

Case No.: \_\_\_\_\_

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**In The**  
**Supreme Court of the United States**

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VOLVY SMILOWITZ, AKA ZEV SMILOWITZ,

*Petitioner,*

-v.-

UNITED STATES OF AMERICA,

*Respondent.*

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*On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Second Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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Dated: March 12, 2021

**QUESTIONS PRESENTED**

1. Title 52, Section 10307(c), proscribes certain wrongful conduct in connection with voting and registering to vote. By its express terms, Section 10307(c) applies to only federal elections. Did the Second Circuit err in widening the scope of the election statute to allow federal oversight of a purely local state election?
2. The Travel Act proscribes an interstate-nexus “bribery.” Did the Second Circuit err in expanding the scope of the Travel Act to allow federal prosecution of conduct that does not constitute bribery under the applicable state, common law, or commercial definitions of that crime?

**PARTIES TO THE PROCEEDING**

The Defendant-Appellant, and the Petitioner herein, is Volvy Smilowitz, who is also known as Zev Smilowitz. Additional defendants in the underlying criminal action were Shalom Lamm and Kenneth Lakdimen.

The Appellee-Respondent is the United States of America.

**PROCEDURAL HISTORY**

- i. On March 15, 2018, the United States District Court for the Southern District of New York (Bricetti, J.) denied a motion to dismiss filed by Petitioner in the criminal matter of *United States v. Shalom Lamm, Kenneth Nadkimen, and Volvy Smilowitz a/k/a “Zev Smilowitz”* (Case No. 16-CR-818). The Court entered the order denying the motion the following day, March 16, 2018, and in light of the order, on June 18, 2018 Petitioner pled guilty.
  
- ii. On September 8, 2020, the United States Court of Appeals for the Second Circuit (Case No. 19-361) affirmed the District Court’s denial of Petitioner’s motion to dismiss. Then, on October 15, 2020, the Second Circuit denied Petitioner’s request for rehearing *en banc*.

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**OPINION BELOW**

On September 8, 2020, the United States Court of Appeals for the Second Circuit affirmed the denial of Petitioner's motion to dismiss the indictment against him. The decision is reported at *United States v. Smilowitz*, 974 F.3d 155 (2d Cir. 2020). *See also* A1-22.

**STATEMENT OF JURISDICTION**

Federal jurisdiction in the District Court was premised upon 52 U.S.C. § 10307(c), 18 U.S.C. §1952, and 18 U.S.C. §3231.

This Petition for a Writ of Certiorari is timely under Rule 13 of the Rules of the Supreme Court of the United States, as amended by its March 19, 2020 Miscellaneous Order extending the deadline to 150 days from the date of the Circuit's denial of the petitioner's request for a rehearing *en banc*. The Second Circuit issued its opinion and judgment affirming Petitioner's conviction on September 8, 2020 (A1-22; A73). Petitioner timely sought rehearing *en banc* on September 22, 2020 (A169-190). *See* Fed. R. App. Procedure 40(a)(1). And the Second Circuit denied *en banc* review on October 15, 2020 (A72).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

**STATUTES IN ISSUE****Title 52, United States Code Section 10307(c):**

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,*<sup>1</sup> That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

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<sup>1</sup> Emphasis in original.

Title 18, United States Code Sections 1952(a) and 1952(b):

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for nay term of years or for life.

(b) As used in this section (i) “unlawful activity” means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term “State” includes a State of the United States, the District of Columbia, and an commonwealth, territory, or possession of the United States.

### **STATEMENT OF THE CASE**

The federal charges in this case emanate from a *purely local* election in Bloomingburg, New York (“the Village”). The election had become a lightning rod in the Village, as residents believed that certain candidates for mayor and village trustee would, if elected, approve a real estate development that would bring a large influx of Hasidic and Orthodox Jews to the community. Driven by open anti-Semitism, many members of the Village sought to thwart these candidates’ election, while the developers sought to advance it.

In the shadow of these events, Petitioner, Zev Smilowitz, became a point-person between the developers and the Jewish community. As part of his role in attempting to increase voter turnout, he used monetary consideration to procure voter registrations from individuals who were not yet living in the Village and would not have been eligible to vote in that local election. For this conduct, he was indicted by a federal grand jury.

On November 12, 2017, Petitioner sought to dismiss the charges. He did not claim that he was innocent of the conduct, but instead argued that he had committed state rather than federal offenses, and, thus, that the federal government lacked jurisdiction to prosecute him. In pertinent part, he argued that: (1) he had been indicted under a federal election statute that, by its terms, did not apply to purely local state elections (A91-103); (2) he had been indicted under a reading of the Travel Act that inflated the definition of the word ‘bribery’ beyond its allowable state law

confines (A107-111); and (3) any ambiguity over the propriety of these arguments should have been construed in his favor under the Rule of Lenity. *See A102-03.*

On March 15, 2018, the United States District Court for the Southern District of New York (Briccetti, J.) denied Petitioner’s motion. Addressing the election law question, the District Court recognized the dearth of precedent in the Second Circuit, but cited authority from five other jurisdictions it found persuasive. *See United States v. Slone*, 411 F.3d 643, 648 (6<sup>th</sup> Cir. 2005); *United States v. Bowman*, 636 F.2d 1003, 1011 (5<sup>th</sup> Cir. 1981); *United States v. Lewin*, 467 F.2d 1132, 1136 (7<sup>th</sup> Cir. 1972); *United States v. Lewis*, 514 F. Supp. 169, 171 (M.D. Pa. 1981); *United States v. Cianculli*, 482 F. Supp. 585, 587 (E.D. Pa. 1979) (A32-36). These cases set the Court’s holding: that it was “persuaded by a survey of case law from other circuits” that the Petitioner’s acts in procuring registrations for this purely local election were “irrelevant” because his conduct exposed *future* federal elections to the “possibility of” corruption because New York’s unitary registration system, now shared by virtually every state in the nation, would enable these registered voters to *possibly* also vote in a future election for a candidate for federal office. *See A35.*

As for the Travel Act, the District Court again agreed with the government. While Mr. Smilowitz’s indictment rested upon a definition of “bribery” that was inapplicable under common law, statutory, or commercial definitions of the term, there was a fourth source of law that, according to the District Court, allowed the charge to stick: “generic” law. Since a “generic definition” of bribery could apply when deciding the contours of the Travel Act, it held, the charges were sustainable. *See A39.*

On July 8, 2019, Mr. Smilowitz appealed to the United States Court of Appeals for the Second Circuit. Again, he argued that he had been indicted under an election law that did not apply to purely local elections (A135-48); that the Travel Act did not apply to the type of “bribery” alleged in his case (148-58); and that the Rule of Lenity should operate in his favor (A139-42; A156-57).

On October 7, 2019, the government filed its Respondent’s brief. In addition to advancing the rationale of the District Court on both issues, the government also advanced a statutory interpretation argument in support of Petitioner’s conviction under the federal election statute, claiming that the statute’s proviso, expressly limiting its reach to elections including at least one candidate for federal office, should be read to apply only to *voting* and not to *registration*.

On September 8, 2020, the Second Circuit affirmed the District Court. Though his conspiracy began and ended around a local election, and though the Court “disagreed” with the government’s “strained textual reading” of the election statute, it upheld Mr. Smilowitz’s conviction because his conduct had the “potential” to affect federal elections in the “future.” *United States v. Smilowitz*, 2020 WL 5359372, at \*4 (2d Cir. 2020). And on the Travel Act, it agreed with the District Court that because the conduct in issue fit within a “generic” definition of bribery, it was an appropriate anchor for the Travel Act. *Id.* at \*6.

The Second Circuit’s reading of Title 52 and the Travel Act assaults principles of election-federalism that have been recognized repeatedly by this Court and enshrined in the Constitution. Left unaddressed, it will expand federal courts’ jurisdiction over

purely intrastate election processes – all while ignoring requirements of lenity that, this Court has held, prevail in the face of questionable criminal statutes. At this moment of political strife and uncertainty over the administration of our elections, this Court should grant Certiorari to resolve these fundamental questions over the role of federalism in our elections.

## **ARGUMENT**

### **REASONS FOR GRANTING THE WRIT**

This Petition presents two questions of timely and exceptional importance that implicate the role of federalism in prosecuting criminal conduct surrounding our elections. One of these statutes governs the dynamic between federal and state governments in regulating fraud in our elections. The other is one of the most widely used statutes in all of federal criminal law. Certiorari will allow this Court to dive into waters that remain uncharted by this Court, that have caused confusion and disagreement in the lower courts, and that are vital for the nation’s understanding of the relationship between our federal criminal justice system and our elections.

At its broadest level, these sensitive questions of federalism could not be more timely. Swimming through a worldwide pandemic, our nation is spinning from a hurricane of what was one of the most trying election seasons in our history. While the country remained sharply divided politically and was still reeling from one presidential election targeted by a foreign country,<sup>2</sup> the pandemic required the

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<sup>2</sup> See U.S. DEPT. OF JUSTICE, *Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election* (July 13, 2018) (available at: <https://www.justice.gov/press-releases/grand-jury-indicts-12-russian-intelligence-officers-hacking>)

citizenry to undergo a massive experiment with mail-in voting that tested the integrity of our institutions. *See, e.g.*, Rebecca Ballhaus, *Trump Urges North Carolina Voters to Test Mail-In System by Attempting to Also Vote in Person*, WSJ (Sept. 3, 2020).<sup>3</sup> With a nation now politically turbocharged by this experience, the question of who should regulate misconduct in future elections – states or the federal government – has not been such an acutely important question since the 1860s. Resolving this question is an urgent task fit for this Court’s attention.

This petition also addresses the scope of one of the most commonly used, farthest-reaching statutes in all of federal criminal law: the Travel Act. The scope of this statute – one that has been tugged widely beyond the intentions of its framers – represents the pinnacle of a phenomenon of increasing federal criminalization. Over forty percent of federal criminal laws enacted since the Civil War were enacted in the last five decades. *See* Thane Rehn, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM L. REV. 1991, 1999 (2008). Thus, in his Year-End Report of the Federal Judiciary in 1998 – one of his last – Chief Justice Rehnquist warned that over-federalizing crime “threatens to change entirely the nature of our federal system.” *See* WILLIAM H. REHNQUIST,

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<https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election>).

<sup>3</sup> Available at: <https://www.wsj.com/articles/trump-urges-north-carolina-voters-to-test-mail-in-system-by-attempting-to-also-vote-in-person-11599144601> (last visited on September 17, 2020).

THE 1998 YEAR END REPORT OF THE FEDERAL JUDICIARY 1, 2 (1999).<sup>4</sup>

Nowhere is that more evident than in the Travel Act, or in the stakes raised by this case for how to define it in the context of an election.

Ultimately, this petition raises two questions of federalism that bear exceptional importance to the country in this moment of political strife. Certiorari is a commensurate response to these stakes.

**I. *Certiorari is required to decide the important and undecided question of whether, under 52 U.S.C. §10307(c), the federal government may regulate fraud in purely local elections.***

While the “[t]imes, [p]laces and [m]anner of holding [e]lections for [federal office], shall be prescribed in each State by the Legislature thereof,” and while “Congress may at any time by [l]aw make or alter such [r]egulations, except as to the [p]lace of ch[oo]sing Senators,” *see* U.S. CONST., ART. 1, Sec. 4, the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST., Amend. X.

To that end, “the Constitution was … intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and

independent governments, except insofar as the Constitution commands otherwise.”

*Oregon v. Mitchell*, 400 U.S. 112, 124 (1970). As “provided in the Tenth Amendment,” then, “the Framers of the Constitution intended the States to keep for themselves … the power to regulate elections,” for “[n]o function is more essential to the separate

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<sup>4</sup> Available at: <https://online.ucpress.edu/fsr/article-abstract/11/3/134/42472/The-1998-Year-End-Report-of-the-Federal-Judiciary?redirectedFrom=fulltext>.

and independent existence of the States ... than the power to determine ... the nature of their own machinery for filling local public offices.” *Id.* at 124-25.

Building Title 52 upon these bedrocks, Congress outlawed conspiracies to corrupt the registrations to vote, or the voting, of others. *See* 52 U.S.C. § 10307(c). But, equally cognizant of the important restraint of the Tenth Amendment and principles of federalism, Congress added a proviso – underscoring its importance by emphasizing it in italics – conclusively barring federal oversight of purely local elections by stating: “*Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of electing any candidate for [federal] office....” *See* 52 U.S.C. §10307(c) (emphasis in original).

This case presents a clean vehicle for the Court to interpret Title 52’s federalist limitation – to determine whether it bars federal prosecutions arising out of purely local elections. Here, after all, there is no allegation that a conspiracy targeted or even contemplated an election for federal office; nor did it encompass any ballot containing the name of a single federal candidate. Through this case, then, the Court can resolve the unanswered, but critical question, of whether the proviso in §10307(c) presents a firm or a weak limitation to federal prosecutors’ jurisdiction. Indeed, under the Second Circuit’s analysis, it provides no limitation at all.

Affirming Mr. Smilowitz’s conviction under Title 52, the Second Circuit essentially wholly invalidated the proviso in §10307(c). Though Smilowitz’s conspiracy began and ended around a local election, and though the Court “disagreed” with the

government’s “strained textual reading” of the statute of conviction, it upheld Smilowitz’s conviction on the ground that his conduct had the “potential” to affect federal elections in the “future.” *United States v. Smilowitz*, 2020 WL 5359372, at \*4 (2d Cir. 2020). This risk, it held, materialized from the existence of “unitary registration” – which allows one registration form to sign up people to vote in both state and federal elections at once – a mechanism in place in virtually every state in the nation. *See Young v. Fordice*, 520 U.S. 273 (1997) (as of 1995, every state in the nation simultaneously registered voters for “both federal and state elections” except for Mississippi).

By viewing the statutory proviso through this lens, therefore, the Second Circuit viewed §10307(c) as allowing the federal government to regulate purely local elections anywhere in the country – all under the guise of addressing “potential” “future” federal conspiracies, rather than limiting the reach of this criminal statute to the actual conspiracy in the case before it. The expansion of a criminal statute in this manner not only impermissibly renders an explicit limitation in the statute’s text superfluous, but also operates to criminalize a conspiracy that has not occurred, for which, all parties agree, intent was wholly lacking.

Reading Title 52’s proviso to contain a strong limitation, rather than the one endorsed by the Second Circuit, is far more reasonable. If the government’s reading of the statute was wrong, as the Circuit held (*Smilowitz*, at \*4) (“We disagree with the government’s textual argument”), then the statute simply cannot reach the conduct at issue here, which involved a purely local election. Regardless of what could

“potential[ly]” happen in some “future” conspiracy, *id.*, the statute – like all criminal statutes – is anchored in an *actus reus* and *mens rea*, neither of which is met here. It proscribes the *act* of harming a federal election, which Mr. Smilowitz did not do. And it governs those who *intend* to harm a vote held “for the purpose of electing any candidate for [federal] office” (see 52 U.S.C. §10307(c)), and, again, the government itself did not accuse Mr. Smilowitz of having those broader intentions. So, by its text and principal components, this federal statute does not apply to such local conduct.

The strong reading of the proviso is reinforced by the rule of lenity. A “court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not *clearly proscribe*.” *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (emphasis added). *See also Jones v. United States*, 529 U.S. 848, 858 (2000) (applying rule of lenity while “avoid[ing] the constitutional question that would arise were we to read [a criminal statute] to render the ‘traditionally local criminal conduct’ in which petitioner … engaged ‘a matter of federal enforcement’”). Since §10307(c) on its face applies “only to … elections held … for … [federal] office,” the authority to prosecute Petitioner Smilowitz for defrauding a purely local election cannot survive lenity’s filter.

The United States is now emerging from an election season rife with controversy, one in which the former President himself claimed that the election was stolen. The impetus will be greater now than in previous generations for candidates and political parties to openly question the integrity of our voting systems – and for the general public to pressure federal agents to enter the fray. Some observers will welcome this

involvement, and others will not. But in the case of purely local elections, it is not an outcome “clearly proscribe[d]” by Congress.

Mr. Smilowitz arrives here the subject of a misdemeanor, but his case presents profound questions over the role of federalism in the regulation of local elections. The Court should grant his petition for *certiorari* and, ultimately, reverse the conviction entered in the District Court.

**II. *Certiorari* is required to decide the important and undecided question of whether the federal government may use the Travel Act to prosecute voter bribery falling outside the confines of statutory law, common law, or commercial law.**

In 1961, as Attorney General of the United States of America, a 35-year old budding politician named Robert F. Kennedy raised national consciousness to the needed federal war on organized crime. *See* Becky Little, HISTORY, *How Bobby Kennedy Started the War on Gangs* (2018).<sup>5</sup> By the time his brother entered the White House, organized crime families boasted about five thousand members and thousands of associates. *Id.* And while prior efforts to fight organized crime had been conducted against individuals, the Kennedys’ war would take the fight against the criminal organizations themselves. *Id.*

The “Travel Act” passed as the “centerpiece” of this effort. *See* Jonathan S. Feld, LAW JOURNAL NEWSLETTERS, *The Rise of The Travel Act* (2017).<sup>6</sup> It was

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<sup>5</sup> Available at: <https://www.history.com/news/robert-kennedy-started-the-war-on-mafia-gangs>.

<sup>6</sup> Available at: <http://www.lawjournalnewsletters.com/2017/10/01/the-rise-of-the-travel-act/?slreturn=20190528160252>.

“primarily designed to stem the ‘clandestine flow of profits’ and to be of ‘material assistance to the States in combating pernicious undertakings which cross State lines[.]’” *United States v. Nardello*, 393 U.S. 286, 292 (1969). This, after all, reflected the Congressional determination that “certain activities of organized crime which were violative of state law had become a national problem.” *Id.*

To that end, the Travel Act – 18 U.S.C. §1952 – addresses anyone who “travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to ... [*inter alia*] promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity....” *See* 18 U.S.C. § 1952(a)(3). And as used in the statute, “unlawful activity” is a term of art: designed to track the types of offenses prevailing around the mob, it pertains to: “(1) any business enterprise involving gambling, [untaxed] liquor..., narcotics ..., or prostitution ..., [or] (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States....” *See* 18 U.S.C. §1952(b).

Since its passage, the Travel Act has developed tentacles that reach beyond the mafia. But it retains the genetic code that cautions against an over-expansive reading; for if read broadly, the Travel Act will “alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of [actors], a matter of happenstance, would transform relatively minor state offenses into federal felonies.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

Attempts to limit the Travel Act face their most challenging test with regard to its anchor in “bribery” law. That is because the most expansive reading of the term ‘bribery’ – paying people to influence their behavior – will find it prolific in society. This includes cash tips to a bartender for unfairly good service in a crowded tavern, or even fruit-baskets to customers around the holidays to encourage patronage. If this Court is to ensure that the Travel Act does not “alter sensitive federal-state relationships” and “transform relatively minor state offenses into federal felonies,” *Rewis v. United States*, 401 U.S. 808, 812 (1971), it must offer a principled way to define the term ‘bribery.’ The question presented is whether that definition should rest upon the bright-line grounds of how bribery is defined in state, common law, or commercial definitions, or whether – as the Circuit Court held – the definition should hinge upon what courts deem to be “generic.”

In particular, neither the state, common law, nor commercial definitions of the term ‘bribery’ permit a Travel Act conviction for paying people to register and vote in the State of New York – as this is neither a violation of the New York bribery statute, the common law definition of bribery, nor an act of commercial bribery. *See* Penal Law §200.00 (statutorily, linking bribery to exerting influence upon a “public servant’s vote, opinion, judgment, action, decision or exercise of discretion”); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing 3 E. Coke, *Institutes* 144, 147 [1628]) (at common law, “bribery extended only to the corruption of judges”); *Perrin*, 444 U.S. at 38-39 (at commercial law, linking bribery to secretly paying an “agent, employee, or fiduciary ... with the intent to influence [that person’s] action in relation to the

principal's or employer's affairs"). Indeed, no case in the history of this Court (or the lower courts that passed upon this case) has ever applied a bribery-based Travel Act charge to a form of "bribery" inconsistent with common law, state law, and commercial law definitions.

Nevertheless, the Second Circuit upheld Mr. Smilowitz's conviction based upon a fourth type of law – "generic" law. It reasoned that bribery's generic definition had been endorsed by this Court in *Perrin v. United States*, that the generic definition of extortion had been endorsed here, too, and that the Second Circuit itself had previously applied generic law to a bribery-based Travel Act conviction. *See Smilowitz*, at \*6 (citing *Perrin*, 444 U.S. 37 [1979]; *United States v. Nardello*, 393 U.S. 286 [1969]); and *United States v. Walsh*, 700 F.2d 846, 868 [2d Cir. 1983]).

While the Travel Act has been stretched into one of the most expansive statutes in all of federal criminal law, the Court should take this opportunity to prevent that expansion from covering an additional acre.

First, the problem with applying "generic" law to a term like 'bribery' is that the definition is subject to substantial disagreement. Take this case as an example. Nearly half the states in America do not define voter-payments as bribery. This includes two of three states in the Circuit from which this case derives – New York and Connecticut. It also includes states comprising the largest three cities in America – New York (New York City), California (Los Angeles), and Illinois (Chicago). And it includes such populous states as Georgia, Michigan, Maryland and North Carolina. *See United States v. Bowling*, 2010 WL 5067698 (E.D. Kent. 2010) (providing list of

states that link bribery and voting, excluding additional states like Alaska, Arkansas, Colorado, Delaware, Hawaii, Indiana, Kentucky, Mississippi, Missouri, Oregon, and West Virginia). So, unlike the certainty of using statutory, common law or commercial definitions, using “generic” law to define bribery begs the question of just how generic the “generic” definition needs to be.

Second, given the diverging opinions about how to label the act of paying people to register and vote – as an act of bribery, as a creature of election law, or otherwise – one rule should again prevail. Facing one of the widest reaching criminal statutes in the entire federal code, and deciding whether to extend it to yet another type of conduct over which the States remained sharply divided, this case presents a strong vehicle to reinforce the rule of lenity. Clearly, in the face of Mr. Smilowitz’s conduct, the criminal court confronted “a statute whose commands [were] uncertain;” this should have triggered the “fundamental principle that [he] should [not] be held accountable” under federal criminal law. *United States v. Banki*, 685 F.3d 99, 109 (2d Cir. 2012) (internal quotations omitted).

Third, contrary to the Circuit’s view, neither *Perrin*, *Nardello*, nor *Walsh* upheld a bribery conviction for behavior outside the contours of statutory, common, or commercial law. Rather, in *Perrin*, this Court decided a case arising under commercial law alone – “whether *commercial bribery* of private employees prohibited by a state criminal statute constitute[d] ‘bribery...’ within the meaning of the Travel Act.” See *Perrin*, 444 U.S. at 39 (emphasis added). Its discussion beyond commercial bribery principles was, thus, *dicta*.

The same was true in *Nardello* and *Walsh*: *Nardello* did not involve bribery, but extortion, and in *Walsh* the defendant's behavior involved using money to corruptly sway public officials – an act that the applicable (New Jersey) law labels bribery explicitly. *See* N.J. Stat. 2C:27-2. None of these cases involved an act of alleged bribery that, as here, did not fit within any of the classic forms of defining the offense.

As our nation's politics continue to polarize the country, citizens increasingly view elections as having heightened stakes – an incentive to mobilize and be civic-minded, but also an incentive to cheat, or levy accusations of cheating against opponents. This raises important questions of federalism regarding the scope of the federal government's authority to regulate misconduct in state elections, and the rights of the states to define and enforce their own laws for their purely local elections. The extent to which illegalities in these elections give rise to Travel Act violations within the purview of federal officers should be decided by Congress if not by established common or commercial law. Enforcing that obligation in this critical moment is a job fit for the Supreme Court.

**CONCLUSION**

For these reasons, we respectfully request that Mr. Smilowitz's petition for a Writ of Certiorari be GRANTED.

Dated: March 11, 2021

Garden City, New York

Respectfully,

BARKET EPSTEIN KEARON  
ALDEA & LOTURCO, LLP

*/s/ Donna Aldea, Esq.*

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## Appendix

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19-361-cr

*United States of America v. Smilowitz*

1

2 In the

3

4 **United States Court of Appeals**  
5  
6 **For the Second Circuit**

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7

8 AUGUST TERM, 2019

9

10 ARGUED: FEBRUARY 10, 2020

11

12 DECIDED: SEPTEMBER 8, 2020

13

14 No. 19-361

15

16 UNITED STATES OF AMERICA,  
17 *Appellee,*

18

19 v.

20

21 VOLVY SMILOWITZ, AKA ZEV SMILOWITZ,  
22 *Defendant-Appellant,*

23

24 SHALOM LAMM, KENNETH NAKDIMEN,  
25 *Defendants.*

---

26

27 Appeal from the United States District Court  
28 for the Southern District of New York.

29 *Vincent Briccetti, Judge.*

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30

31 Before: WALKER, PARKER, and CARNEY, *Circuit Judges.*

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32

33

1           Volvy "Zev" Smilowitz pled guilty to (1) conspiring to submit  
2 false voter registrations and buying voter registrations in violation of  
3 18 U.S.C. § 371 and 52 U.S.C. § 10307(c) and (2) conspiring to violate  
4 the Travel Act by paying bribes for voter registrations and votes, in  
5 violation of 18 U.S.C. §§ 371 and 1952. Specifically, Smilowitz bribed  
6 individuals to unlawfully vote in Bloomingburg, New York, and he  
7 and his co-defendants falsified voter registration records to make it  
8 appear as though these individuals lived in Bloomingburg for at least  
9 thirty days prior to their registration. On appeal, Smilowitz argues  
10 that the federal election statute, 52 U.S.C. § 10307(c), does not apply  
11 because the offense conduct was strictly tied to a local, not federal,  
12 election. He also argues that his conviction under the Travel Act was  
13 improper because buying voter registrations does not constitute  
14 bribery. We conclude that 52 U.S.C. § 10307(c) applied to Smilowitz's  
15 conduct because it exposed future federal elections to corruption. We  
16 also conclude that his payment to influence voter conduct fits within  
17 the generic definition of bribery and thus violated the Travel Act.  
18 Therefore, we AFFIRM the judgment.

19

20

21           AUDREY STRAUSS, Acting United States Attorney  
22 for the Southern District of New York, Attorney  
23 for United States of America, New York, NY  
24 (Kathryn Martin; Daniel B. Tehrani, New York,  
25 NY; Assistant United States Attorneys, New York,  
26 NY, *on the brief*), for Plaintiff-Appellee.

1 BARKET EPSTEIN KEARON ALDEA & LOTURCO, LLP  
2 (Donna Aldea, Alex Klein, *on the brief*), Garden  
3 City, NY, *for Defendant-Appellant.*

4 \_\_\_\_\_  
5

6 JOHN M. WALKER, JR., *Circuit Judge:*

7 Volvy "Zev" Smilowitz pled guilty to (1) conspiring to submit  
8 false voter registrations and buying voter registrations in violation of  
9 18 U.S.C. § 371 and 52 U.S.C. § 10307(c) and (2) conspiring to violate  
10 the Travel Act by paying bribes for voter registrations and votes, in  
11 violation of 18 U.S.C. §§ 371 and 1952. Specifically, Smilowitz bribed  
12 individuals to unlawfully vote in Bloomingburg, New York, and he  
13 and his co-defendants falsified voter registration records to make it  
14 appear as though these individuals lived in Bloomingburg for at least  
15 thirty days prior to their registration. On appeal, Smilowitz argues  
16 that the federal election statute, 52 U.S.C. § 10307(c), does not apply  
17 because the offense conduct was strictly tied to a local, not federal,  
18 election. He also argues that his conviction under the Travel Act was  
19 improper because buying voter registrations does not constitute  
20 bribery. We conclude that 52 U.S.C. § 10307(c) applied to Smilowitz's  
21 conduct because it exposed future federal elections to corruption. We  
22 also conclude that his payment to influence voter conduct fits within  
23 the generic definition of bribery and thus violated the Travel Act.  
24 Therefore, we AFFIRM the judgment.

1

### BACKGROUND

2        This conviction stemmed from Smilowitz's involvement in a  
3        criminal voting scheme to further a real estate development project in  
4        the village of Bloomingburg, New York. With a small population of  
5        about 420 people, Bloomingburg is managed only by a mayor and two  
6        trustees. Smilowitz was a business associate of Shalom Lamm and  
7        Kenneth Nakdimen, two real estate developers. In 2006, these  
8        developers planned a development in the village that was expected  
9        to house thousands of families from the Hasidic Jewish community.  
10       Smilowitz and his father entered into a non-binding letter of intent to  
11       buy Chestnut Ridge, the first part of the development, for more than  
12       \$29 million. In a confidential "Executive Summary," circulated to  
13       potential investors, Lamm and Nakdimen stated that the project  
14       would provide an excellent location for an Hasidic community and  
15       that, because of Bloomingburg's small population, this religious  
16       community would be able to control local government decisions.  
17       Wary of local objections to the project, Lamm and Nakdimen kept it  
18       secret and repeatedly misrepresented the scope of the development  
19       while gaining the requisite real estate approvals.

