No. 18-1059

IN THE
# Supreme Court of the United States

BRIDGET ANNE KELLY,
*Petitioner,*

v.

UNITED STATES,
*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

## BRIEF FOR PETITIONER


MICHAEL D. CRITCHLEY
CRITCHLEY, KINUM
& DENOIA, LLC
75 Livingston Avenue
Roseland, NJ 07068

YAAKOV M. ROTH
*Counsel of Record*
MICHAEL A. CARVIN
ANTHONY J. DICK
ANDREW J. M. BENTZ
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

*Counsel for Petitioner*

## QUESTION PRESENTED

Does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision?

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**STATUTES**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## INTRODUCTION

One day before granting certiorari in this case, this Court set aside the U.S. Commerce Secretary's decision to include a citizenship question on the 2020 census, on the ground that his "stated reason" for the decision "seems to have been contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). Five Justices held that this "disconnect between the decision made and the explanation given" failed the "reasoned explanation requirement of administrative law." *Id.* For their part, the dissenters warned that opening "a Pandora's box of pretext-based challenges to" agency actions would "enable[] partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction." *Id.* at 2583 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 2597 (Alito, J., concurring in part and dissenting in part) (warning against giving "license for widespread judicial inquiry into the motivations of Executive Branch officials").

Under the Third Circuit's decision in this case, however, the Commerce Secretary would not merely have his decision be set aside. He would also be *imprisoned for fraud*. Whatever the proper bounds of judicial review as a matter of administrative law, that astoundingly expansive theory of criminal fraud cannot be correct. It would undo, in one fell swoop, three decades of this Court's precedents rejecting attempts to enforce "honest government" through vague federal criminal statutes. It would transform the judiciary into a Ministry of Truth for every public official in the nation. And it would readily enable partisans not just to harangue and harass political opponents—but to prosecute and jail them.

Stepping back, this prosecution arose out of the so-called "Bridgegate" affair, in which senior political officials at the Port Authority of New York and New Jersey reallocated two traffic lanes over the George Washington Bridge in a way that increased traffic in the town of Fort Lee—while decreasing it elsewhere. All lanes remained in public use at all times; some simply shifted from one constituency to another, reversing a "political deal," cut decades earlier, that favored Fort Lee. Pet.App.4a. The prosecution's core allegation was that the Port Authority's deputy executive director (Bill Baroni) and an aide to New Jersey's Governor (Bridget Kelly) ordered the change to punish Fort Lee's mayor for not endorsing the Governor's reelection. That political motive drove their actions, prosecutors argued, rather than "the best interest of the people of New Jersey." JA.886.

The Third Circuit affirmed the convictions of those officials under the statutes prohibiting wire fraud and fraud from federally funded programs. The court reasoned that they had defrauded the Port Authority of its *property*—namely, the lanes, and the employee labor (including their own) used to plan and study the realignment. How? By citing a traffic study as the reason for the realignment, despite their "true purpose" being political payback. That is to say, the "fraud" here—and the basis for seven convictions under two federal criminal statutes—was *the concealment of political motives for an otherwise-legitimate official act*. All that separates a routine decision by a public official from a federal felony, per the opinion below, is a jury finding that her public-policy justification for the decision was not *really and truly* her subjective reason for making it.

There is no way that could be the law. Taken seriously, it would allow any federal, state, or local official to be indicted on nothing more than the (ubiquitous) allegation that she lied in claiming to act in the public interest. Consider a deputy mayor who orders pothole repair to reward her boss's political base, justifying it on policy grounds. Or a staffer who requests an environmental review as window-dressing to assuage a lobby group, with no intention of heeding its recommendations. Or a state cabinet secretary who appoints a friend to a post, declaring him to be the best-qualified. All are felons under the decision below, since they engaged in spin in describing their "true purposes," and so "deprived" the state of "property" (the pothole-repair trucks, the expense of the study, or the appointee's salary). This is, in effect, a souped-up version of the honest-services fraud theory that this Court constrained in *McNally v. United States*, 483 U.S. 350, 360 (1987), and *Skilling v. United States*, 561 U.S. 358 (2010). The Third Circuit has now blessed a back-door route to criminalize all of the same conduct (and more).

Not surprisingly given its absurd practical and doctrinal consequences, the Third Circuit's decision is profoundly wrong. Its core error was to treat the Port Authority's regulatory decisionmaking power as a "property" interest under the fraud statutes. The state's "sovereign power to regulate" is not property. *Cleveland v. United States*, 531 U.S. 12, 23 (2000). Altering the alignment of lanes over a public bridge is therefore not property fraud. Treating sovereign policy decisions as "property" would put every official action in the sights of the fraud laws, turning them into broad government ethics codes.

Nor does it matter that implementation of the realignment required some public employee labor, or resulted in some additional expenses for the agency. *Every* official decision involves implementation and cost, even if just the value of employee time. If those incidental costs of a regulatory decision were enough to make it property, every order to conduct a study, review, or assessment the official does not intend to follow would be a crime (due to the expenses of conducting it), every nepotistic hiring would be fraud (due to the appointee's salary), and indeed *Cleveland* itself would have come out the other way (based on the cost of processing the fraudulent licenses). That is simply not the law. None of this amounts to the fraudulent deprivation of property because the goal of these schemes is not pecuniary. In this case, too, the officials' "scheme" was to influence how the Port Authority exercised regulatory power over lane alignment, not to deprive it of the employee wages incidentally implicated by that exercise.

There are other flaws in the decision below, too. For one, even if the "scheme" here targeted a genuine property right, it makes no sense to say that officials acting *on behalf of* the state *defraud* the state when they take exercise their authority for "bad" reasons. In that situation, the state is not being defrauded of property; it is being deprived of the good-faith service of its agent acting within the scope of her authority. That is not fraud; it is breach of fiduciary duty. Here there was no dispute that the officials had authority, at least in the first instance, to decide how to allocate the traffic lanes. Even if they did so for their own political reasons, the Port Authority was not thereby "defrauded" of any property.

Further, public officials' subjective reasons for acting are beyond the scope of the fraud statutes. It is the *objective decision* that affects and concerns the state, not the *subjective motive* for it. That being so, misrepresenting such motives does not constitute property fraud—just as, in commercial contexts, lies about a seller's reserve price or how a buyer intends to use a product are treated as too remote from the elements of the bargain to qualify as fraud, even if those lies induce a transaction. Analogously, when an official makes a lawful decision, her "true" reason for acting cannot ground a fraud prosecution.

In short, the proper rule is that the prohibitions against fraudulent deprivations of property do not reach a public official's exercise of sovereign power—only schemes whose purpose is to deprive the state of its property. Regulatory power is not property. Even if it were, an official's exercise of her *own* delegated power, no matter how improper, does not deceive the state into parting with it. And lies about her *reasons* for exercising such power, especially, are too remote from the decision itself to constitute property fraud.

* * *

The alleged conduct here was petty, insensitive, and ill-advised. But in our system, *political* abuses of power are addressed *politically*. Prosecutors may try to supplement political blowback with criminal sanctions, especially when public anger reaches a vitriolic peak. But the role of the courts is to ensure that this anger is channeled consistent with the rule of law—to ensure fairness for these defendants and, even more importantly, to preclude mischief going forward. The rule of law here compels reversal of the convictions. The Court should order just that.

## OPINIONS BELOW

The district court's opinion refusing to dismiss the indictment (Pet.App.75a) is at 2016 WL 3388302. Its opinion denying post-trial relief (Pet.App.105a) is at 2017 WL 787122. The Third Circuit's decision affirming in part, reversing in part, and remanding (Pet.App.1a) is reported at 909 F.3d 550.

## JURISDICTION

The Third Circuit issued its opinion and entered judgment on November 27, 2018; it denied rehearing on February 5, 2019. Pet.App.1a, 129a. This Court granted certiorari on June 28, 2019. Jurisdiction lies under 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

The relevant statutory provisions (18 U.S.C. §§ 666 and 1343) are at Pet.App.131a, 133a.

## STATEMENT

As the court below acknowledged, "[t]he facts of this case are not materially in dispute." Pet.App.3a n.1. It involves allegations that senior officials at the Port Authority reallocated lanes over the George Washington Bridge in a way that increased traffic in a nearby town because that town's mayor refused to endorse the New Jersey Governor's reelection. The Third Circuit held that this conduct defrauded the Port Authority of property interests in the lanes and the services of its employees, because the officials had concealed their "true" political motives under the "guise" of an insincere public policy rationale (namely, studying traffic). Pet.App.2a, 7a.

### A. The Port Authority and Its Governance

The Port Authority is a bi-state agency, created under a congressionally approved interstate compact between New York and New Jersey. *See* 42 Stat. 174 (1921); N.Y. Unconsol. Laws § 6404; N.J. Stat. § 32:1-4; *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 4-5 (1977) (background). The Port Authority's function is to manage public bridges, tunnels, airports, and other transportation facilities in the region.

The Port Authority's senior political leadership is divided between New York and New Jersey in "two parallel chains of command." JA.723. New York's Governor appoints half of its Commissioners as well as its executive director; New Jersey's Governor designates the rest of the Commissioners and the deputy executive director. JA.137, 141-43. The governors hold ultimate veto power. JA.549.

