No. 17-1818

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

v.

BRIDGET ANNE KELLY,

Defendant-Appellant.

On Appeal from the U.S. District Court
for the District of New Jersey,
Hon. Susan Wigenton, District Judge

BRIEF OF DEFENDANT-APPELLANT BRIDGET ANNE KELLY

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INTRODUCTION

Imagine a city mayor who wakes up to a major snowfall. Roads are virtually impassable. The mayor directs the city's snow plows to start by clearing the streets of Ward 4, her political home base—but to leave for last Ward 8, which overwhelmingly supported her rival. She tells her aides and the media that this ordering is based on relative need, but later chuckles to her husband that being stuck at home for most of the day will serve Ward 8 right for its political resistance. Petty? Absolutely. A model of good government? Hardly. *But a federal crime*? Nonsense.

The allegations in this case are materially indistinguishable. The Government claims that Bridget Kelly, a political staffer for New Jersey's Governor, planned, with political officials at the Port Authority of New York and New Jersey, to reallocate two toll lanes on a bridge away from local access entry, in favor of the main highway; that she did so because a local mayor had refused to endorse the Governor; and that, in carrying out this realignment, the participants represented that it was to study traffic. To the Government and the District Court, this was (i) criminal infringement of a "clearly established" constitutional right to intrastate travel, because local drivers faced heavier traffic unrelated to a "legitimate governmental objective"; (ii) intentional misapplication of property from a recipient of federal funds, because Port Authority lanes were allocated based on "unjustified" political motives; and (iii) wire fraud, because Defendants hid their true aim. Their overriding sin, the Government told the jury in closing, lay in failing "to separate politics from … public service." JA.5191.

Under these theories, our plow-rationing mayor could be convicted of the same crimes. By vindictively de-prioritizing Ward 8, she prevented its residents from safely accessing public roads, burdening their right to travel. By directing that the plow give preference to Ward 4, she allocated municipal property with the apparently criminal motive of favoring political supporters over political opponents. And by claiming to be acting in the city's best interests, she was less than forthright about her motives and thereby "defrauded" the city. Lock her up!

Something is plainly wrong with the Government's theories. Taken seriously, they would criminalize not just "fraudulent" political spin, but earmarks, patronage, favoritism, redistricting, and many other practices blending politics with governance that, for better or worse, have been the currency of electoral democracy from time immemorial. No doubt, the behavior alleged here is odious. But, in our system, *political* abuses are addressed *politically*. The Government deserves credit for creativity, but the Supreme Court has warned time and again that ambiguous federal criminal laws are not to be given broad constructions as a way to impose "standards of … good government" on "local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Skilling v. United States*, 561 U.S. 358 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000). This prosecution openly thumbs its nose at those warnings.

In short, the Government's legal theories are invalid; its allegations do not add up to criminal activity. Kelly should be acquitted on all counts.

At minimum, however, a new trial is required. Under the Government's legal theories, Kelly's *motive*—allegedly, political revenge—is what transforms an otherwise unexceptionable traffic realignment into a criminal scheme. Incredibly, however, the District Court instructed the jury that it could convict *even if it rejected* the allegation that Defendants' conduct was intentionally punitive. It sufficed for the jury to find the realignment "unjustified" or not "legitimate." Those instructions were grossly overbroad and erroneous; as a result, there is no way to know whether the jury *accepted* the prosecutors' allegations of vindictive intent, or merely concluded that the lane realignment was poor public policy. Consequently, a new trial is necessary even under the Government's wrong-headed legal theories.

JURISDICTIONAL STATEMENT

A final judgment of conviction was entered on March 30, 2017. JA.4. Kelly noticed an appeal on April 10, 2017. JA.1. 28 U.S.C. § 1291 confers jurisdiction.

STATEMENT OF THE ISSUES

1. Is there a clearly established constitutional right to avoid traffic within a state; and, even if so, did the District Court wrongly instruct the jury about its scope? JA.60-63 (ruling); ECF 305 at 51-57 (motion); JA.5003-09 (charge conference).

2. a. Does an official "intentionally misappl[y]" property by allocating state resources among legitimate functions with a political motive; and, even if so, did the District Court wrongly instruct the jury on what "misapplying" means? JA.53-57 (ruling); ECF 304 at 9-15 (motion); JA.4559-63, 4990-92, 5009 (charge conference).

b. Did the Government prove beyond a reasonable doubt that the property supposedly "intentionally misapplied" by Defendants had a value of at least $5,000? JA.57-58 (ruling); ECF 305 at 45-49 (motion).

3. Does a state official "defraud" the State of a traditional, well-established property right by misrepresenting her true motive for taking facially legitimate official action? JA.59-60 (ruling); ECF 304 at 25-27, 35-40 (motion).[1]

STATEMENT OF RELATED CASES

Kelly's co-defendant, William Baroni, Jr., also appealed his convictions (No. 17-1817), and these appeals were consolidated for disposition.

STATEMENT OF THE CASE

This case involves allegations that senior officials at the Port Authority of New York and New Jersey ("Port Authority") reallocated lanes on the George Washington Bridge in a manner that increased traffic in a nearby city because that city's mayor had refused to endorse the New Jersey Governor's re-election. The Government claims that this conduct violated three federal criminal laws: one that prohibits deprivation of clearly established constitutional rights, 18 U.S.C. § 242; one directed against "[t]heft or bribery," *id.* § 666(a)(1); and one that forbids defrauding another of any "money or property," *id.* § 1343. (These statutes are set forth in a statutory appendix.)

[1] Pursuant to Fed. R. App. Proc. 28(i), Kelly also adopts the arguments made in Defendant-Appellant Baroni's brief, including that the District Court misinstructed the jury on elements of the offenses and constructively amended the indictment.

1. The Port Authority and the George Washington Bridge.

The Port Authority is a "bi-state agency" that manages bridges, tunnels, and other transportation facilities in the New York City region. JA.1064. Among these is the George Washington Bridge, connecting Manhattan with Fort Lee, New Jersey. The bridge's upper and lower decks each accommodate multiple lanes of travel, with motorists paying tolls when traveling east into Manhattan. JA.793-94. The upper-level toll plaza has twelve tollbooths and two approaches. The first approach, known as the "Main Line," consists of a collection of highways, including I-95 and other major roads. The second, called the "Local Access Lanes," feeds from local Fort Lee streets onto the far right side of the toll plaza. *See* JA.807-09, 5803 (photo).

Prior to the events here, typical practice for weekday morning rush hour was to place traffic cones so that the Local Access Lanes fed into three dedicated tollbooths, with the remaining nine for the Main Line. JA.811-12, 5804 (photo). Although Fort Lee residents made up just 5% of bridge traffic (JA.1913-14), a quarter of the upper-level booths were thus reserved for the local lanes. This incentivized non-residents to cut through Fort Lee to cross the bridge more quickly. JA.1671, 5822. Fort Lee had no legal entitlement to these dedicated local lanes (JA.1656); rather, they owed their existence to a political deal, decades earlier, with a Fort Lee mayor who thereby increased the value of property his family owned nearby (JA.2443-44, 4464).

The Port Authority's political leadership was divided between New York and New Jersey in "two parallel chains of command." JA.4236. New York's Governor

appointed half of the governing Board's commissioners and the executive director; New Jersey's Governor designated the other commissioners and the deputy executive director. JA.1063, 1067, 1069. The governors held ultimate veto power. JA.1128.

At the relevant times, the deputy executive director was Bill Baroni. His role encompassed management of "all aspects" of Port Authority business, including operation of the George Washington Bridge. JA.92, 1483. Holding "the number one position on the New Jersey side," he was expected to "watch out for New Jersey's interests." JA.1482-83. The executive director *technically* outranked him, but the Port Authority *in practice* had "two equal Governors, two equal Boards, and two equal day-to-day operators"; Baroni neither answered nor reported to the executive director, then Patrick Foye. JA.3641. As Baroni's successor agreed, the executive director "was not [her] boss," as the officials "were both considered to be at the same level, the highest New Jersey and New York appointees." JA.3193-94.

Given its leadership structure, the Port Authority was, not surprisingly, often leveraged for political purposes. Port Authority personnel would give tours of the World Trade Center to favored officials in the hope of earning endorsements. *E.g.*, JA.1524-28. Decisions about use of surplus vehicles, or allocation of grants, turned on political factors. JA.1509-26. The New Jersey Governor's office was involved in every major Port Authority decision. JA.2119. One New Jersey appointee, David Wildstein, testified that he subscribed to what he called the "one constituent rule": If something was "good for Governor Christie, it was good for us." JA.1492.

