No. 18-1059

IN THE

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.,*

Respondents.

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

REPLY BRIEF FOR RESPONDENT WILLIAM E. BARONI, JR. IN SUPPORT OF PETITIONER

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INTRODUCTION

The government's theory of criminality in this Court is unrecognizable from the one it charged, tried, and then defended in the Court of Appeals. In the lower courts, the government asserted that when Bill Baroni participated in directing Port Authority subordinates to reassign two traffic lanes from the use of Fort Lee drivers to the use of other New Jersey drivers, and to collect data about the resulting traffic to determine whether to make the change permanent, he committed fraud because the stated purpose was a lie. The real purpose, said the government, was to punish a political opponent—the mayor of Fort Lee—by denying the lanes to the mayor's constituents and causing those constituents to sit in traffic. As the government explained to the Third Circuit, that was an "[u]nauthorized *[p]urpose*": "*No* [Port Authority] official was entitled to use [Port Authority] facilities or resources as Defendants did." Gov't 3d Cir. Br. 28, 52 (first emphasis added). Thus, any public official who concealed from subordinates the purportedly unauthorized political purpose for realigning the lanes and, instead, offered a legitimate public policy purpose was guilty of fraud.

As Baroni demonstrated in his opening brief, that theory of fraud has disastrous and far-reaching implications for our political process. It renders the limitations on the federal fraud statutes described in *McNally* and *Skilling* a dead letter. It threatens to turn almost any public official who misrepresents the motivation behind some official action into a criminal fraudster. And it empowers federal prosecutors to pick and choose which concealed motives are politics as usual, and which are criminal acts.

For the first time in the long history of this case, the government seems to agree. The government now concedes that someone (or ones) at the Port Authority *did* have authority "to use [Port Authority] property that way." Gov't 3d Cir. Br. 53. Specifically, any official authorized to make the "official decision to realign the lanes" could do so without criminal exposure *even if* the purpose was to cause traffic in Fort Lee as political punishment. Gov't Br. 47 (internal quotation marks omitted). Such an official or officials could even "lie about [their] rationale" to staff without incurring criminal liability for fraud. *Id.* at 48. And the government does not dispute that this would all remain true even if the official could later be overruled by a superior, so long as the official had at least "first instance authority" to make the official decision. *Id.* at 39 (internal quotation marks omitted).

The government's theory *now* is that Baroni was not such an official. In other words, the crime was not, as the government consistently claimed below, that Baroni realigned the lanes from one constituency to another for the unauthorized *purpose* of inflicting traffic to punish a political opponent. Instead, the government now argues that the crime was that Baroni was an unauthorized *person* because, as the Port Authority's Deputy Executive Director, he supposedly did not even have "first instance" discretion to make an official decision to realign lanes on the George Washington Bridge.

The government's new argument is bewildering. The indictment alleged and the government took pains to prove that, as Deputy Executive Director, Baroni was "responsible for the general supervision of all aspects of the Port Authority's business, including the operations of Port Authority transportation facilities."

J.A. 21, 237-38. During cross-examination, the government made a point of extracting Baroni's acknowledgment that he was "the head of the agency." *Id.* at 652-53. By the government's *own* allegations and proof, Baroni was at the top of a massive agency, was generally responsible for supervision of all aspects of its operations and transportation facilities like the George Washington Bridge, and the government has never identified *any* formal rule or policy restricting his authority to supervise this particular aspect of the operations of this particular transportation facility (the placement of traffic cones on weekday mornings). Yet the government says even these circumstances do not demonstrate sufficient authority for a public official to avoid a fraud charge for lying to subordinates about the reason for an official decision.

For this reason, the Court should accept the arguments in Bridget Anne Kelly's briefs that the question does not turn on the meaning of authority, but on the meaning of property. See, *e.g.*, Kelly Reply 3 ("The right way to preclude abuse of the federal fraud statutes is instead to adhere to the simple rule this Court adopted in *Cleveland v. United States*, 531 U.S. 12 (2000): that 'sovereign power to regulate' is not 'property.'"). The fact that the government's proposed application of its proposed rule leads it to conclude that a fraud was committed in this case shows that hinging the difference between guilt and innocence on a public official's supposed authority provides no actual defense and prosecutors will always seek a way around it. See *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372-73 (2016) ("[The Court] cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (internal quotation marks omitted).

