No. 18-1059

IN THE

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

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RESPONDENT WILLIAM BARONI'S BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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March 15, 2019

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QUESTION PRESENTED

Does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision?

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OTHER AUTHORITIES

Katie Rogers, *President Signs Order to Help U.S. Manufacturers and "Trump People"*, N.Y. Times (Jan. 31, 2019) 23

Michael Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry Into Clinton Foundation*, N.Y. Times (Nov. 13, 2017) 25

Nicholas Fandos, *House Democrats Demand Information From White House About Security Clearances*, N.Y. Times (Mar. 1, 2019) 25

Nicholas Fandos, *House Democrats Are Flooding Trump World With Demands. Here's a Guide to the Investigations*, N.Y. Times (Mar. 7, 2019) 25

Nina Agrawal, *As Gov. Chris Christie Bids Farewell, Many in New Jersey Say Good Riddance*, Los Angeles Times (Jan. 9 2018) 2

Rebecca Ballhaus & Corinne Ramey, *Trump Foundation Says New York State Probe Is Rooted in Political Bias*, Wall Street J. (Aug. 30, 2018) 25

Ryan Hutchins, *Chris Christie: Bridgegate Prosecutor Wanted to Score Points with Clinton*, Politico (Jan. 29, 2019) 25

Sandra Tan, *Loughran Alleges Political Retaliation After Staffer Fired From Legislature*, The Buffalo News (Jan. 9, 2019) 24

Summer Meza, *Trump Rallygoers Now Chant 'Lock Her Up' About Any Woman They Don't Like*, The Week (Oct. 10, 2018) 24

RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondent William Baroni respectfully requests that this Court grant Bridget Anne Kelly's petition for a writ of certiorari to review the decision of the Third Circuit (the "Petition").

STATEMENT OF THE CASE

This case arises out of what has come to be known as "Bridgegate." In September 2013, the Port Authority of New York and New Jersey reallocated the twelve tollbooth lanes that feed onto the upper level of the George Washington Bridge. Petition Appendix 9a ("Pet. App."). Historically, only nine of the lanes onto the upper level of the bridge handled the mass of traffic approaching from a variety of feeder highways dubbed the "Main Line," while three lanes were set aside for drivers approaching from the local streets of Fort Lee, New Jersey. *Id*. at 4a. Bill Baroni, the Deputy Executive Director of the Port Authority, and others participated in the decision to reallocate two of those three lanes, opening them to Main Line drivers. *Id*. at 3a, 9a. The result of reducing Fort Lee's allocation to a single lane was that a bottleneck at the entrance to the bridge caused traffic to back up into Fort Lee, producing severe local traffic. *Id*. at 9a. The lane reallocation lasted almost a full work-week before the Port Authority reversed course and reinstated the original traffic pattern. *Id*. at 9a-10a.

The change in lane allocation and the week of significant traffic in Fort Lee became a political scandal in New Jersey, with angry motorists demanding to know why the lane allocation had been changed. *Id*. at 11a. The Port Authority publicly stated that the lanes had been reallocated as part of a traffic study

that would measure the impact of the new traffic pattern on the flow of traffic towards the George Washington Bridge. J.A. 1833-35.[1] But the press eventually reported that the lanes were reallocated to create traffic in Fort Lee as a form of political retribution against Fort Lee's mayor, who had declined to endorse New Jersey Governor Chris Christie in his bid for re-election. Pet. App. 2a.

Like most political scandals, there was a significant political cost for the parties involved. Baroni was fired due to the public outcry, others involved were also fired or forced to resign, *id.* at 11a, and Governor Christie left office in January 2018 with the lowest recorded approval rating for any New Jersey governor. Nina Agrawal, *As Gov. Chris Christie Bids Farewell, Many in New Jersey Say Good Riddance*, Los Angeles Times (Jan. 9, 2018). That would have been enough in most circumstances to satisfy the public that its public officials had been held accountable for using the allocation of public resources as a way to inflict political payback.

But the Government decided that the political process was not enough in the Bridgegate case, concluding instead that this political scandal was actually a criminal conspiracy. The Government charged Baroni and Bridget Anne Kelly, an aide to Governor Christie, with conspiracy to defraud the Port Authority of its property and criminal civil rights violations. Pet. App. 11a-13a. Baroni and Kelly were convicted after a jury trial, *id.* at 13a, and argued on appeal that there was insufficient evidence to show that there was any fraud. It could not be the case, they argued, that public officials who make decisions

[1] Citations to "J.A." refer to the Joint Appendix filed in the Third Circuit on August 24, 2017.

about the allocation of public resources based on undisclosed political interests have committed a federal crime. *E.g.*, *id.* at 29a-30a, 35a-36a. They also argued that the criminal civil rights charges failed as a matter of law because the supposed right at issue—the right of Fort Lee's citizens to unhampered *intra*-state travel—was not clearly established. *Id.* at 66a-67a.

