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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. PLASTIC SURGERY INSTITUTE OF · UTAH, INC.; MICHAEL KIRK MOORE JR.; KARI DEE BURGOYNE; KRISTIN JACKSON ANDERSEN; AND SANDRA FLORES, Defendants.	Case No. 2:23-cr-00010-HCN UNITED STATES' OPPOSITION TO DEFENDANT MICHAEL KIRK MOORE JR.'S MOTION TO DISMISS THE INDICTMENT Judge Howard C. Nielson Jr.

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In the Tenth Circuit, "[c]hallenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence . . . . Rather, [a]n indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true."[1]

"New estimates from the World Health Organization (WHO) show that the full death toll associated directly or indirectly with the COVID-19 pandemic (described as "excess mortality") between 1 January 2020 and 31 December 2021 was approximately 14.9 million (range 13.3 million to 16.6 million)."[2]

1. INTRODUCTION

This is a consequential case. It has profound implications for both public health and safety and the rule of law during a global pandemic and national health emergency. It involves an unusual defendant, a highly educated, long-seasoned, and well-compensated Utah plastic surgeon who, during a global pandemic, chose to use his Salt Lake County practice as a front to destroy government-provided COVID-19 vaccines and to knowingly distribute fraudulently completed COVID-19 vaccination record cards to unvaccinated persons.

Along with his codefendants, Dr. Moore has been indicted for (1) Conspiracy to defraud the United States in violation of 18 U.S.C. § 371; (2) Conspiracy to Convert, Sell, Convey, and Dispose of Government Property in violation of 18 U.S.C. §§ 371 and 641; and (3) Conversion, Sale, Conveyance, and Disposal of Government Property in violation of 18 U.S.C. §§ 641 and 2.

These charges are based largely on the defendant coconspirators' scheme to destroy COVID-19 vaccines and to unlawfully distribute COVID-19 vaccination record cards to approximately 1,000 persons who never received a COVID-19 vaccine. Dr. Moore and his

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[1] *United States v. Todd*, 446 F.3d 1062, 1067 (10th Cir. 2006) (internal citations and quotation marks omitted) (quoting *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994)).

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[2] *United Nations Department of Economic and Social Affairs, 14.9 million excess deaths associated with the COVID-19 pandemic in 2020 and 2021*, at https://www.un.org/en/desa/149-million-excess-deaths-associated-covid-19-pandemic-2020-and-2021#:~:text=New%20estimates%20from%20the%20World,13.3%20million%20to%2016.6%20million (last visited July 23, 2024).

coconspirators did this so that the card recipients could masquerade as having been vaccinated to avoid complying with then-current health-and-safety restrictions for the unvaccinated. And they did this to obstruct the Center for Disease Control and Prevention ("CDC")'s lawful government function of responding to the COVID-19 pandemic by (a) providing COVID-19 vaccinations to the public, and (b) providing a reliable means of verifying vaccination status through the controlled distribution of COVID-19 vaccination record cards to vaccinated persons only. In doing so, Defendants also converted, sold, conveyed, and destroyed United States' property—they destroyed vaccines and converted, sold, and conveyed the corresponding vaccination record cards.

Contrary to Defendant's assertion, this will not, however, be the first case to go to trial involving a medical professional who abused his position of trust to waste vaccines or distribute COVID-19 vaccination record cards to unvaccinated persons. In 2023, after a federal jury trial, a pharmacist was convicted of conversion of government property for selling 630 COVID-19 vaccination record cards for a total of approximately $5,600.[3] Other similar cases across the nation have also led to criminal charges and convictions.[4]

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[3] Pharmacist Tangtang Zhao, 36, of Chicago, stole CDC-issued COVID-19 vaccination cards from the pharmacy where he worked, and sold them to buyers across the country through an online marketplace. Zhao and other pharmacists administered COVID-19 vaccinations to the public, and therefore Zhao had access to vaccination cards at the pharmacy. During a three-week timeframe in March and April 2021, Zhao posted listings for over 650 COVID-19 vaccination cards that he advertised as "authentic" and "straight from the CDC." In total, he sold 630 cards to approximately 200 unique buyers, who paid Zhao more than $5,600. *Pharmacist Convicted of Stealing and Selling COVID-19 Cards (DOJ Press Release dated June 26, 2024)* at https://www.justice.gov/opa/pr/pharmacist-convicted-stealing-and-selling-covid-19-cards (last visited July 15, 2024).

[4] *See, e.g.*, *Woman Pleads Guilty to COVID-19 Vaccine Card Fraud Scheme*, at https://www.justice.gov/opa/pr/woman-pleads-guilty-covid-19-vaccine-card-fraud-scheme (last visited July 15, 2024) ("[A] midwife at Sage-Femme Midwifery PLLC (Safe-Femme), an authorized COVID-19 vaccine administration site in Albany, New York, conspired to obstruct the government's distribution of COVID-19 vaccines by providing COVID-19 vaccination record cards to individuals who were not vaccinated).

Naturopath who sold fake vaccine cards gets nearly 3 years, at https://apnews.com/article/health-california-covid-san-francisco-immunizations-a2654cad5153d7ddf3edda3cff0b2674 (last visited July 15, 2024) ("A naturopathic doctor who sold fake COVID-19 immunization treatments and fraudulent vaccination cards during the height of the coronavirus pandemic was sentenced [in federal court] in California on Tuesday to nearly three years in prison, federal prosecutors said.").

[Footnote continued on next page]

Although the Indictment states all the elements of each charge, Dr. Moore moves to dismiss the Indictment. He claims that (1) the CDC lacked authority to control the distribution of COVID-19 vaccines and vaccination record cards; (2) the CDC improperly collected information on vaccinated persons by requiring authorized vaccine distributors (a) to provide vaccination record cards to vaccinated persons only and (b) to report to state agencies all COVID-19 vaccinations they administered; (3) the vaccines and vaccination record cards were not United States' property; and (4) the government cannot establish the market value of the vaccination record cards.

For various reasons, all these arguments fail. The Defendant would have the Court treat his motion to dismiss the indictment like a motion for summary judgment in the civil context; however, the Court is not free to look beyond the Indictment to determine whether there are genuine issues of material fact—that is a job for the jury. The CDC had statutory authority to conduct measures to attempt to mitigate and eradicate COVID-19. Neither the CDC nor the federal

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Former Marine Corps Reservist Sentenced to 21 Months in Prison for Stealing, Forging and Distributing Hundreds of Fraudulent COVID-19 Vaccination Cards During the Pandemic, at https://www.justice.gov/usao-edny/pr/former-marine-corps-reservist-sentenced-21-months-prison-stealing-forging-and#:~:text=During%20the%20Pandemic-,Former%20Marine%20Corps%20Reservist%20Sentenced%20to%2021%20Months%20in%20Prison,Vaccination%20Cards%20During%20the%20Pandemic (last visited July 15, 2024) ("[I]n federal court in Brooklyn, Jia Liu was sentenced by United States District Judge Diane Gujarati to 21 months in prison for conspiring to steal, forge and distribute fraudulent COVID-19 Vaccination Cards. On June 9, 2023, co-defendant Steven Rodriguez, a Long Island nurse, was sentenced to 30 months' imprisonment for his role in the same scheme. Liu and Rodriguez pleaded guilty in April 2023 to conspiracies to defraud and obstruct the United States' response to the COVID-19 pandemic.").

Former Long Island nurse sentenced for fake COVID vaccine card scheme as she speaks out for the first time, at https://www.cbsnews.com/newyork/news/long-island-fake-covid-vaccine-card-nurse-sentenced/ (last visited July 15, 2024) (Former nurse who sold fake covid cards sentenced to 840 hours of community service, five years' probation and $1.2 million in forfeiture; she charged $220 to $350 per adult fake shot and $85 to $220 for children).

Registered Nurse Pleads Guilty in Covid-19 Vaccination Record Card Fraud, at https://www.justice.gov/usao-edmi/pr/registered-nurse-pleads-guilty-covid-19-vaccination-record-card-fraud (last visited July 15, 2024) ("Kierczak pleaded guilty to theft of government funds. According to court records, Kierczak admitted to stealing or embezzling authentic Covid-19 Vaccination Record Cards from the VA hospital—along with vaccine lot numbers necessary to make the cards appear legitimate—and then reselling those cards and information to individuals within the metro Detroit community. Kierczak's theft of Covid-19 Vaccination Record Cards began at least as early as May 2021 and continued through September 2021. Kierczak sold the cards for $150-$200 each and communicated with buyers primarily via Facebook Messenger.").

government collected information to track vaccinated or unvaccinated persons. The controlled distribution of vaccination record cards to vaccinated persons only, and the local reporting of vaccine administrations did not violate the Paperwork Reduction Act in any way. The vaccination record cards were not to be distributed to unvaccinated persons, and both the cards and the vaccine remained United States' property until they were properly administered. The allegations of the indictment establish that the vaccination record cards had a market value of at least $50 each. And the Indictment alleges every element of each charged offense. Therefore, the Court should deny Dr. Moore's motion to dismiss the Indictment and have this case proceed to trial.

2. STATEMENT OF FACTS

2.1 In January 2023, Dr. Moore and his codefendants were indicted for various crimes relating to the distribution of fraudulently completed vaccination record cards to the unvaccinated.

On January 11, 2023, a grand jury indicted Dr. Moore and his four codefendants. (ECF 1). The defendants are charged with (1) Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371; (2) Conspiracy to Convert, Sell, Convey, and Dispose of Government Property, in violation of 18 U.S.C. §§ 371 and 641; and (3) Conversion, Sale, Conveyance, and Disposal of Government Property, in violation of 18 U.S.C. § 641 and § 2. Among other things, the Indictment alleges that Dr. Moore and his codefendants knowingly obstructed the CDC's COVID-19 vaccination (and vaccination-record-card) program by destroying vaccines and distributing fraudulently completed COVID-19 vaccination record cards to unvaccinated persons. They did so during a global pandemic. They did so intentionally. And they did so by abusing the trust that Dr. Moore had as a physician who signed a COVID-19 Vaccination Provider Agreement with the CDC. By signing that agreement, he promised to distribute the vaccines properly and to properly report their administration to the Utah statewide immunization system. He broke those promises.

2.2 The Indictment alleges that Dr. Moore and his co-conspirators entered into an agreement to impede, impair, obstruct, and defeat lawful government functions of the CDC related to the CDC COVID-19 Vaccination Program.

