

1 DAVID C. WEISS  
 2 Special Counsel  
 3 LEO J. WISE  
 4 Principal Senior Assistant Special Counsel  
 5 DEREK E. HINES  
 6 Senior Assistant Special Counsel  
 7 950 Pennsylvania Avenue NW, Room B-200  
 8 Washington, D.C. 20530  
 9 Telephone: (771) 217-6091  
 10 E-mail: Leo.Wise@USDOJ.GOV, DEH@USDOJ.GOV

11 Attorneys for Plaintiff  
 12 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT

14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 ROBERT HUNTER BIDEN,

19 Defendant.

No. CR 23-cr-00599-MCS

GOVERNMENT’S OPPOSITION TO  
 DEFENDANT’S MOTION TO DISMISS  
 COUNT 1 AS UNTIMELY, OR  
 ALTERNATIVELY, DISMISS ALL  
 COUNTS FOR FAILURE TO STATE  
 CLAIM AND LACK OF SPECIFICITY

Hearing Date: March 27, 2024

Hearing Time: 1:00 p.m.

Location: Courtroom of the  
 Hon. Mark C. Scarsi

20 Plaintiff United States of America, by and through its counsel, hereby opposes the  
 21 defendant’s motion to dismiss Count 1 as untimely, or alternatively, dismiss all counts for  
 22 failure to state a claim (Dkt. 29) (the “Motion”).

23 //

24 //

25 //

1           This opposition is based upon the attached memorandum of points and authorities,  
2 the filings and records in this case, and any further argument as the Court may deem  
3 necessary.

4  
5 Dated: March 8, 2024

Respectfully submitted,

6           DAVID C. WEISS  
7           Special Counsel

8           LEO J. WISE  
9           Principal Senior Assistant Special Counsel

10           

11           \_\_\_\_\_  
12           DEREK E. HINES  
13           Senior Assistant Special Counsel

14           Attorneys for Plaintiff  
15           UNITED STATES OF AMERICA

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Count 1 of the Indictment charges that the defendant’s willful failure to pay his 2016  
4 individual income taxes occurred in June 2020, when he untimely filed his 2016 Form  
5 1040. The defendant claims that this constitutes “artful pleading,” as the defendant asserts  
6 that the government should have alleged that the crime occurred in April 2017, when the  
7 2016 taxes were due, but claims, without evidence, that it did not do so to avoid a statute  
8 of limitations problem. While the defendant accuses the government of charging Count 1  
9 in order to avoid a statute of limitations problem, the defendant failed to disclose that he  
10 signed two tolling agreements that extended the statute of limitations as to the 2016 failure  
11 to pay offense to April 2024, well beyond the date of indictment. It is the defendant, and  
12 not the government, who has engaged in gamesmanship. If the government had wanted  
13 to charge failure to pay the 2016 tax year in 2017, the tolling agreements the defendant  
14 signed would have allowed the government to do so. Instead, as will be described in more  
15 detail below, the government charged the case when willfulness arose, based on the facts  
16 and circumstances specific to the defendant’s failure to pay for the 2016 tax year.

17 Additionally, the defendant’s motion should be denied because the Indictment  
18 alleges that the offense occurred in June 2020. At this stage in the proceedings, those  
19 allegations must be accepted as true. In bringing his motion, the defendant asks the Court  
20 to act as a finder of fact. That is something only a jury at trial can do.

21 Further, to the extent that the defendant argues, as a legal matter, that he could not  
22 have acted willfully at a time after taxes were due, he is wrong. The Ninth Circuit has  
23 embraced the concept of late-arising willfulness in the context of tax crimes; indeed, the  
24 defendant’s motion even cites the leading case.

25 Finally, the defendant misapplies the law and argues that the Indictment should be  
26 dismissed in its entirety. The argument fails because it rests on a fundamental  
27 misunderstanding of both the Indictment and the law regarding willfulness.

