

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANÍBAL ACEVEDO VILÁ, et al.,

Defendants.

CRIMINAL NO. 08-00036 (PJB)

**MOTION OF DEFENDANT ANÍBAL ACEVEDO VILÁ¹ TO DISMISS
COUNTS 1, 10 – 22, AND 25 – 27 OF THE SUPERSEDING INDICTMENT
AND INCORPORATED MEMORANDUM OF LAW**

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¹ With respect to counts against multiple defendants, certain other defendants join in the arguments made herein. The defendants joining each argument are identified in footnotes attached to the argument headings.

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Defendant Aníbal Acevedo Vilá, by and through undersigned counsel, moves to dismiss Counts 1, 10-22, and 25-27 of the Superseding Indictment for the reasons set forth below.²

INTRODUCTION AND SUMMARY

The Superseding Indictment returned on March 24, 2008 (the “Indictment”) represents the fruits of a lengthy and invasive investigation into the business, personal, and political affairs of Aníbal Acevedo Vilá, the sitting Governor of the Commonwealth of Puerto Rico. Investigators have picked over every aspect of Mr. Acevedo Vilá’s life, from his university transcripts to – literally – the clothes on his back. They have questioned witnesses about a hair transplant, devoted substantial resources to ascertaining whether Mr. Acevedo Vilá had plastic surgery, visited jewelry stores in search of evidence, and questioned longtime friends of Mr. Acevedo Vilá’s wife about whether they purchased a gown for Mr. Acevedo Vilá’s inauguration.

At the end of this highly touted public corruption investigation, the prosecution has brought an indictment that alleges no actual corruption. It does not claim that Mr. Acevedo Vilá took bribes, misused public resources or abused the public trust, or undertook official actions for any reason other than the public interest. In fact, the Indictment alleges virtually no personal misconduct by Mr. Acevedo Vilá, relying instead on innuendo that is largely derivative of the claimed conduct of others.³ Instead, the Indictment stretches and strains to hold the Governor criminally responsible for alleged technical violations of campaign-finance rules by his campaign, and for underreporting taxable income by failing to report as “income” campaign-related or political expenditures made on his behalf that no candidate or party leader would regard as taxable personal income. In order to level these charges, the prosecution is forced to rely on

² Defendant Acevedo Vilá requests that oral argument be held on this motion.

³ To the extent the Indictment focuses on Mr. Acevedo Vilá’s own actions, it alleges innocuous, garden-variety political activity that suggests no criminality. For example, it alleges that Mr. Acevedo Vilá solicited funds, monitored his campaign’s finances, asked his staff to contact government agencies on behalf of individuals, and did so himself. Indictment at 11-12, 20, 23-24.

novel and legally defective theories. Almost every count of the Indictment suffers from fatal defects arising from the prosecution's single-minded determination to squeeze the square peg of Mr. Acevedo Vilá's conduct into the round holes of federal criminal offenses.

1. The principal allegation concerning Mr. Acevedo Vilá is that his campaigns violated campaign finance restrictions. With respect to his race for Resident Commissioner in 2000, the Indictment alleges that the campaign collected impermissible contributions from corporations in Philadelphia and Puerto Rico and "conduit" contributions from family and staff, and failed to report them. Indictment at 6-26 (Count 1). In making these allegations, the Indictment impermissibly combines three conspiracies into one, presumably in an effort to avoid the statute of limitations, which bars prosecution of two. The time, place and conduct in each alleged conspiracy is separate, rendering Count 1 duplicitous and subject to dismissal. *See infra* Section I.

2. The same basic conduct underlies the wire fraud counts. Indictment at 38-45 (Counts 10-21). The Indictment charges that by raising contributions from "collaborators," as well as other contributions that went unreported to the Commonwealth Electoral Commission, the campaign "defrauded" the Commonwealth by receiving public financing in the gubernatorial race in 2004 without abiding by the Puerto Rico funding limits. This is an obvious overreach. Whatever such alleged conduct may be, it is not federal wire fraud. *See infra* Section II.

First, the Commonwealth was not defrauded out of any money or property for the fundamental reason that Mr. Acevedo Vilá's gubernatorial campaign was entitled to receive all of the funds that it did. The campaign qualified for participation in the public financing system and submitted bona fide vouchers for expenses that were actually incurred and were eligible for reimbursement. There is no dispute about this, and no allegation to the contrary. The consequence of failing to adhere to overall spending limits is not disqualification from participation in the

public financing system but rather liability for regulatory penalties. The Commonwealth thus had no property interest in the funds disbursed to Mr. Acevedo Vilá's campaign, but rather a regulatory interest in punishing any violations. As the Supreme Court has made clear, the absence of a property interest places this outside the scope of the federal wire fraud statute.

Second, the wire fraud counts allege no material misrepresentation. The Indictment is predicated upon supposed omissions from campaign finance reports that occurred long after the entitlement to public funding was established. And even then, the Indictment depends upon supposed omissions of campaign contributions from reports that either did not require their disclosure or were not submitted to the agency that disburses public campaign funds.

Finally, the Indictment does not satisfy the jurisdictional requirement that the communications be "in interstate...commerce." Each of the charged e-mails went from one person in Puerto Rico to another.

3. Count 22, which charges "program fraud," involves an even more tortured effort to transform alleged violations of local campaign finance law into a federal crime. It depends on the same defective theory that the campaign "defrauded" the Voluntary Fund out of public funds to which it was incontestably entitled; the principal difference is that whereas the wire fraud counts allege that the campaign defrauded the Voluntary Fund of \$7 million in 2004, Count 22 claims that the very same funds were obtained by fraud in 2005, even though no campaign expenses were incurred or submitted for reimbursement after the end of the 2004 election year.

This shift exists because the program fraud statute requires an allegation that the defendant used his status as an "agent" of a government or agency to defraud it. Mr. Acevedo Vilá could not, as a matter of law, have engaged in program fraud in 2004 before he became Governor. But it is undisputed that all campaign-related expenditures took place during the 2004 cam-

paign, and all reimbursement requests were submitted during that year. The charge that he used his office as Governor to defraud the Treasury of campaign funds that were sought in the prior year (before he became Governor) is flawed on its face. In any event, all of the charged conduct, even if it had occurred in the proper year, falls within an express statutory carve-out for “bona fide...expenses.” 18 U.S.C. § 666(c). The subject expenses were all legitimate, and the Indictment does not allege otherwise. *See infra* Section III.