As its name implies, the Centers for Disease Control and Prevention exists to control and prevent disease. Regarding Count 1, the Indictment alleges that Dr. Moore and his coconspirators conspired to defraud the United States of America and the CDC for the purpose of impeding, impairing, obstructing, and defeating the lawful governmental functions of the CDC in distributing and administering authorized COVID-19 vaccines and COVID-19 vaccination record cards through approved vaccine distributing entities. (ECF 1 [Indictment] ¶¶ 1, 20-21).[5]

More specifically, the CDC's lawful government functions at issue included responding to the COVID-19 pandemic by both (1) providing COVID-19 vaccines at no cost to individuals in the United States who wanted to receive a vaccine, and (2) "distributing and administering authorized COVID-19 vaccines and COVID-19 [v]accination [r]ecord [c]ards [exclusively] through approved vaccine distributing entities." (Ex. 1 [Indictment] ¶¶ 7-10, 11-12, 14-16, 17, 17a.-h.). This was done both (a) to attempt to stem the pandemic by providing COVID-19 vaccines to willing recipients who would not waste the vaccines, and (b) to ensure that the vaccination record cards could be used to reliably identify persons who had actually received bona fide COVID-19 vaccine doses. (*See id.* ¶¶ 7-10, 11-12, 14-16, 17, 17a-g, 17h). Providing a reliable means of verifying vaccination status fostered and facilitated compliance with federal, state, and local government health-and-safety protocols and requirements. (*See id.*). Paragraph 17h notes that the CDC COVID-19 Program Provider Agreements specifically required program participants like Dr. Moore and his Plastic Surgery Institute to agree to "[a]dminister the COVID-19 vaccines in compliance with all applicable state and territorial vaccine laws." (*Id.* ¶ 17h).

[5] As a courtesy, the United States has provided as Exhibit 1 a copy of the Indictment highlighting relevant language.

In even more detail, the Indictment alleges that the United States and the CDC sought to control the distribution of COVID-19 vaccines and vaccination record cards by making them exclusively available through the CDC's authorized vaccine distributing entities. (Ex. 1 ¶¶ 11-12, 14-17). To this end, the Indictment alleges that the CDC imposed rules and protocols for vaccine distributing entities to ensure that they properly administered the vaccine and that they did not issue any COVID-19 vaccination record cards to any persons who did not actually receive the COVID-19 vaccines listed on the *CDC-issued* vaccination record cards. (*See id.* ¶¶ 12, 14-16, 17a-h, 18). The CDC thus required each vaccine distributing entity to sign a CDC COVID-19 Vaccination Program Provider Agreement. (*Id.* ¶ 17). This agreement required vaccine distributing entities to abide by the CDC's rules and protocols for administering the vaccines and distributing the vaccination record cards before the authorized providers could even receive the vaccines and vaccination record cards, and to then properly report their administrations of COVID-19 vaccines to the appropriate state, local, or territorial public health authority. (*Id.* ¶¶ 17, 17b, 17a-17h).

The CDC thus provided for the controlled distribution of authentic COVID-19 vaccines and vaccination record cards in a way that ensured proper, safe vaccine administration and made it difficult for persons to falsely claim they had been vaccinated in order to evade health-and-safety protocols and to undermine the CDC's efforts to control and reduce the spread of COVID-19.

Contrary to Dr. Moore's implication, nowhere does the Indictment say that the lawful government functions at issue in this case involved, or were exclusive to, preventing "vaccine shortages" affecting persons who wanted vaccines, or to "Dr. Moore's purported submission to a state agency of vaccine information relating to his patients that was not truthful." (Compare Ex. 1 [Indictment] with Def.'s Mot. to Dismiss at 13).

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2.3 The Indictment alleges that Dr. Moore and his coconspirators converted, sold, conveyed, and disposed of United States property in the form of COVID-19 vaccines and vaccination record cards.

Regarding Counts 2 and 3, the Indictment alleges that Dr. Moore and his coconspirators both conspired to, and in fact did, convert, sell, convey, and dispose of United States Property in the form of COVID-19 vaccines and vaccination record cards in violation of 18 U.S.C. §§ 371, 641, and 2. (Ex. 1 [Indictment] ⁋⁋ 22, 24-26, 29-30). The Indictment alleges that, among other things, Dr. Moore and his codefendants:

- In exchange for direct cash payments or directed donations of *$50 per person per occurrence*, "distributed COVID-19 [v]accination [r]ecord [c]ards to Fraudulent Vax Card Seekers . . . without administering a COVID-19 vaccine to them. (Ex. 1 [Indictment] ⁋⁋ 22f, 22l).
- Uploaded or caused to be uploaded the names of all Fraudulent Vax Card Seekers who requested it to the Utah Statewide Immunization Information System (*Id.* ⁋⁋ 22o, 22r); and
- Destroyed or caused to be destroyed viable doses of COVID-19 vaccines, usually by drawing them from the bottle and squirting them down the drain from a syringe. (*Id.* ⁋ 22q).

In challenging Counts 2 and 3, Dr. Moore raises only two issues: (a) whether the vaccines and vaccination record cards were United States property, and (b) whether the United States can properly assign a market value to the fraudulently completed vaccination record cards of $50 per notation on each card, consistent with the directed donation amount. (Def. Mot. to Dismiss at 23-33). The United States answers both questions affirmatively.

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2.4 Despite the clarity of the Indictment, Dr. Moore now asks the Court to dismiss the Indictment for purportedly failing to state an offense against him.

The Indictment alleges each of the elements of the offenses with which Dr. Moore is charged. (Ex. 1 [Indictment] ¶¶ 19-23 (Count 1), 24-28 (Count 2), 29-31 (Count 3)). Notwithstanding, Dr. Moore has filed a motion to dismiss the Indictment, apparently claiming that it nevertheless fails to state an offense under FED. R. CRIM. P 12(b)(3)(B)(v).[6]

3. LEGAL ARGUMENT

The United States maintains that the Indictment and each count therein properly charges Dr. Moore and his codefendants with three separate crimes: (1) Conspiracy to defraud the United States in violation of 18 U.S.C. § 371; (2) Conspiracy to Convert, Sell, Convey, and Dispose of Government Property in violation of 18 U.S.C. §§ 371 and 641; and (3) Conversion, Sale, Conveyance, and Disposal of Government Property in violation of 18 U.S.C. §§ 641 and 2.

3.1 In evaluating the sufficiency of the Indictment, the Court should not look beyond the allegations of the Indictment.

Criminal defendants enjoy the constitutional right "to be informed of the nature and cause of the accusation" against them. U.S. CONST. Amend. VI. Therefore, Federal Rule of Criminal Procedure 7 requires that an indictment provide this notice by stating the "essential facts constituting the offense charged." FED. R. CRIM. P. 7(c)(1). An indictment complies with this standard "if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir. 1997) (citation omitted); *United States v. Todd*, 446 F.3d 1062, 1067 (10th Cir. 2006). "[W]here the indictment quotes the

[6] Although Dr. Moore cites various statutes and case law in his motion, he does not explicitly state the legal authority for his motion. Notwithstanding, the United States interprets the motion to dismiss to be based on FED. R. CRIM. P. 12(b)(3)(B)(v), which authorizes a motion asserting a defect in the indictment, including a failure to state an offense.

language of a statute and includes the date, place, and nature of illegal activity, it need not go further and allege in detail the factual proof that will be relied upon to support the charges." *United States v. Powell*, 767 F.3d 1026, 1030 (10th Cir. 2014) (quoting *United States v. Redcorn*, 528 F.3d 727, 733 (10th Cir. 2008)). "An indictment need only meet minimal constitutional standards[;] . . . [courts] determine the sufficiency of an indictment by practical rather than technical considerations." *Powell*, 767 F.3d at 1030 (quoting *Dashney,* 117 F.3d at 1205).

Challenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994). Rather, "[a]n indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *Id.* An indictment must enable a defendant to prepare a defense, ensure the defendant that he is being prosecuted on the basis of facts presented to the grand jury, and enable him to plead double jeopardy against a later prosecution. *See United States v. Staggs*, 881 F.2d 1527, 1530 (10th Cir. 1989).

Here, the Defendant has not alleged that the indictment fails in any of these respects. He has not challenged his ability to prepare a defense, there is no allegation of double jeopardy, nor is there any question that an essential element of the indictment has been omitted.

Therefore, in ruling on Dr. Moore's motion to dismiss the Indictment, the Court is bound by the factual allegations in the Indictment. *Hall*, 20 F.3d at 1088. The Court may only consider other facts when they are "undisputed and the government fails to object to the district court's consideration of those undisputed facts." *Id.* Here, the United States objects to any consideration of facts outside the allegations of the Indictment. Consequently, "[u]nder Tenth Circuit law, the Court is not free to determine, like on a motion for summary judgment under the Federal Rules of

Civil Procedure, whether a genuine issue of material fact exists." *United States v. Tafoya*, 376 F. Supp. 2d 1257, 1260 (D.N.M. 2005) (citing and applying *Hall*, 20 F.3d at 1088).

3.2 The Court should not dismiss Count 1 of the Indictment, because the Indictment states all the elements of the charge of Conspiracy to Defraud the United States by obstructing a lawful government function of the CDC.

As noted above, the Indictment lays out each of the elements required to state an offense of Conspiracy to Defraud the United States by obstructing a lawful government function of an agency of the United States—namely the CDC—in violation of 18 U.S.C. § 371. The elements of such an offense are (1) the defendant entered into an agreement, (2) to obstruct a lawful function of the federal Government (or one of its agencies), (3) by deceitful or dishonest means, (4) committed at least one overt act in furtherance of the conspiracy, and (5) acted with interdependence. 18 U.S.C. § 371.[7] Here, Dr. Moore challenges only the second element of the offense—whether Dr. Moore sought to obstruct a lawful government function of the CDC. (*See* Def.'s Mot. to Dismiss at 1, 3-22). This challenge fails.

3.2.1. The Indictment sufficiently alleges that Dr. Moore and his codefendants sought to obstruct a lawful government function of the CDC.

As a matter of law, the Indictment alleges that Dr. Moore and his coconspirators sought to impede, impair, obstruct, and defeat a lawful governmental function of the CDC. The Indictment alleges the defendants sought to impede, impair, obstruct, and defeat "the lawful governmental functions of the CDC" in responding to the COVID-19 pandemic and working to minimize and contain the spread of COVID-19 through mass vaccination. (*See* Ex. 1 ¶¶ 1, 19-21; *supra* § 2.2).[8]

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[7] *United States v. Coplan*, 703 F.3d 46, 60–61 (2d Cir. 2012) (stating elements of Conspiracy to Defraud the United States by obstructing a lawful governmental function of the United States or one of its agencies, like the CDC); Tenth Circuit Pattern Crim. Jury Instructions No. 2.19; *United States v. Cooper*, 654 F.3d 1104, 1115 (10th Cir. 2011); Fifth Circuit Crim. Pattern Jury Instruction No. 2.15B, *Conspiracy to Defraud 18 U.S.C. § 371* (Second Clause) (2019 ed.).

[8] Section 18 U.S.C. § 371 not only includes the cheating of the government out of property or money, but "also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Coplan*, 703 F.3d at 60–61.

More specifically, the Indictment alleges the defendants conspired to obstruct the CDC's lawful governmental functions of "distributing and administering authorized COVID-19 vaccines and [v]accination [r]ecord [c]ards through approved vaccine distributing entities." (*Id.* ¶ 20).

On its face, the Indictment's allegations sufficiently state this element of the first Count for Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371. Therefore, the Court should decline to look to facts outside the Indictment, and should deny the motion to dismiss Count 1 on that basis alone. *Hall*, 20 F.3d at 1087; *supra* § 3.1.

