United States Court of Appeals

for the

Third Circuit

Case No. 17-1817

UNITED STATES OF AMERICA,

– v. –

WILLIAM E. BARONI, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (WIGENTON, J.), CASE NO. 2-15-CR-00193-001

BRIEF FOR DEFENDANT-APPELLANT WILLIAM E. BARONI, JR.

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JURISDICTION

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this timely appeal from a judgment of conviction pursuant to 28 U.S.C. § 1291.

ISSUES FOR REVIEW

1. Does it exceed the scope of 18 U.S.C. § 666's anti-theft provision to convict a political appointee who is otherwise authorized to decide the allocation of a public resource because he transferred the resource from one constituency to another for a political reason? (JA52-58.)

2. Does it exceed the scope of the wire fraud statute to convict an executive who is otherwise authorized to direct subordinates to carry out his decisions because he concealed from those subordinates the true purpose of his decision, particularly where the executive is a political appointee and the concealed purpose was a political one? (JA58-60.)

3. Where there is a circuit split on the existence of even a generalized due process right to intrastate travel, and no court has ever identified a more specific due process right to intrastate travel free from illegitimately-created traffic, is it error to deem that more specific right clearly established? (JA60-63.)

4. Where the Indictment alleged that a public official's otherwise authorized act was criminal because it was undertaken with a politically punitive intent, did

instructing the jury that it could convict without finding that politically punitive intent impermissibly permit conviction based on lawful conduct and constructively amend the Indictment? (JA4575-83; JA4996-5009.)

5. Did the District Court erroneously instruct the jury to consider non-cognizable property under Section 666? (JA131-32; JA229-30; JA4992-94.)[1]

RELATED CASES

In a precedential opinion, this Court reversed a decision that granted a consortium of media groups' motion for disclosure of a sealed filing in this criminal case. *N. Jersey Media Grp. v. United States*, 836 F.3d 421 (3d Cir. 2016).

INTRODUCTION

Bill Baroni diligently served the citizens of New Jersey for 10 years, first as a state assemblyman, then as a state senator, and finally as New Jersey's highest-level executive appointee at the Port Authority of New York and New Jersey. (JA3632; JA3641.)[2] He dedicated himself to this public purpose fresh out of law school (JA3631), and did so without a hint of corruption throughout his political career. Baroni is not a crooked politician, nor has that ever been the allegation in this case. Instead, the unprecedented allegation here is that Baroni took part in sharp political practice—taking a public resource away from a politically unsupportive mayor's

[1] Pursuant to Fed. R. App. P. 28(i), Baroni also adopts in full the arguments made in Appellant Bridget Kelly's brief.

[2] "JA" refers to the Joint Appendix.

town and transferring it to the use of the general public—something that neither is nor has ever been held to be a crime.

In September 2013, while he was Deputy Executive Director of the Port Authority, Baroni participated in a decision to reassign two of the twelve tollbooth lanes that feed onto the upper level of the George Washington Bridge. Specifically, Baroni participated in taking away two of three lanes that historically had been set aside for the use of drivers coming from local streets in Fort Lee, New Jersey, and adding those two lanes to the other nine lanes used by the predominant flow of traffic coming from various highways. The result of reducing Fort Lee's allocation to only a single lane was that traffic backed up into Fort Lee, creating severe traffic in that town for almost a week.

The government would later claim—in the Indictment and at trial—that the lanes were taken away from Fort Lee as political punishment of Fort Lee's mayor for refusing to endorse New Jersey Governor Chris Christie's upcoming reelection bid, and that Baroni and others intended the traffic that resulted. Baroni asserted (and still asserts) that the lanes were reassigned to conduct what he believed was a legitimate traffic study meant to determine whether anything other than a prior political deal justified giving Fort Lee drivers such a large percentage of the available lanes onto the bridge. Either way, there was public outrage over the incident and the

state political process worked a harsh but not-unexpected result—Governor Christie fired Baroni and appointed someone else to the post.

Then came the federal government. It charged Baroni with committing three federal crimes on indisputably novel theories. While acknowledging that Baroni—as the highest-ranking New Jersey executive at the Port Authority—was generally empowered to reallocate lanes at the George Washington Bridge, the government asserted that by doing so with a *punitive political intent*, Baroni violated a statute that prohibits theft from federal programs, committed wire fraud, and deprived Fort Lee residents of their supposed due process right to intrastate travel free of illegitimate government restrictions. And then, remarkably, the government convinced the District Court at trial that the jury could convict *without* finding that Baroni acted with that punitive political intent—the only thing that allegedly made his conduct a crime. The jury convicted based on instructions that asked whether Baroni's behavior was "unjustifiable or wrongful." (JA5109.)

These convictions cannot stand. It is not, has never been, and probably could not be a crime for a public official who is empowered to allocate a public resource to make that allocation for a political purpose. That does not change where the decision is for the sharp but hardly uncommon purpose of punishing an unsupportive politician by withholding or denying a public resource. No prior case has ever followed the government's novel theory.

The government's invocation of the civil rights laws is even more misplaced. It is far from "clearly established"—the standard required by the Supreme Court for conviction—that the Constitution protects a right to intrastate travel at all. And no authority establishes that such a right could be violated by a traffic jam. The civil rights statutes punish clear violations of clearly established constitutional rights. No case supports the way the government used them here.

Accordingly, the judgment of conviction should be reversed in its entirety. At a minimum, a new trial is required because, over defense objection, the jury was permitted to convict without finding that Baroni acted with the punitive political intent on which the government's theory relied—an omission so mystifying that the jury sent a note asking if that could really be the case.

Although the government's theories in this case are unprecedented, the impulse to use federal criminal statutes to channel public outrage over political acts is not. For that reason, the Supreme Court has repeatedly had to rebuff federal prosecutors' improper attempts to use federal criminal law to "involve[] the Federal Government in setting standards of good government for local and state officials." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (internal quotation marks omitted). This Court must do so again here.

STATEMENT OF THE CASE

A. Statement of Facts

1. The George Washington Bridge and Fort Lee's Special Access Lanes

The George Washington Bridge (the "Bridge") is a double-decked suspension bridge spanning the Hudson River between Fort Lee, New Jersey and Manhattan. (JA793-94.) The Bridge and its toll plazas are operated by the Port Authority of New York and New Jersey. (JA1064.)

There are twelve tollbooth lanes that feed onto the Bridge's upper level from the Fort Lee side. (JA809.) Historically, Port Authority police officers have set up traffic cones during the weekday-morning rush-hour to segregate three of those lanes for the exclusive use of traffic approaching from Fort Lee's local streets (the "Special Access Lanes"). (JA811-14; JA4029.) The remaining nine lanes are accessible to drivers approaching on the "Main Line," which is fed by I-80, I-95, and several other highways. (JA806-11; JA5818.) Giving Fort Lee the three Special Access Lanes was not mandated by any formal Port Authority policy or agreement. (JA863; JA1656.) Rather, it was a custom that dated back to a decades-old political deal. (JA1595.)

2. Wildstein, Kelly, and Baroni

Baroni was appointed by Governor Christie in 2010 to serve as Deputy Executive Director of the Port Authority. (JA3641.) That position made him the

highest ranking New Jersey executive at the bi-state agency. (JA1482.) Moreover, as multiple government witnesses testified, the term "Deputy" was an undisputed misnomer. Within the Port Authority's management structure, the New Jersey appointee who holds the Deputy Executive Director position functions as the equal of the New York appointee who holds the Executive Director position. (JA3194 ("One did not report to the other. They were both considered to be at the same level[.]"); JA1482 (the two appointees had a "50/50 partnership, not with any one state having more authority than the other").)

David Wildstein—a cooperating defendant whose trial testimony was the lynchpin of the government's case—was a lifelong operative in New Jersey politics. (JA1472.) In 2010, he was hired by the Port Authority as its Director of Interstate Capital Projects, and functioned as Baroni's chief of staff. (JA1467; JA1484.) As he explained at trial, Wildstein's position was essentially political and he espoused what he called the "one-constituent rule," meaning that he viewed his primary duty as serving the political interests of Governor Christie. (JA1492.)

Bridget Kelly was an aide to Governor Christie in Trenton, New Jersey, where she served as Deputy Chief of Staff for the Office of Intergovernmental Affairs ("IGA"). (JA1464.) IGA is the liaison between the Governor's Office and elected officials throughout the state. (JA1358.) Because those elected officials often raised issues involving the Port Authority, Kelly frequently interacted with Wildstein.

(JA1500-01.) Kelly had almost no direct interaction with Baroni. (JA3720; JA4787-88.)

3. The Governor's Office's Efforts to Secure Democratic Endorsements for Governor Christie's 2013 Reelection Campaign

As early as 2011, individuals at IGA began to discuss soliciting support from Democratic elected officials for the reelection of Governor Christie—a Republican—in the 2013 gubernatorial election. (JA1364.) The belief was that a large, bipartisan victory in the gubernatorial election would help Governor Christie launch a campaign for President. (JA1364-66; JA1436-37.)

In time-honored fashion, IGA officials used all of the available—and publicly financed—levers of government to court public officials who might endorse Governor Christie. Among other things, potential endorsers were favored with tickets to the Governor's boxes at sports arenas, meetings with state officials, breakfast meetings with Governor Christie at the Governor's mansion, and invitations to the Governor's annual holiday party. (JA1368-42; JA1396-98.)

Similarly, as Governor Christie's two highest ranking loyalists within the Port Authority, Wildstein and Baroni were regularly called upon to "assist the Governor's Office in finding opportunities" to bestow favors on potential endorsers. (JA1522.) The Governor's Office recognized that the scope of the Port Authority's operations gave it "an ability to do things for Democratic officials that would potentially put the Governor in a more favorable position." (JA1522-23.) Thus, the Port Authority

made various "large expenditure[s] that were motivated by political interests," including purchasing the Marine Ocean Terminal at Bayonne for approximately $250 million in part to benefit that town's mayor politically, and funding a park project in Essex County at the request of the county executive. (JA1556-59; JA2516-17.) The Port Authority also bestowed more token favors on selected politicians, giving them flags, tours, and the like. (JA1509; JA1524-25; JA1528.)

4. The Governor's Office's *Non-Criminal* Efforts to Favor and Then Punish Jersey City Mayor Steven Fulop

Just as the Governor's Office was eager to open the spigot of publicly financed favors to potential supporters, it showed little hesitation in shutting off the spigot and turning a cold shoulder to those who refused to endorse Governor Christie. An example of this that received attention at trial involved the Governor's Office's use of the Port Authority to court and then punish Jersey City Mayor Steven Fulop—an episode that the government claimed bore a "striking" "degree of factual similarity" to the charged conduct, and yet affirmatively asserted (in successfully seeking admission pursuant to Fed. R. Evid. 404(b)) "*was not criminal*." (JA244; JA259-60 (emphasis added).)

In October 2012, Fulop was a Democratic city councilman who was campaigning to be mayor of Jersey City. (JA1712-713.) At the time, Fulop was also employed by a company called FAPS that was looking to enter into a business

"deal" with the Port Authority. (JA1712-15.)[3] Recognizing that Fulop might win the mayoral election and then "possibly endors[e] Governor Christie's campaign for re-election," Governor Christie's then-Chief of Staff Bill Stepien requested that Baroni and Wildstein execute the deal, which they did. (JA1713-14.)

