COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:	:	
	:	**No. 6 JD 15**
MICHAEL LOWRY	:	
FORMER JUDGE	:	
PHILADELPHIA TRAFFIC COURT	:	
PHILADELPHIA COUNTY	:	

RESPONDENT'S MOTION FOR DEFER HEARING

Respondent Michael Lowry, by and through his counsel, Meredith A. Lowry, respectfully requests this Honorable Court to defer discipline and sanction hearings in this matter for the following reasons:

1. On January 29, 2013, Former Traffic Court Judge Michael Lowry and several traffic court judges, a magisterial district court judge, and others were charged with several counts of federal mail and wire fraud. Mr. Lowry was also charged with making a false declaration before the grand jury under 18 U.S.C. 1623 (hereinafter "perjury") in connection with allegations of ticket fixing.

2. The Pennsylvania Supreme Court initially suspended Lowry without pay on February 1, 2013.

3. This Court ordered Mr. Lowry to be suspended **with pay** on October 25, 2013 based on the "serious uncertainty" that Mr. Lowry would be convicted of the charges. *See In re Lowry*, 78 A.3d 1276, 1287 (Ct. Jud. Disc. 2013). The opinion analyzes the merits of the defendants' argument in a pretrial motion that the indictment failed to allege a cognizable fraud theory. The defendants argued, and this Court agreed, that the city and state have no property interest in unadjudicated traffic tickets based on United States Supreme Court precedent. *See id.* at 1285.

4. After a 28-day criminal trial, Mr. Lowry was acquitted of the wire fraud and mail fraud charges, but he was convicted of perjury.

5. Mr. Lowry and his co-appellants appealed their judgments to the Third Circuit Court of Appeals. Their convictions were affirmed on January 18, 2019. *See United States v. Hird*, 913 F.3d 332 (3d Cir. 2019).

6. Mr. Lowry, along with his co-Petitioners, filed a Petition for Writ of Certiorari relating specifically to their perjury convictions. *See* Exhibit A, *Lowry v. United States*, No. 18-1581.

7. Simultaneously, Henry Alfano and William Hird[1] also filed a Petition for Writ of Certiorari, arguing that the defendants were not properly charged with fraud because unadjudicated traffic tickets are not property under the mail and wire fraud statutes. *See* Exhibit B, *Alfano et al. v. United States*, No. 18-1552.[2] Alfano's petition sets forth the same argument that this Court found meritorious in its opinion in *In re Lowry*, 78 A.3d 1276, 1287 (Ct. Jud. Disc. 2013).

8. Mr. Lowry and his co-petitioners filed a brief in support of Alfano's Petition on July 19, 2019. *See* Exhibit C. Although Mr. Lowry was acquitted of the fraud counts, his co-petitioners and he have consistently argued that the predominance of the fraud charges in the trial that lasted more than a month, prejudiced the jury's ability to apply the rules of law to the perjury counts. The Third Circuit Court of Appeals did not reach this "prejudicial spillover" argument, because it rejected on the merits appellants' fraud arguments.

---

[1] Alfano and Hird were charged in the same indictment as Mr. Lowry and his co-petitioners but pled guilty to mail and wire fraud counts before the trial.

[2] Mr. Lowry also joined his co-defendant's pretrial motion to dismiss setting forth this argument.

9. The United States Supreme Court denied both certiorari petitions described above on December 9, 2019.

10. However, on June 29, 2018, the United States Supreme Court granted the Petition for Writ of Certiorari in *Kelly v. United States*, No. 18-1059 ("Bridgegate"), which was filed from the Third Circuit Court of Appeals. The Court heard oral argument on the merits on January 14, 2020. Petitioner's Brief is attached as "Exhibit D."

11. The issue before the Supreme Court in *Kelly* is whether the government properly alleged a property right. For example, Ms. Kelly argues that the Port Authority's "right to control" the traffic lanes used to conduct the purported traffic study is a regulatory scheme, not a property right. Likewise, Mr. Lowry and his co-petitioners have consistently argued that the city and state's right to regulate drivers in Pennsylvania is not a property right under the wire and mail fraud statutes.

12. If the Court rules in favor of Ms. Kelly, Mr. Lowry will seek to vacate his perjury conviction in the district court.[3]

13. Accordingly, Mr. Lowry requests this Court to defer litigation in this case until the Supreme Court issues a decision in *Kelly v. United States*, No. 18-1059.

14. While there is a presumption that a "prompt disposition" of the case "is in the best interests of the judicial system", circumstances exist here that overcome this presumption.

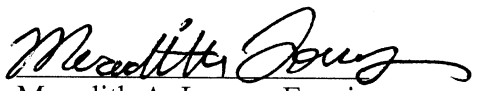
[3] Although habeas corpus relief is only available to incarcerated individuals, the Third Circuit recognizes coram nobis relief. In *United States v. Panarella*, 2011 WL 3273599 (E.D. Pa. Aug. 1, 2011), the court vacated the petitioner's honest services fraud convictions following the Supreme Court's decision in *Skilling v. United States* because the petitioner's conviction was based on an invalid theory according to the *Skilling* decision.

15. Mr. Lowry is no longer a judge, the Philadelphia Traffic Court has been abolished, and he will not seek judicial or public office again. Therefore, neither the Judicial Conduct Board nor the public will be prejudiced by a further deferral.

16. Given Mr. Lowry's potential ability to have his conviction vacated in the near future, he will be substantially prejudiced if his discipline and sanction impacts his pension prior to the United States Supreme Court issuing a decision in *Kelly v. United States*.

WHEREFORE, the Respondent, Michael Lowry, respectfully requests the Court to defer hearings on discipline and sanctions until the United States Supreme Court issues a decision in *Kelly v. United States*, No. 18-1059.

Respectfully submitted,



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Date: January 29, 2020

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:	:	
	:	**No. 6 JD 15**
MICHAEL LOWRY	:	
FORMER JUDGE	:	
PHILADELPHIA TRAFFIC COURT	:	
PHILADELPHIA COUNTY	:	

CERTIFICATE OF SERVICE

I, Meredith A. Lowry, hereby certify that on January 29, 2020, I caused a true and correct copy of Respondent's Motion to Defer to be served upon the following:

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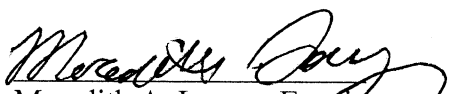
Respectfully submitted,



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Date: January 29, 2020

EXHIBIT A

No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL LOWRY, ROBERT MULGREW
and THOMASINE TYNES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Bronston v. United States*, 409 U.S. 352 (1973), this Court declared that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner ...." The Court further emphasized that "[p]recise questioning is imperative as a predicate for the offense of perjury." In this light:

Can responses to fundamentally ambiguous questions – or literally truthful answers to unambiguous questions – constitute "false declarations" before a federal grand jury under 18 U.S.C. § 1623, on the basis that (a) forbidden imprecision in questioning is limited to "glaring instances of vagueness or doublespeak ... that ... would mislead or confuse a witness"; or that (b) the grand jury witnesses should have understood from the "thrust" of the line of questions that the prosecutors meant something other than what they actually asked?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioners and respondent United States). Co-defendants Henry Alfano and William Hird are filing a separate petition, which is related to the instant petition as explained under Point 2. There were other co-defendants at trial; those individuals either were acquitted or have not joined in the petitioners' appeal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Michael Lowry, Robert Mulgrew, and Thomasine Tynes jointly petition this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Third Circuit affirming their convictions and sentences for making false statements before a federal grand jury.

OPINIONS BELOW

The Third Circuit's precedential opinion (per Nygaard, J., with Greenaway & Fisher, JJ.), filed January 18, 2019, is Appendix A. It is published at 913 F.3d 332, *sub nom. United States v. Hird.* The United States District Court for the Eastern District of Pennsylvania (Kelly, J.) wrote a memorandum opinion, filed July 1, 2013, *sub nom. United States v. Sullivan,* addressing petitioners' pretrial motion to dismiss the mail and wire fraud counts (of which they were acquitted at trial). That opinion is not published in the Federal Supplement but is available at 2013 WL 3305217; a copy is Appx. B. The District Court (Stengel, J.) also wrote an unpublished memorandum opinion on the denial of post-trial motions, filed November 6, 2014, and available at 2014 WL 5795575. Appx. C. The orders granting in part petitioner Mulgrew's and Tynes's petitions for rehearing of the Court of Appeals' initial (since withdrawn) opinion (901 F.3d 196), filed concurrently with the amended opinion, are available at 913 F.3d 392 and 913 F.3d 393, respectively.

JURISDICTION

On January 18, 2019, the United States Court of Appeals for the Third Circuit filed its amended opinion and judgment affirming the petitioners' convictions. Appx. A. This opinion superseded an earlier-filed opinion, *see* 901 F.3d 196 (August 21, 2018, since withdrawn), and followed the granting, in part, of petitions for rehearing by these petitioners. On February 7, 2019, the Court of Appeals denied motions for leave to file further rehearing petitions. As a result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari by any of the petitioners was initially due on or before April 18, 2019. By order dated April 11, 2019, under Dkt. 18A1048, Justice Alito extended the time for filing a petition for a writ of certiorari until May 18, 2019, and then, by Order dated May 13, 2019, further extended the time to June 17, 2019. This petition is timely filed on or before that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTES INVOLVED

Title 18, U.S. Code, provides, in pertinent part:

§ 1623. False Declarations Before Grand Jury or Court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any

book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

* * * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT OF THE CASE

Petitioners Michael Lowry, Robert Mulgrew and Thomasine Tynes were elected, non-lawyer judges of the Philadelphia Traffic Court. A federal grand jury indicted them for devising and executing scheme to defraud the City and State of revenues in the form of fines and penalties that would allegedly have become due upon a proper adjudication of alleged traffic offenses.[1] The government's theory was that the

[1] Petitioners filed or joined in pretrial motions to dismiss these charges as failing to state a cognizable theory of "property"-based mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1349. The pretrial motions were denied. Appx. B. Co-defendants Henry Alfano and William Hird pleaded guilty to the fraud charges under an agreement allowing them to preserve those issues for appeal, which was unsuccessful. Appx. A. Their separate petition for certiorari is being filed contemporaneously with this one. *See* Point 3 of the Reasons for Granting in this Petition, *post*.

judges of Traffic Court systematically gave special "consideration" to favored litigants in their court. (There was no accusation, however, nor any evidence, that any of them took bribes or otherwise profited from this supposed "scheme.") After a lengthy trial at which the particulars of numerous alleged traffic violations were examined, and at which the evidence showed that the judges had wide discretion to show leniency to accused drivers without strict regard for legal rules, the petit jury acquitted the petitioners and their co-defendants of all such charges.