3.2.2 The CDC had authority to provide and control the distribution of COVID-19 vaccines and vaccination record cards to attempt to stem the pandemic and to provide a reliable means of verifying persons' vaccination status during the pandemic.

Despite the sufficiency of the allegations supporting Count 1, Dr. Moore urges the Court to dismiss that count anyway on the ground that the CDC "exceeded its authority" by implementing its COVID-19 vaccination program in an effort to stem the COVID-19 pandemic and to provide a reliable means of safely distributing the vaccine and verifying vaccination status during the pandemic. The argument appears to be that because the CDC allegedly exceeded its authority in implementing the program, the CDC's administration and distribution of COVID-19 vaccines and vaccination record cards was not a "lawful governmental function." Therefore, according to Dr. Moore, the United States apparently cannot, as a matter of law, prove that he conspired to obstruct a "lawful governmental function" of the CDC. For numerous reasons, this argument fails.

3.2.2a The CDC is authorized to take measures directly related to preventing the interstate spread of communicable diseases.

The Centers for Disease Control and Prevention's mission includes controlling and preventing disease.[9] In a public health emergency like the COVID-19 pandemic, the CDC likewise

[9] "The Centers for Disease Control and Prevention (CDC) serves as the national focus *for developing and applying disease prevention and control*, environmental health, and health promotion and health education activities designed

is and was authorized to attempt to mitigate and contain the spread of the disease through vaccination and other appropriate methods, including the distribution of vaccine and the provision of vaccination record cards (and reporting procedures to local public health agencies) to provide a reliable means of verifying persons' vaccination status and tracking the distribution of vaccines.

Numerous statutes authorize the CDC to perform this "lawful governmental function."[10] These statutes include, among others, Section 361(a) of the Public Health Service Act. 42 U.S.C. § 264(a) ("Section 264(a)"). This is recognized by the very case that Dr. Moore cites to claim the contrary—*Alabama Ass'n of Realtors v. Dep't. of Health and Human Servs.*, 594 U.S. 758 (2021).

As noted in *Alabama Ass'n of Realtors*, Section 264(a) specifically provides that "The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are *necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State . . . into any other State . . .*" *Id.* at 761 (citing 42 U.S.C. § 264(a)) (emphasis added). The statute continues in the next sentence to clarify that, "[f]or purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be source of dangerous infection to human beings, *and other measures, as in his judgment, may be necessary*." *Id.* (emphasis added). Doctor Moore acknowledges that this statutory authorization has been

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to improve the health of the people of the United States. . . . *CDC is responsible for controlling the introduction and spread of infectious diseases . . . .*" such as COVID-19. https://www.cdc.gov/about/media/pdfs/iod-mission-statement.pdf (emphasis added) (last visited July 17, 2024).

[10] Notably, in a concurrence, the United States Supreme Court has, for purposes of 18 U.S.C. § 371, equated a "lawful" government function with a "legitimate" (and "proper") function. *See Dennis v. United States*, 384 U.S. 855, 876-77 (1966) (Black, J., concurring) ("Had the indictment failed to charge that the functions obstructed were 'lawful' and 'proper,' it would have been fatally defective under our prior cases accepted by the Court today which state that an essential element of the crime of defrauding the Government is the obstruction of a 'lawful' and 'legitimate' governmental function.").

delegated to the CDC pursuant to 42 C.F.R. § 70.2 (Def. Moore's Mot. to Dismiss at 5).[11]

The Supreme Court held that Section 264(a) did not provide the CDC with limitless authority to impose a national eviction moratorium of "vast economic and political significance" that (a) impacted at least 80% of the country, including between 6 and 17 million tenants and millions of landlords, (b) threatened noncompliant landlords with criminal penalties of up to a $250,000 fine and one year in jail for exercising their "fundamental" property "right to exclude," and (c) threatened "to significantly alter the balance between federal and state power and the power of Government over private property." *Alabama Ass'n of Realtors*, 594 U.S. at 763-64.

However, in so ruling, the Supreme Court explained that the second sentence of Section 264(a) "informs the grant of authority [under the statute] by *illustrating* the kinds of measures that could be necessary" among the "other measures" provided for in the statute. *Id.* at 763 (emphasis added); 42 U.S.C. § 264(a) (listing " and other measures" at the end of the illustrative series). Consistent with these illustrating measures, the Supreme Court concluded that, unlike the overreaching imposition of a national eviction moratorium, Section 264(a) *does permit the CDC to impose measures that "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." Id.* at 763 (emphasis added).

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[11] 42 C.F.R. § 70.2 addresses "Measures in the event of inadequate local control." It reads:

> Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, *he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary*, ***including*** inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

42 C.F.R. § 70.2 (emphasis added).

It is a canon of statutory construction that the verb "to include" introduces examples, and not an exhaustive list. *United States v. South Half of Lot 7 & Lot 8, Block 14*, 910 F.2d 488, 490-91 (8th Cir. 1990). Therefore, Section 42 C.F.R. § 70.2's list of measures the CDC may take to prevent disease should be read as illustrative and not exhaustive.

In this case, *the CDC's measures at issue involve contractual efforts "directly related to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself [COVID-19]."* These measures facilitate mass COVID-19 vaccination in states like Utah and other jurisdictions and provide for the controlled distribution of COVID-19 vaccination record cards (and related vaccination reporting to state authorities) to provide a reliable means of verifying persons' vaccination status. Therefore, the CDC's *contractual* measures, which Dr. Moore challenges after the fact, were authorized by Section 264(a) as interpreted by the Supreme Court.[12]

3.2.2b The CDC is authorized to enter into voluntary CDC Vaccination Provider Agreements to respond to public health emergencies.

Section 264(a) was not the only Congressionally passed statute that authorized the CDC, as part of its COVID-19 Vaccination Program, to enter into voluntary CDC COVID-19 Vaccination Program Provider Agreements with approved vaccine distributing entities.[13] Indeed, 42 U.S.C. § 247d ("Section 247d"), which addresses "Public Health Emergencies" such as COVID-19, specifically provided that if the Secretary of the United States Department of Health and Human Services ("HHS") "determined that a disease present[ed] a public health emergency .

[12] Notably, for over 50 years, the United States Supreme Court has also frowned upon efforts by a defendant, like Dr. Moore, who is charged with conspiring to defraud the United States in violation of 18 U.S.C. § 371, to challenge the "lawfulness" of a federal statute or regulation after the fact, after violating the statute:

> It is argued in dissent, see pp. 1852—1854, post, that we cannot avoid passing upon petitioners' constitutional claim because it bears upon whether they may be charged with defrauding the Government of a "lawful function." . . . *This position loses sight of the distinction between appropriate and inappropriate ways to challenge acts of government thought to be unconstitutional*. Moreover, this view assumes that for purposes of § 371, a governmental function may be said to be "unlawful" even though it is required by statute and carries the fresh imprimatur of this Court. Such a function is not immune to judicial challenge. *But, in circumstances like those before us, it may not be circumvented by a course of fraud and falsehood, with the constitutional attack being held for use only if the conspirators are discovered.*

Dennis v. United States, 384 U.S. 855, 867 (1966) (emphasis added).

[13] For the Court's convenience, a copy of Dr. Moore's signed CDC COVID-19 Vaccination Program Provider Agreement is attached hereto as Exhibit 2.

. . the Secretary may take such action as may be appropriate to respond to the public health emergency, including . . . *entering into contracts* . . . ." *Id.* (emphasis added).[14] Such contracts include CDC Vaccination Program Provider Agreements, such as those used during the COVID-19 pandemic and the one signed by Dr. Moore, himself. Under statutory authority, these contracts were implemented to facilitate collaboration with relevant state, local, and territorial authorities through cooperative agreements with the CDC to foster immunization.[15] Versions of these CDC Vaccination Program Provider Agreement forms have been used as a template for other Utah State contracts with vaccine providers who enroll in, for example, the CDC-funded Utah Vaccines for Children Program ("Utah VFC Program"). (Ex. 3 [Lakin MOI] at 2). The Utah VFC Program provides vaccines at no cost to children who otherwise might not be able to afford vaccines. (*See id.*). Similar to the CDC's COVID-19 Vaccination Program, in other such CDC-funded programs, enrolled providers contract with a local public health agency, like the Utah Department of Health (as opposed to the CDC), to distribute vaccines provided by the CDC to persons needing vaccines. (*See id.*).[16] Using such vaccine-provider agreements is a standard public-health procedure to

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[14] On or about January 31, 2020, the Secretary of HHS declared a national public health emergency under 42 U.S.C. § 247d as a result of the spread of a novel coronavirus to and within the United States. (Ex. 11 [Indictment] ¶ 7).

[15] *See* Ex. 2 [Dr. Moore's CDC COVID-19 Vaccination Program Provider Agreement] at Page 2, Agreement requirements) ("This program is part of a collaboration under the relevant, state, local, or territorial immunization's cooperative agreement with CDC.") *see also* Ex. 3 [Memo of Interview of Rich Lakin, Immunization Director of the Utah Department of Health and Human Services ("Lakin MOI")) at p. 2).

[16] *See* UTAH VACCINES FOR CHILDREN PROGRAM PROVIDER MANUAL (2003 ed.)

1-1 Utah Vaccines for Children Program Provider Operations Manual
As defined by the Centers for Disease Control and Prevention (CDC), the Vaccines for Children (VFC) Program is a *federally funded program* that *provides vaccines at no cost to children who might not otherwise be vaccinated because of an inability to pay*. In Utah, the program is administered by the Department of Health, Division of Disease Control and Prevention, Bureau of Epidemiology, Immunization Program.

At https://immunize.utah.gov/wp-content/uploads/Provider-Manual-05062024.pdf (last visited July 22, 2024) (emphasis added).

facilitate the distribution of CDC-provided vaccines, and to combat disease; it is not unique to COVID-19.

In this case, the CDC Vaccination Program Provider Agreements required, among other things, that the vaccine provider administer the vaccine properly and properly report the vaccinations to the relevant State, Local, or Territorial Immunization Information System ("IIS"). (*See* Ex. 3 [Lakin MOI]; Ex. 2 [Dr. Moore's Provider Agreement] at 2, 6 (wherein he agreed to report vaccine administrations to the Utah Statewide Immunization Information System ("USIIS"))). This facilitates general tracking of vaccinations and diseases throughout the United States, without the use of record-level data or direct personal identifiers.[17]

The Utah Statewide Immunization Information System is "a free, confidential, web-based information system that contains immunization histories for Utah residents of all ages."[18] USIIS consolidates immunizations from multiple providers into one centralized record to facilitate patient care and access to schools and daycare centers.[19] Only authorized users, such as healthcare providers, pharmacies, schools, licensed childcare programs, and public programs have access to USIIS. And USIIS complies with HIPAA and state law to protect patient privacy, requiring all providers and users to sign confidentiality agreements before they are given access to USIIS.[20]

In signing the CDC Vaccination Provider Agreements, vaccine distributing entities voluntarily agreed, in exchange for receiving vaccines, to comply with the CDC's requirements

[17] For example, the Utah Department of Health only provided "anonymized" COVID-19 vaccine administration data to the CDC, and did not transmit the names of vaccine recipients to the CDC. (Ex. 3 [Lakin MOI] at 2-3).