At the times relevant here, the deputy executive director was William Baroni, Jr. As the Government emphasized, his role encompassed management of "all aspects" of Port Authority business. JA.20-21, 237-38. Holding "the number one position on the New Jersey side," he was expected to "watch out for New Jersey's interests." JA.236-38. While the executive director outranked Baroni and technically had the power to override his decisions (Pet.App.18a), the Authority in practice had "two equal day-to-day operators," such that Baroni neither answered nor reported to the agency's executive director, Patrick Foye. JA.549. As Baroni's successor agreed, the executive director "was not [her] boss," because the officials "were both considered to be at the same level, the highest New Jersey and New York appointees." JA.518-19.

Given its political leadership, the Port Authority was, not surprisingly, often used "to bestow political favors," including to local officials who were viewed as "potential endorsers" of the New Jersey Governor. Pet.App.5a. To help grease political support, "[t]he Port Authority gave benefits ranging from gifts (e.g., steel from the original World Trade Center towers, flags that had flown over Ground Zero, framed prints) and tours, to jobs, to large economic investments (e.g., the $250 million purchase of the Military Ocean Terminal at Bayonne)." *Id.*

### B. The George Washington Bridge

Among the transportation facilities that the Port Authority manages is the George Washington Bridge, "a double-decked suspension bridge" that connects Fort Lee, New Jersey to New York City. Pet.App.4a. The upper level of the bridge hosts twelve toll lanes, which can be accessed in two ways. The first, known as the "Main Line," consists of a collection of major highways, including I-95. The second, known as the "Local Access Lanes" or "Special Access Lanes," feeds from local Fort Lee streets onto the far right side of the toll plaza. *See* JA.72-74, 936; Pet.App.4a.

As the result of a "political deal" reached decades ago "between a former New Jersey governor and Fort Lee mayor," the typical practice during "the morning rush hour" was for traffic cones to "reserve the three right-most lanes ... for local traffic from Fort Lee." Pet.App.4a. The remaining nine lanes were reserved for the Main Line. *Id.* Although Fort Lee residents made up just 5% of total bridge traffic (JA.433-34), a quarter of the upper-level booths were reserved for local lanes. As a result, drivers would cut through Fort Lee just to access the bridge. JA.291-92, 1004.

### C. The Lane Realignment

On September 6, 2013, a Port Authority official named David Wildstein, who "functioned as Baroni's chief of staff" (Pet.App.3a), directed civil servants to change the traffic patterns leading to the upper-level tollbooths on the George Washington Bridge starting the following Monday. Pet.App.8a–9a. Instead of reserving nine lanes and tollbooths for Main Line traffic and the remaining three for the local approach, employees were instructed to place the traffic cones to reserve eleven and one, respectively. Pet.App.9a. Wildstein told the employees that the purpose of this change was to study the resulting traffic patterns "so that New Jersey could determine whether those three lanes given to Fort Lee would continue on a permanent basis." Pet.App.8a.

The civil servants told Wildstein that "because only one Special Access Lane would remain open, the Port Authority needed to pay an extra toll collector to be on relief duty" in case that one remaining collector needed a break. Pet.App.9a. Over the course of the realignment, the Port Authority paid $3,696 in these additional wages to ensure consistent service at the remaining dedicated local tollbooth. Pet.App.47a.

Wildstein also directed Port Authority engineers to "collect[] data on the ensuing traffic." Pet.App.9a. Three employees did so, "working on the traffic study" by gathering data, analyzing it, and comparing it to "historical travel times" under the prior alignment. Pet.App.24a-25a. Collectively, they spent roughly 38 hours on the project, amounting to approximately $1,828 in labor costs based on these salaried workers' effective hourly rates of pay. Pet.App.48a-49a.

To be clear, no toll lanes or booths were closed as part of the realignment. Rather, two toll lanes were *reallocated* from the local approach to the Main Line. Unsurprisingly, this realignment reduced Main Line traffic, because those drivers had access to two extra lanes. On Tuesday, September 10, Wildstein noted that Main Line rush-hour traffic broke 45 minutes earlier than usual. JA.367. Preliminary analysis by Port Authority employees found that, over the week, the realignment saved "approximately 966 vehicle hours" for Main Line drivers. JA.977. Of course, traffic worsened for motorists employing the Local Access Lanes, as cars "backed up into Fort Lee and gridlocked the entire town." Pet.App.9a.

Fort Lee's mayor tried to contact Port Authority officials about the issue, but they did not respond. Pet.App.9a-10a. Nor had the Port Authority given Fort Lee any "advance warning of the change," which would have been typical practice. Pet.App.8a-9a.

The realignment remained in effect for four days, until Executive Director Foye "sent an email to Baroni and others, criticizing the 'hasty and ill-advised' realignment and ordering the restoration of the prior alignment." Pet.App.10a. Baroni asked Foye to reconsider, calling the issue "important to Trenton," meaning the Governor's Office—but Foye refused. *Id.* Importantly, however, Foye admitted at trial that no policy ever required his *pre-approval* of the realignment. Pet.App.135a-36a. It was actually the Government that elicited that testimony, to show that Baroni had lied to a state legislative committee by claiming to have proposed such a policy change in the wake of the scandal. *See id.*

### D. The Indictment and Trial

**1.** After gaining Wildstein's cooperation, federal prosecutors from New Jersey's U.S. Attorney's Office indicted Baroni for wire fraud (18 U.S.C. § 1343), defrauding a federally funded entity (*id.* § 666(a)), and conspiracy to commit the same. Their theory was that Baroni had fraudulently obtained Port Authority property by concealing his true motives for the lane realignment. The Government alleged that his true purpose was to punish Fort Lee's mayor, Mark Sokolich, for refusing to endorse the Governor. But Baroni instead "falsely represent[ed] ... that the lane and toll booth reductions were for the purpose of a traffic study." Pet.App.12a. While Port Authority employees did in fact conduct a traffic study, it was allegedly a "sham," in the sense that Baroni was not sincerely interested in its results. Pet.App.56a.[1]

The Government also indicted Petitioner Bridget Anne Kelly on the same charges, on the ground that she had conspired with, and aided and abetted, Baroni and Wildstein. JA.20-55. Kelly was a political staffer in the Governor's Office whose roles included keeping track of local officials' political relationships with the administration, and ensuring that state agencies were responsive to those local officials. Pet.App.4a-5a. At the Port Authority, Wildstein was Kelly's liaison. *Id.*

---

[1] Although no longer relevant, the indictment also charged civil-rights violations under 18 U.S.C. § 242, on the theory that the realignment had deprived the residents of Fort Lee of their (supposedly) clearly established constitutional right to engage in intrastate travel. JA.59-60. The Third Circuit reversed those convictions (Pet.App.73a), which are no longer at issue.

The district court denied motions by Baroni and Kelly to dismiss the indictment. Pet.App.75a. On wire fraud, the court reasoned that it was enough to allege that the defendants had "prevented the Port Authority from exercising 'its right to exclusive use of' its property, which here allegedly includes toll booths and roadways, in addition to money in the form of employee compensation." Pet.App.94a. On § 666, the court construed the statute to forbid not only theft, embezzlement, conversion, and fraud, but also "any improper use of property," and declared categorically that it is "improper" to be motivated by political "retribution." Pet.App.86a-87a.

Despite acknowledging that this prosecution was "novel," the court rejected a vagueness challenge as "inappropriate for a pretrial motion" and cast aside the rule of lenity as irrelevant because the statutes at issue were, in the court's view, neither "unclear" nor "ambiguous." Pet.App.80a-81a & n.3.

**2.** At trial, Wildstein testified that his purpose for the realignment was "punishing Mayor Sokolich," and that he had developed "a public policy reason" as a "cover story" so that he did not have to disclose that "it was political." Pet.App.7a. More specifically, when giving direction to civil servants at the Port Authority, he described the realignment as "a traffic study" for purposes of evaluating whether the local lanes "would remain permanent." Pet.App.7a-8a.

The central fact disputes at trial concerned the knowledge and role of Baroni and Kelly, particularly whether they shared Wildstein's punitive motive. Kelly and Baroni testified that they believed that the realignment was a *bona fide* effort to study the effect of the change on traffic, which might worsen in the

short-term but then improve after drivers stopped cutting through Fort Lee to access its quicker lanes. *E.g.*, JA.730-36. The Government, by contrast, elicited testimony from Wildstein that Kelly, after confirming that Sokolich would not endorse the Governor, directed him to punish Sokolich by causing traffic in Fort Lee. Pet.App.12a-13a. Wildstein also testified that Baroni had approved all relevant parts of the plan. Pet.App.8a.

After a lengthy trial, the jury convicted Baroni and Kelly on all counts. Pet.App.13a.

**3.** The district court denied post-trial relief. The defendants contended that the "unprecedented theory of money or propery fraud" advanced by the Government was an end-run around this Court's "limitations ... on the intangible rights and honest services theories." R.304 at 35. But the trial court held otherwise, reasoning that a jury could conclude that the defendants' concealment of their motives for the realignment deprived the Port Authority of "an intangible property right"—namely, its "control" over assets "such as toll booths, roadways, [and] employee compensation." Pet.App.122a n.15.