4. Finally, the Indictment charges a conspiracy to evade the tax laws, along with two counts of filing false tax returns. Indictment at 49-55 (Counts 25-27). These charges are legally defective. Counts 26 and 27, which allege the filing of false tax returns, simply assert that Mr. Acevedo Vilá filed false tax returns, with *no* indication of what income allegedly went unreported. To the extent these counts are meant to be based on the conduct alleged in the Count 25 tax conspiracy, they still fail, because the type of income identified – payments by political campaigns or political parties for the leader of the party’s wardrobe or an official’s travel – are not federally taxable. Even assuming that these expenditures were made and that they could be considered taxable personal income – both highly contestable propositions – they would be sourced to Puerto Rico, reportable on Puerto Rico tax forms, and taxed only in Puerto Rico, not federally. Accordingly, Mr. Acevedo Vilá’s federal tax returns were not false at all, and they cannot have been *materially* false in any event, because no omission of Puerto Rico income could have affected federal tax administration. At a bare minimum, these complex issues at the intersection of federal and Puerto Rico tax law are sufficiently unclear to preclude willfulness as a matter of law. *See infra* Section IV. And since there were no false tax returns, there cannot have been any conspiracy to file such returns, as is alleged in Count 25. That count also fails to adequately allege the existence of an unlawful agreement. *See infra* Section V.

ARGUMENT

I. THE COUNT 1 CONSPIRACY TO VIOLATE FEDERAL ELECTION LAW IS DUPLICITOUS AND MUST BE DISMISSED.⁴

Count 1 of the Indictment charges a supposedly wide-ranging conspiracy, comprising some ten defendants, spread out over multiple years, locations, and campaigns, to violate various federal campaign finance laws. Indictment at 6-26. As a matter of law, Count 1 is defective and must be dismissed, because it improperly combines multiple distinct conspiracies, two of which are time-barred, into a single charge.

A. Count 1 Impermissibly Combines Three Separate Conspiracies.

Rule 8(a) prohibits “the joining in a single count of two or more distinct and separate offenses.” *United States v. Martinez Canas*, 595 F.2d 73, 78 (1st Cir. 1979). This rule protects critical rights: It ensures that the jury reaches a unanimous verdict on a single charge, *see United States v. D’Amico*, 496 F.3d 95, 98-99 & n.3 (1st Cir. 2007), *judgment vacated on other grounds*; *United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir. 1999); *United States v. Valerio*, 48 F.3d 58, 63 (1st Cir. 1995); it protects the defendant’s Sixth Amendment right to notice of the charges against him, and Fifth Amendment right against double jeopardy, *D’Amico*, 496 F.3d at 99 n.3; *United States v. King*, 200 F.3d 1207, 1212 (9th Cir. 1999); and, particularly relevant here, it assists accurate application of statutes of limitations, Charles Alan Wright & Andrew Leipold, 1A *Federal Practice & Procedure, Criminal* § 142 at 8-10 (4th ed. 2008). Duplicity must be raised before trial, *see United States v. Sheehy*, 541 F.2d 123, 130 (1st Cir. 1976), and it requires dismissal of offending counts. *E.g.*, *United States v. Muñoz-Franco*, 986 F. Supp. 70, 72 (D.P.R.

⁴ The following Defendants join in the argument made in this section: Edwin Colón Rodríguez, Eneidy Coreano Salgado, Luisa Inclán Bird, Cándido Negrón Mella, Ramón Velasco Escardille and Jorge Velasco Mella. Defendants Marvin I. Block and Robert M. Feldman join in Section I(A).

1997) (pre-trial dismissal of conspiracy count that alleged separate conspiracies).⁵

An indictment may not combine multiple conspiracies into a single conspiracy charge. *Kotteakos v. United States*, 328 U.S. 750, 773 (1946) (reversing conspiracy convictions where evidence demonstrated eight separate conspiracies with a single common actor). To determine whether an indictment impermissibly charges multiple conspiracies in a single count, the court must examine “the nature, design, implementation, and logistics of the illegal activity; the participants’ *modus operandi*; the relevant geography; and the scope of coconspirator involvement.” *United States v. Boylan*, 898 F.2d 230, 241 (1st Cir. 1990).⁶

The District of Puerto Rico recently dismissed a duplicitous conspiracy charge in *United States v. Muñoz-Franco*. There, the government charged two bank officers and several other defendants with a single conspiracy to defraud the bank. 986 F. Supp. at 71. The indictment identified two separate transactions, each involving the two bank officers, the same time span, and the same institution, but different co-conspirators. *Id.* at 71-72. On that basis, it charged a single conspiracy with the goals of defrauding the institution for financial gain and concealing the wrongdoing from federal agencies. Because “[t]he only element of commonality is that the two conspiracies were to defraud one same bank and both include the same bank officers,” and were otherwise distinct agreements, the court dismissed the count as duplicitous. *Id.* at 72-73; *see also United States v. Jackson*, 696 F.2d 578, 583-84 (8th Cir. 1982) (multiple arsons committed by a

⁵ *See also United States v. Rodriguez-Torres*, Cr. No. 07-302, Magistrate Judge’s Report and Recommendation at 22-25 (D.P.R. June 20, 2008) (recommending pre-trial dismissal of a conspiracy charge as duplicitous where it involved two different schemes comprising different participants, means, methods, and motives).

⁶ *See United States v. LiCausi*, 167 F.3d 36, 45 (1st Cir. 1999) (looking at “the commonality *vel non* of the nature, motive, design, implementation, and logistics of the illegal activities as well as the scope of coconspirator involvement”); *United States v. Drougas*, 748 F.2d 8, 17 (1st Cir. 1984); *United States v. Dennis*, 917 F.2d 1031, 1032-33 (7th Cir. 1990) (reversing conspiracy conviction for duplicitousness).

single “torch” did not link those responsible for individual fires into a single, overall arson conspiracy); *United States v. Marlinga*, No. 04-80372, 2005 WL 513494, at *2-4 (E.D. Mich. Feb. 28, 2005) (conspiracy count alleging receipt of illegal election contributions from different co-conspirators stated two separate conspiracies).

Count 1 similarly alleges three separate conspiracies, which are linked only by the fact that they all relate in some way to Mr. Acevedo Vilá’s campaign for Resident Commissioner. It expressly charges three different contribution schemes, each with its own distinct “Manner and Means,” *see* Indictment at 8-13, and “Overt Acts,” *id.* at 13-24.

