No. 18-1059

In the Supreme Court of the United States

BRIDGET ANNE KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's convictions for wire fraud and federal-program fraud when she and her co-conspirators engaged in deception that caused the Port Authority of New York and New Jersey to pay thousands of dollars to employees for unnecessary work that served no legitimate Port Authority function.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is published at 909 F.3d 550. The opinion of the district court (Pet. App. 105a-128a) is not published in the Federal Supplement but is available at 2017 WL 787122. A prior opinion of the district court (Pet. App. 75a-104a) is not published in the Federal Supplement but is available at 2016 WL 3388302.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2018. A petition for rehearing was denied on February 5, 2019 (Pet. App. 129a-130a). The petition for a writ of certiorari was filed on February 12, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiracy to obtain by fraud, knowingly convert, or intentionally misapply property of an organization receiving federal benefits, in violation of 18 U.S.C. 371 and 666(a)(1)(A); one count of obtaining by fraud, knowingly converting, or intentionally misapplying property of an organization receiving federal benefits, in violation of 18 U.S.C. 666(a)(1)(A); one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; two counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiracy to violate civil rights, in violation of 18 U.S.C. 241; and one count of deprivation of civil rights under color of law, in violation of 18 U.S.C. 242. Pet. App. 2a-3a. The district court sentenced petitioner to 18 months of imprisonment, to be followed by one year of supervised release. Judgment 3-4. The court of appeals affirmed petitioner's wire fraud, Section 666, and related conspiracy convictions; vacated her civil rights convictions; and remanded for resentencing. Pet. App. 73a-74a.

1. Petitioner was a Deputy Chief of Staff to former New Jersey Governor Chris Christie. Pet. App. 4a-5a. In 2013, petitioner and other public officials conspired to cause the Port Authority of New York and New Jersey (Port Authority) to use its money and property to create massive traffic jams in Fort Lee, New Jersey, under the guise of conducting a fictitious traffic study, as punishment for the Fort Lee mayor's refusal to endorse Christie's reelection bid. *Id.* at 2a-7a.

The Port Authority "is an interstate agency created by Congressional consent" that "receives substantial

federal funding." Pet. App. 32a. One of the Port Authority's functions is to operate the George Washington Bridge, the busiest bridge in the world, which connects Fort Lee and New York City over the Hudson River. *Id.* at 2a, 4a, 27a. Typically, 12 toll lanes carry traffic into New York from New Jersey, with three lanes reserved during the morning rush hour for local traffic from Fort Lee and surrounding communities. *Id.* at 4a. At the time of the events at issue here, William E. Baroni, Jr. was the Port Authority's Deputy Executive Director and David Wildstein was Baroni's Chief of Staff. *Id.* at 3a.

In the months before New Jersey's 2013 gubernatorial election, petitioner was responsible for seeking endorsements of Christie's reelection bid from officials throughout the State. Pet. App. 4a-5a. Despite entreaties and favors from the Governor's Office, the mayor of Fort Lee refused to offer his endorsement. *Id.* at 6a. In response, Wildstein told petitioner that the Port Authority could "close down those Fort Lee lanes" on the George Washington Bridge "to put some pressure on" the mayor. *Id.* at 6a (citation omitted). Petitioner responded in an email: "Time for some traffic problems in Fort Lee." *Ibid.* (citation omitted). Wildstein told Baroni "that [petitioner] wanted the Fort Lee lanes closed for the purpose of punishing [the mayor] because he had not endorsed Governor Christie." *Id.* at 6a-7a (brackets, citation, and ellipses omitted). The sole purpose of closing the Fort Lee lanes was to "creat[e] a traffic jam that would punish [the mayor]." *Id.* at 6a (citation omitted).

In order to get Port Authority employees to implement the lane changes, Wildstein, in consultation with Baroni and petitioner, concocted a phony "'traffic

study'" to "provide a cover story" that would justify temporarily constricting Fort Lee's access lanes. Pet. App. 7a (citation omitted); see *id.* at 17a. They also decided to close the Fort Lee access lanes starting on September 9, 2013, "the first day of school in Fort Lee." *Id.* at 8a. And in contravention of Port Authority protocol, they agreed to "wait until the last minute" to provide notice of the lane closures so that Fort Lee officials and other Port Authority officials—including Port Authority Executive Director Patrick Foye—would not learn of the plan. *Id.* at 8a (citation omitted).

