No. 18-___

IN THE

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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?

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INTRODUCTION

For over three decades, this Court has repeatedly warned against using vague federal criminal laws to impose "standards of ... good government" on "local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016). This case proves that some prosecutors still resist that directive—and some courts still refuse to rein them in. The court below adopted a theory of fraud so incredibly potent as to undo—in one fell swoop—the restrictions this Court imposed in *all* of those decisions. Its opinion is a playbook for how to prosecute political adversaries, and transforms the federal judiciary into a Ministry of Truth for every public official in the nation. This Court's intervention is again urgently needed.

This high-profile 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 core allegation was that two officials—the Port Authority's deputy executive director, and a staffer in the New Jersey Governor's Office—ordered this change to punish Fort Lee's mayor for not endorsing the Governor's bid for reelection. That political motive drove their actions, prosecutors objected, rather than "the best interest of the people of New Jersey." JA.5303.

In the decision below, the Third Circuit affirmed the convictions of those officials under the wire-fraud and fraud-from-federally-funded-programs statutes. 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, impose, and study the realignment. How? By citing a "traffic study" as the purpose for the realignment, even though their "true purpose" in ordering it was political payback. And the officials needed that lie to "obtain" the property, the court said, as disclosure of their true motives would have jeopardized the plan.

In other words, the "fraud" here—and the basis for convictions under two federal criminal statutes—was *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 possibly be the law. Taken seriously, it would allow any federal, state, or local official to be indicted based on nothing more than the (ubiquitous) allegation that she lied in claiming to act in the public interest. Consider a cabinet secretary who appoints a friend to a public post, declaring him to be best-qualified. Or a deputy mayor who orders pothole repair to reward her boss's political base, justifying it on neutral policy grounds. Or, for that matter, the Port Authority officials who entered the original "political deal" that *favored* Fort Lee, but assuredly did not so advertise it. All are felons under the decision below, because all engaged in spin in describing their "true purpose."

Not surprisingly given its absurd consequences, the Third Circuit's decision conflicts with this Court's cases. As a practical matter, the court below junked a host of this Court's precedents constraining federal corruption laws, by blessing a back-door way to criminalize *all the same conduct*. As a doctrinal matter, the court below ignored this Court's holdings interpreting "property" narrowly in the political arena, to exclude interests in sovereign authority. And, as a methodological matter, the court below defied this Court's instruction to use principles of lenity, fair notice, avoidance, and federalism to avoid criminalizing routine political behavior.

So too, the Third Circuit's decision conflicts with the decisions of other courts of appeals. The Seventh Circuit *scoffed* at the notion that the fraud statutes enforce "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." *United States v. Blagojevich*, 794 F.3d 729, 736 (7th Cir. 2015). That same court also called it "preposterous" to think it is a crime "to take account of political considerations when deciding how to spend public money." *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007). The decision below embraces both ludicrous propositions at once. And while other courts may not have used language as colorful as Judge Easterbrook in doing so, they too have refused prosecutorial efforts to turn the fraud statutes into all-purpose ethics codes.

To correct the consequential errors, resolve the multiple conflicts, and close the dangerous loopholes generated by the Third Circuit's decision below, this Court should grant review.

OPINIONS BELOW

The district court's opinion denying the motions to dismiss the indictment (Pet.App.75a) i at 2016 WL 3388302. Its opinion denying acquittal or a new trial (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 (2018 WL 6175668).

JURISDICTION

The Third Circuit issued its opinion and entered judgment on November 27, 2018, and denied a timely motion for rehearing on February 5, 2019. *See* Pet.App.1a, 129a. This Court has jurisdiction 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 of New York and New Jersey reallocated lanes over the George Washington Bridge in a manner 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 motive under the "guise" of a public policy rationale. Pet.App.2a, 7a.

A. The Port Authority and Its Operations.

The Port Authority is a bi-state agency that manages bridges, tunnels, and other transportation facilities in the New York City region. Among these is the George Washington Bridge, "a double-decked suspension bridge connecting the Borough of Fort Lee, New Jersey, and New York City." Pet.App.4a. The bridge's upper level has twelve toll lanes, which can be accessed in two ways. The first approach, known as the "Main Line," consists of a collection of highways, including I-95. The second, called 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.807-09, 5803; 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 open to the Main Line. *Id.* Although Fort Lee residents made up just 5% of bridge traffic (JA.1913-14), a quarter of the upper-level booths were thus reserved for local lanes. It was undisputed at trial that this arrangement caused non-residents to cut through Fort Lee just to access the bridge. JA.1671, 5822.

