UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. WILLIAM E. BARONI, JR. and BRIDGET ANNE KELLY	Honorable Susan D. Wigenton, United States District Judge Crim. No. 15-193

BRIEF IN SUPPORT OF MR. BARONI'S POST-TRIAL MOTIONS

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I. PRELIMINARY STATEMENT

For the reasons set forth herein, the Court should grant the following relief.

First, a judgment of acquittal on Counts One and Two is merited because the government failed to present sufficient evidence that Mr. Baroni either agreed to or did obtain property by fraud, act without authority, or intentionally misapply property of the Port Authority. Moreover, the government failed to present sufficient evidence that the alleged offenses could foreseeably involve or did involve property with a value of at least $5,000. The Court should also enter a judgment of acquittal on Counts One and Two because 18 U.S.C. § 666(a)(1)(A) is void for vagueness as applied to Mr. Baroni.

Second, a judgment of acquittal on Counts Three, Five, and Seven is merited because the government failed to present sufficient evidence that Mr. Baroni agreed to or did commit a fraud in his utilization of Port Authority resources. In sum, Mr. Baroni did not and could not commit the alleged fraud because he was lawfully entrusted with the power to distribute Port Authority resources in the manner in which he saw fit.

Third, a judgment of acquittal on Count Eight is merited because the government failed to present sufficient evidence that Mr. Baroni agreed to oppress or injure the residents of Fort Lee in the exercise and enjoyment of a right protected by the Constitution. Instead, the government's witnesses consistently testified to their belief that the sole intent of the lane realignments was to punish Mayor Sokolich for not endorsing Governor Chris Christie for re-election. Further, at trial, the government highlighted the fact that the Fort Lee local access lanes were used by drivers from all over New Jersey and that Mr. Baroni was aware of this fact.

Fourth, a judgment of acquittal on Count Nine is merited because the government failed to present sufficient evidence that Mr. Baroni deprived the residents of Fort Lee of a right protected by the Constitution. Notably, the evidence at trial showed that motorists were delayed. A delay is not a deprivation of a civil right.

Finally, the Court should order a new trial, or at least permit further investigation, based on an indication that, on November 2, 2016, a subset of the jurors improperly deliberated without the participation of the full jury.

II. APPLICABLE LEGAL STANDARD

A. Rule 29

Federal Rule of Criminal Procedure 29(c)(1) provides that "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1). "If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c)(2). The court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Voigt*, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Whether the court believes that the evidence at trial established guilt beyond a reasonable doubt does not matter. *Jackson*, 443 U.S at 318-19. The court may only consider legal and factual theories that have been presented to the jury. *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). The court must grant a judgment of acquittal where "the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." *United States v. Giampa*, 904 F. Supp. 235, 355 (D.N.J. 1995) (quoting *United States v. McNeill*, 877 F.2d 448, 450 (1989)) (internal quotations omitted).

B. Rule 33

Federal Rule of Criminal Procedure 33(a) provides that upon "the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Motions for a new trial in the interests of justice are committed to the sound discretion of the district court. *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003). "Any error of sufficient magnitude to require reversal on appeal is an adequate ground for granting a new trial." *United States v. Clovis*, Crim. No. 94–11, 1996 U.S. Dist. LEXIS 20808, at *5 (D.V.I. Feb. 12, 1996). *See also United States v. Dixon*, 658 F.2d 181, 193 (3d Cir. 1981) (remanding

with instructions to consider granting new trial based on potential prejudicial effect of jury hearing testimony directed primarily at one defendant in multi-defendant case).[1]

Under Rule 33(a), "[a] district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (internal quotation marks omitted). "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the government, but instead exercises its own judgment in assessing the government's case." *Brennan*, 326 F.3d at 188-89 (citations omitted).

[1] To the extent Mr. Baroni challenges a guilty finding based upon the insufficiency of the evidence, he also moves for a new trial on that basis pursuant to Rule 33.

III. A JUDGMENT OF ACQUITTAL ON COUNTS ONE AND TWO IS MERITED BECAUSE THE GOVERNMENT FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION

Counts One and Two allege a conspiracy and substantive violation of 18 U.S.C. § 666(a)(1)(A). Specifically, those Counts allege that Mr. Baroni "obtained by fraud, otherwise without authority knowingly converted to his use and the use of others, and intentionally misapplied" Port Authority property "with a value of at least $5,000." As discussed *infra*, principles of federalism indicate that § 666 should be given a narrow reading. The government failed to present sufficient evidence to sustain a conviction on Counts One and Two for three reasons. First, the government did not present sufficient evidence to establish Mr. Baroni obtained any property by fraud or acted without authority because all of his actions were within his authority as the Deputy Executive Director of the Port Authority. Second, the government failed to present sufficient evidence to establish that property was misapplied. Third, the government failed to establish that the offense involved property with a value of at least $5,000.

A. Principles of Federalism Counsel In Favor of a Narrow Reading of § 666.

The Government's expansive interpretation of § 666 is inconsistent with the interpretation required by principles of federalism. The conduct actually proved at trial does not violate the statute, once the statute is correctly construed. Accordingly, a judgment of acquittal should be granted on the § 666 counts.

Section 666 is intended "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. Rep. No. 98-225, at 370 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. While enacted in part to permit the prosecution of public officials (as well as agents of private organizations that receive federal funds), Congress never intended § 666 to be read as imposing a single, federal standard of good government and ethical conduct on virtually *all* state and local government employees nationwide. The plain meaning of the statute does not come close to supporting such a conclusion, and the legislative history and purpose of § 666, if anything, counsels that § 666 is to be viewed for what it is, an anti-theft and anti-bribery law. *See United States v. Thompson*, 484

F.3d 877, 881 (7th Cir. 2007) (the Section "is captioned 'Theft or bribery concerning programs receiving Federal funds,'and the Supreme Court refers to it as an anti-bribery rule.") (citing *Sabri v. United States*, 541 U.S. 600 (2004); *Fischer v. United States*, 529 U.S. 667 (2000); *Salinas v. United States*, 522 U.S. 52 (1997)).[2] As the Third Circuit has observed, "[f]ederal legislation that criminalizes conduct of state officials reaches into the realm of state self-government," and, as a consequence, "[w]hen Congress has not explicitly authorized an expansion of federal power into an area that is of paramount state concern"—for example, "setting standards of disclosure and good government for local and state officials"—"courts should refrain from interpreting the legislation in a way that alters the federal-state balance." *In re Grand Jury Investigation*, 865 F.2d 578, 582 (3d Cir. 1989) (citing cases).[3]

Although federal courts, rightly, "are reluctant to metamorphose every municipal misstep into a federal crime," *United States v. Jimenez*, 705 F.3d 1305, 1311 (11th Cir. 2013), that is precisely the result the Government's theory at trial would effect here. The Government asserted at trial that "the property and resources, including employee services, including the lanes, themselves, including the revenue collected at those tolls, were misapplied in service of a fraudulent scheme . . . to facilitate and conceal the causing of traffic problems in Fort Lee." Trial Tr. 10/11 at 66. But such facts, even if true, do not amount to a misapplication of property under the plain language and the prior judicial constructions of § 666.

First, the Supreme Court has long emphasized that, where a proposed interpretation of a federal criminal statute "would dramatically intrude upon traditional state criminal jurisdiction," courts must "avoid reading statutes to have such reach in the absence of a clear indication that

[2] *See also Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (adopting a narrower definition of a term based on the caption of the statute); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute."); *cf. United States v. Fernandez*, 722 F.3d 1, 25 (1st Cir. 2013) (observing that "Congress may have intended to cabin § 666 'to the hard-core area of bribery, where any federal interest in government integrity will be stronger" and "Congress may have been wary of venturing too far into the thickets of state and local corruption, which often implicate the political processes of the state").

