No. 18-1059

In the Supreme Court of the United States

BRIDGET ANNE KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the evidence that defendants repeatedly lied in order to redirect the resources of the Port Authority of New York and New Jersey toward their desired ends in a manner that exceeded their authority is sufficient to sustain their convictions for wire fraud and wire-fraud conspiracy, in violation of 18 U.S.C. 1343 and 1349, and federal-program fraud and federal-program-fraud conspiracy, in violation of 18 U.S.C. 666(a)(1)(A) and 371.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 909 F.3d 550. The opinion of the district court (Pet. App. 105a-128a) is not published in the Federal Supplement but is available at 2017 WL 787122. A prior opinion of the district court (Pet. App. 75a-104a) is not published in the Federal Supplement but is available at 2016 WL 3388302.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2018. A petition for rehearing was denied on February 5, 2019 (Pet. App. 129a-130a). The petition for a writ of certiorari was filed on February 12, 2019, and granted on June 28, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner Bridget Kelly and respondent William Baroni (defendants) were each convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; two counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiracy to fraudulently obtain, knowingly convert, or intentionally misapply property of an organization receiving federal benefits, in violation of 18 U.S.C. 371 and 666(a)(1)(A); one count of fraudulently obtaining, knowingly converting, or intentionally misapplying property of an organization receiving federal benefits, in violation of 18 U.S.C. 666(a)(1)(A); one count of conspiracy to violate civil rights, in violation of 18 U.S.C. 241; and one count of deprivation of civil rights under color of law, in violation of 18 U.S.C. 242. Pet. App. 2a-3a. The district court sentenced Kelly to 18 months of imprisonment, and Baroni to 24 months of imprisonment, each to be followed by one year of supervised release. Judgments 3-4. The court of appeals affirmed the wire fraud, federal-program fraud, and related conspiracy convictions; vacated the civil rights convictions; and remanded for resentencing. Pet. App. 73a-74a. The district court resentenced Kelly to 13 months of imprisonment, and Baroni to 18 months of imprisonment, each to be followed by one year of supervised release. Am. Judgments 2-3.

A. Factual Background

1. Kelly is the former Deputy Chief of Staff to the Governor of New Jersey, and Baroni is the former Deputy Executive Director of the Port Authority of New York and New Jersey. Pet. App. 3a-4a. The Port Au-

thority "is an interstate agency created by Congressional consent," *id.* at 32a, that New Jersey and New York have empowered to "purchase, construct, lease and/or operate any terminal or transportation facility within" the Port District, a region with a radius of about 25 miles around the Statute of Liberty. N.J. Stat. Ann. § 32:1-7 (West 1963); N.Y. Unconsol. Law § 6407 (McKinney 1961). One of the Port Authority's facilities is the George Washington Bridge, a double-decker suspension bridge spanning the Hudson River from Fort Lee, New Jersey to New York City. Pet. App. 4a, 27a. With daily traffic of 250,000 to 300,000 vehicles, C.A. App. 904, the George Washington Bridge is the busiest motor-vehicle bridge in the world, Pet. App. 27a.

In the late summer of 2013, Kelly and Baroni schemed to use Port Authority resources to "create as big a traffic jam as possible" in Fort Lee. J.A. 269;[*] see Pet. App. 6a. Twelve lanes and toll booths serve traffic for the upper level of the George Washington Bridge. Pet. App. 4a. During the morning rush hour, the Port Authority police set out cones to dedicate three of those upper-deck lanes solely for traffic entering the bridge from the streets of Fort Lee; the other nine lanes are dedicated to through traffic from the "Main Line," which includes Interstates 80 and 95. *Ibid.* The former three lanes are used not only by Fort Lee commuters, but also by thousands of commuters from other localities who "cut through Fort Lee" to reach the bridge. J.A. 292. Those three lanes thus handle their proportionate share of the upper-level traffic; roughly 25% of

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[*] The joint appendix does not indicate which witness is testifying in each of the excerpted portions of trial testimony. The addendum to this brief contains a chart with that information.

that traffic flows through them. J.A. 172. Baroni accordingly recognized that a reduction from three lanes to one—particularly if it were not announced in advance—would cause massive gridlock in Fort Lee. J.A. 243.

As the Port Authority's Deputy Executive Director, "Baroni lacked the authority to realign the bridge's traffic patterns unilaterally." Pet. App. 31a; see *id.* at 119a-120a. The Port Authority's statutes and by-laws placed "final authority" over day-to-day operations in the hands of the Executive Director, who was required to manage the Port Authority's operations "in compliance with the agency's policies as established by [its] Board of Commissioners." J.A. 138-139. In addition, the Port Authority had policies and practices that precluded Baroni from taking any action that might cause traffic in a local community without a valid justification. See Pet. App. 17a; J.A. 149-150. He "would not have been able to realign the lanes" had he "provided * * * no reason at all" for doing so. Pet. App. 17a. And he also "would not have been able to realign the lanes" by providing his "actual reason" for wanting to do so—namely, that Kelly wanted to punish Fort Lee's mayor for refusing to endorse the New Jersey governor for reelection. *Ibid.*; see *id.* at 5a-6a.

Instead, Baroni and Kelly "needed to lie to realign the traffic patterns." Pet. App. 18a. They seized upon the suggestion of co-conspirator David Wildstein, who was Baroni's de facto chief of staff, "to create the cover of a traffic study." *Id.* at 7a (citation omitted). The traffic study, however, was a "sham." *Id.* at 28a. As the Port Authority's Executive Director later testified, "there was no study." J.A. 181. But Baroni and Kelly "had to create the traffic study cover story in order to

get Port Authority employees to implement the realignment." Pet. App. 17a; see J.A. 264-265. In particular, the conspirators concluded that "calling" the lane reduction "a traffic study would provide a cover story" that would, among other things, serve as a basis "for asking career officials at the Port Authority to change the lane configuration." J.A. 264-265.

The conspirators also "lied to Port Authority officials * * * about whether [the] Executive Director * * * knew of the realignment." Pet. App. 17a. When the Port Authority's Director of Tunnels, Bridges and Terminals asked Wildstein if the Executive Director "knew" about the lane reduction, "Wildstein lied and said he did." *Id.* at 8a-9a. "Wildstein later told the same lie to" the Port Authority's General Manager for the George Washington Bridge. *Id.* at 9a. Those lies were "necessary to keep [the Executive Director] in the dark and prevent him from putting an immediate end to the scheme." *Id.* at 17a-18a. And "everything about the way th[e] 'study' was executed contravened established Port Authority protocol and procedures." *Id.* at 30a-31a. In particular, "traffic studies are usually conducted by computer modeling, without the need to realign traffic patterns or disrupt actual traffic"; "[w]hen traffic disruptions are anticipated, the Port Authority gives advance public notice"; and "Baroni lacked the authority to realign the bridge's traffic patterns unilaterally." *Id.* at 31a.

The conspirators knew that their scheme would both divert existing Port Authority resources to "implement the lane reduction," J.A. 300, and also require the Port Authority to invest additional resources into the George Washington Bridge. See Pet. App. 9a. For example, traffic planners spent "[a] little bit more than eight

hours" ahead of time predicting "the impact" of the change that the conspirators had already decided to make. J.A. 472-473 Moreover, while the conspirators never directed the Port Authority's Chief Engineer to "conduct a Port Authority traffic study" of the realigned lanes, Wildstein did ask the Chief Engineer to provide him with "some numbers" indicating "how many cars were involved and how far back the traffic was delayed." J.A. 305. As a result, "three Port Authority traffic engineers" devoted "unnecessary labor" to "collecting traffic data on the realignment, in furtherance of no legitimate Port Authority purpose." Pet. App. 49a, 55a. And because only one lane from Fort Lee "would remain open, the Port Authority needed to pay an extra toll collector"—at overtime rates—"to be on relief duty for th[e] sole toll collector" in that lane. *Id.* at 9a; see J.A. 303, 313. Baroni, Kelly, and Wildstein all agreed that using Port Authority resources to pay extra toll collectors was not a "problem." J.A. 303. Indeed, they "joked about" the fact that the Port Authority would have to "pay a second toll collector to sit and wait in case the first toll collector had to go to the bathroom." J.A. 303-304.

2. In order to "maximize the impact on Fort Lee," J.A. 267-268, the conspirators implemented their scheme on Monday, September 9, 2013—"the first day of school," Pet. App. 8a. "[T]o make the traffic jam as bad as possible," J.A. 268, the conspirators also deviated from normal protocol by ensuring that Fort Lee would have no advance knowledge of the lane alteration. Pet. App. 9a. Accordingly, they "'wait[ed] until the last minute to give a final instruction so that nobody at the Port Authority would let Fort Lee know'" or "'would

communicate'" what was happening "'to Fort Lee or anyone else within the Port Authority,' including [the] Executive Director." *Id.* at 8a (quoting J.A. 301).

As the conspirators had intended, the result was "concrete gridlock" in Fort Lee. J.A. 107. The Fort Lee Chief of Police would later testify that "it was the wors[t] traffic [Fort Lee] had to deal with, except for 9/11," when the George Washington Bridge had been entirely closed because of the terrorist attacks. J.A. 96. Because "no vehicles [were] moving northbound" and traffic was severe in all parts of the city, J.A. 81, the gridlock trapped numerous children on their way to their first day of a new school year, J.A. 111-112.