At the same time, the jury convicted each of the petitioners of one or more instances of alleged false declarations before the grand jury in violation of 18 U.S.C. § 1623, a kind of perjury. In particular, petitioner Lowry was alleged to have responded falsely to a single question:

> Q. So if I understand your testimony, you're saying you don't give out special favors; is that right?
>
> * * *
>
> A. No, I treat everybody in that courtroom the same.

Appx. 31a. Like Lowry, petitioner Mulgrew was convicted on one count, based on his responses to two questions alleged to be part of a single inquiry:

> Q. How about your personal, has your personal received any calls like that from other judges, other ward leaders that she's conveyed to you, saying so-and-so has called about this case?
>
> A. If she did, she didn't convey them to me.
>
> * * * *
>
> Q. Let me make sure as well that if I got your

testimony correct [sic]. You're saying that if other people, whether they be political leaders, friends and family, anybody is approaching your personal and asking her specifically to look out for a case, see what she can do in a case, give preferential treatment, however you want to phrase it, that she is not relaying any of that information on to you; is that correct?

A. No, she isn't.

Appx. 37a.[2]

Finally, petitioner Tynes was indicted and convicted on two separate counts of perjury. The first alleged that she answered falsely as follows:

Q. In all the years you've been [at Traffic Court] have you ever been asked to give favorable treatment on a case to anybody?

A. No, not favorable treatment. People basically know me. The lawyers know me. The court officers know me. I have been called a no-nonsense person because I'm just not that way. I take my position seriously, and the cards fall where they may.

Appx. 25a. The second count was based on a separate and later exchange:

Q. You've never taken action on a request?

A. No.

Appx. 26a. Each petitioner was sentenced to a term of imprisonment, all of which have been fully served.

---

[2] A judge's "personal," in the Philadelphia courts, means essentially the judge's "tipstaff" or courtroom deputy, sometimes referred to as "personal assistant" to the judge.

On appeal, petitioners Tynes and Lowry argued that the questions to which they allegedly responded falsely were fundamentally ambiguous, and thus immune from perjury prosecution under this Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973), while Mulgrew argued that his responses were literally truthful, measured against the ill-framed questions he was asked. This, too, would require reversal under *Bronston*. Tynes also invoked literal truth as a defense for one of her answers.

The U.S. Court of Appeals for the Third Circuit rejected these arguments in a precedential opinion, and affirmed the three petitioners' convictions. Appx. A. The court of appeals ruled that the "fundamental ambiguity" doctrine applies only to "glaring instances of vagueness or double-speak by the examiner at the time of questioning (rather than artful post-hoc interpretations of the questions) that—by the lights of any reasonable fact-finder—would mislead or confuse a witness into making a response that later becomes the basis of a perjury conviction." Appx. 23a. The court below further held that a defense of literal truth to the particular question asked could be defeated by reference to the "thrust" of a prosecutor's line of questions. Appx. 39a.

This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

1. The decision of the court below disregards this Court's precedent and conflicts with the decisions of other circuits.

This case presents several interrelated aspects of the rule laid down for federal perjury prosecutions some 45 years ago by this Court in *Bronston v. United States*, 409 U.S. 352 (1973). The Court decided in *Bronston* that "precise questioning is imperative as a predicate for the offense of perjury." *Id.* 362. "The burden is on the questioner to pin down the witness to the specific object of the questioner's inquiry." *Id.* This ensures that only responses that are both "false" and "knowingly" so are made predicates for conviction, as the statute requires.[3] Even where a witness's answers were "intentionally misleading," "any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." *Id.* 363. It follows from these principles that the consequences of any imprecision in the questioning must fall at the feet of the inquisitor. At odds with numerous decisions in other circuits, the opinion of the court below contravenes the governing rule established in *Bronston*.

The government sought a ruling in *Bronston* that a witness's evasive, deliberately unresponsive answer can be deemed "false" under perjury law even if literally accurate. In a unanimous opinion authored by the Chief Justice, this Court unanimously rejected the

[3] *Bronston* arose under 18 U.S.C. § 1621, but the same principles apply equally to § 1623 prosecutions, as here.

government's attempt to carve out an exception from the settled, pre-existing, common-sense, general legal rule that a statement that is literally true cannot be criminalized as "false." "[T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner ...." 409 U.S. at 360.[4]

This case presents issues under both of the most common applications of the foundational principles of perjury law established in *Bronston*. One is that a literally truthful answer (even if misleading) cannot be the predicate for a perjury conviction. The other is that fundamental ambiguity in a question prevents the answer from being prosecuted as perjury. Underlying both is the understanding that a perjury conviction fails unless the government proves beyond a reasonable doubt that the witness understood the cited question, at the time that she answered it, in a way that would make her allegedly-perjurious answer false. That is why "precise questioning is imperative as a predicate for" perjury. 409 U.S. at 362.

These core principles cannot be reconciled with the opinion of the court below, which allowed petitioner Mulgrew's *clear* answers to *unambiguous* and narrow questions, for example, to be reinterpreted as false responses to *unstated and broader* questions inferred

[4] Accordingly, the principles governing perjury prosecutions established by *Bronston* are by no means limited to cases where a defendant has been accused of making a statement that is unresponsive as well as literally true. The simple fact is that a statement that is literally true is not and can never be "false" in a prosecution under 18 U.S.C. § 1621 or § 1623.

from the overall "thrust of the Government's line of questions" (Appx. 39a), the "thrust of the inquiry" (*id.*), the content of a "follow up question," or the "focus" of the line of inquiry (*id.*). See also *United States v. DeZarn*, 157 F.3d 1042, 1051 (6th Cir. 1998) (mistakenly applying *Bronston*'s "literal truth" rule only to unresponsive answers).

The court below requires the witness to divine (from the "thrust" of the questions, rather than their words) what question the prosecutor meant to ask, and then to answer that question instead. The *Bronston* rule leaves no such room for shifting the burden of clarity to the witness. ("burden is on the questioner"). It is the questioner, this Court held, who bears the burden of asking precise questions that communicate the "specific object of the inquiry" and "pin the witness down." 409 U.S. at 360. A witness, like Mulgrew, who answers truthfully the precise question asked cannot be convicted of perjury.

The doctrine of "fundamental ambiguity" is but another application of the same rule. No special gloss on the basic principles of perjury (and evidentiary sufficiency) is necessary to formulate it. It simply requires proof beyond a reasonable doubt that the defendant knew what the questioner was asking – proof without which the jury cannot find that the defendant knew that his answer was false. When a term cannot be used with mutual understanding absent a definition, it is impossible (and unlawful) to conclude that the defendant understood the question posed, which is a logical prerequisite to any conviction based on the claim that a declaration was knowingly false.

The court below affirmed petitioners' perjury convictions by drastically limiting the application of these foundational precepts. As with its treatment of the "literal truth" rule, its opinion put the burden on the witnesses to resolve fundamental ambiguities in the prosecutors' questions by requiring each witness to infer, from the "focus" of the inquiry, what the questioner meant to ask (but did not). Appx. 27a.

Indeed, the court below purported to limit the ambiguity inquiry to:

> glaring instances of vagueness or double-speak by the examiner at the time of questioning ... that – by the lights of any reasonable fact-finder – would mislead or confuse a witness into making a response that later becomes the basis of a perjury conviction.

Appx. 23a. The Third Circuit is not the only court to have misread this Court's standard in this way. See *United States v. Robbins*, 997 F.2d 390, 394–95 (8th Cir. 1993) ("The literally true answers to the questions that are the basis of the false oath charge must be considered in the context in which they were given."; for jury to determine whether defendant knew prosecutor intended to refer to different corporation than he asked about); *cf. United States v. Weiss*, 930 F.2d 185, 200–02 (2d Cir. 1991) (Restani, J., dissenting).

The standard applied below cannot be reconciled either with this Court's precedent or with the case law of most of the circuits, thus requiring this Court's intervention. The other circuits have long held that a perjury conviction cannot stand when predicated upon a question that lacks "a meaning about which men of ordinary intellect could agree, nor ... could be used

with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered." *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986). A conviction must not be upheld on the basis that the witness "understood, or should have understood, the import behind the prosecutor's questions." *United States v. Eddy*, 737 F.2d 564, 569 (6th Cir. 1984). No perjury conviction can stand on the basis of "a particular interpretation that the questioner placed upon an answer." *United States v. Shotts*, 145 F.3d 1289, 1298 (11th Cir. 1998) (reversing § 1623 conviction because answer was literally true).

The court of appeals' tolerance in petitioners' case for ambiguous questioning cannot coexist with the prohibition against ambiguity that the Court established in *Bronston*. This Court's rule offers no safe harbor to government questioning that is too imprecise to create a "mutual understanding" but falls short of "glaring [] double-speak" that would affirmatively mislead or confuse.

Numerous other courts have vacated convictions predicated upon responses to questions that would be excused under the Third Circuit's test. See, *e.g.*, *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967) (denial of having "taken any trips" with a certain individual, when the defendant was with the person in another state but had not traveled with him) (discussed in *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir. 1975)); *Lighte*, 782 F.2d at 376 (failure to specify whether use of "you" referred to the witness's actions as a trustee or as an individual). None of these terms suffers from "glaring" vagueness; none is "double-speak"; none would affirmatively

"mislead or confuse." Yet none can support a perjury conviction, because none has "a meaning about which men of ordinary intellect could agree." *Lighte*, 782 F.2d at 375. Under *Bronston*, the threshold question must always be whether prosecutors have discharged their duty to communicate the object of the questioning and hold the witness to it. *Bronston*, 409 U.S. at 360.