On § 666, the court reasoned that the evidence was sufficient to show intentional misuse of Port Authority property—again including "compensation paid to Port Authority personnel" and "the value of the access lanes and toll booths"—because the defendants had "concealed the real reason" for the realignment. Pet.App.117a-19a.

The district court sentenced Baroni to 24 months in prison and Kelly to 18 months, but allowed both to remain free pending appeal. Pet.App.13a.

### E. The Third Circuit's Decision

The Third Circuit first affirmed the convictions for wire fraud, agreeing that the defendants deprived the Port Authority of its "property."

*First*, their "lie" was advancing a "rationale" for the lane allocation (*i.e.*, studying traffic) that differed from their "real reason" for making it (*i.e.*, political retribution against the mayor). Pet.App.23a. This "untruthful claim" about their subjective motivations for the decision satisfied the deception element of the offense. Pet.App.15a. And the defendants needed that "cover story," the court reasoned, to convince agency bureaucrats to cooperate and to stop their superiors from interceding. Pet.App.17a-18a.

*Second*, the panel held that this lie deprived the Port Authority of "intangible property." Pet.App.22a. The defendants supposedly "obtained," through their fraud, "public employees' labor"—*i.e.*, the labor of the extra toll collectors, of the staff who conducted the traffic study by collecting and analyzing data about the realignment's impacts, and even Wildstein's and Baroni's *own* labor. Pet.App.22a, 24a-25a. In the court's view, this work was "unnecessary," and the defendants had thus "commandeer[ed]" the employee time. Pet.App.25a, 28a. The court further held that the defendants had deprived the Port Authority of its "right to control" physical assets like the lanes—its supposed "unquestionable property interest in the bridge's exclusive operation." Pet.App.26a-28a.[2]

---

[2] While the court claimed *sua sponte* that the defendants had "arguably forfeited" in the district court their challenge on the property element, it proceeded to address the issue on the

The panel upheld the § 666 convictions on the same basic reasoning. It invoked the § 666(a) prong forbidding the agent of a federally funded agency to "obtai[n] by fraud" any property of that agency worth at least $5,000. Pet.App.35a. For the same reasons as the defendants had committed wire fraud, the court held, they had also "fraudulently obtain[ed]" property: "the labor of Port Authority employees." *Id*. Again, the defendants lied "about the purpose of the realignment" and, through that lie, "obtain[ed]" the employees' labor for otherwise "unnecessary" work that did not further what the court viewed as "legitimate" Port Authority objectives. Pet.App.44a. Again, the court relied on the services of the extra tollkeepers and the engineers who had "conducted" the insincere "traffic study." Pet.App.56a.

In reaching these decisions, the panel claimed to be "mindful" of this Court's decisions in *McNally* and *Skilling*, but insisted that those precedents did not "counsel[] a different result" since "Defendants were charged with simple money and property fraud," not honest-services fraud. Pet.App.30a. Similarly, the court dismissed any "federalism concerns," since the Port Authority "is an interstate agency created by Congressional consent" and receives federal funds. Pet.App.32a. The panel also denied that its reading of the relevant statutes created any "constitutional vagueness concerns." Pet.App.45a.

---

(continued…)

merits. Pet.App.20a-21a. Anyway, there was no forfeiture: The defendants challenged the Government's theory of property at length in their post-trial motion, explaining that the theory was an improper end-run around *Skilling*. *See* R.304 at 35-40.

## ARGUMENT

Federal prosecutors have long been tempted to pursue public officials for perceived malfeasance in advancing "the public good." They initially invoked generic fraud statutes, contending that unfaithful officials defrauded citizens of a supposed intangible property right to "honest and impartial government." *McNally*, 483 U.S. at 355. But this Court held that these laws protect only traditional "property rights," and refused to construe them in a way that would "involv[e] the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* at 360. Congress then enacted an honest-services statute; prosecutors again began to use its broad, amorphous text to punish any "unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204, 1206 (2009) (Scalia, J., dissenting from denial of certiorari). Once again, this Court intervened, limiting the statute's reach to the core targeted misconduct: bribery and kickbacks. *See Skilling*, 561 U.S. at 408-10.

This case takes the jurisprudence full-circle. The officials here did not take bribes or kickbacks, and so the Government could not charge them with honest-services fraud. It charged them with *property* fraud. Of course, the defendants took no money or property from the agency. The Government's theory, however, was that the concealment of their political motives deprived the Port Authority of "intangible" property: the right to control how the bridge was run and how its employees were used. Pet.App.22a, 27a-28a. The Third Circuit agreed: The defendants were guilty because they lied about their "real reason" for the realignment. Pet.App.23a.

Petitioner's argument proceeds in two parts. Part I explains why the Third Circuit's decision *must be* wrong. Nothing is easier than accusing a public official of harboring ulterior political motives for his decisions. That allegation suffices, per the decision below, not just to vote against the official, or to set aside his administrative decision, but also to *indict him for fraud*. Imprisonment thus hinges on a jury's finding about whether the official's "policy reason" for acting was also her "true purpose." Pet.App.7a. There is no end to the (bipartisan) mischief that such a regime would facilitate, or to the chilling effect it would carry. That is why this Court, in *McNally* and *Skilling*, rebuffed efforts to use criminal fraud laws to police the ethical duty of public officials to advance the public interest. The opinion below nullifies those seminal precedents by allowing all the same conduct to be reframed as a deprivation of property.

Part II then explains, more doctrinally, why the Third Circuit's decision *is* wrong. There are actually several reasons. One, *Cleveland* explained that the state's "intangible rights of allocation, exclusion, and control" do not constitute property for purposes of the fraud statutes. 531 U.S. at 23. Yet that is all that the "scheme" here targeted: the Port Authority's control over the allocation of lanes on a public bridge. And the incidental costs of the regulatory action are irrelevant, as they were not the object of the "scheme to defraud." Two, even if there were a property right here, the Port Authority was not *deprived* of it when its own senior officials made decisions about its use. Three, an official's lie about her *subjective motives* for a decision is categorically not the type of falsehood that can support a fraud charge.

## I. THE GOVERNMENT'S SWEEPING CONCEPTION OF "PROPERTY FRAUD" IS DANGEROUSLY WRONG

The crux of the Third Circuit's reasoning on the scope of the fraud statutes—is straightforward: the lane reallocation would have been legal if done for legitimate purposes, but was converted to criminal fraud because the officials' "true," unstated purpose was political. Their "real reason" for realigning the lanes was exacting political revenge, yet they justified it as serving a neutral policy "rationale": studying traffic. By concealing their motives in that way, the defendants were able to "conscript[]" their Port Authority subordinates "into their service" to conduct the realignment, without being overruled by superiors who might have looked askance at naked political payback. They thereby defrauded the Port Authority of that marginal employee labor, plus their own labor, plus the intangible "right to control" the allocation of the lanes. Pet.App.23a, 24a, 26a.[3]

The implications of that theory are astounding—and grave. It would readily allow the indictment and prosecution of nearly any public official in the nation. And it would effectively unwind thirty years of this Court's jurisprudence reining in the far-flung honest-services fraud theories that prosecutors have invoked to enforce their preferred visions of good government. These consequences, both practical and doctrinal—and none of which the Third Circuit denied—make it abundantly clear that the decision below is wrong.

---

[3] Because the Third Circuit affirmed the § 666 convictions under that statute's "obtains by fraud" prong (Pet.App.35a), all of the convictions hinge on the Government's theory of property fraud. *Accord* BIO.11-12 (treating both statutes together).

### A. The Government's Theory Criminalizes Politics and Chills Public Service

**1.** As a practical matter, the decision below is untenable. Under it, any official (federal, state, or local) who conceals or misrepresents her subjective motive for an otherwise-lawful decision—including by purporting to act for public-policy reasons without admitting to her ulterior political goals, commonly known as political "spin"—has thereby defrauded the government of "property" (her own labor if nothing else). And if she used a phone or email in connection with that scheme, or if her government takes federal funds, then she is guilty of *federal crimes*.

Consider the nearly limitless array of routine conduct that is criminal under the decision below. Political motives are everywhere; that is the nature of democracy. *See, e.g.*, Joe Stephens & Carol D. Leonnig, *Solyndra: Politics Infused Obama Energy Programs*, WASHINGTON POST, Dec. 25, 2011 (describing green-energy program "infused with politics at every level"); Colin Campbell, *At 3 A.M., NC Senate GOP Strips Education Funding from Democrats' Districts*, NEWS & OBSERVER, May 13, 2017 (citing legislation shifting state funds from Democratic to Republican districts); Ben Casselman & Patrick McGeehan, *Tax Bill Posing Economic Woe in N.Y. Region*, N.Y. TIMES, Dec. 4, 2017 (describing tax bill as "economic dagger aimed at ... Democratic-leaning areas"); Aubrey Weber & Claire Withycombe, *Gov. Brown May Veto Several Rural Proposals Friday*, MAIL TRIBUNE, Aug. 6, 2019 (reporting that Oregon's Governor was planning to veto proposals advanced by rural lawmakers after those legislators "opposed her cornerstone environmental policy").