The Chief of Police also had "grave concerns for public safety." J.A. 85. First responders were impeded in their ability to reach emergencies involving "a missing four-year old child" and a "cardiac arrest." J.A. 87; Pet. App. 10a. The gridlock prevented the "fire department [from] being able to move large equipment throughout town, the Ambulance Corps [from] being able to get their crew," and police officers from quickly getting backup to "maintain their personal safety." J.A. 98. The conspirators compounded the difficulties by deliberately frustrating local officials' efforts to find out what was going on. Pet. App. 9a-10a. The conspirators had decided to maintain "radio silence" from the Port Authority while the gridlock was occurring. J.A. 269-270. Wildstein accordingly instructed Port Authority officials to direct all Fort Lee inquiries to Baroni, who then refused to respond to any of them. Pet. App. 9a-10a.

Baroni, Kelly, and Wildstein were all informed of the public safety hazards that their scheme had caused. On the first morning, they learned that the Fort Lee mayor

had called Baroni about an "urgent matter of public safety." J.A. 918-920. The next day, Baroni received notice that the traffic was sufficiently severe that "volunteer ambulance attendants" had to "leav[e] their vehicle" and "respond on foot * * * to an emergency call." J.A. 224; Pet. App. 10a. Baroni nevertheless stuck with the plan to stonewall all Fort Lee inquiries, refusing to return calls from Fort Lee officials reporting an "urgent matter of public safety in Fort Lee"; the "difficulty" that local "police and paramedics" had encountered "responding to a missing child and a cardiac arrest"; and "life/safety" issues. Pet. App. 10a (citations and internal quotation marks omitted). And when Wildstein forwarded Kelly a text from the Fort Lee mayor stating that Fort Lee was having a "problem * * * getting kids to school," Kelly responded "Is it wrong that I'm smiling?" J.A. 753.

3. The traffic jams continued for four days. Pet. App. 10a-11a. Until the fourth day, the conspirators had successfully prevented the Executive Director from "interfer[ing]" with their plan, J.A. 301, by giving the instructions for the lane reductions at the last minute and lying about the Executive Director's knowledge, *ibid.*; Pet. App. 17a. But they were ultimately unable to stop the Executive Director from learning about what was happening through a media inquiry. J.A. 154. When the Executive Director found out, he reversed the lane reductions, Pet. App. 10a-11a, and vowed to "get to the bottom of this abuse of decision [sic] which violates everything [the Port Authority] stands for." J.A. 159. Baroni twice asked the Executive Director to reinstate the lane reductions. J.A. 165-167; Pet. App. 10a. The Executive Director refused. Pet. App. 10a; J.A. 192

("I'm not going to have someone die in the back of an ambulance, not on my watch.").

In an effort to continue the cover-up, Baroni and Wildstein drafted and issued a "false press release" that asserted that "[t]he Port Authority ha[d] conducted a week of study at the George Washington Bridge of traffic safety patterns." J.A. 176, 180, 409-410. Wildstein would later testify that the phrase "'traffic safety patterns" "doesn't mean anything,'" but that he used it because he thought it "sounded good." J.A. 385. Only weeks later did he learn "for the first time" that Port Authority engineering staff had in fact collected some data. J.A. 414. The conspirators "viewed it as a gift" because "there was an aspect of these materials that actually supported the cover story of the traffic study." J.A. 414-415.

Baroni and Wildstein also prepared a false report that would further their traffic-study cover story, J.A. 420-423, but they did not release it "because Port Authority staff were asked to testify before the New Jersey State Assembly," Pet. App. 11a. When Baroni himself was called to testify, he continued to lie about the existence of a traffic study. *Id.* at 11a, 117a; J.A. 426, 431-432. And he supplemented that lie with other falsehoods regarding the fictional study. J.A. 429-431, 534-537. For example, Baroni falsely told the Assembly that two police officers had asked for a study, *ibid.*, and that the "radio silence" during the traffic jams was the result of a "communication breakdown," J.A. 229-230; 632-633. During Baroni's testimony before the Assembly, Kelly and Wildstein exchanged text messages praising Baroni's performance. J.A. 438-440.

4. On December 6, 2013, Wildstein was fired. Pet. App. 11a. On December 12, Baroni was fired. *Ibid.* On

the same night, Kelly asked a colleague to delete an email in which she had responded "Good" after being told that Fort Lee's mayor was complaining about a "horrendous traffic back up in town." J.A. 505-506, 930-931. Kelly would eventually admit to deleting numerous emails and texts regarding the scheme. J.A. 800-801, 834-835. She was fired on January 9, 2014. Pet. App. 11a.

B. Trial Proceedings

Wildstein pleaded guilty to one count of conspiracy to obtain by fraud, knowingly convert, and intentionally misapply property of an organization receiving federal benefits, in violation of 18 U.S.C. 371, and one count of conspiracy against civil rights, in violation of 18 U.S.C. 242. Pet. App. 3a. He also agreed to cooperate with the government in its prosecution of Kelly and Baroni.

1. A grand jury returned a seven-count indictment against Kelly and Baroni, which charged them with the same two offenses to which Wildstein had pleaded guilty, violations of the underlying substantive statutes (18 U.S.C. 242, 666(a)(1)(A), and 2), and violating and conspiring to violate the federal wire fraud statute, 18 U.S.C. 1343, 1349. The indictment alleged that Kelly and Baroni had fraudulently schemed "to obtain money and property from the Port Authority and to deprive the Port Authority of its right to control its own assets by falsely representing and causing false representations to be made that the lane and toll booth reductions were for the purpose of a traffic study." J.A. 54; see J.A. 55. The indictment also alleged that Kelly and Baroni had committed federal-program fraud, in violation of 18 U.S.C. 666(a)(1)(A), because the Port Authority received a qualifying amount of federal funds, and defendants had "obtained by fraud, otherwise without

authority knowingly converted to their use and the use of others, and intentionally misapplied property owned by and under the care, custody, and control of the Port Authority, with a value of at least $5,000." J.A. 25, 53.

In explaining the factual predicate for both the wire-fraud and federal-programs fraud counts, the indictment alleged that defendants had "concocted and promoted a sham story that reducing the number of lanes and toll booths accessible [from the Fort Lee streets] was for a traffic study. They created and continually advanced this cover story so that they could use Port Authority property, including the time and services of unwitting Port Authority personnel and other resources, to implement the lane and toll booth reductions and to conceal the Conspirators' true punitive purpose." J.A. 26.

Kelly and Baroni moved to dismiss the fraud-related counts on the theory, *inter alia*, that "Baroni and Wildstein had unfettered power and authority to change the configuration of the lanes at any time and for any purpose." Pet. App. 93a. The district court accepted that defendants could not be convicted on the fraud charges if they could show that Wildstein and Baroni were "acting within the bounds of the powers granted to them." *Id.* at 93a-94a. But the district court determined that "[t]he existence and scope of Wildstein and Baroni's authority" was "a question of fact for the jury." *Id.* at 93a.

The district court similarly reasoned that the jury should decide whether Kelly and Baroni "diverted Port Authority personnel to do work that was not part of the agency's 'usual course of business.'" Pet. App. 89a (citation omitted). The court explained that if agency personnel were diverted in this way, then their time and

labor could qualify as misappropriated property under Section 666, which precludes conviction for federal-program fraud based on the use of "bona fide salary, wages, fees or other compensation paid, or expenses paid or reimbursed, in the usual course of business." *Id.* at 88a.

2. Over eight days of testimony at trial, Wildstein provided a detailed account of how he, Kelly, and Baroni had conspired to obtain Port Authority resources to cause gridlock in Fort Lee by lying about the existence of a traffic study. Among other things, Wildstein explained that the conspiracy originated in August 2013, when he received an email from Kelly stating that it was "time for some traffic problems in Fort Lee." J.A. 248-249. He also testified that, in acceding to Kelly's directive, he knew that he was agreeing to change the lanes "[f]or the purpose of * * * creating a traffic jam that would punish" the mayor of Fort Lee and that the conspirators had no "business reason" or "any other reason to change those lanes." J.A. 254. He further testified that "changing these lanes for this purpose" was not a "legitimate use of Port Authority resources." *Ibid.* He acknowledged that "a process of approvals * * * needed to be followed" in order "to use [Port Authority] resources," and that he "did not follow" it. J.A. 255.

Wildstein admitted that he, with Kelly's and Baroni's knowledge and consent, called the lane reductions "a traffic study" as a "cover story," in part so that they would have a "reason for asking career officials at the Port Authority to change the lane configuration." J.A. 264-265; see J.A. 266. Wildstein explained how he lied to the Port Authority's Chief Engineer by telling him that he wanted to "see what the impact on the traffic

would be" if the Port Authority took away the Fort Lee lanes to help New Jersey "determine whether those three lanes given to Fort Lee would continue on a permanent basis." J.A. 280; see J.A. 280-281. Wildstein also recounted how he likewise falsely informed the George Washington Bridge's General Manager that he "wanted to see what the effect was of taking away two of the three Fort Lee lanes" so that "the New Jersey side of the Port Authority[] could make a determination down the road as to whether those lanes would stay on a permanent basis." J.A. 302. He admitted that he repeated the lie to the Port Authority's Director of Tunnels, Bridges and Terminals, and falsely reassured him that the Executive Director was aware of the plan. J.A. 306-307. And Wildstein testified about the resources that the conspirators had been able to divert as a result of the lie. See J.A. 303; 310-313.