2. The Lane Reallocation.

During the week of September 9, 2013, Wildstein (who functioned as Baroni's chief of staff) instructed Port Authority civil servants to change the traffic patterns leading to the upper-level tollbooths on the George Washington Bridge. Instead of reserving nine tollbooths for Main Line traffic and three for Local Access Lane traffic, traffic cones were placed to reserve eleven and one. JA.1666-67, 5806 (photo). No toll lanes or booths were closed. Rather, two toll lanes were reallocated from the local approach to the Main Line. JA.2148. To ensure that the remaining booth dedicated to local-access travel would remain in service even when the toll collector needed a break, a second collector was maintained on standby duty. JA.2897.

Unsurprisingly, this realignment reduced Main Line traffic. On Tuesday, September 10, Wildstein reported that Main Line rush-hour traffic broke 45 minutes earlier than usual. JA.1775. Preliminary analysis by Port Authority employees found that over the week's course, the realignment saved "approximately 966 vehicle hours" for Main Line drivers. JA.5816. Even Fort Lee's police chief admitted that there was "some" improvement on the Main Line. JA.875.

Of course, traffic worsened for motorists employing the Local Access Lanes. According to Fort Lee's police chief, traffic backing up from the bridge also caused severe congestion in Fort Lee itself. JA.858. Such congestion was not unusual; to the contrary, Fort Lee's mayor, Mark Sokolich, had been complaining *for years* about "our day-to-day battle with crippling traffic gridlock." JA.5820.

Sokolich reached out to Baroni and others at the Port Authority to complain about the reallocation, but did not get a response. JA.976-77. On Friday, September 13, Executive Director Foye, who had not been previously involved, ordered a return to the usual lane configuration, criticizing the realignment as "hasty and ill-advised." JA.5809. Foye admitted at trial, however, that no policy requiring his pre-approval of such actions had ever been "in place at the Port Authority." JA.1113-14.

3. The Indictment.

Following an investigation, and with Wildstein's cooperation, the Government indicted Baroni for violating (i) 18 U.S.C. § 242, by depriving Fort Lee residents of their supposedly clearly established constitutional "right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives"; (ii) 18 U.S.C. § 666(a)(1)(A), by misapplying Port Authority property through an allegedly politically motivated departure from "ordinar[y]" agency practice; and (iii) 18 U.S.C. § 1343, by concealing the true motives for the scheme through "false[] claim[s]" to the media and state legislature that the realignment was "a traffic study." JA.92-127. The indictment also charged conspiracy to commit each of these crimes. *Id.*

The indictment's overriding theme was that the reallocation was undertaken not as good-faith public policy, but rather to cause "traffic problems in Fort Lee" as "punishment of Mayor Sokolich" for having refused to endorse Governor Christie's re-election. JA.96. The indictment referenced Sokolich and used the words "punish," "punishment," or "punitive" dozens of times. JA.92-127.

The Government also indicted Kelly on the same charges, on the ground that she had conspired with, and aided and abetted, Baroni and Wildstein. Kelly was a political staffer in the Governor's Office, whose roles included keeping track of local officials' political relationships with the administration, and ensuring that state agencies were appropriately responsive to those local officials. JA.4451-63. At the Port Authority, Wildstein was Kelly's liaison. JA.4458-59.

Baroni and Kelly moved to dismiss the indictment; the District Court refused. As to the civil-rights counts, the court concluded that this Court's decision upholding a municipal ban on "cruising, which consists of driving repeatedly around a loop of certain major public roads through the heart of the city," *Lutz v. City of York, Pa.*, 889 F.2d 255, 256 (3d Cir. 1990), not only demonstrated the existence of a constitutional right to intrastate travel in the face of a "split on the issue" among the appellate courts, but also clearly established it at a sufficiently specific level to impose criminal liability. JA.37-40. On the misapplication counts, the court held that § 666 proscribes "any improper use of property," and declared it "improper" to be motivated by political "retribution." JA.30-31. Regarding wire fraud, the court reasoned that the indictment sufficiently alleged that Defendants had "[d]epriv[ed]" the Port Authority of "control over [its] assets." JA.36-37. The District Court acknowledged that this prosecution was "novel," but rejected a vagueness challenge as "inappropriate for a pretrial motion" and cast aside the rule of lenity as irrelevant because the statutes at issue were, in its view, "not unclear" or "ambiguous." JA.26 & n.3.

4. The Trial and Jury Instructions.

For Kelly, the central fact dispute at trial was her knowledge and intent with respect to the realignment, and in particular whether she knew and shared Wildstein's punitive motive. Kelly explained that Wildstein had mentioned as far back as 2011 that the lane configuration was unfair to Main Line motorists, and that in 2013 he claimed to be working with Port Authority staff to develop a traffic study examining the effects of altering the configuration. JA.4463-64. Kelly testified that Wildstein told her that there would be short-term traffic problems in Fort Lee, but that commuting patterns would adjust as drivers stopped cutting through the town to access its quicker local lanes (JA.4469), and that the Governor could take political credit for reducing Main Line travel time (JA.4476). Kelly explained that her email telling Wildstein it was "[t]ime for some traffic problems in Fort Lee" simply parroted the way he often talked about Port Authority projects, which were notorious for causing traffic, and was simply meant to convey that the Governor's Office had signed off on the study. *E.g.*, JA.4489-90.

The Government, by contrast, elicited testimony from Wildstein that Kelly, after confirming that Sokolich would not endorse the Governor, directed Wildstein to punish Sokolich by causing traffic in Fort Lee. JA.1620.

Although each side proposed jury instructions that repeatedly mentioned the reallocation's allegedly punitive nature (JA.280, 295-99, 331, 341), the Government reversed its position at the charging conferences and asked the court to remove these

mentions. JA.4575-83, 4995-5014. The Government argued that punishment was merely the *motive* for the offenses, but not itself an element of any of them. Over manifold objections, the court acceded. *Id.* In contrast to the indictment's scores of references to punishment and Mayor Sokolich, the final jury instructions mentioned neither in *any* of the instructions defining *any* of the elements of *any* of the crimes.

These instructions apparently confused the jurors, who sent a note asking: "Can you be guilty of Conspiracy without the act being intentionally punative [sic] toward Mayor Socholich [sic]?" JA.648. Again over objection (JA.5547-59), the court responded: "Yes. Please consider this along with all other instructions that have been given to you." JA.648. The jury then convicted Kelly and Baroni on all counts.

5. The Post-Trial Proceedings.

The District Court denied Defendants' motions for acquittal or for new trials. Defending its jury instructions, the court adhered to its position that "any punitive goal Defendants may have had goes to their motive" but was "not an essential element of any of the crimes charged." JA.50. So the jury "was not required to find" that "Defendants wanted to retaliate against Mayor Sokolich." JA.52. The court also reiterated its holdings that the criminal statutes encompassed Defendants' alleged conduct, and affirmed the evidentiary sufficiency. JA.52-63.

The court sentenced Baroni to 24 months' imprisonment and Kelly to 18 months (JA.6, 13), but allowed both to remain free pending appeal (JA.5719, 5799). Wildstein was later sentenced to probation in view of his cooperation.

SUMMARY OF ARGUMENT

Everyone hates traffic. The public anger over the alleged conduct in this case is therefore understandable. But the role of the courts is to ensure that this anger is channeled consistent with the rule of law. And the law requires the reversal of Kelly's convictions. As the Supreme Court has repeatedly instructed, federal criminal statutes should not be read as imposing a "good government" code on state and local officials. The statutes at issue were never intended to proscribe the *political* abuses alleged, and the Government's contrary, sweeping constructions would make every official in the country a potential indictment target. Kelly is entitled to acquittal on all counts, or at least a new trial due to the District Court's overbroad jury instructions.

I. The criminal civil-rights laws punish serious, willful violations of "clearly established" constitutional rights. Yet the District Court admitted that the Supreme Court has never recognized a substantive due-process right to "intrastate" travel, and that several Circuits reject its existence. That alone invalidates Kelly's convictions. Moreover, the only cases to recognize a liberty interest in "intrastate" travel did so when confronting *prohibitions* on free movement (*e.g.*, curfew laws), which cannot establish with the requisite specificity any "clearly established" constitutional right to avoid being *delayed* in travel by additional traffic. On top of all this, the District Court wrongly allowed the jury to convict as long as it felt that the lane realignment was not "legitimate"—with no guidance as to what that, legally, means—so a new trial is required even if creating traffic for political vengeance *would* constitute a crime.