20       By late 2013, following years of construction, Bloomingburg's  
21       residents learned of the scheme. The village halted Chestnut Ridge's  
22       construction, which left it uninhabitable. After local elected officials  
23       voted against measures that Lamm, Nakdimen, and Smilowitz

1     needed to complete the Chestnut Ridge project, the three men sought  
2     to replace two of the elected officers with their chosen candidates.  
3     Specifically, they wanted to install Mark Berensten, a Chestnut Ridge  
4     supporter, as mayor and Harold Baird as a trustee. Because Baird did  
5     not live in the village, the conspirators helped him find a residence in  
6     the Village that he could falsely register as his.

7           With the majority of Bloomingburg residents opposed to the  
8     development, Lamm and Nakdimen sought to increase their  
9     favorable voting base by encouraging individuals to move into rental  
10    properties the defendants purchased in Bloomingburg. To that end,  
11    defendants sought out members of the Hasidic community living  
12    elsewhere whom they could register to vote. Smilowitz, acting as a  
13    liaison, reached out to residents in Kiryas Joel, New York, and the  
14    Williamsburg section of Brooklyn, New York, and offered them cash  
15    payments and rent subsidies in return for their agreement to move to  
16    and register to vote in Bloomingburg. By the residency registration  
17    deadline of February 18, 2014, a month before the March 18 election,  
18    however, only a few of these individuals had actually moved to  
19    Bloomingburg and most of the previously purchased rental  
20    properties remained vacant.

21           Undeterred, Lamm, Nakdimen, Smilowitz and others working  
22    at their public relations firm, Beckerman PR, fraudulently registered  
23    approximately 142 new voters. Each registrant had to submit a

1 signed, sworn New York State voter registration form to the Sullivan  
2 County Board of Elections (BOE). Smilowitz and his co-defendants  
3 falsified registration forms by listing registrants' addresses as the  
4 Bloomingburg properties owned by Lamm and Nakdimen and by  
5 stating that these individuals had been living in Bloomingburg for at  
6 least thirty days prior to registration, as required by New York law.  
7 At Smilowitz's insistence, these ineligible voters signed backdated  
8 rental applications. The defendants also had Beckerman PR  
9 employees go to the rental residences and leave personal items, such  
10 as toiletries, to make the homes appear occupied.

11 Prior to the March 18, 2014 election, after Bloomingburg certain  
12 residents sued in state court to invalidate the new voter registrations  
13 on the basis of non-residency, a Sullivan County Supreme Court  
14 justice ordered the challenged registrants to vote by affidavit ballot,  
15 attesting to their residency. On March 13, 2014, federal agents  
16 executed search warrants on various business offices and sham  
17 residences of Lamm and Nakdimen.

18 On Election Day, Lamm, Nakdimen, and Smilowitz arranged  
19 transportation to Bloomingburg for the registrants who lived  
20 elsewhere. A total of 265 votes were cast in the election. After 157  
21 votes were challenged and invalidated by the BOE in connection with  
22 defendants' scheme, incumbent mayor Frank Gerardi, who opposed  
23 the development, won reelection.

1        On December 12, 2016, a grand jury charged Lamm, Nakdimen,  
2 and Smilowitz with one count of conspiring to submit false voter  
3 registrations and buy voter registrations in violation of 18 U.S.C. § 371  
4 and 52 U.S.C. § 10307(c), and conspiring to violate the Travel Act by  
5 paying bribes for voter registrations and votes, in violation of 18  
6 U.S.C. §§ 371 and 1952.

7        On November 10, 2017, Smilowitz moved to dismiss the  
8 Indictment on three grounds. He argued first, that 52 U.S.C. §  
9 10307(c), the federal election statute, did not apply to him because the  
10 alleged scheme related solely to a local election; second, that the  
11 Indictment should be dismissed because it was “vague” as applied to  
12 him; and finally, that the Travel Act object of the conspiracy was  
13 invalid because purchasing voter registrations and votes does not  
14 constitute bribery under the applicable New York statute. The  
15 District Court for the Southern District of New York (Briccetti, J.)  
16 rejected these arguments and denied the motion.

17       On June 15, 2018, Smilowitz pled guilty pursuant to a written  
18 plea agreement to Count One of the Superseding Indictment  
19 containing the foregoing single conspiracy count. On January 24,  
20 2019, the district court sentenced Smilowitz to three months'  
21 imprisonment, followed by one year of supervised release, together  
22 with 200 hours of community service.

1

**DISCUSSION**

2

On appeal, Smilowitz presses the arguments made before the district court, except for the vagueness claim.<sup>1</sup> We review “questions of statutory interpretation *de novo*.<sup>2</sup> We also “review a district court’s denial of a motion to dismiss an indictment *de novo*.<sup>3</sup>

4

**I. The Federal Election Statute**

5

Smilowitz first contends that his conviction under 52 U.S.C. § 10307(c), which pertains to federal elections, must be vacated because his admitted conduct related only to a local election with no federal candidate on the ballot. In connection with this argument, it is critical to note that New York’s election system is unitary, whereby registration entitles an individual to vote in all local, state and federal government elections.

6

Congress enacted § 10307 under its constitutional power to shield federal elections from fraud or corruption. That power is found in Article I, Section 4 of the Constitution which specifies that: “The

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<sup>1</sup> The government contends that Smilowitz’s claims are waived by his unconditional guilty plea. Smilowitz argues that *Class v. United States*, 138 S. Ct. 798 (2018), preserves his challenge to the constitutionality of his conviction. *Class* held that a guilty plea, by itself, does not bar a defendant from challenging the constitutionality of the statute of conviction on appeal. *Id.* at 803. Because we reject Smilowitz’s arguments on the merits, we do not address the contours of appellate review following a guilty plea post-*Class*.

<sup>2</sup> *United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016) (quoting *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006)).

<sup>3</sup> *United States v. Canori*, 737 F.3d 181, 182 (2d Cir. 2013) (citations omitted).

1 Times, Places and Manner of holding Elections for Senators and  
2 Representatives, shall be prescribed in each State by the Legislature  
3 thereof; but the Congress may at any time by Law make or alter such  
4 Regulations, except as to the Places of chusing Senators.”<sup>4</sup> The  
5 Supreme Court has recognized that if Congress does not “have the  
6 power to protect the elections on which its existence depends . . . it  
7 is left helpless before the two great natural and historical enemies of  
8 all republics, open violence and insidious corruption.”<sup>5</sup> This  
9 authority is augmented by the Necessary and Proper Clause, which  
10 empowers Congress: “To make all Laws which shall be necessary and  
11 proper for carrying into Execution the foregoing Powers, and all other  
12 Powers vested by this Constitution in the Government of the United  
13 States, or in any Department or Officer thereof.”<sup>6</sup>

14 Notwithstanding this express constitutional authority to  
15 regulate federal elections, case law has made clear that Congress must  
16 not encroach on the states’ authority to regulate their own electoral  
17 processes.<sup>7</sup> Because the “Constitution grants to the States a broad

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<sup>4</sup> U.S. Const. art. I, § 4, cl. 1.

<sup>5</sup> *The Ku Klux Cases*, 110 U.S. 651, 658 (1884).

<sup>6</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>7</sup> See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“recogniz[ing] that States retain the power to regulate their own elections”); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (“The Constitution grants to the States

1 power" to regulate their election procedures, long-standing  
2 federalism principles limit congressional infringement on state  
3 elections.<sup>8</sup>

4 Title 52, section 10307(c) of the United States Code, under which  
5 Smilowitz was convicted, regulates only federal elections. It states in  
6 relevant part:

7 Whoever knowingly or willfully gives false information . . .  
8 for the purpose of establishing his eligibility to register or  
9 vote, or conspires with another individual for the purpose  
10 of encouraging his false registration to vote or illegal  
11 voting, or pays or offers to pay or accepts payment either  
12 for registration to vote or for voting shall be fined not more  
13 than \$10,000 or imprisoned not more than five years, or  
14 both: *Provided, however,* That this provision shall be  
15 applicable only to general, special, or primary elections  
16 held solely or in part for the purpose of selecting or electing  
17 any candidate for the office of President, Vice President,  
18 presidential elector, Member of the United States Senate,  
19 Member of the United States House of Representatives . . .

20  
21 Smilowitz contends that the plain text of the "provided,  
22 however" clause limits the reach of the statute to only those elections

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a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives.'"); *Boyd v. Nebraska*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen . . ."); *United States v. Bowman*, 636 F.2d 1003, 1008 (5th Cir. 1981) (noting that Congress added qualifying language to the initial federal election statute because "it was felt that Congress had no constitutional authority to enact legislation to prevent corruption in all elections, both state and federal").

<sup>8</sup> *Tashjian*, 479 U.S. at 217.

1 that include a federal candidate, and that because no federal  
2 candidate was on the ballot in the March 18, 2014 Bloomingburg  
3 election in this case, § 10307(c) has no application here. He further  
4 argues that allowing the statute to reach state-only elections would  
5 violate the principles of federalism that limit Congress's authority  
6 over state elections.

7 The government responds with two arguments. First, the  
8 government counters Smilowitz's textual argument with a textual  
9 argument of its own: the "provided, however" clause is expressly  
10 limited to actual "elections," and because voter registrations are not  
11 elections and are not tied to any particular election, the "provided,  
12 however" limitation does not limit the government's power to  
13 regulate voter registrations regardless of whether they pertain to state  
14 or federal elections or a combination of the two. Therefore, the  
15 government maintains, the fact that only local candidates were on the  
16 ballot to which the registrations would immediately apply does not  
17 matter because the statute reaches Smilowitz's admitted tampering  
18 with voter registration in a state-only election.

19 We disagree with the government's textual argument. First, the  
20 plain text of § 10307 before the "provided, however" clause reaches  
21 both elections and registrations, and the text of the "provided,  
22 however" clause itself is most naturally read to modify all of that  
23 which precedes the clause. The "provided, however" clause refers to

1 the prohibitory command of the entire section preceding it when it  
2 states that “this *provision* shall be applicable” to the election of the  
3 specified federal candidates. The entire provision offers no indication  
4 that the “provided, however” clause is carving out “false registration  
5 to vote” from the language it modified.

6 The government’s strained textual reading would permit  
7 federal regulation of voter registration that applies only to state and  
8 local elections, even though federal courts have consistently held that,  
9 because core principles of federalism limit federal control over state  
10 matters, federal courts lack jurisdiction over a “pure” state or local  
11 election.<sup>9</sup> We reject the government’s argument because it cannot be  
12 reconciled with the text and it offends federalism principles and  
13 related caselaw.<sup>10</sup>

14 The government’s second argument fares much better,  
15 however. The government contends that, because New York’s

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<sup>9</sup> See, e.g., *United States v. Slone*, 411 F.3d 643, 649 (6th Cir. 2005); *Bowman*, 636 F.2d at 1011 (concluding that “Congress may regulate ‘pure’ federal elections, but not ‘pure’ state or local elections”); see also *United States v. Cole*, 41 F.3d 303, 306 (7th Cir. 1994) (holding that federal courts have jurisdiction in a mixed federal/state election); *Schuler v. Bd. of Educ. of Cent. Islip Union Free Sch. Dist.*, No. 96-CV-4702 (JG), 2000 WL 134346, at \*12 n.18 (E.D.N.Y. Feb. 1, 2000) (noting that *Bowman* stands for the proposition that Congress may not regulate “pure” state or local elections).

<sup>10</sup> See *Burdick*, 504 U.S. at 433 (interpreting Art. I, § 4, cl.1 of the Constitution and noting that “the Court . . . has recognized that States retain the power to regulate their own elections”).

1 registration process is unitary, Smilowitz's fraudulent conduct has  
2 the potential to affect future federal elections.

3 The registration process implicated here was not confined to a  
4 "pure" state or local election of the sort that would be beyond the  
5 power of Congress to regulate. New York's unitary registration  
6 process *permanently* qualifies a registrant to cast ballots in any local,  
7 state, or federal election. Thus, Smilowitz's conduct is within the  
8 statute's purview. Because § 10307(c) reaches voter registrations that  
9 pertain to the federal elections specified in the "provided, however"  
10 clause, and because the registrations here cover future federal  
11 elections, the statute applies to the fraudulent conduct in this case.

12 Our ruling is in keeping with the purpose of the Voting Rights  
13 Act of 1965: to protect the integrity of the federal vote through new  
14 enforcement tools.<sup>11</sup> The fact that no federal candidate was on the  
15 Bloomingburg ballot on March 18, 2014 is of no moment. Because of  
16 New York's unitary registration system, Smilowitz's actions exposed  
17 future federal elections to corruption. To hold otherwise would  
18 arbitrarily limit voter registration challenges because, in the context  
19 of a unitary registration, it is "impossible to isolate a threat to the

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<sup>11</sup> See *Bowman*, 636 F.2d at 1008 (noting that the "legislative history of the Act reveals a Congressional desire to protect the integrity of a person's right to vote by protecting the integrity of that vote"); see also *United States v. Cianciulli*, 482 F. Supp. 585, 617 (E.D. Pa. 1979) (discussing the legislative history and Congress's intent to protect the federal electoral process from corruption).

1      integrity of the state electoral process from a threat to the integrity of  
2      the federal contest.”<sup>12</sup>

3              Smilowitz argues that recognizing federal jurisdiction because  
4      of New York’s unitary registration system violates principles of  
5      federalism since “unitary registration prevails in practically every  
6      state in America.” While unitary registration is prevalent, applying  
7      the prohibition to unitary registrations raises no federalism concerns  
8      because the crime affects voter registrations that permit federal  
9      voting. Moreover, any lingering federalism concerns could be  
10     mitigated by any state’s modifying its local election laws to have a  
11     separate registration process for purely state elections.

12              Our reasoning aligns with that of several of our sister circuits.<sup>13</sup>  
13     The Seventh Circuit’s decision in *United States v. Lewin* is instructive.<sup>14</sup>  
14     There, the appellants were convicted of conspiracy to pay and offer to  
15     pay persons for registering to vote in violation of 42 U.S.C. § 1973i(c)  
16     (now codified at 52 U.S.C. § 10307(c)).<sup>15</sup> The Seventh Circuit rejected  
17     the same local election argument that Smilowitz makes here,

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<sup>12</sup> *Bowman*, 636 F.2d at 1012.

<sup>13</sup> See, e.g., *id.*; *United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999) (citing *Bowman*, 636 F.2d at 1012); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982); *United States v. Lewin*, 467 F.2d 1132, 1136 (7th Cir. 1972).

<sup>14</sup> 467 F.2d 1132.

<sup>15</sup> *Id.* at 1134.

1 reasoning that because Illinois had “permanent registration” for “all  
2 elections in Illinois,” there was “no merit in the contention” that the  
3 statute did not apply.<sup>16</sup>

4 The Fifth Circuit in *Bowman* employed similar reasoning in  
5 addressing 42 U.S.C. § 1973i(c)’s applicability to certain registration  
6 conduct. Specifically, the Fifth Circuit referred to *Lewin* for the  
7 proposition that because “permanent voter registration in Illinois  
8 carried with it the privilege of voting in both federal and non-federal  
9 elections,” and because the “act of registering, whether or not it occurs  
10 in the same year as a federal election, creates an eligibility to vote in a  
11 federal election,” the fraudulent conduct would have “an equal  
12 impact” upon the federal and non-federal elections.<sup>17</sup>

13 Likewise, we hold here that the prohibitions in 52 U.S.C. §  
14 10307(c) apply to any voter registration practices that expose federal  
15 elections – present or future – to corruption, regardless of whether

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<sup>16</sup> *Id.* at 1136.

<sup>17</sup> *Id.* The Fifth Circuit also cited *United States v. Cianciulli* for the proposition that 1973i(c) includes “false voter registrations occurring in both federal and non-federal election years because the act of registering, whether or not it occurs in the same year as a federal election, creates an eligibility to vote in a federal election” and thus, corrupt practices “would have equal impact upon the federal and the non-federal election.” *Bowman*, 636 F.2d at 1011 (citing *Cianciulli*, 482 F. Supp. 585, 617-18 (E.D. Pa. 1979)). Here, the district court relied on *Cianciulli* and *United States v. Lewis*, 514 F. Supp. 169 (M.D. Pa. 1981). In both those cases, the courts found that, because Pennsylvania had a unitary registration system, Section 1973i(c) outlawed all fraudulent registrations.

1 any federal candidate is on the immediate ballot. Because Smilowitz's  
2 conduct, due to New York's unitary registration format, had "the  
3 *potential* to affect the 'integrity and purity' of [a federal] election,"<sup>18</sup>  
4 we conclude that § 10307(c) is applicable.

5 **II. The Travel Act**

6 Smilowitz next contends that the Travel Act component of his  
7 conspiracy conviction should be reversed because his conduct did not  
8 satisfy the requisite predicate offense of "bribery." The Travel Act  
9 criminalizes, among other things, interstate travel and use of the mail  
10 in connection with conduct related to "unlawful activity." In  
11 particular, 18 U.S.C. § 1952(a), in pertinent part, prohibits individuals  
12 from travelling interstate and using the mail to "promote, manage,  
13 establish, carry on, or facilitate the promotion, management,  
14 establishment or carrying on, of any unlawful activity," or who  
15 attempt to do the same.<sup>19</sup>

16 Section 1952(b) defines "unlawful activity," in relevant part,  
17 as "extortion, bribery, or arson in violation of the laws of the State in

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<sup>18</sup> *McCrane*, 169 F.3d at 727 (citing *Bowman*, 636 F.2d at 1012); *see also* *Mason*, 673 F.2d at 739 (holding that Congress "clearly includes the power to regulate conduct which, although directed at non-federal elections, also has an impact on the federal races").

<sup>19</sup> 18 U.S.C. § 1952(a).

1 which committed or of the United States . . . ."<sup>20</sup> Here we are  
2 concerned with the meaning of the term "bribery" in that section.

3 The question before us is whether the New York state offense to  
4 which Smilowitz pled guilty, New York Election Law § 17-142,  
5 amounted to "bribery" within the meaning of § 1952(b). Under § 17-  
6 142, a person is guilty of a felony if he:

7 Pays, lends or contributes or promises to pay, lend or  
8 contribute any money or other valuable consideration to or  
9 for any voter, or to or for any other person, to induce such  
10 voter or other person to vote or refrain from voting at any  
11 election, or to induce any voter or other person to vote or  
12 refrain from voting at such election for any particular  
13 person or persons, or for or against any particular  
14 proposition submitted to voters, or to induce such voter to  
15 come to the polls or remain away from the polls . . . .

16 Smilowitz argues that because § 17-142 does not punish bribery  
17 as defined by the New York state bribery statutes,<sup>21</sup> which requires  
18 the payee to be a "public servant,"<sup>22</sup> his violation of § 17-142 cannot

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<sup>20</sup> *Id.* § 1952(b).

<sup>21</sup> The crimes of bribery under New York law—New York Penal Law §§ 200.00 (third degree), 200.03 (second degree), 200.04 (first degree)—each require that the "benefit" the guilty party "confers, or offers or agrees to confer" be directed to "a public servant." Under New York Election Law § 17-142, however, the consideration that must be paid or promised by the guilty party may be directed to "any . . . person."

<sup>22</sup> N.Y. Penal Law §§ 200.00, 200.03, 200.04.

1 serve as the Travel Act predicate “crime of bribery.” However,  
2 precedent forecloses this argument.

3 First, the Supreme Court held forty years ago in *Perrin v. United*  
4 *States* that in enacting the Travel Act, Congress intended “the generic  
5 definition of bribery, rather than a narrow common-law definition  
6 limited to public officials, was intended by Congress.”<sup>23</sup> In describing  
7 the activities that fit within the generic definition, the Supreme Court  
8 noted that even at the time of Blackstone, “the crime of bribery had  
9 been expanded to include the corruption of any public official *and the*  
10 *bribery of voters* and witnesses as well.”<sup>24</sup> The Court pointed to the  
11 legislative history of § 1952 to indicate that Congress “used ‘bribery’  
12 [in the Travel Act] to include payments to private individuals to  
13 influence their actions.”<sup>25</sup> A decade earlier, in *United States v. Nardello*,  
14 the Court held that in a Travel Act prosecution, the predicate  
15 unlawful activity of extortion includes all acts within its generic  
16 description.<sup>26</sup> *Nardello* made clear that “the inquiry is not the manner

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<sup>23</sup> 444 U.S. 37, 49 (1979).

<sup>24</sup> *Id.* at 43 (emphasis added). The Model Penal Code also defines “bribery” to include conferring “any pecuniary benefit as consideration for the recipient’s decision, opinion, recommendation, *vote* or other exercise of discretion as a public servant, party official, or *voter*. Model Penal Code § 240.1(1) (emphasis added).

<sup>25</sup> *Id.* at 46.

<sup>26</sup> 393 U.S. 286, 295 (1969).

1 in which States classify their criminal prohibitions but whether the  
2 particular State involved prohibits the extortionate activity  
3 charged.”<sup>27</sup> The same reasoning applies here. It is undisputed based  
4 on the text of § 17-142 that New York prohibited Smilowitz from  
5 paying voters. His conduct thus is within the federal definition of  
6 “bribery” under § 1952.

7 Second Circuit case law also supports our conclusion. We have  
8 held that the generic description of bribery applies to Travel Act  
9 convictions. In *United States v. Walsh*, the defendants challenged their  
10 Travel Act conviction on the basis that the applicable New Jersey  
11 bribery statute failed to specifically charge an “intent to corrupt  
12 official action.”<sup>28</sup> We held that even though the applicable state  
13 statute was “technically a ‘gratuity’ or ‘corrupt solicitation’ statute,  
14 not a ‘bribery’ statute, [it] proscribe[d] conduct which fits within the  
15 broad generic description of bribery” and thus “was properly charged  
16 to the jury as a Travel Act predicate of bribery.”<sup>29</sup> Because Travel Act  
17 bribery is construed broadly, the lack of a precise fit between § 17-142  
18 and the New York bribery statute does not matter. We therefore agree

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<sup>27</sup> *Id.*

<sup>28</sup> 700 F.2d 846, 858 (2d Cir. 1983).

<sup>29</sup> *Id.* (citing *United States v. Forsythe*, 560 F.2d 1127, 1137-38 (3d Cir. 1977)); *Nardello*, 393 U.S. at 295-96).

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20

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1 with the district court that Smilowitz's admitted payment to voters  
2 suffices as a Travel Act predicate.

3 **CONCLUSION**

4 For the reasons stated above, we AFFIRM the judgment of the  
5 district court.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**DEBRA ANN LIVINGSTON  
CHIEF JUDGE**

Date: September 08, 2020

Docket #: 19-361cr

Short Title: United States of America v. Lamm (Smilowitz)

**CATHERINE O'HAGAN WOLFE  
CLERK OF COURT**

DC Docket #: 7:16-cr-818-3

DC Court: SDNY (WHITE  
PLAINS)

DC Judge: Briccetti

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

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PLAINS)  
DC Judge: Briccetti

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

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respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

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and in favor of

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for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_) \_\_\_\_\_

**(VERIFICATION HERE)**

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Signature

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA

4 v. 16 Cr. 818 (VB)

5 DECISION

6 VOLVY SMILOWITZ,  
7 also known as Zev Smilowitz,

8 Defendant.

9 -----x  
10  
11 United States Courthouse  
12 White Plains, N.Y.  
13 March 15, 2018

14  
15 Before: THE HONORABLE VINCENT L. BRICCETTI,

16 District Judge  
17  
18  
19 APPEARANCES

20 GEOFFREY S. BERMAN  
21 United States Attorney for the  
22 Southern District of New York  
23 BENJAMIN ALLEE  
24 KATHRYN MARTIN  
25 Assistant United States Attorneys

26  
27 SHER, TREMONTE, LLP  
28 Attorneys for Defendant  
29 NOAM KORATI BIALE

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1                   THE DEPUTY CLERK: United States of America against  
2 Volvy Smilowitz.

3                   Will counsel please note their appearance for the  
4 record.

5                   MR. ALLEE: Good afternoon, your Honor. Benjamin  
6 Allee and Kathryn Martin for the government.

7                   MR. BIALE: Good afternoon, your Honor. Noam Biale  
8 for Zev Smilowitz, who is with me at counsel table. And as  
9 your Honor knows, I think, Ms. Harris is on trial currently in  
10 Boston.

11                  THE COURT: Okay. Welcome.

12                  Have a seat.

13                  First of all, let me just apologize for running late.  
14 It's been a very busy day today. Ms. Martin knows that. So I  
15 apologize. But we're a little behind.

16                  All right. I'm prepared to resolve the pending  
17 motions, so I'm going to go ahead and -- well, before I do  
18 that, is there anything further, anything new that's developed,  
19 any case that's come down, any new fact that has come to light  
20 since we were last here with respect to the motions?

21                  Mr. Allee?

22                  MR. ALLEE: Not from our side, your Honor.

23                  THE COURT: And Mr. Biale?

24                  MR. BIALE: No, your Honor.

25                  THE COURT: Okay.

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1                   By motion dated November 10th, 2017, the defendant,  
2 Volvy Smilowitz -- and again, pronounce your client's last name  
3 again for me. Is that correct?

4                   MR. BIALE: That's correct, your Honor, Smilowitz.

5                   THE COURT: Mr. Smilowitz seeks to dismissal of the  
6 one-count indictment in this case on the ground that none of  
7 the objects of the charged conspiracy constitutes a violation  
8 of federal law. He also seeks dismissal of the first object of  
9 the conspiracy on the additional ground that it is  
10 unconstitutionally vague.

11                  I previously denied the defendant's motion to dismiss  
12 the indictment on the ground of vindictive prosecution.

13                  For the reasons I'm about to explain, the motions are  
14 denied.

15                  The relevant background is as follows:

16                  The indictment, which was returned December 12th,  
17 2016, charges Mr. Smilowitz, as well as Shalom Lamm and Kenneth  
18 Nakdimen, with participating in a single conspiracy with three  
19 separate objects: One, violation of 52, United States Code,  
20 Section 10307(c) by "giving false voter registrations"; two,  
21 violation of that same section, Section 10307(c), by "buying  
22 voter registrations"; and, three, violation of the Travel Act,  
23 18, United States Code, Section 1952, by "facilitating the  
24 promotion, management and carrying on of bribery after  
25 traveling interstate and using facilities of interstate

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1 commerce." And that's from paragraph 10 of the indictment.

2 The following is a summary of the facts alleged in  
3 the indictment:

4 Starting in about 2006, the defendants sought to  
5 build and sell real estate in Bloomingburg, New York.

6 And again, I'm not making findings of fact here. All  
7 I'm doing is summarizing the facts as alleged.

8 By late 2013, the first of these real estate  
9 developments was met with local opposition and remained under  
10 construction and uninhabitable, despite an investment of  
11 millions of dollars.

12 On or about December 12th, 2013, the Village of  
13 Bloomingburg's Planning Board voted against measures sought by  
14 Lamm and Nakdimen.

15 Accordingly, the defendants "placed importance on the  
16 election of local officials who would support" their real  
17 estate project. That's from paragraph 8 of the indictment.

18 In advance of the Village elections scheduled for  
19 March 18, 2014, the defendants "offered cash and other payments  
20 and other items of value, including rent-free housing, to  
21 individuals who did not live in Bloomingburg provided that they  
22 register to vote and vote in Bloomingburg." That's a quote  
23 from paragraph 14(b) of the indictment.

24 The defendants and others who worked on their behalf  
25 then submitted voter registration forms reflecting addresses at

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1 which the registrants did not actually live to the Sullivan  
2 County Board of Elections. The forms were false because "the  
3 registrants swore and affirmed that they had lived in the  
4 voting district for 30 days prior to the election when, in  
5 fact, they had not." That's from paragraph 14(c) of the  
6 indictment.

7 Anticipating their voter-registration scheme would  
8 draw scrutiny, defendants "took steps to give the false  
9 appearance that the unoccupied properties in which registrants  
10 falsely claimed to live were occupied," including creating sham  
11 and backdated lease agreements, placing personal items such as  
12 toothpaste and toothbrushes in the unoccupied properties, and  
13 picking up mail from the mailboxes at the properties. That's  
14 from paragraph 14(d).

15 On election day, the defendants arranged  
16 "transportation to Bloomingburg for registrants who lived  
17 elsewhere and prepared to coach the registrants on their false  
18 addresses in order to respond to challenges to the false  
19 registrations." That's from paragraph 14(f).

20 In particular, Mr. Smilowitz is alleged to have:

21 One, received a spreadsheet from co-defendant Lamm  
22 setting forth a "goal of 150 leases and 150 registered voters."  
23 That's paragraph 15(a) of the indictment.

24 Two, created with others a to-do list, which included  
25 preparing leases, picking up mail from leased apartments every

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1 two days and picking up home goods from Wal-Mart for every  
2 apartment, including soda, beer, snacks, clothes for closets,  
3 toothbrushes and toothpaste. That's at paragraph 15(b) of the  
4 indictment.

5 Three, offered someone \$500 and a rent-free apartment  
6 if that person registered to vote and did vote and offered the  
7 same benefits for up to ten of that person's acquaintances.  
8 That's paragraph 15(d).

9 And, four, submitted false voter registration forms  
10 to the Sullivan County Board of Elections on February 18th or  
11 19th, 2014. That's paragraph 15(f).