The same flaw infects the decision of the Third Circuit with respect to the petitioners' responses that were literally truthful. For example, as to petitioner Mulgrew's response that to his knowledge his assistant had not received "any calls like that," the opinion states:

> The transcript makes it obvious that Mulgrew's singular reliance on the reference to a "call" ignores the thrust of the Government's line of questions. The questions focus on the substance of the communications between Mulgrew's personal assistant and himself, rather than the mode of those communications.

Appx. 39a. As to the second question and answer, the opinion similarly contradicts *Bronston* by blaming the witness rather than his interrogator for a response that was true, even if it may have avoided what the prosecutor meant to ask about (but didn't):

> [A]s with the first question, Mulgrew cherry-picks a small part of the question out of context, distorting it. The full text and follow up question show that the thrust of the inquiry was whether Mulgrew's personal assistant was informing him of the names of those requesting preferential treatment from him. And Mulgrew's response to the follow-up question—saying that he did not

> want to know so that he did not have to worry about what he did in the courtroom—is consistent with one who understood this.

Appx. 39a–40a. It is on this foundation that the panel concluded:

> that, ultimately, the evidence is sufficient for a reasonable jury to conclude Mulgrew understood that both of these questions were focused on whether his personal assistant informed him of requests for him to give preferential treatment, and that he answered in the negative to both.

Appx. 40a. The court below thus treated a defense of literal truth as if it were an attack on an ambiguous question, where petitioner Mulgrew's argument was never that.[5] The issue was not whether petitioner knew or understood why he was under investigation (which he may very well not have, nor did the prosecutors necessarily even know, at that early stage). The question, in a perjury case, is whether the cited answers to *those* questions were false, and knowingly so.

Attention by a lay witness to the precise wording of the question posed by a professional interrogator such as a federal prosecutor is not to be derided as "cherry-pick[ing] a small part of the question" or "distorting" its meaning. Appx. 39a. The question

---

[5] Petitioners Tynes and Lowry did contend that the questions asked of them were ambiguous. Nearly the entire introductory discussion of the *Bronston* rule in the opinion of the court below focused on the problem of ambiguous questioning. *See* Appx. 21a–23a. Nevertheless, both doctrines – "fundamental ambiguity" and "literal truth" – flow from *Bronston*'s firm stand that precise questioning is a prerequisite to any perjury conviction for making a "knowingly ... false" statement.

about "calls" is the question Mulgrew was charged with, and convicted for, answering falsely.[6] Context, such as the "thrust" of a line of antecedent questions, can be used by a jury to infer that a defendant was not confused by a question that invites more than one interpretation, where confusion is claimed as a defense, or to protect against misinterpretation of an answer, but never to alter a question's literal meaning if the question on its face is unambiguous.

Bronston itself demonstrates that the "context" of questioning is not to be consulted in a manner that eliminates the requirement of looking to the precise question asked and answer given, where there is no claim that the witness (now defendant) was confused. 409 U.S. at 361–62. Where the specific questions and

---

[6] By challenging his conviction for perjury on a particular question asked before the grand jury, petitioner did not seek to "impl[y]" that "had the Government asked him about receiving index cards with such requests," rather than being asked whether his assistant had received "any calls like that," then "his answer would have been completely different." Appx. 37a. No one knows what his answer would have been to some question that was never asked. See *United States v. Laikin*, 583 F.2d 969, 971 (7th Cir. 1978) ("defendant was not required to answer the unasked question," since *Bronston* burden is on questioner to pin the witness down; answer given was "literally true and [r]esponsive" to question that was asked). As the quoted passage reveals, the approach of the court below, in contradiction to *Bronston*, is essentially inconsistent with the presumption of innocence. A court must assume that a witness's answer to some other question would have been truthful, not the opposite, as the Third Circuit panel insinuated. Similar disdain for the possibility of innocence infected the court's disposition in the same opinion of the scope-of-mail-fraud issue, Appx. 15a–16a, as shown in co-defendants Alfano and Hird's separate petition.

answers charged and on which a conviction is predicated are not ambiguous, reference to the context of the questions – or worse, to the content of a "follow up question" posed *after* a charged answer was given, Appx. 39a – is not allowed. If it were, all the evils and unfairness would emerge that the precise questioning requirement is intended to prevent.

The decisions of other circuits illustrate the point and reveal how badly the decision of the court below deviates from the governing rule. See *United States v. Hairston*, 46 F.3d 361, 375–76 (4th Cir. 1995) (reversing perjury and subornation convictions where "the prosecutor did not use the requisite specificity in questioning, despite Mack's apparent confusion or evasion" as to meaning of terms); *United States v. Porter*, 994 F.2d 470, 475 (8th Cir. 1993) (reversing conviction where "Defendant did not commit perjury simply by answering the questions in a narrow, arguably evasive fashion, giving a literal meaning to the words "mail" and "generate"); *United States v. Reverson-Martinez*, 836 F.2d 684, 690 (1st Cir. 1988) (reversing § 1621 conviction where "the government is saddled with what was *said*, rather than what might have been meant" by defendant whose response was literally true under his apparent interpretation of question) (emphasis original). "When a witness bobs and weaves, it is the questioner's obligation to get the proper bearings; a federal perjury prosecution is medicine too powerful to be dispensed casually as a quick fix for unresponsiveness." *Id.* 691. *Cf. United States v. Larranaga*, 787 F.2d 489, 496–97 (10th Cir. 1986) (reversing where government's failure to ask more specific questions left an ambiguity in response that was only untrue by negative implication).

In conflict with this Court's authority and the decisions of the other circuits, the decision of the court below dilutes the requirement of proof beyond a reasonable doubt that the defendant understood the questioning and intended to lie. Only defendants questioned by "glaring[ly]" incompetent or treacherous prosecutors would be protected by the foundational principles of perjury prosecutions. The court below blames and penalizes the witnesses for not answering questions that the prosecutors, in hindsight, wish they had asked, and for not disregarding the particular question in favor of an interpretation of the "thrust" of the questioning as a whole, including subsequent inquiries. Neither controlling precedent nor fundamental fairness can tolerate such a result.

Accordingly, this petition should be granted.

2. This case offers an excellent vehicle for clarifying the *Bronston* rule governing perjury prosecutions, not only because of the petitioners' acquittals on all non-perjury charges, but more importantly because variations in the questioning of the three petitioners permit the Court to examine a number of common applications of that seminal decision.

As shown under Point 1, the issues at stake in this case are important, and the holding of the court below conflicts with this Court's precedent and the rulings of other circuits. The record of the instant case also offers a good vehicle for the discussion and resolution of such questions. After a lengthy trial, the jury entirely rejected the government's underlying theory of this case, acquitting every defendant of all charges

of mail and wire fraud. So far as the jury could find, based on an extensive presentation of direct and circumstantial evidence, there was no fraud in the operation of the Philadelphia Traffic Court,[7] or at least not in these petitioners' courtrooms. As the jury learned at trial, any tradition of "consideration" that existed resulted not in corrupt "ticket-fixing," but only in the kind of lenient and sympathetic outcomes in particular cases that might eventuate anyway in such an informal, lawyerless, minor tribunal, simply from the accused drivers' showing up and telling their stories. Thus, it is highly likely that the responses sworn to by the petitioners before the grand jury were in fact given in good faith, even though they denied most if not all of the wrongdoing of which the prosecutors, however mistakenly, then believed them guilty. Protecting such suspects from perjury convictions is a basic goal of the rule established by this Court in *Bronston*.

Petitioners' case offers an excellent vehicle not only because the acquittals make this a pure case of alleged perjury with no complicating other charges, but also for another reason. The questions and answers underlying the charges here are few in number (one count each for Mulgrew and Lowry; just two for Tynes) yet they present a fair sampling of the various issues that arise in the dozens of cases prosecuted in the federal courts each year that require application of the rule established in *Bronston*. The proper meaning and enforcement of that precedent

[7] Much less was there any bribery, as the government appears to have suspected during the grand jury investigation but never charged, as the court below mentions. *See* Appx. 28a–29a.

with respect to claims of "fundamental ambiguity" are presented, as well as a defense of "literal truth."

The validity of a perjury conviction cannot depend on a defendant's ability to establish that she did not understand a term the way that the prosecutor later asserts that he intended it. Yet that is the burden that the court below imposed in petitioner Tynes's case. The court opined, for example, that the record fails to show "any reason why" Tynes would interpret the grand jury questioning as addressing a different definition of "favorable treatment" than the government invoked. Appx. 29a. In so doing the court skipped a crucial step: finding evidence in the record that would support a finding by the jury that the prosecutor had communicated to petitioner the convoluted "consideration" theory that was advanced at trial, but which no one – not an investigating agent, not a prosecutor, not even the press – had articulated, let alone articulated to Tynes, at the time she was questioned.

Here, so far as trial jury knew, the questioning of petitioner Tynes *began* with the question about "favorable treatment" that underlay Count 71. It was unquestionably plain that the prosecutor was not giving "favorable treatment" its ordinary meaning in that question, that is, an outcome in court that would be in the party's favor – which of course is what every litigant seeks in every case. Yet the prosecutor did nothing to enlighten his witness as to the meaning he intended, which later was said to have something to do with improper motive on the part of the judge. The trial jury had no evidence before it that would establish beyond a reasonable doubt that Tynes had divined his intent. Literally nothing in the record

permits the conclusion that petitioner Tynes knew, when she answered in the grand jury room, the novel and highly-specific construction that the prosecutor put on the term: "consideration," which he also called "ticket-fixing" – a concept that eventually required multiple layers of definitions to charge. See CA3 Appx. 195a–196a (Indictment ¶¶ 30, 32). *Bronston* required reversal for this fundamental failure of proof, and did not allow a shifting of responsibility to the witness (later, defendant).

The "consideration" theory later espoused was far more esoteric than the concept of bribery, which petitioner Tynes seemingly inferred was the matter under investigation, and which she could truthfully deny. Because the evidence did not establish beyond a reasonable doubt that petitioner Tynes necessarily answered the idiosyncratic "consideration" theory rather than the common bribery theory (or another theory entirely), reversal is required. See, *e.g.*, *Chapin*, 515 F.2d at 1280 (D.C. Cir.) (discussing with approval *Wall*, *supra* (6th Cir.), which reversed a perjury conviction because defendant's interpretation of term was more common than government's).