- First, it discusses “Puerto Rico Collaborator Contributions,” an alleged conspiracy from 1999 to 2000 to solicit “collaborator” contributions from Puerto Rico businesses to cover debts owed by the Comité Acevedo Vilá Comisionado 2000, Inc. (“the Committee”) to “Company A,” which is Lopito, Ileana & Howie (“Lopito”), a media relations firm retained by the Committee. *Id.* at 8-9.
- Second, it alleges “Family and Staff Contributions,” a conspiracy in 2001 and 2002 to solicit “conduit” contributions from family members and employees of the Committee. *Id.* at 9.
- Finally, it alleges a “Philadelphia Contributions” conspiracy from 2002 to 2003 to solicit and receive conduit and corporate contributions from businesses and individuals in Philadelphia. *Id.* at 10.⁷

These three conspiracies differ in their “nature, design, implementation[,] logistics,” “*modus operandi*,” “geography” and “scope of coconspirator involvement.” *Boylan*, 898 F.2d at 241.

First, the three alleged schemes cover almost entirely distinct time periods: the first from 1999-2000, the second from 2001-2002, and the third from 2002-2003. *See Jackson*, 696 F.2d at

⁷ It should be noted that when interviewed by the FBI, Cándido Negrón Mella made clear that Mr. Acevedo Vilá knew nothing regarding the source or nature of any contributions to his campaign from Philadelphia: “Acevedo Vila never asked Negrón any questions about the campaign contributors. . . . Negrón never told Acevedo Vila that he was giving Acevedo Vila straw contributions. Acevedo Vila never asked or discussed with Negrón how Negrón was able to get so many people in the Philadelphia, Pennsylvania, and New Jersey areas involved in the campaign of a Puerto Rican politician.” 302 Discl. at 107-08 (Ex. A).

583 (no single conspiracy where underlying events occurred over the course of a year without “mutual dependence and assistance” between alleged co-conspirators); *United States v. Hardy*, 762 F. Supp. 1403, 1408-10 (D. Haw. 1991) (dismissing conspiracy count as duplicitous where two schemes involved different financial transactions, had only a single common member, and occurred at different times).

Second, the conspiracies are geographically distinct. The first two occurred at different times in Puerto Rico, while the third took place largely in Philadelphia. *Compare* Indictment at 8-9, *and id.* at 13-18, *with id.* at 18-26.

Third, the three conspiracies allege different participants. The Puerto Rico Collaborator Contributions conspiracy names Defendants Acevedo Vilá, Velasco Escardille, and Colón Rodríguez. *Id.* at 8. The Family and Staff Contributions conspiracy names Acevedo Vilá and Inclán Bird. *Id.* at 9. The Philadelphia Contributions conspiracy names Feldman, Negrón Mella, Avanzato, Block, Velasco Mella, Coreano Salgado, Acevedo Vilá, and Inclán Bird. *Id.* at 10-13. Other than Mr. Acevedo Vilá (who was named simply because he was the candidate), the conspiracies involve an almost entirely different cast of characters.⁸ But the presence of a common participant is insufficient to link otherwise distinct events into a single conspiracy. This is clear from *Kotteakos*, where the Supreme Court concluded that Congress had not intended that the government could “string together...eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one

⁸ The only other defendant named in even two of the alleged schemes is Luisa Inclán Bird, whose only purported involvement in the Philadelphia Contributions conspiracy is to have assisted the alleged conduit contributors in dealing with government agencies. Indictment at 11-12. Even this tenuous link between the conspiracies collapses upon inspection: there is no suggestion that Inclán Bird knew of the Philadelphia Contributions and no allegation that she participated in any agreement related to the Philadelphia Contributions, *see id.* at 10 ¶ f; and this allegation is surplusage that is irrelevant to the conspiracy charge and is the subject of a separate motion to strike, as well as a motion to dismiss that Defendant Inclán Bird is filing concurrently.

man participated in all.” 328 U.S. at 773. *Muñoz-Franco* holds likewise, where the involvement of the same two bank officer defendants (even coupled with the same victim and same basic goal) did not merge two conspiracies into one. 986 F. Supp. at 72-73. *Cf. Boylan*, 898 F.2d at 242 (declining to dismiss because “each of the defendants was directly connected by word and deed to all other defendants”).

Fourth, and perhaps most telling, the alleged conspiracies differ in their “nature, design, implementation, and logistics.” *Id.* at 241. By the Indictment’s own terms, they all operated differently. The Puerto Rico Collaborator Contributions conspiracy allegedly involved payments made from Puerto Rico “collaborator” businesses to Lopito in order to defray debts owed to Lopito by the Committee. Indictment at 8. The Family and Staff Contributions conspiracy, by contrast, allegedly involved different defendants soliciting a different type of contribution from wholly different individuals – specifically, “conduit” contributions solicited “from staff members at the Resident Commissioner’s Office in San Juan” “and from close family members of defendant Acevedo Vilá,” paid to the Committee, and then reimbursed. *Id.* at 9. The Philadelphia Contributions conspiracy was of another sort entirely, allegedly involving a group of Philadelphia businessmen soliciting and reimbursing conduit contributions from their employees, particularly through the use of corporate bank accounts and credit cards. *Id.* at 10.

Finally, the conspiracies do not share a common purpose to commit the same crime. To sustain a conspiracy, the government must allege that *all* members of the conspiracy shared a common criminal objective. *Drougas*, 748 F.2d at 17; *see also Dennis*, 917 F.2d at 1032 (reversing conviction where participants did not “knowingly embrace[] a shared, single criminal objective”); *Jackson*, 696 F.2d at 583. There is nothing in the Indictment to support even the inference that every participant shared a common purpose to commit the same crime. Quite the

contrary, the Indictment makes clear that each alleged conspiracy served a different purpose. The alleged purpose of the Puerto Rico Collaborator Contributions conspiracy was to cover debts owed to Lopito for work performed before and during the 2000 election. Indictment at 8-9. It was distinct from general fundraising, and had nothing to do with soliciting corporate contributions in Philadelphia. *Id.* at 13-16. The Family and Staff Contributions conspiracy was allegedly intended to raise funds to retire overall campaign debt following the 2000 election. There is no allegation that these donations were intended to repay Lopito, or to further political and business ties with Philadelphia. *Id.* at 16-18. For its part, the Philadelphia conspiracy purportedly concerned “access...and influence.” *Id.* at 11. Its Philadelphia-based members wanted to “impress defendant Acevedo Vilá, and thereby promote their business interests in Puerto Rico.” *Id.* at 18. There is no “interconnectedness” between the three alleged conspiracies, *Boylan*, 898 F.2d at 242, but merely a vague similarity at the highest level of generality – each of the conspiracies related in some fashion to raising campaign funds for Mr. Acevedo Vilá, in much the same way that each of the conspiracies in *Muñoz-Franco* related to defrauding the same bank.

