APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1817

UNITED STATES OF AMERICA

v.

WILLIAM E. BARONI, JR.,

Appellant

No. 17-1818

UNITED STATES OF AMERICA

v.

BRIDGET ANNE KELLY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 2-15-cr-00193-001 and 2-15-cr-00193-002)
District Judge: Honorable Susan D. Wigenton

Argued: April 24, 2018

Before: AMBRO, SCIRICA, and SILER, JR.[♦], *Circuit Judges*.

(Opinion Filed: November 27, 2018)

* * *

OPINION OF THE COURT

SCIRICA, Circuit Judge

Defendants William E. Baroni, Jr. and Bridget Anne Kelly engaged in a scheme to impose crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee's mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. To this end, under the guise of conducting a "traffic study," Baroni and Kelly, among others, conspired to limit Fort Lee motorists' access to the George Washington Bridge—the world's busiest bridge—over four days in early September 2013: the first week of Fort Lee's school year. This scheme caused vehicles to back up into the Borough, creating intense traffic jams. Extensive media coverage ensued, and the scandal became known as "Bridgegate."

In 2015, a grand jury indicted Baroni and Kelly for their role in the scheme. Each Defendant was charged with seven counts: conspiracy to obtain by fraud, knowingly convert, or intentionally misapply property

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[♦] Honorable Eugene E. Siler, Jr., United States Court of Appeals for the Sixth Circuit, sitting by designation.

of an organization receiving federal benefits, 18 U.S.C. § 371, and the substantive offense, *id.* § 666(a)(1)(A); conspiracy to commit wire fraud, *id.* § 1349, and two counts of the substantive offense, *id.* § 1343; and conspiracy against civil rights, *id.* § 241, and the substantive offense, *id.* § 242. A jury convicted Defendants on all counts. They appeal only their judgments of conviction.

For reasons that follow, we will affirm Defendants' judgments of convictions on the wire fraud and Section 666 counts but will reverse and vacate their civil rights convictions.

I.[1]

In 2010, then-New Jersey Governor Chris Christie appointed Baroni to serve as Deputy Executive Director of the Port Authority of New York and New Jersey. That same year, David Wildstein—a cooperating witness in this case[2]—was hired to serve as the Port Authority's Director of Interstate Capital Projects, in which capacity he functioned as Baroni's chief of staff.

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[1] Because Defendants were convicted at trial and raise sufficiency challenges, "we review the evidence in the light most favorable to the government." *United States v. Hodge*, 870 F.3d 184, 204 (3d Cir. 2017). The facts of this case are not materially in dispute.

[2] Pursuant to a cooperation plea agreement, Wildstein pled guilty on May 1, 2015, to an Information charging him with one count of conspiracy to obtain by fraud, knowingly convert, and intentionally misapply property of an organization receiving federal benefits, 18 U.S.C. § 371, and one count of conspiracy against civil rights, *id.* § 242.

Among its many functions, the Port Authority operates the George Washington Bridge, a double-decked suspension bridge connecting the Borough of Fort Lee, New Jersey, and New York City across the Hudson River. On the bridge's upper deck, twelve toll lanes carry traffic from New Jersey into New York. During the morning rush hour, Port Authority police place traffic cones to reserve the three right-most lanes—the "Special Access Lanes"—for local traffic from Fort Lee. This leaves the other nine lanes for drivers on the "Main Line," which includes traffic from I-80 and I-95. This practice of reserving Special Access Lanes was a decades-long custom dating back to a political deal between a former New Jersey governor and Fort Lee mayor.

Wildstein testified he first became aware of the Special Access Lanes in March 2011. He learned the three lanes were given to Fort Lee by a former New Jersey governor to reduce local traffic and "immediately thought that this would be . . . a potential leverage point with [Fort Lee] Mayor [Mark] Sokolich down the road." Joint App'x (J.A.) 1596. Wildstein shared this observation with Baroni, Governor Christie's then-Chief of Staff Bill Stepien, and Kelly, then the Deputy Chief of Staff for New Jersey's Office of Intergovernmental Affairs (IGA). Wildstein did not, however, use the Special Access Lanes as leverage at that time.

Around the same time that Wildstein realized the Special Access Lanes could be used as leverage, IGA officials—including Kelly—were discussing a plan to solicit endorsements from Democratic elected officials to generate bipartisan support for Governor Christie's 2013 re-election bid. IGA officials rewarded potential

endorsers with, among other things, "Mayor's Days" (meetings with top departmental and agency staff) and invitations to sporting events, breakfasts and parties at Drumthwacket (the Governor's Princeton residence), and the Governor's State of the State address.

The Governor's Office and IGA used the Port Authority similarly to bestow political favors on potential endorsers. As Wildstein explained at trial, the Port Authority "was viewed as the economic engine of the region" and "had an ability to do things for Democratic officials that would potentially put the Governor in a more favorable position." J.A. 1522–23. Baroni and Wildstein were thus asked "to assist the Governor's Office in identifying opportunities that would be helpful." J.A. 1523. The Port Authority gave benefits ranging from gifts (e.g., steel from the original World Trade Center towers, flags that had flown over Ground Zero, framed prints) and tours, to jobs, to large economic investments (e.g., the $250 million purchase of the Military Ocean Terminal at Bayonne).

One Democratic endorsement sought by the Governor's Office was that of Mayor Sokolich. IGA invited Sokolich to a New York Giants game, several holiday parties, and one of Governor Christie's budget addresses. And, as early as 2010, the Governor's Office and IGA directed Wildstein to leverage the Port Authority's resources to obtain Sokolich's endorsement. Sokolich received benefits ranging from the sort of gifts described above to substantial Port Authority assistance for Fort Lee (e.g., Port Authority Police assistance directing traffic in Fort Lee, a $5,000 contribution to the Fort Lee fire department for an equipment purchase, and over $300,000 in funding for

four shuttle buses providing Fort Lee residents with free transport between ferry and bus terminals). Despite that, Sokolich informed IGA in 2013 that local political considerations precluded him from endorsing the Governor's reelection bid.

In June 2013, Kelly told Wildstein that she was disappointed Sokolich would not be endorsing Governor Christie, and Wildstein reminded her "if she want[ed] the Port Authority to close down those Fort Lee lanes to put some pressure on Mayor Sokolich, that that c[ould] be done." J.A. 1605. On August 13, 2013, Kelly sent an email to Wildstein that read: "Time for some traffic problems in Fort Lee." Supplemental App'x (S.A.) 42. Wildstein "understood that to mean it was time to change the lane configurations, the upper level of the George Washington Bridge in order to create traffic in the Borough of Fort Lee." J.A. 1612. Wildstein testified that, on a follow up telephone call, Kelly told him that "Mayor Sokolich needed to fully understand that life would be more difficult for him in the second Christie term than it had been [i]n the first." J.A. 1620. Wildstein admitted at trial that he agreed to change the lane configuration "[f]or the purpose of causing—of punishing Mark Sokolich, of creating a traffic jam that would punish him, send him a message," and that there was no other reason for the change. J.A. 1621.

Wildstein testified he told Baroni he "received an email from Miss Kelly that [he] viewed as instructing [him] to begin to put leverage on Mayor Sokolich by doing a lane closure." J.A. 1618. He also testified he told Baroni "that Miss Kelly wanted the Fort Lee lanes closed . . . [f]or the purpose of punishing Mayor Sokolich . . . [b]ecause he had not endorsed Governor

Christie" and that "Mr. Baroni was fine with that." J.A. 1623.

According to Wildstein, he decided "to create the cover of a traffic study" and shared his plan with both Baroni and Kelly. J.A. 1624. Wildstein believed "calling it a traffic study would provide a cover story for the true purpose of changing and realigning that traffic pattern at the bridge" and "to have a public policy reason for doing so as opposed to saying it was political and it was punitive and revealing the true purpose."[3] J.A. 1632. In furtherance of Defendants'

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[3] Baroni's position at trial and on appeal has been that "[a]t no point did Wildstein tell [him] that the purpose of realigning the lanes was political payback rather than to conduct a legitimate traffic study." Baroni Br. at 14 n.4. While "Baroni acknowledges that Wildstein's testimony alone is legally sufficient to permit a jury to conclude otherwise," he contends "Wildstein committed perjury at trial." *Id.* We cannot discount Wildstein's testimony—which the jury evidently credited—"for it is the exclusive province of the jury . . . to decide what facts are proved by competent evidence," and "also their province to judge . . . the credibility of the witnesses . . . and the weight of their testimony." *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 50–51 (1837); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc) ("[W]e 'must be ever vigilant . . . not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury.'" (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)) (omission and second alteration in original)). But we observe that, in fashioning Baroni's sentence, the District Judge applied a Guidelines enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, in part because she found Baroni attempted "to mislead the jury in this case regarding [his] role in this conspiracy." J.A. 5678. The trial judge concluded Baroni committed perjury at trial when he "continued to maintain the traffic study was legitimate when [he] clearly knew . . . that it was not." *Id.* For similar reasons, Kelly also received this enhancement.

traffic study cover story, Wildstein contacted Peter Zipf, the Port Authority's chief traffic engineer, and told him he wanted to take away the cones that created the Special Access Lanes "so that New Jersey could determine whether those three lanes given to Fort Lee would continue on a permanent basis." J.A. 1657–58. Zipf responded later that day with various proposals but recommended that at least one segregated lane be left in place to prevent sideswipe crashes.

According to Wildstein, he and Baroni discussed when to implement the lane closure at the end of August 2013, and they selected Monday, September 9, 2013—the first day of school in Fort Lee. But Wildstein waited to give the instruction until Friday, September 6. He testified "[i]t was a deliberate effort on [his] part to wait until the last minute to give a final instruction so that nobody at the Port Authority would let Fort Lee know, would communicate that to Fort Lee or anyone else within the Port Authority," including Executive Director Patrick Foye. J.A. 1684. According to Wildstein, he discussed waiting to give the instruction with both Baroni and Kelly, who agreed. This directly contravened normal Port Authority protocol, with any lane closures announced to the public weeks, and even months, in advance.

Wildstein gave the instruction to Zipf and two other Port Authority managers, Bob Durando (the general manager of the George Washington Bridge) and Cedric Fulton (the director of Tunnels, Bridges & Terminals), again claiming that New Jersey wanted to see whether the Special Access Lanes would remain permanent. When Fulton asked if Foye knew, Wildstein lied and

said he did. Wildstein later told the same lie to Durando.

Durando explained that because only one Special Access Lane would remain open, the Port Authority needed to pay an extra toll collector to be on relief duty for that sole toll collector. Wildstein discussed this with Baroni and Kelly, and none of the three saw a problem with this extra cost. Wildstein and Zipf also discussed collecting data on the ensuing traffic, and Wildstein testified he understood it would require "some staff time." J.A. 1688.

On the morning of Monday, September 9, Port Authority police placed traffic cones two toll booths to the right of where they were customarily placed on the upper deck, thereby reducing the number of Special Access Lanes from three to one, and increasing the number of Main Line lanes from nine to eleven. This realignment meant that Fort Lee's sole remaining Special Access Lane had to accept both cash and E-ZPass, further delaying traffic. As discussed, Fort Lee received no advance warning of the change—contrary to the Port Authority's standard procedures.

As a result of this change, cars attempting to cross the George Washington Bridge during the morning commute backed up into Fort Lee and gridlocked the entire town. Mayor Sokolich repeatedly attempted to contact Baroni and IGA to have the two other Special Access Lanes reinstated, but Baroni deliberately did not respond. Wildstein testified "that was the plan that [he] had come up with along with Mr. Baroni and Miss Kelly, which is that all calls would be directed to Mr. Baroni. And that Mr. Baroni would be radio silent. Meaning any—all the calls would come to him,

and he wasn't planning on returning any of them." J.A. 1687–88.

On the morning of September 9, Mayor Sokolich called Baroni's office about an "urgent matter of public safety in Fort Lee," but received no response. S.A. 51. The Fort Lee borough administrator also called to say Fort Lee police and paramedics had difficulty responding to a missing child and a cardiac arrest. The next day, the mayor called again, saying the traffic was a "life/safety" issue and that paramedics had to leave their vehicle and respond to a call on foot. S.A. 54. Receiving no response to his calls, he then sent Baroni a letter on September 12 detailing the negative impact on public safety in Fort Lee. Kelly was similarly unmoved by the traffic and the anger it generated, reportedly smiling when a colleague at IGA informed her of the situation.

Executive Director Foye first learned of the realignment on the evening of Thursday, September 12. The following morning, he sent an email to Baroni and others, criticizing the "hasty and ill-advised" realignment and ordering the restoration of the prior alignment with three Special Access Lanes. J.A. 1100–02, 5809. Baroni went to Foye's office and asked that the realignment be put back into effect, with only one Special Access Lane for Fort Lee. Foye testified Baroni said the issue was "important to Trenton," which Foye understood to reference the Governor's Office. J.A. 1107–08. Foye refused to do so. Baroni returned to Foye's office later that day, again asked that two of Special Access Lanes be taken away from Fort Lee, and said the issue was "important to Trenton" and "Trenton may call." J.A. 1109. Foye held firm and continued to refuse. Wildstein testified

Baroni reached out to David Samson, the New Jersey-appointed Chairman of the Port Authority, to "overrule Mr. Foye and talk to others on the New York side," but Samson ultimately declined to do so, instead recommending Baroni "let it go." J.A. 1832.

In response to significant public backlash, Baroni and Wildstein began preparing a report that would describe what happened as "a traffic study to determine whether it was fairer to give three lanes to Fort Lee." J.A. 1870. The report would also have admitted that the Port Authority had failed to give Fort Lee appropriate notice due to an alleged "communications breakdown." J.A. 1870. But the report was never released because Port Authority staff were asked to testify before the New Jersey State Assembly. *See* J.A. 1879–80. Wildstein helped Baroni prepare his testimony, which was based on the draft report and the traffic study and "fairness" rationale.

Then-Governor Christie fired Wildstein on December 6 and Baroni on December 12. Kelly was fired on January 9, 2014. A federal criminal investigation followed and resulted in the underlying prosecution.

II.

On April 23, 2015, a federal grand jury returned a nine-count indictment, charging Defendants with seven counts each.

In Count 1, the grand jury charged Defendants with conspiracy to obtain by fraud, knowingly convert, or intentionally misapply property of an organization receiving federal benefits. 18 U.S.C. § 371. As charged, "[t]he object of the conspiracy was to misuse Port Authority property to facilitate and conceal the

causing of traffic problems in Fort Lee as punishment of Mayor Sokolich." J.A. 96. In Count 2, Defendants were charged with the substantive offense of that conspiracy. The grand jury alleged Defendants, through Port Authority agents Baroni and Wildstein, "obtained by fraud, otherwise without authority knowingly converted to their use and the use of others, and intentionally misapplied property owned by and under the care, custody, and control of the Port Authority, with a value of at least $5,000." J.A. 119; 18 U.S.C. §§ 666(a)(1)(A), 2.

In Count 3, Defendants were charged with conspiracy to commit wire fraud. 18 U.S.C. § 1349. The charged "object of the conspiracy was to obtain money and property from the Port Authority and to deprive the Port Authority of its right to control its own assets by falsely representing and causing false representations to be made that the lane and toll booth reductions were for the purpose of a traffic study." J.A. 120. In Counts 4 through 7, the grand jury charged each Defendant with two substantive wire fraud violations. 18 U.S.C. §§ 1343, 2. Count 4 pertained to Kelly's August 13, 2013 email informing Wildstein it was "[t]ime for some traffic problems in Fort Lee," and Count 6 to her September 9, 2013 email thanking Wildstein for confirming there would be "[r]adio silence" from Baroni in response to Mayor Sokolich's inquiries. J.A. 123 (second alteration in original). Counts 5 and 7 related to Baroni's September 9 and 12, 2013 emails to Wildstein concerning complaints from Mayor Sokolich.

In Count 8, the grand jury charged Defendants with conspiracy against civil rights. 18 U.S.C. § 241. The charged "object of the conspiracy was to interfere with

the localized travel rights of the residents of Fort Lee for the illegitimate purpose of causing significant traffic problems in Fort Lee to punish Mayor Sokolich." J.A. 124. In Count 9, Defendants were charged with the substantive violation. 18 U.S.C. §§ 242, 2.

At the outset, Defendants moved to dismiss all the charges. *See* Fed. R. Crim. P. 12(b)(3)(B). The District Judge held oral argument and denied the motions. After a six-week trial, the jury found Defendants guilty on all counts. Defendants moved for judgments of acquittal, *see* Fed. R. Crim. P. 29, and for a new trial, *see* Fed. R. Crim. P. 33. Again, the trial judge denied the motions. She then sentenced Baroni to 24 months' imprisonment and Kelly to 18 months' imprisonment. Defendants, who are free on bail pending this appeal, challenge only their judgments of conviction.[4]

III.

Defendants challenge the sufficiency of the evidence supporting their wire fraud and Section 666 convictions.

"We exercise plenary review over a district court's grant or denial of a motion for judgment of acquittal based on the sufficiency of the evidence," *United States v. Willis*, 844 F.3d 155, 164 n.21 (3d Cir. 2016), and we apply the same standard as the district court, *see United States v. Ferriero*, 866 F.3d 107, 113 n.4 (3d Cir. 2017) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "A judgment of acquittal is appropriate

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[4] The trial court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction over Defendants' appeal of their judgments of conviction under 28 U.S.C. § 1291.

under Federal Rule of Criminal Procedure 29 if, after reviewing the record in a light most favorable to the prosecution, we determine that no rational jury could have found proof of guilt beyond a reasonable doubt." *Willis*, 844 F.3d at 164 n.21. Where sufficiency arguments give rise to questions of statutory interpretation, our review is also plenary. *See Ferriero*, 866 F.3d at 113 n.4.

A.

Defendants challenge the sufficiency of the evidence underlying their wire fraud convictions. "A person violates the federal wire fraud statute by using interstate wires to execute 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Ferriero*, 866 F.3d at 120 (quoting 18 U.S.C. § 1343). Conspiracy to commit wire fraud is a separate crime subject to the same penalties as the substantive offense. *See* 18 U.S.C. § 1349.

The Government's theory at trial was that Defendants sent emails in furtherance of, and to execute, a scheme to defraud the Port Authority of physical property (i.e., the Special Access Lanes and toll booths) and money (i.e., public employee labor) in order to carry out the lane reductions. In summation, the Government explained this was the "same money, the salaries, the same property, the lanes, the toll booths," that it alleged Defendants fraudulently obtained, knowingly converted, or intentionally misapplied in violation of 18 U.S.C. § 666. J.A. 5195. The Government explained:

> The physical property that was misused were the local access lanes, themselves, and the toll

> booths. . . . The defendants agreed to use these Port Authority assets, that property, to purposely create a traffic jam in Fort Lee. That agreement was not a legitimate use of the George Washington Bridge, the Port Authority's property.

J.A. 5193–94. The Government identified the "money" as "the salaries of each of the employees who wasted their time in furtherance of the defendants' scheme," including "the salary paid to the overtime toll booth collectors for the one remaining toll booth that was accessible to Fort Lee," "the money paid to Baroni and Wildstein themselves while they . . . [were] wasting their time in furtherance of this conspiracy," and "money paid to the engineers who wasted time—and Port Authority professional staff, who wasted time collecting data that no one ever wanted." J.A. 5194. The Government also invoked the costs the Port Authority incurred in redoing a legitimate traffic study—at Center and Lemoine Avenues in Fort Lee—that was spoiled by the gridlock and "would not have been ruined without these lane reductions." J.A. 5296.

According to the Government, Defendants' untruthful claim they were conducting a traffic study was what allowed them to carry out the lane reductions and to obtain the Port Authority property and money necessary to do so. The Government also contended Defendants conspired with each other and Wildstein in furtherance of this fraudulent scheme.

Defendants argue the evidence was insufficient to prove a scheme to defraud because (1) Baroni possessed unilateral authority over Port Authority traffic patterns and any resources necessary to

implement his decisions, and (2) the Port Authority was not deprived of any property right. In addition to these challenges, Defendants contend the Government has disguised an impermissible honest services fraud case as a wire fraud case in an attempt to circumvent the Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010).

For reasons that follow, we hold the Government presented evidence sufficient to prove Defendants violated the wire fraud statute by depriving the Port Authority of, at a minimum, its money in the form of public employee labor.

1.

Defendants principally argue they could not have committed fraud because Baroni possessed the unilateral authority to control traffic patterns at Port Authority facilities and to marshal the resources necessary to implement his decisions.

They previously raised this argument in moving both to dismiss the indictment and for judgments of acquittal or a new trial. Before trial, the District Judge declined to dismiss the wire fraud counts on this basis, holding the existence and scope of Baroni's authority was a question of fact for the jury. After trial, the judge denied Defendants' motions because that question was "one that the jurors resolved in favor of the prosecution." J.A. 60. Carefully reviewing the relevant witness testimony, the judge held "the Government presented evidence at trial from which the jury could reasonably have found that Baroni did not have the authority to change the lane configurations, and in fact, did defraud the Port Authority." J.A. 59. We agree.