28

1 **II. FACTS**

2 The first count of the Indictment, which charges a willful failure to pay tax for tax  
3 year 2016, alleges facts that are distinct to that tax year and different from the other tax  
4 years charged in the Indictment. In 2016, the defendant earned sufficient income to trigger  
5 the obligation to file an individual income tax return. Dkt. 1 ¶¶ 50-51 During the 2016 tax  
6 year, the defendant's company, Owasco, PC, paid him a salary and regularly withheld and  
7 paid over tax to the Treasury. *Id.* ¶¶ 28, 70. Furthermore, in April 2016 the defendant made  
8 a quarterly payment of estimated tax to the IRS. *Id.* ¶ 53

9 In or about April 2017, the defendant timely requested an automatic extension to  
10 file that return, though he ultimately did not do so within the time granted. *Id.* ¶ 52 At the  
11 time he filed the extension, the defendant's return preparer advised him that he likely  
12 would owe an additional \$26,000 in tax. *Id.* ¶¶ 53-54 In October 2017, the Defendant's  
13 return preparer prepared a 2016 Form 1040 and other returns for the defendant. *Id.* ¶ 55  
14 Business Associate 4, the defendant's business partner, reviewed the returns and sent an  
15 email apprising the defendant that the finalized returns were at the defendant's office and  
16 that the defendant should sign and mail them. *Id.*

17 At that point, as to the 2016 Form 1040, the defendant manifested some intent to  
18 file the return and pay the taxes due.

19 In November 2017, the defendant sent Business Associate 4 an email that appeared  
20 to indicate that he understood the return had not been filed and that his ex-wife would need  
21 to sign the return before it was filed. *Id.* ¶ 56. The defendant subsequently brought the  
22 2016 Form 1040 to his ex-wife so she could sign it. *Id.* ¶ 57. The defendant's ex-wife  
23 reviewed the return and returned an executed copy to the defendant. *Id.*

24 The defendant subsequently appears to have formed a subjective belief, regardless  
25 of evidence to the contrary, that he filed the 2016 Form 1040 and paid the taxes due. In  
26 March 2018, the defendant's ex-wife informed the defendant that she found the unfiled  
27 returns, with checks attached, in his automobile. *Id.* ¶ 58. The defendant insisted that the  
28

1 returns had been filed, claiming “[t]he taxes are filed those were copies with [Personal  
2 Assistant 1]’s notes.” *Id.* The defendant appeared to hold fast to his belief that he had filed  
3 his 2016 Form 1040 and paid his 2016 individual income taxes until January 2020 when  
4 his recently retained return preparers contacted the IRS and learned that the 2016 Form  
5 1040 had not been filed. *Id.* ¶ 62. The accountants subsequently prepared a 2016 Form  
6 1040 showing a tax due and owing of \$45,661. The defendant submitted the return to the  
7 IRS in June 2020, and made no payment at that time, even though he knew there was a tax  
8 due and owing, had funds available to pay some or all of the tax due, and had the benefit  
9 of a third-party subsidizing many of his other expenses. *Id.* ¶¶ 62-64. The Indictment  
10 alleges that the crime of willful failure to pay the 2016 taxes thus occurred on June 12,  
11 2020, at the time he submitted the delinquent return without payment. *Id.* ¶ 65

### 12 **III. LEGAL STANDARD**

13 The Federal Rules require that an Indictment “state the elements of the offense  
14 charged with sufficient clarity to apprise a defendant of the charge against which he must  
15 defend and to enable him to plead double jeopardy.” *United States v. Hinton*, 222 F.3d  
16 664, 672 (9th Cir. 2000). When presented with a motion to dismiss an indictment for  
17 failure to state an offense, the Court is “bound by the four corners of the indictment” and  
18 “must accept the truth of the allegations in the indictment in analyzing whether a  
19 cognizable offense has been charged.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.  
20 2002) (citing *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996)).

21 Count 1 charges willful failure to pay, in violation of 26 U.S.C. Sec. 7203. The  
22 Ninth Circuit has identified two elements for this offense: “(1) willfulness and (2) failure  
23 to pay the tax when due.” *United States v. DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987);  
24 *see also United States v. Tucker*, 686 F.2d 230, 232 (5th Cir. 1982) (articulating the  
25 elements of the Section 7203 offense as: (1) the defendant had a duty to pay a tax; (2) the  
26 defendant did not pay the tax; and (3) the failure to pay was willful).