Initially, the effort seemed to have paid off. Fulop—while still a councilman—informed Wildstein that "he was looking forward to endorsing Governor Christie." (JA1716-17.) As a result, when Fulop won the mayoralty, the Governor's Office promptly scheduled him a so-called "Mayor's Day": a daylong series of meetings between a favored mayor and representatives of various key state agencies, including Baroni. (JA1728-29.)

But before those scheduled meetings happened, Fulop made clear that he would not be endorsing Governor Christie. (JA1730). In response, Governor Christie ordered the cancellation of Fulop's "Mayor's Day," and—to ensure that Fulop received the clear "political … message" that "he was not going to get any assistance out of the State of New Jersey while he was Mayor"—Baroni and the other state agency representatives were told to separately and independently communicate their cancellations to Fulop. (JA1730-31.) Fulop subsequently emailed Baroni on several occasions to communicate about "points of mutual

[3] The specifics of the deal were not revealed at trial. (JA1712-15.)

interest with regards to Jersey City and the Port Authority," but Governor Christie ordered (through Stepien) that Baroni should "continue to ice" Fulop, and Baroni obeyed. (JA1737-49.)

5. The Governor's Office's Failed Effort to Court Fort Lee Mayor Mark Sokolich

Another target of the Governor's Office's endorsement efforts was Mark Sokolich, the Democratic mayor of Fort Lee. (JA942-44; JA1389-90; JA1574.) IGA courted Sokolich in its usual ways, inviting Sokolich to watch a New York Giants game from the Governor's box, inviting him to attend several holiday parties at the Governor's mansion, and providing him with VIP seats to the Governor's budget address. (JA935-38.)

In addition, beginning in 2010, Wildstein executed instructions from the Governor's Office to provide Sokolich with favorable Port Authority treatment to secure his endorsement. (JA1574-75.) At the more token level, Baroni and Wildstein had the Port Authority give Sokolich two Freedom Tower tours (JA924-29); a ceremonial flag that flew over Ground Zero (JA939; JA1525); and a commemorative framed print of the Bridge (JA1577). More substantially, Baroni and Wildstein bestowed Port Authority funds and transportation resources on Sokolich's constituents in Fort Lee. In one instance, the Port Authority granted Sokolich's request to help alleviate "traffic [that] was backing up" from the Bridge by deploying a Port Authority "police officer to direct traffic[.]" (JA1575-76.) The

Port Authority also contributed $5,000 to purchase equipment for the Fort Lee fire department. (JA917.) Most significantly, Baroni and Wildstein—with Stepien's blessing—approved Sokolich's request for more than $300,000 in Port Authority funding to provide Fort Lee with four shuttle buses so that Fort Lee residents could have free transportation to ferry and bus terminals. (JA1589-92.) Stepien remarked that it was "a lot of dough" (JA1592), and "hope[d] [Sokolich] remember[ed]" the Christie administration's largesse in the future (JA1406).

Ultimately, despite the benefits bestowed on him and his constituents, Sokolich informed an IGA staffer in March 2013 that he could not endorse Governor Christie because he feared political payback by local Democrats. (JA1410-12.)

6. The Decision to Take Away Fort Lee's Special Access Lanes

Although Baroni disputes much of what the government claims occurred next—at least as to Baroni's own knowledge and intent and, in particular, the allegation that he acted with an intent to punish Sokolich—he acknowledges that the evidence, when viewed in the light most favorable to the government, was not insufficient to permit a jury to reach the following conclusions.

In March 2011, Wildstein noticed Fort Lee's Special Access Lanes for the first time. (JA1595.) He observed that the lanes allowed drivers from Fort Lee to "mov[e] more quickly" onto the Bridge "than [drivers in] the other nine lanes on the upper level." (*Id.*) Wildstein learned that this special privilege came from an

agreement between "a previous Mayor of Fort Lee [and] a previous Governor of New Jersey," and concluded that the Port Authority's ability to stop creating the Special Access Lanes—they existed only because the Port Authority placed cones each morning—could be used as political leverage with Sokolich if needed. (JA1595-96.) Wildstein shared this conclusion with Stepien, Kelly, and Baroni, but otherwise did not act on it. (JA1596-97; JA1603-04.)

In June 2013, after learning that Sokolich did not plan to endorse Governor Christie, Wildstein reminded Kelly that the Port Authority had the ability "to close down those Fort Lee lanes to put some pressure on Mayor Sokolich." (JA1605.) Kelly did not immediately accept the offer. (*Id.*) On August 13, 2013, however, Kelly sent Wildstein an email stating that it was "[t]ime for some traffic problems in Fort Lee," which Wildstein understood as an instruction that "it was time to change the lane configurations[.]" (JA1611-12.) According to Wildstein, Kelly subsequently told him that the purpose was to send Sokolich the political message "that life would be more difficult for him in the second Christie term than it had been [i]n the first." (JA1620.) Wildstein further testified that he and Kelly expected and even hoped that taking away the lanes would cause punishing traffic in Fort Lee. (JA1620-22.)

After informing Baroni about Kelly's instruction and its punitive purpose (JA1622-23), Wildstein decided "to create the cover of a traffic study" to provide a

more palatable explanation for eliminating the Special Access Lanes than "saying it was political and it was punitive[.]" (JA1624; JA1632.)[4] Wildstein contacted the Port Authority's chief traffic engineer, Peter Zipf, and told him that he wanted to "take the cones away" that segregated the three Special Access Lanes from the remaining nine lanes—*i.e.*, make all 12 lanes available to all drivers—"to see what the impact on the traffic would be" so that "the New Jersey side of the Port Authority … could determine whether those three lanes" should be taken away. (JA1657-58.) Wildstein subsequently decided to retain one Special Access Lane when Zipf explained that it would prevent sideswipes that could result from having Fort Lee traffic merge into Main Line traffic. (JA1662-64.)

On Friday, September 6, Wildstein told Zipf and two other Port Authority managers to implement the plan, starting with that Monday morning's rush-hour. (JA1684-85; JA1689.) Wildstein gave the other managers the same explanation for the change that he had provided Zipf. (JA1685; JA1689.)[5] Wildstein told Baroni

[4] Although Baroni will not belabor the point, it is his position that Wildstein committed perjury at trial. At no point did Wildstein tell Baroni that the purpose of realigning the lanes was political payback rather than to conduct a legitimate traffic study. That said, Baroni acknowledges that Wildstein's testimony alone is legally sufficient to permit a jury to conclude otherwise, even though—as discussed in Point IV, *infra*—the District Court's instructional error makes it impossible to know whether the jury *did* conclude otherwise, and the jury's question during deliberations suggests that it did not.

[5] With no corroboration, Wildstein testified that Baroni chose September 9 because it was Fort Lee's first day of school. (JA1638.) As for waiting until

and Kelly that the lane realignment would go into effect on Monday morning. (JA1691-95.)

Wildstein knew that Port Authority personnel would necessarily be needed to implement the lane realignment. Among other things, Wildstein asked Zipf to collect traffic data on the realignment, understanding that this would involve "some staff time." (JA1688-89.) Wildstein was also told that the Port Authority would need to keep an extra toll collector on standby in case the toll collector for the single Special Access Lane required a break. (JA1686.) Wildstein communicated this to both Baroni and Kelly. (JA1686-87.) At sentencing, the government concluded that these employees spent time worth approximately $5,500, and the total value of *all* Port Authority resources supposedly misapplied (including various legally non-cognizable items) came to only $14,314.04. (JA650-51.)

7. The Week of the Lane Realignment

Before the morning rush-hour on September 9, Port Authority police officers placed traffic cones two tollbooths to the right of where they had been placed on previous mornings, thereby creating two fewer Special Access Lanes while making two additional lanes available to all other drivers. (JA1665-67; JA1699-70.) The

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September 6 to give the order, Wildstein testified that it was either (i) to prevent Fort Lee officials and the Port Authority's Executive Director from interfering (JA1684), or (ii) "to create as big a traffic jam as possible" (JA1636).

Port Authority did not provide Fort Lee with advance warning of the changes. (JA1335.)

The new traffic pattern remained in place from Monday, September 9 through some point on Friday, September 13. (JA991.) During the morning rush-hour on those days, traffic attempting to enter the Bridge from Fort Lee streets snarled at the single Special Access Lane and backed up into Fort Lee, causing severe traffic within Fort Lee. (*See*, *e.g.*, JA834-37.) At the same time, traffic for Main Line drivers—who now had access to nearly 25% more lanes—was reduced by approximately 50%. (JA2861 (email from traffic engineer summarizing traffic data); JA1775 (text from Wildstein: "I95 traffic broke about five minutes ago. About 45 minutes earlier than usual because there were two additional lanes to handle morning rush.").)

The traffic in Fort Lee, while substantial, was hardly unprecedented. For example, after one particularly bad stretch around November 2010, Sokolich wrote Baroni that Fort Lee had been "completely gridlocked" on at least 20 occasions over the past 40 days, turning Fort Lee into "a parking lot." (JA911-14.)

Throughout the week of the lane realignment, Sokolich repeatedly attempted to contact Baroni and IGA to have the two additional Special Access Lanes reinstated, asserting on several occasions that the traffic in Fort Lee was a public

safety hazard. (JA960; JA964; JA968-70; JA984-87.)[6] Pursuant to a prearranged plan, Baroni deliberately did not respond to Sokolich's messages. (JA1637.)

On Friday morning, after learning about the lane realignment, Port Authority Executive Director and New York appointee Patrick Foye sent an email to Baroni and others criticizing it and ordering restoration of the prior traffic pattern. (JA1100-02; JA5809.) Baroni met with Foye that morning and asked that the lane realignment be reinstituted, but Foye refused. (JA1107.)

8. The Firing of Wildstein, Kelly, and Baroni

The lane realignment became the subject of intense media interest. (*See, e.g.*, JA1833-34; JA1863-65.) In response, Baroni and Wildstein began preparing a Port Authority report, acknowledging that standard procedures for notifying relevant stakeholders—including Fort Lee—were not followed, while asserting that it was inequitable to maintain the three Special Access Lanes while all other drivers shared nine. (JA1869-70.) The publication of the report was scrapped, however, when Baroni instead appeared and gave testimony on the issue before the Transportation Committee of the New Jersey State Assembly. (JA1879-80.)[7]

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[6] Wildstein testified that he did not receive any indications from the Port Authority police that there was a safety issue, and that neither he nor Baroni believed what they perceived to be exaggerations by Sokolich. (JA1764; JA2527-31.)

[7] The government lavished significant attention on Baroni's videotaped testimony, asserting that it was false in various respects. (*See*, *e.g.*, JA1260.) Baroni contends that he gave his legislative testimony in good faith, based on what

Ultimately, Baroni's testimony did not alleviate the mounting media and political pressure. (JA3714-15.) As a result, Governor Christie fired Wildstein and Baroni on December 6 and 12, respectively. (*Id.*) Kelly was fired on January 9, 2014. (JA4784.)