The Port Authority's political leadership was divided between New York and New Jersey in "two parallel chains of command." JA.4236. New York's Governor appointed half of the governing Board's commissioners and the executive director; New Jersey's designated the other commissioners and the deputy executive director. JA.1063, 1067, 1069. The governors held ultimate veto power. JA.1128.

At the times relevant here, the deputy executive director was William Baroni. His role encompassed management of "all aspects" of Port Authority business, including the George Washington Bridge. JA.92, 1483. Holding "the number one position on the New Jersey side," he was expected to "watch out for New Jersey's interests." JA.1482-83. While the executive director outranked him and had the power to override his decisions (Pet.App.18a), the Port Authority in practice had "two equal Governors, two equal Boards, and two equal day-to-day operators"; Baroni neither answered nor reported to the executive director, then Patrick Foye. JA.3641. As Baroni's successor agreed, the executive director "was not [her] boss," as the officials "were both considered to be at the same level, the highest New Jersey and New York appointees." JA.3193-94.

Given its leadership structure, the Port Authority was, not surprisingly, often used "to bestow political favors," including to local officials who were "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.* One appointee from the New Jersey side, David Wildstein—who "functioned as Baroni's chief of staff" (Pet.App.3a)—testified that he subscribed to a principle he called the "one constituent rule": If something was "good for Governor Christie, it was good for us." JA.1492.

B. The Lane Realignment.

On September 6, 2013, Wildstein directed senior Port Authority civil servants to change the traffic patterns leading to the upper-level tollbooths on the George Washington Bridge beginning the following Monday. Pet.App.8a–9a. Instead of reserving nine lanes and tollbooths for Main Line traffic and three for the local approach, employees placed traffic cones to reserve eleven and one, respectively. Pet.App.9a. Wildstein told the employees that the purpose of this change was "so that New Jersey could determine whether those three lanes given to Fort Lee would continue on a permanent basis." Pet.App.8a.

To be clear, no toll lanes or booths were closed. Rather, two toll lanes were reallocated from the local approach to the Main Line. To ensure that the remaining booth dedicated to local-access travel would remain in service even when the toll collector needed a break, a second collector was maintained on standby duty, at "extra cost." Pet.App.8a.

Unsurprisingly, this realignment reduced Main Line traffic. On Tuesday, September 10, Wildstein reported that Main Line rush-hour traffic broke 45 minutes earlier than usual. JA.1775. Preliminary analysis by Port Authority employees found that over the week, the realignment saved "approximately 966 vehicle hours" for Main Line drivers. JA.5816. Of course, traffic worsened for motorists employing the Local Access Lanes, and cars "backed up into Fort Lee and gridlocked the entire town." Pet.App.9a. Fort Lee's mayor tried repeatedly to contact Port Authority officials about the issue, but they did not respond. *See* Pet.App.9a–10a.

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, explaining that the issue was "important to Trenton," meaning the Governor's Office—but Foye refused. *Id.* Foye admitted at trial, however, that no policy requiring his *pre-approval* of actions like the realignment had ever been "in place at the Port Authority." Pet.App.135a-36a.

C. 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), theft from 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* conduct a traffic study of sorts, that was allegedly just a "sham," meant to hide Baroni's true purpose. Pet.App.56a.[1]

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[1] Although no longer relevant, the indictment also charged civil-rights violations, on the theory that the realignment had deprived the residents of Fort Lee of their clearly established right to "intrastate travel." The Third Circuit reversed those convictions (Pet.App.73a), which are no longer at issue.

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. 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 officials. Pet.App.4a-5a.

The district court denied motions by Baroni and Kelly to dismiss the indictment. Pet.App.75a. On wire fraud, the court reasoned that the indictment sufficiently alleged that they "[d]epriv[ed]" the Port Authority of "control over [its] assets." Pet.App.94a. On § 666, the court construed the statute to proscribe "any improper use of property," and then declared it "improper" to be motivated by political "retribution." Pet.App.86a–87a. The district court acknowledged that this prosecution was "novel," but 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 its view, "not unclear" or "ambiguous." Pet.App.80a–81a & n.3.

2. At trial, Wildstein testified that his purpose for the realignment was "punishing Mayor Sokolich," and that Wildstein came up with "a public policy reason" merely as a "cover story" so that he did not have to disclose that "it was political." Pet.App.7a. Specifically, when giving direction to subordinates at the Port Authority, he described the realignment as "a traffic study" to evaluate whether the local lanes "would remain permanent." Pet.App.7a–8a. Following through on that rationale, Port Authority employees were asked to study the "ensuing traffic," and they did so. Pet.App.9a.