Defendants rely on our opinion in *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988). There, the defendants were pension fund trustees who received kickbacks for investing in a mortgage company. *See id.* at 140–41. We held the indictment failed to charge violations of the mail and wire fraud statutes because it did not allege "an actual money or property loss to the pension fund." *Id.* at 147–48. In so holding, we observed, among other things, that the defendants, "as trustees of the pension fund, had the power and the authority to invest the fund's monies with others." *Id.* at 147. Likening Baroni to the pension fund trustees in *Zauber*, Defendants argue "the undisputed evidence showed that Baroni's position as co-head of the Port Authority gave him authority to make unilateral decisions about the alignment of traffic patterns at Port Authority facilities, and to command the resources needed to carry those decisions out." Baroni Br. at 42. We disagree.

As a preliminary matter, *Zauber* is inapposite because here the grand jury alleged, and the Government proved at trial, that the Port Authority was actually deprived of its money and property. In any event, the evidence refutes the notion Baroni possessed "unilateral" authority to realign the bridge's lanes. To the contrary, it reveals Defendants would not have been able to realign the lanes had Baroni and Wildstein provided the actual reason or no reason at all. They had to create the traffic study cover story in order to get Port Authority employees to implement the realignment. And, as we described above, Wildstein lied to Port Authority officials Durando and Fulton about whether Executive Director Foye knew of the realignment. This lie was necessary to keep

Foye in the dark and prevent him from putting an immediate end to the scheme. In fact, that is exactly what happened when he finally learned of the realignment. Foye ordered the three Special Access Lanes be restored to the use of Fort Lee motorists and refused Baroni's repeated entreaties to reinstate the realignment. Baroni then appealed to Chairman Samson, who declined to intervene and overrule Foye's decision. This evidence belies Defendants' assertion Baroni had anything approaching "authority to make unilateral decisions about the alignment of traffic patterns at Port Authority facilities." Baroni Br. at 42. If that were so, Baroni could have reinstated the realignment on his own without needing to appeal to Foye and then Samson. That Baroni was countermanded shows he lacked the unencumbered authority he claims he possessed, and that he needed to lie to realign the traffic patterns. The record contains overwhelming evidence from which a rational juror could have reached these conclusions. Indeed, it is difficult to see how any rational juror could have concluded otherwise. The jury's verdict necessarily reflects its rejection of Defendants' argument that Baroni possessed unilateral authority to control the bridge.

Defendants contend we cannot draw this inference because the trial judge declined to give a jury instruction based on *Zauber*.[5] We disagree. The judge instructed the jury that

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[5] Defendants requested the following language be added to the jury instructions:

> However, if an organization grants or bestows upon an employee the power or authority to control the

> [i]n order to establish a scheme to defraud, the Government must also prove that the alleged scheme contemplated depriving the Port Authority of money and property. An organization is deprived of money or property when the organization is deprived of the right to control that money or property. And one way the organization is deprived of the right to control that money and property is when the organization receives false or fraudulent statements that affect its ability to make discretionary economic decisions about what to do with that money or property.

J.A. 5121–22. This instruction forecloses the possibility the jury convicted Defendants of fraud without finding Baroni lacked authority to realign the lanes. For Baroni could not deprive the Port Authority

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> organization's money or property, and the employee acts within the bounds of that power or authority, then you cannot find a scheme to defraud. Thus, if you find the Port Authority granted or bestowed upon David Wildstein or Mr. Baroni the power or authority to control the Port Authority money or property at issue here, and David Wildstein or Mr. Baroni acted within the bounds of that power or authority, then you cannot find a scheme to defraud existed. . . . Mr. Baroni and Ms. Kelly contend that the proof establishes that the Port Authority granted David Wildstein and Mr. Baroni the right to control the Port Authority money and property at issue here, which would prevent the existence of a scheme to defraud.

J.A. 307 (footnote omitted). The District Judge declined to adopt this language but told Defendants they were free to make this argument to the jury. While the Government argued the realignment was unauthorized, Baroni instead chose to argue he acted in good faith and did not know the study was a sham.

of money and property he was authorized to use for any purpose. Nor could he deprive the Port Authority of its right to control its money or property if that right to control were committed to his unilateral discretion. In finding the existence of a scheme to defraud, the jury necessarily concluded Baroni lacked authority to order the realignment.

2.

Defendants also argue the Port Authority was not deprived of any tangible property and challenge the Government's and District Court's invocation of the "right to control" theory of property.

Before trial, the trial judge rejected Defendants' related argument the charges should be dismissed because they did not "obtain" money or property. Relying on our decision in *United States v. Al Hedaithy*, 392 F.3d 580 (3d Cir. 2004), the judge ruled "it [wa]s enough that they prevented the Port Authority from exercising 'its right to exclusive use of' its property, which here allegedly includes toll booths and roadways, in addition to money in the form of employee compensation and the costs of redoing a traffic study." J.A. 36–37.

In their post-trial motions, however, Defendants raised no sufficiency arguments respecting the property at issue. Rather, they contended only that Baroni possessed the authority to realign the lanes. We note Defendants arguably forfeited their right to raise these issues on appeal by not presenting them to the District Court.[6] But we need not decide that

[6] Nearly all our sister circuits have held that while a general sufficiency challenge is adequate to preserve specific sufficiency

question because Defendants' arguments are unpersuasive under any standard of review.

The wire fraud statute proscribes "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. § 1343. As Defendants note, the federal fraud statutes require the defendants to scheme to defraud a victim of "property rights." *See McNally v. United States*, 483 U.S. 350, 359–60 (1987) (holding that the mail fraud statute is "limited in scope to the protection of property rights"). Those property rights, however, need not be tangible. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987) ("[Confidential business information's] intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights."); *United States v. Henry*, 29 F.3d 112,

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arguments on appeal, a defendant who seeks a judgment of acquittal on specific grounds forfeits on appeal all other grounds not specifically raised. *See United States v. Samuels*, 874 F.3d 1032, 1036 (8th Cir. 2017); *United States v. Hosseini*, 679 F.3d 544, 550 (7th Cir. 2012); *United States v. Chong Lam*, 677 F.3d 190, 200 (4th Cir. 2012); *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011); *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010); *United States v. Herrera*, 313 F.3d 882, 884–85 (5th Cir. 2002) (en banc); *United States v. Chance*, 306 F.3d 356, 371 (6th Cir. 2002); *United States v. Peña-Lora*, 225 F.3d 17, 26 & n.5 (1st Cir. 2000); *United States v. Spinner*, 152 F.3d 950, 955 (D.C. Cir. 1998); *United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995); *see also* 2A Charles Alan Wright et al., Fed. Prac. & Proc. Crim. § 469 (4th ed. Apr. 2018) ("And if the defendant has asserted specific grounds in the trial court as the basis for a motion for acquittal, he or she cannot assert other grounds on appeal."). We have not squarely addressed the question and need not do so here.

113–14 (3d Cir. 1994) ("*Carpenter* made clear, however, that although a property right is required under *McNally*, it need not be a tangible one.").

Defendants argue they "did not deprive the Port Authority of any tangible property." Kelly Br. at 40. "After all," they say, "the Port Authority still owns all of the lanes and tollbooths (and always has)." *Id.* But even assuming *arguendo* Defendants are correct, the federal fraud statutes are not limited to protecting tangible property rights. "[T]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right." *Henry*, 29 F.3d at 115; *see also United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) ("That the right at issue here has not been treated as a property right in other contexts, and that there are many basic differences between it and common-law property[,] are relevant considerations in deciding whether the right is property under the federal fraud statutes.").

The Government introduced ample evidence Defendants obtained by false or fraudulent pretenses, at a minimum, public employees' labor. Their time and wages, in which the Port Authority maintains a financial interest, is a form of intangible property. *Cf., e.g.*, *United States v. Pintar*, 630 F.2d 1270, 1282 (8th Cir. 1980) ("[T]here was evidence of concealment in connection with the diversion of employee services. Assuming proof of fraud is necessary, this suffices.").[7]

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[7] As we will explain, it is well established that public employee labor is also property for the purposes of Section 666, which

Wildstein testified that, on the Friday before the lane reductions, he called Durando, the general manager of the George Washington Bridge, and said he wanted to study traffic patterns and see the effect of taking two lanes away from Fort Lee. Wildstein told Durando the New Jersey side of the Port Authority wanted to be able to "make a determination down the road as to whether those [Fort Lee] lanes would stay on a permanent basis." J.A. 1685. Of course, as Wildstein admitted at trial, the traffic study rationale offered to Durando was not the real reason for the realignment.

Among other things, Durando told Wildstein he would need to have a relief toll worker on duty because all of Fort Lee's traffic would be going through one lane. Wildstein testified he "understood that the Port Authority would have to pay for an extra toll collector to be on relief duty for that first toll collector," J.A. 1686, and discussed this cost with both Defendants. According to Wildstein, both Baroni and Kelly found it humorous that the Port Authority would have to "pay a second toll collector to sit and wait in case the first toll collector had to go to the bathroom," and they had no problem with the extra cost. J.A. 1687. On Sunday, September 8, 2013, Wildstein emailed Durando to say he would "be at [the] bridge early Monday [morning] to view [the] new lane test." S.A. 49. Durando replied that he would also be present, and that he had "also brought a toll collector in on overtime to keep toll lane 24 (the extreme right hand toll lane Upper level) in the event the collector assigned to TL 24 needs a

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proscribes, *inter alia*, fraudulently obtaining property. *See infra* III.B.1.

personal." S.A. 49. Wildstein forwarded the email to Baroni. On cross-examination, Baroni admitted he had received the email and did not object to bringing in overtime toll booth workers.

The Government also called Theresa Riva, a Port Authority employee who served as an Operations Planning Analyst for the George Washington Bridge during the relevant time period. In that capacity, Riva supervised time keeping for operations staff and managed scheduling and coverage for toll collectors. Riva testified she learned of the lane reductions the Friday before, and Bob Durando "asked [her] to staff one additional toll collector" on the upper level toll plaza twenty-four hours a day. J.A. 2897. Because toll collectors work eight-hour shifts, this meant "three toll collectors a day to be an excess toll collector in the toll house." J.A. 2897. Riva testified all these additional toll collectors were paid an overtime rate "[b]ecause they either worked on their regular day off or in excess of eight hours, a double [shift]." J.A. 2898. Riva testified these employees would not have been paid absent the lane realignment.

In addition to the overtime toll workers, Wildstein discussed with Zipf using Port Authority professional staff to track data, which would include "numbers on how—how many cars were involved and how far back the traffic was delayed." J.A. 1688. Wildstein understood Zipf "would have to use some staff time." J.A. 1688. At trial, the staff members testified to the significant amount of time they spent performing unnecessary work related to the realignment.

Amy Hwang, Senior Operations Planning Analyst for the Port Authority, testified she collected data on

traffic at the bridge and compared it to traffic on the same date the year before. Hwang testified she spent two hours working on the traffic study per day from Monday, September 9, through Friday, September 13, for a total of 10 hours.

Victor Chung, Senior Transportation Planner for the Port Authority, was asked to forecast the impact of reducing Fort Lee's Special Access Lanes from three to one. Chung testified he spent a little over eight hours doing this analysis on the Friday before the reductions went into effect. During the week of the reductions, Chung was asked to compare travel times approaching the bridge's upper-level toll plaza during peak hours and to compare it to historical travel times. Chung testified he spent about six hours on this analysis, for a total of 14 hours spent on unnecessary work.

And Umang Patel, Staff Service Engineer in the Port Authority's Traffic Engineering department, downloaded and analyzed data relating to travel time on the Main Line during the lane reductions. Patel testified he spent two hours discussing the lane reductions on Monday, September 9, and four hours per day analyzing data on Tuesday, September 10, through Thursday, September 12, for a total of fourteen hours.

Moreover, Wildstein estimated he spent twenty-five to thirty hours working on the lane reductions, and that Baroni spent fifteen to twenty hours, for a total of forty to fifty hours. Their compensation is plainly "money" for the purposes of the wire fraud statute.[8]

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[8] As we will explain, Section 666 contains a safe harbor for, among other things, bona fide compensation. *See* 18 U.S.C.

The Government's evidence that Defendants fraudulently conscripted fourteen Port Authority employees into their service, and that Baroni and Wildstein accepted compensation for time spent conspiring to defraud the Port Authority, is alone sufficient for a rational juror to have concluded Defendants deprived the Port Authority of its money or property.

Although we need not reach or decide Defendant's arguments on the "right to control" theory[9] in light of our holding, we recognize this traditional concept of property provides an alternative basis upon which to

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§ 666(c). That safe harbor applies only to that statute and does not affect our analysis of the money and property at the heart of the wire fraud counts.

[9] Although each Defendant has fully adopted the arguments made in the other's brief, *see* Baroni Br. at 2 n.1; Kelly Br. at 4 n.1; Fed. R. App. P. 28(i), their positions on the "right to control" theory of property are in conflict. Baroni appears to accept as a background principle of law our precedent that "[i]ncluded within the meaning of money or property is the victim's 'right to control' that money or property." Baroni Br. at 41 (citing *Al Hedaithy*, 392 F.3d at 601–03). Kelly, on the other hand, argues at considerable length that "the theory that the Port Authority had been deprived of its supposed *intangible* property right to 'control' the use of its own 'assets' . . . fails as a matter of law." Kelly Br. at 40; *see id.* at 41 ("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."); *id.* at 42 ("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."); *id.* at 45 ("The Government and the District Court invoked [*Al Hedaithy*] to support the 'right to control' theory. . . . It is utterly inapposite here."); *id.* at 46 ("In fact, the 'right to control' theory is hotly contested among the Courts of Appeals.").

conclude Defendants defrauded the Port Authority. As Baroni notes, "[i]ncluded within the meaning of money or property is the victim's 'right to control' that money or property." Baroni Br. at 41 (citing *Al Hedaithy*, 392 F.3d at 601–03); *see Carpenter*, 484 U.S. at 26–27 (holding "[t]he [Wall Street] Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the 'Heard' column" and that "it is sufficient that the Journal has been deprived of *its right to exclusive use* of the information, for exclusivity is an important aspect of confidential business information *and most private property for that matter*" (emphasis added)); *Al Hedaithy*, 392 F.3d at 603 ("[T]he deprivation in this case is identical to that asserted in *Carpenter*, *i.e.*, the deprivation of ETS's right to *exclusive* use of its property."); 2 William Blackstone, *Commentaries* *2 (describing "the right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

The George Washington Bridge is the world's busiest motor vehicle bridge[10] leading to our nation's most populous city. The Port Authority's physical property—the bridge's lanes and toll booths—are revenue-generating assets. The Port Authority has an unquestionable property interest in the bridge's

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[10] *See George Washington Bridge*, Port Auth. of N.Y. & N.J., http://www.panynj.gov/bridges-tunnels/george-washington-bridge.html ("The busiest bridge in the world, connecting northern Manhattan and Fort Lee, NJ.") (last visited Nov. 8, 2018).

exclusive operation, including the allocation of traffic through its lanes and of the public employee resources necessary to keep vehicles moving. Defendants invented a sham traffic study to usurp that exclusive interest, reallocating the flow of traffic and commandeering public employee time in a manner that made no economic or practical sense. Indeed, the realignment—intended to limit access to the bridge and gridlock an entire town—was impractical by design.

In sum, Defendants' arguments concerning the property interest at issue fall far short.

3.

Finally, Defendants argue we "should reject the government's attempt to shoehorn a repudiated theory of honest services fraud into an ill-fitting theory of money or property fraud." Baroni Br. at 44.

In denying Defendants' post-trial motions, the District Court summarily rejected this argument, holding "[t]here is a difference . . . between intangible rights to honest services not covered by the wire fraud statute, and intangible property rights which are." J.A. 60 n.15 (citing *Carpenter*, 484 U.S. at 25, and *McNally*, 483 U.S. at 356). We agree.

Defendants primarily rely on the Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010), which narrowed the scope of the honest services statute, 18 U.S.C. § 1346. After the Supreme Court ruled in *McNally* that the mail fraud statute was "limited in scope to the protection of property rights," *Skilling*, 561 U.S. at 402 (quoting *McNally*, 483 U.S. at 360), Congress enacted Section 1346 "specifically to cover one of the 'intangible rights' that

lower courts had protected . . . prior to *McNally*: 'the intangible right of honest services,'" *id.* (quoting *Cleveland v. United States*, 531 U.S. 12, 19–20 (2000)). That statute provides, for the purposes of the mail and wire fraud statutes, that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.* (quoting 18 U.S.C. § 1346). In *Skilling*, the Supreme Court acknowledged "Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud." *Id.* at 404. But it also recognized a broad reading of the statute "would raise the due process concerns underlying the vagueness doctrine." *Id.* at 408. In order to preserve the statute, the Court surveyed pre-*McNally* honest services case law, *see id.* 404–08, and concluded "there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks," *id.* at 408. Accordingly, the Court limited the application of Section 1346 to "the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 409.

Defendants argue it cannot be a crime "for a public official to take official action based on concealed 'political interests.'" Baroni Br. at 48. And they warn that "[t]he government's theory—that acting with a concealed political interest nonetheless becomes mail or wire fraud so long as the public official uses *any* government resources to make or effectuate the decision—would render the Supreme Court's carefully considered limitation [on honest services fraud] a nullity." Baroni Br. at 48. According to Defendants, "[i]t cannot be the case that the Supreme Court has pointedly and repeatedly rebuffed the government's

attempts to prosecute public officials for the deprivation of the public's intangible right to honest services or honest government if, all along, the inevitable use of at least a peppercorn of public money or property made every instance of such conduct prosecutable as money or property fraud."[11] Baroni Br. at 48–49.

We are mindful of the Supreme Court's honest services case law but do not believe it counsels a different result in this case. Defendants were charged with simple money and property fraud under Section 1343—not honest services fraud—and the grand jury alleged an actual money and property loss to the Port Authority. In any event, their conduct in this case can hardly be characterized as "official action" that was merely influenced by political considerations. Defendants invented a cover story about a traffic study for the sole purpose of reducing Fort Lee's access to the George Washington Bridge and creating gridlock in the Borough. Trial testimony established that everything about the way this "study" was executed contravened established Port Authority protocol and

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[11] In passing, Defendants also contend their convictions raise First Amendment concerns because they represent "a criminal penalty for misleading political speech." Baroni Br. at 49 (quoting *United States v. Blagojevich*, 794 F.3d 729, 736 (7th Cir. 2015)); *see also* Kelly Br. at 44 ("Moreover, given its implications for core political speech, this theory raises real First Amendment issues."). These arguments—to which Defendants devote a mere three sentences between their two briefs—have not been sufficiently presented or developed. We agree with the Government they are waived. *See John Wyeth & Bro. Ltd. v. Cigna Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived.").

procedures. Indeed, witnesses testified that traffic studies are usually conducted by computer modeling, without the need to realign traffic patterns or disrupt actual traffic. When traffic disruptions are anticipated, the Port Authority gives advance public notice. And, as we have discussed, the evidence conclusively demonstrates Baroni lacked the authority to realign the bridge's traffic patterns unilaterally.

It is hard to see, under Defendants' theory, how a public official could ever be charged with simple mail or wire fraud. They appear to suggest that, as public officials, any fraud case against them necessarily entails intangible right to honest services. That is not so. As we have explained, Defendants were charged with defrauding the Port Authority of its money and property[12]—not the intangible right to their honest services. Prosecutions of public officials for defrauding the government of money and property are unfortunately quite common. *See, e.g.*, *United States v. James*, 888 F.3d 42 (3d Cir. 2018) (former Virgin Islands senator charged with wire fraud and Section 666(a)(1)(A) violations for obtaining legislature funds under false pretenses); *United States v. Fumo*, 655

[12] The trial evidence is sufficient to show Defendants deprived the Port Authority of much more than a "peppercorn of public money or property," Baroni Br. at 49. In any event, as the Government notes, the wire fraud statute contains no monetary threshold. *See* 18 U.S.C. § 1343; *cf. United States v. DeFries*, 43 F.3d 707, 709 (D.C. Cir. 1995) ("It is difficult to see where the defendants find this *de minimis* exception. The [federal] fraud statute speaks only of 'money or property' generally, not of property above a certain value. . . . Given the absence of any statutory hint of a threshold minimum, it is hardly surprising that several courts have found [the statute] applicable to what at first glance appear to be exceedingly small property interests.").

F.3d 288 (3d Cir. 2011) (Pennsylvania state senator convicted of mail and wire fraud for using state-paid employees for personal and political tasks in violation of state ethics laws); *United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011) (New Jersey state senator charged with mail fraud for fraudulently inflating pension eligibility through no-show jobs); *United States v. Williams*, No. 17-137, 2017 WL 2716698 (E.D. Pa. June 6, 2017) (Philadelphia district attorney charged with mail and wire fraud for defrauding city and federal government of use of publicly owned vehicles).

Defendants also argue their convictions pose federalism concerns and would "involve[] the Federal Government in setting standards of good government for local and state officials." Baroni Br. at 49 (quoting *McNally*, 483 U.S. at 360). Again, we disagree. This case lacks the federalism concerns present in *McNally*, where the federal government prosecuted a Kentucky state official and a private citizen for their role in a "self-dealing patronage scheme" involving the state's purchase of insurance policies. *See* 483 U.S. at 352–53. But unlike a typical state or local governmental body, the Port Authority is an interstate agency created by Congressional consent, *see* H.R.J. Res. 337, 67th Cong. (1922) (enacted), and Defendants acknowledge it receives substantial federal funding. The federal government thus has an especially significant interest in protecting the Port Authority's financial and operational integrity.

