No. 18-1059

IN THE
Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court Of Appeals
For The Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
Co-Chair, *Amicus Committee*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
DRATEL & LEWIS
29 Broadway, Suite 1412
New York, N.Y. 10006
(212) 732 – 0707
jdratel@dratellewis.com

Attorney for Amicus Curiae

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in the scope of criminal statutes, especially the mail fraud statute and what allegations fail to satisfy its "money or property" and/or fraud elements.[1]

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[1] The parties have provided written consent to the submission of this brief. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amicus, its members, or counsel contributed money or

SUMMARY OF ARGUMENT

The past 30 years have witnessed a familiar cycle of mail fraud prosecutions pursuant to 18 U.S.C. §1341, and its "money or property" prong: following this Court's imposition of important limitations on the statute in *McNally v. United States*, 483 U.S. 350, 356 (1987), periodically prosecutions and convictions occur that test the boundaries of the meaning and concept of "money or property." The conception of "property" in those prosecutions often exceeds the scope of the statute prescribed by this Court, requiring this Court's intervention to restate the applicable restrictions.

This case presents the latest example of such prosecutorial overreach in two respects. The decision below proposes a phantom version of "property" – the right to regulate the traffic on the George Washington Bridge – that would effectively eliminate the brakes this Court has carefully applied to §1341 during the past three decades. Also, in attempting to criminalize state governmental policy decisions that allegedly were justified on pre-textual grounds, the decision would substitute the criminal process for the political process. If state decisionmakers deprive the electorate of the candid reasons for policy choices, the solution is at the ballot box, not the jury box.

Otherwise, for the reasons set forth in Petitioner's Brief, as well as those set forth below by

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services to the preparation or submission of this brief.

NACDL, the "property" element of mail fraud will be untethered from any limits, and every government decision or policy not executed 100% for the reasons publicly stated would be susceptible to criminal prosecution as "fraud." Accordingly, it is respectfully submitted that the Third Circuit's decision below should be reversed.

ARGUMENT

I

A STATE GOVERNMENT'S RIGHT TO REGULATE TRAFFIC FLOW DOES NOT QUALIFY AS "MONEY OR PROPERTY" UNDER THIS COURT'S APPLICATIONS OF THE MAIL FRAUD STATUTE

The decision below threatens to expand the mail fraud statute's "money or property" element to the point where it is rendered meaningless, and would thereby undo this Court's serial efforts to confine it to the statute's objectives and cognizable traditional notions of "property." In *Cleveland v. United States*, 531 U.S. 12 (2000), the Court held that unissued state licenses did not constitute property under the statute because they did not qualify as "property in the hands of the victim" government. *Id.*, at *15.

As NACDL did in *Cleveland*,[2] it files this brief *amicus curiae* in order to express its interest in maintaining the necessary limits on the mail fraud statute that this Court has imposed time and again. In that context, NACDL relies on Petitioner's presentation of the facts and the legal principles and case law applicable to this case.

As this Court emphasized in *McNally v. United States,* 483 U.S. 350 (1987), "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *Id.*, at 356. This Court also confirmed in *McNally* the necessity for a mail fraud charge to be premised upon a deprivation of "money or property." *Id.* Although this Court has accepted intangible property as satisfying the "money or property" element of the mail fraud statute,[3] it has never included state government functions or regulatory actions as

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[2] NACDL's amicus brief in Cleveland is available at 2000 WL 719563.

[3] In Carpenter this Court found that "[c]onfidential business information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy." 484 U.S. at 26 (citing 3 W. Fletcher, Cyclopedia of Law of Private Corporations §857.1, p. 260 (rev. ed. 1986)). In addition, a 1988 amendment permits mail fraud to be premised upon "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, P.L. No. 100-690, §7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1994)). However, that theory of liability is not at issue in this case.

"property" for the purposes of mail fraud under §1341.

Here, the decision below would nullify *Cleveland*, which represented the culmination of this Court's carefully constructed jurisprudence over what is now a 30-year period. After *McNally*, in *Carpenter v. United States*, 484 U.S. 19 (1987), *Cleveland*, and *Pasquantino v. United States*, 544 U.S. 349 (2005), this Court consulted and relied upon traditional forms and definitions of property in determining whether the prosecution in each case asserted a property interest that satisfied that element. *See also* Paul Mogin, "The Property-Rights Limitation in Mail and Wire Fraud Cases," *The Champion*, April 2008, at 24-25.

For example, even in *Pasquantino*, in which this Court affirmed the convictions, this Court recognized the distinction between the regulatory interest at stake in *Cleveland* and the economic interest – taxes owed the Canadian government – at issue in *Pasquantino*, explaining that while in *Cleveland* this Court "held that a State's interest in an unissued video poker license was not 'property,' because the interest in choosing particular licensees was 'purely regulatory' and '[could not] be economic[,]'" 544 U.S. at 357 (*quoting Cleveland*, 531 U.S. at 22-23) (internal quotation marks omitted) (first bracket in original), in contrast, in *Pasquantino* "Canada's entitlement to tax revenue is a straightforward 'economic' interest." 544 U.S. at 357. *See also id.* ("Canada could hardly have a more 'economic' interest than in the receipt of tax revenue").

