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

United States of America, Plaintiff, v. [1] María Milagros Charbonier-Laureano, Defendant.	Crim. No. 20-248 (DRD)

MOTION TO DISMISS COUNTS
TWO AND THREE (SECTION 666 COUNTS)

TO THE HONORABLE COURT:

COMES NOW, defendant María Milagros Charbonier-Laureano (Mrs. Charbonier), through the undersigned attorneys, and pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, respectfully requests the dismissal of Counts Two and Three, charging violations of Section 666, for lack of subject-matter jurisdiction and failure to state an offense.[1] Pursuant to Local Rule 7(f), Mrs. Charbonier requests oral argument on this motion.

I. INTRODUCTION

Counts Two and Three of the Indictment charge Mrs. Charbonier with violations of 18 U.S.C. § 666, commonly known as the Federal Program Fraud statute. The Indictment alleges that Mrs. Charbonier (an outspoken former Puerto Rico House of Representative member with strong conservative views) raised her employee's salary and received a portion of said increase.

[1] To the extent the conspiracy charge in Count One is based on Section 666 offenses, the same should also be dismissed, as a matter of law.

There is no federal program involved in the purported conduct, nor did the Puerto Rico House of Representatives ("PR House") – the government unit in which the alleged conduct occurred – receive any federal funding.

The legal question presented for the Court's resolution is whether Section 666 extends to all purported bribery acts, irrespective of whether the government unit involved had a federal program or received federal funds. The short answer is no, and certainly not under the facts alleged in this case.

Section 666 has a *sine qua non* jurisdictional requirement, found at 18 U.S.C. Section 666 (b). The alleged bribe must involve an agent of an organization, government, or agency that received more than $10,000 in federal benefits. Because the PR House, which is the governmental unit at issue, received *no Federal funding or benefits* during the time charged in the Indictment (2017-2020), the jurisdictional threshold is not met in Mrs. Charbonier's case.

Since there are no federal funds in the PR House, the government tried to cure this fatal flaw by by-passing the PR House, reaching to the Commonwealth of Puerto Rico, to attempt to meet the jurisdictional threshold. The Indictment charges that the Commonwealth of Puerto Rico ("PR Commonwealth"), as a whole, received more than $10,000 in federal benefits. As the government would have it, this would suffice to meet the jurisdictional threshold of Section 666. The significance of what the government is attempting to do cannot be overstated. With this broad stroke, the government has conveniently re-written Section 666, eliminating the need for federal funding of the unit involved (in this case the PR House), or the existence of a federal program. It matters not, under the government's theory, whether the entity the legislator worked

for received federal funds or had a federal program tied to the alleged conduct. The government is wrong. Section 666 ties the federal funds to the unit involved in the alleged conduct. In this case, the PR House.

The government's theory appears to rest on an erroneous interpretation of *United States v. Fernández*, 722 F.3d 1 (1st Cir. 2013) ("*Bravo-Fernández I*"). In *Bravo-Fernández I*, the First Circuit concluded that, under certain circumstances, a legislator could be considered an agent of the state under Section 666. The *Bravo-Fernández I* court never considered, nor decided, whether merely alleging that a state or territory received $10,000 in benefits from the federal government satisfies Section 666 jurisdictional threshold. It did not need to. Contrary to this case, in *Bravo-Fernández I*, the legislator charged was a senator and the government introduced evidence that the Puerto Rico Senate, the unit at issue in that case, received more than $10,000 in federal funds.

To plausibly plead the jurisdictional threshold, cases have required that the government agency implicated receive benefits from a federal program. In the case at hand, the PR House of Representatives – not the PR Commonwealth as a whole – is implicated in the proscribed conduct. Thus, the federal benefits threshold must be alleged and proven as to the PR House.

Further, Section 666 requires that the person charge be "an agent" of an organization, government, or agency that received more than $10,000 in federal benefits. Mrs. Charbonier should not be considered an "agent" of the PR Commonwealth, which the government wrongly alleges received the federal funds to meet the jurisdictional threshold. The alleged conduct did not involve Mrs. Charbonier decision making on legislation, or any conceivable act involving the PR Commonwealth. At best, she is an "agent" of the PR House.