Baroni and Kelly both took the stand. Baroni asserted that he had "believed" Wildstein's claim that Wildstein was in fact conducting an "important" traffic study, and that he had not wavered in that belief throughout the entire period of the lane reductions and gridlock. J.A. 558. Confronted with the extensive evidence that he had intentionally ignored public safety entreaties from Fort Lee during the week of the lane reductions, Baroni claimed that Wildstein had asked him not to return the Fort Lee mayor's calls because he would "wimp out" and "ruin the study." J.A. 558, 584, 593. Kelly similarly testified that before, during, and well after the lane reductions she "believed" that Wildstein "was doing [a] legitimate traffic study" and that "[t]he Port Authority and Fort Lee were working together." J.A. 800-802.

3. In light of the contradictory testimony, both the government and the defense agreed in their closing statements that a key question was "whether Mr. Baroni and Ms. Kelly understood that the traffic study was real or not." J.A. 895 (government closing statement); see J.A. 889 (Baroni closing statement); J.A. 894 (Kelly closing statement). As the government acknowledged, "if Mr. Baroni and Ms. Kelly believed that the traffic study was real, they're not guilty." J.A. 895.

The jury instructions reflected the need to resolve that question. As a threshold matter, the jury was informed that to find Kelly and Baroni guilty of the fraud-related counts, it had to find that they participated in a "scheme to defraud," defined as a "plan, device, or course of action to deprive someone else of money or property by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence." J.A. 874-875; see also J.A. 870 (explaining that "[t]o obtain by fraud" in Section 666 "means to intentionally take something by false representations, suppression of the truth, or deliberate disregard for the truth").

"In this case," the instructions explained, "the Indictment alleges that the scheme to defraud was carried out by making and causing to be made certain false or fraudulent statements, representations, and claims." J.A. 875. The instructions defined a statement as "false" if it was knowingly "untrue when it was made" and "fraudulent" if it was "falsely made with the intention to deceive." *Ibid.*; see *ibid.* ("In addition, deceitful statements of half-truths or the concealment of material facts or the expression of an opinion not honestly held may constitute false or fraudulent statements."). The district court explained that in this case, the indictment

"alleges that the lane and toll booth reductions were conducted on the false pretense of a traffic study." *Ibid.*

In addition to its instructions on the requirement to find the representations about "a traffic study" to be "false" or "fraudulent," J.A. 875, the district court further cautioned that "[i]n this case, there is a question whether the defendants knew the lane and toll booth reductions were part of a traffic study or whether defendants knew the traffic study was a false pretense," J.A. 877. The jury was instructed that "an honest mistake or * * * an honest misunderstanding that the lane and toll booth reductions were part of a legitimate Port Authority traffic study rather than part of a plan to cause traffic problems in Fort Lee" was "a complete defense." J.A. 879. And the jury was explicitly directed that it could not "find that a defendant knew that the traffic study was a fiction if [it found] that the defendant actually believed that the lane and toll booth reductions were part of a legitimate Port Authority traffic study." J.A. 878.

Although Kelly and Baroni asked that the jury be instructed that the intent to punish Fort Lee's mayor was an element of every offense, the district court agreed with the government that such an instruction would be inappropriate. C.A. App. 4996-5009; see also Pet. App. 110a-111a. The jury was instead instructed that "[m]otive is not an element of the offense with which a defendant is charged." J.A. 863. "Proof of bad motive," the district court emphasized, "is not required to convict." *Ibid.* The court explained that "proof of bad motive alone does not establish that the defendant is guilty" and "proof of good motive alone does not establish that the defendant is not guilty." *Ibid.* The court

noted, however, that "[e]vidence of the defendant's motive" might "help [the jury] to determine [a defendant's] intent." *Ibid.*

During deliberations, the jury sent a note asking whether a defendant could "be guilty of conspiracy without the act being intentionally punative [sic] toward" the mayor of Fort Lee. Pet. App. 107a (citation omitted). After hearing from counsel, the district court responded, "Yes. Please consider this along with all other instructions that have been given to you." *Ibid.* The jury found Baroni and Kelly guilty on all counts. *Id.* at 13a.

4. The district court subsequently denied motions for judgments of acquittal or for a new trial. Pet. App. at 105a-128a. Among other things, the court rejected defendants' argument that "the punishment of" Fort Lee's mayor "was 'an essential element of each of the charged offenses' which the Government was required to prove beyond a reasonable doubt." *Id.* at 110a (citation omitted). The court observed that the "motivation to punish" Fort Lee's mayor "was central to the Government's case * * * only as a means of explaining to the jury why Defendants may have violated the law." *Id.* at 111a. "It is not criminal under Section 666," the court explained, "to punish or conspire to punish [the mayor]; rather, it is criminal under Section 666 to intentionally misuse Port Authority property." *Ibid.* The court reaffirmed that the jury "was allowed to consider, but was not required to find, that Defendants wanted to retaliate against" the mayor. *Id.* at 113a.

The district court also rejected the argument that "Baroni had the authority 'to undertake every action alleged in the Indictment.'" Pet. App. 117a-118a (citation

omitted); see *id.* at 119a-120a. Examining the trial record, the court determined that "the jury could have reasonably found that Baroni did not have the authority to close or realign the lanes as he did." *Id.* at 119a-120a. The court observed that the "jury's verdict indicates that the jurors rejected" Baroni's argument at trial that "the lack of written policies regarding lane closures or realignments indicates that he had absolute authority to manage Port Authority resources or lanes." *Id.* at 119a n.11. "The existence and scope of Baroni's authority," the court emphasized, "was a question of fact for the jurors, and one that the jury resolved in favor of the prosecution." *Id.* at 122a.

At sentencing, the district court gave both defendants a sentencing enhancement for perjury. J.A. 908-909.

C. Appeal

The court of appeals affirmed the wire fraud, federal-program fraud, and related conspiracy convictions; vacated the civil rights convictions; and remanded for resentencing. Pet. App. 1a-74a.

1. With respect to the wire fraud convictions, the court of appeals first rejected the argument that Baroni had the unilateral authority to control the lanes, such that no lie would have been necessary to realign them. Pet. App. 15a-20a. The court accepted that Baroni could not "deprive the Port Authority of money and property he was authorized to use for any purpose" and could not "deprive the Port Authority of its right to control its money or property if that right to control were committed to his unilateral discretion." *Id.* at 19a-20a. But the court found "overwhelming evidence" to support the

jury's determination that Baroni "lacked the unencumbered authority he claims he possessed" and "that he needed to lie to realign the traffic patterns." *Id.* at 18a.

The court of appeals separately rejected the (forfeited) argument that "the Port Authority was not deprived of any tangible property" as part of the scheme, an argument that it found "unpersuasive under any standard of review." Pet. App. 20a-21a. The court found "ample evidence" supporting the jury's determination that Kelly and Baroni "obtained by false or fraudulent pretenses, at a minimum, public employees' labor," thereby depriving the Port Authority of its property right in those employees' "time and wages." *Id.* at 22a. The court observed that the fraudulent scheme required the Port Authority "'to pay for an extra toll collector to be on relief duty,'" which required paying "'three toll collectors a day'" for an eight-hour shift at "an overtime rate." *Id.* at 23a-24a (citation omitted); see *id.* at 47a (observing that payroll records showed a total cost of $3,696.09). The court also observed that Kelly and Baroni divested the Port Authority of the labor of several of its engineers and other professional staff members, who collectively spent several dozen hours "performing unnecessary work related to the realignment." *Id.* at 24a; see *id.* at 24a-25a (cataloguing hours); *id.* at 49a (calculating total cost of $1,828.80). The court also noted that Wildstein and Baroni themselves spent "forty to fifty hours" of salaried time working on the lane reductions. *Id.* at 25a.

The court of appeals observed that the sufficiency of the wage-deprivation evidence obviated the "need [to] reach or decide" whether the fraud convictions could also be sustained on the ground that Kelly and Baroni deprived the Port Authority of its "'right to control'" its

property. Pet. App. 26a. The court added, however, that the right-to-control theory "provide[d] an alternative basis upon which to conclude [Kelly and Baroni] defrauded the Port Authority" because "the bridge's lanes and toll booths" are "revenue-generating assets" and "[t]he Port Authority has an unquestionable property interest in the bridge's exclusive operation, including the allocation of traffic through its lanes and of the public employee resources necessary to keep vehicles moving." *Id.* at 26a-28a.

Finally, the court of appeals rejected defendants' argument that the wire fraud charges circumvented the limitations on honest-services fraud recognized in *Skilling* v. *United States*, 561 U.S. 358 (2010). Pet. App. 28a-32a. The court emphasized that Kelly and Baroni were "charged with simple money and property fraud" and that "the grand jury alleged an actual money and property loss to the Port Authority." *Id.* at 30a. The court stressed that Kelly's and Baroni's conduct—engaging in deception to cause the Port Authority to use its money and property to create gridlock and attendant public safety hazards in Fort Lee—could "hardly be characterized as 'official action' that was merely influenced by political considerations." *Ibid.*

2. The court of appeals also affirmed the federal-program fraud convictions. Pet. App. 33a-52a.

The court of appeals rejected the "broad[]" argument that Kelly and Baroni "merely allocated a public resource based on political considerations." Pet. App. 35a. The court explained that, unlike in Kelly and Baroni's hypothetical example of "a mayor who, after a heavy snowfall, directs city employees to plow the streets of a ward that supported her before getting to a ward that supported her opponent," Kelly and Baroni "conscripted

fourteen Port Authority employees to do sham work in pursuit of no legitimate Port Authority aim." *Id.* at 35a-36a. The court observed that the "jury was instructed that" it would be "a complete defense" if Kelly and Baroni had "believed the traffic study was legitimate," but the jury had "roundly rejected" that defense. *Id.* at 56a. And the court explained that with "no facially legitimate justification" to gridlock Fort Lee, defendants' conduct did not amount to resource allocation. *Id.* at 36a. "That Defendants were politically motivated," the court observed, "does not remove their intentional conduct from the ambit of the federal criminal law." *Ibid.*

The court of appeals determined that, "at a minimum, the Government offered a valid theory that Defendants fraudulently obtained, knowingly converted, or intentionally misapplied the labor of Port Authority employees, and that it offered evidence sufficient to sustain Defendants' convictions." Pet. App. 43a. The court found it "well established that public employees' labor is property for the purposes of Section 666." *Ibid.* And it reiterated its finding that defendants had "defrauded the Port Authority of the labor of fourteen public employees—eleven toll collectors paid overtime and three professional staff members," who "spent hours doing work that was unnecessary and furthered no legitimate Port Authority aim." *Id.* at 44a.