12 On May 25, 2017, Mr. Nakdimen pleaded guilty to the  
13 charged conspiracy. He was sentenced on September 15th, 2017.

14 On June 6th, 2017, Mr. Lamm pleaded guilty to the  
15 charged conspiracy. He was sentenced on December 7th, 2017.

16 Now, the following legal standards apply to this case  
17 and to this motion:

18 First of all, Rule 12(b)(3)(B) of the Federal  
19 Rules of Criminal Procedure provides that a defendant may  
20 challenge an indictment pretrial on the ground that it fails to  
21 state an offense.

22 Rule 7(c) requires that an indictment contain a  
23 plain, concise and definite written statement of the essential  
24 facts constituting the offense charged.

25 Moreover -- and this is a quote from Hamling against

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1       United States, 418 U.S. 87, 117 -- "an indictment is sufficient  
2 if it, first, contains the elements of the offense charged and  
3 fairly informs the defendant of the charge against which he  
4 must defend and, second, enables him to plead an acquittal or  
5 conviction in bar of future prosecutions for the same offense."

6           Thus, the validity of an indictment is based on its  
7 allegations, not on "the ground that there was inadequate or  
8 incompetent evidence before the grand jury." That's a quote  
9 from Costello against United States, 350 U.S. 359, 363.

10           Accordingly, the Second Circuit has "consistently  
11 upheld indictments that do little more than to track the  
12 language of the statute charged and state the time and place in  
13 approximate terms of the alleged crime." That's from United  
14 States against Bout, 731 F.3d 233, 240.

15           Mr. Smilowitz argues the first two objects of the  
16 conspiracy fail to state a federal offense under 52 U.S. Code  
17 Section 10307(c).

18           Section 10307(c) provides:

19           "Whoever knowingly or willfully gives false  
20 information as to his name, address or period of residence in  
21 the voting district for the purpose of establishing his  
22 eligibility to register or vote or conspires with another  
23 individual for the purpose of encouraging his false  
24 registration to vote or illegal voting or pays or offers to pay  
25 or accepts payment either for registration to vote or for

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1 voting shall be guilty of a crime; provided, however, that this  
2 provision shall be applicable only to general, special or  
3 primary elections held solely or in part for the purpose of  
4 selecting or electing any candidate for the office of  
5 President, Vice President, presidential elector, a member of  
6 the United States Senate, a member of the United States House  
7 of Representatives, a delegate from the District of Columbia,  
8 Guam or the Virgin Islands or Resident Commissioner of the  
9 Commonwealth of Puerto Rico."

10 Congressional authority to protect the integrity of  
11 federal elections comes from the Constitution's elections  
12 clause, which provides, "The times, places and manner of  
13 holding elections for Senators and Representatives shall be  
14 prescribed in each state by the Legislature thereof, but the  
15 Congress may at any time, by law, make or alter such  
16 regulations except as to the places of choosing Senators."  
17 That's Article I, Section 4, Clause 1 of the Constitution.

18 And Article I, Section 8, Clause 18: The necessary  
19 and proper clause vests Congress with the authority to make  
20 laws "necessary and proper for carrying into execution...all  
21 other powers vested by this Constitution and the Government of  
22 the United States."

23 Accordingly, registration to vote in federal  
24 elections is properly subject to federal regulation.

25 Now, the following alleged facts regarding the voter

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1 registrations at issue are relevant to deciding whether the  
2 indictment states a crime under 52 U.S.C. 10307(c).

3 In New York State, voter registration is unitary,  
4 meaning that a single New York State voter registration form  
5 filed with a local board of elections allows an elector to vote  
6 indefinitely in any local, state or federal election. That's  
7 paragraph 4(a) of the indictment.

8 Paragraph 4(a) of the indictment also alleges that  
9 the New York State voter registration form requires a  
10 registrant to provide "the address where he or she lives" and  
11 "to swear or affirm that he or she has lived within the voting  
12 district for a period of 30 days prior to an election."

13 According to the indictment, Mr. Smilowitz conspired  
14 to "knowingly give false information as to registrants'  
15 addresses for the purpose of establishing the registrants'  
16 eligibility to register and vote" in Bloomingburg -- that's  
17 paragraph 11 -- and to "pay and offer to pay and accept payment  
18 for registrations to vote." That's paragraph 12.

19 Mr. Smilowitz argues that the "provided" clause in  
20 Section 10307(c) limits the statute's applicability to  
21 elections held solely or in part to elect candidates for  
22 federal office. Thus, according to the defendant, the  
23 indictment fails to state a crime under Section 10307(c)  
24 because there was no federal official on the ballot in the  
25 March 18, 2014 election in Bloomingburg.

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1                   The Court disagrees. The Court is not aware of any  
2 Second Circuit case law applying Section 10307(c) or its  
3 predecessor, 42 U.S.C. 1973i(c), which was passed as part of  
4 the Voting Rights Act of 1965.

5                   A survey of case law from other circuits, however,  
6 persuades the Court that the indictment sufficiently alleges  
7 conduct that violates Section 10307(c) because the false and  
8 paid-for voter registrations defendants allegedly filed with  
9 the Sullivan County Board of Elections enabled registrants to  
10 vote indefinitely in any election, whether local, state or  
11 federal. As such, the false and paid-for voter registrations  
12 exposed future federal elections to the possibility of  
13 corruption, just the scenario Congress intended to prevent when  
14 it amended the proposed Voting Rights Act to include Section  
15 1973(i)(c), which, as I said, is the predecessor to Section  
16 10307(c).

17                   Other courts that have considered the issue have  
18 found false and paid-for voter registrations violate Section  
19 1973i(c).

20                   In *United States against Lewin*, 457 F.2d 1132, a  
21 Second Circuit case from 1972, appellants challenged an  
22 indictment charging them with a conspiracy to pay and offer to  
23 pay persons for registering to vote in Illinois, in violation  
24 of Section 1973i(c). On the official registration day for  
25 persons desiring to vote in Chicago, appellants allegedly

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1       brought numerous individuals to register at a registration site  
2       in a hotel lobby and paid them for doing so. Like New York,  
3       Illinois had "permanent registration," which allowed  
4       registrants to vote in federal and nonfederal elections.  
5       That's 467 F.2d at 1136.

6               As is the case here, appellants challenged the  
7       indictment on the ground that it was not restricted to  
8       elections for the various federal officials enumerated in  
9       Section 1973i(c). The Seventh Circuit found no merit in  
10      appellant's contention, stating "of course registration carries  
11      with it the privilege of voting in nonfederal elections."  
12      That's 467 F.2d 1136.

13               In United States against Lewis, 514 F. Supp. 169,  
14       M.D. Pennsylvania 1981, defendants were charged with multiple  
15       voting, in violation of 42 U.S.C. 1973i(e). Not (c), but (e).  
16       Finding little authority to guide its analysis, the court  
17       looked at the predecessor of the statute issued here, Section  
18       1973i(c), stating, "Congress enacted this legislation to give  
19       the widest possible protection to the franchise of American  
20       citizens." That's 514 F. Supp. at 178.

21               The court further stated that Section 1973i(c)  
22       "outlaws all fraudulent registrations, regardless of when they  
23       are effected, because the qualifications of a phantom voter  
24       could corrupt federal elections held in future years." That's  
25       514 F. Supp. at 178. And the court in Lewis cited United

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1 States v. Cianciulli, 482 F. Supp. 585, Eastern District of  
2 Pennsylvania from 1979.

3 In the Cianciulli case, the defendants filed  
4 post-trial motions for judgment of acquittal, arrest of  
5 judgment, and a new trial following their convictions for,  
6 among other things, conspiracy to encourage false registration  
7 and giving false information for the purpose of establishing  
8 eligibility to register to vote.

9 Like New York, voter registration in Pennsylvania  
10 permitted a registrant to vote in any local, state or federal  
11 election without the need for separate registrations for each  
12 election, although Pennsylvania voter registrations were valid  
13 for two-year periods rather than indefinitely like New York's.

14 Defendants -- and this is, again, Cianciulli --  
15 defendants argued "any false voter registration occurring in  
16 1975 was not within the jurisdiction of Section 1973i(c)  
17 because there was not a federal election in that year." That's  
18 482 F. Supp. at page 613.

19 The court in Cianciulli reasoned that statutory  
20 construction urged by defendants would be a "derogation of the  
21 manifest congressional intent" because it would allow "a person  
22 intending to vote in a federal election by means of a false  
23 registration" to "wait until the off year to commit the false  
24 registration and then cast a vote in the following year."  
25 That's from page 617 of 482 F. Supp.

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1                   After an extensive review of the legislative history,  
2 the Cianciulli court concluded that the "provided" clause  
3 applies only to the act of voting, not voter registration.  
4 That's 482 F. Supp. at 616. The court further held that any  
5 false registration in Pennsylvania "can be the basis of a  
6 violation of Section 1973i(c) because it creates an eligibility  
7 to vote in a federal election." 482 F. Supp. 617.

8                   I agree with the reasoning of these cases.  
9 Accordingly, the allegation that defendants conspired to submit  
10 false voter registrations and paid or offered to pay for false  
11 voter registrations which would allow registrants to vote in  
12 future federal elections is sufficient to state a crime under  
13 Section 10307(c).

14                   Moreover, I am persuaded by a survey of case law from  
15 other circuits that Mr. Smilowitz's purported intention to  
16 influence only a local election is irrelevant because his  
17 conduct exposed the federal election to the possibility of  
18 corruption.

19                   For example, in United States against Bowman, 636  
20 F.2d 1003 -- that's a Fifth Circuit case from 1981 -- the  
21 defendant appealed her conviction on three counts of paying,  
22 conspiring to pay and aiding and abetting other people to pay  
23 voters in Vernon Parish, Louisiana, in violation of Section  
24 1973i(c). Appellant argued that Section 1973i(c) was  
25 unconstitutional as applied to her because she intended to help

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1 only the local candidate for whom she was working, not the  
2 congressional candidate, who also appeared on the ballot. The  
3 court held that "congress may regulate pure federal elections,  
4 but not pure state or local elections. When federal and state  
5 candidates are together on the same ballot, Congress may  
6 regulate any activity," for example, voter registration, "which  
7 exposes the federal aspects of the election to the possibility  
8 of corruption whether or not the actual corruption takes place  
9 and whether or not the persons participating in such activity  
10 had a specific intent to expose the federal election to such  
11 corruption or possibility of corruption." And again, that's  
12 United States against Bowman, 636 F.2d at 1011.

13 And in United States against Slone, 411 F.3d 643, a  
14 Sixth Circuit case from 2005, the defendant appealed his  
15 guilty-plea-based conviction for vote buying, in violation of  
16 42 U.S.C. 1973i(c). Slone pleaded guilty to offering an  
17 elector \$50 to vote for a particular candidate for county  
18 executive during a primary election that included a contest for  
19 the U.S. Senate. Slone argued that the facts he admitted at  
20 his guilty-plea hearing did not constitute a basis to find him  
21 guilty of a federal crime because his conduct related solely to  
22 a candidate for county office, although federal offices were on  
23 the same ballot. The court held that 42 U.S.C. 1973i(c)  
24 "applies to all elections in which a federal candidate is on  
25 the ballot, and the government need not prove that the

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1 defendant intended to affect the federal component of the  
2 election by his corrupt practices." That's 411 F.3d at 648.

3           Although Bowman and Slone relate to vote buying  
4 rather than false or paid-for registrations, the Court is  
5 convinced that the same principles apply here, making  
6 defendant's intention irrelevant. As the Court stated in  
7 Slone, "an election is a process whose fairness is meant to  
8 engender confidence in a democratically selected government.  
9 When the purity of the process is compromised in part, the  
10 corruption affects the integrity of the whole." That's the  
11 Slone case, 411 F.3d at 650.

12           Now, the defendant next argues that the third object  
13 of the conspiracy, influencing voter registration and procuring  
14 votes through bribery, in violation of the Travel Act, 18  
15 U.S.C. 1952(a)(3), must be dismissed for failure to state a  
16 federal offense.

17           The Travel Act "punishes individuals for using  
18 facilities of interstate or foreign commerce to further certain  
19 unlawful activities." That's United States against Jenkins,  
20 943 F.2d 167, 173, a Second Circuit case from 1991.

21           The Travel Act provides in relevant part:

22           "Whoever travels in interstate or foreign commerce or  
23 uses the mail or any facility in interstate or foreign commerce  
24 with intent to promote, manage, establish, carry on or  
25 facilitate the promotion, management, establishment or carrying

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1 on of any unlawful activity and who thereafter performs or  
2 attempts to perform such activity shall be guilty of a crime."  
3 And that's, again, Section 1952(a)(3)(A) of Title 18.

4 The term unlawful activity is defined to include  
5 "extortion, bribery or arson, in violation of the laws of the  
6 state in which committed or of the United States." That's from  
7 Section 1952(b)(2) of Title 18.

8 The defendant here is alleged to have influenced  
9 voter registration and procured votes through bribery, in  
10 violation of New York Election Law Sections 17-142(1), (3) and  
11 (4). Those are the subdivisions, (1), (3) and (4).

12 Section 17-142(1), titled "giving consideration for  
13 franchise," provides in relevant part:

14 "Any person who directly or indirectly, by himself or  
15 through any other person, pays or offers or promises to pay any  
16 money or other valuable consideration to or for any voter or to  
17 or for any other person to induce such voter or other person to  
18 vote or refrain from voting in any election or to induce any  
19 voter or other person to vote or refrain from voting at such  
20 election for any particular person or persons or to induce such  
21 voter or other person to place or cause to be placed or refrain  
22 from placing or cause to be placed his name upon a registration  
23 poll record is guilty of a felony."

24 Mr. Smilowitz argues a violation of New York Election  
25 Law Section 17-142 is not bribery under New York law and, thus,

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1 does not constitute a predicate bribery for purposes of the  
2 Travel Act.

3 The Court disagrees for two reasons.

4 First, "the generic definition of bribery, rather  
5 than a narrow common-law definition, was intended by Congress"  
6 in the Travel Act. That's a quote from Perrin against United  
7 States, 444 U.S. 37, 49. Moreover, according to the Supreme  
8 Court in Perrin, from as early as the 19th Century, the  
9 definition of bribery has included "the bribery of voters."  
10 That's 444 U.S. at page 43. Thus, defendant's alleged conduct,  
11 which includes offering to pay voters to submit false  
12 registration forms and to vote, fits comfortably within the  
13 generic definition of bribery.

14 Second, at least 21 states characterize defendant's  
15 conduct as bribery. New Jersey, for example, criminalizes the  
16 same conduct as alleged against Smilowitz in a statute titled  
17 simply "bribery." And the New Jersey statute reads as follows:

18 If a person shall, directly or indirectly, give any  
19 money or other valuable consideration to or for any voter or to  
20 or for any person in order to induce any voter to vote or shall  
21 corruptly do or commit any of the acts in this section  
22 mentioned because of any such voter having voted or refrained  
23 from voting at an election or registered or refrained from  
24 registering at an election, he shall be guilty of a crime of  
25 the third degree." That's Section 19:34-25(a) of the New

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1 Jersey Statutes Annotated.

2 In the related context of extortion and blackmail,  
3 the Supreme Court, in *United States against Nardello*, 393 U.S.  
4 286, considered whether blackmail, in violation of Pennsylvania  
5 law, could constitute the Travel Act predicate of extortion.

6 The court stated:

7 "Congress' intent was to aid local law enforcement  
8 officials, not to irradicate only those extortionate activities  
9 which any given state denominated extortion. We can discern no  
10 reason why Congress would wish to have Section 1952 aid local  
11 law enforcement efforts in Utah, but to deny that aid in  
12 Pennsylvania when both states have statutes covering the same  
13 offense."

14 And that's from 393 U.S. at 294 to page 295.

15 Applying the same rationale here, the Court can  
16 discern no reason why Congress would wish to aid local law  
17 enforcement efforts in New Jersey, but deny that aid in New  
18 York when both states have statutes covering the same offense.  
19 Accordingly, the Court concludes that Mr. Smilowitz's alleged  
20 conduct constitutes a Travel Act predicate for bribery.

21 The Court declines to address defendant's argument  
22 that the connection between his conduct and interstate travel  
23 or commerce was too casual and incidental to sustain a Travel  
24 Act charge. He asserts "the only interstate nexus was the fact  
25 that the Beckerman Group was based in New Jersey, while

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1 Bloomingburg is in New York." That's from defendant's brief at  
2 page 30, Footnote 14. Defendant's argument is a challenge to  
3 the sufficiency of the proof and, therefore, not appropriately  
4 considered in a pretrial motion.

5 Finally, Mr. Smilowitz argues that the first object  
6 of the conspiracy, charging a conspiracy to submit false voter  
7 registrations, "is void for vagueness as applied because a  
8 person of ordinary intelligence would not be on notice that his  
9 or her actions violated Section 10307(c)." That's a quote from  
10 defendant's brief at page 24.

11 The Court disagrees.

12 A criminal statute is unconstitutionally vague and,  
13 thus, violates due process if it "fails to provide a person of  
14 ordinary intelligence fair notice of what is prohibited or is  
15 so standardless that it authorizes or encourages seriously  
16 discriminatory enforcement." That quote is from Holder against  
17 Humanitarian Law Project, 561 U.S. 1 at page 18. That's a 2010  
18 case.

19 Defendant's vagueness argument here focuses  
20 principally on the fair notice prong of the inquiry.

21 First of all, Section 10307(c) is certainly not vague  
22 in its prohibition against paying or offering to pay voters to  
23 vote or register to vote. For example, in U.S. against Lewin,  
24 which I mentioned earlier, the court held that Section  
25 1973i(c), the predecessor to 10307(c), is not vague. That's

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1 467 F.2d at page 1136.

2           Thus, the Court addresses defendant's argument that  
3 New York's election laws regarding what constitutes residency  
4 for purposes of voter registration are vague as applied to him.

5           Under New York Election Law Section 5-102(1):

6           "No person shall be qualified to register for and  
7 vote at any election unless he is a citizen of the United  
8 States and is or will be, on the day of such election, 18 years  
9 of age or over and a resident of this state and of the county,  
10 city or village for a minimum of 30 days next preceding such  
11 election."

12           And pursuant to New York Election Law Section  
13 1-104(22), residence means "that place where a person maintains  
14 a fixed, permanent and principal home into which he, wherever  
15 temporarily located, always intends to return."

16           Smilowitz asserts "the definition of residency under  
17 the New York Election Law is subject to substantial ambiguity"  
18 and, thus, too vague to put a person of ordinary intelligence  
19 on notice that his actions violate the law. That's from the  
20 defendant's brief at page 26.

21           Judicial decisions interpreting a statute can provide  
22 fair notice of the law's contours. For example, in Mannix  
23 against Phillips, 619 F.3d 187, 199, the Second Circuit  
24 rejected a vagueness claim where New York courts had previously  
25 ruled conduct similar to the defendant's conduct satisfied the

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1 elements of the challenged statute.

2 And pursuant to New York case law, "The crucial  
3 determination whether a particular residence complies with the  
4 requirements of the election law is that the individual must  
5 manifest an intent, coupled with physical presence, without any  
6 aura of sham." That's from *People against O'Hara*, 96 N.Y.2d  
7 378, 385.

8 New York courts analyzing the legitimacy of a  
9 registrant's residency have considered, among other things, the  
10 regularity with which a registrant returns to his registered  
11 address -- the cite for that is *Maas against Gaebel*, 129 A.D.3d  
12 178 at page 181 -- or where the registrant receives bills and  
13 pay stubs -- that's from *Stewart against Chautauqua County*  
14 *Board of Elections*, 69 A.D.3d 1298 at page 1301 -- or whether a  
15 registrant demonstrates significant and genuine contacts with  
16 his registered address -- *Willkie against Delaware County Board*  
17 *of Elections*, 55 A.D.3d 1088, 1090 -- or whether a registrant  
18 keeps personal belongings at his registered address -- *Thompson*  
19 *against Karben*, 295 A.D.2d 438, 440.

20 Here, Mr. Smilowitz is charged with falsely  
21 registering individuals who did not live in Bloomingburg, did  
22 not intend to live in Bloomingburg, and had never set foot in  
23 Bloomingburg. That's from paragraph 2 of the indictment.

24 Moreover, the defendant's assertion that the New York  
25 Election Law is vague is belied by his alleged conduct. The

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1 defendant and his co-conspirators allegedly went to great  
2 lengths to establish an appearance of residency at unoccupied  
3 apartments in Bloomingburg. The Court is hard-pressed to  
4 imagine what might constitute an aura of sham if not falsified  
5 leases and apartments staged to look like somebody lived there  
6 when, in fact, nobody lived there.

7 Mr. Smilowitz also asserts that Section 10307(c), as  
8 applies to him, is vague because it "is so standardless that it  
9 invites arbitrary enforcement." That's from the defendant's  
10 brief at page 27.

11 The Second Circuit, in the Mannix case that I  
12 mentioned earlier, 619 F.3d at 197, said, "The arbitrary  
13 enforcement prong requires that a statute give minimal  
14 guidelines to law enforcement authorities so as not to permit a  
15 standardless sweep that allows policemen, prosecutors and  
16 juries to pursue their personal predilections."

17 Defendant supports his assertion that the statute  
18 invites arbitrary enforcement by reference to his vindictive  
19 prosecution claim. Having previously found defendant's  
20 vindictive prosecution claim to be without merit, the Court  
21 rejects defendant's argument regarding arbitrary enforcement.

22 Accordingly, the Court declines to find Section  
23 10307(c) or New York's election laws vague as applied to  
24 defendant.

25 The Court has considered all other arguments raised

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1 by the defendant not specifically addressed in this bench  
2 ruling and finds them to be without merit.

3 The motion to dismiss the indictment is denied.

4 Now, I noticed in Mr. Smilowitz's reply brief, in a  
5 footnote -- so, apparently, he tried to hide it as much as  
6 possible for me, but, anyway, it's in a footnote -- he's  
7 seeking a bill of particulars by which the government would  
8 inform him which criteria of nonresidency applies to which  
9 voters registered for the March 2014 election.

10 That doesn't sound like a particularly bad idea to me  
11 to do that if you're trying to avoid any vagueness issue,  
12 but -- Mr. Allee or Ms. Martin, I don't know if you noticed  
13 that or whether that's been raised again with you separately.  
14 It's page 6, note 2 of the reply brief -- reply memorandum.

15 It says, "To the extent the government's case is  
16 concerned only with voters who satisfy all of the above  
17 criteria, we request that the government inform the defense  
18 whether it alleges that this applies to all voters registered  
19 for the 2014 election or, if not, to provide a bill of  
20 particulars as to which voters do meet the criteria."

21 So it's not crystal clear as to exactly what the  
22 defense wants, but I'm just curious whether you've had that  
23 conversation and, if so, what are you going to do about it.

24 MR. ALLEE: Your Honor, prior to the defense's  
25 submitting this reply, they called us and asked the question

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1 that's related to this footnote, at least as I recall it,  
2 whether we would -- I don't know if it was phrased as a bill of  
3 particulars, but sort of provide that detail. But that's it.  
4 It was a quick call, and then the reply came in.

5 I think today our answer to you would be we think our  
6 indictment is very clear. We think no bill of particulars is  
7 required. But we would like to and are willing to talk more  
8 with defense counsel about what we expect to prove up at the  
9 trial, and if they are continuing to find it mysterious or not  
10 clear or useful to have something in writing, we can sort of  
11 explore that if that comes out of those discussions with them.

12 THE COURT: Yes. I'm not ordering you to do that  
13 right now, but it just occurred to me -- I mean, it was a  
14 little bit -- that footnote was little bit -- it was not  
15 crystal clear to me, either, but the impression I got was that  
16 there was a lot of different voters here. Right? How many  
17 voters are we talking about with the false registrations, the  
18 alleged false registrations?

19 MR. ALLEE: And there was another conference where  
20 you asked that. So the most concise answer I can give you  
21 is --

22 THE COURT: Yes. I remember asking that, but I  
23 forget what the answer is.

24 MR. ALLEE: The most concise I can give, it's roughly  
25 150 registrations are submitted. We are prepared to prove up

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1        dozens of them with particular falsehoods. You asked it, I  
2        think, in a sentencing context where I think you wanted to know  
3        how many were false. We think the majority of them were false.

4            THE COURT: But I guess --

5            MR. ALLEE: At any trial --

6            THE COURT: -- I'm just trying to put myself in the  
7        shoes of defense counsel for a moment.

8            You know, there are different indicia of residents  
9        and nonresidents. So, for those 150 people or so -- let's just  
10        call it a 150 -- it might be different indicia for different  
11        people, and I think all they're asking for is for you to tell  
12        them, well, you know, for which people is it that they didn't  
13        live there at all or for which people did they never manifest  
14        any intent to live there or -- you know -- I don't know.

15           Again, I'm struggling with exactly how to phrase it,  
16        but it feels to me like it's not crazy to be a little bit more  
17        specific as to what you claim to be false about these 150  
18        different registrations because there's a lot of them, and so  
19        there may be a variety of things; some indicia apply to certain  
20        registrations, some apply to others, some apply to all of them.  
21        I don't know. I'm not familiar enough with the case to know  
22        that.

23           MR. ALLEE: I agree with your Honor. I would  
24        actually even go further and say it would be a reasonable thing  
25        to ask us in advance of trial which voters are we talking about

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1 just so they can prepare for trial.

2 THE COURT: Right.

3 MR. ALLEE: And there's no concession or there's no  
4 surprise in me saying, for each voter, it's different. It's  
5 different. Some voters -- or some registrants, I should say,  
6 had been to Bloomingburg just to check it out and then decided  
7 not to move there. Some hadn't been there. Some, when they  
8 were there, went to a different apartment. There's sort of a  
9 different story for each voter.

10 In advance of trial, we can have discussions with  
11 counsel about the ones we expect to prove up at the trial and,  
12 whether it's a formal bill of particulars or just conversations  
13 with counsel, make it so that they're not surprised at the  
14 trial, which they shouldn't be. There's nobody trying to  
15 surprise them.

16 THE COURT: All right. Well, as I said, I'm not  
17 making a ruling right now.

18 Mr. Biale, you can say anything you want, but it  
19 seems to me you ought to try and work this out. If you can't,  
20 then you can always apply to me for whatever you think you need  
21 me to do.

22 MR. BIALE: Thank you, your Honor. We'll do that.  
23 And I apologize if we were not clear in the papers, though I  
24 think your Honor got the gist of the request perfectly well.  
25 We will have further conversations. It would be helpful to

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1 have the information that Mr. Allee provided and, further, to  
2 have the information about what aspect of that voter  
3 registration they consider to be false such that it violates  
4 the New York law. That's what we're seeking. And we can have  
5 further discussions about that. It sounds like we'll be able  
6 to work it out. To the extent we can't, we'll come to the  
7 Court, but, hopefully, we won't have to.

8 THE COURT: Let's leave it at that for now.

9 Okay. Go ahead.

10 MR. ALLEE: Notwithstanding what you just said, could  
11 I add one more thing?

12 THE COURT: Sure. Of course.

13 MR. ALLEE: The defense asked us, after we produced  
14 discovery, to produce further items to include grand jury  
15 materials and other matters that we are not Rule 16, or at  
16 least, in our view, are not Rule 16 discovery, and we  
17 ultimately agreed to that request and made a very fulsome  
18 secondary production that included a lot of testimony of voter  
19 registrants.

20 And I bring this up now just so that your Honor  
21 understands -- and the defense is not disputing this, and I'm  
22 not saying they're suggesting otherwise even in their footnote,  
23 but they have a lot of information about which registrants we  
24 focused on pre-indictment and what those folks had to say about  
25 their intent, or lack thereof, to move to Bloomingburg and what

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1 steps they took or didn't take to move there. So they're in a  
2 very good position right now.

3 THE COURT: Well, that's what you think. They may  
4 have a different view. I hear what you're saying.

5 MR. ALLEE: I think it's a very fair -- actually,  
6 bill-of-particulars cases, the rare winning bill-of-particulars  
7 case is about -- if you say we've got 150 voters and they don't  
8 say which ones you're going to prove up at trial and then they  
9 pick six, that's not very fair. So I'm sure we're going to  
10 have discussions about what we expect to prove at trial. Maybe  
11 it will be a less formal process than a bill of particulars,  
12 which is not warranted, but to avoid surprise.

13 My point now, the added point, is the defense is  
14 already ahead of the ball and should not be in a position now  
15 to feel like they will be surprised at a trial.

16 THE COURT: All right. That's fair enough.

17 I mean, it was in a reply brief, so you didn't have  
18 the opportunity to respond to that. So I only had that brief  
19 footnote to look at, and I really didn't know -- like what you  
20 just told me about the grand jury material, I didn't know that.  
21 That's new information. Presumably, if you had responded -- if  
22 you had had the opportunity to respond, you would have said,  
23 well, wait a minute, they don't really need this because we've  
24 given them all this grand jury material and they know who these  
25 people are and they know what they said about what their

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1       residence was or what their status was vis-a-vis living in  
2       Bloomingburg, which is even better than a bill of particulars,  
3       really. I mean, they're kind of stuck with that testimony,  
4       right, if those people end up being witnesses at trial?