Indeed Tynes's case provides a powerful example of the kind of ambiguity that *Bronston* makes fatal. Even *the Third Circuit panel* was confused by the distinction between "consideration" (as a sort of ticket-fixing) and bribery – asserting later in its opinion that the record supports "no reasonable inference that the Government was asking [Tynes] about matters outside of the alleged bribes." Appx. 29a.[8] That is the defense argument (and presumably

[8] In point of fact, nothing in the 26 pages of grand jury transcript that preceded the charged question and answer

the opposite of what the panel meant to say): that the record does not support an inference that the government was asking about anything outside of bribes.[9] Tynes's denial of giving "favorable treatment" (in the sense of allowing herself to be bribed), if that was her understanding, was not and could not be perjury.

Petitioner Lowry's case is likewise a useful source for discussion of the problem of ambiguity under *Bronston*. Lowry was convicted for responding untruthfully to a question in which the prosecutor asked whether she correctly understood Lowry's testimony, in substance, to be that he did not "give out special favors." Lowry replied, "No," adding that he treated "everybody in that courtroom the same." Appx. 31a. As the appellate panel said it recognized, Appx. 21a, "[p]recise questioning is imperative as a predicate for the offense of perjury." *Bronston*, 409 U.S. at 362. Yet the prosecutor's ill-framed, multi-layered, compound and ambiguous question not only turned on an undefined use of "special favors," but also made the intended referent for Lowry's introductory "No" hopelessly uncertain. Government counsel then left unexplored with follow-up what the way

(cont'd)

gave any hint of what "favorable treatment" meant at all. The immediately preceding topic was the social life of other Traffic Court judges. Because those pages were not in evidence, however, the jury could only speculate about the context preceding the question charged in Count 71 – but even had the jury had the pages, they would not have clarified the intended meaning, at the time the question was asked, of "favorable treatment."

[9] At the time of the questioning, after all, nothing was yet "alleged," and after investigation no "bribes" were ever stated to be the government's theory.

was, according to Lowry, that everyone in his courtroom was treated. Again, the nature of the inquiry made the question "fundamentally ambiguous," and should have precluded, as a matter of law, any conviction. Instead, the court below put the burden on Lowry for not responding to that question in accordance with what the prosecutors' "line of questioning reasonably supports ...." Appx. 32a.

As to petitioner Mulgrew, his sufficiency challenge was governed by yet another common application of *Bronston*'s rule that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner ...." 409 U.S. at 360. Thus, the instant case presents a good vehicle to discuss not only the nature of "fundamental ambiguity" in questioning, but also the scope of *Bronston*'s "literal truth" rule. See *United States v. Sarwari*, 669 F.3d 401, 406–07 (4th Cir. 2012) (collecting cases giving this rule a narrow rather than the intended strict interpretation). Rather than accept that Mulgrew's response to the question asked was literally accurate, as measured against the precise question asked, the court below looked to its own view of the overall "thrust" of the entire line of questions to sustain the conviction.

For these reasons, the instant petitioners' case affords an excellent vehicle for the elaboration and explication of several aspects of this Court's *Bronston* rule – both "fundamental ambiguity" in questioning, and "literal truth" in answers.

3. At least, this petition should be held pending disposition of the petition filed by co-defendants Alfano and Hird.

Petitioners Lowry and Mulgrew joined co-defendants Alfano and Hird's motions to dismiss the mail and wire fraud charges for lack of a valid theory of property deprivation under this Court's cases. On appeal, they argued that being forced to stand trial for over a month, having to confront and justify dozens of past favorable dispositions of various minor traffic tickets cherry-picked by the government to raise suspicions about their integrity and fairness, prejudiced the jury's ability to apply the rules of law to the perjury charges, notwithstanding the eventual acquittals of fraud. The Court of Appeals did not reach this "prejudicial spillover" argument, because it rejected the Alfano-Hird argument for dismissal of the fraud counts (referred to in the opinion below as "Sullivan's motion"; *see also* Appx. B) on the merits. Appx. 23a n.24.[10]

Petitioners' erstwhile co-defendants Alfano and Hird have now petitioned this Court for a writ of

[10] Petitioner Tynes likewise sought to participate in the pretrial dismissal motion by submitting a proposed order allowing joinder. The court below held that effort procedurally deficient and disallowed her attempt to rely on it in support of the spillover prejudice argument on appeal. *See* Appx. 24a n.25; *but see* Appx. 23a n.24 (accepting that Tynes joined the motion). If this Court grants the Alfano-Hird petition and reverses, it should reject the Third Circuit's either self-contradictory or at least overly punctilious refusal of Tynes's joinder, and should remand her case as well.

certiorari to review the validity of the mail and wire fraud theory utilized in this case. If the Court does not grant the instant petition and reverse all the perjury convictions, then it should at least hold the instant petition pending consideration of Alfano's and Hird's. If that petition is granted and a reversal results, the affirmance of petitioners' convictions for perjury should then at least be vacated and remanded to the Court of Appeals for further consideration of the merits of their spillover argument.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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Dated: June 17, 2019

EXHIBIT B

No. _____

In The
Supreme Court of the United States

HENRY P. ALFANO and WILLIAM HIRD,

Petitioners,

v.

UNITED STATES OF AMERICA,

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 the potential for collection of fines and costs which may become due to the state from unadjudicated traffic tickets, on which there has yet been no finding of guilt, constitute "property" which may be the object of a scheme to defraud under the mail- and wire-fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1349?

LIST OF PARTIES

In addition to the parties to this Petition (Henry P. Alfano, William Hird and the United States of America), the parties to the proceeding below were Appellants Thomasine Tynes, Robert Mulgrew, Michael Lowry and Willie Singletary. Ms. Tynes, Mr. Mulgrew and Mr. Lowry will be seeking certiorari via a separate joint petition to this Court. Mr. Singletary is not seeking certiorari review.

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The initial opinion of the United States Court of Appeals for the Third Circuit is reported as *United States v. Hird*, 901 F.3d 196 (3d Cir. 2018). Following petitions for rehearing, the Third Circuit issued an amended opinion, which appears in the appendix and is reported as *United States v. Hird*, 913 F.3d 332 (3d Cir. 2019).

The opinion of the United States District Court for the Eastern District of Pennsylvania denying the motion to dismiss the indictment appears in the appendix and is unofficially reported as *United States v. Sullivan*, No. 2:13-cr-00039, 2013 U.S. Dist. LEXIS 91660 (E.D. Pa. July 1, 2013).

JURISDICTION

The Court of Appeals initially denied relief on August 21, 2018. In response to petitions for rehearing submitted by Mr. Alfano and Mr. Hird's co-appellants, the Court of Appeals issued an amended opinion on January 18, 2019, when it granted rehearing in part. On April 11, 2019, Justice Alito extended the time to file this petition until May 18, 2019. *See* Docket No. 18A1048. On May 13, 2019, Justice Alito further extended the time to file this petition until June 17, 2019. This petition is thus timely. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1341 provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false

> or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1349 provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner Henry Alfano is a Philadelphia entrepreneur with businesses in the scrap metal and towing industries. Petitioner William Hird is the former Director of Records for the Philadelphia Traffic Court ("Traffic Court"). In 2013, both men were charged with participating in a scheme to "fix" Traffic Court tickets.[1]

[1] As Mr. Alfano and Mr. Hird challenge the sufficiency of the Indictment, the facts in this petition are drawn directly from the Indictment, which is presumed to be accurate.

A. The Operation of Traffic Court

As it existed prior to the indictment in this case,[2] Traffic Court was staffed by full-time, elected judges, as well as various senior judges and other local judges appointed by the Administrative Office of the Pennsylvania Courts. The judges adjudicated tickets issued by the Philadelphia Police Department and Pennsylvania State Police within the City of Philadelphia ("City"). Once the police issued a citation, the ticketholder was given a date to appear in Traffic Court for trial. Before trial, ticketholders entered a plea (guilty or not guilty) to the alleged violation(s). When a ticketholder pleaded not guilty, the ticketholder could present evidence at a hearing, including by questioning the police officer who issued the ticket. Indictment ¶ 6.

When resolving citations, judges could choose from several different options. They could, of course, find the ticketholder guilty or not guilty. They could also find the ticketholder guilty of a different offense, guilty *in absentia*, not guilty *in absentia* or guilty with reduction of speed. Finally, they could dismiss the ticket. In addition, the ticketholder could plea bargain with the police officer who prosecuted the ticket. Indictment ¶ 7.

An adjudication of guilt of any variety subjected the ticketholder to statutorily established fines and costs. Some offenses also carried with them statutorily mandated "points" on the ticketholder's driving record.

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[2] Traffic Court's functions were transferred to the Philadelphia Municipal Court in 2013. The court was formally abolished by constitutional amendment in 2016.

The money received from the tickets would be split evenly between the City and Pennsylvania and paid out to particular funds. When a ticketholder was found not guilty, however, or when the ticket was dismissed, the ticketholder did not have to pay any fines or costs. Indictment ¶¶ 8-10.

B. The Allegations

The Indictment in this case alleged violations of the mail- and wire-fraud statutes stemming from a long-standing practice by Philadelphia Traffic Court officials who used their positions to "fix" tickets at the request of politically and socially connected individuals receiving traffic citations. Specifically, the Indictment alleges that the defendants who were formally affiliated with Traffic Court during the relevant time frame (July 2008 to September 2011) provided the following benefits to the politically and socially influential:

> (1) dismissing tickets outright; (2) finding the ticketholder not guilty after a "show" hearing; (3) adjudicating the ticket in a manner to reduce fines and avoid assignment of points to a driver's record; and (4) obtaining continuances of trial dates to "judge-shop," that is find a Traffic Court judge who would accede to a request for preferential treatment.

Indictment ¶ 30.

