No. _____

In The
Supreme Court of the United States

KENNETH R. SPIRITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Erin Harrigan
GENTRY LOCKE
919 East Main Street, Suite 1130
P.O. Box 780
Richmond, Virginia 23218-0780
(804) 297-3700
harrigan@gentrylocke.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

This Court made plain in *Kelly v. United States* that Congress intended the federal program fraud laws to apply only to a narrow field of official misconduct, specifically "fraudulent schemes for obtaining property." 140 S. Ct. 1565, 1568 (2020).

In a case with no evidence of personal gain, no evidence of action outside of exercising regulatory authority, no evidence funds were used in any way other than pursuant to the vote of a public authority, and no evidence funds were used for an illegitimate purpose, the Fourth Circuit created an exception to *Kelly's* rule. The Fourth Circuit held in a published opinion that prosecutions for violations of 18 U.S.C. § 666(a)(1)(A) under a theory of intentional misapplication "do[] not require the defendant to 'obtain' the property or 'deprive' the owner of the property." Petitioner's Appendix ("App.") at A17.

In so holding, the Fourth Circuit generated a split in the circuits regarding the elements of the offense of federal program fraud under a theory of misapplication. *See United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007); *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013).

The question presented is:

Whether the elements of the offense of federal program fraud under 18 U.S.C. § 666(a)(1)(A) differ under a theory of intentional misapplication and stand as an exception to *Kelly's* rule that the government must prove the defendant fraudulently intended to obtain property or deprive the owner of property.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

OPINIONS BELOW

The opinion of the court of appeals (App. A1-A45) is reported at 36 F.4th 191. The ruling of the district court denying Petitioner's motion for judgment of acquittal (Pet. App. A47-A66) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2022. A petition for rehearing was denied on June 28, 2022 (Pet. App. A66). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 666(a)(1)(A) provides, in relevant part:

> Whoever … being an agent of an organization, or of State, [or] local … government, or any agency thereof … embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that (i) is valued at $5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency … shall be fined under this title, imprisoned not more than 10 years, or both.

(Pet. App. at A67-A68).

Title 18, United States Code, Section 1957 is set forth in Pet. App. A69-A71.

Title 49, United States Code, Section 46301(a)(1) provides, in relevant part: "A person is liable to the United States Government for a civil penalty of not more than $25,000 (or $1,100 if the person is an individual or small business concern) for violating" the statutes governing the use of airport revenue. (Pet. App. at A71-A72).

Title 49, United States Code, Section 46301(a)(3) provides, in relevant part:

> Penalty for diversion of aviation revenues. The amount of a civil penalty assessed under this section for a violation of section 47107(b) of this title (or any assurance made under such section) or section 47133 of this title may be increased above the otherwise applicable maximum amount under this section to an amount not to exceed 3 times the amount of revenues that are used in violation of such section.

(Pet. App. at A72).

INTRODUCTION

When enacting 18 U.S.C. § 666, Congress never intended a jury to wade through a complex web of regulations, policy manuals, and agency procedures to determine whether official funds, designated for official uses, were used against a state or federal regulation. This case highlights how the government's misuse of this statute to criminalize *any and all* official actions that deviate from a policy

provision stands in stark contrast to the egregious behavior Congress intended to punish in fashioning federal program fraud. As made plain in *Kelly v. United States*, "[s]ave for bribes or kickbacks[], a state or local official's fraudulent schemes violate that law only when, again, they are 'for obtaining money or property.'" 140 S. Ct. 1565, 1571-72 (2020). *Kelly* expressly rejected the use of the federal program fraud laws to vitiate a government regulatory interest.

Despite this clear guidance about the necessary elements that must be present to convict a defendant of federal program fraud, the Fourth Circuit created an exception to *Kelly's* rule – and a circuit split – for cases where the government proceeds on a theory of intentional misapplication. Both the Seventh Circuit and the Eleventh Circuit have recognized that intentional misapplication is but a means for violating the federal program fraud statute, and, similarly, requires proof the target of the fraudulent scheme was to obtain money or property.