B. Procedural History

On April 23, 2015, a grand jury in the District of New Jersey issued a nine-count indictment (the "Indictment"), charging Baroni and Kelly with: conspiring to commit and committing theft from a federal program in violation of 18 U.S.C. §§ 371 and 666 (the "Section 666 Counts"); conspiring to commit and committing wire fraud in violation of 18 U.S.C. §§ 1349 and 1343 (the "Wire Fraud Counts"); and conspiring to deprive and depriving an individual of a constitutional right in violation of 18 U.S.C. §§ 241 and 242. (JA92-129.)

Following denial of motions to dismiss the Indictment (JA21-44), a seven-week trial commenced on September 19, 2016, before the Honorable Susan D. Wigenton, United States District Judge, and a jury. (JA656-5641.) At the conclusion of trial, the jury found the defendants guilty on all counts. (JA5641-

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Wildstein had told him. (JA3701-04.) Either way, the details of that testimony are not relevant to this appeal, since they were offered to establish that Baroni realigned the lanes with a politically punitive intent, and Baroni acknowledges that the evidence, viewed favorably to the government, was sufficient to permit that conclusion.

5650.) Following denial of post-trial motions (JA45-64), the District Court sentenced Baroni principally to 24 months' imprisonment (JA14), and Kelly principally to 18 months' imprisonment (JA6). The defendants are free on bail.

SUMMARY OF ARGUMENT

The jury heard evidence (presented here in the light most favorable to the government) that the defendants took a public resource away from one town and reassigned it to the general public, knowing—hoping, according to Wildstein—that it would disadvantage that town and send the town's mayor the punitive political message that his lack of political support had placed him out of favor. The jury was also presented with evidence that the defendants concealed the political purpose behind this decision. To be clear, at least as to his own knowledge and intent, Baroni absolutely denies that any of this is true. And as discussed in Point IV, *infra*, the District Court's erroneous instructions make it impossible to know whether the jury concluded it was true. But the evidence was at least sufficient to permit it to do so.

Even so, none of this amounted to a crime under any of the statutes charged.

First, Baroni did not violate the anti-theft provision of Section 666. There is no serious argument that a public official violates Section 666 whenever his decision about how to allocate a public resource disadvantages one group of constituents and benefits another, and the argument does not become any more serious when the decision has the unremarkable purpose of favoring political supporters or

disfavoring political opponents. Every applicable tool of statutory construction shows that Section 666 is not amendable to the government's contrary interpretation.

Second, Baroni did not commit wire fraud. In the first place, while it may be deceit, it is not fraud—obtaining money or property—when an executive authorized by an organization to dictate an action misleads his subordinates about the reason for his order. More importantly, a public official certainly does not commit fraud when he misleads subordinates about the political purpose motivating an official act. That theory of criminality has been expressly rejected in the honest services fraud context, and it would nullify that carefully considered limitation to permit the same conduct invariably to qualify as money or property fraud simply because the public official's decision inevitably involves the use of at least some public money or property.

Third, the charged constitutional right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives cannot support criminal liability because it is not clearly established. There is a circuit split about whether a due process right to intrastate travel exists at all. Even if it does, no case has ever held that it is violated by improperly-caused traffic.

For these reasons, the judgment of conviction should be reversed.

Alternatively, even if the conduct in this case could have constituted a crime, the District Court committed instructional error requiring a new trial.

First, if anything converted Baroni's authorized official acts into crimes, it was that he acted with a supposedly illegal intent to punish Mayor Sokolich politically. Indeed, that is how the government charged the case. Yet, over defense objection, the District Court refused to require the jury—either in its instructions, or in response to a note from the appropriately confused jury—to find that punitive intent before convicting. This erroneously permitted the jury to convict based on legal conduct and, at a minimum, constructively amended the Indictment.

Second, the District Court erroneously instructed the jury to consider non-cognizable property under Section 666.

ARGUMENT

POINT I

The Evidence Was Insufficient on the Section 666 Counts Because Allocating a Public Resource Based on Political Considerations Is Not Theft

As this Court has expressly held, Section 666 is an anti-theft and anti-bribery statute that must be construed narrowly. It does not set a federal standard of good government for state and local officials that prevents them from engaging in the ordinary practice of allocating public resources to political supporters and taking them away from non-supporters. Every applicable tool of statutory construction confirms this. Accordingly, even if the jury accepted what the government attempted to prove—that Baroni, as an official authorized to alter traffic patterns at

Port Authority facilities, took two Special Access Lanes away from Fort Lee and returned them to drivers on the Main Line as political payback for Mayor Sokolich's refusal to endorse Governor Christie—that would not be a crime, and a holding to the contrary would be unprecedented.

A. Standard of Review

Courts will reject a sufficiency-of-the-evidence challenge if there was "substantial evidence, taking the view most favorable to the Government, to support" the verdict. *United States v. Inigo*, 925 F.2d 641, 649 (3d Cir. 1991). But courts "must … reverse a conviction when the evidence clearly fails to support the verdict." *Id.* Where "sufficiency arguments raise issues of statutory interpretation, [this Court's] review is plenary." *United States v. Ferriero*, — F.3d —, 2017 WL 3319283 at *3 n.4 (3rd Cir. Aug. 4, 2017).

B. Section 666 Was Not Intended to Expand Ordinary Theft Principles and "Must Be Construed Narrowly"

Section 666 is entitled, "Theft or Bribery Concerning Programs Receiving Federal Funds." 18 U.S.C. § 666. Consistent with that title, the statute has distinct provisions that prohibit theft and bribery. *Id.* As to theft, the statute makes it a crime to "embezzle[], steal[], obtain[] by fraud, or otherwise without authority knowingly convert[] … or intentionally misappl[y]" more than $5,000 worth of the property of a federally funded agency. 18 U.S.C. § 666(a)(1)(A). In this case, the Indictment

relied on only three of these alternatives, alleging that Port Authority property was obtained by fraud, knowingly converted, and intentionally misapplied. (JA96.)

The statute was not intended to expand ordinary theft and bribery principles. As this Court observed in parsing Section 666's legislative history, Congress enacted the statute to address only two "specifically identifie[d] weaknesses" of then-existing laws against theft and bribery involving federal funds. *United States v. Cicco*, 938 F.2d 441, 446 (3rd Cir. 1991). First, "Congress enacted § 666, in part, to augment" the existing "protect[ion of] federal funds by authorizing federal prosecution of thefts and embezzlement from programs receiving substantial federal support *even if the property involved no longer belonged to the federal government*." *Id.* at 445 (emphasis added). Second, the "only … other purpose for § 666" was "to enlarge and clarify the class of persons subject to the federal bribery law." *Id.*

Although the District Court held that Section 666 should be read expansively to serve the purposes of its enactment (*see, e.g.*, JA29), this case involves no disputed issue relating to those two purposes. First, Baroni stipulated that the Port Authority receives more than $10,000 in federal funding annually, making its property federally derived. (JA787-88.) Second, Baroni has never claimed to be outside of the class of persons subject to the law.

Beyond those two purposes, nothing justifies an expansive interpretation of the remainder of Section 666, which did no more than "remedy specific deficiencies"

in the reach—but not the meaning—of "existing federal theft and bribery statutes." *Cicco*, 938 F.2d at 446. Indeed, this Court has expressly held that "§ 666[] must be construed narrowly." *Id*.

C. Courts, Including This One, Have Rejected Attempts to Apply Section 666 to the Politically Motivated Use of Government Property

This Court and others have policed the reach of Section 666 tightly where prosecutors have attempted to use it—as here—to criminalize a public official's efforts to allocate or reallocate public resources based on politics. This Court's decision in *Cicco* is particularly instructive. In *Cicco*, the allegation—remarkably similar to the allegations here—was that a town mayor and councilman attempted to punish two part-time "special" police officers because they had not "actively supported the town's Democratic organization in the recent elections." *Cicco*, 938 F.2d at 442-43. The defendants used the town's federally funded resources to send their political message, telling the officers that "[a]s a result of the town council's displeasure," the officers' annual appointments would not be renewed. *Id.* at 443; *see also United States v. Cicco*, 10 F.3d 980, 986 (3d Cir. 1993) (defendant's "primary motivation" was "retaliation" for officers' "failure to help out in the November 1988 election campaign"). Because "the jobs were worth more than $5,000," the defendants were convicted of (among other things) violating Section 666's bribery provision by demanding "election day services" in exchange for "municipal employment." *Cicco*, 938 F.2d at 444.

This Court reversed the convictions. *Id.* at 446-47. Although the Court acknowledged that "the literal language of § 666" might cover the defendants' conduct, it observed that the drafters appeared to have had the more narrow "intention of focusing solely on offenses involving theft or bribery, the crimes identified in the title of that section." *Id.* at 444. The Court concluded that "the text of § 666 is ambiguous," observing that the "broad[]" reading that the government preferred would make the "boundaries [of the statute] … difficult to limn." *Id.* at 444.

In resolving the textual ambiguity, the Court found the "legislative history and purpose of § 666" dispositive. *Id.* Identifying the two narrow purposes of Section 666's enactment, the Court found that the defendants' use of their town's resources to demonstrate their "displeasure" towards (*i.e.,* retaliate against) two town employees for their political disloyalty was "simply different in kind" from "the crimes Congress targeted when it created § 666." *Id.* at 443, 445-46.[8]

The Seventh Circuit reached a similar conclusion in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). In that case, the government used Section 666 to prosecute a state procurement official who manipulated a contract-bidding

[8] The Court's conclusion was "bolster[ed]" by the fact that Section 601 already criminalized threatening deprivation of public employment to cause an individual to make a contribution to a political party or candidate. *Id.* at 446.

process to assist a particular travel agency for "political reasons"; reasons that arguably included satisfying her boss's interest in "reward[ing] [the travel agency's] past and potential financial support of the Governor." *Id.* at 878-79. A jury convicted, but the Seventh Circuit reversed. *Id.* at 878.

The court found that Section 666—in particular, "the word 'misapplies'" which "is not a defined term"—was ambiguously amenable to broad and narrow readings, with a "broad reading that turns all (or a goodly fraction of) state-law errors or political considerations in state procurement into federal crimes, and a narrow reading that limits § 666 to theft, extortion, bribery, and similarly corrupt acts[.]" *Id.* at 881; *see also United States v. Jimenez*, 705 F.3d 1305, 1308 (11th Cir. 2013) ("Courts have struggled to discern § 666's contours, especially the modified verb 'intentionally misapplies.'"). Like the *Cicco* court, the Seventh Circuit chose the narrow reading, relying (as in *Cicco*) on "the statute's caption for guidance," and also on "the Rule of Lenity, which insists that ambiguity in criminal legislation be read against the prosecutor." *Thompson*, 484 F.3d at 881. Finding that the political basis for the defendant's choice of where to direct federally derived public resources did not make her conduct "theft, extortion, bribery, [or a] similarly corrupt act[]," *id.*, the court found no Section 666 violation. Indeed, contemplating federal law more generally, the court observed that "[t]he idea that it is a federal crime for any official in state or local government to take account of political considerations when

deciding how to spend public money *is preposterous*." *Id.* at 883 (emphasis added); *see also United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003) ("Speedy pothole repair for neighborhoods that support the incumbent is common in municipal government, and we do not for a second suppose that putting salaried workers to this political end is bribery[.]").