When instructions about the lane changes were given to Port Authority managers, one of them told Wildstein that, because only one local lane from Fort Lee would remain open, the Port Authority would need to pay an extra toll collector to be on relief duty for the sole toll collector. Pet. App. 9a. Wildstein discussed that issue with petitioner and Baroni and they had no problem with the extra cost and "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.'" *Id.* at 23a (citation omitted). Wildstein also discussed collecting data on the ensuing traffic with the Port Authority's chief traffic engineer and knew that carrying out the phony traffic study would require staff time. *Id.* at 9a. When Port Authority managers asked if Executive Director Foye knew about the lane changes, Wildstein lied and said that he did. *Id.* at 8a-9a.

On the morning of September 9, 2013, Port Authority police reduced the number of Fort Lee's access lanes from three to one, "gridlock[ing] the entire town." Pet. App. 9a. Fort Lee leaders made frantic attempts to

alert Port Authority and New Jersey officials of the paralyzing gridlock and the public safety hazards it created, informing them that Fort Lee police and paramedics had difficulty responding to a missing child and a cardiac arrest. *Id.* at 10a. But Wildstein, Baroni, and petitioner had planned in advance to ignore all calls that came in, and petitioner "reportedly smile[d] when a colleague * * * informed her of the situation" in Fort Lee. *Id.* at 10a.

Executive Director Foye first learned of the lane changes three days after they began, and he "order[ed] the restoration of the prior alignment" the following morning. Pet. App. 10a. Baroni went to Foye's office twice that day to get the lane changes reinstated, saying that the issue was "important to Trenton," but Foye refused. *Ibid.* (citation omitted). Baroni also reached out to the New Jersey-appointed Chairman of the Port Authority to request that Foye be overruled, but the Chairman declined that request. *Id.* at 10a-11a.

2. A federal grand jury charged petitioner and Baroni with wire fraud, federal-program fraud, related conspiracy offenses, and civil rights offenses. Pet. App. 11a-13a. Wildstein separately pleaded guilty to two conspiracy counts. *Id.* at 3a n.2.

Petitioner and Baroni proceeded to trial and were convicted on all counts. Pet. App. 2a-3a. The district court sentenced petitioner to 18 months of imprisonment, to be followed by one year of supervised release. Judgment 3-4.

3. The court of appeals affirmed petitioner's wire fraud, federal-program fraud, and related conspiracy convictions; vacated her civil rights convictions; and remanded for resentencing. Pet. App. 1a-74a.

a. With respect to the wire fraud convictions, the court of appeals first rejected petitioner's argument that Baroni had the unilateral authority to control the lanes, such that the scheme constituted an exercise of that authority rather than the commission of fraud. Pet. App. 15a-20a. The court noted that, "[b]efore 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." *Id.* at 16a. And the court observed that, after trial, the district court denied a motion for a judgment of acquittal because "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." *Ibid.* (citation omitted).

The court of appeals accepted that Baroni could not "deprive the Port Authority of money and property he was authorized to use for any purpose" and could not "deprive the Port Authority of its right to control its money or property if that right to control were committed to his unilateral discretion." Pet. App. 19a-20a. But the court found "overwhelming evidence" to support the jury's determination that Baroni "lacked the unencumbered authority he claims he possessed" and "that he needed to lie to realign the traffic patterns." *Id.* at 18a. The court explained that the trial evidence "reveals [the defendants] would not have been able to realign the lanes" if they had "provided the actual reason or no reason at all" for their directions to Port Authority employees to make the changes. *Id.* at 17a. Rather, "[t]hey had to create the traffic study cover story in order to get Port Authority employees to implement the realign-

ment," and Wildstein had to lie about whether Executive Director Foye "knew of the realignment" to "keep Foye in the dark and prevent him from putting an immediate end to the scheme." *Id.* at 17a-18a. And the court noted that when Foye learned of the scheme, he ordered the reversal of the lane changes and "refused Baroni's repeated entreaties to reinstate the realignment." *Id.* at 18a.

The court of appeals separately rejected the argument that "the Port Authority was not deprived of any tangible property" as part of the scheme. Pet. App. 20a. The court initially noted that petitioner had "arguably forfeited [her] right to raise these issues on appeal by not presenting them to the District Court" in her post-trial motion for acquittal, but the court declined to decide that forfeiture question because it found petitioner's arguments "unpersuasive under any standard of review." *Id.* at 20a-21a.