II. The Government claims Kelly "intentionally misapplied" Port Authority property. But she did not steal, embezzle, or misappropriate anything. Indeed, since all of the lanes remained *open* and in *public use*, there indisputably would have been no "misapplication" if the realignment had been executed for non-political reasons. The notion that this somehow became a "misapplication" because of Defendants' *subjective motives* is legally baseless—another Circuit called this theory "preposterous"—and would criminalize routine political conduct like earmarks. Federal criminal law does not prohibit senior officials from having "political" motives for legitimate allocations of resources. Further, the Government failed to prove that any misapplied property was worth $5,000. And, again, the District Court erroneously defined the crime to sweep in any "unjustified" use of property, requiring a new trial at bare minimum.

III. Notwithstanding the Government's rhetoric before the jury, this cannot be prosecuted as an "honest services" case, as it involves no bribes or kickbacks. To prove wire fraud, the Government must show that the realignment deprived the Port Authority of a *traditional property right*. As nothing tangible was lost, the Government contended below that Baroni defrauded the agency of its "right to control" its assets. But that is just an attempt to revive the condemned honest-services doctrine under a new name. An official whose job is to make state decisions does not *defraud* the State of property by making bad ones, or making them for bad reasons. Indeed, the State has no cognizable property interest in its sovereign power. That is why politicians cannot be jailed for "spinning" their actions—and why reversal is required here.

STANDARD OF REVIEW

This Court exercises plenary review over the construction of criminal statutes, *United States v. Kouevi*, 698 F.3d 126, 129 n.3 (3d Cir. 2012); sufficiency of the evidence, *United States v. Wright*, 665 F.3d 560, 572 (3d Cir. 2012); and correctness of the District Court's jury instructions, *United States v. McLaughlin*, 386 F.3d 547, 552 (3d Cir. 2004).

ARGUMENT

The Government has done its best to shoehorn the alleged political abuses here into Title 18 of the U.S. Code. This Court should review that effort with skepticism. The Supreme Court has time and again warned *against* imposing good-government norms through broad, novel constructions of open-ended federal criminal laws.

In *McNally*, the Court rejected the "honest services" theory of fraud, declining to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360. After Congress codified the honest-services doctrine, the Court read that provision narrowly too, citing "the due process" and "vagueness" concerns that would arise from extending it to an "amorphous category of cases" of political misconduct. *Skilling*, 561 U.S. at 410. In *McDonnell*, the Court again invoked "significant constitutional concerns," including "fair notice" and "federalism," to justify a narrow construction of "official action" under the federal corruption laws, and eschewed a reading that would "cast a pall of potential prosecution" over "commonplace" political activities. 136 S. Ct. at 2372-73.

As these decisions teach, employing novel legal theories to criminalize political abuses offends due process, fair notice, and federalism—which is why a "statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter," *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). That lesson looms large in this case, where the Government, in an attempt to punish unpopular conduct, has contorted longstanding statutes to criminalize a stunning swath of routine political decisionmaking. There is hardly an official in the nation who could not be accused of allocating resources based on political considerations, or of misrepresenting her true motives. Sustaining the Government's theories would thus give federal prosecutors a dangerous degree of discretion over highly sensitive political matters at every level of government. The Constitution puts a heavy thumb on the scales against these legal theories—which, as explained below, fail on their own terms anyway.

I. THE CIVIL-RIGHTS CONVICTIONS CANNOT STAND.

It is a crime to willfully deprive another "of any rights, privileges, or immunities secured or protected by the Constitution." 18 U.S.C. § 242. Here, the Government argued that by reallocating lanes in a way that increased local traffic, Defendants violated the constitutional right of drivers to "localized travel on public roadways free from restrictions unrelated to legitimate government objectives." JA.124. Kelly was convicted of this offense (Count IX) and conspiracy to commit it (Count VIII).

These convictions must be set aside for two reasons. *First*, most fundamentally, the criminal civil-rights statutes forbid only the violation of "clearly established" rights, those that have been "made specific by the text or settled interpretation." *United States v. Lanier*, 520 U.S. 259, 267, 270-71 (1997). Yet not only is it highly dubious that a constitutional right to "localized," intrastate travel exists at all—the Supreme Court having implied otherwise, and other Circuits having so held—but no court anywhere has ever extended it to a situation remotely like this, where travel may have *taken longer*, but nobody was *forbidden* to travel or *penalized* for doing so. Simply put, there is no "clearly established" civil right to be free of traffic jams, whatever their source.

Second, the District Court wrongly instructed *the jury* to decide if the purpose for the lane realignment was "legitimate," offering no guidance on how to make that legal judgment. And because the court also instructed that punitive political intent was not needed for conviction, the jury may well have reached its verdict by deeming criminal a governmental purpose that is legally "legitimate"—thus requiring a new trial.

A. A Substantive Due Process Right To Avoid Intrastate Traffic Has Never Been Recognized, Much Less Clearly Established.

To avoid vagueness concerns, the Supreme Court has "limited" the "coverage" of the criminal civil-rights laws "to rights fairly warned of," meaning those that were "clearly established" at the time of the conduct. *Lanier*, 520 U.S. at 267, 270–71. This is the same "exacting standard" that guides qualified immunity in civil litigation. *See City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015).

The Government comes nowhere close to satisfying that standard. It begins with a substantive due process right that—even at the highest level of abstraction—is, at best, controversial. And then, ignoring repeated Supreme Court warnings, the Government refuses to descend below that level of generality, relying on cases so inapposite that the analogies would be laughable if Kelly's liberty were not at stake.

1. The "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). Meaning, what must be "clearly established" is "the violative nature of [the] *particular* conduct." *Id.* (emphasis added). Indeed, if a case "presents a unique set of facts," that "alone should [be] an important indication … that [the] conduct did not violate a 'clearly established' right." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). The Supreme Court has thus repeatedly reversed where courts analyzed the right at "a high level of generality" rather than asking if its "contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014); *see also, e.g.*, *Pauly*, 137 S. Ct. at 552 (reversing because Tenth Circuit "failed to identify a case where an officer acting under similar circumstances … was held to have violated the Fourth Amendment" and instead employed "excessive-force principles at only a general level"); *Sheehan*, 135 S. Ct. 1765; *Mullenix*, 136 S. Ct. 305; *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam).

This Court has taken that lesson to heart. In this Circuit, "there must be sufficient precedent at the time of [the] action, *factually similar to the plaintiff's allegations*, to put defendant on notice that his or her conduct is constitutionally prohibited." *Mammaro v. N.J. Dep't of Child Protection & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016) (emphasis added). This Court "look[s] first for applicable Supreme Court precedent." *Id.* If that search comes up empty, "it may be possible that a 'robust consensus of cases of persuasive authority' in the Court of Appeals could clearly establish a right." *Id.* (quoting *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam)).

2. The supposed constitutional right at issue here is the right to "localized" (*i.e.*, intrastate) travel, purportedly deriving from the substantive liberties of the Due Process Clause. But even broadly characterized at that level of abstraction, this right is dubious and contested. As the District Court admitted, "the Supreme Court has not yet recognized a constitutional right to localized travel." JA.37. If anything, the Court has implied that, unlike *interstate* travel, movement *within* a state is *not* protected. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) ("[A] purely intrastate restriction does not implicate the right of interstate travel ….").

Further, the District Court conceded that "the federal appellate courts are split on the issue," citing four Circuits as "rejecting the right." JA.37. As the Supreme Court has explained, "[w]hen the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017). This Court, similarly, has held

that where "sister Circuits are split," there is "no consensus of authority that [the conduct] implicates a clearly established constitutional right." *Rossiter v. City of Phila.*, 674 F. App'x 192, 197-98 (3d Cir. 2016). "[T]he fact that the courts are divided" over the existence of a constitutional right to intrastate travel thus "demonstrates that the law on th[is] point is not well established," *Ziglar*, 137 S. Ct. at 1868, alone requiring reversal of the civil-rights convictions as a matter of law.

3. Even setting all that aside, and assuming there were a "robust consensus" that some generalized "right to intrastate travel" exists, the Government's theory here would transform the right far beyond anything contemplated—let alone clearly established—in any prior decision. The Government and District Court principally relied on cases addressing *de jure prohibitions on free movement*. Those do not bear the slightest resemblance to this case, where the allegation is only that some drivers faced *traffic delays*, in a city already known as "the traffic capital of New Jersey." JA.1014. There are obvious, meaningful distinctions between these scenarios.