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.4463-69. The Government, by contrast, elicited testimony from Wildstein that Kelly, after confirming that Sokolich would not endorse the Governor, directed Wildstein to punish Sokolich by causing traffic in Fort Lee. Pet.App.12a–13a. Wildstein also testified that Baroni was fully on board with, and had approved, the plan. Pet.App.8a.

The jury convicted both Defendants on all counts.

3. The district court denied acquittal or a new trial. On wire fraud, the court held that there was sufficient evidence for the jury to conclude that Defendants had, by misrepresenting their motives for the realignment, defrauded the Port Authority of "an intangible property right"—namely, its "control" over assets "such as toll booths, roadways, [and] employee compensation." Pet.App.123a n.15. On § 666, the court reasoned that the evidence was also sufficient because Defendants "concealed the real reason" for the realignment, which was "not in line with routine Port Authority procedures and departed significantly from prior practices." Pet.App.117a, 119a. The court also rejected challenges to the jury instructions it had provided. Pet.App.112a.

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.

D. The Decision Below.

The Third Circuit affirmed in relevant part. It did recognize that there is no clearly established constitutional right to "intrastate travel" and thus reversed the two convictions premised on that right. Pet.App.70a–73a. But the court otherwise affirmed.

On wire fraud, the court sustained the theory that Defendants had fraudulently deprived the Port Authority of "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 Fort Lee). Pet.App.23a. This "untruthful claim" about their subjective motivations for the decision satisfied the deception element of the fraud offense. Pet.App.15a. And Defendants needed that "cover story," the court reasoned, to convince the agency bureaucrats to cooperate, and to prevent any superiors from interceding. Pet.App.17a–18a.

Second, the panel held that this lie deprived the Port Authority of "intangible property." Pet.App.22a. Defendants supposedly "obtained," by their fraud, "public employees' labor"—the labor of the extra toll collectors needed for the realignment, the labor of the staff who actually conducted the traffic study by "collect[ing]" and "analyz[ing]" data about the impacts of the realignment, and even Wildstein's and Baroni's *own* time spent working on the realignment. Pet.App.22a, 24a–25a. In the court's view, this work was all "unnecessary," and Defendants had therefore "commandeer[ed]" the employees' time (including their own). Pet.App.25a, 28a. The court further held that Defendants had deprived the Authority of its

"right to control" physical assets like the lanes—its supposed "property interest in the bridge's exclusive operation." Pet.App.26a–28a.

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 Defendants committed wire fraud, the court below reasoned, they had also "fraudulently obtain[ed]" property in the form of "the labor of Port Authority employees." *Id*. Again, Defendants lied "about the purpose of the realignment" and, through that lie, "obtain[ed]" the labor of the employees to perform "unnecessary" work that did not further (in the court's view) "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 "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 claimed that its decision did not raise any "federalism concerns," because the Port Authority "is an interstate agency created by Congressional consent" and "receives substantial federal funding." Pet.App.32a. The panel also denied that its reading of the relevant statutes created any "constitutional vagueness concerns." Pet.App.45a.

The Third Circuit denied Kelly's petition for rehearing on February 5, 2019. Pet.App.129a.

REASONS FOR GRANTING THE WRIT

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 the citizenry of the intangible property right to "honest and impartial government." *McNally*, 483 U.S. at 355. Although the lower courts "uniformly and consistently" approved, *id.* at 364 (Stevens, J., dissenting), this Court held that those laws protect only traditional "property rights," and refused to construe them in a manner that "involves the Federal Government in setting standards of disclosure and good government for local and state officials," *id.* at 360 (majority). Congress thereafter enacted an honest-services statute; prosecutors again began to use its amorphous language 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, lower courts largely stood by until this Court intervened, limiting the statute's reach to bribery and kickbacks. *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. Instead, it charged them with *money-or-property* fraud, on the theory that concealment of their political motives deprived the Port Authority of "intangible" property: how the bridge was operated and how its employees were deployed. Pet.App.22a, 27a-28a. The Third Circuit agreed: Defendants had lied about their "real reason" for realigning the lanes, so they were guilty of serious felonies. Pet.App.23a.

The implications are astounding—and grave. Nothing is easier than accusing a public official of harboring secret political or personal motives for his decisions. Such an allegation suffices, under the decision below, not just to vote against the official, or sue him for an injunction, but to *indict him for fraud*. Imprisonment thus hinges on a jury's determination about whether the official's "public policy reason" for acting was her "true purpose." Pet.App.7a. Do the federal fraud statutes really establish a judicially staffed Ministry of Truth for political "spin"?