[18] Utah Department of Health and Human Services, About UISS at https://immunize.utah.gov/about-usiis/ (last visited July 18, 2024).

[19] *Id.*

[20] *Id.*

for vaccine administration, vaccine-record-card administration and distribution, and the reporting of vaccine administrations. As with prior vaccination provider agreements, the statutorily authorized CDC COVID-19 Vaccination Program Provider Agreements were not imposed on medical practitioners by regulation. They were voluntarily entered into by those, like Dr. Moore, who agreed to, or at least pretended to agree to, distribute the CDC-provided vaccines to American residents, without publicly or openly refusing to comply with the vaccination program.

3.2.2c The CDC is authorized to maintain and distribute a stockpile of vaccines to provide for the health security of the United States.

Under 42 U.S.C. §274d-6(b), the CDC also has statutory authorization to maintain and distribute a stockpile of vaccines to provide for the health and security of the United States. Indeed, Congress has *mandated* that HHS (working with the CDC) maintain a stockpile of vaccines "to *provide for and optimize the emergency health security of the United States*, including the emergency health security of children and other vulnerable populations." 42 U.S.C. § 247d-6b(a)(1) (emphasis added). This mandate includes stockpiling "ancillary medical supplies."[21] A common understanding of that term includes *items related to the proper administration of medicine and vaccines*, such as vaccination record cards, or in the context of Dr. Moore's crimes, *COVID-19 vaccines and vaccination record cards*.[22] The United States also anticipates that trial testimony will establish that ancillary supplies in this case included vaccination record cards.

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[21] "The Secretary, in collaboration with the Assistant Secretary for Preparedness and Response and the Director of the Centers for Disease Control and Prevention, and in coordination with the Secretary of Homeland Security (referred to in this section as the 'Homeland Security Secretary'), *shall maintain a stockpile or stockpiles of drugs*, *vaccines* and other biological products, medical devices, and other supplies (including personal protective equipment, *ancillary medical supplies*, and other applicable supplies required for the administration of drugs, vaccines and other biological products, medical devices, and diagnostic tests in the stockpile) in such numbers, types, and amounts as are determined consistent with section 300hh-10 of this title by the Secretary to be appropriate and practicable…" 42 U.S.C. § 247d-6b(a)(1) (emphasis added).

[22] *See e.g.,* HHS.GOV: COVID-19 VACCINE ANCILLARY SUPPLY AND MIXING KITS, at https://aspr.hhs.gov/SNS/Pages/COVID19-Vaccine-Ancillary-Supply.aspx (last visited July 22, 2024) (providing that ancillary supply kits include "needles, syringes, alcohol pads, vaccination cards, needle info cards, and PPE (e.g., face shields and surgical masks) for vaccinators").

HHS's and the CDC's efforts to provide for both COVID-19 vaccine distribution and a reliable means of verifying COVID-19 vaccination status, through the controlled distribution of both COVID-19 vaccines and validly issued COVID-19 vaccination record cards, were part of the CDC's lawful government functions. These efforts fell within the CDC's statutory authorization to provide for the emergency health security of the United States during the COVID-19 pandemic and, also, more particularly, to provide for the emergency health security of children and other vulnerable populations during that pandemic.[23] By distributing COVID-19 vaccines and creating a reliable means of verifying COVID-19 vaccination status, HHS and the CDC were empowering Americans, and particularly vulnerable individuals, to minimize their risk of infection and to avoid higher-risk situations where they might otherwise be in confined spaces with unvaccinated individuals—such as on an airplane, on a train or bus, or in a public venue. These lawful government functions were fulfilled even though there was never a complete nationwide vaccine mandate requiring every person to be vaccinated. 42 U.S.C. § 247d-6b(a)(1). There did not have to be one for the CDC to be engaged in its lawful government function.

The public health emergency statutes also provide that the Secretary of HHS shall "devise plans for effective and timely supply chain management of the stockpile, in consultation with the Director of the Centers for Disease Control and Prevention." 42 U.S.C. § 247d-6b(a)(3)(E). This provision provides notice that HHS and the CDC work together to manage the supply chain of the stockpile, including vaccines and ancillary medical supplies. Further, the Secretary of HHS is to

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[23] *See* CENTERS FOR DISEASE CONTROL AND PREVENTION: PEOPLE WITH CERTAIN MEDICAL CONDITIONS AND COVID-19 RISK FACTORS, at https://www.cdc.gov/covid/risk-factors/?CDC_AAref_Val=https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited July 22, 2024) (advising persons with certain medical conditions to take precautions against contracting COVID-19); 42 U.S.C. § 247d-6b(a)(1) provides that HHS shall maintain a stockpile, including vaccines and ancillary medical supplies, in part "to provide for and optimize the emergency health security of the United States, including the emergency health security of children and other vulnerable populations, in the event of a bioterrorist attack or other public health emergency."

"deploy the stockpile at the discretion of the Secretary to respond to an actual or potential public health emergency or other situation in which deployment is necessary to protect the public health or safety." 42 U.S.C. § 247d-6b(a)(3)(G). And the Secretary of HHS is also to "provide assistance, including technical assistance, to maintain and improve State and local public health preparedness capabilities to distribute and dispense medical countermeasures and products from the stockpile, as appropriate." 42 U.S.C. § 247d-6b(a)(3)(J). Clearly, these statutes establish that the CDC had an authorized lawful governmental function to work in collaboration with states like Utah to ensure public health preparedness and to manage the distribution *of COVID-19 vaccines* and their correlated ancillary supplies, such as *COVID-19 vaccination record cards*.[24]

In addition, the version of § 247d-1 in effect during the relevant period provided that HHS could also "track the initial distribution of federally purchased influenza vaccine in an influenza pandemic." This provision—effective June 24, 2019 *before the COVID-19 pandemic emerged in December of that year*—did not mention vaccine distribution related to the COVID-19 pandemic by name.[25] However, this provision did provide notice that HHS's lawful government functions to respond to a public health emergency can include tracking vaccine distribution. HHS's and the CDC's efforts to do just that, by controlling the distribution of COVID-19 vaccination record cards, were in line with their statutory mandate. Consistent with this mandate, HHS and the CDC

[24] At the time, COVID-19 was not specifically identified in these statutes. But no person could reasonably argue that HHS's and the CDC's lawful government functions did not encompass responding to the COVID-19 pandemic, merely because the global COVID-19 pandemic—which took the entire world unawares—had not been legislatively divined and specifically identified by name beforehand in the statutory framework that generally authorized and required these agencies to respond to public health emergencies.

[25] The current version of the statute, effective December 29, 2022, explicitly provides that "The Secretary, together with relevant manufacturers, wholesalers, and distributors as may agree to cooperate, may track the initial distribution of federally purchased influenza vaccine in an influenza pandemic, *or other federally purchased vaccine to address another pandemic*. Such tracking information shall be used to inform Federal, State, local, and tribal decision makers during an influenza pandemic *or other pandemic*." 42 U.S.C. § 247d-1(a) (emphasis added).

imposed careful protocols to ensure that card recipients had actually received a vaccine *before* they received a vaccination record card. All these actions were authorized by statute.

Under the relevant statutory authority, the CDC thus did not exceed its authority in implementing a CDC COVID-19 Vaccination Program during the pandemic that included facilitating the proper administration and distribution of COVID-19 vaccines and vaccination record cards. In fact, in doing so, the CDC was fulfilling its core, lawful governmental function to control and prevent the spread of a deadly, communicable disease during a global pandemic.

3.2.3 The *Loper* decision supports the CDC's Congressional authorization to control the administration and distribution of COVID-19 vaccines and vaccination record cards during the pandemic.

Dr. Moore argues that by overruling the *Chevron* doctrine, *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024) ("*Loper*") somehow establishes that the CDC exceeded its "lawful government functions" in implementing its COVID-19 Vaccination Program by entering into Provider Agreements with authorized vaccine distributing entities, like Dr. Moore's Plastic Surgery Institute. (Def.'s Mot. to Dismiss at 7-14). This argument misses the mark.

Loper does not lead to the conclusion that the CDC exceeded its lawful authority in responding to the COVID-19 public health emergency by implementing its COVID-19 vaccination program. *Loper* holds that rather than defer to a federal agency's interpretation of a law, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority. . . ." 144 S.Ct. at 2273. In doing so, the Supreme Court directs that "*when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation*, while ensuring that the agency acts within it." *Id.* (emphasis added).

Here, the statutes cited above[26] clearly authorized the CDC to take the actions at issue—namely, "distributing and administering [in a controlled manner] authorized COVID-19 vaccines and COVID-19 vaccination record cards through approved vaccine distributing entities" by means of statutorily authorized CDC COVID-19 Vaccination Program Provider Agreements. (Ex. 1 [Indictment] ⁋⁋ 15-17, 20; *supra* §§ 3.2.2a-3.2.2c). Therefore, even under *Loper's* more rigorous analysis, the CDC's actions did not exceed the CDC's lawful authority.

Notwithstanding, Dr. Moore asserts that the CDC exceeded its lawful authority because it purportedly attempted to "require Dr. Moore to vaccinate his patients and to assist in the creation of a state database of those who chose to remain unvaccinated." (Def.'s Mot. to Dismiss at 14). This is a misstatement of both the law and the facts. The CDC passed no regulation requiring Dr. Moore or any other physician to vaccinate anyone. Nor did the CDC pass a regulation requiring Dr. Moore or any other physician (much less a plastic surgeon) to "assist in the creation of a state database of [persons] who chose to remain unvaccinated" for whatever reason.

Rather, acting as his Plastic Surgery Institute's "Chief Medical Officer" and "Medical Director," Dr. Moore *voluntarily* enrolled his Plastic Surgery Institute in the CDC COVID-19 Vaccination Program by signing the CDC COVID-19 Vaccination Program Provider Agreement.[27] He knew this agreement was between his Plastic Surgery Institute and the CDC. In fact, the agreement he signed specifically stated, "I understand this is an agreement between Organization [Plastic Surgery Institute] and CDC." (Ex. 2 [Provider Agreement] at 2). This was not a case of a government agency imposing its will on Dr. Moore. Rather, he voluntarily—albeit fraudulently—

[26] *Supra* §§ 3.2.2a to 3.2.2c (citing 42 U.S.C. §§ 264(a), 247d, 274d-6(b) and its subsections, and 247d-1, and 42 C.F.R. § 70.2).

[27] Ex. 2 [Dr. Moore's CDC Provider Agreement] at 1, 4 (showing Dr. Moore's signature on the agreement).

enrolled his practice in the CDC's COVID-19 Vaccination Program, with the intent of obstructing the CDC's lawful governmental functions and undermining public health-and-safety measures.

Under the CDC COVID-19 Vaccination Program Provider Agreement that Dr. Moore willingly signed, in exchange for the CDC distributing COVID-19 vaccines and ancillary medical supplies, including COVID-19 vaccination record cards, to him (at no cost), Dr. Moore agreed that he, his organization, and his employees would comply with the CDC's rules and protocols for administering and distributing the vaccines and vaccination record cards. Those contractual rules and protocols required, among other things, that Dr. Moore and his agents properly administer the COVID-19 vaccines to others and that they properly administer and distribute the COVID-19 vaccination record cards only to persons who had actually been administered a COVID-19 vaccine.