But as this brief explains, even on the government's own theory, its "sleights of hand," Kelly Reply 2, fail and Baroni's conviction must be reversed. Try as it might to make large concessions and then characterize "[t]he dispute in this case" as "factual, not legal," Gov't Br. 24, permitting a public official to be convicted of fraud on the flimsy basis proffered by the government here would wash away every protection the government claims to acknowledge. The government claims that its position addresses legitimate "concerns about potentially criminalizing large swaths of routine politics," *id.* at 47 (internal quotation marks omitted), and "chilling political activity" by ensuring that "[a]n official doing what he is authorized to do," *id.* at 23, is not turned into a criminal by doing it for a punitive political reason. But then, in its desperation to save these convictions, the government tries to take it all away by asserting that if a public official otherwise imbued with tremendous authority deviates in some respect from some unwritten, informal practice, all bets are off and the accuracy with which he reports his subjective reason for an official decision can once again land him in federal prison. If that is criminal, the government's concessions are an illusion.

Indeed, the other basis on which the government tries to salvage these convictions shows exactly the same thing. Attempting to further reassure this Court that its position creates no criminal exposure for a "[a]n official doing what he is authorized to do," Gov't Br. 23, regardless of his subjective motivation, the government observes that it *also* would not "have been federal fraud for defendants to initiate a real traffic study, hoping that it would result in a traffic jam that would harm a political enemy," *id.* at 47. In other words, the government *now* acknowledges that Baroni could legally do the thing it told the Third Circuit was

the crime: "[u]sing the ruse of a traffic study … [to] commandeer[] the resources of the Port Authority … to restrict access from local streets in Fort Lee … to create massive traffic jams." Gov't 3d Cir. Br. 1.

But that is what the government's evidence showed happened here. David Wildstein's own undisputed testimony was that he told Bridge supervisors to realign the lanes because he "wanted to see what the effect was" in order to "make a determination … as to whether those lanes would stay on a permanent basis," and he directed the engineering department to "track" the resulting traffic and collect "data" about "how many cars were involved and how far back the traffic was delayed." J.A. 302-05. As explained in the indictment and proved at trial, "Port Authority personnel" followed Wildstein's instructions; they "took steps to implement the [lane] reductions and to assess their impact on traffic." *Id.* at 31.

But the government still says Baroni is a criminal. Although the government concedes that it would not be fraud to initiate a traffic study as a pretext for causing traffic in a political opponent's town, the government contends that this traffic study—involving by the government's own admission "contemporaneous data collection and post hoc consideration of that data," Gov't Br. 42—was not "real" *enough*.

Once again, the government purports to support a safe harbor for official action, but in practice it seeks to litter that harbor with unseen mines. If Baroni's conviction is affirmed on the new, straw-grasping arguments advanced here, a public official who initiates otherwise legitimate agency action as a pretext to achieve some political purpose, with little interest in the publicly proffered justification—not criminal conduct, according to the government—is back in the crosshairs if his action was even slightly procedurally

irregular based not on any demonstrable violation of law or policy but on some prosecutor's view of prior, unwritten practice. Public officials from at least the Commerce Secretary all the way down every line of federal, state, and local government should take no comfort in a protection that extends only that far. See *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2564 (2019) (describing irregular, concealed process of soliciting the Justice Department and other agencies to submit a request for a citizenship question on the census). Nor should this Court allow it.

ARGUMENT

I. THE GOVERNMENT'S CONCESSIONS ABOUT AUTHORITY RESOLVE THIS CASE IN DEFENDANTS' FAVOR.

A. The Government Proved Baroni Had Authority to Realign the Lanes.

In the district court, the defendants requested a jury instruction saying: "[I]f you find the Port Authority granted or bestowed upon David Wildstein or Mr. Baroni the power or authority to control the Port Authority money or property at issue here, and David Wildstein or Mr. Baroni acted within the bounds of that power or authority, then defendants cannot be found to have obtained by fraud, knowingly converted, or intentionally misapplied Port Authority money or property." 3d Cir. J.A. 287-88 (Section 666); see also *id*. at 307 (same for fraud); Pet. App. 18a n.5. The district court sustained the government's objection. 3d Cir. J.A. 4564-66; see also Pet. App. 18a n.5. The court told defendants vaguely that they could "make the argument and challenge the allegations at trial," without specifying to what end. 3d Cir. J.A. 4565; see also Pet. App. 18a n.5. But the court made clear that authority

was not (as the government *now* has it) a defense. Specifically, the court explained that it would not give an instruction "based on the argument that [Baroni and Wildstein] were authorized" because that would "potentially mislead the jury as to what the Government's burden is" by incorrectly "making [Baroni's authority] … a defense." 3d Cir. J.A. 4565.