Lutz is the only case decided by this Court that the Government has invoked to demonstrate the "clearly established" right. There, this Court rejected a challenge to an ordinance forbidding "cruising, which consists of driving repeatedly around a loop of certain major public roads through the heart of the city." 899 F.2d at 256. That decision thus concerned a regulation that *prohibited* certain individuals from traveling through certain public areas. The other cases the Government cited are to the same effect. *See Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003) (juvenile curfew);

Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002) (ordinance prohibited arrestees from presence in "drug-exclusion zones"). These latter restrictions, unlike the one in *Lutz*, were invalidated. But none of these cases involved official actions that merely *delayed* travel. Accordingly, none remotely establishes that "the right's contours were sufficiently definite that any reasonable official in [Kelly's] shoes would have understood that [s]he was violating it." *Plumhoff*, 134 S. Ct. at 2023.

This is hardly a novel distinction. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality op.). One may have a Due Process right to marry, for example, *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2598-99 (2015), but being compelled to wait in line at the registrar's office for a marriage license does not implicate the Constitution. Thus, even if a right to intrastate travel exists, it would not be violated by action that neither "prevent[s]" anyone "from entering or leaving any part of the State" nor "erect[s] any actual barrier" to free movement. *Doe v. Miller*, 405 F.3d 700, 713 (8th Cir. 2005). Indeed, as to *interstate* travel, too, there is no "right to the most convenient form of travel, and minor restrictions," such as a delay of "a little over one day"—far longer than any holdup at issue here—"do not amount to the denial of a fundamental right." *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140-41 (2d Cir. 2010); *see also Lanin v. Borough of Tenafly*, No. 2:12-02725, 2014 WL 31350, at *9 (D.N.J. Jan. 2, 2014) ("Traffic, even if it can be attributed to poor public planning, is not a deprivation of a fundamental right.").

Any broader conception of the right to "localized" travel would carry absurd, far-reaching consequences. All changes to traffic patterns involve tradeoffs, as some motorists benefit while others are delayed. If those delays implicate the Constitution, then any minor change is fair game for § 1983 litigation or even criminal charges, delving into the official's subjective motives. For example, if a governor uses a motorcade and police escort to reach a campaign event, causing citizens to wait in traffic, the Government's theory would allow him to be sued or imprisoned. Politics (per the Government) is not a "legitimate" objective, and the short duration is irrelevant, as the wrong (per the District Court) "is demonstrated by an improper purpose, not by the severity of the infringement." JA.62.

4. The District Court nevertheless reasoned from the above authorities that officials "may only restrict … travel within a state for legitimate purposes"—and that this was "clearly established." JA.39. At the outset, that approach conflates the *right* with the *standard of scrutiny*: The State only needs to justify "restrictions" that implicate the Constitution—and there was no such "clearly established" restriction here.

Beyond that, this reasoning flouts Supreme Court precedent by proceeding at a "high level of generality." *Plumhoff*, 134 S. Ct. at 2023. This Court's recent *Mammaro* decision is instructive. There, as here, the defendants allegedly violated a substantive due process right, described only in general terms in one prior case from this Court. 814 F.3d at 169. Recognizing its duty to "frame clearly established law in light of the specific context of the case, not as a broad general proposition," this Court concluded

that its earlier decision was insufficient to defeat immunity, because it laid out only a general standard and was "factually off point." *Id.* at 170. So too here. Given the "unique set of facts" presented in this case, it is impossible to conclude that Kelly violated "clearly established" constitutional rights. *Pauly*, 137 S. Ct. at 552.[2]

B. At Minimum, The Instructions Erroneously Allowed The Jury To Define For Itself "Legitimate" Governmental Interests.

At minimum, a new trial is required. The District Court's instructions—which the Government confessed it had "cobbl[ed] together" because its legal theory was so novel (JA.4601)—wrongly delegated *to the jury* the task of defining "legitimate" governmental interests. And because the court then also advised the jury that it could convict *without* finding any intent to punish Sokolich—the only arguably "illegitimate" purpose in the record—Kelly may have been convicted for lawful conduct.

In its civil-rights instructions, the District Court directed the jury to determine whether Defendants had restricted localized travel for reasons unrelated to "legitimate government objectives." JA.5128. But it offered no guidance on what a "legitimate" objective is, or whether any particular objective qualifies. That was error. Whether a state interest is "legitimate" is a question of law. *See, e.g.*, *Cripps v. La. Dep't of Agric. &*

[2] The District Court also invoked a second line of cases, even further afield, in which courts reasoned that reserving public benefits for those who resided in a city for a certain length of time "penalized persons because they have recently migrated." *Cole v. Hous. Auth. of City of Newport*, 435 F.2d 807, 811 (1st Cir. 1970). Such decisions obviously have no relevance here. Indeed, in distinguishing cases that *upheld* residency rules, the Government itself noted "the different factual context in which the courts in these cases addressed the existence of the right." ECF 91 at 67.

Forestry, 819 F.3d 221, 232 (5th Cir. 2016) ("Whether the governmental action is rationally related to a legitimate governmental interest is a question of law for the court."); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 706 (1999) ("jury was instructed … that the various purposes asserted by the city were legitimate public interests"); *id.* at 732 (Scalia, J., concurring) (jury was "properly" instructed that certain interests were legitimate); *id.* at 753-54 (Souter, J., concurring in part and dissenting in part) (agreeing "it would be far removed from usual practice to charge a jury with the duty to assess the constitutional legitimacy of the government's objective"). Because it is the "duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case," *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998), the District Court should have told the jury which grounds for the realignment, if any, would have been legally "illegitimate."

Perfecting the problem, the District Court eliminated from its instructions—over an objection that "applie[d] to every count of the indictment" (JA.5009)—any requirement that the jury find the only arguably illegitimate purpose grounded in the evidence, *i.e.*, punishing Mayor Sokolich. Even the Government thus admits that the instructions allowed for conviction if the jury disbelieved the political-vengeance narrative and found instead that Kelly acted for other reasons. ECF 311 at 13, 53-54. Even if "[s]pite is not a legitimate government purpose" (JA.5197), there is no way to know whether the jury actually rested its verdict on that purpose, or instead on other, *legally legitimate* objectives. For example, what if Kelly's motive was greater equity for

Main Line drivers? JA.4463. Under the instructions, the jury could have so found, yet still convicted by reasoning that the prior allocation was fair and thus that any change was not supported by a "legitimate" interest. Or, what if Kelly acted simply to please her boss, the democratically elected Governor? JA.4476. Again, as instructed, that alone could have been the basis for the jury's verdicts.

Here, moreover, the record reveals a strong possibility that the jury convicted on a legally invalid theory. While deliberating, the jury specifically asked: "Can you be guilty … without the act being intentionally punative [sic] toward Mayor Socholich [sic]?," and the District Court said yes. JA.648. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). There is thus good reason to believe that the jury's verdict rested, not on the punishment theory, but on some other, legally improper ground.

Under these circumstances—when the instructions are legally erroneous and "the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"—the verdict must be "set aside." *Yates v. United States*, 354 U.S. 298, 312 (1957); *see also United States v. Syme*, 276 F.3d 131, 144-46 (3d Cir. 2002) (discussing this rule). Accordingly, if the civil-rights convictions are not reversed outright, they must at minimum be vacated and remanded for a new trial with jury instructions that specifically identify a legally illegitimate government interest and require the jury to find that purpose before convicting.

II. THE MISAPPLICATION CONVICTIONS CANNOT STAND.

Under 18 U.S.C. § 666(a)(1)(A), anyone who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner *or intentionally misapplies*" property, "valued at $5,000 or more," of a recipient of federal funds faces criminal liability. The Government argued that Defendants "intentionally misapplie[d]" Port Authority property by reallocating the lanes with the motive of political payback. Kelly was convicted of the substantive offense (Count II) and conspiracy to commit it (Count I).

These convictions must be reversed for three reasons. *First*, the Government's understanding of "misapplies" is legally erroneous; the actions it alleged do not violate § 666. *Second*, at minimum, the jury was instructed using an erroneous definition of "misapplies" that allowed it to convict for lawful conduct. *Third*, there was legally insufficient evidence that any "intentionally misapplied" property was worth $5,000.

