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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government contends that the officials here "obtain[ed]" "property" by fraud, 18 U.S.C. § 1343, because their deceitful reallocation of two toll lanes from one public cohort to another was "materially indistinguishable" from lying to use public resources for a *private* project. But it does not take any deep insight to identify the distinction between these two scenarios—and it is assuredly a material one.

When municipal construction crews renovate the mayor's private home, the mayor diverts their labors from the public and "obtain[s]" them for her private use. That is not an exercise of regulatory power; it is objectively a theft of property, no less than a private employee's embezzlement of funds or office supplies for his personal use. By contrast, when that mayor allocates public property among public uses—*e.g.*, by renovating city hall instead of the courthouse—she has not thereby "obtain[ed]" any "property." She has simply exercised or influenced regulatory power.

Conflating these scenarios, as the Government does, exposes every policy decision at every level of government to second-guessing and sincerity-testing by juries wielding criminal sanctions. If *every* use of public property or labor could give rise to property fraud—even if all public resources are devoted to objectively lawful public ends—then *every* official act, policy decision, and exercise of regulatory power is on the table. The only jury question is whether it was effectuated by deceit, including misrepresentation of an official's subjective purpose. This turns honest-services fraud into a total redundancy. And, given the ease of alleging political insincerity or pretext, it turns every official into a viable target.

The Government admits that is untenable, but engages in two sleights of hand to avoid it. *First*, it claims the defendants lied about the existence of a "real" traffic study, not their subjective motives. But the study *undisputedly occurred*; it was allegedly not "real" only because it was not the "real reason" for realigning the lanes. Pet.App.23a. That still hinges everything on subjective purpose. Anyway, whatever the facts here, the Government's theory necessarily criminalizes concealing one's true subjective purpose to induce an (objectively lawful) policy result.

Second, the Government concedes that an official with "unilateral authority" or "unfettered discretion" over public resources does not obtain that property by lying. Govt.Br.23, 49-50. That does not avoid the practical or doctrinal absurdities either. To start, it still leaves exposed every official who does *not* have absolute power over the ultimate regulatory decision: the Senator who asks the White House to build a military base in his state; the mayor who encourages the city manager to prioritize snow removal for a favored district; the deputy assistant secretary who recommends approval of a public works project. On the Government's view, if any of them relied on false pretenses or concealed their "real reason" as a means of promoting their desired policy outcome, they have "obtained property" by fraud, even if the policy result is otherwise perfectly legitimate.

Moreover, if this record allows a jury to find that Baroni lacked authority to realign the lanes, that finding could be made about *any* official decision. Baroni was the "second highest ranking executive" at the agency, and the executive director testified that no policy requiring his approval for lane allocation

changes was "ever proposed or put in place at the Port Authority." JA.20; Pet.App.136a. Nonetheless, the Government insists the jury was free to infer that unwritten, unspecified "practices" had rendered Baroni's actions unauthorized. This conclusory conception of authority is an empty vessel for a jury's subjective value judgments, not an objective limit on prosecutorial power. By the same logic, a jury could "infer" that the Commerce Secretary did not possess authority to add a citizenship question to the census on the false pretense of civil-rights enforcement.

The Government's proposal—to shield only those officials whom the jury determines held unfettered discretion to take the action—is thus underinclusive, manipulable, and cold comfort to public servants.

The right way to preclude abuse of the federal fraud statutes is instead to adhere to the simple rule this Court adopted in *Cleveland v. United States*, 531 U.S. 12 (2000): that "sovereign power to regulate" is not "property." *Id.* at 23. When public resources are allocated to a *public use*, even as a result of deceit or politics, the state is not deprived of (and the official does not "obtain") property—only regulatory control. Thus, neither that decision nor the incidental costs of implementing it can give rise to a *property* fraud prosecution—only, in the case of a bribe or kickback, to an *honest-services* prosecution. Property fraud charges would lie only if the official "obtained" public property for a truly *private use*, like by filing false expense reports or tricking public workers into fixing his sister's driveway. Unlike the Government's test, this rule is clear, respects the line between property and honest services, and refrains from turning every political act into a potential federal indictment.

It also compels the reversal of these convictions, even without denuding the baseless factual premises upon which the Government has built its argument. Nobody disputes that reallocating two lanes to the main highway, thereby reversing a prior "political deal" (Pet.App.4a), was on its face a perfectly valid use of public resources. If the defendants induced that policy result through deceit, shame on them. But neither that regulatory decision nor any expense associated with its implementation is "property" that they schemed to fraudulently "obtain."