* * *

In sum, the Government presented sufficient evidence for the jury to convict Defendants of wire fraud.

B.

Defendants' other sufficiency challenge contests their Section 666 convictions. In relevant part, Section 666 provides:

> **(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; . . .
>
> 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.

18 U.S.C. § 666(a)(1)(A), (b).

Accordingly, a violation of Section 666(a)(1)(A) requires proof of five elements. The government must prove that: (1) a defendant was an agent of an organization, government, or agency; (2) in a one-year period that organization, government, or agency received federal benefits in excess of $10,000; (3) a defendant stole, embezzled, obtained by fraud, knowingly converted, or intentionally misapplied property; (4) that property was owned by, or in the care, custody, or control of, the organization, government, or entity; and (5) the value of that property was at least $5,000.[13] *See id.*

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[13] In this case, with the parties' agreement, the trial court instructed the jury on these five elements consistent with the Third Circuit Model Jury Instruction:

> In order to find the defendants guilty of violating Section 666(a)(1)(A), you must find that the Government proved each of the following five elements beyond a reasonable doubt. First, that from August through December, 2013, Mr. Baroni or Mr. Wildstein was an agent of the Port Authority. Second, that in the calendar year 2013, the Port Authority received federal benefits in excess of $10,000. Third, that the defendants obtained by fraud, knowingly converted, or intentionally misapplied Port Authority property. Fourth, that the property obtained by fraud, knowingly converted, or intentionally misapplied, was owned by or was in the care, custody or control of the Port Authority. And fifth, that the value of the property obtained by fraud, knowingly converted, or intentionally misapplied was at least $5,000.

J.A. 5107.

Defendants' appeal involves only the third and fifth elements[14]—whether they obtained by fraud, knowingly converted, or intentionally misapplied Port Authority property (the actus reus), and whether that property was worth at least $5,000.

As with the wire fraud counts, the Government's theory at trial was that the property at issue fell into two categories: physical property (i.e., the Special Access Lanes and toll booths) and money (i.e., employee labor).

Defendants argue the evidence was insufficient to prove a violation of Section 666 because (1) that provision criminalizes theft, not the allocation of a public resource based on political considerations, and (2) the value of the property at issue was under $5,000.

For reasons that follow, we hold the Government presented evidence sufficient to prove Defendants violated Section 666 by fraudulently obtaining, at a minimum, the labor of Port Authority employees in furtherance of their scheme, and that the value of that labor exceeded the statute's $5,000 threshold.

1.

Defendants broadly argue they merely allocated a public resource based on political considerations, which cannot be criminal. Offering an analogy, Kelly contends Defendants' conduct is "materially indistinguishable" from that of a mayor who, after a heavy snowfall, directs city employees to plow the streets of a ward that supported her before getting to

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[14] Defendants conceded that Baroni and Wildstein were agents of the Port Authority and stipulated that the Port Authority received federal funds in excess of $10,000 in 2013.

a ward that supported her opponent. Kelly Br. at 1. Baroni makes similar arguments. *See* Baroni Br. at 31 ("In any event, it is obvious that there is nothing illegal about allocating public resources to favor political supporters and allies. Budgets are enacted, projects are funded, pork is doled out, potholes are filled, and snow is plowed at every level of government with political considerations in mind.").

While such analogies have some superficial appeal, we find them unpersuasive. We agree with the District Court that this argument "conflates motive . . . with *mens reas* and conduct." J.A. 54. Defendants altered the bridge's decades-old lane alignment—without authorization and in direct contravention of Port Authority protocol—for the sole purpose of creating gridlock in Fort Lee. To execute their scheme, they conscripted fourteen Port Authority employees to do sham work in pursuit of no legitimate Port Authority aim. That Defendants were politically motivated does not remove their intentional conduct from the ambit of the federal criminal law. What Defendants did here is hardly analogous to a situation where a mayor allows political considerations to influence her discretionary allocation of limited government resources in the normal course of municipal operations. There is no facially legitimate justification for Defendants' conduct here.

Nor are we persuaded by Defendants' arguments that the Government has sought to expand the reach of Section 666 beyond conduct involving bribery and theft. Relying upon our decision in *United States v. Cicco*, 938 F.2d 441 (3d Cir. 1991), Defendants contend the Government is attempting to use Section 666 "to criminalize a public official's efforts to allocate or

reallocate public resources based on politics." Baroni Br. at 24. In that case, Cicco, a mayor, declined to rehire two auxiliary police officers because they failed to support the Democratic Party in a local election. *See Cicco*, 938 F.2d at 443. The Government filed a multi-count indictment charging Cicco and a member of the town council with, among other things, violations of Section 666's anti-bribery provision, 18 U.S.C. § 666(a)(1)(B). *See id.* After the jury found the defendants guilty, the trial court entered a judgment of acquittal on the Section 666 counts, reasoning Congress did not intend for the statute to apply to their conduct and that it was unconstitutionally vague. *See id.* at 444.

On appeal, we recognized Section 666, read literally, might cover the defendants' use of municipal employment to solicit election day services as a form of quid pro quo, but that the statute's language was "also consistent with an intention of focusing solely on offenses involving theft or bribery, the crimes identified in the title of that section." *Id.* at 444. Because we found the statute ambiguous, we turned to the legislative history. Concluding "the crimes Congress targeted when it created § 666 are simply different in kind than those alleged" against the defendants, we held they did not violate the statute. *Id.* at 445–46. We also observed that the conduct in question—deprivation of public employment to solicit political contributions—was within the ambit of a different criminal statute, 18 U.S.C. § 601. *See id.* at 446.

The Government responds that *Cicco* is inapposite because the conduct at issue in that case "potentially implicated the bribery provisions of § 666(a)(1)(B), but

has nothing to do with property obtained by fraud, converted or otherwise intentionally misapplied." Gov't Br. at 38. We agree that this case is not like *Cicco*.

But *Cicco* is instructive here. Our exposition of Section 666's legislative history—which was not limited to Section 666's bribery provisions—confirms that Defendants' conduct in this case falls squarely within the statute's purpose. As we explained in *Cicco*, Congress enacted Section 666 as part of the Comprehensive Crime Bill of 1984. *See* 938 F.2d at 444. We noted "[t]he provision was 'designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program.'" *Id.* (quoting S. Rep. No. 98-225, at 369 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3510). We observed "[t]he Senate Report expressly notes that Congress wished the new statutory provision to be interpreted 'consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.'" *Id.* at 444 (quoting S. Rep. No. 98-225, at 370, 1984 U.S.C.C.A.N. at 3511). And "[w]e quote[d] extensively from the legislative history to illustrate that Congress intended § 666 to redress particular deficiencies in identified existing statutes."[15] *Id.* at 444–45.

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[15] The legislative history reveals Congress intended for Section 666 to augment two existing statutes, 18 U.S.C. §§ 641 and 665. Section 641, "the general theft of Federal property

We have subsequently reaffirmed our understanding that Congress intended Section 666 to focus on offenses involving fraud and theft, observing "that Congress intended to expand the federal government's prosecutorial power to encompass significant misapplication of federal funds at a local level." *United States v. Willis*, 844 F.3d 165, 165 (3d Cir. 2016) (quoting *United States v. Valentine*, 63 F.3d 459, 463 (6th Cir. 1995)). We have also "not[ed] that courts have been wary of interpreting § 666 too narrowly" and that "the Supreme Court has repeatedly avoided constructions of § 666 that would impose limits beyond those set out in the plain meaning of the statute." *Id.* at 166. Although all of the

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statute," applies "only if it can be shown that the property stolen is property of the United States." *Cicco*, 938 F.2d at 445 (quoting S. Rep. No. 98-225, at 370, 1984 U.S.C.C.A.N. at 3511). As we recounted, the Senate Report explains:

> In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds.

Id. (quoting S. Rep. No. 98-225, at 370, 1984 U.S.C.C.A.N. at 3511). And while Section 665 makes it a crime for an agency officer or employee to steal federal job training funds, there was no statute of general applicability pertaining to theft or embezzlement by such individuals. *See id.* Thus Congress enacted Section 666, in part, to correct the deficiencies in these provisions. "The goal was to protect federal funds by authorizing federal prosecutions of thefts and embezzlement from programs receiving substantial federal support even if the property involved no longer belonged to the federal government." *Id.*

relevant Supreme Court cases involve challenges to Section 666's bribery provisions, their discussion of the statute's text and legislative history validate our long-established understanding of the statute's purpose and scope.

In *Salinas v. United States*, 522 U.S. 52 (1997), for example, the petitioner contended the Government must prove a connection between a bribe and federal funds to obtain a conviction under Section 666(a)(1)(B). *Id.* at 55–56. The Supreme Court disagreed, holding that Section 666's bribery prohibition "is not confined to a business or transaction which affects federal funds." *Id.* at 57. Relying upon the statute's "expansive, unqualified language, both as to the bribes forbidden and the entities covered," *id.* at 56, and "the broad definition of the 'circumstances' to which the statute applies," the Court found "no textual basis for limiting the reach of the bribery prohibition," *id.* at 57. The Court held the statute was unambiguous on this point because it would "be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue," *id.* at 60 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)).

The Court next addressed Section 666 in *Fischer v. United States*, 529 U.S. 667 (2000). At issue was whether Medicare payments paid to a hospital constituted federal "benefits" for the purposes of Section 666(b). *Id.* at 669. The petitioner argued the qualifying patient was the sole beneficiary of payments made under the Medicare program and that hospitals were merely being compensated for services rendered. *See id.* at 676. The Court disagreed, holding that a federal assistance program can have multiple beneficiaries, and that participating health

care organizations were also beneficiaries under the Medicare program. *See id.* at 677–81. The Court reasoned, in part, that "[c]oupled with the broad substantive prohibitions of subsection (a), the language of subsection (b) reveals Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs." *Id.* at 678.

Finally, in *Sabri v. United States*, 541 U.S. 600 (2004), the Supreme Court addressed another challenge to Section 666's bribery provision. The petitioner argued, *inter alia*, that Section 666(a)(2) could "never be applied constitutionally because it fails to require proof of any connection between a bribe or kickback and some federal money." *Id.* at 604. The Court disagreed, holding that the Necessary and Proper Clause gives Congress the power "to see to it that taxpayer dollars appropriated under [its Spending Clause] power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.* at 605. The Court thus held "[i]t is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here." *Id.* at 606. To confirm its understanding of the statute, the Court relied upon the same legislative history we discussed extensively in *Cicco*:

> For those of us who accept help from legislative history, it is worth noting that the legislative record confirms that § 666(a)(2) is an instance of necessary and proper legislation. The design was generally to 'protect the integrity of the vast sums

> of money distributed through Federal programs from theft, fraud, and undue influence by bribery,' see S.Rep. No. 98-225, p. 370 (1983), in contrast to prior federal law affording only two limited opportunities to prosecute such threats to the federal interest: 18 U.S.C. § 641, the federal theft statute, and § 201, the federal bribery law. Those laws had proven inadequate to the task. The [federal theft statute] went only to outright theft of unadulterated federal funds . . . .

Id. Recognizing that the statute was intended to address offenses involving fraud and theft, the Court held that "Congress was within its prerogative to protect spending objects from the menace of local administrators on the take." *Id.* at 608.

Defendants' reliance on *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007), is also misplaced. In that case, Thompson, a Wisconsin state procurement official, was prosecuted for steering a contract to a local travel agency, allegedly in violation of state procurement statutes and regulations. *See id.* at 878–80. The government's theory had been that Thompson "'intentionally misapplie[d]' more than $5,000 by diverting it" away from the firm that should have been selected under the state's procurement regulations. *Id.* at 880. The Seventh Circuit was not convinced that Thompson's decision actually violated the state's regulations. *See id.* at 880–81. And it observed that, unlike "[a]pproving a payment for goods or services not supplied," her conduct "d[id] not sound like 'misapplication' of funds." *Id.* at 881. Significantly, the firm she selected was actually the low bidder, and "[t]he federal government saved money because of Thompson's decisions." *Id.* The Seventh Circuit

turned to the statute's caption—"Theft or bribery concerning programs receiving Federal funds"—because "the word 'misapplies' is not a defined term." *Id.* Relying on that caption and the Rule of Lenity, the Seventh Circuit adopted a more narrow reading of intentional misapplication "that limits § 666 to theft, extortion, bribery, and similarly corrupt acts." *Id.* The Court further commented it did not believe a state official's violation of state regulations and statutes—even if intentional—would violate Section 666 "unless the public employee is on the take." *Id.*

Thompson is distinguishable. Thompson applied the state's procurement regulations in a way that actually saved the federal government money and caused no loss. Defendants, on the other hand, lied in order to obtain public employee labor from fourteen Port Authority employees. They forced the Port Authority to pay unnecessary overtime to toll workers and diverted well-paid professional staff away from legitimate Port Authority business. Their fraud is soundly within the scope of conduct Congress sought to proscribe in Section 666.

We hold that, at a minimum, the Government offered a valid theory that Defendants fraudulently obtained, knowingly converted, or intentionally misapplied the labor of Port Authority employees, and that it offered evidence sufficient to sustain Defendants' convictions.

It is well established that public employees' labor is property for the purposes of Section 666. *See, e.g.*, *United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992) (concluding the defendant's "theft of employee time [wa]s as much a theft of property as his theft of

[physical property], for the purposes of his section 666(a)(1)(A) conviction"); *accord United States v. Genova*, 333 F.3d 750, 758–59 (7th Cir. 2003) (affirming conviction under Section 666(a)(1)(A) where the defendant used public works employees for political labor); *United States v. Delano*, 55 F.3d 720, 729 (2d Cir. 1995) (holding indictment sufficiently detailed instance of theft of "the labor of [the defendant's] employees").

We have explained, in addressing Defendants' sufficiency challenge to the wire fraud counts, how they defrauded the Port Authority of the labor of fourteen public employees—eleven toll collectors paid overtime and three professional staff members—in furtherance of the scheme. Those public employees spent hours doing work that was unnecessary and furthered no legitimate Port Authority aim. Defendants were able to obtain these employees' labor only by lying about the purpose of the realignment, claiming they were conducting a traffic study.

Defendants argue they could not have misapplied Port Authority employee labor because they did not receive a "personal pecuniary benefit." Baroni Br. at 27. We disagree. Defendants had Port Authority employees do work they would not have otherwise done to further their personal scheme. The fact Defendants sought to benefit politically, not monetarily, does not alter the fact they forced the Port Authority to pay toll workers overtime, and diverted the time of salaried professional staff, in furtherance of no legitimate purpose. *Cf. Genova*, 333 F.3d 758–59 (explaining that "the point of the § 666 prosecution is that political activities are *not* the performance of a garbage collector's official duties," and that while

"Public Works employees were entitled to unpaid leave for political endeavors[,] the § 666 problem was paying them for that time").

Defendants argue this interpretation raises constitutional vagueness concerns. We disagree. At trial, the Government introduced evidence that, after Jersey City Mayor Steven Fulop declined to endorse Governor Christie, the Governor's office directed state agencies (including the Port Authority) to cancel meetings with Fulop and otherwise ignore him. In seeking to admit this evidence, *see* Fed. R. Evid. 404(b), the Government argued there was no danger of unfair prejudice because "[t]he mistreatment of Mayor Fulop, while hardly reflective of good government, was not criminal and thus, was *less* serious than the criminal conduct for which Defendants stand accused, conduct that needlessly imperiled public safety in Fort Lee and directly inconvenienced thousands of people." J.A. 259–60. Defendants contend it is not clear why their mistreatment of Mayor Sokolich is criminal, but their mistreatment of Mayor Fulop was not, and that "[t]his inconsistency demonstrates the inherent arbitrariness of the government's interpretation of Section 666." Baroni Br. at 40. Defendants again conflate motive with conduct. While their decision to punish Mayor Fulop may have been animated by the same desire to exact political revenge, there were no allegations they defrauded their federally funded employer in order to do so.

Defendants also raise federalism concerns, arguing the Government is improperly attempting "to police state and local officials in the conduct of their official duties." Baroni Br. at 36. As we have observed, Congress has a uniquely significant interest in

safeguarding the Port Authority, an interstate agency created by its consent. But we also believe federalism arguments are especially inapposite in the context of Section 666. We have described how Congress enacted Section 666 specifically to bring state and local officials within the scope of the federal criminal theft law. And as the Supreme Court has observed, "Congress was within its prerogative to protect spending objects from the menace of local administrators." *Sabri*, 541 U.S. at 608.

In sum, the Government presented evidence sufficient to prove Defendants fraudulently obtained, knowingly converted, or intentionally misapplied Port Authority employee labor in violation of Section 666(a)(1)(A).

2.

Finally, Defendants contend there was insufficient evidence to meet the $5,000 threshold because the Port Authority employees' wages are exempt under 18 U.S.C. § 666(c)'s safe harbor for bona fide compensation, and the Government quantified only $3,696 in toll workers' wages. They also assert the costs the Port Authority incurred in redoing the legitimate Center and Lemoine traffic study cannot satisfy the $5,000 threshold because they were not aware of the study and the costs represent consequential damages, not the value of misapplied property.[16]

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[16] We note the jury was also instructed it could consider "the value of the affected real property, including the lanes and toll booths as measured by the amount of tolls generated during the lane and toll booth reductions." J.A. 5110–11. In summation, the Government directed the jury to evidence demonstrating that the

The District Judge rejected these arguments, concluding "the Government introduced evidence that Defendants diverted Port Authority personnel to do work that was not part of the agency's 'usual course of business' when reconfiguring the access lanes," and that "[t]he jury could reasonably find that the value of compensation paid to Port Authority personnel, losses from a ruined traffic study, and the value of the lanes and toll booths were not bona fide and satisfied the $5,000.00 threshold." J.A. 58.

Without reaching the other costs presented to the jury (i.e., the value of the lanes and toll booths themselves, and the costs of redoing the Center and Lemoine traffic study), we hold the Government presented sufficient evidence that Defendants fraudulently obtained more than $5,000 worth of public employee labor.

As to the cost of compensating overtime toll booth workers, the Government introduced, and Riva testified to, detailed payroll records showing eleven overtime toll booth workers were paid $3,696.09. The Government presented this number to the jury on a

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sole remaining Special Access Lane collected "well in excess of $5,000" during the week of the realignment. J.A. 5297. Defendants did not challenge the sufficiency of this evidence in their post-trial motions and do not raise the issue on appeal. And they concede "the lanes and tollbooths can qualify as 'property' for" Section 666. Kelly Br. at 40. This alone seemingly forecloses any argument the $5,000 threshold was not satisfied. But because our affirmance of Defendants' Section 666 convictions rests on their theft of employee labor, and the Government presented sufficient evidence the value of that labor exceeds $5,000, we decline to decide the issue.

chart and reminded them of the specific figure in summation.

As to the value of the time of Port Authority professional staff, and of Baroni and Wildstein themselves, the Government also presented witness testimony and detailed payroll records.[17] On the first day of trial, payroll records for the relevant Port Authority employees were admitted by stipulation. These records indicate an hourly rate of $43.79 for Hwang, $52.11 for Chung, $47.24 for Patel, $79.59 for Wildstein, and $153.67 for Baroni. Based on these

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[17] In its brief, the Government asserts it "established that the lane diversion required $5,524.93 in pro-rated salaries of [Port Authority] employees to implement, and that is before the value of time Baroni and Wildstein spent on their mission to gridlock Fort Lee and cover up the reasons for that gridlock." Gov't Br. at 47 (citing J.A. 650–51). In support of this figure, the Government cited its post-trial sentencing memorandum. That memorandum contains a chart quantifying, *inter alia*, the cost of labor provided by Hwang, Chung, Patel, the additional toll collectors, and Baroni and Wildstein. The source of these calculations was unclear, however, because the chart contains no citations to the trial record.

At oral argument, the Government explained the calculations were established at trial through Port Authority payroll records, which had been admitted into evidence by stipulation, and testimony from Hwang, Chung, Patel, and Wildstein about how many hours each had worked on the fraudulent traffic study.

Following oral argument, we requested the Government to file a supplemental letter brief addressing, with citations to the trial record, the evidence it presented to the jury to establish the property subject to the Section 666 counts is valued at $5,000 or more. We further ordered the Government to attach any relevant trial exhibits or stipulations it had not previously submitted. We also allowed Defendants to file a joint response. The Government timely filed its brief, and Defendants filed a joint response.

rates and the hours Hwang, Chung, and Patel testified they worked on the sham traffic study, the evidence shows their time was valued at $437.90 ($43.79 x 10 hours), $729.54 ($52.11 x 14 hours), and $661.36 ($47.24 x 14 hours), respectively. Cumulatively, the three Port Authority traffic engineers provided unnecessary labor valued at approximately $1,828.80. The value of the work done by Hwang, Chung, and Patel, taken with the $3,696.09 spent on overtime toll workers, satisfies the $5,000 threshold.

Furthermore, based on Wildstein's testimony about the amount of time he and Baroni spent in furtherance of the scheme, the value of their time was, at a minimum, $4,294.80. This figure reflects approximately $1,989.75 for Wildstein's time ($79.59 x 25 hours) and $2,305.05 for Baroni's time ($153.67 x 15 hours).