D. The Section 666 Charge Against Baroni Is Premised on His Having Acted with a Supposedly Impermissible Political Purpose

The government's theory of the Section 666 offense is historically unique because it predicates criminal liability not on Baroni's conduct—which, in and of itself, involved his otherwise authorized decision to commit Port Authority resources to an ordinary function of the Port Authority for no personal pecuniary benefit—but on the assertion that Baroni engaged in that conduct for a prohibited *political* purpose; specifically, to impose political punishment on an elected official for his lack of political support. No other theory was offered.

First, the government did not contend and the proof did not show that Baroni obtained or caused someone to obtain a pecuniary benefit from the use of Port Authority property, as one would expect when charging a statute intended to "focus[] solely on offenses involving theft or bribery[.]" *Cicco*, 938 F.2d at 444. It is hardly surprising that prosecutions under this anti-theft statute overwhelmingly involve someone improperly obtaining a pecuniary benefit from federally derived property. *See*, *e.g.*, *United States v. Willis*, 844 F.3d 155, 158 (3d Cir. 2016); *United States v.*

Bryant, 655 F.3d 232, 236 (3d Cir. 2011). That was not the government's theory here.

Next, the government did not and could not contend that altering traffic patterns—even knowing and intending that it will cause traffic problems—is an inherently impermissible use of Port Authority property such that the defendants misapplied Port Authority property simply by causing the Port Authority to engage in that activity. The Port Authority regularly sets and alters traffic patterns for various reasons at facilities across the region. (*See*, *e.g.*, JA1237-43 (describing various Port Authority projects).) Moreover, as the government elicited from one Port Authority executive, the Port Authority does so with the self-evident knowledge that its actions will "cause traffic backups." (JA1239). Such knowledge is legally indistinguishable from an *intent* to cause traffic backups. *Tison v. Arizona*, 481 U.S. 137, 150 (1987) ("Traditionally, one *intends* certain consequences when he desires that his acts cause those consequences, *or knows that those consequences are substantially certain to result from his acts*.") (emphasis added) (internal quotation marks omitted); *see also In re Conte*, 33 F.3d 303, 307-08 (3d Cir. 1994). Thus, there is nothing unusual or illegal about a Port Authority official altering traffic patterns with the knowledge and intent that it will cause traffic problems, and nobody could suggest that employing Port Authority resources with that intent alone is a crime.

For this reason, the government's theory in this case differs materially from that in *United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995)—the only case the government and District Court cited for the proposition that a defendant need not gain personally to be guilty under Section 666. (JA30; JA56.) In *Frazier*, the defendant took funding required by federal regulations to "be used solely for providing [job-search] training" and, instead, used it "to purchase computers" for his organization. *Frazier*, 53 F.3d at 1108-09. Leaving aside that the decision contains almost no supporting reasoning at all, *id.* at 1111 (resolving issue in single, conclusory paragraph), *Frazier* at least involved the application of funds to an activity—purchasing computers—for which the funds legally could not be used. That was not the government's theory here.

Finally, the government did not contend that Baroni lacked sufficient, unilateral authority to order realignment of traffic patterns at the Bridge. Indeed, the government went out of its way to establish the opposite. Multiple government witnesses testified that Baroni, as Deputy Executive Director, had authority equal to that of the Executive Director. (JA3194 (testimony of subsequent deputy executive director); JA1482 (Wildstein's testimony).) Moreover, the government affirmatively asserted in its opening statement that Baroni's authority as co-head of the agency included unilateral authority to change lane configurations, telling the jury that "as the highest-ranking New Jersey official at the Port Authority, [Baroni]

had the power to reverse" the realignment of the Special Access Lanes because "[h]e had the power to operate the George Washington Bridge." (JA671.)

Consistent with its opening statement, the government took pains to establish that Baroni had the unilateral authority to order changes in traffic patterns at the Bridge. Using leading questions to be certain the point was clear, the government had Wildstein confirm that Baroni "was … responsible for the general supervision of all aspects of the Port Authority's business … [i]ncluding the operations of Port Authority transportation facilities." (JA1483.) And the government nailed the point down by having Executive Director Foye confirm that although Baroni suggested after the lane realignment that it would be a sensible *new* policy going forward to require both the Executive Director and Deputy Executive Director to sign off on "any non-emergency permanent change or study of a lane configuration," no "such policy [had] ever [been] proposed or put in place at the Port Authority." (JA1113-14.) Thus, the government's theory was not that Baroni lacked unilateral authority to order the realignment of lanes at the Bridge.

E. Section 666 Does Not Criminalize a Public Official's Otherwise Lawful Allocation of Public Resources Just Because He Acted With the Intent to Impose Political Punishment

As the foregoing shows, Baroni's conduct could only violate Section 666 if that statute makes it a crime to allocate or reallocate public resources for a political purpose. But the statute does not, which is why the government cannot find any case

that has ever so held. Indeed, the Seventh Circuit has found the notion "preposterous." *Thompson*, 484 F.3d at 883. This Court likewise held in *Cicco* that cutting off political non-supporters from public resources to punish their disloyalty was "simply different in kind" from "the crimes Congress targeted when it created § 666." *Cicco*, 938 F.2d at 445-46.

With respect to allocating public resources for the purpose of *favoring* political supporters, even the government implicitly seems to agree—as it must—that the idea that Section 666 makes that a crime is an absurdity. In this case alone, the government offered proof of a multitude of such acts. The Port Authority spent hundreds of thousands of dollars on buses for Fort Lee for the purpose of courting Mayor Sokolich's endorsement of Governor Christie, and made various other "large expenditure[s] that were motivated by political interests." (JA1556-59; JA2516-17.) The Port Authority and IGA doled out a variety of smaller publicly-funded favors as well. The government did not charge the many participants in these decisions, nor did it think to include this conduct as other crimes or bad acts when it gave Rule 404(b) notice.

In any event, it is obvious that there is nothing illegal about allocating public resources to favor political supporters and allies. Budgets are enacted, projects are funded, pork is doled out, potholes are filled, and snow is plowed at every level of government with political considerations in mind. If the defendants had *added* a

fourth Special Access Lane to court Sokolich's endorsement, rather than taking two away purportedly to punish his lack of support, we would not be here. As the Seventh Circuit said, the contrary notion "is preposterous." *Thompson*, 484 F.3d at 883.

The analysis does not change when a public official takes something *away* from an elected official and his constituents for purposes of punishing that politician's lack of political support. Such political payback is commonplace, and reports of it litter the news. *See*, *e.g.*, Liam Moriarty, *Gov. Kate Brown To Veto Funding For Medford Projects As Political Payback*, Jefferson Public Radio (Aug. 8, 2017), http://ijpr.org/post/gov-kate-brown-veto-funding-medford-projects-political-payback (reporting that Oregon governor vetoed millions in funding for three projects in district of legislator who reneged on promised support for tax bill); Erica Martinson, *Trump Administration Threatens Retribution Against Alaska over Murkowski Health Votes*, Alaska Dispatch News (Jul. 27, 2017), https://www.adn.com/politics/2017/07/26/trump-administration-signals-that-murkowskis-health-care-vote-could-have-energy-repercussions-for-alaska (reporting that Interior Secretary threatened to withhold federal support for Alaska after senator broke party ranks and voted against repeal of Affordable Care Act). Consistent with this reality, nothing about Section 666 indicates that it criminalizes taking two Special Access Lanes away from the dedicated use of drivers coming

from a particular town and transferring them to the use of all other drivers, even if done for the purpose of punishing a lack of political support by the town's mayor. Indeed, every applicable tool of statutory construction cuts against that conclusion.

1. The Statutory Language and Title

The statute's language does not support the government's interpretation. To be sure, at its broadest, the undefined prohibition on intentionally misapplying property can be read to cover almost anything. *See Thompson*, 484 F.3d at 881 (finding Section 666's anti-theft provision ambiguous); *Jimenez*, 705 at 1308 (recognizing same). Indeed, in this case, the District Court (over defense objection) told the jury that it simply meant any use of money or property that was "unjustifiable or wrongful." (JA5109.) But that literal breadth simply highlights the text's ambiguity, because "if § 666 is read as broadly as the government reads it," it would "become vague indeed." *Cicco*, 938 F.2d at 444.

Fortunately, statutory language need not be read in a vacuum. Other words in the statute make clear that Section 666 does not criminalize every "wrongful" use of an organization's money or property. First, the title gives important guidance. This Court has previously relied on the "crimes identified in the title of" Section 666—"Theft" and "Bribery"—to conclude that the statute's terms should be read narrowly to "focus[] solely on offenses involving theft or bribery." *Id.* at 444; *see also Thompson*, 484 F.3d at 881 (relying on "statute's caption" to reject a broad

prohibition on "political considerations in state procurement" and adopt "a narrow reading that limits § 666 to theft, extortion, bribery, and similarly corrupt acts").

Beyond the statute's title, the various acts that Section 666 prohibits shed light on each act's meaning. "[U]nder the familiar interpretive canon *noscitur a sociis*, a word is known by the company it keeps," and that "canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *McDonnell*, 136 S. Ct at 2368 (internal quotation marks and citations omitted). Here, the first two prohibited acts are "embezzl[ing]" and "steal[ing]"—crimes that are consistent with the statute's title, and so *inconsistent* with the conduct alleged in the Indictment that that government did not charge them. (JA96). In that context (and even without it), the next two acts—"obtain[ing] by fraud" and "convert[ing]"—similarly connote the theft-like crimes of taking or stealing something. With that further context, *noscitur a sociis* compels the conclusion that the final prohibited act—"intentional misappli[cation]"—also means something theft-like, and not simply any "wrongful" use of government property.

In contrast, the government unmoored the last three acts from their context entirely, telling the jury in summation that obtaining by fraud and knowing conversion were just synonyms of the unbounded phrase "intentionally misapplies," and all three "more or less … get at the same thing, *doing something that you're not*

suppose[d] to be doing with Government property." (JA5292-93 (emphasis added).) Indeed, the Indictment alleges that the object of the Section 666 conspiracy was to "misuse" Port Authority property (JA96), ignoring the statute's actual language and reaffirming that the government incorrectly believes the drafters of this anti-theft statute intended the terms fraud, conversion, and intentional misapplication all to be synonyms of "misuse." Although the government needs that broad interpretation to turn Section 666 into an unprecedented criminal prohibition on using public resources to punish a politician's lack of political support, the statute's language and title do not permit it.

2. The Legislative History and Purpose

The legislative history and purpose of Section 666 similarly make clear that it was not intended to criminalize the political payback alleged here. As already discussed, Section 666 was intended to expand previously-existing theft and bribery laws in only two ways—to cover federally derived funds that "no longer belonged to the federal government," and to expand "the class of persons subject to the federal bribery law." *Cicco*, 938 F.2d at 446. Neither purpose suggests an intent to redefine theft and embezzlement to prohibit reallocating public resources to punish political disloyalty. Such political retribution is "simply different in kind" from "the crimes Congress targeted when it created § 666." *Id.*

3. Principles of Federalism

"The Government's position also raises significant federalism concerns," *McDonnell*, 136 S. Ct. at 2373, and the Supreme Court has advised that such concerns require a narrow interpretation. The Supreme Court has repeatedly explained that "where a more limited interpretation of [a criminal statute] is supported by both text and precedent, we decline to construe the statute in a manner that leaves its outer boundaries ambiguous and *involves the Federal Government in setting standards of good government for local and state officials*." *Id.* (internal quotation marks omitted; emphasis added); *accord McNally v. United States*, 483 U.S. 350, 360 (1987). "If Congress desires to go further, it must speak … clearly[.]" *McNally*, 483 U.S. at 360.