Obviously not. If they did, *McNally* would have come out the other way; *Skilling* would never have arisen at all. The opinion below turns both of those precedents—and others besides—into a dead letter, by ignoring this Court's directives to narrowly construe "property" in the fraud statutes, and its specific holding that "property" does not extend to a State's "intangible rights of allocation, exclusion, and control," *Cleveland v. United States*, 531 U.S. 12, 23 (2000). In essence, the Third Circuit's "reframing" nullified this Court's seminal precedents. *See* Brette Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After Skilling*, 112 Colum. L. Rev. 359 (2012).

Other Courts of Appeals have generally been skittish about allowing in, through the back door, the theories of criminal liability this Court has thrown out the front. But the Third Circuit has removed the back door from its hinges entirely, and erected an "Enter" sign in flashing neon lights atop it. To protect the integrity of this Court's decisions, resolve this Circuit split, and stop this criminalization of politics in its tracks, this Court must grant review.

I. THE DECISION BELOW IS UNTENABLE AND DANGEROUS.

Although the Third Circuit's opinion is long and covers a series of issues, the crux of its reasoning on the core issue of guilt—*i.e.*, the scope of the two criminal statutes at issue—is straightforward: The jury could have concluded that Defendants' "real reason" for realigning the lanes was exacting revenge on Mayor Sokolich for his political sins, yet they justified the realignment as serving the neutral public-policy "rationale" of studying traffic patterns. By virtue of that misrepresentation of their motives, Defendants were able to "conscript[]" their Port Authority subordinates "into their service" to conduct the realignment and traffic study—which work was otherwise "unnecessary." They thereby defrauded the Authority of those employees' labor, plus their own labor, plus the "right to control" the allocation of the traffic lanes. Pet.App.23a, 24a, 26a.

Even before identifying the many ways in which this remarkable theory contradicts the decisions of this Court and other Circuits, it is worth taking a moment to understand its implications. Under the decision below, any official (federal, state, or local) who conceals or misrepresents her *subjective motive* for making 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 accepted federal funds during the same year (as virtually all do), then she is guilty of *federal crimes*.

Search the opinion below for a viable limiting principle; none exists. The fraud statutes cover only deprivations of "property" but, as construed below, nearly every decision by a public official will do so. Either the decision will relate to use of a physical asset, touching the government's "right to control" it (Pet.App.26a); or else it will occupy the time of an employee, whose labors are thereby "conscripted" (*id.*); in the rare case involving neither of those, the official's *own* attention will be "diverted" by the scheme (Pet.App.44a). Under the Third Circuit's decision, each of those qualifies as a deprivation of public "property" under the statutes. And while § 666 has a $5,000 threshold, "the wire fraud statute contains no monetary threshold." Pet.App.31a n.12. Accordingly, as the court agreed, even a "peppercorn of public money or property" is enough to throw the errant official into prison. *Id.*

The Third Circuit also emphasized that Baroni lacked "unilateral authority to control traffic patterns ... and to marshal the resources necessary to implement his decisions." Pet.App.16a. By that, it meant the Port Authority's executive director and its governing board could have overruled him—which is why he "had to create the traffic study cover story" to avoid being "countermanded." Pet.App.17a. Of course, *no* official in our system has "unencumbered authority" that cannot be overridden by some other actor. Foye could have been overruled by the Port Authority's board; the board by the two Governors. Most officials have a superior; even chief executives answer to legislatures, to courts, and to voters. *All* officials must fear intercession if they advertise their basest political motives. *That is why none do.*

Consider, in light of all this, the nearly limitless array of routine conduct that is criminal under the decision below. Political motives are everywhere. Indeed, our constitutional system *presupposes* that officials will often act out of "personal motives"—which is why "[a]mbition must be made to counteract ambition," and "[t]he interest of the man must be connected with the constitutional rights of the place." Federalist No. 51, at 349 (J. Cooke ed. 1961) (James Madison). That is the very nature of democracy.

Yet these commonplace political motives are *spun*—never admitted. Municipal 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, let alone to city councils or voters. Public officials who (permissibly) promote the interests of their campaign donors, *see McCormick v. United States*, 500 U.S. 257, 272 (1991), do not advertise their political ties when they do so. Legislators who draw districts to favor their own political party, *see Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004), do not announce to their colleagues, the governor, or the public that they are doing so. Rather, all of these official decisionmakers invariably justify their acts on neutral public-policy grounds—as fair, equitable, and consistent with the common good. And, under the decision below, all of these decisionmakers have committed criminal fraud. "It would be more than a little surprising ... if the judiciary found in the ... mail fraud statute[] a rule making everyday politics criminal." *Blagojevich*. 794 F.3d at 735. Yet that is truly what the Third Circuit has done in this case.