The Third Circuit agreed that the civil rights charges were deficient. *Id.* at 66a-73a. But it affirmed the balance of the charges, holding that Baroni and Kelly had defrauded the Port Authority of its property—namely, the tollbooth lanes and the cost of employee labor—because they had lied about the reason for the lane reallocation and used a traffic study to conceal their true political motives. *Id.* at 13a-66a. In other words, the Third Circuit concluded that the "fraud" in this case was the concealment of political motives for an official act.

That cannot be the law. Indeed, in the context of honest services fraud, this Court has made clear that it is not. In *Skilling* v. *United States*, 561 U.S. 358 (2010), this Court—after decades of wrangling among Congress, prosecutors, and the courts—held that prosecutors cannot use the honest services fraud statute as a free-ranging tool to "'set[] standards of . . . good government for local and state officials.'" *Id.* at 402 (quoting *McNally* v. *United States*, 483 U.S. 350, 360 (1987)). This Court explicitly held that mere "undisclosed self-dealing by a public official"—*i.e.*, the taking of official action to further undisclosed personal interests while purporting to act in the interests of the public (without a bribe or kickback)—is *not* honest services fraud. *Id.* at 409-10. Unquestionably, the Court's reasoning includes undisclosed political interests. The Solicitor General herself, in briefing in

a companion case to *Skilling*, conceded that "[h]onest-services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty." Br. for the United States at 45, *Weyhrauch* v. *United States*, 561 U.S. 476 (2010) (No. 08-1196), 2009 WL 3495337 at *45 ("Weyhrauch Br.").

The decision below disregards all that. It permits federal prosecutors to convict local and state officials for doing *exactly* what *Skilling* says is not fraud: taking official action to further undisclosed political interests while purporting to act in the interests of the public. It does so by authorizing federal prosecutors to *nominally* charge "money or property" wire fraud or "property" federal program fraud even though they are *actually* just policing the non-bribes-and-kickbacks honest services fraud that the Court said was not criminal. According to the panel below, the "fraud" is the concealed political motive for the official's action, and the "money or property" that is the object of that fraud is the inevitable (and often, as here, incidental and trivial) public employee labor allocated to the action (including merely the labor of the official involved in the deceit). But a repudiated theory of honest services fraud cannot be so easily shoehorned into an ill-fitting theory of "money or property" fraud. If it could, *every* mere "good-government" and undisclosed interest case that *Skilling* declared to be beyond the reach of federal prosecutors would be chargeable as a money-or-property fraud based on any pittance of money or property used, and the Court's carefully considered limitation on the reach of the honest services theory would be rendered a nullity.

Thus, the Third Circuit's decision is wrong. But beyond that, review here is warranted because of the

prosecutorial floodgates that the court of appeals' decision opens if it is left standing. *Every* action taken by *every* public official can be shown to have required at least *some* amount of public resources to carry it out. Therefore, on the theory sanctioned below, *every* official action that involves a concealed political motive becomes a prosecutable "money or property" fraud. The decision below turns ordinary political practices into *federal crimes*. And those ordinary political practices are, for better or worse, an inevitable and ubiquitous aspect of our democratic system of government. Indeed, at some point or another, nearly every public official will make some decision or take some action motivated by a concealed political interest. Now *all* of those public servants are indictable federal felons, turning United States Attorney's Offices into roving police forces authorized to pick and choose which local and state officials they want to target to "set[] standards" of what they have decided is "good government." *Skilling*, 561 U.S. at 402.

I. BACKGROUND OF THE CASE

A. Factual Background

The Port Authority is a bi-state agency created by the states of New York and New Jersey. J.A. 1064. The two states each appoint officials to oversee the Port Authority's operations. *Id.* at 1063, 1067-69. Baroni was appointed by the Governor of New Jersey to be the Deputy Executive Director of the Port Authority, which functioned as a "co-head" of the agency along with the Executive Director appointed by the Governor of New York. Pet. App. 3a; J.A. 1063, 1067-69, 1482, 3194.