In the wake of *Kelly*, the Fourth Circuit is not the only court that sought to interpret the language of intentional misapplication differently. Recently, the Third Circuit opined that intentional misapplication was not governed by the same standards as the other theories of liability set forth in 18 U.S.C. § 666(a)(1)(A), but ultimately held that any error in instructing the jury in that case on the elements of misapplication was harmless, as the government's primary theory was that the defendant had funneled public money to pay his personal expenses. *United*

States v. Shulick, 18 F.4th 91, 108-11 (3d Cir. 2021).[1] The confusion in the circuits about intentional misapplication extends to difficulty in interpreting the proper jury instructions for federal program fraud, particularly where, as here, the evidence at trial consisted solely of violations of regulations and policies. This issue will continue to frustrate the courts.

The Fourth Circuit interpretation of misapplication, resting solely on evidence of regulatory and policy violations, creates a serious practical problem for government officials in their daily jobs. Violations of federal agency policy in the Fourth Circuit do not fall under the regulatory enforcement process set forth in the Code of Federal Regulations. Instead, a federal agency's interpretation of its regulations in a guidance memo to a highly regulated industry could form the basis of a federal criminal prosecution. The Fourth Circuit's opinion creates a significant imbalance in the balance of state and federal power, allowing the federal government to prosecute state and local officials to vitiate an agency's regulatory interests for every policy violation involving the use of federal

[1] The Third Circuit determined the initial consideration of this question had not been adequate and granted petition for rehearing by the panel in part so the panel could issue an amended opinion on the sole issue of interpreting the elements of the offense of intentional misapplication on the facts of the case. *United States v. Shulick*, Nos. 18-3305 & 19-1011 (3rd Cir. Order September 16, 2021); *see United States v. Shulick*, 994 F.3d 123, 140-42 (3d Cir. 2021) (original opinion).

funding, without regard to any proof of personal benefit, theft, or fraudulent diversion of funds to an improper purpose.

The lower court opinion creates a conflict among the circuits, conflicts with this Court's precedent, and concerns recurring issues of significant importance. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

1. *Factual Background.*

The Petitioner served as the Executive Director for the Peninsula Airport Commission (PAC), a regional public authority comprised of several members from neighboring jurisdictions selected to govern operations for the Newport News-Williamsburg International Airport (PHF). Pet. App. at A3. The airport received several sources of funding, overseen by both federal and state agencies through regulations, policy manuals, and agency guidance. Pet. App. at A3-A4. The PAC held monthly public meetings and routinely entered closed session to address personnel issues, air service development, and real estate purchases, at the guidance of their legal counsel. Court of Appeals Joint Appendix ("CA JA") at 1317-18. The PAC oversaw the use of all airport funds. CA JA 1318-19. The PAC had the authority to hire and fire the Petitioner, to approve the budget and to oversee projects of the airport, to amend airport policies, and to commission an annual, outside audit of airport operations. CA JA 1316-19.

In 2014, after the 2011 exit of AirTran from the airline market at the airport, the PAC voted to provide collateral to guarantee a $5 million loan from a private bank to a private company, People Express (PEX), for the purpose of air service development. Pet. App. at A4-A5. The PAC discussed the project over the course of several meetings, including concerns about the background of PEX principals and the substantial risk some members saw in guaranteeing the loan. CA JA 735-36, 1358-59. During those meetings, the attorney for the PAC explicitly authorized the use of airport funds for the collateral for the loan and opined that the PAC had the authority to guarantee a loan using airport funds. CA JA 1487, 1537-39, 1552-54. Legal counsel for the PAC issued a letter opining that, after reviewing the documents for the loan guarantee, the PAC had the power and the authority to enter the contract with bank to guarantee the loan, and the loan guarantee "do[es] not, and will not, constitute a breach or result in a violation of any applicable federal or state law, statute, rule or regulation." CA JA 858-59. The PAC Chairperson, not the Petitioner, executed the contracts to guarantee the loan, with the attorney for the PAC present. Pet. App. at A5-A6, CA JA 748-49.

As a condition of the loan guarantee, the bank required the PAC to deposit the collateral promised under the contract into PAC-controlled bank accounts specifically earmarked for the loan guarantee. CA JA 867-68. Airport funds controlled by the PAC were transferred to these PAC-controlled bank accounts at the bank. At all times relevant to the transfer of funds into the collateral accounts, these airport funds remained under the direct

control of the PAC, and no funds ever moved to the account of another.

