No. 18-1059

IN THE

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

If there is one thing this country does not need right now, it is a rule of law allowing a public official to be locked up based on a jury determination that she "lied" by purporting to act in the public interest or by concealing her "political" purposes. There is no end to the (bipartisan) mischief such a regime would facilitate, or the chilling effect it would carry. That is why this Court has rebuffed prosecutorial efforts to use criminal fraud statutes to police the ethical duty of public officials to advance the public interest. *See McNally v. United States*, 483 U.S. 350 (1987); *Skilling v. United States*, 561 U.S. 358 (2010).

Yet in this case, by using "creative prosecutorial charging," the Government simply "reframe[d]" the dishonest political conduct that this Court has long ruled off-limits "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). The Third Circuit blessed that contrivance. As a result, Petitioner has been sentenced to prison for reallocating traffic lanes from one set of drivers to another—not because the realignment violated any *objective* rule or regulation, but because she and her co-defendant told subordinates they wanted to study its traffic impact, while allegedly being *subjectively* motivated by an ulterior political goal. In the Third Circuit's view, this amounted to "fraud" on the state, because the decision required public employees' labor ("property") and because superior officials might have stepped in had Defendants been honest about their true motives ("false pretenses"). Pet.App.17a-18a, 22a-28a.

As the petition explained, this reasoning invites indictment of every public official who justifies her actions on policy grounds without confessing the base political calculus that lies beneath—which is to say, *every* official. From the mayor who approves a grant to help a political supporter, to the state official who orders an environmental study to please an interest group, to the federal prosecutor who pursues a case to boost his own political ambitions—none of whom own up to this in announcing their decisions—all are guilty of criminal fraud under the decision below. So much for *McNally* and *Skilling* reining in "honest services" fraud. Turns out this was all illegal under the plain-old property-fraud statutes the whole time.

The Government does not dispute that, if this is what the court below held, this Court must correct it. Instead, it backpedals from the broad positions it prevailed on below, recharacterizing the holding to distinguish the precedent and parade of horribles. Its efforts are illusory. The notion that Baroni had to lie because he lacked "unilateral authority" to realign the lanes is simply to say that, had he openly shared his motives, a superior may have countermanded his order. That will *always* be true, and surely always be a finding open to a jury: This is not an autocracy. Nor does the use of employee labor distinguish this case; every official decision requires implementation. As for the assertion that the realignment served no "legitimate" purpose, that is nonsense: No allocation of lanes between two public cohorts is "illegitimate." It is only Defendants' *motives* that can be attacked, which is precisely the problem: We are back to jailing a public official because the jury second-guesses her subjective intent for otherwise-lawful actions.

ARGUMENT

I. THE GOVERNMENT'S ATTEMPTS TO NARROW THE THIRD CIRCUIT'S HOLDING FAIL.

The Third Circuit held that Baroni defrauded the Port Authority by ordering the realignment, because (1) he claimed his purpose was to study traffic, whereas really he was politically motivated ("false pretenses"), and (2) the realignment and traffic study required labor of public employees, including Baroni ("property"). Pet.App.22a-26a. The false pretenses were necessary to the "fraud" because, had he been honest, staff might have gone over his head and the Port Authority's Executive Director might then have overturned his orders. Pet.App.17a-18a.

The petition explained why that reasoning—*i.e.*, that a public official who conceals a political motive for an action thereby "defrauds" the state of property used for that action—is untenable in the extreme. Nothing is easier (or more common) than accusing a politician of advancing his own political interests while purporting to act in the public interest. If that suffices to indict, and if a jury finding to that effect suffices to convict, no official in the nation could steer clear of the prosecutorial crosshairs. That state of affairs is exactly what this Court sought to avoid in *McNally* and *Skilling*. *See also, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (construing bribery statutes to avoid casting "pall of prosecution" over "nearly anything a public official does"). This aggressive conception of public-sector property fraud would also swallow honest-services fraud entirely, escaping the constraints *Skilling* put on that amorphous doctrine. *See* Black-McDonnell Amicus.Br.3-8.

The Government never disputes that the holding described above would not only contradict the Court's cases but also be disastrous as a practical matter. It hardly could: Even the Attorney General agrees that criminalizing "bad" or "political" intent in official decision-making would "paralyze the government." Sen. Judiciary Comm., Atty. Gen. Confirmation Hrg. (Jan. 15, 2019). Instead, the Government suggests that the holding can be cabined, pointing to supposed limiting principles to distinguish the flood of hypotheticals and preserve *Skilling*. All of these efforts, however, quickly collapse under scrutiny.

A. The Government's principal "distinction" is that Baroni did not "possess unilateral authority" to realign the lanes and therefore "had to lie" about his motives. BIO.13-15. This is how it tries to dismiss the hypotheticals about mayors and governors, and to reconcile the decision below with *Skilling* and *McDonnell*. BIO.16, 19-20.