The government's broad interpretation of Section 666 does exactly what *McDonnell* and *McNally* prohibit. It takes an ambiguous federal anti-theft statute and attempts to use it to police state and local officials in the conduct of their official duties, telling them that they commit a federal crime when they take a public resource from one constituency and give it to another for political purposes, particularly if federal prosecutors decide it was too harsh. Accordingly, principles

of federalism and clearly established rules for applying them require the conclusion that Section 666 does not apply to the conduct alleged here.[9]

4. Fair Warning and the Rule of Lenity

"Criminal statutes, like § 666, must be construed narrowly" *Cicco*, 938 F.2d 441, because the "fair warning requirement" mandates that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Lanier*, 520 U.S. 259, 260-61 (1987) (internal quotation marks omitted). This principle is reflected in at least two tools of statutory construction. First, the "rule of lenity [] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* at 266. Second, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.*

The government's proposed interpretation of Section 666 is a novel construction that resolves what is, at best, grievous ambiguity in favor of criminality rather than lenity. So far as the government has been able to show, no public official has ever been successfully prosecuted under Section 666 for exercising otherwise

[9] Notably, ordinary state political processes worked their own remedy for any improperly sharp political practice here. Wildstein, Baroni, and Kelly were each fired from their government jobs because of public outcry, and the Governor on whose behalf they supposedly operated has seen his political standing plummet.

valid authority to allocate a public resource just because he did so for a political purpose, even a punitive one. In *Thompson*, a conviction along such lines was dismissed. And in *Cicco*, this Court found that Section 666's anti-bribery provision was not violated by using government funds to coerce political support and punish political disloyalty. Thus, the fair warning requirement and the rule of lenity bolster the conclusion that the government's broad and novel interpretation of Section 666 should be rejected.

5. Avoidance of Constitutional Vagueness Concerns

Finally, under the void-for-vagueness doctrine, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (internal quotation marks omitted). Where a broad interpretation of a criminal statute would "raise the due process concerns underlying the vagueness doctrine," a court must "avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible." *Id.* at 406-08 (internal quotation marks omitted).

The government's proposed reading of the statute raises substantial vagueness concerns. One need not look beyond the government's acknowledgement that the supposed effort to punish Mayor Fulop of Jersey City was *not* criminal to see that

even federal prosecutors, much less ordinary people, have no coherent, non-arbitrary understanding of when political payback supposedly is and is not a crime under Section 666. As described above, *supra* Stmt. of the Case A.4, Mayor Fulop was a potential endorser whom the Governor's Office's initially courted through the scheduling of a "Mayor's Day" of meetings with the heads of significant state agencies. But when Mayor Fulop refused to endorse Governor Christie, the Governor's office directed each agency head (including Baroni) to cancel their meeting with Mayor Fulop, to ignore Mayor Fulop's emails and calls, and generally to freeze him out, to send the "political … message" that Mayor Fulop "was not going to get any assistance out of the State of New Jersey while he was Mayor." (JA1730-31.)

In moving to admit this evidence pursuant to Rule 404(b), the government appropriately described the Jersey City episode as bearing a "striking" "degree of factual similarity" to the charged conduct involving Fort Lee. (JA254.) Moreover, in summation, the government described the episode using language that mirrored how the District Court had defined a Section 666 offense, arguing that the defendants had "no legitimate justification" for their political punishment of Mayor Fulop (JA5253); *i.e.*, that it was "unjustifiable," to use the District Court's definition (JA5109). Nevertheless, the government expressly stated in its motion *in limine* that

the Jersey City incident, "while hardly reflective of good government, *was not criminal*." (JA259-60 (emphasis added).)

This inconsistency demonstrates the inherent arbitrariness of the government's interpretation of Section 666. It is not clear—particularly to ordinary people—why it is supposedly a crime to use the resources and employee services of the Port Authority to punish a mayor by reassigning two tollbooth lanes from the use of his town to the use of others, but it is not a crime to use the resources and employee services of the Port Authority to punish a mayor by freezing his town out of all Port Authority and other state resources entirely. Because a more limited interpretation of the statute is not just possible but more natural, the arbitrariness and unpredictability inherent in the government's broad interpretation of Section 666 is one more reason for this Court to reject it.

POINT II

The Evidence Was Insufficient on the Wire Fraud Counts Because a Public Official's Concealment of His Political Reasons for an Official Act Is Not Fraud

Although Baroni was authorized to direct the use of Port Authority resources to alter traffic patterns at Port Authority facilities, the government asserts that he fraudulently "obtained" those resources, and deprived the Port Authority of the "right to control" them, when he supposedly participated in deceiving subordinates about his political purpose. (JA120.) But the notion that an executive empowered

to control an entity's resources commits fraud when he deceives his subordinates about the reason for his decision is nonsensical. It may be deceit, but he has obtained nothing and already had the right to control.

More importantly, the theory that a *public official* commits fraud when he conceals the *political* reason for a decision "supposes an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act also is the real one." *United States v. Blagojevich*, 794 F.3d 729, 736 (7th Cir. 2015). Not surprisingly, in the context of honest services fraud, that theory has been firmly repudiated. The government's contortions to avoid that limitation by calling this money or property fraud fail.

A. Standard of Review

The standard of review is the same as that described *supra* I.A.

B. As the Port Authority Executive Empowered to Order Lane Realignments, Baroni's Supposed Provision of False Reasons to Subordinates is Not Fraud

Section 1343 makes it a crime to use wire communications to commit a scheme to defraud for the purpose of "obtaining money or property." 18 U.S.C. § 1343. Included within the meaning of money or property is the victim's "right to control" that money or property. *See United States v. Hedaithy*, 392 F.3d 580, 601-03 (3d Cir. 2004). At trial, the government asserted that Baroni committed wire fraud because he "obtain[ed] th[e] property" needed to effect the lane realignment—

specifically, the Port Authority's tangible property and employee services—only by lying to subordinates about his political reason for realigning the lanes. (JA5196 ("It was that deception that they were doing the traffic study that allowed them access to the Port Authority employees and property[.]"); JA5246 ("[I]t was that lie, that cover story, that allowed them to use Port Authority property[.]"); JA5299 ("[T]hey used deception in order to obtain that property.").)

That argument is meritless. As detailed in the preceding section, the undisputed evidence showed that Baroni's position as co-head of the Port Authority gave him authority to make unilateral decisions about the alignment of traffic patterns at Port Authority facilities, and to command the resources needed to carry those decisions out. *See supra* I.D. Baroni did not need to lie to subordinates to obtain that property. He was empowered to direct subordinates to perform these tasks without specifying any reason at all. And even if he did lie, it could not and did not obtain him anything he did not already have, making his transgression deceit, not fraud. *See United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970) ("we have found no case in which an intent to deceive has been equated with an 'intent to defraud'"); *see also United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution.").

This Court reached a similar result in *United States v. Zauber*, 857 F.2d 137 (3rd Cir. 1988). The defendants in that case were pension fund trustees who were motivated by concealed kickbacks to invest pension-fund money with a particular mortgage company. *Id.* at 140. They were initially convicted on an honest services fraud theory, but after the Supreme Court's supervening decision in *McNally* invalidated that theory, the government asserted that the defendants had actually committed money or property fraud. *Id.* at 142-49. The Court rejected the argument. Although the defendants had concealed from the pension fund their true reasons for investing in the mortgage company, nonetheless, "as trustees of the pension fund, [they] had the power and the authority to invest the fund's monies with others," and the investments themselves were genuine investments. *Id.* at 147. Under those circumstances, the Court explained that it "fail[ed] to see what the defendants 'appropriated' in this case." *Id.*

Accordingly, for this reason alone, Baroni did not commit fraud.

C. The Government's Contorted Money or Property Theory is an Attempt to Evade Established Limitations on Honest Services Fraud

In any event, regardless of whether an executive could ever defraud an organization of money or property by misleading his subordinates about his reason for a decision, the law is clear that a *public official* does not commit mail or wire fraud by concealing that an official act had a *political* purpose. That is a theory of

honest services fraud that has been firmly rejected by the Supreme Court and squarely abandoned by the Solicitor General of the United States.

This Court should reject the government's attempt to shoehorn a repudiated theory of honest services fraud into an ill-fitting theory of money or property fraud. If pointing to the modest value of any public resources spent in connection with making or carrying out an official decision were sufficient to establish money or property fraud, the limitations that the Supreme Court deliberately placed on honest services fraud would be a nullity because any official decision necessarily involves the use of at least *some* amount of public money or property.

1. The Supreme Court Has Considered and Rejected Honest Services Fraud Liability Based on Concealed Political Intent

Over the course of decades, the Supreme Court has repeatedly rejected attempts by federal prosecutors to use the mail and wire fraud statutes in a vague and ill-defined manner to transform public officials' unseemly or unethical conduct into a federal crime. Starting in the 1940s, prosecutors began pushing and courts began accepting the theory that although the federal fraud statutes mention only "money or property," 18 U.S.C. §§ 1341, 1343, they also prohibited schemes to deprive the public of the intangible right to a public official's "honest services." *Skilling*, 561 U.S. at 400-401 & n.35. That attempted expansion was rebuffed in 1987, however, when the "[Supreme] Court, in *McNally* … stopped the development of the intangible-rights doctrine in its tracks," *id.* at 401, by rejecting the notion that the

mail fraud statute covered the deprivation of "the intangible right of the citizenry to good government." *McNally*, 483 U.S. at 356.

Congress quickly sought to expand the law again by enacting 18 U.S.C. § 1346 to restore "the intangible right of honest services." *Skilling*, 561 U.S. at 402 (internal quotation marks omitted). But this provision soon came under attack as well, on the ground that it was unconstitutionally vague. In particular, in a dissent from a denial of certiorari, Justice Scalia presciently warned that "[w]ithout some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204, 1204 (2009) (Scalia, J., dissenting from denial of certiorari). Justice Scalia further cautioned that "[i]f the 'honest services' theory—broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers—is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; … [and] a public employee's recommendation of his incompetent friend for a public contract." *Id.*

Justice Scalia's concerns about this potential expansion of the federal fraud statutes into ordinary political conduct were soon resolved. Less than one year after his dissent, the Supreme Court granted certiorari in three cases—*Skilling; Weyhrauch v. United States*, 561 U.S. 476 (2010); and *Black v. United States*, 561 U.S. 465 (2010)—to determine what, if anything, was meant by the mail and wire fraud statutes' protection of the right to honest services.

At least one aspect was undisputed. Reacting to Justice Scalia's dissent, the Solicitor General made clear in her brief in *Weyhrauch* that Section 1346 "does not target all manner of dishonesty but rather criminalizes only schemes in which an employee or public officer takes official action to further his *own* interests[.]" Br. for the United States 45, *Weyhrauch v. United States*, No. 08-1196 (U.S. Oct. 29, 2009), *available at* 2009 WL 3495337 (hereinafter Weyhrauch Br.) (emphasis added). Thus, the Solicitor General conceded, "Section 1346 does not render criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; … or reach a public employee's recommendation of his incompetent friend for a public contract." *Id.* (internal quotation marks omitted). In short, "*Honest-services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty*." *Id.* (emphasis added).