PEX drew down the entirety of the loan funds by August 2014. CA JA 890-91. After a few months of initial operations at PHF in the summer of 2014, PEX ceased all operations and airline service at PHF and stopped making any of its loan payments. CA JA 893-895. The bank called the loan, and the PAC, through its Chairperson and its legal counsel, directed the Petitioner to pay the loan from the airport funds contained within the collateral accounts. CA JA 1526-27.

It is not disputed that PAC members explicitly voted to authorize the guarantee of the loan to People Express, that PAC members signed the loan documents pledging PAC funds as collateral, and that the PAC discussed the financial risk of this venture. It is not disputed that the PAC had a contractual obligation with the private bank to transfer the collateral funds in the event of a default. Despite the PAC vote explicitly authorizing the loan guarantee and the advice of counsel regarding the propriety of the funding, the Petitioner was the only person charged for any of these offenses.

2. *District Court Proceedings.*

The government charged the Petitioner with eleven counts of federal program fraud, and six counts of money laundering, for the series of bank transfers to and from the PAC bank accounts to collateralize the loan, and for the later forfeit of the funds after the bank called the loan when PEX

defaulted. Pet. App. at A5-A7.[2] During the jury trial, the government proceeded solely on a theory of intentional misapplication of funds and, in support, pointed to federal and state regulations, policies, and manuals regarding the use of different sources of airport funds. Pet. App. at A3-A4. Despite the ***singular*** reliance on regulatory and policy violations to prove the offense, the district court refused a limiting instruction offered by the defense on the proper weight to assign evidence of violating agency policies and handbooks. CA JA 2182, 2212, 2215-16.

Over the Petitioner's objection, the district court instructed the jury that they could find the Petitioner guilty of committing federal program fraud under a theory of intentional misapplication, if they found he had "intentionally misapplied property." Pet. App. at A36. Notably, the jury was not instructed that it must find the defendant obtained property of another or deprived the owner of property. Instead, the district court instructed only:

> To intentionally misapply money or property means to intentionally use money or property of the [] Airport Commission knowing that such use is unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an

[2] The government also charged Spirito with making false statements to a federal agent about the source of the funding during an email exchange years later, and with several counts of perjury for statements Spirito made during a deposition in later civil litigation. Pet. App. at A8-A9.

> unauthorized purpose, even if such use benefitted the Commission.

Pet. App. at A37, CA JA 2337-38. The jury returned a verdict of guilty on the federal program fraud and money laundering counts.

The Petitioner moved for a judgment of acquittal, citing to this Court's opinion in *Kelly* and the lack of any evidence from the government that the Petitioner had obtained any property or deprived an owner of any property, or had acted without authority. CA JA 2508-10. In a written opinion on July 10, 2020, the district court denied the motion, finding that the use of airport funds for the loan guarantee violated federal and state regulations, that the Petitioner, and not the PAC, was responsible for directing those funds, and that *Kelly* did not apply to the Petitioner's conduct. Pet. App. at A52-A58.

On July 15, 2020, the district court departed below the advisory sentencing guidelines range and sentenced the Petitioner to probation supervision for a period of 48 months, with a special condition of home detention for a period of 30 months. CA JA 2587-92.

In rendering this sentence, the district court observed the Petitioner had "set out to do the right thing and did it in the wrong way." CA JA 2573. The district court found the sentencing guideline range of 97 to 121 months "just absolutely excessive," based on the Petitioner's conduct. CA JA 2576. The district court noted that "Congress passed this statute to deal with theft, fraud, bribery and other matters dealing with federal funds, but as we look at this,

there's no theft that went into your pocket," "there's no bribery involved here," and "***[t]he Court doesn't consider it fraud that you committed***." CA JA 2580 (emphasis added). The district court noted he viewed the Petitioner's convictions as a "misguided, overzealous effort to get an airline for the airport" and he did not find the Petitioner's conduct "was motivated by any personal greed or desire to benefit." CA JA 2581.

Despite these disavowals of any personal benefit or gain by the Petitioner, the district court ordered the Petitioner to pay more ***$2.5 million in restitution*** to the PAC, the amount of money the PAC paid to a private bank in satisfying their contractual obligation to guarantee the loan to PEX. Despite the recognition that the Petitioner had exercised his regulatory authority to allocate funds for the PAC in accordance with a vote, he was found personally liable for millions of dollars in funds lost due to the failure of a government project.