Unpacked, however, this is no distinction at all. The Government's language is cleverly ambiguous, but it has always been undisputed that Baroni had authority, in the first instance, over allocating the lanes. As the Government told the jury in closing, Baroni was a "high-ranking" official who "had authority" to "move the cones." JA.5302-03; *see also* JA.92 (indictment). Indeed, he was "number two" at the Port Authority (JA.1482), and undisputedly did not need approval of the only more-senior official to "change ... a lane configuration" (Pet.App.135a-136a). Of course, had lane alignment been outside Baroni's purview, even the "policy reason" he offered would not have caused the Port Authority bureaucracy to carry out his orders.

Baroni lacked "unilateral authority" only in the sense that his orders *could be overruled* by the Executive Director. Pet.App.18a ("That Baroni was countermanded shows he lacked ... unencumbered authority ...."). Had he informed Port Authority staff that he wanted to realign the lanes for political revenge, the court thought, there was a *practical risk* that they would go over his head and convince the Executive Director to override him. *See id.*

Even if this distinction held up, it would mean that every public official *below* chief executive—the vast majority of officials—could be convicted of fraud for hiding subjective political motives for actions legally within their purview. That is a breathtaking expansion of property fraud in its own right. In any case, this new "chief executive exception" is illusory. Even chief executives answer to legislatures, courts, or voters, who might obstruct nakedly political acts. Even chief executives thus have a reason to lie.

Accordingly, if Baroni's "public policy reason" for the realignment was fraud because honesty risked inviting reversal, the same holds true for every hypothetical in the petition: A mayor who is honest about her snowplow sequence risks causing staff to object and city council to intervene, and thus "need[s] to lie" (BIO.16) to implement it. A police officer who admits to a retaliatory arrest would see his boss release the arrestee; he therefore cites some probable cause. A Commerce Secretary who owns up to a partisan basis for adding a census question might be stymied by a President (or court), so he invokes a neutral ground. Most crucially, juries could surely make these analogous findings; per the decision below, that is enough to throw 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, he would have "had to lie" to avoid being overruled by its Board of Commissioners. Had he been 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 or impeachment.

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.

B. The Government also repeatedly implies that this case is unique because the realignment caused "unnecessary work that served no legitimate Port Authority function." BIO.13-14. It distinguishes the snowplowing and pothole-repair hypotheticals on the basis that those are "legitimate functions." BIO.16; *see also* BIO.20 (distinguishing *McDonnell* as it did not involve "sham work" for "no legitimate ... aim").

This is another smokescreen. Dividing twelve lanes into an eleven-one configuration is no less "legitimate" than aligning them into a nine-three pattern. Allocating scarce public resources among public constituencies is what officials are elected to do—whether the resource is school funding, pothole-repair, or traffic lanes. The "political deal" that originally bestowed three special-access lanes on Fort Lee (Pet.App.4a) obviously holds no exclusive, permanent claim to public legitimacy.

The realignment required an extra tollkeeper to ensure that the "one local lane from Fort Lee would remain open" if the assigned tollkeeper there needed relief (ironically, this was thus a step that *improved* Fort Lee traffic). BIO.4. Port Authority engineers also studied traffic data arising from the change in traffic patterns. BIO.8. Collecting tolls and studying traffic are obviously "facially legitimate" tasks for public employees. BIO.16.

The Government's claim that the employee labor was "unnecessary" or "no[t] legitimate" thus reduces again to the claim that Defendants had *bad reasons* to order the realignment in the first place. If they were *sincerely* motivated by studying traffic patterns or making the lane allocation more fair, then the employee labor was indisputably both necessary and legitimate. The *only* reason this labor is converted into "unnecessary" and "illegitimate" work is because Defendants' subjective motive was political. The Government's brief thus confirms that the Third Circuit's dispositive factor for property fraud is 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 sincerely driven by national security. The legislator who appropriates pork causes expenditure of money for "no legitimate purpose," since he knows there is no need for a bridge to nowhere. Even the public employee who "phones in sick to go to a ball game," *Sorich v. United States*, 555 U.S. 1204, 1205-06 (2009) (Scalia, J., dissenting from denial of certiorari), causes the state to incur "unnecessary" costs in paying a substitute worker.

Pejorative labels are not limiting principles. Any official deemed to have hidden her political motives or lied about acting in the public interest can equally be accused, by a court or jury, of taking "illegitimate" or "unnecessary" action. If the Third Circuit's ruling stands, there will not be room in the federal prisons to house all of the offenders.

C. Last, the Government suggests that this case is unusual since it "involve[d] a deprivation of money or property." BIO.16-17.

That literally begs the question presented. And the Third Circuit's broad conception of "money or property," to include the state's "intangible" interest in "public employees' labor" (Pet.App.22a), ensures that virtually *every* official decision could be said to cause such a "deprivation." When officials make decisions, civil servants implement them; it is hard to imagine a decision that does *not* demand at least some time or attention from an employee. If the Third Circuit's rule governs, any such decision can therefore be the basis for a fraud indictment, on nothing more than the ubiquitous allegation that the official's stated purpose was not her actual one.

