilerplate allegation that the defendants “did knowingly, willfully, and unlawfully, combine, conspire,” etc., to do so, but not one of the allegations specific to Mr. Acevedo Vilá alleges any fact to support or explain the boilerplate tracking of the statute. Every one of the allegations specific to him instead alleges either that he covered expenses or obtained income improperly, *see* Indictment at 50-52 ¶¶ 4(a), (b), (c), (d), 5-9, or that he filed false tax returns or ethics reports, *see id.* at 51, 53 ¶¶ 4(e), 13. The first category (improperly handling expenses and receiving income) allegedly involved other individuals, but it had nothing to do with impeding the IRS. The second category (filing false returns) could, but the Indictment does not allege that Mr. Acevedo Vilá agreed or conspired with anyone to do those alleged acts, much less for the purpose of impeding the IRS. And “failure to disclose income is, without more, generally insufficient to establish a *Klein* conspiracy.” *Adkinson*, 158 F.3d at 1154. Absent some factual allegation in the indictment tending to suggest that Mr. Acevedo Vilá personally agreed with another person to engage in unlawful activity for the purpose of concealing income, Count 25 is facially deficient.

The only allegation in Count 25 that suggests a conspiratorial agreement to conceal anything from anyone relates only to actions allegedly undertaken in 2006 – by other individuals, not Mr. Acevedo Vilá, and well *after* the relevant time period. The Indictment alleges that the conspiracy lasted “[f]rom in or about 2003, and continuing in or about 2006,” *see* Indictment at 50, but the only meaningful factual allegation of conspiratorial agreement is that Ms. Inclán Bird “and others” met in 2006 to discuss the PDP’s treatment of clothing purchases, *see id.* at 52-53. This agreement, however, postdates the alleged misreporting of taxes and indeed every act relevant to the supposed conspiracy. The only conduct alleged here that could even theoretically

have impeded the IRS – the filing of allegedly false tax returns – occurred in 2004 and 2005,²⁹ and so the Indictment must allege an agreement prior to that time, but it does not.

Moreover, even the supposed after-the-fact “agreement” does not relate to the conspiracy that is charged. The Indictment alleges (at 52-53 ¶¶ 10-11) that in 2006, Inclán Bird and others met and “agreed that the clothing purchases would be falsely claimed as a business expense of the Popular Democratic Party, and that the false expenses would be post-dated to include them in reports to the State Electoral Commission in 2005, even though the purchases occurred in 2003 and 2004.” The alleged discussion does not pertain to Mr. Acevedo Vilá’s taxes, but rather to whether the PDP would claim the clothing purchases “as a business expense.” *Id.* at 53 ¶ 11. Not only does this supposed agreement relate to a different issue, it is one that already has been litigated and resolved in the Puerto Rican courts. *See Maldonado v. State Elections Comm’n*, No. KPE2007-0853 (P.R. App. Ct. Mar. 31, 2008) (Ex. M). Puerto Rican courts have directly addressed the issue of the party’s failure to report the clothing, and have determined that evidence suggested that the PDP had no intent to commit fraud. *Id.* It is puzzling that this very allegation against the PDP – already determined to suffer from “lack of intent to hide the omitted expenses or to commit fraud”– should reappear as the basis of a federal conspiracy charge against individuals. In short, the sole alleged meeting of the minds in Count 25 does not relate to Mr. Acevedo Vilá, is later in time than the events related to allegedly false tax reporting, and pertains to a different objective than the one alleged.