3. Fourth Circuit Decision.

In May 2022, a Fourth Circuit panel affirmed the Petitioner's conviction. Pet. App. at A1-A46.

In upholding the Petitioner's convictions of federal program fraud and money laundering under a theory of intentional misapplication, the panel acknowledged that the PAC executed the loan guarantee, Pet. App. at A15, the Petitioner was acting within his regulatory power in allocating the airport funds, Pet. App. at A18, and that the only guidance governing the use of airport funds derives from "regulations, manuals, and policies." Pet. App. at A3. The panel focused on the transfer of funds to a

private bank to collateralize the loan, which it found violated regulations and policies by benefiting the private bank and a private company, and expressly held that a conviction for federal program fraud can stand under intentional misapplication theory even where the funds are used for a legitimate purpose, here to meet a contractual obligation with a private entity. Pet. App. at A16-A18.

The panel acknowledged the Petitioner's proffered instruction regarding the proper weight to give the evidence of regulatory violations was "a correct statement of law and would draw a clear line between the appropriate use of civil regulations to define the contours of a criminal law and the inappropriate replacement of a criminal law with civil regulations." Pet. App. at A35-A36. Nevertheless, the panel pointed to the jury instruction on intentional misapplication to conclude that the jury properly understood the elements of the offense and how to weigh the evidence of regulatory violations when determining criminal liability. Pet. App. at A36-A37.

Importantly, the panel rejected the notion that the core holding of *Kelly* regarding the object of federal program fraud applied in the context of intentional misapplication:

> [The Petitioner] maintains that he did not "obtain[] the property" of another or "deprive" another of their "property." But the statute requires the "misapplication" of property owned by, or under the care, custody, or control of another—it does not require the defendant to "obtain" the

> property or "deprive" the owner of the property.

Pet. App. at A17.

Thus, in two brief sentences, the Fourth Circuit created an exception to *Kelly's* mandate that federal program fraud must be directed at the object of obtaining property or depriving the owner of property, and upheld the Petitioner's convictions for federal program fraud despite the evidence that the funds remained, at all times, at the direction and control of the public authority.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT CREATED A CIRCUIT SPLIT ON THE ELEMENTS OF THE OFFENSE FOR INTENTIONAL MISAPPLICATION CASES.

The circuits have split on the question of whether the intentional misapplication theory of program fraud stands apart from the other means enumerated in 18 U.S.C. § 666(a)(1)(A), or whether the same, necessary elements of the offense govern all theories of prosecution under that statute. The Fourth Circuit in its published opinion created an explicit exception to *Kelly's* "object of the offense" rule and stands in contrast to the holdings of the Seventh Circuit and the Eleventh Circuit.

The issue of how to interpret the elements of the crime of intentional misapplication has created such a conflict in the circuits that defendants cannot reasonably anticipate whether their actions constitute a crime. Felony convictions for federal program fraud should not depend on whether the

criminal prosecution is brought by federal prosecutors in Virginia or in Florida or in Wisconsin.

A. The Seventh Circuit and Eleventh Circuit Decisions on Intentional Misapplication.

Prior to this Court's decision in *Kelly*, both the Seventh Circuit and the Eleventh Circuit considered whether the theory of intentional misapplication stood apart from the other means of pursuing federal program fraud convictions. Both circuits resoundingly rejected this notion and emphasized the purpose of 18 U.S.C. § 666(a)(1)(A) as limited to that level of fraudulent scheme that warranted a punishment akin to bribery.

1. *The Thompson Decision*

In *United States v. Thompson*, the government charged the defendant state official with federal program fraud over a procurement decision to steer a contract for travel services to a particular bidder, purportedly for political reasons. 484 F.3d 877, 878-78 (7th Cir. 2007). The government's proceeded under a theory of intentional misapplication, and the Seventh Circuit rejected the government's argument that "any public employee's knowing deviation from state procurement rules is a federal felony," regardless of intent. *Id.* at 881. The panel reversed Thompson's conviction. *Id.* at 884.