One of the Port Authority's responsibilities is managing the George Washington Bridge, a double-decked suspension bridge connecting Fort Lee, New

Jersey and New York, New York. Pet. App. 4a. There are twelve tollbooth lanes that feed onto the Bridge's upper level from the Fort Lee side. *Id.* Historically, Port Authority officers set up traffic cones during the weekday-morning rush-hour to segregate three lanes for the exclusive use of traffic approaching from Fort Lee's local streets. *Id.* The remaining nine lanes are accessible to drivers approaching from the "Main Line," which is fed by a number of different highways. *Id.* The decision to give Fort Lee special use of three lanes onto the bridge each weekday morning was the result of a decades-old political deal between the then-Governor of New Jersey and the then-Mayor of Fort Lee. *Id.*

Just like the participants in that historical deal, Governor Chris Christie and his staff likewise saw political opportunity in the ability to use the Port Authority to provide favors to political allies. To this end, the Office of Intergovernmental Affairs ("IGA")—a liaison between the Governor's office and elected officials throughout New Jersey—coordinated and executed a plan to court endorsements for Governor Christie's 2013 reelection campaign by favoring potential endorsers with a variety of political pork, including items to be provided through the Port Authority. Baroni, in his role at the Port Authority, was regularly called upon to assist the Governor's office and bestow favors on elected officials. *Id.* at 5a. These favors ranged from the very small (providing steel from the original World Trade Center towers, flags that had flown over Ground Zero, and tours of Ground Zero) to the very large (having the Port Authority purchase the Military Ocean Terminal at Bayonne for $250 million to benefit that town's mayor politically). *Id.* These various gifts and favors were all politically motivated. *Id.* Although the Govern-

ment easily established at trial that all of these dispositions of Port Authority (and other public) labor and property were politically motivated, the Government has never suggested that any of it was criminal or that the numerous people who participated are criminals.

One potential endorser whom IGA targeted was Mark Sokolich, the Democratic Mayor of Fort Lee. *Id.* IGA did so by calling on the resources of the Port Authority to benefit Fort Lee. *Id.* For example, besides the smaller gifts of tours and commemorative items from Ground Zero that were provided to Mayor Sokolich personally, the Port Authority also provided police assistance to direct traffic in Fort Lee, contributed $5,000 to the Fort Lee fire department for equipment purchase, and spent more than $300,000 to fund four shuttle buses to transport Fort Lee residents between ferry and bus terminals. *Id.* at 5a-6a. Nevertheless, in March 2013, Mayor Sokolich informed IGA that it was politically untenable for him as a Democrat to endorse a Republican governor such as Christie for re-election. *Id.* at 6a.

David Wildstein—a Christie political operative who served as the Port Authority's Director of Interstate Capital Projects and functioned, in practice, as Mr. Baroni's chief of staff—responded to Mayor Sokolich's decision by proposing a plan to inflict a political cost on Mayor Sokolich. *Id.* at 3a, 6a. Specifically, Wildstein suggested to Kelly—then Christie's Deputy Chief of Staff for the IGA—that Fort Lee's special access lanes could be taken away. *Id.* at 4a, 6a. According to Wildstein's testimony at trial, Kelly approved of the plan, intending to show Mayor Sokolich "that life would be more difficult for him in the second Christie term than it had been [i]n the first." *Id.*

at 6a (alteration in original). Wildstein testified that Baroni approved the plan as well. *Id.* at 6a-7a.

In September 2013, Wildstein ordered several Port Authority employees to reallocate two of Fort Lee's three special access lanes. *Id.* at 8a-9a. In doing so, he did not tell them that the reallocation had a political motivation. Instead, he said that it was for the purpose of studying the resulting traffic to see whether to implement the new traffic pattern on a permanent basis. *Id.*

The new lane allocation went into effect on a Monday morning without advance warning to Fort Lee public officials or drivers. *Id.* at 9a. Because only one lane was available to drivers attempting to enter the bridge from Fort Lee, traffic backed up into Fort Lee, causing severe traffic within the town. *Id.* By contrast, drivers entering the bridge from the Main Line, who now had two additional lanes to use, experienced less traffic than they had in the past. J.A. 1775, 5816.

Near the end of the week, Port Authority Executive Director Patrick Foye became aware of the realignment. Pet. App. 10a. After discussing it with Baroni, who argued for continuing the realignment because it was important politically to Governor Christie's office, Foye ordered the restoration of the original traffic pattern. *Id.*

At trial, the Government presented evidence regarding the Port Authority "property" that was deployed in furtherance of the lane reallocation and the resulting cost to the Port Authority. One principal category was $3,696.09 spent to have backup toll collectors available to relieve the toll collector manning the single Fort Lee lane so that traffic would not stop if that collector needed a break. *Id.* at 47a. Any deci-

sion to reduce Fort Lee's allocation of lanes from three to one necessarily carried this cost, irrespective of the reason for the reallocation.