The court of appeals also upheld the district court's "refusal to instruct the jury it needed to find [that Kelly and Baroni] intended to punish [Fort Lee's mayor] in order to convict." Pet. App. 62a; see *id.* at 62a-66a. The court of appeals explained that defendants had "conflate[d] motive with *mens rea* intent and conduct." *Id.* at 63a. It observed that the district court "properly instructed the jury, for example, that to find Defendants

guilty of wire fraud, the Government was required to prove they 'knowingly devised a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations, or promises,' and that they 'acted with intent to defraud.'" *Id.* at 64a (citation omitted). The court of appeals explained that such an instruction "describes the conduct proscribed by the statute and the required *mens rea*." *Ibid.* "The intent to punish [the mayor]," the court continued, "may explain Defendants' motive—*why* Defendants intended to defraud the Port Authority in this case—but it is distinct from *mens rea* and is not a required element of any of the charged offenses." *Ibid.*

3. Although the court of appeals upheld Kelly's and Baroni's wire fraud and Section 666 convictions, it determined that their civil rights convictions could not stand, because they lacked sufficient notice that their actions would violate individuals' civil rights. Pet. App. 73a. The court therefore vacated the civil rights convictions and remanded so that the district court could "resentence [Kelly and Baroni] on the remaining counts of conviction." *Id.* at 74a.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that Kelly and Baroni committed fraud when they lied about the existence of a traffic study to hijack Port Authority resources for a lane realignment that they could not otherwise have ordered. Kelly and Baroni do not seriously dispute that a public official commits fraud when he lies to divert agency resources that he could not otherwise control. They instead assert—contrary to the jury findings and both decisions below—that a traffic study did in fact exist, that Baroni did in fact have authority

to order the realignment, and that they were in fact convicted simply for "concealment of political motives for an otherwise-legitimate official act," Kelly Br. 2, 19 (emphasis omitted). But while convictions on such a record would not be valid, the convictions on this record are.

I. Kelly's and Baroni's convictions are valid so long as they rest on a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. 1343. And the scheme here satisfies all of the requirements set forth in this Court's precedents interpreting that text. The scheme involved materially false statements about the existence of a traffic study that did not actually exist. Those false statements were the means through which Kelly and Baroni obtained control of the Port Authority resources necessary to realign the lanes and gridlock Fort Lee. And those resources—payments to workers who would not otherwise have been on duty, the value of wages paid to salaried employees whom the conspirators unwittingly conscripted into their plans, and the right to control the real property of the George Washington Bridge—are each a "'species of valuable right [or] interest'" that constitutes "property" under the fraud statutes, *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005) (citation omitted).

Kelly and Baroni acknowledge that a public official commits fraud if, for example, he misleadingly diverts public-agency resources to work on a private home. See Baroni Br. 27; see also Kelly Br. 46. Their conduct here is materially indistinguishable. Contrary to defendants' assertions, they were not convicted for "misrepresent[ing] [the] subjective motive for an otherwise-lawful decision," Kelly Br. 19; see, *e.g.*, Baroni Br. 20. The jury was explicitly instructed that motive was *not*

an element of the charged crimes, and that the relevant lie was about the existence of a traffic study, not defendants' motives. Nor could the jury have returned guilty verdicts if it harbored reasonable doubt that realigning the lanes was an "otherwise-lawful decision," Kelly Br. 19, because it had to find that Baroni "lacked authority to realign the lanes." Pet. App. 19a. And, as both courts below found, ample evidence supported the jury's findings that Baroni could not have realigned the lanes without a traffic study and that no traffic study existed.

II. Had Kelly and Baroni actually been convicted on the strawman "subjective motivation" theory that they posit, the concerns they raise about chilling political activity would have force. But those were not the facts here, and the scenarios they present would not be prosecutable as federal fraud. In some, the object of the scheme is not "property," but instead a non-property interest like a legislator's vote. In others, the official has unfettered discretion to direct agency resources (*e.g.*, a town's snowplows) as she sees fit, and any lies she tells are not the means by which she obtains control over those resources.

That latter set of scenarios also founders on the statutory requirement that the scheme be for "obtaining" money or property. 18 U.S.C. 1343. As this Court has long recognized in the sovereign-immunity context, an official who acts within her authority is *acting as the agency*. An official doing what he is authorized to do therefore does not divest the agency of its property. That remains true even in scenarios where the defendant's authority over the resources is contingent on his making a finding (*e.g.*, that an emergency exists) or offering a valid reason (*e.g.*, a nondiscriminatory one) in order to exercise authority over the resources. So long

as the defendant *himself* has the power to make the finding or decide the reason, then any finding he makes or reason he offers (whether "false" or not) is attributable to the agency, and therefore cannot be said to deprive the agency of its property.

In this case, however, the evidence established that Kelly and Baroni did *not* have the authority to decide when it was permissible to reduce the local access lanes. To the contrary, it showed that the conspirators could realign the lanes only by lying about the existence of a traffic study, and about the Executive Director's knowledge of the fictional study. By telling those lies, and diverting the agency's resources to serve their own personal ends of inflicting massive four-day gridlock on Fort Lee, Kelly and Baroni committed fraud.

ARGUMENT

The dispute in this case is factual, not legal. Kelly and Baroni appear to acknowledge that a public official can commit property fraud by lying to divert agency resources for "objectively improper" ends—*e.g.*, conscripting employees to renovate a private residence. Kelly Br. 46 (emphasis omitted); see Baroni Br. 27. The government, in turn, agrees that an official does not commit property fraud merely by "conceal[ing] or misrepresent[ing] her subjective motive for an otherwise-lawful decision." Kelly Br. 19. Where the parties diverge is on whether this is a case of the former or the latter.

The jury, the district judge, and a unanimous panel of the court of appeals found it to be the former. As they recognized, Kelly and Baroni lied about a traffic study in order to hijack Port Authority resources to gridlock a town, cause maximal harm to its residents, and endanger public safety. That was both outside their authority

and repugnant to the goals of safe and efficient transportation to which those resources would otherwise have been committed. No reason exists for this Court to disturb that uniform determination.

Kelly's and Baroni's parade of horribles—which, in any event, is already addressed by uncontested preexisting limitations on federal fraud—is inapposite. This is a case of *unauthorized* commandeering of Port Authority resources on the pretense of a *nonexistent* traffic study; it is not a case about *authorized* use of Port Authority resources to conduct an *actual* traffic study with a bad motive. This case therefore presents no occasion to consider, let alone impose, any extratextual limitations on the federal fraud statutes.

I. KELLY AND BARONI COMMITTED PROPERTY FRAUD BY FAKING A TRAFFIC STUDY TO DIVERT AGENCY RESOURCES

Lying about the existence of a traffic study in order to obtain the Port Authority's resources is fraud. Kelly and Baroni do not meaningfully argue otherwise; they instead simply dispute whether that is actually what they did. But the jury and the courts below all rejected their assertions that Baroni had authority to divert the resources even without a traffic study and that the traffic study was real. This Court should reject those assertions as well. And without them, Kelly's and Baroni's legal objections to their convictions are insubstantial.

A. The Statutory Definition Of Fraud Is Satisfied By Proof That The Defendant Obtained Property By Means Of A Material Falsehood

Kelly and Baroni were convicted of wire fraud, in violation of 18 U.S.C. 1343; defrauding a federally funded agency, in violation of 18 U.S.C 666(a)(1)(A); and

conspiracy to commit those crimes, in violation of 18 U.S.C. 371 and 1349. Kelly and Baroni do not dispute in this Court that all of those convictions are valid so long as their conduct amounted to a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," as described in the wire fraud statute, 18 U.S.C. 1343. Section 666(a)(1)(A) permits conviction under other theories—and such theories were preserved in the court of appeals, Pet. App. 60a-62a—but "fraud" alone suffices. 18 U.S.C. 666(a)(1)(A).

This Court's decisions have fleshed out the contours of the relevant language in the wire fraud—and related mail fraud and bank fraud—statutes. See 18 U.S.C. 1341, 1343, 1344; see, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 20 (1999) (treating statutes collectively). Construing the disjunctive language as a unitary whole, the Court has applied the "common understanding" of "the words 'to defraud,'" as referring "'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify[ing] the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally* v. *United States*, 483 U.S. 350, 358-359 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)); see *Pasquantino* v. *United States*, 544 U.S. 349, 358 (2005) (explaining that a "scheme or artifice to defraud" is a "scheme 'designed to defraud by representations'" (quoting *Durland* v. *United States*, 161 U.S. 306, 313 (1896)).