Until it reached this Court, the government stood by that reasoning. Baroni's general authority over lane realignment at Port Authority facilities was not a defense, according to the government, because: "*No* [Port Authority] official was entitled to use [Port Authority] facilities or resources as Defendants did. [Port Authority] employees are expected to act 'in the best interests of' their employer, which excludes using [Port Authority] property" to punish a political opponent. Gov't 3d Cir. Br. 28; see *id.* at 53 (same).

In this Court, the government acknowledges for the first time that if "Baroni did in fact have authority to order the realignment" then "conviction[] … would not be valid," irrespective of his purpose or whether any lies were told. Gov't Br. 21-22; see also *id.* at 47 ("Had Baroni enjoyed discretion to make the official decision to realign the lanes even in the absence of a traffic study, lying about a traffic study would not have exposed defendants to prosecution." (internal quotation marks omitted)). This is because "so long as [an official] can instruct her staff to undertake … tasks without offering an explanation, any gratuitous lie about her rationale cannot be the mechanism that induces her staff to commit the [agency's] resources" to the tasks. *Id.* at 48 (internal quotation marks and alterations omitted). "[W]here the official has the authority to control … resources on the agency's behalf[,] [i]n exercising that authority, whether honestly or dishon-

estly," the official neither deprives the agency of anything nor obtains anything because "the official is acting as the agency, and the resources therefore remain the agency's resources[.]" *Id.* at 49.

That concession—long in coming—should be the end of this case. The question presented in this case is whether a public official commits property fraud by advancing a public policy reason for an official decision that conceals his real reason, even where, as alleged here, the real reason is to take two lanes away from the constituency of a political opponent and provide them to another constituency for the purpose of causing traffic in the opponent's town. Reversing years of adherence to a contrary position, the government now says the answer to that question is no, at least so long as the official had authority to make official decisions about the property's use. The district court refused to give defendants' authority instruction precisely because it disagreed with the (now conceded) premise and did not want to "potentially mislead the jury" into believing that Baroni's authority was "a defense" to employing the property in that manner. 3d Cir. J.A. 4565. Thus, the jury decided the case under the deliberately conveyed but critically mistaken understanding that Baroni would be guilty of fraud if he lied about his purpose for realigning the lanes *even if he had authority to realign the lanes.*

Incongruously, the government thinks the next step is deferential sufficiency-of-the-evidence review; whether a different jury that correctly understood what the government *now* concedes to be the law "*could* have found [defendants] guilty." Gov't Br. 35 (emphasis added) (internal quotation marks omitted). That is not the standard. To the contrary, it is well-established that the Court "cannot allow a conviction to stand on … an equivocal direction to the jury on a

basic issue." *Yates* v. *United States*, 354 U.S. 298, 327 (1957) (internal quotation marks omitted); see also *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946) ("[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."). In other words, if the court fails to give "clear and explicit instructions" on issues that are at the "heart of the charges," reversal is required. *Yates*, 354 U.S. at 327.[1]

Reviewed under the correct standard, Baroni's conviction must be reversed and the indictment dismissed because no jury could have found that he lacked "authority to order [a lane] realignment" on the Bridge. Gov't Br. 21-22; see also *McDonnell*, 136 S. Ct. at 2375 (new trial contingent on government identifying sufficient evidence to convict under clarified standard). Indeed, *the government* made a point of alleging and proving Baroni's authority over *all* Port Authority business, including transportation facilities like the Bridge:

- The indictment alleged that Baroni, with Executive Director Foye, "was responsible for the general supervision of *all aspects* of the Port Authority's business, *including* the operations of Port Authority transportation facilities." J.A. 21 (emphasis added).

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[1] In seeking affirmance based on mere sufficiency-of-the-evidence review where the jury misunderstood the law, the government relies on *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016). But in *Musacchio*, the mistake was that the instructions improperly *heightened* the government's burden, *see id.*, not, as here, improperly reduced it by misconstruing what the government now identifies as the line between guilt and innocence.