The Government also showed that Port Authority staff, in fact, collected traffic data while the new traffic pattern was in place and studied it to observe the difference in historical travel times. *Id.* at 48a-49a. The Government asserted that this traffic study, however, was a charade. *Id.* Using payroll records, the Government estimated that the value of the time spent conducting the traffic study was $1,828.80. *Id.*

Wildstein also estimated the number of hours that he and Baroni spent on the lane reallocation, which the Government valued at $4,294.80. *Id.* at 49a. In addition, the change in traffic patterns interrupted an ongoing, unrelated traffic study that Baroni and Kelly were unaware of at the time, but which needed to be redone at an additional cost that the Government calculated at sentencing to be $4,494.44. *Id.* at 15a; J.A. 650-51.

B. Proceedings Below

In April 2015, a grand jury indicted Baroni and Kelly for: (1) obtaining by fraud, knowingly converting, and intentionally misapplying Port Authority property and conspiring to do so in violation of 18 U.S.C. §§ 371 and 666; (2) conspiring to commit and committing wire fraud in violation of 18 U.S.C. §§ 1349 and 1343; and (3) conspiring to deprive and depriving others of a constitutional right in violation of 18 U.S.C. §§ 241 and 242. Pet. App. 11a-13a. Following denials of motions to dismiss the indictment, there was a seven-week jury trial, at the conclusion of which the jury found Baroni and Kelly guilty on all counts. *Id.* at 13a.

Baroni and Kelly appealed. As described in the Petition, the Third Circuit affirmed as to the fraud counts, reversed as to the civil rights counts, and remanded for resentencing. Petition 11-12. As to the wire fraud and Section 666 convictions, the Third Circuit held that Baroni and Kelly were guilty of fraud because they had lied about their political motivation for ordering the lane realignment, and in doing so had deprived the Port Authority of the labor costs described above as well as its right to control its lanes. *Id.*

Kelly filed a petition for rehearing that was denied on February 5, 2019. Pet. App. 129a-130a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS A RADICAL DEPARTURE FROM THIS COURT'S PRECEDENTS AND OTHER CIRCUITS' DECISIONS FAITHFULLY FOLLOWING THEM.

1. Starting in the 1940s, courts began interpreting the federal fraud statutes to prohibit schemes to deprive the public of the intangible right to a public official's honest services. *Skilling*, 561 U.S. at 400-01. In *McNally*, this Court "stopped the development of the intangible-rights doctrine in its tracks." *Id.* at 401. The federal fraud statutes, *McNally* held, do not create a "right of the citizenry to good government" or a "right to have public officials perform their duties honestly." *McNally*, 483 U.S. at 356, 358. And they emphatically do not "set[] standards of disclosure and good government for local and state officials." *Id.* at 360. Instead, the Court held that the federal fraud statutes are "limited in scope to the protection of property rights." *Id.* at 360.

Soon after *McNally*, Congress enacted 18 U.S.C. § 1346 "specifically to cover one of the intangible rights that lower courts had protected . . . prior to *McNally*: the intangible right of honest services." *Skilling*, 561 U.S. at 402 (internal quotation marks omitted). The new provision came under attack for its vagueness, because it lacked a "coherent limiting principle." *Sorich* v. *United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of cert.). One of the driving concerns was that the amendment would invite "abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Id.* The Court took up the question of what that "honest services" provision prohibits in *Skilling* and two companion cases, *Weyhrauch* v. *United States*, 561 U.S. 476 (2010), and *Black* v. *United States*, 561 U.S. 465 (2010).

With the issue before the Court, and cognizant of the above-described concerns, the Government conceded there that the honest services statute does not criminalize acting with concealed political interests—*e.g.*, it "does not 'render[] criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection,'" and "does not embrace allegations that purely political interests may have influenced a public official's performance of his duty." Weyhrauch Br. at 45. Consistent with that concession, this Court pared honest services fraud "down to its core," holding that it covers only schemes involving "bribes or kickbacks." *Skilling*, 561 U.S. at 404.

The conduct that the Third Circuit held to be criminal here—that the defendants reallocated two lanes from one constituency to another, not for the greater

good but for a concealed political purpose—is exactly what this Court excised from the federal fraud statutes in 2009. It is not "bribery," and it is not a "kickback." It would have been charged as intangible-rights fraud if these facts had played out prior to *McNally*. And after the enactment of 18 U.S.C. § 1346, it would again have been charged as honest services fraud if these facts had played out before the Court again pared back the law in *Skilling*. But *McNally* and *Skilling* made clear that the federal fraud statutes do not cover good-government violations like these.

Those cases also made clear that those statutes *should not* be construed to cover such violations. The federal sovereign owes the States and their officials a duty of comity that means that the federal government does not impose "good government" norms on the states. The realities of politics and of governing mean that criminalizing political motivations, even base ones, would turn countless political decisions into felonies. Indeed, it would criminalize far more decisions than would or could ever be prosecuted, and so would expose nearly every state or federal government official to arbitrary or politically motivated prosecution. And allowing such prosecutions, and further endorsing the criminalization of American politics, can only deter qualified leaders from seeking to serve in government. That will mean that prosecutorial campaigns like this one seeking to enforce good government norms will make good government that much harder to attain.