ARGUMENT

In her opening brief, Kelly showed why treating regulatory actions or the cost of implementing them as "property" "obtained" by the involved officials would permit dangerous and intolerable abuse of the fraud statutes. It would require federal prosecutors, juries, and judges to examine the internal workings of state and local political decisionmaking, including the "real reasons" for the decisions reached and the effect of any deceit on the political process. Honest-services fraud would be superfluous, as the integrity of every official act would implicate property fraud. Due-process and federalism concerns are patent.

In response, the Government embraces the Third Circuit's expansive definition of property, but insists it "creates no concern about chilling routine official or political activity." Govt.Br.48. When an official holds "unilateral authority" over the public resource, she does not deprive the state of its property, even if she lies in exercising that authority. Govt.Br.49-50. That dispenses with every difficult hypothetical, the Government maintains, yet supposedly (as a factual matter) does not require reversal here.

Below, Part I explains why the Government's rule—really just a semantic game—does not solve the problem. Part II then explains how *Cleveland*, by distinguishing property from regulatory power, takes property fraud off the table unless the official truly "obtained" public property by lying to divert it to a *private use* (as opposed to a *public use* motivated by *bad reasons*). That rule, unlike the Government's, comports with the statute and avoids the dangers of the decision below. It also plainly compels reversal.

I. THE GOVERNMENT DOES NOT OFFER A VIABLE LIMITING PRINCIPLE

The Government admits that the fraud statutes cannot be construed in a way that leaves "routine political conduct" in the crosshairs. Govt.Br.47. But instead of tailoring the definition of property—as the Court did in *Cleveland* and *McNally v. United States*, 483 U.S. 350 (1987)—the Government relies on the point that a public official who acts within the scope of his "authority" does not obtain state property by making unfaithful or deceitful decisions. Govt.Br.49. That is true as far as it goes, and any fair application of that principle to this record would itself lead to reversal. Kelly.Br.44-48. But it is not a solution to the larger problem. Many public officials do not have "unilateral" or "unfettered" power, yet still play a material role in political decisionmaking. Under the Government's test, they put their fate in a jury's hands whenever they do their jobs. Further, the Government's conception of "authority," exemplified by its arguments for affirmance in this case, is so loose and manipulable as to be worthless in practice. No official would feel safe under this test—and no prosecutor would feel constrained by it.

A. Consider the application of the Government's broad definition of "property" (Govt.Br.31-32) to the following hypotheticals, in each of which the official "lacked the authority" to "unilaterally" effectuate his desired policy outcome (Govt.Br.30-31):

- A legislator calls an agency director, urging a particular action because it "would be best for my district." In reality, his reason is that it would be best for a major political ally.
- A police chief tells the mayor the city needs to hire more officers due to an anticipated crime wave. Actually, the only thing that he anticipates is currying favor with the union.
- A cabinet secretary advises the governor to approve a nuclear power plant, ostensibly to improve energy security but in truth because the plant owner is an old college buddy.
- A city hall aide working on a plan for a new waste-treatment facility reports that siting it on the south side would be best. It is not a coincidence that he lives on the north side.

In each example, every element identified by the Government is satisfied: The official was dishonest (Govt.Br.29); his statements were material, or at least a jury could so find (Govt.Br.30); the lie was the "means" of effectuating the desired result, in that the official "lacked the authority" to implement it alone or by telling the truth (Govt.Br.30-31); and the policy affected real property or public labor (Govt.Br.31-32). Each of the hypotheticals, in the Government's view, is "precisely the same" as diverting public resources to *private* use—even though each outcome is entirely legitimate as an objective matter. *Id.*

At best, the Government's rule thus merely shifts prosecutors' scrutiny to *subordinate* officials, while shielding those at the top. That makes little sense. And it still casts a pall over routine political conduct.

It also still swallows honest-services fraud. Under *McDonnell v. United States*, a public official commits bribery—and thus honest-services fraud—by "provid[ing] advice" to, or "exert[ing] pressure" on, another official in exchange for something of value. 136 S. Ct. 2355, 2370 (2016). On the Government's view, however, the official has already committed *property* fraud: He concealed the bribe from the other official, and by doing so induced a policy action that he could not have effectuated without deceit.