Likewise, the acts and interests alleged in support of these three schemes in no way overlap, Indictment at 13-24, which is unsurprising in light of the fact that they are temporally, geographically and operationally distinct. They in no way “link[] together...as to afford a plausible basis for the inference that an agreement existed” among all the defendants to accomplish the same criminal objective. *Boylan*, 898 F.2d at 242. To create a façade of linkage, the government appends a series of boilerplate “objects” – to raise illegal contributions, to hide the illegal contributions, and to mislead government investigators, Indictment at 7-8 – cast at such a high level of abstraction that they characterize every conspiracy involving campaign finance. These asserted interests are too abstract to link these events into a single agreement to commit a specific crime.

In this regard the Indictment is on all fours with *Muñoz-Franco*. There, the government charged a single conspiracy to defraud a bank on the theory that the participants in two different schemes shared the goals of defrauding the same institution and concealing their wrongdoing. But there, as here, those goals could have linked any two efforts to defraud the same bank no matter how otherwise differentiated they were. Accordingly, because “[t]he only element of commonality [wa]s that the two conspiracies were to defraud one same bank and both include[d] the same bank officers,” the court dismissed the count as duplicative. 986 F. Supp. at 72-73. Count 1 of this Indictment fares no better.

B. Two Of The Three Conspiracies In Count 1 Are Time-Barred.

The prosecution lumped three conspiracies into one count in an effort to salvage plainly time-barred charges relating to a campaign that occurred eight years ago. This is precisely what the duplicity doctrine is designed to prohibit. *United States v. Gabriel*, 920 F. Supp. 498, 503-05 (S.D.N.Y. 1996).

To bring a timely conspiracy charge under 18 U.S.C. § 371, the government must allege that within five years of the indictment, “the conspiracy, as contemplated in the agreement as finally formulated, was still in existence...and that at least one overt act in furtherance of the conspiracy was performed after that date.” *Grunewald v. United States*, 353 U.S. 391, 396 (1957); *Doherty*, 867 F.2d at 60-61. This inquiry is limited to and governed by the allegations in the indictment. *United States v. Hitt*, 249 F.3d 1010, 1015-16 (D.C. Cir. 2001). Here, the Indictment is dated March 24, 2008, so the relevant cutoff date for chargeable conduct is March 24, 2003. Both the Family and Staff Contributions conspiracy and the Puerto Rico Collaborator Contributions conspiracy, however, were completed prior to that date and so are time-barred.

1. The Family And Staff Contributions Conspiracy Is Time-Barred.

According to the Indictment itself, the Family and Staff Contributions conspiracy ran its

course outside the limitations period. The agreement underlying that conspiracy occurred between September 2001 and December 2002. Indictment at 9; *see Grunewald*, 353 U.S. at 397 (fundamental to applying the statute of limitations “is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy”). The overt acts pertaining to this alleged conspiracy, too, are wholly outside the statute of limitations: the last FEC report is alleged to have been filed on January 31, 2003. *See* Indictment at 18.

2. The Puerto Rico Collaborator Contributions Conspiracy Is Time-Barred.

The second alleged conspiracy is likewise untimely. The gist of the allegation is that various defendants solicited contributions that were paid directly to Lopito to defray campaign-related costs incurred by that company. *Id.* at 8. Contributions were sought and made; false invoices allegedly prepared; and false FEC reports allegedly filed. *Id.* at 13-15. The agreement underlying this conspiracy, however, took place “[b]etween September 1999 and May 2000,” far outside the limitations period. *Id.* at 8. And the conspiracy was complete when the last alleged contribution was made on July 28, 2000, *id.* at 15, and certainly no later than the filing of the last-referenced FEC report on January 31, 2003, *see id.* at 16.

Forty of the 41 overt acts alleged in connection with the Puerto Rico Collaborator Contributions conspiracy occurred outside of the limitations period. Indictment at 13-16, 33-34 (alleging acts between September 1999 and January 2003). The sole exception is an alleged effort by defendants Ramón Velasco Escardille and Edwin Colón Rodríguez – charged in Count 8 and incorporated into Count 1 by reference, *id.* at 13 – to conceal “that a sizeable portion of the debt owed to Company A had not been reported to the FEC and was not yet paid off in full, and that portions of that unreported debt which had been paid” were paid in violation of FECA. *Id.* at 33.

But this overt act cannot save the Puerto Rico Collaborator Contributions conspiracy. Even leaving aside that this alleged act occurred long after all the other overt acts alleged in support of this conspiracy, this allegation involves a supposed effort to conceal information that is unrelated to the conduct otherwise alleged in Count 1.

As noted above, the general purpose of the alleged conspiracies was to “solicit and receive illegal contributions for the candidacy of defendant Acevedo Vilá.” Indictment at 7 ¶ 2. The Puerto Rico Collaborator Contributions conspiracy allegedly did so by having contributors directly reimburse Lopito for debts owed by the Committee without reporting these contributions to the FEC or to the Puerto Rico Voluntary Fund. The supposed act of concealment in Count 8, however, concerns a separate FEC investigation that occurred after the last FEC report supposedly omitting the direct reimbursements to Lopito, which concerned the wholly distinct question whether Lopito *itself* made an inappropriate contribution to the Committee.

In 2003, during the period when the allegedly false statements were made, the FEC was investigating whether Lopito had improperly extended credit to the Committee or was too lax in recouping its fees.⁹ To address the FEC’s concerns, the Committee submitted affidavits from Velasco Escardille and Colón Rodríguez, both dated April 4, 2003, concerning the Committee’s intent to repay Lopito. *See* Exs. D, E. Those affidavits are the source of the alleged false statements in Count 8. Given the focus of the FEC investigation, both affidavits addressed Lopito’s efforts to collect debts from the Committee, and the Committee’s negotiations with Lopito about those collection efforts. *See, e.g., id.* Neither affidavit addressed whether collaborator contribu-

⁹ Indictment at 32-33; *see also* FEC General Counsel’s Second Report #2 (G-FEC-003164-82) (explaining the history of the FEC’s two investigations into the 1999-2000 election and recommending that the FEC find no cause to proceed) (Ex. B); Letter of April 8, 2003 from Johanna Emmanuelli Huertas to Kathleen Dutt (“The only charge pending ... before this Commission is whether the Campaign received an illegal campaign contribution from Lopito....”) (Ex. C).

tions were made to Lopito or whether other portions of the debt owed to Lopito had been defrayed in improper ways. There would have been no reason for the affidavits to address these topics given the nature of the FEC's inquiry. Simply put: the FEC investigation of whether Lopito itself made an impermissible corporate contribution to the Committee was not relevant to the conduct underlying the conspiracy in Count 1, and Count 8 attempts to bridge the gap by charging the alleged omission of unrelated information there was no duty or reason to include. *See* Indictment at 33.