Regarding the petitioners, the Indictment asserted that Mr. Alfano provided his friend, Judge

Fortunato N. Perri, Sr., with citation numbers, names of offenders and/or actual citations from friends, employees and associates. Judge Perri, according to the Indictment, would then convey the information to Mr. Hird to arrange preferential treatment, known as "consideration," for the citations at issue. Indictment ¶¶ 39-40.

Mr. Hird then conveyed the consideration requests to the judge assigned to each case. Sometimes, Judge Perri and Mr. Hird also attempted to arrange for a particular judge to hear the citation. Once the citation was adjudicated, Mr. Hird would provide printouts of the case disposition to Judge Perri, who would in turn mail them to Mr. Alfano or the ticketholder as a "receipt." Indictment ¶¶ 41-42. The Indictment did not allege that Mr. Alfano or Mr. Hird interfered in any way with the collection of fines or costs already imposed on ticket holders who had been found guilty.

Count 1 of the Indictment alleged, in over 50 pages, a conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349. Counts 2 through 50 alleged substantive wire-fraud violations (18 U.S.C. § 1343), while Counts 51 through 68 allege substantive mail-fraud violations (18 U.S.C. § 1341). All the mail- and wire-fraud charges (Counts 1-68) relate to the same alleged scheme to defraud and, specifically, a scheme to adjudicate traffic tickets more favorably for "politically connected individuals, and others who, because of their influential positions . . . asked Traffic Court judges . . . for preferential treatment. . . ." Indictment ¶ 28.

C. Procedural History

On January 29, 2013, Mr. Alfano and Mr. Hird, along with several Traffic Court judges, were indicted and charged with conspiracy to commit mail and wire fraud, as well as multiple counts of wire fraud and mail fraud.[3] All the charges against them stemmed from the ticket-fixing allegations detailed above. Co-defendant Michael J. Sullivan filed a motion to dismiss the Indictment, which petitioners joined. The defendants argued that the Indictment failed to allege that the alleged scheme targeted a property interest under the wire- and mail-fraud statutes because, *inter alia*, the money due from fines and costs on traffic tickets did not become "property" unless and until there was an adjudication of guilt. But the Indictment did not allege that Mr. Alfano or Mr. Hird interfered with the collection of funds from tickets for which the drivers had already been adjudicated guilty, only that they had helped to prevent an adjudication of guilt in the first place.

The district court denied the motion. In pertinent part, the district court shockingly ruled that accepting defendants' argument "would permit the alleged conspirators in this case to enter into a scheme to commit fraud and then hide behind the argument that the success of their fraud precludes prosecution under the 'money or property interest' requirement of the mail and wire fraud statutes." *Sullivan*, 2013 U.S. Dist. LEXIS 91660, at *24. In other words, the district court

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[3] Mr. Hird also was charged with making false statements to the FBI. *See* 18 U.S.C. § 1001.

appeared to conclude, the scheme itself converted the traffic tickets at issue into property under the applicable statutes.

Both petitioners later pleaded guilty to the charges against them. Their plea agreements included appellate waivers, but the parties excepted from the waivers their right to challenge the district court's ruling on the motion to dismiss. Mr. Alfano was sentenced to three years' probation and ordered to pay a special assessment of $1,300, and a $5,000 fine. Mr. Hird was sentenced to 24 months' imprisonment and ordered to pay a special assessment of $1,800 and a $5,000 fine. Both men then appealed, raising the same issue—the lack of property interest under the mail- and wire-fraud statutes in the alleged scheme.

The Third Circuit affirmed. In a precedential opinion, the court ruled that the district court "said it well. . . . Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments of guilt and the imposition of fines and costs) as the basis to claim that there is no fraud. Indeed, the not-guilty judgments that Alfano and Hird worked to obtain through the extrajudicial system were alleged in the indictment as evidence of the scheme itself." *Hird*, 913 F.3d at 343. As with the district court, the Third Circuit thus appeared to rest its opinion that the alleged scheme targeted a property interest on the nature of the scheme and not the nature of the traffic tickets that were "fixed."

REASONS FOR GRANTING THE WRIT

I. An Unadjudicated Traffic Ticket Does Not Constitute "Property" Under the Mail- and Wire-Fraud Statutes, 18 U.S.C. §§ 1341, 1343 and 1349, and the Third Circuit's Contrary Ruling Unduly Expands the Reach of Federal Criminal Law.

This Court has recognized that the federal mail- and wire-fraud statutes do not "purport to reach all frauds." *Schmuck v. United States*, 489 U.S. 705, 710 (1989). Rather, the statutes are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987), *superseded by statute*, 18 U.S.C. § 1346. Here, the Third Circuit ruled that an unadjudicated traffic ticket—from which no money is owed—constitutes property to the government. That conclusion was wrong. And the Third Circuit's opinion expands the reach of federal criminal law into an area Congress has seen fit to leave to the states. Thus, this Court should grant the writ to reinforce the proper boundaries of federal criminal law.

A. Legal Background: The Mail- and Wire-Fraud Statutes Require a "Property" Interest Be at Stake.

Over the course of four opinions spanning nearly 20 years, this Court announced and then later refined its view concerning the scope of "property" under the mail- and wire-fraud statutes.

The Court first addressed the issue in *McNally*, where the defendants were suspected of running a self-dealing scheme involving Kentucky state insurance contracts. 483 U.S. at 353. McNally and his co-defendant were accused of violating the mail-fraud statute, 18 U.S.C. § 1341, by denying "the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *Id.* at 352. After conviction, the Sixth Circuit affirmed, concluding based on a line of decisions in the Courts of Appeals that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355.

This Court reversed reasoning, *inter alia*, that while § 1341 could fairly be read to include intangible rights, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60. Finding such clear and definite language lacking, the Court held that § 1341 is limited to protecting property rights. *Id.* at 360.

This Court began to define the contours of the property-right requirement later that year. In *Carpenter v. United States*, 484 U.S. 19 (1987), a reporter for the Wall Street Journal provided pre-publication information from a column he wrote about stocks for the newspaper to employees at a brokerage firm, who, in turn, traded on the information. The newspaper had a policy that made pre-publication information Journal

property. *Id.* at 23. After the defendants were convicted of, *inter alia*, mail and wire fraud for their scheme, the Second Circuit affirmed their convictions. *Id.* at 21-22.

This Court granted certiorari. The defendants, petitioners before this Court, contended that, under *McNally*, the pre-publication information from the newspaper did not constitute "property." *Id.* at 25. This Court disagreed, concluding that the intangible nature of the property did not lessen its protection under the mail- and wire-fraud statutes. *Id.* The Court further held that the lack of publication of the pre-publication information was immaterial. *Id.* at 26. "[I]t is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26-27.

This Court next confronted the question of what constitutes "property" under the mail- and wire-fraud statutes in *Cleveland v. United States*, 531 U.S. 12 (2000). In *Cleveland*, the defendant was accused of committing mail fraud by lying on an application to the Louisiana State Police for an application to run video poker machines. *Id.* at 17. After his conviction (which the Fifth Circuit affirmed), this Court granted certiorari to resolve whether a state license constitutes property under the mail- and wire-fraud statutes. *Id.* at 18. The Court answered the question in the negative. As an initial matter, the Court determined that the state's concern in its video-poker-licensing regime was regulatory, not proprietary. *Id.* at 20-21. Though the state

benefitted financially from the licensing scheme, most of the money it made came after it issued the license. *Id.* at 22. Moreover, the Court concluded that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* at 24. Thus, for purposes of the mail-fraud statute, "the thing obtained must be property in the hands of the victim" to constitute property. *Id.* at 15.

Finally, in *Pasquantino v. United States*, 544 U.S. 349 (2005), the defendants imported large quantities of alcohol from the United States into Canada surreptitiously to avoid the payment of Canadian taxes. After their conviction of wire-fraud charges, affirmed by the Fourth Circuit, this Court granted certiorari. *Id.* at 354. The Court affirmed the convictions, concluding, *inter alia*, that the unpaid taxes constituted "property" under the wire-fraud statute. *Id.* at 355. In reaching this conclusion, the Court noted that the money the defendants failed to pay to Canada in taxes was "legally due." *Id.* at 356. "Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury. . . . The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury." *Id.*

The Court's jurisprudence in this area thus establishes a couple of basic principles, particularly where government interests are at stake. If defendants' scheme seeks to deprive the government money that is

"legally due," the scheme targets property under the mail- or wire-fraud statute. But if the scheme is aimed only at obtaining something that the government holds in its regulatory capacity—or if the state is deprived of no economic benefit—then there is no property for purposes of the mail- or wire-fraud statute.

B. An Unadjudicated Traffic Ticket Does Not Constitute "Property."

The Indictment in this case charged Mr. Alfano and Mr. Hird with participating in a scheme to "fix" tickets in Traffic Court. As set forth above, the essence of the alleged scheme is that Mr. Alfano, operating through Traffic Court judges and staff, arranged for well-connected individuals to have their tickets resolved favorably. The Indictment contains no allegations that Petitioners ever interfered with the collection of fines and costs associated with ticketholders adjudicated guilty. Thus, for Mr. Alfano or Mr. Hird to have committed mail or wire fraud, the unadjudicated traffic tickets that he helped to "fix" must themselves be property under the mail- and wire-fraud statute. For several reasons, they are not.

First, the government's interest in unadjudicated traffic tickets is only regulatory and not proprietary. The Pennsylvania statutory scheme authorizing the City and Commonwealth to issue traffic citations, outlining the fines and costs for specific violations, and detailing the processes for adjudicating traffic violations is part of the Commonwealth of Pennsylvania's

regulatory function and not a revenue-raising mechanism. The Pennsylvania Vehicle Code is "a system of general regulation . . . prescribing the manner and by whom motor vehicles shall be operated upon the highways of the state, *is necessary to promote the safety of persons* and property within the state." *Maurer v. Boardman*, 7 A.2d 466, 472 (Pa. 1939) (emphasis added). "The primary purpose of the Motor Vehicle Code and its amendments is to protect and promote public safety and property within the Commonwealth. Therefore, *every provision of the Code should be interpreted in light of that intent*." *Commonwealth v. DeFusco*, 549 A.2d 140, 142 (Pa. Super. Ct. 1988) (emphasis added) (internal citations omitted). "The purpose of the Vehicle Code is to ensure public safety upon the streets and highways of the Commonwealth." *Commonwealth v. Eliason*, 509 A.2d 1296, 1298 (Pa. Super. Ct. 1986). Like the video-poker licensing scheme at issue in *Cleveland*, Pennsylvania vehicle codes constitute a "typical regulatory program." *Cleveland*, 531 U.S. at 21. While the government does collect money from issuing tickets, the Commonwealth's "core concern is *regulatory*." *Id.* at 20 (emphasis in original).