The Government reminded the jury of this evidence in summation:

> Based on Port Authority payroll records and testimony you've heard, about $5,000 in Port Authority salaries were paid for the time in connection for the lane reduction work performed by Tunnels, Bridges and Terminals, Miss Hwang, Mr. Chung, traffic engineering Mr. Patel, as well as for Mr. Baroni and Mr. Wildstein's time spent to facilitate and conceal causing traffic problems in Fort Lee. Those service[s] were wasted. Those services were wasted for these lane reductions meant to punish the Mayor.

J.A. 5295–96. Accordingly, we conclude the Government presented to the jury evidence sufficient to satisfy the $5,000 threshold.

Defendants argue this compensation cannot count toward the threshold under the statute's exemption for "bona fide salary, wages, fees, or other compensation." 18 U.S.C. § 666(c). According to Defendants, "all of the Port Authority staff responsibly performed actual work, in good faith, for facially legitimate Port Authority purposes." Kelly Br. at 38. The Government responds this argument is "a red herring" because "Defendants fraudulently obtained and misapplied the *services* of [Port Authority] staff, not those employees' *salaries*."[18] Gov't Br. at 45. "But the best way of measuring the value of those services," according to the Government, "was to calculate what portion of those employees' salaries covered the time

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[18] The Government made this distinction at trial. In its summation, the Government argued:

> The defendants also agreed to misuse the time and the services of Port Authority employees. Those services have value. They're worth money. And that's Port Authority money. The Port Authority money that was paid to those employees. And because the Port Authority paid the salaries of each of the employees who wasted their time in furtherance of the defendants' scheme to punish the Mayor. And that includes the salary paid to the overtime toll booth collectors for the one remaining toll booth that was accessible to Fort Lee. That also includes the money paid to Baroni and Wildstein themselves while they spent time wasting, wasting their time in furtherance of this conspiracy. When they were suppose[d] to be working to advance the Port Authority's interests. And it includes money paid to the engineers who wasted time—and Port Authority professional staff, who wasted time collecting data that no one ever wanted.

J.A. 5194.

they spent unwittingly carrying out Defendants' vendetta." *Id.* We agree.

Section 666(c) has no application to the services of the eleven overtime toll booth workers, Hwang, Chung, or Patel. The Government offered evidence Defendants fraudulently obtained those public workers' services and labor; their salaries are merely a measure of the loss incurred by the Port Authority when it compensated those individuals for unnecessary, sham work. *See United States v. Valentine*, 63 F.3d 459, 465 (6th Cir. 1995) (holding "the plain language of [Section 666(c)] does not preclude prosecution" where there is "no allegation concerning [the defendant's] own salary, nor the salary of others," and "the government presented proof that [the defendant] misappropriated employee services").

The charges involving the compensation paid to Baroni and Wildstein themselves are different, however. The accusation is essentially that they did not earn their salaries in good faith by accepting payment for time spent defrauding their employer, so their compensation for that time could not have been "bona fide." Section 666(c) thus could apply to exempt compensation paid to Baroni and Wildstein. "Whether wages are bona fide and earned in the usual course of business is a question of fact for the jury to decide." *United States v. Williams*, 507 F.3d 905, 909 (5th Cir. 2007); *accord United States v. George*, 841 F.3d 55, 62–63 (1st Cir. 2016).

In this case, the judge instructed the jury that "[p]roperty does not include bona fide salary, wages, fees or other compensation paid or expenses paid or

reimbursed in the ordinary course of business," and that "[c]ompensation for an employee's time and services obtained through deception is not legitimate or bona fide." J.A. 5110. This instruction allowed the jury properly to exclude Baroni and Wildstein's compensation under Section 666(c) only if it found they were both bona fide and paid in the usual course of business.

Because the jury in this case was provided only a general verdict form, we do not know how it determined the $5,000 threshold was satisfied. The wire fraud convictions suggest the jury did not find Baroni and Wildstein's compensation "bona fide." *See* Black's Law Dictionary 210 (10th ed. 2014) (defining "bona fide" as "in good faith; without fraud or deceit"). But even if the jury determined Baroni and Wildstein's compensation was subject to the Section 666(c)'s safe harbor, the value of the services of the eleven toll workers and of Hwang, Chung, and Patel—which was not subject to that exemption—was sufficient to satisfy the statute's $5,000 threshold.

In light of our holding, we need not address Defendants' argument the frustrated Center and Lemoine traffic study is not cognizable property under Section 666.

* * *

Because the Government offered evidence at trial sufficient to prove Defendants fraudulently obtained the labor of Port Authority employees, and that the value of that labor exceeded $5,000, Defendants' sufficiency challenge must fail.

IV.

Defendants also challenge the jury instructions on the Section 666 counts and the District Judge's refusal to instruct the jury it was required to find Defendants intended to punish Mayor Sokolich.

Where, as here, a party has timely objected to the trial court's jury instructions, we exercise plenary review in determining whether the jury instructions stated the proper legal standard. *See United States v. Shaw*, 891 F.3d 441, 449–50 (3d Cir. 2018). "We must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error'" for the error to be harmless. *United States v. Elonis*, 841 F.3d 589, 597–98 (3d Cir. 2016) (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). Our inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

A.

Defendants raise three challenges to the jury instructions on the Section 666 counts. They argue we should vacate and remand their convictions because the District Judge erred in instructing the jury: (1) to consider the value of the Center and Lemoine study in determining whether the $5,000 threshold was satisfied; (2) that the Government did not need to prove Defendants knew of the specific property fraudulently obtained, knowingly converted, or intentionally misapplied; and (3) that "[t]o intentionally misapply money or property" means to intentionally use money or property "knowing that the

use is unauthorized or unjustifiable or wrongful," J.A. 5109. Because any error was harmless beyond a reasonable doubt, we will affirm.

1.

Defendants contend that, even if there is evidence sufficient to prove Section 666 violations, we should vacate their convictions and remand for retrial because the District Judge erroneously instructed the jury to consider the value of the Center and Lemoine traffic study. Because we can affirm Defendants' convictions solely on the value of public employee labor, we need not reach the Center and Lemoine study.

We have already detailed the trial evidence establishing the value of the public employees' labor in addressing Defendants' sufficiency challenge. Our analysis there focused on whether the record, viewed in the light most favorable to the Government, provided a sufficient basis for a rational juror to convict. But our inquiry here is different. Defendants contend that, even if the record contained sufficient evidence that the value of public employee labor exceeded $5,000, we cannot be certain beyond a reasonable doubt the jury actually considered all of that time in light of its instructions. We disagree. No reasonable juror could have failed to credit the value of Port Authority employee labor Defendants used to effect their fraudulent scheme, which alone satisfies Section 666(a)(1)(A)(i)'s $5,000 threshold.

Defendants do not assert any error in the jury instructions as to the value of the public employee labor, and we find none. The Government presented overwhelming and undisputed evidence—which we

described in analyzing Defendants' sufficiency challenge—concerning the amount of time Port Authority employees spent in furtherance of Defendants' scheme.

As to the cost of compensating overtime tollbooth workers, the Government introduced, and Riva specifically testified to, detailed payroll records showing eleven overtime tollbooth workers were paid $3,696.09. The Government presented this number to the jury on a chart and referenced it in summation.

The Government also elicited testimony from three members of the Port Authority's professional staff—Hwang, Chung, and Patel—about the time they spent collecting traffic data on the realignment, in furtherance of no legitimate Port Authority purpose, and testimony from Wildstein about the time he and Baroni spent in furtherance of the scheme. Detailed payroll records reveal the value of the traffic engineers' time was approximately $1,828.80.

Defendants argue we cannot be confident the jury considered the traffic engineers' time because it was not presented a full calculation of the value of their hourly rate multiplied by the hours they claimed to have worked on the sham study. We disagree. The parties admitted the relevant payroll records by stipulation, the Government elicited testimony to establish the number of hours worked, and it reminded the jury of this evidence in summation, estimating that the value of the engineers' and Baroni and Wildstein's time exceeded $5,000—which is correct. The amount was over $6,000.

Accordingly, the value of the work performed by Hwang, Chung, and Patel, taken together with the

$3,696.09 spent on overtime toll workers, satisfies the $5,000 threshold. The time Baroni and Wildstein spent plotting their fraud represents an additional $4,295.

Because the jury was instructed "[c]ompensation for an employee's time and services obtained through deception is not legitimate or bona fide," and the Government presented overwhelming evidence Defendants fraudulently obtained Port Authority employee services, the jury necessarily found all the toll worker and professional staff time satisfied the $5,000 threshold and was not subject to Section 666(c)'s exclusion for bona fide compensation. As noted, even if the jury did not credit Baroni and Wildstein's compensation, the value of employee time Defendants obtained nonetheless exceeds $5,000.

Defendants' convictions on the wire fraud counts confirm this conclusion. The jury found Defendants defrauded the Port Authority and conspired to do so. The only fraudulent scheme before them was one to cause a traffic blockage in Fort Lee by conducting a sham traffic study. There is overwhelming evidence that the bridge lanes were altered, eleven toll collectors worked additional overtime hours as a result, and the traffic study was conducted with the help of several well-paid Port Authority engineers. Defendants do not argue the study was not conducted. At trial, they asserted they did not know it was a sham or barely participated in it—an argument the jury roundly rejected. Indeed, the jury was instructed that, if it found the Defendants believed the traffic study was legitimate, it was a complete defense. On appeal, they argue Baroni had the authority to conduct the study even if it was a sham. The jury could not have

concluded that Defendants conspired to conduct a sham traffic study but then ignored the value of the employee labor necessary to effect that fraudulent scheme. As we have explained, the jury was presented with overwhelming and undisputed evidence demonstrating the value of the toll workers' and professional staff's time exceeds $5,000.

2.

Next, Defendants contend the District Court erred in instructing the jury it did not need to know of the specific property obtained. Defendants raise this argument to challenge the inclusion of the Center and Lemoine study in the jury instructions. Although we agree the instruction was erroneous, the error was harmless.

The District Judge instructed the jury:

> The Government does not have to prove that the Defendants knew of the specific property obtained by fraud, knowingly converted, or intentionally misapplied, or that the value of the property met or exceeded $5,000.

J.A. 5110. This addition to the Third Circuit's Model Jury Instruction was proposed by the Government. In proposed draft jury instructions submitted to the trial court, the Government "propose[d] keeping [this] language" on the following basis:

> As this Court recognized in denying Defendants' motions to dismiss the Indictment, the $5,000 requirement is a "jurisdictional element." *United States v. Baroni*, Crim. No. 15-193, 2016 WL 3388302, at *7 (D.N.J. June 13, 2016) (citing *United States v. Briston*, 192 F. App'x 84, 85 (3d Cir. 2006)). The Third Circuit has long held that

> a defendant's "knowledge of . . . jurisdictional fact[s]" is "irrelevant." *United States v. Crutchley*, 502 F.2d 1195, 1201 (3d Cir. 1974); *see also United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012) ("[i]t is well settled that mens rea requirements typically do not extend to the jurisdictional elements of a crime") (quotation omitted).

J.A. 495. At the charging conference, Defendants objected to this addition and requested the judge instruct the jury it had to be "at least reasonably foreseeable what property would be obtained." J.A. 4993. The Government responded that "[r]easonably foreseeable goes to mens rea, which the Third Circuit has held clearly does not extend to the jurisdictional elements of statutes like 666." J.A. 4993. The judge agreed and declined to instruct the jury the property at issue had to be reasonably foreseeable to Defendants. J.A. 4994.

Defendants argue this was error because the "Section 666's jurisdictional element is the requirement that the victim be a federal program beneficiary," and that "[t]he $5,000 threshold is a *de minimis* exception, below which Congress simply chose not to authorize prosecution." Baroni Br. at 73; *see Fischer*, 529 U.S. at 682 (Thomas, J., dissenting) (describing "[t]he jurisdictional provision of 18 U.S.C. § 666(b)"). We agree Section 666(b) is the statute's jurisdictional provision in the sense that this provision provides the jurisdictional hook "tying the proscribed conduct to the area of federal concern delineated by the statute," *United States v. Feola*, 420 U.S. 671, 695 (1975), here Congress's Spending Clause power, *see Sabri*, 541 U.S. at 605. But Section 666(a)(1)(A)(i)'s

requirement that the value of affected property be at least $5,000 can be described as jurisdictional in the sense that it is a "jurisdictional floor" below which Congress has determined there is insufficient federal interest in prosecution.

In any event, the affected property is not part of Section 666(a)(1)(A)(i)'s $5,000 requirement. That provision requires only that the property "is valued at $5,000 or more." 18 U.S.C. § 666(a)(1)(A)(i). The property is the direct object of the conduct element, Section 666(a)(1)(A), which provides that one 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*" violates the statute. *Id.* § 666(a)(1)(A).

While the jury need not have found that Defendants knew the *value* of the property, it was error for the trial judge to instruct the jury "[t]he Government d[id] not have to prove that the Defendants knew of the specific property obtained by fraud, knowingly converted, or intentionally misapplied." J.A. 495. Such an instruction runs the risk of negating the statute's *mens rea* requirement and thus relieving the Government of its burden of proof on an essential element of the crime. We do not believe, for example, one could intend to misapply something one does not know exists; to instruct the jury otherwise would seemingly dispense with the intent requirement.

But because we need not reach nor credit the Center and Lemoine study to affirm Defendants' convictions, the error was harmless. There is overwhelming evidence Defendants knew of the property

fraudulently obtained or intentionally misapplied, including the work of fourteen of Baroni's subordinates at the Port Authority.

3.

Defendants next challenge the District Judge's definition of intentional misapplication as ambiguous. We disagree. Following the Third Circuit Model Jury Instruction, the judge instructed the jury:

> To intentionally misapply money or property means to intentionally use money or property of the Port Authority knowing that the use is unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even if the use actually benefitted the Port Authority.

J.A. 5109. Defendants argue that "unjustifiable or wrongful" is overbroad and ambiguous. Defendants raised this same argument in pretrial motions and at the charging conference. The Government responded these are common terms and have been used in numerous intentional misapplication cases going back decades. Kelly's lawyer suggested that the judge "just define what unjustifiable and wrongful are," but when asked for proposed definitions, had nothing to offer. J.A. 4992. The judge overruled Defendants' objection because the terms are not "inherently vague" and were not "strong legal term[s]." J.A. 4992.

On appeal, Defendants argue these terms are so broad that the jury could have convicted if it believed the lane realignment was "a bad idea," unjustifiable "as a policy matter," or that Baroni should have sought

Executive Director Foye's approval. Kelly Br. at 35 (emphasis omitted). We disagree.

Other instructions in the District Judge's thorough and comprehensive charge foreclose the possibility the jury convicted defendants for lawful but imprudent conduct, e.g., because the jury thought the lane reductions were "a bad idea." These include the requirement that $5,000 worth of property be stolen or misapplied and that the misapplication be "for an unauthorized purpose." The judge also told the jury that it had to be convinced beyond a reasonable doubt that the purpose of the lane reductions was *not* a legitimate traffic study and that Defendants' good faith would be a complete defense to the charges. *See* J.A. 5141–42. Because the jury was instructed that Defendants could not be convicted if they believed in good faith that the reductions were part of a legitimate traffic study, a jury following its instructions could not have convicted Defendants based on its personal judgments about the wisdom and execution of the traffic study.

Moreover, we observe that this definition, or even broader language, is contained in the model jury instructions in several of our sister circuits. It is included verbatim in the Section 666 pattern jury instructions from the Eighth Circuit. 8th Cir. Model. Crim. Jury Instr. § 6.18.666A. The First Circuit's 18 U.S.C. § 656 (theft, embezzlement, or misapplication by bank officer or employee) pattern instructions define "willful misapplication" to include "that [defendants] wrongfully used the bank's funds" without further clarifying what "wrongfully" means. 1st Cir. Model. Crim. Jury Instr. § 4.18.656. The Ninth and Tenth Circuits both have pattern

instructions for statutes containing "willful misapplication" that do not define those terms at all. *See* 9th Cir. Model. Crim. Jury Instr. § 8.41; 10th Cir. Model Crim. Jury Instr. § 2.32. Jurors are regularly trusted to understand the meaning of these ordinary words in criminal cases.

B.

Defendants also challenge the District Judge's refusal to instruct the jury it needed to find Defendants intended to punish Mayor Sokolich in order to convict. They contend this error affects every count and constructively amended the indictment, "permit[ing] the jury to convict based on conduct that was not unlawful." Baroni Br. at 63. We disagree.

Defendants requested the object of the conspiracy be defined throughout the jury charge as one "to misuse Port Authority property to facilitate and conceal the causing of traffic problems in Fort Lee as punishment of Mayor Sokolich." *E.g.*, J.A. 501–04, 506. The trial court disagreed, ruling "the purpose or the object of the conspiracy being to punish Mayor Sokolich goes to motive," which is "not an element of the crime" and so "not an element that has to be proven." J.A. 5009.

During deliberations, the jury sent a note asking: "Can you be guilty of conspiracy without the act being intentionally punative [sic] toward Mayor Socholich [sic]." J.A. 648. The judge responded: "Yes. Please consider this along with all other instructions that have been given to you." J.A. 648.

In their post-trial motions, Defendants argued the punishment of Mayor Sokolich was "an essential element of each of the charged offenses," and that the failure to instruct the jury on this point relieved the

Government of its burden of proof. J.A. 50. The trial judge again disagreed, explaining that "any punitive goal Defendants may have had goes to their motive for violating the charged statutes, [but] is not an essential element of any of the crimes charged." J.A. 50. We agree.

Defendants argue the "intent to punish Sokolich [is] an essential element of the *mens rea* of the charged offenses." Baroni Br. at 58. Once again, Defendants conflate motive with *mens rea* intent and conduct. As we recently explained in *Hassan v. City of New York*:

> [T]here's a difference between "intent" and "motive." "[A] defendant acts intentionally when he desires a particular result, without reference to the reason for such desire. Motive, on the other hand, is the reason why the defendant desires the result." 2 Harry Sanger Richards et al., *American Law and Procedure* § 8, at 6 (1922). In other words, "intent" asks whether a person acts "intentionally or accidentally," while "motive" asks, "If he did it intentionally, *why* did he do it?" 1 John William Salmond, *Jurisprudence* § 134, at 398 (7th ed.1924) (emphasis in original); *see also Black's Law Dictionary* 881 (Bryan Garner ed., 10th ed. 2014) ("While motive is the inducement to do some act, intent is the mental resolution or determination to do it."). This fundamental "distinction between motive and intent runs all through the law." *Johnson v. Phelan*, 69 F.3d 144, 155 (7th Cir.1995) (Posner, C.J., concurring in part and dissenting in part).

804 F.3d 277, 297 (3d Cir. 2015).

The District Judge properly instructed the jury, for example, that to find Defendants guilty of wire fraud, the Government was required to prove they "knowingly devised a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations, or promises," and that they "acted with intent to defraud." J.A. 5119. This describes the conduct proscribed by the statute and the required *mens rea*. The intent to punish Mayor Sokolich may explain Defendants' motive—*why* Defendants intended to defraud the Port Authority in this case—but it is distinct from *mens rea* and is not a required element of any of the charged offenses. *See*, *e.g., Pointer v. United States,* 151 U.S. 396, 417 (1894) ("The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction."); *United States v. Sriyuth*, 98 F.3d 739, 747 n.12 (3d Cir. 1996) ("[M]otive is always relevant in a criminal case, even if it is not an element of the crime."); *cf. United States v. Davis*, 183 F.3d 231, 244 (3d Cir. 1999) ("It is clear that the parties involved in this intrigue had different motives. . . Davis contends that this disproves a conspiracy. We disagree. If they all agreed to interfere with a pending judicial proceeding, they are guilty of conspiracy. That is the difference between motive and intent."); *United States v. Harrison*, 942 F.2d 751, 756 (10th Cir. 1991) ("The goals of all the participants need not be congruent for a single conspiracy to exists, so long as their goals are not at cross purposes." (quoting *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990))).

Indeed, following the Third Circuit Model Jury Instructions, the District Judge charged the jury on this critical difference between motive and intent:

> Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done. Personal advancement and financial gain, for example, are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable, while prompting another person to intentionally do an act that is a crime. Motive is not an element of the offense with which a defendant is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that the defendant is guilty. And proof of good motive alone does not establish that the defendant is not guilty. Evidence of the defendant's motive may, however, help you to determine his or her intent.

J.A. 5139; 3d Cir. Model. Crim. Jury Instr. § 5.04. The judge specifically instructed the jury that evidence of motive may be relevant to establishing *mens rea*, thus allowing a juror who found evidence of motive lacking to vote for acquittal. Defendants were free to argue—and did argue—that they were not motivated by any desire to punish Mayor Sokolich. The jury's guilty verdict necessarily demonstrates no juror found motive so lacking as to raise a reasonable doubt concerning Defendants' guilt. Moreover, as we have explained, the comprehensive and thorough jury charge created no risk that Defendants were convicted on the basis of lawful conduct.

And while the grand jury included language describing Defendants' motive to punish the mayor in the indictment, that language—which did not describe an essential element of the charged offense—was merely surplusage. Because the jury instructions did not modify the essential elements of the offenses as charged in the indictment, there was no constructive amendment. *See United States v. Repak*, 852 F.3d 230, 257–58 (3d Cir. 2017) ("An indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." (quoting *United States v. Daraio*, 445 F.3d 253, 259–60 (3d Cir. 2006))).

Accordingly, we find no error in these instructions or the District Judge's response to the jury's question.

