The Buffalo Billion Corruption Scandal:

Honest Services and the "Right-to-Control" Theory

New York American Inn of Court White Collar Crime Program

October 26, 2022

6:30 – 8 pm

Table of Contents

Timed Agenda..1

United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982); *United States v. Margiotta,* 811 F.2d 46 (2d Cir. 1982)(denial)…………………………………………………………………………..2

United States v. Murphy, 323 F.3d 102 (3d Cir. 2003), *as amended* (June 4, 2003)…………….41

United States v. Percoco, 13 F.4th 158 (2d Cir. 2021), *cert. granted sub nom. Ciminelli v. United States*, 142 S. Ct. 2901 (2022)…………………………………………………………………...71

United States v. Percoco, 13 F.4th 180 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 2901 (2022)….88

Question Presented, *Ciminelli v. United States*…………………………………………………...108

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Brief for the Petitioner, *Ciminelli v. United States*, No. 21-1170 (Aug. 2022)………………………………109

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Brief for the Respondents Steven Aiello and Joseph Gerardi, *Ciminelli v. United States*, No. 21-1170 (Aug. 2022)……………………………………………………………………………………174

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Amicus Curiae Brief of New York Council of Defense Lawyers, *Ciminelli v. United States*, No. 21-1170 (Sept. 2022)………………………………………………………………………………226

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Brief for the United States, *Ciminelli v. United States*, No. 21-1170 (Oct. 2022)…………………………...260

Question Presented, *Percoco v. United States*……………………………………………………315

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Brief for the Petitioner, *Percoco v. United States*, No. 21-1158 (Aug. 2022)…………………………….....316

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Brief for the Respondent Steven Aiello, *Percoco v. United States*, No. 21-1158 (Aug. 2022)......................379

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Amicus Curiae Brief of New York Council of Defense Lawyers, *Percoco v. United States*, No. 21-1158 (Sept. 2022)……………………………..441

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit, Brief for the United States, *Percoco v. United States*, No. 21-1158 (Oct. 2022)……………………………457

Daniel Fetterman & Brian Choi, *Bridgegate Has The Potential To Upend A Raft of Prosecutions*, LAW 360, May 21, 2020…………………………………………………………………...516

Robert J. Anello & Richard F. Albert, *SCOTUS to Assess 'Right-to-Control' and Honest Services Fraud*, NYLJ, Aug. 11, 2022…………………………………………………………...521

Tai Park, *The "Right To Control" Theory of Fraud: When Deception Without Harm Becomes A Crime*, 43 Cardozo L. Rev. 1 (2021)………………………………………………...………525

Panelists' Biographies...591

<u>The Buffalo Billion Corruption Scandal: Honest Services and the "Right-to-Control" Theory</u>
New York American Inn of Court White Collar Crime Program
Foley & Lardner LLP
October 26, 2022
6:30 – 8 pm

Timed Agenda

Introduction — 3 min.

Questions presented in the Buffalo Billion cases on the Supreme Court docket

Percoco v. U.S., No. 21-1158

Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decision-making, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?

Ciminelli v. U.S., No. 21-1170

Whether the Second Circuit's "right-to-control" theory of fraud – which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud – states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. 1343?

Skit inspired by the real cases

<u>Act I</u> — 15 min.

Scene 1 Alleged Bid-Rigging Scheme
Scene 2 Alleged Bribery Scheme

(Laurie Brecher, Mary Diaz, Harry Dixon, Milosz Gudzowski, Diana Haladey, Meredith Jones, Jared Rosen)

<u>Act II</u> — 20 min.

Scene 1 Internal AUSA Meeting – Review elements of criminal statutes: wire fraud 18 U.S.C. 1343 and honest services fraud 18 U.S.C. 1346
Scene 2 AUSA Meeting with Defense Counsel in alleged bribery scheme
Scene 3 AUSA Meeting with Defense Counsel in alleged bid-rigging scheme

Host reviews Jury Charges and the Proceedings Below

(Brian Choi, Jeff Gross, Russell Lippman, Walter Ricciardi, Brian Steinwascher)

<u>Act III</u> — 17 min.

Supreme Court Justices review arguments on questions presented before oral argument.

(Laurie Brecher, Evan Brustein, Harry Dixon, Jeff Gross, Milosz Gudzowski, Diana Haladey, Meredith Jones, Russell Lippman, Walter Ricciardi, Jared Rosen)

"Fireside Chat" with defense counsel from the real cases — 30 min.

(Milton L. Williams, interviewed by Mary Diaz)

Audience Q&A — 5 min.

No. 1238, Docket 82-1025
United States Court of Appeals, Second Circuit

United States v. Margiotta

688 F.2d 108 (2d Cir. 1982)
Decided Jul 27, 1982

No. 1238, Docket 82-1025.

Argued June 2, 1982.

109 Decided July 27, 1982. *109

Irving Younger, Washington, D.C. (Edward Bennett Williams, Robert L. Weinberg, John J. Buckley, Jr., Gerson A. Zweifach, Williams Connolly, Washington, D.C., of counsel), for appellant.

Edward R. Korman, U.S. Atty., E. D. New York, Brooklyn, N.Y. (Vivian Shevitz, Larry J. Silverman, Asst. U.S. Attys., E. D. New York, Brooklyn, N.Y., of counsel), for appellee.

Appeal from the District Court for the Eastern District of New York.

Before KAUFMAN and WINTER, Circuit Judges, and WARD, District Judge.–

– Of the United States District Court for the Southern District of New York, sitting by designation.

111 *111

IRVING R. KAUFMAN, Circuit Judge:

The significant role played by political parties in municipal government has been an often noted characteristic of American urban life. Some critics, contributing to the prevailing mythology that machine politics have controlled the corridors of local government,[1] have highlighted the opportunities available to those who hold the strings of political power[2] for defrauding the citizenry and reaping personal gain, through the sale of public office and other favors. Other commentators, however, have asserted that local party leaders have often served important functions of political representation and association. In cities fragmented into diverse social and economic groups, it has been argued, party organizations have played a salutary role in organizing large numbers of people, and fulfilling their desires with patronage, jobs, services, community benefits, and opportunities for upward social mobility.[3] In sum, the line between legitimate political patronage and fraud on the public has been difficult to draw.

1 *See* J. Robertson, American Myth, American Reality 265-66 (1980).

2 *See* J. Bryce, The American Commonwealth (2d ed. 1891).

3 *See* J. Robertson, *supra* note 1, at 265. For an amusing description, and justification, of the operation of a political machine, *see* W. Riordon, Plunkitt of Tammany Hall (E. P. Dutton 1963).

Today, not unmindful of these competing visions of political history, we must consider where such lines may be drawn in the context of a criminal prosecution for mail fraud[4] and extortion.[5] Specifically, we are asked to determine, *inter alia,* when, if ever, a political party leader who holds no official government office but who participates substantially in the governance of a municipality owes a fiduciary duty to the general citizenry, and what conduct violates such a fiduciary duty. The issues before us arise *112 out of a criminal

112 prosecution against Joseph M. Margiotta, long-time Chairman of the Republican Committees of both Nassau County and the Town of Hempstead, New York. The Government charges Margiotta with one count of mail fraud in violation of 18 U.S.C. § 1341 (1976)[6] and five counts of extortion in violation of 18 U.S.C. § 1951 (1976)[7] for activities in connection with the distribution of insurance commissions on municipal properties to Margiotta's political allies. The Government presented "evidence of a scheme of fraud spun into a web of political power"[8] at a trial before Judge Sifton, at which nearly seventy witnesses testified during a period of three weeks. After deliberating for eight days, the jury announced it was hopelessly deadlocked, and the trial judge declared a mistrial.

4 18 U.S.C. § 1341 (1976) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing . . . or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

5 18 U.S.C. § 1951 (1976) provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by . . . extortion or attempts or conspires so to do, commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —

6 *See* note 4, *supra.*

7 *See* note 5, *supra.*

8 *United States v. Margiotta,* 662 F.2d 131, 135 (2d Cir. 1981).

Upon a request by the Government, in anticipation of a retrial, Judge Sifton reconsidered a number of legal and evidentiary rulings made at the trial. The trial judge entered an order in which he stated that the challenged rulings would be followed at Margiotta's second trial. The Government then appealed to this Court for review of Judge Sifton's order prior to the retrial. We found those portions of Judge Sifton's order indicating the court would abide by certain jury instructions at retrial were not appealable pursuant to 18 U.S.C. § 3731 (1976)[9] and, accordingly, dismissed the Government's appeal in that respect. While the portions of the order concerning the judge's evidentiary rulings were appealable, we concluded that the district court had acted well within its discretion, and affirmed the order on the evidentiary rulings.

9 18 U.S.C. § 3731 (1976) provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information....
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

Margiotta's retrial before Judge Sifton proved to be another closely fought contest. Following a trial lasting three weeks, the jury deliberated conscientiously for three days. It returned a verdict of guilty on all six counts, including the one count of mail fraud in violation of 18 U.S.C. § 1341 (1976) and the five counts of extortion in violation of 18 U.S.C. § 1951 (1976). Judge Sifton sentenced Margiotta to concurrent terms of imprisonment of two years on each count.

Margiotta appeals to this Court from the judgment of conviction entered by Judge Sifton. On appeal, he raises a number of claims, several of which involve novel issues. Margiotta argues that his conviction of mail fraud must be reversed and the indictment dismissed on the grounds that the federal mail fraud statute, 18 U.S.C. § 1341 (1976), does not embrace a theory of fiduciary fraud by individuals who participate in the political process but who do not occupy public office, and that Margiotta owed no fiduciary duty to the general citizenry of Nassau County and the Town of Hempstead under federal or state law. Moreover, he asserts that the evidence was insufficient to support a finding of fiduciary duty even if it were held that the trial court's instructions were not erroneous as a matter of law. In addition, Margiotta claims that the indictment and conviction violate his First Amendment rights of freedom of expression, association and petition, and that the mail fraud statute is impermissibly vague on its face and as applied to him on the facts of this case. Furthermore, he asserts that he did not fail to disclose material information in violation of the mail fraud statute. Margiotta also claims that *113 his conviction of five counts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976), should be reversed and the indictment dismissed because he did not commit extortion "under color of official right" or through the wrongful use of "fear," and because the district court's allegedly improper instructions on the mail fraud count prejudiced the jury's consideration of the Hobbs Act charges. Finally, Margiotta argues that Judge Sifton erred by admitting Richard A. Williams's hearsay account of his father's alleged agreement with Margiotta. For the reasons stated below, we reject Margiotta's contentions, and affirm the judgment of conviction in all respects.

I. *Background*

Since the conduct at issue in this case involves an intricate scheme of fraud, we must set forth the facts in detail. As noted above, Joseph M. Margiotta, was at all relevant times the Chairman of the Republican Committee of both Nassau County and the Town of Hempstead, New York. Although he held no elective office, his positions as County and Town Republican Chairman, according to the Government, afforded him sufficient power and prestige to exert substantial control over public officials in Hempstead and

Nassau County who had been elected to office as candidates of the Republican Party. This control, it was charged, enabled Margiotta to exercise influence over the appointees of these elected officials as well. The spread of his political tentacles over the governments of Town and County allegedly offered Margiotta the opportunity to engage in a highly remunerative fraudulent design involving the distribution of insurance commissions on municipal properties to his political associates.

The responsibility of the Nassau County Executive and the Presiding Supervisor of the Town of Hempstead in maintaining the properties owned and operated by their respective jurisdictions was at the crux of this artifice. The holders of these public offices were responsible for obtaining insurance coverage for the properties owned by the Town and County. As a matter of practice, the authority for obtaining insurance on municipal properties was delegated to a Broker of Record designated by the entities and serving at their pleasure. The Broker of Record was the only individual who acted on behalf of these jurisdictions in placing insurance policies. The Broker received as compensation for his services commissions consisting of a portion of the monies paid by the municipalities for the insurance policies.[10]

10 Moreover, it appears that Nassau County also occasionally compensated the Broker of Record through personal services contracts not subject to competitive bidding.

According to the Government, this municipal insurance activity was transformed into a scheme to defraud the citizens of Hempstead and Nassau County in 1968. At that time, Margiotta allegedly contrived the appointment of Richard B. Williams Sons, Inc., an insurance agency, (hereinafter the "Williams Agency" or "Agency"), as Broker of Record for the Town of Hempstead. Richard B. Williams determined to have the Agency designated as Broker of Record for the Town, a position then held by one Mortimer Weis. Williams allegedly met with Margiotta and Weis to strike a secret "deal": The Williams Agency would be named Broker of Record for the Town of Hempstead, and Weis would become a $10,000 a year consultant to the Town. In return for the appointment, the Williams Agency would set aside 50% of the insurance commissions and other compensation it received, to be distributed to licensed insurance brokers and others designated by Margiotta. Shortly thereafter, Ralph Caso, the Presiding Supervisor of Hempstead, appointed the Williams Agency as Hempstead's Broker of Record based on Margiotta's recommendation. In 1969, the Williams Agency began to write insurance for the Town of Hempstead, and commenced making "kickbacks" to brokers selected by political leaders of local election districts in the Town who were loyal to the appellant.

In 1970 Caso was elected County Executive of Nassau County. After his election, Richard B. Williams met with Margiotta to discuss the possibility of the Williams Agency *114 acting as Broker of Record for Nassau County. On January 1, 1971, the day on which he took office, Ralph Caso designated the Williams Agency as Broker of Record for Nassau County based on Margiotta's recommendation. Soon thereafter, the Williams Agency commenced to distribute 50% of the commissions it earned on Nassau County properties to brokers and others politically allied with Margiotta. Between 1969 and 1978, according to the Government, the compensation paid the Broker of Record in connection with this arrangement totalled in excess of two million, two hundred thousand dollars. Among the recipients of more than five hundred thousand dollars in kickbacks were numerous insurance brokers who performed no legitimate work, lawyers and other friends of Margiotta who rendered no services in return for their compensation, and the appellant himself. The concealment of this fraudulent scheme, according to the Government, was

fostered through the preparation of fictitious property inspection reports. As a result, it was made to appear that the recipients of the insurance commission kickbacks were legitimately earning their commissions. Moreover, the Government has charged, the insurance activities were disguised by Margiotta through false and misleading testimony during the course of an investigation by the New York State Investigation Commission.

In November, 1980, a federal grand jury indicted Margiotta on one count of mail fraud, in violation of 18 U.S.C. § 1341 (1976), and five counts of extortion, in violation of 18 U.S.C. § 1951 (1976). The mail fraud count (Count One) was based on a scheme to defraud the Town of Hempstead, Nassau County, New York State, and their citizens (1) of the right to have the affairs of the Town, County and State conducted honestly, free from corruption, fraud and dishonesty, and (2) of the right to Margiotta's honest and faithful participation in the governmental affairs of the Town, County and State. The factual predicate underlying Count One was the above-described insurance commission ruse in which, pursuant to a secret agreement, Margiotta arranged the appointment of the Williams Agency as Broker of Record for the Town and County in return for the Agency's payment of kickbacks to insurance brokers and others designated by Margiotta. Counts Two through Six charged Margiotta with violating the Hobbs Act by inducing the Williams Agency to make the payments of the insurance commissions under color of official right and by means of the wrongful use of fear. Count Two charged Margiotta with extortion in connection with the payments to the insurance brokers who were political allies. Count Three set forth a Hobbs Act violation based on Margiotta's actions in obtaining monthly payments in the amount of $2,000 from the Williams Agency to attorneys William Cahn and his son Neil Cahn between 1974 and 1975. Count Four was predicated on a $10,000 payment by the Williams Agency to one Robert Dowler, who allegedly entered into an agreement to pay one-half of the money to Margiotta. Count Five described a Hobbs Act offense arising from a series of payments totalling more than $60,000 to Joseph M. Reilly, a New York State Assemblyman, and Count Six charged Margiotta with extortion in connection with payments by the Williams Agency to Henry W. Dwyer, a New York State Assemblyman and consultant to the Nassau County Republican Committee.

The first of the appeals spawned by this indictment arose from the pretrial maneuvering of the parties. On January 6, 1981, Margiotta filed a pretrial motion to dismiss Count One,[11] alleging, *inter alia,* that Count One failed to state an offense pursuant to 18 U.S.C. § 1341, that the Count was duplicitous, and that it was unconstitutionally vague. In response, the Government submitted an affidavit describing hundreds of *115 items sent through the mails upon which a charge of fraudulent use of the mail could be based. Judge Sifton ruled that Count One stated an offense under § 1341, but ordered the Government to elect a single mailing to submit to the jury. The Government appealed Judge Sifton's order to this Court, which held that the order was appealable and that the Government was not required to elect among the numerous specified mailings. *United States v. Margiotta,* 646 F.2d 729 (2d Cir. 1981). Trial commenced on March 27, 1981. While the Government presented evidence to prove that Margiotta's involvement in the insurance activities was a scheme to defraud, Margiotta offered a defense of good faith. He attempted to prove that he had no secret agreement with the Williams Agency for the distribution of insurance commissions as a *quid pro quo* for securing the appointment of the Agency as Broker of Record. Admitting that he recommended the Agency to be Broker of Record for both the Town and the County and that he directed the distribution of insurance commissions, he argued that this behavior was merely a longstanding political patronage arrangement practiced for decades by

Republicans and Democrats alike. As noted above, after deliberating carefully for more than a week, the jury announced that it could not agree on a verdict, and a mistrial was declared.

11 Margiotta's pretrial motion to dismiss was filed under a prior indictment that was superseded by an indictment filed on January 15, 1981. The principal change in the superseding indictment was the addition of the word "secret" before the description of the alleged fraudulent agreement between Margiotta and the Williams Agency. This superseding indictment has been the predicate for all subsequent proceedings.

This court's second review of the Margiotta case followed Judge Sifton's declaration of the mistrial. In anticipation of another hotly contested battle at the retrial, the Government sought reconsideration of a number of legal and evidentiary rulings Judge Sifton had made at the first trial. The Government challenged Judge Sifton's instruction to the jury that for the Government to show Margiotta had defrauded the citizens of Nassau County and the Town of Hempstead of the right to have the affairs of those entities conducted honestly, free from corruption, fraud and dishonesty, in violation of the mail fraud statute as charged in Count One, the jury had to find that Margiotta owed some kind of special fiduciary duty to the citizenry.[12] The Government also sought reconsideration of the district court's related instruction that a violation of mail fraud under Count One required an additional showing of willful concealment.[13] Moreover, the Government contended that the district court erred in declining to instruct the jury that Margiotta could be found guilty, as a principal, of extortion under color of official right in violation of 18 U.S.C. § 1951. Instead, Judge Sifton instructed that Margiotta could be found guilty of extortion pursuant to 18 U.S.C. § 2(b) only if the jury found that he had caused public officials acting under color of official right to induce a victim to part with money.[14] The Government also took issue with certain evidentiary rulings made by Judge Sifton at the first trial.[15] The Government appealed from *116 Judge Sifton's order stating that he would follow these rulings at the second trial. This Court affirmed the order on the evidentiary rulings and dismissed the appeal with respect to the challenged jury instructions, on the ground that those portions of the order relating to the jury instructions were not appealable by the Government pursuant to 18 U.S.C. § 3731. *United States v. Margiotta,* 662 F.2d 131 (2d Cir. 1981). In dismissing the Government's appeal with respect to the jury instructions, we explicitly stated we intended to express no views on the merits of those claims.

12 The district court declined to adopt the Government's requested charge that a special fiduciary relationship need not be established for it to prove the first "prong" of Count One, which charged that Margiotta's scheme to defraud the citizens of Nassau County and the Town of Hempstead deprived them of the right to have the affairs of those entities conducted honestly, free from corruption, fraud, and dishonesty. The Government's requested instruction would have permitted the jury to find the defendant guilty of mail fraud simply on the basis of a determination that Margiotta had agreed to recommend the Williams Agency as Broker of Record in return for the Agency's participation in the kickback scheme, without reference to the question of a breach of a fiduciary relationship by the defendant.

13 *See United States v. Margiotta,* 662 F.2d 131, 137 (2d Cir. 1981).

14 18 U.S.C. § 2(b) (1976) provides in pertinent part:

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

15 At the first trial, Judge Sifton had excluded (1) evidence that Margiotta's conduct violated New York law; (2) evidence of a prior similar act involving the dependence of employee salary increases on their agreement to contribute one percent of their salaries to the Republican Party; and (3) certain statements of appellant's attorneys in a memorandum submitted to the Attorney General in an attempt to persuade the Department of Justice that Margiotta should not be indicted.

At the second trial, the Government again sought to prove that Margiotta's participation in the insurance activities amounted to an elaborate scheme of fraud in violation of the federal mail fraud and extortion statutes rather than a mere political patronage system. The Government presented evidence to show that Margiotta had deeply insinuated himself into the affairs of government in the Town of Hempstead and Nassau County, to the point that he was in effect undertaking the business of government and not simply the activities of the Republican Party. This evidence was provided by testimony of Ralph Caso, who was the Presiding Supervisor of the Town of Hempstead until 1971 and Nassau County Executive until 1977. Caso stated that prior to his "break" with Margiotta in 1976, he was "controlled" by Margiotta in "the basic responsibilities that [he] was to carry out," including appointments to offices and positions such as the Broker of Record.

While Caso's successor, Francis Purcell, who still holds the office of Nassau County Executive, did not describe the same relationship of dominance over the affairs of government in Town and County, the testimony of Margiotta himself and those who carried out his directives established that the appellant exercised a vise-like grip over the basic governmental functions in Hempstead and Nassau County. In explaining his role in the selection of the Williams Agency for the position of Broker of Record, Margiotta testified that Richard B. Williams, an active participant in the political affairs of the Town of Hempstead and Nassau County, had approached him in 1968 and asked to replace Mortimer Weis as Broker of Record for the Town of Hempstead. Margiotta determined that the Williams Agency should replace Weis as the Broker of Record, and this decision was implemented by Caso. In 1971, after Ralph Caso was elected Nassau County Executive, Mr. Williams again approached Margiotta to express his desire to become Broker of Record for Nassau County. Margiotta testified that he determined the Williams Agency "deserved it above anybody else [he] thought was capable of handling it." On January 1, 1971, the day on which he took office, Ralph Caso designated the Williams Agency as Broker of Record for Nassau County based on Margiotta's recommendation.

Moreover, Margiotta's participation in the "governmental administration of insurance affairs" involved more than the selection of the Broker of Record. Margiotta himself testified that on one occasion he was directly involved in discussions concerning efforts to obtain insurance for the Nassau County Coliseum and the Veterans Hospital, and that he was consulted by Alphonse D'Amato, then Presiding Supervisor of the Town of Hempstead, about the possibility of adopting a self-insurance plan following inquiries by the New York State Investigation Commission. Insurance brokers Dowler and Curran corroborated this evidence of Margiotta's dominance in municipal insurance activities. They stated that when they sought the Town and County business, they undertook discussions with Margiotta, not with the public officials. After Margiotta declined their offers, they did not appeal to the public officials because, as broker Curran testified, "there was no place else to go." Margiotta's version of these

discussions does not put the lie to the assertion he told Curran that "in view of [Williams's] party service I had no intention of taking any insurance away from him." Similarly, *117 after Richard B. Williams, the founder of the Williams Agency, died in 1978, Margiotta testified that Williams's son, Richard A. Williams, approached him to ask whether the death of his father would affect their insurance arrangement. Margiotta stated that he would always "retain and recommend" the Williams Agency as Broker of Record. Moreover, Margiotta conceded that if the Williams Agency ever refused to follow his instructions concerning the distribution of portions of the insurance commissions, he would have convened a meeting of the Executive Committee of the Republican Party, and would have recommended that the Williams Agency be replaced as the Broker of Record.

The municipal insurance activities were not Margiotta's sole concern in participating in municipal government. Margiotta also played a substantial role in making hiring and promotion decisions. Margiotta's activities as a de facto Department of Personnel for Nassau County were described at trial by Alfred G. Riehl, the program staffing officer of Nassau County, and Donald Woolnough, the Republican headquarters functionary who was Margiotta's administrative assistant. Mr. Riehl assumed his duties as program staffing officer following a meeting with Margiotta, at which the appellant directed Riehl to see Donald Woolnough. Riehl and Woolnough discussed the procedure for handling requests for employment, promotions and raises. In essence, Riehl was informed that whenever a position not covered by applicable civil service regulations became available, Riehl should notify Woolnough. Woolnough testified that he would "disseminate" those jobs paying less than $15,000 to local Republican Party leaders unless a number of jobs were made available at one time, in which case Margiotta would instruct Woolnough on which local political districts should receive the employment opportunities. According to both Woolnough and Margiotta himself, while Woolnough would interview applicants for positions as clerks, electricians and other types of laborers to be hired by the municipal government, Margiotta would interview individuals who were applying for the higher level positions, such as candidates for County or Town Attorneys and department heads. Riehl testified that he contacted Woolnough on all cases involving hiring, requests for promotions, and salary increases in excess of $1,500. Woolnough stated that he would convey the information to Margiotta, who would often direct him to check with the local leader. Margiotta would also personally approve or disapprove promotions and salary increases for Nassau County positions. According to Woolnough, Margiotta's approval would be based upon the individual's "political activity." If a request for a raise or promotion was denied, Riehl would simply inform the appropriate department head of the decision, but would not proffer any reasons for the denial.

Margiotta played a similar role in the government of the Town of Hempstead. Muriel DeLac, the Director of Personnel for the Town of Hempstead stated that she followed the "unvarying practice" of seeking approval of raises and promotions concerning positions with the Town of Hempstead by forwarding a request to Donald Woolnough at the Republican Committee. The requests would be returned with the notations, "approved" or "denied." According to Ms. DeLac, the only individuals approved for hiring were those referred by the leaders of the Republican Party. One of Woolnough's responsibilities was to obtain lists from Nassau County and the Town of Hempstead showing the names of all employees and the salary they earned. Armed with this information, Margiotta and his associates would study the relationship between the amount of money earned by an individual and the amount of money contributed to the Republican Party before approving or denying a request for a raise or

118 promotion.[16] In short, Margiotta's role *118 in the affairs of Nassau County and the Town of Hempstead may be summarized in the words of Donald Woolnough: "everything went through his hands."

16 According to Andrew Parise, the Chief Executive Assistant to the Presiding Supervisor of the Town of Hempstead, it was "common knowledge" that an employee was expected to contribute one percent of his salary to the Republican Party. This expectation was enforced. by the Party's control of the process governing raises and promotions. At the first trial the district judge had precluded the Government from describing the one percent system in detail on the ground that its probative value was exceeded by its prejudicial impact. As noted at page ___, after declaring a mistrial, Judge Sifton stated in an order that he would follow this evidentiary ruling at the second trial. On hearing the Government's appeal from this order, this Court affirmed on the ground that Judge Sifton acted well within his discretion in balancing the probative value and prejudicial impact. *United States v. Margiotta, supra,* 662 F.2d at 142.

According to the Government, Margiotta converted this control over the governments of Town and County into a scheme to defraud relating to the municipal insurance activities. The tale of Margiotta's allegedly corrupt agreement was recounted at trial by Richard A. Williams, son of Richard B. Williams, the founder of the Williams Agency and close political associate of Margiotta. In 1968 Williams accompanied his father to a meeting attended by Margiotta and Mortimer Weis. The younger Williams waited outside the meeting room. Later, Williams was advised by his father that the Williams Agency would be named Broker of Record for the Town of Hempstead and that the Agency had agreed to split its commissions on a "50-50 basis." Margiotta has conceded that this meeting was held. Moreover, the testimony of Williams that his father had agreed to set aside 50% of his commissions was corroborated by documents prepared by Williams and his father in 1969. These documents specified the amounts of commissions the Williams Agency had received, and showed, under a column labeled "50% of commissions," that the funds had been divided in half. The younger Williams testified that his father had a conversation with Margiotta prior to the appointment of the Williams Agency as Broker of Record for Nassau County. The Williams Agency continued to set aside 50% of the commissions it earned on Nassau County properties for distribution to Margiotta's political allies.

Through his control over the appointment process and other aspects of municipal government, Margiotta had thus generated a "slush fund," the proceeds of which could be distributed to purchase party loyalty, to assist friends, or, for purposes he designated, in his words, "whenever the spirit moved [him]." For example, attorney William Cahn, a former district attorney for Nassau County, was "retained" by the Williams Agency at a fee of $2,000 per month beginning in January, 1975 after Margiotta asked whether the Williams Agency could "see its way clear to retain [Cahn]." The Williams Agency paid William Cahn $24,000 per year in 1975 and 1976, and continued to pay $2,000 per month in 1977. In April, 1977, the Agency began making the payments to Cahn's son, Neil, after William Cahn told Margiotta that he wanted his son to receive the money. The Williams Agency deducted the payments to the Cahns from the amount allocated from the commissions earned by placing insurance on Nassau County properties. Neither William nor Neil Cahn rendered any legal services on behalf of the Williams Agency.

Another beneficiary of the insurance scheme was Michael D'Auria, a former State Supreme Court Justice who was ultimately disbarred. Following Margiotta's approval, the Williams Agency made a series of payments totalling approximately

$16,000 between 1971 and 1975 to D'Auria, who did no compensable legal work. Moreover, John Sutter, a Nassau County criminal lawyer, received payments derived from the insurance proceeds. Sutter represented Williams and several others, including Margiotta, William Cahn, Nassau County Executive Purcell, New York State Assemblyman Joseph Reilly, and Deputy Nassau County Executive Henry Dwyer, following inquiries by the New York State Investigation Commission and a grand jury into state insurance practices in 1977. Sutter never billed Margiotta or any of the other clients except the Williams Agency and Nassau County. Moreover, it appears that Sutter *119 billed the Williams Agency for work incurred in representing one John Hansen in an unrelated state criminal matter, pursuant to instructions from Margiotta. Furthermore, the Government presented evidence that Margiotta had arranged for a payment of $5,000 to himself. Robert Dowler testified that Margiotta and Dowler agreed to split a payment of $10,000 made by the Williams Agency to Dowler.

To support its theory that the insurance arrangement was a scheme to defraud rather than a good faith patronage practice, the Government sought to prove that Margiotta tried to conceal the practice by directing the preparation of falsified property inspection reports by recipients of the kickback payments who did no meaningful work. According to the younger Williams, Margiotta convened a meeting with Williams in 1975, responding to the growing concern that the public exposure of the insurance activities would cause embarrassment to the Republican Party. As a result, from 1975 to 1978, the insurance brokers who received portions of the commissions earned by the Williams Agency were directed to make useless inspections of properties and to write unnecessary reports. Thus, it was made to appear that the recipients of the insurance proceeds were legitimately earning their commissions. In addition, the Government presented evidence showing that Margiotta attempted to disguise the insurance practices by misleading the State Investigation Commission when it inquired into the propriety of the insurance scheme in 1977 and 1978. Many of the recipients of the kickbacks, represented by a group of attorneys whose fees were paid by the Nassau County Republican Committee, misrepresented to the Commission the reason they were receiving the payments. The witnesses stated that they worked and performed services for the money they received. Margiotta himself testified that his conversation with Williams concerning the sharing of commissions in 1971 was motivated in part by the workload facing the brokers.

At trial, Margiotta maintained that, although he recommended the designation of the Williams Agency as Broker of Record and expected the Agency to continue the insurance patronage system, his recommendation was not made contingent upon a secret agreement to split the commissions on a "50-50 basis." Margiotta asserted that his practice of commission sharing among brokers was a good faith continuation of a long-standing and widely-known political patronage arrangement in New York. Margiotta argued that until 1978, no New York law prohibited the sharing of municipal commissions among non-working brokers.[17] He emphasized that the insurance patronage scheme was discontinued after Governor Carey proposed a new State regulation requiring the performance of services by brokers receiving commissions. John F. English, former Nassau County Chairman of the Democratic Party, Palmer Farrington, past Presiding Supervisor of the Town of Hempstead, testified that the distribution of insurance commissions on municipal properties to non-working brokers was a patronage system practiced by both Democrats and Republicans in the County for decades. Margiotta further asserted that he was not responsible for the preparation of fictitious property inspection reports, and that he did not lie to the State Investigation Commission. After deliberating for several days, the jury empanelled

for his second trial convicted Margiotta of mail fraud and five counts of extortion. We have set forth at some length the factual contentions of the Government and Margiotta so that the points raised on appeal may be considered against the background of the bitterly contested trial.

17 Moreover, Margiotta has called attention to an informal opinion rendered in 1943 by the General Counsel of the State Insurance Department concluding that a municipality could require a broker who placed municipal insurance to share his commissions with other brokers in the community. In response, the Government has noted a 1950 Insurance Department memorandum stating that commission sharing was desirable "in order to avoid political or other kinds of favoritism."

On appeal, Margiotta raises a cluster of arguments in support of his claims that his *120 mail fraud and Hobbs Act convictions should be reversed and indictment dismissed. Moreover, he asserts that the trial court erred by admitting into evidence Richard A. Williams's account of his father's alleged agreement with Margiotta. We turn now to the merits of Margiotta's claims.

II. *Mail Fraud*

Margiotta asserts that his conviction of mail fraud (Count One) must be reversed and the indictment dismissed on the grounds that the federal mail fraud statute, 18 U.S.C. § 1341 (1976), does not embrace a theory of fiduciary fraud by private participants in the political process, and that Margiotta owed no fiduciary duty to the general citizenry of Nassau County or the Town of Hempstead upon which a mail fraud offense could be based. Count One alleged that Margiotta devised a scheme to defraud Nassau County and the Town of Hempstead, New York State, and the citizens of these jurisdictions, (1) of the right to have the affairs of those entities conducted honestly, free from corruption, fraud and dishonesty, and (2) of the honest and faithful participation of Margiotta in the governmental affairs of those entities. The basic factual predicate underlying Count One was the allegation that Margiotta, who participated extensively in the selection of public officeholders in Hempstead and Nassau County, had entered into a secret agreement pursuant to which the Williams Agency was designated Broker of Record on the understanding that the Agency would kick back a substantial portion of its commissions in accordance with Margiotta's instructions. Margiotta argues that an alleged deprivation of an "intangible right" to a defendant's honest and faithful services forms a predicate for a federal mail fraud violation only where the defendant shares a fiduciary relationship with the putative victim. Asserting that a fiduciary duty to the general citizenry requiring honest and faithful participation in governmental affairs has been recognized only in cases involving defendants who are public officials, Margiotta concludes that the novel application of the mail fraud statute on an "intangible rights" theory to a non-office holder such as Margiotta represents an untenable and improper extension of the mail fraud statute beyond its permissible bounds.

In construing the elements of the mail fraud statute in this case of first impression, we tread most cautiously. As we have noted in another context, *see United States v. Barta,* 635 F.2d 999, 1005-06 (2d Cir. 1980), *cert. denied,* 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981), § 1341 is seemingly limitless on its face. We are not unaware of the time-honored tenet of statutory construction that ambiguous laws which impose penal sanctions are to be strictly construed against the Government. *Id.* at 1001. *See also United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 5 L.Ed. 37 (1820). Concomitantly, it is indisputable that there are situations in which the legislature has intended to define broadly the scope of criminal liability. Our task today is complicated because the broad provisions of the mail fraud statute have been applied in a context implicating two conflicting sets of values, both of which merit

stringent protections. On the one hand, the prosecution under § 1341 of those who simply participate in the affairs of government in an insubstantial way, or exercise influence in the policymaking process, poses the danger of sweeping within the ambit of the mail fraud statute conduct, such as lobbying and party association, which has been deemed central to the functioning of our democratic system since at least the days of Andrew Jackson. On the other hand, an unduly restrictive reading of § 1341, leading to the formulation of a rule that precludes, as a matter of law, a finding that a person who does not hold public office owes a fiduciary duty to the citizenry, regardless of that individual's de facto control of the processes of government, eliminates a potential safeguard of the public's interest in honest and efficient government. While we conclude that there are limitations on the application of the mail fraud statute to violations of the intangible right to "good government," we believe that the statute reaches the conduct evidenced by the appellant in this case. *121

A. *The applicability of the mail fraud statute.*

Margiotta argues that the mail fraud statute cannot, as a matter of law, embrace a theory of fiduciary fraud by private participants in the political process. Specifically, he emphasizes that although § 1341 has been applied to fiduciaries in both the public and private sectors, the fiduciary duty associated with the public's intangible right to an individual's honest and faithful participation in governmental affairs has been accepted only where the defendant is a public official. *See, e.g., United States v. Mandel,* 591 F.2d 1347, 1358 (4th Cir.), *aff'd en banc in relevant part,* 602 F.2d 653 (1979), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); *United States v. Brown,* 540 F.2d 364, 374 (8th Cir. 1976). We reject Margiotta's claim. In the private sector, it is now a commonplace that a breach of fiduciary duty in violation of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property. *See United States v. Barta, supra,* 635 F.2d at 1005-06 (deprivation of employer's right to employee's honest and faithful services); *United States v. Buckner,* 108 F.2d 921 (2d Cir.), *cert. denied,* 309 U.S. 669, 60 S.Ct. 613, 84 L.Ed.2d 1016 (1940). Fraudulent schemes designed to cause losses of an intangible nature clearly come within the terms of the statute. *See United States v. Bronston,* 658 F.2d 920 (2d Cir. 1981), *cert. denied,* ___ U.S. ___, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982). A close reading of the statute supports this result. Section 1341 prohibits "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations or promises"[18] (emphasis added). Accordingly, the prohibition against schemes or artifices to defraud is properly interpreted to be independent of the clause "for obtaining money or property." *See United States v. States,* 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied,* 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974). *But see* Comment, *The Intangible Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute,* 47 U.Chi.L.Rev. 562 (1980) [hereinafter "Comment — *Intangible Rights*"].

18 *See* note 4, *supra.*

In the public sector, as the appellant correctly points out, the mail fraud statute has been employed in prosecutions of public officials who have allegedly deprived the citizenry of such intangible rights as the right to good government, or the right to the honest and loyal services of its governmental officers. A number of courts have approved the prosecution of allegedly corrupt politicians who did not deprive the citizens of anything of readily identifiable economic value. *See, e.g., United States v. Mandel, supra; United States v. Keane,* 522 F.2d 534 (7th Cir. 1975), *cert. denied,* 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976); *United States v. States, supra.* From these cases, a basic principle may be distilled: a public official may be prosecuted under 18 U.S.C. § 1341 when his alleged scheme to defraud has as

its sole object the deprivation of intangible and abstract political and civil rights of the general citizenry. The definition of fraud is thus construed broadly to effectuate the statute's fundamental purpose in prohibiting the misuse of the mails to further fraudulent enterprises of all kinds. *See United States v. States, supra,* 488 F.2d at 764. *See also* Comment — *Intangible Rights, supra,* at 564.

The instant case raises the novel issue whether an individual who occupies no official public office but nonetheless participates substantially in the operation of government owes a fiduciary duty to the general citizenry not to deprive it of certain intangible political rights that may lay the basis for a mail fraud prosecution. In the private sector cases, a formal employer-employee relationship is not a prerequisite to a finding that a fiduciary duty is owed. *See, e.g., Oil Gas Ventures — First 1958 Fund Ltd. v. Kung,* 250 F.Supp. 744, 749 (S.D.N. Y. 1966) (Weinfeld, J.) (fiduciary relation may be founded upon dominance). Similarly, *122 we do not believe that a formal employment relationship, that is, public office, should be a rigid prerequisite to a finding of fiduciary duty in the public sector. *Cf. United States v. Del Toro,* 513 F.2d 656, 663 n. 4 (2d Cir.), *cert. denied,* 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975) (prosecution for conspiracy to defraud the United States in violation of 18 U.S.C. § 371).

The drawing of standards in this area is a most difficult enterprise. On the one hand, it is essential to avoid the Scylla of a rule which permits a finding of fiduciary duty on the basis of mere influence or minimum participation in the processes of government. Such a rule would threaten to criminalize a wide range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service. On the other hand, the harm to the public arising from the sale of public office and other fraudulent schemes leads us to steer a course away from the Charybdis of a rule which bars on all occasions, as a matter of law, a holding that one who does not hold public office owes a fiduciary duty to the general citizenry even if he in fact is conducting the business of government.

Although there is no precise litmus paper test, two time-tested measures of fiduciary status are helpful: (1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary. *See* Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 Am.Crim.L.Rev. 117, 147 (1981) [hereinafter "Coffee, *From Tort to Crime*"]; *Cheese Shop Int'l, Inc. v. Steele,* 303 A.2d 689, 691 (Del.Ch.), *rev'd on other grounds,* 311 A.2d 870 (Del.Sup. 1973); *Mobil Oil Corp. v. Rubenfeld,* 72 Misc.2d 392, 399-400, 339 N.Y.S.2d 623, 632 (Civ.Ct. 1972), *aff'd,* 77 Misc.2d 962, 357 N.Y.S.2d 589 (1974), *rev'd on other grounds,* 48 A.D.2d 428, 370 N.Y.S.2d 943, 947 (2d Dep't. 1975), *aff'd mem.* 40 N.Y.2d 936, 390 N.Y.S.2d 57, 358 N.E.2d 882 (1976); *In re Jennings Estate,* 335 Mich. 241, 244, 55 N.W.2d 812, 813 (1952) (no fiduciary relationship absent a showing of confidence, trust and reliance); *Trustees of Jesse Parke Williams Hospital v. Nisbet,* 191 Ga. 821, 841, 14 S.E.2d 64, 76 (1941) (fiduciary status based on position of dominance and control); *Miranovitz v. Gee,* 163 Wis. 246, 249, 157 N.W. 790, 792 (1916) (reliance on superior knowledge of fiduciary); *see also United States v. Mazzei,* 521 F.2d 639 (3d Cir.) (*en banc*), *cert. denied,* 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). These tests recognize the important distinction between party business and government affairs, permitting a party official to act in accordance with partisan preferences or even whim, up to the point at which he dominates government. Accordingly, the reliance and de facto control tests carve out a safe harbor for the

party leader who merely exercises a veto power over decisions affecting his constituency. *See* Coffee, *From Tort to Crime, supra,* at 147.

In light of these guidelines, the prosecution of Margiotta under the mail fraud statute was permissible, notwithstanding the fact that the appellant held no official public office. It cannot be gainsaid that Margiotta had a stranglehold on the respective governments of Nassau County and the Town of Hempstead. According to Donald Woolnough, one of Margiotta's principal assistants, "everything went through his hands." The evidence established not only that he was responsible for the administration of the municipal insurance activities, but also that he acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases. Others relied upon him for the rendering of important governmental decisions, and he dominated governmental affairs as the de facto public leader. As a result, the federal mail fraud statute properly supported a prosecution for Margiotta's breach of at least a minimum duty not to sell his substantial influence and control over governmental processes. *123

Moreover, Judge Sifton's charge to the jury was consistent with the limitations we have delineated on the application of the mail fraud statute to participants in the political process who hold no public office. Judge Sifton did not simply instruct that the jury could find that Margiotta owed a fiduciary duty if he participated or had influence in Nassau County and the Town of Hempstead. Instead, the trial court charged that the jury should determine whether Margiotta's work "was in substantial part the business of Government, rather than being solely party business and that his performance of that work was intended by him and relied on by others in Government as part of the business of Government ...." This charge was harmonious with the guidelines we have articulated today, and ensured that the jury's consideration of the mail fraud count was properly channelled. *Cf. Penato v. George,* 52 A.D.2d 939, 942, 383 N.Y.S.2d 900 (2d Dep't 1976) (reliance is an important factor in determining existence of fiduciary relationship), *appeal dismissed,* 42 N.Y.2d 908, 397 N.Y.S.2d 1004, 366 N.E.2d 1358 (1977); *Ahern v. Board of Supervisors of Suffolk County,* 17 Misc.2d 164, 171, 184 N.Y.S.2d 894 *rev'd on other grounds,* 7 A.D.2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959) (Party chairman participates in governmental function when nominating Commissioner of Elections).

Margiotta's argument that the legislative history does not support the application of the mail fraud statute to private participants in the political process, regardless of the extent to which they dominate the affairs of government, is unavailing. While the mail fraud statute, originally enacted as § 301 of the Act of June 8, 1872, ch. 335, 17 Stat. 283, 323, resulted from a recommendation of a committee of postal officials for legislation "to prevent the frauds which are perpetrated by lottery swindlers through the mails,"[19] § 1341 has never been limited to this narrow purpose. *See* Coffee, *From Tort to Crime, supra,* at 123. Yet no legislative history exists to suggest that Congress has intended the mail fraud statute to deal only with schemes to defraud involving money or property, *see United States v. States, supra,* 488 F.2d at 764, let alone to be subject to a hard-and-fast distinction between public officeholders and dominant non-public officeholders in cases involving intangible political rights. Accordingly, our construction of § 1341 furthers the basic purpose of the statute in proscribing the use of the mails to promote fraudulent enterprises. *See Durland v. United States,* 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896). *See generally Intent, Clear Statements, and the Common Law; Statutory Interpretation in the Supreme Court,* 95 Harv.L.Rev. 892, 893 (1982) (instrumental approach is one technique of statutory interpretation).

19 Report of the Committee of Post Office Officials, 19-20 (March 30, 1870). *See* Comment, *The Intangible Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute,* 47 U.Chi.L.Rev. 562, 567-68 (1980).

Furthermore, Margiotta's prosecution does not exceed the permissible bounds of the statutory language. More than five decades ago, the Supreme Court stated that the phrase "scheme to defraud" extends to "a great variety of transactions." *Fasulo v. United States,* 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926). In his brief, appellant has conceded that a deprivation of an intangible right to a defendant's honest and faithful services properly forms the basis for a mail fraud violation where the defendant owes a fiduciary duty to the alleged victim. As a result, while the question remains whether Margiotta owed a fiduciary duty to the general citizenry of the Town of Hempstead and Nassau County, there is no merit to Margiotta's claim that the language of the federal mail fraud statute cannot embrace a theory of fiduciary fraud by one, like the appellant, who has de facto control over the processes of government and is relied upon by others in the rendering of essential governmental decisions.

B. *Fiduciary Duty.*

Margiotta argues that, even assuming the applicability of the statute to his role in the insurance scheme, he owed no *124 fiduciary duty to the general citizenry under federal or state law upon which a mail fraud violation could be predicated. At the outset, we reject his contention that absent a showing of a violation of New York statute or a duty imposed by New York law, a defendant may not be found guilty of using the mails in furtherance of a scheme to defraud on the basis of a breach of a fiduciary duty to the citizenry. The mail fraud statute was enacted to prohibit the use of the mails for promoting schemes deemed contrary to federal public policy. Early in the history of § 1341's interpretation, the Supreme Court stated that "Congress may forbid any such act done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not," since "[t]he overt act of putting a letter into the post office of the United States is a matter that Congress may regulate." *Badders v. United States,* 240 U.S. 391, 393, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916). Accordingly, a violation of local law is not an essential element of a scheme to defraud in contravention of 18 U.S.C. § 1341. *See, e.g., United States v. States, supra,* 488 F.2d at 767; *United States v. Mandel, supra,* 591 F.2d at 1362. This principle applies to the question of fiduciary duty as well. In *United States v. Barta, supra,* 635 F.2d at 1007, we stated that an employee's duty to disclose material information to his employer need not be imposed by state or federal statute. Rather, the duty not to conceal, and in fact to reveal, material information could be deemed to arise from the employment relationship itself. *Id. See generally United States v. Bush,* 522 F.2d 641, 646 n. 6 (7th Cir. 1975) (a conviction for mail fraud is not dependent upon a violation of state law), *cert. denied,* 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976). *But cf. Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 479-80, 97 S.Ct. 1292, 1304, 51 L.Ed.2d 480 (1977) ("There may well be a need for uniform federal fiduciary standards . . . [b]ut those standards should not be supplied by judicial extension of § 10b and Rule 10b-5 [of the federal securities acts]. . . ."). Similarly, we need not examine state law to determine whether Margiotta's relationship of dominance in municipal government gives rise to certain minimum duties to the general citizenry. Justice Holmes once wrote that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. L.R. Co. v. United States,* 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920). It requires little imaginative leap to conclude that individuals who in reality or effect are the government owe a fiduciary duty to the citizenry. Moreover, such a conclusion merely construes the elements of a mail fraud violation and does not

contravene the principle that there is no "federal common law of crimes." *Parratt v. Taylor,* 451 U.S. 527, 531, 101 S.Ct. 1908, 1910, 68 L.Ed.2d 420 (1981).

Theoretically, the application of the federal mail fraud statute to state and local political participants without reference to state law principles of fiduciary duty raises federalism concerns. Indeed, Margiotta has argued that if New York State does not require individuals who are not public officeholders to act in a disinterested manner, a federal court's application of such a requirement constitutes an improper intrusion into the governmental affairs of New York State, as well as the county and local governments. *See generally National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). We need not reconcile the principles of federalism with the mandate of the mail fraud statute because Margiotta owed a fiduciary duty to the citizenry of Hempstead and Nassau County under New York law.

It has been held in the New York courts that "[t]he county committee [of the Republican Party] and its chairman are . . . trustees of party interests for the registered voters of the party in that county." *In re Application of Roosevelt,* 9 Misc.2d 205, 160 N.Y.S.2d 747, 749-750 (Sup.Ct.), *aff'd,* 3 A.D. 988, 163 N.Y.S.2d 403 (1st Dep't 1957), *aff'd,* 4 N.Y.2d 19, 171 N.Y.S.2d 841, 148 N.E.2d 895 (1958). The primary function of the Republican Party Committees is "the promotion of Republican candidates and policies...." *Seergy v. Kings County Republican* 125 *125 *County Committee,* 459 F.2d 308, 310 (2d Cir. 1972). Margiotta argues that his fiduciary duty to the Republican Party, which arises from his position as a party officer, would be impaired by a finding of a fiduciary duty to the citizenry requiring disinterested conduct. But while his party position may have been the springboard to control of the municipal governments, it is his participation in government, not his party position, which creates his fiduciary duty to the citizens. New York law clearly distinguishes between "public officers" and "party officers." *See People ex rel. McMahon v. Clampitt,* 34 Misc.2d 766, 767, 222 N.Y.S.2d 23, 25 (Ct.Spec.Sess. City of New York 1961). The cases cited by Margiotta do not involve the question whether dominance over the affairs of government by an individual who is a party officer may create a fiduciary duty to the citizenry with respect to those affairs. In concluding that effective control over the processes of government may transform a mere party functionary into a public fiduciary under New York law, we are directed to § 3-502(2) of the New York Election Law. Under this section, the Chairman of the Nassau County Democratic and Republican Committees are given the authority to nominate a Commissioner of the Nassau County Board of Elections. In construing this section, one New York court has concluded that since, in making the nomination, the County Chairman participates in a governmental function, he is "to that extent a governmental officer and is subject to the same mandatory power of this court when he fails to perform a duty imposed upon him by law." *Ahern v. Board of Supervisors of Suffolk County, supra,* 17 Misc.2d at 171, 184 N.Y.S.2d at 901. Accordingly, New York law supports the position that a party officer, who owes a duty to his party and its followers, may owe certain minimum duties to the public as well, as a result of the other obligations he assumes.

While Cardozo described the standard of behavior governing a fiduciary as "the punctilio of an honor the most sensitive," *Meinhard v. Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), such rhetoric does not assist in determining when a fiduciary duty arises. Judge Sifton, in his charge to the jury on the nature of the participation the jury had to find in deciding whether Margiotta had a special duty to disclose the corrupt agreement, adopted a standard consistent with two measures of fiduciary duty recognized under New York law. As noted above, the district court instructed the jury that it must determine whether the work done by Margiotta was "in substantial part the business of

government, rather than being solely party business and that his performance of that work was intended by him and relied on by others in Government as part of the business of Government." This instruction reflects the concepts of reliance, and de facto control and dominance, which are at the heart of the fiduciary relationship. *See, e.g., Penato v. George, supra,* 52 A.D.2d at 942, 383 N.Y.S.2d at 904-05; *Mobil Oil Corp. v. Rubenfeld, supra,* 72 Misc.2d at 399-400, 399 N.Y.S.2d at 632; *Ahern v. Board of Supervisors of Suffolk County, supra. See generally Coffee, From Tort to Crime, supra,* at 147. Accordingly, the jury could properly find that Margiotta owed a special duty to the electorate under New York law.[20] *126

[20] Moreover, the Government has contended that a fiduciary duty was created by New York Election Law § 17-158 (McKinney 1978), which proscribes the payment or receipt of valuable consideration in connection with "any nomination or appointment for any public office or place," and by New York Penal Law § 200.50 (McKinney 1975), which makes it unlawful for a public official or party leader to solicit or accept money in connection with nominations or appointments to "public office." Judge Sifton concluded that the position of Broker of Record for the Town of Hempstead and the County of Nassau is not a "public office" or "place" within the meaning of the New York statutes, and excluded evidence that Margiotta's conduct violated these statutes. On appeal by the Government prior to the second trial, we held that even if the position of Broker of Record for the Town of Hempstead or Nassau County were a "public office or place," Judge Sifton acted well within his discretion in concluding that the probative value of the evidence was outweighed by the danger of unfair prejudice and confusion of the issues. *United States v. Margiotta, supra,* 662 F.2d at 143. On this appeal, we decline to hold that Judge Sifton erred in concluding that the Broker of Record is not a "public office or place," but note that even if the Broker does not meet the definition of that phrase, these statutes provide analogous authority for a finding of fiduciary duty.

Moreover, these instructions did not differ to an impermissible extent from the prosecution's "theory" charged in the indictment, in violation of the Fifth Amendment principle mandating reversal when the grand jury indicts on one theory, and the petit jury convicts on another. *See, e.g., Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). The Government's theory in the indictment, encapsulated in the two prongs of the charging paragraph, was that a finding of Margiotta's guilt could be predicated on his entering into an agreement which defrauded Nassau County and the Town of Hempstead of the right to have their affairs administered honestly. In response to the defendant's motion to dismiss, the Government contended that an individual who knowingly and in fact undertakes the business of governing a particular jurisdiction owes a duty of loyalty to the citizens just as does one who is formally elected to public office. As noted above, Judge Sifton did not simply charge that mere participation in government, in the form of consultation or recommendations concerning appointments or salary increases, was sufficient to create such a fiduciary duty. Instead, he charged that the jury had to find that the "work done by [Margiotta] was in substantial part the business of Government rather than being solely party business and that the performance of that work was intended by him and relied on by others in Government as part of the business of Government in order to carry forward its affairs as a whole." This charge did not depart from the Government's "theory of the case." Indeed, having been put on notice by Judge Sifton prior to the second trial that the district court intended to charge as it did, Margiotta raised no objection that he would be tried on a theory never presented to

the grand jury.[21] *See United States v. Garguilo,* 554 F.2d 59 (2d Cir. 1977). Since Judge Sifton's charge to the jury did not permit conviction "upon theories and evidence that were not fairly embraced in the charges made in the indictment," *id.* at 63, Margiotta did not suffer any prejudicial variance warranting reversal.[22]

21 We note that the Government did raise objections to the propriety of the charge on a number of other grounds.

22 Margiotta raises an additional variance objection to Judge Sifton's jury instructions relating to Count One in which the jury was charged that if the Williams Agency were found to be a fiduciary based on its "participation in Governmental affairs" and if Margiotta had been a co-schemer with Williams in the breach of that duty, Margiotta could be convicted of mail fraud as a result of the non-disclosure of the corrupt agreement. We do not believe this instruction subjected Margiotta to any prejudicial variance. *See United States v. Garguilo,* 554 F.2d 59, 63 (2d Cir. 1977). The charging paragraph of Count One detailed the participation of others, including the Williams Agency, in the fraudulent scheme to which Margiotta was a party in breach of a fiduciary duty to the citizenry. Moreover, Count One specifically referred to 18 U.S.C. § 2. While the Government principally focused on Ralph Caso in attempting to prove liability pursuant to 18 U.S.C. § 2, the Government throughout the trial emphasized the role of the Williams Agency in municipal insurance affairs. Accordingly, aiding and abetting of others, such as the Williams Agency, to breach a fiduciary duty owed by them to the public was a separate basis on which the charges in Count One could properly have been submitted to the jury. Furthermore, a finding that the Williams Agency breached a fiduciary duty owed to the public as a result of an undisclosed corrupt agreement with Margiotta has support in the law, since the Broker for Nassau County and the Town of Hempstead, like any broker, is an agent of his principal, in this case the municipalities, *see Bohlinger v. Zanger,* 306 N.Y. 228, 231, 117 N.E.2d 338, 339 (1954); New York Insurance Law § 111(2) (McKinney 1981 Supp.), and owes a duty of loyalty and good faith to this principal, including an obligation to exercise good faith and reasonable diligence in procuring insurance on the best terms he can. *See generally* 29 N.Y.Jur., Insurance § 468.

C. *Sufficiency of the evidence of fiduciary duty.*

Margiotta argues that the evidence was insufficient to support a finding of fiduciary duty to disclose his secret agreement *127 to the public even under the trial court's instructions to the jury. His claim that the Government did not present sufficient evidence that he assumed governmental functions concerning municipal insurance affairs is plainly without merit. While one author has stated that those who "govern most make the least noise,"[23] the Government introduced ample evidence that Margiotta was deeply involved in governmental affairs. The detailed proof adduced at trial reveals more than a limited role in giving political clearance for certain high-level appointments, such as County or Town attorneys and deputy department heads. Indeed, the evidence, including the testimony of Margiotta himself, supports a reasonable inference that Margiotta dominated the administration of several basic governmental functions, including the municipal insurance activities and the selection of individuals to fill positions in government. As Donald Woolnough, one of Margiotta's principal assistants, testified, everything relating to hiring, salaries and promotions "went through his hands." Moreover, the testimony of Margiotta and the insurance brokers demonstrates that Margiotta wielded similar power with respect to the selection of the Broker of Record and the distribution of insurance commissions to political allies. Williams met with

Margiotta to arrange for the designation of the Williams Agency as Broker of Record. Insurance brokers approached Margiotta, not the individuals who officially held public office, to seek the municipal insurance business. From the selection of the Broker of Record, to such matters as obtaining insurance for particular municipal facilities and approving an alteration in the methods of obtaining insurance, as well as designation of the recipients of the insurance commissions generated on municipal properties, it was reasonable to infer that Margiotta undertook the business of government in administering the insurance and other affairs of Hempstead and Nassau County.

23 J. Selden-Table-Talk: Power-State.

Furthermore, Margiotta claims that the evidence was insufficient to prove that he made any "impartial" undertaking that could lay the basis for a breach of fiduciary duty. Admitting that he always acted in a strictly partisan political role, and that his sole responsibility was to promote the election of Republican candidates and the health of the Republican Party, Margiotta asserts that there was a complete failure of proof to show that in recommending the Williams Agency as the Broker of Record, he made any representation that his decision was disinterested, impartial, or the result of a determination based on merit. This argument is misdirected. The breach of fiduciary duty on which his mail fraud prosecution has been predicated is not his failure to make decisions on the basis of merit, or on any misrepresentation or omission concerning his partiality. Rather, the crux of Margiotta's impropriety is the secret scheme, pursuant to which his recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies. Ample evidence, including the testimony of Richard A. Williams and Margiotta himself, supports the Government's contention that this secret deal was struck and followed over the course of several years.

Finally, Margiotta argues that even if it could be found that he was a fiduciary and this arrangement with the Williams Agency existed, the evidence did not establish that he had an affirmative duty to disclose information to County or Town officials concerning the basis for his recommendation of the Agency as Broker of Record. The district court instructed the jury that in order to decide that Margiotta breached his fiduciary duty, it had to find that Margiotta had concealed "from those in Government who rely on his participation" material information concerning his entry into a corrupt agreement "to influence him in the performance of his governmental functions." It is undisputed that a defendant's breach of a fiduciary duty may be a predicate for a violation of the mail fraud statute where the breach entails the violation of a duty to disclose material information. *See,* 128 *e.g.,* *128 *United States v. Newman,* 664 F.2d 12 (2d Cir. 1981); *United States v. Barta, supra,* 635 F.2d at 1006; *United States v. Bush, supra,* 522 F.2d at 648 (city employee could be convicted of mail fraud for depriving city and its citizens of his honest and faithful services when such deprivation is combined with material misrepresentations and active concealment). An affirmative duty of disclosure need not be explicitly imposed, but may be implicit in the relationship between the parties. In *Barta,* this Court stressed that an employee's duty to disclose material information to his employer need not be the creation of a state or federal statute. On the contrary, the employment relationship itself may give rise to an obligation on the part of an employee not to conceal, and in fact to reveal information material to his employer's business. *United States v. Barta, supra,* at 1007. *See also United States v. Bush, supra.*

In this case, an affirmative duty to disclose could reasonably be inferred from the de facto employer-employee relationship Margiotta enjoyed with the municipal government. Margiotta regularly participated in the selection of persons for public positions in Nassau County. Having undertaken basic functions of government, he

owed at least a duty to disclose material information or give notice of his conflict of interest to those in the government who relied upon him, just as an employee, under *Barta,* may owe his employer a duty to disclose material information. In addition to the evidence of non-disclosure of Margiotta's agreement with the Williams Agency, the Government presented evidence that Margiotta failed to disclose the corrupt arrangement during the State Investigation Commission's inquiries, during which he portrayed the artifice as an ordinary patronage practice. As a result, ample evidence supports a finding that Margiotta assumed an affirmative duty of disclosure, and breached it by his failure to disclose material information.

D. *Alleged First and Fourteenth Amendment limitations on the mail fraud conviction.*

Margiotta argues that the trial court's fiduciary doctrine impairs important rights of free expression and association, as well as the right to petition government to effect political or social change. He asserts that Judge Sifton's instructions apply to all persons influencing government. As a result, Margiotta argues, the trial court's construction of § 1341 brings within the statute's ambit "the entire spectrum of political participation" in governmental affairs, and thus criminalizes a substantial amount of constitutionally protected conduct. *See Grayned v. Rockford,* 408 U.S. 104, 114-15, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). Such overbroad regulation, Margiotta continues, carries the potential of significant chill arising from the likelihood of criminal prosecution. *See Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Furthermore, according to the appellant, requiring a political party or its chairman to act as a "disinterested fiduciary" for the general citizenry abridges the cherished right of freedom of political association. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley,* 102 S.Ct. 434, 436 (1981). Moreover, Margiotta alleges, the imposition of criminal liability pursuant to the district court's fiduciary doctrine eviscerates the right of petition by interfering with the efforts of political party leaders freely to lobby government officials on behalf of their supporters. *See generally United Mine Workers v. Pennington,* 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965) (First Amendment protects concerted efforts to influence public officials).

If the indictment and prosecution of Margiotta for mail fraud on the basis of his breach of a fiduciary duty to the citizenry meaningfully implicated First Amendment interests, we would be loathe to approve such an application of the mail fraud statute. One of the essential purposes of the First Amendment is to protect the unfettered discussion of governmental affairs, *see Mills v. Alabama,* 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed.2d 484 (1966), and the activities of lobbyists and 129 *129 others who seek to exercise influence in the political process are basic in our democratic system. The First Amendment concerns raised by Margiotta, however, are a chimera. Count One of the indictment and the pertinent jury instructions do not address mere participation in the political process or protected conduct such as lobbying or party association. Rather than resting on a generalized breach of duty to render disinterested services on the part of one who participates in the political process in some unspecified way, the indictment and prosecution focused on whether Margiotta's corrupt agreement breached a fiduciary duty which Margiotta owed as a result of his significant role in the governance of Hempstead and Nassau County. Since the conduct charged in the Indictment was within the power of the United States Government to proscribe and there is no indication that the application of the mail fraud statute in this specific case would deter protected political activities in other contexts, the prosecution of Margiotta under Count One did not violate the First Amendment. *See Broadrick v. Oklahoma, supra,* 413 U.S. at 615, 93 S.Ct. at

2917. Moreover, there is simply no authority for the proposition that a conviction should be reversed and an indictment dismissed because the underlying "theory" of the case may be misused in other situations and misapplied to constitutionally protected conduct.

En passant, in response to Margiotta's contention that other political leaders are in jeopardy of prosecution, we believe his argument overlooks our narrow construction of the mail fraud statute. The necessity of meeting our restricted tests for the existence of a duty as a government fiduciary on the part of those who technically hold no public office precludes the use of § 1341 for dragnet prosecutions of party officials.

We need only briefly consider Margiotta's argument that the mail fraud statute is impermissibly vague both on its face and as applied to the facts of this case. Section 1341 has withstood repeated challenges which have raised the claim that it does not provide fair notice and warning of the conduct proscribed by the statute. *See, e.g., United States v. Louderman,* 576 F.2d 1383, 1388 (9th Cir.), *cert. denied,* 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978). The broad language of the statute, intended by Congress to be sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising, is not unconstitutionally vague because § 1341 contains the requirement that the defendant must have acted willfully and with a specific intent to defraud. *See Screws v. United States,* 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945); *United States v. Manfredi,* 488 F.2d 588, 602 (2d Cir. 1973), *cert. denied sub nom., LaCosa v. United States,* 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974). Judge Sifton appropriately charged the jury on this element of the offense. Moreover, Margiotta knew that the conduct reached was likely to be contrary to law, since he conceded at trial that a corrupt agreement pursuant to which he recommended the Williams Agency on the condition that the Agency kick back fifty percent of its commissions could be illegal. In light of the inclusion of payments to non-brokers in the scheme, the application of the mail fraud statute to his artifice should have come as no surprise. As a result, although he may not have anticipated the precise legal theory according to which the insurance ruse was deemed fraudulent, Margiotta was given fair warning that his activities could cause him to run afoul of the federal mail fraud statute.

E. *Material Information.*

Margiotta argues that he did not fail to disclose material information in violation of the mail fraud statute. Since the violation of an affirmative duty to disclose material information coupled with a breach of fiduciary duty violates § 1341, *see United States v. Newman, supra,* 664 F.2d at 19; *United States v. Barta, supra,* 635 F.2d at 1006, Margiotta claims that his conviction must be reversed because the information concerning the insurance scheme he allegedly failed to disclose was not material, for, as he asserts, any broker would not and *130 could not reduce commissions. This assertion simply flies in the face of the evidence. The Williams Agency obviously was willing to work for less than the amount of the commissions paid by the municipalities, since it was relinquishing portions of the commissions as kickbacks to be distributed to Margiotta's political allies. If responsible officials in the Town and County had known of the secret deal, the concealment of which excluded potential bidders whose competition might have lowered the price to the public, the municipalities could have derived significant savings. Since the concealment of the insurance arrangement deprived the public of a potential[24] reduction in the costs of owning property, the information withheld by Margiotta was material. Accordingly, this case is unlike *United States v. Ballard,* 663 F.2d 534, 542 (5th Cir. 1981), in which the court decided that the information withheld by the alleged "fiduciaries" was not material on the ground that "the price paid would have been unaffected by . . . disclosure."

24 There is no requirement that the public actually suffer a tangible harm, *see United States v. Barta,* 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied,* 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981); the prosecution need only prove that some actual harm or injury was contemplated, *see United States v. Dixon,* 536 F.2d 1388, 1399 n. 11 (2d Cir. 1976).

Moreover, Margiotta's reliance upon § 188 of the New York Insurance Law is misplaced. That section prohibits a broker from rebating any portion of his commission directly to the insured. New York Insurance Law § 188 (McKinney 1966). In this case, the issue is not whether a broker would have rebated a part of his commission to the insured, the municipality, but whether it was possible that the responsible officials could have found a broker who would have been willing to accept a lower commission. On appeal, Margiotta has conceded that "a broker could theoretically agree to accept a lower commission," although he emphasizes that a witness, one Alfred Jaffee, testified at trial that a broker would not reduce its premium rate for only one municipality within a particular rate classification. On cross-examination, Jaffee admitted that a broker's commission could be reduced, and Richard A. Williams himself testified that on a few occasions, he reduced the commissions on policies written for the Town of Hempstead or Nassau County. Accordingly, the information concerning Margiotta's special arrangement appears to have been highly material.

Since all of Margiotta's claims concerning the mail fraud count are without merit, we affirm the judgment of conviction of mail fraud in violation of 18 U.S.C. § 1341.

III. *Hobbs Act Convictions.* A. *Extortion.*

Margiotta argues that his conviction under Counts Two through Six charging violations of the Hobbs Act, 18 U.S.C. § 1951, should be reversed and the indictment dismissed. Section 1951 proscribes various kinds of extortionate interference with interstate commerce, and defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1976). Margiotta was charged with violating the Act by inducing the Williams Agency to make payments by means of wrongful use of "fear," and alternatively, "under color of official right." Judge Sifton instructed the jury that it could find Margiotta guilty if it decided that he had employed one of these two methods. We find no error infecting Margiotta's conviction on five counts of extortion.