The court of appeals explained that "ample evidence" supported the jury's determination that petitioner and Baroni "obtained by false or fraudulent pretenses, at a minimum, public employees' labor," thereby depriving the Port Authority of its property right in those employees' "time and wages." Pet. App. 22a. The court observed that the fraudulent scheme required the Port Authority "'to pay for an extra toll collector to be on relief duty'" and that, when petitioner and Baroni were notified of that expense, "they had no problem with the extra cost." *Id.* at 23a (citation omitted); see *id.* at 24a (citing trial testimony that the Port Authority had employed "three toll collectors a day to be an excess toll collector in the toll house," all of whom were "paid an overtime rate," while the scheme was in effect) (citation

omitted). Trial testimony established that "these employees would not have been paid absent the lane realignment." *Id.* at 24a; see *id.* at 47a (citing "detailed payroll records" establishing that the "eleven overtime toll booth workers were paid $3,696.09").

In addition, to implement the fake traffic study that was necessary to carry out the scheme, petitioner and Baroni caused the Port Authority to divert the labor of several Port Authority engineers and other professional staff members who collectively spent several dozens of hours "performing unnecessary work related to the realignment." Pet. App. 24a; see *id.* at 24a-25a (cataloguing the hours that Port Authority staff spent on unnecessary tasks such as collecting and analyzing data that the staff did not realize was part of a phony study); *id.* at 49a ("Cumulatively, the three Port Authority traffic engineers provided unnecessary labor valued at approximately $1,828.80."). The court also noted that Wildstein and Baroni themselves spent "forty to fifty hours" working on the lane reductions. *Id.* at 25a. In sum, the court determined that the evidence that "fourteen Port Authority employees" had been "fraudulently conscripted" into working on the lane-change scheme, and "that Baroni and Wildstein accepted compensation for time spent conspiring to defraud the Port Authority," sufficed for "a rational juror to have concluded [the defendants] deprived the Port Authority of its money or property." *Id.* at 26a.

Because the court of appeals found the evidence sufficient to show that the Port Authority was deprived of money or property, the court stated that it did not "need to reach or decide" whether the fraud convictions could also be sustained on the ground that petitioner and

Baroni deprived the Port Authority of its "'right to control'" its property. Pet. App. 26a. The court observed, however, that the right-to-control theory "provide[d] an alternative basis upon which to conclude [petitioner and Baroni] defrauded the Port Authority" because "the bridge's lanes and toll booths" are "revenue-generating assets" and "[t]he Port Authority has an unquestionable property interest in the bridge's exclusive operation, including the allocation of traffic through its lanes and of the public employee resources necessary to keep vehicles moving." *Id.* at 26a-28a.

Finally, the court of appeals rejected the argument that the wire fraud charges circumvented the limitations on honest-services fraud recognized in *Skilling* v. *United States*, 561 U.S. 358 (2010). Pet. App. 28a-32a. The court emphasized that petitioner was "charged with simple money or property fraud" and that "the grand jury alleged an actual money and property loss to the Port Authority." *Id.* at 30a. And the court stressed that petitioner's and Baroni's conduct—engaging in deception to cause the Port Authority to use its money and property to create gridlock and attendant public safety hazards in Fort Lee—could "hardly be characterized as 'official action' that was merely influenced by political considerations." *Ibid.*

b. The court of appeals also affirmed petitioner's Section 666 federal-program fraud convictions. Pet. App. 33a-52a. The court rejected the "broad[]" argument that petitioner and Baroni "merely allocated a public resource based on political considerations." *Id.* at 35a. The court explained that, unlike in petitioner's hypothetical example of "a mayor who, after a heavy snowfall, directs city employees to plow the streets of a ward that supported

her before getting to a ward that supported her opponent," petitioner and Baroni "conscripted fourteen Port Authority employees to do sham work in pursuit of no legitimate Port Authority aim." *Id.* at 36a. As the court observed, the "jury was instructed that" it would be "a complete defense" if petitioner had "believed the traffic study was legitimate," but the jury "roundly rejected" that defense. *Id.* at 56a. The court found that with "no facially legitimate justification" to gridlock Fort Lee, petitioner's conduct did not amount to resource allocation. *Id.* at 36a. And the fact that petitioner was "politically motivated," the court observed, did "not remove [her] intentional conduct from the ambit of the federal criminal law." *Ibid.*