In rejecting this argument, the Third Circuit concluded that "fees charged to obtain a license cannot be equated with fines and costs that result from a traffic ticket." *Hird*, 913 F.3d at 341. In pertinent part, the court stated that a traffic ticket "merely establishes the summary violation with which the person is charged. Once a person has been charged, it is judicial power (not the state's police power) that is exercised to

determine whether the person is guilty and, if guilty, to impose the fines and costs." *Id.* The fines and costs that are issued, the Third Circuit held, "cannot be cabined as a product of the state's regulatory authority." *Id.*

Even assuming, *arguendo*, that the Third Circuit was correct about post-judgment traffic tickets, the Third Circuit's opinion elides a key point: all of the tickets at issue here were *pre*-judgment tickets. At the point of the alleged interference, no judicial action had yet taken place. Mr. Alfano and Mr. Hird were accused of interfering with a process by which tickets might be converted to judgments, *not* a process by which Traffic Court ensured that the proceeds of post-judgment tickets were collected. Even by the Third Circuit's own logic, Mr. Alfano and Mr. Hird could not commit wire or mail fraud because they interfered only with pre-judgment tickets, which were exclusively the result of the state's exercise of its regulatory authority.

Second, and relatedly, the presumption of innocence mandates in favor of a finding that pre-judgment traffic tickets are not "property" under the mail- and wire-fraud statutes. The Indictment makes clear that the City and Commonwealth were not entitled to any fines or costs unless and until a ticketholder was adjudicated guilty. *See* Indictment ¶ 10 ("Upon an adjudication of not guilty or dismissal, the ticketholder did not pay any fines or costs."). This makes sense; the ticket fixing occurred pre-adjudication, at a point when the ticket holder is presumed innocent and the elements of the alleged motor vehicle code violation must

be proven beyond a reasonable doubt. *See, e.g.*, *Commonwealth v. Kittleberger*, 616 A.2d 1, 6 (Pa. Super. Ct. 1992) ("To sustain a conviction for speeding, the Commonwealth must show beyond a reasonable doubt that: (1) an accused was driving in excess of the speed limit; (2) the speed timing device was approved by the Department of Transportation; and (3) the device was calibrated and tested for accuracy within the prescribed time period by a station which has been approved by the department."); *Commonwealth v. Hamaker*, 541 A.2d 1141, 1142 (Pa. Super. Ct. 1987) (Commonwealth must prove certain factors beyond a reasonable doubt to sustain a conviction for speeding); *Commonwealth v. Maddesi*, 588 A.2d 580, 583 (Pa. Commw. Ct. 1991) ("In order to prove that the licensee failed to stop for a red light, the Commonwealth must show that the traffic control signal was red, and that the licensee traveled through that part of the intersection controlled by the red signal."); *Commonwealth v. Hudson*, 38 Pa. D&C 3d 248, 253-54 (Pa. Com. Pl. 1985) (Commonwealth bears burden to prove violation of Vehicle Code § 3323(b), or failing to stop at a stop sign). Thus, before a guilty adjudication, a ticketholder owes nothing, and the City and Commonwealth have no property in their "hands." *Cleveland*, 531 U.S. at 26.

In resisting this argument, the Third Circuit dismissively referred to the presumption of innocence, a foundational component of our republic,[4] as a "red

[4] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the

herring that is properly disregarded here." *Hird*, 913 F.3d at 344. The court reasoned that Mr. Alfano, Mr. Hird and their co-defendants acted "for the purpose of obviating judgments of guilt imposing fines and costs in those selected cases." *Id.* Later, the court concluded, "traffic tickets (*or more precisely, judgments arising from them*)" constitute property under §§ 1341 and 1343, as a "scheme to obviate judgments imposing fines . . . imposes an economic injury that is the equivalent of unlawfully taking money from fines paid out of the Government's accounts." *Id.* at 344-45.

But the Third Circuit's reasoning is incoherent. By the court's own admission, the right to property exists in the judgment. As a general matter, a judgment occurs after some event, such as an adjudication by the court or the agreement of the parties, and becomes binding on the parties through the action of the tribunal. Judgment is only entered once parties have waived or exercised their due-process rights. *See*, *e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (right to litigate claims against oneself guaranteed by Due Process Clause and conditions upon which that right is waived "must be respected"). The entry of judgment is a crucial event—for example, it generally triggers the right to execute or collect on the judgment, *see* Fed. R. Civ. P. 62(a) (prevailing party may execute on judgment once 14 days from entry have passed), and the right to appeal, *see* Fed. R. App. 4(b)(1)(A)(i) (in

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administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

criminal case, appeal must ordinarily be filed within 14 days of entry of judgment).

A ticket, at least under the Pennsylvania laws, on the other hand, is nothing more than a charging document, equivalent to an indictment in a criminal case. Only upon a finding of guilt are fines and costs due. This circumstance cannot be reconciled with *Cleveland*, where this Court has explained, "[i]t does not suffice . . . that the object of the fraud *may* become property in the recipient's hands; for purpose of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15 (emphasis added). As the *Pasquantino* Court further explained, an "entitlement to collect money," such as a tax, qualifies as property because, consistent with the notion of common-law fraud, the "right to be paid money has long been thought to be a species of property." 544 U.S. at 356. This, as the Court noted, makes sense "given the economic equivalence between money in hand and money legally due." *Id.*

Here, no right to money exists at the time of the alleged interference. Instead, any such right exists only *after* an adjudication of the ticket. Money or "property" (in the form of fines and costs) is only legally due when there is a finding of guilt. Before the ticketholder has been found guilty, the ticket represents, at most, *potential* revenue for the City and/or Commonwealth, a potential obviated by the presumption of innocence. The government has no authority to collect on the debt until the ticket has been adjudicated. In fact, the government has nothing to collect. Far from being "a red

herring that is properly disregarded," the presumption of innocence thus plays a key role in the analysis of the property interests at issue in this case. Even assuming, *arguendo*, that fines and/or costs due on a judgment arising from a traffic ticket constitute property under the mail- and wire-fraud statutes, the ticket itself does not, and the Third Circuit erred in brushing aside the difference between the two.

C. The Third Circuit's Opinion Represents a Results-Oriented Expansion of Federal Criminal Law.

The Third Circuit's opinion is not merely in error. It represents a substantial encroachment of federal criminal law into an area of state concern. "States possess primary authority for defining and enforcing the criminal law." *Medellin v. Texas*, 552 U.S. 491, 532 (2008); *see also Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Federal criminal authority in areas of overlapping concern, on the other hand, is to be interpreted in a more limited manner, except where Congress has spoken clearly to the contrary. *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."); *see also Jones v. United States*, 529 U.S. 848, 860 (2000) (Stevens, J., concurring) ("I reiterate my firm belief that we should interpret narrowly federal criminal

laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain.").

This Court has been particularly careful not to extend the reach of the mail- and wire-fraud statutes, except where Congress has made its intention abundantly clear. "Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." *Cleveland*, 531 U.S. at 27. The *Cleveland* Court specifically rejected the government's construction of the mail-fraud statute because of concerns about the potentially "sweeping expansion" of federal criminal law it might bring about. "Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* at 24; *see United States v. Ratcliffe*, 488 F.3d 639, 649 (5th Cir. 2007) (rejecting argument that salary of public official obtained via fraudulent campaigning constituted property under mail-fraud statute, given that theory, if endorsed, would "bring[] state election fraud fully within the province of the federal fraud statutes. The mail fraud statute does not evince any clear statement conveying such a purpose.").

Here, the Third Circuit's opinion threatens to effect a similar encroachment of federal criminal law onto state sovereignty. Pennsylvania, like other states, has enacted a robust system for dealing with matters of alleged judicial misconduct. Complaints concerning

judges are initially made to the Judicial Conduct Board of Pennsylvania, which has the power, *inter alia*, to compel testimony under oath and the production of documents, determine whether there is probable cause to file formal charges against a judge and present the case in support of charges to the Court of Judicial Discipline. *See* Pa. Const. art. V, § 18(a)(7). The Court of Judicial Discipline, in turn, hears complaints against judges and conducts on-the-record hearings to determine if sanctions against a judge are warranted. *See* Pa. Const. art. V, § 18(b)(5). A judge who is sanctioned has the right to appeal to the Pennsylvania Supreme Court. *See* Pa. Const. art. V, § 18(c)(1). A Pennsylvania Supreme Court justice who is sanctioned can appeal to a special tribunal composed of judges from Pennsylvania's intermediate appellate courts. *Id.*

Regulation of state judicial conduct is a quintessential area of state concern, one that states like Pennsylvania are well-equipped to handle. Converting every traffic ticket—or other similar charging document—into property threatens to federalize the entire realm of judicial ethics. This would constitute the sort of "sweeping expansion" of federal criminal law about which the *Cleveland* Court warned.

The Third Circuit overreached by employing a results-oriented analysis that sought to penalize Mr. Alfano and Mr. Hird for engaging in behavior that the court deemed unsavory. The court wrote: "Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments

of guilt and the imposition of fines and costs) as the basis to claim that there is no fraud." *Hird*, 913 F.3d at 343. But the Third Circuit gave no reason for this conclusion, and cited nothing except the district court's opinion in support. The Third Circuit's ends-oriented jurisprudence distorts the balance of authority between the state and federal government to address the alleged misconduct at issue. The lower court's circular reasoning also distorts and ignores this Court's disdain for invading "the legislative domain." *United States v. Stevens*, 559 U.S. 460, 481 (2010). If Congress wishes to penalize interfering with a judicial process that at its end might entitle the government to money, then Congress should do so. However, absent evidence of such legislative intent, the restraint traditionally employed by this Court "in assessing the reach of a federal criminal statute" mandates reversal. *United States v. Aguilar*, 515 U.S. 593, 600 (1995). A writ of certiorari should issue.