Noting that 18 U.S.C. § 666 caption referred to "theft or bribery" and that this Court routinely referred to this statute as "an anti-bribery rule," the Seventh Circuit opted for a "narrow reading" of intentional misapplication that refers only to "theft, extortion, bribery, and similarly corrupt acts." *Id.*

The Seventh Circuit was particularly concerned with prosecutorial overreach if it adopted the government's interpretation of misapplication. *Id.* For a felony criminal fraud, *Thompson* noted that a theory of misapplication only would implicate the kind of conduct involved in "a disbursement in exchange for services not rendered (as with ghost workers), or to suppliers that would not have received any contract but for bribes, or for services that were over-priced (to cover the cost of baksheesh), or for shoddy goods at the price prevailing for high-quality goods." *Id.*

Under this interpretation, *Thompson* maintained the very posture *Kelly* took for federal program fraud crimes as a whole: even under a theory of intentional misapplication, the government must prove a fraudulent scheme to obtain or deprive property, in the nature of embezzlement, theft, or bribes.

2. *The Jimenez Decision*

The Eleventh Circuit confronted a similarly aggressive interpretation of the theory of intentional misapplication by the government in *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013). There, a local official advocated for a public education program to purchase copies of his wife's book, and later failed to disclose the conflict of interest in violation of local policy. *Id.* at 1306-07.

The Eleventh Circuit observed that "[c]ourts have struggled to discern § 666's contours, especially the modified verb 'intentionally misapplies.' Congress left this critical phrase undefined." *Id.* at 1308. The Eleventh Circuit aptly presented the conflict on intentional misapplication: "Read too narrowly,

federal prosecutors would be unable to effectuate the statute's purpose of 'protect[ing] the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.'" *Id.* at 1309 (quoting *Sabri v. United States*, 541 U.S. 600, 606 (2004)). "[R]ead too broadly, courts would run afoul of the Rule of Lenity, 'which insists that ambiguity in criminal legislation be read against the prosecutor.'" *Id.* (quoting *Thompson*, 484 F.3d at 881).

In weighing those competing interests, the Eleventh Circuit reversed Jimenez's conviction for intentional misapplication of funds, relying on the Seventh Circuit's reasoning in *Thompson* for the "general rule," that "minor deviations of state or local law are not always sufficient to establish an 'intentional misapplication,' especially when the record evinces neither a bribe nor a kickback." *Id.* at 1309. The Eleventh Circuit determined Jimenez was not in a position to ultimately determine to "apply" the funds in question to purchase the book. *Id.* at 1310. The Eleventh Circuit contrasted other examples of undisclosed conflicts in procurement, where the defendant had also engaged a "sham employee." *Id.* at 1310-11. Importantly, the Eleventh Circuit cautioned the government: "we are reluctant to metamorphose every municipal misstep into a federal crime." *Id.* at 1311.

Just as in *Thompson*, the Eleventh Circuit maintained for intentional misapplication the very posture *Kelly* took for federal program fraud criminals as a whole: a corrupt or dishonest act in violation of a regulation or policy, such as failing to disclose a conflict of interest, alone is not enough to

find a federal felony fraud offense. Instead, the government must prove the defendant directed a fraudulent scheme to obtain or deprive property, in the nature of embezzlement, bribes, or theft.

B. The *Kelly* Decision on the Necessary Elements for Federal Program Fraud.

This Court confronted an instance of the government's expansive interpretation of the federal criminal fraud statutes to state and local official action in *Kelly*. There, the Court addressed a scheme by state officials to frustrate travel and generate traffic in an act of political retribution for a local government official. While the defendants acted with bad intent and for bad purposes in closing traffic lanes, the Court emphasized that "not every corrupt act by state or local officials is a federal crime." *Kelly,* 140 S. Ct. at 1574.

Instead, "federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Save for bribes or kickbacks[], a state or local official's fraudulent schemes violate that law only when, again, they are 'for obtaining money or property.'" *Id.* at 1571-72. "That requirement, this Court has made clear, prevents these statutes from criminalizing all acts of dishonesty by state and local officials." *Id.* at 1571.

Kelly addressed the government's regulatory interest in that case, and determined it was not a property interest that can be the target of a fraud scheme. "The State's 'intangible rights of allocation, exclusion, and control'— its prerogatives over who should get a benefit and who should not—do 'not create a property interest.'" *Id.* at 1572 (quoting

Cleveland v. United States, 531 U.S. 12, 23 (2000)). "[T]hose rights 'amount to no more and no less than' the State's 'sovereign power to regulate.'" *Id.* (quoting *Cleveland*, 531 U.S. at 23). Because closing the traffic lanes fell under the legitimate power and authority of the defendant officials, their actions could not be construed as a deprivation of money or property, regardless of their corrupt intent. *Id.*

Importantly, nothing in *Kelly* created an exception for intentional misapplication under the federal program fraud statute.