The court of appeals further observed that "[i]t is well established that public employees' labor is property for the purposes of Section 666." Pet. App. 43a. Petitioner had misapplied Port Authority employee labor, the court found, by "defraud[ing] the Port Authority of the labor of fourteen public employees—eleven toll collectors paid overtime and three professional staff members," who "spent hours doing work that was unnecessary and furthered no legitimate Port Authority aim." *Id.* at 44a.

c. Although the court of appeals upheld petitioner's wire fraud and Section 666 convictions, it determined that her civil rights convictions could not stand because petitioner lacked sufficient notice that her actions would violate individuals' civil rights. Pet. App. 73a. The court therefore vacated the civil rights convictions and remanded so that the district court could "resentence [petitioner] on the remaining counts of conviction." *Id.* at 74a.

4. On April 24, 2019, the district court sentenced petitioner to 13 months of imprisonment and one year of

supervised release on the remaining counts of conviction. Am. Judgment 2-3.

ARGUMENT

Petitioner seeks review (Pet. 15-21) of the court of appeals' determination that the evidence was sufficient to sustain her wire fraud and federal-program fraud convictions. Petitioner further asserts (Pet. 22-33) that the court's decision conflicts with decisions of this Court and other courts of appeals. Petitioner's arguments, however, rest on a mistaken view of both the conduct underlying her convictions and the ramifications of the court of appeals' decision. The court's decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence supporting her wire fraud and Section 666 convictions. The wire fraud statute prohibits using interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. The crime requires proof "that the object of the fraud be money or property in the victim's hands." *Pasquantino* v. *United States*, 544 U.S. 349, 355 (2005) (brackets, citation, ellipsis, and internal quotation marks omitted). Section 666 similarly prohibits "obtain[ing] by fraud" or "intentionally misappl[ying]" the property of an organization that receives federal benefits. 18 U.S.C. 666(a)(1)(A). As the court recognized, the elements of both statutes were satisfied by the trial evidence showing that petitioner and her co-conspirators engaged in deception in order to carry out a scheme that deprived

the Port Authority of its money or property and that served no legitimate Port Authority function.

The court of appeals correctly determined that "the Government presented evidence sufficient to prove [petitioner] violated the wire fraud statute by depriving the Port Authority of, at a minimum, its money in the form of public employee labor." Pet. App. 16a. The court cited extensive trial evidence that established that petitioner's scheme caused the Port Authority to pay eleven toll workers thousands of dollars in overtime wages when those workers would otherwise not have been assigned to the extra shifts. *Id.* at 22a-24; see *id.* at 47a-48a. Petitioner was informed that, to implement the lane-change scheme, the Port Authority would incur the expense of hiring extra toll collectors to be on relief duty, and she "had no problem with the extra cost." *Id.* at 23a. Indeed, petitioner "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." *Ibid.* (citation and internal quotation marks omitted). In addition, the phony traffic study that petitioner and her co-conspirators concocted to hide the true purpose of their scheme caused three Port Authority traffic engineers to spend dozens of hours on unnecessary work that served no Port Authority purpose. *Id.* at 24a-25a. Payroll records established that the Port Authority paid approximately $1828.80 for the labor necessary to carry out the phony traffic study. *Id.* at 49a.

The court of appeals also correctly determined that the trial evidence was sufficient to show that petitioner's and her co-conspirators' lies about the traffic study were necessary to carry out the scheme. As the court recognized, the jury rejected the trial defense

that petitioner and her co-conspirators "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." Pet. App. 16a. The government introduced evidence at trial to establish that the defendants "would not have been able to realign the lanes" if they had "provided the actual reason or no reason at all" for the lane changes. *Id.* at 17a. Instead, they had to lie and "create the traffic study cover story in order to get Port Authority employees to implement the realignment." *Ibid.* The evidence additionally established that it was necessary to lie about whether Executive Director Foye knew of the lane changes in order to "keep [him] in the dark and prevent him from putting an immediate end to the scheme," as he did as soon as he learned of the lane changes. *Id.* at 17a-18a. The court of appeals thus correctly concluded that "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 that petitioner and her co-conspirators "in fact[] did defraud the Port Authority." *Id.* at 16a (citation omitted).