* * *

Because Defendants' sufficiency challenges to their wire fraud and Section 666 offenses fail, and because we find any error in the jury instructions was at worst harmless, we will affirm Defendants' judgments of convictions as to the wire fraud and Section 666 offenses. We now turn to the civil rights counts.

V.

Finally, Defendants challenge the sufficiency of Counts 8 and 9 of the indictment. In those counts, the grand jury charged Defendants with conspiring to violate, and substantively violating, the civil rights of Fort Lee residents. It alleged "[t]he object of the

conspiracy was to interfere with the localized travel rights of the residents of Fort Lee for the illegitimate purpose of causing significant traffic problems in Fort Lee to punish Mayor Sokolich," J.A. 124, and that Defendants "knowingly and willfully deprived the residents of Fort Lee of the rights, privileges, and immunities secured 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," J.A. 127. Defendants argue the substantive due process right the grand jury identified—"the right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives"—is not clearly established and thus cannot form the basis of the civil rights offenses charged in Counts 8 and 9.

Defendants' attack on the sufficiency of Counts 8 and 9 of the indictment is a legal question over which our review is plenary. *See Willis*, 844 F.3d at 161 n.7. "[W]hether the alleged violation of substantive due process was clearly established . . . is a question of law over which our review is unrestricted." *Mammaro v. N.J. Div. of Child Protection & Permanency*, 814 F.3d 164, 168 (3d Cir. 2016).

Section 241 makes it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," and Section 242 makes it a crime for a person "under color of any law, statute, ordinance, regulation, or custom, to willfully subject[] 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." 18 U.S.C. §§ 241–42.

"[I]n lieu of describing the specific conduct it forbids, each statute's general terms incorporate constitutional law by reference." *United States v. Lanier*, 520 U.S. 259, 265 (1997). The statutes' scope is limited to "rights fairly warned of, having been 'made specific' by the time of the charged conduct." *Id.* at 267. The Supreme Court has held that "the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying" the criminal civil rights statutes. *Id.* at 270. Accordingly, we apply the same test as in qualified immunity cases, asking whether the right allegedly deprived was clearly established. *See id.*

Before trial, Defendants moved to dismiss the indictment, arguing that there is no constitutional right to localized travel on public roadways and that, even if such a right did exist, it had not yet been clearly established. As the District Court noted when denying the motion, our Court recognized a Fourteenth Amendment due process right to intrastate travel nearly three decades ago. *See Lutz v. City of York*, 899 F.2d 255, 268–70 (3d Cir. 1990). Specifically, in reviewing a city ordinance that prohibited cars from driving three or more times through certain overcrowded streets during evening hours, *see id.* at 257, we held there is "[a] due process right of localized movement on the public roadways," *id.* at 269, which we alternately described as "the right to move freely about one's neighborhood or town, even by automobile," *id.* at 268. We further held no other

constitutional provision could provide the source of the right. *See id.* at 262–68 (rejecting Article IV Privileges and Immunities Clause, Fourteenth Amendment Privileges or Immunities Clause, rights of national citizenship, Commerce Clause, and Fourteenth Amendment Equal Protection Clause theories). We nonetheless upheld the ordinance because it was narrowly tailored to meet the significant city objectives of protecting public safety and reducing intense traffic congestion. *Id.* at 270.

Contrary to the District Court's holding, however, and according to the Supreme Court's qualified immunity precedent, *Lutz* alone could not have put Defendants on notice that they were violating a constitutional right. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 248 (3d Cir. 2016) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). "To determine whether the right is clearly established, we look at the state of the law when the [conduct] occurred," *Fields v. City of Phila.*, 862 F.3d 353, 361 (3d Cir. 2017), here 2013. The Supreme Court has suggested that a single binding case from the defendant's jurisdiction is insufficient to give notice that certain conduct could lead to criminal punishment. *See Carroll v. Carman*, 135 S. Ct. 348, 350 (2014). Instead, "[w]e look first to applicable Supreme Court precedent." *L.R.*, 836 F.3d at 247–48. A relevant Supreme Court holding ends the inquiry. "[I]f none exists, it may be possible that a 'robust consensus of cases of persuasive authority' in the

Court[s] of Appeals could clearly establish a right for purposes of qualified immunity." *Id.* at 248 (quoting *Mammaro*, 814 F.3d at 169).

The Supreme Court has never recognized an intrastate travel right. Far from a "robust consensus" in the Courts of Appeals that the right exists, the law across the circuits is uncertain. And most often our sister circuits have considered the matter in reviewing challenges to municipal residency requirements, not government action prohibiting free movement in public spaces, undermining the notice those opinions might have provided to Defendants as to the criminal nature of their conduct.

In addition to our opinion in *Lutz*,[19] the First, Second, and Sixth Circuits have recognized a right to intrastate travel, though they have described it at varying levels of generality. *See Cole v. Hous. Auth. of City of Newport*, 435 F.2d 807, 809 (1st Cir. 1970) (striking down city's two-year durational residency requirement for low-income housing on equal protection grounds for violating the "right to travel"); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648–49 (2d Cir. 1971) (striking down five-year durational residency requirement for admission to municipality's public housing on equal protection grounds for violating a "right to travel within a state"); *Johnson v. City of Cincinnati*, 310 F.3d 484, 495, 502–05 (6th Cir. 2002) (favorably citing *Lutz* to hold a city

[19] We earlier recognized the right in *Wellford v. Battaglia*, 485 F.2d 1151, 1152 (3d Cir. 1973) (per curiam), where we struck down a durational residency requirement for mayoral candidates because it burdened potential candidates' fundamental "right to travel."

ordinance banning persons convicted of drug crimes from "drug-exclusion zones" violated the due process "right to travel locally through public spaces and roadways").[20]

On the other hand, the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have treated the question more skeptically, often hesitating to recognize a due process intrastate travel right and sometimes explicitly rejecting theories rooted in other constitutional provisions. *See Eldridge v. Bouchard*, 645 F. Supp. 749, 753–55 (W.D. Va. 1986) (rejecting challenge to regional salary differential for police officers, in part, because "the plaintiffs do not have a federally recognized fundamental right to intrastate travel" rooted in the Privileges or Immunities Clause of the Fourteenth Amendment, though suggesting an intrastate travel right may be implicated in durational residency cases), *aff'd*, 823 F.2d 546 (4th Cir. 1987); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (upholding juvenile curfew ordinance even "assum[ing] without deciding that the right to move about freely [in public] is a fundamental right," noting "under certain circumstances, minors may be treated differently from adults"); *Wright v. City of Jackson*, 506 F.2d 900, 903–04 (5th Cir. 1975) (upholding fire department's continual residency requirement because it offended no fundamental right to intrastate travel); *Andre v. Bd. of Trustees of Vill. of Maywood*, 561 F.2d 48, 53 (7th Cir. 1977) (declining to "consider

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[20] The Government cites *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016), as also recognizing the right, but this case post-dates the conduct at issue and could not have provided fair notice here. *See Fields*, 862 F.3d at 361.

whether a right of intrastate travel should be acknowledged" because town's new continual residency requirement for public employment was not durational); *Townes v. City of St. Louis*, 949 F. Supp. 731, 735–36 (E.D. Mo. 1996) (holding ordinance blocking access to one city intersection to reduce crime would not violate due process intrastate travel right, assuming it exists), *aff'd*, 112 F.3d 514 (8th Cir. 1997); *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 776 (10th Cir. 2010) (per curiam) (rejecting substantive due process challenge to school district's continual residency requirement because "the constitutional rights at issue apply only to *inter*state travel, and the travel that Plaintiffs claim was restricted was *intra*state travel").

The D.C. Circuit is internally conflicted but has not yet set precedent. A plurality of the Court sitting en banc suggested a due process right to intrastate travel might exist but did not reach the question. *See Hutchins v. D.C.*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (plurality opinion) (acknowledging "a hypothetical municipal restriction on the movement of its citizens, for example, a draconian curfew, might bring into play the concept of substantive due process," but declining to find a fundamental right implicated by a juvenile curfew ordinance, in part because juveniles do not have the same rights as adults). In separate opinions, another plurality concluded a right to intrastate travel exists and ought to be subject to intermediate scrutiny. *See id.* at 553 n.1 (Rogers, J., concurring in part and dissenting in part) (listing views expressed by each presiding judge on the "fundamental right to movement").

Simply put, although four circuits (including our own) have found some form of a constitutional right to intrastate travel, there is hardly a "robust consensus" that the right exists, let alone clarity as to its contours. Although *Lutz* is both clear and binding in our jurisdiction, this area of law as a whole is far from settled. Based on the Supreme Court's qualified immunity precedent, we hold the District Court erred in concluding *Lutz*, standing alone, provided fair warning that Defendants conduct was illegal, especially in view of the state of the law in our sister circuits. *See Carroll*, 135 S. Ct. at 351. "[W]hether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'" *Id.* at 352 (quoting *Stanton v. Sims*, 571 U.S. 3, 10–11 (2013) (per curiam)).

Accordingly, we will reverse and vacate Defendants' civil rights convictions and remand with instructions to dismiss Counts 8 and 9 of the indictment under Federal Rule of Criminal Procedure 12(b). *See Cicco*, 938 F.2d at 446–47. Because we reverse and vacate Defendants' convictions, we need not reach their arguments concerning the jury instructions on the civil rights counts.

VI.

For the foregoing reasons, we will affirm Defendants' judgments of convictions as to the wire fraud and Section 666 counts (Counts 1 through 7), and we will reverse and vacate only as to the civil rights counts (Counts 8 and 9). Because we have reversed and vacated two counts of the indictment, we will vacate Defendants' sentences on the remaining

counts of convictions.[21] We will remand with instructions to dismiss only Counts 8 and 9 of the indictment and to resentence Defendants on the remaining counts of conviction.

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[21] The Supreme Court has explained that resentencing is appropriate where Defendants successfully appeal some but not all of the counts of conviction:

> [Sentencing package] cases typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction. The appeals court, in such instances, may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a). In remanded cases, the Government relates, trial courts have imposed a sentence on the remaining counts longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed. Thus the defendant ultimately may gain nothing from his limited success on appeal, but he will also lose nothing, as he will serve no more time than the trial court originally ordered.

Greenlaw v. United States, 554 U.S. 237, 253–54 (2008) (citations omitted); *United States v. Hodge*, 870 F.3d 184, 188 (3d Cir. 2017) (remanding "for requisite resentencing" where some, but not all, counts of convictions were vacated).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. WILLIAM E. BARONI, JR. and BRIDGET ANNE KELLY, Defendants.	Case: 2:15-cr-00193-SDW **OPINION** June 13, 2016

WIGENTON, District Judge.

Before this Court are Defendants William E. Baroni Jr. ("Baroni") and Bridget Anne Kelly's ("Kelly") (collectively, "Defendants") Motions to Dismiss the Indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B).[1]

[1] As Defendants seek to join each other's motions, arguments made by one defendant are applied to both, unless otherwise noted. (Kelly Mot. at 40 (requesting permission "to join the motions of her co-defendant to the extent they are not inconsistent with her filings"); Baroni Reply Br. at 26 (noting that he "joins Kelly's pretrial motions").)

For the reasons stated below, the Motions to Dismiss are DENIED.

I. BACKGROUND AND PROCEDURAL HISTORY

This Court assumes familiarity with the allegations and procedural history of this case and reviews only the facts relevant to the present motion. On April 23, 2015, Baroni, former Deputy Executive Director of the Port Authority of New York and New Jersey ("Port Authority"), and Kelly, former Deputy Chief of Staff for Legislative and Intergovernmental Affairs for the Office of the Governor of New Jersey ("OGNJ") were indicted by the United States Attorney's Office for the District of New Jersey ("USAO") on charges of conspiracy, fraud, and civil rights violations for their alleged roles in causing lane closures on the George Washington Bridge ("GWB") in September 2013. (Dkt. No. 1, Indictment.) The Indictment alleges that Defendants, along with David Wildstein ("Wildstein"), conspired to improperly close Local Access Lanes on the GWB to create traffic problems in order to punish the Mayor of Fort Lee, New Jersey, Mark Sokolich, for refusing to endorse Governor Chris Christie's re-election campaign. (*Id*. at 4–5.) To do so, the Indictment alleges that Defendants falsely claimed the reductions were part of a traffic study to justify using Port Authority personnel "to implement the changes to the Local Access Lanes" to hide "the true punitive purpose of the plan." (*Id*. at 5–8.) Personnel used included a manager who was tasked with implementing the lane changes, maintenance staff who altered signage for the changes, a traffic engineer, toll booth operators, the Port Authority Police Department, and employees of the Port Authority

engineering department who collected and reviewed traffic data for the phony study. (*Id.* at 9–11.) Defendants communicated, in part, via email and text as they planned and implemented their scheme. (*See, e.g., id.* at 8, 11, 12, 13, 15.)

The nine-count Indictment specifically charges Defendants as follows:

Count 1: Conspiracy to Obtain by Fraud, Knowingly Convert, and Intentionally Misapply Property of an Organization Receiving Federal Benefits in violation of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 371.

Count 2: Obtaining by Fraud, Knowingly Converting, and Intentionally Misapplying Property of an Organization Receiving Federal Benefits in violation of 18 U.S.C. § 666(a)(1)(A) and § 2.

Count 3: Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. § 1349.

Counts 4–7: Wire Fraud in violation of 18 U.S.C. § 1343 and § 2.[2]

Count 8: Conspiracy Against Civil Rights in violation of 18 U.S.C. § 241.

Count 9: Deprivation of Civil Rights in violation of 18 U.S.C. § 242 and § 2.

On February 1, 2016, Defendants moved to dismiss the Indictment. (Dkt. Nos. 71, 72.) The Government timely filed its opposition on March 11, 2016. (Dkt.

[2] Counts Four and Six are brought against Defendant Kelly and counts Five and Seven against Defendant Baroni.

No. 91.) Defendants filed their replies on April 13, 2016. (Dkt. Nos. 102, 103.) The Government requested and was granted permission to file a sur-reply. (Dkt. Nos. 105, 106, 107.) This Court held oral argument on the motions on April 28, 2016. (Dkt. No. 109.)

II. LEGAL STANDARD

Federal Rule of Criminal Procedure 12(b)(3)(B) permits a defendant to move to dismiss for "a defect in the indictment" including a "lack of specificity" or "failure to state an offense." FED. R. CRIM. P. 12(b)(3)(B); *see also United States v. Delle Donna*, 552 F. Supp. 2d 475, 482 (D.N.J. 2008) (noting that a defendant may "move to dismiss an indictment at any time for failure to state an offense"). An indictment must contain a "'plain, concise, and written statement of the essential facts constituting the offense charged' and include the statute(s) that the defendant(s) are alleged to have violated." *Della Donna*, 552 F. Supp. at 482 (quoting FED. R. CRIM. P. 7(c)(1)). "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or a conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also United States v. Kemp*, 500 F.3d 257, 280 (3d Cir. 2007). "[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir. 1989).

When reviewing a motion to dismiss pursuant to Rule 12(b)(3)(B), a trial court may only consider the allegations contained in the charging document, because "the indictment must be tested by its sufficiency to charge an offense" not by whether the "charges have been established by the evidence." *United States v. Sampson*, 371 U.S. 75, 78–79 (1962). An indictment "fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002), *abrogated on other grounds by Skilling v. United States*, 561 U.S. 358 (2010). "In evaluating a Rule 12 motion to dismiss, a district court must accept as true the factual allegations set forth in the indictment." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012); *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990).

III. DISCUSSION

Before turning to Defendants' count-specific arguments, this Court must first address their contention that their Due Process rights have been violated because 1) they did not have fair notice that their conduct violated federal criminal law, and 2) the Government has not dealt with them in a "fundamentally fair manner." (Baroni Mot. at 1, 11–26; Kelly Mot. at 6–9.)

First, Defendants take the position that the laws under which they are charged are "impermissibly vague" pursuant to the "void-for-vagueness doctrine on an as-applied basis." (Kelly Mot. at 6.) A criminal statute is void for vagueness if it "'fails to give a person of ordinary intelligence fair notice that his

contemplated conduct is forbidden by the statute,' or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'" *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (internal citations omitted); *United States v. Stevens*, 533 F.3d 218, 249 (3d Cir. 2008). This doctrine "does not mean that [a] statute must define every factual situation that may arise." *United States v. Nelson*, 712 F.3d 498, 508 (11th Cir. 2013). Because this is an "as applied" challenge, it must be reviewed in light of Defendants' specific conduct and the underlying facts at hand. Such an analysis is inappropriate for a pretrial motion to dismiss. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 550 (1975) (holding it "well established that vagueness challenges to statutes which do not involve First Amendment freedoms" require review of the factual record); *Huet*, 665 F.3d at 595 (stating that "[a] pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence"); see also *United States v. Caputo*, 288 F. Supp. 2d 912, 917 (N.D. Ill. 2003) (stating that an "as applied" review requires analysis of the specific facts of a case and noting that those "types of factual determinations are not appropriately determined by a court in a pre-trial motion"); *United States v. O'Brien*, 994 F. Supp. 2d 167, 191 (D. Mass. 2014) (denying defendants' motion to dismiss the indictment in part for statutory vagueness and the rule of lenity, stating that "[t]o the extent that defendants raise issues that turn, even in part, on the evidence, those issues cannot properly be resolved on

a motion to dismiss").[3] Therefore, Defendants' motion for dismissal of any of the counts of the Indictment under the void-for-vagueness as-applied doctrine is denied.

Defendants next claim that they have been denied Due Process because the Government "mishandle[ed]" *Brady* material and failed to demand complete document productions from the law firm of Gibson Dunn. (Baroni Mot. at 1–2, 11–26.) Defendants previously raised these arguments in Omnibus Discovery Motions filed in November 2015 and during oral argument before this Court on February 5, 2016. (Dkt. Nos. 42, 43, 77.) This Court addressed their

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[3] In addition to their general vagueness argument, Defendants claim that the Indictment's "novel construction of § 666" deprives them of their "Due Process rights of 'fair notice' and protection from arbitrary enforcement of the law." (Kelly Mot. 18–19; Baroni Mot. 28–31.) Dismissal is not warranted, however, merely because the Government has chosen to prosecute a novel set of facts under § 666(a)(1)(A). The statutory language of § 666(a)(1)(A) is broad, but not unclear. *See, e.g., Salinas v. United States*, 522 U.S. 52, 52 (1997) (describing the statute as having "plain and unambiguous meaning"); *United States v. Urlacher*, 979 F.2d 935 (2d Cir. 1992) (holding that "[t]he term 'intentionally misapply,' as it is used in § 666, is not unconstitutionally vague."); *United States v. Deen*, No. Cr. 14-184-01-03, 2016 WL 900463, at *3 (W.D. La. Mar. 7, 2016) (finding that "men of common intelligence are not required to guess at [the] meaning" of § 666(a)(1)(A)).

Nor is Defendants' invocation of the rule of lenity appropriate here. The rule of lenity demands that courts interpret criminal statutes in favor of defendants only when there is a "grievous ambiguity or uncertainty" in the statute. *United States v. Salahuddin*, 765 F.3d 329, 340 (3d Cir. 2014) (internal citation omitted). Where, as here, a statute is not ambiguous, the rule of lenity is not applicable.

concerns in its ruling from the bench and granted Defendants permission to issue a Rule 17(c) subpoena to Gibson Dunn for documents to which they believed they were entitled. Aside from the Government's delay in turning over one set of materials, which the Defendants concede they have had in hand since January 11, 2016, (Baroni Mot. at 21–22, 21 n.8), Defendants point to no specific exculpatory documents that the Government has withheld. This Court finds nothing unfair in the Government's dealings with Defendants as to document discovery or any other facet of this matter. Defendants make much of the fact that they are private individuals involved in a case against the United States Government and adverse non-parties with significant resources, (Baroni Mot. at 13, 24), but this is not an uncommon state of affairs. While rhetorically satisfying, labeling oneself a "David" to the Government's "Goliath" is insufficient to create a violation of Due Process. Defendants' motion for dismissal of any of the counts of the Indictment on Due Process grounds is denied.

A. Counts One & Two

Counts One and Two charge conspiracy to violate and substantive violations of 18 U.S.C. § 666(a)(1)(A). Section 666 provides in relevant part:

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

18 U.S.C. § 666(a)(1)(A).

The Indictment alleges that Defendants, together with Wildstein, conspired to and did fraudulently obtain, knowingly convert, and intentionally misapply Port Authority property worth at least $5,000. (Indictment at 5, 28.) Specifically, the Indictment alleges that Defendants concocted a sham traffic study in order to reduce Local Access Lanes on the GWB during morning rush hour without prior notice in order to cause significant traffic in Fort Lee to punish Mayor Sokolich. (Indictment at 5–6.) Defendants argue that the Indictment fails to allege facts that, as a matter of law, constitute violations of § 666. (Kelly Mot. 27–34; Baroni Mot. at 3, 27–44.)