B. *Extortion "under color of official right."*

Extortion "under color of official right" is committed when a public official makes wrongful use of his office to obtain money not due him or his office. *United States v. French,* 628 F.2d 1069, 1072 (8th Cir.), *cert. denied,* 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); *United States v. Trotta,* 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), *cert. denied,* 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). The public officer's misuse of his office supplies the necessary element of coercion, and the *131 wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear. *See United States v. Mazzei, supra,* 521 F.2d at 644. The district court concluded that although Margiotta was not a public official; he could be found guilty of extortion "under color of official right" pursuant to 18 U.S.C. § 2(b), which provides:

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Judge Sifton charged the jury that if it determined "that the defendant willfully and knowingly caused officials of the Town of Hempstead and County of Nassau under color of office to

contribute in a substantial way to inducing the Williams Agency to consent to pay out the moneys . . . then the defendant is as responsible for the official action as if he was himself the public official concerned and had performed the action directly."

Margiotta asserts that the district court erred in applying 18 U.S.C. § 2(b) to this case because it was not shown that Margiotta had caused a public official to commit extortion "under color of official right" in violation of the Hobbs Act and because the trial court's instructions were improper. We disagree, and conclude that the requirements of 18 U.S.C. § 2(b) were met. This section is based on the precept that an individual with the requisite criminal intent may be held liable as a principal if he is a cause in fact in the commission of a crime, notwithstanding that the proscribed conduct is achieved through the actions of innocent intermediaries.[25] *United States v. Kelner,* 534 F.2d 1020, 1022 (2d Cir.), *cert. denied,* 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976). *See also United States v. Giles,* 300 U.S. 41, 48-49, 57 S.Ct. 340, 344, 81 L.Ed. 493 (1937). It is unnecessary that the intermediary who commits the act have a criminal intent. *United States v. Kelner, supra,* 534 F.2d at 1023; *United States v. Bryan,* 483 F.2d 88, 92 (3rd Cir. 1973) (*en banc*). In causing the innocent intermediary to commit the challenged actions, the individual adopts both the intermediary's act and his capacity. *See, e.g., United States v. Ruffin,* 613 F.2d 408, 415 (2d Cir. 1979); *United States v. Wiseman,* 445 F.2d 792, 795 (2d Cir.), *cert. denied,* 404 U.S. 967, 92 S.Ct. 346, 30 L.Ed.2d 287 (1971). Section 2(b) has been broadly interpreted to cover not only the voluntary acts of a defendant's agents, but also involuntary conduct on the part of his victims. *See United States v. De Cavalcante,* 440 F.2d 1264, 1268 (3rd Cir. 1971). These principles are consistent with Congressional intent. The House Report accompanying an earlier version of § 2(b) stated that one of the principal purposes of the section was to eliminate any doubt that an individual who "causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal," in accord with such judicial decisions as *United States v. Giles, supra.* H.Rep. No. 304, 80th Cong., 1st Sess. 2448-49 (1949). *See generally United States v. Ruffin, supra,* 613 F.2d at 412-16.

> 25 As a result, 18 U.S.C. § 2(b) accomplishes a different result from that intended through 18 U.S.C. § 2(a) (1976), which provides in pertinent part:
>
> > (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> One cannot aid and abet another to do an innocent act within the meaning of § 2(a). *See United States v. De Cavalcante,* 440 F.2d 1264, 1268 (3rd Cir. 1971).

In light of these guidelines, Margiotta could be found guilty of extortion pursuant to 18 U.S.C. § 2(b). One of the indispensable elements in the extortion kickbacks from the Williams Agency was the official act of Ralph Caso and other public officials of Nassau County and the Town of Hempstead in appointing and retaining the Williams Agency as Broker of Record. Had that conduct, which the jury could reasonably find from the evidence was caused by Margiotta, never occurred, the Williams Agency would not have been in a position to make the challenged payments. If the *132 public officials were aware that the Agency was making the kickbacks at the direction of Margiotta as a result of their exercise of official power in designating and retaining the Agency as Broker, the public officials could have been found guilty of extortion as principals, for unlawfully obtaining the consent to the payments under color of official right. *See, e.g., United States v. Butler,* 618 F.2d 411 (6th Cir.), *cert.*

denied, 447 U.S. 927, 100 S.Ct. 3024, 65 L.Ed.2d 1121 (1980); *United States v. Trotta, supra.* In light of Ralph Caso's testimony that he was unaware of any commission sharing by the Williams Agency and the absence of proof, or contention by the Government, that Caso was party to the secret understandings concerning the designation of the Agency as Broker of Record for Town and County, it is likely that the public officials could not be found guilty of a Hobbs Act violation under color of official right, since it could not be established they were aware that Margiotta had caused them to exercise their power in a manner which induced the Williams Agency to make the kickbacks. Nonetheless, the defendant who caused them to act in this way is viewed as having "adopt[ed] not only [their] act but [their] capacity" as well. *United States v. Ruffin, supra,* 613 F.2d at 415. *See also United States v. Wiseman, supra,* (defendants, who were private process servers, could be found guilty of 18 U.S.C. § 242, which prohibits those acting "under color of any law" from depriving citizens of their civil rights, by operation of 18 U.S.C. § 2(b), where the defendants had caused a state employee, the Clerk of the New York City Civil Court, to enter judgments against third persons, although the Clerk did not know that the judgments were fraudulently obtained); *United States v. Lester,* 363 F.2d 68 (6th Cir. 1966), *cert. denied,* 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967). Since Margiotta could reasonably be found to have caused a public official to commit the act necessary for inducing the Agency's consent to make the kickback payments, he could be convicted of extortion pursuant to the provisions of 18 U.S.C. § 2(b), even though the public official may have been a mere innocent intermediary, and did not participate in all aspects of the extortionate enterprise that is the subject matter of the criminal offense. *See United States v. Wiseman, supra.* These principles were reflected in Judge Sifton's careful jury instruction, that the jury would have to find that Margiotta had "caused officials of the Town of Hempstead and Nassau County under color of office to contribute in a substantial way to inducing the Williams Agency to consent to pay out the monies referred to in Counts Two through Six."

In short, the jury could reasonably find that Margiotta had caused public officials in Hempstead and Nassau County to appoint and retain the Williams Agency as Broker of Record, a prerequisite step in the process of extorting insurance payments. The insurance commissions simply could not have been generated but for this official action. Moreover, this conclusion is not undercut by Margiotta's other arguments in support of his claim that he could not be found guilty of obtaining money under color of official right pursuant to 18 U.S.C. § 2(b). His contention that there is no proof that the Presiding Supervisor of the Town of Hempstead or the Nassau County Executive attempted to induce the Williams Agency to make the payments or that the Agency was motivated to make the kickbacks as a result of "the assertion of pressure" by the public officials is unavailing. Affirmative pressure in the form of force, fear, or direct solicitation of money may transform an official's act into a violation of the Hobbs Act, but it is the utilization of the power of public office to induce consent to the payments that is the gist of an offense of obtaining money "under color of official right." *See, e.g., United States v. Jannotti,* 673 F.2d 578 (3rd Cir.) (Hobbs Act covers actions by public officials under color of official right even when payment is not obtained by force, threats or use of force), *cert. denied,* ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). The use of public office, with the authority to grant or withhold benefits, takes the place of pressure or threats. In this case, the 133 appointment and *133 retention of the Agency as Broker of Record thus satisfies the requirement of a use of public office or action "under color of official right." Moreover, it is clear that the victim's "motivation for the payment" of portions of the insurance commissions focused on the public officials' power of office. *United States v.*

Braasch, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied,* 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975). It is reasonable to conclude that the Williams Agency consented substantially for the reason that the positions held by the public officials, who were controlled by Margiotta, gave the officials the power to choose another as Broker of Record if the Agency did not consent to the payments. *See United States v. Hedman,* 630 F.2d 1184, 1194 n. 4 (7th Cir. 1980), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).

Furthermore, it is not necessary to support a Hobbs Act charge by showing that a public official offer a *quid pro quo* in the form of some specific exercise of the powers of his office or a forbearance to carry out a duty; a public official may be guilty of obtaining money under color of official right if the payments are motivated as a result of his exercise of the powers of his public office and he is aware of this fact. *United States v. Trotta, supra,* 525 F.2d at 1100. While the lack of awareness on the part of the public officials may have relieved them of criminal liability for extortion under color of official right, it does not relieve Margiotta of criminal responsibility, for, pursuant to 18 U.S.C. § 2(b), he could be found guilty of having caused the public officials unknowingly to use their power of office in such a manner that would induce the payments. *See United States v. Wiseman, supra.* In addition, Margiotta may not seek refuge in the claim that Ralph Caso and the other public officials were not themselves the recipients directly or indirectly of payments by the Williams Agency, and therefore did not make "wrongful use of [public office] to gain personal financial reward." *United States v. Butler, supra,* 618 F.2d at 419. A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right. *See United States v. Trotta, supra,* 525 F.2d at 1098 n.2. Finally, the focus of the prosecution on the actions of Margiotta in causing public officials unknowingly to use their power in such a way as to induce the Williams Agency to make kickbacks to Margiotta's political allies and the carefully drawn instructions of the district court ensured that Margiotta's prosecution under the Hobbs Act did not draw within its ambit conduct that has traditionally been viewed as legitimate lobbying and political activity. Since Judge Sifton specifically charged that Margiotta could be convicted only if the jury found that he had acted with the requisite criminal intent, the application of the Hobbs Act's proscription of extortion "under color of official right" by operation of 18 U.S.C. § 2(b) in this case does not open a Pandora's box of liability in connection with lobbying or other legitimate political activities.

C. *Extortion through wrongful use of "fear."*

As noted above, Judge Sifton alternatively instructed the jury that it could find Margiotta had violated the Hobbs Act by extortion through wrongful use of fear. Margiotta claims that the evidence was insufficient as a matter of law to establish that the payments made by the Williams Agency were induced by the wrongful use of fear. In light of the overwhelming evidence that the principals of the Williams Agency understood the Agency would lose its position as Broker of Record for Town and County if it ceased making the payments specified in Counts Two through Six, Margiotta's claim is plainly without merit.

Richard A. Williams first testified about his state of mind when he was called as a witness before the New York State Investigation Commission. When asked what would happen if he did not make the payments to other insurance brokers, Williams responded that he believed the municipal insurance business would be distributed to *134 someone else, and that he would be "excluded." Williams's testimony at trial concerning his state of mind in making the challenged payments was generally consistent with this prior testimony, and was sufficient for a reasonable jury to find that the

principals of the Williams Agency had reasonably been induced to fear that the Agency's participation as Broker of Record would be terminated if it did not make the payments in accordance with Margiotta's directions. *See, e.g., United States v. Brown,* 540 F.2d 364, 373 n. 6 (8th Cir. 1976); *United States v. Provenzano,* 334 F.2d 678, 687 (3rd Cir.), *cert. denied,* 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964). Proof that the Williams' fear was reasonable includes Margiotta's own statement that he would convene a meeting of the Executive Committee of the Republican Party in the event that the Agency ceased making payments. Moreover, putting the victim in fear of economic loss can satisfy the element of fear required by the Hobbs Act. *See United States v. Brecht,* 540 F.2d 45, 52 (2d Cir. 1976), *cert. denied,* 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977). Since the parties to the agreement understood this would be the result, Margiotta was able to exploit the fear of the brokers and thereby wrongfully obtain portions of their insurance commissions with their "consent." *See United States v. Furey,* 491 F.Supp. 1048, 1061 (E.D.Pa.), *aff'd without opinion,* 636 F.2d 1211 (3rd Cir. 1980), *cert. denied,* 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 304 (1981). That the Agency concealed its practice of reducing the amount of kickbacks as the size of the commissions increased corroborates the finding that the Agency feared the loss of the municipal insurance business if Margiotta learned that the Agency was reneging on the secret deal to divide the commissions on a "50-50 basis."

We note that the evidence is particularly compelling as to Count Three which charged extortion in connection with the payments to William and Neil Cahn, and Count Five, which set forth a Hobbs Act violation arising from payments to former Assemblyman Reilly. Margiotta directed a series of monthly payments in the amount of $2,000 to attorneys William Cahn and his son, as an alleged legal retainer by the Williams Agency. Margiotta admitted that payments to lawyers were not part of any prior patronage system. Moreover, on several occasions, Richard A. Williams approached Margiotta to determine whether the Agency could stop making payments to Cahn. In 1976, Williams asked Margiotta if the Agency should continue to make the payments, and Margiotta responded in the affirmative. Later, in 1978, after continuing to pay the monthly $2,000 kickbacks, Williams again sought Margiotta's permission to halt the payments. Although Margiotta initially agreed, Cahn appealed to Margiotta, and Williams was directed to commence making the payments again. After Williams's third request, in 1979, Margiotta gave his permission to cease making payments to the Cahns. At trial, Margiotta admitted that his recommendation was relevant to Williams's decision to continue to make the monthly payments. Although Williams testified that he had a high opinion of Neil Cahn's legal abilities, he stated that the work done by William Cahn for the Williams Agency was "insubstantial." Accordingly, ample evidence supports the inference that the Cahn payments were induced by a reasonable fear stemming from Margiotta's power to ensure the Williams Agency would suffer adverse consequences if it did not follow his directions.

Count Five was based upon a series of payments totalling approximately $50,000 to Assemblyman Reilly in 1979 and 1980, after Margiotta allegedly terminated the practice upon which he and Williams had agreed many years earlier. In 1978, according to Margiotta himself, he met with Williams to determine whether Williams "could see his way clear" to continue Reilly as an employee at a salary of $25,000 each year. During the several years Reilly was paid by the Agency, he performed no meaningful work, and generated only a few hundred dollars in commissions. Williams testified that he understood the Agency could lose the municipal insurance business if the Agency did not continue to make the payments to Reilly. *135

In light of this evidence, the jury could reasonably find that the principals of the Williams Agency were induced to make the payments by the fear they would lose their position of Broker of Record if they did not comply with Margiotta's instructions. The jury could properly disbelieve Williams's isolated answer of "no" in response to a question whether he had "any state of mind of fear at the time [he] made any of these payments," and that, instead, he distributed portions of the commissions earned by the Agency because he understood that he had "to live up to" a verbal contract between the elder Williams and Margiotta. In his testimony, Williams repeatedly made clear his belief that the Agency would have lost the municipal insurance commissions if it had breached its secret agreement with Margiotta. Moreover, the jury could reasonably infer that Williams did not believe he was carrying out a "valid contract" from the evidence of Williams's participation in the creation of fictitious property inspection reports, his dissembling testimony before the New York State Investigation Commission, and the decision to reduce the portions of the commissions distributed from the agreed upon fifty percent. *Cf. United States v. Barber,* 668 F.2d 778, 783 n.2 (4th Cir. 1982) (falsification of documents amply supports inference that donations were compelled, not voluntary, campaign contributions).

Furthermore, there is no merit to Margiotta's claim that he could not have induced the Williams Agency to consent to the payments through the wrongful use of fear because the Williams Agency initially approached him to secure the positions of Broker of Record for Hempstead and Nassau County and therefore was a "willing collaborator." *See United States v. Rabbitt,* 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979). Margiotta relies upon dictum in *United States v. Brecht, supra,* 540 F.2d at 51, in which the court stated that extortion under the Hobbs act "involves initiative on the part of the defendant and coercion on the part of the victim." The court made this statement for the purpose of distinguishing bribery and extortion, not for the purpose of holding that a defendant cannot be guilty of extortion when the victim has taken the initiative, even if the victim was induced by fear to make the initial approach. We believe extortion under the Hobbs Act encompasses just such a situation, and well-reasoned precedent confirms our view. *See United States v. Duhon,* 565 F.2d 345, 351 (5th Cir.) (agreement of putative victims to offer union leaders money to remove pickets prior to meeting with the union leaders does not preclude a finding that the defendants intended to obtain money from the victims through wrongful use of fear; "[t]he extortionist need not explicitly demand property before it is offered"), *cert. denied,* 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978); *United States v. Hathaway,* 534 F.2d 386 (1st Cir.) (although the victim may have initiated the subject of payments, the jury could find that such approach arose from a reasonable fear that without paying he would not be considered by the authority), *cert. denied sub nom., Baptista v. United States,* 429 U.S. 819, 97 S.Ct. 64, 50 L.Ed.2d 79 (1976). In this case, the elder Williams was aware that kickbacks were essential for the Williams Agency to secure and retain the position of Broker of Record. Indeed, "prior practice" was Margiotta's principal defense to the charge of mail fraud in Count One. Moreover, Margiotta acknowledged that the Williams Agency faced the prospect of losing the municipal insurance business if it ceased making the payments. The jury could reasonably find that in this atmosphere of coercion, the Williams Agency labored under a well-founded fear that without agreeing to pay, and continuing to pay once appointed Broker, it would not be considered by the "authority" representing the Town and County: Joseph Margiotta. In short, as appellant's counsel stated at oral argument, the elder Williams agreed to the secret kickback arrangement because he was "doing what he had to do to get the business." Accordingly, the evidence is sufficient to support a

finding that Margiotta was guilty of extortion in violation of *136 18 U.S.C. § 1951 through the wrongful use of "fear."

Since the jury could properly have found Margiotta guilty on Counts Two through Six either by a theory of extortion under color of official right or by a theory of extortion through the wrongful use of fear, both of which were included by Judge Sifton in his jury instructions, it is not necessary to consider Margiotta's argument that reversal of the jury's verdict is required unless both were correct as a matter of law and supported by the record. *See United States v. Ballard,* 663 F.2d 534 (5th Cir. 1981). Moreover, the district court's instructions on the mail fraud count, which we believe were correct in all respects, did not prejudice the jury's consideration of the extortion charges in Counts Two through Six. Margiotta argues that Judge Sifton, in charging on the mail fraud count, instructed the jury that Margiotta was essentially a public official with a public official's fiduciary duty to render honest and loyal services to the general citizenry, and that this impaired his defense that he was not acting "under color of official right," under the Hobbs Act. This claim is without merit. Judge Sifton's charge on Count One did not state that Margiotta was essentially a public official. Moreover, in its instructions on Counts Two through Six, the district court explained that Margiotta was not a public official and the liability on the Hobbs Act counts could only be based on 18 U.S.C. § 2(b).

IV. *Admission of Williams's hearsay statements.*

Margiotta's final claim is that the trial court erred by admitting into evidence Richard A. Williams's hearsay account of his father's alleged agreement with Margiotta. Since the alleged secret agreement was forged at a 1969 meeting attended by the elder Williams, now deceased, Margiotta and Weis, the Government sought to prove the existence of this agreement in large part through the testimony of the younger Williams, who had waited outside the meeting room. At trial, the district court permitted Williams to describe his father's (the declarant's) purported account of the agreement reached at the meeting, over objection by Margiotta's counsel. Williams first recounted his father's plan to offer fifty percent of the Williams Agency's commissions to Margiotta if the latter secured the Town of Hempstead's insurance business for Williams. Judge Sifton admitted this hearsay testimony pursuant to the "state of mind" exception to the hearsay rule, Federal Rules of Evidence, Rule 803(3),[26] as a statement of the decedent's "design" or "plan." *See also United States v. Annunziato,* 293 F.2d 373, 377 (2d Cir.), *cert. denied,* 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961). Margiotta asserts, however, that the district court improperly admitted Williams's testimony that his father reported to him that an agreement had been reached concerning the municipal insurance business. Since the statement was offered to prove that Margiotta had engaged in a past act, the formation of an unlawful secret agreement, the state of mind exception of Fed.R.Evid. 803(3) was not available. Instead, Judge Sifton admitted this testimony on the con-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E), which provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. We believe Judge Sifton did not commit error.

[26] (3) Then existing mental, emotional, or physical condition.

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design . . .), but not including a statement of memory or belief to prove the fact remembered or believed. . . .

The law is well-settled that declarations that are otherwise hearsay may nonetheless be provisionally admitted pursuant to Rule 801(d)(2)(E), subject of course to ultimate connection of the defendant with the conspiracy alleged in the indictment, if the trial court determines that the 137 *137 defendant and the declarant participated in the conspiracy, by a fair preponderance of the evidence independent of the hearsay utterances. *See, e.g., United States v. Cambindo-Valencia,* 609 F.2d 603, 630 (2d Cir. 1979), *cert. denied,* 446 U.S. 940, 100 S.Ct. 2163, 64 L.Ed.2d 795 (1980); *United States v. Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). In this case, sufficient evidence independent of the challenged hearsay statements established that a conspiracy existed, that it was in existence at the time the statement was made, that the declarations were made in furtherance of the conspiracy, and that both the elder Williams and Margiotta participated in the conspiracy. *See, e.g., United States v. Lyles,* 593 F.2d 182, 194 (2d Cir.), *cert. denied,* 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 794 (1979); *United States v. Cafaro,* 455 F.2d 323, 326 (2d Cir.), *cert. denied sub nom., Schulman v. United States,* 406 U.S. 918, 92 S.Ct. 1769, 32 L.Ed.2d 117 (1972). This evidence includes Margiotta's own admissions concerning his approach by, and meeting with Richard B. Williams. Margiotta testified that during the meeting, Williams stated that he would "continue" the "system" carried on by Mortimer Weis, the Broker of Record for Hempstead at that time. Moreover, Margiotta testified that if the Williams Agency should ever have ceased distributing portions of its commissions, he would have convened a meeting of the Executive Committee of the Republican Party, and would have "probably" voted to replace Williams. Margiotta stated that he never told Ralph Caso, or other public officials, about the arrangement to share commissions on a "50-50 basis."

Furthermore, the non-hearsay evidence showed that as soon as the Williams Agency obtained the Town's insurance business following its designation as Broker of Record, the Agency, which had been sharing approximately ten percent of the commissions generated by placement of policies on properties owned by the Town of Oyster Bay, began setting aside fifty percent of the commissions earned. This evidence included ledger sheets dating from 1969 which contained a column labelled "50% of commissions," and a list of recipients sent by Margiotta's office to the Williams Agency designating amounts which totalled exactly 50% of the amount of the commissions shown on the ledger sheet as of the date of that list. The Williams Agency paid 50% of the commissions to the persons whose names appeared on the list. Indeed, ample evidence also supported a finding that Margiotta and Williams understood that their illicit arrangement should remain secret. In addition to Margiotta's admission that he did not disclose the terms of the arrangement to Ralph Caso or other officials, the recipients of the kickbacks were ultimately directed to assist in the creation of falsified property inspection reports to make it appear they had performed work in exchange for the money they received. In the case of William Cahn, the parties to the agreement devised an arrangement of a legal retainer. Moreover, as noted above, numerous individuals associated with the municipal insurance scheme provided dissembling testimony to the State Investigation Commission. In short, the non-hearsay evidence was sufficient to show that a conspiracy existed, that it was in existence at the time the statement was made, and that both Williams and Margiotta participated in the agreement. Furthermore, since the parties to the agreement desired to keep the terms of the pact secret, and Richard A. Williams would necessarily participate in the distribution of insurance commissions, the elder Williams's declaration to his son can reasonably be considered to have been made "in furtherance of" the conspiracy. *See United States v. Lyles, supra,* 593 F.2d at 194.

Margiotta claims that despite this evidence, the trial court erred in admitting the challenged hearsay statements because it did not explicitly make the findings articulated in *United States v. Geaney, supra,* and its progeny. This Court has never required a district court to use any talismanic words when admitting testimony under the co-conspirator exception to the hearsay rule. In *United States v. Cambindo-Valencia, supra,* *138 609 F.2d at 631, appellant Cambindo-Valencia argued that the trial judge failed to make an explicit finding of sufficient independent evidence. This Court rejected his claim as a ground of reversible error, noting that it was possible to "infer that the finding was made implicitly when the court admitted the statements over the defense's objections." *Id.* In light of Judge Sifton's familiarity with this evidence after the completion of the first trial, this inference seems especially warranted on the facts of this case. *See also United States v. Rosenstein,* 474 F.2d 705, 711-12 (2d Cir. 1973).

In any event, in explaining the admission of Richard A. Williams's hearsay account of his father's secret agreement, Judge Sifton observed that there was "a fairly substantial showing that at least as an initial matter there was a starting point of 50/50," and that there was "a sufficient basis" for inferring that there was "some agreed upon arrangement made in advance." Such language makes clear that Judge Sifton made the requisite *Geaney* findings, if not in *haec verba.* Finally, in stating that there was a sufficient basis to present Williams's testimony to the jury "for them to decide whether to accept" it or not, Judge Sifton was not permitting the jury to decide whether the co-conspirator exception was available. Rather, he was merely noting that once the hearsay account was admitted, the jury could accept or reject the testimony. As a result, the district court did not violate the principle that determining the admissibility of challenged testimony is a function for the court, not the jury. *See United States v. Rosenstein, supra,* 474 F.2d at 712. For all these reasons, the district court did not err in admitting Richard A. Williams's hearsay account of his father's statements.

V. *Conclusion.*

Since our unraveling of the tangled skein of Margiotta's fraudulent artifice and analysis of his claims has taken us on a lengthy journey, we briefly set forth our conclusions. While the line between legitimate political patronage and fraud on the public has always been difficult to draw, we believe that the application of the mail fraud statute is permissible on the facts of this case. In the context of a mail fraud prosecution, we reject a per se rule precluding, as a matter of law, the finding of a fiduciary duty to the citizenry to render honest and faithful services on the part of individuals who technically hold no official public office yet participate substantially in the governance of communities. We hold that as an individual who was a de facto leader of government and who was relied upon by individuals in government for the administration of governmental affairs, Margiotta could properly be found to owe a fiduciary duty to the general citizenry of Hempstead and Nassau County, the breach of which duty could lay the predicate for a violation of the mail fraud statute. Moreover, the evidence was sufficient to support a finding that Margiotta assumed a fiduciary duty to disclose his secret agreement. Properly circumscribed as it was here, the indictment and prosecution of Margiotta for mail fraud did not violate his First Amendment rights of freedom of expression, association and petition, and we reject his claim that § 1341 is impermissibly vague on its face or as applied to the facts of the instant case. In addition, ample evidence supports the finding that Margiotta failed to disclose material information in violation of the mail fraud statute.

Addressing ourselves to the Hobbs Act convictions, we hold that Margiotta, having caused public officials to take actions which induced the consent of the Williams Agency to make the payments, could reasonably be found to

have met the requirements of 18 U.S.C. § 2(b). As a result we conclude that the Government satisfied all the elements for convicting Margiotta of extortion "under color of official right." Moreover, the evidence was sufficient to support a verdict that the appellant had committed extortion through wrongful use of "fear." Finally, the trial court properly admitted Richard A. Williams's hearsay account of his father's statements concerning the secret agreement.

Accordingly, the judgment of conviction is affirmed in all respects.

> . . . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

139 *139

---

[86] RALPH K. WINTER, Circuit Judge (concurring in part and dissenting in part):

While I do not agree in every particular with the majority's analysis of the conviction rendered under the Hobbs Act, I concur in the result. Margiotta was not the instrument of a party organization executing well understood patronage practices but instead exercised personal discretion in each case as to the recipients of kickbacks, including payments to himself. This, I believe, is sufficient to characterize the entire kickback scheme as extortionate.

I dissent, however, as to the mail fraud count. The majority's use of mail fraud as a catch-all prohibition of political disingenuousness expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes.

I

It should be emphasized at the outset that, while a kickback scheme[1] is relevant to Margiotta's conviction for mail fraud, it is not essential. Nor is the government required to prove any loss whatsoever to taxpayers or a violation of New York law. Reduced to essentials, the majority holds that a mail fraud conviction will be upheld when a politically active person is found by a jury to have assumed a duty to disclose material facts to the general citizenry and deliberately failed to do so. Margiotta's conviction is based upon his failure as a partisan political leader with great influence to disclose to the citizens of the Town of Hempstead and Nassau County his knowledge that the Williams Agency would have been willing to act as Broker of Record for considerably smaller commissions than were actually paid. Because those citizens might have compelled the municipalities to reduce these costs had they been given this information, it is a material fact.

> 1 My use of "kickback scheme" includes what has been referred to as a "sale of office." While that phrase serves as useful window dressing for the majority, it is not clear whether they are referring to the post of Broker of Record or Republican County Chairman. Judge Sifton ruled that the former is not a public officer under New York law, while the latter seems *a fortiori* a private position. It does not matter, however, since the crux of the majority's theory is non-disclosure of a material fact, *i.e.,* the excessive nature of the insurance commissions. Whether these offices are either "public" or "sold" is irrelevant under that theory.

The kickback scheme is relevant to Margiotta's conviction because it proves (i) that the Williams Agency would have been willing to procure insurance for commissions considerably smaller than those actually paid and (ii) that Margiotta knew it. Had Margiotta secured Williams' appointment because of past political support knowing that the size of the commissions far exceeded the value of services to be performed,

the fraud would have been as complete. Moreover, Judge Sifton charged, and the majority agrees, that the government need not prove that actual savings to taxpayers would have resulted from disclosure. Finally, although Margiotta is a local partisan political leader and the scheme involves municipal funds, no violation of state or local law[2] is necessary to support the federal mail fraud conviction since a jury is free to find a federal duty to disclose material facts.

2 The majority cites no New York authority establishing the duties they impose on political activists or public officials. They argue that Margiotta's ability to influence official action renders him subject to the same obligations under state law as are borne by the official having *de Jure* power to take such action. Even assuming that state law would treat Margiotta as a public officer — an assumption not supported by New York authority — there is nothing to indicate that such officers have legal obligations under state law such as those imposed on Margiotta by the majority. The majority's assertions to the contrary are thus sheer *ipse dixit.* Since New York law is, as the majority itself notes, irrelevant to a federal mail fraud conviction, I fail to understand why they take such pains to make a patently inadequate argument.

The majority pays lip service to construing the criminal law against the government but then gives the mail fraud statute a more sweeping interpretation than any court which has addressed the statute to date. Given that this statute has occasioned *140 a number of courts to comment apprehensively in the past about its steady expansion,[3] that is no mean feat.

3 *See, e.g., United States v. Rabbitt,* 583 F.2d 1014, 1024 (8th Cir. 1978) ("Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute."), *cert. denied,* 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979); *United States v. Louderman,* 576 F.2d 1383, 1388 (9th Cir.) ("[T]he [mail fraud] statute should be carefully and strictly construed to avoid extension beyond the limits intended by Congress."), *cert. denied,* 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978); *United States v. McNeive,* 536 F.2d 1245, 1252 (8th Cir. 1976) (Government attempt to prosecute "tipping" or payment of gratuities to official of a city agency "would effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety.... The Government here is attempting to criminalize cupidity and we do not believe § 1341 can be extended to that extreme without a showing of additional facts which clearly bring the conduct within § 1341. Section 1341 is a penal statute with limitations as to its scope, which limitations were grossly exceeded in the present case."); *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir.) ("A narrow, careful construction is especially appropriate where, as here, the [mail fraud] statute threatens to reach criminal conduct in the field of domestic relations which the state can, and should, effectively and appropriately control."), *cert. denied,* 409 U.S. 891, 93 S.Ct. 118, 34 L.Ed.2d 148 (1972); *United States v. Kelem,* 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied,* 397 U.S. 952, 90 S.Ct. 977, 25 L.Ed.2d 134 (1970).

The indictment itself demonstrates the scope of the theory underlying Margiotta's conviction. It charged him with defrauding the State, the Town of Hempstead and Nassau County and their citizens (i) "of the right to have [their] affairs . . . conducted honestly, impartially, free from bribery, corruption, fraud, dishonesty, bias, and deceit" and (ii) "of the honest and faithful participation of [Margiotta] in [their] affairs." Given this sweeping charge and the majority opinion, no amount of rhetoric seeking to limit the holding to the facts of this case can conceal that there is no end to the

common political practices which may now be swept within the ambit of mail fraud. Since the doctrine adopted by the majority applies to candidates as well as those holding office, *United States v. States,* 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974), a candidate who mails a brochure containing a promise which the candidate knows cannot be carried out is surely committing an even more direct mail fraud than what Margiotta did here. An elected official who for political purposes performs an act imposing unnecessary costs on taxpayers is guilty of mail fraud if disclosure is not made to the public. A partisan political leader who throws decisive support behind a candidate known to the leader to be less qualified than his or her opponent because that candidate is more cooperative with the party organization, is guilty of mail fraud unless that motive is disclosed to the public. A partisan political leader who causes elected officials to fail to modernize government to retain jobs for the party faithful is guilty of mail fraud unless that fact is disclosed. In each of these cases the undisclosed fact is as "material" as the facts which Margiotta failed to disclose, the harm to the public is at least as substantial as the harm resulting from Margiotta's scheme, and the dishonesty, partiality, bias and deceit in failing to disclose those facts is equally present. This is not to say that Margiotta's conduct as a whole is not more odious than the conduct described in these hypotheticals. That is not the issue. The point is that the actions taken by Margiotta deemed relevant to mail fraud by the majority are present in each case: a relationship calling for disclosure, a material fact known to the candidate, official or party leader, and a failure to disclose it.

The majority is quite simply wrong in brushing aside the First Amendment issues. The theory they adopt subjects politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs. The majority explicitly bottoms Margiotta's mail fraud conviction on his failure to say something. Its logic would easily extend to the content of campaign literature. Indeed, it takes no great foresight to envision an indictment framed on the theory adopted by *141 the majority and alleging mail fraud based on public speeches.

II

My brethren are not striking out on their own in pushing the mail fraud statute to limits far exceeding any Congressional intent.[4] To the contrary, much of what they say has substantial and direct precedent. For example, the statutory proscriptions are not limited to common law fraud or deceit but extend to dishonest schemes generally. *United States v. Barta,* 635 F.2d 999, 1005-06 (2d Cir. 1980), *cert. denied,* 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981). It also seems well established that dishonest actions by an employee which violate the employee's fiduciary obligations to an employer can be a basis for a mail fraud conviction. *United States v. George,* 477 F.2d 508, 512-14 (7th Cir.), *cert. denied,* 414 U.S. 827, 94 S.Ct. 49, 38 L.Ed.2d 61 (1973). Moreover, loss or concrete harm need not be shown beyond the fact that the employer was deprived of information which might have affected his or her judgment. *Barta, supra.*

4 The legislative history of the mail fraud statute gives no indication that the statute was ever intended by Congress as an all-purpose weapon against political corruption. The current statute, 18 U.S.C. § 1341, had its origin in Section 301 of the Act of June 8, 1872, Ch. 335, § 301, 17 Stat. 323, and was part of a broad recodification of the postal laws and aimed at "prevent[ing] the frauds which are perpetrated by lottery swindlers through the mails," Report of the Postal Committee, March 30, 1870, 19-20. Congressman Farnsworth, sponsor of the legislation, stated that the mail fraud provisions were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing

the innocent people in the country," Cong.Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). In 1889, Congress amended the mail fraud statute by adding specific prohibitions against a type of "counterfeit money fraud" called the "sawdust swindle" which dealt in "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," or "green cigars." Act of March 2, 1889, Ch. 393, § 1, 25 Stat. 873; *see* S.Rep. No. 2566, 50th Cong., 2d Sess. 2-4 (1889). In 1909, in the course of a general revision of the penal code, the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added to the statute as a clarification of the original phrase "any scheme or artifice to defraud." Act of March 4, 1909, Ch. 321, § 215, 35 Stat. 1130; *see* 42 Cong.Rec 1026 (1908) (remarks of Sen. Heyburn). In 1948, the statute was modified to delete "the obsolete argot of the underworld" added in 1889 and other language considered "surplusage," "without change of meaning" in the provision. H.R.Rep. No. 304, 80th Cong., 1st Sess. A100 (1948); Act of June 25, 1948, Ch. 645, § 1341, 62 Stat. 763. In 1949 the term "dispose of" was substituted for "dispose or," Act of May 24, 1949, Ch. 139, § 34, 63 Stat. 89, and in 1970 "Postal Service" was substituted for "Post Office Department," Postal Reorganization Act, Pub.L. No. 91-375, § 6(j)(11), 84 Stat. 719 (1970). None of these changes indicates any intent to fashion a statute with limitless parameters. Indeed, the addition of the "underworld argot" in 1889 arguably indicates that the original intent of the statute was not broad enough to cover even that most obvious of private frauds. Moreover, the addition to the statute of the phrase "false or fraudulent pretenses, representations, or promises" appears aimed at common law rulings which held false promises insufficient to gain a conviction for fraud. Indeed, it appears that Congress, in so modifying the legislation, was simply codifying the Supreme Court decision in *Durland v. United States,* 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896), which had previously rejected the common law rule. None of these changes indicates that the Congress considered mail fraud to be an appropriate statute for prosecuting political corruption and deception. Even if there were not a canon of construction calling upon us to avoid broad construction of criminal statutes, the recent extension of mail fraud by judicial fiat would be unwarranted.

One can, with seeming logic, move from those propositions to the proposition that a person holding governmental employment is bound by the same standards. *United States v. Bush,* 522 F.2d 641, 646-49 (7th Cir. 1975), *cert. denied,* 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976); *United States v. Brown,* 540 F.2d 364, 374 (8th Cir. 1976); *United States v. Del Toro,* 513 F.2d 656 (2d Cir.), *cert. denied,* 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). From that it seems a small leap to apply these principles to those who hold elective as well as appointed office. *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 *142 (1980); *United States v. Isaacs,* 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974). We then arrive at a rule that elected officials have a duty to disclose material facts concerning their conduct of public affairs. Any official who fails to disclose such facts is guilty of mail fraud without regard to whether actual loss occurred or to whether local law was violated.

Much of what the majority says thus has direct precedential support. They add only one seemingly small element to these precedents: a jury may find that a politically active person has sufficient influence and power over the acts of elective officials to be subjected to the same duty as those officials so far as those acts are

concerned. The failure of such a person to disclose material information to the public can thus constitute mail fraud.

However logical this growth of the law may seem, it leads to a result which is not only greater than, but is roughly the square of, the sum of the parts. The proposition that any person active in political affairs who fails to disclose a fact material to that participation to the public is guilty of mail fraud finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation. This wholly impermissible result is brought about, I believe, by drawing an erroneous analogy between fiduciary relationships involving private parties based on express or implied contract and relationships between politically active persons and the general citizenry in a pluralistic, partisan, political system.

Mr. Justice Frankfurter quite appropriately underlined the fact that

> to say that a man is a fiduciary only begins an analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 85-86, 63 S.Ct. 454, 458, 87 L.Ed. 626 (1943). The words fiduciary duty are no more than a legal conclusion and the legal obligations actually imposed under that label vary greatly from relationship to relationship. Nevertheless, because fiduciary relationships in the private sector have been the subject of centuries of common law development, there is a considerable body of law based on implied or express contract governing whether particular behavior is legal. Its most notable feature, however, is the degree to which fiduciary obligations vary from relationship to relationship. Partners, employees, trustees and corporate directors are all fiduciaries, yet their legal obligations may be wholly dissimilar. While an hourly employee usually may quit a job without fearing legal action even though he leaves at a time which makes it difficult for the employer to continue business, a trustee may not so easily abandon his beneficiaries. While a trustee's actions are void or voidable if tainted by a conflict of interest, the corporate officer generally can act even if he is personally interested so long as the action is fair to the corporation.

To transfer this complex, variable body of law to the political context, simply by mouthing the word fiduciary, makes the very mistake underlined by Mr. Justice Frankfurter in *Chenery.* Although the courts have, with precious little analysis, brought virtually all participants in government and politics under the rubric fiduciary, the obligations imposed are wholly the creation of recent interpretations of the mail fraud statute itself. A reading of the cases in this area, however, shows how little definition there is to these newly created obligations which carry criminal sanctions. For all one can find in the case law, no distinction is made between the fiduciary obligations of a civil servant, political appointee, elected official, candidate or partisan political leader. Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes. One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation 143 *143 to conduct governmental affairs "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing." *Mandel,* 591 F.2d at 1361. The present case is no exception. While there is talk of a line between legitimate patronage and mail fraud, there is no description of its location. With all due respect to the majority, the quest for legal standards is not furthered by reference to "the right to good government" and the duty "to act in a disinterested manner."

Of course, we should all hope that public affairs are conducted honestly and on behalf of the entire citizenry. Nevertheless, we should recognize that a pluralistic political system assumes politically active persons will pursue power and self-interest. Participation in the political process is not limited to the pure of heart. Quite frankly, I shudder at the prospect of partisan political activists being indicted for failing to act "impartially" in influencing governmental acts.[5] Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions. Where Congress has not passed legislation specifying particular acts by the politically active as criminal, our reliance rather should be on public debate, a free press and an alert electorate. In a pluralistic system organized on partisan lines, it is dangerous to require persons exercising political influence to make the kind of disclosure required in public offerings by the securities laws.

5 Among the truths assumed by the founders was that self-interest would be a major generating force in democratic politics. The concern over "faction" motivated by "passion . . . adverse . . . to the interests of the community" appears again and again in The Federalist Papers. *The Federalist* No. 10, at 54 (J. Madison) (Modern Lib. ed. 1937); *see also, e.g., id.* No. 9 (A. Hamilton); *id.* No. 14, at 79-80 (J. Madison); *id.* No. 37, at 225, 228, 232 (J. Madison). The founders suffered under no illusion that only "enlightened statesmen" would hold the reins of power. *Id.* No. 10, at 57 (J. Madison). They sought safety in checks and balances and a separation of powers which would prevent the assertion of too much power in a single hand. *See id.* No. 47 (J. Madison); *id.* No. 48 (J. Madison); *id.* No. 49 (J. Madison or A. Hamilton); *id.* No. 50 (J. Madison or A. Hamilton); *id.* No. 51 (J. Madison or A. Hamilton). The majority decision vests federal prosecutors with largely unchecked power to harass political opponents. It may be that we should expect only "enlightened statesmen" to hold such office, but, with Madison, I would prefer not to take such a risk.

III

My concerns in this case thus extend far beyond a disagreement over statutory interpretation. The limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution. It may be a disagreeable fact but it is nevertheless a fact that political opponents not infrequently exchange charges of "corruption," "bias," "dishonesty," or deviation from "accepted standards of . . . fair play and right dealing." Every such accusation is now potentially translatable into a federal indictment. I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors.

Margiotta's crimes were carried out in the name of Nassau County Executive Ralph Caso. Without his authority, the mail fraud described here could not have been committed. Caso testified that he was controlled by Margiotta and did not know that the Williams Agency would have procured insurance for smaller commissions or that there was a kickback scheme involved. Even if he lacked that specific knowledge, however, surely he did not think that Margiotta's interest in naming the Broker of Record stemmed from intellectual curiosity about the application of actuarial principles. And surely the fact Caso appointed the Williams Agency solely at the behest of Margiotta 144 and without regard to cost of *144 insurance was a material fact which should have been disclosed by Caso, the County Executive, to the citizens of Nassau County. Yet Caso was not indicted.

Even as to the partisan distribution of insurance commissions, the government concedes that Margiotta's conduct, so far as relevant to mail fraud, was hardly unique; in fact, it was a statewide practice. For example, Margiotta's Democratic counter-part in Long Island diverted commissions to brokers recommended by him when he was in power. One presumes he made no public announcement that he was doing so even though the practice imposed unnecessary costs on taxpayers. And the government brief states, as to insurance purchased by the State, "New York State employees performed all the work that a broker of record would perform; when policies were awarded, a politically designated broker was named the broker for each particular policy and received the commission." While the government seeks to distinguish this scheme by saying there was no sale of office — a point irrelevant to the theory of the mail fraud count[6] — the New York State scheme was, if anything, more harmful so far as the taxpayers were concerned. In Nassau County, the Williams Agency did perform some services in return for the commissions. The state practice was to pay state employees to do the work and distribute the commissions to brokers who did nothing at all. Notwithstanding the state-wide existence of what in the majority's view was mail fraud, only Margiotta was indicted.

6 *See* note 1, *supra.*

In arguing this case, the United States Attorney left no doubt that he prosecuted Margiotta for political corruption generally.[7] The problem is that in stretching the mail fraud statute to fit this case, we create a crime which applies equally to persons who have not done the evil things Margiotta is said to have done, a catch-all political `crime which has no use but misuse. After all, the only need served by resort to mail fraud in these cases is when a particular corruption, such as extortion, cannot be shown or Congress has not specifically regulated certain conduct. But that use creates a danger of corruption to the democratic system greater than anything Margiotta is alleged to have done. It not only creates a political crime where Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists. When the first corrupt prosecutor prosecutes a political enemy for mail fraud, the rhetoric of the majority about good government will ring hollow indeed.

7 During oral argument, there were comparisons to "Leonid Brezhnev" and "systems that are alien to our country," statements such as "in Mineola, not Moscow," and a reference to "a former District Attorney who was supposed to be enforcing the law gets convicted, he's paid off $2,000 a month to make sure that the skeletons stay in the closet."

casetext

casetext Sign In Get a Demo Free Trial

Search all cases and statutes... JX

Opinion Case details

From Casetext: Smarter Legal Research

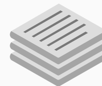
United States v. Margiotta

United States Court of Appeals, Second Circuit

Nov 5, 1982

811 F.2d 46 (2d Cir. 1982)

Copy Citation



Casetext: The secret research weapon for attorneys.

Try Casetext For Free

No. 82-1025.

November 5, 1982.[–]

– Released for Publication February 11, 1987.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the defendant-appellant, Joseph M. Margiotta.

Upon consideration by the panel that heard the appeal, it is

ORDERED that the said petition for rehearing is DENIED, Judge Winter dissenting.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED.

Circuit Judges OAKES, MESKILL, NEWMAN, and WINTER dissent from the denial of rehearing in banc, believing that the extension of the mail fraud statute, 18 U.S.C. section 1341 (1976), reflected in the panel decision, warrants in banc consideration of the fundamental and recurring issue whether the statute applies to schemes to defraud members of the public of intangible rights, such as a right to the faithful performance of duty by a public official or a political leader exercising equivalent authority. *See* Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U.Chi.L.Rev. 562 (1980).

Circuit Judge PRATT took no part in the consideration or decision of this case. *47

47

Make your practice more effective and efficient with Casetext's legal research suite.

Get a Demo

Casetext research

Parallel Search

Compose

AllSearch

casetext
Sign In Get a Demo Free Trial
Search all cases and statutes... JX
Opinion Summaries Case details

From Casetext: Smarter Legal Research

U.S. v. Murphy

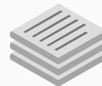
United States Court of Appeals, Third Circuit

Mar 19, 2003

323 F.3d 102 (3d Cir. 2003)

Copy Citation

Download Treatment



Try Casetext. It's easier than googling the law.

Try Casetext free >

No. 01-3757.

Argued September 18, 2002.

March 19, 2003.

Appeal from the United States District Court for the District of New Jersey, Garrett E. Brown, Jr., J. *103

Lawrence S. Lustberg (Argued), Kevin McNulty, Gibbons, Del Deo, Dolan, Griffinger Vecchione, Newark, for Appellant.

Christopher J. Christie, United States Attorney, George S. Leone (Argued), Chief, Appeals Division, Office of the United States Attorney, Newark, for Appellee.

Before BECKER, Chief Judge, SCIRICA and McKEE, Circuit Judges.

OPINION OF THE COURT

BECKER, Chief Judge.

This is an appeal by Peter A. Murphy following a jury trial in which he was convicted on three counts of violating the *104 Travel Act, 18 U.S.C. § 1952 (the predicate offense being bribery under New Jersey law, N.J.S.A. 2C:27-2), and three counts of mail fraud, 18 U.S.C. §§ 1341 and 1346. Murphy is the former Chairman of the Republican Party in Passaic County, New Jersey ("the County"). The charged conduct concerned a contracts-for-payments scheme that Murphy allegedly organized by using his considerable influence over Passaic County officials to procure contracts for Central Medical Services, Inc. ("CMSI"). According to the Government's case, CMSI would then siphon off a certain amount of funds received from the County contracts to a panel of four individuals chosen by Murphy who performed no useful services in return for the payment.

In its prosecution of the mail fraud charge, the Government pursued three alternative theories of criminal liability. The first theory alleged that Murphy defrauded Passaic County of money and property. The second theory accused him of participating in a scheme to defraud the County of the honest services of its County Administrator, who was involved in the bribery scheme. The Government's third theory charged Murphy with depriving the County of its right to Murphy's own honest services in the affairs of the County.

This last theory relied on the decision of the Court of Appeals for the Second Circuit in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), which sustained the conviction of a county chairman under similar circumstances. *Margiotta* was decided over a strong dissent by Judge Ralph K. Winter, who opined that the Court had impermissibly allowed the jury to determine whether a private party official involved himself so much in the government that he acquired a fiduciary duty to its citizens, and that such an inquiry was not based on any legal duties articulated in federal or state law.

The Government's *Margiotta* theory was that Murphy had attained such a dominant role in the political system of Passaic County that he could be considered the equivalent of a publicly elected official, and that Murphy had a fiduciary duty to the County and its citizens to provide honest services which he breached by not informing County officials about the fraudulent nature of the contracts-for-payments scheme.

The District Court permitted the Government to proceed under *Margiotta,* and charged the jury accordingly. Murphy contends that this court should not endorse the *Margiotta* rationale because it is an overreaching interpretation of the mail fraud statute. We agree and conclude, in accord with Judge Winter, that *Margiotta* extends the mail fraud statute beyond any reasonable bounds. In our recent decisions interpreting honest services fraud, we emphasized the need to establish a violation of state law in such cases to serve as a limiting principle on the federal prosecution of local political actors. *See United States v. Panarella,* 277 F.3d 678, 693 (3d Cir. 2002); *United States v. Antico,* 275 F.3d 245, 262 n. 18 (3d Cir. 2001). Although the Government suggests that Murphy's violation of the New Jersey Bribery Act, N.J.S.A. 2C:27-2, which was the predicate offense in the Travel Act charges, could serve as the state law source of a fiduciary obligation, we are not persuaded by this argument. The Bribery Act does not create a fiduciary relationship between Murphy and the public, just as no other criminal statute creates such a relationship between a defendant and the public. Without the anchor of a fiduciary relationship established by state or federal law, it was improper for the District Court to allow the jury to create one. We will therefore reverse Murphy's mail fraud conviction and remand for a new trial in *105 which the *Margiotta* theory of mail fraud will not be submitted.

Because we find reversible error in the mail fraud counts, we must consider whether the evidence the Government presented to support its invalid *Margiotta* theory tainted the jury's verdict on the Travel Act counts as well. The key step in this analysis is the identification of evidence admitted to prove the mail fraud counts that would not be admissible with respect to the charge of bribery under the Travel Act. If such evidence exists that prejudiced the verdict on the Travel Act, we must reverse the entire conviction. According to our decision in *United States v. Pelullo,* 14 F.3d 881,

898-99 (3d Cir. 1994), our investigation into prejudice requires an inquiry into whether: (1) the charges are "intertwined with each other"; (2) the evidence supporting the remaining counts is "sufficiently distinct to support the verdict" on these counts; (3) the elimination of the invalid count "significantly changed the strategy of the trial"; and (4) the prosecution used language "of the sort to arouse a jury."

Murphy contends that under *Margiotta*, the Government was entitled to present evidence about his role in Passaic County government that was prejudicial and not admissible to prove bribery under the Travel Act. We agree. At trial, the Government often justified its admission of evidence regarding Murphy's activities in the County that were unrelated to the specific contracts-for-payments scheme with CMSI by claiming that such evidence supported its *Margiotta* theory of mail fraud. The jury evidently viewed this evidence as concerning the mail fraud *and* Travel Act counts because in a query to the District Court during its deliberations, the jury asked how evidence of Murphy's political activities, which mostly included evidence to prove the *Margiotta* theory, affected the elements of both criminal offenses. Further, much of the evidence that related only to the *Margiotta* theory was highly damaging because it suggested that Murphy had the propensity to engage in corrupt activities.

Finally, because Murphy wanted to limit the evidence of his involvement in Passaic County politics in order to lessen the appearance that he acquired a fiduciary duty to the County under the *Margiotta* theory, it appears that he might have employed a different defense strategy absent this impermissible theory to counter the charge in the Travel Act counts that he had the intent to engage in a corrupt *quid pro quo* rather than ordinary and legal patronage. We must therefore set aside the conviction on Travel Act counts as well as the mail fraud counts, and remand to the District Court for a new trial.

I.

The charged conduct arose out of a "contracts-for-payments" scheme that involved the award of $1,207,199 of Passaic County contracts in exchange for $72,879.25 in payments to four individuals designated by Murphy. We construe the facts on which Murphy's conviction is based "in the light most

favorable to the Government, as we must following the jury's guilty verdict." *United States v. Perez,* 280 F.3d 318, 323 (3d Cir. 2002) (citing *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942)).

A. Murphy's Influence in Passaic County Politics

The Government adduced extensive evidence at trial about Murphy's dominance of numerous aspects of Passaic County's politics. To understand this evidence, some background on the County's political system is necessary. The County is managed by a seven-member Board of *106 Freeholders elected by the voters. The Freeholders have ultimate legislative and administrative responsibility for the County, which includes the approval of County contracts. Because the Freeholders serve part-time and meet only biweekly, an unelected County Administrator conducts the day-to-day operations of the County and serves at the pleasure of the Freeholders. The County Administrator is charged with the responsibility to negotiate contracts on behalf of the County, review and recommend contract bids to the Freeholders, monitor the operations of contractors, and approve payments on contracts.

During the relevant period, all seven Freeholders were members of the Republican Party. As Republican Party County Chairman, Murphy strongly influenced who in his party ran for Freeholder, which Freeholders could run for re-election, who would receive campaign funds, and how the Board of Freeholders operated. Testimony by the County Administrator, Nicola DiDonna, indicated that Murphy handpicked the membership of the Freeholder committees in order to maintain control over the Freeholders' decision-making process.[1] Murphy also took an active role in determining the agenda of Freeholder meetings, including making suggestions about how to vote on resolutions, the selection of contract vendors, and the employment of County personnel.

1 Prior to the commencement of Murphy's trial, DiDonna pleaded guilty to two counts of conspiracy to commit mail fraud. In return for his testimony against Murphy, DiDonna received a reduced sentence of 4 months incarceration.

County Administrator DiDonna apparently owed his job security to Murphy as well. Although DiDonna had been appointed several years before Murphy assumed the Chairmanship of the Republican Party, DiDonna testified as to his belief that his continued enjoyment of his job depended on a positive relationship with Murphy. He also explained how Murphy communicated with the heads of the various County agencies in order to influence their selection of vendors for County contracts and applicants for public employment positions. Although the Freeholders approved the selection of contractors and County personnel, Murphy directed the entire process. Murphy's role was not a secret, and potential contractors knew that they needed his approval before presenting bids to DiDonna or the Freeholders.

B. The Contracts-for-Payments Scheme

In early 1994, CMSI, a company seeking to provide various services to Passaic County, hired Angelo Joseph "Buddy" Fortunato, a former State Assemblyman who had known Murphy's father, to assist in obtaining County contracts.[2] Prior to that time, CMSI held no contracts with the County. Fortunato organized a meeting in February 1994 at Anthony's, a restaurant owned by Murphy in Totowa, New Jersey, at which Fortunato informed Murphy of CMSI's interest in doing business with the County, and Murphy expressed interest in the idea. Murphy arranged a follow-up meeting at his restaurant among the principals of CMSI, Robert Jorgensen and Matthew Burstine, Fortunato, Albert C. Lisbona (a mutual friend of Murphy and Fortunato), County Administrator DiDonna, and himself to see what types of contracts the County could award CMSI. At *107 that meeting, Jorgensen and Burstine proposed that CMSI manage the County's workers' compensation claims, and stated that they could save the County about a million dollars from a reduction in abuse of the system.

2 Fortunato pleaded guilty to one count of conspiracy to commit mail fraud. Like DiDonna, in return for testifying against Murphy, Fortunato received a reduced sentence of 3 years of probation.

Approximately a week later, Murphy spoke again with Fortunato, Jorgensen, and Burstine when they were dining at his restaurant. In response to Murphy's complaint that people were always pestering him for jobs, Burstine suggested that he could help Murphy by creating a four person

"Panel" to advise CMSI. Murphy responded favorably and proposed that the Panel be funded with a portion of the proceeds from any contracts CMSI entered into with the County. In order to pay the Panel the desired sum of $100,000, Burstine and Murphy determined that about $1,000,000 in County contracts would be necessary, which Murphy would help to procure.

Shortly thereafter, Murphy provided Fortunato with a list of four persons to serve as Panel members and the amounts that each should be paid, which Fortunato relayed to Burstine at CMSI. Murphy chose Curt Masklee, his best friend and business partner; John Bonazzi, an undersheriff in the Passaic County Sheriff's Department; Joseph DiDonna, County Administrator DiDonna's father; and Joseph DiPasquale, a member of the State Waterfront Commission to whom Murphy owed a political favor, to serve as Panel members. There was circumstantial evidence presented at trial that Murphy received a portion of Masklee's payments as a kickback, and that DiDonna took a piece of his father's proceeds.

Murphy then began to put pressure on DiDonna to award CMSI a County contract. When it became apparent that a workers' compensation contract would not be available, Murphy pressed DiDonna to aid CMSI in bidding for a third party administration ("TPA") contract at the County jail, regardless of CMSI's lack of experience in this field. DiDonna aided CMSI throughout the bidding process and, notably, allowed it secretly to resubmit a bid after the submission period expired because CMSI had previously filed a bid that was considerably higher than those of its competitors. DiDonna then recommended the CMSI bid to the Board of Freeholders, while Murphy talked to several of the Freeholders about the contract. On July 20, 1994, the Board of Freeholders awarded the TPA contract to CMSI at its revised bid of $165,000.

A short time after the contract was awarded to CMSI, the Panel members had not yet received any payment. This upset Murphy, who relayed his concern to Fortunato. Fortunato explained that CMSI could not fulfill its obligation under the scheme unless it received advance payment on the TPA contract. Murphy contacted DiDonna, who made three months' worth of advance payment on the contract even though it had been in effect for only two weeks. In September 1994, the Panel met for the sole purpose of

receiving their checks according to the amounts specified by Murphy. In order to conceal the operation, the Panel members were paid by a shell corporation established by Jorgensen and Burstine, called Physician's Management, and were instructed to pay taxes on the payments so that the Panel appeared legitimate. This pattern continued: Murphy would pressure DiDonna to ensure that CMSI was paid by the County, and Murphy would press Jorgensen and Burstine at CMSI to call another Panel meeting to distribute payments. No actual work was ever done by the Panel members, who did not have relevant expertise and provided no business advice or guidance to CMSI. Murphy was aware that the *108 Panel members were being paid despite the fact that they did no work.

In order to continue the operation, Murphy, Jorgensen, and Burstine worked with DiDonna to find more County contracts that could be awarded to CMSI. Over the next year, DiDonna helped CMSI receive three more County contracts: $39,625 for arranging drug and alcohol testing for operators of large trucks and heavy machinery; $173,250 to renew the TPA contract; and $624,000 to provide nursing services at the Passaic County Jail.

The scheme began to unravel in May 1996 when DiDonna became nervous about being pressured to find even more contracts for CMSI and the possibility that his father could be harmed if the scheme were exposed. Shortly thereafter, two of the Panel members, Joseph DiDonna and Curt Masklee, wrote letters of resignation. In June and July of 1996, the United States Attorney's Office approached Burstine and Jorgensen and let them know that the scheme had been uncovered. Although they both agreed to cooperate with the Government's investigation, Burstine tipped off Fortunato, Lisbona, DiDonna, and Murphy about the federal investigation and the possibility that CMSI's phones might be tapped. Nevertheless, the Government managed to record Jorgensen and Burstine's telephone conversations and tape meetings during the next two years in order to develop evidence presented at trial, including a conversation between Fortunato and Jorgensen in which Fortunato described the entire history of the scheme.

No further payments were made to the Panel nor contracts awarded to CMSI after the Government's investigation was exposed in July 1996. In

total, the Panel members shared $72,879.25, which was derived from $1,207,199 in County contracts awarded to CMSI.

C. Procedural History

Murphy was indicted by a grand jury. Counts One through Four of the indictment charged Murphy with violations of the Travel Act, 18 U.S.C. § 1952, the underlying predicate offense being bribery under the New Jersey bribery statute, N.J.S.A. 2C:27-2(a). The required interstate commerce element on these counts was four uses of the mails: two mailings of payments to the Panel, one mailing of an invoice with respect to the TPA contract, and one mailing of the nursing services contract. Counts Five through Eight charged violations under the mail fraud statute, 18 U.S.C. §§ 1341 and 1346, and were based upon the same mailings cited in the Travel Act counts. The mail fraud counts were predicated on three theories of liability: first, that Murphy defrauded the County of "money and property"; second, that Murphy caused County Administrator DiDonna to breach his duty of honest services to the County by failing to disclose material information regarding the contracts awarded to CMSI; and third, that Murphy defrauded the County of its right to Murphy's "honest services in the affairs of the County."

The jury returned its verdict on May 14, 2001, convicting Murphy on Counts One through Three (all Travel Act), and Five through Seven (all mail fraud) but acquitting him on Counts Four (Travel Act) and Eight (mail fraud). The jury's verdict was general, and did not specify which theory or theories of mail fraud it believed Murphy had violated. At the sentencing hearing, the District Court increased Murphy's offense level by eight levels since the convictions involved a payment intended to influence an elected official or any official holding a high-level decision-making or sensitive position, pursuant to U.S.S.G. § 2C1.1(b)(2)(B). The Court also imposed *109 a four level increase under U.S.S.G. § 3B1.1(a) because Murphy had organized criminal activity involving five or more participants. On September 18, 2001, the District Court sentenced Murphy to 43 months of incarceration, 3 years of supervised release, a fine of $20,000, restitution of $72,879.25 to Passaic County, and a special assessment of $600.

Judgment was entered on September 24, 2001 and Murphy filed a notice of appeal on the same day. The District Court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

II. The *Margiotta* Mail Fraud Theory

The indictment charged Murphy with four counts of mail fraud pursuant to 18 U.S.C. §§ 1341 and 1346. To recapitulate, each count alleged three theories of how Murphy defrauded Passaic County: Theory One charged him with defrauding the County of money and property; Theory Two alleged a scheme to defraud the County of the honest services of its County Administrator; and Theory Three accused Murphy of violating his duty to provide the County with his own honest services. As we have already noted, Murphy contends that Theory Three stretched the mail fraud statute beyond its reasonable bounds and improperly relied on the oft-criticized holding of *United States v. Margiotta,* 688 F.2d 108 (2d Cir. 1982), which sustained the conviction of a county chairman under similar facts. Murphy does not dispute the legal viability of the Government's other two theories, which we find legally sufficient for the reasons discussed *infra*.

A. Review of General Verdicts

The Government contended at oral argument, and in supplemental briefing, that according to *United States v. Asher,* 854 F.2d 1483 (3d Cir. 1988), we should affirm the mail fraud convictions even if we determine that Theory Three, which relied on *Margiotta,* was not legally viable. In *Asher,* the jury returned a general verdict convicting the defendant of mail fraud, and thus did not specify whether it followed the prosecutor's monetary-loss or deprivation of honest services theory. After the conviction, the Supreme Court ruled in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), that honest services fraud was not a legally viable theory of prosecution under § 1341. Despite not knowing whether the jury relied on the now-impermissible honest services fraud theory, we sustained the defendant's conviction in *Asher* because we were "unable to hypothesize a set of circumstances under which this jury . . . could not have found a fraudulent scheme that consisted solely of depriving the citizens of their

right to honest government that did not also involve tangible losses. . . ." 854 F.2d at 1495-96.

The jury in this case also returned a general verdict, and thus did not specify which of the Government's theories of mail fraud the jury believed Murphy had violated. In the Government's submission, even if we find the *Margiotta* theory of mail fraud not legally viable, we must sustain Murphy's mail fraud conviction because, as in *Asher,* there is no way that the jury could have found that Murphy deprived Passaic County of its right to his honest services without also finding that he devised a fraudulent scheme to deprive the County of money, *i.e.,* the payments to the Panel. We need not evaluate the merits of the Government's contention, however, because the Supreme Court's opinion in *Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), and our interpretation of *Griffin* in *United States v.* *110 *Syme,* 276 F.3d 131 (3d Cir. 2002), undermine *Asher.*

In *Griffin,* the Court articulated a "clear line" distinguishing general verdicts that could have relied on a factually insufficient theory from those that might have been based on a legally invalid theory. 502 U.S. at 59, 112 S.Ct. 466. The former would be sustained, but the latter would merit reversal as the Court explained:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from error. Quite the opposite is true, how ever, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id.

In *Syme,* we examined *Griffin* and the Court's prior decisions concerning whether general verdicts consisting of an unconstitutional, legally invalid, or factually inadequate theory could be sustained. We concluded that "under

Griffin, if one of two or more alternative theories supporting a count of conviction is either (1) unconstitutional, or (2) legally invalid, then the reviewing court should vacate the jury verdict and remand for a new trial without the invalid or unconstitutional theory." 276 F.3d at 144. We are therefore satisfied that current precedent dictates that, should we find one of the Government's theories of mail fraud legally invalid, we must reverse Murphy's conviction on the mail fraud counts and remand for a new trial because the jury returned a general verdict.

B. The *Margiotta* Opinion; the District Court's Charge

We turn to the merits of Murphy's contention that the Government's third theory of mail fraud, relying on *Margiotta,* is legally invalid. The mail fraud statute, 18 U.S.C. §§ 1341 and 1346, provides in relevant part:

> § 1341: Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.
>
> § 1346: For the purposes of [18 U.S.C. § 1341, *et seq.*], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

We have interpreted this statute so that to prove mail fraud, "the evidence must establish beyond a reasonable doubt (1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails . . . in furtherance of the scheme." *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001).

In *Antico,* we reviewed the history of the mail fraud statute and its application to "honest services" fraud, which is also sometimes referred to as the "intangible rights" doctrine. *Id.* at 262 n. 16. Until 1987, many courts applied "scheme or artifice to defraud" in 18 U.S.C. § 1341 broadly and extended it to schemes that defrauded citizens of their right to honest government services. The Supreme Court rejected this construction in

111 *McNally, supra,* when it held that the mail and wire *111 fraud acts did not prohibit conduct that defrauded citizens of their intangible right to honest services, but only of money or property. 483 U.S. at 359, 107 S.Ct. 2875. That decision was informed by the Court's application of the rule of statutory construction that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60, 107 S.Ct. 2875.

Unhappy with this holding and in response to the Court's desire for a clear legislative voice, Congress enacted 18 U.S.C. § 1346, which sought to restore the mail fraud jurisprudence to its status pre- *McNally. Antico,* 275 F.3d at 262 n. 18; *see also Cleveland v. United States,* 531 U.S. 12, 20, 121 S.Ct. 365, 148 L.Ed.2d 221 (stating that "Congress amended the law specifically to cover one of the `intangible rights' that lower courts had protected under § 1341 prior to *McNally:* `the intangible right of honest services'"). Recognizing "Congress' clear intent in enacting § 1346," this court held in *Antico* that § 1346 "includes the prosecution of state and local officials and public employees for depriving the citizens they serve of their right to honest services." 275 F.3d at 262.

The prosecution of a private party official is, however, a horse of another color. The only case cited by either party that applied such an interpretation of the mail fraud statute is *Margiotta.* [3] In that case, the Court of Appeals for the Second Circuit upheld the conviction of Joseph Margiotta, the Chairman of the Republican Committee of Nassau County and the Town of Hempstead, New York. Like Murphy, Margiotta wielded significant political influence and used this power to construct a contracts-for-payments scheme far more extensive than that with which Murphy was charged. 688 F.2d at 113-14. Margiotta was indicted for, *inter alia,* one count of mail fraud, alleging that he defrauded the citizens of either (1) the right to the honest services of their government officials or (2) "the right to Margiotta's honest and faithful participation in the governmental affairs of the Town, County, and State." *Id.* at 114.

3 Aside from *Margiotta,* the Government can only muster a citation to the Supreme Court's opinion in *McNally* for the general proposition that a

county chairman may act like a public official and owe a fiduciary duty to the government. This citation to *McNally* is unhelpful, however, since the Court only assumed the facts as the government presented them for the purposes of that case, and then went on to reverse the conviction anyway. 483 U.S. at 352, 361, 107 S.Ct. 2875. No other court has expressly followed *Margiotta,* thus it remains the Government's sole direct authority. Indeed, it is questionable whether *Margiotta* is even good law any longer in the Second Circuit since that Court has expressly foreclosed the use of pre- *McNally* cases when construing the meaning of § 1346. *See United States v. Sancho,* 157 F.3d 918, 921-22 (2d Cir. 1998).