[3] Mr. Baroni is not arguing that Congress lacks the *power* to impose such a requirement, should it choose to do so. But the case law is clear that Congress must speak clearly before it will be held to have intended such an interpretation.

they do." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (alterations and internal quotation marks omitted).[4] Here, Congress has not spoken "clearly." Far from it: Courts have struggled to discern § 666's contours, especially the phrase "intentionally misapplies," because Congress left that critical phrase wholly undefined. *Thompson*, 484 F.3d at 881 (observing that the term "misapplies," as used in § 666, "is not a defined term"). Nor is "misapplies" a term with a settled, traditional meaning at common law. *See United States v. Britton*, 107 U.S. 655, 669 (1883).[5]

The Seventh Circuit's reading of "misapplies" is instructive as "limit[ing] § 666 to theft, extortion, bribery, and similarly corrupt acts." *Thompson*, 484 F.3d at 881.[6] Consequently, the misuse of property, absent outright theft or bribery, does not fall within the scope of the statute. The evidence adduced at trial established, at most, a suboptimal use of Port Authority resources. No evidence indicated that the Defendants stole anything or took a bribe. Based on well-established readings of the statute, the lack of any such evidence warrants a judgment of acquittal.

The use of Port Authority property in a politically-motivated way cannot be deemed a crime, unless an extraordinarily broad—indeed, virtually limitless—definition of "misapplies" is used. As explained in detail at Section III.C, *infra*, the government failed to present sufficient evidence at trial to support the theory that property was "misapplied" in conducting the lane

[4] *See also United States v. Bass*, 404 U.S. 336, 347 (1971) ("In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.") (citation and internal quotation marks omitted); *cf. Cleveland v. United States*, 531 U.S. 12, 24 (2000) (declining to read the mail fraud statute in a way that would extend liability to "a wide range of conduct traditionally regulated by state and local authorities"); *Williams v. United States*, 458 U.S. 279, 290 (1982) (construing a statute narrowly in part because the case involved "a subject matter that traditionally has been regulated by state law").

[5] "[W]hen assessing the reach of a federal criminal statute, [courts] must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids." *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991) (citing *Dowling v. United States*, 473 U.S. 207, 213 (1985)).

[6] *See Thompson*, 484 F.3d at 881 ("We could read that word broadly, so that it means any disbursement that would not have occurred had all state laws been enforced without any political considerations. Or we could read it narrowly . . . .").

realignment and traffic study. This failure becomes even more apparent once the concept of "misapplication" is given its proper, limited scope.

Second, precedent supports a reading of "misapplies" as limited to tangible property, not to intangible property such as employee time. In the closely related context of misapplication under 18 U.S.C. § 656, and consistent with a long and consistent line of case law narrowly construing the term "misapplication," the Third Circuit has held that "[t]he element of misapplication requires proof of *conversion*." *United States v. Thomas*, 610 F.2d 1166, 1174 (3d Cir. 1979) (per curiam) (emphasis added);[7] *see also Britton*, 107 U.S. at 666-67 (holding that "to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of someone else of the moneys and funds of the association by the party charged," otherwise there would be only "maladministration . . . rather than criminal misapplication"); *United States v. Weaver*, 275 F.3d 1320, 1332 (11th Cir. 2001) ("the term 'misapplies' implies that a conversion must exist").

This appropriately limited reading of "misapplies" is fatal to the government's theory of liability on the § 666 Counts, in light of the many cases that hold that "conversion," as a matter of law, does not cover intangible property such as employee time. *See, e.g.*, Restatement (Second) of Torts § 222A (1965) ("Conversion is an intentional exercise of dominion or control over a *chattel* . . . .") (emphasis added); *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co.*, 780 F. Supp. 2d 1061, 1081 (D. Haw. 2011) ("Plaintiff cites to no caselaw, nor can the court find any, in support of the proposition that person's time can be considered chattel."); *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 489, 462 N.Y.S.2d 413, 448 N.E.2d 1324 (N.Y. 1983) (noting that "an action for conversion will not normally lie, when it involves intangible property").[8] A critical component of the government's evidence in this case, however, was based on the theory

[7]Under the § 656 line of cases, "[i]t is not necessary to prove, however, that the defendant himself was the beneficiary of the misapplication." *Thomas*, 610 F.2d at 1174.

[8] *See, e.g.*, *Stonecrafters, Inc. v. Foxfire Printing & Packaging, Inc.*, 633 F.Supp. 2d 610, 613 n.1 (N.D.Ill. 2009); *American Nat. Ins. Co. v. Citibank*, N.A., 543 F.3d 907, 910 (7th Cir. 2008); *Intel Corp. v. Hamidi*, 71 P.3d 296, 308 (Cal. 2003); *Glynn v. EDO Corp.*, 641 F. Supp. 2d 476, 484 (D. Md. 2009).

that Mr. Baroni misapplied the time of Port Authority employees, who "wasted their time," Trial Tr. 10/28 at 31, in furtherance of the alleged scheme. Thus, a judgment of acquittal should enter on the § 666 Counts because, as discussed at Section III.D, infra, removing employee time from the calculation of the jurisdictional amount in this case brings the total below $5,000.

In sum, federalism concerns strongly militate in favor of a narrow reading of § 666(a)(1)(A). The government, in contrast, has invited this Court to interpret this provision in an extraordinarily broad way. Because under a properly limited reading of § 666, which is supported by this Circuit, the evidence adduced at trial—even in the light most favorable to the government—is insufficient to support a conviction, a judgment of acquittal should be granted.

B. There Was Insufficient Evidence That Mr. Baroni Obtained Property By Fraud Or Acted Without Authority.

The government failed to produce any evidence that Mr. Baroni either obtained property by fraud or acted without authority because, as the Port Authority's Deputy Executive Director, he was authorized to undertake every action alleged in the Indictment. Thus, Mr. Baroni did not engage in fraud by carrying out those authorized actions. At most, the evidence arguably was sufficient to show (although Mr. Baroni disputes that it did show) that Mr. Baroni participated in a politically motivated decision to take two lanes away from dedicated use by the constituents of a politically disfavored mayor and reassign them to the use of other New Jerseyans, while misrepresenting the political motivation for the decision. But as explained at Sections V and VIII, there is no evidence that Mr. Baroni acted for any personal benefit, and a public official does not commit fraud by concealing the political motivation for an official decision that he is authorized to make. Accordingly, there was no fraud or lack of authority that could support a § 666 conviction.

The evidence at trial clearly indicated that the Deputy Executive Director has significant authority to direct the operations of the Port Authority and that Mr. Baroni's conduct did not breach any recorded guidelines, procedure, rule, by-law or policy of the organization. Multiple government witnesses testified to the fact that as the Deputy Executive Director, Mr. Baroni

possessed significant power over every level of the Port Authority. Indeed, David Wildstein, the government's star witness, testified that in practice Mr. Baroni had near total control over Port Authority operations in New Jersey, despite the role lacking the formal by-law power of the Executive Director. Mr. Wildstein testified:

> Q: When did -- what was Mr. Baroni's position at the Port Authority?
>
> A: He was the Deputy Executive Director.
>
> Q: And who appointed him to that position?
>
> A: Governor Chris Christie.
>
> Q: Where does that position fall within the hierarchy of full-time employees at the Port Authority?
>
> A: It was the number one position on the New Jersey side.
>
> Q: And as a technical matter, though, is there an Executive Director and a Deputy Executive Director?
>
> A: Yes.
>
> Q: And as a technical matter, where does the Deputy Executive Director fall?
>
> A: As a technical matter, the Deputy Executive Director would be the number two position.
>
> Q: And is that how you viewed the hierarchy?
>
> A: No.
>
> Q: How did you view the hierarchy?
>
> A: I viewed the Port Authority having equal responsibility to the states of New Jersey and New York. And I viewed it as a 50/50 partnership, not with any one state having more authority than the other.

Trial Tr. 9/23 at 134. Wildstein continued:

> Q: As the Deputy Executive Director of the Port Authority, what were Mr. Baroni's responsibilities?
>
> A: Mr. Baroni's responsibilities were to watch out for New Jersey's interests at the Port Authority and that included a number of -- a number of areas, whether it was the administration of the agency or supervision of facilities who were working on capital projects.