Despite those concerns, and driven by the hue and cry over the George Washington Bridge traffic jams, the Government here was determined to find charges to assert over defendants' conduct. Its primary charge, and the one that drove defendants' sentenc-

ing calculation at their original sentencing, was deprivation of the constitutional right of intrastate travel under 18 U.S.C. § 242. That had the benefit that it factually fit the substance of defendants' actions—causing the traffic that the public was angry about. But it had the significant demerit that, as the Third Circuit correctly found in reversing that count of conviction, it was not a crime because the supposed right that was infringed was not clearly established to be a right at all. Pet. App. 66a-73a.

The Government's backup theory was that defendants had committed "money or property" wire fraud and obtained "property" from a federal program through fraud. But that was a kludge. New Jersey drivers were not angry with defendants for having made one toll-booth worker work overtime during the week of the traffic jams. Nor were New Jersey drivers angry that defendants had employed a small number of hours of the time of Port Authority staffers, let alone some of defendants' *own* time, on the lane reassignment. Drivers were mad about the waste of *their* time, while they sat in traffic. Wasting the drivers' time, however, was not a crime.

But the fact that defendants' decisions caused at least one government employee to lift a finger gave the Government what it thought it needed—what the Third Circuit itself acknowledged was only a "peppercorn" (Pet. App. 30a)—to turn a classic honest services case, driven not by the law but by public opprobrium, into a property case. And the panel approved, finding that this case was different from *Skilling* simply because "[d]efendants were charged with simple money and property fraud under Section 1343—not honest services fraud." *Id.*

That destroys *Skilling*. It elevates form over substance. Every decision and action by every public

employee requires some use of employee time, and in almost every case some use of government resources, to make the decision and to effectuate it. So now, under the law in the Third Circuit, every public action taken based on a concealed political purpose is a federal crime. The Government has a playbook for putting people in prison in that Circuit for politically motivated decisions with which it disagrees: simply tot up a few hours of public employee time spent on any policy decision—even if only the labor of the offending official him or herself—and charge "money or property" fraud. Alone among state officials in the nation, the governors, agency heads, legislators, and judges of the States of Delaware, Pennsylvania and New Jersey, along with the territorial governor and officials of the U.S. Virgin Islands, all must do their work in fear that a federal prosecutor will, any time within the fraud statutes' five-year limitations period, come to doubt the good-government motivations of their official acts and decisions, and choose to prosecute. Federal executive branch officials, members of Congress working in their home offices, and federal judges in those same districts live and work under the same Sword of Damocles. This Court's review is needed to clear that threat.

2. The Third Circuit's approval of the Government's theory here further warrants review because it conflicts with the decisions of the Seventh and Eleventh Circuits. The law as it stands is thus a crazy quilt of: danger zones for governmental officials in the states within the Third Circuit, where they must conduct their daily work under the scrutiny of a federal board of review, with their liberty at stake; safe harbors in the states of Florida, Georgia, Alabama, Illinois, Indiana and Wisconsin, where it is clear that ordinary politics are not criminal; and zones of uncer-

tainty throughout the rest of the country where the clear protections of *Skilling* presumptively apply but where officials now must wonder whether a prosecutor will be inspired by the conviction here to bring charges against them for harboring undisclosed and subjectively improper political motivations for decisions that prove to be unpopular. Only this Court can resolve that disparity and return order both to the country's law and its governance.

As to the Eleventh Circuit, in *United States* v. *Goodrich*, 871 F.2d 1011 (11th Cir. 1989), the Government charged the defendant with honest services fraud for bribing county commissioners to get favorable zoning decisions. *Id.* at 1012-13. *McNally* then came down before trial, invalidating the charged theory. In a superseding indictment, the Government shifted to a property-fraud theory, claiming—as here—that the defendant had deprived the county of the salaries and services of the commissioners who participated in the "sham commission meetings" where the result was "foreordained" (*i.e.*, public employees' labor), and—as here—of "control over the decision making process" concerning zoning (*i.e.*, the right to control public money or property). *Id.* at 1012-13 & n.1. The Eleventh Circuit, however, held the district court properly dismissed these charges because the use of public employee labor for commission meetings that were supposedly a charade was "indistinguishable from the intangible right to good government described in *McNally*," and the "right" to "have control over zoning decisions . . . cannot be considered property" *Id.* at 1013-14, 1015. In short, the court of appeals held that the Government may not charge "a scheme to defraud a victim of money and property" when it *actually* is pursuing "a scheme to

defraud the [public] of [its] right to good government." *Id.* at 1013.