On appeal, a divided panel of the Second Circuit rejected Margiotta's argument that an alleged deprivation of an intangible right to one's honest services under the mail fraud statute could exist only when the defendant owed a fiduciary duty to the victim based on a formal legal relationship. 688 F.2d at 121-22. In the political context, Margiotta had contended that the statute should only reach public officials, who owe a fiduciary duty to their constituents, and not party officials, who only owe a fiduciary duty to their employer, the political party. Initially, the panel recognized the pitfall in finding a private actor equivalent to a public official for the purposes of criminal liability and noted:

> On the one hand, it is essential to avoid the Scylla of a rule which permits a finding of fiduciary duty on the basis of mere influence or minimum participation in the processes of government. Such a *112 rule would threaten to criminalize a wide range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service. On the other hand, the harm to the public arising from the sale of public office and other fraudulent schemes leads us to steer a course away from the Charybdis of a rule which bars on all occasions, as a matter of law, a holding that one who does not hold office owes a fiduciary duty to the general citizenry even if he in fact is conducting the business of government.

112

Id. at 122.

Despite these concerns, the panel approved a gestalt approach that allowed the jury to derive a fiduciary duty on the part of Margiotta based on (1) a general reliance test, which looked at whether others relied on Margiotta "because of a special relationship in the government," and (2) a de-facto control test that examined whether Margiotta was "in fact mak[ing] governmental decisions." *Id.* at 122. The Court defended these tests by claiming that they "recognize the important distinction between party business and government affairs, permitting a public official to act in accordance with partisan preferences or even whim, up to the point at which he dominates government." *Id.*

Although the panel recognized that there might be federalism problems in using a federal criminal statute to prosecute local political actors, it girded its holding by citing New York state cases that supported the broad proposition that political party officials might owe a fiduciary duty to the citizenry under state law. *Id.* at 124-25. Even so, the panel abjured a narrow holding that "absent a showing of a violation of New York statute or a duty imposed by New York law, a defendant may not be found guilty" of mail fraud because the statute was enacted to "prohibit the use of mails for promoting schemes contrary to federal public policy." *Id.* at 125. In other words, although it found some state law that supported the holding, the panel clearly rejected the contention that the prosecution must prove that the defendant violated a state law in order to sustain his mail fraud conviction. *Id.*

After approving this mail fraud theory, the Second Circuit panel looked at the sufficiency of the evidence. It found that the district court had correctly instructed the jury that "in order to decide that Margiotta had breached his fiduciary duty, it had to find that Margiotta had concealed from those in Government who rely on his participation material information concerning his entry into a corrupt agreement to influence him in the performance of his governmental functions." *Id.* at 127 (quotations omitted). Further, the panel noted that "an affirmative duty to disclose could reasonably be inferred from the de facto employer-employee relationship Margiotta enjoyed with the municipal government." *Id.* at 128. Finding ample evidence that the jury could infer both a fiduciary duty and a breach thereof, the Court affirmed the conviction of Margiotta on the mail fraud count. *Id.*

The District Court in the case at bar relied extensively and exclusively on *Margiotta* in its charge to the jury on the Government's Theory Three of mail fraud. The Court's reliance is evidenced, for example, in the charge to the jury, which read in relevant part:

> In order to find the defendant guilty of defrauding Passaic County and its citizens of their right to his own honest services you must find that the defendant Murphy had a fiduciary duty and that he violated that duty by failing to disclose material information. An individual may have such a fiduciary duty even if he is technically not an employee of the particular local government — *113 here, Passaic County. An individual who knowingly undertakes the business of governing a particular jurisdiction owes a duty of loyalty to the citizens just as does one who formally holds public office. An affirmative duty to disclose can reasonably be inferred from what is essentially an employer-employee relationship. Thus, you may find that the defendant Murphy had a fiduciary duty to Passaic County and its citizens, if you find that the work done by [the] defendant was in substantial part the business of Passaic-County [*sic*] government, rather than being solely party business, and that the performance of that work was intended by him and relied on by others in Passaic County government as part of the business of government in order to carry forward its affairs as a whole. In determining whether the defendant had a fiduciary duty, among other things, you should consider whether the defendant regularly participated in the selection of persons for public positions, regularly participated in the selection of vendors for Passaic County business, or otherwise regularly participated in running Passaic County business. If you find that defendant Murphy essentially served as a fiduciary for Passaic County, then he had a duty to disclose material information to those in Passaic County government who relied on him.

Essentially, the charge stated that if Murphy knowingly undertook governmental functions and others relied on him, then he could have a fiduciary duty that he breached by not notifying Passaic County of the

arrangement to award contracts to CMSI in return for payments to the Panel.

C. Is *Margiotta* 's Honest Services Fraud Theory Legally Viable? 1. The Parties' Contentions; Judge Winter's Dissent

Murphy urges us not to follow *Margiotta* for several reasons. First, he points out that our recent decision in *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002), precludes a broad reading of *Margiotta*'s holding that a jury may find that a party official has a fiduciary duty absent any reference to a breach of fiduciary duty found in state law. In *Panarella*, we held that "the existence of a violation of state law . . . is sufficient to establish honest services wire fraud," though we did not resolve the issue of whether a state law duty was necessary. *Id.* at 699 n. 9. Second, Murphy argues that the indictment and charge in this case did not allege that Murphy had a fiduciary duty based on New Jersey state law to disclose material information to Passaic County. Finally, he contends that reading § 1346 as imposing a fiduciary duty on local party officials without reference to state law would violate the "clear statement" rule, the principle of lenity, and that of federalism, which we noted in *United States v. Antico, supra*, and *Panarella*, were significant concerns regarding the application of the statute. In support of his position, Murphy invokes Judge Winter's forceful *Margiotta* dissent, which illustrated the numerous problems with allowing a jury to find a fiduciary duty without any reference to established law.

Judge Winter opined that although the majority's opinion in *Margiotta* was based on precedents that pushed honest services mail fraud to its logical limit in reaching public officials, it was an unacceptable leap to allow "a jury [to] find that a politically active person has sufficient influence and power over the acts of elective officials to be subject to the same duty as those officials so far as those acts are concerned." 688 F.2d at 142 (Winter, J., dissenting). In Judge Winter's view, the source of this "impermissible result" was "an erroneous analogy between fiduciary relationships involving *114 private parties . . . and relationships between politically active persons and the general citizenry in a pluralistic, partisan, political system." *Id.* Noting the varying requirements of fiduciary duties in different contexts (*e.g.*,

employer-employee, trustee-beneficiary, director-shareholders, etc.), Judge Winter faulted the majority for allowing a jury to find that a party official could have a fiduciary duty absent some guidance. *Id.* Such a result, Judge Winter reasoned, leaves juries the freedom "to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Id.*

The Government asks us not to follow Judge Winter's dissent because it contends that it pertained to the problems of "honest services" fraud generally, and Congress has since resolved this concern by enacting § 1346 to allow for these types of prosecutions. The Government also points to this court's decisions in *Antico* and *Panarella*, which held that § 1346 was a sufficiently clear statement to permit the prosecutions of public officials. Murphy finds the Government's citations to *Antico* and *Panarella* unpersuasive; he notes that Judge Winter reasoned that for private party officials "there is no description" of "a line between legitimate patronage and mail fraud." *Id.* at 115, 117. Murphy argues that we must draw such a bright line. He claims that while government officials are bound by their office to act in the public interest, a party official is an entirely different creature. He further contends in his brief that party officials "are expected to pursue their self-interest. Far from impartial, they are entitled to be partisan. In the rough-and-tumble of politics, they will bring pressure upon public officials to favor their interests above others'. . . ."

Murphy also cites our own precedent expressly rejecting an analogy between county chairmen and government officials in a one-person, one-vote case. *Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965). In *Lynch*, we determined that "the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices. . . ." *Id.* Rather, local party leaders "may be responsible for raising and spending money in the party interest"; "may plan and direct" campaigns, issue advocacy, and voter registration drives; and "may administer political patronage." *Id.* While that case noted that there may be some situations in which a party official's activities could be considered state action (*e.g.*, when making emergency nominations for public office), we squarely rejected the idea of viewing county chairmen and government officials equivalently. *Id.*

2. Is the Government's Theory that a County Chairman May Act Like a Public Official and Acquire a Fiduciary Duty to the Local Government Viable?

We turn to an analysis of the Government's *Margiotta* theory. While the idea of allowing a jury to determine whether a party official acted enough like a government official is itself enough to give us pause, the Government recognized belatedly in this appeal the apparent need for a state law source to buttress its theory of honest services fraud. As noted above, the *Margiotta* court skirted the issue of whether state law is relevant to a mail fraud conviction. 688 F.2d at 105 n. 2. Both parties here have recognized, however, that in our decisions in *Panarella* and *Antico* we noted that a violation of state law serves as an important limiting principle on the scope of § 1346 honest services fraud, which might be necessary to avoid lenity and federalism concerns in federal prosecutions of state or local political officials. *115 *Panarella,* 277 F.3d at 693; *Antico,* 275 F.3d at 262 n. 18.

Before determining whether a state law predicate is indeed necessary, we need to see if the Government asserts a valid predicate. The first time the Government actually articulated a state law predicate, a violation of the New Jersey Bribery Act, N.J.S.A. 2C:27-2, was in its brief on appeal. Neither the indictment nor the charge informed the jury that they needed to find that Murphy violated a state law in order to determine whether he had a fiduciary duty to Passaic County. Although the jury convicted Murphy of violating the New Jersey Bribery Act, that served as the predicate of the Travel Act counts and was not advanced in connection with mail fraud. At all events, despite the Government's new appellate argument, we are not persuaded that the New Jersey Bribery Act provides a fiduciary duty on the part of Murphy as a party official to disclose material information to Passaic County for several reasons.

First, as noted above, the jury was never asked to determine whether a fiduciary duty could be inferred from the New Jersey Bribery Act. Theory Three of the charge asked the jury to consider generally "whether the defendant regularly participated in running Passaic county business," but it did not allege that Murphy was involved in a scheme that violated the New Jersey Bribery Act, but rather that he breached "a duty to disclose material

information to those in Passaic County government who relied on him." While the Government is correct in noting that N.J.S.A. 2C:27-2 applies to party officers as well as public officials, it cannot point to anything in the statute that creates a fiduciary duty on the part of party officials to disclose information to the government. Rather, the statute only proscribes "the solicit[ation], accept[ance], or agree[ment] to accept from another . . . [a]ny benefit as consideration for a decision, opinion, recommendation. . . ." *Id.* Moreover, while bribery may often accompany breaches of a duty to disclose, *see Panarella,* 277 F.3d at 695, and may even be the paradigm case of honest services fraud committed by public officials, *see United States v. deVegter,* 198 F.3d 1324, 1327 (11th Cir. 1999), the Government points to no case that found that a bribery statute can create an obligation to provide honest services without any preexisting legal duty.

This final point is the crux of the issue, and it presents a slightly different question from that which we addressed in *Antico* and *Panarella.* In those cases we assumed, based on extensive pre- *McNally* case law, that public officials have a duty to provide honest services to the public. We then looked to state law to ascertain what standards of fiduciary care the public officials were required to meet in order to determine whether the officials defrauded the citizens of their right to honest services.[4] For example, in *Antico,* we referred generally to state and local conflict of interest laws to identify what fiduciary duties the defendant owed to the public. 275 F.3d at 264. And, in *Panarella,* we found "that the clarity of [the state's] disclosure statute

116 criminalizing a public official's nondisclosure of his sources of income *116 addresses rule of lenity concerns . . . more effectively than does [a general prohibition against] `misuse of office for personal gain.'" 277 F.3d at 693. These cases best support Theory Two of the Government-that Murphy participated in a scheme to defraud Passaic County of County Administrator DiDonna's honest services-since the bribery statute clearly relates to services that DiDonna, as a public official and fiduciary, owed to the citizenry.

4 In *Antico,* the defendant was himself a public official. In *Panarella,* the defendant was a private businessman who bribed a Pennsylvania State Senator, but the Government's theory was that the defendant was guilty of being an accessory after the fact under 18 U.S.C. § 3 to a wire fraud scheme

> to deprive the public of the State Senator's honest services in violation of 18 U.S.C. §§ 1343, 1346. 277 F.3d at 689. Thus, the central inquiry was whether the State Senator had committed honest services wire fraud-not whether the defendant had done so.

These cases do not, however, answer the question whether the New Jersey Bribery Act alone can create a fiduciary *relationship* that could then serve as the predicate for determining that Murphy himself owed honest services to Passaic County and its citizens. Murphy submits that *McNally* stands for the general proposition that absent a "clear statement" from Congress, a court should not "construe the [federal mail fraud] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 350. We agree. Although we have held that § 1346 was a clear statement by Congress that it wished to criminalize honest services fraud, *see Antico,* 275 F.3d at 261, we recognized in *Panarella* the need for a "limiting principle defining the scope of honest services fraud." 277 F.3d at 694.

More specifically, this is because the plain language of § 1346 provides little guidance as to the conduct it prohibits. We explained:

> Deprivation of honest services is perforce an imprecise standard, and rule of lenity concerns are particularly weighty in the context of prosecutions of political officials, since such prosecution may chill constitutionally protected political activity. Moreover, decisions of our own Court stating that "fraud is a broad concept that `is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community,'" [citations omitted] do little to allay fears that the federal fraud statutes give inadequate notice of criminality and delegate to the judiciary impermissibly broad authority to delineate the contours of criminal liability.

Id. at 698; *see also Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (stating that the rule of lenity "serves to ensure that there is fair warning of the boundaries of criminal conduct and that

legislatures, not courts, define criminal liability"). We thus endorse (and are supported by) the decisions of other Courts of Appeals that have interpreted § 1346 more stringently and required a state law limiting principle for honest services fraud, as set forth in the margin.[5] *117

117

[5] In *United States v. Brumley,* 116 F.3d 728 (5th Cir. 1997), for example, the Court of Appeals for the Fifth Circuit held *en banc* that state law must provide the specific honest services owed by the defendant in a fiduciary relationship. *Id.* at 734. Looking at the plain language of the statute, the Court found nothing "to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of . . . an ethical regime." *Id.* Rather, "[u]nder the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law." *Id.*

Similarly, the Court of Appeals for the Second Circuit concluded that § 1346 stands "for the proposition that a scheme to harm another by breach of a duty enforceable by an action in tort may support a conviction for a scheme to defraud another of `honest services,'" *United States v. Handakas,* 286 F.3d 92, 106 (2d Cir. 2002), but it then found § 1346 unconstitutionally vague as applied to a conviction of honest services mail fraud based on the violation of duties to report material information as mandated by state labor and constitutional law. *Id.* This holding is much broader than this court's in *Panarella* in that the *Handakas* Court concluded that wrongs covered by state criminal and contract law could not form the basis of a definition of "honest services."

Murphy urges us to address the issue we reserved in a footnote in *Panarella:* Whether a violation of a state-law created fiduciary duty is *required* to sustain an honest services fraud conviction. *Id.* at 699 n. 9. Although federalism concerns are paramount in federal prosecutions of local political party officials, we do not think that this case requires us to resolve that question. This is because *Panarella* and *Antico* address the different issue of what *types* of fiduciary duties are required, within the meaning of honest services, when either state or federal law already clearly establishes a fiduciary relationship. Here, in contrast, the Government cannot identify any clearly established fiduciary relationship or legal duty in either federal or state law between Murphy and Passaic County or its citizens. In other

words, it cannot point to an established "right" of honest services that Murphy owed to the County or its citizens beyond a criminal statute, which we do not believe can create a fiduciary relationship. The Government's use of the *Margiotta* theory of honest services fraud therefore falls far outside the classical definition of fraud. *See Panarella*, 277 F.3d at 695 ("Fraud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation.") (quoting *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987)).

Reading the New Jersey Bribery Act as the Government does would require us to find not merely a duty owed in that statute, but also the predicate for a fiduciary relationship between a county political chairman and the public. We cannot endorse this methodology because all criminal activity would breach a duty to the public not to break the law that could then form the basis of a mail fraud conviction. This outcome would, of course, run counter to the federalism concerns we expressed in *Panarella* about the potentially limitless application of § 1346. While we recognize that the New Jersey Bribery Act properly restricts the conduct of party officials, probably in recognition of their influential political position, we cannot read it as creating a fiduciary or other legal relationship to the public.

Without any legal basis for determining whether Passaic County or its citizens had a right to Murphy's honest services, we conclude that it was improper for the District Court to allow the jury to conjure such a duty out of a fog of assumptions. In *Panarella* we warned about the "parade of horribles envisioned by those who fear overly broad application of the federal mail and wire fraud statutes." 277 F.3d at 699. One example of such an overly broad application we cited was from Judge Winter's dissent in *Margiotta*, in which he posited that under the *Margiotta* theory, "[a] partisan political leader who throws decisive support behind a candidate known to the leader to be less qualified than his or her opponent because that candidate is more cooperative with the party organization, is guilty of mail fraud unless that motive is disclosed to the public." 688 F.2d at 140 (Winter, J., dissenting). While Murphy's actions certainly were not the same as in this hypothetical, we note that there is nothing in *Margiotta* that would prevent an over-zealous prosecutor from pursuing this scenario.

Further, we agree with Judge Winter that *Margiotta* fails to provide any logical *118 rationale for treating private party officials in the same manner as public officials since such a loose interpretation of the mail fraud statute creates "a catch-all political crime which has no use but misuse." *Id.* at 144; *see also* John C. Coffee, Jr., Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 *Am.Crim. L.Rev.* 427, (Spring 1998) ("The overreach in [*Margiotta*'s] theory is obvious and invades even the sphere of the First Amendment.").

Because *Margiotta* is in direct contravention of the principles of honest services fraud we articulated in *Antico* and *Panarella*, and the jury did not specify which theory of mail fraud it believed Murphy violated, we will reverse Murphy's conviction on the mail fraud counts and remand to the District Court for a new trial absent this legally invalid theory.

III. Did Spillover of *Margiotta* Evidence "Taint" the Entire Conviction?

Murphy contends that should we reverse on the mail fraud counts, we must also vacate the entire conviction because the evidence presented by the Government to support its invalid *Margiotta* theory of mail fraud "tainted" the jury's verdict on the Travel Act counts as well. When we find reversible error on one or more counts, we consider "whether the presence of the [invalidated] count[s] had any spillover effect sufficiently prejudicial to call for reversal" of the remaining counts. *United States v. Pelullo*, 14 F.3d 881, 897-98 (3d Cir. 1994) (citation omitted).

The critical factor in any claim of "taint" is the existence of evidence admitted to support the invalid counts that would not be admissible to prove the remaining counts. *United States v. Cross*, 308 F.3d 308, 318 (3d Cir. 2002). Only if we find such evidence must we "consider whether the verdict on the remaining count was affected adversely by the evidence that would have been inadmissible at trial limited to that count." *Id.* This requires an inquiry into whether (1) the charges are "intertwined with each other"; (2) the evidence for the remaining counts is "sufficiently distinct to support the verdict" on these counts; (3) the elimination of the invalid count

"significantly changed the strategy of the trial"; and (4) the prosecution used language "of the sort to arouse a jury." *Pelullo,* 14 F.3d at 898-99.

Murphy claims that the Government was allowed to put on a considerable amount of evidence to support its *Margiotta* theory that would otherwise have been inadmissible solely to prove bribery under the Travel Act. As explained in Section II of this opinion *supra,* the cornerstone of the *Margiotta* theory as applied in this case was that Murphy acquired a fiduciary duty to Passaic County and its citizens by virtue of his extensive influence over the County's governance. Because the jury would be charged with determining whether this fiduciary duty existed based on how Murphy participated in County governance, the Government was entitled to present evidence detailing all aspects of Murphy's involvement in County politics.

As Murphy points out, much of this evidence was not directly related to the bribery charges under the Travel Act. Murphy specifically identifies testimony by Passaic County Administrator DiDonna and Panel member Curt Masklee concerning the power Murphy wielded in the County and statements that Murphy handpicked and controlled the County Freeholders, ran County business at his restaurant, and boasted that he had the jobs of 2,000 people in his hands. [A132-38, 152-304.] Some of this evidence gave the impression of Murphy as a back-slapping, corrupt party boss. *119

More specifically, in testimony recorded in over 160 pages of transcript, Masklee and DiDonna explicate Murphy's role in and control over Passaic County government as exemplified by the following statements: Murphy would "hold court" at his restaurant where he would discuss County business; Murphy had an interest in who handles County bonds; Murphy cooperated with the County Sheriff to prevent State Senator Joe Bubba from countering Murphy's control of the County; there was an alliance between Murphy and the County Sheriff since 1991 to assert dominance over County affairs; Murphy allegedly stated, "I hold the careers of people in my hand, 2,000 people, I hold their jobs in my hands"; Murphy demonstrated to the vendors the power he had in the County; Murphy determined on which committees the Freeholders would serve so that he could have "ultimate control"; Murphy got his friend appointed as County Adjuster; Murphy's orders to the Freeholders to confirm his recommended appointments are

more than a "mere recommendation"; Murphy arranged for a part-time job for an associate at the Office of Aging; Murphy aided a subcontractor in his attempt to get paid by a contractor by providing the contractor with an emergency County contract in return; Murphy helped the son of a County official get transferred to another government job; he helped the same official's campaign worker get a government position; Murphy got a labor lawyer hired who was meant to do work at the County hospital but instead spent his time trying to get a bill passed in the State legislature that would have provided the undersheriff with job protection; Murphy ensured that there was always enough County work for another lawyer, who would clear settlements of County matters with Murphy before going to the Freeholders; Murphy helped the State Democratic Party chairman obtain consulting work in the County, including as part of various construction contracts; Murphy occasionally received flow charts of the County departments from DiDonna so that he would know where he could place individuals in County jobs; he also received the vender list, which Murphy would use to solicit venders for political fundraising; Murphy placed the wife of his friend Curt Masklee on the Welfare Board, an autonomous County agency; Murphy ordered a letter drafted to the State Medical Examiner so that an individual who ran a local funeral home could continue doing business with the County Medical Examiner; at the request of the Sheriff, Murphy had an individual appointed to handle security for the Vo-Tech school; the Sheriff and Murphy also cooperated to choose the appointment for Emergency Management Coordinator, and Murphy pressed DiDonna to put this choice before the Freeholders even after he did not appear on the first selection list, which the Freeholders did because he was "Murphy's guy"; Murphy successfully urged the County payroll supervisor to reduce the salary of the newly elected County Clerk compared to the prior Clerk because she sent a flier saying that the Sheriff endorsed her without the Sheriff's approval; Murphy also told the new Clerk whom he wanted her to hire as Deputy Clerk and what that person's salary should be, orders she should follow if she would want a raise in the future; Murphy would get people appointed to County jobs by disregarding the Civil Service list; Murphy intervened to assist a relative who worked for the County Utilities Authority in settling his disability claim; Murphy helped a construction company that built the County Administration Building get paid when it was

having problems with the County; Murphy helped a fellow resident from Totowa get a raise and a job title change; the Sheriff and Murphy collaborated in getting the former police chief of *120 Prospect Park appointed part time director of the police academy; Murphy played a role in arranging for raises for County attorneys by lobbying the Freeholders; Murphy intervened to prevent a groundskeeper at the hospital from getting fired; he also got the cook at his restaurant a second job at the hospital, which posed problems with the union because only this cook got the weekend off (to work at Murphy's restaurant); Murphy created a legal instructor job in the County Counsel's Office to help an individual who needed health benefits; he also got a lawyer who worked for a political rival a County job so as to make that lawyer loyal to him and weaken his rival; Murphy ordered the appointment of an insurance agent on record for the County and a secretary in the Public Works Department to similarly gain the loyalty of these individuals who were associated with a political rival; the president of the County College came to Murphy at his restaurant asking for help in his reappointment, which Murphy successfully did; Murphy urged the creation of a job in the Department of Human Services for a lawyer who needed a job, but this individual did no real work; Murphy promoted the hiring of an individual for a post at the Countyrun camp; Murphy helped Albert Lisbona, a Panel member and friend of Murphy, in securing legal work for the County on its bond issues in exchange for a monetary kickback to Murphy;[6] Murphy also arranged for the provision of a piece of the bond issues work to an accountant of his choosing; Murphy ordered the Freeholders to set a certain salary for the County's Registrar of Deeds and his deputy; Murphy placed a lawyer on the County high school's payroll; Murphy helped a political protege who lost an election to get a job in the Community College; Murphy met with the head of the County Parks Department at his restaurant and notified the official that he supported him continuing in that position; Murphy interceded to prevent the hospital from laying-off its finance manager; Murphy determined who would get the host benefit payments from the revenues generated by the County's waste transfer station; Murphy got involved in negotiations to expand the size of the waste transfer station and ostensibly represented the County in this transaction; Murphy also negotiated a settlement with the developer on a failed project to build an incinerator; Murphy bailed out someone who

purchased land for development but was prevented from doing so because of environmental reasons by having the County purchase the land and turn it into a park; Murphy orchestrated a plan to get a former Freeholder appointed as director of the County Utilities Authority, and then negotiated a generous severance package when the County sought to have the newly-hired director fired from the job; and Murphy took care of the County chairman for the Democratic Party by supporting him on the Welfare Board.

[6] It is particularly instructive that in response to Murphy's objection to DiDonna's testimony on this unrelated kickback scheme, the Government claimed that there was no issue of inadmissible character evidence under Fed.R.Evid. 404 because the testimony related to Murphy's "give and take with respect to vendors," which suggests Murphy's role in influencing County governance under *Margiotta,* but does not imply any relevance to the bribery charge under the Travel Act.

The Government counters that this evidence would have been admissible to prove bribery under the Travel Act in order to show that Murphy had the opportunity and ability to orchestrate the contracts-for-payments scheme. We do not gainsay that some of this evidence might also have been admissible under the Government's first two theories of mail fraud, and thus *121 did not only go to the impermissible *Margiotta* theory. However, we think that the proper method for evaluating "taint" is to look at whether any "evidence introduced to support the reversed count," in this case, the mail fraud counts, "would have been inadmissible at a trial on the remaining count." *Cross,* 308 F.3d at 317. We deal here with the three remaining counts — the Travel Act counts incorporating the New Jersey Bribery Act. While we agree that portions of this *Margiotta* evidence might still have been admissible to prove the bribery or Travel Act violations, we do not find this argument sufficient to avoid Murphy's charge of "taint" for several reasons. First, the Government admitted before the District Court that its reason for presenting much of this evidence was to prove its *Margiotta* theory of mail fraud. For example, in response to an objection by Murphy as to some testimony by Curt Masklee, the Government stated that "there is going to be hours of testimony from Mr. DiDonna, about Mr. Murphy's involvement on the *Margiotta* issues" and that "[t]he evidence will show on a broader level that Mr. Murphy had direct involvement in the operations of Passaic

County Government, and picking vendors, and picking employees to work in the county, and then *that goes directly to the central issue in this case of Mr. Murphy's involvement under the* Margiotta *issues."* [A132, 133 (emphasis added).] This enabled the Government to admit practically any evidence on Murphy's political activities without having to show its relevance to the Travel Act counts.

Moreover, when the jury posed a question to the District Court regarding the interpretation of evidence of Murphy's patronage activities, which substantially included evidence designed to prove the *Margiotta* theory, the jury clearly indicated that this evidence was central to its deliberations on both the mail fraud and Travel Act counts. It is therefore highly probable that the charges were "intertwined" in the mind of the jury, and that the jury relied on the evidence of Murphy's political activities in its deliberations on the Travel Act counts.

Murphy also argues convincingly that the absence of the *Margiotta* theory of mail fraud would have greatly changed his strategy at trial. Because evidence of Murphy's political involvement could be construed by the jury under this theory as creating a fiduciary relationship, Murphy wanted to minimize a discussion of his involvement in Passaic County governance. On the other hand, such evidence would have been useful to his defense to the Travel Act charge that he did not have the requisite criminal intent to turn the contracts-for-payments scheme into a corrupt *quid pro quo* because he routinely engaged in such patronage, which is legal. Absent the impermissible *Margiotta* theory, it is likely that Murphy would have employed a different defense strategy that would have allowed him free reign to present his role in the County in order to rebut the inferences that his participation in the scheme was anything more than ordinary and legal patronage.

Finally, as discussed above, some evidence of Murphy's influence over the Passaic County government may be relevant under the Travel Act counts in order to illustrate Murphy's role in the bribery scheme. But the quantum of evidence introduced to show Murphy in effect acted as a government official would not be necessary absent the *Margiotta* theory. The Court specifically instructed the jury that "[i]t is no defense to the charge of bribery that the

person receiving or soliciting the bribe . . . was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason." Thus, any evidence *122 of favor-trading or inappropriate acts that did not have any relevance to the elements of bribery or to Murphy's opportunity to instigate this particular contracts-for-payments scheme would be irrelevant. The cumulative effect of unrelated evidence likely left an impression with the jury that Murphy routinely engaged in corrupt political activities and thus might have had the propensity to engage in the charged contracts-for-payments scheme.

We also note that "[w]hen evaluating taint or spillover effect, courts have applied a test somewhat favorable to the defendant." *Pelullo,* 14 F.3d at 898. For the foregoing reasons, we are satisfied that "the jury was likely to be confused or relied upon improper evidence," *id.,* in its deliberations on the remaining counts, and that there was spillover of evidence from the improper *Margiotta* theory that tainted those convictions as well. We will therefore reverse the judgment and remand this case to the District Court for a new trial on all counts in which the Government may not use the *Margiotta* theory of honest services fraud liability.[7]

7 Because we will reverse the entire conviction and remand for a new trial, we do not need to address Murphy's arguments concerning allegedly insufficient supplemental instructions in response to the jury's queries during its deliberations, and allegedly erroneous evidentiary and sentencing rulings.

*214

Make your practice more effective and efficient with Casetext's legal research suite.

18-3710(CON)
United States Court of Appeals, Second Circuit

United States v. Percoco

13 F.4th 158 (2d Cir. 2021)
Decided Sep 8, 2021

Docket Nos. 18-3710(CON) 18-3712(CON) 18-3715(CON) 18-3850(CON) August Term 2019

09-08-2021

UNITED STATES of America, Appellee, v. Joseph PERCOCO, Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, aka Dr. K, Defendants-Appellants, Peter Galbraith Kelly, Jr., Michael Laipple, Kevin Schuler, Defendants.

Matthew D. Podolsky, Assistant United States Attorney (Robert L. Boone, Janis M. Echenberg, and Won S. Shin, Assistant United States Attorneys, on the brief), for Audrey Strauss, United States Attorney for the Southern District of New York, New York, New York, for Appellee. Alexandra A.E. Shapiro (Daniel J. O'Neill and Fabien M. Thayamballi, on the brief), Shapiro Arato Bach LLP, New York, New York, for Defendant-Appellant Steven Aiello. Paul L. Shechtman, Bracewell LLP, New York, New York, for Defendant-Appellant Louis Ciminelli. Milton L. Williams (Jacob Gardener and Avni P. Patel, on the brief), Walden Macht & Haran LLP, New York, New York, for Defendant-Appellant Joseph Gerardi. Michael C. Miller (Bruce C. Bishop, Reid H. Weingarten, Michael G. Scavelli and David B. Hirsch, on the brief), Steptoe & Johnson LLP, New York, New York and Washington, DC, for Defendant-Appellant Alain Kaloyeros.

Chin, Circuit Judge

Matthew D. Podolsky, Assistant United States Attorney (Robert L. Boone, Janis M. Echenberg, and Won S. Shin, Assistant United States Attorneys, on the brief), for Audrey Strauss, United States Attorney for the Southern District of New York, New York, New York, for Appellee.

Alexandra A.E. Shapiro (Daniel J. O'Neill and Fabien M. Thayamballi, on the brief), Shapiro Arato Bach LLP, New York, New York, for Defendant-Appellant Steven Aiello.

Paul L. Shechtman, Bracewell LLP, New York, New York, for Defendant-Appellant Louis Ciminelli.

Milton L. Williams (Jacob Gardener and Avni P. Patel, on the brief), Walden Macht & Haran LLP, New York, New York, for Defendant-Appellant Joseph Gerardi.

Michael C. Miller (Bruce C. Bishop, Reid H. Weingarten, Michael G. Scavelli and David B. Hirsch, on the brief), Steptoe & Johnson LLP, New York, New York and Washington, DC, for Defendant-Appellant Alain Kaloyeros.

Before: Raggi, Chin, and Sullivan, Circuit Judges.

Chin, Circuit Judge:

Defendants-appellants Steven Aiello, Joseph Gerardi, Louis Ciminelli, and Alain Kaloyeros appeal from judgments entered by the district court (Caproni, *J.*), convicting them of conspiracy to engage in wire fraud by engaging in a scheme to rig the bidding processes for New York State-funded projects, in violation of 18 U.S.C. § 1349. 164 Aiello, Gerardi, and Kaloyeros also *164 appeal from their convictions for wire fraud, in violation of 18 U.S.C. §§ 1343 and 2, in connection with rigging the bidding for projects in Syracuse, New

casetext

York, and Ciminelli and Kaloyeros appeal from their convictions for wire fraud under the same provisions for rigging the bidding for projects in Buffalo, New York. Gerardi also appeals his conviction for making false statements to federal officers, in violation of 18 U.S.C. § 1001(a)(2).[1]

[1] The superseding indictment charged the defendants and others with eighteen counts stemming from alleged corruption and abuse of power. The district court severed the counts of the superseding indictment into two trials, one for the counts involving alleged bribes taken by Joseph Percoco, the former Executive Deputy Secretary to the former Governor Andrew Cuomo, and the second on the counts stemming from the bid-rigging scheme discussed above. Both trials resulted in convictions. The appeals were consolidated. This opinion addresses only those appeals of the convictions at the second trial. We address the issues relating to the bribery trial in a separate opinion.

On appeal, defendants challenge the sufficiency of the evidence with respect to the charged wire fraud conspiracies, the instructions to the jury regarding the right-to-control theory of wire fraud and the good faith defense, the preclusion of evidence regarding the success of the projects awarded to defendants through the rigged bidding system and the admission of evidence from competitors regarding the range of fees typically charged by other companies in the market, and the district court's denial of Gerardi's motion to dismiss his false statement charge for alleged prosecutorial misconduct.[2]

[2] Defendants also contend that the right-to-control theory of wire fraud is itself invalid, primarily arguing that the right to control one's own assets is not "property" within the meaning of the wire fraud statute. Defendants acknowledge that the right-to-control theory of wire fraud is well-established in Circuit precedent, *see, e.g.* , *United States v. Finazzo* , 850 F.3d 94, 105-09 (2d Cir. 2017), which controls this panel. Insofar as they raise the argument to preserve it for further review, we need not discuss it further. Nor are we required to reconsider our precedent by *Kelly v. United States* , ––– U.S. ––––, 140 S. Ct. 1565, 206 L.Ed.2d 882 (2020). There, the Supreme Court ruled that a "scheme to reallocate the [George Washington] Bridge's access lanes" was not property for purposes of the wire fraud statute because lane realignment by the Port Authority was an "exercise of regulatory power," not "the taking of property." *Id.* at 1573-74. *Kelly* is inapposite here because this case does not concern the exercise of regulatory power. *See United States v. Gatto* , 986 F.3d 104, 116 (2d Cir. 2021) (distinguishing *Kelly* on basis that defendants there were motivated by "political retaliation" and not taking of property). We further note that the Supreme Court recently denied a petition for *certiorari* that presented challenges to the right-to-control theory similar to those raised by defendants here. *See Binday v. United States* , ––– U.S. ––––, 140 S. Ct. 1105, 206 L.Ed.2d 178 (2020).

We conclude that there was sufficient evidence to support each of defendants' convictions, the district court did not err in instructing the jury, it did not abuse its discretion in admitting the challenged evidence while precluding other evidence, and it did not err in denying Gerardi's motion to dismiss the false statement charge. Accordingly, the judgments of the district court are AFFIRMED.

BACKGROUND

I. *The Facts* [3]

[3] Because defendants appeal their convictions following a jury trial, "our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might

have drawn in its favor." *See United States v. Rosemond* , 841 F.3d 95, 99-100 (2d Cir. 2016).

A. The Buffalo Billion Initiative

In 2012, then-Governor Andrew Cuomo launched 165 an initiative to develop the greater *165 Buffalo area through the investment of $1 billion in taxpayer funds; the project became known as the "Buffalo Billion" initiative. App'x at 1034. At the time, Kaloyeros was the head of the College of Nanoscale Science and Engineering ("CNSE"), an economic development and research organization that formed part of the University of Albany -- itself part of the State University of New York ("SUNY"). In late 2011, Kaloyeros hired Todd Howe, a consultant and lobbyist with a longstanding relationship with the Cuomo administration, to help improve his relationship with the Governor's office. In exchange for Howe's help, Kaloyeros arranged to have SUNY's Research Foundation pay Howe $25,000 per month.

With Howe's assistance, Kaloyeros's relationship with the Governor's office improved and, in 2012, Kaloyeros was put in charge of developing proposals for projects under the Buffalo Billion initiative. In this role, Kaloyeros was to propose development projects he believed would attract private industry to the upstate region. Once a proposed project was approved, Kaloyeros would also oversee the development of the project, which was to be paid for by public funds but ultimately leased out for use to private companies with the aim of generating jobs for the upstate economy.

Due to restrictions on state agencies engaging in public-private partnerships, Kaloyeros used Fort Schuyler Management Corporation ("Fort Schuyler"), a nonprofit corporation established to support the missions of SUNY and other affiliated organizations, as the vehicle for purchasing the land and developing the facilities for the Buffalo Billion development projects. Fort Schuyler was controlled by a Board of Directors (the "FS Board") whose members (among them Kaloyeros) were appointed by SUNY and the SUNY Research Foundation.

B. The Scheme

By the summer of 2013, Howe had not only helped Kaloyeros secure a central role in the Buffalo Billion initiative but was also helping Kaloyeros pursue his additional goal of separating CNSE from the University of Albany and becoming president of the newly independent university.[4] At the same time that the SUNY Research Foundation, at Kaloyeros's direction, was paying Howe to act as a consultant on these state-sponsored projects, two other construction companies -- COR Development Company ("COR Development"), owned by Aiello and Gerardi, and LPCiminelli, owned by Ciminelli -- were paying Howe for his help in obtaining state-funded work Kaloyeros and Howe then began conspiring to deliver the Buffalo Billion state contracts to Howe's clients.

[4] Kaloyeros ultimately received support from the most senior members of the Governor's staff, commonly referred to as the Governor's "Executive Chamber," Gov't App'x at 500, to form a new university, SUNY Polytechnic Institute, and to become that university's president.

Although Kaloyeros had substantial influence and control over the Buffalo Billion projects, Fort Schuyler's role in the selection process foreclosed his ability to immediately award the contracts to Howe's clients. In selecting developers and construction managers, Fort Schuyler employed a request-for-proposal ("RFP") process under which it would announce its needs for each project through an RFP and then permit interested parties to compete for the projects by submitting bids and 166 a description of their qualifications.[5] *166 Although Kaloyeros was responsible for designing and drafting the RFP documents, the authority to award a contract rested with the FS Board, which typically did so only after an evaluation team at

Fort Schuyler reviewed the responses and made a recommendation. But Kaloyeros and Howe circumvented Fort Schuyler's typical bidding process in two ways.

5 The RFP process is generally used to help ensure that funds "are spent in a transparent and a competitive way." App'x at 1037.

First, in August 2013, Kaloyeros successfully proposed that Fort Schuyler issue two RFPs -- one for Syracuse (the "Syracuse RFP") and another for Buffalo (the "Buffalo RFP") -- to identify "a strategic development partner" in each region. Notably, unlike Fort Schuyler's usual RFPs, the Syracuse and Buffalo RFPs would "not focus on a specific project." App'x at 1050. Indeed, the then-chairman of Fort Schuyler's Board of Directors testified that Fort Schuyler had no specific projects in mind for either region at the time of Kaloyeros's proposal, and the Syracuse and Buffalo RFPs that were ultimately issued sought generally "to establish a strategic research, technology outreach, business development, manufacturing, and education and workforce training partnership with a qualified developer" in those regions, "for potential research, technology outreach, business development, manufacturing, and education and training hubs," App'x at 1912. The successful bidders would be "designat[ed] ... as the PREFERRED DEVELOPER" for the region, App'x at 1912, and, thus, would have the first opportunity to negotiate with Fort Schuyler for the specific projects Fort Schuyler eventually identified.

Second, Kaloyeros and Howe worked to draft these RFPs in a way that would give COR Development and LPCiminelli an advantage unbeknownst to others at Fort Schuyler. Notably, Kaloyeros solicited, through Howe, qualifications or attributes of COR Development and LPCiminelli to include as requirements in the Syracuse RFP and Buffalo RFP so that the bidding process would favor the selection of these companies as preferred developers.

Through a series of email and in-person communications in August and September of 2013, Howe worked with Aiello, Gerardi, Ciminelli, and Kevin Schuler, an executive at LPCiminelli, to come up with a list of qualifications -- which they referred to as "vitals" -- that, once incorporated into the RFPs, would improve their chances of being selected for the Buffalo and Syracuse projects.[6] *See, e.g.* , App'x at 1560, 1647-49. This information was then relayed to Kaloyeros, who, after asking for more specificity, *see* App'x at 1578, and even soliciting feedback on proposed drafts, incorporated the doctored qualifications into the RFP drafts that were ultimately submitted to the FS Board for approval.

6 Schuler pleaded guilty shortly before trial pursuant to a cooperation agreement with the government, and he testified at trial as a government witness.

In September and October of 2013, the Syracuse and Buffalo RFPs were issued by the FS Board, as prepared by Kaloyeros. Notably, the final Syracuse RFP contained a fifteen-year experience requirement, which directly matched the experience of COR Development, along with a requirement that the preferred developer use a particular type of software (which COR Development also used), and other language lifted directly from the list of qualifications Aiello and Gerardi had prepared and sent to Howe. Similarly, the final Buffalo RFP contained specifications unique to LPCiminelli, including "[o]ver 50 years of proven experience" in the field, App'x at 1914, a requirement that the preferred developer be headquartered in Buffalo, and additional language lifted directly from talking points *167 provided to Kaloyeros from Ciminelli and Schuler.

C. The Bidding

Both the Syracuse RFP and Buffalo RFP imposed a "blackout period" between the time of their issuance and the deadline for bidders to submit proposals, during which time all communication

between interested vendors and the RFP issuer were to occur in designated, open forums or through a designated point person to ensure equal access to information and avoid any unfair advantages among competitors. Notwithstanding this restraint, Aiello, Gerardi, Ciminelli, and Schuler continued to discuss their applications with Howe and Kaloyeros during this period. For example, Aiello emailed Howe to warn him about a potential competitor for the Syracuse RFP, and Schuler reached out to Kaloyeros, through Howe, to express concern over public statements made by the Governor that he believed might remove their advantage in securing the Buffalo RFP.

Kaloyeros, for his part, continued to provide secret assurances to Aiello, Gerardi, and Schuler, through Howe, that they would be awarded the contracts while simultaneously taking steps to ensure that the bidding process appeared open and fair to the public. In one instance, Kaloyeros learned from Howe (who had learned from Schuler) that another company was representing itself to others as a gatekeeper for the Buffalo RFP project. Kaloyeros quickly denied the rumor to Howe, and then went on to email the competitor, copying Fort Schuyler employees and members of FS Board, reminding the competitor that Fort Schuyler could "neither endorse nor support a pre-cooked process or any process that singles out anyone" before the bidding period was closed. Gov't App'x at 738.

Kaloyeros also made modifications to the Buffalo RFP in response to public scrutiny. After the 50-year experience requirement caught the attention of an investigative reporter who began to ask questions about its origin, Kaloyeros claimed that the requirement was "a typographical error," and changed it back to 15 years, as in the Syracuse RFP. Gov't App'x at 733. Presumably also to combat any perception that the RFP was tailored to a particular bidder, Kaloyeros further decided that Fort Schuyler would name two preferred developers for the Buffalo projects, instead of one, although he continued to allow Ciminelli and Schuler to unduly influence the process. Not only did Kaloyeros continue to assure Schuler and Ciminelli that LPCiminelli would still get the contract for the larger of the two projects, but he allowed them to select the second preferred developer.

D. The Final Selections and Awarding of Contracts

Once the RFP responses were submitted, evaluation teams made up of Fort Schuyler employees reviewed and scored the bids. Kaloyeros recused himself from the evaluation of the bids and the FS Board vote, but he failed to disclose his relationships to any of the bidders. Ultimately, COR Development submitted the only response to the Syracuse RFP and the Fort Schuyler evaluation team recommended that COR Development be selected as the preferred developer for Syracuse. Three companies submitted responses to the Buffalo RFP, and the Fort Schuyler evaluation team recommended that LPCiminelli and McGuire Development Company ("McGuire"), the bidder Schuler and Ciminelli selected, be named preferred developers for the 168 Buffalo contracts.*168 Through resolutions adopted on December 19, 2013, and January 28, 2014, the FS Board formally announced that the Syracuse RFP would be awarded to COR Development and that the Buffalo RFP would be awarded to LPCiminelli and McGuire. Following passage of the resolutions, Kaloyeros awarded two construction projects to COR Development -- the building of a film studio worth approximately $15 million in revenue and the construction of a solar panel plant valued at approximately $90 million. He awarded LPCiminelli the "Riverbend project," which ultimately became a $750 million construction project.

E. Gerardi's Proffer

During its investigation into the rigging of the Buffalo and Syracuse RFPs, the government had a proffer session with Gerardi. At the session, Gerardi told federal officers that he did not ask for

the Syracuse RFP to be tailored to help COR Development and that his handwritten mark-up of the draft Syracuse RFP reflected his freely given assistance in helping Howe's law firm, which Gerardi stated was drafting the RFP to make the RFP broader and more open to other competitors. Gerardi also stated that his written comment regarding the inclusion of COR Development's software as a qualification in the Syracuse RFP as being "too telegraphed," really meant "too telescoped," reflecting his concern that the qualification might unfairly prevent other competitors from applying. App'x at 1328.

Gerardi further told federal officers that although it was true that COR Development did not have audited financials, his requests to remove the audited financial requirement from the Syracuse RFP was not to help COR Development, but rather to loosen a requirement that might prevent other companies from applying. Finally, Gerardi told investigators that he had no idea why, after he requested that the Syracuse RFP permit a financial institution reference letter in lieu of audited financials, Howe had emailed Gerardi to confirm that Kaloyeros had included such a provision. According to Gerardi, he had merely responded " [g]reat" and "[t]hank you" to Howe's email to be polite. App'x at 1329.

II. *Proceedings Below*

On September 19, 2017, a federal grand jury returned a superseding indictment charging eighteen counts, four of which are relevant to this appeal. Count One charged Kaloyeros, Aiello, Gerardi, Ciminelli, and others with conspiracy to commit wire fraud in connection with a scheme to rig the bidding processes for the Buffalo and Syracuse RFPs, in violation of 18 U.S.C. § 1349. Count Two charged Kaloyeros, Aiello, and Gerardi with wire fraud in connection with rigging the bidding process for the projects in Syracuse, in violation of 18 U.S.C. §§ 1343 and 2. Count Four charged Kaloyeros, Ciminelli, and others with wire fraud in connection with rigging the bidding process for the projects in Buffalo, in violation of 18 U.S.C. §§ 1343 and 2. And Count Sixteen charged Gerardi with making false statements to federal officers in connection with the conduct charged in Counts One and Two, in violation of 18 U.S.C. § 1001(a)(2).[7]

[7] Although two other counts in the superseding indictment, Counts Three and Five, also arose from the Buffalo Billion scheme, the government did not proceed to trial on those counts, and they were dismissed at sentencing and in defendants' final judgments.

Trial on Counts One, Two, Four, and Sixteen commenced on June 11, 2018. At the close of the government's case, the defense made oral Rule 29 motions attacking the sufficiency of the government's evidence, which were renewed after the *169 district court permitted the government to reopen its case for the limited purpose of supplementing its evidence of venue. After the government rested, the defense put on an affirmative case consisting of three witnesses.

On July 12, 2018, the jury returned a verdict of guilty on all counts. Defendants renewed their Rule 29 motions, which were denied by the district court at each of the defendants' respective sentencings. During four separate sentencing hearings held in December 2018, the district court sentenced defendants as follows: Ciminelli to 28 months' imprisonment, Gerardi to 30 months' imprisonment, Aiello to 36 months' imprisonment, and Kaloyeros to 42 months' imprisonment. Defendants were also ordered to pay fines and forfeit funds in varying amounts.

These appeals followed.

DISCUSSION

Four issues are presented: (1) the sufficiency of the evidence to support the fraud counts of conviction and venue for Count Two; (2) the instructions to the jury regarding the right-to-control theory of wire fraud and the good faith defense; (3) the preclusion of evidence regarding

the merits and public benefits of the projects awarded to defendants and admission of evidence from competitors regarding the range of fees typically charged by other construction management companies in the market; and (4) the district court's denial of Gerardi's motion to dismiss his false statement charge for alleged prosecutorial misconduct. We address each issue in turn.

I. *Sufficiency of the Evidence*

Defendants challenge (1) the sufficiency of the evidence supporting their convictions for the charged wire fraud conspiracy (Count One) and substantive wire frauds (Counts Two and Four) and (2) the sufficiency of the evidence supporting venue for Count Two. We conclude that the evidence was sufficient as to both.

A. Standard of Review

We review preserved claims of insufficient evidence *de novo* . *United States v. Sabhnani* , 599 F.3d 215, 241 (2d Cir. 2010). When assessing a sufficiency of the evidence challenge, we "view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Chavez* , 549 F.3d 119, 124 (2d Cir. 2008) (citations, alteration, and quotation marks omitted), *abrogated on other grounds by Dean v. United States* , ––– U.S. ––––, 137 S. Ct. 1170, 197 L.Ed.2d 490 (2017). We will not set aside a conviction as long as "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* , 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ; *see also United States v. Guadagna* , 183 F.3d 122, 130 (2d Cir. 1999).

Unlike the elements of a charged crime, the government is required to prove venue only by a preponderance of the evidence. *United States v. Smith* , 198 F.3d 377, 382 (2d Cir. 1999). "We review *de novo* the District Court's determination that the evidence was sufficient to support a finding that venue was proper." *United States v. Kirk Tang Yuk* , 885 F.3d 57, 71 (2d Cir. 2018). Where a defendant challenges venue following a jury verdict, we "review the record evidence in the light most favorable to the government, drawing every reasonable inference in support of the jury's verdict." *Id* .*170

170 ***B. The Right-to-Control Theory of Wire Fraud***

Defendants first contend that the evidence was insufficient to support their convictions under a right-to-control theory of wire fraud because the government failed to prove economic harm or the requisite intent to defraud.

1. *Applicable Law*

"The federal mail and wire fraud statutes penalize using the mails or a wire communication to execute ‘any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.’ " *United States v. Greenberg* , 835 F.3d 295, 305 (2d Cir. 2016) (quoting 18 U.S.C. §§ 1341, 1343). "Since a defining feature of most property is the right to control the asset in question, ... property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets." *United States v. Lebedev* , 932 F.3d 40, 48 (2d Cir. 2019) (internal quotation marks and alteration omitted), *cert. denied sub nom. Gross v. United States* , ––– U.S. ––––, 140 S. Ct. 1224, 206 L.Ed.2d 219 (2020). This Court has endorsed a "right-to-control theory" of wire fraud that allows for conviction on "a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information." *Id.* (internal quotation marks and alteration omitted); *accord United States v. Gatto* , 986 F.3d 104, 126 (2d Cir. 2021).

The right-to-control theory requires proof that "misrepresentations or non-disclosures can or do result in tangible economic harm." *United States v. Finazzo* , 850 F.3d 94, 111 (2d Cir. 2017). A "cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Binday* , 804 F.3d 558, 570 (2d Cir. 2015) (internal quotation marks and alteration omitted). Examples include when the scheme "affected the victim's economic calculus or the benefits and burdens of the agreement," "pertained to the quality of services bargained for," or "exposed the [victim] to unexpected economic risk." *Id.* at 570-71. It is, however, "not sufficient ... to show merely that the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations." *Id.* at 570.

To prove a scheme to defraud, "[i]t need not be shown that the intended victim of the fraud was actually harmed; it is enough to show defendants contemplated doing actual harm." *United States v. Schwartz* , 924 F.2d 410, 420 (2d Cir. 1991). In a right-to-control case, "it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss -- it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision." *Binday* , 804 F.3d at 579. Thus, the requisite intent is established if "the defendant's misrepresentations foreseeably concealed economic risk or deprived the victim of the ability to make an informed economic decision." *Id.* at 578.

2. *Analysis*

i. Economic Harm

The trial evidence demonstrated that the defendants, by secretly tailoring the Buffalo and Syracuse RFPs, took steps to reduce the possibility that companies other than their own would be seen as competitive, or even qualified at all, for the *171 bids at issue. There was also evidence that Fort Schuyler employed the RFP process precisely because of its desire for free and open competition, and that the FS Board relied on this aspect of the process to achieve its economic objective -- selecting the lowest-priced or best-qualified vendor. Thus, in rigging the RFPs to favor their companies, defendants deprived Fort Schuyler of "potentially valuable economic information," *id.* at 570 (internal quotation marks omitted), that would have resulted from a truly fair and competitive RFP process.

Defendants nevertheless insist that the government failed to prove economic harm for two interrelated reasons. First, defendants maintain that even if the Syracuse and Buffalo RFPs were not competitive, the absence of competition could not have caused harm to Fort Schuyler, because the rigged RFPs merely awarded COR Development and LPCiminelli preferred developer status, and did not affect the terms of the separate, subsequently negotiated development contracts. In other words, the rigged RFPs only afforded these companies "the right to negotiate with Fort Schuyler for work that would be forthcoming." Ciminelli Br. at 3-4. Second, defendants assert that the government did not offer evidence that another company with lower prices, better quality, or better value would have applied and been selected for either the Syracuse or the Buffalo contracts. We are not persuaded by either argument.

As to the first argument, as an initial matter, the record does not support the clean division between the award of preferred developer status and the subsequent awards of particular development contracts that defendants describe. Although COR Development and LPCiminelli were not guaranteed any project once they were chosen preferred developers, they indisputably had "a leg up because they had been preselected," Trial Tr. at 221, as the designation "guaranteed them the beginning of a partnership with ... Fort Schuyler," Trial Tr. at 341. Further, Fort Schuyler had an interest in seeing its proposed projects come to

fruition, and the costs attendant to identifying another developer after investing in identifying preferred developers would be a strong disincentive to walking away from those developers. Indeed, if preferred developer status were as inconsequential as defendants suggest, no developers would bother responding to the RFP. Accordingly, the rigged RFP process constituted more than mere "fraudulent inducements to gain access to" the development contracts, which would not be sufficient to support the wire fraud convictions here. *See Schwartz* , 924 F.2d at 421. Rather, COR Development and LPCiminelli's selection as preferred developers made it much more likely that they would be awarded the contracts. Moreover, while we have recognized "a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid -- which do not violate the mail and wire fraud statutes -- and schemes that depend for their completion on a misrepresentation of an essential element of the bargain -- which do," *United States v. Shellef* , 507 F.3d 82, 108 (2d Cir. 2007), the evidence, viewed in the light most favorable to the government, *see Rosemond* , 841 F.3d at 99-100, demonstrated that a competitive process was "essential" both to the selection of preferred developers and -- in light of the preferred developers' "leg up" for projects that then arose -- to the award of the subsequent development contracts.

As to the second argument, we recognize that many of our right-to-control precedents have involved more tangible evidence of economic harm than is presented in this case. *See, e.g.* , *172 *Finazzo* , 850 F.3d at 100-02, 114-15 (discussing merchandising company employees' testimony that company executive who steered company to particular vendor in exchange for kickbacks deprived company of specific cost savings and better-quality goods); *Binday* , 804 F.3d at 572-74 (finding economic harm in misrepresentation to insurers that insurance policies were not intended for sale to third parties where insurance executives "testified unequivocally and at length that their companies refused to issue [such policies] for economic reasons," including that those policies "ha[d] different economic characteristics that could reduce their profitability"). Here, the government offered little evidence that other companies would have successfully bid for the projects and then either charged less or produced a more valuable product absent the fraud.[8] But "[i]t is not required that the victim[ ] of the scheme in fact suffered harm." *Binday* , 804 F.3d at 569 ; *accord Gatto* , 986 F.3d at 123-24 (rejecting argument that wire fraud statute "requires that property or money be obtained *by* the defendant *from* the victim"). And that evidence of actual economic harm was presented in other right-to-control cases does not make such evidence a requisite for conviction.

8 There was evidence introduced at trial that absent the fraud, Fort Schuyler would have considered more, and perhaps stronger, applications in response to the RFPs. One representative from a rival company testified that he considered submitting a bid for the Buffalo RFP but decided not to because aspects of the RFP, including its "vagueness" and fifty-year experience requirement, left him with the impression that the project "was being steered towards a local competitor." App'x at 1296. Notably, both that company's representative and a representative of another regional construction management company that applied to the Buffalo RFP as part of a team testified to having construction management fees were typically lower than those of both LPCiminelli and COR Development. Accordingly, if Fort Schuyler had been able to consider additional applications, it might have selected a preferred developer who could offer more favorable economic terms for development contracts that Fort Schuyler eventually negotiated.

We are similarly unpersuaded by defendants' arguments that rigging the Buffalo and Syracuse RFPs was not wire fraud because it merely induced negotiations, *see Shellef* , 507 F.3d at 109, or because Fort Schuyler still received the benefit of its bargain, *see Binday* , 804 F.3d at 570. The bargain at issue was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. Depriving Fort Schuyler of that information was precisely the object of defendants' fraudulent scheme, and for Fort Schuyler, it was an essential element of the bargain.[9] This was plainly sufficient for a wire fraud conviction under our caselaw. *See Shellef* , 507 F.3d at 108 ("Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid -- which do not violate the mail or wire fraud statutes -- and schemes that depend for their completion on a misrepresentation of an essential element of the bargain -- which do violate the mail and wire fraud statutes."). 173 *173 ***ii. Fraudulent Intent***

9 *See, e.g.* , App'x at 1809 (Memorandum of Understanding ("MOU") between Fort Schuyler and COR Development indicating that COR Development was selected "after a competitive process, including the RFP"); Gov't App'x at 780 (same as to LPCiminelli); *see also* Gov't App'x at 766 (Notice to Proceed with COR Development describing the MOU with COR as the result of a "competitive bidding process under the RFP"); Gov't App'x at 788 (same as to LPCiminelli).

We also reject the arguments made by Aiello, Gerardi, and Ciminelli that there was insufficient evidence of their intent to defraud. Emails introduced at trial showed all three defendants communicating with Howe on how to rig the RFP process. *See, e.g.* , App'x at 1644 (email from Howe to Aiello discussing LPCiminelli's initial ideas for rigging the RFP); App'x at 1685-86 (email from Howe to Aiello containing advance copy of Syracuse RFP, which Aiello forwarded to Gerardi and others at COR Development); App'x at 1656 (email from Gerardi with a written markup of the advance copy of the Syracuse RFP, in which he expressed his concern that Kaloyeros had made it "too telegraphed"); App'x at 1593-61 (email from Kaloyeros to Ciminelli containing draft Syracuse RFP with message: "Draft of relevant sections from RFP enclosed [...] obviously, we need to replace Syracuse with Buffalo and fine tune the developer requirements to fit [...] hopefully, this should give you a sense where we're going with this [...] thoughts?"). On this evidence, a reasonable jury could have found beyond a reasonable doubt that Aiello, Gerardi, and Ciminelli knew about the scheme to rig the RFPs, and that it was at least foreseeable to them that doing so would deprive Fort Schuyler of its ability to award contracts that were the result of a fair and competitive bidding process. The evidence of intent to defraud was therefore sufficient to uphold their convictions. *See Binday* , 804 F.3d at 578 (intent established where shown that "the defendant's misrepresentations foreseeably concealed economic risk or deprived the victim of the ability to make an informed economic decision").[10]

10 Gerardi argues that "the RFP underwent multiple layers of drafting, review, and approval within Fort Schuyler ... and by outside counsel, and there was no evidence of any objections raised by those parties or pressure applied by the defendants." Gerardi Br. at 40. The fact that others did not object, however, shows only that defendants managed to conceal their scheme. That a victim may have been negligent or gullible is not a defense to fraud. *See United States v. Thomas* , 377 F.3d 232, 243 (2d Cir. 2004).

C. Venue for Count Two

Gerardi also argues that there was insufficient evidence to establish venue for Count Two, which charged him, Kaloyeros, and Aiello with wire fraud in connection with rigging the bidding process for the Syracuse RFP. Although criminal prosecutions are to be brought in the district in which the crime was committed, *see* U.S. Const. art. III § 2; U.S. Const. Amend. VI ; Fed. R. Crim. P. 18, where "the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue," *United States v. Reed* , 773 F.2d 477, 480 (2d Cir. 1985). Instead, an offense committed in more than one district may be "prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a).

Here, to establish venue for Count Two, it was enough for the government to show by a preponderance of the evidence that Gerardi used, or caused others to use, a wire to communicate with others in the Southern District and did so in furtherance of the scheme to rig the Syracuse RFP. *See United States v. Rutigliano* , 790 F.3d 389, 397 (2d Cir. 2015) (noting that for a wire fraud charge "venue lies where a wire in furtherance of a scheme begins its course, continues or ends"); *United States v. Gilboe* , 684 F.2d 235, 239 (2d Cir. 1982) (finding venue proper in light of "numerous telexes and telephone calls" by 174 defendant and caused by him to advance *174 the alleged fraud in New York).[11] The trial record contained various wires relating to the Syracuse RFP sufficient to satisfy this burden. *See, e.g.* , App'x at 2217 (email from Howe to Kaloyeros sent in July 2013 while Howe was in the Washington, D.C./Maryland area and Kaloyeros was in Manhattan, setting up a time for Aiello and Kaloyeros to meet to discuss the bid-rigging scheme); App'x at 2209-20 (email sent from Howe while in the Washington, D.C./Maryland area to various employees at the Governor's Manhattan office encouraging the State to approve funds for Fort Schuyler to be used to pay COR Development); App'x at 2206-08 (emails among Aiello, Gerardi, Howe, and Joseph Percoco while Howe was in the Maryland/Washington D.C. area and Percoco was in Manhattan, in which Gerardi and Aiello asked for assistance getting State funds to pay vendors for work associated with the Syracuse RFP projects).

11 The Southern District of New York includes Manhattan and the Bronx, as well as Westchester, Rockland, Putnam, Dutchess, Orange, and Sullivan Counties. Both COR Development and LPCiminelli are based outside of New York City, and the contracts ultimately awarded to them by the RFPs were for construction projects that took place in different venues in the Western and Northern Districts of New York. Still, neither the venue statute nor the Constitution requires the majority of the charged conduct to have occurred in the charged venue, as long as the offense was begun, continued, or concluded there.

Accordingly, there was evidence from which a reasonable jury could conclude that venue in the Southern District of New York was established by a preponderance of the evidence as to Count Two, and we reject Gerardi's argument that the evidence was insufficient.[12]

12 Gerardi argues that we cannot rely on these wires because they were admitted only after the district court granted the government's motion to reopen its case to supplement its venue evidence as to Count Four but not, in his view, as to Count Two. Because Gerardi raises this argument only in a footnote, we need not reach it. *See United States v. Svoboda* , 347 F.3d 471, 480 (2d Cir. 2003) ("It is well-established in this Circuit that we do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." (internal quotation marks and alteration omitted)). It also bears noting that Gerardi makes only a passing reference to the district court's error in

admitting these wires, and that reference is unsupported by any citation to any legal authority. *See Allen v. Credit Suisse Sec. (USA) LLC* , 895 F.3d 214, 223 n.13 (2d Cir. 2018) (cursory argument without relevant authority need not be addressed). In any event, although the government initially moved to reopen with respect to Count Four (relating to the Buffalo RFP), it eventually sought to offer evidence as to both the Buffalo RFP and the Syracuse RFP, and the district court allowed admission of the evidence.

II. *Jury Instructions*

Next, Aiello and Kaloyeros argue that their convictions should be set aside for errors in the jury instruction. Specifically, Aiello and Kaloyeros contend that the district court erred in instructing the jury on the right-to-control theory of wire fraud, and Kaloyeros also argues that the district court erred in instructing the jury regarding the good faith defense to wire fraud. We conclude that neither instruction was erroneous, and therefore we reject their challenges.

A. Standard of Review

We review *de novo* a defendant's challenge to the district court's jury instructions. *United States v. Roy* , 783 F.3d 418, 420 (2d Cir. 2015). An "instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id.* (internal quotation marks omitted). Even where an instruction is found to contain *175 errors, reversal is not warranted if the error was harmless. *See* Fed. R. Crim. P. 52(a) ; *United States v. DeMizio* , 741 F.3d 373, 384 (2d Cir. 2014). Thus, a conviction should be affirmed despite instructional error if it "appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States* , 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (internal quotation marks omitted).

B. The Right-to-Control Instruction

Aiello and Kaloyeros contend that the district court's wire fraud instruction was erroneous because it permitted the jury to convict even if it found that Fort Schuyler received, and was intended to receive, the full economic benefit of its bargain. *See Binday* , 804 F.3d at 570 ("[W]e have repeatedly rejected application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain.").

We reject this argument because the relevant instruction clearly explained the right-to-control theory. The jury charge began in relevant part by defining property to include "intangible interests such as the right to control the use of one's assets" and explaining that the right to control "is injured" when the victim "is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." App'x at 1554. It went on to define "potentially valuable economic information" as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." App'x at 1554. Importantly, the charge then expressly cautioned that:

> If all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of proof.

App'x at 1554-55.

The charge then explained "economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it

would receive and what it actually received." App'x at 1555. The charge defined "intent to defraud" to mean "act[ing] knowingly and with a specific intent to deceive, for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information." App'x at 1555. The charge also explicitly provided that the government could not meet its burden by merely showing that the defendants caused Fort Schuyler to enter into an agreement or transaction "without proving that Fort Schuyler was thereby exposed to tangible economic harm." App'x at 1554-55. The charge went on to define "tangible economic harm" as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." App'x at 1555.

Although this charge closely tracked the language set forth in our prior opinions, *see, e.g.* , *Finazzo* , 850 F.3d at 111 ; *Binday* , 804 F.3d at 570-71, Kaloyeros and Aiello nonetheless argue that the instructions were inadequate because they failed to explain that receiving the full benefit of a bargain is not wire fraud and they purportedly allowed for convictions "based on a merely hypothetical possibility of harm." *176 Aiello Br. at 75. We see no merit to these arguments.

As indicated above, our cases have stressed time and again that "the Government need not prove 'that the victims of the fraud were actually injured,' but only 'that defendants contemplated some actual harm or injury to their victims.' " *Greenberg* , 835 F.3d at 306 (quoting *United States v. Novak* , 443 F.3d 150, 156 (2d Cir. 2006)); *accord Gatto* , 986 F.3d at 124 ; *Binday* , 804 F.3d at 569. Though defendants rely on *Binday* 's statement that our precedent has "repeatedly rejected application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain," 804 F.3d at 570, *Binday* 's description of our cases did not undercut the rule that economic harm need only be contemplated. The cases *Binday* cited dealt with scenarios in which the victim faced no exposure to economic harm due to the fraud. *See id.* at 570 n.10 ; *id.* at 599 n.46. In fact, *Binday* expressly rejected nearly the same argument defendants raise here, underscoring that the "mail and wire fraud statutes do not require a showing that the contemplated harm actually materialized." *Id.* at 574 ; *see also id.* at 576 ("The indictment need not allege, and the government need not prove, that the specified harms had materialized for the particular policies at issue or were certain to materialize in the future."). Thus, there was no error, and certainly no harmful error, in the district court's right-to-control jury instruction.

C. The No-Ultimate-Harm Instruction

Kaloyeros also argues that the district court erred in instructing the jury on the good faith defense to wire fraud by including a no-ultimate-harm instruction that, in his view, undermined both the court's good faith instruction and the instruction regarding the requisite intent necessary for conviction.

After explaining that " good faith on the part of a defendant is a complete defense to a charge of wire fraud," the district court went on to state:

> In considering whether a defendant acted in good faith, you are instructed that if a defendant knowingly and willfully participated in the scheme to deprive Fort Schuyler of potentially valuable economic information, a belief by the defendant that eventually everything would work out so that Fort Schuyler would get a good deal does not mean that the defendant acted in good faith.

App'x at 1555.