Ultimately, the Supreme Court agreed with the Solicitor General's concession that honest services fraud did not reach allegations that a public official acted with a concealed political interest. Indeed, in *Skilling*, the Supreme Court pared honest services fraud "down to its core," holding that it covered only "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who ha[s] not been deceived." *Skilling*, 561 U.S. at 404.

2. The Government's Attempt to Evade Limitations on Honest Services Fraud Prosecutions Would Render Those Limitations Illusory

The government's theory in this case is indistinguishable from the intangible rights theory feared by Justice Scalia in *Sorich*, repudiated by the Solicitor General in *Weyhrauch*, and left on the cutting room floor by the Supreme Court in *Skilling*—namely, that Baroni committed wire fraud by taking an official act (redistributing two lanes from one constituency to another) not for the greater good but for a concealed political purpose. Indeed, during the peroration of its closing argument, the government articulated its theory by nearly quoting the repudiated honest services doctrine that Justice Scalia had disparaged in his dissent and the Solicitor General had subsequently disavowed, telling the jury: "Mr. Baroni and Ms. Kelly … had a higher responsibility. A higher responsibility to the public.… And that responsibility was to make each and every decision in the best interest of the people of New Jersey[.]" (JA5303.)

To be sure, the government attempted to cloak its case in the argument that the scheme here was to obtain money or property, not to deprive the public of an intangible right to honest government. Specifically, the government asserted that Baroni's concealment of his alleged political motive allowed him to "obtain" (JA5299) from the Port Authority the resources (principally employee services, including his own) needed to make and carry out his otherwise authorized decision to transfer the lanes.

But that cannot support a legally cognizable theory of wire fraud. For seventy-five years, Congress, prosecutors, and the courts have wrangled over the question of whether the federal fraud statutes protect an intangible right to honest government that would make it a crime for a public official to take official action based on concealed "political interests." Weyhrauch Br. 45. It is now settled law that they do not. The government's theory—that acting with a concealed political interest nonetheless becomes mail or wire fraud so long as the public official uses *any* government resources to make or effectuate the decision—would render the Supreme Court's carefully considered limitation a nullity. *Every* decision by *every* public official can be shown to have required some amount of resources either to make the decision or to effectuate it. It cannot be the case that the Supreme Court has pointedly and repeatedly rebuffed the government's attempts to prosecute public officials for the deprivation of the public's intangible right to honest services or

honest government if, all along, the inevitable use of at least a peppercorn of public money or property made every instance of such conduct prosecutable as money or property fraud.

The government's money or property theory has additional problems. In finding that honest services fraud does not reach a politician's false statements to conceal his political intent, the Seventh Circuit noted that it was "unlikely" that such a criminal statute could "be valid under the First Amendment" in any event, since it would be "a criminal penalty for misleading political speech." *Blagojevich*, 794 F.3d at 736. That concern was valid in the honest services fraud context, and it is valid in the money and property fraud context. In addition, as discussed with respect to Section 666, federalism concerns counsel against permitting the government to use the pretext of small, inevitable amounts of supposed money or property (that were neither obtained by the defendant nor deprived of the supposed victim) to "involve[] the Federal Government in setting standards of good government for local and state officials." *McNally* 483 U.S. at 360.

POINT III

Baroni's Conviction on the Civil Rights Counts Must Be Reversed Because There Is No Clearly Established Constitutional Right That Is Violated By Improperly-Caused Traffic

Baroni was convicted under 18 U.S.C. §§ 241 and 242 of infringing Fort Lee residents' supposed due process "right to localized travel on public roadways free

from restrictions unrelated to legitimate government objectives" by causing traffic for an improper purpose. (JA124.) But Sections 241 and 242 only apply where it is *clearly established* that a defendant's conduct violated a *specific* constitutional right. Here, the federal circuits are divided on whether any due process right to intrastate travel exists at all, and those that acknowledge the right have only ever found it violated in the context of *de jure* restrictions. No case has ever found that any general right to intrastate travel includes the more specific right to be free of improperly-caused traffic.

Sections 241 and 242 are circumscribed prohibitions that are reserved for the punishment of *clear* violations of *clearly* established rights. They are not permitted to be used to test novel theories like the one pressed here. Accordingly, Baroni's conviction on the Civil Rights Counts must be reversed.

A. Standard of Review

"[W]hether [an] alleged violation of substantive due process was clearly established … is a question of law over which [this Court's] review is unrestricted." *Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 168 (3d Cir. 2016).

B. There is No Clearly Established Due Process Right to Intrastate Travel Free from Improperly-Caused Traffic

Because Sections 241 and 242 do not "describe[e] the specific conduct [each] forbids," but, instead, "incorporate constitutional law by reference," the fair warning

doctrine prohibits criminal liability absent notice that specific conduct violates a specific right that has been "clearly established." *Lanier*, 520 U.S. at 265, 270. Employing the same standard applicable to qualified immunity, *id.* at 270, a constitutional right is not clearly established unless "existing precedent … ha[s] placed the … constitutional question beyond debate." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (internal quotation marks omitted).

In determining whether a right has been clearly established, "[d]efining the right at issue is critical[.]" *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 248 (3d Cir. 2016). This Court and the Supreme Court have repeatedly emphasized that the right "should not be defined at a high level of generality," and, instead, "the clearly established law must be particularized to the facts of the case." *White v. Pauly*, 137 S.Ct. 548, 552 (2017) (internal quotation marks omitted); *see also*, *e.g.*, *Mammaro*, 814 F.3d at 169. The purported right should track what was *specifically* alleged to have happened, to determine if it was clearly established that there was a constitutional right to be free from *that* conduct. *See*, *e.g.*, *L.R.*, 836 F.3d at 249 ("In light of the specific allegations in the complaint, … the right at issue here is an individual's right to not be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm.");

Mirabella v. Villard, 853 F.3d 641, 653 (3d Cir. 2017) (defining similarly fact-specific right).

Once the right has been defined, this Court "look[s] first for applicable Supreme Court precedent" to determine if the right is clearly established. *Mammaro*, 814 F.3d at 169. If no such precedent exists, "it may be possible that a robust consensus of cases of persuasive authority in the Court[s] of Appeals could clearly establish a right[.]" *Id*. (internal quotation marks omitted).

1. Neither the Supreme Court nor a "Robust Consensus" of the Courts of Appeals Has Recognized a Substantive Due Process Right to Intrastate Travel

The jury convicted Baroni of violating Fort Lee residents' supposed right "to localized travel on public roadways free from restrictions unrelated to legitimate government objectives." (JA124; JA5130.) As discussed below, that is an impermissibly general formulation of the supposed right at issue, but even on its own terms that right cannot be clearly established because it is not clearly established that there exists *any* due process right to intrastate travel.

First, the Supreme Court has never recognized a substantive due process right to intrastate travel, and language in at least one Supreme Court decision suggests that no such right exists. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (suggesting that "a purely intrastate restriction does not implicate the right of interstate travel").

Second, there is circuit split on the question, not a robust circuit-level consensus. Although this circuit and several others have recognized a due process right to intrastate travel, numerous other circuits have rejected the existence of such a right. *Compare*, *e.g.*, *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir. 1990); *Cole v. City of Memphis*, 839 F.3d 530, 535 (6th Cir. 2016) (citing cases) *with*, *e.g.*, *Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999) (en banc) (criticizing *Lutz* and expressing "doubt[] that substantive due process … can be so lightly extended"); *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 776 (10th Cir. 2010) ("substantive due process right[] to travel" applies "only to *interstate* travel, and the travel that Plaintiffs claim was restricted was *intrastate* travel"); *Wright v. City of Jackson, Mississippi*, 506 F.2d 900, 901-02 (5th Cir. 1975) (rejecting argument that Supreme Court cases applying "right to freedom of travel should also extend to intrastate travel") (controlling in 11th Circuit).

Indeed, the District Court itself recognized that "the Supreme Court has not yet recognized a constitutional right to localized travel" and that "the federal appellate courts are split on the issue." (JA37.) That divide should end the analysis. Where "federal and state courts nationwide are sharply divided" on whether a right exists, its existence is not "beyond debate" and thus not clearly established. *Stanton*, 134 S. Ct. at 5 (internal quotation marks omitted). Because even a general right to

intrastate travel is not clearly established, the more specific right alleged in this case cannot be clearly established.

2. Baroni's Conduct Did Not Violate Any Right Established in *Lutz*

Despite the foregoing, the District Court concluded that this Court's single, factually-off-point decision in *Lutz* clearly established the existence of the alleged "right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives." (JA37-40; JA124.) This was wrong in several respects.

First, although the Supreme Court has not entirely foreclosed finding a clearly established right based solely on a circuit's own precedent, the Supreme Court has repeatedly reversed courts, including this one, for finding that a right is clearly established based on broad readings of their own precedent. *See, e.g.*, *Carroll v. Carman*, 135 S. Ct. 348, 351 (2014) (characterizing as "perplexing" this Circuit's determination that a right was "clearly established" based on its own precedent given "decisions of other federal and state courts, which have rejected the rule"); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 602 (2016) (discussing Supreme Court's reversal of courts for relying on their own precedent, "particularly if other courts have disagreed").

But even if a single case could "clearly establish" a constitutional right, Baroni's case falls well outside the scope of any right established in *Lutz*. Put

differently, for purposes of the "critical" task of "[d]efining the right at issue," whatever right *Lutz* might establish at a high level of generality, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established," *L.R.*, 836 F.3d at 248, and *Lutz* does not clearly establish a right to be free from the *particular* conduct proved here—improperly-created traffic.

The facts of *Lutz* demonstrate how different that case is from this one. The plaintiff in *Lutz* asserted that a local "anticruising" ordinance—which banned driving non-commercial vehicles past a "traffic control point[]" in designated areas more than twice within any two-hour period at night—violated his substantive due process right to travel. *Lutz*, 899 F.2d at 257. Considering the claim, this Court recognized that "[t]he right to travel does not fit comfortably within" the Supreme Court's range of "[m]odern substantive due process cases," which "almost all cluster around decisions involving family matters or procreative decisions," and that "the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel." *Id*. at 267, 269. Nevertheless, the Court made the "unquestionably ad hoc" judgment that "the right to move freely about one's neighborhood" was, on the facts of that case, entitled to substantive-due-process protection. *Id*. at 268. Even so, the *Lutz* court found that the challenged regulation survived intermediate scrutiny. *Id*. at 271.

Nothing in *Lutz* clearly establishes the constitutional freedom from improperly-created traffic that the government seeks to enforce here. Nor have any of the courts that have recognized a right to intrastate travel found that right violated by something other than a *de jure* restriction on travel. Indeed, *Lutz* expressly contrasted being "[]impeded by law" (which presumably might burden travel rights) with "traffic jams" (which, by implication, would not). *See Lutz*, 899 F.2d at 265. Put simply, "[t]raffic … is not a deprivation of a fundamental right," *Lanin v. Borough of Tenafly*, No. 2:12-02725, 2014 WL 31350, at *9 (D.N.J. Jan. 2, 2014), and neither *Lutz* nor any other case has held that it is.