Yet these political motives are regularly *spun*. Officials who order "[s]peedy pothole repair for neighborhoods that support the incumbent," *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003), do not confess their "real reason" to their superiors or subordinates. Elected officials who (permissibly) promote the interests of their donors, *see McCormick v. United States*, 500 U.S. 257, 272 (1991), do not advertise their political ties in doing so. Legislators who draw districts to favor their own political party, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2494-95 (2019), do not generally announce that objective. Rather, these officials justify their acts on neutral, objective policy grounds. Under the Government's theory, all of them have committed fraud. "It would be more than a little surprising ... if the judiciary found in the ... mail fraud statute[] a rule making everyday politics criminal." *United States v. Blagojevich*. 794 F.3d 729, 735 (7th Cir. 2015). That is the effect of the Third Circuit's decision here.

This is not hyperbole. Replace the toll lanes in this case with any scarce public resource—snowplow trucks, for example, or building permit inspectors. An official allocates it: the trucks will focus on one neighborhood; the inspector will prioritize a project. The official announces that the decision promotes the public good: the neighborhood is needy; the project is good for the local economy. In fact, though, her "real reason" was less public-spirited: the neighborhood voted for her boss; the development is owned by a campaign donor. Per the decision below, the official's misstated motive deprived the state of the resource in question. Every politically motivated allocation of resources is now "fraud," unless openly confessed.

**2.** The problem is actually far worse. All that is needed to obtain an indictment is a mere *allegation* that the official misrepresented something relating to an official decision, including his political motives. Making that allegation and then throwing the issue to a jury—to probe the inner workings of the public official's decisionmaking and make an unrefutable finding of bad faith, with serious criminal penalties hanging in the balance—could not be easier. "[A]n official's state of mind," after all, is notoriously "'easy to allege and hard to disprove.'" *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998).

The threat of political abuse, and the resulting deterrent to public service, is palpable and profound. Indeed, even in civil cases, this Court has expressed great concern over rules that would penalize officials based on jury determinations of their true motives. Just last Term, the Court considered whether an arrestee may sue for retaliatory arrest claim if there was objective probable cause for the arrest but the officer's *real reason* was allegedly to retaliate for his speech or political views. In holding that the answer is generally no, the Court expounded on the dangers of tying liability to "purely subjective" facts like "mental state." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019). Only an objective test, the Court said, would "ensure that officers may go about their work without undue apprehension of being sued." *Id.* Allowing liability based on "a subjective inquiry" would "pose overwhelming litigation risks" and "thus 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)).

Likewise, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court refused to exempt, from antitrust law's state-action immunity, governmental decisions "'not in the public interest.'" 499 U.S. 365, 376-77 (1991). Such value judgments must be left to "elected officials," and tethering "personal liability" for officials to "*ex post facto* judicial assessment" of the public interest would be impractical. *Id.* at 377. And a "subjective test" (asking whether the officials *truly believed* they were acting in the public interest) could be "even worse," because that "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Id.*

Of course, the chilling effect of hinging *criminal* liability on an official's subjective motives is far more severe—a point that the Attorney General himself recognized at his confirmation hearing. Discussing the offense of obstructing justice, he explained: "If you say that any act that influences a proceeding is a crime if you have a bad state of mind," the result would be to "essentially paralyze the government," since influencing proceedings is what public officials "do every day of the week." Sen. Judiciary Comm., Atty. Gen. Confirmation Hrg. (Jan. 15, 2019). Citing certain pardons issued by former President Clinton, he asked whether a prosecutor could allege that they obstructed justice because they were taken "for a political reason," namely "to help Hillary Clinton run in New York." *Id.* The Attorney General's point was correct: If routine, otherwise-lawful decisions become criminal if taken for concealed "political reason[s]," then *every* official becomes a target. And that would indeed "paralyze" the government.

These concerns are not academic. It has become commonplace to sue public officials, claiming their actions were motivated by concealed, illicit purposes, rather than by their stated, legitimate goals. For instance, in *Trump v. Hawaii*, the plaintiffs argued that the President had issued an immigration proclamation because of "religious animus" and that his "stated concerns about vetting protocols and national security were but pretexts." 138 S. Ct. 2392, 2417 (2018). Plaintiffs challenging rescission of the DACA program claim there was an "ulterior motive" for the decision, different from the stated interest in enforcing the law. *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 774 (D. Md. 2018). And, as referenced above, this Court agreed that there was a "significant mismatch between the decision the Secretary made" regarding the citizenship census question "and the rationale he provided." *Dep't of Commerce*, 139 S. Ct. at 2575.

Again, whatever the validity of these theories as a basis for *civil relief* under the Constitution or the APA, the Government's theory here weaponizes them to another level: They are now grounds for a *criminal fraud indictment*. President Trump fraudulently obtained the labor of thousands of consular officials by citing national security for his proclamation; Secretary Duke defrauded Homeland Security of the money spent on the "unnecessary" task of drafting and executing the DACA rescission by lying about its "true purpose"; and Secretary Ross did the same by hiding his reasons for the citizenship question. None could have taken these actions without falsely citing valid policy reasons—or so a jury could surely find. If this is the law, the nation should brace itself.

**3.** Opposing certiorari, the Government claimed that the Third Circuit's holding can be cabined to avoid these untenable consequences. Each limiting principle that it proffered, however, collapses under scrutiny. There is no principled, coherent limit on the theory of fraud adopted below.

*First*, the Government argued that Baroni did not "possess unilateral authority" to undertake the realignment and therefore he "had to lie" about his motives in order to effect the realignment. BIO.13-15. Based on this, the Government suggests that the holding below is limited to public officials who lie to induce *unauthorized* actions. That is not a tenable distinction, either here or as a general matter.

Some unpacking is required. It has always been undisputed that Baroni had the authority, *in the first instance*, over lane allocation. As the Government told the jury, Baroni was a "high-ranking" official who "had authority" to "move the cones." JA.884-86; *see also* JA.20 (indictment). Indeed, Baroni was "number two" at the Port Authority (JA.236), and the Government elicited testimony that he did not need the approval of the only more-senior official to "change ... a lane configuration" (Pet.App.135a-136a). Of course, had this been outside of Baroni's purview, even the "policy reason" he offered would not have caused the bureaucracy to carry out his orders.

True, Baroni lacked *final* authority; his decisions could be overruled by the Port Authority's executive director, its governing board, or the Governors. *See* Pet.App.18a ("That Baroni was countermanded shows he lacked ... unencumbered authority ...."). The Third Circuit accordingly speculated that, had Baroni told the Port Authority staff that he wanted

to realign the lanes for political revenge, there was a practical risk they would have gone over his head and convinced the executive director to override him. *Id.* So he "had to create the traffic study cover story" to avoid being "countermanded." Pet.App.17a.

With the undisputed facts understood, it is clear that the Government's limiting principle is illusory. *No* official in our system holds "unencumbered authority" in the sense that the court below used the term—*i.e.*, cannot be overridden by some other actor. Foye himself could have been overruled by the Port Authority's Board of Commissioners; the Board by the two Governors. Even chief executives answer to legislatures, to courts, and to voters, all of whom have some power and inclination to obstruct nakedly political acts. There is nothing unique about Baroni. *All* officials must fear intercession if they advertise their basest political motives. *That is why none do.*

Accordingly, if Baroni's "public policy reason" for the realignment was fraud because honesty risked inviting reversal, the same holds true for every hypothetical discussed above: A mayor who is honest about her snowplow sequence risks causing staff to object and city council to intervene, and so "need[s] to lie" (BIO.16) to implement it. A police officer who confesses to a retaliatory arrest would see his chief release the arrestee, which is why he cites probable cause. A cabinet secretary who owns up to a political basis for adding a census question or rescinding a program might be stymied by the President or by Congress (or by a court), so she invokes a neutral ground. Most crucially, juries could certainly make these analogous findings and, per the decision below, that is enough to throw all these officials in jail.

To put the point a different way: Nothing about the Third Circuit's logic turns on Baroni's particular role in the Port Authority's hierarchy. Had he been the executive director, it could equally be said that he "had to lie" to avoid being overruled by its Board of Commissioners. Had he been the Chairman of the Board, he would have "had to lie" to avoid being overruled by the Governor. Had he been Governor, he would have "had to lie" to avoid possible censure by the legislature or impeachment by voters.

In short, any official who conceals his political motive for an action worries that its disclosure would jeopardize, as a practical matter, his ability to execute. The Third Circuit's reasoning about how Baroni "needed to lie" can thus be easily replicated in every context. It does not limit, in the slightest, the potency of this novel theory of criminal fraud.

Moreover, even if the Government's (invented) distinction could be sustained, the result would be that every public official *below* chief executive—the vast majority of officials—could be convicted of fraud for hiding their political motives. Even if a mayor or a governor were treated as having "unencumbered authority" and thus could not be prosecuted for, *e.g.*, lying about her reasons for siting a stadium (or a waste-treatment plant) in a particular location, the *deputy* mayor or gubernatorial *aide* could be. That is a breathtaking expansion of fraud in its own right, and it makes little sense for the fraud statutes to exempt only the *most powerful* officials.