b. Although petitioner asserts (Pet. 15) that the court of appeals' decision is wrong, she does not explain why the elements of the wire fraud statute and a Section 666 offense were not satisfied. Petitioner appears to take issue (Pet. 16) with the court's analysis that the Port Authority was deprived of money or property, but she does not dispute the trial evidence showing that the Port Authority spent several thousands of dollars paying employees for unnecessary work that served no legitimate Port Authority function and would not have

been performed in the absence of the scheme to defraud. As the court observed, "[i]t is well established that public employees' labor is property" for the purposes of the fraud statutes. Pet. App. 43a; see *id.* at 44a (citing decisions). Petitioner offers no interpretation of the statutory phrase "money or property" that would exclude the expenditure of funds for wholly unnecessary work—including overtime work by employees who would otherwise have been off duty—and any such interpretation would be untenable.

Petitioner similarly fails to explain why the conduct underlying her convictions does not satisfy the statutory requirement that the deprivation of money or property occur "by means of false or fraudulent pretenses." 18 U.S.C. 1343. Although petitioner disputes (Pet. 16) the relevance of evidence that the lies were necessary to ensure that Executive Director Foye would not put an immediate end to the scheme, she does not address the additional evidence demonstrating that the deception also was essential "in order to get Port Authority employees to implement the realignment" in the first place. Pet. App. 17a. And while petitioner takes issue with (Pet. 16) the jury's finding that Baroni did not have unilateral authority to change the lanes, that factbound dispute does not warrant this Court's review. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that the Court "do[es] not grant a certiorari to review evidence and discuss specific facts").

c. Petitioner does not identify any statutory element that her own conduct or the conduct of her co-conspirators failed to satisfy. She instead principally argues (Pet. 15) that the court of appeals erred by purportedly holding that "any official (federal, state, or

local) who conceals or misrepresents her *subjective motive* for making an otherwise-lawful decision * * * has thereby defrauded the government of property." But the court adopted no such rule.

Petitioner offers examples of conduct (Pet. 29) that she contends would be covered by the court of appeals' reasoning, such as a mayor who directs a snowplow to a particular neighborhood to please his constituents while maintaining the measure is necessary for public safety. But those examples, in contrast to the facts of her case, involve officials who possess unilateral authority over discretionary resources, therefore do not need to lie to allocate those resources, and so do not cause a deprivation of money or property "by means of" their deception. See *Loughrin* v. *United States*, 573 U.S. 351, 365 (2014) (in bank fraud context, explaining that the fraud statute's "'by means of' language requires * * * that the defendant's false statement [be] the mechanism naturally inducing a [victim] to part with its money"). An official who allows political motives to influence a decision she unilaterally possesses the authority to make does not commit fraud, even if she conceals her true motives. See *Neder* v. *United States*, 527 U.S. 1, 16 (1999) (deceptive conduct underlying a scheme to defraud must be material—that is, it must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed") (citation omitted).

The court of appeals recognized exactly that distinction, emphasizing that petitioner's scheme "could not deprive the Port Authority of money or property [that Baroni] was authorized to use for any purpose" and "could [not] deprive the Port Authority of its right to control its money or property if that right to control

were committed to [Baroni's] unilateral discretion." Pet. App. 19a-20a. A mayor or city supervisor who has authority to order snowplowing and pothole repair generally need not offer any reason for the decision to allocate those resources in a particular way, and deception about the actual reason for the allocation is not necessary to ensure that employees carry out the orders. And snow removal and pothole repair are legitimate functions for government workers to perform. But in this case, the court determined that the jury had reasonably found that petitioner and her co-conspirators "had to create the traffic study cover story in order to get Port Authority employees to implement the realignment" and that they "would not have been able to realign the lanes had [they] provided the actual reason or no reason at all." *Id.* at 17a. The jury further rejected petitioner's defense that she believed the traffic study was legitimate, *id.* at 56a, with the result that there was "no facially legitimate justification" to create paralyzing gridlock in Fort Lee, *id.* at 36a. Those jury findings about Baroni's authority and the sham nature of the traffic study, upheld and explained by the court of appeals, substantially differentiate this case from the hypothetical prosecutions of officials who exercise their discretion to allocate "scarce public resource[s]." Pet. 18.