C. The Fourth Circuit Directly Conflicts with *Kelly*.

The panel opinion failed to apply *Kelly* to the government's theory of intentional misapplication under 18 U.S.C. § 666(a)(1)(A), and, because of that error, found that a regulatory violation in using airport funds to satisfy a contractual obligation, with the express authorization of the public authority, and with the funds remaining at all times in the dominion and control of the public authority, amounted to a criminal endeavor akin to bribery. Such an interpretation stands in stark contrast to the rulings in other circuits. *See, e.g., United States v. De La Cruz*, 469 F.3d 1064, 1068 (7th Cir. 2006) (holding that when a defendant acts with the "[a]uthorization, or ratification, from those with authority," this very fact "militat[es] against a finding of intentional misapplication").

The panel acknowledged that the Petitioner was exercising his regulatory power when he moved funds between bank accounts owned and controlled by the PAC. Yet, the panel decided, directly contrary

to *Kelly*, that this "run-of-the mine exercise of regulatory power" could "count as the taking of property." *Kelly*, 140 S. Ct. at 1573.

The panel cited decisions of the Second Circuit, First Circuit, Tenth Circuit, Sixth Circuit, and Third Circuit for the proposition that intentional misapplication does not require proof the defendant gained a personal benefit or diverted funds to an illegitimate purpose for a conviction under a theory of misapplication. *See United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992); *United States v. Cornier-Ortiz*, 361 F.3d 29, 37 (1st Cir. 2004); *United States v. Shulick*, 18 F.4th 91, 107-13 (3d Cir. 2021); *United States v. Frazier*, 53 F.3d 1105, 1114 (10th Cir. 1995); *United States v. Freeman*, 86 F. App'x 35, 41 (6th Cir. 2003) (unpublished). Pet. App. at A16-A17. None of these opinions, save *Shulick*, considered the implications of this Court's opinion in *Kelly* on the elements of the offense for intentional misapplication, which was precisely the question before the panel.

The Third Circuit in *Shulick* followed similar reasoning to the Fourth Circuit opinion here: that intentional misapplication was not governed by the same standards as the other theories of liability set forth in 18 U.S.C. § 666(a)(1)(A). *Shulick*, 18 F.4th at 108-11. However, *Shulick* bypassed the issue, ultimately holding any error in instructing the jury harmless, as intentional misapplication was the ***alternate*** theory of liability, second to the primary theory that the defendant had embezzled public money to pay his personal expenses. *Id*.

In passing on the questions of government regulatory interests, the authorization to act, and

the public authority's retained control over the funds, the panel failed to address the explicit application of *Kelly*. The panel plainly failed to consider, directly in contravention of *Kelly,* whether the evidence was sufficient to prove the Petitioner intended to obtain the property of another or deprive the lawful owner of property, an explicit requirement of federal program fraud under *Kelly.* Instead, the panel ruled that misapplication does not require the government to prove this element at trial. Pet. App. at A17. Contrary to the panel's conclusion, this Court made no exception for "misapplication" cases under 18 U.S.C § 666(a)(1)(A) in its ruling and clearly set forth the standard: even for prosecutions under intentional misapplication, *Kelly* requires the government to prove both that the defendant acted "without authority" and with the intent to obtain the property of another. *Id.* at 1571.

The panel compounded this problem by approving the elements of the offense set forth in the jury instruction on intentional misapplication ***without*** the limiting instruction on the proper weight to give evidence of regulatory and policy violations. The panel permitted conviction by the jury of an "unauthorized or unjustifiable or wrongful" use of funds, measured ***only*** against the standard of a regulatory or policy violation. Nothing in the jury instructions placed the words "unauthorized or unjustifiable or wrongful" in their proper context or made clear that the jury needed to find something more than a regulatory violation to convict the Petitioner of federal program fraud. The limiting instruction here was necessary precisely because of the critical interplay between intentional misapplication ***and*** the evidence at trial showing

that, as the panel noted, the only guidance about the use of airport funds comes from "regulations, manuals, and policies." Pet. App. at A3.