Next, disavowing the stern warnings in *United States v. Bravo-Fernández*, 913 F.3d 244, 249 (1st Cir. 2019) ("*Bravo-Fernández II*"), the government has failed to identify a federal program that arguably satisfies the jurisdictional threshold. The reason is that no federal program was involved directly or indirectly in the offense charged. Net, no federal funds were at risk, and thus there is no nexus to sustain the 666 charges.[2]

Lastly, the underlying conduct alleged in the Indictment — a purported unlawful raise of Acevedo's salary — falls squarely within Section 666(c)'s safe harbor. As such, it cannot be the basis to allege a Section 666 violation. Counts Two and Three should be dismissed.

II. THE RELEVANT COUNTS

Count Two charges Charbonier with violating 18 USC §666(a)(1)(A) and 2. The indictment states that "Charbonier, being an agent of the Commonwealth of Puerto Rico…fraudulently obtained money from the PR Commonwealth by unlawfully inflating Acevedo's government salary and retaining the inflated portion of that salary for the defendants' own use and benefit." *See* Indictment at ¶52.

As to the jurisdictional threshold, the government alleges that "[i]n each of the calendar years 2017, 2018, 2019, and 2020, the Commonwealth of Puerto Rico received in excess of $10,000 from the United States government under federal programs involving grants, subsidies, loans, guarantees, insurance, and other forms of assistance." *See* Indictment at ¶50.

[2] In fact, in the last 20 years the PR House has not received any federal benefits.

Count Three charges defendant with violating 18 USC §666 (a)(1)(B) & 2. Charbonier is charged with corruptly soliciting and demanding for her own benefit and accepting and agreeing to accept things of value of defendant Acevedo, that is Acevedo's alleged inflated salary. *See* Indictment at ¶56. Count 3 states that the Commonwealth received in excess of $10,000 in Federal Program benefits. *See* Indictment at ¶¶54 & 56. As stated, there is absolutely no mention of the PR House receiving federal funds because it has not.

III. ARGUMENT

A. There is no connection between Mrs. Charbonier's alleged conduct and a government unit receiving federal benefits.

Counts Two and Three are fatally flawed. Under the government's theory, Section 666 would automatically apply to *all state and local legislators*, even if the alleged conduct in no way involves a governmental unit receiving $10,000 or more in benefits. Clearly, that was not Congress's intent.

Congress's intent when enacting Section 666 was to "protect the integrity of the vast sums of money distributed through federal programs," S.REP. NO. 98–225 at 370 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. It certainly did not intend to create a method for the Federal government to criminalize purely localized conduct. *See, U.S. v. Abu-Shawish*, 507 F.3d 550, 557, (7th Cir. 2007) ("surely Congress did not intend to criminalize, with this provision, an act that does not implicate the integrity of federal funds (either directly or indirectly) in any way.").

The alleged conduct in this case (an alleged unlawful raise in salary) is so far removed from *any* federal funds to the point that the Indictment fails to state that such conduct affected the integrity of *any* government entity receiving funds from Federal Program or any other

benefit, directly or indirectly. Adopting the government's interpretation of Section 666 in this case "would sweep under the statute's rubric a broad range of conduct that in no way implicates 'the reliability of those who use public money.'" *U.S. v. Sunia*, 643 F. Supp. 2d 51, 64 (D.D.C. 2009) (quoting *Sabri v. U.S.*, 541 U.S. 600 (2004)).

To avoid this outcome, some circuits, including the First Circuit, require some nexus between the defendant's illegal conduct and the agency receiving the federal benefits. "[T]here must be some nexus between the criminal conduct and the agency receiving federal assistance." *United States v. Sotomayor-Vazquez*, 249 F.3d FN.6 (1st Cir. 2001), *see United States v. Phillips*, 219 F.3d 404, 411 (5th Cir. 2000)(dismissing the government's argument "that the statute can reach any government employee who misappropriates purely local funds, without regard to how organizationally removed the employee is from the particular agency that administers the federal program."). *See also*, *Sabri v. United States*, 541 U.S. 600, 607 (2004) (stating that § 666 "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds"). Recently, the Supreme Court emphasized that Section 666(a)(1)(A) bars illegally "obtain[ing]" the "property" (including money) of a federally funded program or entity." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). Though the *Kelly* opinion focused on defining what constituted "property" under the statute, the Supreme Court explicitly recognized the limitations built within the statute, and the needed connection to a federally funded program or entity. *See id*. at 1571.