5            MR. ALLEE: Yes, your Honor, it is better. Of  
6       course, there are other voters who we didn't put in the grand  
7       jury, so it's not the entire universe of the trial proof  
8       necessarily, but it should be helpful to the defense to know  
9       where we're focused.

10           THE COURT: All right.

11           You know, my feeling, I just -- when we try the case,  
12       assuming we try it, I want it to go in as orderly and efficient  
13       a way as possible, and I don't want to be in a position where  
14       I'm being told by the defense that there was some sort of  
15       unfair surprise. So I will rely on counsel, who are,  
16       obviously, highly skilled, highly ethical lawyers on both sides  
17       of the case, to work this out.

18           Mr. Biale, if you need something from me, you know  
19       where to find me.

20           MR. BIALE: Thank you.

21           THE COURT: All right.

22           Just give me a second, counsel.

23           (Pause)

24           THE COURT: I was just checking to see whether we had  
25       scheduled any other dates for pretrial submissions in this

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1 case, and it looks like I did not do that.

2 We set a trial date for June 18th at 9:30. Is that  
3 correct? Does that sound right to both of you?

4 MR. ALLEE: Yes, your Honor.

5 MR. BIALE: Yes.

6 THE COURT: All right.

7 I'm sure I asked you this before, Mr. Allee. I'll  
8 ask you again. How long do you anticipate the trial taking?

9 MR. ALLEE: At least for the government's direct  
10 case, two weeks.

11 THE COURT: Okay.

12 And, Mr. Biale, you know, you don't have to tell me.  
13 You don't really even have to answer this question at all. You  
14 can if you want to. Do you anticipate putting on a case?

15 MR. BIALE: Depends on what's in the government's  
16 case, your Honor.

17 THE COURT: All right. That wasn't really an answer,  
18 but I get it.

19 Okay. That's fine. I think that's consistent with  
20 what you told me before.

21 Well, before we get to that and set some dates for  
22 motions in limine and requests to charge and so on and so  
23 forth, is there anything that either of you would like to  
24 raise?

25 MR. ALLEE: No, your Honor.

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1                   MR. BIALE: No.

2                   THE COURT: Okay. So it's just a matter of  
3 scheduling motions in limine, requests to charge, voir dire, a  
4 final pretrial conference, and then we'll commence the trial on  
5 June 18th at 9:30.

6                   Well, that brings me to motions in limine. Do you  
7 anticipate motions in limine in this case, either of you?

8                   I'll ask Mr. Allee first.

9                   And by the way, I'm not limiting you. I'm just  
10 trying to get a sense of how much time and effort is going to  
11 be required.

12                  MR. ALLEE: The best I can say is there will probably  
13 be motions in limine, but I couldn't specify now. We haven't  
14 focused on what those would be.

15                  THE COURT: Well, the obvious or typical kind motion  
16 in limine is similar-act evidence. Do you anticipate anything  
17 like that?

18                  MR. ALLEE: Like 404(b)?

19                  THE COURT: Yes.

20                  I'm not really foreclosing it. If you haven't really  
21 thought it through, then just tell me that, but --

22                  MR. ALLEE: If we had to submit a 404(b) motion  
23 today, there would be nothing. Let me put it that way. But  
24 we'll think about it more before trial. It's possible.

25                  THE COURT: All right. So I'm taking from that that

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1 if there are motions, and it's certainly possible that there  
2 will be, but it doesn't sound like there's going to be a lot to  
3 that. Whatever gets filed will get filed and we'll deal with  
4 it. Some cases, there's more than others. Sometimes there's  
5 motions addressed to expert witnesses or some really knotty  
6 evidentiary issues.

7 You would know about those things, right, now?

8 MR. ALLEE: I would happily indulge you more and give  
9 you more if I had it. I think we have to talk to counsel.  
10 Sometimes motions in limine come out of that. They'll point  
11 out some evidentiary issue or we'll disclose possible exhibits.

12 THE COURT: All right. Fair enough. That's fine.

13 MR. ALLEE: Very hard to say right now.

14 THE COURT: Mr. Biale.

15 MR. BIALE: I would say the same thing. It will  
16 depend on what the government presents to us in terms of  
17 exhibit lists, the witnesses they intend to call. I do  
18 think --

19 THE COURT: Well, stop right there.

20 They're not actually required to give you an exhibit  
21 list or a list of witnesses or even 3500 material until after  
22 the witness has testified on direct, although we're going to  
23 address that in a moment. So you really can't wait for that.  
24 You need to think about that. It's a motion in limine. You  
25 need to think about it and discuss whatever the issues are that

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1 you think might come up with the government ahead of time so  
2 that we can sort this out before you get the final list of  
3 exhibits or list of witnesses.

4 MR. BIALE: Fair enough, your Honor. And in most  
5 cases I've been involved in, the government does give it before  
6 they're required to under statute so that these issues can be  
7 worked out in advance of trial. I'm not saying -- I don't know  
8 when they're planning to do that, but I anticipate that we may  
9 able to deal with some of those issues in advance of trial.

10 THE COURT: What I usually do is set a date for  
11 motions in limine and also for disclosure of 404(b) evidence as  
12 part of a motion in limine 30 days before trial. Doesn't mean  
13 there has to be 404(b) evidence, but that would be the time to  
14 disclose it and to make a motion in limine for it to be  
15 admitted.

16 So 30 days before trial would be May 18th.

17 MR. ALLEE: Your Honor, there is more to answer your  
18 question. Ms. Martin has reminded me of one issue in the case  
19 that might generate some motion practice.

20 THE COURT: Okay.

21 MR. ALLEE: As your Honor is aware, there was an  
22 election lawyer retained named John Ciampoli. And I say  
23 retained without specifying because it's clear that he was  
24 retained by the co-defendants in this case, Lamm and Nakdimen.  
25 It's also clear that any privilege that might have arisen and

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1 applied to communications was waived long before this case was  
2 commenced.

3 That may generate some motion practice in a couple  
4 different directions, one of them being -- I'm not sure it's  
5 entirely clear what Smilowitz's relationship is to the  
6 attorney, or his proffered relationship. We'll have to discuss  
7 that some. And while the waiver has come and gone, unless we  
8 hear different from counsel, I think that might not generate  
9 motion practice.

10 THE COURT: Well, who waived the privilege?

11 MR. ALLEE: Lamm and Nakdimen waived the privilege.  
12 And there were productions made. I don't think that will be  
13 the motion practice, but then there might be -- maybe there's  
14 an advice-of-counsel instruction sought and things like that.

15 So that's in answer to your question. There might be  
16 some motions in limine having to do with the presence of  
17 counsel.

18 THE COURT: I'm sort of assuming that that would be  
19 part of the defense because that certainly came up -- even  
20 though Lamm and Nakdimen pleaded guilty, it certainly came up  
21 that, yeah, they were guilty, but they also relied on their  
22 lawyer and, gee wiz, if this guy had just done a better job,  
23 they wouldn't be in this situation today. That was my  
24 impression from all of the sentencing submissions that were  
25 made.

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1                   And so I, maybe mistakenly, but I assumed, based on  
2 that, that Mr. Smilowitz may well assert an advice-of-counsel  
3 defense, not necessarily because the lawyer was his lawyer, but  
4 because he relied on Lamm -- let's just make it simple -- he  
5 relied on Lamm, who told him my lawyer says we can do this.  
6 Would that constitute an advice-of-counsel defense? I mean, at  
7 the end of the day, you have to prove -- I don't know what the  
8 elements are, but --

9                   MR. ALLEE: There are three, your Honor, which are  
10 full disclosure of all the relevant facts of counsel.

11                  THE COURT: What are the elements of the offense, I  
12 mean, other than the agreement part? What's the mental-state  
13 requirement for -- putting aside the bribery for a minute, but  
14 the registration piece? Does he have to know that the  
15 registrations were false? He must. You can't be guilty of a  
16 crime if you don't know that they're false, right?

17                  MR. ALLEE: That's an easy one. The government has  
18 to prove that the conspiracy was to submit false registrations  
19 knowingly.

20                  THE COURT: Right.

21                  MR. ALLEE: I'm sorry. I thought you were asking the  
22 elements of the advice-of-counsel defense.

23                  THE COURT: The advice of counsel, right. But what  
24 I'm trying to get at is I can see an advice-of-counsel defense  
25 even if it's one step removed.

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1                   Actually, I don't even know whether you can do that.  
2 Can you do that? Can you rely on somebody else's lawyer? In  
3 other words, I'm involved in a business transaction with you.  
4 You have your own lawyer. Your lawyer tells you you can do X,  
5 Y and Z and then you tell me that your lawyer told you that you  
6 could do X, Y and Z, and so I go ahead and I do X, Y and Z.  
7 Next thing I know, I get indicted. Do you have an  
8 advice-of-counsel defense in that scenario?

9                   MR. ALLEE: I think we may have some motion practice  
10 on that. That's possible.

11                  Just to answer your question what to anticipate,  
12 probably something to do with the presence of a lawyer. Maybe  
13 precisely that question.

14                  THE COURT: Yes. I don't know the answer to that, so  
15 I'm just throwing it out there. It just occurred to me that  
16 that might be part of the case.

17                  MR. BIALE: Yes. I think it may be something that we  
18 would want to deal with before the case, whether it's an  
19 advice-of-counsel defense or simply a good-faith defense to the  
20 knowledge requirement of the charged offense. I think we'll  
21 sort of think through that. We'll research the question your  
22 Honor raised, and we'll either raise it in motion practice or  
23 it may just be an issue that comes up in the charge conference.

24                  THE COURT: Yes. And it's sort of a mixed bag  
25 because it seems to me it would be a lot harder -- if you do

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1 prove that Mr. Smilowitz knowingly paid voters to vote or to  
2 register falsely, I don't even know that -- just paying them to  
3 vote or register would probably be enough to violate the New  
4 York statute. Right? And it doesn't sound -- it would be much  
5 harder, it seems to me, to have an advice-of-counsel defense  
6 with that. Most people would know that you're not supposed to  
7 pay bribes to voters. Don't really need a lawyer to tell you  
8 that that's okay or not okay.

9                   But the registration bit is harder. I don't think  
10 it's unconstitutionally vague. I certainly don't think that,  
11 especially given -- hopefully this came through from what I  
12 just said a few minutes ago -- especially given the alleged  
13 conduct to pretend that these people lived there when, in fact,  
14 they didn't. That kind of undercuts the notion that the New  
15 York statute, the underlying registration statute, was somehow  
16 vague. If you're buying toothbrushes and creating false or  
17 phoney leases or backdated leases, that kind of -- if that's  
18 true, one would conclude that you knew what you were doing was  
19 wrong, it's not vague, because you acted to make it look like  
20 people were living there when you knew they weren't.

21                   So I'm not going back on anything that I said in  
22 terms of vagueness, but, having said that, registrations and  
23 the timing and exactly what residency means, it's a little bit  
24 more complicated, I would say, than paying someone to go vote.  
25 Who do I vote for? Vote for this guy. Here's \$500. Okay.

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1 That seems more straightforward to me than does the  
2 registration part of it, that's all. So I can see this coming  
3 up. That's why I'm raising it, because it occurs to me it's  
4 something that I'm anticipating coming up. So whatever.

5 404(b)/motions in limine by May 18th. We're in  
6 March. Yes, that's plenty of time. Oppositions -- in fact,  
7 you know what? Let's make it May 11th and make opposition by  
8 May 25th. That still gives you six weeks plus to make whatever  
9 motions you think you need to make.

10 Is that okay, Mr. Allee?

11 What's the trial date again? June 18th is the trial  
12 date.

13 MR. ALLEE: Yes, your Honor.

14 THE COURT: So May 11th for motions in limine/404(b)  
15 disclosure. Opposition May 25th.

16 MR. ALLEE: Your Honor, just because it's confused me  
17 in the past in other cases, when you say 404(b) disclosure,  
18 what specifically are you ordering?

19 THE COURT: Well, 404(b), the rule itself requires  
20 that the evidence sought to be submitted be presented to the  
21 opposing party sufficiently in advance of trial for them to --  
22 I forget what the exact language is, but there's something in  
23 there, right?

24 MR. ALLEE: Yes. And I don't mean to parse out the  
25 rule. I'm just asking. There's a couple things that happen

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1 with 404(b). We give it to the defense so they know what we  
2 might offer and then there's motion practice.

3 Are you ordering that date that we make a disclosure  
4 to the defense or make a motion or both?

5 THE COURT: Well, you would disclose it by making a  
6 motion.

7 MR. ALLEE: Okay.

8 THE COURT: You're going to make a motion. You're  
9 not going to just say here's the 404(b) and then not tell me  
10 anything about it until the day of trial, right? You're going  
11 to tell me about it ahead of time by making a motion in limine.  
12 So it seems to me we can do them at the same time. You  
13 disclose it by making a motion in limine and saying this is the  
14 similar-act evidence, Mr. Smilowitz, that we intend to offer at  
15 trial, and here's why we think it's admissible in our motion,  
16 in our memorandum.

17 MR. ALLEE: Got it.

18 THE COURT: That's what I would do.

19 It's not limited to that. It could be other things.  
20 Attorney/client privilege -- I mean, not privilege, but  
21 good-faith reliance on counsel. That's not 404(b) evidence.  
22 There could be other things that could be covered by a motion  
23 in limine. It doesn't even have to be -- it could be an  
24 evidentiary issue or a relevance issue or a privilege issue.  
25 Could be lots of things.

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1           I'm not a big fan of relevance-related motions in  
2 limine only because they're very hard. I just find it very  
3 difficult to really understand the relevance of a piece of  
4 evidence before the trial actually starts. Also, it has been  
5 my experience that very often -- it's usually the government  
6 that does this -- the government makes a motion to admit  
7 certain evidence, not as 404(b), just as evidence relevant to  
8 the offense charged, and then they make a proffer, but then, as  
9 it gets closer to trial, or even at trial, the evidence kind  
10 changes. It doesn't really change, but the nuances of that  
11 evidence changes and the testimony is a little bit different  
12 than it was when it was presented as part of a motion. And I  
13 always feel like I'm wasting my time if I do that, if I'm  
14 spending a lot of time dealing with -- I'm not saying it's in  
15 bad faith. A good-faith representation of here's what we think  
16 the evidence will be, but then it turns out it's different or  
17 it's less or it's more or something. Things change.

18           It doesn't mean you can't do it. It's just that I  
19 find that those tend to be the most difficult motions to  
20 address. And often times I feel like I spend an inordinate  
21 amount of time resolving such a motion only to find out that  
22 the -- well, it's not quite that. The evidence is slightly  
23 different than what I had previously described. Sorry. It's a  
24 little bit different.

25           Anyway, I'm not limiting you. You do whatever you

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1 want. I just want to do it ahead of time, that's all. Because  
2 this is an unusual case. This is not your routine  
3 drug-conspiracy case. That's for sure. I want to do it  
4 sufficiently in advance of trial so that I have time to deal  
5 with it. Plus I've got a trial scheduled for May 21st, which  
6 is a week to two weeks in length. So I've got other stuff  
7 going on, too. So the more notice I have of what I have to  
8 deal with, the better it is for me. And I want to give you  
9 plenty of time. This case was indicted in December of 2016,  
10 so, you know, at some point, we've got to move forward.

11 MR. BIALE: Your Honor, I don't know this for sure,  
12 so I don't want to commit ourselves to this, but I do  
13 anticipate there may be some motion practice under Rule 403  
14 coming from us given Mr. Smilowitz's limited role in the  
15 alleged conspiracy. I don't know what the two-week trial is  
16 going to consist of, but I anticipate that there may be some  
17 motion practice from us to try to confine this a little bit to  
18 Mr. Smilowitz's role and whatever the government has to put on  
19 that's necessary to tell the story of the conspiracy, but not  
20 to go beyond that and into the roles of other defendants that  
21 don't necessarily involve Mr. Smilowitz and might have a  
22 prejudicial impact on his case. Again, I'm not saying we're  
23 necessarily going to move in that direction, but I just want  
24 to -- in light of the fact that I heard the two weeks, I wanted  
25 to preview that for your Honor.

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1                   THE COURT: Okay. Again, you can do whatever you  
2 want. I'm not limiting you in any way, shape or form. But  
3 that's exactly the kind of thing that's difficult to do,  
4 frankly, far in advance of trial, or even one day in advance of  
5 trial.

6                   Having said that, your client's charged with a  
7 conspiracy. He's not charged in a standalone substantive  
8 count. He's charged in a conspiracy. The other two defendants  
9 aren't here, but that doesn't mean that the government can't  
10 prove the conspiracy that's charged. Why wouldn't I let them  
11 do that? Even if it involves -- I guess I can envision this  
12 case involving a great deal of evidence about things that  
13 Mr. Lamm or Mr. Nakdimen did that did not directly involve  
14 Mr. Smilowitz. It's a conspiracy indictment, so it seems to me  
15 that gives the government some leeway in terms of proving the  
16 conspiracy, including all of the conduct of Lamm and Nakdimen  
17 that they think is relevant to the conspiracy.

18                   At the end of the day, of course, the jury has to  
19 decide not whether Lamm and Nakdimen are guilty, but, rather,  
20 whether Mr. Smilowitz is guilty. That's a different question.  
21 But I don't know. Again, this is sort of in a vacuum here  
22 because I don't know exactly what the government's doing to do,  
23 either, but it's a conspiracy case, and it's a conspiracy case  
24 that involves conduct by other people as well as by  
25 Mr. Smilowitz. So the evidence the government presents as to

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1 Lamm and Nakdimen may not be -- it may well be prejudicial to  
2 your client, but that doesn't mean it's unfairly prejudicial  
3 and it doesn't mean that it's not admissible.

4 So, with that being said, I'm not stopping you from  
5 doing whatever you want to do.

6 I mean, Mr. Allee, you tell me. Is this case going  
7 to be about Mr. Smilowitz or is it going to be about  
8 Mr. Smilowitz, Mr. Lamm and Mr. Nakdimen, even though the other  
9 two fellows are not here?

10 MR. ALLEE: Well, of course it's about both. I mean,  
11 it's about Mr. Smilowitz because he's on trial, but he  
12 participated in a conspiracy with at least two other people,  
13 so -- usually -- I've heard -- or I've gotten motions like that  
14 in conspiracy cases, and our interests are actually usually  
15 aligned. We don't want to drag the trial out with proof where  
16 nobody's talking about Mr. Smilowitz for three days. But  
17 sometimes you need to get into those things so the jury can  
18 understand the full conspiracy. So we're not going to drag it  
19 out for two weeks and have just bits of testimony about  
20 Mr. Smilowitz. You know, two weeks, it's just, you know, there  
21 are some witnesses that are going to take a while and there's a  
22 lot of witnesses here, and it's a little conservative, maybe,  
23 that estimate, so that's how we get to that number.

24 THE COURT: Plus, when you have a situation like  
25 this, where you have three defendants charged in the

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1       indictment, but two of them are not sitting here, the more you  
2       pile on to those other two defendants, arguably, the more it  
3       helps the remaining defendant. So that would incentivize the  
4       government to use judgment in that regard. Right? Because  
5       that just enables -- in other words, I'm sort of agreeing with  
6       you that it's in your interest not to overdo it vis-a-vis other  
7       people who are not sitting here because, if anything, that  
8       makes it easier for the defense. It may be a completely  
9       legitimate defense to say it wasn't me, it was them. And you  
10      can make it easier for the defense to make that argument by  
11      having the jury sit here and say when are we going to hear  
12      stuff about Mr. Smilowitz. Right? Is that a fair statement?

13            MR. ALLEE: Yes, your Honor.

14            THE COURT: I mean just as a matter of trial  
15      strategy.

16            MR. ALLEE: Yes, your Honor.

17            THE COURT: So, anyway, I'm not limiting you in any  
18      way, but that's why I'm having this conversation, because I  
19      want to kind of be on the lookout for this stuff.

20            All right. May 11th for motions. May 25th for  
21      opposition. Proposed voir dire and requests to charge by --  
22      really, two weeks before trial would be fine, so that would be  
23      June 4th.

24            And by the way, I'll issue a short order which will  
25      have these dates in it. That's really almost for my benefit as

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1 much as it is for yours, to make sure everybody's on the same  
2 page here.

3 So June 4th for that.

4 Now, 3500 material. We all know what the law says,  
5 but it seems to me, in a case like this, it's not unreasonable  
6 to expect the government or at least hope that the government  
7 will produce 3500 material and Giglio material two weeks before  
8 trial.

9 Is that something you can do or you have to -- I  
10 can't make you do it, as you know, but I would like you to  
11 commit to doing it.

12 MR. ALLEE: Yes, your Honor.

13 THE COURT: You can do that?

14 MR. BIALE: Yes.

15 THE COURT: All right. So that's June 4th as well.  
16 Thank you.

17 Marked government-case-in-chief exhibits. With the  
18 understanding that, so long as the government is not trying to  
19 hide the ball, which I'm sure they won't, but it seems to me  
20 two weeks before trial is reasonable with respect to that, as  
21 well, unless you tell me otherwise.

22 MR. ALLEE: That's fine, your Honor.

23 THE COURT: Okay. Great.

24 And the only other thing we need to do is set a final  
25 pretrial conference date the week before June 18th, so sometime

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1 during the week of June 11th.

2 And Donna reminds me that Wednesday, Thursday and  
3 Friday of that week is the Second Circuit Judicial Conference,  
4 which means I'll be out of the building. So we have to do it  
5 Monday or Tuesday of that week.

6 Let's do Monday. Monday, the 11th.

7 THE DEPUTY CLERK: How about 11:00 on Monday, June  
8 11.

9 THE COURT: Does that work for counsel?

10 Monday, June 11th, 11 a.m. So I know what I'm doing  
11 that weekend.

12 Are there any other dates that I need to be setting  
13 here? Any pretrial dates I need to be setting that either of  
14 you can think of, or any of you can think of?

15 MR. ALLEE: No, your Honor.

16 THE COURT: I don't mean to exclude Ms. Martin, of  
17 course.

18 Ms. Martin, you can always grab Allee and shove him  
19 down if you want to say something.

20 But, anyway, is there any other dates that we need to  
21 set?

22 MR. ALLEE: No, your Honor.

23 MR. BIALE: Sorry. If we can just have one moment.

24 THE COURT: Yes. Sure.

25 (Pause)

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1                   MR. BIALE: That's fine, your Honor.

2                   The time for the June 11th conference?

3                   THE COURT: 11:00.

4                   MR. BIALE: 11:00. That's fine.

5                   THE COURT: Okay. Those are your dates.

6                   Mr. Allee or Ms. Martin, do you want to make an  
7 application to exclude time under the Speedy Trial Act?

8                   MR. ALLEE: Yes, your Honor. We ask that you exclude  
9 time until the trial, June 18th of this year. We ask you to do  
10 that in the interests of justice. It will allow the parties to  
11 prepare for that trial, which includes making motions in limine  
12 by May 11th. It will also allow, to the extent that it's  
13 possible, our discussions towards a resolution to the case if  
14 there is to be one.

15                  THE COURT: Wait a minute. Can you say that one more  
16 time.

17                  MR. ALLEE: If there are going to be any more  
18 discussions towards a resolution, it will allow time for  
19 counsel to have those discussions.

20                  THE COURT: Okay. Fair enough.

21                  Any objection?

22                  MR. BIALE: No objection, your Honor.

23                  THE COURT: All right. The Court excludes time under  
24 the Speedy Trial Act from today through and including -- I'll  
25 go right up to the trial date of June 18, 2018. I find that

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1 the ends of justice served by granting the requested  
2 continuance outweigh the best interests of the public and the  
3 defendant in a speedy trial for the reasons stated on the  
4 record by Mr. Allee.

5 All right. Thank you all very much. I'll see you on  
6 June 11th. And if you need to see me earlier than that, you'll  
7 let me know, of course.

8 Have a good day.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :  
: USDS 18-16018  
: DOCUM  
: ELEC  
: DOC #  
: DATE  
v. : 3-16-18  
: 16 CR 818 (VB)  
: 16  
VOLVY SMILOWITZ, :  
Defendant. :  
-----x

ORDER

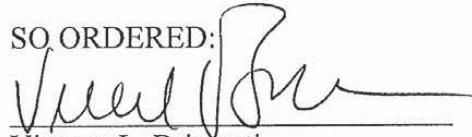
For the reasons stated on the record at today's pretrial conference, defendant's motion to dismiss the indictment is DENIED.

In addition:

1. Rule 404(b) evidence shall be disclosed no later than May 11, 2018;
2. Motions in limine, including any government motion to admit Rule 404(b) evidence, shall be filed by May 11, 2018. Opposition to any motions in limine shall be filed by May 25, 2018;
3. Proposed voir dire and requests to charge shall be filed by June 4, 2018;
4. On consent of the government, 3500 material and Giglio material shall be produced by June 4, 2018;
5. Marked government case-in-chief exhibits shall be produced by June 4, 2018;
6. The next pretrial conference is scheduled for June 11, 2018, at 11:00 a.m.;
7. Jury selection and trial are scheduled for June 18, 2018, at 9:30 a.m.;
8. For the reasons stated on the record at today's conference, time is excluded under the Speedy Trial Act in the interest of justice until June 18, 2018.

Dated: March 15, 2018  
White Plains, NY

SO ORDERED:

  
\_\_\_\_\_  
Vincent L. Briccetti  
United States District Judge

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

---

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15<sup>th</sup> day of October, two thousand twenty.

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United States of America,

Appellee,

v.

**ORDER**

Docket No: 19-361

Shalom Lamm, Kenneth Nakdimen,

Defendants,

Volvy Smilowitz, AKA Zev Smilowitz,

Defendant - Appellant.

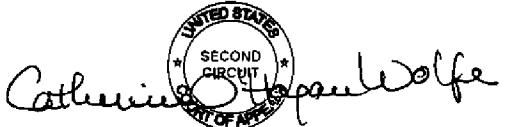
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Appellant, Volvy Smilowitz, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

  
Catherine O'Hagan Wolfe

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8<sup>th</sup> day of September, two thousand twenty.

Before: John M. Walker, Jr.,  
Barrington D. Parker,  
Susan L. Carney,  
*Circuit Judges.*

---

**JUDGMENT**

United States of America,  
Appellee,

Docket No. 19-361

v.  
Shalom Lamm, Kenneth Nakdimen,  
Defendants,  
Volvy Smilowitz, AKA Zev Smilowitz,  
Defendant - Appellant.

---

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,  
Clerk of Court

  
Catherine O'Hagan Wolfe

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

-against-

ZEV SMILOWITZ,

Defendant.

16 Crim. 818 (VB)

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT ZEV SMILOWITZ'S OMNIBUS PRETRIAL MOTION**

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Defendant Zev “Volvy” Smilowitz, by and through his undersigned attorneys, Sher Tremonte LLP, respectfully submits this memorandum of law in support of his Pretrial Motions.

**PRELIMINARY STATEMENT**

This case represents a profound government overreach. The United States has charged Mr. Smilowitz with a multi-object federal conspiracy count for actions surrounding a *village* election based on issues of purely local concern. To make out its charge, the government stretches federal statutes beyond what their text, legislative history, and common sense permit. It applies a federal elections law to an election involving no federal office candidates, contrary to the plain statutory language limiting the statute’s reach. And it distorts the meaning of bribery, rendering the term unrecognizable, to fit an unprecedented and novel theory of prosecution under the Travel Act. Accordingly, because none of the objects of the conspiracy constitute federal crimes, the Indictment fails “to state an offense” and should be dismissed.

Moreover, evidence in the public domain and the discovery suggests that this prosecution was instigated by individuals with retaliatory animus against a real estate development that they tried, but failed, to halt through the political process, and that such individuals may have coopted the prosecutorial power of the federal government to bring the Indictment. Because there is substantial evidence that the government may have unwittingly become a “stalking horse” of these individuals, the Indictment should also be dismissed as the product of a vindictive prosecution. In the alternative, the Court should compel the government to provide Mr. Smilowitz with all documents reflecting communications between law enforcement agents and local residents of the Village of Bloomingburg and the Town of Mamakating because such evidence is material to the defense, in that it may support a colorable claim of vindictive prosecution as well as advance additional trial defenses.

### FACTUAL BACKGROUND

This case arises from a hard-fought political battle over a real estate development in the village of Bloomingburg, New York (“the Village”). That political battle spawned various rounds of civil litigation, and now is being pursued, improperly, through a federal criminal prosecution.<sup>1</sup>

In 2006, Shalom Lamm and Kenneth Nakdimen, who were principals of the real estate company Black Creek Holdings (“Black Creek”), began to develop a real estate project in and around the Village. The project, known as “Chestnut Ridge,” included a 396-unit housing development and the replacement of the Village’s aging wastewater treatment plant. *See* November 9, 2017 Declaration of Justine A. Harris (“Harris Decl.”) ¶ 5. In 2010, the State Department of Environmental Conservation and the Village Planning Board approved the project. *Id.* Despite the fact that the plans for the development were publicly filed, and specifically detailed the number of planned units, the development only became controversial in 2012, when residents of the Village and of neighboring communities, such as the Town of Mamakating, came to believe that the development was to be marketed to Hasidic Jews. It was at this time that Mr. Smilowitz became involved the project. Mr. Smilowitz, a 25-year-old member of the Satmar Hasidic community, was brought in as a point of contact to that community.