A. Section 666 Targets Theft And Embezzlement, Not Allocating Public Resources Among The Public With "Improper" Motives.

To misapply property means to make "improper or illegal use" of it. BLACK'S LAW DICTIONARY (10th ed. 2014). The question here is what renders use of property criminally "improper." The statute plainly proscribes diverting government property to non-governmental, private uses. But can an official who dedicates public property to an *objectively legitimate public use* nonetheless be guilty of this offense simply because she did so, in whole or in part, with an allegedly "improper" subjective motive?

The answer is no. As this Court held in *United States v. Cicco*, the text of § 666 is "ambiguous" and "must be construed narrowly"—not rendered "vague" by extending it to criminalize conduct "different in kind" from "the crimes Congress targeted." 938 F.2d 441, 444-46 (3d Cir. 1991). Statutory text, structure, and history confirm that Congress enacted this law to target theft and embezzlement—*i.e.*, diversion of public property to private uses—not to pry into subjective motives behind officials' allocations of public property among legitimate beneficiaries. No court has read it to authorize the latter, and construing § 666 to forbid *politically motivated* decisions, in particular, would be utterly absurd and threaten great mischief. "The 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." *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007). Yet the Government's theory hinges on that "preposterous" notion.

1. There is nothing inherently or objectively improper about what Defendants *did* with the Port Authority property. No property was ever diverted to objectively private uses or beneficiaries, such as having agency helicopters fly Kelly's kids to school, or closing the bridge to the public so that Baroni could speed to his dinner reservation. Rather, two lanes were redirected from one public traffic cohort to another public traffic cohort, and all twelve lanes remained in use *by the public*, consistent with the Port Authority's mandate. The lanes were thus put to the same use as always, for the same beneficiaries—public motorists crossing into Manhattan.

How to allocate scarce lanes between two entries necessarily is a discretionary policy decision, no different from the allocation among jurisdictions of any other public resource (*e.g.*, education funds, infrastructure capital, or police patrols). And whether the Local Access Lanes were reduced to one, kept at three, or increased to five—all of these are, on their face, legitimate choices for government to make.

Nor was the realignment objectively "improper" in any other way. There was no legal duty to preserve the Local Access Lanes. JA.1656. And the Government did not identify any Port Authority rule or policy that was violated. *See* ECF 45 at 32–33. As the most senior New Jersey official, it Baroni indisputably "had authority" to act (JA.5302), especially as to a New Jersey facility. *Accord* JA.92 (indictment). That is why the bureaucracy abided the instructions delivered in Baroni's name. JA.5807. And it is why Executive Director Foye criticized the realignment for being "hasty and ill-advised," not a violation of any rule. JA.5809. As he testified, no policy compelled Baroni to obtain approval before reconfiguring the lanes. JA.1113-14. Foye thought "there *ought* to be a process for approval," but there was not one. JA.1103.

Instead, the realignment was supposedly a "misapplication" of Port Authority property not based on *what was objectively done with the property* (which was legitimate), but rather based on *the subjective motive with which it was allegedly done* (politics). Had Defendants unquestionably been motivated by a belief that the prior lane allocation was inequitable, there plainly would have been no "misapplication." But because they allegedly took the same act, with the same effect, based on *a political motive*—to punish

Mayor Sokolich—the Government argues that § 666 criminalized this otherwise-unobjectionable conduct. *E.g.*, JA.5294 ("They misused [Port Authority property] by conducting these punitive lane reductions."); ECF 91 at 21 (Defendants put Port Authority property to "impermissible use—the punishment of Mayor Sokolich"). The District Court embraced that theory, upholding the indictment because it alleged the "impropriety of [Defendants'] *motives*." JA.31 (emphasis added).

2. This represents a completely unprecedented reading of § 666. Allocating public property to legitimate beneficiaries cannot be an "improper" use of property—and does not become so merely because it was *motivated* by political calculus.

All the reported decisions about "misapplication" involve objectively improper uses of property. In most, the defendant diverted public resources to private uses. *E.g.*, *United States v. Baldridge*, 559 F.3d 1126, 1138-39 (10th Cir. 2009) (county funds used for work on private home); *United States v. De La Cruz*, 469 F.3d 1064, 1065 (7th Cir. 2006) (projects "on private property"); *United States v. Delano*, 55 F.3d 720, 723 (2d Cir. 1995) ("work on private homes"); *United States v. Sanderson*, 966 F.2d 184, 186 (6th Cir. 1992) ("private construction"). In a few others, defendants violated objective legal constraints in putting property to otherwise-permissible uses. *E.g.*, *United States v. Frazier*, 53 F.3d 1105, 1108-09, 1111 (10th Cir. 1995) (non-profit received grant to provide job-skills training but, in violation of regulation, instead used it "to purchase computers"); *United States v. Urlacher*, 979 F.2d 935, 937-38 (2d Cir. 1992) (funds spent

on "police purposes" but not "the purposes allocated").[3] No court has ever applied § 666 to punish a use of property that is legitimate on its face, and not objectively out-of-bounds, simply by virtue of the defendant's subjective motive.

This caselaw is faithful to the statutory text, context, and history, none of which remotely suggests that § 666—designed to combat theft and embezzlement—can be used to probe the motives for objectively legitimate policy decisions, much less to filter out and punish excessively "political" decisionmaking.

First, both the *ejusdem generis* and *noscitus a sociis* canons of construction call for reading "misapplies" to be similar to § 666's other verbs: embezzle, steal, obtain by fraud, and convert. As the Government admitted, these verbs are "variations on the same theme." JA.5294. And each other such verb refers to diversion of property to objectively private beneficiaries. If an employee chooses to buy the company's office supplies from a particular dealer because he is a friend, nobody would call that embezzlement. *See Thompson*, 484 F.3d at 881-82. To "avoid the giving of unintended breadth," the term "misapplies" should be "known by the company it keeps," and be understood in like fashion. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[3] There is a circuit split over whether § 666 extends to this latter category. The Seventh Circuit (correctly) holds that it does not, since construing § 666 to reach any use of property tainted by any "violation of regulations" or of state law would vastly expand its reach, turning every minor regulatory breach by a funding recipient into a crime. *Thompson*, 484 F.3d at 881. Because Defendants violated no rule or regulation, however, this Court need not take a position on that question here. *Cf. United States v. Jimenez*, 705 F.3d 1305, 1310 n.2 (11th Cir. 2013) (declining to consider this issue).

Second, the statute's title "reinforces" this reading. *United States v. Winebarger*, 664 F.3d 388, 392 n.3 (3d Cir. 2011). Section 666 is entitled: "Theft or bribery concerning programs receiving Federal funds." Because § 666(a)(1)(B) proscribes *bribery*, the clear implication is that § 666(a)(1)(A) proscribes *theft*. *Thompson*, 484 F.3d at 881 ("us[ing] the statute's caption" in adopting "narrow reading"). Yet, of course, one does not commit theft by having a bad subjective motive for a proper use of property.

Third, the "legislative history and purpose of § 666" confirm that its objective is "to protect federal funds" from "thefts and embezzlement." *Cicco*, 938 F.2d at 444-45. Congress designed the law to "vindicate significant acts of theft, fraud, and bribery involving Federal monies." S. Rep. No. 98-225 at 369 (1983); *see also Fischer v. United States*, 529 U.S. 667, 675 (2000) (referring to § 666 as prohibiting "theft and fraud"). Again, these terms do not naturally sweep in ill-motivated decisions about allocation of public property among the public.

Finally, other criminal statutes similarly proscribe misapplication within a series of theft-like verbs, *e.g.*, 18 U.S.C. §§ 656, 669, 1163; and precedent under those laws similarly confirms that "to misapply money or property means a willful conversion or taking of such money or property *to one's own use and benefit*." *United States v. Tamargo*, 637 F.2d 346, 350 (5th Cir. 1981) (emphasis added). This "consistent" construction "in other statutes" bolsters the understanding that § 666 does not reach objectively legitimate applications of property simply because they are taken with allegedly illicit subjective motives. *United States v. Saybolt*, 577 F.3d 195, 200 (3d Cir. 2009).