Worse, the Government's theory eviscerates this Court's *limits* on honest-services fraud. *See Skilling v. United States*, 561 U.S. 358 (2010). If an official misrepresents his advice as the product of sincere policy beliefs rather than ulterior political motives, no bribe or kickback would be needed to prosecute him; that would be property fraud. So *McNally* and *Skilling* alike are still both out the window.

B. Even looking to ultimate decisionmakers, the Government's elucidation of what it means to have "unilateral authority" also exposes its rule as a mere semantic trick. By insisting that the jury could find that Baroni lacked authority, the Government shows how easily any prosecutor could evade this "limit" and how little protection it offers against overzeal and abuse. There is no real "factual" dispute here (Govt.Br.24); as the court below correctly noted, the facts are "not materially in dispute." Pet.App.3a n.1. Rather, the Government is smuggling its overbroad legal position into the vague term "authority."

After all, under any normal understanding of the term "authority," Baroni had it. The Government's own statements and evidence make that clear. The indictment described Baroni as the "second highest ranking executive" at the agency, "responsible for the general supervision of all aspects of [its] business." JA.20-21. In its opening statement, the Government declared that Baroni "had the power to operate the George Washington Bridge." JA.68. At trial, in an effort to show that Baroni had lied to the New Jersey legislature by promising a new policy requiring the executive director to approve any realignments, the Government elicited undisputed testimony that such a policy was not "*ever* proposed or put in place at the Port Authority." Pet.App.136a (emphasis added). In closing, the prosecutors reaffirmed that Baroni was a "high-ranking" officer who "had authority," including to "move the cones." JA.885. The Government *never* argued—much less proved—that Baroni exceeded his authority under any Port Authority rule or policy by ordering the realignment. Its claim was instead that he "abused the power" he had been "trusted with," by deploying it for political ends rather than in "the best interest of the people of New Jersey." JA.886. Even now, the Government admits Baroni did not violate any policies "reduced to writing." Govt.Br.52.

On this record, the defendants clearly prevail even on the Government's test. Arguing otherwise, the Government waters down the "authority" concept to the point of being a mere label, not a meaningful protection for legitimate official decisions. Consider the evidence that the Government says would allow a jury finding that Baroni lacked authority; it would support such a finding in *any* case.

First, the Government argues that the fact of the lie—the defendants' "own understanding that they needed to concoct the traffic-study story"—"by itself supports the rational inference" that Baroni lacked authority to order the reallocation alone. Govt.Br.38. In other words, when an official lies, a jury can infer that he lacked authority. If that "by itself" is enough to indict and convict, then the Government's test does nothing to defuse the untenable consequences of the decision below. A jury could equally infer that when a mayor lies about the basis for her snowplow sequence, or when a governor lies about his rationale for appointing a friend to a public post, or when the Secretary of Homeland Security conceals her "real reason" for rescinding DACA—and so forth—the lie itself proves the official's "own understanding" that he lacked authority. And if so, we are back where we started: The fate of every official lies in the hands of a jury tasked with scrutinizing her political spin and distinguishing true purposes from pretexts.

Second, the Government observes that, under the Port Authority's bylaws, all power is vested in its executive director. Govt.Br.39. And under Article II, all "executive Power" is vested in the "President." U.S. CONST., art. II, § 1. That does not mean every subordinate official in the executive branch lacks "authority" to act without presidential sign-off. All it means is that subordinate officials might be reversed by superiors. The Third Circuit believed that Baroni thus lacked "unencumbered authority." Pet.App.18a. But that reasoning would equally apply to virtually *every* official in a system, like ours, of divided power and checks-and-balances. Kelly.Br.24-26. It is not a meaningful limiting principle.

Third, the Government says the jury could infer from trial testimony that Baroni contravened some "unwritten" policy by realigning the lanes "as he did," even if he was empowered to realign the lanes "in *some* circumstances." Govt.Br.36, 38, 40. Never specified is the *substance* of this supposedly violated unwritten policy.[1] Perhaps it is the one, articulated by the executive director at trial, that Port Authority officials must always "act in the best interests of the citizens." JA.140. At some level, of course, every official carries that obligation—and every politicized decision could thus be called unauthorized by a jury. The Government's rule then again becomes a vehicle for enforcing the vague fiduciary duties that *McNally* and *Skilling* ruled were beyond the statutory scope.