Kaloyeros argues that this "no ultimate harm" instruction fails to comply with our precedent in *United States v. Rossomando* , 144 F.3d 197, 200-03 (2d Cir. 1998). In *Rossomando* , we rejected the instruction that "[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the

[victim] will excuse fraudulent actions or false representations by him," *id.* at 199, in a case where the defendant firefighter had underreported his post-retirement income on pension forms but claimed that he did not believe *any* harm would result, *id.* at 198. We have since clarified that *Rossomando* is "limited to the quite peculiar facts that compelled [its] result," *United States v. Ferguson* , 676 F.3d 260, 280 (2d Cir. 2011) (internal quotation marks omitted), and explained that "a 'no ultimate harm' instruction given by the district court is proper where (1) there was sufficient factual predicate to necessitate the instruction, (2) the instruction required the jury to find intent to defraud to convict, and (3) there was no evidence that the instruction caused confusion," *United States v. Lange* , 834 F.3d 58, 79 (2d Cir. 2016). The requisite predicate *177 for such an instruction is present where there is evidence that a defendant intended an immediate cognizable harm, but he argues that there was no harm in the long run. *See id* .

Here, the district court did not err in giving the no-ultimate-harm instruction. The necessary factual predicate for the instruction was satisfied because there was evidence that the defendants intended immediate cognizable harm -- depriving Fort Schuyler of potentially valuable economic information in connection with the Buffalo Billion projects -- even though defendants argued at trial that ultimately the projects were a success and Fort Schuyler was not harmed. *See, e.g.* , App'x at 1480 ("[W]hen the dust settled, Fort Schuyler got great contractors for important work at Riverbend, the IT center, the film hub, Soraa."). Moreover, the instructions properly required the jury to find that fraud was intended. Finally, nothing in the record indicates that the instruction caused confusion; in fact, it clearly stated that "[a]n honest belief in the truth of the representations made by a defendant is a complete defense." App'x at 1555. Accordingly, we find no error in this instruction.

III. *Evidentiary Rulings*

The defendants also challenge a pair of evidentiary rulings made by the district court during trial. First, Kaloyeros, Aiello, and Gerardi argue that the district court denied them the right to present a defense by precluding evidence that the buildings constructed by COR Development and LPCiminelli were built "on time" and were of "high-quality," and that the fees charged were "reasonable." *See* Kaloyeros Br. at 33, 35. Second, Kaloyeros and Ciminelli argue that the district court should not have permitted witnesses from rival construction companies to testify regarding the prevailing range of construction management fees.

A. Applicable Law

We review evidentiary rulings for abuse of discretion. *United States v. White* , 692 F.3d 235, 244 (2d Cir. 2012). "We will find an abuse of discretion only where the trial judge ruled in an arbitrary or irrational fashion." *United States v. Kelley* , 551 F.3d 171, 175 (2d Cir. 2009) (internal quotation marks omitted). Even when a district court's evidentiary ruling is "manifestly erroneous," however, the defendant is not entitled to a new trial if the error was harmless. *United States v. Siddiqui* , 699 F.3d 690, 702 (2d Cir. 2012). An evidentiary error is harmless if this Court determines with "fair assurance that the jury's judgment was not substantially swayed by the error." *United States v. Paulino* , 445 F.3d 211, 219 (2d Cir. 2006) (internal quotation marks omitted).

"The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment," *Washington v. Schriver* , 255 F.3d 45, 56 (2d Cir. 2001), as well as by the Due Process Clause of the Fifth Amendment, *United States v. Almonte* , 956 F.2d 27, 30 (2d Cir. 1992). "The right is not, of course, unlimited; the defendant ‘must comply with established rules of procedure and evidence designed to assure both

fairness and reliability.' " *Schriver* , 255 F.3d at 56 (quoting *Chambers v. Mississippi* , 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)); *see also United States v. Valenzuela-Bernal* , 458 U.S. 858, 867 n.7, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (noting that "the Sixth Amendment does not guarantee criminal defendants *178 the right to compel the attendance of any and all witnesses").

B. Analysis

1. *Quality-of-Construction Evidence*

Prior to trial, the district court granted the government's motion to preclude the defense from offering evidence of the alleged merits or public benefits of the projects awarded to COR Development and LPCiminelli, concluding that the evidence was not relevant because "the defendants are accused of defrauding Fort Schuyler of the right to make a fully informed decision and not the right to a building that satisfied the terms of the development contracts." App'x at 1292.

Defendants argue that the district court should have admitted evidence regarding the quality of the construction project as evidence that Fort Schuyler obtained the benefit of its bargain. As already noted, however, the quality of defendants' construction projects was not the bargain compromised by defendants' fraudulent scheme, and it is not a defense to a right-to-control wire fraud that the product the victim was fraudulently induced into buying did not harm the victim or was generally a good product. Because this evidence was not material, we conclude that the district court did not abuse its discretion in precluding it, and that its exclusion did not violate defendants' right to present a meaningful defense. *See Valenzuela-Bernal* , 458 U.S. at 867, 102 S.Ct. 3440.

2. *Testimony Regarding Construction Management Fees*

Kaloyeros and Ciminelli also challenge the district court's evidentiary ruling allowing the government to elicit testimony from two witnesses employed by competing construction companies that were interested in bidding on the Buffalo RFP. On appeal, Kaloyeros and Ciminelli principally contend that it was unfairly prejudicial to them to admit this evidence while precluding evidence that Fort Schuyler ultimately received a good deal in its contracts with the defendants. *See* Fed. R. Evid. 403.

The challenged witnesses testified to the range of fees typically charged by other construction management companies in the market. This evidence, unlike the evidence that defendants sought to admit, was relevant under the right-to-control theory of wire fraud because it demonstrated that defendants contemplated economic harm by preventing Fort Schuyler from fairly considering bids in a marketplace where lower prices might have been available. The construction-fee evidence was relevant to the right-to-control theory because, if there is a reasonable range of fees for projects generally, a factfinder could infer such a range for particular projects. While the witnesses did not specify what range of fees might be available for the particular projects COR Development and LPCiminelli actually undertook, defendants were able to -- and indeed did -- cross-examine the witnesses on this and other purported deficiencies, thereby avoiding prejudice. In these circumstances, the district court acted within its discretion in admitting the fee evidence.

IV. *Gerardi's False Statements Conviction*

Finally, Gerardi argues that the district court erred in denying his motion to dismiss the false statements count for purported prosecutorial misconduct.[13] *179 Such a dismissal, following a conviction, "is an extraordinary remedy," *United States v. Casamento* , 887 F.2d 1141, 1182 (2d Cir. 1989) (internal quotation marks omitted), but

"pursuant to [this court's] supervisory power," we "may dismiss an indictment for prosecutorial misconduct if the grand jury was misled or misinformed, or possibly if there is a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process," *United States v. Brito* , 907 F.2d 392, 394 (2d Cir. 1990) (internal quotation marks and citations omitted). We review the denial of a motion to dismiss for prosecutorial misconduct *de novo* . *United States v. Walters* , 910 F.3d 11, 22 (2d Cir. 2018).

> 13 Gerardi also argues that if his convictions for wire fraud conspiracy and wire fraud are overturned, he would be entitled to a new trial on his false statement conviction on account of "prejudicial spillover." Gerardi Appellant Br. at 49; *see also United States v. Rooney* , 37 F.3d 847, 855 (2d Cir. 1994). Because we find no basis for overturning Gerardi's wire fraud convictions, we do not reach this argument.

Gerardi's claim of prosecutorial misconduct stems from the government's conduct during his June 21, 2016 proffer session that became the subject of his Count Sixteen conviction. He argues that the prosecutors misled him into thinking that he was not a target of the investigation before his proffer. Relying on *United States v. Jacobs* ("*Jacobs I* "), 531 F.2d 87 (2d Cir. 1976), he contends that this rose to the level of prosecutorial misconduct and warranted dismissal of the count. In *Jacobs I* , we affirmed the suppression of grand jury testimony, and the resultant dismissal of a perjury charge based on that testimony, where the government failed to warn the witness that he was a target of the investigation. *Id.* at 89-90. Notably, however, we subsequently clarified that *Jacobs I* was to be narrowly interpreted -- "a one-time sanction to encourage uniformity of practice ... between the Strike Force and the United States Attorney." *United States v. Jacobs* ("*Jacobs II* "), 547 F.2d 772, 773 (2d Cir. 1976).

Although *Jacobs I* is relevant, it is not entirely on-point as it related to a grand jury investigation and not to a pre-indictment proffer session. Regardless, Gerardi's argument lacks merit because he had no right to lie in the proffer session, and he does not have a constitutional right to a warning that he is a target. *See United States v. Washington* , 431 U.S. 181, 189, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977) ("It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury, and witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights."); *United States v. Remington* , 208 F.2d 567, 570 (2d Cir. 1953) (stating that "to call the perjury a fruit of the government's conduct ... is to assume that a defendant will perjure himself in his defense" and identifying no cognizable "causal relation ... between the government's wrong and the defendant's act of perjury"); *see also United States v. Babb* , 807 F.2d 272, 277, 279 (1st Cir. 1986) (rejecting contention that prosecutor's representation, at defendant's grand jury appearance, that defendant was neither a target nor a subject "undermined the fundamental fairness of the proceedings" because "it defies logic to argue that assurances that might have lulled a witness into giving incriminating statements had the effect of inducing the witness to commit perjury").180 *180 Thus, even assuming that the government failed to warn Gerardi that he was a subject of an investigation during his proffer -- something the government disputes -- such a failure would not rise to the level of misconduct required to justify dismissal of the charge. Accordingly, the district court did not err in denying Gerardi's motion to dismiss his conviction for making a false statement.

CONCLUSION

For the reasons set forth above, the judgments of the district court are AFFIRMED.

No. 18-2990
United States Court of Appeals, Second Circuit

United States v. Percoco

13 F.4th 180 (2d Cir. 2021)
Decided Sep 8, 2021

Nos. 18-2990 18-3710 19-1272 August Term 2019

09-08-2021

UNITED STATES of America, Appellee, v. Joseph PERCOCO, Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, aka Dr. K, Defendants-Appellants, Peter Galbraith Kelly, Jr., Michael Laipple, Kevin Shuler, Defendants.

Matthew D. Podolsky (Robert L. Boone, Janis M. Echenberg, Won S. Shin, on the brief), Assistant United States Attorneys, for Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY, for Appellee United States of America. Michael L. Yaeger, Carlton Fields, P.A., New York, NY (Walter P. Loughlin, New York, NY, on the brief), for Defendant-Appellant Joseph Percoco. Alexandra A.E. Shapiro (Daniel J. O'Neill, and Fabien Thayamballi, on the brief), Shapiro Arato Bach LLP, New York, NY for Defendant-Appellant Steven Aiello.

Richard J. Sullivan, Circuit Judge

Matthew D. Podolsky (Robert L. Boone, Janis M. Echenberg, Won S. Shin, on the brief), Assistant United States Attorneys, for Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY, for Appellee United States of America.

Michael L. Yaeger, Carlton Fields, P.A., New York, NY (Walter P. Loughlin, New York, NY, on the brief), for Defendant-Appellant Joseph Percoco.

Alexandra A.E. Shapiro (Daniel J. O'Neill, and Fabien Thayamballi, on the brief), Shapiro Arato Bach LLP, New York, NY for Defendant-Appellant Steven Aiello.

Before: Raggi, Chin, and Sullivan, Circuit Judges.

184 Richard J. Sullivan, Circuit Judge:*184 This case, which concerns public corruption in New York State, requires us to again consider the reach of the federal fraud and bribery statutes. Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and found Percoco guilty of both conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and solicitation of bribes or gratuities, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2.[1]

> [1] The district court held a second trial on separate, fraud-related counts in which Aiello, Alain Kaloyeros, Joseph Gerardi, and Louis Ciminelli were convicted on several conspiracy and substantive wire fraud counts, and Gerardi was convicted on a false statement count. Although the cases were consolidated upon appeal, the fraud trial is addressed in a separate opinion in *United States v. Aiello* , Nos. 18-3710-cr, 18-3712-cr, 18-3715-cr, and 18-3850-cr.

On appeal, the defendants argue that the district court committed reversible error when it (1) instructed the jury that it could convict defendants

casetext

of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber "as opportunities ar[i]se"; (2) charged the jury that the defendants could be liable for conspiracy to commit honest-services fraud for actions Percoco took while he was not formally employed as a state official; (3) instructed the jury that Percoco could be liable under § 666 for soliciting, demanding, accepting, or agreeing to accept a gratuity as a reward for certain action; (4) constructively amended Aiello's indictment by permitting his conviction to be based on acts Percoco committed while he was not a public official; (5) denied defendants' motions for a judgment of acquittal based on the insufficiency of the evidence at trial; and (6) ordered forfeiture against Percoco in the amount of $320,000. Finding none of these arguments persuasive, we **AFFIRM** .

I. BACKGROUND

A. Facts

This case involves two schemes in which Percoco – a longtime friend and top aide to former Governor Andrew Cuomo – accepted payment in exchange for promising to use his position to perform official actions. For the first scheme, Percoco promised to further the interests of an energy company named Competitive Power Venture ("CPV"). For the second, Percoco agreed with Aiello to advance the interests of Aiello's real estate development company, COR Development Company. Drawing from the evidence introduced at trial, we briefly describe the facts of these schemes in the light most favorable to the government. *See United States v. Silver* , 948 F.3d 538, 546 n.1 (2d Cir. 2020), *cert. denied* , ––– U.S. ––––, 141 S. Ct. 656, 209 L.Ed.2d 18 (2021).

1. The CPV Scheme

The CPV scheme started in 2012, when Percoco served as a high-level official in the Governor's Office, also called the Executive Chamber. For all his political influence, Percoco found himself financially constrained. So he reached out to his friend Todd Howe, who was an influential and corrupt lobbyist. Percoco confided in *185 Howe that money was tight, and he asked if any of Howe's clients would hire Percoco's wife. Sometime later, Howe approached Peter Galbraith Kelly, Jr., whose energy company, CPV, was angling for a so-called "Power Purchase Agreement" that would have required New York State to purchase power from CPV.

Percoco, Howe, and Kelly met over dinner to discuss an arrangement whereby Percoco would help CPV secure the Power Purchase Agreement in exchange for securing employment for – and sending payments to – Percoco's wife. Throughout the fall of 2012, Percoco pressured Howe to close the deal with Kelly so that Percoco could earn what he and Howe code-named "ziti" – a reference to the term for payoffs featured in the mafia-themed television show "The Sopranos." *See* Suppl. App'x at 1–3; App'x at 553. CPV later hired Percoco's wife as an "education consultant" paying her $7,500 a month for a few hours of work each week. To conceal this arrangement, Kelly instructed his employees to omit the last name of Percoco's wife from CPV materials, and routed the payments through a third-party contractor, whom Percoco referred to as Kelly's "money guy." Suppl. App'x at 212. Invoices from Kelly's "money guy" likewise excluded any reference to Percoco's wife.

In exchange for these payments, Percoco agreed to help CPV obtain a Power Purchase Agreement from New York State. Later, while serving as Executive Deputy Secretary in Cuomo's administration, Percoco confirmed in an email that he would "push on" the supervisor of New York's state agencies, Howard Glaser, to discourage the state from awarding a Power Purchase Agreement to one of CPV's competitors. Howe replied that Percoco had to "[h]old [Glaser's] feet to the fire" to "keep the ziti flowing." *Id.* at 30.

casetext

Percoco also accepted continued payments to influence New York State officials to approve a so-called "Reciprocity Agreement" between New York and New Jersey, which was designed to allow CPV to build a power plant in New Jersey by purchasing relatively inexpensive emission credits in New York. After an assistant commissioner in New York's Department of Environmental Conservation ("DEC") told Kelly that he would need a "push from above" to secure the agreement, *id.* at 8–10, Kelly, through Howe, reached out to Percoco for that push. In response, Percoco stated that he would contact the Commissioner of the DEC. When Howe followed up with Percoco about a week later, Percoco indicated that his mother was not well, and referred Howe to Glaser and another high-ranking official in Governor Cuomo's administration who could contact the DEC Commissioner. Copying Percoco on the email, Howe forwarded the message to Glaser and the other official. Glaser and the other official then successfully directed the Commissioner to have the state agency enter into the Reciprocity Agreement with New Jersey.

2. The COR Development Scheme

The second scheme began while Percoco was temporarily managing Governor Cuomo's reelection campaign in 2014. Pursuant to this scheme, Aiello arranged for his company, COR Development, to pay Percoco to take action to benefit the company. Initially, Aiello sought out Percoco's assistance so that COR Development could avoid entering into a potentially costly agreement with a local union, known as a "Labor Peace Agreement," prior to receiving state funding for a project. On July 30, 2014, Aiello emailed Howe asking whether "there is any way Joe P can help us" with the Labor Peace Agreement "while he is off the 2nd floor working on the Campaign." App'x at 680. The next day, Aiello *186 followed up with an email to Howe asking him to "call Joe P." for "help" on the Labor Peace Agreement. Suppl. App'x at 59. Less than two weeks later, COR Development transferred $15,000 to an entity that Howe controlled, prompting Howe to cut a $15,000 check to Percoco's wife. In October 2014, after several emails were exchanged but before Percoco had taken any action concerning the Labor Peace Agreement, COR Development sent an additional $20,000 to Percoco through the same circuitous route. Percoco received both payments after he had told his bank and several others that he intended to return to the Governor's Office.

After receiving payment, Percoco directed a state agency, Empire State Development ("ESD"), to reverse its previous decision requiring COR Development to enter into a Labor Peace Agreement. On December 3, 2014, Howe forwarded Percoco an email from Aiello's partner, Joseph Gerardi, pressing Howe to have Percoco resolve the issue. Percoco responded that Howe should stand by; within an hour, Percoco called Andrew Kennedy, who oversaw ESD, and urged him to move forward without the Labor Peace Agreement.

At that point, Percoco was a few days from formally returning to his position in the Governor's Office and had already signed and submitted his reinstatement forms. In fact, Percoco's swipe-card and telephone records revealed that he was at his desk in the Executive Chamber when he directed Kennedy to resolve the Labor Peace Agreement in COR Development's favor. Kennedy testified that he interpreted Percoco's call as "pressure" coming from one of his "principals," who was a "senior staff member[ ]," and that he relayed this sentiment to another senior executive at the agency when encouraging that official to waive the required Labor Peace Agreement. App'x at 535. After his call with Kennedy, Percoco contacted Howe to confirm that the state agency would soon reach out to Gerardi "with a different perspective" on the need for a Labor Peace Agreement. *Id.* at 710 (internal quotation marks omitted). The following morning, the agency did as Percoco predicted.

casetext

After he resumed his official role in Governor Cuomo's administration, Percoco pressured subordinate state officials to prioritize and release outstanding funds that the state owed COR Development. Percoco also ordered the Director of Administrative Services for the Executive Chamber and employees of the Office of General Services to process a stalled pay raise for Aiello's son, who at that time worked in the Executive Chamber. Recognizing Percoco's role in procuring a raise for his son, Howe encouraged Aiello to send Percoco a thank-you note.

B. Procedural History

The federal government eventually caught wind of the schemes, and in November 2016, a grand jury indicted Percoco, Aiello, Kelly, and Gerardi for their alleged roles in them. The operative indictment, a second superseding indictment filed in September 2017, charged eighteen counts, eleven of which concern the CPV and COR Development schemes relevant to this appeal. Count Six charged Percoco with conspiracy to commit extortion in connection with both schemes, in violation of 18 U.S.C. § 1951. Counts Seven and Eight charged Percoco with Hobbs Act extortion in connection with the CPV scheme and the COR Development scheme, in violation of 18 U.S.C. §§ 1951 and 2. Count Nine charged Percoco and Kelly with conspiracy to commit honest-services wire fraud during the CPV scheme, in violation of 18 U.S.C. § 1349. Count Ten charged Percoco, Aiello, and Gerardi with conspiracy to 187 *187 commit honest-services wire fraud tied to the COR Development scheme, in violation of 18 U.S.C. § 1349. Counts Eleven and Twelve charged Percoco with solicitation of bribes and gratuities for his efforts in the CPV scheme and the COR Development scheme, respectively, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2. Count Thirteen charged Kelly with payment of bribes and gratuities as part of the CPV scheme, in violation of 18 U.S.C. §§ 666(a)(2) and 2, while Count Fourteen charged Aiello and Gerardi with violating the same law by paying bribes and gratuities for the COR Development scheme. Finally, Counts Seventeen and Eighteen charged that Aiello and Gerardi, respectively, violated 18 U.S.C. § 1001(a)(2) by making false statements to federal officers during the investigation into the COR Development scheme.

Percoco, Aiello, Gerardi, and Kelly proceeded to a jury trial, which lasted from January 22, 2018 until March 13, 2018. After the government rested, the trial defendants each moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court reserved decision, ultimately denying the motions in an opinion issued after trial. Prior to charging the jury, however, the district court dismissed the Count Eight extortion charge, reasoning in a later-issued opinion that, as a matter of law, Percoco could not have committed Hobbs Act extortion under color of official right, because he did not have an official position in the administration when he received bribe payments tied to the COR Development scheme.

After dismissing the extortion count, the district court instructed the jury. In relevant part, the court stated that to convict the defendants of conspiracy to commit honest-services wire fraud (Counts Nine and Ten) and soliciting or accepting a bribe (Count Eleven), the jury was required to find the existence of a quid pro quo, meaning that a payment was made or solicited or accepted with the intent that "the payment or benefit ... be in exchange for official actions." App'x at 655–57; *see also id.* at 652–53. Though the court instructed that "[a]n official act or official action is a decision or action on a specific matter that may be pending or may by law be brought before a public official," the court also stated that the quid-pro-quo element would be satisfied if Percoco wrongfully "obtained ... property ... in exchange [for] official acts as the opportunities arose." *Id.* at 652–53.

In addition, the district court instructed the jury about Percoco's fiduciary duty for the purposes of Counts Nine and Ten, stating that "[a] person does not need to have a formal employment relationship with the state in order to owe a duty of ... honest services to the public." *Id.* at 655. According to the district court's instruction, the jury could find that Percoco "owed the public a duty of honest services when he was not a state employee if" (1) "he dominated and controlled any governmental business" and (2) "people working in the government actually relied on him because of a special relationship he had with the government." *Id.* at 655.

The jury ultimately found Percoco and Aiello guilty of conspiracy to commit honest-services wire fraud linked to the COR Development scheme (Count Ten). The jury also returned a guilty verdict against Percoco for conspiring to commit wire fraud related to the CPV scheme (Count Nine) and for soliciting bribes or gratuities during the CPV scheme (Count Eleven). The jury acquitted Percoco, Aiello, and Gerardi on the remaining counts, and deadlocked on the charges against Kelly, who later pleaded guilty to one 188 count of *188 conspiracy to commit wire fraud in connection with the CPV scheme.

The district court sentenced Percoco to a term of 72 months' imprisonment, to be followed by three years' supervised release; imposed a $300 mandatory special assessment; and ordered Percoco to forfeit funds in an amount later determined to be $320,000. The district court sentenced Aiello, who was also convicted on all relevant counts during a separate trial for fraud, to a term of 36 months' imprisonment, to be followed by two years' supervised release; imposed a $500,000 fine, along with a $300 mandatory special assessment; and ordered Aiello to forfeit funds in an amount later determined to be $898,954.20.

Percoco and Aiello timely appealed. They now challenge three of the district court's jury instructions, along with the sufficiency of the evidence supporting their convictions; assert that the government improperly amended the indictment by relying on acts Percoco committed when he was not a public official; and contend that the district court erred when it ordered Percoco to forfeit $320,000.

II. STANDARD OF REVIEW

We review de novo challenges to the district court's jury instructions, as well as claims of constructive amendment to, or prejudicial variance from, the indictment. *United States v. Roy* , 783 F.3d 418, 420 (2d Cir. 2015) ; *United States v. Dove* , 884 F.3d 138, 146, 149 (2d Cir. 2018). We also review de novo the sufficiency of the evidence, *United States v. Sabhnani* , 599 F.3d 215, 241 (2d Cir. 2010), recognizing, of course, that a defendant raising such a challenge "bears a heavy burden because a reviewing court must consider the evidence 'in the light most favorable to the prosecution' and uphold the conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' " *United States v. Aguilar* , 585 F.3d 652, 656 (2d Cir. 2009) (quoting *Jackson v. Virginia* , 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)); *see also United States v. Harvey* , 746 F.3d 87, 89 (2d Cir. 2014). Finally, when a defendant objects to his forfeiture order in the district court, we review the district court's finding of facts with respect to forfeiture for clear error and its legal conclusions de novo. *See Sabhnani* , 599 F.3d at 261.

III. DISCUSSION

A. The "As Opportunities Arise" Jury Instruction

The defendants first argue that the district court committed reversible error by instructing the jury that it could convict the defendants of conspiracy to commit honest-services fraud if Percoco had accepted a bribe to take official actions to benefit

the payors "as opportunities arose." The government concedes that, in light of the Second Circuit's intervening decision in *United States v. Silver* , the district court's bribery instructions were erroneous; it contends, however, that the error here was harmless. We agree with the parties that the district court's instruction falls short of the legal standard as clarified by *Silver* , but conclude that the error was harmless.

1. The "As Opportunities Arise" Instructions Were Erroneous.

Federal law criminalizes the use of wire communications to effectuate a "scheme or artifice to defraud." 18 U.S.C. § 1343. Among the frauds covered by the wire fraud statute are schemes "to deprive another of the intangible right of honest services." *Id.* § 1346. When a public official commits "honest services" fraud, he may be held liable on the "theory that a public official acts as trustee for the citizens and *189 the State and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them." *See Silver* , 948 F.3d at 551 (quoting *United States v. Silvano* , 812 F.2d 754, 759 (1st Cir. 1987)). Honest-services fraud is carefully circumscribed, however, and only criminalizes bribes and kickbacks. *Skilling v. United States* , 561 U.S. 358, 409, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010).

Here, the parties stipulated before the district court that "bribery" for the purposes of the honest-services fraud statute is defined by reference to 18 U.S.C. § 201, which makes it a crime for "a public official" to "corruptly demand[ ], seek[ ], receive[ ], accept[ ], or agree[ ] to receive or accept anything of value ... in return for ... being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A) ; *see United States v. Percoco* , No. 16-cr-776 (VEC), 2019 WL 493962, at *5 n.12 (S.D.N.Y. Feb. 8, 2019) (noting parties' agreement to charge jury that the "official act" requirement applies); *accord McDonnell v. United States* , ––– U.S. ––––, 136 S. Ct. 2355, 2365, 195 L.Ed.2d 639 (2016) ("The parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U.S.C. § 201."). To prove bribery under § 201, the government must establish a quid pro quo, proving that Percoco "committed (or agreed to commit) an ‘official act’ in exchange for" some benefit. *McDonnell* , 136 S. Ct. at 2361.

Although our Court in *United States v. Ganim* held that that the government can satisfy the quid pro quo requirement merely by showing that a government official promised to act for the bribing party's benefit "as the opportunities arise," 510 F.3d 134, 142 (2d Cir. 2007), we recently clarified the limits of this theory in light of the Supreme Court's decision in *McDonnell v. United States* . *See generally Silver* , 948 F.3d at 550–58 ; *United States v. Skelos* , 988 F.3d 645, 655–56 (2d Cir. 2021). In *McDonnell* , the Supreme Court considered the meaning of the phrase "official act" for the purposes of 18 U.S.C. § 201, and determined that the term referred to "something specific and focused that is ‘pending’ or ‘may by law be brought before any public official.’ " 136 S. Ct. at 2374 (quoting 18 U.S.C. § 201(a)(3)). It further held that an official act must be "something that is relatively circumscribed – the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 2369.

In *Silver* , we considered the impact of *McDonnell* on the "as opportunities arise" theory of honest-services fraud. As an initial matter, we rejected the argument that *McDonnell* "eliminated" this theory of bribery. *Silver* , 948 F.3d at 552. But while we held that *McDonnell* does not "require[ ] identification of a particular *act* of influence," we also concluded that *McDonnell* does "require[ ] identification of a particular *question or matter* to be influenced." *Id.* That is to say, the promisor must at least commit "to take official action *on a particular question or matter* as the opportunity to influence that same question or matter arises." *Id.* at 552–53. So the offered "quo" must have "enough definition and focus to be properly

understood as promising, in return for some quid, the formal exercise of governmental power." *Id.* at 557–58.

Applying this standard in *Silver* , we found that the district court improperly instructed the jury that the defendants need only have "expected to exercise official influence or take official action *for the benefit of the payor* ." *Id.* at 568. That "open-ended" charge "failed to convey that [the defendant] could not be convicted of honest services fraud unless the [g]overnment proved that, at the time the bribe *190 was accepted, [he] promised to take official action on a *specific and focused question or matter* as the opportunities to take such action arose." *Id.* at 569. We reached the same conclusion in *United States v. Skelos* , which applied *Silver* to a jury instruction predicating liability on the defendant's agreement to "perform official acts in exchange for ... property." 988 F.3d at 656. That instruction likewise impermissibly "left open the possibility that the jury could convict even if [the defendant] was expected to take official action on *any* question or matter in return for the payment." *Id.*

The district court here instructed the jury that the quid-pro-quo element was satisfied if "Percoco obtained ... property to which he was not entitled by his public office, knowing that it was given in exchange [for] official acts as the opportunities arose." App'x at 653. As in *Silver* and *Skelos* , which were decided after conclusion of the trial in this matter, the jury instruction here was "too open-ended" because it failed to convey that the defendants could not be convicted of honest-services fraud unless they promised to undertake official action on a specific question or matter as the opportunities arose. *Silver* , 948 F.3d at 569 ; *see also Skelos* , 988 F.3d at 656.[2]

[2] Percoco contends that the "as opportunities arise" error "infected the instructions for every count of conviction in Percoco's case, including § 666," because "[a]ll counts and their instructions alleged Percoco agreed to take 'official action' 'as opportunities arose.' " Percoco Suppl. Br. at 1. But as we have repeatedly explained, "*McDonnell* 's 'official act' standard for the quo component of bribery as proscribed by § 201 does not apply to the 'more expansive' language of § 666." *United States v. Ng Lap Seng* , 934 F.3d 110, 133 (2d Cir. 2019) (quoting *United States v. Boyland* , 862 F.3d 279, 291 (2d Cir. 2017)), *cert. denied* , —— U.S. ——, 141 S. Ct. 161, 207 L.Ed.2d 1098 (2020). Accordingly, Percoco's passing commentary about his § 666 conviction misses the mark.

2. The Erroneous Bribery Instructions Were Harmless.

But the mere fact that the district court's jury charge was erroneous does not end the inquiry. Having found the bribery instructions deficient, we must now consider whether that error is harmless. It is well-settled that "we will not reverse a conviction if the government can show harmlessness, *i.e.* , show that it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Ng Lap Seng* , 934 F.3d 110, 129 (2d Cir. 2019) (internal quotation marks omitted); *see also* Fed. R. Crim. P. 52(a). To conclude that the faulty jury instructions were harmless, "we must be convinced that a rational jury would have found that [the defendants] entered into the alleged quid pro quos understanding that [Percoco] was expected to influence 'specific,' 'focused, and concrete' questions or matters." *Silver* , 948 F.3d at 569 ; *see also United States v. Bah* , 574 F.3d 106, 114 (2d Cir. 2009). Of course, "[c]ircumstantial evidence demonstrating an understanding between the payor and the official will often be sufficient for the [g]overnment to identify a properly focused and concrete question or matter." *Skelos* , 988 F.3d at 656–57 (first alteration in original) (quoting *Silver* , 948 F.3d at 557). We first address Percoco's conviction for conspiracy to commit honest-services fraud related to the CPV scheme (Count Nine), before

casetext

turning to both defendants' conviction for conspiracy to commit honest-services fraud connected to the COR Development scheme (Count Ten).

a. The CPV Scheme

The evidence presented at trial overwhelmingly showed that, from the beginning *191 of the CPV scheme, Percoco and his co-conspirators understood that the payments made to Percoco's wife were in exchange for action on the Power Purchase Agreement. Recall that Percoco approached Howe because he needed an influx of cash, and Howe, playing the role of matchmaker, connected Percoco to Kelly because CPV needed assistance to secure the Power Purchase Agreement. Howe testified that the plan was solidified during a 2012 dinner in Danbury, Connecticut – and even Percoco concedes that the Power Purchase Agreement was discussed over dinner. The evidence further reflects that Percoco pressured Howe to seal the deal with Kelly so that Percoco could get his "ziti." And only after CPV began paying Percoco's wife for her low-show job did Percoco exert his influence to secure the Power Purchase Agreement for CPV. *See United States v. Biaggi* , 909 F.2d 662, 684 (2d Cir. 1990) ("[E]vidence of the receipt of benefits followed by favorable treatment may suffice to establish circumstantially that the benefits were received for the purpose of being influenced in the future performance of official duties, thereby satisfying the quid pro quo element of bribery."). Howe's testimony, the email evidence, and the timing of the payments expel any doubt: From the get-go, Percoco agreed to act on the Power Purchase Agreement – a "specific" and "focused" matter as required by *McDonnell* and *Silver* .

We also consider the other specific matter involved in the CPV scheme – the Reciprocity Agreement. The government's theory at trial was that, in exchange for continued monthly payments for his wife's low-show job, Percoco agreed to undertake official action on the Reciprocity Agreement – all to keep the "ziti" flowing. Percoco contends that the Reciprocity Agreement cannot be the basis for his Count Nine conviction, because the jury could at most find that he promised to act on the Reciprocity Agreement a year *after* the CPV conspiracy was hatched. But our caselaw does not support this argument.

As far as timing goes, our caselaw requires that "a particular question or matter must be identified at the time the official makes a promise or accepts a payment." *Silver* , 948 F.3d at 558 (emphasis omitted). This rule hardly precludes a conviction based on an official's follow-on agreements – after an initial deal is reached – to take additional action in exchange for additional money. It would be strange indeed to hold that an original deal between an official and payor somehow froze their agreement in time, excluding the possibility that an official could later commit to take more acts in order to maintain a revenue stream. Rather, it is enough that the parties identified the "particular question or matter ... at the time" that they agreed to the official action that would be taken in exchange for additional money. *See id.*

Nothing in *Silver* is to the contrary. In fact, *Silver* explicitly limited its holding to the " ‘as the opportunities arise’ theory as set forth in *Ganim* ." *Id.* at 553 n.7. There, we were presented with an unfettered "as opportunities arise" theory, which would have permitted a conviction based on a promise "to take – as the opportunities arise – ‘*any* decision or action on any question, matter, cause, suit, proceeding or controversy [that] may at any time be pending.’ " *Id.* at 556 (alteration in original) (quoting 18 U.S.C. § 201(a)(3)). In *Silver* , we recognized that such a promise was "so vague as to be meaningless," leaving the illusory agreement without any definable quo. *Id.* at 556–57.

Here, the evidence demonstrated a clear quid pro quo on a new, specific matter for additional money in the form of continued *192 monthly payments. While payments were ongoing, Kelly informed Percoco (through Howe) that he needed a "push

from above" to secure the Reciprocity Agreement. Suppl. App'x at 4–7. Percoco, in turn, instructed Howe to ask other officials for help; Howe forwarded Percoco's message, copying Percoco, which prompted the state officials who received the email to approve the Reciprocity Agreement. All of this was done to keep the "ziti" flowing. This evidence, combined with the surreptitious method of paying Percoco, strongly supports a finding of guilt – especially because the jury instructions explained that payments to cultivate goodwill were insufficient to establish a quid pro quo. *See Silver* , 948 F.3d at 571.

We therefore have no reasonable doubt that a properly instructed jury would necessarily have found Percoco guilty of the CPV honest-services fraud scheme, and we affirm his conviction on Count Nine. *See Ng Lap Seng* , 934 F.3d at 129.

b. The COR Development Scheme

We also find that the erroneous jury instruction was harmless with respect to the charges related to the COR Development scheme, as there can be no doubt that both Aiello and Percoco understood that the payments to Percoco were made to procure his assistance in pressuring ESD to reverse its position on the need for a Labor Peace Agreement.

For starters, neither defendant contested the fact that Aiello sought – and Percoco gave – assistance on the Labor Peace Agreement, which was undoubtedly a specific matter. Percoco, who on appeal primarily piggybacks on Aiello's harmlessness analysis as it relates to the COR Development scheme, effectively conceded in summation that COR Development paid him to advance the company's interests with respect to the Labor Peace Agreement. Tr. at 6354 ("Less than three weeks after COR made its first payment to Joe [Percoco], he was asked to take action, action related to [a Labor Peace Agreement], in fact."). His theory, instead, was that he never agreed to undertake *official* action, in part because he committed to lobby for COR Development while he was on the campaign trail. Though we assess and reject this argument below, the key point here is that the "concreteness" of the question or matter awaiting action was not in doubt.

Indeed, Aiello did not dispute the concreteness of the matter. Instead, Aiello's theory at trial was that he in fact *refused* to pay Percoco and merely sought Howe's help as a consultant. *See id.* at 6084 (arguing during summation that "Steve [Aiello] says, I'm not hiring Percoco. ... I am paying you [(Howe)] $14,000 a month. ... You've been telling me for six years, and you've proven it, you've got contacts with the state. Why do I need [Percoco]? No. Gerardi and I talked, we're not hiring him."); *see also id.* at 6087 ("There is no reason why Steve Aiello on his own could have given the money to Joe Percoco."). Aiello argued that Howe, when facing pressure from Percoco about securing a consulting job, transferred funds he received from COR Development without Aiello's knowledge. *See id.* at 6093 (arguing during summation that "[Howe] tells Joe Percoco that the [money] comes from COR, and he lies to him. ... It comes from checks that he steals from COR ...."). But in convicting Aiello and Percoco of honest-services fraud, the jury necessarily rejected Aiello's denials by finding a quid pro quo between him and Percoco. *See United States v. Jennings* , 160 F.3d 1006, 1022 (4th Cir. 1998) (concluding, on plain error review, that the failure to provide a quid pro quo instruction at trial was not reversible error because the defendant *193 "testified that he did not pay [the official] a dime, and [the defendant's] lawyer pressed this point at length in his closing," which the "jury completely rejected" in finding him guilty).

In addition, the evidence overwhelmingly established that Percoco's action on the Labor Peace Agreement was part of the quid pro quo. Howe testified that he encouraged Aiello to hire Percoco because Aiello had been struggling to avoid the Labor Peace Agreement requirement, Aiello agreed to pay Percoco through Howe's

firm, and Aiello "wanted that [L]abor [P]eace [A]greement to go away and realized that Joe [Percoco] was in a position that ... could make that happen, and that's what they were asking" when they agreed to hire him. App'x at 552. Additional evidence introduced at trial corroborated this account. For example, Aiello emailed Howe about the Labor Peace Agreement, asking if there "is there any way Joe P can help us with this issue while he is off the 2nd floor working on the Campaign. We can't seem to put it behind us. ... I could really use a[n] advocate with regard to labor issues over the next few months." *Id.* at 680. Moreover, Howe's invoices and the memo line in one of the Percoco's paychecks referenced the labor assistance, expressly linking the payment with the official action on a specific matter.

In light of this clear evidence and the fact that the defendants did not contest the specificity or the concreteness of the Labor Peace Agreement, we have no doubt that the jury would have reached the same conclusion on that issue notwithstanding the pre- *Silver* instructional error. *See Neder v. United States* , 527 U.S. 1, 17, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."). And because the evidence of an agreement on the Labor Peace Agreement is so overwhelming, we need not address the other official acts identified by the government in connection with the COR Development scheme – namely, the pay raise for Aiello's son or the release of state funds to COR Development. *See United States v. Eldridge* , 2 F.4th 27, 42 (2d Cir. 2021) ("In light of the overwhelming evidence of [the defendant's] guilt and the jury's verdicts on other counts, there can be no doubt that the jury still would have returned a guilty verdict ... even if the only theory presented had been" a valid predicate for conviction.).[3]

3 Aiello nevertheless argues that the jury might have convicted him for his efforts to influence his son's pay raise as the jury acquitted Gerardi, who had nothing to do with the salary bump. But our precedent has cautioned against guessing why a jury delivered differing verdicts for co-defendants. *See United States v. Acosta* , 17 F.3d 538, 545 (2d Cir. 1994). It is enough that a reasonable jury would have found that Aiello, as Howe put it, "agreed to hire Joe [Percoco] as a consultant, and the foremost and front and center issue was th[e] [L]abor [P]eace [A]greement." App'x at 567.

B. The Fiduciary-Duty Jury Instruction

The defendants also argue that the district court erred when it instructed the jury that the defendants could be guilty of honest-services fraud based on actions Percoco took in 2014, after he resigned from state government to manage Governor Cuomo's reelection campaign. Specifically, the district court charged the jury that Percoco did "not need to have a formal employment relationship with the state in order to owe a duty of ... honest services to the public," so long as he "owed *194 the public a fiduciary duty." App'x at 655. According to the district court's further instruction, Percoco owed a fiduciary duty to the public if, and only if, (1) "he dominated and controlled any governmental business," and (2) "people working in the government actually relied on him because of a special relationship he had with the government." *Id.* The court also explained that both factors were required, and that "[m]ere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty." *Id.*

The district court's fiduciary-duty instruction fits comfortably within our decision in *United States v. Margiotta* , where we held that "a formal employment relationship, that is, public office," is not a "rigid prerequisite to a finding of fiduciary

casetext

duty in the public sector." 688 F.2d 108, 122 (2d Cir. 1982). Rather, a private citizen's "dominance in municipal government" may "give[ ] rise to certain minimum duties to the general citizenry." *Id.* at 124. Indeed, "[i]t requires little imaginative leap to conclude that individuals who in reality or effect are the government owe a fiduciary duty to the citizenry," just as much as those who are formally employed by a government. *Id.* To spell out the bounds of this fiduciary duty, we looked to common law generally and New York law specifically, ultimately concluding that "the concepts of reliance, and de facto control and dominance" lie "at the heart of the fiduciary relationship." *Id.* at 125.

Although the defendants seem to agree that the district court's fiduciary-duty instruct falls within *Margiotta* , they nonetheless urge us to revisit *Margiotta* and to chart a new course in light of the Supreme Court's decisions in *McDonnell* and *McNally v. United States* , 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), as well as various constitutional considerations. We decline to follow that path, and reaffirm *Margiotta* 's reliance-and-control theory in the public-sector context.

1. *Margiotta* Remains Valid After *McNally* .

The text of § 1346, coupled with the history of its enactment, makes clear that Congress adopted *Margiotta* 's fiduciary-duty theory. Before *McNally* , all federal Courts of Appeals interpreted the mail and wire fraud statutes as prohibiting honest-services fraud. *United States v. Napout* , 963 F.3d 163, 180 (2d Cir. 2020). But *McNally* "stopped the development of th[is] intangible-rights doctrine in its tracks." *Id.* (quoting *Skilling* , 561 U.S. at 401, 130 S.Ct. 2896). There, the Supreme Court considered a Sixth Circuit case that, following *Margiotta* , had decided that "an individual without formal office [was] held to be a public fiduciary" because he "substantially participated in governmental affairs and exercised significant, if not exclusive, control" of certain governmental decisions. *McNally* , 483 U.S. at 355–56, 107 S.Ct. 2875 (internal quotation marks omitted). The Court reversed, interpreting the mail fraud statute "as limited in scope to the protection of property rights." *Id.* at 360, 107 S.Ct. 2875. At the same time, the Court invited Congress to "speak more clearly" if it "desires to go further." *Id.*

Congress answered this call the following year by enacting § 1346, the honest-services statute. *See Skilling* , 561 U.S. at 402, 130 S.Ct. 2896. By doing so, "Congress amended the law specifically to cover one of the ‘intangible rights’ that lower courts had protected under § 1341 prior to *McNally* : ‘the intangible right of honest services.’ " *Cleveland v. United States* , 531 U.S. 12, 19–20, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000) (quoting 18 U.S.C. § 1346). Put simply, Congress "effectively overruled *195 *McNally* ." *United States v. Bahel* , 662 F.3d 610, 631 n.4 (2d Cir. 2011) (citing *United States v. Rybicki* , 354 F.3d 124, 136–37 (2d Cir. 2003) (en banc)).

That said, the enactment of § 1346 did not automatically revive all pre- *McNally* cases dealing with honest-services fraud. Instead, as we concluded in *Rybicki* , our pre- *McNally* caselaw in that space remains "pertinent," but not " ‘precedent’ in the sense that it sets forth rules of law that we are bound to follow." 354 F.3d at 145. While *Rybicki* held that honest-services fraud in the *private* sector covered those "who assume a legal duty of loyalty comparable to that owed by an officer or employee," *id.* at 142 n.17, it expressly avoided discussing the reach of the honest-services fraud statute with respect to public corruption cases, *id.* at 138–39. Nor have we had occasion to revisit *Margiotta* to determine if its fiduciary-duty theory survives in the public-sector context after *McNally* and the enactment of § 1346.

In our view, § 1346 covers those individuals who are government officials as well as private individuals who are relied on by the government

and who in fact control some aspect of government business. Our analysis begins, as it must, with the text of § 1346, *see N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals* , 987 F.3d 207, 216 (2d Cir. 2021), which prohibits a "scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. § 1346. Although this language cannot be precisely defined "simply by consulting a dictionary for the literal, 'plain' meaning of the phrase," *Rybicki* , 354 F.3d at 135, the core meaning of the text encompasses "a legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception," *id.* at 153 (Raggi, J., concurring in the judgment). On its face, the statute's capacious language is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary.

This reading of the statute finds support from the historical understanding of the statute's language. As explained in *Rybicki* , we can "look to the case law from the various circuits that *McNally* overruled," understanding that the statute's language may have developed a "well-settled meaning" that Congress incorporated when adopting § 1346. *Id.* at 136–37 (majority opinion). In other words, those pre- *McNally* cases, while not technically binding, may shed useful light on what Congress meant when it spoke of "the intangible right of honest services," 18 U.S.C. § 1346. *See id.*

There is no question that many cases before *McNally* applied the honest-services doctrine to government officials. *McNally* , 483 U.S. at 362 & n.1, 107 S.Ct. 2875 (Stevens, J., dissenting) (collecting cases). Our caselaw since the enactment of § 1346 has done the same. *See, e.g.* , *Skelos* , 988 F.3d at 650, 653–54 ; *Silver* , 948 F.3d at 545, 575. We see no statutory basis for distinguishing a formal government employee, who is clearly covered by § 1346, from a functional employee who owes a comparable duty. *Cf. Rybicki* , 354 F.3d at 142 n.17 ("Although the bulk of the pre- *McNally* honest-services cases involved employees, we see no reason the principle they establish would not apply to other persons who assume a legal duty of loyalty comparable to that owed by an officer or employee to a private entity.").

Importantly, *McNally* directly overruled a Sixth Circuit case, *United States v. Gray* , 790 F.2d 1290 (6th Cir. 1986), that leaned heavily on *Margiotta* 's reliance-and-control theory. *See* 483 U.S. at 355–56, 107 S.Ct. 2875. In fact, in language that foreshadowed the text of § 1346, *McNally* *196 described that Sixth Circuit case as being part and parcel of "a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their *intangible rights to honest* and impartial government." *Id.* at 355, 107 S.Ct. 2875 (emphasis added). And drawing from *Margiotta* , the Court then explained that, under this theory, "an individual without formal office may be held to be a public fiduciary if others rely on him ' "because of a special relationship in the government" ' and he in fact makes governmental decisions." *Id.* (quoting *Gray* , 790 F.2d at 1296 (quoting *Margiotta* , 688 F.2d at 122)).

Because the Court in *McNally* outright rejected the entire doctrine of honest-services fraud, it had no occasion to directly rule on the *Margiotta* -based theory. But the Supreme Court's description of the settled doctrine nonetheless underscores the tight connection between *Margiotta* 's fiduciary-duty theory and the "intangible right of honest services." 18 U.S.C. § 1346. Based on the cases that *McNally* overturned, it stands to reason that Congress effectively reinstated the *Margiotta* -theory cases by adopting statutory language that covered the theory. *See Rybicki* , 354 F.3d at 136–37 ; *see also* 134 Cong. Rec. 32,708 (1988) (statement of Sen. Biden) (observing that the "intent [of § 1346] is to reinstate all of the pre- *McNally* caselaw pertaining to the mail and wire fraud statutes without change").

In the end, both the text and history of § 1346 lead us to conclude that the statute validates the instruction the district court gave here.

2. *McDonnell* Does Not Undermine *Margiotta* .

Rather than wrestle with the text or history of § 1346, the defendants mainly ground their challenge to *Margiotta* on the Supreme Court's decision in *McDonnell* , arguing that an "official act" can only be performed by an "official" with de jure authority, because "to be official, the act must be something ‘within the specific duties of [one's] official[ ] position – the function conferred by the authority of [one's] office.’ " Percoco Br. at 30 (second alteration in original) (quoting *McDonnell* , 136 S. Ct. at 2369). But *McDonnell* merely interpreted the definition of "official act," which is "quite [a] different issue" from *who* can violate the honest-services statute. *United States v. Halloran* , 821 F.3d 321, 340 n.13 (2d Cir. 2016). It did not hold that only a formal government officer could perform an "official act."

Such a holding could not be reconciled with the text of § 201 in any event, since that provision defines the term "public official" to include both a traditional public officer, like a "Member of Congress," as well as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of [g]overnment thereof, ... in any official function, *under or by authority of* any such department, agency, or branch of [g]overnment." 18 U.S.C. § 201(a)(1) (emphasis added). As the Supreme Court noted in *Dixson v. United States* , the "proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the [g]overnment's agent, but rather whether the person occupies a position of public trust with official federal responsibilities." 465 U.S. 482, 496, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984). In other words, it is not the formal employment role, but rather the fiduciary duty to the public, that defines an "official action."

Accordingly, *McDonnell* ’s passing reference to "an official position" gives us no reason to doubt that someone who is functionally *197 a government official can violate the honest-services fraud.

3. Constitutional Considerations Do Not Require Overturning *Margiotta* .

Aiello further argues that "three ‘significant constitutional concerns’ " – based on the First Amendment, due process, and federalism – should drive us to read § 1346 more narrowly to foreclose *Margiotta* ’s fiduciary-duty theory. Aiello Br. at 32 (quoting *McDonnell* , 136 S. Ct. at 2372–73). Unfortunately for Aiello, we have repeatedly applied the reliance-and-control theory to § 1346 frauds committed in a variety of other contexts where no formal employment relationship existed. *See, e.g.* , *Halloran* , 821 F.3d at 337–40 (party chair accepting payment to influence party); *Rybicki* , 354 F.3d at 142 n.17 (collecting cases). Because the constitutional avoidance principles Aiello raises apply equally to these other cases, we see no reason to introduce a new requirement of formal *governmental* employment before a fiduciary duty may be deemed to arise under § 1346.

While Aiello insists that the First Amendment affords unique protection for citizens to petition and seek to influence the government, the First Amendment also protects the right of a person to speak persuasively to a private company. Indeed, the right of free speech and the right to petition the government are "cognate rights" that "share substantial common ground." *Borough of Duryea v. Guarnieri* , 564 U.S. 379, 388, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011) (internal quotation marks omitted). Cases implicating these rights are thus "generally subject to the same constitutional analysis." *White Plains Towing Corp. v. Patterson* , 991 F.2d 1049, 1059 (2d Cir. 1993) (internal quotation marks omitted); *accord McEvoy v. Spencer* , 124 F.3d 92, 97 n.1 (2d Cir. 1997). Consequently, it is not obvious why speech

directed to the government would necessarily require special treatment. We therefore detect no First Amendment rationale for carving out an exception to § 1346 that would require formal employment *only* when defrauding the government (as opposed to a private party).

C. The Gratuity Jury Instruction

Percoco next contends that it was error for the district court to instruct the jury that it could convict him for violating § 666 on the theory that he solicited or received a gratuity as a reward for some action. Although the precise basis for Percoco's argument is unclear, he does not appear to question that a conviction under § 666 can be based on acceptance of gratuities. Nor could he. *See Skelos* , 988 F.3d at 660 (recognizing that, under binding caselaw, § 666 applies to gratuities and bribes). Rather, without any elaboration, Percoco argues that the jury instructions distinguished between a bribery theory and a gratuity theory only in "a perfunctory way," suggesting that the gratuity instruction, which did not track the government's bribery theory of the case, led to jury confusion and "paradoxical and contradictory verdicts." Percoco Br. at 53–54.

None of these unsupported arguments, however, rebuts "the law's general assumption that juries follow the instructions they are given." *United States v. Agrawal* , 726 F.3d 235, 258 (2d Cir. 2013) ; *see also United States v. Acosta* , 17 F.3d 538, 545 (2d Cir. 1994) ("[I]t has long been established that inconsistency in jury verdicts of guilty on some counts and not guilty on others is not a ground for reversal of the verdicts of guilty."). And because Percoco neither challenges the instruction as being inconsistent with the law nor contests the *198 sufficiency of the evidence on this charge, we see no ground for reversal here.

D. The Constructive Amendment Challenge

Aiello next contends that the district court's *Margiotta* -based instruction and the trial evidence introduced to support the fiduciary-duty theory amounted to a constructive amendment of, or a prejudicial variance from, the indictment, which never explicitly alleged that Percoco owed a fiduciary duty when he was running the Governor's reelection campaign. Again, his argument is wide of the mark.

"[A] constructive amendment occurs either where (1) an additional element, sufficient for conviction, is added, or (2) an element essential to the crime charged is altered." *Dove* , 884 F.3d at 146 (internal citation omitted). Our precedent has "consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core* of criminality to be proven at trial." *United States v. Banki* , 685 F.3d 99, 118 (2d Cir. 2012) (internal quotation marks omitted). Put differently, the indictment must alert a defendant to "the essence of a crime, in general terms," but need not specify "the particulars of how a defendant effected the crime." *United States v. D'Amelio* , 683 F.3d 412, 418 (2d Cir. 2012). So, to prevail on a constructive amendment argument, a defendant "must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Salmonese* , 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks omitted).

Even if a defendant is unable to show a constructive amendment, he can still obtain relief if there was a prejudicial variance. A variance occurs "when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *D'Amelio* , 683 F.3d at 417 (citing *Salmonese* , 352 F.3d at 621). A "defendant alleging variance must show 'substantial prejudice' " to warrant relief. *United States v. Rigas* , 490 F.3d 208, 226 (2d Cir. 2007) (quoting *United States v. McDermott* , 918 F.2d 319, 326 (2d Cir. 1990)). A variance is prejudicial only when it "infringes on the substantial rights that

indictments exist to protect – to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." *United States v. Dupre* , 462 F.3d 131, 140 (2d Cir. 2006) (internal quotation marks omitted).

Here, the indictment was not constructively amended as it clearly identified "the core of criminality to be proven at trial." *D'Amelio* , 683 F.3d at 417 (emphasis and internal quotation marks omitted). For starters, Count Ten of the indictment alleged that the honest-services fraud conspiracy occurred from 2014 until 2015, which covers the period when Percoco left state office to run the reelection campaign. Moreover, the indictment set out the specific dates for Percoco's departure from state office and his return to his government, alleging that he was bribed during that time "in exchange for [his] official assistance." App'x at 292. And the indictment asserted that even after Percoco "officially left New York State employment to serve as campaign manager," he nevertheless "continued to function in a senior advisory and supervisory role with regard to the Governor's Office." *Id.* at 278–79.

Although the indictment did not expressly state that Percoco owed a fiduciary duty to the public after he formally resigned as Executive Deputy Secretary, the indictment's "generally framed" language 199 *199 "encompasse[d]" the *Margiotta* theory, *Salmonese* , 352 F.3d at 620 (internal quotation marks omitted), providing ample notice that the honest-services charge could include acts that occurred while Percoco technically lacked an official role in state government. Without a mismatch between the generally framed indictment and the *Margiotta* jury instruction, "there is no constructive amendment." *Id.*

Our conclusion is not at all disturbed by *United States v. Hassan* , in which we held that a conviction based on a particular type of drug that differed from the drug alleged in the indictment would be an impermissible constructive amendment. 578 F.3d 108, 133–34 (2d Cir. 2008). Unlike this case, *Hassan* involved ‘ "unique’ due process issues" on account of the regulatory scheme tied to the narcotics at issue in that case, and consequently "required us to ‘scrutinize the ... instructions ... very closely.’ " *United States v. Andino* , 627 F.3d 41, 48 n.4 (2d Cir. 2010) (quoting *Hassan* , 578 F.3d at 132). The jury instruction there would have permitted a conviction for an offense distinct from what was charged in the indictment and in fact would have carried different penalties. *See Hassan* , 578 F.3d at 133–34 ; *see also D'Amelio* , 683 F.3d at 423 (distinguishing *Hassan* on the same grounds). Aiello falls far short of establishing that any of the purported amendments modified his offense or the range of penalties that he faced.

Nor has he shown any prejudicial variance between the indictment and evidence introduced at trial. To begin, there is no basis to conclude that "the evidence at trial prove[d] facts materially different from those alleged in the indictment," *D'Amelio* , 683 F.3d at 417 (quoting *Salmonese* , 352 F.3d at 621), since the indictment was far-reaching on its face. But even if Aiello could satisfy this prong, his argument would founder on the prejudice requirement. While Aiello contends that he had "no reason to lay an evidentiary foundation for arguments that Percoco neither ‘dominated’ nor ‘controlled’ governmental business and that no one in state government – let alone the public – relied on him once he walked away from public office," Aiello Br. at 27, Aiello actually had significant incentive to develop such evidence at trial. After all, the § 666 bribery charge encompassed Percoco's time out of the office, and to prove that Aiello illegally paid a bribe or gratuity during that time, the government needed to establish that Percoco was an "agent" of the State of New York. 18 U.S.C. § 666(a)(2). Because Aiello already had every incentive to mount a defense distancing Percoco from the state government, we find that there was no prejudicial variance.

E. The Sufficiency of the Evidence

Percoco and Aiello also contest the sufficiency of the evidence supporting their convictions, arguing that there was no proof that Percoco agreed to take official action as to either scheme, and that the evidence failed to establish that he owed a fiduciary duty under *Margiotta* . Recall that a defendant making such a challenge "bears a heavy burden," *United States v. Heras* , 609 F.3d 101, 105 (2d Cir. 2010) (internal quotation marks omitted), because we "cannot substitute [our] own judgment for that of the jury as to the weight of the evidence and the reasonable inferences to be drawn therefrom," *Ng Lap Seng* , 934 F.3d at 130. Instead, we "must consider the evidence in the light most favorable to the prosecution and uphold the conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 129 (internal quotation marks omitted). Viewed in this light, 200 there *200 can be no doubt that the evidence proved the challenged elements.[4]

[4] Noting that the defendants did not renew their Rule 29 motions for acquittal at the close of all evidence, the government contends that the defendants must further bear the burden to demonstrate "plain error or manifest injustice." Gov't Br. at 106 (quoting *United States v. Finley* , 245 F.3d 199, 202 (2d Cir. 2001)). But the case on which the government relies, *United States v. Finley* , applied the "plain error or manifest injustice" standard where the defendant moved for acquittal, the district court then denied the motion, and the defendant subsequently failed to renew that motion at the end of the trial. *See* 245 F.3d at 202. Here, by contrast, the district court reserved decision on the defendants' Rule 29 motions, opting to deny them after the jury returned its verdict. Under this scenario, it would appear that "the defendant is not required to take any additional procedural steps to preserve the issue for appellate review." *United States v. Wahl* , 290 F.3d 370, 374 (D.C. Cir. 2002). We need not definitively resolve the issue, however, because Percoco and Aiello cannot bear the ordinary "heavy burden" that applies to sufficiency challenges. *See Heras* , 609 F.3d at 105.

1. The Evidence Was Sufficient to Prove an Agreement to Perform Official Acts in the CPV Scheme.

First, Percoco contends that there was insufficient evidence that he agreed to commit any official act related to the CPV scheme because he simply set up meetings, which under *McDonnell* would not qualify as official acts. *See McDonnell* , 136 S. Ct. at 2371. But the Supreme Court did not hold that setting up a meeting can *never* evince an intent to take official action. To the contrary, the Court explained that, "[i]f an official sets up a meeting ... on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act" because a jury could conclude "that the official was attempting to pressure or advise another official on a pending matter." *Id.* That is exactly what the evidence demonstrated here. Take, for instance, the email from Howe advising Percoco that, to "keep the ziti flowing," Percoco had to "[h]old" another official's "feet to the fire" to obtain the Power Purchase Agreement. Suppl. App'x at 30. And in the same exchange, Percoco agreed to "push" the official to discourage the state from awarding a Power Purchase Agreement to a competitor of CPV. *Id.*

In addition, Kelly specifically requested that Percoco act on the Reciprocity Agreement, as he needed a "push from above." *Id.* at 8–10. In response, Percoco – whose wife was then receiving monthly payments for a low-show job – agreed to contact a state commissioner, which alone bolsters a finding of the bribery scheme. *See United States v. Triumph Cap. Grp.* , 544 F.3d 149, 162 (2d Cir. 2008) (noting that pay for unperformed work provided "strong support" for the existence of a bribery scheme); *see also Biaggi* , 909 F.2d at 684. When the illness of Percoco's

mother made it impossible for him to directly intervene, Percoco then emailed Kelly to refer him to two other government officials in the Executive Chamber. Kelly, in turn, forwarded this email to a state official – copying Percoco to show his tacit agreement – to move it forward. Although Percoco contends that, by directing Kelly to two other officials in the Executive Chamber, he showed his intent *not* to act on the Reciprocity Agreement, the evidence allowed the jury to reach the exact opposite conclusion. From the series of communications between Percoco and Kelly, the jury was entitled to infer that Percoco intended to influence a pending government matter, even when personal circumstances prevented him from doing so directly, by means of a referral. *See United States v. White* , 7 F.4th 90, 101 (2d Cir. 2021) ("We defer to the jury's rational ... choice of 201 *201 the competing inferences that can be drawn from the evidence." (internal quotation marks omitted)).

2. The Evidence Was Sufficient to Prove an Agreement to Perform Official Acts in the COR Development Scheme.

Percoco also argues that the evidence was inadequate to prove that he agreed to perform an official act as to the COR Development scheme. Specifically, Percoco argues that his call to Kennedy about the Labor Peace Agreement was not an official act because Kennedy and other senior officials already believed the Labor Peace Agreement was not required. But the testimony at trial demonstrated that COR Development had struggled unsuccessfully to remove the Labor Peace Agreement requirement – until Percoco stepped in and pressured Kennedy to act.

In any event, Percoco's argument is really beside the point: All that ultimately matters is Percoco's *agreement* to perform official action, not his execution of the deal. *See Silver* , 948 F.3d at 551–52. It is enough that the evidence introduced at trial demonstrated that Percoco, owing a fiduciary duty to the public, nevertheless accepted Aiello's invitation to become COR Development's "advocate with regard to labor issues." App'x at 680. And the mere fact that Kennedy or other officials were inclined to take the steps that Percoco pushed them to take is not a defense. *See City of Columbia v. Omni Outdoor Advert., Inc.* , 499 U.S. 365, 378, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) (noting that an official "is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid"); *United States v. Alfisi* , 308 F.3d 144, 150–51 (2d Cir. 2002) (rejecting argument that bribery "requires evidence of an intent to procure a violation of the public official's duty," and stating there "there is no lack of sound legislative purpose in defining bribery to include payments in exchange for an act to which the payor is legally entitled").

3. The Evidence Was Sufficient to Establish Percoco's Fiduciary Duty.

Aiello and Percoco further argue that there was insufficient evidence that Percoco owed New York State a duty of honest services while he was managing the Governor's campaign. But when viewed in the light most favorable to the government, the evidence reflects that Percoco exercised sufficient control and reliance to trigger a duty of honest services under *Margiotta* . *See* 688 F.2d at 125.

Before he left the government to manage the sitting Governor's reelection campaign, Percoco's official role was that of Executive Deputy Secretary to the Governor. To many in the administration, this role was among the highest-ranking positions in New York State's executive department. Among other things, Percoco had power over the Executive Chamber's budget, personnel decisions, and operations. He also had a significant role in overseeing labor relations, governmental affairs, and legislative affairs, and he worked closely with the Governor and other senior officials in the Executive Chamber.

Percoco's power was amplified by his unique relationship with Governor Cuomo; he had worked with Governor Cuomo in a number of roles, and was known for being close to him and his family.

The government's theory at trial was that, for all practical purposes, Percoco maintained the same position of power and trust in the state throughout his time on the campaign trail. And that theory finds ample record support. For starters, no one ever formally replaced Percoco in his role *202 as Executive Deputy Secretary. Rather, as early as August 7, 2014, Percoco represented that he had a guaranteed position with Cuomo's administration after the election, and he did in fact return – as Executive Deputy Secretary – four months later. Throughout the election campaign, Percoco also held onto and used his Executive Chamber telephone, desk, and office, where he continued to conduct state business. Percoco himself bragged in an email that he retained "a bit of clout" even after formally leaving the administration. App'x at 697.

Several individuals testified that Percoco maintained control over official matters. Howe, for instance, testified that "regardless of whether he was in the campaign or he was in the governor's office physically, [Percoco] had the ability to pick up the phone and get things done." *Id.* at 552. Howe witnessed Percoco "pick up the phone and call the governor's staff from the campaign on many occasions" to discuss "campaign and non-campaign business" alike, and overheard Percoco "instruct them on various [non-campaign] topics." Suppl. App'x at 437–38; *see also* App'x at 567–69 (testimony regarding pressure Percoco exerted to prevent staff from leaving the administration). From Howe's perspective, Percoco's grip on power never changed, diminished, or dissipated as he managed the campaign.

This was generally consistent with the testimony of those in the Governor's administration. For instance, Kennedy testified that Percoco helped organize a state event, attended a government briefing about an impending winter storm, and discussed the terms of a redevelopment project with government employees – all while Percoco was technically out of office. Another government employee stated that Percoco continued to be an advisor to the Governor and to coordinate both the Governor's official and campaign schedules. And another testified that she called Percoco to solicit his advice on pending legislation related to public-sector unions.

While Aiello views Percoco as failing to exercise the same level of control as the defendant in *Margiotta* , a rational jury could certainly disagree. In at least some respects, Percoco maintained firmer control over the government's decisions than the defendant in *Margiotta* , who never officially held public office. *See* 688 F.2d at 113, 122. Percoco, of course, held an official position as the Executive Deputy Secretary to the Governor, returned to that position after managing the campaign, and maintained significant control over government decisions throughout the campaign.

And though Aiello disputes his knowledge of Percoco's control, the trial evidence reflected that Aiello specifically sought out Percoco to use his position of power to push the Labor Peace Agreement through. He explicitly recognized the power that Percoco wielded to accomplish this, even while "he [wa]s off the 2nd floor working on the Campaign." App'x at 680. Importantly, Aiello's payments to Percoco took a circuitous route through an entity Howe controlled, which likewise could have prompted a rational jury to conclude that Aiello understood that the payments were designed to compensate Percoco for unlawful conduct. *Cf. Rybicki* , 354 F.3d at 142 ("At the end of the day, we simply cannot believe that [the defendants] did not know that they were courting prosecution and conviction for mail and wire fraud when they undertook to use the wires and the mails, in effect, to pay off insurance adjustors,

casetext

while assiduously covering their tracks."). We therefore affirm the defendants' convictions on Counts Nine, Ten, and Eleven.

F. The Forfeiture Order

Finally, Percoco argues that the district court erred in finding that all of *203 the funds paid to his wife pursuant to the CPV scheme were forfeitable. Federal law provides for the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" certain identified offenses, including "bribery of a public official." *See* 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7)(B)(iv). For crimes "involving ... illegal services [or] unlawful activities, ... the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto," so "proceeds" are "not limited to the net gain or profit realized from the offense." *Id* . § 981(a)(2)(A). " '[U]nlawful activities' include 'inherently unlawful activit[ies], like say the sale of foodstamps, or a robbery.' " *See United States v. Bodouva* , 853 F.3d 76, 80 (2d Cir. 2017) (second alteration in original) (quoting *United States v. Contorinis* , 692 F.3d 136, 145 n.3 (2d Cir. 2012)). In other words, where the criminal conduct cannot ever be conducted legally, the gross proceeds of the crime are forfeitable.

By contrast, "[i]n cases involving ... lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." 18 U.S.C. § 981(a)(2)(B). Section "981(a)(2)(B) applies in, for example, insider trading cases because [a] security is a lawful good[ ] for the purposes of § 981(a)(2)(B), ... which, if [purchased or sold] based upon improperly obtained material nonpublic inside information, is sold ... in an illegal manner." *Bodouva* , 853 F.3d at 79–80 (alterations in original) (internal quotation marks omitted). In such cases, the defendant has "the burden of proof with respect to the issue of direct costs." 18 U.S.C. § 981(a)(2)(B) ; *see also United States v. Mandell* , 752 F.3d 544, 554 (2d Cir. 2014).

The district court ordered Percoco to forfeit $320,000, which included the $35,000 consulting fee related to COR Development and $285,000 that his wife, Lisa Percoco, received as compensation for leading an education program.