In this case, the government made no reference to federal benefits related to the PR House, which had custody and control of the alleged property and where the illegal conduct

allegedly occurred. The reason is simple – **the PR House did not receive federal funding during the relevant time**. *See* Exhibit 1. In other words, Section 666's $10,000 threshold cannot be met.

i. The Indictment seems premised on an incorrect interpretation of *Bravo-Fernández I* to argue that the jurisdictional threshold has been met

Based on the Indictment, it appears that the government will argue that Charbonier was an agent of the Commonwealth *as a whole*. And, since the Commonwealth received benefits in excess of $10,000, the threshold is met. However, this premise is incorrect, as a matter of law, since it dismisses the distinctions contemplated in the statute, rendering some of its language superfluous. The term "State" is defined to include the various states of the United States, and any commonwealth (like Puerto Rico). 18 U.S.C. § 666(d)(4). "Local" is defined as "pertaining to a political subdivision within a State" and "government agency" is defined to mean "a subdivision of the executive, legislative, judicial, or other branch of government . . . ." 18 U.S.C. §§ 666(d)(2)-(3). These definitions reiterate that Section 666 draws distinctions between the state and its constituent parts, like its branches and agencies.

Moreover, the Indictment glosses over the fact that Acevedo was a PR House employee, and the salary, the property at issue, was assigned and paid from the PR House budget.

If the government is relying on *Bravo-Fernández I* to advance that it has sufficiently alleged the jurisdictional amount, it is wrong. While deciding whether a senator could be an agent of a state under facts specific to that case, the *Bravo-Fernández I* court stated, **in passing,** that the PR Commonwealth received federal funding exceeding $10,000. Subsequently, the First Circuit clarified that it did not hold that receiving $10,000 in federal funds was sufficient to meet the jurisdictional threshold. *Bravo-Fernández II* at 249. ("But our statement in [*Bravo-Fernández I*]

is not dispositive as it was neither essential to our holding there nor could the issue now before us have been decided in that initial appeal. Contrary to what the government contends, defendants did not argue about the funds-benefits distinction in their first appeal."). Dismissing the language in *Bravo-Fernández I*, the First Circuit explained that the issue of "whether 'benefits' as used in the statute were received" was never before the *Bravo-Fernández I* court and, thus, "not dispositive." *Bravo-Fernández II* at 249. In other words, any statement on whether the threshold was met based on the Commonwealth's receipt of funds in excess of $10,000, was, at best, mere *dictum*.

What is clear is that in *Bravo-Fernández I*, the government alleged and, in fact, introduced evidence to establish "[t]he federal assistance received by the Senate of Puerto Rico for [its] childcare program" for purposes of § 666(b)). *Bravo-Fernández II* at 248. As to this evidence, the *Bravo-Fernández II* court remarked that it "[was] specifically tailored to establishing the § 666 jurisdictional requirement." *Id*. That is not the case here since no federal program or specific federal benefits have even been referenced in the Indictment; nor could they be as to PR House. The PR Commonwealth decided to not allocate federal funds to the PR House

Further, the conduct alleged (i.e., increasing salaries of a PR House employee) does not implicate the PR Commonwealth such as would, for example, the passing of legislation, which was the conduct averred in *Bravo-Fernández I*. Unlike *Bravo-Fernández I*, the government does not aver that money was paid to influence legislative action that could somehow affect the PR Commonwealth as a whole. Instead, it alleges that Mrs. Charbonier increased the salaries of a PR House employee and, thereafter, received a portion of that salary.

This distinction is important. When concluding that the senator in *Bravo-Fernández* acted as an agent of the Commonwealth of Puerto Rico, the First Circuit primarily relied on two cases: *United States v. Lipscomb*, 299 F.3d 303, 333 (5th Cir. 2002) and *United States v. Sunia*, 643 F.Supp.2d 51, 67 (D.D.C. 2009). Both cases examined the allegations of misuse of legislative authority, or lack thereof, when analyzing whether legislative members could be considered acting as agents at the governmental level, instead of at the legislative branch level. *Bravo-Fernández I* at 8-9.