> Q: As the Deputy Executive Director in that role, though, was he responsible for the general supervision of all aspects of the Port Authority's business?
>
> A: Yes.
>
> Q: Including the operations of Port Authority transportation facilities?
>
> A: Yes.

Trial Tr. 9/23 at 135-36.

Another government witness, Deborah Gramiccioni, a former Assistant United States Attorney who succeeded Mr. Baroni as the Deputy Executive Director, corroborated Wildstein's account of the true hierarchy of the Port Authority. Ms. Gramiccioni testified that while "[i]n a normal company, the Executive Director would appear hierarchically the first – the highest person on that organizational chart[,] *it wasn't that way at the Port Authority* …." Trial Tr. 10/11 at 31-32 (emphasis added). She continued:

> [T]he Deputy Executive Director would be the highest New Jersey appointee at the Port Authority, and then Executive Director would be the highest New York appointee. *And one did not report to the other. For better or worse, that's the way that the Port Authority worked. One did not report to the other. They were both considered to be at the same level, the highest New Jersey and New York appointees.*

Id. at 32. It was "the norm" at the Port Authority that "New York would handle certain New York projects without talking to New Jersey and vice versa." *Id.*

The government failed to present any evidence that Mr. Baroni went beyond the scope of his authority. In fact, there was significant evidence to the contrary. Another government witness, Pat Foye, the Executive Director of the Port Authority, testified that the Port Authority possessed no written policy, procedure, or rule anywhere that required the Fort Lee local access lanes to be aligned in any particular order. Trial Tr. 9/19 at 154. Tellingly, Mr. Foye failed to identify a single recorded policy, procedure, or rule that was breached by the lane realignment. Additionally, the government failed to produce any evidence of any recorded policy, guideline, or procedure about how lane realignments and traffic studies should be conducted by the Port Authority. The closest the government came to presenting evidence that Mr. Baroni did anything

without authority was the subjective belief of Pat Foye that "there ought to be a process for approval of an action like this [the George Washington Bridge traffic study]." Trial Tr. 9/19 at 132. The retroactive opinion of Mr. Foye, who was functionally Mr. Baroni's equal, that the lane realignment should have been done differently is woefully insufficient to prove beyond a reasonable doubt that Mr. Baroni acted without authority.

As there was no evidence that Mr. Baroni acted without authority by approving the lane realignment, Mr. Baroni did not commit a fraud in order to carry it out. As discussed in Mr. Baroni's Motion to Dismiss the Indictment, Dkt. #72-1 at 35-41 (incorporated herein), a comprehensive review of § 666 cases demonstrates that no person has ever been convicted of obtaining property by fraud when they already possessed the authority to utilize the property in the manner alleged in the Indictment. All of the "obtains by fraud" cases identified follow the conventional understanding of a fraud, that is an individual lies in order to personally benefit from the use or possession of property that they would not have been otherwise entitled to, absent the fraud. It is uncontroverted that Mr. Baroni received no tangible benefit in the form of property, money, services or anything else. To the extent the evidence can be construed as sufficient to show that Mr. Baroni concealed a political motivation for an official decision that he was authorized to make, that is not fraud, and to suggest otherwise "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).

C. The Government Failed To Present Sufficient Evidence To Establish Property Was Misapplied.

The government failed to present sufficient evidence upon which the jury could find that property was misapplied in conducting the lane realignment and traffic study. As discussed above, the government failed to present a single recorded guideline, policy, procedure, or rule that was violated by the lane realignment or resulting traffic study. The closest the government came to presenting evidence of misapplication was Pay Foye's opinion that the realignment "ought" to have been done differently. Trial Tr. 9/19 at 132. One person's subjective opinion

about the execution of a lane realignment that was within Mr. Baroni's power to order is not enough to establish a criminal misapplication of resources beyond a reasonable doubt.

To allow such a subjective opinion to establish what constitutes a "misapplication" is exactly what the Seventh Circuit warned against in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). In contemplating the contours of the "intentionally misapplies" subpart of § 666(a)(1)(A), the Seventh Circuit observed that a broad reading "turns all (or a goodly fraction of) state-law errors or political considerations in state procurement into federal crimes." *Id.* at 881. For the same reasons Mr. Baroni set forth in his Motion to Dismiss, Dkt. #72-1 at 41-45 (fully incorporated herein), a subjective belief that government resources were not utilized in the optimal way, even when politically motivated, is not enough to make that use of government resources a crime under § 666(a)(1)(A). In all other identified cases successfully prosecuted under the "intentionally misapplies" subpart of § 666(a)(1)(A), the defendant either breached some recorded rule or provision, or the defendant benefitted personally in the form of property, money, or services. In Mr. Baroni's case, the government failed to present evidence of the breach of any rule, guideline, policy, or procedure. The government further failed to present any evidence that Mr. Baroni received any identifiable benefit from the alleged misapplication of resources.

A review of the evidence relating to the allegedly misapplied property demonstrates the deficiency of the government's theory. Victor Chung, the Senior Transportation Planner for the Port Authority Tunnels, Bridges and Terminals Department and a 17-year employee of the Port Authority, testified that he worked approximately eight hours before the study and "c[a]me up with an analysis on the impact if the three local Fort Lee toll lanes are reduced to one lane only," known as a "calculation analysis" that is like an "animated simulation," 10/5 Trial Tr. at 4-5; that he worked approximately six hours each day of the study (except for one day when he was not at work) to make "comparisons of travel times approaching the George Washington Bridge upper level toll plazas [with] … historical travel times value," which was "the data available," *id.* at 6, 9-10; and that he conducted his work "seriously" with the objective of being "accurate," and,

most significantly, that he was "comfortable" that he was conducting an "appropriate task" and did not believe he was violating any Port Authority policy by conducting his work as he did. *Id.* at 11-12.

Umang Patel, a 16-year employee of the Port Authority who worked in the Engineering Department in September 2013, testified that he worked multiple hours each day of the George Washington Bridge traffic study to analyze travel time reader data on the mainline approach to the George Washington Bridge, *id.* at 16, 22, 24-25; that his analysis, which included a graphic representation of "the impact of new traffic pattern on travel times on I-95 local and express lanes to U.S. toll plaza," demonstrated "some improvement in the overall travel time on the mainline during the morning pe[a]k period, 6 a.m. to noon," *id.* at 26; and that he prepared a summary showing "[f]or traffic originating on I-95 express lanes, an average reduction of 4.12 minutes, about 52 percent in travel time was observed," and that "[f]or traffic originating on I-95 local lanes, an average reduction of 2.72 minutes, about 43 percent in travel time was observed," but that those "improvements in the travel time on the mainline should be weighed against the deterioration of the level of service for the local traffic originating from Fort Lee" – which, of course, was the point of the study. *Id*. Mr. Patel confirmed that, absent certain traffic spikes caused by aberrant events at the George Washington Bridge during the traffic study period (*e.g.*, a threatened bridge jumper; a moving vehicle accident), the reduction in mainline travel times "was consistent and it was always faster during the lane reduction." *Id.* at 54-55. Mr. Patel further confirmed that he "stand[s] by the calculations" he performed as part of the George Washington Bridge traffic study. *Id.* at 58.

Amy Hwang, a Senior Operations Planning Analyst and 30-year employee of the Port Authority, testified that she spent several hours analyzing traffic data during the week of the George Washington Bridge traffic study and comparing it to comparable weekdays from the prior year. 10/5 Trial Tr. at 213, 220-24, 230-32. Ms. Hwang further testified that she believed her analysis to be "accurate" and that she conducted her work "seriously and with the same amount of diligence [she] would do anything else." *Id.* at 231-32.