Percoco argues on appeal, as he did before the district court, that Lisa Percoco's actions were not "inherently unlawful," and thus the bona fide services she rendered to CPV, which Percoco calculated to be $2,500 per month, should be subtracted from the forfeiture amount. But this argument misunderstands the criminal conduct at the heart of this case. *See Bodouva* , 853 F.3d at 80. At issue here was not an education-consultant position conducted unlawfully; rather, the position was a farce – merely the means to execute and conceal an illegal bribery scheme. As the district court found, regardless of the value Lisa Percoco provided as an educator, she would not have received the job absent the bribery scheme, which obviously could not be carried out lawfully. Her low-show job was a cover for, and in furtherance of, the illegal bribery scheme; any legitimate value she added was, at most, an incidental by-product of the fraud. Accordingly, the criminal conduct involved "unlawful activities" under subsection (A), rather than "lawful services" sold in an illegal manner under subsection (B). 18 U.S.C. § 981(a)(2) ; *see also Bodouva* , 853 F.3d at 80. We thus affirm the forfeiture order.

IV. CONCLUSION

For the reasons stated above, the judgment of the district court is **AFFIRMED** .

21-1170 CIMINELLI V. UNITED STATES

DECISION BELOW: 13 F.4th 158

LOWER COURT CASE NUMBER: 18-3710, 18-3712, 18-3715, 18-3850

QUESTION PRESENTED:

Whether the Second Circuit's "right to control" theory of fraud-which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud- states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343.

CERT. GRANTED 6/30/2022

No. 21-1170

In The Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Michael R. Dreeben
Counsel of Record
Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, DC 20006
(202) 282-5300
mdreeben@omm.com

Jason Zarrow
O'MELVENY & MYERS LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
(213) 430-6000

L. Nicole Allan
O'MELVENY & MYERS LLP
Two Embarcadero Center,
28th Floor
San Francisco, CA 94111
(415) 984-8700

QUESTION PRESENTED

Whether the Second Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDING

Petitioner is Louis Ciminelli, defendant and appellant below. Joseph Percoco, Steven Aiello, Joseph Gerardi, and Alain Kaloyeros were Mr. Ciminelli's co-defendants and appellants below and are parties in this Court pursuant to Supreme Court Rule 12.6.

Respondent is the United States of America, appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION.. 2

STATUTORY PROVISIONS INVOLVED................. 2

STATEMENT.. 3

A. The Buffalo Billion RFP 3

B. District Court Proceedings............................ 5

C. Second Circuit Proceedings 7

SUMMARY OF ARGUMENT 9

ARGUMENT 12

THE RIGHT-TO-CONTROL THEORY FAILS TO STATE A VALID BASIS FOR LIABILITY UNDER THE FEDERAL WIRE FRAUD STATUTE.. 12

I. THE RIGHT-TO-CONTROL THEORY CANNOT BE RECONCILED WITH THE STATUTORY TEXT 12

A. The Mail And Wire Fraud Statutes Extend Solely To Schemes To Obtain Money Or Property...................................... 12

B. The Right-To-Control Theory Impermissibly Extends Beyond Traditional Property Interests 15

TABLE OF CONTENTS (continued)

Page

1. No property right exists to make informed economic decisions 15

2. Withholding potentially valuable economic information does not automatically deprive the victim of property 28

C. The Right-To-Control Theory Transgresses The Statutory Requirement That The Scheme Aim To Obtain Money Or Property 31

II. THE RIGHT-TO-CONTROL THEORY DEFIES THE STRUCTURE OF THE FEDERAL FRAUD LAWS 35

A. The Right-To-Control Theory Runs Counter To The Statute's Limited Protection Of Intangible Rights.................. 35

B. The Right-To-Control Theory Undermines This Court's Holding In *Skilling* 36

C. The Right-To-Control Theory Collapses Discrete Statutory Elements, Thereby Lightening The Government's Burden....... 38

III. UPHOLDING THE RIGHT-TO-CONTROL THEORY WOULD HAVE UNTENABLE CONSEQUENCES 41

TABLE OF CONTENTS
(continued)

Page

A. Prosecutions Based On The Right-To-Control Theory Violate Fair Notice Principles And Raise Vagueness Concerns 41

B. The Right-To-Control Theory Offends Principles Of Federalism By Upending The Federal-State Balance 47

C. Upholding The Right-To-Control Theory Would Run Contrary To The Rule Of Lenity 48

IV. PETITIONER'S CONVICTION MUST BE REVERSED 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Serv., 141 S. Ct. 2485 (2021) 21

Bousley v. United States, 523 U.S. 614 (1998) 18

Boyle v. United States, 556 U.S. 938 (2009) 41

Carpenter v. United States, 484 U.S. 19 (1987) .... *passim*

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) 21

Cleveland v. United States, 531 U.S. 12 (2000) .... *passim*

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 30

Dickman v. Commissioner, 465 U.S. 330 (1984) 42, 43

Durland v. United States, 161 U.S. 306 (1896) 19, 31

Elston v. Schilling, 42 N.Y. 79 (1870) 23

Fasulo v. United States, 272 U.S. 620 (1926) 19, 26

TABLE OF AUTHORITIES
(continued)

Page(s)

Fresh Pond Shopping Ctr., Inc. v. Callahan,
464 U.S. 875 (1983) 21

Hammerschmidt v. United States,
265 U.S. 182 (1924) 34

Johnson v. United States,
576 U.S. 591 (2015) 41, 47

Jones v. United States,
529 U.S. 848 (2000) 41

Kansas v. Garcia,
140 S. Ct. 791 (2020) 47

Kelly v. United States,
140 S. Ct. 1565 (2020) .... *passim*

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 21, 23

McDonnell v. United States,
579 U.S. 550 (2016) 46, 47

McKeon v. Bisbee,
9 Cal. 137 (1858).. 20

McNally v. United States,
483 U.S. 350 (1987) .... *passim*

Neder v. United States,
527 U.S. 1 (1999) 19, 38, 39

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Pasquantino v. United States,
544 U.S. 349 (2005) 19, 20, 32

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 21

Salman v. United States,
137 S. Ct. 420 (2016) 49

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003) 33

Sekhar v. United States,
570 U.S. 729 (2013) 32, 33

Shaw v. United States,
137 S. Ct. 462 (2016) 28, 30

Skilling v. United States,
561 U.S. 358 (2010) .... *passim*

Smith v. Shaughnessy,
318 U.S. 176 (1943) 43

United States v. Bass,
404 U.S. 336 (1971) 48

United States v. Biaggi,
909 F.2d 662 (2d Cir. 1990).................................. 17

United States v. Binday,
804 F.3d 558 (2d Cir. 2015).......................... *passim*

United States v. Craft,
535 U.S. 274 (2002) 27, 42

United States v. D'Amato,
39 F.3d 1249 (2d Cir. 1994).................................. 40

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Davis,
139 S. Ct. 2319 (2019) 33, 48

United States v. Fagan,
821 F.2d 1002 (5th Cir. 1987) 39

United States v. Finazzo,
850 F.3d 94 (2d Cir. 2017).................................... 39

United States v. Gen. Motors Corp.,
323 U.S. 373 (1945) 21

United States v. Johnson,
945 F.3d 606 (2d Cir. 2019)............................ 38, 40

United States v. Kerkman,
866 F.2d 877 (6th Cir. 1989) 17

United States v. Little,
889 F.2d 1367 (5th Cir. 1989) 17

United States v. Miller,
953 F.3d 1095 (9th Cir. 2020) 28, 29

United States v. Novak,
443 F.3d 150 (2d Cir. 2006).................................. 45

United States v. Ochs,
842 F.2d 515 (1st Cir. 1988)................................. 37

United States v. Regent Off. Supply Co.,
421 F.2d 1174 (2d Cir. 1970).................... 40, 44, 45

United States v. Rowe,
56 F.2d 747 (2d Cir. 1932).................................... 17

United States v. Sadler,
750 F.3d 585 (6th Cir. 2014) 35, 36

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Santos,
553 U.S. 507 (2008) 48

United States v. Schwartz,
924 F.2d 410 (2d Cir. 1991).................................. 46

United States v. Shellef,
507 F.3d 82 (2d Cir. 2007).................... 8, 44, 45, 46

United States v. Shyres,
898 F.2d 647 (8th Cir. 1990) 17

United States v. Starr,
816 F.2d 94 (2d Cir. 1987).................................... 45

United States v. Taylor,
142 S. Ct. 2015 (2022) 11, 41

United States v. Wallach,
935 F.2d 445 (2d Cir. 1991).......................... *passim*

United States v. Walters,
997 F.2d 1219 (7th Cir. 1993) 31

United States v. Yates,
16 F.4th 256 (9th Cir. 2021)................................. 37

Statutes

18 U.S.C. § 2.. 5

18 U.S.C. § 1341... 31

18 U.S.C. § 1343.. 2, 5, 31

18 U.S.C. § 1346...................................... 10, 14, 35, 36

18 U.S.C. § 1349... 4

18 U.S.C. § 1951... 32

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 1254(1) 2

Act of July 16, 1952, ch. 879, § 18(a), 66
Stat. 722.. 19

Act of June 8, 1872, ch. 335, § 301, 17
Stat. 323.. 19

Act of Mar. 4, 1909, ch. 321, § 215, 35
Stat. 1130.. 19

Legislative History

Cong. Globe, 41st Cong., 3d Sess. 35 (1870) 34

S. Rep. No. 44, 82d Cong., 1st Sess., 14 (1951)......... 19

Articles and Treatises

1 William Blackstone, *Commentaries on the Laws of England* (1765) 20

2 Joel Prentiss Bishop, *A Treatise on Criminal Law* (9th ed. 1865)................................ 34

2 William Blackstone, *Commentaries on the Laws of England* (1765) 20

3 W. Fletcher, *Cyclopedia of Law of Private Corporations* (rev. ed. 1986).............. 13, 22

Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531 (2005) 27

Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. Pa. L. Rev. 2001 (2009) 20, 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371 (2003) 27

Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 869 (2013) 24

Courtney C. Tedrowe, Note, *Conceptual Severance and Takings in the Federal Circuit*, 85 Cornell L. Rev. 586 (2000) 24, 26, 27

J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711 (1996) 27

Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. Cincinnati L. Rev. 57 (2013) 25, 27

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duquesne L. Rev. 771 (1980) 47

Restatement (Second) of Torts § 538 (1977) 39

Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135 (2021) 17

Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357 (2001) 25

TABLE OF AUTHORITIES (continued)

Page(s)

Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998) 20, 21, 26, 27

Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913) 25

Other Authorities

Dispose, Black's Law Dictionary (1st ed. 1891).. 23

Right of Possession, Black's Law Dictionary (11th ed. 2019).................................... 21

Right of Possession, Black's Law Dictionary (1st ed. 1891) 21

In The Supreme Court of the United States

No. 21-1170

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

INTRODUCTION

This case involves a paradigmatic overextension of federal fraud law: the prosecution of property fraud under the "right to control" theory. Contrary to that theory, the federal fraud statutes do not afford all-purpose protection of ethereal interests. Yet the right-to-control theory has that impermissible effect, extending the statutes far beyond the protection of traditional property rights.

Under the right-to-control theory, a property interest is harmed when a defendant schemes to "deprive the victim of potentially valuable economic information" that is "necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (internal quotation marks and

citations omitted). Prosecutors employ this abstract information-deprivation theory when they cannot show a scheme to harm traditional property interests. But this Court's precedent, common-law definitions of property, statutory context, and principles of statutory interpretation all confirm that the right-to-control theory is invalid. A scheme that deprives a person of information alone may violate a sense of moral uprightness; it does not establish a scheme or artifice to obtain money or property by means of deception. Because the right-to-control theory formed the sole basis for the court of appeals' holding that the evidence was sufficient to support petitioner's conviction, this Court should reverse.

OPINIONS BELOW

The Second Circuit's opinion is reported at 13 F.4th 158, and is reprinted in the Appendix to the Petition (Pet. App.) at 1a-41a.

JURISDICTION

The court of appeals entered judgment on September 8, 2021, and denied rehearing on November 1, 2021. J.A. 22, Pet. App. 57a-58a. On January 7, 2022, this Court extended the time to file a petition for a writ of certiorari until March 1, 2022. The petition was filed on February 18, 2022 and granted on June 30, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for

> obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT

A. The Buffalo Billion RFP

In 2012, the governor of New York initiated a program to invest one billion dollars in upstate development projects, known as the "Buffalo Billion" plan. Pet. App. 5a. The vehicle for these public-private partnerships was Fort Schuyler Management Corporation (Fort Schuyler), a non-profit entity affiliated with the state university system and designated to award state-funded economic development projects. *Id.* at 6a. To select developers and construction managers for those projects, Fort Schuyler would issue requests for proposals (RFPs). *Id.* at 7a. The RFPs would not focus on specific projects, but would instead seek a "strategic development partner" that would have a "first opportunity to negotiate with Fort Schuyler" over particular projects. *Id.* at 7a-8a. The RFPs did not bind Fort Schuyler to a particular developer, nor did they award particular contracts or establish terms for particular projects. *Id.*; J.A. 51-53.

In 2013, the board of directors for Fort Schuyler issued an RFP to select "preferred developer[s]" for

revitalization projects in Buffalo. Pet. App. 7a-8a. The RFP included requirements for potential developers, including that they be headquartered in Buffalo and have 50 years' experience—later revised to 15 years' experience—in construction and operation of mixed-use facilities. *Id.* at 9a-11a. Three companies responded to the RFP. *Id.* at 11a. In early 2014, Fort Schuyler's board selected two as preferred developers for Buffalo-area projects: LPCiminelli, then among the most significant construction companies in upstate New York, and McGuire Development Company, LLC. *Id.* at 11a; J.A. 71, 93-94. Following negotiations, Fort Schuyler awarded LPCiminelli a contract in a $750 million project to build a high-tech facility in Buffalo; McGuire was also awarded a multimillion-dollar contract. Pet. App. 12a.

Investigators subsequently uncovered evidence that a member of Fort Schuyler's board—Dr. Alain Kaloyeros, who was then the President of the College of Nanoscale Science and Engineering in Albany and who was in charge of developing proposals for projects under the Buffalo Billion initiative—had worked to draft the RFP to include certain of LPCiminelli's qualifications and attributes so that the bidding process would favor LPCiminelli's selection as a preferred developer. *Id.* at 5a, 8a-9a. No evidence existed that Mr. Ciminelli directed changes to the RFP's terms. Nevertheless, federal prosecutors obtained an indictment against Mr. Ciminelli and others involved in the RFP process. *Id.* at 13a. As relevant here, the superseding indictment charged Mr. Ciminelli and others with conspiracy to commit wire fraud in connection with a scheme to rig the bidding processes for the RFP, in violation of 18 U.S.C. § 1349

(Count One) and wire fraud in connection with rigging the bidding process for the RFP, in violation of 18 U.S.C. §§ 1343 and 2 (Count Four). *Id.*[1] The superseding indictment relied exclusively on the "right to control" theory of fraud, alleging that the defendants "devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm," through false representations about the fairness and competitiveness of the bidding process. J.A. 31-34 (trial indictment filed July 7, 2018).

B. District Court Proceedings

1. At trial, the government offered proof that Mr. Ciminelli and Dr. Kaloyeros conspired with others to tailor the Buffalo RFP so that LPCiminelli would be selected as a preferred developer. The tailoring allegedly consisted of adding terms to the RFP that favored LPCiminelli over other companies, including the 50-year experience requirement and the Buffalo-headquarters requirement. Pet. App. 6a-11a.

The government offered no proof that in the negotiation that followed, or the later performance of the contract, Fort Schuyler was deprived of a fair price, fair terms, or quality workmanship. Nor was there any evidence that Fort Schuyler could have obtained

[1] The superseding indictment also included similar allegations for an RFP for a preferred developer in Syracuse. Pet. App. 3a & n.1. Two of Mr. Ciminelli's co-defendants on the conspiracy count—Stephen Aiello and Joseph Gerardi—owned the Syracuse construction company COR Development Company, which won the Syracuse RFP after an alleged scheme to slant the Syracuse RFP to favor COR. *Id.* at 7a-13a. The government has never alleged that Mr. Ciminelli had any role in the Syracuse events, and he did not.

the same quality or a better price for the work from any other provider.[2] And the defense was prohibited from introducing contrary evidence on this point on the premise that such evidence was irrelevant. J.A. 46, 60-62. The district court denied oral motions for acquittal attacking the sufficiency of the evidence and the right-to-control theory. Pet. App. 13a-14a.

2. Over objection, the court instructed the jury on an expansive right-to-control theory of fraud. J.A. 40-43, 103. Under that theory, the deprivation of "money or property" that the scheme must contemplate "includes intangible interests such as the right to control the use of one's assets"; that interest "is injured," the jury was told, "when [the victim] is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Id.* at 41a. The court further instructed that "'potentially valuable economic information' is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." *Id.*

With that amorphous guidance about the nature of the property interest at stake, the jury found Mr. Ciminelli guilty of conspiracy and substantive wire

---

[2] The testimony of two contractors cited by the government in its brief in opposition, *see* BIO 22, was not introduced to show—and did not show—that developers other than LPCiminelli could have completed the same work at a lower price or with superior quality. Rather, this testimony was admitted to illustrate only "the normal range of a development fee," not an appropriate range "in this case." J.A. 73. Indeed, the district court recognized that the testifying contractors knew nothing about the specific projects in question. *See id.*

fraud charges. Pet. App. 14a. Although Mr. Ciminelli and his co-defendants renewed their Rule 29 motions, the district court denied them at each of the defendants' sentencings. *Id.* The district court sentenced Mr. Ciminelli principally to 28 months' imprisonment. *Id.*

C. Second Circuit Proceedings

The court of appeals affirmed. Mr. Ciminelli and his co-defendants argued that "the 'right-to-control theory' of wire and mail fraud" is invalid, Ciminelli C.A. Br. 16, because, among other reasons, "the right to control one's own assets is not 'property' within the meaning of the wire fraud statute," Pet. App. 4a n.2. Recognizing that circuit precedent adopting the right-to-control theory bound the panel and that the argument was being raised "to preserve it for further review," the court did not directly address the issue. *Id.* But the court then adopted an interpretation of the right-to-control theory that revealed the stark departure of that theory from traditional property frauds.

Initially, the court stated that "[i]n a right-to-control case, 'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision.'" *Id.* at 17a (quoting *United States v. Binday*, 804 F.3d 558, 579 (2d Cir. 2015)). The court also recognized that its decisions drew "a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail and wire fraud statutes—and

schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do." *Id.* at 19a-20a (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)); *id.* at 22a (same). But the court believed that the conduct proved here fell on the prohibited side of the line. *Id.* at 21a-22a. It viewed success at the RFP stage as giving LPCiminelli "a leg up" on selection for a particular project and found that a competitive RFP process was an "essential" term of the ensuing contracts. *Id.* at 19a-20a; *see also id.* at 22a & n.9. It did not explain why the purported advantage amounted to more than a scheme to induce Fort Schuyler to enter into negotiations. Nor did it explain how the "bargain" represented by the contracts "was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process." *Id.* at 21a.

Having collapsed the RFP and project-contracting phases—and having identified no deceptive conduct in the negotiation of the contract terms themselves—the court went on to address the absence of proof of economic harm. The court acknowledged that, in other right-to-control cases, the government offered "more tangible evidence of economic harm than is presented in this case." *Id.* at 20a. "Here, the government offered little evidence that other companies would have successfully bid for the projects and then either charged less or produced a more valuable product absent the fraud." *Id.* But in the court's view, that evidence is not "a requisite for conviction." *Id.* at 21a. Instead, the informational deprivation in the RFP

process itself constituted all the harm to "property" the government needed to show.[3]

Mr. Ciminelli filed a petition for rehearing en banc, arguing, *inter alia*, that the Second Circuit's right-to-control theory conflicts with controlling precedents of this Court and the other courts of appeals and that "an amorphous doctrine that defies consistent and predictable application should not be allowed to stand in the nation's commercial center." Rehearing Pet. 6. The Second Circuit denied the petition. Pet. App. 57a-58a.

SUMMARY OF ARGUMENT

The right-to-control theory of wire fraud is invalid. The theory dispenses with the traditional common-law requirement of fraud: proof of intended harm to a recognized property interest. Instead, it finds a scheme to defraud when a person is "depriv[ed] of information necessary to make discretionary economic decisions." Pet. App. 17a (internal quotation marks omitted). But an informational deprivation, standing alone, is not a deprivation of money or property. The theory opens up wide swaths of conduct to prosecution

---

[3] The court noted trial evidence that a rival firm considered submitting, but did not submit, a bid for the Buffalo RFP because of an impression that it was being "steered towards a local competitor," and that that firm and another regional construction firm typically offered lower construction-management fees than the selected firms here. Pet. App. 20a-21a n.8. But that evidence was not admitted to show that those firms would have offered lower fees on the Buffalo project. *See supra* at 6 n.2. Beyond that, the proof was irrelevant to the right-to-control theory on which the court of appeals sustained the convictions; the deprivation of "potentially valuable economic information" was enough. Pet. App. 18a.

and offends multiple principles of statutory construction. Because the theory does not state a valid basis for federal fraud liability, this Court should reverse.

I. The right-to-control theory is inconsistent with the statutory text. This Court has made clear that the federal fraud statutes reach only schemes to deprive a victim of a *traditional* property interest. *McNally v. United States*, 483 U.S. 350 (1987); *Cleveland v. United States*, 531 U.S. 12 (2000). The right-to-control theory finds no home in traditional common-law understandings of property: No traditional property interest is infringed by the deprivation of complete information bearing on economic decisions. And a modern-day "bundle of sticks" approach cannot rescue the theory. Under the fundamental principle that statutory language is interpreted as of the date of enactment, the twentieth century bundle-of-sticks approach to property does not apply. But even if it did, the right-to-control theory would fail: The absence of complete information does not automatically deprive the holder of its control over assets; the power to exercise control remains with the holder. And for similar reasons, a person who withholds economically valuable information does not "obtain" the right to control assets. The right-to-control theory thus falls outside the statutory text.

II. The theory also contradicts the structure of the fraud statutes. First, the deprivation of economic information is not an intangible right that Congress reinstated after *McNally*. Congress protected only "the intangible right of honest services," 18 U.S.C. § 1346, not the right to make informed economic decisions. Second, the theory circumvents and defeats

the limitations on honest-services prosecutions announced in *Skilling v. United States,* 561 U.S. 358 (2010). To avoid unconstitutional vagueness, *Skilling* limited honest-services prosecutions to bribes and kickbacks—specifically rejecting undisclosed conflicts of interest as a basis for conviction. *Id.* at 404-13. Yet the right-to-control theory allows the government to prosecute undisclosed conflicts of interest as property frauds. It thus lets in the back door what this Court escorted out the front, while raising all the same vagueness concerns. Third, the theory collapses three distinct elements of fraud—fraudulent intent, contemplated harm to property, and materiality—into a single element: deception about economic information. This Court does not interpret statutes to treat separate elements as equivalents. *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022).

III. The theory also flouts multiple principles of statutory construction. First, the theory is incurably vague. The ever-finer (and inexplicable) distinctions in the case law underscore the theory's inherent elusiveness. And its vagueness lays traps for individuals in a host of commercial settings. Tough negotiations can easily be second-guessed as fraudulent if the withholding of economically valuable information counts as fraud. And a criminal theory that dispenses with proof of intent to inflict concrete harm invites overreaching. Second, the theory alters the federal-state balance by overlaying federal power into domains traditionally regulated by the states. And, third, interpreting the statute to encompass the ethereal and counter-textual right-to-control theory violates the rule of lenity.

IV. Because the sole basis for petitioner's prosecution was the right-to-control theory and the court of appeals upheld the sufficiency of the evidence solely on that basis, the judgment must be reversed and the case remanded for entry of judgment of acquittal. If Congress wishes to depart from traditional concepts of fraud to criminalize the deprivation of an intangible right to information bearing on the right to control assets, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

ARGUMENT

THE RIGHT-TO-CONTROL THEORY FAILS TO STATE A VALID BASIS FOR LIABILITY UNDER THE FEDERAL WIRE FRAUD STATUTE

I. THE RIGHT-TO-CONTROL THEORY CANNOT BE RECONCILED WITH THE STATUTORY TEXT

A. The Mail And Wire Fraud Statutes Extend Solely To Schemes To Obtain Money Or Property

This Court's precedents establish that the mail and wire fraud statutes prohibit *only* schemes to deprive someone of money or property. *See Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020); *Cleveland v. United States*, 531 U.S. 12, 19 (2000); *Carpenter v. United States*, 484 U.S. 19, 25 (1987).[4] The government therefore must show not only that a defendant "engaged in deception, but [also] that an object of the[] fraud was [money or] property." *Kelly*, 140 S. Ct. at 1571 (internal quotation marks and alterations omitted). This requirement reflects that the fraud statutes are not a general license for "the

---

[4] The Court applies "the same analysis" to the mail and wire fraud statutes, which "share the same language in relevant part." *Carpenter*, 484 U.S. at 25 n.6.

Federal Government … to enforce (its view of) integrity." *Id.* at 1574. The statutes instead "protect[] property rights only." *Cleveland*, 531 U.S. at 19. The Court has accordingly rejected the extension of these statutes beyond traditional property interests.

In *McNally v. United States*, 483 U.S. 350 (1987), the Court held that the mail fraud statute proscribed only schemes to obtain money or property, not schemes to defraud aimed at "the intangible right of the citizenry to good government." *Id.* at 356. The Court declined to read the statutory prohibition of "schemes to defraud" independently from the statute's second clause, which covers schemes "for obtaining money or property." *Id.* at 358-59. Rather, the Court confined the statute to its original purpose: to "protect individual property rights." *Id.* at 359 n.8.

Soon after, in *Carpenter*, the Court reaffirmed *McNally*'s focus on property by recognizing that intangible interests were covered only if they qualified as traditional property. *Carpenter* held that confidential business information is a cognizable interest because it "has long been recognized as property." 484 U.S. at 26. While an employee's "honest and faithful service" was "too ethereal … to fall within the [statute's] protection," *id.* at 25, the Court looked to settled authority treating confidential information of a corporation as a "species of property," *id.* at 26 (quoting 3 W. Fletcher, *Cyclopedia of Law of Private Corporations* § 857.1, at 260 (rev. ed. 1986)). The Court applied that principle to hold that an employee's "appropriati[on] [of that] confidential business information for his own use" could be

prosecuted as a property fraud. *Id.* at 28.[5]

In *Cleveland*, the Court again rejected decisions extending the federal fraud laws beyond "money and property" offenses. There, the charged scheme involved false statements in applying for state licenses for video-poker machines. The Court held that the scheme did not target the state victim's money or property when it sought to "frustrate[] the State's right to control the issuance, renewal, and revocation of video poker licenses." 531 U.S. at 23. Disapproving of "theories of property rights" that "stray from traditional concepts of property," the Court explained that the mail fraud statute does not encompass schemes targeting "the[] intangible rights of allocation, exclusion, and control." *Id.* at 23-24.

Most recently, in *Kelly*, the Court rejected the government's theory that a scheme by state officials to "reallocate the [George Washington] Bridge's access lanes" constituted wire fraud. 140 S. Ct. at 1574. It reasoned that, notwithstanding incidental costs incurred by the victim, the object of the defendant's scheme was a version of the "allocation, exclusion, and control" interest that failed to qualify as property in *Cleveland*. *Id.* at 1573-74 (quoting *Cleveland*, 531 U.S. at 23). The Court explained that, to amount to wire fraud, "property must play more than some bit part in a scheme" and instead "must be an object of the fraud."

[5] Congress responded by enacting the honest-services statute, which extended the mail and wire fraud statutes to encompass "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. "Significantly, Congress covered only the intangible right of honest services," *Cleveland*, 531 U.S. at 20—not any other intangible right.

Id. at 1573 (internal quotation marks omitted). "Because the scheme here did not aim to obtain money or property," the defendants "could not have violated the … wire fraud law[]." *Id.* at 1574.

B. The Right-To-Control Theory Impermissibly Extends Beyond Traditional Property Interests

The right-to-control theory cannot be reconciled with this Court's cases or with the text of the fraud statutes. This theory "allows for conviction on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information." Pet. App. 16a (internal quotation marks omitted). The Second Circuit has never been clear on what property interest has been deprived. But whether the theory rests on the deprivation of a right to make informed economic decisions, or on a purported deprivation of a property interest in controlling one's assets, the theory cannot be squared with what the wire fraud statute requires: *deprivation of a traditional property interest*. No traditional property interest is infringed by the withholding of complete and accurate information bearing on economic decisions. And no deprivation of any right to control occurs solely by the withholding of information; the right still rests with the holder. On either account, therefore, the right-to-control theory fails to state a traditional property fraud.

1. No property right exists to make informed economic decisions

a. The Second Circuit's right-to-control doctrine originated in the context of the withholding of economically important information from stockholders. In *United States v. Wallach*, 935 F.2d

445 (2d Cir. 1991), the court upheld mail fraud convictions of defendants who had failed to disclose to shareholders that part of a fee to an outside consultant was actually a kickback to one of the corporation's directors. *Id.* at 460. As relevant here, the prosecution theory was that shareholders were deprived of the "right to control" how the corporation's money was spent. *Id.* at 461. The court sustained that theory through an attenuated chain of reasoning that had little to do with first principles. The court began with the observation that "ownership of stock" is a property interest and leaped from there to the conclusion that informational deprivation impaired "other incidents accompanying the property interest that a stockholder owns." *Id.* at 462.

To categorize that as a property fraud, the court cited mail fraud cases purportedly recognizing the "right to control" as a property interest, but it readily acknowledged that "[d]espite the recurrent references to a 'right to control,' we think that use of that terminology can be somewhat misleading and confusing." *Id.* It then interpreted "the case law" as basing the theory "on a showing that some person or entity has been deprived of potentially valuable economic information." *Id.* at 462-63. With that understanding, the court held that "[b]y concealing this information [about kickbacks], the value of [the corporation's] stock was obscured and the shareholders and the corporation were deprived of the opportunity to make informed decisions." *Id.* at 464.

Wallach stretched the concepts of property fraud beyond previous boundaries by stitching together a disparate variety of sources addressing different

issues.[6] None of its sources addressed the traditional common-law meaning of property as reflected in the mail fraud statute's origins. *Wallach*'s historical context may account for this innovation.[7] But the result was the creation of a doctrine with no traditional roots. The court's key reasoning rested on a shareholder's asserted "property interest" in "monitor[ing] and … polic[ing] the behavior of the corporation and its officers," but then leaped to a sweeping—and unprecedented—conclusion: that "the right to complete and accurate information is one of

[6] Apart from citing mail fraud cases that contain no analysis of traditional property concepts and that all involved kickbacks, *see* 935 F.2d at 462-63 (citing *United States v. Biaggi*, 909 F.2d 662, 687 (2d Cir. 1990); *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990); *United States v. Kerkman*, 866 F.2d 877, 880 (6th Cir. 1989); *United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989)), *Wallach* cited corporate and securities law sources about the obligation of officers to keep and maintain accurate books and records and make appropriate disclosures to shareholders, *id.* at 462, and out-of-context dictum in a decision written by Learned Hand that addressed a typical property fraud, *id.* at 463 (citing *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)). Absent from any of these sources is an analysis of traditional common-law property concepts.

[7] *Wallach* was charged, tried, and decided in the wake of this Court's invalidation of the intangible-rights theory of fraud in *McNally*—and before Congress enacted Section 1346 to reinstate that theory. In that gap, prosecutors invented the right-to-control theory to prosecute kickbacks received by corporate fiduciaries as property fraud without having to prove economic harm to the corporation. *See* Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 161-62 (2021); Criminal Law Scholars *Amici Curiae* Br. at 7-9, *Aiello & Gerardi v. United States*, No. 21-1161 (Mar. 25, 2022).

the most essential sticks in the bundle of rights that comprise" this property interest. *Id.* at 463.

Subsequent Second Circuit cases have described the "concrete harm" in an informational-deprivation fraud case as the denial of the victim's "right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (internal quotation marks omitted). The core element of the theory is that this deprivation of information bearing on an economic decision can amount to a property fraud. But no traditional property interest exists in making informed economic decisions about one's assets, and the Second Circuit has never adequately explained the basis for treating the purported deprivation as a deprivation of property.

b. The reference point for determining the scope of the property interests that the federal fraud statutes protect is the state of the common law at the time these laws were originally enacted and amended. It is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (internal quotation marks and alterations omitted). To "invest old statutory terms with new meanings" would amount to judicial amendment of statutory text. *Id.* That is a particularly unwarranted exercise for a criminal statute, "[f]or under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). This principle has applied to the mail fraud statute for nearly a century. *See McNally*, 483 U.S. at 360 ("There are no

constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). And because fraud was an offense well known at common law, the Court presumes that Congress intended to incorporate the common-law meaning of "fraud" in the federal fraud laws unless "the text or structure of the fraud statutes" rebuts that presumption. *Neder v. United States*, 527 U.S. 1, 22-23 & n.7 (1999).

The mail fraud statute was enacted in 1872 to cover "any scheme or artifice to defraud" and was amended in 1909 in light of *Durland v. United States*, 161 U.S. 306 (1896), to add the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *McNally*, 483 U.S. at 356-57.[8] Because the original enactment was designed "to protect the people from schemes to deprive them of their money or property" and the post-*Durland* amendment "gave further indication that the statute's purpose is protecting property rights," *id.,* this Court has read the two clauses in tandem as protecting property rights: "As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to

[8] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323; Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. Congress enacted the wire fraud statute in 1952. Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722. Congress used "identical language" in the wire fraud statute, reflecting its intent to adhere to the meaning of property embodied in the mail fraud statute. *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (reading the mail and wire fraud statutes "*in pari materia*"); *see also Carpenter*, 484 U.S. at 25 n.6; S. Rep. No. 44, 82d Cong., 1st Sess., 14 (1951).

the future as well as other frauds involving money or property." *Id.* at 359. Accordingly, the common-law understanding of "property" prevailing at the turn of the century forms the basis for construing these statutes.

The common law offers no support for the Second Circuit's information-based theory of the right to control. The original "Blackstonian trilogy" of property rights has been "translated" as encompassing the rights to exclude (or possess), to use, and to dispose (or transfer). Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 736-37 (1998); *see* 2 William Blackstone, *Commentaries on the Laws of England* 2 (1765) (defining "the right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"); 1 William Blackstone, *Commentaries on the Laws of England* 134 (1765) (the right "of property … consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land"). Thus, "the long-standing definition of property in American law [is that] 'property is the exclusive right of possessing, enjoying, and disposing of a thing.'" Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. Pa. L. Rev. 2001, 2014 & n.54 (2009) (quoting *McKeon v. Bisbee*, 9 Cal. 137, 143 (1858)).

This Court has relied on Blackstone to define what "has long been thought to be a species of property" under the wire fraud statute, *Pasquantino v. United States*, 544 U.S. 349, 356 (2005), and it has repeatedly invoked this description of Blackstone's three core

property rights, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945))); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (same, for intangible property). None of these three traditional rights corresponds to the right to make informed decisions about how to use one's assets.

Right to exclude. "The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021) (quoting *Loretto*, 458 U.S. at 435); *see also Ala. Ass'n of Realtors v. Dep't of Health & Hum. Serv.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (right to exclude "is one of the most fundamental elements of property ownership"). Sometimes called the right to "possess," *see* Merrill, *supra*, at 736, this right concerns access. *See Loretto*, 458 U.S. at 436 (discussing ability to "exclude others"). In this context, "control" has long meant the ability to "eject or evict a wrongful possessor." *Right of Possession*, Black's Law Dictionary (11th ed. 2019); *see also Right of Possession*, Black's Law Dictionary (1st ed. 1891) ("The right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant."); *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting from dismissal of appeal) (describing a landlord's "power to end or terminate the physical invasion" of a tenant as the power to "restor[e] control of his property"). The right does not entitle its holder to all the information

pertinent to its exercise. For example, no authority would support the claim that a restaurant is deprived of its right to exclude a diner because the diner has not disclosed that he plans to flee after his meal without paying.

The right to exclude lies at the heart of the intangible property rights that this Court has recognized as traditional property interests. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that "[c]onfidential business information has long been recognized as property," emphasizing that it is "a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy," *id.* at 25-26 (quoting 3 W. Fletcher, *Cyclopedia of Law of Private Corporations* § 857.1, at 260 (rev. ed. 1986)). In *Carpenter* itself, the Court applied that understanding to unpublished articles of the Wall Street Journal, explaining that the Journal "had a property right in keeping" the articles "confidential and making exclusive use, prior to publication, of the schedule and contents." *Id.* at 26. The defendants in *Carpenter* deprived the Journal of that traditional property interest by making unauthorized use of the unpublished columns for securities trading. *Id.* at 28 (one defendant "appropriat[ed] [the Journal's] confidential business information for his own use"). Nothing analogous can be said about a defendant who deprives a putative victim of economically valuable information bearing on *that* person's decisions.

Right to use. The right to use, meanwhile, means the "power to control the use of the property," whether by occupying it, obtaining a profit from it, or otherwise

doing as one pleases with it. *Loretto*, 458 U.S. at 436. But this right has never encompassed the right to full information about potential uses. A developer who does not inform adjacent homeowners of its development plans does not deprive the homeowners of the use of their homes. The homeowners are free to use them as they see fit even if they lack full information.

Right to dispose. This right means only the right to sell or otherwise alienate property. *See Dispose*, Black's Law Dictionary (1st ed. 1891) ("To alienate or direct the ownership of property, as disposition by will."); *Elston v. Schilling*, 42 N.Y. 79, 79-80 (1870) ("conveyance" or sale is "disposal of property"). Like the rights to exclude and use, the right to dispose does not entitle its holder to information that might affect her decisions. The owner of a lot is not deprived of her right to dispose of it if the purchaser withholds information about plans for a new development nearby that will increase the value of the lot before she agrees to sell it to him. So long as the terms of the sale themselves are transparent and non-deceptive, the seller, though unaware of valuable information, is not deprived of a property interest.

The takeaway from the traditional common-law understanding of property is straightforward. Nothing supports the proposition that the three basic rights—to exclude, use, and dispose—encompass a fourth: the right to full and accurate information when exercising those rights. Yet the deprivation of that purported fourth right forms the basis for the Second Circuit's late-twentieth century invention of the right-to-control theory. The theory's departure from the

traditional common law renders it invalid for that reason alone.

c. The Second Circuit has never set forth a traditional common-law basis for the supposed property deprivation underlying the right-to-control theory. Rather, it has relied on the modern-day "bundle of sticks" metaphor. *See Wallach*, 935 F.2d at 463 ("the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest"). But that metaphor cannot salvage the right-to-control theory.

The nontraditional conception of property as a collection of rights—which in certain combinations rise to the level of property—was not developed until long after the mail fraud statute was enacted and amended to its present form. It therefore cannot be the basis for expanding the federal criminal fraud statutes' coverage of property fraud. And even setting aside that temporal disconnect, the right to control is not property even under the bundle-of-sticks metaphor.

i. The bundle-of-sticks theory postdates by several decades Congress's enactment and amendment of the mail fraud statute. The earliest "image" of property as "a bundle" did not appear until 1888, in a "treatise on eminent domain."[9] Even then, the metaphor was embryonic.[10] "Property scholars' histories of the

[9] Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 869, 877 (2013).

[10] *See* Courtney C. Tedrowe, Note, *Conceptual Severance and Takings in the Federal Circuit*, 85 Cornell L. Rev. 586, 589 (2000).

bundle-of-rights metaphor all begin with Wesley Newcomb Hohfeld,"[11] who in 1913 wrote an article[12] that is widely credited with providing the "intellectual justification for this metaphor."[13] But not until the 1920s and 1930s was Hohfeld's theory "popularized" (or less charitably, "co-opted" and "appropriated") by the legal realists as part of a project to expand the power of government.[14] For the realists, "[i]f property ha[d] no fixed core of meaning, but is just a variable collection of interests established by social convention, then there [wa]s no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of general welfare."[15] With the bundle-of-sticks metaphor in hand, they argued "for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses."[16]

---

[11] Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. Cincinnati L. Rev. 57, 62 (2013)

[12] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

[13] Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 365 (2001); *see also* Baron, *supra*, at 62 & nn.18-22.

[14] Baron, *supra*, at 63 & nn.27-30; *see also* Merrill & Smith, *supra*, at 365 (noting "the motivation behind the realists' fascination with the bundle-of-rights conception was mainly political" to "smooth the way for activist state intervention in regulating and redistributing property" (internal quotation marks omitted)).

[15] Merrill & Smith, *supra*, at 365.

[16] Mossoff, *supra*, at 2007; *see also id.* at 2009 ("These abstract conceptual moves served the political goal of making property

Whether or not the bundle of sticks metaphor justified its proponents' progressive-era regulatory aims, it cannot be projected back in time to guide the interpretation of federal fraud law. The twentieth-century evolution—and expansion—of property concepts cannot be read back into a statute that took shape in the nineteenth century to protect traditional interests and that has long been understood as limited to that realm. *See supra* at 12-15, 18-20.

ii. Even under the theory that property comprises a bundle of sticks, the right to make informed economic decisions cannot be described as property—at the least, not with the clarity required to import it into a criminal statute. *See McNally*, 483 U.S. at 360; *Fasulo*, 272 U.S. at 629. To start, no authority supports the proposition that the right to full information in making decisions about one's assets is a "stick" in the bundle. In fact, no standardized list of sticks exists at all. As Professor Merrill has explained, the "bundle has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different 'sticks' or 'strands' are expanded or diminished, added to or removed from the bundle altogether."[17] The Second Circuit's right-to-control theory illustrates one of the major problems with superimposing the bundle-of-sticks metaphor onto the

---

more plastic as a legal and constitutional restraint on the then-nascent administrative state.").

[17] Merrill, *supra*, at 737; *see also, e.g.*, Tedrowe, *supra*, at 591 ("[T]his picture does not inform us of what sticks are in the bundle or what their interrelationship is with one another, let alone whether fragments of them amount to property … .").

fraud statutes: the metaphor is inherently vague. *See infra* at 41-47.

The lack of a predetermined list of "sticks" (or rights) is hardly the only flaw. In the modern formulation, the bundle represents "a collection of individual rights which, *in certain combinations*, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002) (emphasis added). But which sticks, in which combinations, give rise to property? Here, for example, if the right to make informed economic decisions counts as a stick, does that stick, standing alone, rise to the level of property? "[T]he bundle-of-rights metaphor raises the question of how to understand the connection of the component rights to the whole bundle, but it cannot answer that question."[18]

This Court should not adopt a theory of criminal fraud where a critical question about one of the crime's elements "cannot be determined in advance."[19] Property as a bundle of sticks "is little more than a slogan,"[20] and a "befogging" one at that[21]; it cannot be a basis for deciding whether someone committed a federal crime. *See infra* at 41-47. And given the

---

[18] Baron, *supra*, at 70; *see also, e.g.*, Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371, 373-74 (2003); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711, 723 (1996).

[19] Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 545-46 (2005); *see also, e.g.*, Tedrowe, *supra*, at 591 ("ambiguity renders application of the bundle-of-rights picture in actual cases very difficult").

[20] Penner, *supra*, at 714.

[21] Merrill, *supra*, at 755.

absence of historical support for the notion that the right to make informed economic decisions counts as property, no source of law is available to cure that ambiguity.

2. Withholding potentially valuable economic information does not automatically deprive the victim of property

If a right to control one's assets is understood as the purported property interest supporting the Second Circuit's right-to-control theory, the theory still fails because withholding economically significant information does not, without more, *deprive* a person of that right. The Second Circuit's theory presupposes that a victim is automatically deprived of a "right to control" its assets any time economically valuable information is withheld. But that is not so, as this case illustrates. Fort Schuyler was not deprived of its right to control how its money was spent. It may have based its decision on incomplete information, but it still possessed the right to make a decision. And absent a scheme to *deprive* a person of a protected property interest, a federal fraud-scheme charge will not lie.

The Court has made clear that a scheme must aim at deprivation of a property interest to state a fraud claim. *See Shaw v. United States*, 137 S. Ct. 462 (2016). In a case under the "analogous" bank-fraud statute, *id*. at 467, this Court held that it is not enough for a scheme to deceive a victim; it must also seek to "deprive [the victim] of something of value," *id*. at 469. This is also the prevailing rule under the mail and wire fraud statutes. *See McNally*, 483 U.S. at 358; *see also*, *e.g.*, *United States v. Miller,* 953 F.3d 1095, 1101 (9th Cir. 2020) ("Like the mail fraud statute from which it is derived, the wire fraud statute, in plain and simple

language, criminalizes the use of interstate wires to further, not mere deception, but a scheme or artifice to defraud or obtain money or property, *i.e.*, in every day parlance, to cheat someone out of something valuable.").

"It follows that to be guilty of wire fraud, a defendant must act with the intent not only to make false statements or utilize other forms of deception, but also to deprive a victim of money or property by means of those deceptions." *Miller*, 953 F.3d at 1101. Yet the Second Circuit's right-to-control theory collapses the deception and deprivation elements, thereby relieving the government of the burden of proving a scheme aimed at deprivation of money or property, not just deception.

According to the right-to-control theory, the deception is "the withholding or inaccurate reporting of information that could impact on economic decisions." Pet. App. 16a. But the Second Circuit then presumes that such deception necessarily injures property: "A 'cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of'" the very information that was deceptively omitted. *Id.* at 17a (quoting *Binday*, 804 F.3d at 570). That formulation skips over any analysis of how the withholding of accurate information deprives the victim of property rights the victim otherwise possesses. Even without full information, a victim is still able to control her assets. She simply cannot exercise that right as

effectively as she otherwise might have.[22] Under the right-to-control theory, therefore, the government has proved deception but has not proved an intent to "deprive" the victim "of something of value." *Shaw*, 137 S. Ct. at 469. That is not enough to constitute a property fraud: "[N]ot everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999).

This case illustrates the reach of the government's theory. Without having to prove any intent to harm Fort Schuyler economically—*i.e.,* without showing a scheme to "wrong[] one in his property rights," *McNally,* 483 U.S. at 358 (internal quotation marks omitted)—the government proceeded on the theory that Fort Schuyler was deprived of the ability to fully assess its decision about using its assets. But that informational impairment is not a deprivation. A diminishment of its ability to make informed decisions because of a lack of complete information did not prevent Fort Schuyler from making decisions. The informational deficit that forms the basis of the right-to-control theory thus does not satisfy a core

---

[22] If, for example, a financial adviser tricked a customer into relinquishing control of her portfolio, the government could argue that the victim was deprived of the right to make decisions about her assets (although that would not be property fraud for the reasons above). But the right-to-control theory does not require even that; rather, deception about economically valuable information that a person might use in making a decision about the use of her assets is alone enough to prove a deprivation of control. *See* Pet. App. 17a.

requirement of fraud: the deprivation of a property interest.

C. The Right-To-Control Theory Transgresses The Statutory Requirement That The Scheme Aim To Obtain Money Or Property

The right-to-control theory cannot be squared with yet another statutory requirement: that "the scheme" must "aim to *obtain* money or property." *Kelly*, 140 S. Ct. at 1574 (emphasis added).

1. The mail and wire fraud statutes contain two clauses: the "scheme to defraud" clause and the "scheme … to obtain money or property" clause. 18 U.S.C. §§ 1341, 1343. But as noted, *supra* at 19-20, this Court has clarified that the two clauses do not operate independently. Instead, the second phrase was added in 1909 to reflect the holding in *Durland v. United States*, 161 U.S. 306 (1896), and "simply ma[k]e[s] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *McNally*, 483 U.S. at 359; *Cleveland*, 531 U.S. at 26 (same). Reading the two clauses coextensively—rather than giving "scheme to defraud" a broader, independent meaning—means that a scheme must seek to "obtain" property that can be transferred from the victim to another. *See United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (mail fraud requires "an actual" or "potential transfer of property from the victim to the defendant").

The "obtaining" element is evident in *Kelly*, which rejected the government's wire fraud theory in part because the defendants did not "commandeer" the bridge's access lanes through their reallocation scheme: "They (of course) did not walk away with the

lanes; nor did they take the lanes from the Government by converting them to non-public use." 140 S. Ct. at 1573. And in *Skilling v. United States*, 561 U.S. 358 (2010), the Court contrasted honest-services fraud with traditional "money or property" fraud by noting that money or property frauds involve situations in which "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Id.* at 400. *Carpenter* reflects the same understanding. There, the "object of the scheme was to take the [newspaper's] confidential business information." 484 U.S. at 25. And the information there was both transferable and "obtained" as part of the insider-trading scheme. The "victim's loss" thus "supplied the defendant's gain" in the "mirror image" contemplated by *Skilling*. 561 U.S. at 400. So too in *Pasquantino*, which involved a scheme to defraud Canada of tax revenues by smuggling goods across the border. Although the Court described the offense as akin to "depriv[ing] a victim of his entitlement to money," 544 U.S. at 356, the victim's lost tax revenues in that case corresponded to the defendant's financial gain, *id.* at 357-58, "with one the mirror image of the other," *Skilling*, 561 U.S. at 400. The scheme thus contemplated that the defendants would obtain the value of what the victim lost.

2. These precedents reflect what this Court has made explicit in the related context of the Hobbs Act, 18 U.S.C. § 1951: "Obtaining property" "requires not only the deprivation but also the acquisition of property." *Sekhar v. United States*, 570 U.S. 729, 734 (2013) (internal quotation marks omitted). The requirement that property be "obtained" means that

the property "must … be transferable—that is, capable of passing from one person to another." *Id.* That requires not only "that the victim 'part with' his property," but also that the perpetrator "'gain possession' of it." *Id.* (citations omitted). The Court applied that principle to hold that the right to make a recommendation was not "*obtainable property* under the Hobbs Act." *Id.* at 737. For that analysis, *Sekhar* relied (*id.*) on *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), where the Court similarly declined to equate interference with the right to control assets with *obtaining* that interest. The *Scheidler* defendants, the Court stated, may have "deprived" clinics of an "alleged property right" to control their assets by disrupting their business, but the defendants did not seek or receive something that they could "exercise, transfer, or sell" and thus were not seeking to "obtain" property. 537 U.S. at 402, 404-05.

Sekhar's rule—that a mere "*interference* with rights" is distinct from obtaining property, and that a defendant must pursue something of value from the victim that can be "exercised, transferred, or sold" to come within the statute's ambit, 570 U.S. at 735-36—applies with equal force here. This Court presumes "that the same language in related statutes carries a consistent meaning," *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019), and has accordingly relied on the mail and wire fraud statutes to interpret the Hobbs Act, *see Sekhar*, 570 U.S. at 737 (looking to *Cleveland*'s analysis of the mail and wire fraud statutes).

The government has sought to distinguish these Hobbs Act precedents on the ground that the mail fraud statute "does not specify a particular source for

property that the defendant intends to obtain." BIO 25. But this purported distinction is illusory. The natural understanding of a fraudulent scheme is that the property must be obtained *from the victim of deception*. As *McNally* explained, the mail fraud statute was designed to protect against "thieves, forgers, and rapscallions generally," who engage in schemes "for the purpose of deceiving and fleecing the innocent people of the country." 483 U.S. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)). And this "original impetus," *id.,* was reflected in Congress's use of the phrase "to defraud," which "commonly refer[s] to wronging one in his property rights by dishonest methods or schemes," *id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

3. The statute thus makes clear the gist of fraud: obtaining property from another by deceiving the victim.[23] But the right-to-control theory dispenses with that requirement. The Second Circuit's theory does not require proof that someone "obtained" a right from the putative victim. In the Second Circuit's view, the government can prove its case "where the

---

[23] This is consistent with the description of false pretenses at common law, which required a parting with and obtaining of the object of the fraud. 2 Joel Prentiss Bishop, *A Treatise on Criminal Law* 388 § 414(3), (4) (9th ed. 1865) (common-law offense of false pretenses occurs when one person states to another "as a fact what he knows to be untrue, for the purpose of procuring from him some valuable thing within the terms of the statute … the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud" (internal citation, quotation marks, and footnotes omitted)).

defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." Pet. App. 17a (internal quotation marks omitted). But as this case illustrates, that formulation does not require proof of obtaining: The government did not have to prove that petitioner schemed to wrest Fort Schuyler's decisional authority away from it and exercise it himself. For that reason as well, the right-to-control theory cannot be reconciled with the statute.

II. THE RIGHT-TO-CONTROL THEORY DEFIES THE STRUCTURE OF THE FEDERAL FRAUD LAWS

The right-to-control theory disrupts the structure of federal fraud law in at least three ways. First, it recognizes an intangible right that Congress did not restore after this Court's decision in *McNally*. Second, it end-runs this Court's limitation of the honest-services statute in *Skilling*. And third, it collapses distinct elements of mail and wire fraud, thus eliminating the government's obligation to prove every element of an offense.

A. The Right-To-Control Theory Runs Counter To The Statute's Limited Protection Of Intangible Rights

The right-to-control theory impermissibly protects an intangible right that Congress did not resurrect in *McNally*'s wake. When Congress enacted 18 U.S.C. § 1346 in 1988 in response to *McNally* and *Carpenter*, it amended the fraud statutes to cover "just one" intangible right from among the "universe of intangible-right[s]" previously recognized: the right of honest services. *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.). The right to control one's assets (or make informed economic decisions) was not included in the post-*McNally* provision.

Congress's failure to cover that intangible right is "[s]ignificant[]." *Cleveland v. United States*, 531 U.S. 12, 19, 20 (2000) (noting the limited scope of Section 1346 in declining to stretch property fraud to cover a government license). "Congress's reverberating silence about other intangible interests tells us all we need to know" about what the wire fraud statutes criminalize. *Sadler*, 750 F.3d at 591.

B. The Right-To-Control Theory Undermines This Court's Holding In *Skilling*

In *Skilling v. United States*, the Court held that the honest-services statute, 18 U.S.C. § 1346, must be limited to bribery and kickback cases; otherwise, the statute would be unconstitutionally vague. 561 U.S. 358, 412-13 (2010). The Court rejected the government's entreaty to "locat[e] within [the mail and wire fraud statutes]" a prohibition on not just bribery and kickbacks, but also "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interest while purporting to act in the interests of those whom he owes a fiduciary duty." *Id.* at 409. The Court explained that "a reasonable limiting construction of § 1346 must exclude this amorphous category of cases" because, otherwise, the statute would fail to provide fair notice and would invite arbitrary and inconsistent prosecutions. *Id*. at 408, 410, 412.

The right-to-control theory allows the government to circumvent *Skilling*'s holding. Prosecutors can reframe virtually any undisclosed conflict of interest as a money-or-property fraud under the right-to-control theory, treating the undisclosed conflict as "material information" bearing on an "essential

element of the bargain." *United States v. Binday*, 804 F.3d 558, 570, 579 (2d Cir. 2015). For example, a county commissioner who votes to approve the purchase of property he secretly owns would fall outside of *Skilling*'s interpretation of Section 1346. But the government could claim that the undisclosed self-dealing deprived the county of its right to control its property and thereby secure a conviction under the mail or wire fraud statutes. Likewise, an attorney who fails to disclose a potential conflict of interest to a prospective client would commit not just an ethical breach but federal fraud. The right-to-control theory thus resurrects through a different channel the honest-services theories that the Court rejected in *Skilling*.

"[C]ourts are [not] free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). Just as this Court in *Kelly* refused to entertain an interpretation of the wire fraud statute that would have allowed prosecutors to "end-run *Cleveland*," 140 S. Ct. at 1574, the Court should reject the government's effort to subvert *Skilling*'s limitations on honest-service prosecutions. *Cf. United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021) (refusing to adopt an interpretation of bank fraud that similarly "would work an impermissible 'end-run' around the Court's holding in *Skilling*").

C. The Right-To-Control Theory Collapses Discrete Statutory Elements, Thereby Lightening The Government's Burden

Under the right-to-control theory, the government can prove the entirety of its case (save use of a wire or mails) through proof of deception alone. The Second Circuit has tried to solve this problem and restore structure to the statute by drawing ever finer lines between elements and making increasingly baffling distinctions. But these efforts find no support in the statutes and only reveal the theory's inherent ambiguity and expansive reach.

1. To prove a violation of the wire or mail fraud statutes, the government must establish several distinct elements: that the defendant "(1) had an intent to defraud, (2) engaged in a fraudulent scheme to obtain [the victim's] money or property," (3) that the scheme involved "material misrepresentations—that is, misrepresentations that would naturally tend to influence, or are capable of influencing, [the victim's] decisionmaking," and, finally, (4) that the defendant "used the wires [or mail] to further that scheme." *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019); *see Neder v. United States*, 527 U.S. 1, 25 (1999) (holding that materiality is an element of the wire and mail fraud statutes).

The right-to-control theory takes the first three of these elements—fraudulent intent; the requirement of intended harm to property; and materiality—and effectively collapses them into one. All can be established by the government through proof of an economic deception. Initially, the second element—intended harm to property—is virtually synonymous with economic deception. Deception under the right-

to-control theory means "the withholding or inaccurate reporting of information that could impact on economic decisions." Pet. App. 16a (internal quotation marks omitted). Proof of such deception necessarily establishes a deprivation of property. Because a harm to property under the right-to-control theory means a deprivation of "potentially valuable economic information," *id.* (internal quotation marks omitted), the intended property harm element will always be satisfied by the withholding of information that could impact on economic decisions.

The same is true of materiality. A false statement is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question," *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977)), so a false statement that could affect economic decisions will always satisfy this standard. Indeed, some of the early right-to-control cases frame the theory's property deprivation requirement as the deprivation of "economically material information," underscoring that "materiality" and harm to property are indistinguishable in the right-to-control context. *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987).

The fraudulent intent element, as viewed through the right-to-control lens, similarly is subsumed by proof of deception. That element is established by proof that "defendants contemplated some actual, cognizable harm or injury to their victims," *United States v. Finazzo*, 850 F.3d 94, 107 n.15 (2d Cir. 2017), which in turn can be satisfied with evidence that the "necessary result" of the deception is to cause harm,

United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994) (acknowledging that "[i]n many cases, [the intent] requirement poses no additional obstacle for the government"); *see also United States v. Regent Off. Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970). But because harm under the right-to-control theory is the informational deprivation itself, an economically relevant deception will always establish fraudulent intent. *See Johnson*, 945 F.3d at 614 ("the question of harm in right-to-control cases is a question of fraudulent intent" (internal quotation marks omitted)).

2. The Second Circuit's answer to this problem has been to draw fine lines—lines that find no support in the text, structure, or history of the federal fraud statutes and that are ultimately vague, *see infra* at 41-47. For example, the Second Circuit has attempted to distinguish materiality from fraudulent intent by drawing a "subtle line" between misrepresentations capable of influencing the intended victim and misrepresentations capable of resulting in tangible harm. *Johnson*, 945 F.3d at 614. Such a distinction is meaningless at worst and elusive at best. Because tangible harm under the right-to-control theory is the deprivation of information that could influence economic decisionmaking, no comprehensible distinction separates the Second Circuit's version of materiality and fraudulent intent, as just explained. To the extent one exists, it turns entirely on a judge's or juror's impressionistic view of the case. *See infra* at 41-47 (describing vagueness problems with the theory).

3. The blurring of elements under the right-to-control theory significantly lightens the government's

burden, allowing prosecutors to secure a federal criminal conviction based on evidence of economic deception alone. Yet courts cannot treat elements of a criminal offense as "surplusage," collapsing one on top of the other with the effect of nullifying distinct requirements. *See Jones v. United States*, 529 U.S. 848, 857 (2000) (rejecting boundless interpretation of the federal arson statute that would cover "[p]ractically every building" "in the land," thus effectively eliminating the interstate-commerce element); *see also Boyle v. United States*, 556 U.S. 938, 947 (2009) (interpreting RICO "pattern" and "enterprise" elements as "distinct," such that "proof of one does not necessarily establish the other" (internal quotation marks omitted)). This Court "do[es] not lightly assume Congress adopts two separate clauses in the same law to perform the same work." *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022). The right-to-control theory's conflation of statutory elements—and the resulting prosecutorial shortcuts it permits—cannot be squared with the structure of the mail and wire fraud statutes and the Court's obligation to keep separate criminal elements distinct.

III. UPHOLDING THE RIGHT-TO-CONTROL THEORY WOULD HAVE UNTENABLE CONSEQUENCES

A. Prosecutions Based On The Right-To-Control Theory Violate Fair Notice Principles And Raise Vagueness Concerns

This Court's precedents establish that a criminal statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes" or "invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). The right-to-control theory implicates these fair notice and vagueness

concerns because it is premised on an amorphous notion of "property"; calls for arbitrary and inconsistent line-drawing; allows prosecutors to secure convictions based on slippery reconfigurations of the statutory elements; and revives the vagueness problems this Court avoided in *Skilling* through its narrow construction of the honest-services statute.

As described above, *see supra* at 15-31, the right-to-control theory is built upon on an invalid foundation: a supposed "property interest" that was not recognized at common law and therefore is not cognizable under the mail and wire fraud statutes. Even if its lack of common-law pedigree did not already invalidate the right-to-control theory's notion of "property," the vagueness concerns implicit in predicating federal criminal liability on such unstable footing would require the same result. *See supra* at 26-28 (describing inherent vagueness of the "bundle-of-sticks" metaphor of property).

The government's brief in opposition, for instance, defended the right-to-control theory's conception of property by citing *Dickman v. Commissioner*, 465 U.S. 330 (1984), *see* BIO 22, a late twentieth-century case that embraced the broad "bundle of sticks" view of property in construing the gift-tax provisions of the Internal Revenue Code. *See Dickman*, 465 U.S. at 336 (describing "property" as "the sum of all the rights and powers incident to ownership," of which "the right to *use* the physical thing to the exclusion of others is the most essential and beneficial"); *United States v. Craft*, 535 U.S. 274, 278 (2002) (citing *Dickman* in describing the modern view of property as "a 'bundle of sticks'—a

collection of individual rights which, in certain combinations, constitute property").[24]

In fact, *Dickman* underscores why such notions of property have no place as the basis for federal criminal law. In the gift-tax context, *Dickman* explains, the term "property" is "used in the broadest and most comprehensive sense … reaching every species of right or interest protected by law and having an exchangeable value." 465 U.S. at 334-35. The Internal Revenue Code embraces all forms of what can now be thought of as property, "however conceptual or contingent." *Id.* (quoting *Smith v. Shaughnessy*, 318 U.S. 176, 180 (1943)). Indeed, even "concepts of property and value" that are "slippery and elusive … cannot escape taxation so long as they are used in the world of business." *Smith*, 318 U.S. at 180. While "conceptual," "contingent," "slippery," and "elusive" meanings of "property" thus have a place in tax law, they cannot serve as the predicates for federal criminal liability without introducing grave vagueness concerns.

Little wonder, then, that the cases applying the right-to-control theory are hardly "models of clarity or consistency." *Skilling v. United States*, 561 U.S. 358, 405 (2010). The Second Circuit itself acknowledged that its rule rested on "a fine line between schemes

[24] *Dickman* further highlights the temporal disconnect between the bundle-of-rights conception of property and the fraud statutes, discussed *supra* at 24-26. The gift-tax scheme was enacted in 1932, *Dickman*, 465 U.S. at 334, when the bundle-of-rights theory was in vogue, *supra* at 25, and the legislative history clearly reflects Congress's intent to embody that capacious conception, *Dickman*, 465 U.S. at 334. The same cannot be said for the fraud statutes. *Supra* at 18-20.

that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail and wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do." Pet. App. 19a-20a (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)); *id.* at 22a (same). This distinction—created out of whole cloth—underscores the arbitrary character of the theory. Non-economic deception that induces a transaction interferes with the intangible right to control decisions no less than economic deception.

For instance, deception about one's background or connections to a potential counterparty may gain entrance to a negotiation and win credibility and trust. But the Second Circuit places such deceptions off limits for prosecution. In *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), the defendants solicited sales by making false statements about referrals to a customer (by a friend or officer of the customer), the source of the goods (a doctor seeking to sell excess stationery), or the reason for the sale (*e.g.*, a death). *Id.* at 1176. These lies got the salesmen's feet in the door and were designed to produce sales to customers who otherwise would have turned them away. Yet the Second Circuit rejected the charge of fraud, emphasizing that it would defy common understanding to criminalize false representations "not directed to the quality, adequacy, or price of goods to be sold, or otherwise to the nature of the bargain." *Id.* at 1179. The court held that "when the customer gets exactly what he expected and at the price he expected to pay," the government's fraud case fails. *Id.* at 1180. The government's theory of fraud,

"despite the absence of any evidence of tangible harm suffered … through the defendants' solicitations," ran aground on the fundamental principle that "the purpose of the scheme must be to injure," which can be inferred when the scheme necessarily has that effect—but not where, as in *Regent Office Supply*, it did not. *Id.* at 1180-81 (internal quotation marks omitted).

Since *Regent Office Supply,* the Second Circuit has repeatedly applied the principle that a misrepresentation that merely "induced [a party] to enter into a transaction it would otherwise have avoided" is not enough to constitute fraud. *See Shellef*, 507 F.3d at 109 (no allegation of a "discrepancy between benefits reasonably anticipated and actual benefits received" or misrepresentation of "the nature of the bargain"); *see also, e.g.*, *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006) ("harm contemplated … must affect the very nature of the bargain itself," and cannot be shown where "the contractors received all they bargained for"); *United States v. Starr*, 816 F.2d 94, 99 (2d Cir. 1987) (evidence showed deception, but "does not identify what harm, if any, the Starrs intended to inflict on their customers," who "received exactly what they paid for").

But the court has since drawn inexplicably arbitrary distinctions that turn on a "fine line" between that line of cases and "schemes that depend for their completion on a misrepresentation of an essential element of the bargain." Pet. App. 19a-20a (quoting *Shellef*, 507 F.3d at 108). The logic behind the distinction is elusive. Worse still, that line turns on arbitrary post-transaction judgments about what constitutes an "essential element of the bargain"—essentially, the court's own determination of what is

core to a transaction versus mere preference or incentive to bargain. That determination yields unpredictable results from case to case. *Compare, e.g.*, *United States v. Schwartz*, 924 F.2d 410, 414 (2d Cir. 1991) (assurance that military equipment would not be exported to certain nations went to an essential element of the bargain between equipment producer and purchaser); *with, e.g.*, *Shellef*, 507 F.3d at 95, 109 (where purchaser misrepresented that product would be sold domestically and manufacturer "would not have sold" product otherwise, recognizing that a prosecution "rested" on "facts … closely resembl[ing] those in *Schwartz*," but nevertheless vacating conviction because jury may have "concluded that the defendants did not misrepresent an 'essential element' of the bargain").

Those judgments are particularly subjective and unpredictable given that the right-to-control theory comes into play only when the government cannot prove traditional property fraud, such as deception about price, quality, or performance. In a right-to-control case, it does not have to. Pet. App. 20a-21a. The government therefore calls on that theory precisely when it cannot prove deceptive conduct that aims to enrich the defendant at the victim's expense. And it leaves to prosecutors, judges, and juries the post-hoc task of drawing finer and finer distinctions that are difficult to explain and impossible to comprehend—let alone anticipate.

A legal standard of fraud that turns on such ineffable and manipulable determinations cannot survive fair notice and vagueness scrutiny. *See McDonnell v. United States*, 579 U.S. 550, 576 (2016) (interpreting criminal statute so that "ordinary people

can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement" (internal quotation marks omitted)); *Skilling*, 561 U.S. at 404 ("par[ing] that body of [pre-*McNally*] precedent down to its core" to avoid vagueness); *Johnson*, 576 U.S. at 601 (invalidating statute as vague given "pervasive disagreement about the nature of the inquiry one is supposed to conduct"). The fraud statutes may qualify as federal prosecutors' "Stradivarius," "Colt 45," "Louisville Slugger," and "Cuisinart."[25] But citizens are entitled to fair notice before the fraud statutes are deployed in such novel ways. Returning the right-to-control genie to the bottle "avoids this 'vagueness shoal.'" *McDonnell*, 136 S. Ct. at 2372 (quoting *Skilling*, 561 U.S. at 368).

B. The Right-To-Control Theory Offends Principles Of Federalism By Upending The Federal-State Balance

The right-to-control theory upsets the constitutional balance of federal and state regulation by vastly expanding the reach of the federal fraud laws. "From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020). Accordingly, in the mail and wire fraud context, this Court has cautioned against "a sweeping expansion of federal criminal jurisdiction" into an area "traditionally regulated by state and local authorities," absent "a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12,

[25] Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duquesne L. Rev. 771, 771 (1980).