Thus, while in *Cleveland*, "[t]here was no suggestion . . . that the defendant aimed at depriving the State of any money due under the license[,]" in

Pasquantino "the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law." *Id.*

Here, like in *Cleveland* and *un*like in *Pasquantino*, the state's interest was entirely regulatory, and did not involve any property cognizable in law or any money to which the state could claim legal entitlement. In fact, it is even further removed from "property" than the licensing interest at issue in *Cleveland* because it was merely an executive function without any economic component.

In applying *Cleveland*, the Circuit courts have on multiple occasions resisted the government's attempts to transform regulatory interests or political activities into "property." For instance, in *Fountain v. United States*, 357 F.3d 250 (2d Cir. 2004), the Second Circuit noted that pursuant to *Cleveland*, the determinative factor is "whether the government's right is regulatory or revenue-enhancing." *Id.*, at 256. *See also id.*, at 258-59 (identifying other cases demonstrating the difference between entitlement to collect taxes and the issuance of permits and licenses by the government).

Likewise, in *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003), the Fifth Circuit concluded that "low-income housing tax credits were not property until they had been issued." *Id.*, at 353.[4] Even in

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[4] In United States v. Hoffman, 901 F.3d 523, 536-37 (5th Cir. 2018), as revised (Aug. 28, 2018), cert. denied, 139 S. Ct. 2615 (2019), in which film tax credits were fraudulently obtained, the Fifth Circuit distinguished Griffin based on the "unique nature of the program [Griffin] considered, in which the state merely

United States v. Hedaithy, 392 F.3d 580 (3d Cir. 2004), in which the Third Circuit ruled that a private educational testing corporation had a property right in access to and use of its examinations was more "akin to a franchisor's right to select franchisees" than to a state's licensing authority, *id.* at 600, the Court nevertheless recognized that in *Cleveland* the theory of liability did not "rest on any [] asset" the state possessed, but rather its "sovereign right to exclude applicants it deem[ed] unsuitable." *Id.*

Here, too, the right to any state asset has not been properly invoked. Rather, the prosecution rests solely on a political and/or regulatory function. In that context, too, the courts have rejected efforts to convert that into property – including by focusing , as the court did below, on the associated labor or salaries of public employees. For example, in *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007), the Fifth Circuit reversed a conviction based on the claim that a candidate's election fraud deprived the parish of "property" in the form of the defendant's salary. The Court in *Ratcliff* pointed out that

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allocated federal tax credits," a situation in which "no state property was at risk." 901 F.3d at 539. While in Griffin the "state's role as an allocator of federal tax credits meant it was acting much like the licensor in Cleveland: deciding which applicants would best serve the state's regulatory interests, decisions that did not directly implicate the state's finances," in Hoffman, because "Louisiana was administering its own tax credits, the fraudulent issuance of those credits would deplete the state treasury[.]" Id., at 539-40. As a result, "Louisiana ha[d] a property interest in the tax credits." Id., at 540.

> [f]inding a scheme to defraud a governmental entity of the salary of elected office based on misrepresentations made during a campaign would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. In practice, the Government's theory in this case would extend far beyond the context of campaign finance disclosures to any misrepresentations that seek to influence the voters in order to gain office, bringing state election fraud fully within the province of the federal fraud statutes.

Id., at 649 (internal quotation marks omitted).

Ratcliff relied on the Sixth Circuit's decision in *United States v. Turner*, 465 F.3d 667, 681-82 (6th Cir. 2006), in which the Court, in another election fraud case, relied on *Cleveland* and *Pasquantino*, in noting that "it appears that, as a matter of law, a court must analyze whether the object of fraud is sufficiently economic in nature to constitute property in the hands of the victim." *Id.*, at 681-82. Pursuant to that evaluation, the Court in *Turner* concluded that the paying of a government official's salary, although it "comes the public fisc," is "regulatory or, perhaps more aptly in this context, administrative," and "implicates the role as sovereign, not as property holder." *Id.*, at 681, *quoting Cleveland*, 531 U.S. at 23-24.

Here, the government's theory of liability would politicize the mail fraud statute beyond repair, making every political decision that involved deception on the public vulnerable to criminal prosecution because in some collateral sense it was accompanied by a government expenditure. However, finding some economic cost associated with a particular executive political decision would not convert it into a pecuniary interest rising to the level of property cognizable under law. Incidental costs are attendant to every governmental decision. Treating each as the defining element of "property" would eviscerate *Cleveland*, and transform *every* government (and private) decision with any financial consequence into "property." That untethered definition is precisely what this Court has been steadfast in resisting for the more than 30 years since *McNally*.