The evidence overwhelmingly showed that the majority of the property the government claims was misapplied was money spent on salary for traffic engineers who actually did study and analyze the data resulting from the lane realignment. The allegedly misapplied property went to pay these traffic engineers (Victor Chung, Amy Hwang, and Umang Patel) to do exactly what they were paid to do in the normal course of their duties. The fact that the traffic study was not perfectly executed does not make it a misapplication of government funds. If it did, any government action that goes poorly and is undertaken with political motivations in mind would constitute a federal felony offense carrying a penalty of up to ten years imprisonment. The opinion of the jury, even if based on the subjective belief of a witness, that money was not prudently spend by a government official is not a sufficient basis on which to sustain a conviction under § 666.§

D. The Government Failed To Establish That The Offense Involved Property With A Value Of At Least $5,000.

For two reasons, the government failed to present sufficient evidence that the offense involved property with a value of at least $5,000. The government failed to prove that the salary and wages paid to Port Authority employees were not bona fide salary or wages under § 666(c). Further, the government failed to prove that a significant amount of the expenses incurred by the Port Authority was reasonably foreseeable.

First, the government failed to meet the $5,000 element because there was no evidence that the wages and salaries of Port Authority employees did not fall under the bona fide salary or wage exception of Section 666(c). In total, the government alleges that toll collectors were paid $3,696.09 more than usual as a result of the lane realignments. Trial Tr. 10/6 at 66. In summation, the government provided an estimate of "about $5,000" for the value of the time spent by Mr. Chung, Ms. Hwang, Mr. Patel, Mr. Baroni, and Mr. Wildstein on the lane realignments and traffic study, although it is unclear how it arrived at this estimate. 10/28 Trial Tr. at 133. The government failed to produce any evidence as to why the wages of the toll collectors and the salaries of the traffic engineers did not constitute bona fide compensation

payments when both the toll collectors and the traffic engineers were acting well within the scope of their employment and regular duties. *See, e.g., United States v. Harloff*, 815 F. Supp. 618, 619 (W.D.N.Y. 1993) (rejecting the argument that the "differential between wages earned and wages paid constituted an embezzlement or misapplication of funds as contemplated by 18 U.S.C. § 666" and concluding that the "plain language [of 666(c)] would prevent making a federal crime out of an employee's working fewer hours than he or she is supposed to work").

When these compensation payments are subtracted, the value of the property at issue is not enough to satisfy the $5,000 element of § 666. Without these wages and salaries, the only property the government alleges to have been obtained by fraud, knowingly converted, or misapplied was the approximately $4,440 that it cost the Port Authority to redo the Center and Lemoine traffic study that was interrupted by the Fort Lee local access lane realignment. The cost of redoing this study does not meet the $5,000 value element by itself. Moreover, no part of the cost of the interrupted study can be counted at all because it was, at most, a consequential effect of the Defendants' conduct; it was not something that under any analysis the Defendants could be said to have sought to obtain by fraud, convert without authority, or intentionally misapply. In other words, the purportedly wasted value of that study is at most in the nature of proximately caused harm, but not something that even the most generous interpretation of the evidence could support treating as property that the Defendants intentionally designed to obtain or misapply.

Second, the government failed to meet the $5,000 value element of § 666 because a significant amount of the property value the government claims was involved in the lane realignment was the result of expenses that were completely unforeseeable to Mr. Baroni, and thus could not have been something that he intended (as the statute requires) to illegally obtain or misapply. The first unforeseeable expense was the cost to redo the Lemoine Avenue traffic study. There was absolutely no evidence presented at trial that Mr. Baroni had any knowledge of the Lemoine Avenue traffic study and could have known that a realignment of the Fort Lee access lanes would disrupt that study. The second unforeseeable expense relating the lane

realignment was the wages paid to toll collectors that resulted from the cones which funneled all Fort Lee local access traffic into one toll booth being left up 24 hours per day. There is no evidence that either Mr. Baroni or Mr. Wildstein knew that the cones were to be left up for 24 hours per day. All evidence indicated that the lane realignments were to take place only during the morning rush hours. At trial it became clear that even Theresa Riva, the senior business manager in charge of the compensation of the George Washington Bridge toll collectors, was unsure whether the cones were left up for 24 hours per day; she had to be called back to the courtroom a second time to change her prior testimony on the issue. 10/13 Trial Tr. at 50-51. As such, the evidence that Mr. Baroni could have intended or foreseen that the lane realignments would involve property valued at more than $5,000 is insufficient to sustain a conviction.

IV. 18 U.S.C. § 666(A)(1)(A) IS VOID FOR VAGUENESS AS APPLIED TO MR. BARONI.

As discussed *supra*, Counts One and Two allege a conspiracy and substantive violation of 18 U.S.C. § 666(a)(1)(A) ,which states in relevant part:

> Whoever, if the circumstance described in subsection (b) of this section exists being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof – 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 — is valued at $5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency ….
>
> ….

18 U.S.C. § 666(a)(1)(A). The Indictment alleges violations only of the final three subparts of the statute: "obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies." These parts of the statute are void for vagueness as applied to Mr. Baroni because the statute fails to describe the offense with sufficient detail so that an ordinary person may understand what conduct is prohibited.

A. The Applicable Legal Standard

The Due Process Clause of the Fifth Amendment protects individuals from the application of laws that are impermissibly vague. *United States v. Williams*, 553 U.S. 285, 304 (2008). The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001). The doctrine is based on the idea of fairness and that statutes should give "fair warning" of prohibited conduct. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1135 (3d Cir. 1992) (citing *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). The void-for-vagueness inquiry is undertaken on a case-by-case basis and a statute is examined as to whether "it is vague as applied to the affected party." *Id.* (citing *United States v. Mazurie*, 419 U.S. 544, 550 (1975)).

While the doctrine focuses on actual notice to individuals and arbitrary enforcement, the Supreme Court has recognized "that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)). This aspect serves to protect against statutes that amount to "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575. Because of the more severe penalties in criminal statutes, courts subject criminal laws to sharper vagueness scrutiny than they do civil laws. *State v. Maldonado*, 137 N.J. 536, 562 (1994) (citing *State v. Afanador*, 134 N.J. 162, 170 (1993)).

B. The Relevant Charges

In Count One, the Indictment alleges that Mr. Baroni conspired with others to intentionally misapply property of the Port Authority in order to "punish Mayor Sokolich" in violation of under § 666(a)(1)(A) and 18 U.S.C. under § 371. Count Two alleges the same substantive offense under § 666(a)(1)(A).

C. As Applied To Mr. Baroni, the "Intentionally Misapplies" Subpart Is Unconstitutional.

The application of § 666(a)(1)(A) to Mr. Baroni's conduct, as alleged in the Indictment and demonstrated at trial, is unconstitutionally vague in violation of his rights under the Fifth Amendment. When applied to Mr. Baroni, § 666(a)(1)(A) fails to: (1) provide sufficient definiteness so that ordinary people (like him) can understand what conduct is prohibited, and (2) establish minimum guidelines to govern law enforcement.

First, the statute provides insufficient guidance to Mr. Baroni about what conduct constitutes "obtains by fraud," "knowingly converts," or the especially vague "intentionally misapplies." The Indictment alleges, and the government sought to prove at trial, that Port Authority property was obtained by fraud, knowingly converted, and misapplied because it was used for the purpose of punishing Mayor Sokolich, or more generally, for political purposes.

This interpretation of the relevant part of § 666(a)(1)(A) effectively criminalizes making any decision to expend Port Authority resources with political considerations in mind. Essentially, the statute as applied assumes that Mr. Baroni and Ms. Kelly obtained by fraud, knowingly converted, and intentionally misapplied Port Authority resources because they had a political motive in how they utilized the property. The statute fails to delineate what is and is not permissible under the statute and what level of political motivation is enough to bring a particular action within the statute. Therefore, as applied to Mr. Baroni, the statute violates due process because the void-for-vagueness doctrine requires notice that the contemplated conduct is adequately proscribed as criminal, not merely wrongful or otherwise actionable. Indeed, the application of the statute here makes it incredibly difficult, if not impossible, for a person in an executive position in a highly politicized organization like the Port Authority to do his or her job.