This might sound hyperbolic. It is not. "Fraud" means using "dishonest methods" to deprive another of "property rights." *McNally*, 483 U.S. at 358. The Third Circuit's reasoning was that the officials here used "dishonest methods" because they claimed the purpose of the realignment was to evaluate its effect on traffic, when their "true purpose" was to punish Fort Lee. Pet.App.7a. And they deprived the Port Authority of "property," because the realignment involved public assets (the lanes) and required the labor of public employees (tollkeepers, engineers, and even the Defendants). Pet.App.27a-28a. Finally, the lie was the vehicle for the deprivation, as an honest account of the officials' motives might have caused others to reject or overrule it. Pet.App.17a-18a.

Now replace the toll lanes in this story with any other scarce public resource—pothole repair trucks, school funding dollars, or building-permit inspectors. A public official decides how to allocate the resource: the trucks will focus on one neighborhood; one school will get a large funding increase; the inspector will prioritize a given development project. The official announces that the decision promotes the public good (the benefiting neighborhood is needy; the recipient school will use the funds effectively; the prioritized project is good for the economy). In fact, her "real reason" was less public-spirited: the neighborhood voted for her boss; the school is run by an influential union; the development is owned by a key campaign donor. Per the decision below, the official's misstated motive is the "dishonest metho[d]," and the public resource is the "property" that she obtained thereby. Every politically motivated allocation of resources is now "fraud," unless transparently confessed.

Given the utter ubiquity of politically motivated decisionmaking, that alone is ground for this Court's review. *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 all levels"); 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. 5, 2017) (describing recent tax bill as "economic dagger aimed at ... Democratic-leaning areas").

But the problem is actually far worse. All that is needed to obtain an indictment is an *allegation* that the official concealed 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, could not be easier. *See Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998) ("an official's state of mind is 'easy to allege and hard to disprove'"). As a practical matter, the decision below thus "open[s] to prosecution ... conduct that in a very real sense is unavoidable." *McCormick*, 500 U.S. at 272. The threat of political abuse, and the resulting deterrent to public service, is palpable and profound. As the Attorney General himself has noted, a theory of corruption that criminalizes political acts based on "subjective intent" alone yields "too much power for the prosecutor" and therefore carries "bad long-term consequences." Jonathan D. Salant, *Trump's Attorney General Nominee Disagreed with Decision To Prosecute Menendez*, NJ.COM, Jan. 16, 2019.

Indeed, it has become commonplace to sue public officials on the theory that their actions were in fact motivated by concealed, illicit purposes, rather than by their stated, legitimate goals. For instance, in *Trump v. Hawaii*, challengers 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 the rescission of the DACA program assert that 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 a district court has held that the Commerce Secretary's "stated rationale" for adding a citizenship question to the Census was "pretextual" and "concealed [his] true basis." *New York v. U.S. Dep't of Commerce*, 2019 WL 190285, at *3 (S.D.N.Y. Jan. 15, 2019). Whatever the validity of these theories as a basis for *civil injunctive relief* under the Constitution, the Third Circuit has weaponized 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"; Secretary Ross did the same by hiding his reasons for changing the Census questions. And none could have succeeded without inventing policy reasons for their decisions—or so a jury could surely find.

As yet another example, this Court has struggled with whether an arrestee may sue for damages when there was objective probable cause for the arrest but he alleges that the officer's *real reason* for the arrest was to retaliate for his speech or political beliefs. *See Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018); *Nieves v. Bartlett*, No. 17-1174 (argued Nov. 26, 2018). Some Justices have worried that "the threat of liability might deter an officer" from doing his job effectively. *Lozman*, 138 S. Ct. at 1958 (Thomas, J., dissenting). Under the decision below, however, an officer could be *criminally sanctioned* on the basis of such an allegation. By lying about his "true purpose" for the arrest, the officer is defrauding the Police Department of his own labor, as well as that of the booking officer, and the right to control use of the holding cell. And, of course, had the officer owned up to his retaliatory purpose, he would have been stymied by superior officers and would never have been able to "obtain" that property.

* * *

In an ideal world, public officials would always act solely in the best interest of the public. But our world is decidedly not ideal, and politics is one of its inherent features, accepted as the cost of democratic accountability. Officials thus constantly have their own political interests in mind. Even if they never openly say so, we all understand as much—except, apparently, the Third Circuit. Trying to enforce the Platonic public good through federal criminal law, that court has now authorized prosecutors to pursue, and empowered juries to imprison, any official whose spin is deemed too aggressive or actions insincerely public-spirited. This Court cannot stand by.