The Provider Agreement also required Dr. Moore's "Organization," "[w]ithin 24 hours of administering a dose of COVID-19 vaccine . . . to record in the vaccine recipient's record and report required information to the relevant state, local, or territorial public health authority." (Ex. 2 [Provider Agreement] at 2 ⁋ 2). Dr. Moore willingly committed that he "will be reporting [the vaccine administration data] to USIIS [the Utah Statewide Immunization Information System]." (*Id.* at 6). This was not a regulatory diktat from on high requiring Dr. Moore to "assist in the creation of a state database of those who chose to remain unvaccinated." (*Cf.* Def.'s Mot. to Dismiss at 14). This was a voluntarily—albeit fraudulently—entered contractual obligation to properly administer and distribute the vaccines and vaccine record cards in a way that would not obstruct the CDC's lawful governmental functions of seeking to mitigate and contain the COVID-19 pandemic through vaccination and proper record keeping.[28]

[28] Contrary to Dr. Moore's hyperbole, the CDC did not use the Utah Statewide Immunization Information System to create a "blacklist" of unvaccinated Utahns. As noted above, the USIIS was used, by the State of Utah, to facilitate patient treatment and access to schools and daycare centers. Nor did the State of Utah provide vaccine records to the CDC that identified the names of the persons who received COVID-19 vaccines. (Ex. 3 [Lakin MOI] at 2-3). [cont'd]

Dr. Moore and his co-defendants remained free not to participate in the program. They were free not to administer the vaccine. They were free not to issue vaccination cards. They were free not to report vaccinations to the USIIS. But they were not free to conspire to defraud the United States and the CDC by obstructing the CDC's COVID-19 vaccination program in this manner. In doing so, they crossed the line into criminal behavior.

3.3 The Paperwork Reduction Act does not apply to this case, and the CDC did not fail to comply with it.

Dr. Moore contends that a relatively obscure Paperwork Reduction Act (the "PRA") somehow bars his prosecution for Conspiracy to Defraud the United States by obstructing the CDC's lawful government functions in relation to the CDC's COVID-19 Vaccination Program. He claims that the public protection section of the PRA (44 U.S.C. § 3512) provides a complete defense to his criminal prosecution based on the CDC's alleged violations of the PRA. More specifically, he claims that the CDC failed to follow a regulatory approval process and provide a control number and other information to Dr. Moore before seeking to collect information from him related to COVID-19 vaccine administrations, and that because of these purported violations, Count 1 of the Indictment must be dismissed. This argument also fails for multiple reasons.

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Further, the suggestion that the USIIS was used to create such a "blacklist" of nonvaccinated Utahns also make little sense, considering that approximately 24% of Utah's population (over 764,000 Utahns) never received a single COVID-19 vaccine, and approximately 34% of the population (over 1,083,000 Utahns) were never fully vaccinated. *USA Facts*, *Utah Coronavirus Vaccination Progress*, at https://usafacts.org/visualizations/covid-vaccine-tracker-states/state/utah/#:~:text=How%20many%20COVID%2D19%20vaccines,have%20recieved%20a%20booster%20dose (last visited July 22,, 2024).

In any event, Dr. Moore's argument is both counterfactual and irrelevant.

3.3.1. The PRA's public protection defense does not apply to criminal prosecutions, but only to administrative agency processes and judicial actions related thereto, which this case is not.

The PRA has no application to criminal actions like this one. Rather, "[t]he Paperwork Reduction Act was enacted in response to one of the less auspicious aspects of the enormous growth of our federal bureaucracy: its seemingly insatiable appetite for data. Outcries from small businesses, individuals, and state and local governments, that they were being buried under demands for paperwork, led Congress to institute controls." *Dole v. United Steelworkers of Am.,* 494 U.S. 26, 32 (1990). Congress passed this law in 1980, to reduce the paperwork burden on small businesses and individuals. It then substantially amended the law in 1995 to include a provision limiting personal liability for failure to comply with collection of information when (1) the information-collection device did not include a "valid control number assigned by the [OMB]," or when (2) "the agency fails to inform the person . . . that such person is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512, *Lewis v. Comm'r*, 523 F.3d 1272, 1274–75 (10th Cir. 2008).

First, and most rudimentary, by its own terms, the PRA "public protection" defense and penalty bar does not provide a defense to criminal actions. Rather, it applies only to "agency administrative process[es] or judicial action[s] applicable thereto." 44 U.S.C. § 3512(b). Consistent with the plain language of Section 3512(b), in an unpublished opinion, the Tenth Circuit has interpreted the "public protection" defense to apply only "during [an] agency administrative process or in a judicial action applicable to that process." *Springer v. I.R.S. ex rel. U.S.*, 231 F. App'x 793, 800 (10th Cir. 2007) (unpublished opinion) (internal quotations omitted). And as the Sixth Circuit consistently pointed out in *United States v. Gross*, "the legislative history surrounding the 1995 amendments to the PRA states that § 3512 was intended as a defense *only* during a[n]

agency administrative process or any subsequent judicial review *as opposed to criminal proceedings in district court*." *Gross,* 626 F.3d 289, 296 (6th Cir. 2010) (internal quotation marks omitted) (emphasis added); *accord Springer*, 231 F. Appx'x at 800 (unpublished).

The legislative history for the 1995 amendment also explained that "[t]he House amendment contains a provision which clarifies and strengthens the Act's current 'public protection' provision by enabling a person to assert this protection at any time during an agency administrative process or any subsequent judicial review of an *agency action involving a penalty*." H.R. CONF. REP. 104-99, 36, 1995 U.S.C.C.A.N. 239, 248 (emphasis added). It is *agency action* and *agency penalties* at stake under the PRA. That is why "[w]here *an agency* fails to follow the PRA in regard to an information collection request that *the agency* promulgates via regulation, at its own discretion, *and without express prior mandate from Congress,* a citizen may indeed escape *penalties for failing to comply with the agency's request*." *United States v. Dawes*, 951 F.2d 1189, 1191 (10th Cir. 1991) (quoting *United States v. Hicks*, 947 F.2d 1356, 1359 (9th Cir. 1991)) (emphasis added).

Indeed, a federal district court in the Eastern District of New York performed "an exhaustive review of the PRA and its legislative history" to conclude "that Congress never intended the Act to apply to criminal proceedings in general." *U.S. v. Burdett*, 768 F.Supp. 409, 412 (E.D.N.Y. July 30, 1991). The court reasoned that "None of Congress' enumerated purposes for enacting the PRA would be served by allowing people to willfully and knowingly commit criminal acts and escape prosecution because an information collection request inadvertently lacked an OMB control number." *Id.*[29] The court further reasoned that, "Congress has specifically

[29] The enumerated purposes of the PRA focus largely on, among other things, minimizing paperwork burdens on individuals, small businesses, and other institutions; maximizing the utility of information collected by government agencies; making Federal information management policies more uniform; and approving the quality and use of

enacted criminal statutes which punish people for failing to provide the government with certain information. Interpretations of the Act which insulate defendants from criminal responsibility inherently disregard the Act's objectives." *Id.* The court recognized that the Ninth Circuit had applied Section 3512 in a criminal action. *Id.* at 413, n.3 (citing *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990)). But the Court found "the application of the PRA as a defense to a criminal charge to be an unintended posture, Ninth Circuit precedent notwithstanding." *Id.* at 413. In reaching that conclusion, the court reasonably found that, "[i]f Congress intended the PRA to give additional rights to criminal defendants, it could have done so explicitly." *Id.* at 413.

Congress did not. And the PRA's "public protection" defense cannot be raised, as here, in a separate civil or criminal proceeding unrelated to an agency administrative process. *Dawes*, 951 F.2d at 1191. Dr. Moore's assertion that the decision to prosecute Dr. Moore and the attendant prosecution was somehow part of "an agency administrative process" has no basis in law or fact. (Def.'s Mot. to Dismiss at 19).[30] And as the Tenth Circuit has pronounced, "[t]he PRA was not meant to provide criminals with an all-purpose escape hatch." *Dawes*, 951 F.2d at 1192 (citation omitted). This Court should not create a defense to criminal actions unrelated to "agency administrative processes" that Congress never created and never intended. *See* 44 U.S.C. §3512.

3.3.2. Even if the PRA public protection defense did apply, Dr. Moore and his codefendants cannot use it as a shield for providing false information.

As discussed above, the PRA provides relief during administrative proceedings to parties overburdened with paperwork. It does not shield defendants from criminal liability for lying to the federal government or providing false information in response to "a collection of information." In

Federal information. 44 U.S.C. § 3501 (listing the purposes of the PRA). The PRA was not intended to provide a defense to the criminal provision of false information.

[30] *See infra* § 3.3.5 (illustrating the kind of agency administrative process section 3512 would apply to).

fact, the Tenth Circuit has explicitly provided that a PRA defense "protects a person only 'for *failing* to file information. It does not protect one who files information which is false.'" *United States v. Chisum*, 502 F.3d 1237, 1243–44 (10th Cir. 2007).[31] Even more specifically and directly relevant to this case, the Tenth Circuit has also declared that "§ 3512 does not protect an individual *against prosecution* for making false statements on government forms." *United States v. Sasser*, 974 F.2d 1544, 1554 (10th Cir. 1992) (emphasis added).

Other Circuits and federal district courts agree. *See, e.g. United States v. Lee*, 967 F.2d 594 (9th Cir. 1992) ("Congress did not intend for the PRA to shield fraudulent misstatements."), *United States v. Weiss,* 914 F.2d 1514, 1522-23 (2d Cir.1990) ("[I]it is no defense to a charge of filing false statements that the government document that prescribed the details of filing had not been approved by the Director of the Office of Management and Budget, as the Paperwork Reduction Act allegedly required."), *United States v. Gemmill*, No. CRIM.A.04-CR-0137-3, 2007 WL 2032927, at *7 (E.D. Pa. July 11, 2007) (unpublished) ("[N]otwithstanding the requirements of the PRA, if an individual member of the public provides a governmental agency with fraudulent information—whether or not in compliance with the PRA—the PRA does not protect the individual from prosecution."). Therefore, "if [a party] filed false information, whether the forms contained current OMB numbers is irrelevant." *Sasser*, 974 F.2d at 1555.

Here, Dr. Moore is improperly attempting to use the PRA in just this manner—he seeks to shield his and his codefendants' false provision of COVID-19 vaccine administration data to the Utah State Immunization Information System (which he falsely equates with the CDC). Dr. Moore contends that because there was no "control number" on the CDC COVID-19 Vaccine Program

[31] (quoting *United States v. Collins*, 920 F.2d 619, 631 (10th Cir. 1990) (emphasis in original) (superseded by statute on other grounds, regarding opportunity to secure counsel, as stated in *United States v. Alcorta*, No. 20-3198, 2023 WL 3835789, at *8 (10th Cir. June 6, 2023) (unpublished)).