This application of § 666(a)(1)(A) means that nearly any action that Mr. Baroni took while employed at the Port Authority that was at least in part affected by a political consideration could conceivably be criminalized by the statute. For instance, imagine if the Port Authority was considering redesigning its logo and Mr. Baroni advocated that New Jersey should come before New York in the Port Authority's name. Suppose the redesign was accepted and money and property were used to change the logos everywhere it appears. In such a circumstance, it would be reasonable to consider the position of wanting New Jersey to come first to be at least in part politically motivated, because Mr. Baroni is from New Jersey and was appointed by the Governor of New Jersey. Under the current application of the statute, it is conceivable that if Mr. Baroni failed to disclose his political motivation for the Port Authority logo redesign, he could be prosecuted for obtaining by fraud, knowingly converting, and intentionally misapplying Port Authority property because he was motivated by a political purpose.

Second, the statute as applied to Mr. Baroni fails to establish minimal guidelines to govern law enforcement. The present interpretation of § 666(a)(1)(A) amounts to "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575. As applied in Mr. Baroni's prosecution, § 666(a)(1)(A) provides

prosecutors and law enforcement personnel insufficient guidance about the extent to which political considerations can convert any governmental action into a criminal fraud, conversion, or misapplication. Section 666(a)(1)(A) likewise provides no guidance to law enforcement officials about how to determine whether an official's choice to favor one constituency over another, such as New Jersey residents versus New York residents, converts a routine agency decision into a criminal act. The statute's vagueness leaves it completely to the prosecutor to determine what level of political consideration motivating a decision converts the conduct from a normal agency function into a federal crime. This gives the government the ability to recast normal agency operations – which inherently involve political considerations – into nefarious frauds, conversions, and misapplications. The statute's vagueness gives the government unfettered discretion to decide what conduct is and is not permissible without giving Mr. Baroni any meaningful guideposts or notice about how his conduct might be interpreted by the prosecution. Without any meaningful standards for what constitutes a violation of § 666(a)(1)(A), individuals like Mr. Baroni are completely at the mercy of the personal predilections of government prosecutors.

For example, the line drawn by the government between Mr. Baroni's conduct relating to the lane realignment and his conduct relating to Mayor Fulop is completely arbitrary. The government stated in its summation that Mr. Baroni ignoring Mayor Fulop had "no legitimate justification" (Summation at 90), *i.e.*, that Mr. Baroni knew it was "unjustifiable" -- to use the words of the § 666 instruction. And since Mr. Baroni and Mr. Wildstein used their own time/salary to do it (the government said in its summation that wasted Baroni time counts as misallocated property), that means the Fulop episode qualifies as another § 666 offense. Despite that, the government expressly stated in its motion *in limine* that the Fulop incident "while hardly reflective of good government, **was not criminal**." (Motion in limine at 20-21) (emphasis added). So § 666 is so vague that it covers similar conduct that the government expressly concedes was not a crime. There is no principled reason why the Fulop incident is not a crime and the Fort Lee incident is – indeed, according to the government, "**the degree of factual**

similarity between the other acts evidence and charged conduct is striking" (Reply in Supp. Of Mot. In Limine at 4) – showing that the government is just making it up as it goes along and leaving the jury to do the same.

This is especially troubling when the conduct covered by § 666(a)(1)(A) is inherently closely related to political speech and association. *Cf. United States v. Blagojevich*, 794 F.3d 729, 736 (7th Cir. 2015) (concluding that "a criminal penalty for misleading political speech" is "unlikely" to be "valid under the First Amendment"). The vagueness of the statute gives prosecutors wide latitude to prosecute political figures with whom they disagree. Because prosecutors are given so little guidance by the statute, they are free to decide that otherwise perfectly permissible conduct is illegal under the statute based purely on an arbitrary determination about whether the political motivations made the conduct unjustifiable, wrongful, or untruthful. *See* Jury Instruction #11; Third Circuit Model Jury Instruction 6.18.666A1A-3. This is the chief problem that the vagueness doctrine is designed to protect against. Indeed, § 666(a)(1)(A) allows for the same arbitrary and discriminatory enforcement that the Supreme Court found so troubling in *Smith*, 415 U.S. 566 (invalidating a law which prohibited "contemptuous" treatment of the flag as overly vague). As in *Smith*, law enforcement in this context is given far too much discretion over whether to prosecute behavior that is inherently political.

Skilling v. United States, 561 U.S. 358, 413 (2010), is also instructive on both the fair notice and arbitrary prosecutions prongs of the constitutional vagueness analysis. In *Skilling*, all nine members of the Supreme Court agreed that a federal criminal statute, 18 U.S.C. § 1346, at a minimum, raised serious vagueness issues. As in *Skilling*, here the courts are split on the scope of the relevant statute, making it difficult to know exactly what conduct is proscribed. *See United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007) (rejecting a broad reading of 666(a)(1)(A) because, *inter alia*, "[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").

Although the *Skilling* Court concluded that, if limited *only* to "bribes and kickbacks," the statute could pass muster, *id*. at 408, it also concluded that "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine." *Id*. at 408. In *Skilling*, the government urged the Supreme Court to read § 1346 as including "another category of proscribed conduct: 'undisclosed self-dealing by a public official . . . —*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 409. The Supreme Court, however, flatly rejected reading the statute to have such a broad scope because, among other things, such a reading would raise vagueness issues, as the Court made clear:

> If Congress were to take up the enterprise of criminalizing "undisclosed self-dealing by a public official or private employee," Brief for United States 43, *it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns*. The Government proposes a standard that prohibits the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty," so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. *That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.*

Id. at 411 n.44 (emphasis added). Congress has answered precisely none of those questions in connection with 666(a)(1)(A). Here, moreover, the alleged "self-dealing" underlying the Government's theory of liability relates not to a direct *financial* self-interest (there is no evidence of that), but to a far more amorphous *political* self-interest. For the same reasons that the wire fraud statute would be impermissibly vague as applied to "undisclosed self-dealing by a public official," so too would § 666(a)(1)(A) be impermissibly vague as applied to Mr. Baroni.

Accordingly, the Court should find that § 666(a)(1)(A) as applied to Mr. Baroni is void for vagueness and issue a judgment of acquittal on Counts One and Two.

V. A JUDGMENT OF ACQUITTAL ON COUNTS THREE, FIVE AND SEVEN IS MERITED BECAUSE THE GOVERNMENT FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

The government failed to present sufficient evidence to sustain a conviction on Counts Three, Five and Seven ("the wire fraud Counts") because the evidence showed at most that Mr. Baroni lied to obscure the political motivation behind the otherwise permissible redistribution of public resources. A lie to obscure the true motivation behind an otherwise lawful use of public resources is not a fraud. Because Mr. Baroni unquestionably possessed the authority to realign the lanes approaching the George Washington Bridge, he could not and did not commit a fraud in order to carry out the realignment simply because there was an undisclosed political motive behind the realignment.

Count Three charged that Mr. Baroni and Ms. Kelly:

> conspired and agreed with each other and others, including Wildstein, to devise a scheme and artifice to defraud, and to obtain money and property from the Port Authority by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communications in interstate commerce certain writings, signs, signals, pictures, and sounds, contrary to Title 18, United States Code, Section 1343.

Ind. at 29. Counts Five and Seven charged that Mr. Baroni:

> knowingly and intentionally devised and intended to devise a scheme and artifice to defraud the Port Authority and to obtain money and property from the Port Authority by means of materially false and fraudulent pretenses, representations, and promises, which scheme is described in substance above in Count 3 of the Indictment.

Ind. at 31.

The language of the Indictment makes clear that Mr. Baroni did not and could not commit a fraud in order to "obtain money and property from the Port Authority by means of materially false and fraudulent pretenses, representations, and promises" because he was already lawfully entrusted with the power to distribute public resources in the manner in which he saw fit. Mr. Baroni was lawfully entrusted with the power to distribute and administer the access

lanes to the Upper Toll Plaza of the George Washington Bridge. As detailed *supra* at Section III.B, it is uncontroverted that in his role as the Deputy Executive Director of the Port Authority, Mr. Baroni had very significant power over the operations of Port Authority facilities in New Jersey. Additionally, there was absolutely no evidence of any recorded policy, procedure, guidelines, or rule concerning the allocation of tooth booths on the Upper Toll Plaza of the George Washington Bridge. Simply put, a person cannot fraudulently obtain property by using it in a manner which is perfectly within their legal duties, even if the person is not transparent in the motivations behind the action.