3. The far-reaching and absurd implications of the Government's contrary theory further prove it must be wrong. Construing § 666 to prohibit badly motivated uses of property would make the crime turn *entirely* on the contents of the official's mind. A mayor would be guilty for using public funds not only to renovate her home, but also to renovate a subway station nearby—if her motive was to improve her own commute. A governor would be guilty for using a state airplane not only for a private trip, but also to attend an official meeting—if his true motive in accepting the meeting was to visit a long-distance girlfriend. A prosecutor would be guilty for using public resources not only to defend himself against a parking ticket, but also to pursue a high-profile case—if his purpose was to build his own political brand. This approach thus would "require the sort of deconstruction of the governmental process and probing of the official 'intent'" that the Supreme Court has "consistently sought to avoid." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 (1991). Indeed, the Government's theory would expose *every* official's use of public property to charges of misapplication, thereby "open[ing] to prosecution … conduct that in a very real sense is unavoidable." *McCormick v. United States*, 500 U.S. 257, 272 (1991).

Even worse, the Government's theory treats *political* motives as "improper," which conflicts squarely with the Seventh Circuit's *Thompson* decision. The defendant there steered a state contract to one bidder in a "politically motivated departure from state administrative rules," possibly because of the bidder's "support of the Governor" or for other "political reasons." 484 F.3d at 878-79. The Circuit found this theory so

outrageous that the panel ordered the defendant's release from prison *immediately*. *See id.* at 878. As it explained, construing "misapplies" to cover decisions motivated by "political considerations" would conflict with the statute's purpose and caption, and the rule of lenity and fair notice. *Id.* at 881. And "[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).

One need only open a history book—or a newspaper—to see that public policy decisions are invariably affected by politics. The venerable practice of earmarks, for example, involves directing funds to politically favored jurisdictions. Similarly, reports found that President "Obama's green-technology program was infused with politics at all levels," with "[p]olitical considerations … raised repeatedly by company investors, Energy Department bureaucrats and White House officials." Joe Stephens & Carol D. Leonnig, *Solyndra: Politics Infused Obama Energy Programs*, WASHINGTON POST, Dec. 25, 2011. More recently, North Carolina legislators punished their partisan opponents by stripping state funds from "programs in Senate Democrats' districts" in favor of "counties represented by Republican[s]." Colin Campbell, *At 3 A.M., NC Senate GOP Strips Education Funding from Democrats' Districts*, NEWS & OBSERVER, May 13, 2017. "It would be more than a little surprising … if the judiciary found in [§ 666] a rule making everyday politics criminal." *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015). Yet all of these "political" decisions would be federal crimes under the theory below; the Government has no principled basis to distinguish them.

The reality is that governments distribute scarce public resources as a matter of course and their allocation always depends on political factors, whether lofty ("I must defend the middle-class") or base ("I need to improve my image with seniors"); whether beneficent ("I need to bring home the bacon") or vindictive ("I need to be seen as cracking down on big oil"). It might be nice if all officials always acted in the best interests of the public as a whole. But politics is an inherent feature of our governance, accepted as the inevitable cost of democratic accountability.

The Port Authority is no different than any other governmental agency, under the control of political appointees and subject to the ultimate veto power of elected officials. *See supra* at 5-6. Its "resources"—from "outright financial contributions to used cars and surplus equipment, to jobs [and] patronage positions"—were viewed as a "goody bag," to be used as "helpful" to the Governor. JA.1531-32. Officials offered "goodies" to localities whose mayors were endorsement targets (*e.g.*, JA.1526-27, 1556-59), and withheld them from those with whom the Governor was on bad terms (*e.g.*, JA.1729-53). As relevant here, the Port Authority controlled twelve lanes over the George Washington Bridge; its job was to allocate them among the public. That an allocation was allegedly informed by politics—even crass politics—does not mean Defendants "misapplied" anything. The Government complained to the jury that Defendants failed "to separate politics from their jobs in public service." JA.5191. But federal law does not compel state officials to act as model technocrats.

4. If any doubt remained over § 666's scope, a host of constitutional principles require that it be resolved in Defendants' favor.

First, the Government's theory "cast[s] a pall of potential prosecution" over "nearly anything a public official does," chilling honest public service and "rais[ing] significant constitutional concerns." *McDonnell*, 136 S. Ct. at 2372. It is the rare public decision indeed that cannot be attacked as driven by political self-interest, especially in the modern climate.

Second, because virtually all state and local governments receive federal funds, interpreting § 666 to proscribe politically motivated decisions would "involve[] the Federal Government in setting standards of … good government for local and state officials." *McNally*, 483 U.S. at 360. Before courts compel all state and local officials to be insulated from politics, Congress must "speak more clearly than it has." *Id.*; *see also Cleveland*, 531 U.S. at 25 (refusing to "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

Last, but not least, lenity and fair-notice principles foreclose the Government's novel construction. *See Thompson*, 484 F.3d at 881. The District Court evaded the rule of lenity by claiming that § 666 is "not ambiguous" (JA.26 n.3), but this Court said just the opposite in *Cicco*, concluding that the law "must be construed narrowly" and refusing to extend it to criminalize the political corruption there, which was "different in kind" from the acts that Congress intended to target. 938 F.2d at 444-46. Surely the same can be said of this novel and aggressive prosecution.

B. At Minimum, The Instructions Erroneously Allowed The Jury To Convict If It Found The Realignment To Be "Unjustified."

Kelly is at minimum entitled to a new trial, even if allocating state resources for political vengeance does constitute "misapplication," because the jury was *not* required to find that Defendants acted to punish Mayor Sokolich. JA.648. Rather, the court defined "misapply[ing]" property as any "*unauthorized or unjustifiable or wrongful*" use. JA.5109. That overbroad instruction was utterly inadequate here to distinguish for the jury between lawful and unlawful acts, creating a real risk that the jury convicted for conduct that is not criminal under any view of § 666.

To start, the jury could have found that the lane realignment was a bad idea. It could have agreed with the Government that "no traffic study was worth even the smallest chance of impacting public safety" (JA.5303), finding the use of the lanes "unjustifiable" *as a policy matter*. But surely the Government would concede that bad public policy is not a crime. Or, the jury may have concluded that—although no rule required it—Baroni ought to have sought the Executive Director's advance approval. JA.1103 (Foye testifying that "there *ought* to be a process for approval of an action like this"). Under the instructions, that might have led the jury to convict based on an "unauthorized" use of property. But no reading of § 666 sweeps in such a minor bending of informal state protocol. Likewise, Kelly testified that, per Wildstein, the realignment would enable the Governor to tout the reduction of Main Line traffic at a bipartisan photo-op with New York's Governor. JA.4476-77. The jury might have

believed that was her intent—yet still viewed this political promotion as "wrongful." Or the jury may have concluded that Baroni's failure to return Sokolich's calls—his much-maligned "radio silence" (JA.5259)—was unjustifiable or wrongful.

Nor are these possibilities merely speculation. The jury *specifically inquired* of the District Court whether it could convict *without* finding that Defendants had intended to punish Mayor Sokolich; the District Court answered affirmatively; and the jury thereafter convicted. *See supra* at 11. It is thus surely possible that the jury *did not find* that Kelly acted out of political vengeance, instead convicting based on one of the above theories—contrary to law, but consistent with the instructions given.

Under these circumstances, a new trial is required. Whether the reallocation of the lanes constituted a "misapplication" of property was at the heart of these charges, and the District Court was required "to instruct the jurors, fully and correctly, on the applicable law of the case." *Smith*, 147 F.3d at 278. If the Government is correct on the law, the court was required to explain to the jury that allocating property for political purposes is "misapplication"—and require the jury to find such conduct to convict. Instead, the court's definition of the term was so broad that it "furnish[ed] wholly inadequate guidance to the jury on this central point," failing to draw a "clear and explicit" line between lawful and unlawful actions. *Yates*, 354 U.S. at 327. As a result, even assuming that using Port Authority property for political vengeance is unlawful, "it is impossible to tell" whether the jury rested on that theory; the verdict must therefore "be set aside." *Id.* at 312; *see also Wright*, 665 F.3d at 570-72.

The Government argued that, because "political revenge" is not an element of § 666, the jury properly did not need to find it. But the Government's theory was that this "improper" motive is what transformed an otherwise-legitimate division of lanes into a supposed "misapplication." *Supra* Part II.A.1; JA.5193 ("[W]hy was it a misuse of Port Authority property? Well, because [Defendants] agreed to use Port Authority property … to punish the Mayor …."); JA.5006 (describing "punishment" as "what this case has been about from the start"). Given the disputes over § 666's boundaries, it was incumbent on the District Court to explain which facts would or would not violate the law. By not specifying the Government's theory of political vengeance, and simultaneously offering a sweeping definition of "misapply," the District Court deprived the jury of the tools it needed to reach a proper verdict.