- The government likewise elicited from Wildstein that Baroni was "responsible for the general supervision of all aspects of the Port Authority's business … [i]ncluding the operations of Port Authority transportation facilities." J.A. 237-38.
- The government elicited from Wildstein that, in practice, Baroni's position as Deputy Executive Director was not "the number two position," and that he shared a "50/50 partnership" with Foye, without either "having more authority than the other." J.A. 236.
- Baroni's successor as Deputy Executive Director, called by the government, testified that the Executive Director and Deputy Executive Director "were both considered to be at the same level," "one did not report to the other," that they "would handle" projects in their respective states "without talking" to one another, and that this arrangement predated Baroni and Foye and "had been around for years." J.A. 519.
- The government pointedly had Baroni acknowledge to the jury during cross-examination that he led the Port Authority, asking him, "[Y]ou're the head of the agency; right?" Baroni unequivocally responded, "Yes." J.A. 652-53.
- The government elicited from the Executive Director himself that no policy had "ever" been "proposed or put in place at the Port Authority" that required "the Executive Director and the Deputy Executive Director affirma-

> tively [to] approve[] any non-emergency permanent change or study of a lane configuration." Pet. App. 135a-136a.

These efforts by the government to allege and prove that Baroni had plenary "supervision of all aspects of the Port Authority's business … [i]ncluding the operations of Port Authority transportation facilities," J.A. 21, 237-38—that he had, in the words of the government's opening statement, "the power to operate the George Washington Bridge," *id.* at 68—were hardly unintentional. Baroni's broad authority was *central* to the government's case. The government's contention was *not* that Baroni had surreptitiously arrogated to himself some power he had never been given. It was, as the government argued in closing, that Baroni "abused the power *that [he] w[as] trusted with* … [by] cho[osing] to use [his] government power to cause traffic problems." *Id.* at 886 (emphasis added); see also 3d Cir. J.A. 698-99 ("They had the power to control public resources.… Resources like the George Washington Bridge.… [T]he defendants abused their power[.]").

Until arriving in this Court, that was what the government thought it had charged and proved. And it made sense under the government's previous legal position. Until its sudden reversal in this Court, proving that the Deputy Executive Director—the "highest-ranking, New Jersey official at the Port Authority," J.A. 68—possessed the obvious authority to reposition traffic cones on the New Jersey side of a Port Authority bridge was all upside. It was a key feature of the government's abuse-of-power narrative, and the government had secured the district court's agreement that such authority was not "a defense." 3d Cir. J.A. 4565-66. The fact that Baroni had used his general authority over the lanes to cause traffic in a political oppo-

nent's town while concealing that purpose was sufficient for a fraud conviction because, in the government's view at the time, "*[n]o* [Port Authority] official was entitled to use [Port Authority] facilities or resources" for that purpose. Gov't 3d Cir. Br. 28.

But now, having conceded that a public official should not be "exposed … to prosecution," Gov't Br. 47, for "mak[ing] a decision that is within his authority to make," *id.* at 49, the government tries to argue that Baroni, in fact, did not have sufficient authority to order a lane realignment on the New Jersey side of the Bridge. In other words, all of the foregoing notwithstanding, the government contends that it is clear beyond a reasonable doubt that the decision to alter the traffic pattern onto the Bridge was *beyond* his authority.

The government first suggests that the Third Circuit and the jury already decided this issue. Neither argument withstands even passing scrutiny.

The government likes the sound-bite from the Third Circuit's opinion that "'Baroni lacked the authority to realign the bridge's traffic patterns unilaterally.'" Gov't Br. 4, 5, 30-31 (quoting Pet. App. 31a). But it ignores that the court based that statement *solely* on its observation that Baroni's decision to realign the lanes was subsequently "countermanded" and Baroni could not "reinstate[] the realignment on his own." Pet. App. 18a. In short, as it said *expressly*, the court was talking about whether Baroni had "*unencumbered* authority." *Id.* (emphasis added). The government acknowledges that that is not relevant—an official need only have decisional authority in the "first instance." Gov't Br. 38-39. The Third Circuit nowhere said Baroni lacked that.

The jury likewise was never presented with the question. The government contends the jury must have found that Baroni lacked authority because it could not have found that an *authorized* official deprived the Port Authority of property. Gov't Br. 36 ("The jury's finding of guilt based on the deprivation of property thus necessarily included a finding that Baroni exceeded his authority."). That is an ironic spin, since it was at the government's behest that the district court *rejected* the notion that authority was a "defense." 3d Cir. J.A. 4565-66. The government asserted that general authority was irrelevant because "*[n]o* [Port Authority] official was entitled to use [Port Authority] facilities or resources as Defendants did." Gov't 3d Cir. Br. 28. Its concession that first-instance authority *is* a defense is new in this Court. The jury could not have understood that an authorized official cannot deprive his agency of property where the government and district court rejected that view and ensured that the instructions would not reflect it. Accordingly, the jury was not asked to and did not need to reject that Baroni had first-instance authority over lane realignments in order to convict him.