24 (2000); *accord McNally v. United States*, 483 U.S. 350, 360 (1987). The right-to-control theory gives federal prosecutors a weapon to criminalize a broad array of corporate, personal, and professional relationships ordinarily left to state regulation. Before federal prosecutors are empowered to substitute their judgment for that of state regulators on how to address deceptions that may affect a person's economic calculus, even those that contemplated no financial harm, Congress must make its intention clear. It has not done so here. The principle that Congress "will not be deemed to have significantly changed the federal-state balance" unless it "conveys its purpose clearly" thus confirms the invalidity of the right-to-control theory. *United States v. Bass,* 404 U.S. 336, 349 (1971).

C. Upholding The Right-To-Control Theory Would Run Contrary To The Rule Of Lenity

The right-to-control theory's lack of clarity implicates the rule of lenity, which provides "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The rule protects citizens from being subjected to punishments that are "not clearly prescribed," incentivizes Congress to "speak more clearly," and keeps courts from "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

This Court has repeatedly applied the rule of lenity to construe the mail and wire fraud statutes. In *McNally*, the Court predicated its interpretation of the mail fraud statute in part on the principle that "when there are two rational readings of a criminal statute,

one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. at 359. The Court echoed that rationale in *Cleveland*, explaining that "to the extent that the word 'property' is ambiguous" in the statute, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 531 U.S. at 25 (internal quotation marks omitted). "In deciding what is 'property' under [the statute]," the Court stated, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* (internal quotation marks omitted); *accord Skilling*, 561 U.S. at 402.

The same principle applies here. By capturing conduct that falls far outside the "heartland" of what is proscribed by the mail and wire fraud statutes, the right-to-control theory triggers the rule of lenity. *Salman v. United States*, 137 S. Ct. 420, 429 (2016). At the very least, Congress has provided no clear and definite endorsement of the right-to-control theory, and this Court should resolve any ambiguity against its recognition. *McNally*, 483 U.S. at 460.

IV. PETITIONER'S CONVICTION MUST BE REVERSED

Petitioner's conviction rests solely on the right-to-control theory. In addressing petitioner's challenge to the sufficiency of the evidence, the court of appeals explicitly held that "[i]n a right-to-control case, it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend that his misrepresentations induce a counter-party to enter a transaction without the relevant facts necessary to make an informed economic decision." Pet. App. 17a

(internal quotation marks omitted). That holding was fatally flawed and it prevented the court from granting relief based on the government's failure of proof.

The charged scheme did not depend on a showing that the defendants schemed to cause Fort Schuyler harm by deceiving it about the quality of the work to be performed, the competence of the contractors, the price to be charged, the conditions of performance, or any other feature of their performance of their end of the bargain. The right-to-control theory made those kinds of harms irrelevant; informational deprivation was enough. Indeed, in the district court, the government successfully precluded petitioner from introducing evidence about the fairness of his fee or the quality of his services by arguing that the evidence was irrelevant under the right-to-control theory. J.A. 46, 60-62. Under those circumstances, if the right-to-control theory is invalid, petitioner's conviction must be reversed. Congress did not enact the theory on which the government proceeded, and this Court should not "construe the statute in a manner that leaves its outer boundaries ambiguous." *McNally v. United States*, 483 U.S. 350, 360 (1987). "If Congress desires to go further, it must speak more clearly than it has." *Id.*

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and the case remanded with instructions to enter a judgment of acquittal.

Respectfully submitted.

Michael R. Dreeben
Counsel of Record
Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, DC 20006
(202) 282-5300
mdreeben@omm.com

Jason Zarrow
O'MELVENY & MYERS LLP
400 S. Hope St.,
18th Floor
Los Angeles, CA 90071
(213) 430-6000

L. Nicole Allan
O'MELVENY & MYERS LLP
Two Embarcadero Center,
28th Floor
San Francisco, CA 94111
(415) 984-8700

August 29, 2022

No. 21-1170

In the

Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

---

BRIEF FOR RESPONDENTS STEVEN AIELLO AND JOSEPH GERARDI IN SUPPORT OF PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondents Steven Aiello and Joseph Gerardi

August 29, 2022

QUESTION PRESENTED

Whether the Second Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDING

Petitioner Louis Ciminelli was a Defendant-Appellant in the Second Circuit.

Steven Aiello, Joseph Gerardi, and Alain Kaloyeros were also Defendants-Appellants in the Second Circuit and, pursuant to Rule 12.6 of this Court's Rules, are Respondents herein.

Respondent United States of America was the Appellee in the Second Circuit.

Joseph Percoco was also a Defendant-Appellant in the Second Circuit. His case was tried separately, and he is the Petitioner in *Percoco v. United States*, No. 21-1158. Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler were Defendants in the district court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.. i

PARTIES TO THE PROCEEDING......................... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES..................................... v

INTRODUCTION.. 1

STATEMENT OF THE CASE 5

A. Factual Background 5

1. *The Economic Development Initiative* 5

2. *The Alleged "Tailoring"*....................... 7

3. *COR's Selection As Preferred Developer* 8

B. The District Court Proceedings 9

C. The Second Circuit's Decision................ 13

SUMMARY OF ARGUMENT 14

ARGUMENT... 16

I. THE RIGHT-TO-CONTROL THEORY IS INCONSISTENT WITH THE STATUTORY REQUIREMENT THAT FRAUD REQUIRES "OBTAINING MONEY OR PROPERTY"... 16

A. The Object Of A Wire Fraud Scheme Must Be "Obtaining Property" From Another 16

B. The Fraud Statutes Protect Only "Property" That Is Obtainable—Meaning Transferable From Victim To Defendant 18

C. Lower Courts Adopting The Right-To-Control Doctrine Have Obliterated The *Obtaining Property* Requirement 26

D. The Right-To-Control Theory Ignores The Conceptual Distinction Between Property Itself And Property Rights 30

II. THE RIGHT-TO-CONTROL DOCTRINE CRIMINALIZES COMMON BUSINESS PRACTICES.. 34

III. THE CONVICTIONS MUST BE REVERSED 40

CONCLUSION 42

TABLE OF AUTHORITIES

Cases **Page(s)**

Abramski v. United States,
573 U.S. 169 (2014)..24

Carpenter v. United States,
484 U.S. 19 (1987)..16

Cedar Point Nursery v. Hassid,
141 S. Ct. 2063 (2021)..30

Cleveland v. United States,
531 U.S. 12 (2000)..17, 19

Evans v. United States,
504 U.S. 255 (1992)..25

Gamble v. United States,
139 S. Ct. 1960 (2019)..1

Honeycutt v. United States,
137 S. Ct. 1626 (2017)......................................23, 24

Kelly v. United States,
140 S. Ct. 1565 (2020)............................3, 16, 17, 29

Kungys v. United States,
485 U.S. 759 (1988)..29

Loughrin v. United States,
573 U.S. 351 (2014)..17

Marinello v. United States,
138 S. Ct. 1101 (2018)..40

McNally v. United States,
483 U.S. 350 (1987)..17, 33

Morissette v. United States,
342 U.S. 246 (1952)..21

Nichols v. United States,
578 U.S. 104 (2016)..24

Porcelli v. United States,
404 F.3d 157 (2d Cir. 2005) 26

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003).......................................*passim*

Sekhar v. United States,
570 U.S. 729 (2013).......................................*passim*

Skilling v. United States,
561 U.S. 358, 418 (2010)........................1, 18, 19, 40

Southwest Airlines Co. v. Saxon,
142 S. Ct. 1783 (2022)...33

Taylor v. United States,
495 U.S. 575 (1990)..21

United States v. Binday,
804 F.3d 558 (2d Cir. 2015) 34

United States v. Clapps,
732 F.2d 1148 (3d Cir. 1984) 16, 17

United States v. Finazzo,
850 F.3d 94 (2d Cir. 2017) 3, 26, 27, 41

United States v. Gatto,
986 F.3d 104 (2d Cir. 2021) 3, 39

United States v. Hedaithy,
392 F.3d 580 (3d Cir. 2004) 27

United States v. Lebedev,
932 F.3d 40 (2d Cir. 2019) 34

United States v. Little,
889 F.2d 1367 (5th Cir. 1989)................................28

United States v. Nardello,
393 U.S. 286 (1969)...21

United States v. Sadler,
750 F.3d 585 (6th Cir. 2014)..................................39

United States v. Sekhar,
683 F.3d 436 (2d Cir. 2012) 22

United States v. Takhalov,
827 F.3d 1307 (11th Cir. 2016)..............................39

United States v. Wallach,
935 F.2d 445 (2d Cir. 1991) 28, 41

United States v. Walters,
997 F.2d 1219 (7th Cir. 1993)................................18

United States v. Weimert,
819 F.3d 351 (7th Cir. 2016)..................................38

Wilson v. Ward Lumber,
67 F. 674 (C.C.E.D. Mo. 1895)...............................31

Yates v. United States,
574 U.S. 528 (2015) 1

Statutes

18 U.S.C. § 1001 12

18 U.S.C. § 1341 .... 3, 15, 16

18 U.S.C. § 1343 .... 3, 6, 15, 16

18 U.S.C. § 1349 6

18 U.S.C. § 1951 19

18 U.S.C. § 1964 32

20 U.S.C. § 4302 32

21 U.S.C. § 853 23

Other Authorities

10 Oxford English Dictionary
(2d ed. 1989) 24

Black's Law Dictionary
(1st ed. 1891) 23, 31

Random House Dictionary of the English
Language (1966) 23

Gregory A. Alexander,
Commodity & Propriety (1997) 31

William Blackstone,
Commentaries on the Laws of
England (1766)...30

Wesley Newcomb Hohfeld,
Some Fundamental Legal Conceptions
as Applied in Judicial Reasoning,
23 Yale L.J. 16 (1913) 31

Tai H. Park,
The "Right to Control" Theory of Fraud:
When Deception Without Harm Becomes
a Crime, 43 Cardozo L. Rev. 135 (2021)............4, 30

INTRODUCTION

In recent years, several Justices of this Court have lamented the "pathology" of "overcriminalization" in the federal criminal code. *E.g.*, *Yates v. United States*, 574 U.S. 528, 569-70 (2015) (Kagan, J., dissenting); *see also Gamble v. United States*, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting) (noting the stunning growth in the scope of federal criminal law). One unfortunate source of this overcriminalization is the tendency of prosecutors and lower courts to expansively interpret the federal fraud statutes in ways that purport to cover nearly any conduct that prosecutors determine was dishonest, immoral, or untoward. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 418 (2010) (Scalia, J., concurring in judgment).

In a seminal series of cases—including *McNally*, *Cleveland*, *Skilling*, and *Kelly*—this Court sought to rein in these breathtakingly broad interpretations. Applying ordinary principles of statutory interpretation, the Court held that the fraud statutes do not cover all dishonest dealings in business or politics. Instead, the fraud statutes are generally limited to their common-law roots, covering only schemes to obtain property by deception. What counts as "obtaining property," moreover, is not limitless.

Unfortunately, however, in the wake of each of these rulings, federal prosecutors sought to continue business as usual, and their expansive theories have often been endorsed by lower courts. The "right to control" doctrine at the heart of this case exemplifies this troubling trend.

Respondents Steven Aiello and Joseph Gerardi co-own COR, a real estate development company in Syracuse, New York. A consultant approached them about a potential business opportunity. He asked for COR's qualifications and shared them with Respondent Alain Kaloyeros, who ran a non-profit company managing a state-funded economic development program. Later, the consultant invited COR to comment on a draft of a document that would be used to solicit developers interested in obtaining contracts under the program. Gerardi suggested a few edits that would broaden the criteria and enable more developers to qualify; some were incorporated in the final "request for proposals" document when it was made public, and some were not. Ultimately, COR was the only interested developer in the area, and it was retained to build two real estate projects. COR fully performed its obligations under the contract. There was no evidence the non-profit company received less than what it paid for. There was no evidence that any other developer was deterred from expressing interest in the Syracuse program by any aspect of the final "request for proposals."

Yet on these facts, the government procured wire fraud convictions on the theory that Respondents engaged in a scheme to defraud the non-profit company of its "right to control" its assets. According to the government and the Second Circuit, Respondents failed to disclose to the non-profit's board that COR had shared its qualifications and commented on the draft document before the document was made public. This supposedly deprived that company of "potentially valuable economic information" and constituted federal

property fraud, even though it caused no conceivable harm to the "victim's" property interests.

This case typifies what can happen when lower courts interpret federal criminal statutes in ways that go beyond the careful limits set by Congress and this Court. The statutes say: fraud means "obtaining money or property" by deception. 18 U.S.C. §§ 1341, 1343. Applying the plain meaning of that text, this Court has held that defendants "violate those laws only if an object of their dishonesty was to obtain the [victim's] money or property." *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020). And the Court has held, in the context of the similarly-worded Hobbs Act, that the common-law phrase *obtaining property* has a limited and specific meaning, and that a defendant does not obtain property when he merely interferes with another's supposed "right to control" property. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401-02 (2003).

Yet lower courts have said that the obtaining property element does not exist *at all*. The law in the Second Circuit (among others) is this: "the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property." *United States v. Finazzo*, 850 F.3d 94, 107 (2d Cir. 2017); *see United States v. Gatto*, 986 F.3d 104, 123 (2d Cir. 2021).

How do lower courts justify this result, so obviously at odds with the statutory text and this Court's cases? The answer is the right-to-control doctrine—an astonishingly broad theory that threatens to criminalize virtually any deceit in a commercial transaction. In practice, the doctrine means that dishonesty alone is sufficient for fraud, and it thereby "essentially

nullifies the property requirement" that has been central to this Court's case law from *McNally* through *Kelly*. Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 189 (2021).

This Court should now affirm once and for all that the doctrine is invalid, and that defendants only violate the fraud statutes if the object of their deception is to obtain money or property.

STATEMENT OF THE CASE

A. Factual Background

1. *The Economic Development Initiative*

In 2012 New York's then-Governor Andrew Cuomo launched an initiative (known as the "Buffalo Billion" program) to promote economic development in upstate New York. Cuomo tapped Alain Kaloyeros, a State university official, to identify and pursue development projects in cities including Syracuse and Buffalo. Pet.App.5a-6a.

The program attracted the interest of several developers, including COR Development Company, based in Syracuse, and LPCiminelli, based in Buffalo. Respondents Steven Aiello and Joseph Gerardi are co-founders and principals of COR, and Petitioner Louis Ciminelli is the principal of LPCiminelli. Both COR and LPCiminelli retained Todd Howe, a well-connected government relations consultant, to assist with state-funded work.

Kaloyeros implemented the plan through Fort Schuyler Management Corporation ("Fort Schuyler"), a private non-profit corporation affiliated with New York State's university system. Fort Schuyler was chosen to finance and manage the projects because it was not bound by cumbersome state procurement rules that State agencies had to follow and thus could proceed with greater speed and efficiency. Kaloyeros served on Fort Schuyler's board of directors. Pet.App.6a; C.A.App.1041, 1056.

As an initial step, Fort Schuyler sought to partner with qualified construction firms in the communities where it would pursue development projects. A key component of Fort Schuyler's strategy throughout the region was to promote local job growth by working with such local firms. C.A.App.1046. To identify local partners in several cities, Fort Schuyler issued requests for proposals ("RFPs"). The RFPs did not identify any specific projects, and at the time it issued the RFPs, Fort Schuyler had no specific Syracuse projects in mind. Pet.App.7a-8a. Rather, the RFPs outlined Fort Schuyler's desired qualifications for developers. The RFP winners ("preferred developers") obtained the ability to negotiate with Fort Schuyler for contracts in that region. But they were not guaranteed any contract, and Fort Schuyler could choose to negotiate with other candidates instead or terminate the process. *E.g.*, Pet.App.7a-8a, 19a.

Fort Schuyler selected COR as the Syracuse preferred developer and negotiated contracts with COR to build two projects in Syracuse, which were successfully completed. Pet.App.11a-12a. Fort Schuyler selected two preferred developers for Buffalo, including LPCiminelli, which negotiated a contract for a Buffalo project. *Id.* (COR had no connection to or involvement in the Buffalo process.)

Aiello, Gerardi, and Kaloyeros were subsequently charged with wire fraud (18 U.S.C. § 1343) and wire-fraud conspiracy (18 U.S.C. § 1349) for "tailoring" the Syracuse RFP to favor COR. Ciminelli and Kaloyeros were similarly charged with "tailoring" the Buffalo RFP to favor LPCiminelli. There was no suggestion

that Kaloyeros was bribed or had any financial interest in either developer. Nor was there any allegation that any defendant intended to cause Fort Schuyler to lose money, or that either developer overcharged Fort Schuyler for its services. Instead, the government's theory was that Kaloyeros failed to disclose to Fort Schuyler's board that he was steering contracts to his preferred winners. According to the government this defrauded Fort Schuyler not of any money, but of its "right to control its assets," and the developers assisted in this alleged scheme. JA31-33.

2. *The Alleged "Tailoring"*

In mid-2013, COR's consultant Howe arranged meetings between COR and Kaloyeros regarding a potential partnership with Fort Schuyler, and he suggested that COR meet other Fort Schuyler personnel as well. *E.g.*, C.A.App.1714. Howe subsequently asked COR for bullet points concerning COR's qualifications, which Gerardi sent. C.A.App.1700-02.

The next month, Howe sent Aiello and Gerardi a draft RFP that he said Fort Schuyler was "fine tuning." C.A.App.1650. In response, Gerardi provided a few comments on the RFP that included suggestions broadening the criteria in ways that would make it easier for other developers to qualify. For instance, Gerardi questioned the RFP's requirement that developers have at least 15 years' experience, even though COR satisfied it. He proposed broadening the categories of prior experience deemed relevant under the RFP, even though COR had the required experience. He proposed omitting a requirement that developers use specific software programs, even though COR

used those programs. He proposed eliminating a performance-bond requirement, even though COR regularly issued performance bonds. And while COR benefitted from one of Gerardi's proposals—which softened the requirement that developers provide "audited" financial statements—so did many other developers. C.A.App.1328, 1420-21, 1656-60.[1]

Howe forwarded Gerardi's suggestions to Kaloyeros, and the final RFP included some of them. Pet.App.8a-9a; C.A.App.1675-78. But Kaloyeros did not control the content of the RFP. Fort Schuyler's board chair, staffers, and lawyers were involved in drafting, reviewing, editing, and issuing the RFP, and they could have removed any provision they felt was improper. *E.g.*, C.A.App.1050, 1080, 1155, 2542. At trial, Fort Schuyler personnel consistently testified that the Syracuse RFP was fair, sensible, and not slanted in favor of any developer, and that the allegedly "tailored" provisions were reasonable. *E.g.*, C.A.App.1063-65, 1088-89, 1096, 1152, 1154-55, 1171. Indeed, the Syracuse RFP was used as a model for several RFPs that Fort Schuyler issued in other regions of New York. *E.g.*, C.A.App.1167.

3. *COR's Selection As Preferred Developer*

COR was the only developer that responded to the Syracuse RFP. Pet.App.11a. The government presented no evidence the allegedly "tailored" RFP provisions disfavored or discouraged any other Syracuse developer from competing with COR. Nor did COR or

[1] Government witnesses testified that it was not uncommon for entities like Fort Schuyler to seek potential bidders' input to improve their RFPs. *See*, *e.g.*, C.A.App.1057, 1278-80.

Kaloyeros do anything to exclude competition. To the contrary, Kaloyeros encouraged Fort Schuyler to respond to potential bidders' inquiries even though they had missed RFP deadlines ("the more the merrier," he said). *E.g.*, C.A.App.1157-58.

Fort Schuyler's evaluation committee and board selected COR as the Syracuse "preferred developer." They selected COR on the merits and without input from Kaloyeros, who recused himself. *E.g.*, Pet.App.11a. At trial, Fort Schuyler personnel testified that the decision to select COR was fair. C.A.App.1066-67, 1152.

After COR was selected, it engaged in protracted arm's-length negotiations for specific projects with experienced Fort Schuyler procurement staff, who tried "to get the best deal they could get." C.A.App.1096-97. If Fort Schuyler had been dissatisfied, it could have issued RFPs for each specific project to compare bids based on price, but it did not. *E.g.*, C.A.App.1089-90.

COR subsequently contracted with Fort Schuyler to build a film hub and a manufacturing plant. Pet.App.11a-12a. COR performed its obligations under the contracts, and there was no evidence its work was anything other than excellent. Even after the indictment, Fort Schuyler continued to work with COR, paid it millions of dollars, and, during the trial, hired it for an additional $6 million of work. C.A.App.2601.

B. The District Court Proceedings

The indictment did not allege that Fort Schuyler was defrauded of any money or suffered any pecuniary

harm, and the government conceded that preferred-developer status was not "property" under the wire fraud statute. C.A.App.996. The sole prosecution theory was that the defendants schemed to "defraud [Fort Schuyler] of its right to control its assets" by representing that the RFP process was "fair, open, and competitive" while "secretly tailor[ing]" the RFP so COR "would be favored to win in the selection process." JA31-33.

The defendants repeatedly argued that this theory was legally invalid and that the government had to prove Fort Schuyler received less than it paid for or overpaid because of defendants' lies. The district court rejected these arguments based on Second Circuit precedent that "[i]n a right-to-control case the property interest at issue is the information that was misrepresented or withheld." C.A.App.996. The court therefore refused to allow the defense to introduce evidence that the developers charged a fair price and did excellent work. *E.g.*, JA44-46.

As its sole attempt to prove economic harm, the government called two witnesses interested in the Buffalo RFP who testified about their normal range of fees. They did not testify about fees in Syracuse or what they would have charged for any of Fort Schuyler's projects. The government conceded they might have charged as much as COR or LPCiminelli. *E.g.*, C.A.App.1292, 1472-73. The district court admitted the evidence solely to show that developer fees can differ, but it ruled that the witnesses could not competently testify about fees for Fort Schuyler's projects. JA73 ("THE COURT: … I have no idea how Mr. Balling has any idea what the development fee ought to

have been in this case."); C.A.App.2627 ("THE COURT: … Balling and Bills also testified that there were many variables that affect [the] fee …. [I]t's not fair to the defendant to ignore those variables ….").

There was no evidence COR overcharged, underdelivered, or gave Fort Schuyler anything less than it paid for. There was no evidence Fort Schuyler would have drafted the RFP differently to attract more competition or select the best developer. There was no evidence the RFP excluded any Syracuse developer, let alone one with a better deal, or made a better deal any less probable.

The jury instructions permitted the jury to convict without proof of any contemplated economic harm. Over objection, the jury was instructed that Fort Schuyler's "property" included "intangible interests such as the right to control the use of one's assets," which "[wa]s injured" if Fort Schuyler "[wa]s deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." JA41.

The instructions on this "right to control" theory were a confusing maze that no juror could have understood. "Potentially valuable economic information" was defined as anything "that affects the victim's assessment of the benefits or burdens of a transaction" or "relates to … economic risks." *Id.* The jury was asked to consider whether Fort Schuyler risked "economic harm," but that term was never defined. JA42. Instead, the jury was told that "economic harm is not limited to monetary loss" and could instead include "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it

actually received." *Id.* And with respect to intent to defraud, all that was required was "an intent to deceive, for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information." JA43.

Based on these instructions, the government argued in closing that "the fact that there had not been a competitive [RFP] process is exactly the kind of economic information [Fort Schuyler] would want to know." C.A.App.1472. The district court compounded the problem by refusing to instruct the jury to acquit if Fort Schuyler "received, and was intended to receive, the full economic benefit of its bargain," or to acquit unless "the scheme, if it were to succeed, would result in economic harm to the victim." C.A.App.911, 960-61, 1449; JA103.

Aiello and Gerardi were convicted on both the wire fraud and wire-fraud conspiracy counts. The district court sentenced them to 36 months' and 30 months' imprisonment, respectively. Pet.App.14a.[2] At sentencing, the court found no actual or intended loss under the Sentencing Guidelines because it was "unable

[2] Gerardi was also convicted for making false statements under 18 U.S.C. § 1001 because he told the government that he never asked to tailor the RFP to COR and that his suggested edits were intended to broaden the criteria to qualify as a preferred developer under the draft RFP. Pet.App.12a-14a. If his fraud convictions are reversed, his § 1001 conviction should be remanded for the Second Circuit to determine whether it should be reversed as well due to spillover prejudice or the statements' lack of materiality. Aiello was also convicted at a separate trial of participating in a conspiracy to commit honest-services fraud. This Court granted certiorari to consider the validity of the theory underlying that conviction in *Percoco v. United States*, No. 21-1158.

to make a determination of pecuniary loss without engaging in pure speculation." C.A.App.2627; *see also* C.A.App.2645.

C. The Second Circuit's Decision

The Second Circuit affirmed the convictions under its "right to control" doctrine, which "allows for conviction on 'a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information.'" Pet.App.16a. The court explained that "[i]n a right-to-control case, 'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision.'" Pet.App.17a.

The court concluded that "in rigging the RFPs to favor their companies, defendants deprived Fort Schuyler of 'potentially valuable economic information' that would have resulted from a truly fair and competitive RFP process." Pet.App.18a. The court acknowledged that "many of [its] right-to-control precedents have involved more tangible evidence of economic harm than is presented in this case." Pet.App.20a.

The court further conceded that "the government offered little evidence that other companies would have successfully bid for the projects and then either charged less or produced a more valuable product absent the fraud." *Id.* However, it held this irrelevant,

because the wire fraud statute does not require proof the victim "suffered harm." Pet.App.21a. The court observed that "if Fort Schuyler had been able to consider additional applications, it might have selected a preferred developer who could offer more favorable economic terms." Pet.App.20a n.8. The court did not explain how this deprived Fort Schuyler of property.

The court rejected the defendants' argument that Fort Schuyler was not defrauded because it "received the benefit of its bargain"—the construction services for which it paid COR. Pet.App.21a. The court did so by redefining the bargain as the receipt of accurate information. According to the court: "The bargain at issue was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. Depriving Fort Schuyler of that information was precisely the object of defendants' fraudulent scheme, and for Fort Schuyler, it was an essential element of the bargain." Pet.App.21a-22a. The court also endorsed the jury instructions, holding that they "clearly explained the right-to-control theory" and "closely tracked the language set forth in our prior opinions." Pet.App.27a-28a.

SUMMARY OF ARGUMENT

As Petitioner and co-defendant Ciminelli explains in his brief, the right-to-control doctrine is inconsistent with this Court's jurisprudence interpreting the mail and wire fraud statutes. This Court has held that those statutes are limited in scope to the protection of property rights. The right-to-control doctrine

finds no basis in traditional, common-law conceptions of property. Respondents join those arguments.

The full context of the statutory text buttresses that conclusion. The fraud statutes require a scheme for "*obtaining* money or property." 18 U.S.C. §§ 1341, 1343 (emphasis added). In closely related contexts, this Court has already held that the phrase "obtaining property" is a phrase with a well-defined common-law meaning—and that the right-to-control doctrine is inconsistent with that common-law meaning. In order to obtain property, a defendant must acquire some transferable property interest. When a defendant merely deprives a counterparty of information and thereby interferes with the so-called right to control, the defendant does not obtain property.

In part because it is unmoored from any common-law conception of "property" or "obtaining property," the right-to-control doctrine is irretrievably amorphous. It criminalizes a wide range of innocuous and commonplace business practices. The problem of overbreadth is not merely theoretical. Federal prosecutors' use of the doctrine—including in this very case—illustrates how broad the doctrine can be in application. The right-to-control doctrine gives the government free-ranging authority to prosecute dishonest or untoward business practices. That authority goes far beyond anything authorized by Congress in the fraud statutes themselves.

This Court should reject the right-to-control doctrine and reaffirm that the fraud statutes are limited to the protection of traditional property rights.

ARGUMENT

I. THE RIGHT-TO-CONTROL THEORY IS INCONSISTENT WITH THE STATUTORY REQUIREMENT THAT FRAUD REQUIRES "OBTAINING MONEY OR PROPERTY"

This Court made clear 35 years ago that obtaining money or property "is a necessary element" of wire fraud. *Carpenter v. United States*, 484 U.S. 19, 25 (1987). And just two years ago, the Court reaffirmed that the defendant's deceit must have "the 'object' of obtaining the [victim's] money or property." *Kelly v. United States*, 140 S. Ct. 1565, 1572 (2020). Thus, the property in question must be obtainable—*i.e.*, capable of being transferred from the alleged victim to the defendant. The right-to-control theory fails this requirement because the right to make an informed decision about how to dispose of assets is not itself property; it is merely an attribute of property ownership. That is not something a defendant can *obtain* from another person.

A. The Object Of A Wire Fraud Scheme Must Be "Obtaining Property" From Another

The mail and wire fraud statutes prohibit "any 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. §§ 1341, 1343. Based on the statutes' use of the disjunctive "or," many circuits initially held that the statutes create *two* distinct offenses—(1) a scheme to defraud, and (2) a scheme to obtain property—and that the former type contains no requirement of obtaining property. *See*, *e.g.*, *United States v. Clapps*, 732 F.2d 1148, 1152

(3d Cir. 1984) ("[T]he 'scheme or artifice to defraud' clause is to be read independently of the 'obtaining money or property by ... false ... pretenses' clause.").

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected that reading of the offense. It held that when Congress added the disjunctive language, it was merely clarifying the meaning of a "scheme to defraud," which "commonly refer[s] 'to wronging one in his property rights by dishonest methods or schemes.'" *Id.* at 358-59. The "money or property" clause "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359. In other words, Congress was clarifying that a "scheme to defraud" *is* a scheme for obtaining money or property.

Some lower courts and prosecutors, however, continued to ignore that ruling. So in *Cleveland v. United States*, this Court once again rejected the argument "that the second phrase of § 1341 defines a separate offense." 531 U.S. 12, 26 (2000). And in *Loughrin v. United States*, the Court again reaffirmed that the mail and wire fraud statutes define "just one offense." 573 U.S. 351, 359 (2014). Most recently, in *Kelly*, this Court reiterated that the wire fraud statute contains just one offense and "prohibits only deceptive 'schemes to deprive [the victim of] money or property.'" 140 S. Ct. at 1571. The defendant's deceit must have "the 'object' of obtaining the [victim's] money or property." *Id.* at 1572.

In sum, the mail and wire fraud statutes define a single offense. That offense has an *obtaining money or property element*—a "scheme to defraud" means a

scheme to obtain money or property by deception. The only question, then, is the legal meaning of the *obtaining money or property* element. As demonstrated below, this Court's cases in both fraud and other contexts have already defined the meaning of that phrase: obtainable property means transferable property. The right-to-control doctrine is inconsistent with that requirement.

B. The Fraud Statutes Protect Only "Property" That Is Obtainable—Meaning Transferable From Victim To Defendant

As Petitioner Ciminelli demonstrates, even if the phrase "money or property" were read in isolation, the right-to-control doctrine would be invalid. The same conclusion is even more firmly established when the phrase "money or property" is read in conjunction with the transitive verb "obtain." Because the defendant must seek to "obtain property" from the victim, the statute protects only property that can be *transferred* from a victim to the defendant. The "right" to have sufficient information to make an informed decision does not qualify.

1. As this Court explained in *Skilling v. United States*, property fraud requires that "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." 561 U.S. 358, 400 (2010). In other words, it must involve not only a deprivation of the victim's property, but the defendant's gain of (or attempt to gain) that same property. *See also United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (mail fraud requires "an actual" or "potential transfer of property from the victim to the defendant").

Thus, the statute does not apply to schemes that "lack[] similar symmetry," such as deceitful efforts to deprive people of "intangible" rights such as the right to a public official's "honest services." *Skilling*, 561 U.S. at 400. Likewise, this Court has held that a state's "right to control the issuance, renewal, and revocation" of video-poker licenses is not "property," because the "object of the fraud" must be property when it is "in the victim's hands." *Cleveland*, 531 U.S. at 23, 26. A poker license is not "property" in the state's hands and only becomes property in the licensee's hands, so making a false statement to obtain a license is not property fraud. *Id.* at 15, 26-27.

2. This Court has also interpreted similar statutory language in other federal criminal statutes. In those decisions, it has affirmed that "obtaining property" includes a requirement of transferability. And it has held that that requirement is not satisfied in a right-to-control case.

a. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court held that interfering with another person's right to control his property is not the same as acquiring or obtaining that property. The decision in *Scheidler* was based on the text of the Hobbs Act, which prohibits the "obtaining of property from another" through force, threats, or violence. 18 U.S.C. § 1951(b)(2).

The plaintiffs in *Scheidler* were abortion clinics and a prominent women's rights organization. They filed a RICO suit against abortion protestors who had engaged in a variety of tactics to discourage abortions and block access to abortion clinics. They alleged that the protestors had "obtained property" in violation of

the Hobbs Act (a predicate offense under RICO) by blocking access to the clinics.

Whatever the legality or morality of their conduct, the protestors had not actually *obtained* anything by protesting as they had. Consequently, the plaintiffs' theory of the case rested on a right-to-control theory. The plaintiffs argued that "'[p]roperty' historically has *encompassed* the right lawfully to control one's assets" and rejected any "attempt[] to distinguish between 'property' and 'property rights.'" Brief of Respondents at 14 (Sept. 17, 2002). They also insisted that property need not be transferable. *Id.* at 16-17 & n.20. According to the *Scheidler* plaintiffs, in its "normal and accepted legal use," the word property simply means "'an exclusive right to control an economic good.'" *Id.* at 18.

For this reason, according to the plaintiffs, the protestors had "obtained" property by interfering with the clinics' right to control that property. They "argue[d] that because the right to control the use and disposition of an asset is property, [the protestors], who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain [the plaintiffs'] property." *Scheidler*, 537 U.S. at 401.

This Court squarely rejected these arguments. It held that they would impermissibly expand the meaning of "obtain property" and thus the scope of the statute. "Whatever the outer boundaries may be, the effort to characterize [the protestors'] actions here as an 'obtaining of property from' [plaintiffs] is well beyond them." *Id.* at 402.

The Court began with the "the general presumption that a statutory term has its common-law meaning." *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 592 (1990), and *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Examining the common law, this Court held that the phrase "obtaining of property" was a phrase with a well-known meaning—"this 'obtaining of property' requirement included both a deprivation and acquisition of property." *Id.* at 403; *see also id.* at 404 ("the 'obtaining' requirement of extortion under New York law entailed both a deprivation and acquisition of property").

Under that common-law definition, the protestors in *Scheidler* did not obtain any property. While they undoubtedly "interfered with, disrupted, and in some instances completely deprived [plaintiffs] of their ability to exercise their property rights," they did not *acquire* anything. *Id.* at 404. Interfering with property rights is not the same as obtaining property. To obtain property means to come into possession of it, which ordinarily means the acquiror must have "received 'something of value from' [the other party] that they could exercise, transfer, or sell." *Id.* at 405 (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)).

Notably, this Court explicitly rejected the right-to-control doctrine as a basis for liability. The protestors "may have deprived or sought to deprive [the plaintiffs] of their alleged property right of exclusive control of their business assets, but they did not acquire any such property." *Id.* To rule otherwise "would effectively discard the statutory requirement that property must be obtained from another." *Id.*

b. This Court reaffirmed *Scheidler*'s holding in *Sekhar v. United States*, 570 U.S. 729 (2013). The defendant in *Sekhar* had sent threatening emails to a New York state employee in hopes that the employee would approve an investment in a fund managed by the defendant's firm. The Second Circuit held that because the defendant generally sought to profit by his conduct, he had sought to "obtain property" within the meaning of the Hobbs Act. *United States v. Sekhar*, 683 F.3d 436, 442-43 (2d Cir. 2012).

This Court reversed. It reiterated both the plain meaning and common-law meaning of the statutory phrase "obtaining property." "Obtaining property requires 'not only the deprivation but also the acquisition of property.'" 570 U.S. at 734 (quoting *Scheidler*, 537 U.S. at 404). The statute, in other words, "requires that the victim 'part with' his property, and that the extortionist 'gain possession' of it." *Id*. (citations omitted). To be obtainable, property "must therefore be *transferable*." *Id*.

This Court noted that the theory of conviction was both inconsistent with *Scheidler* and fairly "absurd"—an "employee's yet-to-be-issued recommendation" on an investment cannot "be called obtainable property." *Id*. at 737-38. "No fluent speaker of English would say that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation,' any more than he would say that a person '*obtained and exercised* another's right to free speech.'" *Id*. at 738.

When one merely deprives another of information relevant to the use or disposition of property, no fluent English speaker would say that he *obtained and exercised* the right to control that property.

c. More recently, in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), this Court extended the logic of *Scheidler* and *Sekhar* to the federal forfeiture statute. That statute allows the government to forfeit "property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" the crime. 21 U.S.C. § 853(a)(1). Lower courts had held that the statute allows joint and several liability in criminal cases—that is, it allows the government to forfeit from a defendant any proceeds of a criminal conspiracy, even if the defendant himself never came into possession of the proceeds.

Once again, this Court's rationale focused on the meaning of the transitive verb *obtain*. The plain meaning of "obtain" is "to come into possession of" or to "get or acquire." 137 S. Ct. at 1632 (quoting Random House Dictionary of the English Language 995 (1966)). That was the ordinary English meaning of the verb when the forfeiture statute was enacted, and it remains the ordinary English meaning of the verb today. *See id*. (citing Black's Law Dictionary, defining "obtain" as "[t]o bring into one's own possession; to procure, esp. through effort"). And this Court quoted *Sekhar*, which in turn quoted *Scheidler*, reaffirming that *obtaining property* requires "the acquisition of property." *Id*. (quoting *Sekhar*, 537 U.S. at 734).

In short, the statutory phrase *obtaining money or property* has a concrete meaning, grounded in the common law and settled by this Court's case law. The right-to-control doctrine is inconsistent with that settled meaning.

3. This Court should apply the logic of *Scheidler*, *Sekhar*, and *Honeycutt* to the mail and wire fraud statutes. Indeed, to reach the same conclusion, this Court need do no more than apply the ordinary rules of statutory interpretation.

This Court "interpret[s] criminal statutes, like other statutes, in a manner consistent with ordinary English usage." *Nichols v. United States*, 578 U.S. 104, 111 (2016) (quoting *Abramski v. United States*, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting)). And this Court has already held that the ordinary English meaning of the verb "obtain" is to *get or acquire* something, to *come into possession* of it. *Honeycutt*, 137 S. Ct. at 1632 (quoting several dictionaries). That is and has always been the ordinary English meaning of the word. "Obtain" means "[t]o come into the possession or enjoyment of (something) … to acquire [or] get." 10 Oxford English Dictionary 669-70 (2d ed. 1989).

A defendant does not obtain property every time he interferes with the owner's use or enjoyment of that property. A landowner has, for example, a right to exclude others from her land so that she can use the property as she sees fit. If a trespasser enters her land, while he may *interfere* with her right to exclude, he does not *obtain* her property. Nor does he "obtain" her right to exclude—indeed, the very notion is grammatically senseless. Similarly, if a meddling neighbor engages in annoying and abusive conduct to prevent a sale of the owner's land, the neighbor may interfere with the owner's right to alienate, but the neighbor obtains neither property nor the right to alienate it. That is the fundamental point this Court recognized in *Sekhar*: "No fluent speaker of English would say

that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation,' any more than he would say that a person '*obtained and exercised*'" another person's right to sell her land, or spend her money as she sees fit. 570 U.S. at 738.

Moreover, this Court has already held that the phrase "obtaining of property" had a well-known meaning at common law—"this 'obtaining of property' requirement included both a deprivation and acquisition of property." *Scheidler*, 537 U.S. at 403. It is a cardinal rule of statutory interpretation that when Congress borrows common-law terms, this Court assumes that Congress meant to incorporate the common-law meanings. *See Evans v. United States*, 504 U.S. 255, 259-60 (1992). Thus, when Congress used the phrase "obtaining money or property" in the fraud statutes, it is reasonable to assume that Congress meant to incorporate the common-law meaning—the same meaning that this Court already elucidated in other statutes using the same phrase.

Statutory interpretation can be complicated when the ordinary English meaning of a term diverges from its common-law meaning. In this instance, however, there is no such complication—the meanings are congruent. The plain text of the statute states that, to commit fraud, a defendant must seek to *obtain money or property* from the victim by deception. That means that the defendant must seek to obtain some transferable property that the victim gives up. That requirement is not satisfied when a defendant merely interferes with another's "right to control" a piece of property. It is not satisfied by mere deception or withholding of information.

C. Lower Courts Adopting The Right-To-Control Doctrine Have Obliterated The *Obtaining Property* Requirement

1. Despite the plain text of the statutes, and despite this Court's holdings, some lower courts have ignored the requirement that a defendant must seek to obtain money or property. The Second Circuit continues to insist, for example, that "the mail and wire fraud statutes do not require that the property involved in the fraud be 'obtainable.'" *United States v. Finazzo*, 850 F.3d 94, 105 (2d Cir. 2017); *see also id.* at 107 ("the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property"). That conclusion cannot be squared with the plain meaning of the statute, which says that a scheme to defraud is a scheme for "obtaining money or property."

Lower courts have also brushed aside this Court's Hobbs Act decisions regarding the meaning of "obtaining property." What little reasoning they have offered collapses upon analysis. In the wake of *Scheidler*, criminal defendants correctly noted that the right-to-control doctrine in the fraud context was dubious, at best. Lower courts responded with something akin to an *ipse dixit*: *Scheidler* interpreted a different statute, therefore its rationale doesn't apply, period. As the Second Circuit said: "The fact that the Hobbs Act and the mail and wire fraud statutes contain the word 'obtain' does not necessitate imposing *Scheidler's* construction of a wholly separate statute onto this Court's pre-existing construction of the mail fraud statute." *Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005).

The court offered no further explanation for why the common-law term "obtaining property" would mean one thing in one federal criminal statute but something else in another federal criminal statute. And even after *Sekhar*, the Second Circuit reaffirmed *Porcelli* and refused "to extend *Sekhar*'s obtainability requirement to the mail and wire fraud statutes." *Finazzo*, 850 F.3d at 107. It did so even though in *Sekhar*, this Court relied in part on *Cleveland* and the mail fraud statute's similar textual requirement, "obtaining money or property." *See Sekhar*, 570 U.S. at 737.

To the extent that any justification for distinguishing the "obtaining property" language in the statutes has ever been offered, it came in passing in a footnote in the Third Circuit's decision in *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004). The court seized on a minor textual difference between the Hobbs Act and the fraud statutes—namely, the words *from another*. "Unlike the mail fraud statute, the Hobbs Act expressly requires the Government to prove that the defendant 'obtain[ed] property from another.'" *Id.* at 602 n.21. The government made a similar argument in opposing certiorari here. *See* BIO at 25.

That distinction makes no sense for several reasons. First, nothing in this Court's *Scheidler* opinion was based on the phrase "from another." The rationale of *Scheidler* was based entirely on the phrase "obtaining property." Second, this Court later applied the rationale of *Scheidler* and *Sekhar* to the forfeiture statute, even though that statute also lacks the words "from another." Third, one cannot obtain property

from oneself; anytime one obtains property, one obtains it from another. Those words are legally and grammatically implicit in the very concept of *obtaining property*.

In sum, the lower courts that maintain the right-to-control doctrine have ignored the plain implication of this Court's case law, and they have eviscerated the requirement that property be obtainable and transferable.

2. The right-to-control doctrine also has the practical effect of eliminating the "obtaining property" element altogether. In justifying the right-to-control doctrine, lower courts have reasoned that the core deprivation is the deprivation of the so-called "right to accurate information." As the Second Circuit said in its seminal right-to-control decision, "the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest." *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991); *see also United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989) (stating that "concealing economic information constitutes a property loss"). According to *Wallach* and its progeny—including the decision in this case—withholding information is *itself* a violation of the right to control and is therefore *a deprivation of property*.

But the theory ignores the symmetry inherent in the term "obtaining"—that there must be "both a deprivation and acquisition of property." *Scheidler*, 537 U.S. at 403. In a right-to-control case, there is no such symmetry. Even if the purported victim is deprived of information that he might find useful in deciding how to spend his money, the defendant does not "acquire"

or "obtain" the alleged victim's right to control the use of his money. Nor does he acquire or obtain the information that he has deprived the victim of learning, because the defendant already had the information.

Moreover, the theory that withholding information automatically deprives one of property effectively collapses the property element into the deception element. Fraud is supposed to require both deception and obtaining property. If "obtaining property" simply means concealing information, then all deception violates property rights—and when a prosecutor proves deception in a business transaction, she also automatically proves a deprivation of property.

In that manner, the right-to-control doctrine renders the "obtaining property" element meaningless. It violates this Court's repeated holding that proving deception is insufficient to prove mail or wire fraud—rather, "the deceit must also have had the 'object' of obtaining the [victim's] money or property." *Kelly*, 140 S. Ct. at 1572. And it violates the canon against surplusage: Statutes should not be read in a manner that renders any portion redundant. *See Kungys v. United States*, 485 U.S. 759, 778 (1988).

In sum, lower courts adopting the right-to-control doctrine have ignored the statutes' plain statement that fraud requires a scheme for *obtaining* money or property. Petitioner Ciminelli has demonstrated that the right-to-control doctrine is inconsistent with the common-law meaning of *property*. It is also inconsistent with the ordinary English and common-law meaning of *obtaining property*. To obtain property means to acquire something that someone else gives

up. Merely withholding information, including potentially valuable economic information, does not satisfy this essential element.

D. The Right-To-Control Theory Ignores The Conceptual Distinction Between Property Itself And Property Rights

There is also another related sense in which the right-to-control doctrine is at odds with traditional conceptions of property: It elides the distinction between property itself and the rights attendant to property. "As a matter of common sense, 'right to control' is an *incident* of ownership of property, not the property itself." Park, *supra*, at 174 (emphasis altered); *see id.* at 174-75 (discussing the different legal meanings of ownership, possession, and property). And Congress itself has made that distinction by expressly protecting not just property, but also property rights, in other statutes—but not in the mail and wire fraud statutes.

1. As Petitioner Ciminelli explains in detail (at Point I.B.1), the classic common-law formulation of property rights comes from Blackstone. He described the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world." 2 William Blackstone, Commentaries on the Laws of England 2 (1766); *see Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting Blackstone). In Blackstone's formulation, the property itself consisted of the "external things" of the world. Commentaries 1-3. These were divided into two simple categories: "lands and moveables." *Id.* at 9. Laws of property developed to address the scarcity problem that arose as the human race

grew—the scarcity of these "external things," the lands and chattels of the planet.

The Blackstonian conception drew a distinction between the *property itself*—that is, the external object—and an owner's *rights* attached to the property. (This was no different from saying a man's *life* was different from his legal *right to life*.)

This conception of property was the dominant conception in Anglo-American law well into the nineteenth century. The first edition of Black's Law Dictionary, published in 1891, defined "property" as "any external object over which the right of property is exercised." *Wilson v. Ward Lumber*, 67 F. 674, 677 (C.C.E.D. Mo. 1895) (quoting Black's). A piece of property is not the same thing as the incidents of ownership that legally attach to that property.

The right-to-control doctrine elides that fundamental distinction. The doctrine rests on a confused application of the twentieth century "bundle of rights" theory—the notion that property consists not of things but of varying relationships between people. That theory was popularized by legal realists who believed that the traditional conception of property was an obstacle to progressive reform. *See*, *e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 21-24 (1913); *see also* Gregory A. Alexander, Commodity & Propriety 319-20 (1997) (discussing early-twentieth-century development of "bundle of rights" metaphor). Whatever the abstract merits of the deconstructed modern conception of property, it was most assuredly *not* the common-law conception.

As Petitioner explains, the Blackstonian conception of property rights had a more concrete meaning—the treble rights of use, exclusion, and alienation. The Blackstonian conception did not include some additional general notion of a "right to control." Additionally, an even more fundamental point is that the Blackstonian conception drew an analytical distinction between the piece of property itself and the rights attendant to property. The idea that the "right to control" is *itself* property finds no basis in the common law.

2. Nor does the statutory text provide any indication that Congress intended to depart from that traditional understanding. The plain meaning of the statutory term "property" is most naturally read in its customary, concrete sense, which is fully consistent with its common-law meaning. That is, the fraud statutes refer only to "money or property" rather than "property rights." This suggests, based on ordinary English usage—at least in cases like this one, where the "right" at issue is merely the right to spend one's money—that the statutes' scope is limited to the property itself, not the rights attendant to the ownership of money or property.

By contrast, when Congress intends to reach beyond "property" to protect the broader interest in conducting a business or exercising autonomy over money or property, it does so expressly. *See*, *e.g.*, 18 U.S.C. § 1964(c) (requiring injury to "business or property"); *id.* § 2333(a) (requiring injury to "person, property, or business"); 20 U.S.C. § 4302(a) (vesting university with "property and the rights of property"). Here, however, it elected not to do so. Instead, it

clearly stated that fraud requires a scheme to obtain property. Under the meaningful-variation canon, when Congress uses one term in one statute but a different term in a different statute, there is a "presumption" that "the different term denotes a different idea." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (quoting A. Scalia & B. Garner, Reading Law 170 (2012)).

* * *

Money and property are things that are obtainable and transferable. Even if the rights attendant to property are considered part of the property itself—which is a dubious proposition for a statute enacted against a Blackstonian background—one does not "obtain property" when one merely interferes with property rights. And that is indeed precisely what this Court held in *Scheidler*. While the defendants in that case "interfered with, disrupted, and in some instances completely deprived [the plaintiffs] of their ability to exercise their property rights," they did not obtain property. 537 U.S. at 404.

Perhaps it is conceivable that Congress could enact a law criminalizing interference with the right to control property. But the fraud statutes only cover a narrower class of conduct: schemes to obtain money or property. "If Congress desires to go further, it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

II. THE RIGHT-TO-CONTROL DOCTRINE CRIMINALIZES COMMON BUSINESS PRACTICES

The right-to-control doctrine vastly expands the scope of the property fraud statutes. Because of the ubiquity of electronic communications in the twenty-first century, it enables prosecutors to charge virtually any deceit as a federal felony. Such a sweeping expansion would stretch the statute far beyond the bounds set by its text, this Court's decisions, the Due Process Clause, and federalism and separation of powers principles. *See generally* Petitioner's Brief, Point III (discussing constitutional concerns with right-to-control theory).

As the Second Circuit explained in the decision below, its "'right-to-control theory' of wire fraud … allows for conviction on 'a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information.'" Pet.App.16a (quoting *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019)). According to the Second Circuit, "[a] 'cognizable harm occurs'" where the defendant deprives the victim of "'information necessary to make discretionary economic decisions.'" Pet.App.17a (quoting *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)). In other words, the mere deprivation of the information supposedly constitutes the requisite harm to property.

1. One problem with this is that virtually any information could qualify as "potentially valuable economic information." For instance, the existence of competitors who might offer potentially different

terms is information that a project sponsor might want to know. For that reason, the fact that an RFP was "tailored" to a particular bidder could also be deemed "potentially valuable economic information," such that failing to disclose it is always property fraud, even absent concrete proof that the "tailoring" could cause financial loss or reasonably affect an economic decision.

To be sure, the mail and wire fraud statutes contain inchoate liability—a defendant is guilty even if his scheme fails. But the object of the scheme must nonetheless be to obtain property. The absence of any proof of harm (in a case like this, where the alleged scheme was, according to the government, *completed* and *successful*) reveals the broad and abstract nature of an information-deprivation-based theory of property. In this case, there was no *evidence* that the "tailoring" caused any economic harm: It is undisputed that the government introduced no proof that any other developer could have built the Syracuse projects for less money or could have done better work for the same money. Nor did the government present evidence that any other developer would have responded to the Syracuse RFP if there had been no "tailoring." In other words, apparently no one was deterred from competing for "preferred developer" status in Syracuse by the purported "tailoring." Thus, there was no actual or potential economic harm to Fort Schuyler; and, for similar reasons, the failure to disclose the "tailoring" was immaterial. Even if Fort Schuyler's board had known of the "tailoring," its decision to bargain with COR would have been unaffected, since no potential competitors were interested.

Yet despite the complete lack of evidence of any economic harm or even a potential competitor's bid, the Second Circuit affirmed the convictions because it *assumed* that "potentially valuable economic information … would have resulted from a legitimate and competitive RFP process." Pet.App.21a. In other words, it substituted speculation for actual evidence. The ease with which the court dispensed with the need for evidence of harm highlights how dangerously malleable and manipulable the right-to-control theory is.

2. The doctrine also enables the government to criminalize behavior that is routine in commercial negotiations where one party has an informational advantage, even if the party had no legal duty to disclose the withheld information. In many commercial transactions, one or both sides have information the other side doesn't have. Sometimes, of course, there is a duty to disclose such information—a specific statutory duty applicable to the type of transaction, like a "lemon law" for used car sales, or a common-law fiduciary duty requiring, for example, a financial adviser to disclose a financial interest in a transaction he proposes to his client. The Second Circuit's precedents, however, do not limit right-to-control fraud to such circumstances; they hold that "[a] 'cognizable harm occurs'" whenever the defendant deprives the victim of "'information necessary to make discretionary economic decisions.'" Pet.App.17a. But many commercial transactions involve sophisticated arm's-length counterparties who are permitted by law to use proprietary information to their advantage in negotiations, or even to engage in other, more affirmatively deceitful tactics like bluffing. Accordingly, if this

Court approves the right-to-control theory, much common and currently legal commercial behavior would be criminalized.

For instance, suppose two parties to litigation are engaged in settlement negotiations. The defendant estimates that the value of the plaintiff's claim is $5 million but says he will only pay $3 million. The defendant's $5 million calculation is surely "potentially valuable economic information" that the plaintiff would find useful in making a "discretionary economic decision" about how much to accept to settle the suit. But there is no duty to disclose this information. Indeed, even if the defendant affirmatively makes a misleading statement in the negotiations, that should not constitute criminal property fraud. Suppose that, instead of saying nothing about the $5 million estimate, the defendant falsely states that he thinks the claim is only worth $3 million. Imposing a duty to disclose the true information would cause a sea change in the U.S. legal system (and surely make civil litigation more difficult to settle). Yet under the right-to-control doctrine, a litigant in settlement negotiations who sends an email that omits confidential information undermining its own negotiating position or makes a statement about its thinking that is potentially misleading could be committing federal property fraud.

Or suppose the CEO of a struggling company arranges a deal to sell the company's commercial real estate. The CEO persuades a potential buyer to take him on as a partner as part of its offer to purchase the property by claiming the company will not otherwise sell. At the same time, he also falsely asserts to his company's board that the buyer will not complete the

sale without his involvement. The company agrees to the deal and sells the property for 33% more than its target price. This conduct is surely a breach of the CEO's duty to his employer and may provide the employer with a basis to fire the CEO. But it is not honest-services fraud, because there is no undisclosed bribe or kickback, as required by *Skilling*. And it should not be property fraud, because the selling company's money or property has not been harmed, as the Seventh Circuit held in reversing a conviction based on these facts. *See United States v. Weimert*, 819 F.3d 351, 353-54 (7th Cir. 2016). The court explained that "the only ways in which [the defendant] misled anyone concerned … negotiating positions. He led the successful buyer to believe the seller wanted him to have a piece of the deal. He led the seller to believe the buyer insisted he have a piece of the deal. All the actual terms of the deal, however, were fully disclosed and subject to negotiation." *Id.* at 354. The prosecution theory was untenable, because it would permit the fraud statutes "to criminalize deception about a party's negotiating positions." *Id.* at 357.

Yet under the right-to-control doctrine, the government could prosecute the CEO for property fraud, even though there was no contemplated or actual harm to the selling company's property interests. The government could do so because the company has been deprived of potentially valuable economic information—the fact that the deal could have been effectuated without the CEO's participation—which is enough under the doctrine to establish property fraud.

3. And for that matter, the right-to-control doctrine, if endorsed, could criminalize a wide variety of

sales practices. In *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), for example, the defendants used saleswomen posing as tourists to trick businessmen into coming into the defendants' nightclubs. The defendants admittedly failed to disclose the relationship between the saleswomen and the clubs—thereby depriving customers of information. The prosecution argued that such deception was itself sufficient for conviction: "In the government's view, the jury could convict the defendants of wire fraud based on those lies alone." *Id*. at 1311.

The Eleventh Circuit wisely rejected that theory of guilt, reversed the conviction, and remanded for a new trial. *Id*. at 1314-16; *see also United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.) (holding that the fraud statutes do not "stretch ... to cover the right to accurate information before making an otherwise fair exchange.").

But if the right-to-control doctrine were valid, then the defendants in such cases would be guilty based merely on the fact that they had withheld information from the other party in the transaction—and had therefore deprived the counterparty of the right to make "an informed economic decision about what to do with its money or property." *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021). For that matter, a business would similarly be guilty of fraud for advertising a certain price as a "great deal" while failing to disclose that it planned to lower the price even further the next week. The right-to-control doctrine converts puffery into fraud.

* * *

These concerns are not merely hypothetical. As the above cases demonstrate, and Amicus Curiae New York Council of Defense Lawyers further details, the federal government has repeatedly used the "right to control" / "right to accurate information" theory to prosecute an enormously wide variety of conduct. Much of that conduct does not involve a scheme to obtain money or property. Simply put, much of that conduct is not actually fraud.

These prosecutions typify how the right-to-control theory's overbroad definition of "property" creates a trap for the unwary and places too much "power in the hands of the prosecutor." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). This Court's decisions in *McNally*, *Cleveland*, and *Kelly* have set clear limits on the scope of the federal property fraud statutes. They are limited to schemes to obtain money or property; they are not all-purpose weapons to enforce "grandiloquen[t]" notions about "'standards of moral uprightness, fundamental honesty, fair play and right dealing.'" *Skilling*, 561 U.S. at 418 (Scalia, J., concurring in judgment). This Court should reinforce the limits it set in *McNally*, *Cleveland*, and *Kelly*, because otherwise virtually any deceit could be deemed a federal fraud.

III. THE CONVICTIONS MUST BE REVERSED

If this Court disavows the right-to-control doctrine, then the convictions must be reversed, because the government failed to prove a scheme to obtain property, and the defendants are entitled to a judgment of acquittal. The sole theory of property alleged in the indictment or at trial was that the defendants' scheme "defraud[ed] [Fort Schuyler] of its right to control its

assets" by "secretly tailor[ing]" the RFP so COR "would be favored to win in the selection process." JA31-33.

The defendants repeatedly objected that the government's theory of the case was invalid. The district court rejected those arguments, explicitly relying on the right-to-control doctrine. It relied on Second Circuit law: "In a right-to-control case the property interest at issue is the information that was misrepresented or withheld." C.A.App.996 (citing *Wallach*, 935 F.2d at 463, and *Finazzo*, 850 F.3d at 110). It consequently excluded defense evidence that there was a fair bargain and no property deprivation.

Accordingly, because of the government's charging decision and the district court's rulings, the only theory of fraud presented to the jury was the right-to-control theory. The district court instructed the jury that "property" includes "intangible interests such as the right to control the use of one's assets," which "is injured" when the purported victim "is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." JA41. And the district court rejected a proposed defense instruction that there is no fraud where the putative victim receives the full benefit of the bargain. The Second Circuit likewise affirmed the conviction based entirely on the right-to-control doctrine. Pet.App.3a-5a, 16a, 26a.

In short, the right-to-control doctrine was the sole basis upon which the defendants were charged, tried, and convicted. If this Court rejects the misguided right-to-control theory, then the convictions must be

reversed, and the defendants are entitled to a judgment of acquittal.

CONCLUSION

This Court should reverse the decision below and remand the case with instructions to enter a judgment of acquittal.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondents Steven Aiello and Joseph Gerardi

August 29, 2022

No. 21-1170

In The Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

CHRISTINE H. CHUNG
CHRISTINE H. CHUNG PLLC
14 Murray Street, No. 236
New York, New York 10007
(917) 685-0423

GARY STEIN
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000

HARRY SANDICK
Counsel of Record
JACOB I. CHEFITZ
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
hsandick@pbwt.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF *AMICUS* CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Right-To-Control Doctrine Is Deployed In The Second Circuit To Procure Convictions Without Proof Of Property Fraud. 5

A. Prosecutors Rely On The Elastic Right-To-Control Doctrine When There Is Deceit But They Cannot Prove Contemplated Economic Harm. 7

B. Even When There Is Proof Of Contemplated Economic Harm, The Right-To-Control Doctrine Serves As An Improper Shortcut For Prosecutors To Procure Convictions And Obtain Other Advantages. 19

II. Jury Instructions On The Right To Control Demonstrate The Doctrine's Elasticity And Incoherence. 22

CONCLUSION 28

APPENDIX A 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Bollenbach v. United States,
326 U.S. 607 (1946) 22

Bond v. United States,
572 U.S. 844 (2014) 13

Cleveland v. United States,
531 U.S. 12 (2000) 5, 6

Kelly v. United States,
140 S. Ct. 1565 (2020) ....*passim*

Marinello v. United States,
138 S. Ct. 1101 (2018) 7

McDonnell v. United States,
579 U.S. 550 (2016) 7, 28

McNally v. United States,
483 U.S. 350 (1987) 5, 18

Skilling v. United States,
561 U.S. 358 (2010) 8, 9, 10, 28

United States v. Binday,
804 F.3d 558 (2d Cir. 2015)..................... 20, 21, 23

United States v. Carlo,
507 F.3d 799 (2d Cir. 2007)................................. 23

United States v. Dinome,
86 F.3d 277 (2d Cir. 1996)........................ 19, 20, 23

United States v. Finazzo,
850 F.3d 94 (2d Cir. 2017)...................... 2, 9, 10, 23

United States v. Gatto,
295 F. Supp. 3d 336 (S.D.N.Y. 2018) 16

United States v. Gatto,
986 F.3d 104 (2d Cir.), *cert. denied*,
142 S. Ct. 710 (2021) 10, 11

United States v. Henry,
29 F.3d 112 (3d Cir. 1994).................................... 13

United States v. Johnson,
945 F.3d 606 (2d Cir. 2019), *cert. denied*, 144 S. Ct. 687 (2020) 12

United States v. Lebedev,
932 F.3d 40 (2d Cir. 2019).............................. 15, 16

United States v. Muratov,
849 F. App'x 301 (2d Cir. 2021) 5

United States v. Percoco,
13 F.4th 158 (2d Cir. 2021) ....*passim*

United States v. Person,
373 F. Supp. 3d 452 (S.D.N.Y. 2019) 16

United States v. Post,
950 F. Supp. 2d 519 (S.D.N.Y. 2013) 9

United States v. Shellef,
507 F.3d 82 (2d Cir. 2007).................................... 27

United States v. Thompson,
484 F.3d 877 (7th Cir. 2007) 13

United States v. Viloski,
557 F. App'x 28 (2d Cir. 2014) ....*passim*

United States v. Wallach,
935 F.2d 445 (2d Cir. 1991)................................ 6, 9

Yates v. United States,
354 U.S. 298 (1957) 22

Statutes

15 U.S.C. § 78m 14

15 U.S.C. § 78ff(a).. 14

18 U.S.C. § 1005... 14

18 U.S.C. § 1960... 15

N.Y. Penal L. § 175.10 14

N.Y. Penal L. § 175.15 14

Other Authorities

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771 (1980) 6

INTEREST OF *AMICUS* CURIAE[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who defend some of the most complex and significant criminal cases in the federal courts and who routinely defend against mail and wire fraud charges.

NYCDL supports Petitioner Louis Ciminelli, and his co-defendants Steven Aiello, Joseph Gerardi, and Alain Kaloyeros,[2] in their challenge to the Second Circuit's adoption of and longstanding adherence to the "right to control" theory of property fraud. The Second Circuit's overbroad application of the federal fraud statutes through this theory implicates NYCDL's core concern of combatting the unwarranted extension of criminal statutes and promoting

[1] The parties have consented in writing to the participation of *amicus*. No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

[2] Messrs. Aiello, Gerardi, and Kaloyeros, whose petitions for certiorari remain pending, filed briefs as Respondents in support of Petitioner Ciminelli. For convenience, all four are collectively referred to herein as "Petitioners."

constitutionally definite standards for criminal liability. NYCDL members defend against the right-to-control theory regularly and have been doing so for decades. NYCDL is thus in a unique position to substantiate that the amorphousness of the right-to-control theory has enabled prosecutors to criminalize mere deceit—to use federal fraud statutes intended to protect property rights to prosecute conduct that may be undesirable or unethical but contemplated no harm to property.

SUMMARY OF ARGUMENT

As set forth in Petitioners' briefs, the right-to-control theory of property fraud is flatly inconsistent with statutory text and structure, the common law, and this Court's precedent. As the Second Circuit has repeatedly held, including in the decision below, the doctrine is predicated on a showing that the defendant "deprived some person or entity of potentially valuable economic information." *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021) (citation omitted); *see also United States v. Finazzo*, 850 F.3d 94, 112 (2d Cir. 2017) (citing cases). But the asserted right to make an informed economic decision that undergirds the theory is not a cognizable property right at all. Proof that an economic actor has been deprived of complete and accurate *information*—*i.e.*, has been deceived—cannot substitute for the property fraud statutes' core requirement of an intended deprivation of *property*.

NYCDL submits this *amicus* brief to highlight for the Court the practical effects of this erroneous theory on the prosecution and defense of criminal cases within the Second Circuit, where the theory

originated and has been deployed most frequently. We focus below on two central points.

First, the right-to-control theory has become enormously popular among white-collar prosecutors, who have invoked it in scores of cases, in a myriad of different factual settings, to avoid the need to prove intended harm to property. In many of these cases, as here, the right-to-control doctrine has enabled prosecutors to criminalize deceit without contemplated harm to property. Prosecutors have used the theory to target undisclosed self-dealing; corruption in local government; conduct that Congress has chosen not to regulate and that traditionally has been left to the states; the breaking of rules of private organizations; and business practices deemed unsavory or unethical. In short, the right-to-control doctrine has become a tool for criminalizing behavior that falls outside the ambit of the federal fraud statutes.

Even when deployed in cases involving conduct that *could* properly be prosecuted as conventional property fraud, the right-to-control doctrine works substantial injustice. By redefining property fraud as the deprivation of potentially valuable information, the doctrine hands prosecutors a shortcut to conviction, allowing them (and the jury) to gloss over an essential element of the crime. It also allows prosecutors to preclude what would otherwise be viable defense arguments and admissible defense evidence. If prosecutors have genuine proof that the defendant contemplated harm to money or property, they do not need to rely on an alternative right-to-

control theory that relieves the government of its normal burden of proof.

Second, the jury instructions in right-to-control cases show how, in practice, the doctrine so dilutes the property component of property fraud that misrepresentation or deceit itself—depriving an alleged victim of the ability to make an informed economic decision—becomes the offense. In this case, the jury was instructed to deem a "right to control the use of one's assets" to be "property" and to consider that "property" to be "injured" if the alleged victim was deprived of "potentially valuable economic information" that "affect[ed]" the victim's "assessment of the benefits or burdens of a transaction" or "relate[d]" to "the economic risks of the transaction." *Percoco*, 13 F.4th at 175 (quoting instruction).

The juror hearing this can too easily convict based on reasoning that all information has economic value and that anyone would assess the value of a transaction differently with knowledge that he or she had been lied to. Mere deceit is transformed into property fraud, contrary to this Court's longstanding precedent. It is illusory to believe that juries are reliably navigating the "fine line between schemes," *id.* at 171 (quotation omitted), that the Second Circuit itself has struggled to define for decades. This shapeless, malleable standard of criminal liability should not be the basis for conviction and imprisonment.

The time has come for this Court to overrule the Second Circuit's indefensibly broad and elastic definition of "property fraud."

ARGUMENT

I. The Right-To-Control Doctrine Is Deployed In The Second Circuit To Procure Convictions Without Proof Of Property Fraud.

This Court has long made clear that, to secure a conviction under the federal fraud statutes, the government must "prove *property* fraud." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (emphasis in original). That means that the government must "show not only that [defendants] engaged in deception, but that an 'object of their fraud was property.'" *Id.* (quoting *Cleveland v. United* States, 531 U.S. 12, 26 (2000)) (alterations removed); *see also McNally v. United States*, 483 U.S. 350, 358 (1987) (mail fraud statute limited to those schemes to defraud "aimed at causing deprivation of money or property").

The right-to-control theory, in the Second Circuit's own words, is an "alternative" theory of liability under the property fraud statutes. *United States v. Muratov*, 849 F. App'x 301, 306 (2d Cir. 2021). Under the "classic" theory of property fraud recognized by this Court, "the harm involved in the scheme is the deprivation of money or tangible property." *Id.* The "alternative" theory, however, "allows a cognizable actual harm to be demonstrated 'where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.'"

Id. (quoting *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)).