This alleged overt act does not rescue the time-barred allegations relating to the Puerto Rico Collaborator Conspiracy. First, it fails to do so because the alleged omission was immaterial to the FEC's investigation. *United States v. Davis*, 533 F.2d 921, 928 (5th Cir. 1976) (failure to correct a prior misstatement did not qualify as a further overt act in support of an otherwise time-barred conspiracy); *see also United States v. Safavian*, No. 06-3139, slip op. at 11-13 (D.C. Cir. June 17, 2008) (no § 1001 violation absent a legal duty to disclose material information). Were the rule otherwise – *i.e.*, that any omission, regardless of any legal duty to disclose, is an overt act in furtherance of a conspiracy – then an alleged co-conspirator's every waking minute could qualify as an overt act. The proper rule is that there must be an overt act of concealment; the mere passive failure to disclose something which there is no clear legal duty to disclose cannot possibly satisfy that requirement.

In addition, these affidavits do not save the Puerto Rico Collaborator Conspiracy because that alleged conspiracy did not embrace an agreement to conceal it beyond the reasonably foreseeable omission of the collaborator contributions from the listed FEC reports. For more than 50 years the Supreme Court has cautioned that the existence of a conspiracy to conceal cannot be inferred merely from the fact of after-the-fact concealment. *Grunewald*, 353 U.S. at 402 (“Acts

of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.”); *Lutwak v. United States*, 344 U.S. 604, 616-17 (1953); *Krulewitch v. United States*, 336 U.S. 440, 442 (1949). Moreover, such subsequent concealment efforts cannot extend the existence of the conspiracy or the running of the statute of limitations. *Grunewald*, 353 U.S. at 399. A contrary rule would permit an expanded conspiracy to be implied based on “elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment.” *Id.* at 404. “Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. Continuity of action to produce the unlawful result, or...‘continuous cooperation of the conspirators to keep it up’ is necessary.” *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (citations omitted). Thus, the First Circuit has repeatedly and properly recognized that counting every subsequent event that flows from a conspiracy “‘would for all practical purposes wipe out the statute of limitations.’” *Doherty*, 867 F.2d at 62; *see also United States v. Goldberg*, 105 F.3d 770, 774 (1st Cir. 1997) (“mere collateral effects of jointly agreed-to activity, even if generally foreseeable, are not mechanically to be treated as an object of the conspiracy”). Accordingly, courts repeatedly have rejected efforts to incorporate acts of concealment into the conspiratorial agreement alleged.¹⁰

This is a textbook example of that impermissible approach. Although the Indictment might be fairly construed to charge that the initial alleged conspiracy to repay Lopito through collaborator companies in Puerto Rico embraced concealing such contributions from the FEC in campaign finance reports, it cannot be fairly construed to sweep into the original conspiracy an

¹⁰ *E.g.*, *United States v. Gordon*, 844 F.2d 1397, 1400-01 (9th Cir. 1988); *Gabriel*, 920 F. Supp. at 503-05; *United States v. Tormos Vega*, No. 88-4673, 1989 WL 61647, at *1-2 (D.P.R. May 30, 1989).

agreement to omit information about this activity in an unrelated investigation into whether Lopito itself had been too lax in collecting its bills. There is nothing in the Indictment to distinguish the supposed “trick, scheme and device” charged in Count 8 from any run-of-the-mill *post hoc* effort at concealment, nor any indication that the original conspiracy continued to exist into the limitations period. *Grunewald*, 353 U.S. at 396-97; *Doherty*, 867 F.2d at 60-61. By the Indictment’s own terms, the last of the purportedly unlawful contributions was received in July 2000. Indictment at 15. Every FEC report covering the relevant period would have been submitted by the beginning of 2001, *see id.* at 16, and the last FEC report restating those contributions was filed on January 31, 2003, *id.* Even if each such filing could be counted as an overt act, there is nothing in the Indictment to indicate that the conspiracy to garner contributions to pay off Lopito continued past the submission of the final FEC report.

II. THE WIRE FRAUD COUNTS ARE DEFECTIVE AND MUST BE DISMISSED.¹¹

The Indictment’s second major set of allegations against Mr. Acevedo Vilá is that he and others violated the federal wire fraud statute, 18 U.S.C. § 1343, by evading Puerto Rican campaign finance restrictions during the 2004 gubernatorial race. In doing so, the prosecution claims, he “defrauded” the Puerto Rico Treasury and the State Electoral Commission of the funds that his 2004 gubernatorial campaign received from the Commonwealth’s Voluntary Fund for publicly financing elections. *See* Indictment at 38-45 (Counts 10-21). Leaving aside the question what possible federal interest there could be in regulatory violations of Puerto Rico law relating to local elections, these charges are legally infirm for three independent reasons.

First, the Puerto Rico Treasury maintained only a regulatory not a “money or property” interest in the Voluntary Fund at the time of the alleged offense. Evasion of Puerto Rico cam-

¹¹ The following Defendants join in the argument made in this section: Ricardo Colón Padilla, Eneidy Coreano Salgado, José González Freyre, Luisa Inclán Bird, Miguel Nazario Franco, Ramón Velasco Escardille, and Jorge Velasco Mella.

campaign finance limits might have rendered the campaign subject to penalties, but it did not disentitle the campaign's vendors from receiving reimbursements from the Voluntary Fund. *Second*, the alleged scheme involved no misrepresentations that could have been material to the Voluntary Fund's expense reimbursement decisions. Unlike the reports to the State Electoral Commission, the reports to the Treasury Department list only particular expenses being submitted for reimbursement and do not require a statement of campaign debts and expenses nor contributions received. And the reports submitted to the Electoral Commission play no part in Voluntary Fund reimbursement decisions. *Third*, the Indictment fails to satisfy the jurisdictional requirement that the underlying communications occur "in interstate...commerce." 18 U.S.C. § 1343. For each of these reasons, these counts must be dismissed.

A. The Scheme Alleged In Counts 10 To 21 Implicates Only A Regulatory Interest Of The Commonwealth, Not A Property Interest.