*Second*, the Government implied that this case is unique because the realignment, allegedly unlike the hypotheticals, caused "unnecessary work that served no legitimate Port Authority function." BIO.13-14.

This is a smokescreen. Dividing twelve lanes into an eleven-one configuration is obviously no less "legitimate" than aligning them into a nine-three pattern. Allocating scarce public resources among public constituencies is what officials do—whether the resource is pothole repair, police patrols, traffic lanes, or anything else. The "political deal" that had originally bestowed three special lanes on Fort Lee (Pet.App.4a) holds no exclusive, permanent claim to public legitimacy. One administration is not bound to a predecessor's policy (much less political) choices.

The notion that the employee labor needed to implement the realignment was "unnecessary" or "no[t] legitimate" thus reduces to the claim that the defendants had *bad reasons* to order the realignment in the first place. If they were *sincerely* motivated by studying traffic or making the lane allocation more fair, then the employee labor was indisputably both necessary and legitimate to get those jobs done. The only reason this labor is supposedly converted into "unnecessary" work is that the decisionmaker's subjective motive was political. This confirms that the Third Circuit's dispositive factor for property fraud is the existence of a hidden political motive—and confirms that all of the hypotheticals, real and imagined, fall within its scope: The President's immigration order caused "unnecessary" work by consular officials, because he was not truly driven by national security. The legislator who appropriates pork causes money to be expended for "no legitimate purpose," as he knows there is no need for a bridge to nowhere. The Commerce Secretary causes dozens of lawyers to conduct an "unnecessary" defense of his pretextual citizenship question. And so forth.

Pejorative labels are not limiting principles. And it is not the role of courts or juries in criminal cases to decide whether policy decisions are "necessary" or "legitimate." Under the decision below, any official deemed to have hidden her political motives or lied about acting in the public interest could equally be accused, by a court or jury, of taking "illegitimate" or "unnecessary" action. That cannot be right.

*Finally*, the Government suggested that this case is unusual since it "involve[d] a deprivation of money or property." BIO.16-17. That literally begs the question presented. It is true that the fraud statutes cover only deprivations of "property." As construed below, however, essentially every decision by a public official will satisfy that element.

Many official decisions will relate to the use of a physical asset (like the bridge in this case), touching the state's supposed intangible "right to control" it. Pet.App.26a. If not, the action will take the time of an employee, whose labors are thus "conscripted." *Id.* Indeed, whenever officials make decisions, civil servants implement them; there is no decision that does *not* demand at least some time or attention from aides, staff, or bureaucrats. And even if there were such a rare case, the official's *own* attention will be "diverted" by the scheme. Pet.App.44a. Under the Third Circuit's rule, each of those independently qualifies as "property" under the fraud statutes. And while § 666 is limited to of property worth at least $5,000, "the wire fraud statute contains no monetary threshold." Pet.App.31a n.12. Accordingly, as the court below agreed, even a "peppercorn" is enough to convict. *Id.*

Between these three "property interests," not a single governmental decision is beyond the reach of a criminal fraud indictment. Any deception relating to that decision, even regarding the official's subjective motive for it, then becomes fodder for prosecution.

* * *

This Court has rejected statutory constructions that would "cast a pall of potential prosecution" over "nearly anything a public official does." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016); *accord McCormick*, 500 U.S. at 272 (rejecting interpretation that would "open to prosecution ... conduct that in a very real sense is unavoidable"). The theory of fraud defended by the Government here would do just that. Trying to enforce the Platonic public good through federal criminal law, it would authorize prosecutors to pursue, and empower juries to convict, any official whose spin is deemed too aggressive or whose actions insincerely public-spirited. That cannot be right.

### B. The Government's Theory End-Runs the Honest-Services Doctrine

The other dead give-away that the Third Circuit erred is the effect its opinion would have on this Court's seminal decisions. In *McNally* and *Skilling*, the Court rejected the unbounded "honest-services fraud" theory prosecutors were using to criminalize dishonest politics. The opinion below negates those rulings, effectively adopting an academic proposal to circumvent them by "reframe[ing]" the same conduct "as deprivations of property." Brette Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After Skilling*, 112 COLUM. L. REV. 359, 363-64 (2012).

**1.** In *McNally*, this Court refused to read the mail fraud statute to protect the "right to have public officials perform their duties honestly." 483 U.S. at 358. The law "clearly protects property rights," the Court held, "but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. So, "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, [the Court] read § 1341 as limited in scope to the protection of property rights." *Id.* at 360.

Following *McNally*, Congress enacted a statute providing that "scheme or artifice to defraud" under the mail- and wire-fraud statutes includes the vague, undefined "scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Prosecutors again used that law to charge and punish all sorts of unsavory political conduct that did not involve the deprivation of traditional property rights. *E.g.*, *United States v. Panarella*, 277 F.3d 678, 680 (3d Cir. 2002) (failure to disclose conflict of interest); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (patronage by party official).

In *Skilling*, this Court put an end to that abuse—or so it thought. To avoid "the due process concerns underlying the vagueness doctrine," the majority limited the honest-services statute to bribery and kickbacks, excluding the "amorphous" broader set of political corruption cases that the Government had prosecuted under that rubric. 561 U.S. at 408-10. Three Justices would have gone further and stricken § 1346 in its entirety as unconstitutionally vague. *See id.* at 415 (Scalia, J., concurring in part).

**2.** Nobody in this case took bribes or kickbacks (or otherwise benefited financially). As a result, the Government did not charge honest-services fraud—at least not expressly, though it argued to the jury that Baroni and Kelly violated their "responsibility to the public" by failing to act "in the best interest of the people of New Jersey." JA.885-86. Formally, though, the Government instead charged money-or-property fraud. But its conception of property fraud, adopted below, is so enormously expansive that it would, at once, revive the honest-services theory that *McNally* rejected—and then extend it to cover even the extreme cases that *Skilling* threw overboard.

To start, the Third Circuit's approach would make the honest-services statute totally superfluous. Consider a bribe: An official accepts cash in exchange for steering a contract, for instance, or approving an oil pipeline. Under the decision below, there is no need to charge honest-services fraud, because he has committed regular property fraud. By failing to disclose his corrupt motive for acting, or by creating a cover story to conceal the bribe, the official has lied and thereby deprived the state of its "property"—the value of the contract or control over the land under which the pipeline is built (plus the value of his own time). After all, had the official disclosed the fact that he was taking these actions because of an illicit bribe, surely his superior or another official would have stepped in to overrule him. This is exactly the reasoning adopted below. Yet to allow this conduct to be charged as ordinary property fraud makes a mockery of *McNally*, which held that *property* fraud under §§ 1341 and 1343 does not include bribery—a distinct type of *political* misconduct.

*McNally* itself would have come out the other way under the decision below. The official there steered state insurance contracts to certain agents in exchange for kickbacks, while hiding his self-dealing. 483 U.S. at 352-53. On the theory adopted below, there was concealment (of the kickbacks), "property" (the contracts and the money paid thereunder, plus the official's salary), and a causal link between them (since other officials could have stepped in had they known about the self-dealing). Yet, it was in fact the *dissent* that would have upheld the convictions on a theory like this one. *See id.* at 377 n.10 (Stevens, J., dissenting) ("When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for.").

Even worse, the Third Circuit's approach would revive, as pecuniary fraud, the prosecutions that this Court in *Skilling* rejected: those that involve "action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." 561 U.S. at 409. For example, in *United States v. Garrido*, a city treasurer recommended that the city council enter a series of contracts, without disclosing his personal and financial interests in the bidders he recommended. 713 F.3d 985, 989-91 (9th Cir. 2013). The court vacated the honest-services convictions in light of *Skilling*. *Id.* at 998. But, under the decision below, this was *property* fraud: The treasurer hid his conflict of interest, thereby inducing the city to enter contracts that cost the city money. If this is right, we have simply imported all the vagaries of pre-*Skilling* honest-services fraud into §§ 1341 and 1343.

Indeed, replace "financial" with "political" in the above quote from *Skilling* and it perfectly describes the allegations here, as the Third Circuit articulated them: "action by the employee that furthers his own undisclosed [political] interests while purporting to act in the interests of those to whom he owes a fiduciary duty." 561 U.S. at 409. Incredibly, it thus revives, under the "property" provisions, a theory of honest-services fraud *even the United States rejected* in a companion case to *Skilling*: "that purely political interests may have influenced a public official's performance of his duty." Br. for the U.S. at 45, *Weyhrauch v. United States*, No. 08-1196 (U.S. Oct. 29, 2009), 2009 WL 3495337. That is literally this case. Under the decision below, politically motivated conduct is property fraud, because "purporting to act" for a neutral policy reason while subjectively intending to further a political purpose defrauds the state of its intangible property interests (and its incidental costs) ancillary to the official's actions.

In short, the decision below conflicts with this Court's precedents on a fundamental level: If the opinion below is correct, then a host of seminal cases constraining application of federal criminal statutes to political behavior were both wrongly decided and utterly pointless. Federal prosecutors have all the discretion that *McNally* and *Skilling* held they did not. Again, that simply cannot be correct. *Accord United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988) ("[W]e do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front.").