The most that the evidence can be claimed to have shown, therefore, is that Mr. Baroni participated in concealing or misrepresenting the political motivations behind his decision as a public official to make a decision that it was within his power to make. This is not fraud. The Seventh Circuit analyzed this issue in *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015). In rejecting the government's argument that former Illinois Governor Rod Blagojevich committed wire fraud by engaging in a scheme – concealed from the public – to appoint an Illinois senator of President Obama's choosing in exchange for President Obama's promise to appoint Blagojevich to his cabinet, the court reasoned:

> To call this an honest-services fraud 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. So if a Governor appoints someone to a public commission and proclaims the appointee "the best person for the job," while the real reason is that some state legislator had asked for a friend's appointment as a favor, then the Governor has committed wire fraud because the Governor does not actually believe that the appointee is the best person for the job. That's not a plausible understanding of § 1346, even if (as is unlikely) it would be valid under the First Amendment as a criminal penalty for misleading political speech.

Id. at 736. While the present case was not charged under § 1346, the government's theory of the offense is almost identical. Instead of trying to criminalize lying about the motive behind making an appointment, as in *Blagojevich*, the government is now trying to criminalize lying about the motive behind realigning traffic lanes, something that was well within Mr. Baroni's

power to do without giving any explanation. Whether or not the government charges § 1346, it cannot criminalize protected, even if deliberately misleading, political speech.

For the foregoing reasons, a judgment of acquittal on Counts Three, Five and Seven is merited.

VI. A JUDGMENT OF ACQUITTAL ON COUNT EIGHT IS MERITED BECAUSE THE GOVERNMENT PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

A. There Was Insufficient Evidence That Mr. Baroni Conspired To Injure Or Oppress The Residents Of Fort Lee In The Exercise Of A Civil Right.

The government failed to produce sufficient evidence to sustain a conviction regarding whether Mr. Baroni conspired "to injure and oppress the residents of Fort Lee in the free exercise and enjoyment of […] the right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives."[9] Ind. at 33.

The government failed to establish that Mr. Baroni intended to injure or oppress the residents of Fort Lee in any way, much less to specifically injure and oppress "the right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives." There is not a single text message, email, or recording evidencing a desire or intent on Mr. Baroni's part to injure or oppress the residents of Fort Lee. Additionally, not a single witness testified that Mr. Baroni expressed the intent to "injure" or "oppress" the people of Fort Lee. Instead, the government's witnesses, chiefly David Wildstein and Mayor Mark Sokolich, consistently and specifically testified to their belief that the sole intent of the lane realignments was to punish Mayor Sokolich for not endorsing Chris Christie for Governor. For instance, Mr. Wildstein testified on direct examination as follows:

> Q: Mr. Wildstein, was this statement true?
>
> A: No, sir, it was not true.
>
> Q: How do you know that?
>
> A: I know that because the intent of the lane closures was to punish Mayor Sokolich for not endorsing Governor Christie.

Trial Tr. 9/27 at 117. Similarly:

> Q: And in terms of your agreement with Mr. Baroni, what was the purpose of this agreement?
>
> A: The purpose of the agreement was to create traffic in Fort Lee.

[9] Mr. Baroni does not concede that any such right exists or is protected by the Constitution, as detailed in his motion to dismiss the Indictment. Dkt. # 72.

> Q: For what purpose?
>
> A: For the purpose of punishing Mark Sokolich for not endorsing Chris Christie's re-election campaign.

Trial Tr. 9/26 at 134. At no point during Mr. Wildstein's eight days of testimony did he say that Mr. Baroni conspired specifically to oppress or injure the residents of Fort Lee. Mr. Wildstein stated over and over again that the sole intent of the lane realignment was to punish Mayor Sokolich by causing traffic problems.

In fact, Mr. Wildstein's testimony established that Mr. Baroni's intent could not have been to specifically injure or oppress the people of Fort Lee. The government repeatedly elicited testimony from Mr. Wildstein that the local access lanes were used by residents of municipalities from all over New Jersey and that Mr. Baroni was aware of this fact. For instance:

> Q: Did you have an understanding as to whether or not those lanes, those lanes and toll booths in the morning peak period, were restricted to Fort Lee residents only?
>
> A: Yes, I knew they were not restricted to Fort Lee residents only.

Trial Tr. 9/26 at 133.

> Q: Mr. Wildstein, you said that you were aware that those local access lanes in Fort Lee were not used only by Fort Lee residents. Was Mr. Baroni aware of that?
>
> A: Yes, he was.
>
> Q: How do you know that?
>
> A: I know because Mr. Baroni was aware of traffic patterns in Fort Lee and I know that Mr. Baroni had a meeting with Mayor Sokolich where Mayor Sokolich specifically discussed that people from other towns cut through Fort Lee in order to get to use those three lanes to gain better access to the GW Bridge.

Trial Tr. 9/27 at 141. The government repeatedly highlighted the fact that the Fort Lee local access lanes were used by drivers from all over New Jersey and that Mr. Baroni was aware of this fact. Despite this, the government claims that Mr. Baroni conspired to specifically injure the residents of Fort Lee by taking an action that would have wide ranging impacts on residents of many New Jersey municipalities. Mr. Baroni could not have had the specific intent to injure the

residents of Fort Lee when there is evidence that Mr. Baroni was cognizant that the lane realignments would not specifically impact Fort Lee residents. Because of Mr. Baroni's knowledge that the lane realignment would not specifically impact Fort Lee residents and the total lack of evidence of Mr. Baroni's specific intent to injure or oppress the people of Fort Lee, a judgement of acquittal should be entered as to Count Eight.

B. There Was Insufficient Evidence That Mr. Baroni Conspired To Commit An Act Contrary To A Legitimate Government Interest.

Even if "the right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives" is a constitutionally protected right, the government failed to prove the realignment was "unrelated to legitimate government objectives." Taken in the light most favorable to the government, the evidence at trial showed, at most, that travel in Fort Lee was slowed as a result of a political decision to take a public resource (two of three dedicated lanes) away from the constituents of a disfavored public official and transfer them to the benefit of other constituents. But the distribution or redistribution of public resources – even for purely political reasons – cannot be deemed unrelated to legitimate governmental objectives. Or if it can, that would just show that defining the right as a right to be free from travel "restrictions" that are "unrelated to legitimate government objectives" blinks reality. Snowplows, pothole repair crews, and public works funding, among other travel-related resources, are routinely distributed based on purely political calculations, and those who are disfavored suffer "restrictions" on their travel (sometimes restrictions not dissimilar from those here, in the case of roads that remain unplowed for days), and yet nobody would contemplate that they had suffered a constitutional injury. Thus, either the politically-motivated distribution of public travel resources must be a "legitimate government objective," or the right at issue has been misdefined. Either way, the evidence at this trial – which showed at most the politically-motivated redistribution of public travel resources – was insufficient to demonstrate a violation of any constitutional right.

In any event, the evidence of a lack of relation to legitimate government objectives is even weaker in this case because there was ample evidence at trial that in some circumstances, the realignments decreased travel times for drivers on the main line approach to the upper toll plaza. Surely, adjusting traffic patterns in a manner that expedites travel for some motorists is a legitimate government objective, even if those attempts are poorly executed and made with political considerations in mind.

The evidence showed unequivocally that the Port Authority's engineering department, contemporaneous with the lane closures, was actively engaged in an effort to quantify and analyze the changes in travel times for some motorists. *See* GX-1209A, GX-1209B, GX-1209C. Umang Patel testified at length about the savings in travel time on the main line and that a number of other individuals were working on analyzing the data from realignment. Trial Tr. 10/6 at 27.