CONCLUSION

An unadjudicated traffic ticket is not "property" as that term is used in the mail- and wire-fraud statutes. To avoid an undue expansion of the federal fraud statutes into areas of traditional state regulation, Mr.

Alfano and Mr. Hird respectfully request that this Court grant its writ of certiorari.

Respectfully submitted:

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Dated: June 17, 2019

EXHIBIT C

No. 18-1552

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY P. ALFANO et al.,

Petitioners,

v.

UNITED STATES OF AMERICA et al.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENTS LOWRY, MULGREW AND TYNES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a program of showing leniency in the adjudicatory process as a personal or political favor to certain accused wrongdoers constitute a "scheme to defraud" the local government, in violation of the mail and wire fraud statutes, by "obtaining property" in the form of potential fines and fees that might be assessed if the underlying accusations of non-criminal wrongdoing were sustained?

LIST OF ALL PARTIES

The petitioners are Henry Alfano and William Hird. This brief is filed for Michael Lowry, Robert Mulgrew and Thomasine Tynes, who are deemed to be respondents (in addition to the United States) under this Court's Rule 12.6, because they were co-appellants of Alfano and Hird in the court below and did not join with them in this Court as petitioners. Respondents have also filed their own petition, raising a separate issue, which has been docketed at No. 18-1581.

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BRIEF OF ADDITIONAL RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents Michael Lowry, Robert Mulgrew, and Thomasine Tynes jointly suggest that this Court grant the petition for a writ of certiorari filed by their co-appellants below, Henry Alfano and William Hird, to review the judgment and order of the United States Court of Appeals for the Third Circuit affirming the convictions and sentences of all of them.

STATEMENT OF THE CASE

Respondents Michael Lowry, Robert Mulgrew and Thomasine Tynes were elected, non-lawyer judges of the Philadelphia Traffic Court. A federal grand jury indicted them, along with co-defendants Henry Alfano and William Hird (among others), for devising and executing a scheme to defraud the City and State of revenues in the form of fines and penalties that would potentially have become due had drivers been convicted of the traffic offenses alleged in tickets that local police had issued. The government's theory was that the judges of Traffic Court systematically gave special "consideration" to favored litigants in their court. (There was no accusation, however, nor any evidence, that any of them took bribes or otherwise profited from this alleged "scheme.")

The present respondents filed or joined in pretrial motions to dismiss the charges as failing to state a cognizable theory of "property"-based mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1349. Their pretrial motions were denied. Pet. Appx. 50–76.

Petitioners Henry Alfano and William Hird pleaded guilty to the fraud charges under an agreement, pursuant to Fed.R.Crim.P. 11(a)(2), allowing them to preserve those issues for appeal. The appeal, however, was unsuccessful. Pet. Appx. 1–23.

After a lengthy trial at which the particulars of numerous alleged traffic violations were examined, and at which the evidence showed that the judges had wide discretion to show leniency to accused drivers without strict regard for legal rules, the petit jury acquitted the present respondents and the rest of their co-defendants of all such charges. At the same time, the jury convicted each of the respondents of one or more instances of alleged false declarations before the grand jury in violation of 18 U.S.C. § 1623, a kind of perjury.

On appeal, respondents Tynes and Lowry argued that the questions to which they allegedly responded falsely were fundamentally ambiguous, and thus immune from perjury prosecution under this Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973), while Mulgrew argued that his responses were literally truthful, measured against the ill-framed questions he was asked. This, too, would require reversal under *Bronston*. Tynes also invoked literal truth as a defense for one of her answers.

The respondents further argued on appeal that the overwhelming predominance of the fraud charges in a trial that lasted more than a month, at which respondents were forced to confront and justify dozens of past favorable dispositions of various minor traffic tickets cherry-picked by the government to raise suspicions about their integrity and fairness, prejudiced the jury's ability to apply the rules of law to the

perjury charges, notwithstanding their eventual acquittals on all the fraud counts. The Court of Appeals did not reach this "prejudicial spillover" argument, because it rejected on the merits the Alfano-Hird argument for dismissal of the fraud counts (referred to in the opinion below as "Sullivan's motion"). Pet. Appx. 26–27 n.24.[1]

In an amended opinion filed upon denial of rehearing, the U.S. Court of Appeals for the Third Circuit in a precedential opinion rejected all of the respondents' arguments challenging their perjury convictions. Pet. Appx. 23–45. The court therefore affirmed the two petitioners' and three respondents' convictions.

Petitioners Alfano and Hird petitioned this Court for a writ of certiorari to challenge the rejection of their attack on the mail fraud theory underlying this case. Respondents Lowry, Mulgrew and Tynes petitioned separately (No. 18-1581), challenging the

[1] Petitioner Tynes sought to participate with her co-defendants in the pretrial dismissal motion by submitting a proposed order allowing joinder. The court below held that effort procedurally deficient and disallowed her attempt to rely on it in support of the spillover prejudice argument on appeal. *See* Pet. Appx. 27 n.25; *but see* Pet. Appx. 26–27 n.24 (accepting that Tynes joined the motion). If this Court grants the instant Alfano-Hird petition and reverses, it should reject the Third Circuit's either self-contradictory or at least overly punctilious refusal of Tynes's joinder, and should remand her case as well.

affirmance of their perjury convictions.[2] In that petition (Point 3), they noted their standing to join petitioner's mail fraud arguments. They therefore suggested that if this present petition is granted and a reversal results, the affirmance of respondents' convictions for perjury should also be vacated and remanded to the Court of Appeals for further consideration of the merits of their spillover argument.

For the reasons discussed in this brief, supplementing those set forth in the petition itself, the petition should be granted.

REASONS FOR GRANTING THE PETITION

1. The decision of the court below disregards this Court's precedent and conflicts with the decisions of other circuits.

In case after case over the last 30 years, this Court has reinforced the limiting construction that it placed on federal mail and wire fraud prosecutions in *McNally v. United States*, 483 U.S. 350 (1987), that is, that a "scheme to defraud" requires a purpose to obtain "property" from a victim by deceit or misrepresentation. If the object of a scheme is not to deprive another of "money or property," then there is no

[2] The Solicitor General has waived response to the instant petition. (As to the respondents' separate petition, on the other hand, No. 18-1581, the government requested an extension of time to respond.) For the reasons set forth in the petition and those further reasons set forth herein, at the very least this Court should reject the government's waiver and call for a response in petitioners' case.

offense under these laws.[3] See *Cleveland v. United States*, 531 U.S. 12 (2000).[4] See also *Loughrin v. United States*, 573 U.S. 351 (2014) (bank fraud); *Sekhar v. United States*, 570 U.S. 729 (2013) (extortion); *Neder* v. *United States*, 527 U.S. 1 (1999) (mail and wire fraud).

The indictment in petitioners' case charged "a scheme to defraud the City of Philadelphia and Commonwealth of Pennsylvania, and to obtain money and property." 2 CA3 Appx. 241a. The money in question was alleged to be "funds to which the Commonwealth and the City were entitled," 2 CA3 Appx. 185a, that is, "money which would have been properly due as fines and costs." 2 CA3 Appx. 197a.

The indictment acknowledged that it was only "[g]uilty adjudications" that "subjected a violator to statutorily determined fines and costs of court ...." 2 CA3 Appx. 188a. From the "manner and means" discussion and the overt act averments of the indictment's introductory conspiracy count, *see* 2 CA3 Appx. 195–240a, it is apparent that the government did not charge that fines and fees, once assessed and due to the City or Commonwealth, were diverted elsewhere (such as to the judges themselves). Rather, the theory of the indictment is clearly that by failing, for

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[3] This case was not indicted under the "honest services" extension enacted by Congress after *McNally*, *see* 18 U.S.C. § 1346, because there were no bribes or kickbacks. See *Skilling v. United States*, 561 U.S. 358 (2010).

[4] The mail fraud statute, despite some ambiguity in its syntax, describes only one offense, which can be committed in only this one way. See *Loughrin v. United States*, 573 U.S. 351, 359 (2014); *Cleveland*, 531 U.S. at 25–26; *McNally*, 483 U.S. at 358–59.

improper reasons, to find certain drivers guilty of the top charge, the judges fraudulently deprived the City and Commonwealth of money.

As the Indictment states: "Traffic Court judges had several options when disposing of citations, including finding the ticketholder guilty of a different offense, guilty, not guilty, not guilty in *absentia*, guilty in *absentia*, guilty with reduction in speed, and dismissal. In addition, the ticketholder could engage in a plea bargain with the police officer or state trooper or other law enforcement officer." 2 CA3 Appx. 187a (italics per original). In other words, in each and every case, there were at least five potential dispositions, all facially lawful, that would result in no money being due, or a lesser amount due, to the City and Commonwealth, and only two (guilty and "guilty *in absentia*") that would produce the maximum revenue.

The question – to put it in terms most favorable to the government – is whether any fines and costs that would have been assessed if the driver were found guilty of the charge on the face of the ticket were "property of" the City and Commonwealth *before* the driver was adjudicated guilty.[5] The indictment thus sought to conceal its true gist, that is, an alleged scheme to deprive the City and Commonwealth of the judges' "honest services" in the pre-*McNally* and pre-*Skilling* sense, that is, of the local governments' supposed "right" to the benefit of a fair and impartial

[5] Thus, the indictment in this case did not allege a scheme to deprive local government of any sort of "right to control a valuable asset, tangible or intangible," that is also a kind of property under such cases as *Carpenter v. United States*, 484 U.S. 19 (1987) (propriety business information is "property.")

trial or hearing in each case. But of course that sort of "right" is an intangible one, at best, and is certainly not "money or property" that belonged to the City or Commonwealth.

In *Pasquantino v. United States*, 544 U.S. 349 (2004), this Court elaborated on *McNally* and held (5-4) that a government's "entitlement" to collect tax revenues was a "property right" of which the governmental entity could be deprived by a mail fraud scheme. *Pasquantino* involved a scheme to smuggle liquor into Canada without paying excise tax due to Canada on the importation. The entitlement to the tax was fixed when the liquor crossed the border, and therefore already constituted "property" of which Canada was to be deprived.