1 The statute of limitations for a willful failure to pay offense is six years. 26 U.S.C.  
2 Sec. 6531(4). As willful failure to pay is not a continuing offense, the statute of limitations  
3 begins to run when all of the elements are present and the crime has been completed. The  
4 Ninth Circuit has expressly held that, for a willful failure to pay charge, “[t]he period of  
5 limitation begins to run not when the taxes are assessed or when payment is demanded,  
6 but rather when the failure to pay the tax becomes willful - an essential element of the  
7 crime.” *United States v. Andros*, 484 F.2d 531, 532 (9th Cir. 1973), effectively overruled  
8 on other grounds by *United States v. Easterday*, 564 F.3d 1004, 1005 (9th Cir. 2009).

#### 9 **IV. ARGUMENT**

##### 10 **A. The Motion Should Be Denied as it Omits Facts Essential to the** 11 **Argument that Undermine the Motion**

12 The defendant argues that Count 1, which charges the defendant with failure to pay  
13 his 2016 individual income taxes, should be dismissed as a matter of law because the  
14 statute of limitations bars prosecution. The government will let the defendant speak for  
15 himself:

16 Count 1 of the Indictment is defective for many reasons. It charges Mr. Biden  
17 under 26 U.S.C. § 7203 with willfully failing to pay all his 2016 taxes that  
18 were due on or before April 18, 2017. (Indict. ¶¶ 60, 65.)<sup>1</sup> The statute of  
19 limitations (SOL) for Section 7203 runs six years from an alleged willful  
20 failure to pay taxes. That means this charge was barred after April 18, 2023,  
21 and thus Count 1 (filed in December 2023, eight months too late) must be  
22 dismissed.

23 Motion at 1.

24 Nowhere in his motion does the defendant inform the Court that the defendant  
25 entered into two separate agreements that specifically tolled the statute of limitations as to  
26 tax offenses. In July 2021, the defendant and his former counsel signed an agreement  
27 tolling the statute of limitations for tax offenses from July 1, 2021, to March 1, 2022. *See*

1 Exh. 1 (“2021 Tolling Agreement”). In March 2022, the defendant and his former counsel  
2 signed a second tolling agreement that further tolled the statute of limitations from March  
3 2, 2022, through June 15, 2022. *See* Exh. 2 (“2022 Tolling Agreement”). The agreements  
4 specifically tolled the statute limitations as to potential violations of the willful failure to  
5 pay statute and did so prior to the time that the 2016 failure to pay offense would have  
6 been time barred. The relevant language of the agreements is as follows:

7  
8  
9 1. The parties agree and understand that Mr. Biden and his affiliated businesses are  
10 the subject of a criminal investigation by the United States relating to potential violations of  
11 federal law, including but not limited to:

- 12 A. Willful failure to file a return or pay tax, in violation of 26 U.S.C. § 7203  
13 B. Tax evasion, in violation of 26 U.S.C. § 7201;  
14 C. Filing a false tax return, in violation of 26 U.S.C. § 7206(1); and  
15 D. Assisting in the preparation of a false tax return, in violation of  
16 26 U.S.C. § 7206(2).

17 2. In order to provide Mr. Biden with an opportunity to present information to the  
18 Government and to engage in discussions and the exchange of information with the Government  
19 in connection with this investigation, Mr. Biden, individually and on behalf of the affiliated  
20 businesses, hereby knowingly and voluntarily waives and foregoes any and all defenses to the  
21 charges described in Paragraph 1 above, based on the expiration of the statute of limitations  
22 during the tolling period. Mr. Biden has discussed this matter with counsel, fully understands the  
23 consequences of this waiver, and agrees to it herein.

24 Taken together, the tolling agreements extended the statute of limitations for all possible  
25 offenses by 349 days. Even assuming that the defendant’s failure to pay his 2016  
26 individual income taxes became willful in April 2017, the statute of limitations would not  
27 bar prosecution of that offense until April 1, 2024.

28 The defendant’s entire motion rests on the assertion that the only reason that Count  
1 of the Indictment alleged that the defendant committed the 2016 failure to pay offense  
in June 2020, and not April 2017, was because the statute of limitations barred prosecution

1 if the offense occurred at the earlier date. Having shown that the premise is false, and the  
2 defendant failed to disclose facts known to him that show his premise is false, the Court  
3 should deny the motion.