Finally, the Government tries to flip the burden of proof, arguing that if the agency's "practices in fact allowed someone in Baroni's position to reduce the number of local access lanes without a traffic study, some indication of that … would have been presented." Govt.Br.39-40. The jury, that is, can infer lack of authority from the (predictable) *absence* of evidence memorializing the official's unfettered discretion to act precisely "as he did."

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[1] Wildstein, for example, testified that he "did not follow" a "process of approvals" for use of resources (JA.255)—without identifying what that process was, whence it came, whether the defendants knew of it, or how it related to his false statement about wanting to study traffic patterns. The other excerpts are even less impressive: The executive director could not recall other traffic-causing operations he was not told of in advance. JA.152. And one Port Authority commissioner testified that the agency's "dysfunctional" dual-command structure was to blame for the (in his "opinion") "unauthorized" realignment. JA.723.

In sum, the "evidence" that the realignment was unauthorized—the false pretenses, the *existence* of superiors, the alleged deviation from "the public interest," and the absence of a clear authorization for the precise act under all the precise circumstances—does not distinguish this case from any other, and so does not prevent the Third Circuit's rationale from wreaking havoc in the future. If the jury could infer a lack of authority on this record, then any jury could draw that same inference about any official act that is alleged to have been deceitful or not in the public interest.[2] Honest-services fraud (and its boundaries) would become academic, and every official decision would fall within prosecutorial grasp.

C. For these reasons, hinging fraud liability on a lack of "unilateral authority" does not meaningfully limit the consequences of the decision below. If any official decision that involves or requires the use of public resources qualifies as "property," prosecutors can readily indict anyone who makes or induces such a decision by deceit. And, importantly, that includes deception about the official's *subjective motives*.

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[2] Actually, the jury here was never even *asked* to render a finding about Baroni's authority; the Government's argument is based on a fiction. The defendants asked for an instruction that, if Baroni "acted within the bounds of [his] power or authority," there was no fraud. Pet.App.18a n.5. The trial court refused to give it. The Third Circuit reasoned that this point was implied by the instruction that fraud requires a deprivation of money or property. Pet.App.19a-20a. But that is far too subtle for a lay jury to appreciate without instruction. Thus, if the Government is correct that an official's "authority" is what defines the line between lawful and fraudulent official decisions, a new trial is the minimum required relief. *McDonnell*, 136 S. Ct. at 2372.

The Government strenuously denies that it is a crime to hide a political motive or to cite an insincere policy rationale. Govt.Br.47. But it never explains *why*. And the Government's theory of property leads inevitably to that result. An official who claims to be motivated by neutral policy factors because her decision or advice would be rejected if she admitted to acting for political gain has lied "to divert [state] money, employee time, or other resources toward an otherwise unachievable end," which the Government defines as property fraud. Govt.Br.28. To be sure, motive is not an offense element, and so the jury was not instructed to find it (Govt.Br.34)—but lying about one's motive can satisfy the *deceit* element.

Indeed, that was undeniably the theory of guilt *in this case*. Wildstein's underlying lie to the agency bureaucrats was that he wanted to realign the lanes "to see what the impact on the traffic would be." JA.280; *see also* JA.302 ("I said that ... I wanted to see what the effect was of taking away two of the three Fort Lee lanes"); JA.306 ("I told Mr. Fulton that we, meaning the New Jersey side, wanted to see the impact on taking those lanes away"). To that end, Wildstein instructed engineers to "track" data on the resulting traffic. JA.305. They did so. JA.29. But evaluating traffic was not the "real reason" for the realignment. JA.281, 302. The "true" "purpose," per the indictment, was "punitive." JA.26, 29. As the jury instructions put it, the "false" representation was that the realignment "was for the *purpose* of a traffic study." JA.854 (emphasis added). The deceit that supposedly rendered the realignment fraudulent thus concerned the defendants' subjective "purpose": Was it really to study traffic, or to punish Fort Lee?

This is certainly how the court below understood the convictions. The Third Circuit reasoned that Wildstein committed fraud by claiming "he wanted to study traffic patterns and see the effect of taking two lanes away from Fort Lee," because that was "not the real reason" for his ordering the lane realignment. Pet.App.23a. And the court repeatedly described the defendants' lie as concerning their "purpose" or "true purpose" for the realignment. Pet.App.7a, 44a.