The government next argues that the evidence itself showed that Baroni lacked first-instance authority to alter a traffic pattern. Not only is the government wrong, but it is dangerously wrong. There may be cases where the government can show a clear limitation on authority, circumvented only by fraud, that would support a conviction. But if a public official can be convicted based on the flimsy lack-of-authority evidence the government relies on here in its post-hoc effort to save these convictions, then no public official is safe.

Even the government acknowledges how far afield this case is. All agree Baroni had general supervision

of the Port Authority's business, including the operations of its transportation facilities. And the government candidly acknowledges that there was not any "written regulation or policy" that "make[s] … clear" that the Deputy Executive Director lacked "first instance" authority to decide where to place lane-dividing traffic cones at this (or any) particular transportation facility. Gov't Br. 52. Likewise, the government does not contend that moving the cones was "objectively improper." *Id.* at 51.[2] That type of proof might be available in "other cases," says the government, but the government concedes that, at best, a jury here would need to make the necessary, beyond-a-reasonable-doubt finding in what the government euphemistically calls a "slightly different" way. *Id.* at 52.

Here, the principal proof that Baroni lacked first-instance authority is that two witnesses, after the fact, testified that they were "surprise[d] that they were not informed" about the lane realignment in advance. Gov't Br. 39; see *id.* at 37 (citing testimony of the Executive Director and Vice-Chairman). That, the government says, is sufficient to define Baroni's authority and, accordingly, define the line between criminal and non-criminal conduct. But neither witness cited any policy requiring the Executive Director's approval before the Deputy Executive Director could shift a traffic pattern. Foye testified that nobody had "ever" proposed such a policy. J.A. 194-95. Indeed, neither witness even expressed surprise that Foye's *approval* had not been obtained. All Foye said was that in the few years of his own tenure, *id.* at 137, he knew of no instance where he was not "personally … *notified*" when

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[2] The practice of setting aside three lanes for Fort Lee drivers on weekday mornings dated to an informal "political deal between a former New Jersey governor and Fort Lee mayor," Pet. App. 4a, and no policy mandated that it persist. *See* 3d Cir. J.A. 1656-57.

an operation "could cause substantial traffic backups in the local community." *Id.* at 152 (emphasis added); see also *id.* at 725 (per vice-chairman, "[t]ypically" the "protocol" would have been to "have an announcement" to the Executive Director and board before "any study").

That cannot be enough. The government is advocating for a rule that it claims will eliminate "concerns about potentially criminalizing large swaths of routine politics," see Gov't Br. 47 (internal quotation marks omitted), and will not "expose[]" a public official "to prosecution," *id.*, for "mak[ing] a decision that is within his authority to make," *id.* at 49. But then it asserts that, in practice, prosecutors may show that one of the two most powerful executives at an agency, with undisputed general supervision of *all* agency facilities, which agency has *no* policy prohibiting him from realigning a traffic pattern, nonetheless acted outside of his sphere of authority in moving a makeshift lane-separator at one of those facilities, because, in the experience of two other officials, they would have expected him not even to seek their approval but at least to inform them.

The government's other arguments add nothing material. The government notes that the Port Authority's by-laws grant operational power to the Executive Director and not to others. Gov't Br. 37. But the government (back when it was trumpeting Baroni's immense authority) deliberately demonstrated to the jury that that was of no practical significance. Right after eliciting from Wildstein that Baroni lacked "by-law power," it addressed any potential misimpression by having Wildstein explain that, nonetheless, "[a]s the Deputy Executive Director in that role, … [Baroni] was … responsible for the general supervision of all aspects of the Port Authority's business … [i]ncluding

the operations of Port Authority transportation facilities[.]" J.A. 237-38. The government's point was correct. That the by-laws commit authority to the Executive Director—just as the Constitution commits authority to the President—does not mean that officials below him lack all authority to make decisions, or inherently must obtain prior approval of any particular decision.