The Seventh Circuit's decisions are similarly faithful to this Court's precedents. In *United States* v. *Thompson*, 484 F.3d 877 (7th Cir. 2007), a jury convicted a state procurement officer of mail and federal program fraud for steering a state travel contract for "political reasons"—namely, to please a politically-appointed superior—to one contractor when state procurement law required the contract to go to another contractor that offered a better combination of service and cost. *Id.* at 878-79. The Seventh Circuit reversed. "The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is," the court said, "preposterous." *Id.* at 883. The official action in the case was the same as countless official actions routinely taken by state and local officials: "Imagine a governor who throws support (and public funding) behind coal-fired power plants because people fear nuclear power rather than because of a cost-benefit analysis; that may be a blunder but is not a crime even if the governor privately thinks that nuclear power would be superior." *Id.*

The Seventh Circuit said much the same again in *United States* v. *Blagojevich*, 794 F.3d 729 (7th Cir. 2015). There a jury convicted the former Governor of Illinois of, *inter alia*, wire and federal program fraud. *Id.* at 733-34. The Seventh Circuit vacated because the instructions allowed the jury to convict based solely on evidence that the Governor had offered a trade to the President-elect: the Governor would allow the President-elect to pick a Senate appointee to a vacant seat, and in exchange the President-elect would appoint the Governor to his cabinet. *Id.* at

734-35. That was "a common exercise in logrolling." *Id.* at 735. "[E]veryday politics" like that are not criminal, the court held: the law does not impose "an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act also is the real one." *Id.* at 735-36. Under the Government's theory in that case (which is also the theory here), "if a Governor appoints someone to a public commission and proclaims the appointee 'the best person for the job,' while the real reason is that some state legislator had asked for a friend's appointment as a favor, then the Governor has committed wire fraud because the Governor does not actually believe that the appointee is the best person for the job." *Id.* at 736. The Seventh Circuit said that that was "not a plausible" understanding of the federal fraud statutes. *Id.*

Goodrich, Thompson and *Blagojevich* reflect this Court's teaching in *McNally* and *Skilling*: That the federal fraud statutes do make it a crime for a public official to take official action based on concealed political interests. If the Eleventh and Seventh Circuits interpreted the law as the Third Circuit does, then the developer in *Goodrich* would have been convicted for stealing the time of the county commissioners in that case, the procurement officer in *Thompson* would have faced a federal sentence for steering a government contract to a political friendly, and the governor in *Blagojevich* would have been convicted for trying to hand over a political appointment to an ally in exchange for a favorable appointment for himself. Those are "preposterous," *Thompson*, 484 F.3d at 883, and "[im]plausible," *Blagojevich*, 794 F.3d at 736, results under the federal criminal law as it applies in at least six American states. But because defendants played politics with the George Washington Bridge on

the New Jersey side of the Hudson River, they are convicted felons under federal law, rather than the free citizens they would be had they done the same over the Seven Mile Bridge in the Florida Keys or the Clark Bridge on the Illinois side of the Mississippi River—notwithstanding that the same statutes apply equally in all those places. That state of the law cannot stand, and this Court should grant review.

II. THE DECISION BELOW IGNORES THIS COURT'S PRECEDENTS ABOUT HOW TO CONSTRUE VAGUE CRIMINAL STATUTES.

Numerous canons of construction require interpreting the federal fraud statutes narrowly. The panel's interpretation does just the opposite.

First, this Court has repeatedly instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling*, 561 U.S. at 410. A court should thus settle on the harsher of two interpretive alternatives only when Congress has "spoken in language that is clear and definite." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). The decision below does the opposite: It resolves ambiguity in favor of criminality rather than lenity by construing federal fraud statutes to reach the novel context of a public official reallocating a public resource from one constituency to another for a purportedly political reason.

Second, this Court has instructed that rather than "'construe [a criminal] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials,'" a court should impose "a more limited interpretation" when such an interpretation is supported by both text and

precedent. *McDonnell* v. *United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *McNally*, 483 U.S. at 360). Despite this instruction, the decision below, as noted, provides a broad charter for federal prosecutorial oversight of state and local officials. This Court has always demanded (and Congress has never opted to provide) a clear statutory instruction before it reads into federal criminal law such an incursion on "traditional state authority." *Bond* v. *United States*, 572 U.S. 844, 858 (2014). That demand is sound. Democratic processes at the state and local level are the best remedy for political folly. No politician (and no human) is perfect: voters should be permitted to weigh the good with the bad when passing judgment on a local official. Turning state political battles into federal crimes takes the decision over who stays in office out of voters' hands and vests it with unelected federal prosecutors. Here, the democratic response was both clear and adequate: Baroni and Kelly were fired due to the public outcry, and the governor who had appointed them to their positions saw his popularity bottom out, his presidential ambitions ruined, and, in relatively short order, his political career end. That swift and harsh political judgment is the right answer to a political act, and this Court has thus been prudent not to allow prosecutors to indiscriminately bring the heavy hammer of federal criminal law down on the working machinery of state politics.