C. In All Events, The Value Of Any Intentionally Misapplied Property Was Under $5,000.

To ensure that "only the most serious instances of governmental corruption should be policed by the federal judiciary," Congress imposed a $5,000 threshold on the value of the intentionally misapplied property. *United States v. Mills*, 140 F.3d 630, 632 (6th Cir. 1998). If nothing else, the Government failed to carry its burden on that separate element of the offense. Because the evidence was legally insufficient, the convictions must be reversed. The District Court held that the Government proved the $5,000 threshold in two ways, but neither holds up as a matter of law.

First, the District Court pointed to various Port Authority personnel who were involved in implementing the realignment, finding that their compensation represents the value of their "misapplied" services. JA.58. But "bona fide salary, wages, fees, or other compensation" are *expressly exempt* from the law's threshold. 18 U.S.C. § 666(c). And, as courts have explained, "[c]ompensation for a job by someone other than a ghost worker is a 'bona fide salary.'" *Blagojevich*, 794 F.3d at 736; *see also United States v. George*, 841 F.3d 55, 62 (1st Cir. 2016) (treating "salary actually earned in good faith for work done for the employer" as exempt); *Mills*, 140 F.3d at 633 (applying exemption when personnel "responsibly fulfill[ed] the duties associated with their employment"). Here, all of the Port Authority staff responsibly performed actual work, in good faith, for facially legitimate Port Authority purposes—even if their instructions were based on improper motives. No rational jury could have found otherwise. The wages and salaries are thus legally irrelevant. In any case, the Government quantified only the tollkeepers' wages—which totaled just $3,696. JA.2901, 5808.

Second, the District Court pointed to a traffic study (at "Center and Lemoine") that had to be redone due to traffic from the realignment. JA.58 n.12. But there was no evidence that Defendants (or even Wildstein) were even aware of this study; they surely did not "intentionally misapply" it. Its cost may be consequential damage to the Port Authority, but the statutory threshold concerns the *value of the misapplied property*, not *downstream losses*. Anyway, this cost was under $4,500. JA.2781, 2799. For both reasons, the Center and Lemoine study, too, is legally insufficient.

III. THE WIRE FRAUD CONVICTIONS CANNOT STAND.

It is a federal crime to use interstate wires "to defraud" someone of "money or property." 18 U.S.C. § 1343. The Government contends that Defendants violated this statute by "hiding the[ir] true motivation" for the lane realignment, which was "to punish Mayor Sokolich." JA.5488. Kelly was convicted of this offense (Counts IV and VI) and conspiracy to commit it (Count III).

These convictions must be set aside, too, because the lane realignment did not deprive the Port Authority of any cognizable property interest. The Government argues that Defendants misappropriated the Authority's intangible "right to control" how its property is used. But that amorphous theory has long been rejected by this Court when, as here, the supposed victim's own senior executive made the decision at issue. And the theory is particularly nonsensical in the governmental context. The federal fraud statutes do not establish a "truth in government" regime. This theory is nothing more than an end-run around the Supreme Court's narrowing of the honest-services statute—an attempt to re-criminalize state officials' failure "to make each and every decision in the best interest of the people of New Jersey." JA.5303.

A. The Port Authority Was Not Deprived Of Any Property Right.

Section 1343 forbids schemes to deprive others of "property rights." *McNally*, 483 U.S. at 360. "[W]hether a particular interest is property for purposes of the fraud statutes" turns on "whether the law traditionally has recognized and enforced it as a property right." *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994).

Here, Defendants did not deprive the Port Authority of any tangible property. After all, the Port Authority still owns all of the lanes and tollbooths (and always has). Instead, the District Court upheld the indictment and the convictions on the theory that the Port Authority had been deprived of its supposed *intangible* property right to "control" the use of its own "assets." JA.36; *see also* JA.60 n.15. That is, Defendants defrauded the Port Authority of its right to decide how to regulate the lanes.[4]

This theory fails as a matter of law. At the outset, this Court long ago rejected the artificial notion that an entity's own senior manager can "defraud" the entity of a "right to control." The Port Authority *did* control how its assets were used—through Baroni, whose job was to act on its behalf. Perhaps he made bad decisions, but fraud is more than a breach of fiduciary duty; and he did not deprive the Port Authority of a traditional *property right*. Moreover, this theory is especially inapposite in the context of a public official. As the Supreme Court has recognized, the State has no traditional property interests in the exercise of its sovereign powers. If the rule were otherwise, then any politician who "spins" the basis for his official decisions could be prosecuted for depriving the government of its "right to control." That is an absurd result, one that other Courts of Appeals have expressly rejected, and no court has accepted.

[4] Section 666 requires only that the defendant "misappl[y]" the property of the entity, which is why the lanes and tollbooths can qualify as "property" for that statute. By contrast, under § 1343, "the deceived party must *lose* some money or property," *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988) (emphasis added), and so these pieces of physical property do not fit the bill.

1. The Government has tried to sell this "right to control" theory before, under far more egregious circumstances, but this Court did not buy it even there.

In *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), the trustees and general counsel of a pension fund took kickbacks for investing plan assets, and attempted to "cover up" their misconduct. *Id.* at 140-42. They were first charged with defrauding the pension fund of their "honest services" but, after *McNally*, the Government tried to reconceptualize its case as alleging that they "deprived the pension fund of control over its money." *Id.* at 142, 146. It argued that "a deprivation of control over how money is spent can constitute an actual loss of money or property." *Id.* at 146.

This Court was not convinced, characterizing this theory as "too amorphous to constitute a violation of the mail fraud statute as it is currently written." *Id.* at 147. The trustees, as managers of the pension fund, "had the power and the authority to invest the fund's monies with others," and the Court thus "fail[ed] to see what [they] 'appropriated.'" *Id.* Perhaps the trustees "acted against the interest of the fund," but that "does not state a violation of the mail and wire fraud statutes." *Id.*

So too here. The Government admits that Baroni was a "high-ranking" official who "had authority" to act on the Port Authority's behalf with respect to the lanes. JA.5302. By exercising that power, he did not deprive the Authority of any property right—even if he could be said to have acted "against" its "interest" in some idealized sense—and the agency at all times retained "control" of its assets, through its duly appointed officers. *Zauber*, 857 F.2d at 147.

To distinguish *Zauber*, the District Court reasoned that Baroni's authority "was a question of fact for the jury." JA.60. Not so. The indictment itself alleged that he held general power over Port Authority operations, including the George Washington Bridge (JA.92), and the Government's witnesses so affirmed (JA.1113-14, 1483); *supra* at 27. Of course, the Government argued that his motive for the realignment made that decision improper. But that is just an argument that he "*abused* the power that [he] w[as] trusted with," as the Government argued in closing, not that he *lacked* that power. JA.5303. That was equally true in *Zauber*. The point, there as here, is that an entity's decisionmaker who fails to act in the entity's best interest may *breach a fiduciary duty*, but does not deprive the entity of *property*. "[A] government official's breach of his or her obligations to the public or an employee's breach of his or her obligations to an employer cannot violate the fraud statutes." *Henry*, 29 F.3d at 114.[5]

2. In any event, whatever force the "right to control" concept may have in the private sector, it cannot be imported to condemn a state official who makes regulatory decisions. The government has no "property interest" in its sovereign power, and any contrary rule would invite the most absurd consequences—turning the federal government into a Ministry of Truth for state and local officials.

[5] Baroni's authority was not resolved by the jury for an additional reason: Citing *Zauber*, Defendants sought an instruction that if "Baroni [had] the right to control the Port Authority money and property," that "would prevent the existence of a scheme to defraud." JA.307. But the District Court, despite acknowledging that Defendants "can certainly argue" this point to the jury, wrongly refused to *instruct* the jury on its legal force. JA.4595. One thus cannot infer that the jury rejected it.

In *Cleveland*, the Supreme Court held that lying to obtain a state license is not fraud, because licenses are not state "property." 531 U.S. at 15. The Government argued that the scheme deprived the State of its "right to control" licensing. *Id.* at 23. But the Court declared that the "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] power to regulate." *Id.* Licensing "implicate[s] the Government's role as sovereign, not as property holder." *Id.* at 24.