The federal wire fraud statute requires the existence of a "scheme or artifice to defraud... by means of false or fraudulent pretenses." 18 U.S.C. § 1343. Like the mail fraud statute, it "protects property rights only." *Cleveland v. United States*, 531 U.S. 12, 19 (2000). That is equally true with respect to governmental entities: "the [wire] fraud statute...had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to *the Government's interests as property holder*." *Id.* at 26. Here, however, that basic requirement is unmet, because the Puerto Rico Treasury retained no property interest in Voluntary Fund monies allocated to reimburse Mr. Acevedo Vilá's legitimate campaign expenses. After those funds were allocated, the Commonwealth's interest was regulatory only: ensuring compliance with Puerto Rico election law and punishing violations.

Candidates opt into Puerto Rico's public-financing system for elections by submitting a sworn certification. P.R. Laws Ann. tit. 16, § 3117. The certification irrevocably establishes the

candidate's participation in the public-financing system for that election. *Id.* ("Once said certification is filed, the option to avail themselves of the benefits of the Voluntary Fund shall be final and binding and may not be revoked for that specific general election.").¹² Gubernatorial candidates participating in the public financing system may receive up to \$7 million in public funds: a "basic appropriation" of \$3 million, plus up to \$4 million in matching funds. *Id.* § 3117(c). Eleven million dollars therefore is the overall limit on campaign expenditures. *Id.* § 3117a.

The system is administered through specially designated accounts, which collectively are known as "the Voluntary Fund." *Id.* § 3117(a). Separate accounts are established for each candidate, where the candidate's own funds as well as the \$7 million in public financing are deposited. *See id.* § 3117(b). When a candidate incurs campaign-related expenditures, his campaign submits reimbursement requests to the Department of Treasury, which disburses the requested funds from the Voluntary Fund directly to campaign vendors. *Id.* § 3117(e).

If a campaign exceeds the spending cap, the law does not disqualify the candidate from receiving public funds or allow recoupment of funds that were disbursed to the campaign's account or its vendors. Instead, Puerto Rico enforces the spending limits through regulatory penalties: "Any political party [or] candidate for governor...that exceeds the limits provided in this section shall be subject to a civil penalty and the procedures provided in § 3109 of this title." *Id.* § 3117a. Section 3109, in turn, provides for penalties "equal to two (2) times the sum in excess of the limits," and authorizes the Electoral Commission "to obtain compliance of the payment of the civil penalty established herein" and to seek judicial intervention "to stop the continued violation of this subtitle." *Id.* § 3109.

¹² All citations to Puerto Rico statutes rely upon the English translation prepared by Michie's reporter, which is available at <http://www.michie.com/puertorico/lpext.dll?f=templates&fn=main-h.htm&cp=prcode>.

Thus, civil fines and injunctive relief are the authorized penalties for violating spending limits.¹³ Nothing in the Electoral Code authorizes the Electoral Commission to claw back money that already was deposited into a candidate's account, nor does it provide that payments cease because a party or candidate has violated the spending cap. This system of regulatory enforcement is inherent in the design of Puerto Rico's public financing system: because it is a campaign's vendor and not the campaign itself that is reimbursed by the Voluntary Fund, withholding Voluntary Fund disbursements for violation of the spending caps would punish a campaign's third-party vendors, not the offending campaign. *See id.* § 3117(d) (requiring the Secretary of the Treasury to reimburse vendors within five days of receiving a reimbursement request).

The crux of the wire fraud charges is that from January 2004 through February 2005, certain defendants (including Mr. Acevedo Vilá) undertook various efforts to surreptitiously exceed the \$11 million spending cap – specifically, by having “collaborators” make payments directly to vendors, and by otherwise raising and spending money that was not reported to the Puerto Rico Treasury. The alleged object of this scheme was “to obtain public campaign financing from the Puerto Rico Treasury Department in the approximate amount of \$7,000,000 by circumventing certain legal requirements required by the Commonwealth of Puerto Rico’s public campaign financing laws.” Indictment at 38-39 ¶ 2.

At the time of the alleged conduct, however, the campaign was already entitled to those funds and was subject only to the enforcement sanctions provided by law for violating spending limits. But the federal criminal prohibitions against fraud “protect[] only the government’s inter-

¹³ In certain circumstances, Commonwealth courts are also authorized to impose criminal fines and/or imprisonment for failure to abide by statutory expenditure limits. *See, e.g.*, P.R. Laws Ann. tit. 16, § 3354 (authorizing sentence of up to six months’ imprisonment and/or \$500 fine for knowing and fraudulent violation of or willful failure to comply with electoral laws); *id.* § 3366 (authorizing sentence of up to six months’ imprisonment and/or \$500 fine for making, soliciting, or receiving payment for excess campaign information media expenses).

est as a property-holder, *excluding protection of a governmental entity in its capacity as a regulator.*” *McEvoy*, 904 F.2d at 793 (emphasis added) (internal quotation marks omitted). Here, that is the only capacity in which the Commonwealth of Puerto Rico could have been affected by the alleged scheme. The campaign’s entitlement to the funds deposited on its behalf in the Voluntary Fund was established – irrevocably – when Mr. Acevedo Vilá submitted the certification. P.R. Laws Ann. tit. 16, § 3117. That occurred in August 2003 – almost *six months before* any fraudulent act is alleged to have occurred. *See* Indictment at 37 ¶ 14, 38 ¶ 1; July 24, 2003 Sworn Statement Concerning the Voluntary Fund for the Financing of Electoral Campaigns (Ex. F). There is no allegation that the affidavit was not properly filed and submitted, nor does the Indictment allege that there was anything false or fraudulent about the certification itself. *E.g.*, Indictment at 37 ¶ 14.

At that point, the campaign was entitled to the monies in the Voluntary Fund insofar as it submitted valid vouchers for the expenses incurred, which Mr. Acevedo Vilá’s campaign did, for the full amount. The vouchers are simple government forms that merely require a listing of individual expenses for which reimbursement is sought and a certification that the services were actually received, that the transaction followed the required procedures, and that payment had not previously been approved by the campaign itself. *See* Form SC 735.3 (Political Parties) (Ex. G). There is no allegation that any of the forms submitted by Mr. Acevedo Vilá’s campaign were false or fraudulent in any way. Each listed bona fide expenses actually incurred, and requested reimbursement on behalf of real vendors who had provided real goods or services to the campaign. Under these circumstances, Puerto Rico law required payment from the Voluntary Fund; withholding payment was not a legally available option. P.R. Laws Ann. tit. 16, § 3117(d) (“the Secretary of the Treasury shall make the corresponding disbursements charged to [the Voluntary

Fund] no later than the fifth business day from having submitted the request for funds with the necessary documents for its processing”). The Treasury had no protectable property interest in those funds. Its interest was instead regulatory: enforcing the law by punishing violations.