Sunia, which extensively analyzed *Lipscomb*, noted that when a legislator "misuses his legislative authority to facilitate corrupt practices affecting agency programs that receive federal funds [it] may well fall within the ambit of § 666…[since] [u]nder those circumstances, the legislator would be engaging in corrupt acts at the governmental level, not with respect to funds that have been allocated to a specific agency." *Sunia*, 643 F. Supp. 2d at 67. The case of *Lipscomb* and *Bravo-Fernández I* precisely dealt with purported bribes connected to the exercise of legislative authority, i.e., the passing of legislation, and thus the agency could have been found to be at the governmental level. However, in *Sunia*, the conduct alleged did not involve the use of legislative authority, and as such, the senators at issue could not be considered agents at the government level. *Sunia*, 643 F. Supp. 2d at 67–68 (noting that "Exploiting the personal cachet appurtenant to one's role in the legislature for personal gain, for example, does not necessarily implicate the same concerns raised by the use of a legislator's official authority because it may not undermine the integrity of any decision made at the governmental level or result in the conversion of funds from the government itself (as opposed to one of its agencies) in the same way that the exercise of a legislator's official authority would."). Like in *Sunia*, the conduct at issue in this case (i.e., raising the salary of a PR House employee) concerned the PR House; thus,

Mrs. Charbonier's alleged conduct cannot be characterized as pertaining to the PR Commonwealth as a whole. *Id*. at 69.

This case is akin to *United States v. Whitfield*, 590 F.3d 325, 335 (5th Cir. 2009). In *Whitfield*, state court judges stood accused of bribery in connection with decisions they made in their judicial roles. The prosecution argued that by virtue of their judicial offices they were agents of Mississippi Administrative Office of the Courts (AOC), which dealt with non-judicial business of the courts of the state and which had received federal funding. The *Whitfield* court concluded that though the judicial officers could be found to be agents of the AOC in some respects, they must have performed functions that directly involved the AOC for purposes of the bribery statute.

Looking at the transactional element of 18 U.S.C. §666 (a)(1)(B)(2), the court concluded that their role as Agents of the AOC "had nothing to do with their capacity as judicial decision makers." *Id*. at 346. Since under Section 666, "the bribe must be offered or accepted "in connection with any business, transaction, or series of transactions" of the agency receiving federal funds," they could not be found liable pursuant to Section 666(a)(1)(B)(2). *Id*. at 345.

In this case, the Indictment alleges that Charbonier was an agent of the PR Commonwealth. However, the object of the alleged bribe (raising salary of a PR House employee) lacks any "connection with any business, transaction, or series of transactions" of the PR Commonwealth as a whole. Unlike the facts alleged in *Bravo-Fernández I*, in this case, there are no "legislative acts that constituted the subject of the bribes", and thus there is no "connection with the business, transaction, or series of transactions" of the Commonwealth of Puerto Rico." *Bravo-Fernández I* at 14.

As such, even if Charbonier can be found to be an agent of the PR Commonwealth (which we deny), Section 666 does not apply to the purported acts alleged in this case.

ii. Mrs. Charbonier is not an "agent" of the PR Commonwealth for purposes of Section 666. *Bravo-Fernández I*'s broad construction of the term "agent" is inconsistent with recent Supreme Court cases applying a narrower construction

In addition to the jurisdictional threshold requirement ($10,000 in federal funds), Section 666 requires that the person charged be "an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof," 18 U.S.C. §§ 666(a)(1), 666(a)(2), provided such "organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," 18 U.S.C. § 666(b).

Bravo-Fernández I did not determine that the jurisdictional threshold is satisfied if the PR Commonwealth, as whole, received $10,000 or more in federal funds. But it did determine that senators could be considered "agents" of the PR Commonwealth for purposes of Section 666 because the "Puerto Rico Senate is a constituent part of the Commonwealth government, created by the Puerto Rico Constitution." *Bravo-Fernández I,* at 9. It reasoned that senators were "part of the limited category of government officials who represent the 'State' as a whole…" *Id.* This may be the case of a state House Representative, but it is certainly not the case of a PR House Representative who has no representation in the US Congress.