4 **B. The Indictment Properly Alleges a Timely Offense**

5 “[T]he issue in judging the sufficiency of the indictment is whether the indictment  
6 adequately alleges the elements of the offense and fairly informs the defendant of the  
7 charge, not whether the Government can prove its case.” *United States v. Buckley*, 689  
8 F.2d 893, 897 (9th Cir. 1982). Further, “in determining whether an indictment charges a  
9 cognizable offense, [the Court is] bound by the four corners of the indictment,” “must  
10 accept the truth of the allegations” contained therein, and “cannot consider evidence that  
11 does not appear on the face of the indictment.” *See United States v. Kelly*, 874 F.3d 1037,  
12 1047 (9th Cir. 2017). “Because it is a drastic step, dismissing an indictment is a disfavored  
13 remedy.” *United States v. Rogers*, 751 F.2d 1074, 1076 (9th Cir. 1985). A motion to  
14 dismiss an indictment can only be determined before trial “if it involves questions of law  
15 rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th  
16 Cir. 1986).

17 The defendant’s motion fails because Count 1 comports with the requirements of  
18 Rule 7(c)(1) as it contains a fulsome “statement of the facts and circumstances that . . .  
19 inform[s] the accused of the specific offense[s] with which he is charged” and sets forth  
20 all elements for the charged offense, including willfulness. *United States v. Blinder*, 10  
21 F.3d 1468, 1476 (9th Cir. 1993) (citation omitted).

22 That having been said, statutory sufficiency and proper notice are not the  
23 defendant’s pursuit. Rather, he seeks to have the Court make a factual determination that  
24 the defendant committed the offense in April 2017, not June 2020 as alleged in the  
25 Indictment. For example, the defendant asks the Court to conclude that he became willful  
26 in 2017 because, among other things: he made tax payments in 2016, his return preparer  
27 advised him in April 2017 that he would owe tax for the 2016 year, and his business  
28



1 associates advised him of the same. Motion 13-14. The defendant takes this position  
2 because the earlier date supposedly makes the count untimely, but as explained above, had  
3 the government chosen to charge the earlier date, the tolling agreements would have  
4 allowed for it. If the defendant argues at trial that willfulness occurred in April 2017, he  
5 will not be able to argue variance or that the count is time-barred. That is because any  
6 such variance could not be prejudicial, as the defendant would be the one injecting it into  
7 the case. *See e.g., United States v. Duran*, 189 F.3d 1071, 1075 (9th Cir. 1999)  
8 (concluding that a variance in proof between the single conspiracy alleged in the  
9 indictment and the two conspiracies shown at trial did not prejudice defendants’  
10 substantial rights).

11 In any event, the defendant’s request to dismiss Count 1 is contrary to Ninth Circuit  
12 precedent holding that while Rule 12(b) motions can be appropriate to consider legal  
13 issues, such as statute of limitations, *see United States v. Smith*, 866 F.2d 1092, 1096 n. 3  
14 (9th Cir. 1989), legal issues “intermeshed with questions going to the merits” must be  
15 reserved for trial. *See United States v. Nukida*, 8 F.3d 665, 670 (9th Cir. 1993). The Motion  
16 should be denied as any determination by the Court of when willfulness was formed and  
17 whether tolling agreements extended the limitations period would require the Court to  
18 impermissibly make findings of fact.

### 19 **C. The Indictment Properly Pleads Late-Arising Willfulness**

20 To the extent that the defendant contends that his conduct could not have become  
21 willful for the failure to pay offense after the time that the taxes were due, his position is  
22 contrary to Ninth Circuit precedent. Willfulness in criminal tax violations is a “voluntary,  
23 intentional violation of a known legal duty.” *Cheek v. United States*, 498 U.S. 192, 201  
24 (1991). Willfulness is a subjective, fact-specific inquiry that focuses on the subject’s state  
25 of mind. *Id.* at 201-202. In *Andros*, which was cited by the defendant but otherwise  
26 ignored, willfulness arose after the time payment was due because it was only later that  
27 the defendant had sufficient funds to pay, as required by the Ninth Circuit’s law at the  
28