Accordingly, even if *Lutz*—a single decision of this Court, in the context of an acknowledged circuit split—could "clearly establish" a right to intrastate travel at some high level of generality, it does not clearly establish "the violative nature of [the] *particular* conduct" alleged in this case. *L.R.*, 836 F.3d at 248. There is no case, including *Lutz*, that clearly establishes that a public official violates a substantive due process right to localized travel by improperly disrupting traffic.[10]

[10] In addition, *Lutz* is ripe for reconsideration based on intervening Supreme Court decisions clarifying that substantive due process rights must be identified only in limited circumstances and articulated narrowly.

POINT IV

The District Court's Instructions Erroneously Permitted the Jury to Convict Baroni Without Finding That He Acted with the Charged Intent to Punish

From indictment through trial and even at sentencing, the government consistently contended that Baroni broke the law by (i) using Port Authority property to punish Sokolich, (ii) fraudulently hiding that he was using Port Authority property to punish Sokolich, and (iii) depriving Fort Lee residents of their right to travel by causing traffic for the illegitimate purpose of punishing Sokolich. As discussed, these are not crimes, but at least it was clear what the government was saying the crimes were.

But when the time came to charge the jury, the government unfathomably staked out the erroneous position—which the District Court accepted—that the jury did *not* have to find that Baroni intended to punish Sokolich. The about-face was so abrupt that even the jury seemed mystified, sending a note asking whether it could convict without finding that the defendants intended to punish Sokolich.

Why the government would take such a needlessly aggressive legal position at the eleventh hour, when it remained steadfast in its factual assertion that the defendants acted to punish Sokolich, is not the subject of this appeal. The result is. And the result is that the remaining jury instructions allowed—practically invited—the jury to convict Baroni for perfectly legal conduct. At a minimum, they constructively amended the Indictment by allowing the jury to convict Baroni for

whatever sort of wrongfulness and illegitimacy it found anywhere in the evidence, rather than what was specifically charged in the Indictment. Accordingly, the judgment of conviction must be vacated and the case remanded for a new trial.

A. Standard of Review

"Where, as here, a party has timely objected at trial to a jury instruction given by the district court, [this Court's] review of the legal standard expressed in the instruction is plenary." *United States v. Waller*, 654 F.3d 430, 434 (3d Cir. 2011). If error is found, reversal is required "unless it can be proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (internal quotation marks and alterations omitted).

B. The District Court's Removal of the Charged Intent to Punish from the Jury Instructions

Throughout this case, the government and the District Court consistently—and correctly—identified an intent to punish Sokolich as an essential element of the *mens rea* of the charged offenses. For example:

- *Indictment*: The Indictment specifically alleged that "[t]he object of the [Section 666] conspiracy was to misuse Port Authority property to facilitate and conceal the causing of traffic problems in Fort Lee *as punishment of Mayor Sokolich*"; and that "[t]he object of the [Civil Rights] conspiracy was to interfere with the localized travel rights of the residents of Fort Lee for the

illegitimate purpose of causing significant traffic problems in Fort Lee *to punish Mayor Sokolich*." (JA96; JA124 (emphasis added).)

- *In Limine Motion*: The government moved under Rule 404(b) to admit evidence of the defendants' supposed punishment of Jersey City Mayor Fulop. In doing so, the government argued that the proffered evidence would "strongly suggest[] Defendants intended to [punish] Mayor Sokolich," and that this punishment evidence proved the defendants' "knowledge and intent" because it "tend[ed] to establish the *mens rea* elements of the charged offenses." (JA254; JA263.)
- *Requests to Charge*: Tracking the Indictment, the parties' pretrial requests to charge jointly proposed an instruction on the Section 666 conspiracy requiring the jury to find that the defendants agreed "to achieve the overall objective of the conspiracy: to misuse Port Authority property to facilitate and conceal the causing of traffic problems in Fort Lee *as punishment of Mayor Sokolich*." (JA295 (emphasis added).)
- *District Court's Initial Jury Instructions*: Before opening statements, the District Court told the jury: "Counts One and

Two of the indictment charge the defendants with obtaining by fraud, knowingly converting and intentionally misapplying property of the Port Authority to facilitate and conceal the causing of traffic problems in Fort Lee *as punishment of Mayor Sokolich*." (JA663-64 (emphasis added).)

- *Government's Opening Statement*: In its opening statement, describing all three charged conspiracies, the government said: "[T]hree of these counts are conspiracy counts[.]… And the conspiracy counts deal with an illegal agreement, *the illegal agreement to punish Mayor Sokolich*." (JA677 (emphasis added).). The government also told the jury that the Section 666 Counts "deal with the misappropriation or the misuse of Port Authority resources … to do something illegitimate. In this case, not to further the needs of the Port Authority but *to use those resources to punish a local mayor*." (JA676 (emphasis added).)
- *Government Sentencing Submission*: Stunningly, even after convincing the District Court to instruct the jury that punitive intent was *not* essential to the required *mens rea*, the government went *back* to its prior position in its sentencing submission, writing: "*[B]y disclaiming any awareness of the punitive motive*

behind the lane reductions, Kelly did deny an 'essential factual element'—her mens rea." (JA654 (emphasis added).)

Consistent with the foregoing, the defendants sought an instruction that to convict on any count, the jury needed to find that the defendants acted with an intent to punish Sokolich. (*See*, *e.g.*, JA501-03.) The defendants pressed the point during the two-part charging conference, arguing that the alleged punitive intent was the only thing that even arguably made the act of changing a traffic pattern illegal and, at a minimum, omitting that requirement worked a constructive amendment because it was the only theory of illegality specified in the Indictment. (JA4575-83; JA4996-5009.) The defendants pressed the point as to "every count of the indictment." (JA5009.) The defendants further objected that, as to Section 666, the District Court's proposed instruction would let the jury convict for any knowing use of Port Authority property that was "unjustifiable or wrongful," and that those terms required definition to prevent the jury from convicting based on a moral judgment about the defendants' conduct. (JA4559-63; JA4990-92.)

The government vigorously opposed the defense requests. (JA4575-83; JA4995-5009.) The government argued that the Indictment's specific identification of punitive intent in the charged objects of the conspiracies was "superfluous" (JA4578) and only described "what the motive was" (JA4999). It further argued

that defining the terms "unjustifiable or wrongful" was unnecessary because the terms were not vague. (JA4990-91.)

The District Court rejected the defense requests, explaining that punitive intent only went "to motive," that motive "is not an element that has to be proven," and that refusing to give the instruction was not "an amendment or variance of the indictment." (JA5009.) As for allowing the jury to convict under Section 666 for using Port Authority property in any knowingly "unjustifiable or wrongful" way, the District said, "I think it's fine. I don't think it's inherently vague." (JA4992.) The District Court then, indeed, instructed the jury that Section 666 prohibited "intentionally us[ing] money or property of the Port Authority knowing that the use is unauthorized or unjustifiable or wrongful" (JA5109), and did not instruct on punitive intent as to any count.

During deliberations, the jury sent a note addressed to all of the conspiracy counts asking, "Can you be guilty of conspiracy without the act being intentionally punitive toward Mayor Sokolich?" (JA5547; JA648.) The defense asserted that "[t]he answer has to be no." (JA5549.) The District Court, at the government's urging, disagreed and answered, "Yes. Please consider this along with all other instructions that have been given to you." (JA 648; JA5557-58.)

C. Absent a Requirement that Baroni Acted with the Intent to Punish Sokolich, the Jury was Left Free to Convict Baroni for Lawful Conduct

"[T]he purpose of a proper charge is to give the jury guideposts as to what would qualify as criminal wrongdoing under the law." *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017). Where an improperly instructed "jury may have convicted [the defendant] for conduct that is not unlawful, and a properly instructed jury might have reached a different conclusion," retrial is required. *Id.* at 119. By refusing to require the jury to find that the defendants intended to punish Sokolich, the District Court permitted the jury to convict based on conduct that was not unlawful. That is true of all three sets of counts.

1. Section 666 Counts

As already discussed, a public official authorized to allocate a public resource does not violate Section 666 by doing so with a political purpose, even punitive one. *See supra* I.E. But he *certainly* does not violate Section 666 (at least on any conceivable view of the facts here) by making that decision *without* a politically punitive purpose. At that point, he is just a public official making a decision he is authorized to make. Thus, there is *no* theory on which Baroni could have violated Section 666 without intending to punish Sokolich—it was, after all, the very thing that the government had always said converted his application of government property into a *mis*application of government property.

But there are *plenty* of theories on which the jury could have found that Baroni, acting completely lawfully, participated in the lane realignment while knowing that it was "unjustifiable or wrongful." (JA5109.) In fact, Baroni essentially conceded that he acted wrongfully or unjustifiably. Baroni never denied knowing that the lane realignment—which he believed was for a legitimate traffic study—was causing serious traffic problems in Fort Lee, or that he deliberately ignored a week of Sokolich's increasingly frustrated pleas to adjust the lanes back to their prior pattern. Baroni testified at trial that he ignored Sokolich's pleas because Wildstein had insisted that the traffic study was important and Baroni agreed with Wildstein that if he communicated with Sokolich he would likely "wimp out, give in, and … ruin the study[.]" (JA3653.) Baroni did not defend his decision; he testified that he had "regretted it ever since." (JA3653.) At sentencing, he drew the same conclusion about his conduct that the improperly instructed jury could have—that he "made the *wrong* choices, took the *wrong* guidance, listened to the *wrong* people," and that he "let the people in Fort Lee down" by knowingly choosing not to stop the lane realignment. (JA5692 (emphasis added).)

And yet, on the instruction given, a jury that believed Baroni's non-criminal version of events should nonetheless have *convicted* him because he participated in setting up the lane realignments and allowing them to persist knowing that he was doing something wrong (or unjustifiable) with Port Authority resources and that the

right (or justifiable) thing was to respond to Sokolich, end the study, and release Fort Lee drivers from severe traffic. Or perhaps the jury agreed with Executive Director Foye that Baroni's decision to order the lane realignment was knowingly "hasty and ill-advised" (JA1101), and concluded that this made it wrongful or unjustifiable. Or perhaps the jury decided that Baroni had (as suggested in testimony) refused to give advance notice of the lane realignment to Fort Lee because notice might skew the traffic study's results (JA4110), and concluded that Baroni knew that it was wrongful or unjustifiable to unsympathetically prioritize traffic data over drivers to that degree. There are numerous other possibilities.

Thus, even absent anything criminal, the District Court's instructions erroneously let the jury convict based on a moral judgment that Baroni allowed or executed the lane realignment in a way that he knew was "unjustifiable or wrongful." (JA5109.) Indeed, the government egged the jury on to do so, concluding its summation by telling the jury that Baroni violated some vague and unwritten "responsibility … to make each and every decision in the best interest of the people of New Jersey." (JA5303.) Any knowing deviation by Baroni from that supposed duty, although not criminal, would necessarily be "unjustifiable or wrongful" and lead to conviction based on mere moral disapproval. Such a conviction cannot stand. *See Silver*, 864 F.3d at 121 (that jury may have "view[ed] something negatively is not the same as finding that the elements of a crime have been met"); *United States*

v. Tavares, 844 F.3d 46, 54 (1st Cir. 2016) ("not all unappealing conduct is criminal").