The Third Circuit went even further by holding that the public official's *own* time counts as property of the state. Pet.App.25a. The Government declines to defend this part of the holding, saying only that the court could have affirmed without it. BIO.17. It is now the law in the Third Circuit, however, that an official who lies about his motives for an action has "plainly" defrauded the state of his "compensation" for the time he spent on the action, even if no other employee's labor is implicated. Pet.App.25a.

As if this were not enough, the Court of Appeals also offered, as an independent "alternative basis" for its holding, the notion that Defendants were guilty of defrauding the Port Authority out of its "exclusive interest" in controlling the bridge. Pet.App.26a-28a. That too is now binding Third Circuit law, which the Government tellingly refuses to defend (BIO.17).

Between these three "property interests"—the public employees' labor, the public official's own time, and the public assets affected by the decision—not a single governmental decision is beyond reach of a criminal fraud indictment based on an allegation of concealed or misrepresented subjective motives.

* * *

Once "unilateral authority," "unnecessary work," and "money or property" are stripped away, here is what remains: Defendants made an official decision; that decision affected public resources; and the jury found that their "true purpose" was political, not the "public policy reason" they had invoked. Pet.App.7a. Calling that criminal fraud is even more sweeping—and even more dangerous—than anything the courts ever did under the honest-services framework. This Court must intervene.

II. THE GOVERNMENT IGNORES THE CONFLICTS OF AUTHORITY.

The consequences of the decision below are reason enough to grant certiorari; the Government's limiting principles do nothing to cabin creative prosecutors' capacity to pursue any official they choose. But that is not all: The opinion below also conflicts with decisions of this Court and other Circuits, which the Government largely ignores.

A. Beyond the "distinctions" already debunked, the Government does not deny that the lower court's conception of property fraud renders honest-services fraud superfluous—and allows prosecution of even the conduct that this Court held *outside* the scope of § 1346. Pet.22-25. Repeating that this is a "money or property" case (BIO.20) is circular, not responsive.

The Government offers one conclusory paragraph to reconcile this case with *Cleveland v. United States*, which held that the state's "power to regulate" does not give rise to "property" under the fraud statutes. 531 U.S. 12, 24 (2000). *Cleveland* is inapposite, the Government says, since this case involved "money" (*i.e.*, employee labor), not just a regulatory decision. BIO.21. But if using public employees to effectuate a regulatory decision were enough to trigger the fraud statutes, *Cleveland* would be a dead letter—as no regulatory action can be implemented *without* paid employees. Pet.26-27. The Government also adds that the Port Authority's traffic lanes were "revenue-generating." BIO.21. It made the same argument about the licenses in *Cleveland*; this Court soundly rejected it. 531 U.S. at 21-22.

Thus, while the Government feigns ignorance as to which offense elements are disputed (BIO.13-14), *Cleveland* makes clear that the official regulatory act here is not "property" within the statutory meaning. Especially because Baroni was a senior official with discretionary power over Port Authority operations, it makes no sense to say that his exercise of that discretion "deprived" the Port Authority of property, whatever his true subjective motive for acting. Pet.28. The contrary reasoning adopted below turns every breach of fiduciary duty into fraud.

Finally, the Government dismisses in boilerplate the federalism, lenity, and due-process canons that guide the construction of criminal laws. It says the petition offers "no authority" to support their use. BIO.18. But the only relevant absence of authority is the Government's failure to cite a *single case* treating as "fraud" a public official's lie about her true motive for taking an official decision. That lack of authority more than justifies deploying these canons.

B. Nor can the Government reconcile the Third Circuit's decision with those of other Circuits.

As to *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015), the Government does no more than restate its holding (BIO.21)—completely ignoring the reasoning and language that Petitioner invoked. The Seventh Circuit expressly held that the federal fraud statutes do not codify "an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act also is the real one." *Id.* at 736. It called that theory "not a plausible understanding of the statute." *Id.* Yet that is the theory on which Petitioner was convicted.

The same goes for *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). Again displaying his more cautious approach toward construction of open-ended federal crimes, Judge Easterbrook called it "preposterous" to think that "it is a federal crime" to "take account of political considerations" in "deciding how to spend public money," even if the official lies about her true rationale. *Id.* at 883. Again, that "preposterous" notion is effectively what the Third Circuit adopted here. Pointing to immaterial factual distinctions between the two cases, the Government ignores the fundamental conflict.

Finally, the Government acknowledges that the First and Eleventh Circuit have rejected "attempts to recast the intangible right to honest services as a property right." BIO.22. That is precisely what the Third Circuit allowed, by sustaining property-fraud convictions after prosecutors excoriated Defendants for violating a "responsibility to the public" to make "each and every decision in the best interest of the people of New Jersey." JA.5303.

CONCLUSION

The Court should grant the petition and reverse the decision below.

MAY 28, 2019

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