In addition, petitioner's hypotheticals, unlike the facts of this case, do not necessarily involve a deprivation of money or property. Petitioner contends that "every decision by a public official" will "touch[] the government's 'right to control'" its property. Pet. 16 (citation omitted). But the court of appeals in this case upheld the jury's verdict based on a finding that petitioner and her co-conspirators deprived the Port Authority of *money*—namely, thousands of dollars of

wages paid for public employee labor that was unnecessary and served no legitimate Port Authority function. Pet. App. 22a. Although the court observed that "the 'right to control' theory" provided "an alternative basis upon which to conclude [petitioner] defrauded the Port Authority," the court focused on the actual deprivation of money and found that evidence "alone sufficient for a rational juror to have concluded" that the money-or-property element was satisfied. *Id.* at 26a-27a.

Nor does this case present an opportunity to consider whether a public employee who hides a political motive (or any other motive) for decisions, but without causing her employer to pay other employees for unnecessary work, has nevertheless "defrauded the government of property (her own labor if nothing else)." Pet. 15. The court of appeals in petitioner's case observed that petitioner's co-conspirators spent "forty to fifty" on-duty hours carrying out the fraudulent scheme and were paid for that "time spent conspiring to defraud the Port Authority," which it found to be "'money' for the purposes of the wire fraud statute." Pet. App. 25a-26a. But the court upheld the jury's verdict only after considering that evidence in combination with the evidence that petitioner's co-conspirators "fraudulently conscripted fourteen [other] Port Authority employees into their service." *Id.* at 26a. Any arguments about whether a fraudster's own labor alone constitutes money or property should be considered in a case where that issue is squarely presented.

Finally, the fact that petitioner was politically motivated to carry out her fraudulent scheme is irrelevant to her guilt. As both the district court and court of appeals recognized, petitioner's focus on the reason for committing the fraud "conflates motive with mens rea[]

and conduct." Pet. App. 36a (citation, ellipses, and emphasis omitted). Petitioner's scheme caused "public employees [to] spen[d] hours doing work that was unnecessary and furthered no legitimate Port Authority aim," and petitioner and her co-conspirators "were able to obtain these employees' labor only by lying about the purpose of the realignment, claiming they were conducting a traffic study." *Id.* at 44a. Whether petitioner and Baroni were motivated by political animus toward the mayor of Fort Lee or by a desire for personal gain, their criminal liability would be unchanged, because their conduct constituted a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. 1343.

d. Petitioner further contends (Pet. 28-31) that the wire fraud statute and Section 666 are ambiguous or vague and must be construed narrowly to avoid constitutional concerns. She offers no authority, however, to support the contention that those statutes are vague as applied to her conduct or that they implicate the rule of lenity on these facts. A criminal statute may be unconstitutionally vague only if "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). Similarly, the rule of lenity applies "only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended." *Ocasio* v. *United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (citation and internal quotation marks omitted). Neither the wire fraud statute nor Section 666 is ambiguous as applied to this case. See *McNally* v. *United States*, 483 U.S. 350, 359 (1987)

(explaining that it is "unmistakable that the [mail fraud] statute reache[s] false promises and misrepresentations as to the future as well as other frauds involving money or property"); see also *Fischer* v. *United States*, 529 U.S. 667, 678 (2000) (noting that Section 666 "reveals Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs").

2. Petitioner argues (Pet. 22-31) that the court of appeals' decision "circumvents" this Court's precedents and conflicts with the decisions of other courts of appeals. Pet. 22 (capitalization and emphasis omitted). But those arguments depend on a mistaken view of the court of appeals' decision, which the court itself disavowed. No conflicts exist.

a. Petitioner asserts (Pet. 22-25) that the court of appeals' decision "negates the[] outcomes" of this Court's honest-services fraud and bribery cases. Pet. 22. That is incorrect.

Petitioner contends (Pet. 24) that "[u]nder the decision below," an official who lies about having a political motive will have committed "property fraud, because 'purporting to act' for one reason while subjectively intending to further a different purpose defrauds the state of intangible property interests ancillary to the official's actions." But the court of appeals adopted no such rule. It instead upheld the jury's verdict based on evidence that petitioner participated in a scheme to fabricate a sham traffic study so that the Port Authority would expend resources that it would not otherwise have expended and that Baroni lacked authority to allocate. See Pet. App. 30a-31a (citing this evidence in distinguishing petitioner's conduct from a mine-run case in which a public official's action is "influenced by political

considerations"). The court was "mindful of the Supreme Court's honest services case law," which "narrowed" the circumstances in which a fraud prosecution may be premised solely on the deprivation of honest services, rather than a money or property loss. *Id.* at 28a, 30a. But on the facts of petitioner's case, the court found no merit to her argument that upholding her conviction would "shoehorn a repudiated theory of honest services fraud into an ill-fitting theory of money or property fraud." *Id.* at 28a (citation omitted).