Desperate to avoid criminalizing insincere spin, the Government now pretends the conspirators' lie was about the objective existence of a "traffic study." Govt.Br.33-34. That cannot withstand even cursory scrutiny. Wildstein told bureaucrats that *he* wanted to see the impact of realigning the lanes, and asked *them* to "track" data for that end. Pet.App.8a, 23a; JA.280, 302-06; Govt.Br.12-13. And there clearly was a resulting study. Indeed, it consumed 38 hours of engineer time—the very "property" he supposedly obtained by fraud. *See* Pet.App.24a-25a; Pet.App.56a ("the traffic study was conducted with the help of several well-paid Port Authority engineers"). So the only thing that Wildstein could conceivably have misrepresented was, as the Court of Appeals agreed, his "real reason" for wanting to alter the lane allocation. Pet.App.23a.[3]

[3] The Government also homes in on Wildstein's "additional lie" that the executive director knew of the realignment plan. Govt.Br.30; *see also* Pet.App.8a-9a. That lie was not the basis for the convictions. It was not even *alleged* in the indictment, which instead defined the misrepresentation as the claim that the realignment was "for the *purpose* of a traffic study." JA.54 (emphasis added). Moreover, there was no evidence that Kelly or Baroni even *knew* about this distinct lie by Wildstein.

Even the Government grudgingly confesses there was a "study" of sorts conducted. *See* Govt.Br.41-42. Continuing with wordgames, however, it maintains the study was a "pointless" "sham," not a "legitimate" "actual" study. *Id.* The jury instructions similarly asked for a determination of whether the study was "legitimate." JA.863-64. But that turns entirely on subjective motives—whether the officials were truly interested in the study. After all, there is no dispute that the employees did as Wildstein ordered: realign the lanes and record traffic data. The employees who did so obviously knew he was not representing the existence of a "computer model[ed]" study that would avoid "the need to realign traffic patterns." Govt.Br.41. In the end, the defendants' convictions rise and fall based on their sincerity, if one accepts the Government's account of "obtaining property."[4]

This is a true nightmare scenario: officials being imprisoned when juries conclude, *ex post*, that they lied about serving the public interest. Even the honest-services doctrine, in its pre-*McNally* heyday, never reached this far. Yet the Government fails to explain why its theory of "obtaining property" does not open this Pandora's box, and defends convictions that cannot be justified on any other basis.

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[4] In her opening brief, Kelly urged the Court to hold that lies about an official's motives cannot give rise to fraud charges. *See* Kelly.Br.49-53. The Government ignores that independent argument. If the Court agrees with it, the convictions must be reversed, because (as explained) they are premised on a lie about the "real reason" for the realignment. Pet.App.23a. If the Court rejects that argument, that only heightens the need to sensibly construe the statutory concept of obtaining property, lest every incident of political spin give rise to a federal felony.

D. Finally, it is worth observing what *cannot* be found in the Government's brief: any mention of the canons of construction. The Government never tries to reconcile its approach with the principles that guided this Court in prior encounters with the fraud statutes. Its brief never uses the words "federalism," "due process," or "lenity."

For reasons explained above, the Government's test would "significantly chang[e] the federal-state balance," *Cleveland*, 531 U.S. at 25, by inserting federal prosecutors and juries into every state and local political decision and probing the "authority" of the decisionmakers to act "as they did." It would also cast "a pall of potential prosecution" over "nearly anything a public official does," *McDonnell*, 136 S. Ct. at 2372, by recognizing a property interest in every official act that implicates public property or public employees (*i.e.*, all of them). And, while the Government's sole amicus believes it is best to allow the jury "to know corruption when it sees it" (Senator Whitehouse Am. Br. 29), the Constitution requires "fair notice of what sort of conduct may give rise to punishment," *McNally*, 483 U.S. at 375. Certainty is not a feature of the test the Government advances.

* * *

The Government acknowledges, as it must, that the fraud statutes cannot be construed to criminalize "routine politics." Govt.Br.47. But the construction it offers would do just that, as this case exemplifies. If these defendants can be imprisoned for concealing their "true ... purpose" for reallocating two toll lanes from one public highway to another (JA.26), then property fraud is indeed the all-encompassing good-government code that *McNally* held it was not.