Provider Agreement he signed, that he and his codefendants were somehow at liberty to falsify vaccine administration records on the vaccine record cards themselves and in the USIIS. This argument flies in the face of the Tenth Circuit controlling precedent in *Chisum* and *Sasser*. *Chisum*, 502 F.3d at 1243–44, *Sasser*, 974 F.2d at 1554. In fact, at least as to *Sasser*, Dr. Moore tacitly admits as much, stating that "at first reading [*Sasser*] *appears* to defeat Dr. Moore's PRA argument." (Def.'s Mot. to Dismiss at 18) (emphasis in the original).

In reality, *Sasser* and *Chisum* not only appear to defeat Dr. Moore's PRA argument; they completely defeat it, bar it, and preclude it. Dr. Moore attempts to distinguish and evade *Sasser's* inescapable precedent by noting that *Sasser* was decided before Congress "strengthened" the PRA by adding subsection (b) of Section 3512. (Def.'s Mot. to Dismiss at 19). However, this argument fails for two reasons. First of all, *Chisum*—a 2007 case—reiterates *Sasser's* relevant holding, long after passage of the 1995 amendments. Second, Dr. Moore's argument would fail even in the absence of *Chisum*'s controlling authority.

Notably, when *Sasser* was decided in 1992, Section 3512 already contained language stating that, "Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency. . . ." *Sasser*, 974 F.2d at 1554. The version of Section 3512 that *Sasser* grappled with thus already protected parties from penalties for failing to provide information to federal agencies. Therefore, when *Sasser* held that "§ 3512 does not protect an individual against prosecution for making false statements on government forms," it did so in the context of understanding that the public protection under Section 3512 existed for failing to provide information. But more important, it recognized that the protection under § 3512 (however strong) did *not* extend to the provision of false information.

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Further, nothing in the 1995-Congressionally-added language of subsection 3512(b) provides any protection to persons who provide *false information*. Therefore, this subsection does not overrule, override, or even undermine in the slightest *Sasser's* still-controlling precedent. Dr. Moore and his codefendants cannot use the PRA as a shield for providing false information.

3.3.3. More specific statutes authorizing the CDC's tracking of vaccine distribution trump the PRA's general regulation of information collection.

Not only is the PRA inapplicable to this criminal proceeding involving the provision of false information, but the PRA—a broad, general statute—must also give way to the more specific statutes Congress passed to address pandemics like COVID-19. Indeed, it is a cannon of statutory construction that a specific statute trumps a general one. *See, e.g. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace canon of statutory construction that the specific governs the general.") (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). As the Tenth Circuit has recognized, "to avoid the superfluity of a specific provision that is swallowed by the general one, we [meaning courts in the Tenth Circuit] require compliance with the specific provision." *Mitchell v. Comm'r*, 775 F.3d 1243, 1253 (10th Cir. 2015) (internal quotation marks omitted).[32]

Here, as discussed above, Congress enacted 42 U.S.C. § 247d (and related statutes addressed elsewhere herein) to authorize the CDC to respond to public health emergencies. Notably, Section 247d-1 specifically authorizes the CDC to facilitate "vaccine tracking and distribution." (*See supra* § 3.2.2c). Therefore, even in a hypothetical world where the PRA could apply to a criminal prosecution like this one, the more specific statute—Section 247d—would

[32] *See also Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009) ("The canon is that a specific statutory provision trumps a general one.").

carve out an exclusion from any restrictions on the disclosure of information relating to vaccine administration that the PRA might otherwise impose.

3.3.4 The PRA does not prohibit the voluntarily contracted-for disclosure of information to vaccine recipients and third parties, like the Utah Department of Health, by distributing vaccination record cards and updating a Statewide Immunization Information System.

Dr. Moore appears to argue that the CDC somehow violated the PRA's provisions regarding the "disclosure to third parties or the public, of facts or opinions *by or for an agency*" by requiring Dr. Moore to (a) provide COVID-19 vaccination record cards to persons he [purportedly] vaccinated, and (b) report COVID-19 vaccine administrations to the Utah Statewide Immunization Information System. (Def.'s Mot. to Dismiss at 17, 19-21). Both arguments fail.[33]

First, and most important, the PRA applies to federal *regulations* that compel the provision of information to federal agencies—not to voluntarily entered contracts, such as the CDC COVID-19 Vaccination Program Provider Agreement Dr. Moore willingly, though fraudulently, signed. *See Dole*, 494 U.S. at 32. Namely, "The Act [the PRA] prohibits a federal agency from *adopting regulations* which impose paperwork requirements on the public unless the information is not available to the agency from another source within the Federal Government. . . ." *Id.* (emphasis added). The enumerated purposes of the PRA further establish that Congress intended the PRA to apply to information collected "by or for" federal agencies, and not for state or local agencies such as the Utah Department of Health. *See* 44 US.C. § 3501(1)-(3), (5)-(6), (8) (focusing on information collected "by or for the Federal Government"); *Dole*, 494 U.S. at 35.[34]

[33] Dr. Moore does not even attempt to argue that the PRA privileged his decision to destroy COVID-19 vaccines without authorization by pouring them down the drain or otherwise disposing of them. It does not.

[34] After *Dole* was decided, Congress added disclosure language to the PRA. But the language regarding the purposes of the PRA remain largely the same, still focusing on collection "by or for" Federal agencies. [Continued next page]

Here, by signing a CDC COVID-19 Vaccination Program Provider Agreement, Dr. Moore willingly and voluntarily enrolled in the CDC COVID-19 Vaccination Program, and voluntarily agreed to properly administer COVID-19 vaccines and vaccination record cards, and to report COVID-19 vaccine administrations to the USIIS. (Ex. 2 [Dr. Moore's Provider Agreement] at 1-4, 6). He was not compelled to do so by any CDC regulation. He had no obligation to enroll in the COVID-19 Vaccination Program and no obligation to sign a CDC COVID-19 Vaccination Program Provider Agreement. He was not compelled to administer and distribute COVID-19 vaccines and vaccination record cards to any of his "patients" or fraudulent-vaccination-record-card seekers. Nor was he compelled to report COVID-19 vaccine administrations to any federal agency. He *willingly contracted* to properly administer and distribute COVID-19 vaccines and vaccination record cards and to report vaccine administrations to the Utah Department of Health.

Dr. More's conduct at issue in this criminal prosecution simply does not constitute a compelled, regulatory "collection of information" under the PRA. The PRA is inapposite.

3.3.5 Even if the CDC had somehow violated the PRA, the PRA does not provide for the suppression of any evidence in this case.

For the reasons explained above, the CDC did not violate the PRA in any fashion by entering into voluntary CDC COVID-19 Vaccine Program Provider Agreements with authorized vaccine distributing entities like the Plastic Surgery Institute. But even if the CDC had somehow

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Equally important, the CDC never received any record-level data with specific identifiers showing the names of any persons vaccinated for COVID-19 in Utah as part of the CDC's COVID-19 Vaccination Program. Any such data provided to the CDC was anonymized. (*See* Ex. 3 [Lakin MOI] at 2-3).

And perhaps most important, to the extent the PRA could ever apply to the voluntary and contractual provision of vaccine administration information pursuant to a COVID-19 Vaccination Program Provider Agreement, it would not have applied here. Namely, as to the defendants, the PRA would still have been inapplicable because, as of April 28, 2020, the Secretary of Health and Human Services had, pursuant to section 319 of the Public Health Service (PHS) Act, 42 U.S.C. 247d, waived any PRA requirements as to the provision of "information to be collected by the Centers for Disease Control and Prevention from individuals, healthcare providers, states, and other partners in order to a facilitate rapid response to the [COVID-19 Public Health Emergency]."
Waiver Notice at https://aspe.hhs.gov/sites/default/files/private/pdf/258866/CDC-PHE-PRA-Waiver-Notice-COVID-19-04-28-20.pdf (last visited July 23, 2024).

violated the PRA, the PRA would not authorize the suppression of evidence in this criminal proceeding. Indeed, the United States cannot find a single instance—nor has Dr. Moore identified a single instance—where a violation of the PRA resulted in suppression of evidence in a criminal proceeding. As discussed above, this is likely because the PRA does not supply a defense in criminal proceedings to begin with. However, even when looking at noncriminal cases where the PRA *was* a valid defense, a finding of a PRA violation did not lead to suppression of evidence. Rather, the federal agency or court remedied the violation by undoing the negative consequence that the agency imposed on a party for not responding to its regulatory collection of information.

For example, in *Pac. Nat. Cellular v. United States*, a party sought money damages from the United States in Federal Claims Court after the Federal Communications Commission ("FCC") dismissed the party's license application for failure to respond to an information collection request that violated the PRA. The court found that the FCC had violated the PRA. *Pac. Nat. Cellular v. United States*, 41 Fed. Cl. 20, 29–30 (1998). However, the court dismissed the party's action against the United States for lack of jurisdiction and granted the United States' motion for summary judgment. *Id.* at 36. The remedy for the PRA violation came from the FCC, which had separately found that its own conduct violated the PRA. It, therefore, simply reinstated the party's application. *In re Kent S. Foster,* F.C.C. 92-531 at 2 (1992). The proper remedy of undoing the faulty agency action came out of an FCC administrative proceeding and involved the agency unwinding the penalty (denial of the application) that it had wrongly imposed.

In another case, a district court found that the United States Department of Agriculture violated the PRA when it required responses to a noncompliant survey. The USDA implemented a program to conduct research related to the strength of the beef industry, funded by mandatory contributions from beef producers and importers. *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*,

2001 DSD 5, ¶ 16, 132 F. Supp. 2d 817, 819 (D.S.D. 2001). The USDA sent out survey forms through a contractor, which did not bear a valid control number, requiring producers and importers to supply answers and verification of certain facts related to whether the program should continue. *Id.* at 819, 823. If a party did not respond, its signature supporting referendum on the mandatory contribution program was deemed invalid. *Id.* at 823. Finding a violation of the PRA, the district court granted the plaintiff's motion for injunctive relief from mandatory contributions to fund the program. *Id*. at 832. Suppression of evidence was never an issue or an option.

These cases, while interesting, have little relevance to Dr. Moore's case. Nor does the PRA. Because the PRA provides no basis to suppress evidence in a criminal proceeding such as this.

And even if it did, contrary to Dr. Moore's claims, in addition to the relevant CDC COVID-19 Vaccination Program Provider Agreement and Dr. Moore's violations of that agreement and related fraud, the United States has significant, additional evidence to prove the defendants' guilt. Among other things, the United States has numerous text messages exchanged among Defendants Dr. Moore, Kari Burgoyne, Kristin Anderson, and others proving their guilt. The United States has evidence from two undercover agents who went through the screening process to purchase fraudulent vaccination record cards from the defendants. The United States has provided evidence from interviews of prior employees that support the charges. The United States even has a cooperation agreement with Defendant Sandra Flores, the "receptionist" that Dr. Moore hired to distribute the fraudulently completed vaccination record cards to others. In that agreement, Ms. Flores has agreed, among other things, to testify against her codefendants. The United States also has a video of Ms. Flores providing a fraudulent vaccination record card to an undercover agent. Given all this evidence, Dr. Moore's suggestion that an improper (and legally unsupported) suppression of the CDC COVID-19 Vaccination Provider Agreement that Dr. Moore signed, and

of any related testimony, would somehow prevent the United States from proving the defendants' guilt at trial ignores the evidentiary realities of this case.