That limitation is also consistent with restrictions on the mail fraud statute in ordinary contexts. In *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993), the Seventh Circuit held that "[l]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement" that "[a] deprivation is a necessary but not a sufficient condition of mail fraud." *Walters*, 997 F.2d at 1227. Moreover, a victim's loss must be primary to the scheme. A loss that is merely incidental to a deceitful scheme does not satisfy the statutory requirement. *See* Elena De Santis, *Mail and Wire Fraud*, 55 Am. Crim. L. Rev. 1447, 1458 (2018), *citing Walter*, 997 F.2d at 1225-26.

Allowing prosecutors discretion to determine whether a state or local executive function should be classified as "property" for the purposes of the mail fraud statute would result in federal executive branch officials, namely federal prosecutors, acting in a legislative capacity. In addition, the appropriate balance between the state and federal government would be seriously altered.

As this Court has declared, "'[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" *Printz v. United States,* 521 U.S. 898, 921 (1997) (*quoting Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991)). Also, absent statutory language or legislative history, a broad reading of a federal statute to "transform relatively minor state offenses into federal felonies," is unwarranted. *Rewis v. United States,* 401 U.S. 808, 812 (1971).

Accordingly, it is respectfully submitted that the government's theory of liability fails to allege §1341's essential element of "money or property" adequately, and that consequently the Third Circuit's decision below should be reversed.

II

THE DECEPTION CHARGED IN THIS CASE – LYING ABOUT THE MOTIVATION FOR STATE GOVERNMENTAL POLICY – IS NOT COGNIZABLE AS FRAUD UNDER THE MAIL FRAUD STATUTE

The government's theory of fraud under §1341[5] – that a state executive's deceptive statement of motive for an executive decision or policy constitutes a fraud upon the state – not only does not allege a fraud, but also presents a number of intractable problems for future cases. As a threshold matter, any false statements attending an executive function were not "fraudulent" because such statements were not responsible for any inducement. There is no question that the executive could have performed the acts in question even without declaring a reason therefor. Thus, even false statements were neither material nor the cause of any reliance. *See e.g. United States v. Weimert*, 819 F.3d 351, 366 (7th Cir. 2016) (holding that deceptions regarding "negotiating positions—the preferences, values, and priorities" of parties "do not support the criminal convictions" of wire fraud).

Indeed, even if the reasons alleged by the prosecution were in fact those underlying the decision to alter the bridge's traffic flow, the executive would

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[5] As noted ante, this case does not include any allegation of a deprivation of the "right to honest services" chargeable under 18 U.S.C. §1346.

nevertheless retain the power to implement the policy. While that might have incurred a hue and cry from the public (and the political opposition), the consequences would be purely political, not economic, and would not affect or hinder the executive's *authority* to make the decision. Extending the concept of "fraud" to the subjective rationale for political acts and policy that the executive is authorized to perform regardless of the underlying (genuine) reason would herald both a dramatic and dangerous expansion.

In addition, the process of discerning motive, or the motive necessary for criminal liability is fraught with daunting obstacles. Would the false motive need to be the *exclusive* motive? If not, would it need to be the primary motive, and, if so, to what extent? Parsing primary or secondary or even equal motivations for official acts would be a difficult task, as would even developing consistent, reliable standards for making such a determination. It would also inject political biases into the criminal justice process. The danger of prosecution for such policy choices might even discourage people from public service altogether.

Besides, all executive functions have *some* political quotient. Would those have to be publicly announced in conjunction with any other rationale – and if so, to what extent and by what means – in order to avoid prosecution? *See Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

Affirming the theory of fraud here would make all executive decisions that are not made wholly for the reasons publicly stated vulnerable not merely to political criticism, but criminal prosecution. While

transparency in decision-making may be an aspirational objective for government, it is neither a legal requirement nor a subject of criminal law generally, much less those specific statutes, such as mail fraud, that target fraud through which a person or entity is deprived of "money or property."

Moreover, any economic costs associated with the policy change, or which the state incurred at all in that regard, were not the result of the alleged fraud – the false reasons – but rather the result of the executive's decision, which could have been made without interference regardless of the reasons stated publicly.

If federal prosecutors arrogate to themselves the discretion to revisit such political decisions and motivations, and impose criminal liability, again, as with the property element, the appropriate balance between the state and federal government would be transformed materially, and make any decision susceptible to partisan exploitation.

Accordingly, it is respectfully submitted that the Third Circuit's decision below should be reversed because the §1341 charge does not sufficiently allege a fraud under the statute.

CONCLUSION

Accordingly, for all the reasons set forth above, as well as in Petitioner's Brief and the other *amicus* briefs filed in support of Petitioner, it is respectfully submitted that the Third Circuit's decision below should be reversed.

Dated: 24 September 2019
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL
Co-Chair, *Amicus* Committee
National Association of Criminal Defense Lawyers
Dratel & Lewis
29 Broadway, Suite 1412
New York, New York 10006
(212) 732-0707
jdratel@dratellewis.com

Attorney for Amicus Curiae