Bravo-Fernández I's interpretation of the "agent" element is based on an expansive reading of Section 666. *Id.* at 10. After *Bravo-Fernández I,* however, the Supreme Court decided the contrary (statutes are not to be interpreted expansively). It clarified that "a statute in this

field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter," in *McDonnell*[3] 136 S. Ct. 2355, 2373 (2016) (internal citations omitted). *See also*, *Yates v. United States*, 574 U.S. 528, 536 (2015) (narrowly interpreting statutory term "tangible objects" to "cover only objects one can use to record or preserve information").

This narrow construction is even more warranted when *McDonnell's* narrow construction rule is coupled with the presumption the Supreme Court required in *Bond v. United States*, 134 S. Ct. 2077 (2014), which requires a "clear statement" before federal criminal statutes displace the exclusive authority of state law. Specifically, "[b]ecause our constitutional structure leaves local criminal activity primarily to the States," the Supreme Court has adopted a clear-statement rule that refuses to "read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such a reach." *Id.* at 2083.

The *Bravo-Fernández I* court did not apply the "*Bond* presumption" to Section 666 since *Bond* was decided a year after *Bravo-Fernández I*. Had it done so, a narrower interpretation was warranted when analyzing whether senators were agents of the Commonwealth under Section 666, rather than an interpretation that expanded federal jurisdiction over state offenses.

Without the benefit of the Supreme Court's more recent case law, the First Circuit erroneously gave Section 666 an expansive "meat axe" interpretation, rather than the "scalpel" interpretation required by *McDonnell*. It explained that "[t]he Puerto Rico Senate is a constituent

[3] The facts evaluated in *McDonnell* are different, however the guidance provided is significant. Namely, that Courts should interpret statutes narrowly. In *McDonnel,* the defendants were indicted on honest services fraud and Hobbs Act extortion charges related to the acceptance of $175,000 in loans, gifts, and other benefits while Governor McDonnell was in office.

part of the Commonwealth government, created by the Puerto Rico Constitution." *Bravo-Fernández I*, 722 F.3d at 9. That is true, but the First Circuit then deduced that this means that "[i]ts members are thus part of the limited category of government officials who represent the 'State' as a whole, unlike employees of localities or agencies at every level." *Id.*

The First Circuit's own analysis disproves that conclusion. The Senate (or in this case, the House of Representatives) does not represent the Puerto Rico government as a whole, but is merely "a constituent part of the Commonwealth government." *Id.* A Representative is not even authorized to act on behalf of the PR House as a whole; only represent her constituents before PR House. Simply put, Mrs. Charbonier could not act on behalf of the government of Puerto Rico as a whole.

Moreover, every agency is a "constituent part" of the executive branch and of the Commonwealth, in the same broad sense that the PR House is a constituent part of the legislative branch and of the Commonwealth. But that clearly is not the way Section 666 defines the unit of government that received federal funds. Section 666 differentiates government agencies by whether they are within the "executive, legislative, judicial, or other branch of government." 18 U.S.C. § 666(d)(2). The PR House of Representatives is within the legislative branch, and can represent only half of the legislative branch. As a lone member, no individual Representative represents even the House of Representatives as a whole (much less the entire Commonwealth of P.R.).

The various distinctions Section 666 draws between branches of government, subdivisions, agencies and local governments all become obsolete if federal monies can all be

aggregated under the label "the 'State' as a whole." *Bravo-Fernández I*, 722 F.3d at 9. The Supreme Court has cautioned against rendering these sorts of distinctions superfluous by transforming them "into a set of synonyms." *Lockhart v. United States*, 136 S. Ct. 958, 966 (2016); *see also McDonnell*, 136 S. Ct. at 2369 (construing a statute narrowly to avoid rendering other statutory terms superfluous); *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (refusing an interpretation that would "write out of the statute" a condition that limited its applicability).