> Q: Okay. And if you could please zoom in on the bottom paragraph, please, Miss Hardy. Thank you. Okay. What did you understand by the sentence: The improvement in the travel time on the mainline should be weighed against the deterioration of level of service for the local traffic originating from Fort Lee?
>
> A: I was trying to tell him it is an improvement on the mainline but also you need to look at the other approaches leading to UL.
>
> Q: And what are those other approaches?
>
> A: Other approaches coming from Fort Lee onto UL.
>
> Q: What did you understand by the facility and TB&T are assessing those impacts?
>
> A: I was -- it was my understanding from Raheel Shabih that TB&T and facility is looking at those conditions on those roads.
>
> Q: A separate department from where you worked?
>
> A: Yes.
>
> Q: Okay. Did you have travel time data to assess impact on local travel originating from Fort Lee?
>
> A: No.
>
> Q: Why not?

> A: Because the travel time readers are installed only on the mainline on I-95.

Id. at 27-28. Similar testimony was provided by other Port Authority engineers including Amy Hwang, and Victor Chung. All worked to further the legitimate government objective of studying traffic patterns in order to plan and implement more efficient procedures in the future, regardless of any possible political motivation behind the realignment. The Port Authority unequivocally learned information about alignment of the Fort Lee access lanes' impact on mainline travel times. The Port Authority learned that travel time could be improved for mainline motorists if the Fort Lee local access lanes were reduced. Just because the realignments were done in a way inconsistent with prior custom does not mean that the realignments were "unrelated to legitimate government objectives." Because there was ample evidence that the realignments were at least somewhat related to a legitimate government objective, no rational jury could have found that the lane realignment was "unrelated to legitimate government objectives." To find otherwise would allow the government almost unfettered power to criminalize almost any apportionment of public resources in a manner which the government can convince a jury is too politically motivated. In this case there was clear and uncontroverted evidence of a legitimate government objective relating to the lane realignment and for that reason a judgment of acquittal on Count Eight is warranted.

VII. A JUDGMENT OF ACQUITTAL ON COUNT NINE IS MERITED BECAUSE THE GOVERNMENT PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

Count Nine charges a violation of 18 U.S.C. § 242, claiming that "[b]etween in or about August 2013 and on or about September 13, 2013, in the District of New Jersey and elsewhere," Mr. Baroni and Ms. Kelly:

> with defendant BARONI, defendant KELLY, and Wildstein acting under color of law, knowingly and willfully deprived the residents of Fort Lee of the rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, namely, the right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives.

Ind. at 36. The government produced insufficient evidence to sustain a conviction on this count.

First, the government failed to establish that Mr. Baroni's conduct "was egregious and outrageous enough to shock the conscience." Jury Instruction #31. No rational jury could find that the traffic resulting from a politically motivated lane realignment could reach the very exacting "shocks the conscience" standard, which was originally articulated by the Supreme Court in *Rochin v. California*, 342 U.S. 165 (1952). In *Rochin*, police officers strapped a suspect to an operating table and forced a tube into his mouth and down his stomach to administer an emetic solution to induce vomiting in order to recover evidence, all without a warrant or court order. *Id.* at 166. The Supreme Court found this to be the type of conduct that "shocks the conscience." Increased traffic resulting from a politically motivated lane realignment does not meet this standard.

Second, the government failed to present sufficient evidence that any resident of Fort Lee was "deprived" of "the right to localized travel on public roadways." Deprivation is defined as

> 1. An act of taking away <deprivation of property>, 2. A withholding of something <deprivation of food>. 3. The state of being without something, wanting <deprivation form lack of food>.

Deprivation, Black's Law Dictionary (7th ed. 1999). The government failed to present any evidence that a single person was deprived of their right to travel. Every resident of Fort Lee was free to travel wherever they wanted. There was absolutely no evidence that any person was

prevented from traveling anywhere. All that was presented at trial was testimony, primarily anecdotal, that the lane realignments caused a significant amount of traffic in Fort Lee, which increased travel times for motorists driving through the affected area of Fort Lee. The motorists still were able to engage in "localized travel on public roadways," albeit at a slower rate of speed than usual. Every motorist could go where they wanted to go, it just took longer.

Simply put, motorists were delayed. A delay is not a deprivation of a civil right. To find otherwise would allow the government to criminalize any act by a public official that makes the exercise of any right less convenient. For instance, a poll worker who decides to take a longer than permitted lunch break and thereby delays an individual in exercising her right to vote would be guilty of a federal civil rights offense. This cannot be the state of the law. As such, the government failed to present sufficient evidence that any single person, much less the residents of Fort Lee generally, was **deprived** of the "right to localized travel on public roadways," if such a right exists.

Third, as articulated *supra* VI.B, the government failed to prove the realignment was "unrelated to legitimate government objectives."

For these reasons, a judgment of acquittal on Count Nine is warranted.

VIII. THE GOVERNMENT'S THEORY OF MONEY-OR-PROPERTY FRAUD ATTEMPTS AN IMPERMISSIBLE END-RUN AROUND SUPREME COURT LIMITATIONS ON THE SCOPE OF HONEST SERVICES FRAUD.

In its summation, the Government explained that its theory of wire fraud was that Mr. Baroni and Ms. Kelly employed deception while "us[ing] their positions at the Port Authority and in the Governor's Office to execute a malicious scheme to punish a local Mayor" as part of a "political game." Trial Tr. 10/28 at 28. Even assuming that the evidence at trial was sufficient to establish that this happened, the evidence is nonetheless insufficient to make out the crime of wire fraud. Although the "intangible rights" and "honest services" theories of mail and wire fraud might at one time have encompassed the notion that a public official violates the federal fraud statutes by employing deception in support of a politically motivated official act, that interpretation has been firmly rejected by the Supreme Court and squarely abandoned by the Solicitor General of the United States. The government cannot now revive this dead theory of "intangible rights" fraud simply by pointing—as it did at trial—to the modest value of the public resources inevitably spent in connection with a public official's act and then claiming that the public official has therefore committed money or property fraud. If what the government claims to have shown at this trial—namely, that a public official who had no design on any financial benefit for himself or anyone else expended some amount of public resources on a politically motivated official act—were deemed sufficient to make out this unprecedented theory of money or property fraud, the limitations that the Supreme Court deliberately placed on the intangible rights and honest services theories of mail and wire fraud would be a nullity because any public official who engages in any official act necessarily uses or causes the use of some amount of public resources.

A. The Supreme Court Has Considered and Rejected the Possibility of Intangible-Rights Fraud Liability Based on Unethical, Politically Motivated Conduct.

Over the course of decades, the Supreme Court has repeatedly rejected attempts by federal prosecutors to use the intangible-rights theory of mail and wire fraud in a vague and ill-

defined manner to transform unseemly or unethical conduct by public officials into a federal crime. As explained by the Supreme Court in *Skilling v. United States*, 561 U.S. 358, 399-400 (2010), starting in the 1940s, prosecutors began pushing, and courts began accepting, the theory that the mail and wire fraud statutes—which facially prohibited only schemes to obtain "money or property," 18 U.S.C. §§ 1341, 1343—also prohibited schemes by public officials designed to deprive the public of the intangible right to the public officials' "honest services," or of "other kinds of intangible rights, including elections fraud and privacy violations." *Skilling*, 561 U.S. at 400-401 & n. 35. In 1987, however, the "[Supreme] Court, in *McNally v. United States*, stopped the development of the intangible-rights doctrine in its tracks." *Skilling*, 561 U.S. at 401. The Supreme Court flatly rejected the notion that the mail fraud statute covered the deprivation of intangible rights, explaining that the "mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *McNally*, 483 U.S. at 356. Thus, "[r]ather than 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," the Court read the statute "as limited in scope to the protection of property rights." *Id.* at 360. "If Congress desires to go further," the Court concluded, "it must speak more clearly than it has." Id.