The Court has explained that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes," but that "'justifiable reliance' and 'damages'"—which "plainly have no place" in those statutes—are not. *Neder*, 527 U.S. at 24-25. And it has

concluded that property is obtained "by means of" fraud "when * * * the defendant's false statement is the mechanism naturally inducing [an entity] (or [the] custodian of [an entity's] property) to part with" money or property "in its control." *Loughrin* v. *United States*, 573 U.S. 351, 363 (2014).

Property, in turn, simply means "'something of value'" in the victim's hands. *Pasquantino*, 544 U.S. at 355 (quoting *McNally*, 483 U.S. at 358). In defining "property," the Court has looked to the term's "ordinary or natural meaning," which "extend[s] to every species of valuable right and interest." *Id.* at 356 (quoting *Black's Law Dictionary* 1382 (4th ed. 1951)). It encompasses both "tangible" and "intangible" "property rights." *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987). It thus includes, for example, "confidential business information," *ibid.*, and "[t]he right to be paid money," *Pasquantino*, 544 U.S. at 356. The term "property" does not, however, include the mere right to an employee's loyal "honest services," *Skilling* v. *United States*, 561 U.S. 358, 399-402 (2010), although a separate statutory provision proscribes "bribery and kickback schemes," *id.* at 412 (citing 18 U.S.C. 1346).

Government victims are treated the same as private victims for purposes of a fraud prosecution. "The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury." *Pasquantino*, 544 U.S. at 356. The fraud statutes do not offer protection to government entities *beyond* what they offer to private entities. For example, the Court has "held that a State's interest in an unissued video poker license was not 'property,' because the interest in choosing particular licensees," unaccompanied by any allegation of lost revenue or the

like, "was 'purely regulatory,'" without private analogue. *Id.* at 357 (quoting *Cleveland* v. *United States*, 531 U.S. 12, 22-23 (2000)). But a government's "economic" interests—including economic interests that have a regulatory source, like "entitlement to tax revenue"—are "property" for purposes of the fraud statutes. *Ibid.*

B. Defendants' Conduct Satisfies Each Of The Requirements For Wire Fraud

Kelly's and Baroni's conduct, as found by the jury and the lower courts, was federal fraud. They themselves approvingly cite cases upholding fraud convictions where officials have deceptively diverted public employee labor to their own use. That is exactly what Kelly and Baroni did in this case.

1. Under the principles described above, it is fraud to lie in order to divert an organization's money, employee time, or other resources toward an otherwise unachievable end. Kelly and Baroni nowhere dispute that it would be fraud for, say, an unauthorized mid-level executive to take the company jet on a vacation to Monaco by falsely telling the pilot that the CEO has authorized a work trip there. Accordingly, employees are routinely convicted for defrauding their "employer[s] and divert[ing]" funds or property "for [their] own use." *United States* v. *Ramdeo*, 682 Fed. Appx. 751, 752 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 367 (2017) (employee diverted employer's payroll funds and used them to start his own charter airline company); see, *e.g.*, *United States* v. *Allison*, 772 F.3d 554, 555 (8th Cir. 2014) (employee defrauded employer out of hundreds of thousands of dollars by "mischaracterizing personal expenses as business expenses"); *United States* v. *Jinian*, 725 F.3d 954, 959 (9th Cir. 2013) (employee lied in order to take "compensation in excess of his annual salary and

to draw advances on that compensation"); *United States* v. *Gregoire*, 638 F.3d 962, 968 (8th Cir. 2011) (employee secretly diverted employer's merchandise to online auctions where he sold the goods for his own profit).

The same principles apply in this context. Kelly's and Baroni's own affirmative examples of fraud include scenarios, involving public officials and public-employee labor, that are legally identical to the fraudulent acquisition of the company jet. Baroni, for example, appears to acknowledge (Br. 27) that "[u]sing Port Authority resources to renovate or do work on a private residence" would be fraud. And Kelly cites a case in which a "parks commissioner used city staff to perform 'work on private homes'" as an example of criminally "misappropriating property over which [an official] exercises control" —a species of fraud. Kelly Br. 46 (quoting *United States* v. *Delano*, 55 F.3d 720,723 (2d Cir. 1995)); see *Carpenter*, 484 U.S. at 27 ("The concept of 'fraud' includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.") (citation and internal quotation marks omitted).

2. This case is materially indistinguishable from those examples. And, like those examples, it satisfies all of the requirements for a federal wire-fraud conviction.

First, the scheme involved "dishonest methods," *McNally*, 483 U.S. at 358 (citation omitted)—specifically, the false representation that a traffic study was occurring. See *Pasquantino*, 544 U.S. at 357; *Neder*, 527 U.S. at 20; *McNally*, 483 U.S. at 358. The jury was instructed that it had to find "false or fraudulent pretenses," and that the indictment alleged "the false pretense of a traffic study." J.A. 874-875. The jury was

further instructed, on mens rea, that it needed to "find that a defendant knew that the traffic study was a fiction," either through direct knowledge or willful blindness. J.A. 878. The jury was instructed that guilty verdicts required finding that Kelly and Baroni "did not actually believe that the reductions were part of an actual traffic study." J.A. 878-879.

Second, the falsehood about the traffic study was "material[]," *Neder*, 527 U.S. at 25, because a reasonable person would have "attach[ed] importance to [it] in determining his choice of action,'" *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2002 (2016) (quoting Restatement (Second) of Torts § 538, at 80 (1977)). The jury instructions explicitly required the jury to find that the false representation regarding the traffic study was "one that a reasonable person might have considered important in making his or her decision to commit Port Authority resources for that endeavor, including the services of Port Authority personnel." J.A. 875-876. And the testimony showed that the lie—along with the additional lie that the Executive Director knew about the "traffic study"—was used to enlist the unwitting aid of the Port Authority's Chief Engineer, the George Washington Bridge's General Manager, and about a dozen other Port Authority employees. J.A. 264-266, 280-281, 302-303, 306-307, 310-313.

Third, and relatedly, the object of the scheme was carried out "by means of" the false statements, because those statements were "the mechanism naturally inducing" the Port Authority or its designated property custodian "to part with [property] in its control," *Loughrin*, 573 U.S. at 363. As the courts below recognized, Baroni and Kelly "needed to lie to realign the traffic patterns," Pet. App. 18a, because "Baroni lacked the authority to

realign the bridge's traffic patterns unilaterally." *Id.* at 31a; see *id.* at 119a-120a. Wildstein testified as much when he explained that he used the traffic study cover story "as a reason for asking career officials at the Port Authority to change the lane configuration." J.A. 265. As Wildstein recounted, when those officials questioned why they needed to do this, lies about the traffic study and the Executive Director's knowledge assuaged their concerns. J.A. 306-307.

Finally, the object of the scheme—employee time and labor and the use of the bridge itself—constituted "property in the hands of" the Port Authority, *Cleveland*, 531 U.S. at 15. As Kelly's (Br. 46) and Baroni's (Br. 27) own examples of misdirected employee work reflect, the Port Authority's right to its employees' time and labor qualifies as "'property' as that term ordinarily is employed," *Pasquantino*, 544 U.S. at 355-356. The Port Authority has a "straightforward 'economic' interest," *id.* at 357, in the uses to which its wage payments are put. The Port Authority in fact paid *extra* money that it would not otherwise have spent to pay overtime toll workers as backup for the toll worker on the single lane coming from Fort Lee. Pet. App. 23a-24a; see *id.* at 47a; see also *Pasquantino*, 544 U.S. at 356 (recognizing that "money in hand" is "property" for purposes of a fraud prosecution). And the George Washington Bridge itself is real property, as to which an owner has long been understood to have the rights of "free use" and "control." See, *e.g.*, 1 William Blackstone, *Commentaries* 134 (1765); see also 2 John Bouvier, *A Law Dictionary* 305 (1839) ("When things are fully our own, * * * it is plain that no person besides the proprietor * * * can have any claim either to use them, or to hinder

him from disposing of them as he pleases."); cf. *The Proprietors of the Charles River Bridge* v. *The Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 463 (1837) (describing a toll bridge as the "real property" of a State).

3. Kelly's and Baroni's scheme was therefore fraud in precisely the same way as "[u]sing Port Authority resources to renovate or do work on a private residence," Baroni Br. 27, on the pretense of, say, a nonexistent training program. As the court of appeals succinctly put it, Kelly and Baroni "conscripted" Port Authority resources "to do sham work in pursuit of no legitimate Port Authority aim." Pet. App. 36a. The "traffic study" on which the Port Authority employees were purportedly working did not exist. J.A. 181; Pet. App. 7a, 17a. Instead, the employees were working for Kelly and Baroni to create gridlock, J.A. 301, 472-473, and to perform pointless data collection that provided the conspirators with a "cover story" for that gridlock, Pet. App. 30a, 48a-49a. That, even on Kelly's and Baroni's view, is fraud. See Kelly Br. 46 (acknowledging that officials may not "put[] property to objectively improper uses") (emphasis omitted); Baroni Br. 27 (acknowledging that a "facially illegitimate use of Port Authority money or property" would be criminal).