The use by prosecutors in the Second Circuit of this "alternative" theory of property fraud has taken root and proliferated in the decades since it was first recognized in *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). Attached as Appendix A is a chart compiling cases in the Second Circuit in which the government has invoked the right-to-control theory since just 2010. As the chart shows, scores of prosecutions in the Second Circuit alone, brought against over 125 defendants, have been founded in whole or in part on the right-to-control doctrine during this period. These cases encompass a wide variety of factual contexts limited only by the prosecutor's imagination. Far from being an obscure or disfavored alternative, the right-to-control doctrine has become the government's bread-and-butter in mail and wire fraud prosecutions in the Second Circuit, the favored composition on the prosecutor's "Stradivarius."[3]

This Court, in rejecting similar expansive interpretations of the federal fraud statutes and other criminal laws, has repeatedly warned of the dangers of prosecutorial overreach. *See Kelly*, 140 S. Ct. at 1574 (adopting limiting construction to avoid a "ballooning of federal power" that would allow federal prosecutors to enforce their own views of "integrity"); *Cleveland*, 531 U.S. at 24 ("We resist the Government's reading . . . because it invites us to approve a sweeping

[3] *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne L. Rev. 771, 771 (1980) (describing mail fraud statute as the 'Stradivarius," "Colt 45," "Louisville Slugger," "Cuisinart," and "true love" of "federal prosecutors of white-collar crime").

expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); *see also Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) ("[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language . . . risks allowing [prosecutors] to pursue their personal predilections[.]") (citation omitted); *McDonnell v. United States*, 579 U.S. 550, 576 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (quotation omitted).

Experience with the Second Circuit's right-to-control doctrine shows that the dangers of overreach arising from this "alternative," judge-made theory of property fraud are all too real. By vesting excessive latitude in the hands of prosecutors, the right-to-control doctrine emboldens prosecutorial creativity and results in overcriminalization, intrusion on Congress' prerogatives, encroachment on enforcement traditionally reserved to states, and circumvention of this Court's precedents.

A. Prosecutors Rely On The Elastic Right-To-Control Doctrine When There Is Deceit But They Cannot Prove Contemplated Economic Harm.

The right-to-control theory has effectively enabled prosecutors to use the fraud statutes to write their own criminal code. With ever-growing frequency, non-disclosure of information has been converted to mail and wire fraud without a showing of

contemplated economic harm. Novel right-to-control cases announced to great media fanfare have criminalized business conduct previously addressed, at most, through state or civil remedies and previously uncomplained of by the purported "victims" because they never believed they had been harmed.

Below are some examples of how the doctrine has been used in the Second Circuit to prosecute cases that are beyond the reach of the property fraud statutes:

1. Undisclosed Self-Dealing

In *Skilling v. United States*, 561 U.S. 358 (2010), this Court held that "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty"—falls outside the scope of the federal fraud statutes. *Id.* at 409-11. Yet such conduct has been found to fall *within* the Second Circuit's right-to-control doctrine.

United States v. Viloski, 557 F. App'x 28 (2d Cir. 2014), involved an employee who failed to disclose that he had a financial interest in transactions he authorized on behalf of his employer. After *Skilling*, the government dismissed its honest-services fraud charge, but contended that the defendant (an alleged co-conspirator of the employee) could be prosecuted for money-or-property fraud under a right-to-control theory. *Id.* at 31. Affirming the conviction, the Second Circuit agreed, *id.* at 32-34, despite the fact that the district court found that the employer suffered no loss

and was not entitled to any restitution, *see* Appendix at A-121, A-138-39, *United States v. Viloski*, No. 14-4176 (2d Cir. June 28, 2013), ECF No. 23 (sentencing transcript).

The Second Circuit held that, under its right-to-control precedents, information that merely "'*could* impact economic decisions' can constitute intangible property for mail fraud prosecutions." 557 F. App'x at 33 (quoting *Wallach*, 935 F.3d at 463) (emphasis in original). The undisclosed self-dealing at issue, the court found, satisfied this remarkably lax test because the employer, had it known the truth, "could have negotiated better deals for itself." *Id.* at 34. But it is difficult to conceive of a case of undisclosed self-dealing where the employer would *not* be able to improve its economic position had it known the truth.

In *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017), the Second Circuit turned the *Viloski* summary order into binding precedent. On substantially similar facts—an employee who did not disclose his interest in the profits generated by purchases of goods he authorized—the Circuit held again that an employee's deceit deprives his employer of "potentially valuable economic information," even if it was not intended to cause "'actual harm . . . of a pecuniary nature,'" so long as the employer "'could have negotiated a better deal for itself.'" *Id.* at 108-09 (citation omitted). Thus, despite *Skilling*, undisclosed self-dealing remains a federal crime in the Second Circuit. *See also United States v. Post*, 950 F. Supp. 2d 519, 539 (S.D.N.Y. 2013) (noting that a theory of property fraud based on city's "right to control its assets on the basis of fair and disinterested information" would be "virtually

identical" to the undisclosed self-dealing theory of honest services fraud invalidated in *Skilling*).

Notably, the jury in *Finazzo*, presented with a special verdict form, *acquitted* the defendant on charges of mail and wire fraud based on the classic theory that he "inten[ded] to deprive [his employer] of money," while convicting him of those same charges on the basis of his employer's "right to control use of its assets." 850 F.3d at 96-97. No better illustration is needed to show how the "alternative" right-to-control theory can spell the difference between conviction and acquittal, enabling the government to prevail where it otherwise is unable to prove an intent to harm or obtain property.

2. Unethical Business Practices

Prosecutors also have reached for the right-to-control doctrine in high-profile cases to prosecute practices that were common in the affected industry but struck prosecutors as unsavory or unethical. In these cases, too, prosecutors backstopped the classic property fraud theory with the "alternative" right-to-control theory because of the difficulty, or impossibility, of proving intended loss. Convictions were then affirmed in reliance on the alternative theory.

One prominent example was a series of prosecutions in the Southern District of New York arising from payments to families of student-athletes in violation of NCAA amateurism rules. *See, e.g., United States v. Gatto*, 986 F.3d 104 (2d Cir.), *cert. denied*, 142 S. Ct. 710 (2021). The *Gatto* defendants (two Adidas personnel and a sports agent) did not seek

to inflict economic harm on the universities that were the purported victims of the wire fraud charges; to the contrary, defendants' conduct was designed to *benefit* the universities by bringing them top athletic recruits who would help their sports teams generate greater revenues for the universities (and Adidas, which sponsored the teams). Convictions were nevertheless obtained and affirmed on appeal because "[d]efendants deprived the Universities of information that would have helped them decide whether to award the Recruits athletic based aid." *Id.* at 116.

Previously, the NCAA rules at issue were enforced through internal disciplinary measures like fines or suspensions or, in most cases, not enforced at all. *See id.* at 132 (concurring and dissenting opinion). But the right-to-control theory allowed prosecutors to make such NCAA rule violations a crime. In a post-trial press release, prosecutors lauded the verdict for upholding "an ideal"—amateurism—"which makes college sports a beloved tradition by so many fans all over the world."[4]

Prosecutors have likewise used the right-to-control theory to criminalize unregulated dealings in the financial industry among sophisticated counterparties. Prosecutors in the Eastern District of New York targeted the widespread practice of "front-running," charging a senior foreign exchange trader with wire fraud for having driven up the price of currency that was the subject of a foreign exchange

[4] Press Release, U.S. Attorney's Office, SDNY, "Adidas Executives And Two Others Convicted Of Defrauding Adidas-Sponsored Universities In Connection With Athletic Scholarships," Oct. 24, 2018.

contract.[5] The defendant did not intend for his misrepresentation (an oral promise that the bank would not aggressively "ramp the fix") to cause any loss to the bank's counterparty; he instructed his traders not to move the price above what the counterparty would have paid absent that promise. *See United States v. Johnson*, 945 F.3d 606, 610-11 (2d Cir. 2019), *cert. denied*, 144 S. Ct. 687 (2020). Thus, the defendant's actions increased his bank's profits from the transaction without causing any loss to the counterparty, which was awarded no restitution. *See id.* at 611, 614-15; Judgment, *United States v. Johnson,* 16 Cr. 457 (E.D.N.Y), ECF No. 239. Nevertheless, the Second Circuit, again conflating deceit with intent to fraud, upheld the conviction under the right-to-control doctrine. The court found that the defendant had "deceived" the counterparty "with respect to both how the FX Transaction would be conducted and the price of the FX Transaction" and, "[f]or this reason," concluded that he had "intended to defraud" the counterparty. *Id.* at 613-14.

3. Conduct Regulated By State Law

In still other cases, the right-to-control doctrine has allowed federal prosecutors to charge conduct that, at most, is a violation of state law and is more properly the province of state authorities—despite this Court's admonition that federal courts "'be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state

[5] Press Release, U.S. Attorney's Office, EDNY, "Former Global Head of HSBC's Foreign Exchange Cash-Trading Found Guilty Of Orchestrating Multi-Million Dollar Front-Running Scheme," Oct. 23, 2017.

power.'" *Bond v. United States*, 572 U.S. 844, 858 (2014) (citation omitted).

This case is a good example. The heart of this prosecution is the allegation that Petitioners "rigged" the RFP process for the New York State-funded Fort Schuyler project, *e.g.*, JA 30, in violation of polices "intended 'to promote open and free competition in procurement transactions,'" Complaint ¶ 76, *United States v. Percoco*, 16 Cr. 776 (S.D.N.Y. Nov. 22, 2016), ECF No. 1). Even assuming procurement rules were violated,[6] a "knowing deviation from state procurement rules is [not] a federal felony," *United States v. Thompson*, 484 F.3d 877, 880 (7th Cir. 2007), and the "interest in a fair bidding process" is not protected "property" under the mail and wire fraud statutes, *United States v. Henry*, 29 F.3d 112, 116 (3d Cir. 1994).

Under the alchemy of the Second Circuit's right-to-control doctrine, federal prosecutors nonetheless were able to bootstrap an allegedly unfair RFP process into a federal property fraud. The government never sought to prove that Petitioners, who provided the contracted-for services at the agreed-upon price, inflicted or intended to inflict any actual pecuniary harm. *See* C.A. App. at 996. Nor did the government prove that Fort Schuyler could have negotiated more advantageous terms with any other firm. *See id.* at 1157-58. No restitution was awarded to or sought by Fort Schuyler, the alleged victim of this completed

---

[6] In fact, Fort Schuyler, a non-profit entity affiliated with the State's university system, was not bound by the cumbersome procurement rules that apply to state construction projects. C.A. App. at 1079, 1086, 1232, 1353.

"property fraud." *See id.* at 143, 150-54, 2601. None of this mattered, according to the Second Circuit, for Petitioners had committed the "crime" of "depriv[ing] Fort Schuyler of its ability to award contracts that were the result of a fair and competitive bidding process." 13 F.4th at 173.

Another example is *United States v. Smothermon*, 19 Cr. 382 (S.D.N.Y. May 23, 2019), a pending case in which the government charges that the defendant deprived his employer of "its right to control its assets . . . by causing false entries to be made in [its] accounting system" and "thereby expos[ing] [the firm] to risk of economic harm." Indictment ¶ 1, *Smothermon*, ECF No. 25. Although New York criminal law contains a general proscription on "falsifying business records," *see* N.Y. Penal L. §§ 175.10, 175.15, Congress has not seen fit to create a similar federal crime. There is a federal offense for making false entries in the books and records of a bank, 18 U.S.C. § 1005, as well as for willfully falsifying the books and records of a public company, 15 U.S.C. §§ 78m, 78ff(a). But Smothermon's employer was neither a bank nor a public company; it was a privately-held commodities trading firm.. Amended Compl. ¶ 3, *Smothermon*, ECF No. 3. Nevertheless, through yet another creative application of the right-to-control doctrine, Smothermon now faces federal wire fraud charges for making "false entries."

Under the government's reasoning, many other corporate employees who falsify business records could find themselves in the same position. Invariably such an act could be claimed to have deprived the employer of "potentially valuable economic information" and,

thus, be prosecutable as wire fraud under the right-to-control doctrine.

4. Exposing An Employer Or Counterparty To The Risk Of Regulatory Penalties

In *Kelly v. United States*, this Court held that the property involved in a wire fraud scheme "must play more than a bit part in a scheme: It must be an 'object of the fraud.'" 140 S. Ct. at 1573 (citation omitted). The right-to-control doctrine as applied in the Second Circuit, however, protects property interests that are plainly *not* an object of the defendant's deception—as where it merely has the incidental effect of exposing the purported victim to the risk of regulatory penalties.

In *United States v. Lebedev*, 932 F.3d 40 (2d Cir. 2019), the defendant operated a digital currency business that was not properly registered or licensed under federal or state law. Instead of charging the defendant with operating an unlawful money transmitting business (which carries a five-year statutory maximum, *see* 18 U.S.C. § 1960), the government charged him with wire fraud for deceiving his firm's bank as to the nature of his business. The defendant did not intend to cause, and did not cause, a loss to the bank, which, to the contrary, profited from processing transactions on behalf of his firm.[7] But because the government had proceeded on a right-to-control theory, this was no defense. The defendant had created "regulatory risk" for the bank, including "potential fines for doing business that is illegal," and

[7] *Lebedev* is yet another case where no restitution was awarded to the bank that was the victim of the fraud. *See* 932 F.3d at 57.

this was deemed sufficient (despite the fact that the defendant obviously did not intend or wish for the bank to be fined, and would not have benefited in any way from a fine) because the defendant "deprived the financial institutions of the right to control their assets by misrepresenting potentially valuable economic information." *Id.* at 48-49.

The government's right-to-control theory in the NCAA prosecutions likewise posited that the defendants' actions threatened economic harm to the universities by "exposing" the universities to the risk of "NCAA fines and penalties." *United States v. Person*, 373 F. Supp. 3d 452, 465-66 (S.D.N.Y. 2019) (upholding government's right-to-control claim against university basketball coach who did not disclose to his employer payments to student-athletes in violation of NCAA amateurism rules); *see also United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018). But it was obviously not the "object" of the coach in *Person* to subject his university to penalties; still less did he "[seek] to obtain" such penalties for himself. *Kelly*, 140 S. Ct. at 1573-74.

Under this reasoning, any employee who in the course of his employment commits a criminal or regulatory offense and fails to disclose it—for instance, an employee who causes his company to make a business decision that violates state environmental regulations—faces not only disciplinary action, as well as liability for the violation, but also federal prosecution for wire fraud for depriving the employer of "potentially valuable economic information" and thereby exposing the employer to the risk of fines and

penalties. Such is the all-but-limitless logic of the right-to-control doctrine.

5. Deceit in the Job Hiring Process.

Two related cases, *United States v. Dunn*, 20 Cr. 181 (D. Conn. Oct. 5, 2020), and *United States v. Perez*, 20 Cr. 180 (D. Conn. Oct. 5, 2020), show how prosecutors can use of the right-to-control doctrine to prosecute the prosaic misconduct of cheating on a civil service examination.

In *Dunn* and *Perez*, two Bridgeport city officials were charged with conspiring to commit wire fraud for "rigging" the city's process for hiring a police chief (much like Petitioners here were alleged to have "rigged" the RFP process).[8] Among other things, Dunn, the city's personnel director, gave Perez, then the acting police chief, a preview of examination questions and tailored the examination scoring criteria to favor Perez. *See* Information at 1-5, *Dunn*, ECF No. 1; Information at 1-4, *Perez*, ECF No. 23. While the scheme helped steer the permanent position to Perez (the mayor's favored candidate), it did not target the city's property. The money budgeted for hiring and salary would have been spent regardless of the scheme and there was no allegation that Perez was unqualified. The government, apparently recognizing it would be difficult to prove that the defendants sought to wrongly obtain property from the city, reframed the allegations in right-to-control terms. They cast the offense as "depriving the City of

[8] Press Release, U.S. Attorney's Office, SDNY, "Bridgeport Police Chief And Personnel Director Plead Guilty To Rigging City's Police Chief Search," Oct. 5, 2020.

financially valuable information relevant to its decision on how to allocate the permanent police chief position and the resulting employment contract." Info. at 2, *Perez*, ECF No. 23. The prosecutors readily secured guilty pleas.

Taken to its logical conclusion, this prosecution demonstrates that the right-to-control doctrine can be used to convert any misrepresentation in an employment application, or any misuse of workplace information, in either the public or private sector, into a federal offense. It also shows how prosecutors' reliance on the intangible "right to control" can revive the intangible "right to honest services" invalidated as a theory of property fraud in *McNally*. The point of the prosecution, as the government itself put it, was not to protect the city's coffers, but to "ensur[e] that Bridgeport's citizens and police officers have leaders with integrity."[9] *Cf. Kelly*, 140 S. Ct. at 1574 ("Federal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for state and local officials'" or to "enforce ([their] view of) integrity in broad swaths of state and local policymaking") (quoting *McNally*, 484 U.S. at 360).

In sum, the use of the right-to-control doctrine in the Second Circuit has fulfilled this Court's prescient warning that if federal prosecutors "could prosecute as property fraud every lie . . . the result would be . . . a sweeping expansion of federal criminal

[9] Press Release, *supra* note 8.

jurisdiction." *Kelly*, 140 S. Ct. at 1574 (citation omitted).

B. Even When There Is Proof Of Contemplated Economic Harm, The Right-To-Control Doctrine Serves As An Improper Shortcut For Prosecutors To Procure Convictions and Obtain Other Advantages.

Prosecutors also commonly rely on the "alternative" right-to-control theory where conviction would be appropriate on a "classic" theory of property fraud. Far from justifying the doctrine, however, these cases demonstrate both that it is an unnecessary addition and that the government uses the doctrine to gain an unfair leg-up in the courtroom and leverage in plea negotiations.

United States v. Dinome, 86 F.3d 277 (2d Cir. 1996), illustrates this point. In that case, the defendant was prosecuted for mail and wire fraud for submitting an application for a residential mortgage loan that overstated his income by nearly three times, in order to satisfy the bank's requirement that the borrower's monthly payments not exceed a certain percentage of monthly income. *Id.* at 278-79. This was a case that clearly could have been prosecuted on the "classic" theory that the defendant's lies harmed the bank's property. As the Second Circuit noted, the defendant's deception "significantly diminished 'the ultimate value of the [mortgage] transaction' to the bank as defined by its standard lending practices," as a loan that "is more exposed to default because of an inadequate income stream to fund the required

periodic payments is reduced in value as an asset." *Id.* at 284 & n.7. Nonetheless, the government sought and obtained a right-to-control jury instruction. *Id.* at 284.

Doing so provided the government with a clear strategic advantage. As a concurring opinion noted, the facts cast doubt on whether the bank was truly a victim; it knew that the defendant's initially reported income was too small yet accepted his claim of additional income without further investigation, suggesting that, "despite [defendant's] lack of provable income, [the bank] felt the loan was a good risk." *Id.* at 285 (Oakes, J., concurring). The defenses of immateriality and absence of intended harm would have had substantially more appeal had the jury been instructed, consistent with the classic theory, that it must conclude that the defendant had intended to cause the bank economic harm. But instead the jury was instructed to convict if it merely found that the defendant deprived the bank of valuable *information* bearing on its "right to control the use of [its] assets." *Id.* at 284.

There are numerous other instances in which the government takes a garden-variety property fraud case, chargeable under the "classic" theory, and prosecutes it by relying on a right-to-control theory. *See* Appendix A (listing a number of such examples). The government does so because it dilutes its burden of proof in ways that change outcomes. Instead of having to prove that the defendant intended harm to the victim's property, the government need only prove that the defendant "intended to withhold information relevant to the [victim's] economic decision-making." *Binday*, 804 F.3d at 579-80. In a case where the

government proves that the defendant did withhold material information, this makes a finding of fraudulent intent a foregone conclusion.

The government gains other advantages from invoking the right-to-control doctrine aside from the jury instruction that relieves their ultimate burden—advantages that in practice can be equally outcome-determinative. For example, the government regularly uses the right-to-control doctrine to block defendants from introducing evidence of an absence of intent to inflict economic injury, arguing that such evidence is irrelevant to whether the defendant intended to deprive the victim of information. *See, e.g., id.* at 583 (government successfully moved *in limine* to preclude defendants from offering evidence relating to how the insurers "actually fared, economically, in the wake of defendants' false representations"); *see also* Appendix A, Nos. 4, 19, 22, 35, 37.

In Petitioners' case, the government, with the trial court's approval, precluded Petitioners from introducing any evidence or arguing that Fort Schuyler had received the full benefit of its bargain. *See* JA 44-46. Thus, in a case where the government almost certainly could *not* have procured a conviction on a classic theory of property fraud (and did not even try to do so), the government used the right-to-control both as a sword (to advance an alternative theory of liability) and as a shield (to ensure the jury never learned important evidence tending to show that defendants contemplated no economic harm). Petitioners were thereby effectively prevented from

disputing the central element in any property fraud case—the defendants' fraudulent intent.

Prosecutors also reap undeniable gains simply from having the power to charge and pursue the less-demanding right-to-control theory. As the Chief Justice has observed, when criminal statutes are afforded their broadest conceivable interpretation, federal prosecutors have "extraordinary leverage" to charge aggressively and to extract guilty pleas. Tr. of Oral Argument at 31, *Yates v. United States*, 574 U.S. 528 (2015) (No. 13-7451). This, too, has been a consequence of the additional measure of bargaining power that the right-to-control doctrine affords prosecutors in the Second Circuit. *See* Appendix A (listing numerous examples of guilty pleas following the filing of right-to-control charges).

II. Jury Instructions On The Right-To-Control Demonstrate The Doctrine's Elasticity And Incoherence.

Underscoring the invalidity of the right-to-control theory, jury instructions in such cases are so unintelligible that no jury could reasonably be expected to reliably apply them, even taking into account the usual presumption that jurors follow instructions. *See Yates v. United States*, 354 U.S. 298, 327 (1957) (requiring "precise and understandable instructions" on issues going "to the very heart of the charges"); *Bollenbach v. United States*, 326 U.S. 607, 613 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue"). The right-to-control theory invites jurors to criminalize deceit without contemplation of harm.

The instructions were originally brief and merely asked the jury to decide if the defendant deprived the alleged victim of "valuable" or "economically material" or "potentially valuable economic information," without explaining what was meant by this ethereal concept.[10] But as the Second Circuit reformulated and elaborated on the contours of its judge-made doctrine in cases such as *Finazzo*, 850 F.3d at 107-13 & n.20, and *Binday*, 804 F.3d at 570-71, district judges began crafting increasingly longer and more convoluted instructions.

Consider the jury charge in this case. The right-to-control instruction in which the Second Circuit found no infirmity below stated, in relevant part:

> [I]n order to prove a scheme to defraud, the government must prove that the alleged scheme contemplated depriving Fort Schuyler of money or property. Property includes intangible interests such as the right to control the use of one's assets. The victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets. In this context, "potentially valuable economic

[10] *See Finazzo*, 850 F.3d at 108 ("potentially valuable economic information"); *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) ("information necessary to make discretionary economic decisions"); *Dinome*, 86 F.3d at 284 ("information [the alleged victim] would consider valuable"); *Viloski*, 557 F. App'x at 34 ("economically material information").

> information" is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction. If all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of proof. In this regard, economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received.

JA 41-42; *see also Percoco*, 13 F.4th at 175 (noting that "this charge closely tracked the language set forth in our prior opinions").

This 218-word exposition, which aggregates and condenses decades of at times internally inconsistent Second Circuit law, is complex, dense, and confusing, whether heard or read. Nor does parsing the instruction improve one's ability to apply it reliably. The instruction requires the jury to find that the

defendants' scheme "contemplated depriving Fort Schuyler of money or property" while defining "property" to include "the right to control the use of one's assets." It adds that this "property" can be deemed "injured" when the victim "is deprived of potentially valuable economic information," thus equating a deprivation of "property" with a deprivation of such "information"—*i.e.*, deceit. The instruction then attempts to define the serial adjectives of "potentially valuable economic" that precede "information," but does so by relying on terms that are equally vague—anything that "affects" the victim's "assessment" of "the benefits or burdens" of a transaction, or that "relates" to "the quality of goods or services received or the economic risks of the transaction."

These instructions permit a juror to convict based on reasoning that in a transaction, all information has potential economic value, thus making intent to deceive—the deprivation of information—the only issue the juror has to resolve. The juror could think that anyone would assess the "benefits or burdens of a transaction" or the "economic risks of the transaction" differently with knowledge that he or she had been lied to. By such reasoning, the deceit itself becomes the basis for finding proven the additional and different element—of contemplated economic harm.[11]

It puts no guardrails around such juror logic, moreover, to instruct that "[i]f all the [g]overnment

[11] Predictably, prosecutors capitalize on the instructions to urge conviction on the basis of deceit alone. In *Viloski*, for example, the case involving an employee's undisclosed self-interest, the

proves is that the [d]efendant caused Fort Schuyler . . . to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm," the government will have failed to meet its burden. JA 41-42. Under this formulation, the government is only required to prove that "expos[ure] to tangible economic harm" was caused by the scheme (*i.e.*, a consequence), not that defendants *intended* an exposure to tangible economic harm (*i.e.*, defendant's state of mind). The Second Circuit interpreted the requirement precisely this way below, stating that the law requires "misrepresentations or non-disclosures [that] can or do *result in* tangible economic harm." 13 F.4th at 170 (emphasis supplied) (quoting *Finazzo*, 850 F.3d at 111).

The Second Circuit acknowledged below that the right-to-control theory demands *more* than a "scheme[] that do[es] no more than cause their victims

government argued in its main summation that, "property doesn't have to be physical property. It can be intangible property, that Dick's [the employer] has a right to learn from its employees information needed to make its business decisions." Trial Tr. at 2246, *Viloski*, 09 Cr. 418 (N.D.N.Y. Aug. 5, 2009), ECF No. 386. After the defense argued that the employer had not lost money but instead *profited* from the purported scheme, and that the defendant intended no economic harm, *id.* at 2280-95, the prosecutor rebutted the defense argument that, as the prosecutor characterized it, there was no "big deal" and no one "got hurt" or "was deprived." *Id.* at 2315. The prosecutor argued that Viloski should be convicted because the government proved that the company's "decision making" relied "on the trust" it had in the unfaithful employee and that knowing that trust was "violated" would have "immediately called into question" "any aspect of that specific transaction and frankly others." *Id.* at 2316.

to enter into transactions they would otherwise avoid." 13 F.4th at 171. The court based its affirmance of Petitioners' convictions on its conclusion that Petitioners' conduct crossed the "fine line" that separates such non-crimes from mail and wire fraud because the "scheme[] . . . depend[ed] for [its] completion on a misrepresentation of an essential element of the bargain." *Id*. (citing *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)).

But a lie intended to induce the victim to enter into a transaction it would otherwise avoid—deceit—is *all* the jury found if it concluded that the defendant merely deprived a counterparty of potentially valuable economic information without intending to cause economic harm. The *sine qua non* of property fraud—an intent to wrongly obtain a victim's property—is eliminated by such instructions.

In this case, the very fact the Second Circuit deemed necessary to affirm the convictions was not one the instructions asked the jury to find. The jury was never instructed that it had to find a "misrepresentation of an essential element of the bargain." In fact, the district court *rejected* the proposed defense instruction that the jury must acquit Petitioners if Fort Schuyler "received, and was intended to receive, the full economic benefit of its bargain." C.A. App. 960-61, 1439, 1449.

It is intolerable that an individual's liberty should depend on jury instructions that define the purported crime in such broad and malleable terms as is the case under the Second Circuit's right-to-control theory. Were Congress to enact a statute setting forth

an offense in such terms—a virtually unthinkable proposition—the law surely would be struck down as unconstitutionally vague. *Cf. Skilling*, 561 U.S. at 411 n.44 ("If Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing by a public official or private employee,' it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."). An equally indefinite jury instruction, issued without Congress' imprimatur, is no more valid. "Invoking so shapeless a provision to condemn someone to prison for [up to 30 years] does not comport with the Constitution's guarantee of due process." *McDonnell*, 579 U.S. at 576 (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and invalidate the right-to-control theory of property fraud.

Dated: September 6, 2022

Respectfully submitted,

HARRY SANDICK
Counsel of Record
JACOB I. CHEFITZ
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
hsandick@pbwt.com

CHRISTINE H. CHUNG
Christine H. Chung PLLC
14 Murray St., No. 236
New York, New York 10007
Telephone (917) 685-0423

GARY STEIN
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022
Telephone (212) 756-2000
Facsimile (212) 593-5955

Attorneys for Amicus Curiae
New York Council of Defense Lawyers

No. 21-1170

In the Supreme Court of the United States

LOUIS CIMINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals, which applied a "right to control" theory of property fraud, correctly found sufficient evidence to support petitioner's convictions for wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349.

TABLE OF CONTENTS

Page

Opinion below ... 1
Jurisdiction ... 1
Statutory provisions involved ... 1
Statement ... 2
Summary of argument ... 11
Argument:
- Petitioner's scheme to obtain hundreds of millions of dollars by means of material misrepresentations violated 18 U.S.C. 1343 and 1349 ... 14
  - A. A defendant commits property fraud by scheming to obtain money or property, using a material misrepresentation, with intent to defraud ... 15
    1. Scheme to obtain money or property ... 16
    2. By means of material misrepresentation ... 17
    3. Intent to defraud ... 20
    4. No requirement of actual or intended financial harm ... 21
  - B. The right-to-control theory, appropriately limited, identifies cases of property fraud involving fraudulent inducement to enter into a transaction ... 24
    1. The money or other consideration in the transaction at issue in a right-to-control case ordinarily satisfies the statute's "money or property" element ... 25
    2. The right-to-control theory seeks to identify actionable fraudulent inducements by requiring a showing of tangible economic harm ... 26
  - C. Petitioner committed property fraud by scheming to obtain money through lies about key features of the process that positioned his company to receive that money ... 31
    1. Petitioner schemed to obtain Fort Schuyler's property by securing hundreds of millions of dollars in contract funds ... 32

Table of Contents—Continued: Page

2. Petitioner's scheme relied on material misrepresentations, essential to the bargain, that his company was competitively and fairly identified as the best 33
3. Petitioner's scheme was intended to defraud by inducing reliance on the false representations about the nature of his company's preferred status 39
4. Petitioner's scheme contemplated economic harm to Fort Schuyler 40
D. Petitioner's policy concerns are misplaced 43
Conclusion 49

TABLE OF AUTHORITIES

Cases:

Buchanan v. *Warley*, 245 U.S. 60 (1917) 25
Carpenter v. *United States*, 484 U.S. 19 (1987) 16, 17, 20, 22
Chiarella v. *United States*, 445 U.S. 222 (1980) 17, 20, 47
Cleveland v. *United States*, 531 U.S. 12 (2000) 16, 33, 46
Durland v. *United States,* 161 U.S. 306 (1896) 40
Janes v. *Trustees of Mercer Univ.*, 17 Ga. 515 (1855) 19
J.I. Case Threshing Mach. Co. v. *Webb*, 181 S.W. 853 (Tex. Civ. App. 1915) 19
Junius Constr. Co. v. *Cohen*, 178 N.E. 672 (N.Y. 1931) 18
Kelly v. *United States*, 140 S. Ct. 1565 (2020) 16, 32
Loughrin v. *United States*, 573 U.S. 351 (2014) 17, 22, 47, 48
McNally v. *United States*, 483 U.S. 350 (1987) 16, 46
Musacchio v. *United States*, 577 U.S. 237 (2016) 31

Cases—Continued: Page

Neder v. *United States*,
527 U.S. 1 (1999) 15, 17, 18, 21, 42, 44

Pasquantino v. *United States*,
544 U.S. 349 (2005)..11, 16, 17, 32, 33

Schmuck v. *United States*, 489 U.S. 705 (1989).................. 29

Shaw v. *United States*, 580 U.S. 63 (2016) 21, 40

Skilling v. *United States*, 561 U.S. 358 (2010)........ 16, 46, 47

State v. *Mills*, 17 Me. 211 (1840) 19

United States v. *Binday*,
804 F.3d 558 (2d Cir. 2015), cert. denied,
579 U.S. 917 and 579 U.S. 918 (2016)............. 24, 25, 26, 27

United States v. *Finazzo*,
850 F.3d 94 (2d Cir. 2017) .... *passim*

United States v. *Gaudin*, 515 U.S. 506 (1995) 44

United States v. *Jabar*, 19 F.4th 66 (2d Cir. 2021),
cert. denied, 142 S. Ct. 1396 (2022) 30

United States v. *Johnson*, 945 F.3d 606
(2d Cir. 2019), cert. denied, 141 S. Ct. 687 (2020)...... 30, 31

United States v. *Leahy*, 464 F.3d 773 (7th Cir. 2006)........ 23

United States v. *New S. Farm & Home Co.*,
241 U.S. 64 (1916) 29, 45

United States v. *Maxwell*, 579 F.3d 1282
(11th Cir. 2009)... 20

United States v. *Mittelstaedt*, 31 F.3d 1208
(2d Cir. 1994) 28

United States v. *Rowe*, 56 F.2d 747 (2d Cir.),
cert. denied, 286 U.S. 554 (1932) 21, 40

United States v. *Sampson*, 371 U.S. 75 (1962) 40

United States v. *Williams*, 553 U.S. 285 (2008) 44

United States v. *Viloski*, 557 Fed. Appx. 28
(2d Cir. 2014), cert. denied, 575 U.S. 935 (2015)............. 28

Cases—Continued: Page

Universal Health Servs., Inc. v. *United States*, 579 U.S. 176 (2016)....................................13, 18, 30, 43, 44
Vernon v. *Keys*, (1810) 104 Eng. Rep. 246 (K.B.)............... 45
Washington Post Co. v. *Sorrells*, 68 S.E. 337 (Ga. Ct. App. 1910).. 19

Statutes:

False Claims Act, ch. 67, 12 Stat. 696................................. 18
18 U.S.C. 1341 15
18 U.S.C. 1343 .... *passim*
18 U.S.C. 1344 15
18 U.S.C. 1346 46
18 U.S.C. 1349 .... 2, 8

Miscellaneous:

2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* (4th Eng. ed. 1876)...... 20, 22
1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* (1888) 22
2 Joel Prentiss Bishop, *Commentaries on The Criminal Law* (6th ed. 1877) 18, 19
Black's Law Dictionary:
(4th ed. 1951).. 16, 17
(11th ed. 2019)... 29
1 William Blackstone, *Commentaries* (1765)...................... 25
3 Dan B. Dobbs et al., *The Law of Torts* (2d ed. 2011)... 20, 22, 45
W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 19, 22
3 Wayne R. LaFave, *Substantive Criminal Law* (3d ed. 2018)... 20, 22

Miscellaneous—Continued: Page

1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (10th ed. 1870) 18, 45

Henry T. Terry, *Intent to Defraud*, 25 Yale L.J. 87 (1915) 22

Restatement (Second) of Torts (1977) 18, 19, 20, 38, 39, 44

In the Supreme Court of the United States

No. 21-1170

LOUIS CIMINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 13 F.4th 158.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2021. A petition for rehearing was denied on November 1, 2021 (Pet. App. 57a-58a). On January 7, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 1, 2022. The petition was filed on February 18, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire-fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money

> or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 1343.

The fraud-specific conspiracy statute further provides that "[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 18 U.S.C. 1349.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Pet. App. 42a. The court of appeals affirmed. *Id.* at 1a-37a.

1. Petitioner was the owner of a Buffalo-based construction company, LPCiminelli. Pet. App. 6a-7a, 9a. Beginning in 2013, petitioner engaged in a scheme to take advantage of then-Governor Andrew Cuomo's "Buffalo Billion" initiative, under which the State of New York aimed to invest one billion dollars of public money for development projects in the Buffalo area. *Id.* at 5a-9a; see C.A. App. 1175.[*]

---

[*] Respondents Kaloyeros, Aiello, and Gerardi were convicted at the same trial for crimes stemming from a similar scheme involving

The scheme was run through Alain Kaloyeros, the head of an economic and research organization at the University of Albany, which is part of the State University of New York (SUNY). Pet. App. 5a. Because of restrictions on state agencies engaging directly in public-private partnerships, Kaloyeros used a nonprofit corporation—Fort Schuyler Management Corporation (Fort Schuyler)—to purchase land and develop the facilities for the Buffalo Billion project. *Id.* at 5a-6a. Fort Schuyler was controlled by a board of directors whose members (including Kaloyeros) were appointed by SUNY and the SUNY Research Foundation. *Id.* at 6a. Kaloyeros was "in charge of developing proposals for projects under the Buffalo Billion initiative." *Id.* at 5a.

Petitioner forged his connection with Kaloyeros by hiring Todd Howe, "a consultant and lobbyist with a longstanding relationship with the Cuomo administration." Pet. App. 5a. Kaloyeros had himself been paying Howe $25,000 per month of state funds to improve Kaloyeros's standing with the governor's office, efforts that had helped Kaloyeros to secure his prominent role in the disbursement of Buffalo Billion funds. *Ibid.* LPCiminelli, for its part, began paying Howe to help the company "obtain[] state-funded work." *Id.* at 7a; see *id.* at 6a-7a. LPCiminelli initially paid Howe's firm $100,000 per year, but later increased the payments to $180,000 per year. C.A. App. 1178-1179; C.A. Supp. App. 872-873.

In the summer of 2013, Kaloyeros and Howe began formulating a scheme to award the state contracts for projects in Buffalo to LPCiminelli. Pet. App. 6a-8a; see

funds for development projects in Syracuse. See Pet. App. 5a-13a. Although the property-fraud convictions from that scheme are sufficiently analogous to petitioner's that they should be treated similarly, they are not directly at issue.

C.A. Supp. App. 877-881. Although Kaloyeros lacked unilateral control over the selection of contractors, he was able to manipulate the request-for-proposals process through which Fort Schuyler solicited bids. Pet. App. 7a. Kaloyeros convinced the Fort Schuyler board to select a "preferred developer" through a process that was intended to help ensure that state funds were "spent in a transparent and competitive way," with the chosen developer then given the first opportunity to noncompetitively come to terms on all future Buffalo projects. *Id.* at 7a-8a (capitalization and citations omitted). Then, taking advantage of his involvement in drafting the requests, Kaloyeros collaborated with petitioner and Howe to transform the purportedly competitive process for selecting the preferred developer into one that was steered toward LPCiminelli's selection. *Id.* at 7a-11a.

More specifically, petitioner and others at LPCiminelli collaborated with Kaloyeros and Howe to develop a set of requirements, to be inserted into a request for applications to be the preferred provider, that would be distinct to LPCiminelli. Pet. App. 8a. In response to Howe's initial request for a list of qualifications to help ensure LPCiminelli's selection, the company recommended that the process focus on factors other than price and sent a list that emphasized experience in western New York. See C.A. App. 1183-1184, 1192, 1575-1577, 1619; C.A. Supp. App. 877. Howe forwarded LPCiminelli's list to Kaloyeros, who pushed back on it because the proposed qualifications were "not unique to [petitioner]'s company." C.A. App. 1578. Kaloyeros insisted that, instead, they "need[ed] more definite specs, like minimum X years in Y, Z number of projects in high tech, etc, etc." *Ibid.*

Howe accordingly brainstormed with an LPCiminelli executive to come up with qualifications "unique to LPC[iminelli]" that would "[p]revent [other firms] from competing," such as a requirement of a minimum number of years working in Buffalo. C.A. App. 1193-1994; see *id.* at 1619-1620. Kaloyeros, meanwhile, shared nonpublic information about development plans with petitioner's company, e-mailed petitioner a draft of a preferred-provider request from a parallel state venture in Syracuse, and solicited petitioner's feedback on "replac[ing] Syracuse with Buffalo and fine tun[ing] the developer requirements to fit." *Id.* at 1593; see *id.* at 1036-1039, 1196-1197, 1579-1589. Kaloyeros later sent petitioner a request for "company statistics (years in business, some key projects, including the latest at Buffalo state, etc)." *Id.* at 1613; see C.A. Supp. App. 879. LPCiminelli supplied the requested information, including the data point that LPCiminelli had "over 50 years of experience." C.A. App. 1603; see *id.* at 1602-1613; C.A. Supp. App. 879.

Those efforts ultimately resulted in Fort Schuyler's board of directors passing a resolution authorizing the issuance of a request for proposals for preferred-developer status in Buffalo that included LPCiminelli-specific requirements. J.A. 105-108. The resolution stated that the board was attempting to select a preferred developer "[u]pon completion of a competitive RFP [request for proposals] process." J.A. 107. But as a result of the conspirators' scheme, the request indicated that a bidder "must demonstrate its ability to meet" various "requirements" that were tailored to LPCiminelli, including:

- "Over 50 years of proven experience and successful track record in the construction and operation

of mixed-use facilities and buildings * * * in the Greater Buffalo Area";

- "Location of headquarters and major operations in the Greater Buffalo Area, with extensive knowledge and demonstrated know how of the local real estate market and business and financial drivers in the Greater Buffalo area"; and
- "Fully integrated and comprehensive in-house skills and services, including design, architecture, legal, financial, leasing, construction, and facility management/lease services, with sophisticated tools and advanced capabilities."

C.A. App. 1914-1915.

Petitioner was "very hot" when he learned about Kaloyeros's inclusion of the 50-year requirement in the request, commenting, "[t]hat's the type of thing that will get a[n] RFP thrown out." C.A. App. 1207; see *id.* at 1206. And after the 50-year requirement caught the attention of a news reporter, Kaloyeros claimed that it was a typographical error and that the requirement was intended to be 15 years. Pet. App. 10a-11a; see C.A. App. 1348-1349, 1052-1053. Meanwhile, although the Buffalo request for proposals imposed a "blackout period" during which all communications between interested developers and Fort Schuyler were to be conducted through designated channels to avoid any unfair competition, LPCiminelli continued to communicate with Howe (and through him, Kaloyeros) about its application. Pet. App. 9a; see *id.* at 9a-10a; C.A. App. 1080-1081, 1217.

When LPCiminelli informed Howe that another company was representing itself as a "gatekeep[er]" for the Buffalo request for proposals, Kaloyeros e-mailed that

competitor—copying Fort Schuyler personnel, including a member of the board—and insisted that the selection process would be "merit based" and must not be "pre-cooked" or "single[] out anyone." C.A. App. 1208-1209; C.A. Supp. App. 738, 748; Pet. App. 10a (citation omitted); see C.A. App. 1048, 1050; 6/19/18 Trial. Tr. 398-399. "Presumably * * * to combat any perception that the RFP was tailored to a particular bidder," Kaloyeros ultimately determined that Fort Schuyler should in fact select two preferred developers for Buffalo. Pet. App. 11a. But Howe communicated to LPCiminelli that it would receive the largest contract and invited its input on which company should be selected as the second developer. C.A. App. 1216-1217; see C.A. Supp. App. 737.

The application that LPCiminelli submitted included the express representation that no person or organization had been "retained, employed or designated * * * to attempt to influence the procurement process." C.A. App. 1884. And while Kaloyeros recused himself from the final selection process for the Buffalo project, his stated ground was his involvement with the governor's office, not his (hidden) relationship with LPCiminelli. *Id.* at 1082. In January 2014, the Fort Schuyler board selected LPCiminelli and McGuire Development Company, LLC—the company that LPCiminelli had recommended—as the preferred developers for Buffalo. J.A. 109-112; C.A. App. 1217. The board's resolution stated that Fort Schuyler's evaluation committee had recommended the two companies "as part of a competitive procurement process that included the RFP." J.A. 111.

Following its selection as a preferred developer, LPCiminelli entered into a memorandum of under-

standing with Fort Schuyler for construction of the venture's marquee project, a large manufacturing facility in Riverbend. See J.A. 113-124; C.A. App. 1084. The memorandum represented that LPCiminelli had been selected as a preferred developer "after a competitive process including the RFP." J.A. 115. A subsequent "notice to proceed" for the Riverbend project, J.A. 125-132 (capitalization and emphasis omitted), similarly represented that the parties had entered into an agreement following "a competitive bidding process under the RFP," J.A. 125. LPCiminelli later entered a final contract for the Riverbend project, see J.A. 133-177, under which it would receive $750 million, Pet. App. 12a; C.A. App. 1172.

2. Based on the Buffalo development scheme, a grand jury in the Southern District of New York charged petitioner, Kaloyeros, and others with crimes including wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. J.A. 31-34.

At trial, the district court instructed the jury that it could find petitioner guilty of those wire-fraud charges only if it found beyond a reasonable doubt that "the alleged scheme contemplated depriving Fort Schuyler of money or property." J.A. 41. The court stated that "[p]roperty includes intangible interests such as the right to control the use of one's assets" and that "[t]he victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Ibid.* The court defined "potentially valuable economic information" as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of

goods or services received or the economic risks of the transaction." *Ibid.*

The district court's instructions emphasized, however, that "[i]f all the Government proves is that the [d]efendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the Government will not have met its burden of proof." J.A. 41-42. Instead, the government had to show that petitioner exposed Fort Schuyler to "tangible economic harm," such as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." J.A. 42.

The jury found petitioner (as well as Kaloyeros) guilty on both counts. Pet. App. 14a, 42a-43a. The district court sentenced him to 28 months of imprisonment, to be followed by two years of supervised release. *Id.* at 14a, 44a, 46a.

3. The court of appeals affirmed. Pet. App. 1a-37a.

Petitioner challenged the sufficiency of the evidence, contending that a "right-to-control theory of wire fraud" is "invalid" because "the right to control one's own assets is not 'property' within the meaning of the wire fraud statute." Pet. App. 4a n.2. The court, however, noted that a "right-to-control theory of wire fraud is well-established in Circuit precedent." *Ibid.* (citing *United States* v. *Finazzo*, 850 F.3d 94, 105-109 (2d Cir. 2017)). And it found petitioner's alternative, record-based, sufficiency claims to be meritless. *Id.* at 14a-23a.

The court of appeals emphasized that the evidence, viewed in the light most favorable to the government, Pet. App. 15a, showed that "Fort Schuyler employed

the RFP process precisely because of its desire for free and open competition, and that the * * * Board relied on this aspect of the process to achieve its economic objective—selecting the lowest-priced or best-qualified vendor," *id.* at 18a; see *id.* at 15a. The court observed that, "in rigging the RFP[] to favor [his] compan[y], [petitioner] deprived Fort Schuyler of 'potentially valuable economic information'" that "would have resulted from a truly fair and competitive RFP process." *Id.* at 18a (citation omitted). And the court found that the evidence supported the finding that petitioner "knew about the scheme to rig the RFP[], and that it was at least foreseeable to [him] that doing so would deprive Fort Schuyler of its ability to award contracts that were the result of a fair and competitive bidding process." *Id.* at 23a.

The court of appeals rejected petitioner's claim that the rigged process could not have harmed Fort Schuyler because it only gave his company "the right to negotiate with Fort Schuyler for work that would be forthcoming." Pet. App. 18a (citation omitted). The court observed that although preferred developers were "not guaranteed any project * * * , they indisputably had 'a leg up because they had been preselected.'" *Id.* at 19a (citation omitted). The court likewise rejected petitioner's claim that the government had failed to show that Fort Schuyler would have obtained a better deal in the absence of the fraud. *Id.* at 18a-19a. The court observed that the wire-fraud statute, which prohibits a "scheme" to defraud, 18 U.S.C. 1343, does not require that the contemplated harm actually occur, Pet. App. 20a-21a; see *id.* at 29a. And the court highlighted evidence showing that, "absent the fraud, Fort Schuyler

would have considered more, and perhaps stronger, applications in response to the RFP[ ]," as well as testimony from representatives of companies with "construction management fees [that] were typically lower than those of * * * LPCiminelli." *Id.* at 20a n.8.

SUMMARY OF ARGUMENT

Petitioner successfully schemed to obtain hundreds of millions of dollars in public-development funding, charging prices higher than a competitor's might have been, by lying about the manipulation of the process through which his company was selected as the best-qualified developer. That scheme was property fraud.

A. A defendant commits property fraud by engaging in a "scheme * * * for obtaining money or property," "by means of" material misrepresentations, with intent to defraud. 18 U.S.C. 1343. The ordinary meaning of "money or property" "extend[s] to every species of valuable right and interest," *Pasquantino* v. *United States*, 544 U.S. 349, 355 (2005)—a definition that can clearly encompass contract funds. And a defendant "obtains" that property even if he provides consideration in return. In the contracting context, the materiality requirement requires the government to prove that a reasonable person would attach, or it was evident that the victim did attach, critical importance to the existence or nonexistence of a misrepresented fact in determining his choice of action in the transaction—that is, that the misrepresentation went to the essence of the contract. And the intent-to-defraud element requires proof that the defendant intended to induce reliance on his misrepresentation. Although financial harm to the victim commonly arises from fraudulent schemes, the fraud statute does not require proof that the defendant caused or intended to cause such harm.

B. In assessing whether the government proved property fraud here, the Second Circuit applied a "right to control" theory recognized by circuit precedent. The Second Circuit has usually described that theory as reflecting that "money or property" can include a victim's right to control the disposition of its assets. But without further limitation, that conception could lead to overbroad results that would expand property fraud beyond its definition at common law and as Congress would have understood it.

In contexts like this one, however, the Second Circuit has applied the right-to-control theory in a more limited manner to identify cases that satisfy all of the property-fraud elements. The core set of cases in which the Second Circuit applies the theory are those in which a defendant fraudulently induces a victim to enter into a transaction. In that situation, the object of the scheme is obtaining money or other consideration in the transaction that indisputably qualifies as "money or property." And the Second Circuit has made clear that a conviction under the right-to-control theory requires a scheme that "contemplated" a "risk of tangible economic harm" by depriving the victim of "'potentially valuable economic information'" concerning its decision to enter into a transaction. *United States* v. *Finazzo*, 850 F.3d 94, 107 n.15, 111-112 (2017) (citation omitted).

Although proof of actual or intended economic harm is not a necessary element of fraud, requiring such proof in a fraudulent-inducement case generally identifies schemes that satisfy the traditional elements of property fraud. The amount that the victim may be overpaying is part of the money or property that the defendant seeks to obtain from the contract; a tangible economic

effect is typically the sort of essential aspect of a bargain that is considered material; and a defendant who deliberately contemplates economic harm acts with intent to induce the victim's reliance on the material misrepresentations.

C. In this Court, petitioner has disclaimed any challenge to the district court's right-to-control instructions and instead contests only the evidence supporting his convictions. Whether viewed through the lens of the right-to-control theory or through a straightforward application of the statutory elements, petitioner's scheme satisfies every element of property fraud. The scheme sought to obtain contract funding ultimately worth $750 million. The misrepresentations about the nature of the process through which LPCiminelli had been named a preferred developer met the "demanding" standard for materiality in the fraudulent-inducement context, *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 194 (2016), because the process's fairness was critical for Fort Schuyler, whose finances and proper functioning as a state agent both depended on it. Petitioner's deception was also intentionally designed to induce reliance. In addition, as the Second Circuit concluded, petitioner's scheme contemplated causing economic harm: The whole point of the scheme was to insulate LPCiminelli from competition with other developers who might have offered lower fees or a better balance of price and performance.

D. Petitioner's policy concerns about overcriminalization do not provide a basis for setting aside his convictions or adding elements that have no basis in the statutory text or common-law principles that the statute incorporates. Any such concerns can instead be addressed through the traditional elements of property

fraud—such as the limitations on actionable omissions and the strict context-specific application of the materiality standard—as well as by various other statutory and common-law limitations. A proper application of those limitations would eliminate any concern that property fraud will supplant honest-services fraud or allow for conviction solely on the basis of undisclosed self-dealing. And in any event, those concerns are not implicated by petitioner's convictions, which rest on a scheme to use affirmative material misrepresentations to obtain hundreds of millions of dollars directly from the victim.

ARGUMENT

PETITIONER'S SCHEME TO OBTAIN HUNDREDS OF MILLIONS OF DOLLARS BY MEANS OF MATERIAL MISREPRESENTATIONS VIOLATED 18 U.S.C. 1343 AND 1349

The wire-fraud statute requires the government to show that a defendant, intending to defraud his victim, made material misrepresentations with the object of obtaining money or property. Petitioner contends that the Second Circuit's right-to-control theory is invalid because the right to control one's assets does not constitute "property" covered by the fraud statutes. The Second Circuit has not always been consistent about the requirements of the right-to-control theory or how those requirements map onto the elements of the statute. But the theory has typically been applied to fraudulent-inducement cases like this one, in which the object of the deceptive scheme—the funds or other property the defendant will gain from the transaction that he seeks to mislead the victim into entering—plainly qualifies as "money or property."

As a matter of first principles, therefore, the fraudulent-inducement cases that the Second Circuit

has analyzed as involving the right to control can also be analyzed as straightforward property fraud aimed at obtaining money or other traditional assets. This case illustrates the point: Whether viewed through the lens of the right-to-control theory or not, the evidence was plainly sufficient to satisfy each of the elements of wire fraud. Petitioner's scheme sought and obtained hundreds of millions of dollars; it did so by materially misrepresenting that a rigged selection process had been open, fair, and competitive; and it did so with intent to defraud—that is, with intent that those misrepresentations would induce Fort Schuyler to enter into the contract. Neither petitioner nor respondents and amici supporting him identify any element of the wire-fraud statute that his conduct failed to satisfy. Petitioner's convictions should be affirmed.

A. A Defendant Commits Property Fraud By Scheming To Obtain Money Or Property, Using A Material Misrepresentation, With Intent To Defraud

The wire-fraud statute prohibits using the wires to execute "any 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. The mail and bank fraud statutes use similar language. 18 U.S.C. 1341, 1344. This Court has long construed the parallel language in those statutes *in pari materia* and in light of the common law. See, *e.g.*, *Neder* v. *United States,* 527 U.S. 1, 20, 22-23, 25 (1999). Thus, as petitioner acknowledges (Br. 38), the federal fraud statutes require the government to prove three basic elements grounded in the common law: a scheme to obtain money or property; material misrepresentations or actionable omissions; and an intent to defraud.

1. Scheme to obtain money or property

The wire-fraud statute requires the government to show that a fraudulent scheme was designed to obtain money or property. Although the statute refers to a scheme or artifice "to defraud, *or* for obtaining money or property," 18 U.S.C. 1343 (emphasis added), this Court has construed the statute's "disjunctive language as a unitary whole," *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020); see *McNally* v. *United States*, 483 U.S. 350, 358-360 (1987). As a result, to sustain a conviction for property fraud, money or property "must be an 'object of the fraud.'" *Kelly*, 140 S. Ct. at 1573 (quoting *Pasquantino* v. *United States,* 544 U.S. 349, 355 (2005)).

In interpreting the phrase "money or property," this Court has relied on the "ordinary or natural meaning" of those terms. *Pasquantino,* 544 U.S. at 356 (citation omitted). That ordinary meaning "extend[s] to every species of valuable right and interest." *Ibid.* (quoting *Black's Law Dictionary* 1382 (4th ed. 1951) (*Black's*)). Thus, while the phrase does not include the right to an employee's "honest services," *Skilling* v. *United States,* 561 U.S. 358, 402 (2010) (citation omitted); see *id.* at 399-402, or "purely regulatory" government decisionmaking, *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000) (citation omitted), it encompasses "'property rights'" both "tangible" and "'intangible,'" *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (citations omitted). Such rights include, for example, the right to "confidential business information," *ibid.*, and "[t]he right to be paid money," *Pasquantino,* 544 U.S. at 356.

The plain meaning of "obtain[]," 18 U.S.C. 1343, in turn, includes the acquisition or retention of property that would otherwise be in someone else's hands. See

Pasquantino, 544 U.S. at 355-356; *Carpenter*, 484 U.S. at 25-26; see also *Black's* 1228 (defining "obtain" as "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way"). The plain meaning of that term establishes that a defendant "obtains" property even if he provides some consideration—or even fair value—in exchange. A worker who has received a paycheck has indisputably "obtained" the funds therein, even though it is remuneration for his labor. The whole point of a contract is to exchange one thing for another, because each party views the trade as beneficial. But that does not make the two (or more) things that are exchanged equivalent in the sense of canceling each other out; instead, each party "obtains" what the other has agreed to provide. Thus, if a defendant induces a victim to enter into a transaction through material misrepresentations, his performance of his end of the bargain does not alter the fact that he "obtained" the victim's funds.

2. By means of material misrepresentation

Conviction under Section 1343 also requires that the scheme seek to obtain money or property "by means of" misrepresentations (or, in certain limited circumstances, actionable omissions, see *Chiarella* v. *United States*, 445 U.S. 222, 235 (1980)). 18 U.S.C. 1343. That requirement is satisfied when the false statement or omission "is the mechanism naturally inducing [the victim] to part with money [or property]." *Loughrin* v. *United States,* 573 U.S. 351, 363 (2014). This Court has further held that the fraud statutes incorporate the common-law requirement that the misrepresentation or actionable omission must concern a "*material* fact." *Neder*, 527 U.S. at 22. A fact is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the

transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action." *Id.* at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977) (Torts Restatement)); see Pet. Br. 39 (relying on this definition).

a. As this Court has recognized in addressing fraud under the False Claims Act, ch. 67, 12 Stat. 696, the context-dependent materiality standard is "demanding" and "rigorous" in the contracting context. *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 192, 194 (2016). A misrepresentation that is "of too frivolous a nature, or of too small a thing[,] * * * will not be sufficient." 2 Joel Prentiss Bishop, *Commentaries on The Criminal Law* § 458, at 252 (6th ed. 1877) (Bishop); see 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 195, at 197-198 (10th ed. 1870) (Story). Instead, under one pertinent articulation of the standard, "a misrepresentation is material if it 'went to the very essence of the bargain.'" *Universal Health Servs.,* 579 U.S. at 193 n.5 (quoting *Junius Constr. Co.* v. *Cohen*, 178 N.E. 672, 674 (N.Y. 1931)); see, *e.g.*, 1 Story § 195, at 197 (similarly describing misrepresentations that "go to the essence of the contract").

b. Although a misrepresentation may be more likely to influence a person's "choice of action" if it pertains to an economic aspect of a transaction, that is not an invariable requirement. A range of noneconomic misrepresentations might have a similar effect depending on the nature of the transaction.

That range includes misrepresentations as to "more-or-less sentimental considerations that the ordinary man regards as important," even if the consideration is

not "one that a reasonable man would regard as affecting the pecuniary advantages of the transaction." Torts Restatement § 538, cmt. d. For example, because it is "natural that a person should wish to possess portraits of his ancestors even though they have no value as works of art," a "fraudulent misrepresentation that a particular picture is a portrait of the purchaser's great-grandfather is a misrepresentation of a material fact." *Ibid.* The range of potential non-economic but material matters also includes victim-specific considerations that are obviously of special importance to him, even if not to "a reasonable man." *Id.* § 538(2)(b). Someone may make clear, for example, that he wants to sell his pet horse to a horse enthusiast, rather than to a glue factory, even if a "reasonable man" might care only about getting the best price.

The understanding that certain noneconomic misrepresentations can qualify as material is deeply rooted in the common law. In the nearly two-century-old case of *State* v. *Mills*, 17 Me. 211 (1840), for example, "the owner of a horse pretended it was a particular one called Charley, knowing it was not," and "the court held this to be a sufficient false pretence, even if the horse were as good and as valuable as the Charley." 2 Bishop § 451, at 247-248; see *Mills*, 17 Me. at 216; see also, *e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 108, at 753-754 (5th ed. 1984) (Prosser on Torts); *J.I. Case Threshing Mach. Co.* v. *Webb*, 181 S.W. 853, 855 (Tex. Civ. App. 1915) (misrepresentation to buyer that his wife wanted to own particular automobile); *Washington Post Co.* v. *Sorrells*, 68 S.E. 337, 337-338 (Ga. Ct. App. 1910) (similar, as to portraits); *Janes* v. *Trustees of Mercer Univ.*, 17 Ga. 515, 519-520 (1855) (misrepresentation to donor that school taught manual

labor). In more modern times, courts have recognized that a defendant commits fraud by, for example, making misrepresentations to secure a government contract intended only for small or disadvantaged businesses. See, *e.g.*, *United States* v. *Maxwell*, 579 F.3d 1282, 1302-1303 (11th Cir. 2009).

3. Intent to defraud

Finally, the fraud statutes incorporate the common-law requirement of intent to defraud—that is, intent to induce reliance. *Carpenter*, 484 U.S. at 28. "At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent." *Chiarella*, 445 U.S. at 227-228; see Torts Restatement § 525 ("One who fraudulently makes a misrepresentation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th English ed. 1876) (Addison on Torts) ("[I]f a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, * * * the party telling the falsehood is responsible in damages in an action for deceit."); 3 Dan B. Dobbs et al., *The Law of Torts* § 664 (2d ed. 2011) (Dobbs) (similar). The mens rea for the crime of false pretenses—which petitioner characterizes as "consistent" with the federal fraud statutes, Br. 34 n.23—is accordingly satisfied when the defendant "intend[s] the victim to rely upon his misrepresentation." 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(f)(2) (3d ed. 2018) (LaFave).

4. No requirement of actual or intended financial harm

Financial harm to the victim is a common feature of fraudulent schemes. Indeed, the Second Circuit's right-to-control cases have long required the government to show such harm, which serves to cabin the reach of the right-to-control theory. See pp. 27-29, *infra*. But this Court has rejected the contention that the federal fraud statutes include any requirement of actual or contemplated financial harm.

As this Court has long recognized, proof of actual harm is not required because the federal fraud statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud." *Neder*, 527 U.S. at 25. And because even a failed scheme violates the statute, the government need not prove that the victim *actually* relied on the defendant's misrepresentations, much less that the victim suffered harm. *Id.* at 24-25. Nor is such a requirement a necessary feature of "obtain[ing]" property. Providing a good or service in exchange for money does not alter the fact that the money was "obtained."

This Court has likewise rejected the suggestion that the fraud statutes require a showing of intended or contemplated financial harm. In *Shaw* v. *United States*, 580 U.S. 63 (2016), a defendant charged with bank fraud argued that he could not be convicted because "he did not intend to cause the bank financial harm." *Id.* at 67. This Court disagreed, emphasizing that the statute "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Ibid.* The Court instead endorsed Judge Learned Hand's observation that " 'a man is nonetheless cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.' " *Ibid.* (quoting *United States* v. *Rowe*, 56 F.2d 747, 749 (2d

Cir.) (Hand, J.), cert. denied, 286 U.S. 554 (1932)); see *Loughrin,* 573 U.S. at 366 n.9 (rejecting the argument that the bank-fraud statute "requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank"); *Carpenter*, 484 U.S. at 26 (rejecting any requirement of actual or intended "monetary loss").

The Court's decision in *Shaw* accords with the settled rule at common law. For example, "it is generally held that the lack of financial loss is no defense" to the common-law crime of "false pretenses." 3 LaFave § 19.7(i)(3). And even if a plaintiff in a common-law civil action for fraud could not obtain damages in the absence of financial harm, she might be able to obtain rescission. See 3 Dobbs § 664 n.6 ("If the plaintiff bargained for a Titian but got a Giorgione of equal value, she would have no pecuniary damages, but should be permitted to get rescission.").

To the extent that a fraudster's intent to harm the victim was ever relevant at common law, it was relevant only to whether punitive damages were warranted, not to whether the defendant had "culpab[le]" intent. Prosser on Torts § 107, at 741; see, *e.g.*, 2 *Addison on Torts* § 1175, at 1005 ("In order to maintain an action for deceit, * * * it is not necessary to prove that the false representation was made from * * * a wicked motive of injury to the plaintiff."); 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 538 (1888) ("[I]t is not necessary, even in an action for damages, for the plaintiff to prove that the defendant intended to injure him."); Henry T. Terry, *Intent to Defraud*, 25 Yale L.J. 87, 99 (1915) (explaining that "the maker of the representation * * * need not intend to cause any actual harm or loss").

Of course, financial harm to the victim is a common—perhaps even typical—feature of fraud. And as the Second Circuit's right-to-control cases illustrate, the presence of intent to cause such harm can be a useful indicator of fraud. See pp. 29-31, *infra*. But it is not required: An applicant who obtains a job (and the accompanying salary) by materially misrepresenting her qualifications commits fraud even if she intends to, and does, perform the required work. A student who obtains scholarship funds by materially misrepresenting his qualifications commits fraud even though the grantor pays no more than it would have if the scholarship had gone to someone else. And a contractor commits fraud if it obtains a lucrative contract by materially misrepresenting its qualifications, whether or not the client can prove that she could have secured better or cheaper work had the fraud not occurred. See, *e.g.*, *United States* v. *Leahy*, 464 F.3d 773, 787-789 (7th Cir. 2006) (rejecting challenge to sufficiency of indictment where defendants falsely represented critical qualifications in order to obtain government contracts, despite defendants' argument that the victim received "a service worth every dime in the contracts"). In these examples, whether or not the victims got fair value in a pocketbook sense, they have been cheated out of a fundamental aspect of what they sought to acquire.

B. The Right-To-Control Theory, Appropriately Limited, Identifies Cases Of Property Fraud Involving Fraudulent Inducement To Enter Into A Transaction

Over several decades, the Second Circuit has developed what it calls the "right to control" theory of fraud. Petitioner (and respondents and amici supporting him) criticize that theory by asserting that it "cannot be

squared with what the wire fraud statute requires: deprivation of a traditional property interest." Pet. Br. 15 (emphasis omitted). They maintain, in particular, that the right to control property is not itself the sort of "property" protected by the fraud statutes. The Second Circuit has not always been consistent in its articulation of the requirements of the right-to-control theory, or in its efforts to ground those requirements in the elements of fraud. And to the extent that language in the court's opinions might suggest that depriving a victim of economically valuable information, without more, necessarily qualifies as "obtaining money or property" within the meaning of the fraud statutes, that is incorrect. Those statements do not, however, reflect the core of the cases in which the Second Circuit has applied the right-to-control theory.

Instead, the theory is typically applied in cases like this one, where the defendant obtains money or other consideration that indisputably fits any definition of "property," by fraudulently inducing the victim to enter into a transaction. In such cases, the money or other consideration in the transaction ordinarily satisfies the "obtaining money or property" element because the whole point of the scheme is to obtain that consideration. See, *e.g.*, *United States* v. *Binday*, 804 F.3d 558, 585 (2d Cir. 2015) (noting that "commission payments" "'were the 'money or property' implicated by the scheme'") (citation omitted), cert. denied, 579 U.S. 917 and 579 U.S. 918 (2016). And although the Second Circuit has most often described the right to control one's assets as a form of property, the requirements of the right-to-control theory are best understood as identifying those fraudulent inducements that satisfy the other elements of the fraud statutes—chiefly, materiality.

Understood in that way, the right-to-control theory, when appropriately limited, serves to identify fraudulent inducements that violate the federal fraud statutes.

1. The money or other consideration in the transaction at issue in a right-to-control case ordinarily satisfies the statute's "money or property" element

Petitioner contends (Br. 12) that the Second Circuit's right-to-control theory "depart[s] from traditional concepts of fraud," principally focusing on the Second Circuit's description of that theory as resting on a "property" right to "control" the disposition of one's assets, see Pet. Br. 12-35. Petitioner asserts that "the federal fraud statutes reach only schemes to deprive a victim of a *traditional* property interest," Br. 10, and that neither "the deprivation of a right to make informed economic decisions" nor the "purported deprivation of a property interest in controlling one's assets," Br. 15, qualifies as such an interest.

This Court's decisions provided a doctrinal footing for the Second Circuit's view that "property interests * * * include the interest of a victim in controlling his or her own assets." *Binday*, 804 F.3d at 570 (citation omitted). The Court has explained, for example, that it is "elementary" that "[p]roperty is more than the mere thing which a person owns," but also "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917) (citing 1 William Blackstone, *Commentaries* 134 (1765)). If, however, the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of "property" giving rise to wire fraud, it would risk expanding the federal fraud

statutes beyond property fraud as defined at common law and as Congress would have understood it.

But petitioner errs in suggesting that the intangible right to control one's assets is the only form of property implicated in cases covered by the right-to-control theory. The theory is typically applied when the defendant fraudulently induces the victim to enter into a contract or other transaction. Indeed, the Second Circuit has made clear that the theory requires a showing that the defendant's misrepresentations deprived the victim " 'of potentially valuable economic information' " in the context of a victim's decision to "enter[] into a discretionary economic transaction." *Binday*, 804 F.3d at 570 (citation omitted); see J.A. 41 (jury instructions focusing on the "transaction" in this case). And when such misrepresentations are intended to cause a victim to enter into a transaction in which money is paid or other property is provided to the defendant or his coconspirators, the scheme satisfies the "obtaining money or property" element wholly apart from any intangible right of control: The very object of the scheme is to obtain the money paid under the contract.

2. The right-to-control theory seeks to identify actionable fraudulent inducements by requiring a showing of tangible economic harm

Although the Second Circuit has treated the "right to control" as a form of property, the court has explained the ultimate function and purpose of the right-to-control theory in a manner distinct from the need to ensure that a fraud involves "money or property." For the Second Circuit, the theory serves to distinguish "between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—

and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *Binday*, 804 F.3d at 570 (citation omitted).