Under a straightforward application of *Cleveland*, Kelly cannot be convicted of fraud for supposedly depriving the Port Authority—a governmental entity—of its "right to control" the allocation of public resources. Just as the sovereign right to control *who obtains a license* does not "create a property interest," neither does the sovereign right to control *who drives on public roads*. Because the State makes resource-allocation decisions in its sovereign role, "loss of the 'right to control' the expenditure of public funds" cannot ground a federal fraud charge. *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994); *see also United States v. Evans*, 844 F.2d 36, 40-42 (2d Cir. 1988) (rejecting theory that arms dealer who lied about weapons' destination had defrauded government of "right to control," as government's interest was "ancillary to a regulation"). In short, if Baroni interfered with Port Authority decisions, they were *regulatory* decisions, and so implicated the agency's "role as sovereign, not as property holder." *Cleveland*, 531 U.S. at 24. That is outside the bounds of § 1343. *Cf. United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017) (right-to-control theory is limited to deprivation of "potentially valuable *economic* information" (emphasis added)).

This interpretation of "property" must be correct. On the Government's view, any federal, state, or local politician who misrepresents her "true motivation" for an official decision (JA.5488) could be investigated and indicted on the theory that she defrauded the government of its right to control public funds or property. Consider a governor who refuses to approve an oil pipeline and claims an environmental motive even though the truth is that he wants to energize his political base. Or a deputy secretary who promotes an anti-immigration measure by citing public security, when his true goals are to alter demography in his political favor. Such routine political spin is indistinguishable from Baroni's allegedly insincere defenses of the realignment.[6]

Once again, the Government's novel and expansive theories would criminalize "commonplace" politics, *McDonnell*, 136 S. Ct. at 2372, and turn federal prosecutors into enforcers of "good government for local and state officials," *McNally*, 483 U.S. at 360. And it would do so through a broad construction of the word "property," which *Cleveland* specifically held must be construed narrowly. 531 U.S. at 24-25. Moreover, given its implications for core political speech, this theory raises real First Amendment issues. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016) (invalidating state law forbidding "false" speech about political candidates).

[6] Indeed, among the "lies" the Government focused on was Baroni's statement that dedicating three lanes to Fort Lee was unfair because Fort Lee residents made up less than 5% of Bridge motorists. It claimed this was false, because non-residents also use the Fort Lee lanes. JA.5279-81. Actually, the fact that non-residents would cut through the town to access these lanes *confirms* that the allocation was inequitable. Anyway, this type of statistical "manipulation" is classic political spin.

All of this is plainly wrong. As other Courts of Appeals have recognized, the "[wire] fraud statute … does not enforce ethics in government," *Mittelstaedt*, 31 F.3d at 1217, and certainly does not impose "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," *Blagojevich*, 794 F.3d at 736. The reason is that, as *Cleveland* makes clear, the State does not have a "property interest" in its sovereign decisionmaking power. An interference with that power "merely implicates the Government's role as sovereign," rather than "as a property holder, purchasing goods and services in the open market." *United States v. Tulio*, 263 F. App'x 258, 262 (3d Cir. 2008). Since, at most, only the former was implicated here, the wire-fraud convictions must be reversed.

3. The Government and the District Court invoked *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004), to support the "right to control" theory. That precedent, however, involved *outsiders* who deprived a *private business* of the right to maintain exclusive access to *confidential, proprietary information*. It is utterly inapposite here.

In *Hedaithy*, foreign nationals "paid an imposter to take" a standardized exam administered by a private business. *Id.* at 583-84. This Court held that, by lying to obtain access to the tests, they had deprived the company of its right to "exclusive use" of its "confidential business information" (including copyrighted material), a "recognized property interest." *Id.* at 595. The Court distinguished *Zauber* because the defendants there were "officers of the pension fund," and *Cleveland* because it had not involved "the property interests of private entities." *Id.* at 603.

In both respects, this case is like those earlier precedents, not *Hedaithy*. As in *Zauber*, the principal "defrauders" are senior officials of the "victim"—not an outsider with no authority over the property at issue. And as in *Cleveland*, the Port Authority is a governmental entity—not a private business. Furthermore, *Hedaithy* involved access to proprietary, copyrighted tests fairly analogized to trade secrets or other confidential business information. *See id.* at 594; *Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Confidential business information has long been recognized as property."). But this case involves nothing of the kind, merely the generalized and "amorphous" right to control that has no features of traditional "property." *Zauber*, 857 F.2d at 147.

The Government has also cited select out-of-Circuit cases. In fact, the "right to control" theory is hotly contested among the Courts of Appeals. *E.g.*, *United States v. Sadler*, 750 F.3d 585, 590-92 (6th Cir. 2014) (invoking lenity and federalism to reject conviction of pill-mill clinic owner who lied to convince drug distributors to sell drugs "they would not have sold had they known the truth"); *United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992) (similar). This Court need not enter that fray, however, because *no court* has ever applied the "right to control" theory to convict an official for not being open about his motives for sovereign decisions. That application is refuted twice over by binding precedent, and also carries untenable consequences.[7]

[7] Kelly preserves her argument that the "right to control" is not property since it is not "obtainable," *Sekhar v. United States*, 133 S. Ct. 2720, 2726 (2013), but agrees that this Court's cases foreclose that argument, *Hedaithy*, 392 F.3d at 601.

B. The Government's Theory Improperly End-Runs *Skilling*.

Stepping back, the Government's strategy is clear: Revive the broad version of "honest services" fraud that the Supreme Court has twice condemned, by renaming it a "right to control" theory and pretending that it enforces a well-established property right. This is a transparently improper effort to circumvent *Skilling*. There would be no need for the honest-services statute if the Government's theory were viable.

A decade ago, the Government would have charged this case under the honest-services statute, which defines a "scheme or artifice to defraud" to include one "to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. That law was employed to criminalize all sorts of unsavory conduct by state officials. *E.g.*, *United States v. Panarella*, 277 F.3d 678, 680 (3d Cir. 2002) (failure to disclose conflict of interest); *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008) (patronage hiring); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (patronage by party's county chairman). The doctrine's premise was that public officials owe a duty to act "in the best interests of their constituents," *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari), and "defraud" the public by acting otherwise.

But in the 2010 *Skilling* decision, the Supreme Court put an end to that abuse. To avoid "the due process concerns underlying the vagueness doctrine," it limited the honest-services statute to bribery and kickbacks, excluding the "amorphous" broader set of political corruption cases that the Government had sought to prosecute under this rubric. 561 U.S. at 408-10.

Because this case involves no alleged bribery or kickbacks, the Government did not charge § 1346 and disclaimed any honest-services theory. ECF 311 at 48-49. But, at bottom, the Government's "right to control" theory rests on the same basic notion: that, by misrepresenting the purpose of the realignment, Defendants violated some fiduciary duty of honesty and loyalty *to the public*. That sounds in honest services, not property law. Indeed, listening to the Government's closing, one could be forgiven for believing that it was pursuing the very honest-services theory it had foresworn:

> With all of that power and influence that Mr. Baroni and Ms. Kelly had, because of their positions, it meant that they had a higher responsibility. A higher *responsibility to the public*. To the people of Fort Lee. And that responsibility was *to make each and every decision in the best interest of the people of New Jersey*, the people that they served. Not what they believed was in the best interest of Bill Baroni, or Bridget Kelly, or Chris Christie.

JA.5303; *see also, e.g.*, JA.1066 (eliciting testimony from Foye that he and Baroni owed "obligation to act in the best interests of the citizens").

The "right to control" concept, as urged by the Government, would effectively revive the open-ended doctrine of honest services under a new name. Any official who purports to act in the public interest but fails to disclose some ulterior political motive or self-interest could be charged with depriving the government (actually, the public) of the "right to control" its property. Of course, that would also revive all the defects that the Supreme Court emphasized in *Skilling* (and *McNally*)—contravening due process, fair notice, federalism, and lenity, and transforming fraud statutes into all-purpose government ethics codes. This Court should not permit that evasion.

CONCLUSION

For these reasons, this Court should reverse Kelly's convictions and grant her an acquittal on all charges or, at minimum, a new trial.

August 25, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B). This brief contains 12,994 words and was prepared in Microsoft Word and produced with a proportional serif 14-point font.

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I further certify that I am a member of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2017, I caused true and correct copies of the foregoing Opening Brief of Defendant-Appellant to be served on counsel for all parties of record via the Electronic Case Filing (ECF) service.

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STATUTORY APPENDIX

No. 17-1818

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

v.

BRIDGET ANNE KELLY,

Defendant-Appellant.

DEFENDANT-APPELLANT'S STATUTORY APPENDIX
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Reproduction of Relevant Authorities:

18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and

bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.