C. Defendants Were Not Convicted For Concealing A Political Motive For An Action That They Were Otherwise Authorized To Undertake

Rather than address the actual theory of prosecution —as reflected in the jury instructions and in the decisions below—on its own terms, Kelly and Baroni attempt to recast it. They assert that "the 'fraud' here * * * was the concealment of political motives for an

otherwise-legitimate official act." Kelly Br. 2 (emphases omitted); see, *e.g.*, Baroni Br. 20 (asserting that the "convictions here stem from" a "novel theory" that an official may be convicted for "offer[ing] an insincere justification * * * to conceal a political motive"). That is incorrect. Kelly's and Baroni's motive was explicitly *not* an element of their convictions. And the characterization of their actions as "otherwise legitimate" is belied by the jury's findings, based on considerable evidence, that Baroni lacked authority to realign the lanes without a traffic study, and that no traffic study existed.

1. The lie found by the jury was about the existence of a traffic study, not Kelly's and Baroni's motives

The jury instructions show that the false statement in this case was a lie about the existence of a traffic study, not a lie about defendants' subjective motives. The instructions on the element of falsity or fraudulence centered on the allegation "that the lane and toll booth reductions were conducted on the false pretense of a traffic study." J.A. 853-854. And the jury was instructed that, in order to find Kelly or Baroni guilty, it "must find that the defendant actively subjectively believed there was a high probability that the traffic study explanation was a fiction, consciously took deliberate actions to avoid learning whether or not there was an alleged traffic study, and did not actually believe that the reductions were part of an actual traffic study." J.A. 864. As the government put it in its closing argument, "if Mr. Baroni and Ms. Kelly believed that the traffic study was real, they're not guilty." J.A. 895.

By contrast, the jury was instructed that it did *not* need to make any finding as to whether Kelly and Baroni had "conceal[ed] political motives," Kelly Br. 2. Kelly asserts that "[t]he prosecution's core allegation

was that" Kelly and Baroni "ordered the [lane] change to punish Fort Lee's mayor." *Ibid.* But the district court *rejected* a request—which came from defendants, not the government—to instruct the jury that a motive to punish Fort Lee's mayor was "an essential element of each of the charged offenses." Pet. App. 110a; C.A. App. 4996-5009. The court correctly recognized that punishing Fort Lee's mayor was the "motive" for the fraud, "not an element of the crime." J.A. 808. And the jury was thus explicitly instructed that "[m]otive is not an element of the offense" and that "proof of bad motive alone does not establish that the defendant is guilty." J.A. 863.

As both courts below recognized, defendants' "motivation to punish [the mayor] was central to the Government's case"—"but only as a means of explaining to the jury *why* [they] may have violated the law." Pet. App. 111a (emphasis added); see *id.* at 64a (similar observation by court of appeals). The "why" was not itself an element of the crime. The conspirators' guilt would be unaffected if they plotted to reduce the lanes because, say, Kelly wanted to speed her own commute. The substance of the fraud prosecution was instead about *what* Kelly and Baroni did (commandeer Port Authority resources over which they otherwise lacked control) and *how* they did it (lying about a nonexistent traffic study). *E.g.*, J.A. 864. The jury did not need to make any findings about motive, and it is far from clear that the jury even agreed that defendants *had* the motive to punish Fort Lee's mayor. During deliberations, the jury sent a note asking whether "you [can] be guilty of conspiracy without the act being intentionally punitive [sic] toward" the mayor. Pet. App. 107a (citing J.A. 905). After

hearing from counsel, the district court correctly answered, "Yes." *Ibid.*

2. Sufficient evidence supports the jury's finding that defendants commandeered Port Authority resources by faking a traffic study

At bottom, Kelly and Baroni simply have a different view of the evidence than the jury or the lower courts did. They take as a given "that Baroni had the authority, in the first instance, over lane allocation." Kelly Br. 24 (emphases omitted); Baroni Br. 29. And they assert that the "Port Authority employees did in fact conduct a traffic study." Kelly Br. 11, 14, 40; Baroni Br. 13, 27-28. But no sound reason exists to disturb the lower courts' and the jury's uniform rejection of those factual assertions. See *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (requiring "a very obvious and exceptional showing of error" to "undertake to review concurrent findings of fact by two courts below") (citation omitted). The question on sufficiency-of-the-evidence review is whether, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found" them guilty. *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016) (citation omitted). The record here readily satisfies that standard.

a. Sufficient evidence shows that Baroni lacked authority to realign the lanes without faking a traffic study

As both the district court and the court of appeals recognized, ample evidence demonstrates that the conspirators "had to create the traffic study cover story in order to get Port Authority employees to implement the realignment." Pet. App. 17a; see *id.* at 119a. They

"would not have been able to realign the lanes had Baroni and Wildstein provided the actual reason or no reason at all." *Ibid.*

i. The jury could not have convicted if it thought the evidence suggested otherwise. As the Third Circuit recognized, the jury instructions "foreclose[d] the possibility the jury convicted [d]efendants of fraud without finding [that] Baroni lacked authority to realign the lanes" as he did. Pet. App. 19a. The instructions required the jury to find that the fraudulent "scheme contemplated depriving the Port Authority of money and property." J.A. 854-855. The instructions also explained that "[a]n organization is deprived of money or property when the organization is deprived of the right to control that money or property." J.A. 855. As the court of appeals observed, "Baroni could not deprive the Port Authority of money and property he was authorized to use for any purpose." Pet. App. 19a-20a. "Nor could he deprive the Port Authority of its right to control its money or property if that right to control were committed to his unilateral discretion." *Id.* at 20a. The jury's finding of guilt based on the deprivation of property thus necessarily included a finding that Baroni exceeded his authority. See *id.* at 19a-20a; see also *id.* at 122a.

The court of appeals also correctly observed that "overwhelming evidence" in the record supports the jury's finding. Pet. App. 18a. For example, Wildstein testified that, after he informed Baroni of Kelly's request to realign the lanes, Baroni "asked how [Wildstein] was going to do that." J.A. 252. Wildstein then devised a plan that involved faking a traffic study "as a reason for asking career officials at the Port Authority to change the lane configuration." J.A. 265. And Wildstein further testified that the Port Authority had

"a process of approvals that needed to be followed" in order to use its resources. J.A. 255. He acknowledged that he "did not follow" that process. *Ibid.* A rational factfinder could infer from that sequence that Baroni needed the fiction of a traffic study in order to acquire the resources for realigning the lanes.

Additional testimony confirmed that Baroni did not have the authority that defendants claim to use Port Authority resources to realign the lanes on the George Washington Bridge. The Port Authority's Executive Director testified that the Port Authority's by-laws "authorize[d] the Executive Director"—not his deputy Baroni—to "manage the day-to-day operations of the Port Authority in compliance with policies set by the Board of Commissioners." J.A. 139. And the Executive Director told the jury that until the Fort Lee traffic jams, he was not aware of any instance in which he was not "notified beforehand" about a "planned Port Authority operation that could cause substantial traffic backups in the local community." J.A. 152. Similarly, the Vice Chairman of the Port Authority's Board of Commissioners testified that the lane reductions were "unauthorized," J.A. 723, observing that, on learning of the lane reductions, he had asked Baroni why the Executive Director had not been informed "before this happened." J.A. 723, 725.

ii. Neither Kelly nor Baroni challenges the adequacy of the jury instructions on this issue. That is for good reason. While the district court denied a defense request for a more explicit jury instruction regarding whether Baroni acted within the scope of his authority, Pet. App. 18a n.5, the court made clear that defendants were "free to make th[e] argument to the jury." *Ibid.*

As the court of appeals recognized, the existing instructions ensured that the jury "necessarily concluded [that] Baroni lacked authority to order the realignment." *Id.* at 20a. And as the district court observed, "[t]he existence and scope of Baroni's authority was a question of fact for the jury, and one that the jurors resolved in favor of the prosecution." *Id.* at 122a.

Defendants' assertion that Baroni had "authority, in the first instance, over lane allocation," Kelly Br. 24 (emphases omitted), is certainly not the *only* rational reading of the record, as would be necessary for their sufficiency challenge to prevail, see *Musacchio*, 136 S. Ct. at 715. In any event, Kelly and Baroni identify no significant record support for that assertion.

As a threshold matter, the critical question is not whether Baroni might have had authority to reduce the number of local access lanes in *some* circumstances, but instead whether he had such authority in *these* circumstances, in the absence of an actual traffic study. The conspirators' own understanding that they needed to concoct the traffic-study story in order to marshal the resources they needed (see Pet. App. 17a; JA. 262, 265) by itself supports the rational inference that Baroni lacked such authority.

Kelly (Br. 24) and Baroni (Br. 29) claim that portions of the government's opening and closing statements affirmatively argued that Baroni had the power to order the realignments. But the cited statements simply reference Baroni's "power to *reverse* this horrible traffic in Fort Lee," J.A. 68 (emphasis added), or, equivalently, to "t[ell] Wildstein to stop" and "move the cones back," J.A. 885. Baroni's ability to *retract* the lie about the

traffic study, and return the lanes to their usual alignment, says nothing about whether he needed to lie about a traffic study to change the original status quo.