II. THE DECISION BELOW CIRCUMVENTS AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

The practical implications of the decision below, on their own, more than warrant certiorari. But the decision below also satisfies the more traditional criteria for review. To start, it conflicts with this Court's precedents—their outcomes, their doctrine, and their methodology.

A. The first way in which the decision below conflicts with this Court's precedents is that it negates their outcomes. 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. In doing so, it rejected the unanimous approach of the lower courts. *Id.* at 364 (Stevens, J., dissenting).

Following *McNally*, Congress enacted a 28-word statute that referred vaguely to "the intangible right of honest services." 18 U.S.C. § 1346. Again, federal courts allowed prosecutors to use that law against all sorts of unsavory conduct by state and local officials. *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's county chairman).

In *Skilling*, this Court put an end to that abuse. 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 the honest-services rubric. 561 U.S. at 408-10. Three Justices would have held § 1346 unconstitutionally vague. *See id.* at 415 (Scalia, J., concurring in part).

Nobody in this case took bribes or kickbacks (or otherwise benefited financially). So 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 make "each and every decision in the best interest of the people of New Jersey." JA.5303. Formally, the Government instead charged *money-or-property* fraud. The Third Circuit believed that *McNally* and *Skilling* were accordingly irrelevant. Pet.App.30a. But the Third Circuit's conception of "property fraud" is so enormously expansive that it would, at once, revive the honest-services theory that *McNally* rejected—and extend it to cover even the extreme cases that *Skilling* threw overboard. *See* Tannenbaum, *supra*, at 363-64 (urging "creative prosecutorial charging" to "reframe now-excluded misconduct ... as deprivations of property").

To start, the Third Circuit's approach would make the honest-services statute superfluous. Every official taking a bribe or kickback creates a "cover story" to explain his actions, and surely affects some "public property," if only the official's own time. But allowing such conduct to be prosecuted as ordinary fraud makes a mockery of *McNally*, which held that

the ordinary fraud statutes do not cover bribery and kickbacks—a distinct category of misconduct.

Even worse, the Third Circuit's approach would revive, as *pecuniary* fraud, the prosecutions that this Court in *Skilling* rejected under the honest-services law: those that do *not* involve bribery or kickbacks, but only "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. 358, 409 (2010). Replace "financial" with "political" and that quotation perfectly describes the allegations in this case. And, incredibly, it then resembles a theory of honest-services fraud that *even the United States foreswore* in the companion case to *Skilling*. *See* Br. for the United States at 45, *Weyhrauch v. United States*, No. 08-1196 (U.S. Oct. 29, 2009), 2009 WL 3495337 (arguing that § 1346 "does not embrace allegations that purely political interests may have influenced a public official's performance of his duty"). Under the decision below, such conduct is ordinary property fraud, because "purporting to act" for one reason while subjectively intending to further a different purpose defrauds the state of intangible property interests ancillary to the official's actions.

The Third Circuit's evisceration of this Court's careful limitation of federal corruption laws goes beyond *McNally* and *Skilling*, too, though those are the most obvious victims. In *McDonnell*, this Court ruled that an official commits bribery only by selling an "official act"—an act respecting a "formal exercise of governmental power." 136 S. Ct. at 2370. Merely "arranging a meeting" or "hosting an event" cannot ground a bribery charge, even if it is traded for a gift

or a campaign donation. *Id.* at 2367-68. But, under the decision below, the latter conduct *would* support a *fraud* charge. Take Governor McDonnell himself: In trying to arrange a meeting between state officials and his benefactor's company, the Governor proffered the rationale that the company's nutritional products might be "good for state employees." *Id.* at 2364. Yet a jury could have concluded that his "real reason" for suggesting the meeting was to ensure continuation of a stream of gifts. *See id.* at 2375. That is enough, in the Third Circuit's view, to convict the Governor of "defrauding" the State by conscripting the labor of subordinates through false pretenses. After all, had he admitted his purpose was a selfish, financial one, other state officials would never have gone along.

In short, the decision below conflicts with this Court's precedents on a fundamental, practical level: If the opinion below is correct, then a host of seminal cases constraining the application of federal criminal statutes to political behavior were utterly pointless. Federal prosecutors have all the discretion that *McNally*, *Skilling*, and *McDonnell* held they did not.

B. The decision below also contradicts a key doctrinal principle established by another of this Court's precedents: *Cleveland*, 531 U.S. 12. In that case, this Court explained that governments do not hold "property" interests, within the meaning of the fraud statutes, in their regulatory powers. The Third Circuit, however, completely ignored this rule of law, despite its prominent place in the briefing below. The court recognized property interests in the allocation of traffic lanes and in ancillary uses of public employees' services—flatly contradicting the legal rule established in *Cleveland*.