### C. The Government's Theory Is Anathema to Every Canon of Construction

The account of property fraud embraced below not only negates the outcomes of this Court's critical precedents, but also flies in the face of the principles that the Court has established to construe the vague federal statutes at issue here.

*First*, the Court should avoid the "constitutional concerns" that would arise from an interpretation that "cast[s] a pall of potential prosecution" over "nearly anything a public official does." *McDonnell*, 136 S. Ct. at 2372. As discussed, the opinion below yields exactly that consequence. *See supra* at 19-23. It is the rare public decision that cannot be attacked as driven by hidden political self-interest. And with ambitious prosecutors seeking out public attention, the threat of criminalizing large swaths of routine politics—and the concomitant threat of selective, abusive enforcement—are very real.

*Second*, the Government's theory also imperils principles of federalism. This Court has refused to read the federal fraud statutes to "involve[] the Federal Government in setting standards of … good government for local and state officials." *McNally*, 483 U.S. at 360. Congress must "speak more clearly" to justify such a result. *Id.*; *see also Cleveland*, 531 U.S. at 25 ("'[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."). Due to the ubiquity of communication by wire (for § 1343) and the fact that virtually all state and local governments receive federal funds (for § 666), the Government's property theory would carry just the result that *McNally* foreswore.

Nonetheless, the Third Circuit declared that this case "lacks the federalism concerns present in *McNally*" since "the Port Authority is an interstate agency." Pet.App.32a. No. An interstate agency is an agency of the states, not the federal government. More fundamentally, the fraud statutes mean the same thing in cases against state and local officials that they mean in cases against officials of interstate agencies, just as they mean the same thing on Tuesdays as they do on Thursdays.

*Finally*, this Court has interpreted the fraud statutes in light of the "doctrine of lenity" and in a way that gives citizens "fair notice of what sort of conduct may give rise to punishment." *McNally*, 483 U.S. at 375. The Third Circuit brushed aside these concerns by trumpeting that the conduct here had "inconvenienced thousands." Pet.App.45a. Even if so, the court's holdings apply to all cases—serious and petty alike. Prosecutors are free to pursue the cases they choose, for reasons they choose. The decision below thus permits prosecution of routine political conduct. That too contravenes this Court's principles of statutory construction.

## II. REALIGNING THE LANES DID NOT DEPRIVE THE PORT AUTHORITY OF PROPERTY, REGARDLESS OF THE DEFENDANTS' SUBJECTIVE MOTIVES

For the reasons above, the Third Circuit must be wrong. For the reasons below, it *is* wrong. There are actually three independent features of this case that take it outside the doctrinal boundaries of the fraud statutes. Ignoring these features, as the lower court did, invites to one extent or another the practical and precedential absurdities spelled out above.

*First*, at its most fundamental level, the scheme here did not take aim at the Port Authority's "property rights." *McNally*, 483 U.S. at 358. It aimed, rather, to alter the allocation of lanes over the George Washington Bridge—*i.e.*, to influence a regulatory decision of the agency. This Court held in *Cleveland* that sovereign power is not "property" under the fraud statutes, whether it is characterized as an "intangible right to control" or otherwise; that principle controls this case. It does not matter that this regulatory act caused some incidental expenses, as that was not, by any account, the scheme's object. Clarifying *Cleveland*'s scope will ensure that property-fraud prosecutions are not used to police—or chill—discretionary policy choices.

*Second*, even where property is truly at issue, an official who is empowered to make decisions about that property *on behalf of* the state does not *defraud* the state by doing so, even if he violates his fiduciary duties in the process. Of course, if he puts property to an objectively improper use, he may be guilty of theft, embezzlement, or misapplication—but *fraud* is an inapposite concept for a decisionmaker.

*Third*, the Court should hold that an official's representations about his subjective reasons for an action do not trigger liability as a matter of law. Not all lies can support a fraud charge. Some concern matters that are too remote from the terms of the transactions they induced. Applying that principle in the public sphere, what counts is *what* the official does—not *why*. Lies about the latter do not cause a deprivation of property. Excising "motive" lies from fraud's domain would go a long way toward reining in the criminalization of politics portended below.

### A. Depriving a State of Regulatory Control Is Not Property Fraud

In *Cleveland*, this Court held that a scheme to deprive the state of regulatory power is not property fraud. That is all that happened here. To distract from that, the Third Circuit emphasized the costs of the regulatory decision in terms of compensation paid to Port Authority employees. *Every* regulatory act incurs some costs like those, however. So long as the object of the scheme is not to deprive the victim of property, it does not amount to property fraud.

**1.** *Cleveland* involved video poker licenses that the State of Louisiana issued. The defendants lied about their ownership interests in the entity that sought the license, allegedly because they had "tax and financial problems that could have undermined their suitability" for licensure. 531 U.S. at 15-17.

This Court reversed the mail-fraud convictions, because a state license is not state "property." *Id.* at 15. The Government argued that the scheme had deprived the State of its "right to control" licensing decisions. *Id.* at 23. But the Court declared that the "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] power to regulate." *Id.* Licensing "implicate[s] the Government's role as sovereign, not as property holder." *Id.* at 24. So, even though the state licenses were "tied to an expected stream of revenue," *viz.*, licensing fees, "the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor." *Id.* at 23. Instead, "[s]uch regulations are paradigmatic exercises of the State's traditional police powers." *Id.*

*Cleveland* directly controls this case. Just as the sovereign right to control *who obtains a license* is not a property interest, neither is the right to control *who drives on public roads*. The Port Authority is, after all, a "body ... politic," with powers "conferred upon it by the legislature[s]" of two states. 42 Stat. 174, 176. And establishing "toll bridges" reflects "an exercise of sovereign power." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 468 (1837). Indeed, the "operation" of "bridges" is a classic "public function." *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). So, to the extent that the defendants interfered in Port Authority decisions, they were *regulatory* decisions, made in the agency's "role as sovereign." *Cleveland*, 531 U.S. at 24. Influencing those decisions through deception is therefore not property fraud.

It makes no difference that the lanes are physical property, because how to *allocate* that property is a regulatory question. The "deprivation" here, after all, was not of the lanes themselves, which the Port Authority retained. Rather, the "deprivation" was, if anything, of the right to decide how to allocate those lanes. And that is precisely akin to the licensing determination in *Cleveland*. That decision would not have come out differently, to put the point another way, had the lie concerned a permit to operate an event in a public park instead of a license to operate poker machines. In both cases, the governmental interest is *regulatory*, not *proprietary*. *Accord United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994) (recognizing that "loss of the 'right to control' the expenditure of public funds" cannot ground a federal fraud charge). The same is true here.

Although Petitioner relied on *Cleveland* below, the Court of Appeals ignored it. The Third Circuit's opinion instead echoes the Fifth Circuit decision that *Cleveland* had *reversed*, recognizing the "right to control" the bridge as a property interest of the Port Authority, and holding that the agency holds "an unquestionable property interest in the bridge's exclusive operation, including the allocation of traffic through its lanes." Pet.App.27a-28a. *Compare United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997) (citing "Louisiana's right to choose the persons to whom it issues video poker licenses"). That is patently wrong: As *Cleveland* explained, "the[ ] intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] sovereign power to regulate." 531 U.S. at 23.

*Cleveland*'s interpretation of the mail and wire fraud statutes is corroborated by comparing them to statutes that extend beyond property rights. In *Hammerschmidt v. United States*, this Court considered 18 U.S.C. § 371's prohibition of conspiring "to defraud the United States ... in any manner or for any purpose." 265 U.S. 182, 185 (1924). The Court read that statute as reaching schemes "to interfere with or obstruct ... lawful governmental functions by deceit." *Id.* at 188. But that "broad construction ... is based on a consideration not applicable to the mail fraud statute": "Section 371 is a statute aimed at protecting the Federal Government alone; however, the mail fraud statute ... had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property holder." *McNally*, 483 U.S. at 358 n.8.

Indeed, if the Third Circuit were correct, § 371 would be largely superfluous. So would be a host of other federal statutes that criminalize particular lies to the government. *See, e.g.*, 18 U.S.C. § 1014 (lies for purpose of influencing actions of a set of federal agencies); *id.* § 1015 (lies relating to naturalization and citizenship); *id.* § 1019 (lies by consular officers). Those lies would inherently deprive the government of at least the labors of the affected public employees (the immigration judge, for example, who considers and evaluates the false citizenship papers). If all of that already amounted to mail or wire fraud, why did Congress enact these other statutes?

**2.** In opposing certiorari, the Government did not defend the Third Circuit's holding about the Port Authority's "right to control" the lanes. BIO.21. Instead, the Government argued that the court had correctly identified employee wages—for the extra toll collector, and the three engineers who conducted the traffic study—as the property interest that the Port Authority had lost as a result of the defendants' conduct. BIO.12. While the defendants' decision to realign the lanes did not itself deprive the Port Authority of property, the argument goes, the labor that was used to *implement* that decision constitutes a cognizable property interest.