Likewise misplaced is Kelly's (Br. 24) and Baroni's (Br. 29-30) suggestion that Baroni lacked authority only in the sense that his orders could subsequently be overturned by the Executive Director. Baroni points to testimony from Wildstein and a former Deputy Executive Director suggesting that the Deputy Executive Director does not generally view himself or herself as "report[ing] to" the Executive Director. J.A. 235, 519. But both witnesses acknowledged that those informal views were inconsistent with the formal structure of the Port Authority. J.A. 519. The former Deputy Executive Director testified that on "just a pure schematic of the reporting structure, [it] would appear" that the Executive Director "was [her] boss." J.A. 518-519. And Wildstein testified that the Deputy Executive Director has "no by-law power," J.A. 237; that the Port Authority had an "approval[]" process for using resources, J.A. 255; and that the process was not followed here, *ibid.*

The claim of "first instance" authority is further undermined by testimony of higher-ranking Port Authority officials expressing surprise that they were not informed of the reductions to the local access lanes, see J.A. 152, 723, 725. Indeed, Wildstein had to assure the Port Authority's Chief Engineer and the George Washington Bridge's General Manager that the Executive Director knew about the realignment in order to get them to go along with the scheme. Pet. App. 8a-9a. Had the Port Authority's policies and practices in fact allowed someone in Baroni's position to reduce the number of local access lanes without a traffic study, some indication of that—either in a written document or in

testimony about past precedent—would have been presented to the jury. None was.

Kelly (Br. 24) and Baroni (Br. 29) err in asserting that the government "elicited testimony that [Baroni] did not need the approval of the only more-senior official to 'change * * * a lane configuration.'" The cited testimony by the Port Authority's Executive Director does not refer to the practices in place when defendants caused the gridlock in Fort Lee. It instead refers to the falsity of testimony that Baroni gave to the New Jersey Legislature in the traffic jams' aftermath. Baroni told the Legislature that because of the gridlock, he was proposing a policy under which the Executive Director and the Deputy Executive Director would approve any non-emergency lane realignments. J.A. 194-195. The Executive Director confirmed that Baroni had lied about that policy proposal in his legislative testimony. *Ibid.* The Executive Director's testimony about the fictional nature of that policy proposal is fully consistent with the evidence—which he himself corroborated—that, at the time of the traffic jams, there was an unwritten approval policy in place that the conspirators "did not follow," J.A. 255 (testimony by Wildstein); see J.A. 152 (testimony of Executive Director that he was notified before "any planned Port Authority operation that could cause substantial traffic backups"). And to the extent that the evidence allows for doubt on that issue, it must be resolved in favor of the jury's finding of guilt. See *Musacchio*, 136 S. Ct. at 715.

b. Sufficient evidence shows that no traffic study existed

Kelly and Baroni never overtly challenge the sufficiency of the evidence establishing that the traffic study was a "fiction." J.A. 864. Instead, they simply assert

that "Port Authority employees did in fact conduct a traffic study" and that the study was "allegedly a 'sham'" only "in the sense that Baroni was not sincerely interested in its results." Kelly Br. 11 (citation omitted); see *id.* at 14, 40; Baroni Br. 13, 27-28. Those assertions lack significant record support; at a minimum, they are not the only rational inference that the jury could draw.

The Port Authority's Executive Director testified that "there was no study." J.A. 181. He remained firm in that testimony even when defense counsel pointed out that it was a statement against interest because it meant that he himself had issued "a false statement" to the media, in the immediate aftermath of the gridlock, claiming the existence of such a study. J.A. 176-177. And as the court of appeals recognized, "[t]rial testimony established that everything about the way this 'study' was executed contravened established Port Authority protocol and procedures. Indeed, witnesses testified that traffic studies are usually conducted by computer modeling, without the need to realign traffic patterns or disrupt actual traffic." Pet. App. 30a-31a.

Wildstein's testimony confirmed that no actual study existed. Far from asking the Port Authority's Chief Engineer "to have his staff conduct a Port Authority traffic study of th[e] lanes," Wildstein simply asked for "some numbers" on "how many cars were involved" and how "far back" the traffic jam went. J.A. 305. And Wildstein testified that he and Baroni were surprised when they learned "for the first time" through a media-initiated Freedom of Information Act request weeks after the lane reductions that some traffic engineers had attempted to "review[] some data" and "put together some recommendations." J.A. 414.

In asserting that Port Authority employees did in fact "conduct[] the traffic study," Baroni Br. 13, Kelly and Baroni are referencing the contemporaneous data collection and post hoc consideration of that data. J.A. 414-415, 478-484. But the jury found that Kelly and Baroni themselves did not "believe that the reductions were part of an actual traffic study," J.A. 879, so even if their fraudulent scheme accidentally produced some useful data for the Port Authority, that would not exonerate them. This Court has found that the common law requirement of "'damages' plainly ha[s] no place in the federal fraud statutes" because those statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud." *Neder*, 527 U.S. at 25.

In any event, the work the Port Authority traffic engineers performed did not qualify as an actual "traffic study" that might have provided a valid basis for reducing the number of local access lanes. As one of the engineers testified, what he did was not "consistent with how the Port Authority conducts traffic studies," in part because much of the assembled data was "not useful" and was simply "discarded." J.A. 484-485. To the extent that the court of appeals' opinion loosely refers to the existence of a "traffic study," *e.g.*, Pet. App. 56a, it is referencing a "*sham* traffic study," *ibid.* (emphasis added), which amounted to pointless busywork, *ibid.* As the court of appeals explained, the testimony showed that the traffic engineers spent time "collecting traffic data on the realignment, in furtherance of no legitimate Port Authority purpose," *id.* at 55a, with the entire amount spent "compensat[ing] those individuals for unnecessary, sham work" constituting harm to the Port Authority. *Id.* at 51a. And even if the record might have allowed a factfinder to conclude that some sort of actual

"traffic study" occurred, it was not irrational for the jury to find otherwise. See *Musacchio*, 136 S. Ct. at 715.

D. Defendants Offer No Sound Legal Basis For Exempting Their Conduct From The Fraud Statutes

The facts of this case thus amply support the theory of prosecution that the government actually pursued—namely, that Kelly and Baroni used a lie about a fictional traffic study to divert Port Authority resources for their own use. Kelly's and Baroni's legal objections to their convictions rest almost entirely on their unsupported view of the case. Kelly, for example, asserts that they were prosecuted for "harboring ulterior political motives"; urges that this "*must be* wrong"; and then proffers alternative legal rationales for why such motives are not a crime. Kelly Br. 17; see, *e.g.*, Baroni Br. 20 (similar). To the extent that any of Kelly's and Baroni's arguments are relevant to the case as it was actually prosecuted and proved, they are unsound.

1. Contrary to Kelly's and Baroni's assertions (*e.g.*, Kelly Br. 29-33; Baroni Br. 17), this case was not an "honest services fraud" prosecution in disguise. Before this Court's decision in *McNally* v. *United States*, *supra*, federal courts recognized an "'honest services' doctrine" under which the property-fraud statutes were deemed to cover a defendant who schemed to profit from dishonest conduct with "no deprivation of money or property" to the betrayed party. *Skilling*, 561 U.S. at 400. For example, a public official could be convicted under an "honest services" theory if she accepted a kickback for negotiating a contract, even if the contract was on the same "terms * * * as any that could have been negotiated at arm's length." *Ibid.* *McNally* ended the criminalization of those sorts of schemes by constru-

ing the mail fraud statute "as limited in scope to the protection of property rights." *Id.* at 402 (quoting *McNally*, 483 U.S. at 360).

The Court in *McNally* made clear, however, that its holding did not affect the prosecution of frauds in which the scheme *was* directed at the property of the victim—including the property of a government agency. The scheme in *McNally* "involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the official partially controlled." *Skilling*, 561 U.S. at 401-402 (citing *McNally*, 483 U.S. at 360). In concluding that the scheme fell outside the scope of the mail fraud statute, the Court emphasized that the case involved "no charge * * * that the Commonwealth itself was defrauded of any money or property" or "was deprived of control over how its money was spent." *McNally*, 483 U.S. at 360. The Court observed, for example, that "the premium for insurance would have been paid to some" insurer, *ibid.*; it was not a new cost resulting from defendants' scheme.

This case, however, incorporated the sort of charges that were missing in *McNally*. As the court of appeals recognized, unlike in an honest-services prosecution, the indictment in this case "alleged an actual money and property loss to the Port Authority" as the object of defendants' scheme, Pet. App. 30a. And the evidence showed not only that defendants schemed for such a loss, but that it occurred. See *id.* at 46a-55a. Among other things, the Port Authority incurred the "cost of compensating overtime toll booth workers." *Id.* at 47a. Those toll workers were necessary only because of Kelly and Baroni's scheme. *Ibid.* Thus, unlike in

McNally, no question exists that the Port Authority spent money it would not otherwise have spent.

2. Kelly's and Baroni's objections to treating the objects of their scheme as "property" are likewise misplaced. As a threshold matter, if property interests like overtime compensation for extra workers, or wages paid for useless work, are not "property," then even some of Kelly's and Baroni's own examples of fraud would be exempt from prosecution. See Kelly Br. 46 (citing *United States* v. *Delano*, *supra* (upholding fraud conviction of official who directed park service employees to perform work for friends and private businesses)); Baroni Br. 27 (citing *United States* v. *Pabey*, 664 F.3d 1084, 1089 (7th Cir. 2011) (upholding fraud conviction of mayor who used "on-the-clock city workers" to renovate his daughter's new home), and *United States* v. *Baldridge*, 559 F.3d 1126, 1139 (10th Cir.) (upholding fraud conviction of county commissioner who diverted county employees to work at his wife's residence), cert. denied, 556 U.S. 1226 (2009)).