Congress "swiftly" enacted 18 U.S.C. § 1346 "specifically to cover one"—but only one—"of the intangible rights" that courts had recognized "prior to *McNally*: the intangible right of honest services." *Skilling*, 561 U.S. at 402 (internal quotation marks omitted); *see also United States v. Turner*, 465 F.3d 667, 673 (6th Cir. 2006) ("§ 1346 expressly limited application of the mail fraud statute to those cases involving deprivations of the intangible right of honest services, as distinguished from the intangible right to an honest election"). But even this narrower provision soon came under attack on the grounds that it was unconstitutionally vague. In a dissent from the denial of certiorari on that issue in 2009, 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; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; [and] a public employee's recommendation of his incompetent friend for a public contract."[10]

Less than one year later, the Supreme Court granted certiorari in three cases—*Skilling*; *Weyhrauch v. United States*, 561 U.S. 476 (2010) (per curiam); and *Black v. United States*, 561 U.S. 465 (2010)—to determine exactly what, if anything, was meant by the mail and wire fraud statutes' protection of the intangible right to honest services. But at least one aspect was undisputed. Reacting to Justice Scalia's dissent, the Solicitor General made clear in her brief in *Weyhrauch* ("*Weyhrauch* Govt. Br.") that § 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[.]" *Weyhrauch* Govt. Br. at 45 (emphasis added). Because of this limitation, 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'; cover 'a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation'; or reach 'a public employee's recommendation of his

[10] Although, to make his point, Justice Scalia was offering a deliberately "broad" and arguably caricatured statement of what the public's right to "honest services" might be stretched to mean, it was, if anything, modest in comparison to what the government actually told the jury in summation at Mr. Baroni's trial: "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[.]" *See* Trial Tr., 10/28 at 140. Whether that may be perceived as their moral responsibility, it is not their legal responsibility and a failure to act in the best interest of every person in New Jersey is not a crime recognized by statute or Supreme Court precedent.

incompetent friend for a public contract.'" *Id.* (quoting *Sorich*, 555 U.S. 1204 (Scalia, J., dissenting from denial of certiorari)). Put simply by the Solicitor General, "Honest services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty." *Weyhrauch* Govt. Br. at 45 (emphasis added).

Ultimately, the Supreme Court agreed with this concession and more. In *Skilling*, the Supreme Court held that honest services fraud needed to be "pare[d] . . . down to its core," and would henceforth only be understood to cover "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.

B. The Government's Theory of Money or Property Fraud Renders the Carefully Considered Limitations on Intangible Rights Fraud Prosecutions Entirely Illusory.

The government's theory in this trial was 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*. Assuming for purposes of this motion that the evidence at trial was sufficient to show that Mr. Baroni, Ms. Kelly, and Mr. Wildstein jointly engaged in any deceptive scheme at all, it was a scheme to take two of three dedicated lanes away from Fort Lee and transfer them to the use of other drivers coming from other directions, while concealing that the decision was politically-motivated to punish the mayor of Fort Lee for his refusal to endorse the Governor. Indeed, the government's argument was that Baroni, Kelly, and Wildstein "saw themselves as [the Governor's] loyal lieutenants who were free to use their government jobs to launch political attacks, and who never attempted to separate politics from their jobs in public service," Trial Tr. 10/28 at 28, and that they "used their power as public servants to carry out a personal vendetta in order to crush a political enemy." Trial Tr. 10/28 at 141.

To be sure, the government cloaked its case in the argument that the Defendants' alleged scheme was one to obtain money or property, not to deny the public or the citizens of Fort Lee an

intangible right to honest government. Specifically, the government asserted that the scheme was designed to obtain money or property because the "Defendants used Government money and Government resources" Trial Tr., 10/28 at 28) to make and carry out the decision to transfer the lanes, principally the salaries of the Port Authority employees who were involved (including Baroni and Wildstein).

But even if the evidence supported the government's theory, the evidence is insufficient to 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 mail and wire 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* Govt. Br. at 45. It is now settled law that these statutes do not protect such a right or criminalize such conduct. The government's theory in this case—that the foregoing 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 involved the use of some amount of government resources either to make the decision (in the form of the deciding official's salary, which the government, indeed, argued was part of the money or property obtained in this case) or to effectuate the decision (in the form of the resources, including the time of salaried employees, needed to carry the decision into effect). It cannot be the case that the Supreme Court has pointedly and repeatedly limited or rejected the government's attempts to use the mail and wire fraud statutes to impose criminal liability on public officials for the deprivation of the public's intangible right to honest services or honest government if, all along, it turns out that the public official's inevitable use of at least a peppercorn of public money or property (and there was little more than that here) makes the conduct prosecutable as a scheme to obtain money or property.

Accordingly, the government's theory in this case should be rejected. The evidence, even in the light most favorable to the government, shows that Baroni made no effort to obtain money or property for his own or anyone else's personal benefit. The most the evidence could be said

to show is that he participated as a public official in a scheme to make a public decision (about the reallocation of two lanes from one set of constituents to another) while concealing his true political motivation behind a false official cover. If that is not a crime in and of itself—and the Supreme Court and Solicitor General have said it is not—it would be nonsensical to say it necessarily and inevitably becomes one as a result of the unavoidable use of some small amount of public resources in making or carrying out the decision. Because the government has offered nothing more, the evidence is insufficient to support the wire fraud counts and a judgment of acquittal should be entered.

IX. THE COURT SHOULD GRANT A MISTRIAL, OR AT LEAST PERMIT FURTHER INVESTIGATION, BASED ON THE INDICATION THAT A SUBSET OF THE JURORS IMPROPERLY DELIBERATED WITHOUT THE PARTICIPATION OF THE FULL JURY ON NOVEMBER 2, 2016.

On Wednesday, November 2, 2016, the Court instructed the jury not to deliberate while an issue was being resolved by the Court and the parties. Trial Tr. 11/2 at 5, lines 20-23.[11] That prohibition was not lifted until November 3.

On November 4, 2016, an article appeared on NorthJersey.com that included quotations from an individual who identified himself as Juror #10, and who indicated that at least some portion of the jury had in fact deliberated on November 2, 2016. In particular, Juror #10 is reported in the article (which is attached as D1-D3) to have said that November 2 "'was probably the worst day" of deliberations and that, in particular, the jurors had discussed and disagreed about "the impact the verdicts would have on the defendants' lives."

Based on the November 4, 2016 article, it appears that at least some of the jurors deliberated on November 2. It is also a fair inference, however, that at least some of the jurors followed the Court's instruction and did not deliberate on that day. Accordingly, part of the jury appears to have improperly deliberated as a subset, without the participation of the entire jury. For this reason, a mistrial should be granted.

At a minimum, the Court should permit further inquiry of the jurors in order to determine whether some of them deliberated without the others on November 2. The Court could do this by granting Mr. Baroni's counsel permission to contact the members of the jury. Mr. Baroni has not done so yet because Local Criminal Rule 24.1(g) makes clear that "[n]o attorney or party to an action shall . . . interview, examine or question any juror, . . . with respect to the deliberations or verdict of the jury . . . except on leave of Court granted upon good cause shown." D.N.J. Local Criminal Rule 24.1(g). Mr. Baroni requests such leave. Good cause exists here because there is

[11] The issue that was being resolved, and the direction that the Court gave to the jury, are discussed in a transcript that is currently under seal. Accordingly, Baroni cannot quote from the transcript. Instead, Baroni respectfully directs the Court to the specific lines where the Court reported to the parties what it had told the jury.

a genuine question whether the jury engaged in partial deliberations without the entire jury present.

The Court could also resolve the factual question at issue through a hearing. If Mr. Baroni is not granted leave to contact the jurors through counsel, he respectfully requests that the Court permit inquiry of the jurors at a hearing.

Accordingly, based on credible evidence that some or all of the jurors appear to have deliberated on November 2 without the participation of jurors who followed the Court's instruction not to deliberate, the Court should: (1) grant a new trial pursuant to Rule 33; (2) permit counsel to contact the jurors to inquire about whether there were deliberations on November 2; or (3) bring the jurors back before the Court to allow them to be examined at a hearing.

X. CONCLUSION

For the foregoing reasons, the Court should grant the relief requested herein.

Respectfully,

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