Similarly, the government's argument, Gov't Br. 38, that the lie supposedly told to Baroni's subordinates about the lane-realignment's purpose "by itself" shows Baroni "lacked … authority" to order it is wrong and dangerous. The government asserts that it is not advocating for a criminal truth-in-politics rule, and that an authorized official can lie to her staff "about her rationale" for an order. *Id.* at 48. But that is cold comfort if, circularly, the lie "by itself" is proof that the official lacked authority.

There is no place for such vagueness when drawing the line between a public official's concededly non-criminal dishonesty, see Gov't Br. 49, and criminal fraud. Public officials should not have to guess, at their peril. If, as the government claims, the line between criminal and non-criminal conduct is the absence of authority, the government must demonstrate some actual, identifiable limitation on the otherwise broad and facially applicable authority that the government itself alleged and proved.[3] Put another way,

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[3] For certain the government cannot satisfy this task with the impermissible burden-shifting it suggests when it asserts that if "someone in Baroni's position" had been authorized to realign the lanes, one would have expected that evidence of that "would have been presented" by the defendants. Gov't Br. 39-40. The government's instinct that one of the parties to a criminal trial should

this case is "slightly different" from the "other cases" the government imagines, Gov't Br. 52, not for the type of proof but because the other cases involve an actual, identifiable limit on the public official's general authority. Because there was not one here, the government's concession that an authorized official cannot deprive his agency of property through an official decision requires that Baroni's conviction be reversed.

B. The Government Proved Baroni Ordered a Traffic Study.

The government's other concession likewise demonstrates that there was no fraud and that reversal is required. Again promising that "[a]n official doing what he is authorized to do" is safe from prosecution even if he lies about his motivation, Gov't Br. 23, the government concedes for the first time that it would not "have been federal fraud for defendants to initiate a real traffic study, hoping that it would result in a traffic jam that would harm a political enemy," *id.* at 47. In other words, the legitimacy of such a study—whether the official subjectively cared about it—does not matter if the official has the authority to order it. The government does not dispute that Baroni had that authority.

That must be the end of this case, because the government has *always* alleged and proved that defendants ordered a traffic study. To be sure, the government said it was not "legitimate" because its actual purpose was to "create a traffic jam in Fort Lee" and "no one ever wanted" the data that was collected and

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have to make a clear and concrete showing concerning the dispositive issue is a good one. It just has the wrong party. And in any event, the government itself presented abundant evidence of Baroni's authority to supervise all aspects of the Port Authority's business and its transportation-facility operations. *See supra* at 9-11.

analyzed. 3d Cir. J.A. 5194. And the jury, instructed that a guilty verdict required "that the defendant knew that the purpose of the lane and toll booth reductions was not to conduct a *legitimate* Port Authority traffic study," agreed. J.A. 863 (emphasis added); see also *id.* at 864-65 (similar).

The Court of Appeals likewise agreed that the study had "no facially legitimate justification." Pet. App. 36a. But it recognized that a study was conducted (and had cost money), citing the "overwhelming evidence that … *the traffic study was conducted* with the help of several well-paid Port Authority engineers." *Id.* at 56a (emphasis added). Indeed, it held the defendants accountable for the foreseeable traffic-study costs, noting that they had never "argue[d] the study was not conducted." *Id.*

In short, there plainly *was* a traffic study. The government alleged and proved that Wildstein ordered one, and asserted that its cost was the principal "property" that the defendants illegally obtained. The indictment alleged that Wildstein initiated the realignment by ordering staff to do it and "assess the [resulting] traffic flow." J.A. 29. In response, Bridge supervisors "took steps to implement the reductions and to assess their impact on traffic." *Id.* at 31. Traffic engineers then "collect[ed] and review[ed] traffic data, believing it was necessary to do so." *Id.* at 32.

There is no dispute that the government's proof established these allegations. Wildstein testified that he told several Port Authority supervisors that he wanted to realign the lanes to "see what the impact on the traffic would be" so he "could determine whether those three lanes given to Fort Lee would continue on a permanent basis." J.A. 280; see also *id.* at 302, 306 (same). He further testified that he told the Port Authority's chief engineer to "track" the results and "give

[Wildstein] some numbers on … how many cars were involved and how far back the traffic was delayed." *Id.* at 305.