Third, the panel's interpretation of these federal fraud statutes raises grave doubts about their constitutionality. "To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03 (alteration

in original) (internal quotation marks omitted). The panel's interpretation fails on both fronts. Under the Third Circuit's interpretation, "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." *McDonnell*, 136 S. Ct. at 2373. Reallocation of two traffic lanes from one constituency to another to punish a mayor who fails to support the Governor's reelection? Now federal fraud in the Third Circuit. But "a public employee's recommendation of his incompetent friend for a public contract," Weyhrauch Br. at 45, concededly *not* federal fraud under *Skilling*. And allocation of $300,000 in Port Authority funds to bestow four shuttle buses on Fort Lee in an effort to court that same mayor's endorsement, prior to punishing his refusal to give it? Pet. App. 5a. Who can say, even *within* the Third Circuit.

This arbitrary mishmash of what is and is not a crime gives prosecutors full discretion to pick and choose their targets from amongst the entire universe of federal, state, and local officials. And that risk of arbitrary and discriminatory enforcement is not some academic hypothetical. In one example drawn from this very case, Governor Christie's Office promised a newly elected Jersey City mayor a so-called Mayor's Day—a daylong series of meetings between a favored mayor and representatives of key state agencies, including Baroni—in return for the mayor's political support. Pet. App. 45a; J.A. 1728-31. When the mayor decided not to endorse the Governor, the Mayor's Day was cancelled, and state agency representatives, including Baroni, were told to communicate their cancellations to the mayor. Pet. App. 45a. That mayor was thus purposefully sent the "political . . . message" that he "was not going to get any assistance out of the State of New Jersey." J.A. 1730-31.

In moving to admit evidence of this episode in the District Court under Rule 404(b), the Government described it as bearing a "striking" "degree of factual similarity" to the charged conduct while maintaining that the episode "*was not criminal*." J.A. 254, 259-60 (emphasis added). That inconsistency demonstrates—in deeply troubling real-world terms—the arbitrary and discriminatory enforcement regime that is now sanctioned in the Third Circuit. In that Circuit, it is now a crime to use the resources and employee services of the Port Authority to punish a mayor by reassigning two traffic lanes from the use of his constituents to the use of others, but it is not a crime to use the resources and employee services of the Port Authority to punish a mayor by denying his town *all* Port Authority and other state resources. That makes no sense. If the latter is not criminal, neither is the former.

The court of appeals shrugged off the Jersey City episode, because "there were no allegations [state officials] defrauded their federally funded employer." Pet. App. 45a. But there were "no allegations" only because federal prosecutors chose not make them, and that is precisely the problem. The state officials involved did not publicly declare that they had rescinded the Mayor's Day because they wanted to punish the mayor; and they used at least some public employee labor to carry out that punishment. That is now federal fraud in the Third Circuit, so federal prosecutors *could* have made the requisite "allegations." That they did not do so there but decided to do so in this case shows that the panel's decision pro-

vides no coherent, non-arbitrary understanding of when political payback is and is not a crime.[2]

III. THE DECISION BELOW CRIMINALIZES THE ORDINIARY ACTIVITY OF PUBLIC OFFICIALS, TURNING NEARLY EVERY PUBLIC OFFICIAL INTO A FELON.

The court of appeals' decision criminalizes ordinary political practices. It has no limiting principle. Here, the criminal practice was punitive resource allocation. In the next case, prosecutors will pursue state lawmakers overseeing an earmarking process, or local political leaders making patronage appointments. Those may be unappealing, but they have never before been deemed criminal. Now, any public official who is *not* indicted when he or she engages in such activity will have to thank the grace of prosecutorial discretion. But that is not good enough. Public officials should not have "to rely on the Government's discretion to protect against overzealous prosecutions." *McDonnell*, 136 S. Ct. at 2373 (internal quotation marks omitted).