3.4 The Court should not dismiss Counts 2 and 3 for the conversion of government property, because the United States has alleged all the elements of both counts.

As noted above, the Indictment lays out each of the elements required to state the offenses of Count 2: Conspiracy to Convert, Sell, Convey, and Dispose of Government Property in violation of 18 U.S.C. §§ 371 and 641; and Count 3: Conversion, Sale, Conveyance, and Disposal of Government Property in violation of 18 U.S.C. §§ 641 and 2. Along with conspiracy elements not disputed here, the elements of the underlying offense for both counts are:

First: The COVID-19 vaccines and accompanying COVID-19 vaccination record cards belonged to the United States government. (It does not matter whether the defendant knew that the COVID-19 vaccines and COVID-19 vaccination record cards belonged to the United States government, only that he knew they did not belong to him.);

Second: The defendant, without authority, disposed of COVID-19 vaccines that were provided by the Centers for Disease Control and Prevention ("CDC") pursuant to a CDC COVID-19 Vaccination Program Provider Agreement; converted COVID-19 vaccination record cards to the defendant's own use

or to the use of others; or, without authority, sold and conveyed vaccination record cards to others; and

Third: The value of the COVID-19 vaccines and vaccination record cards was more than $1,000.[35]

Dr. Moore challenges only the first and (in part) the third elements of the underlying violation of 18 U.S.C. § 641.[36] He contends that the United States cannot prove *the allegations* in the Indictment that (a) the COVID-19 vaccines and vaccination record cards were United States

[35] 18 U.S.C. § 641; Tenth Circuit Crim. Pattern Jury Instructions, No. 2.31.

[36] By failing to challenge the other elements of these counts, Dr. Moore concedes, by omission, that the United States can establish and has established these other elements. Dr. Moore also concedes that the COVID-19 vaccines, themselves had value. He only challenges the alleged value of the COVID-19 vaccination record cards.

property (first element), and (b) (as to the third element) the fraudulently completed COVID-19 vaccination record cards had a market value of $50 per notation on each card. (Def.'s Mot. to Dismiss at 23-33). Because these facts are alleged in the Indictment, both arguments fail on their face.[37] *Supra* § 3.1; *Hall*, 20 F.3d at 1087 ("An indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true.").

But even if the Court were to look beyond the allegations of the Indictment to resolve this motion, which it should not and need not do, Dr. Moore's arguments would still fail.

3.4.1 The Court should not dismiss Counts 2 and 3 for the conversion of government property, because, contrary to Dr. Moore's claims, the COVID-19 vaccines and vaccination record cards were, at all relevant times, property of the United States.

To avoid accountability for his crimes, Dr. Moore contends that the United States cannot prove the allegations in the Indictment that the COVID-19 vaccines and vaccination record cards were property of the United States when Dr. Moore acquired them. (Def.'s Mot. to Dismiss at 24). Dr. Moore "*does not dispute* that at one point in time[,] the [COVID-19] vaccine[s] and the [COVID-19 vaccination] record cards constituted '*a thing of value of the United States*'"—that is, that they were United States property at one point. (*Id.* at 25) (emphasis added). But he mistakenly argues that he acquired this property (the vaccines and vaccine record cards), not from the United States or its agency, the CDC, but from the State of Utah, after the State of Utah had supposedly taken possession of the property. This argument is wrong on the law and the facts.

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[37] Ex. 1 [Indictment] ⁋⁋ 25-26, 30 (alleging the COVID-19 vaccines and vaccination record cards were a thing of value of, and property of, the United States).

3.4.1a The system and process for distributing the COVID-19 vaccines and vaccination record cards shows that they remained United States' property until properly issued to a vaccinated person.

As alleged, at all relevant times, the COVID-19 vaccines and vaccination record cards at issue were property of the United States. The vaccines and vaccination record cards were distributed only to authorized providers (vaccine distributing entities), like Dr. Moore's Plastic Surgery Institute, who had signed CDC COVID-19 Vaccination Provider Agreements. (Ex. 1 [Indictment] ⁋⁋ 15-17, 17a-17h; *supra* §§ 2.2, 3.3.4). Dr. Moore voluntarily signed such an agreement *with the CDC*. (Ex. 1 [Indictment] ⁋ 22a; *supra* §§ 3.2.3, 3.3.4; Ex. 2 [Dr. Moore's Provider Agreement] at 2-3) (noting Dr. Moore was contracting with the CDC).

Because he signed the Provider Agreement, Dr. Moore knew he was dealing with the CDC. He knew that he was not authorized to deliberately waste or destroy COVID-19 vaccines. And he knew that he was not authorized to distribute COVID-19 vaccination record cards to any person unless and until his Organization (the Plastic Surgery Institute) had *first* administered a COVID-19 vaccine to that person. (Ex. 2 [Dr. Moore's Provider Agreement] at 1-3).

Up until and through the point that a vaccine and vaccination record card were properly issued to a vaccine recipient, the COVID-19 vaccines and COVID-19 vaccination record cards belonged to the United States and the CDC. Dr. Moore was never free to distribute vaccination record cards to unvaccinated persons. Because neither Dr. Moore nor any of his codefendants ever properly distributed a COVID-19 vaccine and related vaccination record card to any person, title to the property at issue (the COVID-19 vaccines and vaccination record cards) remained with the CDC up until, if not beyond, the point that Dr. Moore destroyed, converted, sold, and conveyed the vaccines and vaccination record cards without authorization.

Nor is there any traction to Dr. Moore's implicit argument that Dr. Moore cannot be charged with conversion of government property because he *believed* that the COVID-19 vaccines and vaccination record cards belonged to the State of Utah, as opposed to the CDC. So long as the property at issue actually belonged to the United States (or its agency), a defendant is criminally liable under 18 U.S.C. § 641 for converting the property, even if he did not know the property belonged to the United States. *United States v. Speir*, 564 F.2d 934, 937–38 (10th Cir. 1977).[38]

Indeed, the Tenth Circuit Criminal Pattern Jury Instruction for 18 U.S.C. § 641 specifies as part of the first element for that charge that: "It does not matter whether the defendant knew that the [name property] belonged to the United States government, *only that he knew it did not belong to him*."[39] Furthermore, the COVID-19 vaccination record cards were also emblazoned with the HHS and CDC logos. Therefore, while it is not an element of the offense, it is hard to imagine how an educated surgeon like Dr. Moore would mistakenly think that the cards belonged to the State of Utah, and not the CDC.

Moreover, contrary to Dr. Moore's assertions, the State of Utah never warehoused, possessed, or controlled the CDC COVID-19 vaccines and CDC COVID-19 vaccination record cards. The CDC did enlist the Utah Department of Health and other state, local, and territorial agencies throughout the country to help enroll (purported) authorized providers (aka vaccine distributing entities), such as Dr. Moore's Plastic Surgery Institute, in the CDC COVID-19 Vaccination Program. (*See* Ex. 3 [Larkin MOI] at 1-2). The CDC also enlisted such local agencies to use the CDC VTrckS system to coordinate the shipments of vaccines and ancillary kits (including vaccination record cards) *directly* to authorized local providers. (*Id.* at 1-2).

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[38] *Id.* cited in Commentary to Tenth Circuit Crim. Pattern Jury Instructions, No. 2.31 (2021 ed.) (noting, "It is not necessary that the defendant knew the property belonged to the [federal] government.").

[39] Tenth Circuit Crim. Pattern Jury Instructions, No. 2.31. (emphasis added).

But in Utah, as elsewhere, the CDC COVID-19 vaccines and COVID-19 vaccination record cards were shipped directly from the manufacturer, generally through UPS or FedEx. (Ex. 3 [Larkin MOI] at 1-2). The vaccines and vaccination record cards were, therefore, continuously within the control and possession of the United States or its authorized manufacturers and shippers up until the COVID-19 vaccines and vaccination record cards were properly distributed by authorized, enrolled providers (vaccine distributing entities) to vaccinated persons. (*See id.* at 1-2). The Utah Department of Health (State of Utah) never took possession of the CDC COVID-19 vaccines and vaccination record cards. It merely coordinated their delivery to enrolled and authorized local providers that it had screened for the CDC COVID-19 Vaccination Program.

Contrary to Dr. Moore's arguments, up until the COVID-19 vaccines and vaccination record cards were directly shipped to an authorized and enrolled vaccine provider, like Dr. Moore, the vaccines and record cards thus remained either in the CDC's possession or the possession of a manufacturer and/or distributor with whom the United States had contracted to deliver them. (*See* Ex. 3 [Larkin MOI] at 1-2; Ex. 1 [Indictment] ⁋⁋ 25-26, 30). Once Dr. Moore received the vaccines and vaccination record cards, he was under a contractual obligation to administer and distribute them properly, and only to truly vaccinated persons. He had no right, license, or authorization to destroy them, forge them, or administer and distribute the cards to unvaccinated persons. The facts of this case clearly indicate that Dr. Moore was dealing with property of the United States.

3.4.1b Federal caselaw regarding federal property's retention of its federal identify in transit to an intended recipient further establishes that the vaccines and vaccination record cards remained United States property until properly administered.

In addition to the facts, caselaw also supports the notion that federal funds or property retain their "federal" character *at least* until they reach their intended recipient. The defendant in *United States v. Largo* argued that he did not violate 18 U.S.C. § 641, when he embezzled federal

grant funds that had been deposited into a bank, because those funds had become the bank's property before his crime occurred. *United States v. Largo*, 775 F.2d 1099, 1101 (10th Cir. 1985). The Tenth Circuit disagreed, finding that "[i]t simply cannot be argued that federal grant money becomes nonfederal the minute it is deposited in the bank." *Id.* The analysis is similar here. Although the State of Utah never took possession of the vaccines and vaccination record cards, even if it had, one cannot credibly argue that the vaccines and vaccination record cards would have become nonfederal the minute they touched a Utah entity's hands in transit to intended recipients.

In *Griffith*, the Tenth Circuit similarly found that federal benefits "retain[ed] their identity as 'public money' under § 641" where they were paid into a joint account, and the joint account owner (not the intended beneficiary) stole the funds. *United States v. Griffith*, 584 F.3d 1004, 1020–21 (10th Cir. 2009).[40] In doing so, the court suggested that the federal identity of the property could last even after funds or property reached their intended beneficiary.

A judge in this District also recently held that a petitioner's interception of funds from the federal government before they reached their intended beneficiary amounted to theft of federal money under 18 U.S.C. § 641. *Howell v. United States*, 634 F. Supp. 3d 1076, 1082 (D. Utah 2022). In that case, the judge concluded that the "[p]etitioner's use of the funds [deposited into a bank account previously held by the intended recipient] occurred prior to their receipt by [the intended recipient] and amounted to theft of SSA [Social Security Administration] money." *Id.* It stands to reason that, as with federal funds, property of the United States retains its federal character at least until it reaches its intended beneficiary, and possibly longer.