Courts interpreting federal criminal statutes "must pay close heed to language, legislative history, and purpose in order strictly to determine the scope" of forbidden conduct. *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007). Congress enacted § 666 "to redress particular deficiencies in identified existing statutes" and "to protect federal funds by authorizing federal prosecution of thefts and embezzlement from programs receiving substantial federal support even if the property involved no longer belonged to the federal

government." *United States v. Cicco*, 938 F.2d 441, 445 (3d Cir. 1991). In so doing, Congress expanded the class of persons subject to prosecution to include individuals "authorized to act on behalf of another person or a government . . . includ[ing] a servant or employee, and a partner, director, officer, manager, and representative[.]" *Vitillo*, 490 F.3d at 322. In simple terms, § 666 "prohibits, *inter alia*, 'an agent' of a local government agency that receives more than $10,000 in federal funds from stealing from that agency property valued at more than $5,000." *Id*. at 321. Section 666 is "'extremely broad in scope,' as that statute seeks to ensure the integrity of vast quantities of federal funds previously unprotected due to a 'serious gap in the law.'" *Id*. (internal citations omitted); *see also Salinas v. United States*, 522 U.S. 52, 57 (1997) (noting that the enactment contains "expansive, unqualified language"); *United States v. Rooney*, 37 F.3d 847, 851 (2d Cir. 1994) (noting that "Congress intended the terms of the statute to be 'construed broadly'"). Its purpose is to "create new offenses to augment the ability of the United States to" prosecute the theft and misapplication of federal monies disbursed to non-federal organizations. *Cicco*, 938 F.2d at 444.

To sufficiently assert a violation of § 666, the Indictment must allege:

- Defendants were agents of the Port Authority;
- The Port Authority received federal benefits of more than $10,000 in a one-year period;
- Defendants intentionally misapplied Port Authority property;

- The misapplied property was owned by or in the care, custody or control of the Port Authority; and
- The misapplied property was worth at least $5,000.

The first and second elements are not in dispute. Defendants concede Baroni was an agent of the Port Authority for purposes of § 666, and Kelly acknowledges, although she was not an agent, that "Count 2 includes an aiding and abetting charge pursuant to 18 U.S.C. § 2." (Kelly Mot. at 27 n.5.) Nor do Defendants challenge that the Port Authority received more than $10,000 in federal benefits in the one-year period in question as required by 18 U.S.C. § 666(b), or that the property in question (employee compensation, access lanes, toll booths and losses from a interrupted traffic study) was owned by or in the care, custody or control of the Port Authority.

Therefore, Defendants' challenge to the Indictment's validity rests on whether it sufficiently alleges that they intentionally misapplied Port Authority property worth more than $5,000.

1. Misapplication

Defendants argue that they did not misapply Port Authority property because they did not personally benefit from the lane closures. (Kelly Mot. at 32 (asserting that "[i]nherent in the statute is criminalizing conduct in which an individual enriches himself or herself, or a family member or friend, with money or property from an agency receiving federal funds"); Baroni Mot. at 33–35.) The statute, however,

contains no such requirement.[4] To misapply something is to make "improper or illegal use of funds or property lawfully held," BLACK'S LAW DICTIONARY (10th ed. 2014), or to "misuse or spend without proper authority," WEBSTER'S THIRD NEW INT'L DICTIONARY (unabridged 1993). Misapplication can refer to any improper use of property, whether or not for personal gain, and can even encompass situations in which an organization benefits from the misuse. *See United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995) (finding misappropriation of property under § 666(a)(1)(A) where an employee falsely certified that federal funds were used for training purposes, but instead used those funds to purchase computers for the organization); *see also* 3d Cir. Model Crim. Jury Instr. § 6.18.666A1A-3 (stating that misapplication "includes the wrongful use of the money or property for an unauthorized purpose, even if such use benefitted the (organization)"). Nor does the statute require that others be aware of the misuse before a violation occurs. Thus, this Court is unpersuaded by Defendants' position that no misapplication occurred because Port Authority personnel were at all times engaged in their normal functions and the toll booths and lanes leading to them were still open and operational. That speaks only to the Defendants' success in keeping their motives and goals hidden, not to the impropriety of those motives and goals. The Indictment clearly informs Defendants that they are

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[4] Although the statute is captioned, "Theft or bribery concerning programs receiving Federal funds" and has been referred to as an "anti-bribery" rule, *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007), a caption alone does not define a statute's essential elements.

being charged with misusing the Local Access Lanes, tollbooths and Port Authority personnel for retribution against Mayor Sokolich in violation of § 666.[5] This Court finds that the Indictment alleges facts sufficient as to the "misapplication" element.

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[5] Defendants rely, in part, on the Seventh Circuit's decision in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007), to argue that they cannot be found to have misapplied property unless they personally received money or property or "caused someone else to receive money or property." (Kelly Mot. at 33.) The *Thompson* decision, however, came after the defendant was tried and convicted, permitting the appellate court to review all the evidence, and also dealt with a situation in which the defendant bent procurement rules to award a travel contract to the lowest bidder in a competitive bidding process, as opposed to a bidder others on the selection group rated more highly. *Thompson*, 484 F.3d at 878. The Seventh Circuit found that, at worst, the evidence showed the defendant made a mistake in how she implemented procurement rules, which imposed no harm on the state as it received what it contracted for and at the market price. *Id.* at 881–82 (noting that "[a]s long as the state [got] what it contract[ed] for, at the market price, no funds have been misapplied, even if the state's rules should have led it to buy something more expensive (and perhaps of higher quality too)"). The facts as alleged in the Indictment here are quite different, and involve individuals allegedly determined to upend expected traffic patterns to get back at a political opponent. If true, the facts do not allege a mistake or a misunderstanding of policies or rules that resulted in a positive outcome, but rather an intentional desire to subvert existing policies and/or practices in order to achieve an improper end.

Similarly unhelpful to Defendants is *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013), (Baroni Mot. at 35), which like *Thompson*, did not find a defect in the charging document, but rather vacated the defendant's conviction based on a review of the sufficiency of the evidence, finding that defendant did not have any power over purchasing decisions and therefore, could not have misapplied property.

2. Property

The Government identifies the relevant property as "compensation paid to [Port Authority] personnel in connection with the lane realignment,"[6] losses incurred from repeating a spoiled traffic study, and the value of the access lanes and toll booths. (Dkt. No. 45, Nov. 24, 2015 Gov't Opp'n Br. at 33; Indictment Ct. 1 ¶¶ 7, 15, 16, 21, 22, 24, 25, 40, 45–47, 51, 52.) Property is defined as the "rights in a valued resource such as land, chattel, or an intangible." BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* 3d Cir. Model Crim. Jury Instr. § 6.18.666A1A-3 (defining property as "things of value" such as "money and tangible objects" but also "intangible things like the value of an employee's time and services"). The statute also contains a "safe harbor" provision that excludes from the definition of property "bona fide salary, wages, fees or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c). Defendants argue that the compensation, study losses, access lanes and toll booths are not "property" for purposes of § 666. This Court disagrees.

First, although § 666(c)'s safe harbor provision protects bona fide compensation paid in the "usual course of business," it does not apply where employee services have been diverted to work that is not part of

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[6] The Government also argues that, in addition to "traffic engineers, toll collectors, police officers, [and] Media Relations employees," Defendants "themselves spent on-the-job time executing and concealing their fraudulent scheme while collecting salary and benefits from the Port Authority." (Gov't Opp'n Br. at 14 n.5.)

an organization's usual course of business. *See, e.g., United States v. Wecht*, No. Crim. 06-0026, 2006 WL 1835818, at *15 (W.D. Pa. June 29, 2006) (ruling that where a county coroner used county employees to perform work for his private medical practice a "theft of employee time" equated to a theft of property for the purposes of § 666); *United States v. Sanderson*, 966 F.2d 184, 186 (6th Cir. 1992) (affirming conviction where defendant used employees paid by the county for official work to work on defendant's private construction projects); *United States v. Pabey*, 664 F.3d 1084, 1089 (7th Cir. 2011) (affirming a § 666(a)(1)(A) embezzlement conviction where mayor used "on-the-clock city workers" to renovate a family home); *United States v. Delano*, 55 F.3d 720, 723–24 (2d Cir. 1995) (affirming conviction under § 666(a)(1)(A) of defendant who forced city parks department employees to "perform work outside the scope of their regular employment duties"); *United States v. Lawson*, No. Crim. 3:08-21-DCR, 2009 WL 1324157, at *2 (E.D. Ky. May 11, 2009) (concluding that "employee time is property within the meaning of this term in § 666(a)(1)(A) because this term includes both tangible and intangible property" and holding that "engineer estimates constitute 'property'" for the purposes of § 666(a)(1)(A)). Where, as here, the Indictment charges that Defendants diverted Port Authority personnel to do work that was not part of the agency's "usual course of business" to achieve their retributive goals, (Indictment at 6 ¶7, 8–9, ¶¶ 15–16, 10–11 ¶¶ 21–23), the Indictment sufficiently alleges activity outside of the scope of § 666(c)'s protection. In addition, this Court notes that whether the compensation at issue was "bona fide" or paid in the

"usual course of business" is a question of fact for the jury. *See, e.g., United States v. Williams*, 507 F.3d 905, 909 (5th Cir. 2007) (noting that "[w]hether wages are bona fide and earned in the usual course of business is a question of fact for the jury to decide"); United States v. Lupton, 620 F.3d 790, 801–802 (7th Cir. 2010); *United States v. Dwyer*, 238 F. App'x 631, 647–48 (1st Cir. 2007).

Defendants present a similar argument as to the Indictment's allegations that because of Defendants' actions, the Port Authority incurred financial losses when it had to pay to repeat a traffic study ruined by the wrongful lane closures and the Port Authority had to repeat the study. (Indictment at 12 ¶ 25.) Defendants take the position that a traffic study is not property, but rather a "service provided by an outside vendor." (Kelly Mot. at 30–31.) The Indictment does not allege, however, that the study itself is property. Rather, the allegation is that the Port Authority was deprived of money when it was required to repeat the ruined study. Defendants then argue that the traffic study "and any repeat thereof, were bona fide 'expenses paid or reimbursed' by the Port Authority for services that were actually rendered 'in the usual course of business.'" (*Id.* (citing 18 U.S.C. § 666(c)).) As noted above, any question of whether a repeat study was "bona fide" and paid in the "usual course of business" is a question of fact for the jury and not properly before this Court on a pretrial motion to dismiss.

Finally, The Indictment alleges that Defendants gained improper control over the access lanes and toll booths that handle GWB traffic by falsely claiming a lane reduction was necessary to conduct a traffic

study. (Indictment at 6 ¶ 7, 11 ¶ 23, 19–20 ¶ 44.) This Court can find no basis to limit property under § 666(a)(1)(A) to moveable property, such as traffic cones, as argued by Defendants. (Kelly Mot. at 31–32). As such, the Indictment sufficiently and clearly identifies tangible property of value that the Government alleges was misused by the Defendants in violation of § 666(a)(1)(A).

3. In Excess of $5,000

In order to "avoid prosecutions for minor kickbacks and limit violations to cases of outright corruption," indictments under § 666 may only be brought if the property in question is worth at least $5,000. *United States v. Abbey*, 560 F.3d 513, 522 (6th Cir. 2009); *see also United States v. Briston*, 192 F. App'x 84, 86 (3d Cir. 2006) (stating that the $5,000 threshold is a jurisdictional requirement). The Indictment charges that the value of compensation paid to Port Authority personnel, losses from a ruined traffic study, and the value of the lanes and toll booths satisfy this requirement. (Indictment at 5 ¶ 2, 28 ¶ 2.)

Defendants again rely on § 666(c)'s safe harbor provision to argue that compensation cannot be considered when calculating the $5,000 threshold. (Kelly Mot. at 28–30.) However, because a determination of whether wages are "bona fide" and subject to the provision's protection is a question for the jury, this Court declines to rule on it now. As for the remaining property, any value determinations are also properly reserved for the factfinder. For purposes of the instant motion, the Indictment sufficiently alleges that the property in question is valued at no less than $5,000.

This Court holds that the Indictment is not defective as to Counts One and Two and Defendants' motions to dismiss as to those counts are denied.

B. Counts Three – Seven

Counts Three and Four of the Indictment allege that Defendants conspired with Wildstein to commit and did commit wire fraud in violation of 18 U.S.C. § 1349 and §§ 1343 and 2. The substantive crime of wire fraud itself is defined in relevant part as:

> 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.

18 U.S.C. § 1343.

The elements of wire fraud are "(1) a scheme or artifice to defraud for the purpose of obtaining money or property, (2) participation by the defendant with specific intent to defraud, and (3) use of the mails or wire transmissions in furtherance of the scheme." *Nat'l Sec. Sys. v. Iola*, 700 F.3d 65, 105 (3d Cir. 2012); *see also United States v. Riley*, 621 F.3d 312, 329 (3d Cir. 2010); *United States v. Al Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004) (discussing the elements of mail

fraud under 18 U.S.C. § 1341);[7] 3d Cir. Model Crim. Jury Instr. § 6.18.1343. "Additionally, the object of the alleged scheme or artifice to defraud must be a traditionally recognized property right." *Al Hedaithy*, 392 F.3d at 590.

Defendants challenge the sufficiency of the Indictment on the grounds that 1) it fails to allege that Defendants schemed to defraud the Port Authority because Baroni and Wildstein had the authority to close the Local Access Lanes, and 2) Defendants did not obtain money or property. (Kelly Mot. at 36–37, 38–39; Baroni Mot. at 31.)

Defendants attempt to argue that they could not have defrauded the Port Authority because Baroni and Wildstein had unfettered power and authority to change the configuration of the lanes at any time and for any purpose. (Kelly Mot. at 36–37; Critchley Decl. Ex. B. at 155, 165, 170.) The existence and scope of Wildstein and Baroni's authority, however, is again a question of fact for the jury. At this juncture, this Court is limited to reviewing the sufficiency of the allegations contained in the Indictment, which charge that Defendants acted outside the scope of their authority in order to pursue goals that were unrelated to and at odds with the mission of the Port Authority. (Indictment at 5 ¶ 2, 11 ¶ 23, 28 ¶ 2.) Defendants may challenge those allegations at trial and show that Wildstein and Baroni were not defrauding their employer because they were acting within the bounds

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[7] Cases construing the elements of mail fraud are equally applicable to wire fraud cases. *See Al Hedaithy*, 392 F.3d at 590 (establishing the elements to "prove mail or wire fraud"); *United States v. Giovengo*, 637 F.2d 941 (3d Cir. 1980).

of the powers granted to them, but this Court cannot and should not make that factual determination at this juncture.

Defendants' second challenge to Counts Three through Seven, that they did not "obtain" money or property, is unavailing. (Kelly Mot. 38–40.) To obtain something generally means to "bring into one's own possession" or "to procure." BLACK'S LAW DICTIONARY (10th Ed.) For purposes of federal wire fraud charges, however, the term "obtain" does not require that a defendant possess or procure property, it only requires that "that which the victim was defrauded of is something that constitutes 'property' in the hands of the victim." *Hedaithy*, 392 F.3d at 602. Depriving an employer of control over an organization's assets is enough to satisfy this element. *See, e.g., United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990); *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987); *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007); *United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005); *United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003). Defendants need not pocket money or drive a car off a dealer's lot or take office computer equipment home for personal use; it is enough that they prevented the Port Authority from exercising "its right to exclusive use of" its property, which here allegedly includes toll booths and roadways, in addition to money in the form of employee compensation and the costs of redoing a traffic study. (Indictment Ct. 1 ¶¶ 7, 15, 16, 21, 22, 24, 25, 40, 45–47, 51, 52.) Therefore, the Indictment adequately alleges violations of 18 U.S.C. §§ 1343 and 1349. Defendants' Motions to Dismiss Counts Three, Four, Five, Six and Seven are denied.

C. Counts Eight and Nine

Counts Eight and Nine charge Defendants with conspiring against civil rights, in violation of 18 U.S.C. § 241, and depriving residents of Fort Lee of their civil rights in violation of 18 U.S.C. §§ 242 and 2. Section 242 prohibits persons acting "under color of any law, statute, ordinance, regulation, or custom" from "willfully subject[ing] 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 . . . ." 18 U.S.C. § 242. Defendants argue that Counts Eight and Nine must be dismissed because there is no constitutional right to "localized travel on public roadways," and even if such a right exists, it has not yet been "clearly established." (Kelly Reply Br. at 15–18; Baroni Mot. at 47.)

It is true that the Supreme Court has not yet recognized a constitutional right to localized travel, *see, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275 (1993) (differentiating between interstate, which is constitutionally protected, and intrastate travel) and the federal appellate courts are split on the issue. *See, e.g., Cole v. Housing Auth. of the City of Newport, et al.*, 435 F.2d 807, 809 (1st Cir. 1970) (recognizing the right); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (recognizing the right); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (recognizing the right); *Johnson v. City of Cincinnati*, 310 F.3d 484, 506–09 (6th Cir. 2002) (recognizing the right); *but see, e.g., Eldridge v. Bouchard*, 645 F. Supp. 749 (W.D. Va. 1986) *aff'd w.o. opinion*, 823 F.2d 596 (4th Cir. 1987) (rejecting the right); *Wright v. City of Jackson*, 506

F.2d 900, 903–04 (5th Cir. 1975) (rejecting the right); *Ahern v. Murphy*, 457 F.2d 363, 364–65 (7th Cir. 1972) (rejecting the right); *Townes v. City of St. Louis*, 949 F. Supp. 731 (E.D. Mo. 1996) *aff'd w.o. opinion* 112 F.3d 514 (8th Cir. 1997) (rejecting the right). In 1990, however, the Third Circuit, explicitly recognized the right to intrastate travel in its decision in *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990). In *Lutz*, the Third Circuit held that a right to intrastate travel exists under even the narrowest conception of substantive due process and held that restrictions on that right are only permissible if they are narrowly tailored to meet significant government objectives. *Id.*, 899 F.2d at 268, 270 (upholding an anti-cruising ordinance imposed during the city's rush hour in order to eliminate traffic that, among other things, impeded emergency vehicles). In so doing, the Third Circuit concluded "that the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'" *Id.* at 268.

A right is "clearly established," not when every possible factual scenario as to that right is identified, but rather when parties are on notice that their actions would be unconstitutional. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002) (stating that "officials can still be on notice that their conduct violates established law even in novel factual circumstances" and further noting that "binding . . . Circuit precedent" is such notice) (citing *United States v. Lanier*, 520 U.S. 259, 269 (1997)); *United States v. Cross*, 128 F.3d 145, 149 (3d Cir. 1997) (finding that so long as "the civil right allegedly violated is defined in the preexisting case law in a way that gave clear notice

that the defendant's proposed conduct would abridge it, a prior conviction or analogous facts are not necessary"); *see also Townes v. City of New York*, 176 F.3d 138, 144 (2d Cir. 1999) (considering "whether a particular right was clearly established as of a particular time" by examining whether the right had been "defined with reasonable clarity" and whether the Supreme Court or Circuit Court "had affirmed the existence of the right"); *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (stating that in determining "whether a new scenario is sufficiently analogous to previously established law to warn an official that his/her conduct is unconstitutional," a court may look to "closely analogous case[s]" or to evidence "that the Defendant's conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court"). *Lutz* made it clear that individuals have a right to intrastate travel, and that the right may only be curtailed by a significant government objective, narrowly tailored to achieve that goal. *Lutz*, 776 F.2d at 269; *see also Lanin v. Borough of Tenafly*, No. 12-2725 (KM)(MCA), 2014 Wl 31350, at *9 (D.N.J. Jan. 2, 2014) *aff'd*, 515 F. App'x 114 (3d Cir. 2013) (recognizing *Lutz* and the established right to intrastate travel "subject to reasonable regulation"). As such, public officials in this Circuit are on notice that they may only restrict the right of citizens to travel within a state for legitimate purposes.

The Government has not exceeded its authority in bringing charges against Defendants for violating that right. Here, the Indictment alleges that Defendants conspired to, and in fact did, disrupt traffic for Fort Lee residents on the GWB, impeding their right to

travel inside the state of New Jersey free from arbitrary impediments. Defendants did so, the Indictment charges, not to achieve a legitimate and significant government interest, but rather to achieve an illegitimate political end – *i.e.* the punishment of Fort Lee's mayor for failing to support Governor Christie's re-election. (Indictment at 5.) A reasonable public official should have known that that conduct was "patently violative" of the constitutional right to intrastate travel recognized by the Third Circuit in *Lutz*. Political payback is not a significant government interest.[8] Taking those facts as true, as this Court must on a motion to dismiss the Indictment, this Court finds them sufficient to sustain the charges under 18 U.S.C. §§ 241, 242 and 2. Defendants' motions to dismiss Counts Eight and Nine, therefore, are denied.

D. The Use of Baroni's Testimony and Document Production

In addition to the count-specific arguments made above, Baroni separately moves to dismiss the Indictment on the grounds that it was "obtained by improperly using immunized testimony" given to the Committee. (Baroni Mot. at 5–10.)

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[8] Defendants argue that the right to intrastate travel articulated in *Lutz* does not create a "constitutional right to be free from improperly created traffic." (Kelly Reply Br. at 15.) The right articulated in *Lutz* is freedom to travel within a state, subject to abridgement by a significant government interest narrowly tailored to achieve that goal. Where traffic is a byproduct of a significant government interest imposed in a limited fashion to meet that goal, it may be constitutional. *See, e.g., Lanin*, 2014 WL 31350 at *9. That is not what is alleged here, however.