This issue is controlled by *Cleveland v. United States*, 531 U.S. 12 (2000). In *Cleveland*, the Supreme Court held unanimously that a scheme to obtain a state video poker license through a false license application fell outside the federal mail fraud statute, because the state’s “core concern is *regulatory*” with respect to the licenses. *Id.* at 20. Although business licenses can, in the hands of the holder, constitute a valuable form of property, *see id.* at 25 (“we do not here question that video poker licensees may have property interests in their licenses”), the Court analyzed the state’s interest based on the terms of state law governing those licenses. It concluded that licenses were issued for the purpose of ensuring that video poker establishments were kept free of criminal elements; that the licenses were part of a regulatory regime that detailed suitability requirements for licenses; and that the state enforced these requirements through regulatory sanctions and fines. *Id.* at 21. Accordingly, the state’s interest in the licenses involved its governmental power to control who held them and how they were allocated, which is a regulatory rather than property interest. *Id.* at 23 (“intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana’s sovereign power to regulate”).

Puerto Rico’s interest in the Voluntary Fund is of precisely the same character. After Mr. Acevedo Vilá’s campaign qualified for participation in the Voluntary Fund, the Treasury retained no property interest in funds set aside to pay legitimate campaign expenses submitted to it. If the campaign exceeded the spending limit and concealed that fact from the Treasury, the recourse under Puerto Rico law would be enforcement through penalties and injunctive relief. P.R. Laws Ann. tit. 16, §§ 3109, 3117; *cf. also id.* §§ 3007(o), 3354, 3361, 3366-68. Such enforce-

ment action is an exercise of “distinctly sovereign authority” and “amount[s] to no more and no less than [the Commonwealth’s] sovereign power to regulate.” *Cleveland*, 531 U.S. at 23. To be sure, Puerto Rico has an important interest in properly disbursing funds and ensuring that campaigns follow the rules, but this is the same “right of control” that the Supreme Court held in *Cleveland* “does not create a property interest” and is a “paradigmatic exercise[] of the States’ traditional police powers.” *Id.* Because the scheme alleged in Counts 10-21 was directed at a “typical regulatory program,” it falls outside the scope of the federal wire fraud statute. *Id.* at 21.

B. The Scheme Alleged In Counts 10 To 21 Involved No Misrepresentations Material To Voluntary Fund Disbursements.

For related reasons, the wire fraud counts must be dismissed for lack of materiality. Even if the Treasury Department had the requisite property interest in the funds distributed to campaign vendors, the alleged scheme involved no misrepresentation that could have been material to those distributions.

The federal wire fraud statute requires that the scheme to defraud be executed through “false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1343. These misrepresentations must be material. *Neder v. United States*, 527 U.S. 1, 25 (1999). The Indictment’s theory is that defendants made material omissions by “caus[ing] individuals to pay for the campaign debts and expenses of Comité Anibal...in a manner that avoided the disclosure of those payments in reports required to be filed with the State Electoral Commission and the Puerto Rico Treasury Department.” Indictment at 39 ¶ 3a. To be material, any omissions must have had a tendency to influence the Voluntary Fund’s disbursement decisions. Here, as a matter of law, none could have. That is because the omissions on which these charges rest were made in documents that either played no role in securing disbursements from the Voluntary Fund, or that imposed no duty on the campaign to make a complete accounting of campaign expenditure.

The reports submitted to the Electoral Commission must contain a “complete and detailed accounting of every” campaign contribution received and expense incurred that has not been charged to the Electoral Fund (a fund for political parties that is distinct from the Voluntary Fund related to electoral campaigns). P.R. Laws Ann. tit. 16, § 3111. Such reports are submitted quarterly to the Electoral Auditor’s Office, which is adjoined to Puerto Rico’s Electoral Commission. *Id.* § 3035. But these reports play no role in disbursements from the Voluntary Fund, which is the alleged object of the wire fraud scheme. *See* Indictment at 38-39 ¶ 2. They are not filed with the Puerto Rico Department of the Treasury, and they are not part of the statutory or administrative process by which the Treasury pays vendors from the Voluntary Fund. Although omissions from these reports might violate legal duties under Puerto Rico law, they have no possible impact on disbursements from the Voluntary Fund. For this reason, they cannot be material to the scheme alleged in Counts 10-21, whose object was “to obtain public campaign financing from the Puerto Rico Treasury Department in the approximate amount of \$7,000,000.” *Id.*

The only reports that even theoretically could contain misrepresentations material to the scheme alleged here are the expense vouchers submitted to the Treasury Department. Campaigns that participate in the public financing system file requests with the Treasury that seek reimbursement for individual expenses incurred. These requests are made via simple voucher forms. *See* Form SC 735.3 (Political Parties) (Ex. G). With respect to expenses for which payment is sought, the form requires the vendor’s name, the services rendered and the amount due, together with a certification that the goods or services were received or rendered according to the established procedures and without other payment having been made. Neither the electoral law nor the form requires that the vouchers list all contributions and expenditures. As a result, no omission from such forms could ever be material to disbursements from the Voluntary Fund;

only affirmative misrepresentations with respect to particular claimed expenditures could. This case involves no such allegation: the Indictment does not allege that any payment request filed with the Treasury Department was false or otherwise improper, and none was.

C. The Indictment Fails To Allege Wire Communications In Interstate Commerce.

Counts 10 through 21 also must be dismissed because as a matter of law, the charged wire communications did not travel “in interstate...commerce.” 18 U.S.C. § 1343. Each of the emails upon which the Indictment is predicated was sent from one Puerto Rico resident to another. Indictment at 42-45. Courts repeatedly have recognized, however, that communications within a single state do not satisfy the statute’s jurisdictional requirement.