Moreover, the allegations in Count 25 do not as a matter of law suffice to make out the sort of agreement that a *Klein* conspiracy to defeat IRS functions requires. The basic allegation

²⁹ The Indictment alleges that Mr. Acevedo Vilá’s 2003 tax returns were filed on April 6, 2003, and his 2004 tax returns on April 4, 2004. Indictment at 53 ¶ 13. This appears to be a typographical error, as his 2003 tax returns were filed in 2004, and his 2004 returns in 2005.

is that Inclán Bird and others unnamed provided Mr. Acevedo Vilá with reimbursements and clothing, Indictment at 52-53, and that Mr. Acevedo Vilá thereafter failed to report certain income, *id.* at 53. But a *Klein* conspiracy directed at the IRS requires more than under-the-table income and a tax return that fails to report it. It is not enough for one party to agree to pay another knowing that the payee did not intend to report the payment to the IRS. *See Goldberg*, 105 F.3d at 774; *United States v. Pappathanasi*, 383 F. Supp. 2d 289, 292 (D. Mass. 2005). Instead, co-conspirators must know and agree that a scheme of this sort *would* be used to evade taxes, not merely that it *could*. *Pappathanasi*, 383 F. Supp. 2d at 292.

The Indictment does not allege any such thing. There is no allegation that anyone other than Mr. Acevedo Vilá had any knowledge of his tax filings. There is no allegation that any alleged co-conspirator, including Mr. Acevedo Vilá, believed that the expenses paid, or clothing received, resulted in reportable federal income to Mr. Acevedo Vilá. There is no allegation that any party other than Mr. Acevedo Vilá filed the allegedly false tax forms. In short, the Indictment goes well beyond what the First Circuit described as the “outer bounds” of Section 371. *Goldberg*, 105 F.3d at 774-75. Indeed this conclusion follows *a fortiori* from *Goldberg*. The Indictment alleges that the conduct of Inclán Bird and others allowed Mr. Acevedo Vilá not to report certain income by providing him certain cash payments and reimbursements. This type of enabling, without more, is precisely what the *Goldberg* court deemed insufficient to make out a *Klein* conspiracy. *Id.*

B. The Indictment Fails To Allege An Unlawful Purpose.

Count 25 also fails to allege an objective that was actually unlawful. The objective of an agreement is unlawful if it is “for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.” *Dennis v. United States*, 384 U.S. 855, 861 (1966). In a *Klein* conspiracy, the fraud on the IRS must be an object of the conspiracy, not merely a

foreseeable consequence. *Goldberg*, 105 F.3d at 773; *see also Adkinson*, 158 F.3d at 1154 (under § 371, the government must “allege and prove there was an *agreement* whose purpose was to *impede the IRS* (the conspiracy), and that each defendant *knowingly participated* in that conspiracy”). As a result, the “failure to disclose income is, without more, generally insufficient to establish a *Klein* conspiracy.” *Adkinson*, 158 F.3d at 1154.

That, however, is all that Count 25 alleges. Individually and together, 16 of the 17 paragraphs and subparagraphs of Count 25 simply describe a failure to disclose income. The only exception is the rote incantation of the words of the statute in paragraph 2. Indictment at 50 ¶ 2. Indeed, the only substantive paragraph of this count that addresses IRS reporting in any way merely accuses Mr. Acevedo Vilá of having filed false returns, which is well shy of the allegations necessary for a *Klein* conspiracy. *Id.* at 53 ¶ 13. And even that paragraph is wholly duplicative of Counts 26 and 27 and fails for the same reasons. It does not adequately allege a scheme that could even theoretically have had the purpose to defraud the IRS, because – for all of the reasons set forth above – no *federally* reportable income was missing from Mr. Acevedo Vilá’s tax returns. *See supra* at IV.B. For Count 25 to be adequate, it would have had to allege that Mr. Acevedo Vilá entered into an agreement with others to engage in conduct that was specifically intended to “obstruct[] the Government’s knowledge and collection of revenue due.” *United States v. Klein*, 247 F.2d 908, 918 (2d Cir. 1957); *see also Adkinson*, 158 F.3d at 1154. The factual allegations in Count 25 do no such thing, and that count therefore should be dismissed.

CONCLUSION

For the foregoing reasons, Counts 1, 10-22, and 25-27 of the Superseding Indictment should be dismissed.

Dated: July 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bradford A. Berenson, hereby certify that on this 8th day of July, 2008, I caused the foregoing Motion of Defendant Aníbal Acevedo Vilá to Dismiss Counts 1, 10-22, and 25-27 of the Superseding Indictment and Incorporated Memorandum of Law to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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