2. Civil Rights Counts

The same analysis holds for the Civil Rights Counts. The District Court instructed the jury to convict if Baroni deprived Fort Lee residents of the supposed "right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives." (JA5128). Although that right does not exist, *see supra* III.B, at least the requested instruction on punitive intent would have specified what the nature of the otherwise undefined "illegitimacy" was. But without that instruction, the jury was again free to choose from the above-described grab bag of morally "illegitimate" but non-criminal causes of the traffic in Fort Lee.[11] It could simply have found that studying traffic through a live test that one knows will cause traffic problems is an illegitimate government objective when, as the evidence showed, traffic studies can be performed through non-intrusive modeling. (JA2868.) In the Indictment, the government was careful to spell out what was purportedly illegitimate about the lane realignment—its allegedly punitive purpose. There is no way to know what the jury decided was illegitimate about it.

[11] As explained in Kelly's brief, it was error to permit the jury to decide for itself the legal question of what are "legitimate" and "illegitimate" government objectives.

3. Wire Fraud Counts

Finally, the exact same problem infects the wire fraud instruction. The government's theory of illegality was that Baroni obtained money or property by deceiving subordinates into believing the lane adjustment was for the purposes of a traffic study and not for what the government claims (incorrectly) was the *impermissible* purpose of punishing a non-supportive elected official. But when one dismisses the requirement that the true purpose of the lane adjustment was an impermissible punitive purpose, then Baroni was convicted of wire fraud simply for deceiving his subordinates for *any* reason. That is deceit, not fraud. *Starr*, 816 F.2d at 98 (holding that deceit is not fraud). The government's legal theory that Baroni obtained money or property by deceiving his subordinates into doing something he was legitimately empowered to instruct them to do was already unsound. It becomes that much more so upon eliminating the requirement that the intent of the deception was to cause the subordinates to do something purportedly impermissible.

D. At a Minimum, the Jury Instructions Constructively Amended the Indictment

By omitting a requirement of intent to punish, the jury instructions also constructively amended the Section 666 Counts and the Civil Rights Counts by allowing the jury to convict based on *anything* it concluded was wrongful, unjustifiable, or illegitimate about the lane adjustment, rather than what the

Indictment specifically *charged* was wrongful, unjustifiable, or illegitimate about the lane adjustment.

"An indictment is constructively amended when … the district court's jury instructions effectively amend[] the indictment by broadening the possible bases for conviction from that which appeared in the indictment." *United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007) (internal quotation marks omitted). Where, as here, a claim of constructive amendment has been properly preserved in the district court, this Court reviews that claim de novo. *See United States v. Vosburgh*, 602 F.3d 512, 531 (3d Cir. 2010). Because a constructive amendment violates the fifth amendment's grand jury clause, *McKee*, 506 F.3d at 229, this Court will reverse a conviction on constructive amendment grounds where it "cannot be sure that the jury did not rely on an uncharged theory of liability for its verdict," *United States v. Centeno*, 793 F.3d 378, 389 (3d Cir. 2015) (internal quotation marks omitted).

The specified object of a conspiracy is of controlling importance at a criminal trial. *See United States v. Wills*, 36 F.2d 855, 858-59 (3d Cir. 1929) ("The object of an alleged conspiracy is that which identifies and describes the particular unlawful agreement or conspiracy with which the defendant stands charged. No part of that description may be ignored as surplusage. It must be proved as laid.") (citation omitted). Here, the Indictment expressly identified "The Object of the Conspiracy" in a single sentence each for the Section 666 and Civil Rights Counts. (JA96;

JA124.) As to each, the Indictment specified that one part of the object was to "caus[e]" "traffic problems in Fort Lee." (*Id.*) But as the government apparently recognized when it elected not to stop there, merely causing traffic problems is not a sufficient object for a criminal conspiracy because it is not illegal—governmental entities like the Port Authority regularly take actions that they know will cause traffic problems.

Thus, for each set of counts, the Indictment continued on, specifying in identical terms what, exactly, made causing traffic an *illegal* object. As to the Section 666 Counts, the Indictment specified that causing traffic in this instance was a "misuse" of Port Authority property because it was intended as "punishment of Mayor Sokolich." (JA96.) Similarly, as to the Civil Rights Counts, the Indictment specified that causing traffic in this instance was "illegitimate" because it was "to punish Mayor Sokolich." (JA124.) This was careful drafting, as it should be, in a case that involves not some simple charge of robbery, but a novel application of particularly unspecific statutes. *See United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) ("[T]o avoid amending an indictment in violation of the Fifth Amendment, the government in fraud cases should think through the nature of the crime it wishes to allege and then spell out the offense in a carefully drafted indictment, instead of confronting the defendant with its theory of criminality for the first time at trial.") (internal quotation marks omitted).

For this reason, there is no merit to the government's argument that the charging language's identification of the intent to punish Sokolich was "superfluous." (JA4578.) It was not superfluous; it was essential. As the government well understood when it drafted the language, punitive intent was the thing that allegedly made the object of the conspiracy *illegal*.

For the same reason, there is no merit to the government's argument that the language only described "what the motive was." (JA4999.) Motive is the reason a person commits a crime. The intent to punish Sokolich is the thing that allegedly *made* this a crime. Somehow, the government knew that when it drafted the Indictment, and found its way back to it by the time of sentencing, (*see* JA654 ("[B]y disclaiming any awareness of the punitive motive behind the lane reductions, Kelly did deny an 'essential *factual* element'—her *mens rea*." (emphasis in original))), but lost sight of it at trial. Indeed, in moving *in limine* to admit evidence of the intent to punish Fulop on the ground that it proved the intent to punish Sokolich, the government did not even argue that it was proof of motive (JA240-64), even though "proving motive" is the first ground of admissibility under Rule 404(b).

By permitting the jury to convict without finding an intent to punish, the District Court's jury instructions massively broadened the charges leveled by the grand jury. There was never any dispute that the defendants caused—and knew they would cause—traffic problems in Fort Lee, whether one credits Wildstein's account

that it was for political payback or Baroni's account that it was the unavoidable product of a legitimate traffic study. What Baroni went to trial to dispute was the Indictment's specific charge that he caused this traffic (not a crime) for the *illegal* purpose of punishing Sokolich. Instead, the District Court's charge threw open the doors and permitted the jury to convict if it found that he created traffic in *any* way that the jury considered "unjustifiable or wrongful" (JA5109), or in *any* way that the jury deemed "unrelated to legitimate government objectives." (JA5128.) This was a constructive amendment. And because examples of the many uncharged bases on which the jury could easily have convicted Baroni have already been described in this section, the convictions must be vacated.

POINT V

The District Court Erroneously Instructed the Jury to Consider Non-Cognizable Property Under Section 666

During the week of the lane realignment, the Port Authority was conducting a traffic study at Center and Lemoine Avenues in Fort Lee, but the lane realignment ruined the study. (JA2766-2812.) There was no proof that the defendants knew about the study, much less that it had been affected.

Prior to trial, the defendants argued unsuccessfully that they could not have intentionally misapplied the ruined study for Section 666 purposes because they did not know it existed. (JA131-32; JA229-30.) At trial, having lost that argument, the defendants asked the District Court at least to instruct the jury that it could only

consider property that was "reasonably foreseeable" to the defendants for purposes of determining whether Section 666's $5,000 threshold was satisfied. (JA4992-93.) The District Court refused (JA4994), instead instructing the jury that the defendants could be convicted of fraudulently obtaining, knowingly converting, or intentionally misapplying property even if the evidence did not "prove that the defendants knew of the specific property." (JA5110.) Additionally, the District Court *specifically* instructed the jury that, in considering the $5,000 threshold, it could consider "losses allegedly suffered by the Port Authority in connection with the Center and Lemoine traffic study." (JA5110-11.)

This was error. Under the Section 666 acts charged here, conviction required that Baroni fraudulently obtained, knowingly converted, or intentionally misapplied property, and *that* property must have been "valued at $5,000 or more." 18 U.S.C. § 666(a)(1)(A). It is logically impossible to *fraudulently* obtain, *knowingly* convert, or *intentionally* misapply property that one does not know exists. If Baroni did not know the property existed, the property cannot support a Section 666 charge and the jury cannot consider it when determining whether the $5,000 threshold was met.

The Government's counter-argument below was twofold. First, it argued that the $5,000 threshold is a "jurisdictional element" (JA136), and "*mens rea* requirements typically do not extend to … jurisdictional elements[.]" *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012). The $5,000 threshold is not a

jurisdictional element. A "jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority." *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016); *see also United States v. Rodia*, 194 F.3d 465, 471 (3d Cir. 1999). Section 666's jurisdictional element is the requirement that the victim be a federal program beneficiary. *See* 18 U.S.C. § 666(b); *Fischer v. United States*, 529 U.S. 667, 682 (2000) (Thomas, J., dissenting) (describing § 666(b) as a "jurisdictional provision"). The $5,000 threshold is a *de minimis* exception, below which Congress simply chose not to authorize prosecution.

The Government also argued that Baroni need not know the value of the misapplied property. (JA4993.) True, but beside the point. Baroni did not contend that he needed to know the value of intentionally misapplied property. He argued that the statute required that he know the property, whatever its value, existed at all.

The error was not harmless. As Kelly's brief asserts, there was insufficient evidence to meet the $5,000 threshold. But if it was sufficient, it was barely so, and there is no way to know which components of the government's highest estimate ($14,314.04) the jury credited, in full or in part. (JA650-51.) The Center and Lemoine study accounted for $4,494.42 of that. (*Id.* (last two sub-items on chart).) Properly removed from the jury's consideration, there might remain *sufficient* evidence of $5,000 in property, but there is no way to know whether the jury credited enough of the remaining items (in full or part) to reach that threshold. Accordingly,

the error is not harmless beyond a reasonable doubt and the Section 666 convictions must be vacated.

CONCLUSION

The judgment of conviction should be reversed, or, in the alternative, the judgment of conviction should be vacated and the case remanded for a new trial.

CERTIFICATE OF BAR MEMBERSHIP

In compliance with Third Circuit LAR 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit. Appellants' counsel Michael D. Mann, Matthew J. Letten, and Nicholas M. McLean are also members of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Michael A. Levy
MICHAEL A. LEVY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Third Circuit LAR 31.1.(c), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), Third Circuit LAR 32, and this Court's Order of August 25, 2017, because this brief contains 16,998 words as determined by the Microsoft 2007 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2007 word-processing system in 14-point Times New Roman font.

This brief complies with the electronic filing requirements of Third Circuit LAR Misc. 113 and Third Circuit LAR 31.1 because the text of the electronic brief is identical to the text of the paper copies. A virus scan was performed on the brief using the McAfee VirusScan Enterprise 8.8 program, and no viruses have been detected.

/s/ Michael A. Levy
MICHAEL A. LEVY

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2017, I electronically filed the foregoing Brief in PDF text format with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the Court's CM/ECF system, which will send notice of such filing to registered ECF users.

/s/ Michael A. Levy
MICHAEL A. LEVY