There was vigorous and heated opposition to the project. Although certain local residents, who ultimately organized themselves under the moniker the “Rural Community

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<sup>1</sup> The Court has already received extensive submissions on the factual background of this case in connection with the sentencing proceedings of Mr. Smilowitz’s co-defendants. We refer the Court specifically to sentencing submission of Shalom Lamm, Dkt. #55 (Oct. 30, 2017). Many of the facts described below have also been the subject of a civil rights lawsuit, *Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg*, 14-cv-7250 (KBF) (S.D.N.Y.).

Coalition” (“RCC”), would later deny any anti-Hasidic animus in response to a discrimination lawsuit and in sentencing letters to this Court, their contemporaneous social media posts tell a different story. As Lesleigh Weinstein, a Bloomingburg resident, stated in an online comment on September 18, 2013, “The hate that people have for them has nothing to do with being anti-Semitic, *it has to do with being anti-Hasidic*, because these people are in a cult where they feel they are superior to others and don’t have to follow the rules.” *See id.*, Ex. B at 1 (emphasis added). Facebook posts from other local residents similarly referred to Hasidic Jews as “a religious cult taking over,” stated that Hasidic Jews would “come in like a virus and ruin [our] beautiful town;” compared Hasidic Jews to “cockroaches;” and stated, “CULTIST f--ks need to go back to the sh-t holes they came from.” *Id.* at 2. These statements were not made solely by a lunatic fringe: Jimmy Johnson, who would later be elected a Village Trustee in the election at issue in this case, stated in a series of Facebook posts in 2013, “I have some great Jewish friends, but Hasid Jews are some other breed;” and, “What we have people, is a religious cult taking over a small village.” *Id.* at 3-4.

The local animus against Hasidic Jews and the development was not confined to social media; at a public meeting regarding the project on May 17, 2012, Village residents openly warned that if the development were to proceed, Hasidic Jews would be “walking the streets” and the local population would “hightail it out of there.” *Id.*, Ex. C. Members of the public also asked the Village Attorney directly whether he could ensure that Hasidic Jews would not be permitted to move into the development, to which he responded, “It’s insane that you just asked me that question.” *Id.* The RCC nevertheless made several attempts to block the project,

including a 2014 lawsuit filed by various RCC founding members. *Id.* ¶ 16.<sup>2</sup> In December 2013, Village residents erected a 20-foot high wooden cross facing the development, which is still standing to this day. *Id.* ¶ 15, Ex. I.

Simultaneously, Bill Herrmann, the administrator for the provocative Mamakating Town Crier Facebook page that often commented on Hasidic Jews, organized efforts to oppose the development by taking over the Mamakating and Bloomingburg governments. In late 2012 or early 2013, he and others formed the Rural Heritage Party (“RHP”), and in the November 2013 Mamakating elections, he, Matt Taylor and Brenda Giraldi were elected Town Supervisor and members of the Town Board, respectively, on the RHP ticket. *Id.* ¶ 9. Their immediate goal was “fighting the 396” homes at Chestnut Ridge, and they designed a campaign to “stop” the development by targeting incumbent Village Trustees who had supported the project and who were up for re-election in the March 18, 2014 Village election (the “Election”). *Id.*, Ex. E.

By late 2013, the promoters of Chestnut Ridge, Lamm and Nakdimen, realized they would have to engage in a major political fight to maintain the project’s support on the Village Board of Trustees. To assist them in devising a political strategy to win the election, they hired a well-known public relations firm, the Beckerman Group, and at Beckerman’s suggestion, retained John Ciampoli, an election law specialist, to assist them in initiating a political strategy

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<sup>2</sup> The Supreme Court, Sullivan County, initially granted a preliminary injunction to the RCC against continued construction activity on Chestnut Ridge, but that decision was reversed by the Third Department. *Rural Cnty. Coal. v. Vill. of Bloomingburg*, 987 N.Y.S.2d 654 (App. Div. 2014). The Third Department later disposed of the entire suit by affirming dismissal of certain of the RCC’s claims and reversing the lower court’s denial of defendants’ motion to dismiss on the RCC’s remaining claims. 6 N.Y.S.3d 758 (App. Div. 2015). The New York Court of Appeals denied the RCC leave to appeal, 33 N.E.3d 503 (N.Y. 2015), and denied reargument, 38 N.E.3d 808 (N.Y. 2015).

to win the election.<sup>3</sup> The Beckerman Group designed a multi-faceted approach to recruiting candidates, registering voters, implementing a “Get Out the Vote” (“GOTV”) program and other “election law strategies.” *Id.*, Ex. H. Promising Lamm and others that its program would “manage a professional GOTV program” and “comply with all election law requirements,” Beckerman undertook to manage all aspects of registering new residents and the GOTV drive, under the supervision and guidance of legal counsel. *Id.*

The RHP mounted a GOTV campaign of its own. The Party’s campaign script used more sophisticated advocacy than its followers’ social media posts, urging supporters to use code in referencing Hasidic Jews: “Use phrase ‘high density housing;’ never refer to a religious sect.” *Id.*, Ex. E. Notices were also delivered to voters registered in Bloomingburg *but who no longer lived there*, urging them to return to the Village “no matter where you are now” and vote “on the Rural Heritage line” in order to “help us take back the village.” *Id.*, Ex. G. Candidates for office beyond Bloomingburg also seized on the RHP message: Steve Neuhaus, who was running for County Executive in Orange County promised in campaign materials, “As County Executive, I will immediately instruct the County attorneys to sue and try to stop” the Chestnut Ridge project. *Id.*, Ex. F.

In addition, it appears that in the months leading up to the Election, individuals associated with the RHP and RCC turned to federal and state law enforcement in an effort to launch a criminal investigation and prosecution of the developers for fraud. Social media posts reflect the residents’ efforts to gather evidence in order to help build a criminal case. *See id.*, Ex. J (“We

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<sup>3</sup> The Indictment suggests that Lamm and Nakdimen retained Ciampoli because they did not like their prior attorney’s advice that residency for voting purposes required “physical presence” in addition to an intent to reside and the absence of any aura of a sham. Indictment ¶ 14(e)(i). There is no allegation, however, and no evidence, that Mr. Smilowitz was aware of the prior attorney’s advice or was involved in any way in retaining Ciampoli.

spoke with a woman today while we were picketing the illegal shul and mikvah. She lives across the street from Baird in Mamakating and told us she would photograph him everyday and send the photos to the RCC;” “PICTURES PEOPLE, ALWAYS PICTURES, NO MATTER WHAT YOU SEE, JUST TAKE THE PICTURES AND IF YOU ARE NOT SURE, ASK QUESTIONS LATER.”). Such evidence included videotaped statements by tenants purportedly living at residences listed on new registration forms, *id.* ¶ 18, a “plethora of photographs of people, license plates, rampapo [*sic*] parking passes,” *id.*, Ex. J at 11, and iPhone videos purportedly showing empty residences, *id.* ¶ 18. Local residents associated with the RCC organized phone campaigns to law enforcement offices and tried to coordinate their activities with the FBI and local police. *Id.*, Ex. J, at 11 (“I encourage everyone else to call and demand that they prosecute each and every fraudulent voter (including Scammy, his wife and children and Kenny N) to the fullest extent of the law. Federal RICO BABY!!!”).

These efforts bore fruit: On March 12, 2014, the government sought and obtained seven search warrants for private residences listed on voter registration forms, as well as a warrant for the offices of Black Creek. The warrants gave law enforcement personnel permission to videotape and/or photograph the interior and exterior of the seven residences, as well as to seize a vast quantity of business records, computers, computer equipment, cellphones and corresponding electronically stored information. *Id.* ¶ 20, Ex. K. The warrant applications cite video-taped statements obtained from a “complaining witness” and note that “other law enforcement officers” had conducted surveillance of the addresses listed on the registration forms on at least seven different occasions over a three-week period in late February and early March 2014. *Id.* at 21, ¶ 35.

Then, on March 13, 2014, just five days before the Election, more than fifty FBI agents descended on Bloomingburg. Agents raided Black Creek’s offices and buildings, taking over thirteen computers and laptops, five external hard drives, an MP3 player, and an Imitation DVD-R. *See id.* ¶21, Ex. L. More than twenty government vehicles surrounded the office throughout the day. Armed with warrants for seven additional locations, the FBI in fact approached *thirteen* properties, sometimes taking videos of interiors, speaking with residents in at least two of the properties, and, in two instances – including the “Smilowitz residence” – entering private homes *for which they did not have warrants* because they claimed that a door was found unlocked or ajar. *Id.*, Ex. M.<sup>4</sup>

The raid and accompanying show of force was celebrated by RCC members and RHP supporters, with many taking credit for having made the raids happen. *See id.*, Ex. O (“Love seeing a raid in my town of all the building this Hasidic builder bought. It’s a great day.” “It is a happy, happy day for Bloomingburg! We are finally getting the justice we all deserve!!!” “This has been a collaborative effort of a great number of people in our community.” “THANK YOU FBI HOMETOWN ANTICORRUPTION HEROES!!”).

The Election took place as scheduled on March 18, 2014. The ballot listed only candidates for Village office. *Id.* ¶23. The RHP slate of candidates ousted the incumbents sympathetic to Chestnut Ridge. Frank Gerardi was elected mayor, beating Mark Berensten by a vote of 81 to 25. *Id.* Kathy Roemer and Jimmy Johnson were elected Village Trustees, beating

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<sup>4</sup> The government has advised that it does not anticipate introducing any evidence seized or photographs taken from this location.

their opponents by respective votes of 80 and 79 to 25 and 24. *Id.*<sup>5</sup> With full control of both the Village and the Town, RCC and RHP supporters worked together to oppose further progress of Chestnut Ridge. Mayor Gerardi ordered a Stop Work Order on a bakery that was being built as part of the development. *Id.*, Ex. Q. Village Trustee Johnson demanded that the Village building inspector find building violations by religious Jews, saying, “There’s got to be something you can charge them with. We have to teach them a lesson.” *Id.*, Ex. R. The new mayor and Village trustees even pushed forward an effort to *dissolve* the Village as a means to move the development into the Town of Mamakating, which had stricter zoning regulations. *Id.*, Ex. S. Meanwhile, Mamakating Town Supervisor Bill Herrmann continued to run the Mamakating Town Crier Facebook Page, using the page to disseminate articles about Hasidic Jews in neighboring towns. *Id.*, Ex. T.

Further, it appears that citizen efforts to build a criminal prosecution persisted well after the Election. Herrmann himself, working under the direction of FBI agents and state and local law enforcement officers, consensually recorded two meetings with Mr. Smilowitz: one on February 26, 2015 with New York State Assemblyman Dov Hikind and the second with Mr. Smilowitz alone on April 20, 2015. *Id.* ¶ 28, Ex. U. These recordings, which Herrmann admitted in deposition testimony were part of an unsuccessful attempt to induce Mr. Smilowitz to offer him a bribe, appeared unknown to the prosecutors until specifically requested by the defense. *Id.*; *see also id.*, Ex. V. Herrmann was not the only one to continue contact with the FBI, as “Holly Roche, leader of the Rural Community Coalition, said she has been in regular

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<sup>5</sup> On March 11, 2014, local Bloomingburg residents brought formal challenges before the Sullivan County Board of Elections regarding their concern with voter registration corruption. Ultimately, 184 of the 285 ballots cast were challenged, and of those 184, 156 votes were canceled by the Board of Elections. *See* Harris Decl. ¶ 19.

contact with the Federal Bureau of Investigation.” *Id.*, Ex. W (“‘Let’s put it this way,’ she said, ‘There is still an ongoing investigation.’”).

Meanwhile, Lamm and others brought a federal antidiscrimination lawsuit against the Town and Village, as well as various Town and Village officials, including Herrmann, in the Southern District of New York on September 9, 2015. *See Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg*, 14-cv-7250 (KBF) (S.D.N.Y.). In October 2016, the defendants settled the case for \$2.9 million. *See* Harris Decl. ¶ 32, Ex. X.

#### THE INDICTMENT

On December 15, 2016, more than 2 ½ years after the village election in Bloomingburg, the government filed the instant Indictment against Lamm, Nakdimen and Mr. Smilowitz, charging them with conspiracy to corrupt the electoral process. *Id.*, Ex. Y (*United States v. Lamm*, 16-CR-818-VB (S.D.N.Y. Dec. 12, 2016), ECF No. 2).

The Indictment charges a single conspiracy with three separate objects: (1) violation of the Voting Rights Act, 52 U.S.C. § 10307(c), by “giving false voter registrations;” (2) violation of that same provision by “buying voter registrations;” and (3) violation of the Travel Act, 18 U.S.C. § 1952, for engaging in “bribery” by buying votes. *Id.*, (Indictment ¶ 10). Specifically, the Indictment alleges that the defendants agreed to and did fill out voter registration forms with false addresses, including addresses that were unoccupied, unleased, or under construction, and that contained sworn statements that the registrants had lived in the voting district for thirty days prior to the election, when in fact they had not. *Id.* (Indictment ¶ 14(c)). It further alleges that the defendants attempted to create false “indicia of residence,” by preparing change-of-address forms, back-dating leases, and opening bank accounts for registrants. *Id.* (Indictment ¶ 14(d)(iv)). As to the vote buying allegation, Mr. Smilowitz is claimed to have offered an

individual \$500 and a rent-free apartment, provided that individual registered to vote and voted, and offered the same for up to ten acquaintances of that individual. *Id.* (Indictment ¶ 15(d)). There is no allegation that Mr. Smilowitz in fact ever paid that individual.

At a court conference on March 15, 2017, the government announced its intention to bring superseding charges against Lamm and Nakdimen. Thereafter, both Lamm and Nakdimen pled guilty to conspiring to submit false voter registration forms. On September 15, 2017, Nakdimen was sentenced to six months' incarceration. Lamm is scheduled to be sentenced on December 7, 2017.

The proceedings in this case still trigger strong community sentiment, as RCC supporters have attended the court proceedings of Nakdimen and Lamm, sometimes wearing t-shirts depicting the defendants behind bars. Harris Decl. ¶ 40. After the filing of the Indictment, social media posts announced "indictment parties" at local bars, and critics of the development were emboldened online and at local community meetings. *Id.*, Ex. Z. More recently, efforts have been launched to claw back the settlement of the anti-discrimination lawsuit based on Lamm and Nakdimen's guilty pleas in this case. *Id.* ¶ 41, Ex. BB. Indeed, while the sentencing of Lamm and Nakdimen have triggered an outpouring of letters to this Court, many of the letters focus on the "hurtful" accusations of "antisemitism," and "anti-Hassidim." *Id.* ¶ 42; Dkt. #54. Nevertheless, the over 140 Hasidic families who live and stay in Bloomingburg continue to face animus and threats of violence: RCC members filed frivolous complaints to try to stop construction on properties in the Chestnut Ridge development; the windows of a building on Bloomingburg's Main Street were smashed; and in June 2017, crude swastikas were spray painted on the mikva, or Jewish ritual bath, under construction in the development. *See* Harris Decl. ¶¶ 44-46, Exs. CC-EE.

**ARGUMENT**

“It is fundamental that a conviction for conspiracy under 18 U.S.C. § 371 . . . cannot be sustained unless there is proof of an agreement to commit an offense *against the United States.*” *Ingram v. United States*, 360 U.S. 672, 677-78 (1959) (emphasis added) (internal citation and quotation marks omitted). Because none of the objects of the conspiracy alleged in the Indictment constitutes a violation of federal law, the Indictment fails to state a conspiracy under 18 U.S.C. § 371 and must be dismissed.

**I. THE FIRST TWO OBJECTS OF THE CONSPIRACY FAIL TO STATE A FEDERAL OFFENSE BECAUSE THE CHARGED CONSPIRACY IS NOT A CRIME UNDER 52 U.S.C. § 10307(C)**

The first two objects of the conspiracy charged in the Indictment allege that Mr. Smilowitz and his co-defendants conspired to violate 52 U.S.C. § 10307(c) by “giving false voter registrations” and “buying voter registrations.” Harris Decl., Ex. Y (Indictment ¶ 10). Because, however, that statute does not reach, and therefore does not criminalize, the conduct alleged, those two objects of the conspiracy fail to state a federal offense. *See, e.g., United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012) (“Since federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute.” (internal citation and quotation marks omitted)); *United States v. Smith*, 985 F. Supp. 2d 547, 561 (S.D.N.Y. 2014) (Karas, J.) (“[A] charge in an indictment is insufficient and must be dismissed when it does not describe conduct that is a violation of the criminal statute charged.” (internal quotation marks omitted)).

Section 10307(c) of Title 52 of the United States Code penalizes one who:

knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false

registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting . . . *Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.*

52 U.S.C. § 10307(c) (emphasis added). Thus, the plain text of the “provided” clause of the statute limits its applicability to elections involving candidates for *federal* office. Here, by contrast, the Indictment alleges conduct relating exclusively to a *local* election – specifically, the March 18, 2014 “village elections in New York,” at which the “mayor and two trustee positions were up for election.” Harris Decl., Ex. Y (Indictment ¶ 9). The Indictment does not allege that the Election was held “solely or in part” for electing candidates for any of the federal positions listed in § 10307(c). Indeed, the Indictment does not allege that *any* federal office was implicated in the Election, and indeed there was not. The conduct charged in the Indictment therefore lies beyond the statute’s reach.

Tacitly conceding that its theory of prosecution finds no basis in the statute, the government has represented before this Court that “where there is a unitary registration system, . . . which has the result that a registration qualifies and registers a voter for federal elections, . . . the statute applies.” Tr. of Hr’g 23:10-14, *United States v. Smilowitz* (S.D.N.Y. Aug. 10, 2017); *see also* Harris Decl., Ex. Y (Indictment ¶ 4(a)). That reading of the statute is wrong for several reasons.

First, criminal laws must be interpreted strictly in keeping with the Constitution’s requirement that Congress, not the courts, define what is and is not a federal crime. The government’s attempt to expand the application of the statute beyond what its text permits

violates the Supreme Court’s oft-repeated rules of statutory construction generally, and, more specifically, the special care with which the Court interprets criminal laws consistent with the separation of powers between the two branches.

Second, to apply the statute to a purely local election, with no candidates for federal office on the ballot, is wrong as a matter of legislative intent and is contrary to principles of federalism. Article I, section 4 of the Constitution gives Congress the power to regulate *federal* elections, but the Tenth Amendment and an unbroken chain of precedents going back to the founding itself reserve the regulation of state and local elections to the states. Congress was well aware of that long tradition when it passed § 10307(c), and it specifically included the “provided” clause to maintain the proper balance between state and federal authority.

Third, no court decisions support the government’s expansive reading of the statute. While the government has repeatedly cited one Pennsylvania district court case from 1979, that case is entirely distinguishable, and moreover, has no controlling force here. Meanwhile, the overwhelming weight of authority forecloses the government’s reading.

Finally, to the extent there is any ambiguity in the statute’s interpretation, the rule of lenity compels resolving any such ambiguity in favor of Mr. Smilowitz.

A. Section 10307(c), like any criminal statute, should be interpreted strictly

Where, as here, a statute’s language is “plain and unambiguous,” courts “must apply the statute according to its terms.” *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *accord Centurion v. Sessions*, 860 F.3d 69, 75 (2d Cir. 2017) (“Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.” (internal quotation marks omitted)). Penal laws in particular require strict interpretation. This is because the Constitution makes clear that “[i]t is the responsibility of ‘the legislature, not the Court, . . . to define a crime,

and ordain its punishment.”” *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (Scalia J., concurring) (quoting *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)). Courts have no authority to “define new federal crimes.” *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J. concurring in part and concurring in judgment). Instead, it is the Court’s responsibility to apply a statute’s plain terms to the conduct at issue. *See Hedges v. Obama*, 724 F.3d 170, 189 (2d Cir. 2013) (“When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” (internal quotation marks omitted)). This Court should accordingly decline the government’s invitation to invent provisions that Congress failed to include in the statute and instead apply its express terms – including the “provided” clause – to hold that the statute does not reach the purely local election here.

B. Expanding the scope of the statute to apply to conduct involving purely local elections violates principles of federalism and runs contrary to the intent of Congress

Regulation of state and local elections is among the inherent powers the Constitution reserves to the states. Article I, § 4 provides, “[t]he times, places and manner of holding elections for *Senators and Representatives*, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.” U.S. Const. art. I, § 4 (emphasis added). Thus, by its terms, Article I, § 4 is limited to federal elections, and by dint of the Tenth Amendment, state elections are to be regulated by the states. *Id.*, amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *see Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (“Such power inheres in the State by virtue of its obligation . . . to preserve the basic conception of a political community.” (internal quotation marks omitted)). Applicable court rulings are unanimous: “Principles of federalism limit the power of federal courts to intervene in state elections,” because “[t]he

*Constitution leaves the conduct of state elections to the states.”* *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (emphasis added) (internal quotation marks omitted). Indeed, in recognition of these principles, the Supreme Court has made “repeated statements . . . that the regulation of state elections is wholly within the authority of the individual states.” *Holley v. Askew*, 583 F.2d 728, 730 (5th Cir. 1978) (per curiam) (collecting cases); *see, e.g., Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (Op. of Black, J.) (“[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” (footnote omitted)); *Ex parte Siebold*, 100 U.S. 371, 393 (1879) (“If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction . . .”).

Because states have a well-recognized strong interest in “protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *accord Republican Party of State of Conn. v. Tashjian*, 770 F.2d 265, 285 (2d Cir. 1985) (acknowledging “the state’s vital interest in the fair and efficient running of elections”), New York law provides a comprehensive scheme for regulating state and local elections, codified in New York Election Law, including criminal proscriptions on *the very conduct* charged here: “[p]rocur[ing], aid[ing], assist[ing], counsel[ing] or advis[ing] any person to go or come into an election district, for the purpose of voting at any election, knowing that such person is not qualified,” N.Y. Elections Law § 17-132(2), and “offer[ing] or promis[ing] to pay, lend or

contribute any money or other valuable consideration to or for any voter . . . to induce such voter or other person to vote or refrain from voting at any election,” *Id.* § 17-142(1). The government’s attempt in this case to invade on the prerogatives of the state in regulating its own elections thus violates principles of federalism enshrined in the Constitution and exceeds the bounds of federal authority.

Consistent with the Constitution’s structure and dictates, the legislative history to § 10307(a) makes clear that Congress *did not* intend for the statute to apply to purely local elections. *See Bond*, 134 S. Ct. at 2093 (noting that courts require a clear indication by Congress in order to interpret a statute in a manner that would upset the traditional state-federal balance of authority). In enacting § 10307(a), Congress was particularly attuned to the States’ plenary authority over their own elections, and the “provided” clause was added to the statute specifically to *prevent* Congress from exceeding its Article I, § 4 power to regulate *federal* elections. *See Alabama v. United States*, 304 F.2d 583, 604 n.17 (5th Cir. 1962) (“The power of Congress to legislate . . . in respect to congressional elections . . . . furnishes no reason for interference at a purely state election.” (internal quotation marks omitted)).

The statute was first introduced by Senator John Williams of Delaware as an amendment to the Voting Rights Act of 1965. 111 Cong. Rec. 8423 (1965). As introduced, the amendment contained no limiting language. Senator Phillip Hart noted that it “applies to State and local elections, as well as to the Federal elections,” *id.* at 8431, and expressed “very grave doubt” that Congress could constitutionally “reach State or local elections with a criminal sanction on payment for fraudulent registration in voting.” *Id.* at 8433. As debate over the amendment continued, Senator Samuel Ervin Jr. stated that, while he was “in favor” of the amendment in principle, it was “unconstitutional because it is not restricted to Federal Elections,” which he

defined as “elections in which presidential electors and Members of the U.S. Senate and Members of the U.S House of Representatives are chosen,” and proposed the “provided” clause to remedy this problem. *Id.* at 8975.<sup>6</sup> With the “provided” clause added, the amendment passed the Senate unanimously. *Id.* A similar amendment was subsequently proposed in the House of Representatives, and the representative who proposed it noted that the “provided clause” was a “proviso which was adopted on the Senate floor . . . , making this applicable to Federal elections” and was included “[s]o that there would be no question of constitutionality.” *Id.* at 15982.<sup>7</sup> The House amendment also passed, *id.* at 16281, and the provision was codified into law. Voting Rights Act of 1965, Pub. L. No. 89-110, § 11(d), 79 Stat. 437, 443 (1965).

Particularly in the context of criminal statutes, courts “can” and should “insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute’s . . . language in a way that intrudes on the police power of the States.” *Bond*, 134 S. Ct. at 2090. Here, far from expressing a clear indication to intrude on the states’ inherent powers, Congress disavowed any such intent.

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<sup>6</sup> Senator Williams concurred with Senator Ervin’s proposal, and requested the amendment be modified to include it. *Id.*; *see also id.* at 8988 (statement by Sen. Williams that proposal would “carry out the purpose of my amendment better than the way it was originally drafted,” because it “spells out that the amendment applies to those elections in which there are national candidates . . . or presidential electors on the ballot”). The clause proposed by Senator Ervin, while otherwise identical to the “provided” clause of the current § 10307(c), did not contain the phrase “or in part,” which was subsequently added to make clear that the statute applies to “mixed” elections involving the elections of both federal and state officials. *See* 111 Cong. Rec. 19375 (1965) (noting that the “‘in part’ language” means that the statute applies “if there is to be an election . . . for State legislators and also, at the same time, . . . for a Member of Congress”).

<sup>7</sup> Though a portion of the representative’s discussion notes “this section 12(e) is not limited to Federal elections,” 111 Cong. Rec. 15983 (1965), that section was a separate provision of the House bill not incorporated into the language that was eventually codified at § 10307(c).

C. No caselaw supports the government's expansive reading

Courts that have interpreted § 10307(c) and its predecessor provision<sup>8</sup> have relied on the foregoing legislative history, together with the plain text of the statute, to hold that, in the words of the Fifth Circuit, Congress may not regulate “‘pure’ state or local elections.” *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981); *see also United States v. Malmay*, 671 F.2d 869, 874-75 (5th Cir. 1982) (quoting same). Certainly courts have applied § 10307(c) to cases involving “mixed federal and state elections,” in which “federal and state candidates are on the same ballot.” *United States v. Slone*, 411 F.3d 643, 649 (6th Cir. 2005). However, in those cases, courts have found that defendants are covered by § 10307 because, even if the defendant’s activities are “intended to influence only the local election,” they may “ha[ve] an effect which reache[s] beyond the local races to taint the federal election process,” and “[s]uch effect is squarely within the prohibitions of [the statute].” *United States v. Mason*, 673 F.2d 737, 740 (4th Cir. 1982); *see also United States v. Howard*, 774 F.2d 838, 843 (7th Cir. 1985) (applying the statute to a situation “in which a federal contest was on the ballot,” because the defendant’s “conduct . . . might tend to corrupt the federal aspect of [the] election”). Such a “taint theory” has been applied *only* in mixed elections, however, where fraud in the state or local election “exposes the federal aspects of the election to the possibility of corruption.” *Bowman*, 636 F.2d at 1011; *see also Anderson v. United States*, 417 U.S. 211, 225 (1974) (evidence supported federal conspiracy to cast false votes “the primary objective of which was to have false votes cast

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<sup>8</sup> Section 10307(c) was originally codified at 42 U.S.C. § 1973c(i), and some of the cases discussed below cite the prior version of the statute.

for [a candidate for state office] *but which also encompassed the casting of false votes for candidates for all other offices*,” including for U.S. Senate and House races (emphasis added).<sup>9</sup>

Referencing the fact that New York has a “unitary election system,” Harris Decl., Ex. Y (Indictment ¶ 4(a)), the government relies on such a taint theory here. Specifically, the government argues that § 10307(c) should be read to reach fraudulent *registrations* in connection with a purely state or local election because such registrations could later be used in a subsequent federal election. That argument fails for several reasons.