*Cleveland* cannot be so easily circumvented. If deceiving a state entity into a regulatory decision is not fraud, then using public resources to *implement* that decision cannot be fraud either. The latter is simply "ancillary to a regulation." *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988). After all, the employees are doing as told, and the state is getting exactly what it paid for. In this case, the tollkeepers

took tolls and the engineers produced traffic reports. The fact that their work was "unnecessary," in the sense that they were effectuating an official decision touched by deceit (Pet.App.43a), does not mean that anyone was "defrauded" of their services or salaries.

Indeed, state employees in *Cleveland* were equally diverted toward processing and printing the falsified license applications; that was not enough for this Court to conclude that the applicants defrauded the state of the employees' time (or the value of the paper on which the licenses were printed). If using public employees or public resources to effectuate a regulatory decision were enough to trigger the fraud statutes, then *Cleveland* would be a dead letter—as no regulatory action is implemented without them. Whether it is paving roads, enforcing laws, or waging war, policy choices have costs. That cannot suffice to transform sovereign decisions into "property."

More fundamentally, an *incidental* loss does not turn deceit into fraud. As this Court has said, fraud requires "the *object* of the [scheme]" to "be money or property in the victim's hands." *Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (emphasis added). "The money or property deprivation must be a *goal* of the plot, not just an *inadvertent consequence* of it." *United States v. Regan*, 713 F. Supp. 629, 637 (S.D.N.Y. 1989) (emphases added); *see also United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988) (requiring "a direct intention to deprive another of a recognized and traditional property right"). Thus, as Judge Easterbook has explained: "Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement." *United States v. Walters*, 997 F.2d 1219, 1227 (1993).

Consider Judge Easterbrook's hypothetical: "*A* mails *B* an invitation to a surprise party for their mutual friend *C*. *B* drives his car to the place named in the invitation. But there is no party; the address is a vacant lot; *B* is the butt of a joke. The invitation came by post; the cost of gasoline means that *B* is out of pocket." *Id.* at 1224. Churlish? Yes. Fraud? No. To treat "practical jokes" as "federal felonies would make a joke" of this Court's "assurance that § 1341 does not cover the waterfront of deceit." *Id.* The statutes cover "schemes to *get* money or property by fraud," not those that "incidentally cause losses." *Id.* at 1225.

The "scheme" here was not fraud for the same reason as the joke in *Walters*: Its object was not to deprive anyone of property. The object was to alter the traffic patterns on the bridge, ultimately to exact political revenge on a partisan foe. Even though the tollkeepers were paid overtime—causing a financial cost to the Port Authority—that was not the object of the scheme. Actually, it was a step suggested by the agency civil servants, to ensure that traffic over the local lanes did not become even *worse*. Pet.App.9a. That secondary, incidental, downstream loss does not transform a scheme to deprive the Port Authority of its regulatory power into property fraud. Simply put, depriving or obtaining property was, by all accounts, never the object of the "scheme." At most, it occurred as a (foreseen) byproduct of their regulatory machinations. That is not enough. *See Westchester Cty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 603, 607 (S.D.N.Y. 2015) (scheme to rig an election was not fraud because "object of the scheme" was "control over the Independence Party," not property).

None of this is to say that governments cannot be victims of property fraud. A plot to deprive the state of taxes due is fraud, for example. *Pasquantino*, 544 U.S. at 355. So too a plot to deceive Medicare (or any other entitlement program) into paying benefits or reimbursements that are not legally due. *See United States v. Medlock*, 792 F.3d 700, 704 (6th Cir. 2015). And the fraud statutes proscribe lying to the state when it is "purchasing goods and services in the open market," *i.e.*, acting as a market participant. *United States v. Tulio*, 263 F. App'x 258, 262 (3d Cir. 2008); *see also Cleveland*, 531 U.S. at 24 (recognizing that government sometimes acts as property holder, in which event it is protected by the fraud statutes). These schemes are fraud, unlike Judge Easterbrook's practical joke and the conduct here, because their *aim* (and not merely their incidental byproduct) is to deprive the government of its property.

* * *

Nearly twenty years ago, this Court squarely held that the state's "sovereign power to regulate" is not property. *Cleveland*, 531 U.S. at 23. A deceitful scheme to affect regulatory action—whether taken by an official or a citizen—is thus not property fraud. And prosecutors cannot render *Cleveland* nugatory simply by pointing to some incidental monetary loss caused by the scheme, as those costs would exist in *any* case. Instead, the fraud statutes require the *object* of the fraud to be property loss. Here, there is no allegation (much less proof) that the defendants sought to deprive the Port Authority of any property, only of its regulatory power. Their convictions must accordingly be reversed.

### B. An Official Does Not Defraud the State by Misusing Property He Controls

Even if a genuine property interest were at stake, the Port Authority was not *defrauded* of it. Fraud requires a material falsehood that induces the victim to part with its property. Thus, in *Cleveland*, the Government's theory of fraud was at least superficially plausible because the applicants had lied *to* state officials to induce them to provide licenses—the supposed "property" at issue. Here, by contrast, the lie was *by* the Port Authority officials who controlled operation of the bridge. In realigning its lanes, they did not *induce* the Port Authority to act on false pretenses. They simply exercised *their own authority* to act on the agency's behalf. If they did so for a bad reason, and even if they lied about that reason, they at worst violated a fiduciary duty to their employer—but they did not defraud it, as the deception was not used to take property, intangible or otherwise, that belonged to the agency.

**1.** As this Court has explained, fraud requires the use of some "material" deception to induce the victim to part with property. *Neder v. United States*, 527 U.S. 1, 22-25 (1999) (citing *Restatement (Second) of Torts* § 538 (1977)). A deception can be "material" only if it provides some "inducement or motive" for the victim to act. *Id.* at 22 (quoting 1 J. Story, *Commentaries on Equity Jurisprudence* § 195 (10th ed. 1870)). In a case of property fraud, the lie is thus the mechanism that the perpetrator uses to obtain property that is not otherwise within his control. To defraud the state, accordingly, the perpetrator must deceive the relevant government decisionmaker into acting based on false pretenses.

By the same token, an official does not commit fraud simply by misusing property that the state has already entrusted to him—*i.e.*, when he himself is the relevant decisionmaker. Since the official is in control of the property, he has authority to act for the state in deciding how it will be used. If he orders the property to be misused, he does not *deceive* the state; he simply *abuses* his authority. And it makes no difference if he provides some false policy reason for his action. What matters is that he has authority to act on the state's behalf, and thus the lie cannot be the mechanism that *induces* the state to act.

To adjust *Cleveland*'s facts, imagine if Louisiana officials handed out poker licenses to their friends and falsely claimed they were suitable candidates. That hypothetical falls even further beyond the scope of the fraud statutes than *Cleveland* itself, because the state officials were not defrauding Louisiana out of the licenses they were authorized to issue, even if they issued them improperly.

Another hypothetical: Baroni exercises his power to redirect a Port Authority financial grant from Fort Lee to a city with a more politically friendly mayor. The Port Authority was not *defrauded* of that grant money. Rather, the agency acted through its agent, whose job was to make decisions on its behalf. He perhaps made the decision for a bad reason; perhaps he even lied about it. But fraud is more than breach of fiduciary duty. To be sure, Baroni may (in this hypothetical) have "abused the power" entrusted to him. JA.886. But an employee's "faithful service" is "an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

Of course, this does not mean a public official can never commit property fraud. To do so, however, he must use deception as a means to induce the state to part with its property. Guilty, for example, is the official who "file[s] false claims with the County for payment," thus diverting public funds to pay for work that was not done. *United States v. Baldridge*, 559 F.3d 1126, 1129-31 (10th Cir. 2009). So too the state legislator who claims entitlement to "per diems and travel reimbursements for assembly district business trips that he did not take." *United States v. Boyland*, 862 F.3d 279, 286 (2d Cir. 2017). In those cases, the public official has no authority to secure the funds from the state without the lies.

A public official may also commit *other* crimes by misappropriating property over which he exercises control. For example, it is unlawful to "embezzle[]," "convert[]," or "misappl[y]" state property. 18 U.S.C. § 666(a). Under those offenses, an official cannot steal or misuse public property by diverting it to *private* use. *E.g.*, *United States v. Delano*, 55 F.3d 720, 723 (2d Cir. 1995) (parks commissioner used city staff to perform "work on private homes"). But those crimes involve putting property to *objectively* improper uses; they do not cover officials who merely act with a subjective political motive in allocating public resources among facially legitimate uses: "A bureaucrat who tells sanitation and snow removal employees to ensure that the mayor's neighborhood is cleaned up early and often" commits no crime, but one who uses city funds to pay workers for campaign work *does* cross the line, because "political activities are *not* the performance of a garbage collector's official duties." *Genova*, 333 F.3d at 758-59.

**2.** The officials here did not use deception as a means to induce the Port Authority to part with its property. They therefore did not commit fraud.