In *Cleveland*, this Court held that lying to obtain a state license is not fraud, because licenses are not state "property." *Id.* at 15. The Government argued that the scheme 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.

The Third Circuit's decision runs headlong into *Cleveland*. 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 the public roads*. Indeed, this Court held nearly 200 years ago that establishing "toll bridges and common roads" is "an exercise of sovereign power." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 468 (1837); *see also Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (describing "operation" of "bridges" as "essentially a public function"). To the extent that Defendants can be said to have interfered in the Port Authority's decisions, they were therefore *regulatory* decisions, made in the course of its "role as sovereign, not as property holder." *Cleveland*, 531 U.S. at 24. Yet the Third Circuit, echoing the Fifth Circuit decision that *Cleveland* reversed, held that "[t]he Port Authority has 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.

It makes no difference that traffic lanes are tangible property. *Cleveland* would equally bar the use of the wire-fraud statute to prosecute someone for lying to obtain a permit for an event in a public park. The point in both cases is that the government interest is *regulatory* rather than *proprietary*. So too here: In managing the bridge, the Port Authority acts in a public capacity, not a private one.

What about the supposedly "conscripted" services of the public employees? Pet.App.26a. If deceiving a governmental entity into a regulatory decision is not property fraud, then using public resources to *implement* that decision cannot be property fraud either. The latter interest 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 government 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 a regulatory decision induced by deceit (Pet.App.43a), does not mean that anyone was "defrauded" of their services or salaries. Indeed, the State's employees in *Cleveland* were diverted toward processing the falsified license applications, but that was not enough for this Court to conclude that the applicants had defrauded the State of property. The Third Circuit's contrary rule renders *Cleveland* as useless and nugatory as *McNally* and *Skilling*.

The Third Circuit's rule also renders superfluous a host of federal statutes that criminalize lying to the government on specific forms and applications. *See, e.g.*, 18 U.S.C. § 1010 (housing); § 1014 (crop insurance); § 1015 (naturalization); § 1019 (consular

activities); § 1040 (emergency benefits). Any such lie would inherently deprive the government of at least the time spent by public employees reviewing the application. If that is mail- or wire-fraud, then why did Congress enact all of these other statutes?

Finally, the comparison to *Cleveland* again *understates* the magnitude of the Third Circuit's error. In *Cleveland*, applicants lied *to* state officials. This case, by contrast, involves a lie *by* state officials. That makes the "fraud" even more attenuated. To adjust *Cleveland*'s facts, this case is analogous to one in which agents of the Louisiana State Police handed out poker licenses to friends and falsely claimed they were good candidates. That hypothetical falls even more obviously beyond the scope of the federal fraud statutes than the facts of *Cleveland* itself. Baroni was, in the prosecutors' words, a "high-ranking" official at the Port Authority, who "had authority" to act on its behalf. JA.5302. Conceptualizing his concealed purposes as "defrauding" the Authority he represented collapses breach of fiduciary duty into fraud, atop the bad-enough *Cleveland* error.

C. More generally, but no less importantly, the opinion below thumbs its nose at the principles of interpretation that this Court has repeatedly used—and directed lower courts to use—when interpreting broad federal criminal laws like those here. This Court has granted certiorari to correct overbroad constructions of federal crimes in a number of recent cases, even in the absence of a circuit split (which does exist here, *see infra* Part III). *E.g.*, *Bond v. United States*, 134 S. Ct. 2077 (2014); *Yates v. United States*, 135 S. Ct. 1074 (2015). Given the breadth of the decision below, the Court should do so here.

First, citing "significant constitutional concerns," this Court has rejected interpretations that "cast a pall of potential prosecution" over "nearly anything a public official does." *McDonnell*, 136 S. Ct. at 2372. For the reasons already discussed, the decision below yields exactly that consequence. It is the rare public decision that cannot be attacked as driven by hidden political self-interest. As *McDonnell* and *McCormick* show, such an interpretation should be avoided if at all possible—not embraced.

The Third Circuit dismissed these concerns. In responding to a hypothetical about a mayor who orders that city snowplows prioritize clearing wards that voted for her but who claims that this sequence is based on the degree of public need, the court below baldly asserted that the conduct here "is hardly analogous to a situation where a mayor allows political considerations to influence her discretionary allocation of limited government resources." Pet.App.36a. Yet the court failed to explain *why* the situations are "hardly analogous." They are precisely parallel. The toll lanes over the George Washington Bridge are a scarce public resource, and there is no "correct" way to allocate them between the local and Main Line approaches. The allocation is necessarily discretionary in nature. And here, the allocation was allegedly motivated by politics (but defended based on policy). If that is a federal criminal offense, then the hypothetical mayor is equally guilty: She deprived the government of "property" (the snowplow resources as well as her own time) through "fraud" (lying about her real reason for acting), because the municipal employees or city council might have stood in the way of naked partisan favoritism.