Out-of-pocket expenses to compensate extra overtime workers, however, are unquestionably "money or property," 18 U.S.C. 1343. And the value received from wages is plainly a "species of valuable right and interest." *Pasquantino*, 544 U.S. at 356 (quoting *Black's* 1382). Someone who steals the money intended to compensate an employee, causing the employee not to report for work, has necessarily deprived the employer of the value of that money. And the same is true of someone who prevents the employee from performing the work for which he was compensated—or, worse yet, diverts the value of the compensated labor to her own ends.

Nor do Kelly or Baroni provide any sound basis to question the other property interests at issue in this case, which the court of appeals identified as an alternative to the excess and wasted wages. See Pet. App. 26a-28a. Kelly posits, for example, that because 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." Kelly Br. 38 (emphases omitted). The right to control the George Washington Bridge, however, is not a regulatory interest, but instead an interest in real property—one of the most fundamental of property rights. See 2 William Blackstone, *Commentaries* 2 (1766). Kelly and Baroni nonetheless suggest (Kelly Br. 46; Baroni Br. 27-28) that the government was not defrauded of a property right because the Port Authority was still able to use the bridge, the lanes, and the staff for *some* purposes. But this Court has explained that a "scheme to defraud" includes circumstances in which a victim "has been deprived of its right to *exclusive* use of" its property, recognizing that "exclusivity is an important aspect of * * * most private property." *Carpenter*, 484 U.S. at 26-27 (emphasis added).

* * * * *

The scheme in this case required the Port Authority to pay additional wages, redirected the value of the Port Authority's scheduled wage payments, and divested the Port Authority of control of the George Washington Bridge, all to the benefit of Kelly and Baroni, who used those Port Authority resources to create traffic jams and a cover-up. The scheme was effectuated by means of a lie—the claim of a traffic study that did not in fact exist—without which Baroni would not have been able to turn the agency's resources from helping the public

to harming it. The scheme was, therefore, a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," in violation of federal law. 18 U.S.C. 1343; see 18 U.S.C. 666(a)(1)(A).

II. AFFIRMING KELLY'S AND BARONI'S CONVICTIONS WOULD NOT SUGGEST THAT ROUTINE POLITICAL CONDUCT IS FEDERAL FRAUD

If Kelly and Baroni had been convicted on a record that showed that Baroni was actually empowered to reduce the number of local-access lanes without a traffic study, or if a traffic study really existed, then their concerns about potentially "criminalizing large swaths of routine politics," Kelly Br. 34, would be relevant. Whether or not organizational resources are involved, neither the "concealment of political motives for an otherwise-legitimate official act," *id.* at 2 (emphases omitted), nor an "insincere justification for an official decision in order to conceal a political motive," Baroni Br. 20, is federal property fraud. 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. See Pet. App. 19a-20a. Nor would it 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.

But those are not the facts that the jury found. The jury found Kelly and Baroni guilty of fraud because it found that they lied about the existence of a traffic study to obtain authority over lane allocation that Baroni did not otherwise possess. The actual facts of this case thus differentiate it from the true official decisions at issue in defendants' parade of horribles. And

affirming their convictions accordingly creates no concern about chilling routine official or political activity.

A. As a threshold matter, some of the scenarios that Kelly and Baroni posit do not involve "property" at all, but instead an elected official's vote. A "legislator has no personal right" to his vote, *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 126 (2011), nor can his constituents claim a "property" interest in it. A legislator who tells a lie to "convince[] other legislators to vote for an appropriation," Baroni Br. 31, for example, has not obtained property, even if the subject of the bill is financial. See, *e.g.*, *United States* v. *Turner*, 465 F.3d 667, 669 (6th Cir. 2006) (en banc) (holding that a "vote hauling" scheme does not implicate property rights).

Other scenarios that Kelly and Baroni posit involve property, but do not involve efforts to obtain that property "by means of" a lie. As this Court explained in *Loughrin*, the "by means of" requirement necessitates something more than an "oblique, indirect" connection between the false statement and the expenditure of money or property; the false statement must be the "mechanism" that induces an entity, or the "custodian" of the entity's property, "to part with" money or resources. 573 U.S. at 363. A city official who has the power to order snow removal or pothole repair generally does not need to tell her staff why she wants them to plow certain roads or fill certain potholes. Kelly Br. 20, 27. And so long as she can instruct her staff to undertake these tasks without offering an explanation, any gratuitous lie about her rationale cannot be the "mechanism" that "induc[es]" her staff to commit the city's resources to her personal use. *Loughrin*, 573 U.S. 363.

B. More fundamentally, however, Kelly's and Baroni's examples are all misplaced because—unlike this case—they do not involve instances where a public official "obtain[s] * * * property" by depriving her agency of control over its resources. Instead, they involve scenarios where the official has the authority to control those resources on the agency's behalf. In exercising that authority, whether honestly or dishonestly, the official is acting *as the agency*, and the resources therefore remain the agency's resources, not the official's personal resources.

A "State can act only through its officials." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 114 n.25 (1984). When an official exercises official authority, he is acting in his official capacity, and any resources expended as a result of his decision are utilized by the agency—not the official personally. In the sovereign-immunity context, for example, a plaintiff cannot evade the limitations on recovering "specific property or monies" from the sovereign simply by bringing suit against the official who allegedly acted wrongfully. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). Instead, when an official "making [a] decision [is] empowered to do so," the resulting action is "the action of the sovereign" itself. *Id.* at 695.

Thus, when an official makes a decision that is within his authority to make, he is not "*obtaining* [the] money or property" necessary to implement that decision, 18 U.S.C. 1343 (emphasis added). A mayor who has unilateral authority to order snow removal or pothole repair, for example, does not personally obtain property by exercising that official authority to direct snowplows or work crews to particular favored constituencies. Kelly Br. 20, 27. Even if she lies about her

motives, she is acting within the scope of her authority, and thus acting in an official capacity. Her authorized deployment of the town's snowplows to remove the town's snow, or of the town's work crews to fix the town's potholes, is an official, rather than personal, use of those resources.

The same is true even if—as in some of Kelly and Baroni's more detailed scenarios, see Kelly Br. 23; Baroni Br. 44-45—an official has contingent rather than absolute authority, so long as the contingency itself is within the official's control. In some circumstances, an official can exercise particular authority (*e.g.*, deploying snowplows) only if the official makes a particular determination (*e.g.*, that a "state of emergency" exists) or publicly announces a valid reason (*e.g.*, a nondiscriminatory reason rather than a discriminatory one). But even if an official could be deemed to have acted "false[ly]" or "fraudulent[ly]" in making the determination or announcement, that does not mean that he has "obtain[ed] money or property" from the agency. If the official *himself* has "delegated power," *Larson*, 337 U.S. at 691, to decide whether the contingency exists, he is not committing fraud by deciding that it does.

Suppose, for example, a town authorizes the police chief to pay overtime only when "necessary for public safety," but *also* allows the police chief to determine when that condition is satisfied. Although the town may have, in a sense, locked its overtime-pay resources in a box, it has given the police chief the key to that box, in the form of his discretion to determine when it should be opened. The town cannot complain that the police chief has "obtain[ed]" its property by exercising his discretion, any more than the town can complain about the mayor "obtaining" the snowplows by exercising hers.

The town, in other words, has given the police chief the authority to decide when the use of its resources is "legitimate." Even if he uses that discretion in ways that the town might not have desired, he is exercising the power that the town has given to him, and is thus acting in an official, rather than personal, capacity.

An official's possession of contingent, rather than unfettered, discretion creates the possibility that a court might later determine, in a suit against an officer in his official capacity or against the agency itself, that the determination or stated reason for the action was incorrect, or even "false." But for the period before that occurs, the action—and the resources it requires—are the agency's, rather than the officer's, for purposes of the federal fraud statutes. Cf. *Larson*, 337 U.S. at 695 ("[W]e have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact."). The dishonest official should probably be fired. But he cannot be federally prosecuted for fraud.

C. The scope of an officer's delegated authority supplies a ready means of identifying acts that "involve putting property to objectively improper uses," Kelly Br. 46 (emphasis omitted), and can therefore potentially provide the basis for a federal fraud prosecution. A use is "objectively improper" when it is forbidden to the official. And if the official himself has discretion within the organization to determine what the "improper uses" are—including by determining whether the conditions on his own resource-allocation authority are triggered—then his uses do not constitute federal fraud. In most cases, the authority inquiry will be fairly straightforward. Officials rarely have authority to, for example,

direct public "resources to renovate or do work on a private residence." Baroni Br. 27. Such "facially illegitimate" uses of those resources, *ibid.*, will thus be easy for the factfinder to detect. In other cases, a written regulation or policy will make the official's authority clear.

The inquiry in this case was slightly different, in large part because the Port Authority's practices and procedures were not generally reduced to writing. Pet. App. 119a n.11. Indeed, under the written by-laws, Baroni as the Deputy Executive Director had "no" power. J.A. 237. But that does not suggest that the jury had no way to make an objective finding about Baroni's authority; it could—and did—hear testimony about what Baroni had the power to do and when he had the power to do it. The district court thus correctly determined that "[t]he existence and scope of Wildstein and Baroni's authority" was "a question of fact for the jury." Pet. App. 93a.

The "jurors resolved" the question "in favor of the prosecution." Pet. App. 122a; see *id.* at 16a-20a; 119a-120a & n.11. Kelly and Baroni offer no sound basis to disturb that finding, or any other finding, by the jury. Nor is there any need to invent new limitations on federal fraud that would exonerate them. Their convictions should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[†] The Solicitor General is recused in this case.

ADDENDUM

Key to Trial Transcripts in the Joint Appendix

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