[40] Other circuits have made similar findings. *See e.g., United States v. Forcellati,* 610 F.2d 25, 31 (1st Cir. 1979) (holding that stealing a government check prior to receipt by the named payee violated 18 U.S.C. § 641 because the government continued to have a property interest in the check); *United States v. O'Kelley,* 701 F.2d 758, 760 (8th Cir. 1983) (holding that an unendorsed United States Treasury check continued to be a "thing of value of the United States" even after receipt of the check by the payee).

Indeed, the case at hand is like *United States v. Robie*, 166 F.3d 444, 452 (2nd Cir. 1999), cited by Dr. Moore himself. In that case, the Second Circuit affirmed a conviction for theft of government property under 18 U.S.C. § 641, in part, on the grounds that stamps misprinted by a company that manufactured stamps for the United States remained United States property because they were made "under contract" for the Postal Service and thus remained under "the dominion" of the United States pursuant to contract. *Id.* at 446-448, 452-453. Here, like the contracted-for postal stamps in *Robie*, at all relevant times, the vaccines and vaccination record cards remained property made or being made for the United States or its agency—the CDC. *See* 18 U.S.C. § 641 (applying to "any property made or being made under contract for the United States or any department or agency thereof"). And the disposition, administration and distribution of that same property remained governed by United States' contracts (CDC COVID-19 Vaccination Program Provider Agreements and related manufacturing and shipment contracts), until the vaccines and vaccination record cards were authorized for dissemination to bona fide vaccine recipients.

Contrary to his suggestion, Dr. Moore is not akin to a "pickpocket" on a city bus who stole property that once belonged to the United States from a third party who had already properly acquired it from the United States. The vaccines and vaccination record cards that Dr. Moore destroyed, converted, and conveyed never reached their intended recipients—individuals who would be properly vaccinated and then receive their corresponding vaccination record card as documentation. Therefore, this property retained its federal identity. And Dr. Moore effectively destroyed, converted, and conveyed it right out of the government's hands.

Because the COVID-19 vaccines and vaccination record cards were the property of the United States and its agency, the CDC, the Court should deny Dr. Moore's motion to dismiss Counts 2 and 3 of the Indictment and allow this case to be decided at trial.

3.4.2 The United States' loss computation for Counts 2 and 3, which is based, in part, on the market value of the vaccination record cards, is proper and supported by the relevant law and alleged facts.

Having apparently exhausted his arguments for dismissing the Indictment outright, Dr. Moore contends that the Court should strike from the Indictment the CDC's loss computation. (Def.'s Mot. to Dismiss at 30). Notably, Dr. Moore does not challenge the value of the COVID-19 vaccines themselves. (*Id.*) (acknowledging that, "for the limited purpose of this motion, the defendant will not contest [the actual cost of the CDC's COVID-19 vaccines]"). Instead, Dr. Moore asserts that the United States' alleged valuation of the "corresponding COVID-19 vaccination record cards" is flawed, describing it as "absurd on its face." (*Id.*).

For purposes of this motion to dismiss, the allegations of the Indictment returned by a Grand Jury, including its loss computation and consequent assignment of value, must be taken as true.[41] Therefore, on that basis alone, Dr. Moore's argument fails. But leaving that dispositive fact aside, Dr. Moore's argument also fails on its merits.

The operative criminal statute for Counts 2 and 3 is 18 U.S.C. § 641. Section 641 clearly states that, for purposes of the statute, "[t]he word 'value' means face, par, *or market value*, or cost price, either wholesale or retail, *whichever is greater*." 18 U.S.C. § 641 (emphasis added). The United States valuation of the "approximately 1937 doses of COVID-19 vaccines and corresponding COVID-19 [v]accination [r]ecord [c]ards," as alleged in the Indictment, is based on the *market value* of the vaccination record cards with fraudulent vaccine notations on them. (Ex. 1 [Indictment] ⁋ 30). The United States calculates the value of the fraudulently issued COVID-19 vaccination record cards based on the market value of the cards as established by the amount of

[41] *Supra* § 3.1; *Hall*, 20 F.3d at 1087 ("An indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true.").

money that fraudulent vaccination card seekers were willing to pay for the cards with fraudulent notations—either directly or via a directed donation. (*See id.* ¶¶ 30, 22-23). The allegations of the Indictment, and the evidence supporting them, clearly establish that, as part of a screening process of sorts, card seekers were routinely directed to "donate," and routinely willingly paid, $50 to a specified charitable organization in order to set an appointment to come to the Plastic Surgery Institute to obtain a fraudulently completed COVID-19 vaccination record card, without receiving a vaccine. (*Id.* ¶¶ 22f, 22g, 22i, 22j, 22k, 22l, 22m, 23e, 23f, 23g, 23h, 23i, 30).

Under 18 U.S.C. § 641, the "market value" of the property may be determined by what someone would be willing to pay for it. *See U.S. v. Ary*, 518 F.3d 775, 779, n. 1, 788 (10th Cir. 2008) (using "auction value" of items to determine their fair market value). Indeed, this case is analogous to a District Court of Maryland case. In that case, as here, a defendant moved to dismiss the indictment charging him with theft under 18 U.S.C. § 641, arguing, similarly, that the United States could not prove the "market value" of the stolen property (government photographs). *U.S. v. Morison*, 604 F.Supp. 655, 657-58, 664-65 (D. Maryland 1985). In *Morison*, the court denied the motion on the grounds that the United States had alleged that a third-party magazine had paid the requisite amount for the property. *Id.* The court reasoned, apparently based on logic and experience, that the magazine's willingness to pay the amount established the market value. *Id.* Likewise, here, the fact that fraudulent-vaccination-record-card seekers were willing to pay $50 to a specified charity per each occurrence (that is, each false notation) on a COVID-19 vaccination record card that they could only obtain from a CDC-authorized provider also establishes that the *market value* of the vaccination record cards at issue in this case was at least $50 per notation.

Dr. Moore's other factual arguments also fail. For one, Dr. Moore falsely claims that he "never received $50, or any other amount, from anyone," for the cards. (Def.'s Mot. to Dismiss at

32). In reality, the United States has evidence to show that defendants received some direct cash payments for the provision of the fraudulently completed and distributed COVID-19 vaccination record cards. (*See e.g.*, S.P. Interview (on 8.25.22) at INT-OIG-SP-01-00002.02). The United States has evidence showing that defendants directed vaccination card seekers to make directed $50 donations for each card per person per occurrence.[42] And the United States has evidence that Dr. Moore redirected thousands of dollars from the directed $50 donations to pay the salary of his codefendant and former employee Sandra Flores, whom he rehired specifically to distribute the fraudulently completed vaccination record cards to persons who had been vetted and had paid the required donations.[43] This shows that Dr. Moore benefitted financially from selling the cards.

But even if Dr. Moore never received any of the money from the "sale" of the vaccination record cards—which he did—it would not affect the market value of the cards. The fraudulently distributed vaccination record cards are worth what the "market" of vaccine-record-card seekers would pay for them. That was, conservatively, at least $50 per notation per card for each person.[44]

Further, the asserted]"facts" that (a) Dr. Moore may have had no *direct* financial interest in the charitable organization to which he and his codefendants directed the payment of $50 donations, and (b) he does not characterize what he did as "selling" the cards, are of no moment. Even if Dr. Moore were primarily motivated to commit his crimes based on his medical beliefs

[42] *See, e.g.* Ex. 1 [Indictment] ⁋⁋ 22f, 22g, 22i, 22j, 22k, 22l, 22m, 23e, 23f, 23g, 23h, 23i, 30; Reports of Undercover Agents who purchased COVID-19 vaccination record cards from defendants at INV-UC-CF-01-00010-10.0, INV-UC-CF-01-000011-11.06, INV-UC-DM-01-00008, and INV-UC-DM-01-00009-09.07.

[43] *See, e.g.,* G.K. and S.K. Interview (on 2.7.23) at INT-FBI-GV-01-00001.06-00001.11, INT-FBI-GV-01-00009.csv, INT-FBI-GV-01-00011; Flores Interview (on 9.28.23) at INT-FBI-SF-01-00001-00001.04; Flores Agreement at PROF-SF-01-00004-00004.06.

[44] In fact, the $50 market valuation is low, considering the prices that other convicted defendants charged for improperly distributed COVID-19 vaccination record cards. *See, supra* n. 4 (noting other defendants had sold fraudulent COVID-19 vaccination record cards during the pandemic for as much as $150 to $350 each).

about the vaccine and his perceived obligation to his solicited or referred anti-COVID-19-vaccine "patients," that would not affect the market value of the bootlegged vaccination record cards.

Nor does Dr. Moore's assertion that "not all patients who got the [bootlegged vaccination record] cards made the [$50] donations" make a substantive difference. (Def.'s Mot. to Dismiss at 32). For one, this is a dubious and very unspecific assertion. (Dr. Moore fails to commit to even an approximate number of vaccination card recipients who supposedly paid nothing.) But more importantly, the fact that some unspecified number of the fraudulent-vaccination-record-card seekers may not have paid the required donation does not change the fact that others did pay that much per person, per occurrence—that is, per notation on each card. Therefore, the United States' alleged market value for the vaccination record cards is reasonable and legally and factually sound.

Lastly, whether or not Dr. Moore's anti-COVID-19-vaccine "patients" would have paid anything to receive a bona fide COVID-19 vaccination record card after having been legitimately vaccinated for COVID-19, which they were not, is also of no moment. These so-called patients of a plastic surgeon—who apparently never administered a single COVID-19 vaccine to anyone—were not paying for a "service." (*Cf.* Def.'s Mot. to Dismiss at 33) (suggesting as much). They did not want a COVID-19 vaccination record card merely to be fraudulently filled out and stored somewhere out of reach. They wanted, without having actually received a COVID-19 vaccine, to obtain a fraudulently completed COVID-19 vaccination record card that they could use to fraudulently evade then-current health-and-safety regulations. They wanted to use and display the card to access facilities, programs, means of transportation, and public and private venues that were otherwise temporarily closed to the unvaccinated. They wanted the cards. That's what they paid for. And that's what had market value—of at least $50 per false vaccination notation.[45]

[45] Dr. Moore's parting FED. R. EVID. 403 argument that the jury will be unfairly prejudiced by accusations of "such a large 'theft' of property" (in the alleged amount of approximately $124,878.50) is premature and unfounded.

4. CONCLUSION

This is a significant case against a well-educated and seasoned plastic surgeon who chose to break the law because he thought he could get away with it. Whatever his motivations may have been, he broke the law. He conspired to obstruct the CDC's lawful government functions, and he conspired to, and actually did, without authorization, unlawfully destroy, convert, sell, and convey government property in the form of COVID-19 vaccines and vaccination record cards. He did this during a global pandemic that took the lives of about 15 million people.[46] The Indictment, which was returned by an independent grand jury, alleges all the elements of each charge. Therefore, the Court should deny the motion to dismiss and allow this case to proceed to trial.

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[46] *Supra* n. 2.