The panel's misstatement of the law on the elements of the offense for federal program fraud under a theory of intentional misapplication led directly to their approval of the jury instructions. The jury convicted the Petitioner on a standard of proof that is ***far less*** than required to show that the Petitioner engaged in a ***criminal*** fraudulent scheme to obtain property.

This creates a conflict in the circuits that is significant, implicates important rights of criminal defendants, and will continue to present challenges for courts interpreting offenses under a theory of intentional misapplication.

II. THE QUESTION PRESENTED REFLECTS A RECURRING PROBLEM OF NATIONAL IMPORTANCE.

A. The Practical Problem.

The Fourth Circuit interpretation of misapplication, resting solely on evidence of regulatory and policy violations, creates a serious practical problem for government officials trying to simply do their jobs. Violations of federal agency policy in the Fourth Circuit do not fall under the regulatory enforcement process set forth in the Code of Federal Regulations. Instead, a federal agency's interpretation of its regulations in a guidance memo to industry could form the basis of a federal criminal prosecution.

Our constitutional system presumes "that a person cannot incur the loss of liberty for an offense

without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). It is hard to fathom that Congress would condition a felony criminal penalty that carries up to twenty years in prison on whether the jury could understand overlapping regulatory policies in a complex industry like aviation. Further, to the extent there is confusion about Congressional intent regarding the conduct to which intentional misapplication applies, the rule of lenity requires resolution in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971) (holding "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

The government is not without redress for regulatory offenses that do not rise to the level of criminal fraud and bribery schemes. The federal government has an arsenal of civil enforcement remedies to address such violations, particularly in airport operations. *See, e.g.,* 49 U.S.C. § 46301(a)(3) & (a)(5) (setting forth a civil penalty for "diversion of aviation revenues" in violation of the provisions governing federal funds for airport operations and establishing a separate schedule for individuals who violate any regulation promulgated under that Title) (Pet. App. at A71-A72); 14 C.F.R. §§ 13.15 & 13.16 (granting authority to the Federal Aviation Administration to issue orders assessing civil penalties for regulatory violations in the hundreds of thousands of dollars) (Pet. App. at A82-A91). With such powerful civil enforcement tools at their disposal, *Kelly* rightly observed that Congress intended the federal program fraud laws to apply only to a narrow field of official misconduct:

"fraudulent schemes for obtaining property." *Kelly*, 140 S. Ct. at 1568.

B. The Imbalance of Power.

The Fourth Circuit's opinion creates a significant imbalance in the balance of state and federal power, allowing the federal government to prosecute state and local officials for every policy violation involving the use of federal funding, without regard to any personal benefit, theft, or fraudulent diversion of funds to an improper purpose.

Considering this published Fourth Circuit opinion, any number of officials across the country must be left wondering if they, too, like the Petitioner, could be convicted of multiple federal felony offenses for "misguided" and "overzealous" pursuit of their jobs, despite a federal judge observing they committed "no fraud," "no theft," and "acted with the best of intentions."

Such prosecutions from broadly interpreted fraud language should not apply to "behavior that, albeit offensive to the morals or aesthetics of federal prosecutors, cannot reasonably be expected by the instigators to form the basis of a federal felony." *United States v. Czubinski*, 106 F.3d 1069, 1079 (1st Cir. 1997).

III. PETITIONER'S CASE IS AN IDEAL VEHICLE TO RESOLVE THE CONFLICT.

The Petitioner fully briefed and raised the question presented in the district court proceedings and in the circuit on appeal, and the lower courts

expressly decided the question presented, with the circuit decision offered in a published opinion. Unlike *Shulick* and other cases decided on "alternate theories" of prosecution, intentional misapplication was the sole theory of federal program fraud advanced by the government and was the only question before the jury.

Thus, this case provides the Court with the opportunity to address the conflict in the circuits directly and provide much-needed clarity to the application of this theory of crime to the tens of thousands of public officials and those in highly regulated industries.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Erin Harrigan
GENTRY LOCKE
919 E. Main Street, Suite 1130
P.O. Box 780
Richmond, Virginia 23218-0780
Phone: (804) 297-3700

Counsel for Petitioner