II. AN OFFICIAL DOES NOT "OBTAIN PROPERTY" BY MAKING OR INDUCING A REGULATORY DECISION

The proper way to reconcile property fraud with honest-services fraud, and to avoid casting a pall of prosecution over every policy decision, is to adhere to *Cleveland*'s core insight: that regulatory power is not "property" within the meaning of the fraud statutes. Efforts to affect regulatory actions, even if deceitful, are therefore not schemes to "obtain property." They may be schemes to deprive the public of the official's *honest services*, if motivated by bribes or kickbacks. But those private financial gains are the sole ulterior motives for official action that can give rise to federal fraud. Property fraud, meanwhile, occurs only when an official schemes to "obtain" public resources for a truly *private* use. Because the defendants' "scheme" here was to influence the allocation of lanes between two public cohorts—a classic regulatory choice—they did not scheme to "obtain property." Nor are they guilty of honest-services fraud, for they were not influenced by bribes or kickbacks. The convictions accordingly must be reversed.

A. This Court held in *Cleveland* that procuring a state license through deceit is not property fraud, because the state's "core concern" regarding licensing is "*regulatory*." 531 U.S. at 20, 22. In deciding whom to license, the state is exercising its "police powers" and furthering its "regulatory interests." *Id.* at 21. When an applicant lies to obtain a license, he is thus depriving the state, not of *property*, but rather of the state's "intangible rights of allocation, exclusion, and control," which "amount to no more and no less than [the state's] sovereign power to regulate." *Id.* at 23. And that falls beyond the scope of the fraud laws.

Here, the object of the defendants' "scheme" was "to realign the lanes." Pet.App.19a. Allocating lanes and aligning traffic patterns over a public bridge is a quintessential "*regulatory*" matter, involving exercise of "police powers" to advance "regulatory interests." *Cleveland*, 531 U.S. at 20-21; *see also* Kelly.Br.38-39. Indeed, the Port Authority's then-executive director testified that the agency's decisions are driven by its "responsibility to the general public" and "the best interests of the citizens." JA.140. That is to say, by its "role as sovereign." *Cleveland*, 531 U.S. at 24.

The Government offers only a single sentence in response to this critical point: "The right to control the George Washington Bridge ... is not a regulatory interest, but instead an interest in real property...." Govt.Br.46. That is a false dichotomy. Of course the bridge is "real property." But when a state operates such real property for the benefit of the public, its choices about how to manage the property and divide its use among members of the public are *regulatory* choices, no less than choices about whom to license to operate video-poker machines.

An example will illuminate. Public parks are real property owned and operated by governmental entities, but "have immemorially been held in trust for the use of the public." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Surely when a parks commissioner advises the city council to open the park past 7 PM, or to build a public tennis court, or to ban vehicles on its grounds, those are regulatory judgments implicating the city's role as sovereign. Accordingly, the commissioner cannot be accused of fraudulently obtaining property if he uses deceit to induce those facially legitimate decisions.

So too here. The defendants' acts did not affect the Port Authority's exclusive title to the bridge; they influenced how the agency allocated use of the bridge among segments of the public. And that implicated the "intangible rights of allocation, exclusion, and control" that, per *Cleveland*, "amount to no more and no less than [the] sovereign power to regulate." 531 U.S. at 23. In effect, the lane realignment "licensed" main-line drivers to access the two lanes in question, while stripping Fort Lee drivers of their "license" to do so. *Cleveland* thus establishes that any deception employed to effectuate the lane realignment did not target, much less obtain, "property."

B. Apart from the regulatory interest in the use of the lanes themselves, the Government invokes the "time and labor" of the Port Authority workers who implemented the realignment. Govt.Br.31, 45.

But if an official does not "obtain property" by inducing the regulatory decision itself, she also does not "obtain" its *implementation* costs. The latter are purely derivative; if the decision is objectively lawful then so too is deploying public employees to execute it. Yet the Government simply ignores Kelly's point that the costs of implementing a regulatory decision are inherently *incidental* to any scheme to effectuate that decision. And schemes that "incidentally" cause monetary losses, as a "byproduct" rather than by design, "do not satisfy the statutory requirement." *United States v. Walters*, 997 F.2d 1219, 1225, 1227 (7th Cir. 1993). Obtaining property must be "the object" of the scheme, *Pasquantino v. United States*, 544 U.S. 349, 355 (2005), meaning "the goal of the plot," *United States v. Regan*, 713 F. Supp. 629, 637 (S.D.N.Y. 1989); *see also* Kelly.Br.40-43.

If the rule were otherwise, *Cleveland* would be a dead letter, as every regulatory decision (including the licensing determination in that case) requires at least some public employee labor. Those incidental, ancillary expenses are irrelevant, because the public official is not "obtaining" them, and obtaining them is certainly not the object of the scheme. They do not transform a *deceitful* scheme to induce a *regulatory* action into a *fraudulent* scheme to obtain *property*.