In *Hernandez v. Ballesteros*, the District of Puerto Rico held that a plaintiff had failed to sufficiently allege wire fraud as a predicate act for civil RICO. Because the plaintiff resided in Puerto Rico, and the defendants’ principal place of business was in Puerto Rico, “the only reasonable inference that can be made is that all their telephone conversations took place in Puerto Rico.” 333 F. Supp. 2d 6, 12 (D.P.R. 2004), *aff’d*, 449 F.3d 240 (1st Cir. 2006); *see also Efron v. Embassy Suites (Puerto Rico), Inc.*, 47 F. Supp. 2d 200, 205 (D.P.R. 1999) (“Because plaintiff has not alleged that any of the facsimile transmissions went outside of Puerto Rico, the allegations concern only intrastate telephone communications unreachable by the statute.”). Simply put: “The federal wire fraud statute does not cover telephone communications between persons within the same state.” *McCoy v. Goldberg*, 748 F. Supp. 146, 154 (S.D.N.Y. 1990).¹⁴

¹⁴ *See also DeFazio v. Wallis*, 500 F. Supp. 2d 197, 204 (E.D.N.Y. 2007) (telephone calls between New York residents insufficient to establish wire fraud as a RICO predicate act); *Utz v. Correa*, 631 F. Supp. 592, 595-96 (S.D.N.Y. 1986) (inferring that all telephone calls occurred within New York City based on parties’ office and residential locations: “All the telephone calls, consequently, were *intrastate* in nature, while the predicate act of wire fraud requires an interstate telephone call.... Such communications are insufficient to constitute a violation of the wire fraud statute.”); *Harris Trust & Savings Bank v. Ellis*, 609 F. Supp. 1118, 1122 (N.D. Ill. 1985)

The statute’s jurisdictional requirement was meant to have teeth. Other federal statutes – such as the mail fraud statute – contain broad jurisdictional elements that are satisfied by the mere use of a *facility of* interstate commerce, such as the U.S. mail or commercial delivery services. *Cf., e.g.*, 18 U.S.C. § 1341 (depositing “any matter or thing whatever to be sent or delivered by the Postal Service, or...any private or commercial interstate carrier”); *id.* § 1958 (use of “any facility of interstate commerce”). By contrast, the wire fraud statute covers only fraudulent schemes that involve communications transmitted “by means of wire, ...*in* interstate ...commerce.” 18 U.S.C. § 1343 (emphasis added). This distinctly different language carries a distinctly different meaning. Congress has repeatedly rejected proposals to expand § 1343 to cover any use of a *facility of* interstate commerce, regardless whether the communication actually traveled beyond state lines. *United States v. Phillips*, 376 F. Supp. 2d 6, 8 (D. Mass. 2005). “Congress is aware of the distinction between legislation limited to activities ‘in commerce’ and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.” *Scarborough v. United States*, 431 U.S. 563, 571 (1977). Section 1343 thus requires more than mere use of an interstate communications facility, *Phillips*, 376 F. Supp. 2d at 8; it requires that the communication itself traveled in interstate commerce. To hold that this requirement is satisfied by an email from one Puerto Rico resident to another – residents who might be ten steps apart in the same office suite – would rob Congress’s chosen words of all meaning. It would effectively adopt the very rule Congress rejected: it would mean that the mere act of sending an email satisfies the jurisdictional prerequisite.

This would effect a sweeping change in the federalism balance Congress chose when it used the words it did in § 1343. Courts are understandably reluctant to interpret the jurisdic-

(“The amended complaint fails to allege any use of interstate wires, and given the Illinois residence of all the parties it would not be reasonable to infer that any such use occurred.”).

tional requirements of federal criminal statutes to inject federal authority into intrastate matters. In the context of interpreting the federal murder-for-hire statute, which contains *broader* “facility of...interstate commerce” jurisdictional language, the district court in *United States v. Paredes* rejected a broad interpretation of the jurisdictional element, and recognized precisely the problems that would result if allegations like the ones here were held to suffice:

It is very likely that in the near future all electronic forms of communication will be transmitted across state lines regardless of the location of the communicating parties. As the original role of federal criminal jurisdiction was intended to be limited in nature, it is troubling to permit technological innovation to significantly expand its scope without a specific expression of Congressional intent.... *Under the government’s theory, an email sent from the kitchen to the office down the road might implicate federal jurisdiction simply because the electronic message was transmitted from a computer in New York to a computer in New Jersey before reaching its final destination. After Lopez, the government’s theory seems a slender reed upon which to rest the exercise of federal jurisdiction over defendant’s alleged conduct.*

950 F. Supp. 584, 589 (S.D.N.Y. 1996) (emphasis added; footnote omitted)).¹⁵ For these reasons, the Supreme Court has declined to interpret federal criminal law to federalize broad swaths of conduct in the absence of clear congressional intent. *See Cleveland*, 531 U.S. at 24-25 (“We resist the Government’s reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.... As we reiterated last Term, ‘unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance’ in the prosecution of crimes.”).¹⁶

¹⁵ The Second Circuit in *United States v. Perez*, 414 F.3d 302, 304 (2d Cir. 2005), noted the existence of a circuit split on this issue and declined to follow *Paredes*, in part because § 1958 (unlike § 1343) at that time used both phrases “facility of interstate commerce” and “facility in interstate commerce.”

¹⁶ *United States v. Ratcliff*, 488 F.3d 639, 648 (5th Cir. 2007); *United States v. Turner*, 465 F.3d 667, 683 (6th Cir. 2006); *see also United States v. Ratcliff*, 381 F. Supp. 2d 537, 550-51 (M.D. La. 2005) (dismissing mail fraud charges: “The undersigned is cognizant of the federal government’s interest in eliminating political corruption; however, this court will not partake in what has been described by other courts as the federalizing of garden-variety state crimes.”).

Such an interpretation would, moreover, create serious problems of notice. Email correspondents and phone callers have no knowledge of, much less control over, the routing of their intrastate communications. Transmission patterns vary based on network service provider and traffic volume, among other factors. To interpret the statute’s jurisdictional requirement as varying based on the fortuitous and often unreconstructable routing of data packets in emails, rather than the parties’ location, would foreclose meaningful notice. *Paredes*, 950 F. Supp. at 589 n.8 (“[T]he manner in which the communication facility operates does not determine the outcome. In evaluating the assertion of federal jurisdiction, the focus should be on the location of the communicating parties.”); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (“We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction. The Due Process Clause exists, in part, to give ‘a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’”). This problem of notice in turn implicates the rule of lenity, which likewise argues against any such broad construction. *See generally United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (noting “the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed”).

III. THE PROGRAM FRAUD CHARGE IS DEFECTIVE AND MUST BE DISMISSED.¹⁷

Count 22 is a shell game. The program fraud statute, 18 U.S.C. § 666(a)(1)(A), is meant to protect federal grant dollars by criminalizing fraud perpetrated against public-sector grant recipients by insiders. It has no application to an allegation like the one here: that a candidate for

¹⁷ The following Defendants join in the argument made in this section: Ricardo Colón Padilla,, Eneidy Coreano Salgado, Luisa Inclán Bird, and Miguel Nazario Franco.