Seeking to establish that the defendants wasted public money on a study they were not interested in,[4] the government spent considerable trial-time establishing that these orders were followed. Wildstein testified that he knew the study would "use some staff time," J.A. 305, and that staff collected and "reviewed" the requested data and started to make "recommendations regarding the future of the three lanes," *id.* at 413-14. Transportation planner Victor Chung testified that he "perform[ed] an analysis" that compared pre- and post-realignment "travel times." *Id.* at 473, 475. And engineer Umang Patel testified that he in fact "prepared a report" addressing "the impact of new traffic pattern on travel times on I-95 local and express lanes to U.S. toll plaza, 1.4 mile section," which the government had him read into the record. *Id.* at 478-80.

In short, the defendants "initiate[d] a real traffic study, hoping that it would result in a traffic jam that would harm a political enemy." Gov't Br. 47. According to the government, that is not "federal fraud." *Id.*

The government tries to avoid this conclusion by asserting repeatedly that the defendants, in fact, caused the lane realignment "by lying about the *existence* of a traffic study," not about their motives. Gov't Br. 12 (emphasis added); see also, *e.g.*, *id.* at 23 ("lie was about the existence of a traffic study, not defendants' motives"). That fails for two reasons.

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[4] The government repeatedly elicited that studying the realignment's effect on traffic was not Wildstein's "real reason" for ordering it. J.A. 280-81, 302.

First, the undisputed record shows that Wildstein did not make *any* representation one way or another about the "existence" of a traffic study when ordering the realignment. Wildstein (i) represented to staff that he wanted to know the effect of the realignment on traffic, (ii) *instructed* them to set the test conditions (realign the lanes), and (iii) *instructed* them to collect and analyze the resulting data. No part of that is a representation about the existence of a traffic study. In fact, only the first part is a representation about anything; specifically, about Wildstein's motive for his instructions. Wildstein testified that he did not actually care about the study results, J.A. 280-81, 302, and the jury—asked whether this was "a legitimate … traffic study," *id.* at 863—believed him.[5]

But the government agrees that a fraud conviction cannot turn on a public official's motives. As for the rest, an instruction to a subordinate—to collect and analyze data—is not capable of being a lie. Accordingly, the government's contention that there was never a "real" study is not only wrong—data was collected and studied—it is beside the point.

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[5] The question whether the traffic study was "legitimate" asked whether it was done for a proper purpose, not whether it existed. "Legitimate" does not mean "existing." The illegitimate ruler of some nation is still its ruler. Indeed, this Court has recognized the difference: for an individual to have a "legitimate expectation of privacy," she must first have "an actual (subjective) expectation of privacy," but "legitim[acy]" turns on whether that actual expectation of privacy is "one that society is prepared to recognize." *Smith* v. *Maryland*, 442 U.S. 735, 740-41 (1979) (internal quotation marks omitted).

Second, it *is* wrong. There is no dispute about what happened, and, as shown above, it was a traffic study.[6] The government's contrary arguments are just semantics. The government says that "no actual study existed" because Wildstein "simply" asked "for 'some numbers' on 'how many cars were involved' and how 'far back' the traffic jam went." Gov't Br. 41 (citing J.A. 305). But employing casual language and adding the adverb "simply" does not alter what he asked for: data on the traffic resulting from the realignment. Wildstein's subordinates clearly understood that. They responded by gathering and analyzing data and preparing a report. The government similarly argues that defendants' only evidence of a traffic study is evidence of "contemporaneous data collection and post hoc consideration of that data." *Id.* at 42. But that is what a study *is*.

The government says Baroni could legally order a traffic study despite an ulterior motive. If his conviction can nevertheless be upheld on the government's hair-splitting argument that the collection and analysis of traffic data that he ordered was not "real" enough to be a "traffic study," then the government-promised safe harbor for an official "doing what he is authorized to do" (Gov't Br. 23) offers no safety at all.

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[6] The government cites a snippet of Foye's testimony that "there was no study." Gov't Br. 41 (quoting J.A. 181). That conclusion hardly could undercut the undisputed facts, but the government has anyway ripped the statement out of context. Foye was answering a hypothetical question. The prosecutor read an email that said, "The Port Authority has conducted a week of study at the George Washington Bridge," and then asked Foye, "[I]f that statement is false, … what does that mean about whether that study ever happened?" J.A. 180-81. Foye's answer was just grade-school logic: if a statement reports there has been a study and that statement is false, then, *ipso facto*, "[i]t means there was no study." *Id.*

CONCLUSION

The defendants' convictions should be reversed.

Respectfully submitted,

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