Here, the Government points to the $3,696 that the Port Authority paid relief tollkeepers to serve the remaining special-access lane. Govt.Br.31. While the jury could have found that the defendants *knew* about this expense, they did not "obtain" it; it was obviously incidental. As the court below recounted, a civil servant recommended hiring extra tollkeepers so the remaining Fort Lee lane would not shut down entirely if its tollkeeper needed a break, and the defendants agreed. Pet.App.9a. This marginal labor expense was thus, at most, the *byproduct* of a scheme designed to influence the Port Authority's exercise of its "intangible rights of allocation, exclusion, and control." *Cleveland*, 531 U.S. at 23.

C. For these reasons, the contradiction that the Government claims to identify in Kelly's position is imagined. Govt.Br.31, 45. When an official directs public employees to work on private projects (like renovating the official's home, or doing work for the official's side business), that "obtains" the employees' services—a property crime. And if the official *lies* to obtain the property (*e.g.*, by having a state-employed chauffeur drive him to a personal engagement on the false pretense that it is an official gathering), that is property fraud. But that is because diverting public

labor to *private* use is not a "regulatory" choice, and the object of the scheme is precisely to "obtain" the public employees' labors for a non-public use. Their work is not incidental to any objectively legitimate policy decision, and the state has lost more than just regulatory control; it has lost the use of the property for the benefit of the public altogether.

This dichotomy is well-explained in *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003). An official "who tells sanitation and snow removal employees to ensure that the mayor's neighborhood is cleaned up early and often" has committed only a "political sin," not a crime. *Id.* at 759. Yet an official who directs staff to attend political rallies does violate the law. *See id.* at 758-59. Why? Because cleaning up snow and garbage is an objectively legitimate public use of public labor, even if that use is dictated by political factors. Meanwhile, attending rallies or distributing campaign literature is "*not* the performance of a garbage collector's official duties." *Id.* Paying him for that work thus crosses the line from a (politically motivated) public use to a clearly non-public use.

Here, no resources were devoted to private use. The realigned lanes were used by public drivers on the main line. The tollkeepers collected tolls on the public's behalf. The engineers compiled data on the traffic effects of the reallocation, for whatever value it might have. Baroni and Kelly certainly obtained no money or property of any kind. To characterize this as property fraud is to erase the line between private and public, and instead treat *every* sovereign decision as "obtaining property." That is practically and doctrinally disastrous, and it flouts every canon of construction.

D. To tie this all up, indulge this final trio of pothole hypotheticals.

In the first, a mayoral aide calls a senior civil servant and urges that a street be repaved, falsely claiming it is in the worst disrepair in the city. In reality, it happens to be a street on which a political ally lives; that is the real reason for his ask. In the second case, the aide presses the same request with the same false reason, this time because a business owner on the street has paid him a bribe. Finally, in the third scenario, the street is in fact a private alley owned by the aide's uncle, but he tricks the officials into thinking it is a public thoroughfare.

Applying the Government's theory, the aide has committed property fraud in all three cases: In each, he has lied (about the street's status and condition) to induce an allocation of valuable public resources (paving services) that he lacks unilateral authority to order on his own and without lying (as inferred from his apparent need to lie to the civil servant).

That is clearly wrong. In the first case, the city lost no "property" by repaving a public street and the aide "obtained" none; the city only lost regulatory control over which streets to pave in which order. The aide was dishonest and did not advance the best interests of the city—but that is not property fraud. It is just political abuse (and a brewing scandal).

In the second case too, the city has not lost any "property," for the public has benefited by the repair. But the acceptance of the bribe deprived the public of its right to the aide's "honest services." He could be prosecuted under § 1346 as construed by *Skilling*, but not under § 1343 as construed by *McNally*.

Only in the third case, where the aide's deception caused city services to be diverted to an objectively *private* use, can he fairly be said to have "obtained" municipal "property" by fraud. That would therefore be prosecutable as property fraud.

As this set of hypotheticals reveals, only Kelly's conception of "property" makes sense of the caselaw, keeps honest-services fraud and property fraud in their own (separate) lanes, and avoids turning every objectively legitimate public-policy decision into open season for federal prosecutors to probe the political process and to psychoanalyze state and local officials. This Court should reaffirm that regulatory power is not property, and reverse the convictions below.

CONCLUSION

This Court should reverse the judgment below.

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