Petitioner's reliance (Pet. 24-25) on *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), is similarly misplaced. Petitioner argues (Pet. 25) that, under the court of appeals' decision, even if former Governor of Virginia McDonnell's arrangement of meetings was not an official act for purposes of honest-services fraud, see 136 S. Ct. at 2367, 2374, McDonnell could have been prosecuted for fraud under a money-or-property theory of liability. But as Governor, McDonnell presumably possessed the authority to arrange the meetings at issue and "could not deprive the [state] of money and property he was authorized to use for any purpose." Pet. App. 19a-20a. Nor did that case involve evidence that the meetings deprived Virginia of thousands of dollars of public employee wages spent on "sham work in pursuit of no legitimate [governmental] aim." *Id.* at 36a.

Petitioner further contends (Pet. 25-28) that the court of appeals' decision is inconsistent with *Cleveland* v. *United States*, 531 U.S. 12 (2000), in which this Court held that the fraud statutes do not reach "false statements made in an application for a state license" for video poker because "such a license is not 'property' in the government regulator's hands." *Id.* at 15, 20. The Court in *Cleveland* found no allegation that the State

had been "defrauded * * * of any money," and concluded that the State's right to control the issuance, renewal, and revocation of video poker licenses "amount[ed] to no more and no less than [its] sovereign power to regulate." *Id.* at 22-23. *Cleveland* has no bearing on the court of appeals' decision in this case that petitioner's fraud deprived the Port Authority of money, which the court found to be "alone sufficient" to uphold petitioner's conviction, making it unnecessary to "reach or decide" arguments about the right-to-control theory of fraud. Pet. App. 26a. The court moreover noted that *Cleveland* would be inapplicable even to a right-to-control theory, because the Port Authority's right to control its revenue-generating physical assets is not a purely regulatory interest. *Id.* at 27a-28a.

b. Finally, petitioner contends (Pet. 31-33) that the court of appeals' decision conflicts with decisions of other circuits. That is incorrect. Petitioner principally relies (Pet. 31) on the Seventh Circuit's decision in *United States* v. *Blagojevich*, 794 F.3d 729 (2015), cert. denied, 136 S. Ct. 1491 (2016), but in that case the court reversed an honest-services fraud conviction where the defendant "did not try to deceive" anyone and performed mere "political horse-trading." *Id.* at 736. The Seventh Circuit additionally concluded that the defendant's attempt to trade an appointment to a public position that he was authorized to make did not implicate any property interests. *Id.* at 734-735.

The Seventh Circuit's decision in *United States* v. *Thompson*, 484 F.3d 877 (2007), is similarly inapposite. The court in *Thompson* found that a state procurement official had not misapplied funds in violation of Section 666 when she steered a contract to a local travel agency allegedly in violation of state procurement rules. *Id.* at

881-882. As the court in petitioner's case recognized, the defendant in *Thompson* had "applied the state's procurement regulations in a way that actually saved the federal government money and caused no loss," while petitioner and Baroni "lied in order to obtain public employee labor from fourteen Port Authority employees," forcing "the Port Authority to pay unnecessary overtime to toll workers and divert[ing] well-paid professional staff away from legitimate Port Authority business." Pet. App. 43a. Unlike in *Thompson*, therefore, the court of appeals found that petitioner's fraud "is soundly within the scope of conduct Congress sought to proscribe in Section 666." *Ibid.*

Decisions of the First and Eleventh Circuits criticizing attempts to recast the intangible right to honest services as a property right are likewise irrelevant. Pet. 32-33 (citing *United States* v. *Ochs*, 842 F.2d 515, 527 (1st Cir. 1988), and *United States* v. *Goodrich*, 871 F.2d 1011, 1013-1014 (11th Cir. 1989)). The convictions in this case are not premised on a breach of petitioner's duty to provide honest services, but rather involve a scheme to defraud in which a jury found that the lies were necessary to deprive the Port Authority of money or property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.