The government's interpretation of Section 666 is also inconsistent with there being a $10,000 threshold. If Congress understood that all money going to all government agencies within a state could be aggregated, then Section 666 would apply across the board in all states in every context because every state in the aggregate receives more than $10,000 in federal funds per year. Under that scenario, rather than create a dollar threshold test that would be met by all state actors (or state actors of a particular class, like legislators), Congress would more naturally enact a statute that would apply to those specific classes of people as it did at the federal level. *See, e.g.*, 18 U.S.C. § 201 (prohibiting bribery involving a "public official," defined by class such as a "Member of Congress"). The existence of the $10,000 threshold demonstrates an absence of the sort of "clear statement" needed to more broadly displace state law required by *Bond*.

B. Counts Two and Three fail to allege an essential jurisdictional element of the offense.

The Indictment fails to allege a specific Federal Program because there is none – as it relates to the PR House. The Section 666 counts merely allege that "the Commonwealth of Puerto Rico received in excess of $10,000 from the United States government under federal programs."

Yet, nowhere in the indictment has it specified which Federal Program satisfies the jurisdictional threshold. A fatal error.

The Indictment's failure to allege a specific Federal Program is a jurisdictional defect not to be taken lightly since it is an essential element of a Section 666 offense. *See, U.S. v. Hooker*, 841 F.2d 1225, 1231 (4th Cir. 1988) ("An essential element of a crime—one that affects a substantial right—is one whose specification ... is necessary to establish the very illegality of the behavior and thus the court's jurisdiction.") (internal citations omitted). The First Circuit recently held that to meet the Section 666 jurisdictional threshold, at a minimum, a Federal Program must be identified. *Bravo-Fernández II*, 913 F.3d at 251 (finding that "the government seems blind to the fact that without reference to a specific federal program it is not only difficult but impossible to [determine whether federal payments are benefits].").

Here, without a reference to a "specific federal program," the defendant is not properly apprised of a Section 666 violation, as required by Fed. R. Crim. P. 7 (requiring the indictment to contain "the essential facts constituting the offense charged"). [4] "To hold otherwise and conclude that any receipt of federal funds is enough to satisfy the jurisdictional element would transmute § 666 into the general bribery statute that the *Fischer* court warned against and "upset […] the proper federal balance." *Id.* at 251. Naming the Federal Program implicated is an essential fact of the Section 666 offense charged, after all, "the statute does not employ this broad, almost

[4] Dismissal is further warranted because absent a specific Federal Program the jury had no basis to find the jurisdictional requirement met, and neither did the grand jury. *See, Sunia*, 643 F. Supp. at 77 (stating that "[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant" of the "protection which the guaranty of the intervention of a grand jury was designed to secure[,][f]or a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him," *citing Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)).

limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer v. United States*, 529 U.S. 667, 681, 120 S. Ct. 1780, 1788, 146 L. Ed. 2d 707 (2000).[5]

The legislative history of Section 666 underpins the importance of defining the Federal Program involved. Congress was especially concerned that the concept of a Federal Program would be defined without limit and stated that "the term 'federal program' means that there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered." S. REP. 98-225, 370, 1984 U.S.C.C.A.N. 3182, 3511.

The *Bravo-Fernández II* court also cited, in FN 3, the opinion of *United States v. McLean*, 802 F.3d 1228, 1237 (11th Cir. 2015), which concluded that "[T]he government must prove beyond a reasonable doubt that the individual worked for an entit[y] which receive[d] ... funds ... in connection with programs defined by a sufficiently comprehensive structure, operation, and purpose to merit characterization of the funds as benefits under § 666(b)."[6]

Counts Two and Three, as drafted, fail to allege an offense for this reason. As the *Bravo-Fernández II* court remarked "it does not appear that any federal program was specifically identified …, prohibiting the ability to determine, under *Fischer*'s 'benefits' analysis, whether the

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[5] *See also, United States v. Cantor*, 897 F. Supp. 110, 116–17 (S.D.N.Y. 1995)(requiring the government to identify the federal program to enable defendant "to prepare a defense, to avoid surprise at trial, and to enable him to interpose a plea of double jeopardy if necessary.").

[6] In *McLean*, the court concluded that in the light most favorable to the government, the record established that the City received federal benefits and it transferred them to an government program known as MCRA, however, the government failed to identify a Federal Program, so that its "structure, operation, and purpose" could be reviewed to permit a determination that the funds qualified as a federal benefit under the jurisdictional element of § 666(b). *Id*. at 1243.

funds … were used for such promotion of well-being" such as to satisfy the jurisdictional threshold. Because the missing element is essential, its absence is a fatal defect. *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988).