On November 20, 2013, the New Jersey State Legislature, Assembly Transportation, Public Works and Independent Authorities Committee ("the Committee") sent Baroni a letter inviting him to testify before the Committee about the lane closures. (Gov't Opp'n Br. Ex. 1.) The letter, signed by the Committee's Chairman, Assemblyman John Wisniewski, advised Baroni that failure to appear to testify on November 25, 2013 "will result in the issuance of subpoenas to require personal appearance to testify before the committee on this matter." (*Id.*)[9] Mr. Baroni, accompanied by counsel, voluntarily appeared on November 25th and testified about various matters relating to the lane closures. (Gov't Opp'n Br. Ex. 2; Baroni Mot. at 5.) He was not sworn in prior to his testimony. (Gov't Opp'n Br. at 95–96; Baroni Mot. at 5.) The Indictment refers to that testimony and alleges that Baroni "knowingly and intentionally made . . . misleading statements and false representations . . . ." (Indictment at 23; Baroni Mot. at 6.) The Indictment also identifies the allegedly false and misleading testimony as an overt act for the purposes of Count One. (Indictment at 27.)

N.J.S.A. 52:13-3 provides in relevant part that:

> Witnesses summoned to appear before any committee authorized by this article or any other law to conduct an investigation or inquiry shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the state. All such witnesses may be sworn by any member of the committee conducting the

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[9] Identical letters were also sent to David Wildstein, Patrick Foye, and Michael Fedorko, Jr. (Gov't Opp'n Br. Ex. 1.)

> investigation or inquiry; and *all witnesses sworn* before any such *committee shall answer truly all questions put to them* which the committee shall decide to be proper and pertinent to the investigation or inquiry; and *any witness so sworn* who shall swear falsely shall be guilty of perjury. *No such witness* shall be excused from answering any such questions on the ground that to answer the same might or would incriminate him; *but no answers made by any witness to any such questions shall be used or admitted in evidence in any proceeding against such witness, except in a criminal prosecution against the witness for perjury in respect to his answers to such questions.*
>
> N.J.S.A. 52:13-3 (emphasis added).

The plain language of the statute grants immunity only to witnesses sworn prior to giving testimony. The statute first requires that "all witnesses sworn before any such committee" must answer questions truthfully. The next sentence refers back to that provision, noting that sworn witnesses are not permitted to refuse to answer the questions posed to them to avoid self- incrimination and providing that "no answers made by any witness to any such questions shall be used or admitted in evidence in any proceeding against such witness . . . ." Thus, the plain language of the statute confers immunity only on those witnesses sworn to testify. Here, because Baroni was not under oath when he appeared before the Committee, his testimony is not immunized under the

statute and may be properly used by the Government.[10]

After his testimony before the Committee, the New Jersey State Legislature Select Committee on Investigation ("SCI") served Baroni with subpoenas dated December 12, 2013, January 16, 2014, January 27, 2014, and February 10, 2014 compelling him to produce documents. (Gov't Opp'n Br. 95, Ex. 3; Baroni Reply Ex. 1.)[11] Attached to each subpoena was a copy of N.J.S.A. 52:13-3 and related statutes. (Gov't Opp'n Br. Ex. 3; Baroni Reply Ex. 1.) The cover letters for each of Baroni's productions stated that they were

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[10] Because this Court finds that Baroni was not under oath when he testified, it need not reach the issue of whether Baroni was "summoned" pursuant to the statute, although this Court notes that the phrase "summoned to appear" has been understood to mean "subpoenas for document production as well as to provide actual testimony." *N.J. Legislative Select Comm. on Investigation v. Kelly*, Nos. L-350-14, L-354-14, 2014 WL 1760028, at *33 (N.J. Super. L. Apr. 9, 2014). Here, Baroni was not under subpoena when he appeared before the Committee and arguably was not "summoned" under the Statute. The fact that he could have been subpoenaed and was informed accordingly does not change the fact that he appeared voluntarily at the Committee's invitation.

[11] The December subpoena was addressed to Baroni as the Deputy Executive Director of the Port Authority, and the January subpoena was addressed to Baroni's attorneys at the Law Office of Lowenstein Sandler. (Gov't Opp'n Br. Ex. 3; Baroni Reply Ex. 1.)

In January 2015, the United States Attorney's Office for the District of New Jersey ("USAO") subpoenaed the New Jersey Legislature for "any and all records obtained . . . by the Committee in connection with its inquiry and investigation of the reduction of access lanes for the Borough of Fort Lee to the George Washington Bridge" and recordings of Baroni's November 25th testimony. (Baroni Reply at 10.)

made "pursuant to N.J.S.A. 52:13-3, *State v. Spindel*, 24 N.J. 395 (1957), *United States v. Hubbell*, 530 U.S. 27 (2000), and *United States v. Doe*, 465 U.S. 605 (1984)." (Baroni Reply Br. Ex. 1 at E39, 41 43.) In response to Baroni's document productions, Reid Schar, counsel for the SCI informed Baroni's counsel on February 25, 2014 that "Baroni's production of documents to the [SCI] in no way confers immunity on Mr. Baroni, including for any testimonial aspect of the production. The [SCI] accepts the documents produced to date without any limitations or acceptance of the application of the authorities you cite" in those cover letters. (Gov't Sur-Reply Ex. 1.) On March 5, 2014, the USAO wrote to Baroni's counsel to set out the terms under which it would "accept Mr. Baroni's voluntary production to the government" of the materials Baroni had provided to the SCI. (Gov't Sur-Reply Ex. 2.) In that letter, the USAO stated that if Baroni were prosecuted "the government may use the Baroni documents without restriction against him in the government's case-in-chief at trial or for purposes of sentencing" but would not use the "act of producing" the documents against him. (*Id.*) Baroni's counsel accepted those terms on March 7, 2014. (Id.) Baroni now requests a hearing pursuant to the Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), on the issue of whether the Government improperly used documents he produced to the SCI, arguing that he produced documents "pursuant to state-law immunity." (Baroni Reply at 8–12.)

In *Kastigar,* the Supreme Court sought to protect against the improper use of immunized testimony and held that "[o]nce a defendant demonstrates that he has

testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Kastigar*, 406 U.S. at 460 (internal citation omitted). As discussed above, Baroni did not testify before the Committee under state immunity pursuant to N.J.S.A. 52:13-3. Nor were his productions to the SCI immunized. In addition, counsel for the SCI explicitly informed Baroni's counsel that his production "in no way confer[red] immunity on" him.[12] (Gov't Sur-Reply Ex. 1.) Further, the Government explicitly reserved its right to use the documents against Baroni "without restriction." (Gov't Sur-Reply Ex. 2.) Therefore, this Court sees no grounds upon which Baroni can claim that those document productions were immunized or that the Government was precluded from using them either to craft the Indictment or to prosecute. Baroni's motion to dismiss the Indictment based on the Government's use of his testimony before the Committee or his document production to the SCI is denied.

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[12] Baroni argues that because those documents were produced in response to a subpoena, they should fall under the immunity provision of N.J.S.A. 52:13-3. However, as discussed above, the statutory immunity provided for only attaches to testimony that is both summoned (subpoenaed) and sworn. Because Baroni's testimony was never sworn, he has no basis upon which to claim immunity.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions to Dismiss the Indictment and for a *Kastigar* hearing are **DENIED**. An appropriate order follows.

/s/ Susan D. Wigenton
SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. WILLIAM E. BARONI, JR. and BRIDGET ANNE KELLY, Defendants.	Case: 2:15-cr-00193-SDW **OPINION** March 1, 2017

WIGENTON, District Judge.

Before this Court are Defendants William E. Baroni Jr. ("Baroni") and Bridget Anne Kelly's ("Kelly") (collectively, "Defendants") Motions for Judgments of Acquittal pursuant to Federal Rule of Criminal Procedure 29 and Motions for a New Trial pursuant to Federal Rule of Criminal Procedure 33.[1]

[1] All citations in this Opinion to "BB" refer to Baroni's Brief in Support of his Motion for Judgment of Acquittal/New Trial and all citations to "KB" refer to Kelly's Brief in Support of her Motion for Judgment of Acquittal/New Trial. Citations to "GB" refer to

For the reasons stated below, the Motions are DENIED.

I. BACKGROUND AND PROCEDURAL HISTORY

This Court assumes familiarity with the allegations and procedural history of this case and reviews only the facts relevant to the present motions. On April 23, 2015, Baroni, former Deputy Executive Director of the Port Authority of New York and New Jersey ("Port Authority"), and Kelly, former Deputy Chief of Staff for Legislative and Intergovernmental Affairs for the Office of the Governor of New Jersey were indicted by the United States Attorney's Office for the District of New Jersey for their alleged roles in improperly closing lanes on the George Washington Bridge in September 2013 to create traffic problems in order to punish the Mayor of Fort Lee, New Jersey, Mark Sokolich ("Sokolich"), for refusing to endorse Governor Chris Christie's re-election campaign. (Dkt. No. 1, Indictment at 4–5.)

The Indictment charged Defendants as follows:

Count 1: Conspiracy to Obtain by Fraud, Knowingly Convert, and Intentionally Misapply Property of an Organization Receiving Federal Benefits in violation

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the Government's Opposition Brief and citations to "GX" refer to Government trial exhibits.

As Defendants seek to join each other's motions, arguments made by one defendant are applied to both, unless otherwise noted. (KB at 58 (stating that "[t]o the extent not inconsistent with her arguments, Ms. Kelly joins in the arguments put forth by Mr. Baroni"); Baroni Letter (Dkt. No. 306) (stating that "Mr. Baroni hereby joins in Ms. Kelly's post-trial motions").)

of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 371.

Count 2: Obtaining by Fraud, Knowingly Converting, and Intentionally Misapplying Property of an Organization Receiving Federal Benefits in violation of 18 U.S.C. § 666(a)(1)(A) and § 2.

Count 3: Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. § 1349.

Counts 4–7: Wire Fraud in violation of 18 U.S.C. § 1343 and § 2.[2]

Count 8: Conspiracy against Civil Rights in violation of 18 U.S.C. § 241.

Count 9: Deprivation of Civil Rights in violation of 18 U.S.C. § 242 and § 2.

On February 1, 2016, Defendants moved to dismiss the Indictment. (Dkt. Nos. 71, 72.) On June 13, 2016, this Court denied those motions. *See United States v. Baroni*, Crim No. 15-193(SDW), 2016 WL 3388302 (D.N.J. June 13, 2016). Trial began on September 19, 2016 and the jury began deliberating on October 31, 2016. On November 1, 2016, the jury sent Jury Note 4 which read, "Can you be guilty of conspiracy without the act being intentionally punative [sic] toward Mayor Socholich [sic]." (Dkt. No. 259.) After hearing oral argument from the defense and prosecution, (11/1/16 Tr. at 16–28) the Court responded, "Yes. Please consider this along with all other instructions that have been given to you." (Dkt. No. 260.) On

[2] Counts Four and Six were brought against Defendant Kelly and counts Five and Seven against Defendant Baroni.

November 2, 2016, the jurors were instructed not to deliberate while the parties and the Court conferred on an issue that had arisen. (11/2/16 Tr. at 5:20–23.) That same day, Defendants moved for reconsideration of the Court's response to Jury Note 4, and also sought broad reconsideration of the Court's holding that the Government was not required to prove beyond a reasonable doubt that Defendants sought to punish Mayor Sokolich. (Dkt. No. 265.) The Government opposed, and this Court denied, the motion on November 3, 2016. (Dkt. Nos. 271, 272.) That same day, the jury was instructed to resume deliberations. On November 4, 2016, the jury found Defendants guilty on all counts.[3] Defendants filed Notices of Motion for Judgments of Acquittal/New Trial on November 11, 2017[4] and filed their briefs in support of their motions on December 19, 2016. The Government filed its opposition on January 17, 2017.[5]

II. LEGAL STANDARD

Federal Rule of Criminal Procedure 29 requires the district court to enter a judgment of acquittal for "any

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[3] On November 3 and 4, 2016, Defendants also filed motions asking this Court to instruct the jury to disregard certain evidence regarding Jersey City Mayor Steven Fulop and Mayor Sokolich. (Dkt. Nos. 274, 278.) The jury returned its verdict before this Court was able to rule on those motions. Therefore, they will be dismissed as moot.

[4] Defendants moved for judgments of acquittal pursuant to Rule 29 at the close of the Government's case and also at the close of the defense case. (*See*, 10/14/16 Tr. at 61:4–12, 70:5–7; 10/26/16 Tr. at 45:6–18.) This Court reserved decision and addresses all issues raised by those motions in this Opinion.

[5] Defendants waived their right to reply. (Dkt. No. 303.)

offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). However, the court must "sustain the verdict if there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision." *United States v. Gambone*, 314 F.3d 163, 169–70 (3d Cir. 2003); *see also United States v. Flores*, 454 F.3d 149, 154 (3d Cir. 2006). In reviewing a motion for acquittal, the court "must be ever vigilant . . . not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." *Flores*, 454 F.3d at 154 (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)). The court must view "the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Silveus*, 542 F.3d 993, 1002 (3d Cir. 2008) (internal citations omitted); *see also United States v. Styles*, No. 15-2629, 2016 WL 4254914, at **3 (3d Cir. Aug. 12, 2016). The government also receives "the benefit of inferences that may be drawn from the evidence and the evidence may be considered probative even if it is circumstantial." *United States v. Pecora*, 738 F.3d 614, 618 (3d Cir. 1986). As such, a defendant bears "a heavy burden" to establish that the trial evidence was insufficient to support a conviction. *United States v. Young*, 334 Fed. App'x 477, 480 (3d Cir. 2009); *see also United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990).

The standard under Federal Rule of Criminal Procedure 33 is "more general" and provides that "the court may vacate any judgment and grant a new trial

if the interest of justice so requires." *United States v. Tiangco*, No. 15-567(KM), 2016 WL 7104841, at *2 (D.N.J. Dec. 5, 2016) (citing FED. R. CRIM. P. 33(a)). However, "even if a district court believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial 'only if it believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.'" *Silveus*¸ 542 F.3d at 1004–05 (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). The court is not required to "view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *Johnson*, 302 F.3d at 150. "Such motions are not favored and should be 'granted sparingly and only in exceptional cases.'" *Silveus*, 542 F.3d at 1005 (internal citations omitted).

III. DISCUSSION

Defendants challenge their conviction on all counts, raising both constitutional and sufficiency of the evidence arguments. Before turning to Defendants' count-specific arguments, this Court first addresses the Government's burden of proof as to whether Defendants acted to punish Mayor Sokolich.

A.

Defendants generally contend that the punishment of Mayor Sokolich was "an essential element of each of the charged offenses" which the Government was required to prove beyond a reasonable doubt. (KB at 1, 3, 5.)[6] As this Court has previously held, however, any punitive goal Defendants may have had goes to

[6] Kelly devoted most of her 60 page brief to this issue.

their motive for violating the charged statutes, it is not an essential element of any of the crimes charged.[7] *See, e.g., United States v. Sriyuth*, 98 F.3d 739, 747 n.12 (3d Cir. 1996) (stating that "motive is always relevant" even though it is not a necessary element of a crime); 3D CIR. MODEL JURY INST. § 5.04 (instructing that "[i]ntent and motive are different concepts" and noting that "[m]otive is what prompts a person to act" but "[i]ntent refers only to the state of mind with which the particular act is done"). Defendants' motivation to punish Mayor Sokolich was central to the Government's case – the prosecution included that allegation in the Indictment (Dkt. No. 1 at ¶¶ 4, 7, 12–18), referred to it in the prosecution's opening statement (9/19/16 Tr. 17–36), and introduced evidence of Defendants' punitive goals during trial, (*see, e.g.*, GX5003-BK-03a; 9/26/16 Tr. at 65:1–8, 66:3–10, 81:18–25; 10/5/16 Tr. at 119:16) – but only as a means of explaining to the jury why Defendants may have violated the law. Because it is not an element of the offenses charged, the Government was under no obligation to introduce evidence of motive, although motive helps present a coherent narrative of events to a jury. It is not criminal under Section 666 to punish or conspire to punish Mayor Sokolich; rather, it is criminal under Section 666 to intentionally misuse Port Authority property.

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[7] *See* 9/19/16 Tr. 4:17–25 ("Motive is not an element that has to be proven. Motive is not an element of the conspiracy."); 10/25/16 Tr. 187:4–13 (referring to punishment of Mayor Sokolich as "motive" that "goes beyond what the object of the conspiracy is" which was "misusing [Port Authority] funds");

Therefore, it would have been improper to have instructed the jury that Defendants' punitive motive was an essential element of any of the crimes at issue. Indeed, as to the conspiracy charges, this Court was required to instruct the jury not as to Defendants' motives, but as to the object of the conspiracies charged: to misuse Port Authority resources (Count One), to defraud the Port Authority (Count Three), and to violate the travel rights of Fort Lee residents (Count Eight). *See, e.g.*, 18 U.S.C. § 371 (defining the object of the conspiracy as the commission of "any offense against the United States").[8]

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[8] The jury may have convicted Defendants not knowing what drove them to act as they did or even believing that each defendant had a different motive. *See, e,g., United States v. Cervantes*, 466 F.2d 736, 738 (7th Cir. 1972) (finding that a conspiracy can exists even where members "have dissimilar motives for participating in it"); *United States v. Harrison*, 942 F.2d 751, 756 (10th Cir. 1991) (stating that "[t]he goals of all the participants need not be congruent for a single conspiracy to exists, so long as their goals are not at cross purposes") (internal citation omitted).

This Court finds no merit in Defendants' argument that their Sixth Amendment right to a unanimous verdict was violated because "the jury did not unanimously find that the government proved punishment beyond a reasonable doubt," (KB at 35) as Defendants' punitive purpose is not an essential element of the crime.

Nor did the Court's refusal to instruct the jury that the Government was required to prove punishment beyond a reasonable doubt constructively amend the indictment, (KB at 35–36), because an indictment is only constructively amended "when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense." *United States v. Duka*, 671 F.3d 329, 352 (3d Cir. 2011)

This Court's response to Jury Note 4 properly reflected this distinction. The jury asked if it was required to find that Defendants acted to intentionally punish Mayor Sokolich and this Court replied in the negative. The response did not, as Defendants argue, negate the need to prove intent, it merely negated the need to prove Defendants' motive. The jury was allowed to consider, but was not required to find, that Defendants wanted to retaliate against Mayor Sokolich.

B.

Counts One & Two

Counts One and Two charge conspiracy to violate and substantive violations of 18 U.S.C. § 666(a)(1)(A). Section 666 provides in relevant part:

> **(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; . . .

(internal citation omitted). Motive is not an essential term of any of the charged offenses.

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

18 U.S.C. § 666(a)(1)(A).

Defendants seek judgments of acquittal on Counts One and Two, arguing 1) that Section 666(a)(1)(A) is void for vagueness as applied, 2) the government failed to present sufficient evidence that Defendants "agreed to or did obtain property by fraud, act without authority, or intentionally misapply property of the Port Authority," and 3) the government failed to present sufficient evidence that the property in question had a value of at least $5,000. (BB at 1.)

1. *Void for Vagueness*

A criminal statute is void for vagueness if it "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'" *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (internal citations omitted); *see also United States v. Stevens*, 533 F.3d 218, 249 (3d Cir. 2008); *United States v. Moyer*, 674 F.3d 192, 211 (3d Cir. 2012). This doctrine "does not mean that [a] statute must define every factual situation that may arise." *United States v. Nelson*, 712 F.3d 498, 508 (11th Cir. 2013). Rather, a statute is sufficiently clear "where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

Defendants take the position that Section 666 is void for vagueness as applied to them because the "misapplication" provision, § 666(a)(1)(A), fails to provide sufficient guidance to "ordinary people" or law enforcement to "understand what conduct is

prohibited." (BB at 18–24.) Baroni specifically asserts that the "misapplication" provision "effectively criminalizes making any decision to expend Port Authority resources with political considerations in mind." (BB at 20.)

As this Court noted previously, "[t]he statutory language of § 666(a)(1)(A) is broad, but not unclear." *Baroni*, 2016 WL 3388302 at *3 n.3; *see also Salinas v. United States*, 522 U.S. 52, 52, 57 (1997) (describing the statute as having "plain and unambiguous meaning" and "expansive, unqualified language"); *United States v. Rooney*, 37 F.3d 847, 851 (2d Cir. 1994) (noting that "Congress intended the terms of the statute to be 'construed broadly'"). Moreover, courts have specifically held that "[t]he term 'intentionally misapply,' as it is used in § 666, is not unconstitutionally vague." *United States v. Urlacher*, 979 F.2d 935, 939 (2d Cir. 1992); *see also United States v. Deen*, Crim. No. 14-184-01-03, 2016 WL 900463, at *3 (W.D. La. Mar. 7, 2016) (finding that "men of common intelligence are not required to guess at [the] meaning" of § 666(a)(1)(A)). The statute was enacted "to protect federal funds by authorizing federal prosecution of thefts and embezzlement from programs receiving substantial federal support even if the property involved no longer belonged to the federal government." *United States v. Cicco*, 938 F.2d 441, 445 (3d Cir. 1991). To that end, "§ 666 convictions based on the use of public money for political activities [are] unexceptionable." *United States v. Genova*, 333 F.3d 750, 755 (7th Cir. 2003); see also *United States v. Willis*, 844 F.3d 155, 165 (3d Cir. 2016) (noting that Congress intended that § 666 be used "to root out public corruption").