First, cases in which a taint theory has been used to apply § 10307(c) to defendants’ actions in connection with local elections have involved an *actual* – rather than theoretical – impact on a mixed election, in which both federal and state candidates were on the ballot. *See, e.g., Slone*, 411 F.3d at 644-45 (noting that, though the defendant’s “conduct related solely to a candidate for a county office,” there were “federal candidates on the ballot”). The principal case relied upon by the government – and in fact the only case identified by counsel – is a four-decades-old district court decision, suggesting that a false registration may violate the statute even if it did not occur during the same year as a federal election. *United States v. Cianciulli*, 482 F. Supp. 585, 617 (E.D. Pa. 1979). But that case is easily distinguishable from the allegations here, because the scheme charged there was *specifically designed* to impact an

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<sup>9</sup> Similarly, jury instructions in vote-buying cases have mirrored this requirement by requiring the government to prove that the subject *election* was held “solely or in part for the purpose of selecting or electing a candidate for the United States Congress.” *United States v. Maricle*, 09-CR-16 (E.D. Ky. 2013); *see also United States v. Risner*, 7:15-CR-18 (E.D. Ky. 2016) (instructing the jury that the payment must have been “in an election in which a federal office is on the ballot”); *United States v. Robinson*, 13-CR-26 (E.D. Ky. 2014) (instructing the jury that the first element is that “an election was held in part for the purpose of electing the President of the United States.”); *United States v. Salyer*, 7:11-CR-05 (E.D. Ky. 2011) (first element charged to the jury was that the election included a federal candidate); *United States v. Powell*, 05-CR-30044 (S.D. Ill. 2005) (instructing the jury that the government must prove that the election for which the votes were bought included federal candidates).

election in which federal candidates would be on the ballot. *Id.* at 589. In *Cianciulli*, the “principal beneficiary” of false registrations filed in Pennsylvania in 1975 was a candidate for the State’s House of Representatives up for election in November 1976, which was to be a “mixed election” that included the race for President of the United States. *Id.*<sup>10</sup> Thus, the *Cianciulli* court aptly described the charged conduct as “conspiratorial and individual activities in falsely registering *to become eligible to vote in federal elections.*” *Id.* at 588 (emphasis added). And, indeed, the false registrations in *Cianciulli* did impact the federal election because the individuals who submitted false registrations in 1975 *actually voted* under their fraudulent registrations in the federal election the following year. *Id.* at 617 & n.34.

Here, by contrast, the alleged false registrations were submitted in 2014 and the scheme charged was one to impact a purely local election in 2014. Harris Decl., Ex. Y (Indictment ¶¶ 8-9). Neither Mr. Smilowitz nor his co-defendants are alleged to have sought to impact any federal or mixed election. Moreover, the government has not alleged that any of the voters who submitted false registrations subsequently used their registrations to vote in a federal election. Absent any allegation of an intent to impact a federal election or an actual, rather than theoretical, impact on such an election, the mere possibility that voters could one day use their false registrations to vote in a federal election does not provide a basis for prosecution under § 10307(c).

Second, any such “possibility” of future taint on the federal election system is speculative at best. The false registration at issue here is tied to residency, which is determined under New

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<sup>10</sup> The *Cianciulli* decision does not disclose whether there was any state or local election in 1975, and instead addressed an argument by the defendants – plainly different from the one raised here – that because 1975 was not a federal election *year*, any registrations within that year were not within the jurisdictional scope of the statute. See *id.* at 613.

York law to be where a voter resides “thirty days next preceding [the] election.” N.Y. Elec. Law § 5-102(1). The voter registration form, which the government alleges was fraudulently filled out, asks the voter to fill in “[t]he address where you live” and also asks the voter to swear or affirm that “I will have lived in the county, city or village for at least 30 days before the election.” Harris Decl., Ex. HH. The Indictment alleges that such registration forms were false because, *inter alia*, “the registrants swore and affirmed that they had lived in the voting district for 30 days prior to the election, when in fact they had not.” Harris Decl., Ex. Y (Indictment ¶ 14(c)). But the next *federal* election following the Election was not until November of that year. *See Fed. Election Comm'n, Federal Elections 2014: Election Results for the U.S. Senate and the U.S. House of Representatives* (Nov. 2015), available at <https://transition.fec.gov/pubrec/fe2014/federalelections2014.shtml>. Thus, a registration form alleged to be false in connection with the Election in March 2014 might in fact present no problems as to an election more than seven months later. Under the government’s theory, however, a false registration filed during a purely local election in the district may be federally prosecuted because it *could sometime in the future* affect a federal election, despite the fact that the registration might be fully accurate by that time. Criminal prosecutions cannot and should not be premised on such speculation. *See Ingram*, 360 U.S. at 680 (“[C]harges of conspiracy are not to be made out by piling inference upon inference . . . .” (internal quotation marks omitted)).

Third, virtually every state has adopted a unitary election system. *See Michael T. Morley, Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 Nw. U.L. Rev. Online 103, 104 (2017); *see also Young v. Fordice*, 520 U.S. 273, 279 (1997) (noting that, as of 1995, with the exception of Mississippi, “[a]ll other States . . . have modified their voter registration rules so that . . . registration registers voters for

both federal and state elections’’). Consequently, if the presence of a unitary election system were enough to bring a purely local election within the ambit of the statute, the purported limitation contained in the ‘‘provided’’ clause would amount to no limitation at all. The government’s argument would render the entire limiting clause mere surplusage. *But see Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality op.) (‘‘We resist a reading of [the statute] that would render superfluous an entire provision . . .’’). Thus, the government’s expansive reading of the federal elections statute, based on a ‘‘taint theory’’ premised on the presence of a unitary election system, is unprecedented and wholly without support.

D. To the extent any ambiguity remains as to the statute’s reach, it must be resolved in Mr. Smilowitz’s favor

Finally, while the statutory text, legislative history, and principles of federalism all indicate that § 10307(c) does not apply to the conduct alleged here, to the extent ‘‘a reasonable doubt persists about [the] statute’s intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute,’’ the court should ‘‘resolve doubts in favor of the defendant rather than imputing to Congress an undeclared will to criminalize conduct.’’ *United States v. Valle*, 807 F.3d 508, 523 (2d Cir. 2015) (internal quotation marks omitted). This is because of the ‘‘familiar principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’’ *Skilling*, 561 U.S. at 410 (internal quotation marks omitted). In explaining the rationale for this rule, which is derived from a ‘‘long line of [its] decisions,’’ the Supreme Court has explained:

This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.

*United States v. Santos*, 553 U.S. 507, 514 (2008). In other words, the rule of lenity “ensures that criminal statutes will provide fair warning of what constitutes criminal conduct, minimizes the risk of selective or arbitrary enforcement, and strikes the appropriate balance between the legislature and the court in defining criminal liability.” *Valle*, 807 F.3d at 523; *see also United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) (noting that the rule “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered” (internal citation and quotation marks omitted)).

Here, the alleged conduct is not “clearly covered” by § 10307(c). To the contrary, the statute’s “provided” clause indicates the opposite: that “this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate” for the enumerated federal offices. 52 U.S.C. § 10307(c). Thus, under the rule of lenity, the statute should be read to be limited to voting registration for an election for federal offices, not a purely local election like the Election here.

For all of the foregoing reasons, the first two objects of the conspiracy, charging a violation of § 10307(c), fail to state a federal offense.

## **II. THE FIRST OBJECT OF THE CONSPIRACY IS UNCONSTITUTIONALLY VAGUE**

The first object of the conspiracy, charging a conspiracy to submit false registrations, suffers from another fatal constitutional flaw: it is void for vagueness, and thus violates Mr. Smilowitz’s Fifth Amendment right to due process. A law is unconstitutionally vague when 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). The Due Process Clause “requires that a penal statute define [a] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that

does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “Although due process does not require impossible standards of clarity,” *id.* at 361, it does require “that a legislature establish minimal guidelines to govern law enforcement,” *id.* at 358 (internal citations omitted). A statute is therefore deemed unconstitutionally vague, and therefore void, if “men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Waterman v. Farmer*, 183 F.3d 208, 212 n.4 (3d Cir. 1999) (internal quotation marks omitted).<sup>11</sup>

Here, the alleged violation of § 10307(a) involving false statements about residency on voter registration forms is void for vagueness as applied because a person of ordinary intelligence would not be on notice that his or her actions violated that statute. The first object of the § 10307(a) conspiracy rests upon the definition of “residency” under New York Election Law. New York law defines residency as the district in which voter resides “thirty days next preceding [the] election,” N.Y. Elec. Law §5-102(1), and the term is further defined as “that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return.” N.Y. Elec. § 1-104(22).

Courts have cautioned that the terms of the New York Election Law cannot be read “in [their] literal sense.” *Williams v. Salerno*, 792 F.2d 323, 327 (2d Cir. 1986). Rather, courts have held that residency is a “fact-based inquiry” into whether the residence is legitimate or creates “any aura of sham.” *Gallagher v. Dinkins*, 343 N.Y.S.2d 960, 962 (App. Div. 1973). Residency at the time of an election is dependent on “an individual’s expressed intent and conduct.” 49

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<sup>11</sup> Statutes that “interfere[] with the right of free speech or of association,” which arguably includes statutes related to voting and the electoral process, are held to an even more stringent vagueness test than other criminal and regulatory laws. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

N.Y. Jur. 2d Elections § 127. A voter may, for example, choose among two homes as his “residency” for voting purposes. *See People v. O’Hara*, 754 N.E.2d 155, 159 (N.Y. 2001) (“As this Court has stated, an individual having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law.” (internal quotation marks omitted)). Similarly, New York courts have held that a voter’s *future* residence may be used for registration purposes even though the voter does not reside, in the lay sense, in the voting district. *See Vescera v. Karp*, 15 N.Y.S.3d 872 (App. Div. 2015) (individual complied with Elections Law where she changed her registration once an apartment had been reserved for her in a building that was being renovated, even though she had not moved to new address and her apartment would not be ready for seven months); *McManus v. Relin*, 730 N.Y.S.2d 594 (App. Div. 2001) (same in connection with a designating petition). Thus, while the Indictment alleges that voter registrations filed in the Election were false because “the registrants did not live at the addresses listed on the form,” Harris Decl., Ex. Y (Indictment ¶ 14(c)), that is not the law.

Given the lack of clarity in New York Election Law, it is no surprise that the defendants in this case sought the advice of attorneys to determine whether individuals moving to the Chestnut Ridge development would be eligible to vote in the Election. The questioning of those attorneys by the government in the Grand Jury reflects that there often is not a straightforward answer under New York law as to whether a particular set of circumstances indicates a legitimate registration or an “aura of a sham.” For instance, when asked by counsel for the government whether an affidavit stating that a voter lived in a location where he had never set foot would be considered a fraud under state law, John Ciampoli, the elections law specialist who advised the defendants, noted that “where there was a person who voted from a residence address where that

residence address when inspected was vacant, uninhabited, had no signs whatsoever of habitation by the voter, . . . [but] had a real estate agent sign on the front lawn that the house was being sold, the Third Department allowed that person to vote from that address.” *Id.*, Ex. FF (Tr. of Grand Jury Testimony by John Ciampoli 30:16-22 (Jun. 10, 2015)). Caselaw interpreting residency, discussion of which spans more than seven pages of Mr. Ciampoli’s testimony, does not yield a concrete rule for distinguishing a valid residence from one indicating an “aura of a sham.”<sup>12</sup> Indeed, the very phrase “aura of a sham” suggests that the New York courts *intended* to imbue the legal determination with considerable discretion. *See* Merriam-Webster’s Dictionary, “Aura” (defining the word as “a distinctive atmosphere surrounding a given source” or a “subtle sensory stimulus (such as an aroma)”), available at <https://www.merriam-webster.com/dictionary/aura>. While that test may be sufficiently clear to determine eligibility for voting, as well as to resolve any civil disputes about eligibility to vote, it is too amorphous to form the basis of *criminal liability*.

Simply put, the definition of residency under New York Election Law is subject to substantial ambiguity and debate among lawyers specializing in the field. It is vague as applied to Mr. Smilowitz because there is no way that he, as a lay person, would be on notice that voters’ conduct and stated intent, as indicated by objective indicia of such intent, that they planned to establish residency was sufficient to meet the fact-based inquiry set forth by the New York courts or, alternately, when such indicia created the “aura of a sham” so as to constitute a crime. *See Johnson*, 135 S. Ct. at 2556 (a law is unconstitutionally vague if it “fails to give ordinary

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<sup>12</sup> Throughout Mr. Ciampoli’s testimony, the government repeatedly demanded that he “put[] aside” caselaw, *id.* at 30:25, and answer hypotheticals about whether particular factual scenarios would amount to a fraud. Mr. Ciampoli testified that he could “not say conclusively” how such scenarios would be addressed by the New York courts, since that question sought “a conclusion of law . . . [w]hich is intertwined with a finding of fact.” *Id.* at 31:18-25 – 31:1

people fair notice of the conduct it punishes”). The definition presents even greater challenges when considered in the context of a federal statute regulating federal elections: at what point would an alleged false statement about residency – especially one relating to duration – taint a future federal election. That is precisely why Mr. Smilowitz relied on the legal advice given by Ciampoli, which was relayed to him by Lamm, Nakdimen, and the PR professionals at the Beckerman firm.

The lack of clarity in the law is also unconstitutionally vague because it is “so standardless that it invites arbitrary enforcement.” *Id.* Indeed, it invites arbitrary and discriminatory enforcement of precisely the kind described in Point IV, *infra*, where the prosecution is driven by improper, retaliatory motives. *See Kolender*, 461 U.S. at 358 (vague statutes invite arbitrary enforcement based on prosecutors’ “personal predilections or because those targeted are ‘unpopular’”). Accordingly, the first object of the conspiracy is void for vagueness.

### **III. THE THIRD OBJECT OF THE CONSPIRACY MUST BE DISMISSED FOR FAILURE TO STATE AN OFFENSE**

The third object of the conspiracy charged in the Indictment is a violation of the Travel Act, which prohibits “travel[ing] in interstate or foreign commerce or us[ing] the mail or any facility interstate or foreign commerce,” with the intent to “promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity, and thereafter perform[ing] an act” intended to do the same. 18 U.S.C. § 1952(a)(3); *see* Harris Decl., Ex. Y (Indictment ¶ 10). The statutory definition of “unlawful activity” does not encompass all illegal acts, but rather enumerates *certain specified offenses*, including “bribery . . . in violation of the laws of the State in which committed.” 18 U.S.C. § 1952(b). Accordingly, the statute was not designed to federalize all state crimes, but rather was meant to

reach those specific crimes that, by their nature, evade prosecution by state authorities based on their interstate characteristics. *See Rewis v. United States*, 401 U.S. 808, 811-12 (1971) (noting that purpose of the Travel Act “was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another,” and not to “transform relatively minor state offenses into federal felonies”); *United States v. Nardello*, 393 U.S. 286, 292 (1969) (the Act “reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem”).

“Where the Government charges Travel Act violations in reliance on underlying violations of state bribery laws, the indictment must . . . allege a predicate act which would violate state bribery laws, and then the Government must prove at trial that such activity was unlawful under state bribery laws.” *Smith*, 985 F. Supp. 2d at 563 (internal quotation marks and alterations omitted). In *Perrin v. United States*, the Supreme Court held that, for purposes of the Travel Act, bribery is not limited to its common law definition, covering only payments to public officials, but also includes payments to private actors “in violation of state commercial bribery statutes.” 444 U.S. 37, 49-50 (1979). However, neither the Supreme Court nor the Second Circuit has ever held that bribery under the Travel Act extends *beyond* state public and commercial bribery statutes to other alleged corrupt bargains. Under New York law, commercial bribery occurs when a person “confers, or offers or agrees to confer, any benefit *upon any employee, agent or fiduciary without the consent of the latter’s employer or principal*, with intent to influence his conduct in relation to his employer’s or principal’s affairs.” N.Y. Penal Law § 180.00 (emphasis added). The Travel Act predicate alleged here – offers of payment made in

exchange for voting in the Election – does not involve any principal-agent relationship or fiduciary obligation, and thus does not constitute “commercial bribery” under New York law.

Even taking a more expansive interpretation of “generic” bribery – which, again, neither the Supreme Court nor the Second Circuit has ever endorsed – the offers of payment alleged here do not meet the definition of bribery. The Second Circuit has repeatedly held that bribery does not encompass all corrupt payments, but rather, “[b]ribery in essence is an attempt to influence another *to disregard his duty* while continuing to appear devoted to it or to repay trust with disloyalty.” *United States ex rel. Sollazzo v. Esperdy*, 285 F.2d 341, 342 (2d Cir. 1961) (emphasis added); *accord United States v. Jacobs*, 431 F.2d 754, 759 (2d Cir. 1970), (“The evil sought to be prevented by the deterrent effect of [the bribery statute] is the aftermath suffered by the public when an official is corrupted and *thereby perfidiously fails to perform his public service and duty*.” (emphasis added)). Thus, an essential element of public-sector bribery is the breach of a duty of loyalty owed to the public, *see United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994); *see also United States v. Walgren*, 885 F.2d 1417, 1422 (9th Cir. 1989) (“[I]f an employee of the State accepts bribes, he violates his duty of loyalty to the people of the State.”) (internal quotation marks omitted)), while “commercial bribery was criminalized on the theoretical premise that such acts represent a violation of the duty of loyalty that an employee owes to an employer.” *United States v. Parise*, 159 F.3d 790, 799–800 (3d Cir. 1998); *accord* Black’s Law Dictionary (10th ed. 2014) (defining commercial bribery as, *inter alia*, “knowing solicitation or acceptance of a benefit in exchange for violating an oath of fidelity”). In other words, “[a]n essential component of public and private sector bribery is the violation of a fiduciary duty of loyalty owed to the public or to the private sector principals.” Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative*

*Regimes*, 35 Mich. J. Int'l L. 673, 692 (2014).<sup>13</sup> Without this essential element, an offer of payment may be illegitimate, but it is not bribery subject to federal regulation under the Travel Act.

Here, the Indictment's allegation of conspiracy to violate the Travel Act is premised on a violation of New York Election Law §§ 17-142(1), (3), and (4), which generally prohibit “[g]iving consideration for the franchise.” Harris Decl., Ex. Y (Indictment ¶ 13). These provisions contain no element of breach of a duty of loyalty that would render such proscribed bargains *bribes* in order to bring them within the ambit of the Travel Act. Although another provision of § 17-142, which Mr. Smilowitz is *not* alleged to have to conspired to violate, mentions “bribery at any election,” *id.* § 17-142(6), that provision too does not contain the required element of breach of a duty. The government’s attempt to shoehorn state crimes that do not meet the definition of generic bribery into a federal offense would allow for a vast expansion of federal authority to regulate conduct traditionally committed to the states’ police powers and would defeat Congress’s express intent to limit the Travel Act’s reach to certain enumerated crimes.<sup>14</sup>

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<sup>13</sup> While the Second Circuit has suggested in dicta that the “common usage” of the word bribery broadly involves “the corrupt selling of what our society deems not to be legitimately for sale,” including “the citizen’s ballot,” *United States v. Zacher*, 586 F.2d 912, 916 (2d Cir. 1978), that statement is at odds with the Circuit’s *holdings* in multiple cases that “a fundamental component” of bribery “is a breach of some official duty owed to the government or the public at large,” *Rooney*, 37 F.3d at 852, or to an employer in the case of commercial bribery.

<sup>14</sup> The Act also does not apply where “the activities engaged in by a defendant were essentially local” and the role of the interstate travel or use of interstate commerce was “a matter of happenstance” that was “minimal and incidental.” *United States v. Archer*, 486 F.2d 670, 681 (2d Cir. 1973) (internal quotation marks omitted). Here, the only interstate nexus was the fact that the Beckerman Group was based in New Jersey, while Bloomingburg is in New York. Such a “casual and incidental” connection to interstate travel or commerce is insufficient to sustain a

Accordingly, because the conduct alleged here is not the type of “unlawful activity” subject to prosecution under the Travel Act, the third object of the conspiracy charged in the Indictment is not an offense under federal law, and must be dismissed.

**IV. THE INDICTMENT SHOULD BE DISMISSED FOR VINDICTIVE PROSECUTION, OR, IN THE ALTERNATIVE, THE GOVERNMENT SHOULD BE COMPELLED TO PRODUCE DISCOVERY RELATING TO INDIVIDUALS WHO PREVAILED UPON IT TO INITIATE THIS PROSECUTION**

Due process forbids the government to use the criminal justice system to retaliate against a person for the exercise of her constitutional or statutory rights. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . .”). Certainly, the burden to establish vindictive motive is a heavy one, as “the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor,” *United States v. White*, 972 F.2d 16, 18 (2d Cir. 1992), and a prosecutor’s pretrial charging decision is presumed legitimate. *Id.* at 19; *see also United States v. Sanders*, 211 F.3d 711 (2d Cir. 2000). To establish an actual vindictive motive, a defendant must prove objectively that the prosecutor’s charging decision was a “direct and unjustifiable penalty,” *United States v. Goodwin*, 457 U.S. 368, 384 & n. 19 (1982), that resulted “solely from the defendant’s exercise of a protected legal right,” *id.* at 380 n. 11. Importantly, however, the defendant need not show that the individual prosecutor(s) handling the case harbored genuine animus. Rather, a claim of vindictiveness may be made when the prosecutors were “prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a ‘stalking horse,’” and there is evidence that the defendant “would not have been prosecuted except for the animus.” *United States v. Koh*, 199 F.3d 632, \_\_\_\_\_ Travel Act charge consistent with Congress’s purpose in enacting the statute. *Id.* at 685 (internal quotation marks omitted).

640 (2d Cir. 1999) (emphasis added); *accord United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir. 1996) (defendant must show that the investigating agency in some way ultimately prevailed upon the prosecutor making the decision to seek an indictment).

Here, we make no claim of vindictive motive on the part of the individual prosecutors handling this case, or, indeed, of anyone within the U.S. Attorney's Office. However, this is an unusual case, where the public record is replete with suggestion that individuals with strong and deep-seated animus against the charged defendants "prevailed" upon law enforcement – in the strongest of terms and over a period of years – to investigate and ultimately to bring criminal charges in an effort to halt the development of a real estate project, prevent the establishment of a Hasidic community in Bloomingburg, and retaliate for the bringing of a legitimate and successful civil rights lawsuit.

We make this motion now, based on the ample evidence in the public record and in the discovery provided to date, in order to preserve it pursuant to Fed. R. Crim. P. 12. However, so that we have an opportunity to investigate and document our claim further, we request in the alternative that the Court direct the government to produce evidence in its possession relating to animus held by residents of Bloomingburg, Mamakating, and the surrounding areas against Hasidic Jews in general and the Chestnut Ridge development specifically, as well as collusion and coordination between those residents and those members of local law enforcement, including FBI agents, who participated in the investigation. *See* Harris Decl., Ex GG.

As the Court knows, Fed. R. Crim. P. 16(a)(1)(E)(i) requires the government to turn over, "[u]pon a defendant's request," all documents and objects "material to preparing the defense." Pursuant to our discovery requests to date, the government has turned over certain materials, namely, the recordings and physical evidence gathered by non-law enforcement witnesses,

including the consensual recordings made by Herrmann. However, the government has declined to produce the statements and other communications concerning cooperation or collusion between local residents and the government relating to: (a) any requests by the resident(s) to bring criminal charges against any of the defendants; (b) a desire by the resident(s) to defeat in the March 2014 village election candidates associated with the defendants; (c) a desire by resident(s) communicating with the government to defeat the civil rights lawsuit filed by Lamm and others, or reverse the October 2016 settlement; (d) any animus against the defendants, the Chestnut Ridge development, or Hasidic Jews generally; or (e) any efforts by such resident(s) to attempt to influence the outcome of the March 2014 village election, including but not limited to, encouraging individuals who did not live in Bloomingburg to vote in the election.

Certainly, the requested evidence bears directly on a claim of vindictive prosecution. *See Koh*, 199 F.3d at 640. While obtaining discovery on vindictive prosecution claims is far from automatic, here Mr. Smilowitz has more than demonstrated “some evidence tending to show the existence of the essential elements of the defense.” *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (applying same discovery standard as applicable to selective prosecution). Indeed, given some community members’ hostility to the real estate project and to the defendants personally, as well as the extent to which these same individuals claim to have worked closely with the agents conducting this investigation, the government should be required to disclose to the defense the full record of communications between the government and those expressing such animus. Indeed, the recent letters submitted in connection with the sentencing of Nakdimen and Lamm expose further the extent to which many of those working with the government were hurt and upset about the filing, and ultimate settlement of, a civil rights lawsuit.

The requested material is also relevant and material to the defense because it is critical to informing the jury about Mr. Smilowitz's state of mind leading up to the Election; why the Beckerman Group and election law specialists hired by Black Creek gave the particular advice they gave with respect to placing items in houses; and why members of the Hasidic community who planned to move to Bloomingburg ultimately decided not to do so based on the hostile atmosphere in the Village and frightening incidents such as the FBI raid that preceded the Election.

The Court should accordingly compel the government to turn over any such evidence in its possession and set a briefing schedule and hearing for any motion based on such material.

### CONCLUSION

For the foregoing reasons, the Court should dismiss the Indictment in its entirety. In the alternative, the Court should enter an order compelling the government to turn over the evidence described above pursuant to Federal Rule of Criminal Procedure 16.

Dated: New York, New York  
November 9, 2017

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**19-0361-cr**

United States Court of Appeals  
for the  
**Second Circuit**

UNITED STATES OF AMERICA,

*Appellee,*

— v. —

SHALOM LAMM, KENNETH NAKDIMEN,

*Defendants,*

VOLVY SMILOWITZ, aka Zev Smilowitz,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR SOUTHERN DISTRICT OF NEW YORK (WHITE PLAINS)

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**BRIEF FOR DEFENDANT-APPELLANT  
and SPECIAL APPENDIX**

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**STATEMENT OF JURISDICTION**

The Southern District of New York had jurisdiction over this case pursuant to 18 U.S.C. §3231, as the defendant, Mr. Smilowitz, was charged with crimes against the United States—to wit, conspiring to violate Title 52, United States Code §10307(c), and violating Title 18, United States Code, §1952. This Court now has jurisdiction pursuant to 28 U.S.C. §1291.

Pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, Mr. Smilowitz's Notice of Appeal was timely filed on February 8, 2019, within 14 days of the final order and judgment entered in the Southern District of New York on January 25, 2019, on which date Mr. Smilowitz was convicted pursuant to a plea of guilty before the Honorable Vincent L. Briccetti.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Title 52, Section 10307(c), proscribes certain wrongful conduct in connection with voting and registering to vote. However, Section 10307(c) applies to only federal elections. Did the District Court err in finding Section 10307(c) applicable to a local election?
  
2. The Travel Act proscribes “bribery” committed with an interstate nexus. Mr. Smilowitz’s illegal conduct did not constitute bribery under the common law or under the definition of commercial bribery, nor did New York law define his conduct as bribery. Did the District Court err in finding the Travel Act applicable?

**STATEMENT OF THE CASE<sup>1</sup>****General Overview**

The federal charges in this case emanate from a campaign to elect candidates for local office in a local election in Bloomingburg, New York (“the Village”). The election had become a lightning rod in the Village, as residents believed it would control the approval or denial of a real estate development that many feared would bring an influx of Jews into the small community. In the shadow of these fears, defendant, Zev Smilowitz, became a participant in the ugly clash as a point-person between the development and the Jewish community. And, ultimately, his role turned criminal through his participation in an attempt to increase the voter turnout through false registrations and vote-purchasing. He was indicted for his conduct, and acknowledged his wrongdoing, but sought to dismiss the charges on the grounds that he had committed only state rather than federal offenses. After the denial of his motion to dismiss, he pled guilty. On this appeal, he challenges the District Court’s order and judgment denying his motion to dismiss, because, as discussed below, his conspiracy to influence a purely-local state election did not implicate either Title 52 or the Travel Act,

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<sup>1</sup> Aside from the general overview and procedural history, the factual background of this case largely restates the “Factual Background” section of Mr. Smilowitz’s underlying motion to dismiss, filed in the Southern District of New York in November 2017.

and accordingly, could not constitute a federal crime. Therefore, his judgment of conviction should be reversed and the indictment dismissed.

**A Real Estate Development is Planned in the Village, Causing Local Residents to Panic Because it Would Cause an Influx of Hasidic Jews.**

In 2006, Shalom Lamm and Kenneth Nakdimen began a real estate development in the Village (A42). Operating through their company, Black Creek Holdings (“Black Creek”), their development envisioned housing for 396 units, as well as the replacement of an aging wastewater treatment facility. The project raised no significant controversy for two years, during which time the State Department of Environmental Conservation and the Village Planning Board approved the project (*id.*).

In 2012, residents in the Village and in neighboring communities came to fear that the development would attract Hasidic Jews (*id.*). Thus in a public meeting concerning the project on May 17, 2012, Village residents sounded the alarm that approval of the development would lead to Hasidic Jews “walking the streets” (A43; A148). Some asked the Village Attorney whether he could promise that Hasidic Jews would be barred from the development (A149.). And over time, the panic boiled out from private meeting rooms and onto the internet: “The hate that people have for them has nothing to do with being anti-Semitic,” said one resident of the Village,

“it has to do with being anti-Hasidic, because these people are in a cult where they feel they are superior to others and don’t have to follow the rules” (A43; A88). Or as another framed the issue on Facebook: members of the Hasidic community would “come in like a virus,” labeling Hasidic Jews akin to “cockroaches,” and stating that “the CULTIST f--ks need to go back to the sh-t holes they came from” (A43; A89; A92).

The fever ran hot enough that it captured Jimmy Johnson, the eventual Village Trustee: “I have some great Jewish friends,” he said, “but Hasid Jews are some other breed” (A43; A90). In December 2013, facing the development, residents thus erected a 20-foot high wooden cross (A188; *see also* A44).

The droning anti-semitism led fearful residents and neighbors to get politically organized. Thus late 2012 or early 2013 saw the formation of the Rural Heritage Party (“RHP”), whose immediate goal was to block the development by ousting local politicians who had supported the project (A44). This placed one contest, with purely local candidates and interests, in the path of the brewing storm: the March 18, 2014 Village election.