C. Section 666(c)'s safe harbor provision exempts the conduct alleged in the Indictment from a Section 666 violation.

The underlying conduct alleged in the Indictment — a purported unlawful raise of Acevedo's salary — falls squarely within Section 666(c)'s safe harbor. As such, it cannot be the basis to allege a Section 666 violation.

Section 666(c)'s safe harbor provides that Section 666 "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 USC § 666(c). This exception is an avowal by Congress that "all [] instances of bribery do not merit the attention of the federal courts." *United States v. Mills,* 140 F.3d 630, 634 (6th Cir. 1998). Rather, the exception "evidenced [Congress's] intent that only the most serious instances of governmental corruption should be policed by the federal judiciary." *Id,* at 632.

The First Circuit has defined "bona fide salary" as "salary actually earned in good faith for work done for the employer." *U.S. v. George*, 841 F.3d 55, 62 (1st Cir. 2016). In other words, a salary is bona fide when an individual legitimately performs the functions of a necessary position. *See, United States v. Mann*, 172 F.3d 50 (6th Cir. 1999) ("Though [the defendant] lacked appropriate credentials under state law, because he legitimately performed the functions of the necessary position … we hold that his wages were 'bona fide.'"). Here, the government does not allege that Acevedo failed to perform the duties of her work, her job was unnecessary, or was paid outside ordinary course of business. Rather, the government's argument is that the increase

in salary was unlawful because Mrs. Charbonier purportedly received a bribe or kickback in exchange for said increase. Those facts are akin to the *Mill's* case (which was dismissed).

In *Mills*, two members of a county sheriff's department provided jobs as deputies to individuals who paid bribes in exchange for obtaining the position (and, thus, the salary). Those individuals performed work as deputy sheriffs and were paid salaries. The government argued that salaries paid to the deputy sheriffs "could not have been bona fide because of the illegal nature of the employment procurement process," and thus the safe harbor in Section 666(c) did not apply. *Id.* at 633. The district court dismissed the Section 666 counts before trial, and the Sixth Circuit affirmed, holding that absent allegations that the jobs were unnecessary or that the individuals did not fulfill their duties (regardless of the alleged bribe), Section 666(c)'s exception applied:

> Unfortunately for the government, the 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. In the absence of such allegations, the government has no support for its claims that the salaries paid to the deputy sheriffs were not properly earned 'in the usual course of business.'

U.S. v. Mills, 140 F.3d at 633

The First Circuit cited *Mills* approvingly in *U.S. v. Dwyer*, 238 Fed. Appx. 631, 648 (1st Cir. 2007) (unpublished). In *Dwyer* the court ruled that a reasonable jury could conclude that the salary an employee received due to the defendant's actions in fraudulently filling out the employee's timesheets "were not made in the usual course of business and thus were not bona fide." *Id,* at 647-48. However, in its discussion, the First Circuit quoted *Mills* to support the proposition that the "bona fide wages exception" was applicable when "there was no allegation

that employees 'did not responsibly fulfill the duties associated with their employment." *U.S. v. Dwyer*, 238 Fed. Appx. at 14 (quoting *Mills*).

Similarly, in *U.S. v. Harloff*, 815 F. Supp. 618, (W.D.N.Y. 1993), the defendants were charged with violations of Section 666 for falsifying payroll records by claiming to have worked 40-hour weeks when, in fact, they worked substantially fewer hours. The government claimed that since the defendants consistently worked fewer hours than they reported, the differential between salary earned and salary paid constituted an embezzlement or misapplication of funds under Section 666. The *Harloff* court dismissed the counts under Section 666(c)'s bona fide salary exception stating that "its plain language would prevent making a federal crime out of an employee's working fewer hours than he or she is supposed to work…". *Id,* at 619.