The allocation of traffic lanes between the Main Line and the Local Access was, by its very nature, a discretionary policy decision. And it was a decision that, by the Government's account, was Baroni's to make in the first instance. *See* JA.20, 236, 884-86; Pet.App.135a-136a. Nobody has ever alleged that he violated any objective restriction in ordering the realignment. Nor has the Government ever disputed that he could lawfully have taken the same action for sincere policy reasons. Thus, Baroni did not *deceive* the agency into realigning the lanes, but simply *acted on behalf of* the agency in ordering it be done. Accordingly, because he had authority to realign the lanes at his discretion, he did not defraud the Port Authority out of any property interest.[4]

---

[4] Nor did he thereby commit "misapplication" or any of the other offenses discussed above. Again, realigning the lanes as between the Main Line and the Local Access was not objectively illegitimate or improper in any way, as all lanes were open for public use at all times—just different *segments* of the public, by virtue of political favoritism. That political motive obviously does not turn an objectively proper use of public property into a federal crime. Indeed, "[t]he idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to [allocate public resources] is preposterous." *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007) (Easterbrook, J.). Thus, although the Government charged the defendants with both fraud *and* misapplication under § 666(a), the Court of Appeals did not rely on the latter in upholding the convictions, and the Government conceded in its opposition to certiorari that the convictions are premised on a "scheme to defraud." BIO.22.

The Third Circuit accepted this legal principle at some level, but reasoned that Baroni did not exercise "unilateral authority" over the lanes because he was subject to being "countermanded" by the Authority's executive director. Pet.App.18a; *see also supra* at 24-25. From this, the lower court concluded that the lie about the true motive for the realignment *was* the mechanism for the deprivation of property: Had the officials' true purpose been publicized, civil servants could have asked the executive director to intervene and reverse the decision (as he eventually did, even before learning the "real reason" for the action). The falsehood thus helped reduce (or delay) the practical risk of reversal by a superior. Pet.App.18a.

That attenuated speculation, even if credited, is not enough to make Baroni guilty of property fraud. After all, the subordinates who received the lie were not the relevant decisionmakers; Baroni did not need to give them *any* justification for his orders. And it remains the case that he did not need any superior's sign-off to realign lanes. Rather, absent a contrary directive, he had his own discretionary authority to impose this change—indeed, that was the predicate for the Government's complaint that Baroni "abused" his "power" to "move the cones." JA.884-86. If he did not *have* that power, he could not have *abused* it. The Port Authority was therefore not tricked into the realignment. At worst, the Port Authority's senior official breached his fiduciary duty by making this decision other than in the agency's best interests, and lulled his subordinates into going along without objection. That is not property fraud. If it were, the same logic could be used to challenge *any* political decision by *any* official. *See supra* at 24-26.

### C. An Official Does Not Commit Fraud by Lying about His Subjective Motives

Even if Baroni's lie could somehow be said to have induced the Port Authority to act, the Court should hold that this did not amount to property fraud because of the *type* of lie. The fraud statutes do not cover every lie, or even every lie that induces action. In the commercial context, courts recognize that only lies about the terms of the exchange—not about the internal thought process of the parties—can render the transaction fraudulent. If a seller lies about his reserve price or a buyer lies about his ability to pay, there has been no property fraud because each side ultimately got exactly what they expected—even if honesty would have altered the course (or even the end result) of the negotiations.

Translated into the public context, an official's deception as to his internal subjective motives for taking an otherwise-lawful action are beyond the scope of the fraud statutes. Even if the official's lies induced the state action, and even if that action cost the state money, the state got what it paid for; there was no fraud about the underlying transaction, only misdirection about the official's *subjective reasons* for engaging in it. Such misdirection about an official's personal reasons for a lawful use of public property is simply too attenuated from any deprivation of state property to qualify as criminal fraud.

**1.** Even where a lie is material, in the sense that it "is capable of influencing another party's decisions," courts have ruled that certain categories of falsities "should not be considered material for purposes of [the] mail and wire fraud statutes." *United States v. Weimert*, 819 F.3d 351, 357-58 (7th

Cir. 2016). The line is between falsehoods that merely induce "victims to enter into transactions they would otherwise avoid" (which do *not* violate fraud statutes), versus lies that concern the transaction's essential terms (which do). *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). Misrepresentations only constitute fraud if they deprive a party of the benefit of its bargain.

One classic example—discussed in *Weimert*—is "deception about negotiating positions," *e.g.*, "reserve prices." 819 F.3d at 358. A car dealer lies about the lowest price he will accept; the customer lies about the most he will pay. These statements do affect the negotiations; had each party been completely honest, the result might have been different. Yet neither party is guilty of fraud. *Id.* at 357-58. The reason is that, in the end, the customer got the car he expected and the seller got the price he agreed to. There was no deception about the *terms of the exchange*—only about "opinions, preferences, priorities, and bottom lines," which are "not considered statements of fact material to the transaction." *Id.* at 358 (citing *Restatement (Second) of Torts* § 538A cmts. b, g).

The Eleventh Circuit used another hypothetical for the point: If a woman asks a "rich businessman to buy her a drink" at a bar, there is no fraud even if the woman fails to disclose that the bar owner "paid her to recruit customers." *United States v. Takhalov*, 827 F.3d 1307, 1313 (11th Cir 2016) (Thapar, J.). Absent those false pretenses, the man may not have bought the drink, but he still "got exactly what he bargained for"; the deceit did not "go[] to the value of the bargain" and so he lost no property. *Id.*

Still another example: If a salesman falsely claims to have been referred by a putative customer's friend, that is not fraud, since the lie is "not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain." *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1179 (2d Cir. 1970). It goes only to the background motives for entering the transaction, and that is too remote to constitute a deprivation of property.

Finally, a buyer's misrepresentations about how he intends to *use* a product are not property fraud. The Ninth Circuit rejected fraud charges based on false assurances that the defendants would not send the purchased goods to the Soviet bloc. *United States v. Bruchhausen*, 977 F.2d 464, 467-68 (9th Cir. 1992). And the Sixth Circuit vacated fraud charges where a defendant lied to drug distributors about how her pain clinic would use pills she was ordering. *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (Sutton, J.). While the lies convinced the sellers to make the sales, they were not deprived of property because they received full price. They were deprived only of "the ethereal right to accurate information," which the fraud laws do not protect. *Id.* at 590-91.

This limiting principle can be framed as a restriction on the types of "schemes" that violate the fraud statutes, or alternatively as cabining what it means to be "deprived" of property. Either way, the point is this: Even misrepresentations that induce action are beyond the scope of the fraud statutes if they concern matters—like one's motive, opinion, or preference—that are too attenuated from the essential terms of the transaction itself.

**2.** By analogy to these private-sector principles, misrepresentations about a public official's subjective motives—especially political motives—for otherwise-lawful official acts are not the types of deception that constitute criminal fraud, as a matter of law.

Just as a commercial transaction is not rendered fraudulent by a misrepresentation that is remote from the basic terms of the bargain (such as why the buyer wanted the product, or the importance to the seller of a quick sale), a public official's decision is not rendered fraudulent if he only misrepresents *why* he subjectively decided to take the action. So long as the official action is otherwise lawful and its nature is not misrepresented, the official's subjective motive is not an "essential element of the bargain," *Shellef*, 507 F.3d at 108, however that is conceptualized in the public sphere. What properly concerns the state is *what* its officials do, not *why* they do it.

Thus, a governor does not commit fraud when he "appoints someone to a public commission and proclaims the appointee 'the best person for the job,' while the real reason is that some state legislator had asked for a friend's appointment." *Blagojevich*, 794 F.3d at 736. Similarly, a governor who "throws support (and public funding) behind coal-fired power plants because people fear nuclear power" has committed no crime, even if he "privately thinks that nuclear power would be superior." *Thompson*, 484 F.3d at 883. Money was spent—to pay the appointee or to build the power plant—and, had the governor been honest, the decision might have been different. But misrepresentations about his opinions, beliefs, and motives cannot be treated as depriving the state of property, because the state "got exactly what [it]

bargained for." *Takhalov*, 827 F.3d at 1313. It was deprived, if anything, only of its official's honest and faithful services—which is not "property." *McNally*, 483 U.S. at 355; *see also Carpenter*, 484 U.S. at 25.

Again, to hold otherwise would be to impose "an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act also is the real one." *Blagojevich*, 794 F.3d at 736. And that would subject public officials to unending second-guessing and hand their political enemies the jailhouse key.

Here, the alleged "lie" concerned only *why* the defendants sought to alter the lane alignment: Was it really to study the ensuing traffic, or was that just a cover story for their true goal of political revenge? Ultimately, the Port Authority got what it bargained for—tollkeepers who collected tolls, engineers who studied traffic, and a lane alignment that favored Main Line drivers over those from Fort Lee. Perhaps the justification that the defendants offered for that decision was contrived—like the car dealer's claim that he will not sell the sedan for a penny less, or the pill-mill owner's promise to dispense drugs only to those with prescriptions. But while the defendants' scheme may well have been deceitful and ill-advised, it was not property fraud.

## CONCLUSION

This Court should reverse the judgment below.

SEPTEMBER 17, 2019

MICHAEL D. CRITCHLEY
CRITCHLEY, KINUM
& DENOIA, LLC
75 Livingston Avenue
Roseland, NJ 07068

YAAKOV M. ROTH
*Counsel of Record*
MICHAEL A. CARVIN
ANTHONY J. DICK
ANDREW J. M. BENTZ
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

*Counsel for Petitioner*