**The Parties Mobilize, and Law Enforcement Intervenes.**

Himself a member of the Hasidic community, Mr. Smilowitz, then twenty-five years old, became involved in the project as a point-person between the Hasidic community and Black Creek (A42). On the other side of the aisle, RHP eventually mounted a sophisticated and aggressive get-out-the-vote campaign, instructing supporters to use code-language to mask sentiments of antisemitism: “Use phrase ‘high density housing,’ never refer to a religious sect,” urged one instruction (A45; A153). And, ominously, RHP attempted to induce votes from people registered in Bloomingburg even though they no longer lived there—urging them to return and vote “no matter where you are now” (A45; A177).

As the local election grew near, Village residents turned from the power of the ballot box to the power of law enforcement to target Hasidic residents and voters, some of whom they suspected had also established false residency in the Village. “I encourage everyone else to call and demand that they prosecute each and every fraudulent voter,” said one resident (A46; A200); “PICTURES PEOPLE, ALWAYS PICTURES, NO MATTER WHAT YOU SEE, JUST TAKE THE PICTURES AND IF YOU ARE NOT SURE, ASK QUESTIONS LATER,” said another (A46; A190). Before long, law enforcement reared its head.

On March 12, 2014, the federal government obtained seven search warrants for homes listed in the Village, as well as for the offices of Black Creek (A46). The following day, more than fifty FBI agents descended on the Village. Law enforcement entered Black Creek and proceeded to seize computers, laptops, hard drives, and more—to tremendous fanfare from Village residents (*id.*).

Five days later was the election (A47). The ballot contained no candidates for federal office (A47; A79). Limited to candidates for members of the Village government, the RHP achieved a wave of success—voting out all the incumbents who had not shared the antisemitism that had ultimately swept across the Village (A47-48).

**The Government Indicts Smilowitz, Among Others; Smilowitz then Moves for Dismissal and the District Court Denies the Application.**

Two and a half years later, on December 15, 2016, the government indicted Lamm, Nakdimen, and Mr. Smilowitz (A49). They were charged with conspiring to falsify registration forms, and creating false indicia of people's local occupancy, to inflate the number of eligible voters in the community who could vote in favor of the development (A18-31). The government charged this conduct as a violation of Title 52, United States Code, Section 10307(c). The government also charged Mr. Smilowitz with

violating the Travel Act with the predicate offense of bribery, an offense predicated on his using money and other consideration to induce votes (*id.*).<sup>2</sup> Nevertheless, the antisemitism lingered long after the charges. Thus in June 2017, it culminated in a mikva in the development being defaced with swastikas (A50).

On November 12, 2017, Mr. Smilowitz filed an application to dismiss the conspiracy charge against him because, as relevant, the scope of the conspiracy began and ended around a purely local election, whereas Title 52 required an election solely or in part for federal office. In addition, he argued, he could not have violated the Travel Act, because the charged conduct did not amount to a recognized form of “bribery,” which was the predicate offense identified in the indictment. He thus sought dismissal of the charges against him (A51-63; A67-71).

On December 8, 2017, the government opposed the motion on both fronts. Because New York adopts a “unitary” registration platform, it argued, Smilowitz’s charges were sustainable even though he only targeted a local election. States that adopt unitary registration systems allow their residents to use state registrations to vote in federal elections. So, according to the government, by rigging state registrations, Smilowitz’s conduct was

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<sup>2</sup> A superseding indictment was filed on May 18, 2018 (A501-516).

broad enough to fall within the grip of the federal statute (A327-340). Moreover, he could be prosecuted for violating the Travel Act as well, the government argued, because the term “bribery” receives broad connotation when used in connection with the Travel Act, and Smilowitz’s conduct allegedly fell within that broader interpretation (A341-346).

The District Court (Briccetti, J.) decided the motion in open court on March 15, 2018, denying Smilowitz’s application for dismissal, and reading its opinion into the record (A454-471). With respect to Title 52, the court recognized the dearth of precedent in the Second Circuit applying the federal law to a local election in this context, but cited dicta from five other cases -- which, notably, *all* either related to elections where at least one federal candidate was also on the ballot, or to a scheme to benefit a federal candidate -- that it found persuasive. *See United States v. Slone*, 411 F.3d 643, 648 (6<sup>th</sup> Cir. 2005); *United States v. Bowman*, 636 F.2d 1003, 1011 (5<sup>th</sup> Cir. 1981); *United States v. Lewin*, 467 F.2d 1132, 1136 (7<sup>th</sup> Cir. 1972); *United States v. Lewis*, 514 F. Supp. 169, 171 (M.D. Pa. 1981); and *United States v. Cianculli*, 482 F. Supp. 585, 587 (E.D. Pa. 1979) (A462-467). Language selected from these inapposite cases thus solidified the Court’s holding:

I am persuaded by a survey of case law from other circuits that Mr. Smilowitz’s purported intention to influence only a local election is irrelevant because his conduct exposed the federal election to the possibility of corruption.

(A465).

As for the Travel Act, the court again agreed with the government, holding that a mere “generic definition” of bribery could apply when deciding the contours of the Travel Act (A469). Moreover, the court reasoned, while New York does not define Smilowitz’s conduct as bribery, at least twenty-one other states would. It could thus “discern no reason why Congress would wish to aid local law enforcement efforts in [some states] but deny that aid in New York when both states have statutes covering the same offense [but with different labels]” (A469-70).

**Smilowitz Pleads Guilty, and is Released on Bail Pending Appeal Based on the Government’s Acknowledgment that his Appeal Raises Jurisdictional Questions that are not Foreclosed by the Plea Agreement.**

By June 18, 2018, Smilowitz’s motion to dismiss had been denied and he had lost his primary defenses. Pursuant to a written plea agreement (A517-522), he thus appeared in court, agreed to an appeal-waiver, and pled guilty to count one of the superseding indictment, for conspiracy (18 U.S.C. §371) to violate federal law (52 U.S.C. §10307(c); and 18 U.S.C. §1952)) (A523-552). He was sentenced on January 24, 2019 (A553-632).

On February 8, 2019, Mr. Smilowitz filed a notice of appeal (A633), and on March 22, 2019, he filed an application for bail pending his appeal's outcome (A634-652). In his application, he addressed not just the merits of his case but also his appeal-waiver. He explained that his waiver did not bar the present appeal, because his appeal targets not his factual guilt but the jurisdiction and authority of the federal government to prosecute him in the first place (A640-644). While the government opposed the application for bail pending appeal (A653-670), it did so on the merits of the novel legal issues; it affirmatively agreed that his appeal on these questions "would not be foreclosed by the appeal waiver in the Plea Agreement" (A662).

\* \* \*

Through this appeal, Mr. Smilowitz asks this Court to find that the federal charges lodged were inapplicable to him as a matter of law. Respectfully, the District Court erred in denying Mr. Smilowitz's motion to dismiss those federal charges under Title 52 and the Travel Act, and, accordingly, his conviction should now be reversed and the indictment dismissed.

**SUMMARY OF THE ARGUMENT**

This appeal presents two questions of statutory construction that have never been decided in this Court or in the Supreme Court of the United States. Both questions implicate the role of the federal government versus state governments in deciding the scope of criminal behavior. And they both involve statutes where, to be generous, two competing interpretations are possible—one broad beyond precedent, and one strict. The broad reading would violate the rule of lenity, and the strict reading yields no federal criminality. Either interpretation of the statutes thus required dismissal of the indictment here.

The first focus of this appeal is Title 52, where Congress outlawed conspiracies to corrupt the registrations to vote, or the voting, of others. On its surface, the type of conduct covered by the statute in Section 10307(c) is the type of conduct exhibited by Mr. Smilowitz: he participated in a conspiracy to pay people to vote and to include false information on their registrations to vote. Except, in the same section of the same statute, Congress added a proviso that states, “this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of electing any candidate for [federal] office....” *See 52 U.S.C. §10307(c).*

Smilowitz’s conspiracy did not target, or even contemplate, any election for federal office, or any ballot containing the name of even a single federal candidate. Using a plain reading of the statute’s text, the federal charges emanating from Title 52 should have been dismissed. And this outcome should have prevailed even if the District Court had found the statute ambiguous, as, under the rule of lenity, that ambiguity must be decided in favor of defendants facing criminal charges. As things stand, Mr. Smilowitz is the only criminal defendant in the half-century history of this statute to be convicted in federal court for corrupting an election bearing no candidates for federal office. The first request in this appeal is to remove this outlier.

The second focus here is the Travel Act. Initially fashioned as a tool to combat organized crime, the Travel Act authorizes federal criminal charges when, with an interstate nexus, a defendant commits one of the listed predicate acts that had been associated with the mob when the Act passed in 1961: gambling, untaxed liquor, narcotics, prostitution, extortion, bribery, or arson. *See* 18 U.S.C. §1952(b). But the acts described in Smilowitz’s indictment are none of these predicates.

While fashioned as “bribery,” all parties in this case agree that his conduct would not have constituted bribery under the common law, under

New York state’s definition of bribery, or even under broader definitions of “commercial bribery” that prevail in New York and elsewhere. Indeed, neither this Court nor the Supreme Court has ever construed bribery under the Travel Act this broadly. And with good reason: adopting the District Court’s invitation to use a “generic” definition of bribery that stretches around Mr. Smilowitz would sow confusion around the Travel Act, remove it from principled applicability, and would, again, require an ambiguity-based conviction of the sort that the rule of lenity outlaws.

The District Court upheld the charges against Mr. Smilowitz on both counts against a motion to dismiss, and in both instances it erred. Mr. Smilowitz’s judgment of conviction should, therefore, be reversed, and the charges emanating from Title 52 and the Travel Act should now be dismissed.

**STANDARD**

“As this appeal presents a matter of statutory interpretation, which is purely a question of law, [the standard of] review is *de novo*.” *United States v. Delis*, 558 F.3d 177, 179 (2d Cir. 2009).

**ARGUMENT**

**I. THE CONVICTION SHOULD BE REVERSED BECAUSE 52 U.S.C. §10307(c) DOES NOT APPLY TO CONSPIRACIES TO RIG PURELY LOCAL ELECTIONS.**

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“[A] court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.” *United States v. Davis*, 2019 WL 2570623, at \*10 (2019).

The criminal statute here does not clearly proscribe wrongdoing in a local election. Instead the statute says the opposite: that it does not apply to local elections, and pertains to elections solely or partly for federal office alone. Since the District Court applied the criminal statute to a conspiracy that encircled a purely local election, its decision should be reversed and the federal conspiracy charge dismissed.

**A. The Plain Reading of the Statute Requires Reversal.**

The analysis begins with the text of the statute. Mr. Smilowitz was accused of violating Title 52, §10307(c). In its entirety, that statute reads as follows:

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: ***Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.***

(emphasis added, but italics in original).

Convicting Smilowitz of the conspiracy in this case, then, required an untenable proposition: that the statute “clearly” proscribes conduct related to a local election—even though it states that it “shall be applicable only to [federal] elections....” *Id.*

The limitation in the statute—that “this provision” is “applicable only to [federal] elections,” invokes “one, cardinal canon before all others” that has been reiterated “time and again”: namely, that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992). Where, as here, “the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Despite the textually-creative impulses of litigants, after all, “Courts may not create an ambiguity where none exists.” *United Nat’l Ins. Co. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 107 (2d Cir. 1993).

The structure of Section 10307(c) makes its meaning plain: it criminalizes certain electoral misconduct related to registering to vote and voting, and then explains that “this provision” only pertains to elections with federal candidates on the ballot. The reader knows that the federal-limitation pertains to the entire statute rather than to any one subsection for registering or voting, since the statute *does not contain* any subsections for registering or voting. Thus, without “creat[ing] an ambiguity where none exists,” the statute as a whole cannot apply, as here, to an election for a local

village government where not a single candidate for federal office is on the ballot or within the scope of the conspiracy.

One can envision a scenario in which this analysis would be more complicated—where a cloud of ambiguity would emerge over whether “this provision” referred to an entire section of a law or just, for example, to the immediately preceding sentence or clause. If the federal-requirement in this statute immediately followed a section or clause dedicated solely to voting, for example, ambiguity could emerge about what it meant: to apply the statute, would the federal-limitation apply just to the voting, or would it apply more broadly to all preceding references to voting or registering to vote?

Fortunately, this problem remains academic in this case. In relation to the federal-proviso, both the immediately preceding sentence and clause in this statute pertain to registering and voting together. *See 52 U.S.C. Section 10307(c)* (referring to someone who “pays or offers to pay or accepts payment *either for registration to vote or for voting*”) (emphasis added). Indeed, in every other location of the statute where the law refers to registering and voting, it refers to them together in the same clause. *See id.* (“Whoever ... gives false information ... for the purpose of establishing his eligibility to *register or vote*;” or “conspires with another ... for the purpose

of encouraging ... false *registration to vote or illegal voting*” (emphasis added).

In applying this statute to Smilowitz’s conduct toward a local election, the District Court thus implicitly found that the federal-ballot-limitation applied to voting but not registering to vote—contrary to a statutory structure that grouped the acts together three consecutive times and never separated them. A better approach, and the required approach, was to assume the statute “means what it says,” *Connecticut Nat. Bank*, 503 U.S. at 253, which, in this case, rendered the law inapplicable to Smilowitz’s purely local conduct.

**B. The Rule of Lenity requires Reversal.**

Regardless of whether lawyers and judges could formulate a way to read Section 10307(c) to govern purely local elections, the rule of lenity “requires that Congress, not the courts or the prosecutors, must decide whether conduct is criminal.” *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015). To that end, assume *arguendo* that the statute suffers an ambiguity about whether it can descend upon the act of registering to vote in a purely local election: since Section 10307(c) “is a criminal statute, [this Court] must construe it strictly for that reason alone” anyway. *United States v. Crispo*, 306 F.3d 71, 80 (2d Cir. 2002). Stated simply, “the rule of lenity

requires ambiguous criminal laws to be interpreted in favor of ... defendants subjected to them,” a rule that “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain.” *United States v. Banki*, 685 F.3d 99, 109 (2d Cir. 2012) (internal quotations omitted).

Applied here, the plain terms of the statute say that it does not apply to local elections, which ought to resolve the matter in Smilowitz’s favor. *Aslandis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1072-73 (2d Cir. 1993) (“a court should presume that the statute says what it means”). To read the statute otherwise, the District Court had to create an ambiguity out of the term “this provision” that distorts the plain reading of the text and which, in any event, must be construed in favor of the defense.

In particular, the statute has two halves: one that criminalizes conduct related to registrations and votes; and a second that limits “this provision” to federal elections. However, to prosecute Smilowitz implicitly required fracturing the statute into additional subparts: one pertaining to registrations and one pertaining to votes. That way, the government could argue that when “this provision” only applies to federal elections, the law intends the federal limitation to apply only to ‘*the voting subsection of* this provision’ and not to Smilowitz’s efforts to affect a local election through registrations.

The biggest problem with the government’s reading of the statute is that Congress could have drafted language that comported with such a view if it wanted to—and still can. For instance, it could have written subparts into the statute itself. One subpart could have pertained to voting, one could have pertained to registration, and each could have separately explained whether they applied to local elections. This would have required little creativity: elsewhere in Title 52 itself, Congress broke down voting statutes into exactly these different subparts—one pertaining to voting and one pertaining to registrations. *See, e.g.*, 52 U.S.C. §10502 (addressing voter residency requirements, containing subsection ‘c’ for voting and subsection ‘d’ for registrations). The fact that Congress chose to use these subsections elsewhere but not in 10307(c) indicates that this structuring was intentional.

Alternatively, Congress could have kept 10307(c) free of subsections, but with a provided-clause that achieved the same goal: ‘*Provided, however, That to the extent this statute proscribes conduct related to voting, as opposed to registering to vote, it shall be applicable only to elections held solely or in part for the purpose of electing [federal officials].*

Left untouched, however, the statute applies to Smilowitz only by inflating an ambiguity into the statute: that when Congress applied “this provision” to federal elections, it meant to say that the federal-limitation

only applied to ‘*the voting component* of this provision.’ This type of self-made ambiguity is precisely the risk that the rule of lenity paves over. Even if the statute here is ambiguous, the very existence of an ambiguity in the criminal statute must “be interpreted in favor of [Smilowitz].” *Crispo*, 306 F.3d at 80. And because this favorable interpretation of the statute detaches Smilowitz’s offense from the charged federal statute, the conspiracy charge is unsustainable and should have been dismissed.

**C. The District Court’s Reading of the Statute Violates Principles of Federalism.**

“Principles of federalism limit the power of federal courts to intervene in state elections,” this Court has held, because “[t]he Constitution leaves the conduct of state elections to the states.” *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (internal quotations omitted). “Only in extraordinary circumstances will a challenge to a state or local election rise to the level of a constitutional deprivation.” *Id.* (internal quotations and ellipses omitted). And this comports with the basic breakdown of our constitutional republic: that while the “[t]imes, [p]laces and [m]anner of holding [e]lections for [federal office], shall be prescribed in each State by the Legislature thereof,” and where “Congress may at any time by [l]aw make or alter such [r]egulations, except as to the [p]lace of ch[oo]sing

Senators,” *see* U.S. CONST., ART. 1, Sec. 4, the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST., Amend. X.

Nevertheless, here, the District Court found that Mr. Smilowitz’s endeavor to tilt an election for members of a local village government triggered federal implications. Though his conspiracy began and ended around a local election, this was “irrelevant,” the court held, because, theoretically, the New York voting registrations that Smilowitz corrupted could have been used toward a federal election down the road (A465) (his conduct “exposed the federal election to the possibility of corruption”). This reasoning flouts the boundary between state versus federal oversight of their respective election processes, and it would expose other criminal statutes to dangerous unintended consequences.

First, the District Court’s reading would turn the federal statute into a patrolman over every state and local election in the country. The only reason federal elections are on the radar in this case is because New York employs “unitary” registration. That is, registering to vote in New York carries the bonus of letting registrants vote in federal elections, too (A461)—hence the downstream “possibility of [federal] corruption” that concerned

the District Court (A465). However, unitary registration prevails in practically every state in America. *See Young v. Fordice*, 520 U.S. 273 (1997) (as of 1995, every state in the nation simultaneously registered voters for “both federal and state elections” except for Mississippi). So in virtually every state and commonwealth, state-registration corruption would trigger federal-registration liability. Divorced from §10307(c)’s express federal gloss, the statute would thus become a mainstay of local politics.

Second, this coating of federal law is particularly unnecessary in New York. New York, after all, boasts its own comprehensive scheme for regulating conduct surrounding its elections. Codified as the New York Election Law, it contains statutes that bar the very conduct that hit the federal tripwires in this case. *See, e.g.*, N.Y. Election Law 17-132(2) (classifying as a felon any person any “person who … counsels … any person to go or come into any election district, for the purpose of voting at any election, knowing that such person is not qualified”); N.Y. Election Law 17-142(1) (classifying as a felon any person who gives “consideration to or for any voter … to induce such voter … to vote”).

Section 10307(c) initially sprouted from the Voting Rights Act of 1965,<sup>3</sup> federal law necessitated by systemic breakdowns of states that could not be trusted to allow for fair voting, and who instead undermined election systems through Jim Crow and the atrocities of the Ku Klux Klan.<sup>4</sup> Creation of this federal power represented one of the crown jewels of American democracy, letting the federal government fill a vacuum left gaping by state failure. And yet, this vacuum-filling is simply not necessary in this case. Smilowitz corrupted a local village government election with not a single federal candidate on the ballot, in a state where there is no scent of governmental-enabling of the type of behavior in question, and where instead a comprehensive web of statutes already awaited Smilowitz for his conduct. To whatever extent §10307(c) would be appropriate in extreme circumstances to sustain democracy, then, those circumstances did not emerge here.

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<sup>3</sup> See Voting Rights Act of 1965, Pub. L. No. 89-110, Section 11(d-e) (1965), available at: <https://legcounsel.house.gov/Comps/Voting%20Rights%20Act%20Of%201965.pdf>.

<sup>4</sup> See, e.g., U.S. DEPT. OF JUSTICE, Introduction to Federal Voting Rights Laws, available at: [https://epic.org/privacy/voting/register/intro\\_a.html](https://epic.org/privacy/voting/register/intro_a.html); Kevin J. Coleman, The Voting Rights Act of 1965: Background and Overview (March 2015), available at: [https://www.everycrsreport.com/files/20150310\\_R43626\\_af64c8a39967fe182f8aad6097d6b6d94be83352.pdf](https://www.everycrsreport.com/files/20150310_R43626_af64c8a39967fe182f8aad6097d6b6d94be83352.pdf).

Third, the District Court’s reading of this statute would weaken federalism in other criminal arenas. As one example, take laws against property damage to motor vehicles. Automobiles are to state-lines what state registrations are to state elections: they both allow their owners the possibility of exceeding their local boundaries even if their owners do not intend to do so. Yet, while the bar is low, the federal law addressing damage to motor vehicles requires a showing that the car actually was “used, operated, or employed in interstate or foreign commerce.” *See* 18 U.S.C. Section 33(a). The District Court’s “possibility” analysis would render that requirement obsolete. Every automobile on the nation’s roadways has the “possibility” of taking its owner across state lines to buy a widget. If this analysis held validity, then, just as every corruption of a voting registration would trigger Title 52, every car-damage case in the country would also blossom into a federal offense.

To support its judgment, the District Court relied upon five cases decided between fourteen and thirty-seven years ago in various District and Circuit courts, vastly stretching their holdings. None of these cases were decided in this Court or in the Supreme Court. And, most significantly, none of them involved a conspiracy touching a purely local election. *See United States v. Slone*, 411 F.3d 643, 648 (6<sup>th</sup> Cir. 2005) (intent to influence

a purely local election can be overcome by federal interests where “a federal candidate is on the ballot”); *United States v. Lewin*, 467 F.2d 1132, 1136 (7<sup>th</sup> Cir. 1972) (indictment for “paying persons for registering ... to vote at elections in the State of Illinois, ... for the purpose of ... electing candidates for the office of President [and] Vice President....”); *United States v. Lewis*, 514 F. Supp. 169, 171 (M.D. Pa. 1981) (charging a conspiracy “to submit fraudulent absentee ballots in both the general election ... and the Democratic primary....”); *United States v. Cianculli*, 482 F. Supp. 585, 587 (E.D. Pa. 1979) (the “principle beneficiary” of the conspiracy was a member of the House of Representatives).

Indeed, *United States v. Bowman*—the fifth case relied upon by the District Court—shows how extreme the ruling against Smilowitz was. As a general culmination of the principles relied upon by the District Court, *Bowman* set forth the very proposition, using the same language, that the District Court deployed here—that “Congress may regulate any activity which exposes the federal aspects of the election to the *possibility of corruption....*” *United States v. Bowman*, 636 F.2d 1003, 1011 (5<sup>th</sup> Cir. 1981). But this language sprouted from a simple limiting clause that does not appear in the District Court’s holding here: “[W]hen federal and state candidates are together on the same ballot....”

Smilowitz's conspiracy did not affect or even contemplate a single ballot or election containing a single candidate for federal office—unlike every case in the 54-year history to apply this statute or its predecessor. By its express terms, the statute applies to solely or partly federal elections, yet all parties in this case agree that Smilowitz's conspiracy began and ended with a local election alone. Applying Title 52 to Smilowitz's conspiracy was, thus, an error.

For these reasons, the District Court should have dismissed the conspiracy charge against Mr. Smilowitz, and its judgment to the contrary should therefore be reversed.

**II. THE CONVICTION SHOULD BE  
REVERSED BECAUSE THE TRAVEL  
ACT VIOLATION LACKED THE  
REQUISITE PREDICATE OFFENSE  
OF “BRIBERY.”**

In 1961, as Attorney General of the United States of America, a thirty-five-year old budding politician named Robert F. Kennedy raised national consciousness to the needed federal war on organized crime. *See* Becky Little, HISTORY, *How Bobby Kennedy Started the War on Gangs* (2018).<sup>5</sup> By the time his brother entered the White House, organized crime families

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<sup>5</sup> Available at: <https://www.history.com/news/robert-kennedy-started-the-war-on-mafia-gangs>.

boasted about five thousand members and thousands of associates. *Id.* And while prior efforts to fight organized crime had been conducted against individuals, the Kennedys' war would take the fight against the criminal organizations themselves. *Id.*

The "Travel Act" passed as the "centerpiece" of this effort. *See* Jonathan S. Feld, LAW JOURNAL NEWSLETTERS, *The Rise of The Travel Act* (2017).<sup>6</sup> It was "primarily designed to stem the 'clandestine flow of profits' and to be of 'material assistance to the States in combating pernicious undertakings which cross State lines[.]'" *United States v. Nardello*, 393 U.S. 286, 292 (1969). This, after all, reflected the Congressional determination that "certain activities of organized crime which were violative of state law had become a national problem." *Id.*

To that end, the Travel Act—18 U.S.C. §1952—addresses anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to ... [inter alia] promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity...." *See* 18 U.S.C. § 1952(a)(3). And as used in the statute, "unlawful activity" is a term of art: designed to track the types of offenses prevailing around the

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<sup>6</sup> Available at: <http://www.lawjournalnewsletters.com/2017/10/01/the-rise-of-the-travel-act/?slreturn=20190528160252>.

mob, it pertains to: “(1) any business enterprise involving gambling, [untaxed] liquor..., narcotics ..., or prostitution ..., [or] (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States....” *See 18 U.S.C. §1952(b).*

Since its passage, the Travel Act has developed tentacles that reach beyond the mafia. But it retains the genetic code that cautions against an over-expansive reading; for if read broadly, the Travel Act would “alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of [actors], a matter of happenstance, would transform relatively minor state offenses in to federal felonies.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

With this in the background, the District Court erred in applying the Travel Act to Mr. Smilowitz—a defendant accused of conduct that bore no relationship to organized crime, a Jewish man accused of corrupting an election in village politics doused in flagrant anti-semitism, and a young man whose conduct activated the Travel Act because of “bribery” that would not constitute bribery under New York state law, the common law, or even bribery in its commercial form. Under these circumstances, the District Court was wrong to lower the blanket of the Travel Act upon the actions of

Mr. Smilowitz, and its decision upholding the Travel Act component of the charges should be reversed.

First, “bribery” at common law and in present day New York does not cover the conduct with which the government charged Mr. Smilowitz. Indeed, at “early common law the crime of bribery extended only to the corruption of judges.” *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing 3 E. Coke, *Institutes* 144, 147 [1628]). The definition of bribery has expanded since its origins. But even in modern day New York, during the time of Smilowitz’s conduct, bribery in the third degree still required that the payee be “a public servant”—which Smilowitz and the voters he tried to register clearly were not. *See* Penal Law §200.00 (linking bribery to exerting influence upon a “public servant’s vote, opinion, judgment, action, decision or exercise of discretion”). Thus, Smilowitz’s conduct clearly did not amount to bribery at common law or under New York’s Penal Law.

Second, Mr. Smilowitz’s conduct did not amount to bribery under commercial definitions, either. Courts have extended Travel Act “bribery” beyond its initial focus on organized crime, and they have extended it further beyond common law definitions to “commercial bribery.” Thus in *Perrin*, the Supreme Court activated the Travel Act for conduct that constituted “commercial bribery”—i.e., secretly paying an “agent, employee, or

fiduciary ... with the intent to influence [that person's] action in relation to the principal's or employer's affairs.” See *Perrin*, 444 U.S. at 38-39 (granting certiorari to resolve “whether commercial bribery of private employees prohibited by a state criminal statute” constituted a Travel Act predicate; holding yes). *Perrin* involved commercial bribery under Louisiana law; and New York has a statute for commercial bribery that echoes Louisiana's. See Penal Law §180.00. Yet, again, this does not encompass Smilowitz's conduct: his conspiracy did not target agents of principles, and the government has not accused him of committing commercial bribery.

Thus, a local resident with no ties to the mob underworld, Smilowitz was charged under a statute designed for the mob, based upon a “bribery” predicate that is not bribery in the state where Smilowitz acted.

Nevertheless, the District Court upheld these charges because of a fourth way to define bribery—not under definitions from common law, or New York state law, or commercial law, but from “generic” law. Smilowitz's conduct “fits comfortably within the generic definition of bribery,” the District Court held, citing *Perrin*'s approval in *dicta* of generic definitions (A469). And indeed, it added, it violates the definition of bribery as defined in at least 21 other states, including New Jersey (*id.*). The court

could thus “discern no reason why Congress would wish to aid local law enforcement efforts in New Jersey, but deny that aid in New York when both states have statutes covering the same offense” (A470).

The District Court should have discerned several reasons why Congress would not have wanted to apply the Travel Act to the circumstances presented here. A prime reason is, no case in the history of the Southern District of New York, the Second Circuit, or the Supreme Court has *ever* applied a bribery-based Travel Act case on a form of “bribery” inconsistent with common law, state law, and commercial law definitions. This makes sense, because the text of the Travel Act specifically refers to predicate acts like bribery being committed “in violation of the laws of the State in which [it was] committed....” *See* 18 U.S.C. §1952(b). So before extending the Travel Act to an unprecedented length, the fact that the statute was already being applied beyond the scope of its text and initial intentions<sup>7</sup> should have warranted a halt.