Second, emphasizing principles of federalism, this Court has rejected interpretations of federal criminal statutes that would "involve[] the Federal Government in setting standards of … good government for local and state officials." *McNally*, 483 U.S. at 360. Before reaching such a result, Congress must "speak more clearly." *Id.*; *see also Cleveland*, 531 U.S. at 25. Again, however, the Third Circuit's approach produces just that result—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).

Trying to square its decision with these principles, the Third Circuit declared that "[t]his 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 that establish it, not of the federal government. More fundamentally, the fraud statutes mean the same thing in cases against state officials that they mean in cases against officials of interstate agencies, just as they mean the same thing on Tuesdays that they mean on Thursdays. The Third Circuit's *interpretation* of those statutes thus imperils federalism, whatever the nature of the officials involved in this particular case.

Last, 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 decision below violates these principles, criminalizing a staggeringly broad range of conduct while denying fair notice of the legal principles that will be applied in the prosecutions.

The Third Circuit brushed aside these concerns by trumpeting the "serious[ness]" of the criminal conduct alleged in this case and the claim that it "inconvenienced thousands." Pet.App.45a. But even granting the Third Circuit's characterization for the sake of argument, its legal holdings will apply to *all* cases—serious and petty alike. Prosecutors will thus have free rein to pursue the cases they choose, for the reasons they choose. In other words, the decision below *permits* the criminalization and prosecution of routine political conduct, and that permission alone squarely contradicts this Court's cases.

III. THE DECISION BELOW ALSO CONFLICTS WITH OTHER CIRCUITS' DECISIONS.

Finally, the Third Circuit's decision also conflicts on at least two levels with the decisions of its sister courts of appeals.

1. The decision below directly conflicts with two decisions of the Seventh Circuit. In *Blagojevich*, 794 F.3d 729, that court ruled that federal fraud statutes do not codify "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." *Id.* at 736. The court offered a hypothetical to illustrate the consequences of that flawed reading: "if a Governor 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 as a favor, then the Governor has committed wire fraud because the Governor does not actually believe that the appointee is the best person for the job." *Id.* "That's not a plausible understanding" of the statute, the Seventh Circuit flatly declared. *Id.*

Similarly, in *United States v. Thompson*, the Seventh Circuit rejected the "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 spend public money," calling that idea "preposterous." 484 F.3d at 883. For example, if "a governor … throws support (and public funding) behind coal-fired power plants because people fear nuclear power rather than because of a cost-benefit analysis," his action "is not a crime," "*even if the governor privately thinks that nuclear power would be superior*." *Id.* (emphasis added).

The decision below conflicts with these decisions. Contra *Blagojevich*, the Third Circuit would hold that the governor defrauded the State of the salary of the appointee; contra *Thompson*, it would hold that the governor defrauded the State of the funds spent on the coal-fired plant—in both instances because he concealed his "real reason" for the official decision by engaging in spin. That is a reading of the statutes that the Seventh Circuit not only rejected, but deemed "[im]plausible" and "preposterous."

2. Quite apart from the blatant conflict with the Seventh Circuit's rulings, the Third Circuit's opinion also conflicts with the reasoning of two more circuits. The First Circuit has explained that courts may not circumvent *McNally* by so easily recasting an honest-services case as a money-or-property case: "[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." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988).

So too, the Eleventh Circuit has ruled that a "'property interest' [that] is indistinguishable from the intangible right to good government described in *McNally* … cannot sustain [a] mail fraud count," even if reframed in property terms. *United States v. Goodrich*, 871 F.2d 1011, 1013–14 (11th Cir. 1989).

The Third Circuit's decision authorizes what the First and Eleventh have forbidden. In its view, this Court's "honest services case law" carries no weight here, because "Defendants were charged with simple money and property fraud," "not honest services fraud." Pet.App.30a. The upshot of that too-facile reasoning is that, in the Third Circuit—but not elsewhere—prosecutors may secure the results they could not achieve even under the adventuresome theory of honest-services fraud, simply by recasting the case under the (heretofore) more conventional theory of money-or-property fraud. Resolving that split is yet another reason to grant review.

CONCLUSION

This Court should grant the petition.

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