1 time. 484 F.2d at 533. Although the “ability to pay” requirement has been overruled by  
2 the Supreme Court’s clarification of what constitutes willfulness, the concept of late-  
3 occurring willfulness remains sound. In *Easterday*, the Ninth Circuit recognized that  
4 Supreme Court precedent had overruled its “requirement that the government prove that  
5 the taxpayer had sufficient funds to pay the tax” to show willfulness. 564 at 1005. In  
6 recognizing the elimination of the “ability to pay” requirement, *Easterday* said nothing  
7 about the late-arising willfulness holding of *Andros*, which is nothing more than an  
8 application of the basic rule that “[a] crime is complete as soon as every element in the  
9 crime occurs.” *United States v. Musacchio*, 968 F.2d 782, 790 (9th Cir. 1991).

10 *Andros*’s recognition of late-arising willfulness is not an outlier in this regard. Other  
11 courts agree with the Ninth Circuit’s holding that willfulness may arise later in a tax case,  
12 leading to the crime not becoming complete until a later date than usual. *See United States*  
13 *v. Sams*, 865 F.2d 713, 716 (6th Cir. 1988) (“the limitations period begins to run when the  
14 taxpayer manifests some act of willful nonpayment”); *United States v. Pelose*, 538 F.2d  
15 41, 45 (2d Cir. 1976) (jury correctly instructed it could find defendant’s willfulness arose  
16 at a later date when health conditions changed); *Capone v. United States*, 51 F.2d 609, 617  
17 (7th Cir. 1931) (“As the statute of limitations does not begin to run until the offense is  
18 committed, it could not begin to run until the failure of the accused became willful.”).  
19 Since the Indictment properly pled late-arising willfulness, the motion should be denied.

20 **D. Willfulness for Count 1 Involves Distinct Facts Different from the**  
21 **Other Counts**

22 The defendant asserts that the Court should dismiss the Indictment in its entirety  
23 because of his flawed notion that the proof of willfulness for all counts in the Indictment  
24 must be identical. *See Motion* at 9-10. Although convoluted, the argument can be summed  
25 up as follows: If the defendant was not willful in April 2017 in regard to his failure to pay  
26 his 2016 taxes, then he could not have been willful as to any other charged tax offense as  
27 proof of willfulness is essentially the same for all counts.

1 But that argument fails because willfulness is unique to each count as it is “inferred  
2 by the trier of fact from all the facts and circumstances of a defendant’s conduct.” *United*  
3 *States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984). The defendant's claim that all  
4 the counts must be dismissed is particularly off base with respect to Counts 6-8, charging  
5 the filing of false returns and attempted evasion of assessment. The defendant’s theory  
6 about willfulness for failure to pay, contorted to begin with, makes no attempt to explain  
7 how it could possibly apply to counts alleging that the defendant filed false tax returns and  
8 committed affirmative acts of evasion.

9 Contrary to the defendant’s claim, the willfulness alleged for Count 1 differs  
10 markedly from the other counts. In 2016, unlike any other charged year, the defendant  
11 withheld and paid over some taxes prior to the time that taxes were due. Dkt. 1. ¶¶ 28, 53,  
12 70. While it is undeniable that, as in the other charged years, the defendant failed to timely  
13 file his 2016 tax returns and pay his taxes, unlike the other charged years, he made some  
14 effort to file the returns and pay his taxes. *Id.* ¶¶ 56-57. Indeed, the Indictment alleges that  
15 there was evidence that the defendant subjectively believed that he filed the 2016 return  
16 and paid his taxes, until he was disabused of that notion in January 2020 and then informed  
17 of how much he still owed in June 2020, unlike any other charged year. *Id.* ¶¶ 58, 62.

18 Thus, there is no inconsistency in the Indictment: willfulness must be judged  
19 separately for each count, and the willfulness (and late-arising willfulness) for Count 1 is  
20 distinct from the other counts. Whether and when the defendant was willful on Count 1—  
21 or any other count—should be left for the jury to determine after hearing all the evidence.

## 22 **V. CONCLUSION**

23 The defendant’s motion is meritless and should be denied.  
24  
25  
26  
27  
28