Defendants' argument that the statute improperly criminalizes political activities is not persuasive. That argument conflates motive (political considerations) with *mens reas* and conduct (intentional misapplication). As discussed in Section A, *supra*, the former is merely the reason a defendant may engage in activities that violate Section 666, while the latter is what triggers prosecution under the statute.[9] This Court is satisfied that both the plain text of the statute, as well as court decisions, put Defendants on notice that intentional misapplication of Port Authority resources was criminal and gave appropriate guidance to law enforcement as to what conduct would violate the statute.[10]

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[9] For example, had Defendants chosen to retaliate against Mayor Sokolich by withholding political support, or failing to invite him to a political fundraiser, the Government would have no basis upon which to charge them with violating Section 666.

[10] Nor is this Court persuaded by Defendants' argument that principles of federalism require a narrow reading of Section 666 to limit it to an "anti-theft and anti-bribery law." (*See* BB at 5–8.) As noted above, the statute was intended to be, and has been, read broadly in order to encompass an array of wrongful conduct. *See, e.g., Willis*, 844 F.3d at 165 (noting that "Congress expressly intended 'to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a federal program.'") (quoting S. Rep. No. 98-225, at 369 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3510); *United States v. Baroni*¸ 2016 WL 3388302, at *5 n.4 (rejecting defendants' argument to limit the reach of the statute because it is captioned "'Theft or bribery concerning programs receiving Federal funds' and has been referred to as an 'anti-bribery" rule,' finding that 'a caption alone does not define a statute's essential elements.'") (citing *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007)).

Further, as applied to Defendants, the evidence introduced at trial was sufficient for a reasonable jury to conclude that Defendants understood that what they were doing was wrong. Specifically, the Government produced evidence that Defendants concealed the real reason for the lane closures from Port Authority personnel, Fort Lee officials, the New Jersey Legislature and the media both during and after the closures occurred. (*See, e.g.*, 9/26/16 Trial Tr. at 73:3–5, 81:20–25, 85:1–15, 92:20–95:20, 96:8–24, 97:9–19, 118:6–129:15, 133:11–134:17, 136:3–140:11, 145:3–148:14, 149:3–151:2, 151:13–152:5, 156:12–160:14; 9/28/16 Tr. at 11:5–24:10, 25:3–31:18; 9/29/16 Tr. at 76:9–19; 9/30/16 Tr. at 59:9–60:15; 10/5/16 Tr. at 18:11–19:4; 23:3–7, 10/6/16 Tr. at 173–75; and 10/13/16 Tr. at 77:6–93:25.) Viewing the evidence in the light most favorable to the prosecution, this Court finds that a reasonable jury could have inferred an intent to misapply Port Authority funds in violation of Section 666 from Defendants' efforts to conceal their activities. *See, e.g., United States v. Dubón-Otero*, 292 F.3d 1, 11–12 (1st Cir. 2002) (citing evidence of concealment introduced at trial as a basis upon which "a jury could find that defendants 'without valid authority' embezzled, stole or obtained by fraud money or property"). Accordingly, Defendants' void-for-vagueness challenge as to their convictions is unavailing.

2. *Sufficiency of the Evidence*

Defendants also argue that the Government failed to introduce sufficient evidence to warrant a conviction under Section 666, because 1) property is limited to tangible property, 2) neither defendant personally benefitted from the lane closures, 3) Baroni

had the authority "to undertake every action alleged in the Indictment," and 4) the value of the property at issue was under the $5,000 statutory minimum. (BB at 6–9, KB at 38–49.)

First, Section 666 does not limit the definition of property to tangible goods. *Baroni*, 2016 WL 3388302, at *6 (discussing the definition of property under the statute); *see also United States v. Lawson*, No. Crim. 3:08-21-DCR, 2009 WL 1324157, at *2 (E.D. Ky. May 11, 2009) (finding that "employee time is property within the meaning of this term in § 666(a)(1)(A) because this term includes both tangible and intangible property" and holding that "engineer estimates constitute 'property'" for the purposes of § 666(a)(1)(A)). Accordingly, "'compensation paid to [Port Authority] personnel in connection with the lane realignment,' losses incurred from repeating a spoiled traffic study, and the value of the access lanes and toll booths" are permissible under Section 666. *Baroni*, 2016 WL 3388302, at *6.

Second, as this Court has ruled previously, a person may violate Section 666 even if he or she does not realize a personal gain. *See Id*. at *6 (finding that "[m]isapplication can refer to any improper use of property, whether or not for personal gain, and can even encompass situations in which an organization benefits from the misuse"); *see also United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995) (finding misappropriation of property under § 666(a)(1)(A) where an employee falsely certified that federal funds were used for training purposes, but instead used those funds to purchase computers for the organization); 3D CIR. MODEL CRIM. JURY INSTR. § 6.18.666A1A-3 (stating that misapplication

"includes the wrongful use of the money or property for an unauthorized purpose, even if such use benefitted the organization").

Third, although Baroni had substantial authority as the Deputy Director of the Port Authority, *see, e.g.*, 9/23/16 Tr. at 135–136; 10/11/16 Tr. at 31–32, the Executive Director, Pat Foye, testified at trial that Baroni violated Port Authority policies regarding lane closures.[11] (*See* 9/21/16 Tr. at 103:6–12, 131:22–132:4, 154:11–18.) Additional testimony indicated that the lane reductions were not in line with routine Port Authority procedures and departed significantly from prior practices. Tellingly, witnesses testified that traffic studies are ordinarily conducted without any lane closures or disruptions to traffic. (10/6/16 Tr. at 33–34 (testimony of Port Authority Engineer Umang Patel); 9/22/16 Tr. at 150:17–151:3 (testimony of Port Authority head of Government and Community Relations Tina Lado); 9/26/16 Tr. at 102:3–103:14 (testimony of co- conspirator David Wildstein).) The trial testimony also indicates that the failure of Port Authority personnel to respond to Mayor Sokolich's requests for information or assistance ran counter to the Port Authority's typical efforts to communicate with local officials. (*See* 9/22/16 Tr. at 82:3–84:5, 143:22–148:23; 9/21/16 Tr. at 108:19–110:17.) Accordingly, the jury could have reasonably found that

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[11] This Court is unpersuaded by Baroni's argument that the lack of written policies regarding lane closures or realignments indicates that he had absolute authority to manage Port Authority resources or lanes. (BB at 11–12.) Baroni equates the absence of written policies with unfettered power – they are not the same thing. More importantly, Baroni made this argument at trial and the jury's verdict indicates that the jurors rejected it.

Baroni did not have the authority to close or realign the lanes as he did.

Finally, in order "to avoid prosecutions for minor kickbacks and limit violations to cases of outright corruption," charges under Section 666 may only be brought if the property in question is worth at least $5,000. *United States v. Abbey*, 560 F.3d 513, 522 (6th Cir. 2009); *see also United States v. Briston*, 192 F. App'x 84, 86 (3d Cir. 2006) (stating that the $5,000 threshold is a jurisdictional requirement). Defendants argue that 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)" and "failed to prove that a significant amount of the expenses incurred by the Port Authority [were] reasonably foreseeable." (BB at 15–16, KB 45–49.) This Court finds no support, nor do Defendants provide any, for their proximate cause argument. Defendants' "knowledge of jurisdictional fact[s] is irrelevant." *United States v. Crutchley*, 502 F.2d 1195, 1201 (3d Cir. 1974). The determination of whether wages are "bona fide" and subject to the provision's protection is a question of fact for the jury. *See, e.g., United States v. Williams*, 507 F.3d 905, 909 (5th Cir. 2007) (noting that "[w]hether wages are bona fide and earned in the usual course of business is a question of fact for the jury to decide"). As this Court previously held, "although § 666(c)'s safe harbor provision protects bona fide compensation paid in the 'usual course of business,' it does not apply where employee services have been diverted to work that is not part of an organization's usual course of business." *See Baroni*, 2016 WL 3388302 at *6 (citing cases). Here, the Government introduced evidence that Defendants

diverted Port Authority personnel to do work that was not part of the agency's "usual course of business" when reconfiguring the access lanes. (*See, e.g.*, 9/26/16 Tr. at 102:3–103:14; 10/5/16 Tr. at 214:19–25, 224:16–25; 10/6/16 Tr. at 6–7, 32:20–33:5.) The jury could reasonably find that the value of compensation paid to Port Authority personnel, losses from a ruined traffic study, and the value of the lanes and toll booths were not bona fide and satisfied the $5,000.00 threshold.[12] Defendants' motions for Judgments of Acquittal on Counts One and Two are denied.

Counts Three – Seven

Counts Three through Seven of the Indictment allege that Defendants conspired to commit and did commit wire fraud in violation of 18 U.S.C. § 1349 and §§ 1343 and 2.[13] The elements of wire fraud are "(1) a scheme or artifice to defraud for the purpose of obtaining money or property, (2) participation by the

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[12] The amounts alleged by the Government include $3,696.00 in compensation to tollkeepers, $5,000.00 in compensation to Port Authority personnel, and $4,400.00 to redo a traffic study. (*See* KB at 45.)

[13] The substantive crime of wire fraud itself is defined in relevant part as:

> 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.

18 U.S.C. § 1343.

defendant with specific intent to defraud, and (3) use of the mails or wire transmissions in furtherance of the scheme." *Nat'l Sec. Sys. v. Iola*, 700 F.3d 65, 105 (3d Cir. 2012); *see also United States v. Riley*, 621 F.3d 312, 329 (3d Cir. 2010); *United States v. Al Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004); 3D CIR. MODEL CRIM. JURY INSTR. § 6.18.1343. "Additionally, the object of the alleged scheme or artifice to defraud must be a traditionally recognized property right." *Al Hedaithy*, 392 F.3d at 590 (internal citation omitted).

Defendants challenge their convictions on these counts, alleging that the Government failed to present sufficient evidence that Defendants defrauded the Port Authority because Baroni had the authority to close the Local Access Lanes. (BB at 25.) Baroni argues that "at most" the evidence shows that Defendants "lied to obscure the political motivation behind the otherwise permissible redistribution of public resources."[14] (BB at 25.) As discussed above, the Government presented evidence at trial from which the jury could reasonably have found that Baroni did not have the authority to change the lane configurations, and in fact, did defraud the Port Authority. The existence and scope of Baroni's authority was a question of fact for the jury, and one that the jurors resolved in favor of the prosecution.[15]

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[14] This Court leaves aside the question of why Defendants would need to lie to cover up their actions if they believed them to be permissible.

[15] Defendants go to great lengths to attempt to characterize the wire fraud charges as "an impermissible end-run around Supreme Court limitations on the scope of honest services fraud" in contravention of that court's decision in *Skilling v. United States*, 561 U.S. 358 (2010). (BB at 35.) To do so, Defendants

Defendants' Motions for Judgments of Acquittal on Counts Three, Four, Five, Six and Seven are denied.

Counts Eight and Nine

Defendants were also convicted of conspiring against civil rights, in violation of 18 U.S.C. § 241, and depriving residents of Fort Lee of their civil rights in violation of 18 U.S.C. §§ 242 and 2. Section 242 prohibits persons acting "under color of any law, statute, ordinance, regulation, or custom" from "willfully subject[ing] 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 . . . ." 18 U.S.C. § 242. Defendants challenge their convictions on Counts Eight and Nine, alleging: 1) that there is no constitutional right to intrastate travel (KB 53); 2) that the Government failed to prove that Defendants had an illegitimate purpose in closing the dedicated lanes (KB 51–56, BB 28–29, 34); 3) there was no deprivation of a right to localized travel on public roadways because motorists were only delayed, rather than prohibited from traveling (BB 33–34); and 4) the shocks the conscience

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argue that the Port Authority was deprived of an intangible right to honest services from Defendants rather than a property right. (BB at 35–37.) There is a difference, however, between intangible rights to honest services not covered by the wire fraud statute, and intangible property rights which are. *See, e.g., McNally v. United States*, 483 U.S. 350, 356 (1987); *Carpenter v. United States*, 484 U.S. 19, 25 (1987). As this Court held in its earlier decision "[d]epriving an employer of control over an organization's assets" such as toll booths, roadways, employee compensation and "the costs of redoing a traffic study" is such an intangible property right. *Baroni*, 2016 WL 3388302 at *6, *9.

test as set out in the jury instructions is "hopelessly vague" and the Government also failed to prove that Defendants' conduct did, in fact, shock the conscience (KB 55–57, BB 33).

First, this Court previously held that the right to intrastate travel exists. *See Baroni*, 2016 WL 3388302, at *9 (discussing the recognition and contours of the right and citing cases); *see also Lutz v. City of York*, 899 F.2d 255, 268, 270 (3d Cir. 1990) (holding that the right to intrastate travel exists under even the narrowest conception of substantive due process and that restrictions on that right are only permissible if they are narrowly tailored to meet significant government objectives). This Court has no basis to revisit that holding.[16]

Second, the Government introduced evidence from which a reasonable jury could conclude that Defendants closed the access lanes, not for a legitimate traffic study or other proper goal, but rather for the illegitimate purpose of harming Fort Lee residents. Testimony indicated that the lane closures

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[16] Defendants argue that the Supreme Court's *per curiam* decision in *White v. Pauly*, 137 S. Ct. 548 (2017), "significantly limited the grounds upon which a constitutional right may be considered 'clearly established.'" (Dkt. No. 315 at 1.) This Court disagrees. The Supreme Court merely "reiterate[d]" a "longstanding principle" that precedent "does not require a case directly on point" in order for a right to be clearly established. *White*, 137 S. Ct. at 551–52. This Court applied that principle when reaching its earlier ruling. *See Baroni*, 2016 WL 3388302 at *9 (noting that "[a] right is 'clearly established,' not when every possible factual scenario as to that right is identified, but rather when parties are on notice that their actions would be unconstitutional") (citing cases).

were planned for the first day of the school year to maximize traffic, that Baroni discussed whether the mayor himself would be affected, and that Defendants ignored requests from Fort Lee for assistance and worked to reinstate the closures after they had been reversed. (*See, e.g.*, 9/21/16 Tr. at 136:11–139:20; 9/22/16 Tr. at 177:2–178:1; 9/26/16 Tr. at 72:19–73:8, 99:6–100:14, 101:6–11, 169:13–170:18; 9/27/16 Tr. at 49:2–51:1; GX145, 274, 368, 1091, 1102, 5003, 5008, 7004, 7006.)[17] Testimony also indicated that the Defendants lied about the existence of a legitimate traffic study in order to hide their true purpose for the lane closures. (See e.g., 9/27/16 Tr. at 56:6–58:18.)

Third, this Court finds no basis upon which to limit the right to intrastate travel only to situations in which residents were prevented from traveling as Defendants request. (BB at 33–34, KB 54–55.) The case law makes no such distinction, nor do Defendants provide any support for a determination that there is no deprivation where residents are merely delayed in their travels. The right articulated by the Third

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[17] Defendants also argue that the evidence shows only that the lane closures were designed to punish Mayor Sokolich, not harm Fort Lee residents. (BB at 38–39.) However, it was not necessary that the Government show that the Defendants' only or main goal was to harm that city's residents. *See, e.g,, United States v. Ellis*, 595 F.2d 154, 162 (3d Cir. 1979) (stating that the law does not "require that the immediate intent to violate constitutional rights predominate over the ultimate purposes which that violation is designed to achieve"); s*ee also United States v. Piekarsky*, 687 F.3d 134, 144 (3d Cir. 2012). For the same reason, this Court is unpersuaded by Defendants' contention that because persons other than Fort Lee residents were harmed, they lacked the specific intent to injure the rights of only Fort Lee residents. (BB at 29–30.)

Circuit in *Lutz* "is freedom to travel within a state, subject to abridgement by a significant government interest narrowly tailored to achieve that goal." *Baroni*, 2016 WL 3388302 at *9 n.8. The violation of the right is demonstrated by an infringement of the right for an improper purpose, not by the severity of the infringement. "Where traffic is a byproduct of a significant government interest imposed in a limited fashion to meet that goal, it may be constitutional." *Id*. Neither the evidence nor the testimony supported a legitimate or significant governmental interest in this case.

Finally, the "shocks the conscience" standard as given to the jury was not vague. This standard is routinely given in cases involving violations of substantive due process rights. *See, e.g., United States v. Lanier*, 520 U.S. 259, 262 (1997). In informing the jurors that they could consider "the purpose of the lane and toll booth reductions," "the amount of time and planning that went into them," "the manner in which they were carried out," "whether the defendants persisted with . . . the reductions despite having information about their consequences," and "whether the defendant[s] intended to deprive Fort Lee residents of their right to localized travel," (10/26/16 Tr. at 83:21–84:6) this Court merely exercised its discretion to "tailor" the standard to the facts of this particular case. *United States v. Garrett*, 574 F.2d 778, 783 (3d Cir. 1978) (noting that the trial court had discretion to use "particular language in charging the jury"). Whether Defendants' conduct did, in fact, shock the conscience, was a purely factual issue for the jury and one the jury resolved in favor of the

prosecution. It is not for this Court to replace the jury's determination with its own.

Therefore, Defendants' Motions for Judgments of Acquittal on Counts Eight and Nine are denied.

C.

Defendants also seek a mistrial based on post-trial statements attributed to Juror #10 in a November 4, 2016 NewJersey.com article. (BB at 41–42.) Juror #10 is quoted as saying that November 2, 2016 "was probably the worst day of" deliberations. (BB Ex. D1-D3.) Defendants argue that this statement creates "a genuine question whether the jury engaged in partial deliberations without the entire jury present" in contravention of this Court's instruction not to deliberate on that date. (BB at 42.) This Court disagrees. Juror #10's statement reflects his perception of the deliberations process, but provides no evidence that the jurors ignored this Court's instructions. As such, there are no grounds for a mistrial and Defendants' Motions for a New Trial are denied.[18]

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[18] In the alternative, Defendants contend that this Court should question the jurors or allow counsel to question them as to the events of November 2, 2016. (BB at 41–42.) Federal Rule of Criminal Procedure 606(b) prohibits such questioning absent evidence of "(A) extraneous prejudicial information . . . improperly brought to the jury's attention; (B) an outside influence . . . improperly brought to bear on any juror; or (C) a mistake . . . in entering the verdict on the verdict form." FED. R. CRIM. P 606(b). Defendants do not allege that any of these circumstances exist. Even if Rule 606 permitted post-trial questioning, it would not be appropriate here, where there is no clear evidence of impropriety. *See, e.g., United States v. Anwo*, 97 F. App'x 383, 386–87 (3d Cir. 2004) (noting that "post-verdict

IV. Conclusion

For the reasons set forth above, Defendants' Motions for Judgments of Acquittal and for a New Trial are DENIED. An appropriate order follows.

s/ *Susan D. Wigenton*
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

Orig: Clerk
cc: Parties

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inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts") (internal citation omitted).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1818

UNITED STATES OF AMERICA

v.

BRIDGET ANNE KELLY,

Appellant

(D.N.J. No. 2-15-cr-00193-002)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., KRAUSE, RESTREPO, BIBAS, PORTER, SCIRICA*, and SILER†, *Circuit Judges*

* Vote as to panel rehearing only.

† The Honorable Eugene E. Siler, Jr., Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation. Vote limited to panel rehearing only.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Anthony J. Scirica
Circuit Judge

Dated: February 5, 2019

APPENDIX E

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.

* * *

APPENDIX F

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.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CRIMINAL ACTION 2:15-CR-193-SDW

UNITED STATES OF AMERICA, – vs – WILLIAM E. BARONI, JR., and BRIDGET ANNE KELLY, Defendants.	TRANSCRIPT OF PROCEEDINGS T R I A L Pages 1 – 191

Newark, New Jersey
September 21, 2016

BEFORE: HONORABLE SUSAN D. WIGENTON, UNITED STATES DISTRICT JUDGE AND A JURY

APPEARANCES:

PAUL FISHMAN, ESQ.,
UNITED STATES ATTORNEY
BY: DAVID FEDER, ESQ.
LEE CORTES, ESQ.
VIKAS KHANNA, ESQ.
Attorneys for the Government

BALDASSARE & MARA, LLC
BY: MICHAEL Z. BALDASSARE, ESQ.
JENNIFER MARA, ESQ.
Attorneys for Defendant Baroni

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/Carmen Liloia
CARMEN LILOIA
Official Court Reporter
(973) 477-9704

[Direct Examination of Patrick Foye by the Assistant United States Attorney]

* * *

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Q * * *

In his testimony, in that testimony in November of 2013, do you recall Mr. Baroni talking about certain policies in relation to what had happened in Fort Lee earlier in September?

A In his statements to the legislature?

Q Correct.

A Yes, sir.

Q And do you recall that one of the policies that Mr. Baroni raised was that the Executive Director and the Deputy Executive Director affirmatively approved

any non-emergency permanent change or study of a lane configuration?

A I recall that.

Q And you recall that being raised —

A Yes, I recall Bill Baroni saying that in the legislature testimony, statement.

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Q At any point in time did Mr. Baroni ever discuss such a policy with you?

A No, sir.

Q Was any such policy ever proposed or put in place at the Port Authority?

A No, sir.

Q And similarly in that testimony before the legislature, do you recall Mr. Baroni's reference to a policy that would require that a monthly report of any lane configuration change would be forwarded to the Operations Committee of the Board?

A Sorry, do I recall him raising that in —

Q At the legislature testimony.

A I do.

Q And at any point in time did Mr. Baroni ever discuss that policy with you?

A No, sir.

Q Was any such policy ever proposed or put into place at the Port Authority?

A No, sir.

* * *