Moreover, because the Third Circuit failed to adequately explain why *supplying* public resources to the constituents of political friends is *not* criminal while *withdrawing* political resources from the constituents of political enemies *is* criminal, the decision leaves an

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[2] Indeed, the arbitrariness sanctioned by the Third Circuit's decision is brought into relief by an irony underlying this prosecution. Defendants were convicted of federal fraud for "alter[ing]" an unwritten "decades-old lane alignment." Pet. App. 36a-37a. But that old "alignment"—nothing more than the daily placement of traffic cones to mark out certain lanes—was itself just an old "political deal" under which the then-governor "gave" a former mayor of Fort Lee the three dedicated lanes. Pet. App. 4a. Under the Third Circuit's rule, that initial allocation was itself criminal.

incoherent mess in its wake. Pet. App. at 36a (stating—without further explanation—that Baroni's conduct is "hardly analogous" to "a situation where a mayor allows political considerations to influence her discretionary allocation of limited government resources in the normal course of municipal operations"). In this case alone, the government offered evidence of many acts of political favoritism involving public resources. For instance, Baroni and Wildstein bestowed Port Authority funds and resources on the Fort Lee mayor's constituents in their initial effort to secure his endorsement of the Governor. Their largesse included approving the mayor's request for more than $300,000 in Port Authority funding to provide Fort Lee with four shuttle buses so that Fort Lee residents could have free transportation to ferry and bus terminals. *Id.* at 5a-6a. The conclusion that this resource allocation to confer political *benefits* is not criminal demands the conclusion that Baroni's resource allocation to confer political *punishment* is also not criminal. To conclude otherwise—as the panel has done without any explanation—is to sustain a distinction without a difference.

It is telling that it is not even necessary to look beyond the evidence in this case to discern the arbitrary and discriminatory enforcement regime that the panel's decision ushers in. But taking that extra look confirms the magnitude of the problem: There are many recent examples—ranging from the highest reaches of federal government to the trenches of local government—of public officials taking official action for a concealed political reason and using at least a small amount of public money or property in the process. See, *e.g.*, Katie Rogers, *President Signs Order to Help U.S. Manufacturers and "Trump People"*, N.Y. Times (Jan. 31, 2019) (reporting that President's top

trade adviser described an executive order as helping "Trump people" but "later changed his comment about the administration's policies benefiting 'Trump people'"); *New York* v. *U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 515-16, 660-64 (S.D.N.Y. 2019) (finding the Commerce Secretary's stated justification for his decision to add a citizenship question to census questionnaire was a pretext for some undisclosed "real reason"), *cert. before judgment granted by* 2019 WL 331100; Sandra Tan, *Loughran Alleges Political Retaliation After Staffer Fired From Legislature*, The Buffalo News (Jan. 9, 2019) (reporting that local legislature's chairman ostensibly fired a staffer associated with a rival local legislator due to a "management decision" but likely did so as "political payback" for the rival's independent voting record). If the Third Circuit's decision were correct, all of these acts would be criminal fraud, and all of these political actors would be at the mercy of prosecutors and their personal sensibilities about which political acts can be tolerated and which are beyond the pale.

Worse yet, in today's political climate, the true test for when prosecutions are brought under the Third Circuit's expansive interpretation may not be when the actions seem to the prosecutor to be excessively political, but when the *actors* seem to the prosecutor to have the *wrong* politics. In recent years, it has become a new norm to call for and pursue criminal investigations of one's political adversaries. The actively encouraged chant of "Lock Her Up" was a central feature of the 2016 presidential campaign, and has continued unabated since then. Summer Meza, *Trump Rallygoers Now Chant 'Lock Her Up' About Any Woman They Don't Like*, The Week (Oct. 10, 2018). Similarly, one does not need to spend much time searching the archives of our national media to

find further calls from both ends of the political spectrum to investigate and prosecute political adversaries. See, *e.g.*, Nicholas Fandos, *House Democrats Are Flooding Trump World With Demands. Here's a Guide to the Investigations*, N.Y. Times (Mar. 7, 2019); Nicholas Fandos, *House Democrats Demand Information From White House About Security Clearances*, N.Y. Times (Mar. 1, 2019); Rebecca Ballhaus & Corinne Ramey, *Trump Foundation Says New York State Probe Is Rooted in Political Bias*, Wall Street J. (Aug. 30, 2018); Michael Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry Into Clinton Foundation*, N.Y. Times (Nov. 13, 2017).

If the federal fraud statutes are implicated whenever public officials conceal their political motives for public acts, political opponents (and politically-minded prosecutors) will have ample opportunity and motivation to test out this new theory of fraud. Indeed, this very case is arguably illustrative of that tendency. Former-Governor Christie has publicly alleged that political motivations played a role in the initiation of the investigation into Bridgegate and the timing of the charges and trial. See Ryan Hutchins, *Chris Christie: Bridgegate Prosecutor Wanted to Score Points with Clinton*, Politico (Jan. 29, 2019).

Ultimately, the Third Circuit's interpretation cannot be the law. The heated rhetoric of recent years notwithstanding, one of this Nation's deepest, most strongly held commitments is that political disputes should be resolved through political channels and the ballot box, not indictments and prison cells. Review is necessary to reaffirm that commitment.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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March 15, 2019

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