By contrast, in *U.S. v. Cornier-Ortiz*, 361 F.3d 29, 34, (1st Cir. 2004), Cornier hired Francisco Monroig ("Francisco") who was the brother of a Puerto Rico Public Housing Administration (PRPHA) employee, Rubin Monroig ("Rubin"), in a bribery scheme where Rubin would treat favorably Cornier's request for federal funds. *Id.* at 32. There, Francisco "*did not perform any work at all* related to [federal] funds." *Id,* at 34 (emphasis added). Rather, the job was performed by his brother, Rubin. The First Circuit held that the payment to Francisco were not bona fide because the work was performed by Rubin and PRPHA conflict of interest rules prohibited the PRPHA employee from participating in such a scheme. *Id.* at 35.[7]

Unlike in *Cornier, t*he government concedes that Acevedo was, in fact, Charbonier's employee and "worked in Charbonier's office in the House of Representatives or on behalf of a

[7] Notably, in *Cornier* the First Circuit once again cited the *Mills* opinion approvingly.

House committee chaired by Charbonier since 2013." Dkt. No. 2 at 4. It is, thus, uncontroverted that Acevedo "earned [her salary] in good faith for work done for the employer." *U.S. v. George*, 841 F.3d at 62. There is no allegation that Acevedo failed to perform her duties, that her position was fictitious or illegitimate, or that her duties were performed by others. As in *Mills*, this Court should dismiss the Section 666 counts because the alleged violations are barred by the bona fide salary exception. 18 U.S.C. 666(c). Acevedo was paid a salary for the legitimate work she performed.

IV. CONCLUSION

The government has a jurisdictional problem. The Indictment parrots the language of the charged criminal statute, 18 U.S.C. Section 666, as to Counts Two and Three, but fails to state essential facts, including those necessary to meet the jurisdictional threshold. Section 666 is not an overall bribery statute. It has limits. The title itself reveals them: "**Theft or bribery concerning programs receiving Federal funds**." (Emphasis added). Whether Section 666 is read broadly or narrowly, makes no difference in this case. After a lengthy investigation, the government cannot point to a single federal dollar in the PR House nor could it identify a single federal program from which Mrs. Charbonier benefitted. The best it could come up with is an allegation that Mrs. Charbonier raised the salary of one of her employees (Acevedo) and got some money back. Then, it tries to muscle these alleged facts into a violation of Section 666 by bypassing the PR House and claiming that because the PR Commonwealth received more than $10,000 in federal funds, the jurisdictional element is met. In other words, any state or local legislator could be charged with federal program fraud so long as the state or territory, as a whole, received in excess of $10,000 of federal funds (which all do). But that is not the law. Section 666 requires that the unit

at issue in the prosecution, in this case the PR House, receive federal funds and it also requires the existence of a federal program. So fatally flawed are Counts Two and Three that the Indictment does not even mention a federal program.

Further, Section 666 requires that the person charged be an "agent" of the unit receiving the federal funds. Even if the Indictment met the jurisdictional threshold –which it does not– Mrs. Charbonier is not an "agent" of the PR Commonwealth. She could not act on behalf of the PR Commonwealth. Unlike *Bravo-Fernández I,* the alleged conduct does not even involve any legislative act on the part of Mrs. Charbonier.

Finally, the purported unlawful raise of Acevedo's salary falls squarely within Section 666(c)'s safe harbor since it is undisputed that Acevedo was paid for legitimate work performed. As such, it cannot be the basis of a Section 666 violation.

For the reasons set forth in this motion, Counts Two and Three should be dismissed. There are other counts in the Indictment that are not subject of this motion to dismiss. Those will be dealt with in due course.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 17th day of February 2021.

MELENDEZ TORRES LAW, PSC
Attorneys María Milagros Charbonier
MCS Plaza, Suite 1200
255 Ponce de León Avenue
San Juan, PR 00917
Telephone (787) 281-8100
Fax (787) 281-8310

s/Sonia I. Torres-Pabón
Sonia I. Torres- Pabón
USDC-PR No. 209310
storres@melendeztorreslaw.com

s/Juan Carlos Fontánez Nieves
Juan Carlos Fontánez Nieves
USDC-PR No. 231408
jfontanez@melendeztorreslaw.com

s/Isabel C. Lecompte Shiba
Isabel C. Lecompte Shiba
USDC-PR No. 230714
ilecompte@melendeztorreslaw.com

CERTICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this same date we electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Sonia Torres-Pabón
Sonia Torres-Pabón