In *Cleveland v. United States*, 531 U.S. 12, 22–27 (2000), by contrast, the Court held that the state of Louisiana was not deprived of "property" by a scheme to corruptly obtain video poker licenses; the state had no property interest in the licenses of which it was deprived when the licenses were issued improperly. Philadelphia and Pennsylvania likewise had no "entitlement" to fines and costs, equivalent to that involved in *Pasquantino*, until and unless a ticketed driver was adjudicated guilty of some violation. Although the Traffic Court was far from a formal criminal tribunal, each accused driver was presumed to be innocent until adjudicated or admitting otherwise. Pet. 15–16 (citing Pennsylvania case law).[6] As a result, the City and state had no established property interest of the kind recognized in *Pasquantino*.

[6] Moreover, the Pennsylvania Vehicle Code expressly provides that the various fines it establishes are due only in the event of conviction. *See, e.g.*, 75 Pa.Cons.Stat. §§ 3362, 6502(a).

These core principles cannot be reconciled with the opinion of the court below. Petitioners' scheme, according to the Third Circuit, "obviate[d] judgments of guilty that imposed the fines and costs," thereby "keeping (or taking) judgments out of the hands of the Government to prevent the imposition of fines and costs." Pet. Appx. 20. But for the scheme, "money ... *would have been* properly due as fines and costs." *Id.* (quoting indictment; emphasis amended). The court below affirmed petitioners' convictions on the impermissible basis that because the scheme, as alleged, had the purpose of dishonestly *preventing* the City from acquiring a property interest in the fines cognizable under *Cleveland*,[7] the petitioners (and respondents) should be convicted to prevent them from getting away with their (alleged) dishonesty. Pet. Appx. 19 ("Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments of guilt and the imposition of fines and costs) as the basis to claim that there is not fraud.").

But the mail and wire fraud statutes address schemes "for obtaining money or property," 18 U.S.C. §§ 1341, 1343, not for depriving or interfering with the *opportunity to acquire* property. In other words, the Court below reasoned, a "scheme" that did *not* violate the statute should be a permissible basis of

[7] The opinion notes that according to one overt act (a superfluous allegation under § 1349, which requires no overt acts), a different defendant (not any of the petitioners or respondents) once undid an adjudicated ticket. Pet.App. 20 (*citing* 2 CA3 Appx. 228–29). Such misconduct, if it occurred, was categorically different from the "scheme or artifice to defraud" under the indictment's charging language.

prosecution precisely because it has as its object preventing a cognizable mail fraud crime from occurring.

The standard applied below cannot be reconciled either with this Court's precedent or with the case law of most of the circuits, thus requiring this Court's intervention. In particular, the decision of the court below squarely conflicts with decisions of the Seventh Circuit. In *Ward v. United States*, 845 F.2d 1459 (7th Cir. 1988), the court of appeals affirmed the post-conviction vacatur of a mail fraud decision based on *McNally*. The defendant there was a lawyer who bribed a judge to reach a favorable disposition of a drunk driving case.[8] As a result, Ward's client's bond was refunded in full rather than after the deduction of fines and costs. As the Seventh Circuit explained, discussing *Ward* in a later case, "[T]hat a state might have lost fines an honest judge might have imposed had defendant not bribed [the] judge was insufficient to establish a property right." *United States v. Ashman*, 979 F.2d 469, 479 (7th Cir. 1992) (failure to execute trades at Chicago Board of Trades by open outcry not deprivation of money or property within fraud statute). See also *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987) (no property interest where defendant deprived the Treasury Department of accurate information and data that if properly disclosed, "might have resulted in the Department assessing tax deficiencies").

The other circuits likewise properly focus their analyses in similar cases on whether money or

[8] As a post-*McNally* but pre-*Skilling* (and pre-§ 1346) case, the "honest services" theory relied on by the government at trial was not available to justify the conviction in *Ward*.

property is presently owing or legally due to the victim, not whether money or property could or might become due. The Second Circuit in a civil RICO case based on alleged mail fraud similarly suggested that it would reject the theory that "lost sales" could constitute a property right in the victim's hands merely because it "may become property."

> To be clear, Empire's Amended Complaint also alleges that its own lost sales were an "object of the scheme." We are skeptical that "lost sales" in this context can constitute an object of the scheme, however, because the "object of the fraud" must be " 'property' *in the victim's hands*," and "[i]t does not suffice ... that the object of the fraud *may become property* in the recipient's hands." *Cleveland*, 531 U.S. at 15 (emphasis added). But our analysis of proximate cause and thus the merits of the case do not turn on this issue, so we decline to resolve it.

Empire Merchants, LLC v. Reliable Churchill LLLP, 902 F.3d 132, 141 n.7 (2d Cir. 2018).

The Fifth Circuit has held similarly that unissued tax credits are not "property" in the state's hands because the state "does not derive any benefit, gain, or income from tax credits while it possesses them." *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003). Likewise, the Ninth Circuit consistently holds that a victim has property rights when money is legally due to the victim, but not before. *See, e.g.*, *United States v. Ali*, 620 F.3d 1062 (9th Cir. 2010) (defendants' scheme to fraudulently obtain software for less than full payment from third party distributors deprived publisher of a property right because company had a

right to full payment if its software was sold outside certain restrictions). While the state, in this case, would have a property right to enforcement of a judgment once entered by the judge, *see* Pet. Appx. 22 & n.20, it did not enjoy a property right to have any particular judgment entered upon the later adjudication of a given ticket.

The opinion of the court below conflicts with this Court's precedent and with better-reasoned decisions in several other circuits. It is also premised on a gross intrusion of federal authority – wielding the bluntest of instruments, a criminal indictment – into the administration of a quintessentially local governmental institution, a traffic court. See *Loughrin*, 573 U.S. at 361–62; *United States v Bass*, 404 U.S. 336, 349 (1971). The indictment's theory also presumes that each ticket, once challenged, must be adjudicated by a strict and rigid application of evidentiary rules and literal construction of traffic laws, like some idealized model of a felony trial in federal court. But in fact the Philadelphia Traffic Court operated as a "people's court," where leniency and mercy were regularly dispensed by non-lawyer judges assessing the circumstances of ordinary citizens who may have made forgivable mistakes in driving.

Worse yet, the indictment was premised on an unconstitutional presumption of guilt, that upon issuance of a ticket, without more, some fine or penalty was automatically due to the city or state. See *Nelson v. Colorado*, 581 U.S. —, 137 S.Ct. 1249 (2017) (giving substantive constitutional effect to presump-

tion of innocence).[9] This unacceptable presumption of guilt as to the motorists was then echoed in the Third Circuit's decision, which appears to reason that the defendants' argument against the validity of the indictment cannot be correct, simply because if it were, then they would go free of conviction. Pet. Appx. 19.

Neither controlling precedent, nor constitutional principles, nor fundamental fairness can tolerate such a result. The petition should be granted.

2. This case offers an excellent vehicle for clarifying the *Cleveland* rule limiting overbroad application of the mail and wire fraud statutes.

As shown under Point 1, the issues at stake in this case are important, and the holding of the court below conflicts with this Court's precedent and the rulings of other circuits. The record of the instant case also offers a good vehicle for the discussion and resolution of such questions. The petition arises upon the denial of a motion to dismiss the indictment, and thus presents a pure question of law on a closed record. Moreover, after a lengthy trial, the jury entirely rejected the government's underlying theory of this

[9] In legal terms, a traffic ticket is an accusation, no more. The Third Circuit's theory would convert every attempted obstruction of justice in a mandatory restitution case, for example, into an indictable fraud on the alleged victim, regardless of the defendant's guilt or innocence of the offense with which he was charged. For the same reason, almost any attempted witness tampering in a drug case could be prosecuted as a wire fraud with the object of depriving the United States of the mandatory criminal forfeiture judgment that would result from a conviction.

case, acquitting every defendant who stood trial of all charges of mail and wire fraud. So far as the jury could find, based on an extensive presentation of direct and circumstantial evidence, there was no fraud in the operation of the Philadelphia Traffic Court,[10] or at least not in these petitioners' or respondents' courtrooms.

As the jury learned at trial, any tradition of "consideration" that existed resulted not in corrupt "ticket-fixing," but only in the kind of lenient and sympathetic outcomes in particular cases that might eventuate anyway in such an informal, lawyerless, minor local tribunal, simply from the accused drivers' showing up and telling their stories. Protecting such suspects from federal felony conviction is a basic goal of the rule established by this Court in *McNally* and applied in *Cleveland*.

The instant petition therefore presents an appropriate vehicle for resolution of the important question presented.

[10] Much less was there any bribery, as the government appears to have suspected during the grand jury investigation but never charged, as the court below mentions. *See* Pet. Appx. 32–33.

CONCLUSION

For the foregoing reasons, in addition to those set forth by petitioners Alfano and Hird, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 19, 2019

EXHIBIT D

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

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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

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

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

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

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

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

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

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

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

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

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

* * *

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

OPINIONS BELOW

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

JURISDICTION

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

PROVISIONS INVOLVED

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

STATEMENT

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

A. The Port Authority and Its Governance

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

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

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

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

B. The George Washington Bridge

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

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

C. The Lane Realignment

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

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

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

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

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

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

D. The Indictment and Trial

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

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

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

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

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

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

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

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

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

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

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

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

E. The Third Circuit's Decision

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

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

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

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

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

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

(continued...)

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, the Government's theory also imperils principles of federalism. This Court has refused to read the federal fraud statutes to "involve[] the Federal Government in setting standards of ... good government for local and state officials." *McNally*, 483 U.S. at 360. Congress must "speak more clearly" to justify such a result. *Id.*; *see also Cleveland*, 531 U.S. at 25 ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes."). Due to the ubiquity of communication by wire (for § 1343) and the fact that virtually all state and local governments receive federal funds (for § 666), the Government's property theory would carry just the result that *McNally* foreswore.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

This Court should reverse the judgment below.

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