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<sup>7</sup> Supporting passage of the bill, Attorney General Kennedy testified himself on June 6, 1961. “Let me say from the outset,” he said, “... we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. ... The target clearly is organized crime. ... Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.” *Rewis v. United States*, 401 U.S. 808, fn. 6 (1971).

Furthermore, Smilowitz's conduct is not within bribery's "generic" definition. *Perrin* is the landmark case that enabled bribery to extend beyond its common law definition, and it did so by recognizing that the duty corruptible by common law bribery exists for more than just public officials. *See Perrin*, 444 U.S. at 44 (describing 28 states that had outlawed "corrupt payments to influence private duties in particular fields"). In the private setting, after all, principle-agent relationships create duties that can also be undermined by corrupt payments. And, thus, to whatever extent the "generic" definition of bribery was used in *Perrin*, it was held to include commercial bribery, too. *Perrin*, 444 U.S. at 49 (1979) ("We hold that Congress intended 'bribery ... in violation of the laws of the State in which committed' as used in the Travel Act to encompass conduct in violation of state commercial bribery statutes").

However, there is no principled way to expand the Travel Act's definition of bribery beyond common law, applicable state law, and commercial law definitions of the term in a way that encompasses Smilowitz's conduct. The most straightforward way to expand bribery beyond traditional confines, for example, would be to set up guardrails around a duty recognized at law—public service duties, duties of honest services, duties of care, and fiduciary duties of loyalty. *See, e.g.*, *United*

*States v. Alfisi*, 308 F.3d 144, 155 (2d Cir. 2002) (“a bribe payer seeks advantage or benefit by attempting to influence an official to breach a public duty”); *Skilling v. United States*, 561 U.S. 358, 409 (2010) (limiting honest services fraud to bribes and kickbacks); *Perrin*, 444 U.S. at 49 (applying “commercial” bribery in Travel Act for breach of agent’s duty to principal). Otherwise, unbound by a state’s own bribery laws, the types of *quid pro quo* arrangements that could qualify as problematic under the Travel Act would become truly sweeping. Assuming an interstate nexus, they would include, say, cash tips to a bartender for unfairly good service in a crowded tavern; fruit-baskets to customers around the holidays to encourage further patronage; or even conduct recognized as crimes—but as other crimes—like offering consideration to a witness in exchange for testimony in a state trial, an act that would not constitute federal witness tampering but which would become a Travel Act violation if “bribery” lacked an anchor in legal duties.

*See, e.g., Park S. Assocs v. Fischbein*, 626 F. Supp. 1108, 1113 (S.D.N.Y. 1986) (18 U.S.C. §1515, the federal witness tampering “statute[,] does not apply to state court proceedings”).

Linking bribery to legally recognized duties would, by contrast, keep the Travel Act faithful to its original concern: to not become so broad that it “might well produce situations in which the geographic origin of [actors], a

matter of happenstance, would transform relatively minor state offenses in to federal felonies.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

The District Court’s reliance upon how at least “21 [other] states” define bribery only adds to the confusion. New York—the state where Smilowitz committed his misconduct—was not one of those states. And if there were about 21 states that defined bribery differently from New York—indeed, there appears to be 26<sup>8</sup>—that still leaves about half the states in America that would look at Smilowitz’s conduct and *not* label it bribery. Where the Travel Act was prompted by a war on organized crime, the states that would refuse to label Smilowitz’s conduct “bribery” would nevertheless include cities ranging from New York City to Los Angeles and Chicago. See *United States v. Bowling*, 2010 WL 5067698, at fn. 1 (E.D. Kentucky 2010) (state list not including New York, California or Illinois).

Viewing Smilowitz’s conduct as a form of “generic” bribery is thus not supported by the even survey the District Court itself endorsed.

Nor does the rule of lenity permit prosecuting Smilowitz under these circumstances. The relevant Travel Act predicate is bribery, yet the state in which he committed his offense does not define his conduct as bribery—nor

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<sup>8</sup> See, e.g., *United States v. Bowling*, 2010 WL 5067698, at fn. 1 (E.D. Kentucky 2010) (reciting 26 states where bribery includes payment to electors).

does the common law, nor does about half the country. And no case in the history of this court has held labeled this type of behavior a Travel Act qualifier. To be generous, then, and even ignoring the plain statutory text that explicitly precludes criminal liability here, the circumstances of Smilowitz's case *at most* present "a statute whose commands are uncertain;" this alone triggers the "fundamental principle that [he] should [not] be held accountable" under federal criminal law. *United States v. Banki*, 685 F.3d 99, 109 (2d Cir. 2012) (internal quotations omitted).

For these reasons, the District Court erred in denying the motion to dismiss Mr. Smilowitz's charges under the Travel Act; his conviction should be reversed and these charges dismissed, because he did not commit the requisite predicate act of bribery.

**CONCLUSION**

For these reasons, the District Court erred in denying Mr. Smilowitz's motion to dismiss, and we respectfully request that this Court REVERSE the judgment of conviction and DISMISS the indictment.

Dated:      Garden City, New York  
                  July 8, 2019

Respectfully,

BARKET EPSTEIN KEARON  
ALDEA & LOTURCO, LLP

  
\_\_\_\_\_  
Donna Aldea  
Alex Klein

**CERTIFICATE OF LENGTH COMPLIANCE**

This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because it contains less than 14,000 words -- specifically, 7,656 words -- and because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, font size 14.

Dated:      Garden City, New York  
                  July 8, 2019

A handwritten signature in black ink, appearing to read "Don Ab", is written over a horizontal line.

**Appx. 160**

## **SPECIAL APPENDIX**

## Appx. 161

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**SPA-1**

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AO 245B (Rev. 02/18) Judgment in a Criminal Case  
Sheet 1**UNITED STATES DISTRICT COURT**

Southern District of New York

UNITED STATES OF AMERICA	)	<b>JUDGMENT IN A CRIMINAL CASE</b>
v.	)	
VOLVY SMILOWITZ	)	Case Number: S1 16 CR 818-03 (VB)
a/k/a "Zev Smilowitz"	)	USM Number: 78503-054
	)	Justine A. Harris, Esq.
	)	Defendant's Attorney

**THE DEFENDANT:**

pleaded guilty to count(s) 1

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

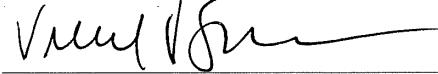
<b>Title &amp; Section</b>	<b>Nature of Offense</b>	<b>Offense Ended</b>	<b>Count</b>
18:371	Conspiracy to Commit Offense Against United States, to wit, Voter Registration Fraud	3/31/2014	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

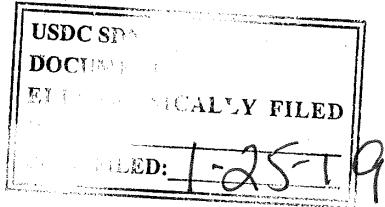
The defendant has been found not guilty on count(s) \_\_\_\_\_

Count(s) 2-25, and original indictment  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/24/2019  
Date of Imposition of Judgment

Signature of Judge

Vincent L. Briccetti, U.S.D.J.  
Name and Title of Judge1/25/2019  
Date

Case 7:16-cr-00818-VB Document 133 Filed 01/25/19 Page 2 of 7

AO 245B (Rev. 02/18) Judgment in Criminal Case  
Sheet 2 - Imprisonment

Judgment - Page 2 of 7

DEFENDANT: VOLVY SMILOWITZ a/k/a "Zev Smilowitz"  
CASE NUMBER: S1 16 CR 818-03 (VB)

**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

3 Months.

The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to FCI Otisville Satellite Camp.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on 4/30/2019

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

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AO 245B (Rev. 02/18) Judgment in a Criminal Case  
Sheet 3 — Supervised Release

Judgment—Page 3 of 7

DEFENDANT: VOLVY SMILOWITZ a/k/a "Zev Smilowitz"

CASE NUMBER: S1 16 CR 818-03 (VB)

**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:

1 Year.

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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AO 245B (Rev. 02/18) Judgment in a Criminal Case  
Sheet 3A — Supervised ReleaseJudgment—Page 4 of 7DEFENDANT: VOLVY SMILOWITZ a/k/a "Zev Smilowitz"  
CASE NUMBER: S1 16 CR 818-03 (VB)**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

DEFENDANT: VOLVY SMILOWITZ a/k/a "Zev Smilowitz"

CASE NUMBER: S1 16 CR 818-03 (VB)

**SPECIAL CONDITIONS OF SUPERVISION**

1. The defendant must perform 200 hours of community service, which shall be for the direct benefit of the village of Bloomingburg, NY, to be approved by the Probation Officer.
2. The defendant must provide the Probation Officer with access to any requested financial information if the fine is not paid within 60 days of the defendant's release from custody.
3. The defendant must not incur new credit charges or open additional lines of credit without the approval of the Probation Officer if the fine is not paid within 60 days of the defendant's release from custody.
4. The defendant shall be supervised by his district of residence.

DEFENDANT: VOLVY SMILOWITZ a/k/a "Zev Smilowitz"  
CASE NUMBER: S1 16 CR 818-03 (VB)

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

**TOTALS**      **Assessment**      **JVTA Assessment\***      **Fine**      **Restitution**

- The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

- Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_.
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: VOLVY SMILOWITZ a/k/a "Zev Smilowitz"

CASE NUMBER: S1 16 CR 818-03 (VB)

### **SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A  Lump sum payment of \$ 100.00 due immediately, balance due  
 not later than \_\_\_\_\_, or  
 in accordance with  C,  D,  E, or  F below; or

B  Payment to begin immediately (may be combined with  C,  D, or  F below); or

C  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:  
The \$2,500.00 fine shall be paid in full no later than 60 days after defendant's release from custody.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.  
 The defendant shall pay the following court cost(s):  
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

**19-361**

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**In the**  
**United States Court of Appeals**  
**For the Second Circuit**

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UNITED STATES OF AMERICA,

*Appellees,*

— v. —

SHALOM LAMM and KENNETH NAKDIMEN,

*Defendants,*

- and -

VOLVY SMILOWITZ, AKA ZEV SMILOWITZ,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**PETITION FOR REHEARING *EN BANC***

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666 Old Country Road, Suite 700  
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(516) 745-1500

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## **INTRODUCTION**

These proceedings present two questions of timely and exceptional importance that implicate the role of federalism in prosecuting criminal conduct surrounding our elections. One of the statutes at issue governs the dynamic between federal and state governments in regulating fraud in our elections. The other is the Travel Act -- one of the most widely used statutes in all of federal criminal law. *En banc* review will allow this Court to dive into waters that remain uncharted by the Supreme Court, yet prove important for the nation's understanding of the boundaries of our federal criminal justice system.

At its broadest level, these sensitive questions of federalism could not be more timely. Swimming through a worldwide pandemic, our nation is staring into a hurricane of what will be one of the most trying election seasons in our history. *See, e.g.*, Dan Coats, *What's at Stake in this Election? The American Democratic Experiment*, NYTIMES (Sept. 17, 2020) (former national security advisor issuing warning that the “most urgent task American leaders face is to ensure that the election’s results are accepted as legitimate”).<sup>1</sup> While the country remains sharply divided politically and is

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<sup>1</sup> Available at: <https://www.nytimes.com/2020/09/17/opinion/2020-election-voting.html> (last visited September 17, 2020).

still reeling from a presidential election targeted by a foreign country,<sup>2</sup> the pandemic will require the citizenry to undergo a massive experiment with mail-in voting that will test the integrity of our institutions. *See, e.g.*, Rebecca Ballhaus, *Trump Urges North Carolina Voters to Test Mail-In System by Attempting to Also Vote in Person*, WSJ (Sept. 3, 2020).<sup>3</sup> Who gets to regulate misconduct in those elections—states or the federal government—has not been such an acutely important question since the 1860s. Resolving this question is an urgent task fit for the Court’s *en banc* attention.

This appeal also addresses the scope of one of the most commonly used, farthest-reaching statutes in all of federal criminal law: the Travel Act. The scope of this statute—one that has been tugged widely beyond the intentions of its framers—represents the pinnacle of a phenomenon of increasing federal criminalization. Over forty percent of federal criminal laws enacted since the Civil War were enacted in the last five decades. *See* Thane Rehn, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM L. REV. 1991, 1999 (2008). Thus, in his Year-End Report

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<sup>2</sup> See U.S. DEPT. OF JUSTICE, *Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election* (July 13, 2018) (available at: <https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election>).

<sup>3</sup> Available at: <https://www.wsj.com/articles/trump-urges-north-carolina-voters-to-test-mail-in-system-by-attempting-to-also-vote-in-person-11599144601> (last visited on September 17, 2020).

of the Federal Judiciary in 1998—one of his last—Chief Justice Rehnquist warned that over-federalizing crime “threatens to change entirely the nature of our federal system.” *See* WILLIAM H. REHNQUIST, THE 1998 YEAR END REPORT OF THE FEDERAL JUDICIARY 1, 2 (1999).<sup>4</sup> Nowhere is that more evident than in Travel Act, or in the stakes raised by this case for how to define it in the context of an election.

Ultimately, this appeal raises two novel questions of federalism that bear exceptional importance to the country in this moment of state and federal strife. *En banc* review is a commensurate response to these stakes.

### **BACKGROUND AND PROCEDURAL HISTORY**

The federal charges in this case emanate from a campaign to elect candidates for local office in a local election in Bloomingburg, New York (“the Village”). The election had become a lightning rod in the Village, as residents believed its outcome would control the approval or denial of a real estate development many feared would bring an influx of Jews. In the shadow of these fears, the defendant, Zev Smilowitz, became a point-person between the development and the Jewish community. His participation ultimately turned criminal through his attempt to increase the voter turnout through false

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<sup>4</sup> Available at: <https://online.ucpress.edu/fsr/article-abstract/11/3/134/42472/The-1998-Year-End-Report-of-the-Federal-Judiciary?redirectedFrom=fulltext>.

registrations and vote-purchasing. He was indicted for his conduct, sought to dismiss the charges because he had committed state rather than federal offenses, and after the denial of his motion he pled guilty.

His appeal sought reversal of the District Court's order and judgment denying his dismissal-motion, because his conspiracy did not implicate Title 52 or the Travel Act. As to Title 52, Smilowitz's conduct was directed at a purely local election and was thus a target for state, but not federal, law. And as to the Travel Act, his conviction rested upon a definition of "bribery" not recognized under common law, commercial law, or statutory law. At a minimum, these problems with the convictions—emanating from bona fide ambiguities in the criminal statutes—warranted reversal under the rule of lenity. But on September 8, 2020, the panel affirmed the convictions of Mr. Smilowitz without addressing the rule of lenity at all.

**REASONS FOR *EN BANC* REVIEW****I. *EN BANC* REVIEW IS APPROPRIATE TO DECIDE THE EXCEPTIONALLY IMPORTANT QUESTION OF WHETHER THE FEDERAL GOVERNMENT MAY REGULATE FRAUD IN A PURELY LOCAL ELECTION; CONTRARY TO THE PANEL'S ADJUDICATION, THE COURT SHOULD HOLD THAT IT MAY NOT.**

“Principles of federalism limit the power of federal courts to intervene in state elections,” this Court has held, because “[t]he Constitution leaves the conduct of state elections to the states.” *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (internal quotations omitted). “Only in extraordinary circumstances will a challenge to a state or local election rise to the level of a constitutional deprivation.” *Id.* (internal quotations and ellipses omitted). And this comports with the basic breakdown of our constitutional republic: that while the “[t]imes, [p]laces and [m]anner of holding [e]lections for [federal office], shall be prescribed in each State by the Legislature thereof,” and where “Congress may at any time by [l]aw make or alter such [r]egulations, except as to the [p]lace of ch[oo]sing Senators,” *see U.S. CONST., ART. 1, Sec. 4*, the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *U.S. CONST., Amend. X.*

Building Title 52 upon these bedrocks, Congress outlawed conspiracies to corrupt the registrations to vote, or the voting, of others. *See* 52 U.S.C. § 10307(c). On the surface, it allowed federal oversight over the type of conduct exhibited by Mr. Smilowitz. He paid people to vote and to include false information on their registrations to vote. However, nodding to classic principles of federalism, Congress added a proviso that bars federal oversight of purely local elections—stating: “this provision shall be applicable only to general, special, or primary elections held solely or in part *for the purpose of electing any candidate for [federal] office....*” *See* 52 U.S.C. §10307(c) (emphasis added).

Smilowitz’s conspiracy did not target, or even contemplate, any election for federal office, nor any ballot containing the names of a single federal candidate. And since “a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe,” *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019), the authority to prosecute Smilowitz for defrauding a purely local election did not rest with the federal government. It rested with New York State.

As things stand, Mr. Smilowitz is the only criminal defendant in the half-century history of this statute to be convicted in federal court for

corrupting an election bearing no candidates for federal office. As this country now tumbles into an election season marked by polarization and remote voting, this precedent, left untouched, will convert these elections—including the local elections—into the stomping grounds of federal agents. Many observers will welcome this involvement, and others will not. But in either case it is not an outcome “clearly proscribe[d]” by Congress.

Nevertheless, here, a panel of this Court affirmed Mr. Smilowitz’s conviction under Title 52—holding that his endeavor to tilt an election in local village politics unleashed the powers of the United States federal government. Though his conspiracy began and ended around a local election, and though the Court “disagreed” with the government’s “strained textual reading” of the statute of conviction, it upheld Smilowitz’s conviction because his conduct had the “potential” to affect federal elections in the “future.” *United States v. Smilowitz*, 2020 WL 5359372, at \*4 (2d Cir. 2020). New York can avoid federalism concerns, it held, by simply eliminating its “unitary registration” system that otherwise registers people to vote in state and federal elections. *Id.* According to the panel, affirming Smilowitz’s conviction thus comported with decisions in other circuits, including *United States v. Lewin*, 467 F.2d 1132 (7<sup>th</sup> Cir. 1972) and *United States v. Bowman*, 636 F.2d 1003, 1011 (5<sup>th</sup> Cir. 1981). See *Smilowitz*, at \*5.

Though the panel’s reasoning is thoughtful, it ultimately breaches the federalism concerns and text of the statute upon which Mr. Smilowitz was convicted. If the government’s reading of the statute was wrong, as the panel held (*Smilowitz*, at \*4) (“We disagree with the government’s textual argument”), then Title 52 simply cannot reach the conduct at play, which involved a purely local election. Regardless of what could “potential[ly]” happen in some “future” conspiracy, *id.*, the statute is governed by an anchor akin to specific intent: that the bad actor harm an election held “for the purpose of electing any candidate for [federal] office.” *See* 52 U.S.C. §10307(c). Since this election was not held for that purpose, federal law does not govern Smilowitz’s conduct.

Indeed, the panel was correct in noting that New York affords unitary registration to its voters, but this is true for virtually every state in America. *See Young v. Fordice*, 520 U.S. 273 (1997) (as of 1995, every state in the nation simultaneously registered voters for “both federal and state elections” except for Mississippi). So, if unitary registration meant the federal government could regulate local elections under the guise of “potential” “future” conspiracies, its jurisdiction would rain down upon virtually every state and commonwealth in the nation. While §10307(c) has an express federal condition that it apply only to elections held “for the purpose of

electing any candidate for [federal] office,” the panel’s construction of the statute would plant it across the country under local politics—just in time to blossom into the most fraught election season in a century.

This is not an outcome paralleled by *Lewin* or *Bowman*. Neither of those cases welcomed federal oversight of a purely local election, as here. In *Lewin*, the government secured an indictment over “elections in the State of Illinois, … for the purpose of … electing candidates for the office of President [and] Vice President....” *United States v. Lewin*, 467 F.2d 1132, 1136 (7<sup>th</sup> Cir. 1972). And in *Bowman*, “the election was held [in part] for the purpose of electing a United States Representative....” *United States v. Bowman*, 636 F.2d 1003, 1005 (5<sup>th</sup> Cir. 1981). “Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption,” it held, presciently, “*when federal and state candidates are together on the same ballot.*” *Id.* at 1011 (emphasis added). These examples thus support Mr. Smilowitz’s point rather than undercutting it: the level of federal incursion underlying this case, into a local election with no federal candidates on the ballot, is unprecedented.

The panel had a platform for avoiding such an outcome. Though oddly not mentioned at all in the Court’s decision, the rule of lenity required a ruling that would have helped the Court avoid the prickly constitutional questions of

federalism. *See, e.g., Jones v. United States*, 529 U.S. 848, 858 (2000) (applying rule of lenity while “avoid[ing] the constitutional question that would arise were we to read [a criminal statute] to render the ‘traditionally local criminal conduct’ in which petitioner … engaged ‘a matter of federal enforcement’”). “When a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite,” the Supreme Court holds. *Id.* (internal quotation omitted). “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.” *Id.* (internal quotation omitted).

As indicated by the panel’s disagreement with the government’s interpretation of the statute, the language of §10307(c) is, at a minimum, not “clear and definite” over whether it applies to Mr. Smilowitz. While a unitary registration state poses “potential” concerns to federal elections down the road, Congress, at the very least, has not “convey[ed] its purpose clearly” to include such registration processes within its ambit. Under Supreme Court precedent, therefore, it should not have been deemed to affect the classic “federal-state balance” (*id.*) in the regulation of local elections.

Mr. Smilowitz arrives here the subject of a misdemeanor, but his case presents profound questions over the role of federalism in the regulation of local elections, and, more broadly, over state criminal conduct in general. The Court should grant his petition for *en banc* review and reverse the conviction entered in the District Court.

**II. EN BANC REVIEW IS APPROPRIATE TO DECIDE THE EXCEPTIONALLY IMPORTANT QUESTION OF WHETHER THE FEDERAL GOVERNMENT MAY USE THE TRAVEL ACT TO PROSECUTE VOTER BRIBERY FALLING OUTSIDE THE CONFINES OF STATUTORY LAW, COMMON LAW, OR COMMERCIAL LAW.**

In 1961, as Attorney General of the United States of America, a 35-year old budding politician named Robert F. Kennedy raised national consciousness to the needed federal war on organized crime. *See* Becky Little, HISTORY, *How Bobby Kennedy Started the War on Gangs* (2018).<sup>5</sup> By the time his brother entered the White House, organized crime families boasted about five thousand members and thousands of associates. *Id.* And while prior efforts to fight organized crime had been conducted against individuals,

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<sup>5</sup> Available at: <https://www.history.com/news/robert-kennedy-started-the-war-on-mafia-gangs>.

the Kennedys' war would take the fight against the criminal organizations themselves. *Id.*

The "Travel Act" passed as the "centerpiece" of this effort. See Jonathan S. Feld, LAW JOURNAL NEWSLETTERS, *The Rise of The Travel Act* (2017).<sup>6</sup> It was "primarily designed to stem the 'clandestine flow of profits' and to be of 'material assistance to the States in combating pernicious undertakings which cross State lines[.]'" *United States v. Nardello*, 393 U.S. 286, 292 (1969). This, after all, reflected the Congressional determination that "certain activities of organized crime which were violative of state law had become a national problem." *Id.*

To that end, the Travel Act—18 U.S.C. §1952—addresses anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to ... [inter alia] promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity...." See 18 U.S.C. § 1952(a)(3). And, as used in the statute, "unlawful activity" is a term of art: designed to track the types of offenses prevailing around the mob, it pertains to: "(1) any business enterprise involving gambling, [untaxed] liquor..., narcotics ..., or

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<sup>6</sup> Available at: <http://www.lawjournalnewsletters.com/2017/10/01/the-rise-of-the-travel-act/?slreturn=20190528160252>.

prostitution ..., [or] (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States....” See 18 U.S.C. §1952(b).

Since its passage, the Travel Act has developed tentacles that reach beyond the mafia. But it retains the genetic code that cautions against an over-expansive reading; for if read broadly, the Travel Act will “alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of [actors], a matter of happenstance, would transform relatively minor state offenses in to federal felonies.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

Attempts to limit the Travel Act face their most challenging test with regard to its anchor in “bribery” law. That is because the most expansive reading of the term ‘bribery’—paying people to influence their behavior—will find it prolific in society. This includes cash tips to a bartender for unfairly good service in a crowded tavern, or even fruit-baskets to customers around the holidays to encourage patronage. If this Court is to ensure that the Travel Act does not “alter sensitive federal-state relationships” and “transform relatively minor state offenses in to federal felonies,” *Rewis v. United States*, 401 U.S. 808, 812 (1971), it must offer a principled way to define the term ‘bribery’ short of its expansive generic antennae.

The way to offer that principled approach is to define ‘bribery’ in the Travel Act within the boundaries of where it has always been defined in the past: as a creature of statutory law, common law, or commercial law. But none of those reservoirs permit a Travel Act conviction for paying people to register and vote in the State of New York—as this is neither a violation of the New York bribery statute, the common law definition of bribery, or an act of commercial bribery. *See* Penal Law §200.00 (statutorily, linking bribery to exerting influence upon a “public servant’s vote, opinion, judgment, action, decision or exercise of discretion”); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing 3 E. Coke, *Institutes* 144, 147 [1628]) (at common law, “bribery extended only to the corruption of judges”); *Perrin*, 444 U.S. at 38-39 (at commercial law, linking bribery to secretly paying an “agent, employee, or fiduciary … with the intent to influence [that person’s] action in relation to the principal’s or employer’s affairs”). Indeed, no case in the history of the Southern District of New York, this Court, or the Supreme Court had ever applied a bribery-based Travel Act charge on a form of “bribery” inconsistent with common law, state law, and commercial law definitions.

Nevertheless, a panel of this Court has now extended the Travel Act’s reach a mile further—affirming a Travel Act conviction of Mr. Smilowitz for a non-statutory, non-common law, non-commercial form of bribery to register

voters in a purely local election. It affirmed this conviction based upon a fourth type of law—“generic” law (*see Smilowitz*, at \*6-7)—which, left alone, will expand the Travel Act into voting crimes that otherwise have no federal nexus at all.

The panel reasoned that bribery’s generic definition had been endorsed by the Supreme Court in *Perrin v. United States*, that the generic definition of extortion had been endorsed in the High Court, too, and that the Second Circuit itself had applied generic law to a bribery-based Travel Act conviction. *See Smilowitz*, at \*6 (citing *Perrin*, 444 U.S. 37 [1979]; *United States v. Nardello*, 393 U.S. 286 [1969]); and *United States v. Walsh*, 700 F.2d 846, 868 [2d Cir. 1983]). But in defending the provenance of generic law, the panel overstated the case for federalizing Smilowitz’s conduct and again understated the role to be played by the rule of lenity.

First, neither *Perrin*, *Nardello*, nor *Walsh* upheld a bribery conviction for behavior outside the contours of statutory, common, or commercial law. To the contrary, the *Perrin* court decided a case arising under commercial law alone—“whether *commercial bribery* of private employees prohibited by a state criminal statute constitute[d] ‘bribery...’ within the meaning of the Travel Act.” *See Perrin*, 444 U.S. at 39 (emphasis added). Its discussion beyond commercial bribery principles were, thus, dicta. The same was true

in *Nardello* and *Walsh*: *Nardello* did not involve bribery, but extortion, and in *Walsh* the defendant’s behavior involved using money to corruptly sway public officials—an act that the applicable (New Jersey) law labels bribery explicitly. *See* N.J. Stat. 2C:27-2. None of these cases involved an act of alleged bribery that, as here, did not fit within any of the classic forms of defining the offense.

Second, paying people to register and vote is not a “generic” form of bribery anyway. Nearly half the states in America do not define it as such. This includes two of three states in this Circuit—New York and Connecticut. It also includes states comprising the largest three cities in America—New York (New York City), California (Los Angeles), and Illinois (Chicago). And it includes such populous states as Georgia, Michigan, Maryland, and North Carolina. *See United States v. Bowling*, 2010 WL 5067698 (E.D. Kent. 2010) (providing list of states that link bribery and voting, excluding additional states like Alaska, Arkansas, Colorado, Delaware, Hawaii, Indiana, Kentucky, Mississippi, Missouri, Oregon, and West Virginia).

Given the diverging opinions about how to label the act of paying people to register and vote—as an act of bribery, as a creature of election law, or otherwise—one rule should have again prevailed. Facing one of the widest reaching criminal statutes in the entire federal code, and deciding whether to

extend it to yet another type of conduct over which the States remained sharply divided, the panel should have adopted the rule of lenity. Since, in the face of Mr. Smilowitz's conduct, the Court confronts “a statute whose commands are uncertain,” this should trigger the “fundamental principle that [he] should [not] be held accountable” under federal criminal law. *United States v. Banki*, 685 F.3d 99, 109 (2d Cir. 2012) (internal quotations omitted).

In the coming months, this country will enter a pressure-cooker of political passions and maneuvering matched by a unique test of our mail-in voting systems. Misconduct surrounding these elections will raise important questions concerning the line between state and federal governments. The extent to which illegalities in these elections give rise to Travel Act violations should be decided by Congress, if not by common or commercial law, and enforcing that obligation in this moment is a job fit for the entire panel of this Court.

**CONCLUSION**

For these reasons, we respectfully request that Mr. Smilowitz's petition for re-hearing *en banc* be GRANTED.

Dated: September 22, 2020  
Garden City, New York

Respectfully,

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