As the theory has developed through its application to particular cases, the Second Circuit has identified the risk of tangible economic harm as a key distinction between the two scenarios. The Second Circuit's requirement of actual or contemplated tangible economic harm goes beyond what the fraud statutes require. But applied in combination with the theory's other requirements, it enables the right-to-control theory to reach only conduct that satisfies the required elements of a property interest, material misrepresentations, and fraudulent intent.

a. In a recent synthesis of its caselaw, the Second Circuit made clear that the "common thread of [its] decisions is that misrepresentations or non-disclosure of information cannot support a conviction under the 'right to control' theory unless those misrepresentations or non-disclosures can or do result in tangible economic harm." *United States* v. *Finazzo*, 850 F.3d 94, 111 (2017). In other words, the scheme must "contemplate[] some actual, cognizable harm or injury to the[] victims." *Id.* at 107 n.15.

Addressing its earlier, less specific descriptions of the right-to-control theory, the Second Circuit explained that the previously articulated requirement to "[d]epriv[e] a victim of 'potentially valuable' information" that is "'economic'" in nature is best understood to encompass only conduct that "*necessarily* creates a risk of tangible economic harm." *Finazzo*, 850 F.3d at 111 (citation omitted). And the court explicated

how an economic-harm requirement limits the theory's application overall. *Ibid.*

Petitioner contends (Br. 40) that "tangible harm under the right-to-control theory" is nothing more than "the deprivation of information that could influence economic decisionmaking." Accord Aiello Br. 28. But the theory does not consider "the information *itself*" to be property. *United States* v. *Viloski*, 557 Fed. Appx. 28, 33 (2d Cir. 2014) (finding jury instruction consistent with theory because it did not define property that way), cert. denied, 575 U.S. 935 (2015); see *United States* v. *Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994) (holding that "lack of information that might have an impact on the decision regarding where government money is spent, without more, is not a tangible harm"), cert. denied, 513 U.S. 1084 (1995). Instead, the "deprivation of information" must "*lead* to tangible harm." *Viloski*, 557 Fed. Appx. at 34 (emphasis added).

Citing scenarios in which the victim is clearly deprived of the benefit of its bargain, the Second Circuit has explained that the requisite "economic harm can be manifested directly—such as by increasing the price the victim paid for a good—or indirectly—such as by providing the victim with lower-quality goods than it otherwise could have received." *Finazzo*, 850 F.3d at 111. Accordingly, the court has suggested that, for example, "the 'right to control' theory would not be applicable" to a retail supplier who falsifies his identity merely to avoid "inter-personal animus" that would otherwise preclude a sale. *Id.* at 111 n.18. Instead, the Second Circuit has suggested such identity falsification would allow for fraud liability under the right-to-control theory only, for example, if the misrepresentation enabled the supplier "to charge the retailer higher prices,"

or concealed a fact that would "anger[] * * * customers" of the retailer, cause "reputational harm," and "could lead or did lead to economic losses." *Ibid.*

b. Limited in that manner, the "tangible economic harm" requirement enables the right-to-control theory to capture fraudulent-inducement cases that meet all of the elements of property fraud.

First, although the Second Circuit has not itself generally described its approach this way, a showing of "tangible economic harm" will typically focus attention on a particular subcomponent of the "money or property" that is the object of the scheme. For example, in many cases involving tangible economic harm, the defendant's scheme to obtain money in the form of a contract payment will necessarily encompass a scheme to obtain *extra* payment—namely, the delta between a fair price and the one that was charged. See, *e.g.*, *Black's Law Dictionary* 649 (11th ed. 2019) (defining "economic loss" as "[a] monetary loss"). Such overcharging cases are a classic form of property fraud. See, *e.g.*, *Schmuck* v. *United States*, 489 U.S. 705, 707 (1989) (describing sale of cars "for prices artificially inflated because of [falsified] low-mileage readings" as "a common and straightforward" fraud); *United States* v. *New S. Farm & Home Co.*, 241 U.S. 64, 71 (1916) (recognizing that "assign[ing] to [an] article qualities which it does not possess," including "the use to which it may be put, the purpose it may serve," is fraudulent).

Second, focusing on the potential for economic harm also helps to confine the right-to-control theory to schemes that satisfy the materiality requirement. The Second Circuit has described the right-to-control inquiry as turning on "whether the defendant's deception 'affect[ed] the very nature of the bargain.'" *United*

States v. *Johnson*, 945 F.3d 606, 612 (2019) (describing that inquiry as part of the intent-to-defraud element) (citation omitted; brackets in original), cert. denied, 141 S. Ct. 687 (2020); see *ibid.* (citing other Second Circuit decisions). That formulation is consistent with a traditional definition of materiality in the contracting context as assessing whether the misrepresentation "went to the very essence of the bargain." *Universal Health Servs.,* 579 U.S. at 193 n.5 (citation omitted).

The Second Circuit has accordingly recognized at times that the right-to-control theory functions as an application of property fraud's materiality requirement. See, *e.g.*, *United States* v. *Jabar*, 19 F.4th 66, 82 n.60 (2d Cir. 2021) (observing that the "right to control theory" "turns on the materiality of the misrepresentations"), cert. denied, 142 S. Ct. 1396 (2022); see also Pet. Br. 39 (noting that "some of the early right-to-control cases" focus on "the deprivation of 'economically material information'") (citation omitted). And petitioner himself endorses the view (Br. 39) that "a false statement that could affect economic decisions will always satisfy th[e] standard" for materiality. Accord Chamber of Commerce Amicus Br. 2 (asserting that the right-to-control theory "is indistinguishable from the materiality requirement").

Finally, the Second Circuit's focus on tangible economic harm has informed its articulation of the fraudulent-intent element of property fraud, which the court has described as requiring "'that defendants contemplated some actual, cognizable harm or injury to their victims' by deceiving them." *Johnson*, 945 F.3d at 614 (quoting *Finazzo*, 850 F.3d at 107 n.15). That articulation, although narrower than what this Court's precedents require, plainly identifies one way of satisfying

the fraud statutes' more general intent-to-defraud element. Petitioner's contention (Br. 40) that, under the right-to-control theory, "an economically relevant deception will always establish fraudulent intent" is misplaced. The intent element in such cases imposes an additional *mens rea* requirement beyond a harmful deception: the deception must be intentional, not accidental. See *Johnson*, 945 F.3d at 614 (defendant must "contemplate[ ]" harm to victim) (citation omitted); see also *Finazzo*, 850 F.3d at 108 (approving jury instructions stating that "To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive.") (citation omitted). The intent element therefore plays the same role under the right-to-control theory that it plays in other fraud cases, separating deliberate wrongdoers from those who may innocently utter falsehoods.

C. Petitioner Committed Property Fraud By Scheming To Obtain Money Through Lies About Key Features Of The Process That Positioned His Company To Receive That Money

In seeking this Court's review, petitioner explicitly disclaimed any challenge to "the adequacy of the jury instructions" and emphasized that his sole claim in this Court is that the evidence was insufficient to support his wire fraud convictions. Cert. Reply Br. 3 ("This petition focuses on the sufficiency issue alone."). In assessing sufficiency challenges, this Court does not consider the jury instructions, but instead simply asks whether the evidence was sufficient to carry the government's burden on each of the "elements of the charged crime." *Musacchio* v. *United States*, 577 U.S. 237, 243 (2016).

Petitioner does not dispute that the evidence was sufficient under the Second Circuit's right-to-control theory, instead arguing only that the theory is invalid. But even absent the right-to-control lens, the evidence readily supports petitioner's convictions on a straightforward application of the elements of property fraud. The use of the interstate wires in petitioner's scheme satisfied every element of property fraud: It was a scheme to obtain money or property, employing material misrepresentations, with an intent to defraud. In addition, although the wire-fraud statute does not require it, the evidence was also sufficient to show that petitioner's scheme contemplated tangible economic harm to Fort Schuyler.

1. Petitioner schemed to obtain Fort Schuyler's property by securing hundreds of millions of dollars in contract funds

Petitioner's scheme sought to "obtain[ ]" Fort Schuyler's "money or property," 18 U.S.C. 1343. The fundamental "object of the fraud," *Kelly*, 140 S. Ct. at 1573 (quoting *Pasquantino*, 544 U.S. at 355), was obtaining the contract funds for petitioner's company. And the direct result of the scheme's design was that Fort Schuyler literally paid "money," 18 U.S.C. 1343, to petitioner's company. Petitioner thereby sought to obtain, and succeeded in obtaining, a contract that was ultimately worth $750 million. C.A. App. 1038, 1172. And he personally received a portion of that payment as profits. See Consent Prelim. Order of Forfeiture as to Specific Property/Money Judgment, D. Ct. Doc. 980, at 2 (Feb. 11, 2019).

The three quarters of a billion dollars in contract funding, including the portion of it that petitioner per-

sonally received, readily qualify as "money or property." 18 U.S.C. 1343. They were "'property' in the victim's hands," *Pasquantino*, 544 U.S. at 355 (quoting *Cleveland*, 531 U.S. at 26), as well as in petitioner's hands, see, *e.g.*, *id.* at 356 ("The right to be paid money has long been thought to be a species of property.") (citing Founding-era treatises). And as previously discussed, see pp. 16-17, *supra*, whether paid out under a contract or otherwise, the "obtaining" of "money," 18 U.S.C. 1343, unambiguously satisfies the relevant statutory requirement. Here, "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." Pet. Br. 32 (quoting *Skilling*, 561 U.S. at 400).

2. Petitioner's scheme relied on material misrepresentations, essential to the bargain, that his company was competitively and fairly identified as the best

a. Petitioner did not obtain the $750 million contract honestly. Instead, he worked extensively with Kaloyeros to turn the process of selecting a preferred developer for Buffalo into a sham procedure that would result in LPCiminelli's selection. See, *e.g.*, Pet. App. 8a-9a. Meanwhile, Kaloyeros falsely assured others involved in the request for proposals that the process was competitive, stating that Fort Schuyler could neither "endorse nor support a pre-cooked process or any process that singles out anyone * * * for business before the RFP process has been completed." C.A. Supp. App. 738.

LPCiminelli's bid for preferred-developer status, in turn, represented that LPCiminelli had not "retained, employed or designated" anyone "to attempt to influence the procurement process." C.A. App. 1884. And when nailing down the details of the Riverbend project,

LPCiminelli signed both a memorandum of understanding and a subsequent notice to proceed with Fort Schuyler, each of which stated that LPCiminelli had been selected as a preferred provider after "a competitive bidding process." J.A. 125; see J.A. 115 ("competitive process").

All of those statements were false because the bidding process was not, in fact, competitive. The entire purpose of tailoring the request for proposals to LPCiminelli's qualifications was to "[p]revent [others] from competing," an approach that was obviously not "consistent with a fair and competitive RFP process." J.A. 69-70 (testimony of LPCiminelli employee); see C.A. App. 1209.

b. The coconspirators' misrepresentations did not concern a low-stakes matter, but were instead material to Fort Schuyler's decision to award funds to LPCiminelli, as well as the means by which LPCiminelli obtained those funds. A fair bidding process "was an essential element of the bargain," Pet. App. 22a, because it was critical to Fort Schuyler's economic interest in obtaining a bid that provided the best performance at the lowest cost.

As the court of appeals found, Fort Schuyler "relied on [the request for proposals] process to achieve its economic objective—selecting the lowest-priced or best-qualified vendor." Pet. App. 18a. The claim that LPCiminelli had already been competitively identified as the best developer was an essential aspect of Fort Schuyler's agreement with LPCiminelli for the Riverbend project, on what appeared in isolation to be reasonable contract terms, without assessing whether other contractors might have provided better or lower-cost services for that project.

The thrust of petitioner's deception was thus akin to a scheme in which a hired recruiter and his hand-picked candidate falsely assure a would-be employer that the candidate has been competitively identified as the most suitable, when in fact they colluded to select the candidate without actual consideration of her suitability. Insofar as the process to identify the best candidate was critical to the employer's willingness to negotiate to hire her, without comparing her to others, the agreed-upon wages (even if in themselves reasonable) were obtained by means of a material misrepresentation.

The analogous misrepresentation here was plainly critical to Fort Schuyler. As a preferred developer, LPCiminelli (along with its handpicked partner) received the exclusive ability to noncompetitively agree to a contract with Fort Schuyler on what might appear to be reasonable terms, even if they were not actually the best balance of price and performance. See Pet. App. 19a; J.A. 111-112; C.A. App. 1215-1216 (noting that there was no second request for proposals specific to the Riverbend project), 1231 (testifying that winning the request for proposals "guaranteed you the right to negotiate"). Fort Schuyler's willingness to hand LPCiminelli a contract without shopping around for better Riverbend bids turned on Fort Schuyler's wholly mistaken belief that LPCiminelli had already been competitively vetted and selected as the best potential partner for the project. In reality, however, the preferred-developer designation had been gift-wrapped for LPCiminelli, without the meaningful competition that was the linchpin of forgoing a traditional bid-solicitation process in contracting for the Riverbend development.

From the very beginning of its resolution authorizing a request for proposals, Fort Schuyler made clear

that a competitive process was vital to its selection of a preferred developer. See J.A. 107 (stating that the preferred developer would be selected "[u]pon completion of a competitive RFP process"). Multiple witnesses—including several Fort Schuyler board members—testified about the importance of a competitive process "[t]o obtain the most qualified vendor to do the work at the most reasonable price." J.A. 57-58 (former chair of Fort Schuyler board); see, *e.g.*, J.A. 50 (testimony of different former board chair that "a competition" would "allow[] for comparing various aspects of an RFP, whether it's price or history or financial stability or innovation or technological expertise"), 63 (testimony of LPCiminelli employee that "the competition will give you the best people on the job, the opportunity to kind of see what company can actually provide you in the manner that you want the best service and potentially the best price"), 85 (testimony of former Fort Schuyler board member that competition "is important" because it "brings quality and value to a RFP"). The misrepresentations about that process were accordingly essential to the bargain—and therefore material.

c. Notwithstanding the uncontested evidence of the central importance of a competitive process, petitioner suggests (Br. 8) that his misrepresentations were too attenuated to be material, because they concerned the process for selecting the preferred developer rather than the specific details of the Riverbend contract. The court of appeals correctly rejected that argument, which is refuted by the record. The competitive nature of the selection of a preferred developer was an essential feature of the Riverbend contract itself, expressly specified in both the memorandum of understanding and the notice to proceed for that project. J.A. 115, 125.

The competitive-vetting qualification was the essential prerequisite for Fort Schuyler's willingness to come to terms with LPCiminelli on the Riverbend contract without soliciting other bids. Fort Schuyler did not seek other Riverbend bids because LPCiminelli's proposal appeared to be a reasonable one and because Fort Schuyler believed it was securing the participation of the developer who had already been competitively identified as the one best-suited to meet its needs. As the court of appeals explained (Pet. App. 19a), walking away and incurring the considerable cost of effectively starting over at the point of the exclusive negotiation was highly unlikely. The trial testimony accordingly showed that both parties viewed the request-for-proposals process as the principal tool for awarding the Riverbend contract. See, *e.g.*, J.A. 48 (Q. "What type of process was used to select a builder for Riverbend?" A. "In this case it was the selection of a preferred developer."); C.A. App. 1208 (characterizing the "[B]uffalo developer R/P" as the "Riverbend procurement"), 1216 ("Riverbend was part of" the request for proposals). Moreover, any clear distinction between the request-for-proposals process and the subsequent contracting stage is untenable given Kaloyeros's personal oversight of contract negotiations. See C.A. App. 1020. The jury's evident rejection of petitioner's proffered distinction should be respected.

d. Because the right-to-control theory required a showing that the scheme contemplated tangible economic harm, the court of appeals did not address whether the misrepresentations were material to any noneconomic aspects of the transaction. But the definition of materiality, outside the specialized lens of the

right-to-control theory, can also encompass noneconomic considerations. See pp. 18-20, *supra*; see also Torts Restatement § 538 cmt. d. And here, the trial evidence made clear that petitioner's deception about the competitiveness of the process was material not only to Fort Schuyler's willingness to forgo solicitation of potentially lower Riverbend bids, but also to another fundamental aspect of what Fort Schuyler was paying for.

Independent of the economic advantages of a competitive process, Fort Schuyler—as an agent of the public—had a strong interest in a fair, transparent process. See, *e.g.*, J.A. 49 (testimony of state official that a "competitive and open process" was to "ensure public funds * * * are spent in a transparent and a competitive way"), 59 (testimony of former chair of Fort Schuyler board that tailoring the process "would be contrary to free and open competition, which is the basis of the policy for procurement"), 86 (testimony of former Fort Schuyler board member that "I wouldn't want a process that was in any way unfair or advantaged to any one person"). The existence of that process was critical to Fort Schuyler's willingness to hand over hundreds of millions of dollars in public funds.

To the extent that petitioner suggests (Br. 46) that such a noneconomic consideration is insufficient to support materiality in this context, that suggestion is misplaced. The critical materiality issue in cases that rely on noneconomic preferences is not, as petitioner would have it, whether a misrepresentation affects cost or functionality, see *ibid.*, but instead whether the victim receives something with the essential features of what he wanted. A brand-new Toyota Corolla may be the same in respect to cost and functionality irrespective of its color, but a buyer may care very deeply that she is

purchasing a blue one—and a seller would plainly commit fraud if he assured such a buyer that the car in question was blue when in fact it was red. See Torts Restatement § 538(2)(a)-(b) & cmt. d. Similarly, if a nonprofit university had a strong interest in supporting and being seen to support local businesses, an out-of-town supplier that secured a contract by falsely pretending to be local would commit fraud even if its products and price were as good as—or better than—what the university could have secured locally.

Here, Fort Schuyler had an analogous community-relationship interest, separate and apart from its direct financial interest, in ensuring a fair, "transparent" process. J.A. 49; see, *e.g.*, J.A. 59, 86. Among other things, that process allowed for public observation of a state agent's handling of a considerable amount of public funds. See, *e.g.*, J.A. 49, 59. Under black-letter materiality principles, the existence of that reasonable and evident interest would be sufficient even without the separate evidence of economic materiality.

3. Petitioner's scheme was intended to defraud by inducing reliance on the false representations about the nature of his company's preferred status

Finally, the evidence demonstrated that the participants in the scheme, including petitioner, acted with fraudulent intent. That evidence included e-mails "introduced at trial" showing petitioner and Kaloyeros "communicating with Howe on how to rig the RFP process." Pet. App. 22a. For example, Kaloyeros explicitly sought petitioner's input on how to "fine tune" the specifications for a preferred developer "to fit" LPCiminelli. C.A. App. 1593. To assist in tailoring those specifications, Kaloyeros asked petitioner for "company statistics (years in business, some key projects, including the

latest at Buffalo state, etc)," which LPCiminelli subsequently provided. C.A. Supp. App. 879; C.A. App. 1602-1613. The company then made multiple written representations that it had been selected in a competitive process—representations that were plainly intended to induce Fort Schuyler to enter into a $750 million contract. See J.A. 115, 125.

Nothing about that scheme, and what it accomplished, was inadvertent or accidental. Instead, it was fraudulent inducement of the sort that this Court has recognized for well over a century as a valid basis for a federal property-fraud conviction. See, *e.g.*, *Durland* v. *United States*, 161 U.S. 306, 313 (1896) (affirming mail-fraud conviction based on fraudulent inducement); *United States* v. *Sampson*, 371 U.S. 75, 77 (1962) (similar).

4. Petitioner's scheme contemplated economic harm to Fort Schuyler

Petitioner asserts (Br. 5) that "[t]he government offered no proof that * * * Fort Schuyler was deprived of a fair price, fair terms, or quality workmanship." "Nor," he asserts (Br. 5-6), "was there any evidence that Fort Schuyler could have obtained the same quality or a better price for the work from any other provider." See Pet. Br. 50; see also Kaloyeros Br. 5, 10; Aiello Br. 10-11, 35-36. But, again, this Court has emphasized that a victim " 'is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.' " *Shaw*, 580 U.S. at 67 (quoting *Rowe,* 56 F.2d at 749 (Hand, J.)). The Second Circuit's right-to-control precedents demand proof of economic harm, but a showing of actual or intended financial loss is not required under the wire-fraud statute. See pp. 21-23, 27-29, *supra*. And in any event, the

Second Circuit correctly held that petitioner's scheme satisfied an economic-harm requirement.

Petitioner's scheme contemplated inflicting "tangible economic harm" on Fort Schuyler. *Finazzo*, 850 F.3d at 111. A central goal of the process for identifying a preferred developer was to ensure that Fort Schuyler secured the most competitive bid, balancing price and qualifications. See pp. 34-36, *supra*. And the entire purpose of petitioner's bid-rigging scheme was to "[p]revent [others] from competing," J.A. 69, such that LPCiminelli could obtain for itself an economic benefit that included the delta between its contract with Fort Schuyler and the contract that might have resulted from a competitive process.

The jury here was instructed that it had to find a "tangible economic harm," such as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received," J.A. 42, and the jury's finding on that point was amply supported by the trial record. The government presented evidence that developers competed over the fees that they would charge for managing a construction project, and that it was "better for [LPCiminelli] to battle on qualifications rather than quantitative things like price" because it was "not always the low cost," J.A. 66-67; see Pet. App. 21a n.8; J.A. 81-82, 94-95, 102. That evidence "demonstrated that [the] defendants contemplated economic harm by preventing Fort Schuyler from fairly considering bids in a marketplace where lower prices might have been available." Pet. App. 34a.

The government also presented evidence that, "absent the fraud, Fort Schuyler would have considered more, and perhaps stronger, applications in response" to its solicitation of applications for preferred-developer

status. Pet. App. 20a n.8. "One representative from a rival company testified that he considered submitting a bid for the Buffalo RFP but decided not to because aspects of the RFP * * * left him with the impression that the project 'was being steered towards a local competitor.'" *Ibid.* (quoting J.A. 78). Had petitioner and his coconspirators not fraudulently rendered the process noncompetitive, Fort Schuyler "might have selected a preferred developer who could offer more favorable economic terms for development contracts than Fort Schuyler eventually negotiated." *Ibid.* Similarly, had they not falsely claimed that the process was in fact competitive, Fort Schuyler would not have bound itself to provide LPCiminelli (and its handpicked partner) with the ability to come to terms on a final contract without competing bids that might have offered acceptable services at lower cost.

Petitioner asserts (Br. 9 n.3) that this evidence "was not admitted to show that [other] firms would have offered lower fees on the Buffalo project." But actual damages are not an element under the wire-fraud statute. See *Neder,* 527 U.S. at 24-25. And even in the absence of direct evidence on the fees that other developers would have charged on the Riverbend project specifically, the jury could have inferred that the *object* of the scheme in this case was for LPCiminelli to profit at Fort Schuyler's expense by insulating itself from economic competition. See C.A. App. 1183-1184, 1192, 1575-1577, 1619; C.A. Supp. App. 877.

Petitioner also asserts (Br. 50) that "[t]he charged scheme did not depend on a showing that the defendants schemed to cause Fort Schuyler harm by deceiving it about * * * any * * * feature of their performance of their end of the bargain." But petitioner did not need

to tell lies about discrete aspects of LPCiminelli's performance, because the scheme had already deceived Fort Schuyler into believing that LPCiminelli offered the best all-around package as a "strategic development partner," vetted by a competitive bidding process. Pet. App. 7a. At that point, the outcome of the bargaining process was "pre-cooked," C.A. Supp. App. 738, such that petitioner could secure a payment that looked reasonable in a vacuum, rather than one that reflected true market competition.

D. Petitioner's Policy Concerns Are Misplaced

Petitioner, the respondents supporting him, and their amici raise a variety of policy concerns centered on perceived overcriminalization. *E.g.*, Pet. Br. 47. But such policy concerns could not justify the atextual and ahistorical limits that petitioner seeks to read into the fraud statutes. And in any event, the concerns that petitioner raises are overstated.

1. Traditional property-fraud doctrine already includes a number of principles that limit the scope of the federal fraud statutes. As an initial matter, petitioner's concern that the federal fraud statutes have become untethered from "traditional interests," and "inherently vague," Pet. Br. 26-27, is misplaced. No vagueness concern would arise from the recognition that a defendant schemes to "obtain[] money or property," 18 U.S.C. 1343, when he tries to secure contract funds. And in the context of the right-to-control theory, the "tangible economic harm" requirement, strictly applied, see *Finazzo*, 850 F.3d at 111, will identify classic instances of fraud, such as cases in which the defendant overcharged the victim.

A "demanding" and "rigorous" materiality standard, *Universal Health Servs.*, 579 U.S. at 192, 194, also limits

the property-fraud statutes' reach in this context. Where, for example, materiality turns on a particular victim's idiosyncratic preference, such as a preference to sell only to those who will treat the purchased item in a particular manner, that preference must be evident up front. See Torts Restatement § 538(2)(b). In addition, not every misrepresentation can be deemed to concern "the very essence of the bargain." *Universal Health Servs.,* 579 U.S. at 193 n.5 (citation omitted). For example, falsely claiming to share an alma mater, or a favorite professional hockey team, with the contracting agent may grease the skids for a vendor's selection, but would not likely be material to the bargain. Similarly, a contracting party's false agreement to comply with a contractual requirement, if it did not disturb the core of the bargain, likely would not be material. See *id.* at 195.

Application of the materiality standard will, of course, depend on the facts of specific cases, but the lengthy historical pedigree of factual findings on materiality illustrates that the concept is not unduly amorphous, incapable of consistent application, or substantively uncabined. See, *e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 512 (1995) (describing fraud precedents as having "recognized * * * that the materiality inquiry * * * 'is peculiarly one for the trier of fact' ") (brackets and citation omitted). And the intent-to-defraud element of the statute serves to ensure that the statute does not serve as a trap for the unwary or the innocent. See *United States* v. *Williams*, 553 U.S. 285, 294 (2008).

In addition, given "the presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the" federal fraud statutes, *Neder*, 527 U.S. at 23 n.7, common-law doctrines not at issue here may further constrain the application of those statutes.

For example, petitioner suggests that the government's theory would permit prosecution of "[t]ough negotiations." Pet. Br. 11; see Aiello Br. 36-39. But information about a party's negotiating position, such as what price the party is willing to pay or accept, has traditionally been excluded from the definition of fraud. See, *e.g.*, 1 Story § 199, at 201-203 (quoting *Vernon* v. *Keys*, (1810) 104 Eng. Rep. 246, 249 (K.B.)).

Similarly, statements of opinion (as opposed to fact) generally do not constitute material misrepresentations, with few exceptions. See, *e.g.*, 1 Story § 197, at 199-200; see also *Omnicare, Inc.* v. *Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 197-199 (2015) (Scalia, J., concurring in part and concurring in the judgment) (discussing the limited circumstances in which an opinion was actionable at common law). And "[p]uffery"—"exaggerated and vague statements * * * praising" a product or service—also typically do not qualify. 3 Dobbs § 676; see *New S. Farm & Home Co.*, 241 U.S. at 71.

2. Petitioner's portrayal (Br. 43-47) of the court of appeals' "right to control" theory as inconsistent or overbroad does not meaningfully account for the court's requirement that misrepresentations "cannot support a conviction under the 'right to control' theory unless those misrepresentations * * * can or do result in tangible economic harm." *Finazzo*, 850 F.3d at 111; see pp. 27-31, *supra*. To the extent that the economic-harm component was insufficiently described in the earlier circuit precedent on which petitioner primarily relies, the court's more recent decisions in *Binday* v. *United States* and *Finazzo* v. *United States* clarify the landscape. In any event, because petitioner's own conduct

was illegal under longstanding, uncontested fraud doctrine, upholding his convictions would neither violate the rule of lenity nor threaten to federalize "a wide range of conduct traditionally regulated by state and local authorities." *Cleveland*, 531 U.S. at 24; contra, *e.g.*, Pet. Br. 47-49; Aiello Br. 1; Law Professors Amicus Br. 16-24.

Petitioner also errs in asserting (*e.g.*, Pet. Br. 36-37) that affirmance here would enable the government to "circumvent" this Court's holdings in *McNally* v. *United States* and *Skilling* v. *United States*, which bar prosecutions for honest-services fraud, including under the honest-services statute, 18 U.S.C. 1346, in the absence of bribes or kickbacks. Accord Kaloyeros Br. 16-35. As respondent Kaloyeros acknowledges (Br. 26), those cases did not involve a property theory (as opposed to an honest-services theory) of fraud, and the Court did not foreclose application of a property theory in a particular case where the requisite facts are proved. See *McNally*, 483 U.S. at 360-361; see also *Skilling*, 561 U.S. at 367-368.

Contrary to petitioner's suggestion (Br. 36), moreover, nothing in this case implies that the government could "reframe virtually any undisclosed conflict of interest as a money-or-property fraud." This case does not involve an "undisclosed conflict of interest." *Ibid.* Instead, it involves repeated affirmative misrepresentations that the preferred-developer selection process was competitive, when in fact it was not. Those misrepresentations were included in written agreements between the parties and concerned a component of the transaction that was built into the contracting procedure and indispensable to Fort Schuyler. See, *e.g.*, J.A. 107, 115, 125; C.A. Supp. App. 738. Those circumstances

are far afield of the omission-based cases in petitioner's parade of horribles, see, *e.g.*, Pet. Br. 37 (hypothesizing, for example, "an attorney who fails to disclose a potential conflict of interest to a prospective client"), which implicate various limitations on fraud that are not relevant here.

Without a "duty to speak," a "nondisclosure" may well not be fraudulent in the first place. *Chiarella*, 445 U.S. at 235. In addition, while the misrepresentations in this case were material, it is unclear that the alleged omissions in many of petitioner's hypotheticals would be. In many cases where a victim receives fair value in a transaction, as was assumed to be the case in *McNally*, a misrepresentation will not have gone to an essential element of the bargain. Furthermore, the structure of many honest-services frauds also differs from the fraud here. *Skilling*, for example, involved a scheme that "was not 'prototypical,'" in which the defendant schemed to increase the value of his own portfolio by deceptively inflating his employer's stock price. 561 U.S. at 413 (citation omitted). Here, in contrast, "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Id.* at 400. Fort Schuyler paid hundreds of millions of dollars, and LPCiminelli obtained those funds.

The statutory "by means of" requirement, 18 U.S.C. 1343, provides another "significant textual limitation" that would be relevant to convoluted self-dealing schemes. *Loughrin,* 573 U.S. at 362 (emphasis omitted). That textual limitation requires more than "but-for caus[ation]"; it "demands that the defendant's false statement is the mechanism naturally inducing a [victim] to part with its money." *Id.* at 364-365; see *id.* at 363 (observing that the requirement is satisfied "most

clearly" when "the defendant seeks to obtain bank property by means of presenting the forgery directly to a bank employee"). If the relationship between an omission (or affirmative misrepresentation) and obtaining the property that is the object of a fraud is "too 'tangential,'" *id.* at 363 (brackets and citation omitted)—as it may well be in self-dealing cases, particularly those not already prosecutable as honest-services fraud—then it will not support a property-fraud prosecution.

At all events, any well-founded concerns about the reach of the fraud statutes are best addressed in a case that, unlike this one, actually presents them. Far from approaching the edges of the statute, this case concerns a successful scheme by petitioner to obtain $750 million in contract funding, charging more than a competitor might have, by lying about his manipulation of the bidding process to reduce competition for that contract. Because petitioner's fraud convictions satisfy every element of property fraud, they can and should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

OCTOBER 2022

21-1158 PERCOCO V. UNITED STATES

DECISION BELOW: 13 F.4th 180

LOWER COURT CASE NUMBER: 18-2990, 18-3710, 19-1272

QUESTION PRESENTED:

Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?

CERT. GRANTED 6/30/2022

No. 21-1158

IN THE

Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONER

BARRY A. BOHRER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.
666 Third Ave.
New York, NY 10017

MICHAEL L. YAEGER
CARLTON FIELDS, P.A.
405 Lexington Ave., 36th Floor
New York, NY 10174

YAAKOV M. ROTH
Counsel of Record
BRINTON LUCAS
BRETT WIERENGA
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th St.
Minneapolis, MN 55402

Counsel for Petitioner

QUESTION PRESENTED

Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant-Appellant in the Second Circuit, is Joseph Percoco.

Steven Aiello was also a Defendant-Appellant in the Second Circuit and, pursuant to Rule 12.6 of this Court's Rules, is a Respondent herein.

Respondent, who was the Appellee in the Second Circuit, is the United States.

Joseph Gerardi, Louis Ciminelli, and Alain Kaloyeros were also Defendants-Appellants in the Second Circuit. Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler were Defendants in the district court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINION BELOW 4
JURISDICTION 4
PROVISION INVOLVED 4
STATEMENT 4
- A. The Honest-Services Doctrine 5
- B. The *Margiotta* Theory 8
- C. The Underlying Facts 13
- D. The Indictment and Trial 15
- E. The Second Circuit's Decision................. 17

SUMMARY OF ARGUMENT 18
ARGUMENT 21

I. *MARGIOTTA* WAS WRONG FROM ITS INCEPTION 21
- A. Private Citizens Owe No Duties To Act in the Public Interest.................... 21
- B. Reliance and Control Do Not Generate a Duty To Provide Honest Services 24

TABLE OF CONTENTS
(continued)

Page

II. *MARGIOTTA* IS NOW ALSO FORECLOSED BY THIS COURT'S PRECEDENTS 29

A. *Skilling* Shut the Door on Novel Theories of Honest-Services Fraud 29

B. *McDonnell* Limited Federal Bribery Law to the Sale of Official Powers........... 34

III. *MARGIOTTA* OFFENDS CONSTITUTIONAL NORMS 38

A. The Second Circuit's Standard Chills First Amendment Activity 38

B. The Second Circuit's Standard Interferes with State Prerogatives.......... 42

C. The Second Circuit's Standard Is Vague, Open-Ended, and Subject to Abuse 44

IV. REJECTING *MARGIOTTA* REQUIRES REVERSAL 47

CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

CASES

Ams. for Prosperity Found. v. Bonta,
141 S. Ct. 2373 (2021) 41

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,
564 U.S. 721 (2011) 41

Carpenter v. United States,
484 U.S. 19 (1987) 22

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 28

Cheese Shop Int'l, Inc. v. Steele,
303 A.2d 689 (Del. Ch. 1973) 26

Citizens United v. FEC,
558 U.S. 310 (2010) 39, 41, 42

City of Columbia v. Omni Outdoor Advert., Inc.,
499 U.S. 365 (1991) 38

City of Hope Nat'l Med. Ctr. v. Genentech, Inc.,
181 P.3d 142 (Cal. 2008) 24

Dixson v. United States,
465 U.S. 482 (1984) 36, 37

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 46

Gentile v. State Bar of Nev.,
501 U.S. 1030 (1991) 47

TABLE OF AUTHORITIES
(continued)

Page(s)

Gregory v. Ashcroft,
501 U.S. 452 (1991) 42

Hall v. Schoenwetter,
686 A.2d 980 (Conn. 1996) 24

In re Jennings' Est.,
55 N.W.2d 812 (Mich. 1952) 27

Kelly v. United States,
140 S. Ct. 1565 (2020) 43

Lee v. LPP Mortg. Ltd.,
74 P.3d 152 (Wyo. 2003) 25

Loving v. United States,
517 U.S. 748 (1996) 22

McCormick v. United States,
500 U.S. 257 (1991) 40

McCutcheon v. FEC,
572 U.S. 185 (2014) 40

McDonnell v. United States,
579 U.S. 550 (2016) 3, 17, 19, 29, 34, 35, 36, 37, 38, 41, 42, 43, 44, 47, 48

McNally v. United States,
483 U.S. 350 (1987) 6, 7, 8, 12, 17, 19, 21, 29, 30, 32, 33, 44, 45, 46

Mobil Oil Corp. v. Rubenfeld,
339 N.Y.S.2d 623 (Civ. Ct. 1972) 26

TABLE OF AUTHORITIES
(continued)

Page(s)

Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545 (2014) 38

Regions Bank v. Schmauch, 582 S.E.2d 432 (S.C. Ct. App. 2003) 25

Shushan v. United States, 117 F.2d 110 (5th Cir. 1941) 5

Skilling v. United States, 561 U.S. 358 (2010) 3, 5, 7, 8, 19, 21, 29, 30, 31, 32, 33, 36, 37, 46

Sorich v. United States, 555 U.S. 1204 (2009) 7

Trs. of Jesse Parker Williams Hosp. v. Nisbet, 14 S.E.2d 64 (Ga. 1941) 27

United States v. Adler, 274 F. Supp. 2d 583 (S.D.N.Y. 2003) 2, 12, 31

United States v. Birdsall, 233 U.S. 223 (1914) 35

United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980) 6

United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc) 27, 28

United States v. Frost, 125 F.3d 346 (6th Cir. 1997) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. George,
477 F.2d 508 (7th Cir. 1973) 6

United States v. Gray,
790 F.2d 1290 (6th Cir. 1986) 12

United States v. Harriss,
347 U.S. 612 (1954) 23

United States v. Holzer,
840 F.2d 1343 (7th Cir. 1988) 12, 30

United States v. Isaacs,
493 F.2d 1124 (7th Cir. 1974) 5

United States v. Kenney,
185 F.3d 1217 (11th Cir. 1999) 36

United States v. Mandel,
591 F.2d 1347 (4th Cir. 1979) 5, 21

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982) 2, 3, 5, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

United States v. Margiotta,
811 F.2d 46 (2d Cir. 1982) 12

United States v. McClain,
934 F.2d 822 (7th Cir. 1991) 39, 40

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Murphy,
323 F.3d 102 (3d Cir. 2003) 12, 22, 31, 49

United States v. Ochs,
842 F.2d 515 (1st Cir. 1988) 33

United States v. Procter & Gamble Co.,
47 F. Supp. 676 (D. Mass. 1942)............................6

United States v. R.L.C.,
503 U.S. 291 (1992)...37

United States v. Reed,
601 F. Supp. 685 (S.D.N.Y.)................................25

United States v. Rooney,
37 F.3d 847 (2d Cir. 1994) 49

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) (en banc) 27

United States v. Silver,
948 F.3d 538 (2d Cir. 2020) 48

United States v. Smith,
985 F. Supp. 2d 547 (S.D.N.Y. 2014)............12, 30

United States v. Sorich,
523 F.3d 702 (7th Cir. 2008)..................................7

United States v. Sprague,
282 U.S. 716 (1931)...22

United States v. Sun-Diamond Growers of Cal.,
526 U.S. 398 (1999)...44

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Thomas,
240 F.3d 445 (5th Cir. 2001) 36

United States v. Urciuoli,
513 F.3d 290 (1st Cir. 2008) 35

United States v. Warner,
292 F. Supp. 2d 1051 (N.D. Ill. 2003) 12, 31

Yenchi v. Ameriprise Fin., Inc.,
161 A.3d 811 (Pa. 2017) 25

Zastrow v. Journal Commc'ns, Inc.,
718 N.W.2d 51 (Wis. 2006) 24, 26

STATUTES

18 U.S.C. § 201 .... 34, 36, 37

18 U.S.C. § 666 .... 15, 16

18 U.S.C. § 1343 15

18 U.S.C. § 1346 .... 4, 7, 8, 15, 17, 19, 20,
21, 27, 29, 30, 31,
33, 36, 37, 43, 44

18 U.S.C. § 1349 15

18 U.S.C. § 1951 15

28 U.S.C. § 1254 4

N.Y. Civ. Serv. Law § 107 43

N.Y. Pub. Off. Law § 73 43

N.Y. Pub. Off. Law § 74 43

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Robert Batey, *Vagueness and the Construction of Criminal Statutes-Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1 (1997) 31, 39

Jordi Blanes i Vidal *et al.*, *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731 (2012) 39

G.G. Bogert, *The Law of Trusts and Trustees* § 482 (rev. 2d ed. 1978) 27

Craig M. Bradley, *Foreword: Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988) 31

John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998) 31

John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of A White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983) 31, 45

Kim Eisler, *Hired Guns: The City's 50 Top Lobbyists*, Washingtonian (June 1, 2007) 39

Ron Elving, *Who Is Clinton Confidant Sidney Blumenthal?*, NPR (May 20, 2015) 45

TABLE OF AUTHORITIES
(continued)

Page(s)

Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 23

Thomas Franck & Dan Mangan, *Senate GOP Suggests Biden Fed Nominee Sarah Bloom Raskin Used Government Ties To Help Financial Tech Firm*, CNBC (Feb. 3, 2022) 45

Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983) 22, 23, 31

John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) 23, 30, 31, 39, 41, 44

David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371 (2008) 31

Evan Minsker, *Kanye West and Kim Kardashian Lobbied Trump in Effort to Free A$AP Rocky*, PITCHFORK (July 18, 2019) 45

Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153 (1994) 31

TABLE OF AUTHORITIES
(continued)

Page(s)

Ashley Parker & Josh Dawsey, *Trump's Cable Cabinet: New Texts Reveal the Influence of Fox Hosts on Previous White House*, WASH. POST (Jan. 9, 2022) 45

Restatement (Second) of Agency (1958) 22, 28

Restatement (Second) of Torts (1965) 24

Revolving Door: Former Members of the 115th Congress, OpenSecrets 39

INTRODUCTION

When a public official accepts money to convince the government to do something, we call him a crook. But when a private citizen accepts money to convince the government to do something, we call him a lobbyist. That is not an arbitrary distinction. It reflects the fact that public officials hold a fiduciary obligation to act in the public's best interests, while private citizens do not. That basic dichotomy lies at the foundation of our system of representative democracy: Citizens are constitutionally entitled to petition the government in service of their self-interests, while public officials are entrusted with making decisions in the public good.

Yet in the decision below, the Second Circuit held that *private citizens* can owe a fiduciary duty *to the public* and thus be guilty of honest-services fraud for accepting "bribes" to influence government decisions. Under its test, if a jury concludes that a private person exercises *de facto* control over government actions by virtue of officials' reliance on him, the jury can send him to prison—even if he had no official title, official powers, official salary, or official duties.

Indeed, that was the sole basis to convict Petitioner Joseph Percoco—who was the campaign manager for then-Governor Andrew Cuomo—for being paid $35,000 by a real estate developer, allegedly to help navigate New York's bureaucracy surrounding labor law. According to the panel, Percoco owed a duty of honest services to the public because, as a former senior staffer and longtime friend of the Governor's family, he continued to command "clout" with state agencies and officials. JA.681-82.

In upholding this conviction, the Second Circuit breathed new life into *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), an aberrational precedent dating back four decades. Issued over a fierce dissent by the late Judge Winter, *Margiotta* broadly expanded the then-nascent theory of "honest services" fraud by extending to influential private citizens the fiduciary duties owed by public officials. Scholars and judges widely condemned the decision, and developments in the law left it so discredited that even district courts within the Second Circuit declared that "*Margiotta* was wrongly decided and is no longer good law in this Circuit or anyplace." *United States v. Adler*, 274 F. Supp. 2d 583, 587 (S.D.N.Y. 2003). In the decision below, however, the panel exhumed *Margiotta*.

This Court should reverse. The notion that private citizens owe a duty of honest services to the public so long as a jury deems them sufficiently influential lacks any foothold in law or common sense. The public has no right to *any* "services" of a private citizen. *Margiotta* erred by transforming one's *influence* over others into a source of *affirmative duties*, without any agency or representative relationship. And then, importing that flawed premise into the public sphere, *Margiotta* blurred the fundamental line that defines the distinct roles of citizens and officials. To be sure, officials who abdicate their power to party bosses, campaign operatives, or lobbyists may violate their *own* fiduciary duties to the public. But such failure does not somehow *transfer* the duties to those private citizens and expose them to criminal prosecution for corruption. In short, Judge Winter was right; *Margiotta* was wrong.

Even if *Margiotta* had a theoretical basis, however, it has since been uprooted by this Court's decisions. This Court has refused to indulge exotic applications of the federal fraud laws, especially the vague honest-services statute. In *Skilling v. United States*, a majority upheld that ill-defined provision against a constitutional challenge, but only through a limiting construction that narrowed its scope to "core" and "paramount" applications. 561 U.S. 358, 404 (2010). The *Margiotta* theory is anything but. To the contrary, treating payments to a private citizen as "bribes" runs smack into *McDonnell v. United States*, which explained that bribery law is concerned not with influence in the abstract, but rather with the sale of one's "official position." 579 U.S. 550, 552 (2016). No official position means no bribery. And no bribery means no honest-services fraud.

Finally, a host of constitutional principles condemn *Margiotta*, resolving any remaining doubt. Foremost is the First Amendment. *Margiotta* offered no basis to distinguish its conception of *de facto* control from effective lobbying, and thus puts an entire sphere of constitutionally protected conduct in the crosshairs. Next is federalism. By inventing a new federal fiduciary duty, *Margiotta* also intruded on the States' power to structure their own democratic systems and norms. And, as Judge Winter warned, the Second Circuit's malleable test offends due process too, by depriving citizens of fair notice and empowering prosecutors to engage in mischief.

Once again, the lower courts' startling expansion of federal bribery law is both wrong and dangerous. The Court should reverse the decision below and vacate Percoco's convictions.

OPINION BELOW

The decision of the U.S. Court of Appeals for the Second Circuit affirming Petitioner's judgment of conviction (JA.641) is reported at 13 F.4th 180.

JURISDICTION

The Second Circuit entered judgment on September 8, 2021, and denied rehearing on November 1, 2021. JA.641; Pet.App.47a-54a. Justice Sotomayor extended the time to file a petition for certiorari until March 1, 2022. No. 21A298 (U.S.). This Court granted a timely filed petition on June 30, 2022, and has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

While serving as campaign manager for Governor Andrew Cuomo's reelection, Petitioner Joseph Percoco accepted $35,000, allegedly in exchange for helping a real estate developer secure a release of certain labor law duties from a state agency. Even though Percoco was a private citizen during this entire period, he was charged with depriving the public of his "honest services" by accepting a "bribe." The theory was that Percoco's past employment as an aide to Cuomo, and his ongoing relationship with the Governor, put him in a position of "dominance" over state affairs.

The district court instructed the jury that Percoco owed a fiduciary duty to the people of New York if he exercised control over government decisions and state officials relied on him. In doing so, the court relied on the Second Circuit's divided decision in *Margiotta*. On appeal, the Second Circuit affirmed, resurrecting *Margiotta* notwithstanding its flaws and a series of intervening legal developments.

A. The Honest-Services Doctrine.

Understanding this case requires some background on the convoluted history of "honest services" fraud. The doctrine began as a circuit-level gloss on the mail and wire fraud statutes. This Court rejected it. After Congress subsequently adopted it in vague terms, this Court narrowed it in a saving construction.

1. The honest-services theory of fraud originated in *Shushan v. United States*, which held that bribery is a "scheme to defraud the public" and thus falls within the mail fraud statute's prohibition of any "scheme to defraud." 117 F.2d 110, 115 (5th Cir. 1941). The court reasoned that public officials owe "sacred duties," and that bribes induce "betrayal" of those duties and deprive the public of the official's "fair judgment." *Id.*

The theory took off in the 1970s, with the Courts of Appeals agreeing that depriving the "citizens" of their officials' "honest and faithful services" by a "breach of fiduciary duty" can be mail or wire fraud, even absent "property loss." *United States v. Isaacs*, 493 F.2d 1124, 1149-50 (7th Cir. 1974); *see, e.g.*, *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979) ("A fraud is perpetrated upon the public to whom the official owes fiduciary duties"); *see also Skilling*, 561 U.S. at 400-01 (recounting this history).

Lower courts applied the same theory to criminalize "employee disloyalty," *i.e.*, a "scheme to defraud an employer of loyal service." *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980). The premise was, again, that employees are agents who owe a "fiduciary duty" to provide "honest and loyal services," and that bribes and kickbacks deprive their employers (the principals) of that "honest and faithful performance." *United States v. George*, 477 F.2d 508, 512-13 (7th Cir. 1973); *see also United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (citing Restatement of Agency for proposition that a "normal relationship of employer and employee implies that the employee will be loyal and honest in all his actions with or on behalf of his employer").

2. This Court rejected the honest-services theory—overturning this lower-court consensus—in *McNally v. United States*, 483 U.S. 350 (1987). The Court held that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. *McNally* invoked the rule of lenity, explaining "that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60. Declining to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," this Court read it "as limited in scope to the protection of property rights." *Id.* at 360. "If Congress desires to go further, it must speak more clearly than it has." *Id.*

As this Court later recounted, *McNally* "stopped the development of the intangible-rights doctrine in its tracks." *Skilling*, 561 U.S. at 401.

3. Congress responded the next year by enacting the honest-services statute. Just 28 words long, it defined "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

Section 1346's brevity and imprecision, however, gave rise to "chaos," as the lower courts "attempt[ed] to cabin [its] breadth … through a variety of limiting principles." *Sorich v. United States*, 555 U.S. 1204, 1206, 1208 (2009) (Scalia, J., dissenting from denial of certiorari). Courts agreed that "some coherent limiting principle" was needed to prevent "abuse," but "[n]o consensus" emerged as to that principle. *Id.* at 1206. In the absence of clear lines, courts upheld convictions for everything from patronage hiring, *see United States v. Sorich*, 523 F.3d 702, 711 (7th Cir. 2008), to academic plagiarism, *see United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997).

4. Two decades after § 1346's enactment, this Court addressed it in *Skilling*. The petitioners there argued that the statute was unconstitutionally vague because it did not define the "honest services" covered or provide any guidance on the scope or breadth of the criminal prohibition. Justices Scalia, Kennedy, and Thomas agreed and would have deemed the statute unconstitutional, *see* 561 U.S. at 415 (Scalia, J., concurring in part and in the judgment), but the majority concluded that it could "preserve" the statute by construing it narrowly, *id.* at 404 (majority op.).

Specifically, the Court said it could "pare" the body of pre-*McNally* cases "down to its core"—"paramount" instances of "bribes or kickbacks"—and treat § 1346 as reinstating the doctrine to that extent. *Id.*; *see also id.* at 405 (noting that courts "consistently applied the fraud statute to bribery and kickback schemes"). The Court therefore read § 1346 to forbid "paradigmatic" violations: *i.e.*, when defendants, "in violation of a fiduciary duty, participate[] in bribery or kickback schemes." *Id.* at 407.

B. The *Margiotta* Theory.

This case presents a unique extension of the honest-services concept developed in its pre-*McNally* heyday. *Margiotta* held that a citizen "who holds no official government office but who participates substantially" in government decisions owes a duty of honest services to the public, just like a public official. 688 F.2d at 111. In recognizing this novel duty, the Second Circuit drew an impassioned dissent from Judge Winter. And it was that dissent, not the majority's analysis, that ultimately earned the favor of other courts and commentators.

1. Joseph M. Margiotta served as Chairman of the Republican Committees of Nassau County and the Town of Hempstead. *Id.* at 112. He was charged with fraud for helping an insurance agency obtain an exclusive broker position with the county and town in alleged exchange for kicking back a portion of its commissions. *Id.* at 120. Although Margiotta held no public office, the prosecutors argued that he owed a fiduciary duty to the public because his "power and prestige" as a party boss gave him "influence" over local Republican officials. *Id.* at 113.

The panel framed the question as whether the fraud statutes prohibit political misconduct "by individuals who participate in the political process but who do not occupy public office." *Id.* at 112. It recognized this was a "novel application" of the law and purported to "tread most cautiously." *Id.* at 120. Indeed, the panel acknowledged that the "seemingly limitless" language of the fraud statutes created a "danger of sweeping within [their] ambit … conduct, such as lobbying and party association, which has been deemed central to the functioning of our democratic system since at least the days of Andrew Jackson." *Id.* But the panel was equally if not more concerned about "eliminat[ing] a potential safeguard of the public's interest in honest and efficient government." *Id.*

The panel ultimately held that "we do not believe that a formal employment relationship, that is, public office, should be a rigid prerequisite to a finding of fiduciary duty in the public sector." *Id.* at 122. In lieu of a "precise litmus paper test" (which it deemed impossible, because "[t]he drawing of standards in this area is a most difficult enterprise"), the majority cited two tests to govern whether a private individual owes a duty to the public: "(1) a reliance test, under which one may be a fiduciary when others rely upon him"; and "(2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary." *Id.* Almost wishfully, the panel claimed these "guidelines" would "permit[] a party official to act in accordance with partisan preferences or even whim, up to the point at which he dominates government." *Id.* Exactly where that point is, the court did not specify.

Committed to its new private-public fiduciary duty, the court rejected any constitutional challenges to its approach. The majority acknowledged that the rights of "lobbyists and others who seek to exercise influence in the political process are basic in our democratic system." *Id.* at 128-29. Yet those First Amendment concerns were merely "a chimera," it said, because "there is no indication that the application of the mail fraud statute in this specific case would deter protected political activities in other contexts," even if the same "theory" could admittedly be "misapplied to constitutionally protected conduct." *Id.* at 129.

The majority likewise recognized, "[t]heoretically," that there may be "federalism concerns" in finding a fiduciary duty absent "reference to state law." *Id.* at 124. Nonetheless, the court held that "a violation of local law is not an essential element" of the offense. *Id.* It sufficed that "federal public policy" ostensibly condemned Margiotta's conduct. *Id.*

Finally, quoting the adage that "[m]en must turn square corners when they deal with the Government," the panel reasoned that it "requires little imaginative leap to conclude that individuals who in reality *or effect* are the government owe a fiduciary duty to the citizenry." *Id.* (emphasis added). It therefore found no "fair notice" concerns. *Id.* at 129.

2. In a scathing dissent, Judge Winter described the majority's reading of the fraud statute "as a catch-all prohibition of political disingenuousness" that "expands [the statute] beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes." *Id.* at 139 (Winter, J., dissenting in part).

While Judge Winter recognized the then-existing honest-services theory, he explained that the majority added "one seemingly small element"—that "a jury may find that a politically active person has sufficient influence and power over the acts of elective officials to be subjected to the same duty as those officials." *Id.* at 142. And that innovation "subjects virtually every active participant in the political process to potential criminal investigation and prosecution." *Id.* at 143.

Turning to first principles, Judge Winter faulted the majority for analogizing fiduciary duties between private parties to those between citizens and the public "in a pluralistic, partisan, political system." *Id.* at 142. The former cannot be imported into the latter context "simply by mouthing the word fiduciary." *Id.* Rather, Judge Winter urged that "we should recognize that a pluralistic political system assumes politically active persons will pursue power and self-interest," not the public good. *Id.* at 143.

Judge Winter proceeded to explain the effects of the majority's standard: "Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Id.* at 142. That malleable test, in turn, creates a "potential for abuse through selective prosecution." *Id.* at 143; And it also threatens the First Amendment, since the theory "subjects politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs." *Id.* at 140. "When the first corrupt prosecutor prosecutes a political enemy for mail fraud," Judge Winter warned, "the rhetoric of the majority about good government will ring hollow indeed." *Id.* at 144.

Of course, Judge Winter "hope[d] that public affairs are conducted honestly and on behalf of the entire citizenry," but "shudder[ed] at the prospect of partisan political activists being indicted for failing to act 'impartially' in influencing governmental acts." *Id.* at 143. "Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions." *Id.* He decried the majority's creation of a new "catch-all political crime which has no use but misuse." *Id.* at 144.

3. *Margiotta* barely escaped en banc review even in the famously collegial Second Circuit, leaving the convictions undisturbed over four judges' dissent after other judges recused themselves from the vote. *See* 811 F.2d 46 (2d Cir. 1982); *Adler*, 274 F. Supp. 2d at 586 (describing *Margiotta*'s en banc vote).

4. *Margiotta* was "widely criticized by practically everybody." *United States v. Smith*, 985 F. Supp. 2d 547, 603 (S.D.N.Y. 2014); *see, e.g.*, *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988) (calling *Margiotta* one of the "worst abuses of the mail fraud statute"). Other courts expressly rejected it—including the Third Circuit. *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003) (Becker, C.J.); *see also United States v. Warner*, 292 F. Supp. 2d 1051, 1061 (N.D. Ill. 2003). And even courts in the Second Circuit declared that *Margiotta* "was wrongly decided and is no longer good law." *Adler*, 274 F. Supp. 2d at 587.

Only the Sixth Circuit followed *Margiotta*, in *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986). Ironically, *Gray* was the decision this Court reversed under a new caption, *McNally*.

C. The Underlying Facts.

Joseph Percoco was a longtime friend of the Cuomo family who served as Executive Deputy Secretary in the Governor's Office. JA.198-99, 681. In April 2014, he resigned from that role to manage the Governor's reelection campaign. JA.179, 203, 664. At that time, Percoco did not intend to return to government thereafter. JA.193, 201, 205. Indeed, he voluntarily sought an ethics opinion regarding what consulting or other work he could undertake as a *former* employee. JA.298-301, 315, 591-93.

After he left government for the campaign, Percoco had no legal control or authority; his official duties were transferred to others. JA.206-08, 260-61, 304-05, 434-35, 464; *see also* JA.549 ("Percoco was clearly not a 'public official' at the time that he worked on Governor Cuomo's campaign."). Nor did Percoco ever suggest otherwise. There was "no evidence that Percoco held himself out to be a public official when he was working on the campaign." JA.541 n.10.

During the campaign period, Percoco's former office in New York City remained vacant, and he used it on occasion while dropping by—with "a long time" between visits—to address campaign strategy or to coordinate the Governor's schedule. *See* JA.194-95, 207-09, 307, 313-14. State employees also regularly used the vacant office and its telephone. JA.437.

Toward the close of the campaign, Percoco's plans changed. Several members of the Governor's "senior staff" left government, and the Governor's father fell "ill and ultimately died within a matter of weeks." JA.193. Attempting to sustain "some stability in the office," Percoco determined to return. *Id.*

He therefore filled out new-hire paperwork, including disclosure of outside income he had received while working on the campaign. *See* JA.213-14, 469-70, 626. Percoco resumed his state employment on December 8, 2014. *See* JA.472.

The events here occurred when Percoco was a private citizen (*i.e.*, between April 18 and December 8, 2014). Percoco told a lobbyist, Todd Howe, that he was interested in doing consulting work during the campaign, as ethics officials had advised he could. JA.357. Meanwhile, Steve Aiello, co-owner of a real estate company known as COR Development (COR), needed labor relations help on a project in Syracuse. JA.358. Among other things, a state agency was insisting COR enter a costly deal (a labor peace agreement or LPA) with local unions. JA.330-33, 378. Aiello emailed Howe to ask if "Joe P can help us with this issue while he is off the 2nd floor working on the Campaign." JA.392, 594. (The Executive Chamber is on the second floor of the state capitol. JA.174.)

For Percoco's work, COR wrote two checks, totaling $35,000, in August and October 2014. JA.362-63. Percoco later disclosed COR as a source of outside income in his new-hire paperwork. JA.213-14, 626.

On December 3, 2014, before Percoco's return to state employment, he called a staffer in the Executive Chamber to inquire why the state agency was still insisting COR enter an LPA even though all parties had previously agreed no LPA was needed. JA.337-42. The staffer, who agreed that no LPA was required, relayed to an agency executive that he was facing "pressure" from his "principals." JA.342. The agency then confirmed no LPA was needed. JA.339.

Many months later, Percoco assisted in processing a pay raise for Aiello's son (a state employee), and also inquired about the status of outstanding funds that the state owed COR. *See* JA.649. No evidence linked either act to the mid-2014 payments.

D. The Indictment and Trial.

In November 2016, Percoco was charged with a variety of offenses. Most relevant here, Count Ten alleged that Percoco had conspired to commit honest-services wire fraud, *see* 18 U.S.C. §§ 1343, 1346, 1349, through his work for COR. JA.649. For that same COR conduct, he was also charged with Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Eight); and solicitation of bribes or gratuities, in violation of 18 U.S.C. § 666(a)(1)(b) (Count Twelve). JA.649-50. Percoco was also indicted for Hobbs Act extortion, honest-services fraud, and solicitation of bribes or gratuities arising from a different scheme involving a company known as CPV. *Id.* One count of Hobbs Act conspiracy (Count Six) was premised on both of the alleged schemes. *Id.*

Percoco moved to dismiss the COR charges on the ground that he could not commit these offenses when he was out of public office. The district court denied that motion. JA.133. As to Hobbs Act bribery, however, the court agreed that only "persons who hold official positions within the government … are capable of committing the substantive offense of extortion under color of official right." JA.548. And Percoco was "clearly not a 'public official'" when he received the payments from COR. JA.549. The court therefore granted acquittal on Count Eight. JA.561.

After the government rested, Percoco moved for a judgment of acquittal on Count Ten. JA.650. He argued that "nothing in the record" showed that he accepted money to take an "official act," as he had accepted funds only "within the period in which he was no longer a state employee" and therefore *could not* take official action. JA.447. The court denied that motion after trial. JA.650.

Near the end of trial, the district court proposed a jury instruction that Percoco could "owe[] the public a duty of honest services when he was not a state employee, if you find that during that time he owed the public a fiduciary duty." Pet.App.133a. Percoco objected, asking that the court instruct that he owed "honest services" only "as a public official." The court disagreed, saying that was "not the law" since "you can owe honest services if you have a fiduciary duty, even if you're not a public official at the time." JA.479-80. Consistent with *Margiotta*, the final instructions directed the jury to assess whether Percoco "dominated and controlled any governmental business" and also whether "people working in the government actually relied on him." JA.511.

After a lengthy deliberation and two *Allen* charges, the jury reached a split verdict. It convicted Percoco on Count Ten (honest-services fraud conspiracy), but acquitted him on the other COR charges, Counts Six and Twelve (Hobbs Act conspiracy, and § 666 bribery). JA.651. The jury also convicted Percoco on two of the three counts arising from the CPV scheme, but acquitted on the third. *Id.*

E. The Second Circuit's Decision.

The Second Circuit affirmed. JA.641-86. The panel upheld the honest-services instruction as falling "comfortably within our decision in [*Margiotta*]." JA.665. The panel acknowledged that *Margiotta* was no longer binding in light of *McNally*, but held that Congress's revival of the honest-services rubric in § 1346 had "effectively reinstated" it. JA.669. The panel reasoned that § 1346's "capacious language is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." JA.667-68. And the court called *Margiotta*'s fiduciary-duty theory "settled doctrine" before *McNally*. JA.666-70.

The panel stated the law as follows: "In our view, § 1346 covers those individuals who are government officials as well as private individuals who are relied on by the government and who in fact control some aspect of government business." JA.667. In effect, the test is whether public officials *listen* to the citizen, thereby handing him *de facto* control.

The panel denied that *Margiotta* had been undercut by *McDonnell*. *McDonnell* held that an "official act" under federal bribery law "must involve a formal exercise of governmental power." 579 U.S. at 574. But the panel thought *McDonnell* did not address *who* could take an "official act," *i.e.*, whether someone without office could be guilty of taking a bribe for influencing state action. JA.670. The panel also dismissed constitutional concerns, framing the issue as whether the Constitution required an *exception* for those who are not formal employees. JA.671-72.

Consistent with its articulation of the law, the panel found sufficient evidence that Percoco owed a fiduciary duty to the public. JA.677, 681-84. That was because he "maintained" a "position of power and trust," attributable mainly to his "unique relationship with Governor Cuomo," "being close to him and his family," plus the likelihood that he would regain the same position after the campaign, and his continued access to the Governor's Office during the campaign period. JA.681-82. And the panel found sufficient evidence that Percoco had agreed to take official action by calling a staffer about the LPA issue in early December 2014. JA.680-81. The panel did not, however, rely on the acts Percoco took following his return to state employment. *Id.*

Under the panel's logic, Percoco was a victim of his own success: The fact that he was able "to use his position of power" to oppose the LPA itself proved the influence and dominance that supposedly gave rise to a fiduciary duty to the public. JA.683.

SUMMARY OF ARGUMENT

I. *Margiotta* was wrong on its own terms. Unlike public officials, private citizens owe no fiduciary duty to act in the public interest. They are not agents of the public; they exercise no authority on its behalf. To the contrary, the premise of republican government is that private citizens and factions will advance their own parochial self-interests, while public officials are tasked with filtering those interests for the common good. *Margiotta* inverts that paradigm by treating private citizens as assuming fiduciary obligations just because officials rely on them to make decisions.

Even in the private sector, the law does not support *Margiotta*'s notion that reliance and control give rise to fiduciary duties. Fiduciary obligations arise from legal relationships (usually principal-agent), not from one party's unilateral reliance on another. Equity courts sometimes use a looser approach to set aside legal instruments or transactions as tainted by undue influence, but that has nothing to do with imposing affirmative duties to act on behalf of others—much less duties with sufficient definiteness and certainty to serve as predicates for criminal prosecution.

II. Whatever may have been true when *Margiotta* was decided, the theory cannot survive this Court's recent decisions. In *Skilling*, the Court saved § 1346 from constitutional challenge by narrowly reading it to reinstate only the "core" of the pre-*McNally* honest-services doctrine, described as "paradigmatic cases of bribes and kickbacks." There is nothing paradigmatic about *Margiotta*'s novel and broadly criticized notion that private citizens can be guilty of accepting bribes. *Margiotta* lacks the foundation and consensus to be elevated to part of the pre-*McNally* "core."

This Court's decision in *McDonnell* confirms that the *Margiotta* conduct is not bribery, let alone "core" bribery. That case clarified that the evil prohibited by federal bribery law is the *sale of official authority*—the use of one's office to control the formal exercise of government power in exchange for private benefit. A private citizen who has no office cannot sell his office; one who exercises no power cannot trade that power. A private citizen may have *influence*, but *McDonnell* refused to conflate that slippery concept with "official action" that triggers federal bribery law.

III. Any residual doubt is resolved by the serious constitutional concerns posed by *Margiotta*.

To start, the First Amendment guarantees citizens the right to petition the government for redress of grievances, yet *Margiotta* would allow prosecutors to charge any half-decent lobbyist in the country with bribery by treating their influence as the source of a fiduciary obligation. Core advocacy by politically active individuals—from campaign donors to union leaders to media influencers—could also be chilled by *Margiotta*'s amorphous test.

Beyond that, the Second Circuit's approach improperly puts federal courts in the position of regulating how private citizens interact with the government and its officials—thereby interfering in this fundamental aspect of state sovereignty. Section 1346, of course, includes nothing resembling a clear statement sufficient to justify that disruption of the federal-state balance.

Finally, *Margiotta*'s "guidelines," 688 F.2d at 122, offend due process by letting a jury convict on nothing more "than the rhetoric of sixth grade civics classes," *id.* at 142 (Winter, J., dissenting in part). At best, this vague theory deprives citizens of the notice to which they are constitutionally entitled. At worst, it invites partisan abuse and selective prosecution.

IV. Rejecting *Margiotta* compels reversal of the convictions here. For Count Ten, all of the relevant conduct occurred while Percoco was a private citizen, so he is entitled to acquittal. The other two counts spanned the public and private time periods; as to those, Percoco is entitled to a new trial based on the flawed jury instructions and prejudicial spillover.

ARGUMENT

I. *MARGIOTTA* WAS WRONG FROM ITS INCEPTION.

Margiotta was indefensible. Its core premise was that private citizens must act in the public's best interest if they exercise *de facto* "control" over government by virtue of their influence or officials' reliance on them. As Judge Winter explained, that contradicts the basic theory of our republic: private citizens may advance their self-interests, while agents of the public try to serve the common good. Nor, contrary to the panel's claim, is *Margiotta* rooted in the common law. True fiduciary obligations arise from agency or analogous legal relationships; in the criminal context especially, they cannot be left to the whim of a jury's ill-defined moral intuitions.

A. Private Citizens Owe No Duties To Act in the Public Interest.

The foundational premise of *Margiotta* is the notion that private citizens who exercise *de facto* control over government decisions assume a duty to serve the public. That is not how our government was designed. Public officials exercise power as agents of the people; private citizens are agents of nobody and possess no state power, only the capacity to influence.

1. The honest-services theory has always presumed an underlying fiduciary duty, because without one there is no obligation to provide "honest, faithful and disinterested service" to another. *Mandel*, 591 F.2d at 1362. This Court construed the theory's codification in § 1346 to require that element. *Skilling*, 561 U.S. at 407 (describing pre-*McNally* core as covering those "who, in violation of a fiduciary duty, participated in bribery or kickback schemes").

The threshold question in any honest-services case is therefore whether the defendant owed a fiduciary duty to provide faithful service to the victim of the scheme. In typical bribery cases, the answer is yes. In a *representative* democracy, public officials exercise power as *representatives*—or agents—of the public. *See United States v. Sprague*, 282 U.S. 716, 733 (1931) (describing Congress as "agent of the people"); *Loving v. United States*, 517 U.S. 748, 777 (1996) (Scalia, J., concurring in part and in the judgment) (describing executive branch as "agent of the People"). Agents are fiduciary-bound to act in their principals' interests. *See* Restatement (Second) of Agency § 387 (1958). And an employee is just a species of agent. *See Carpenter v. United States*, 484 U.S. 19, 27 (1987).

Margiotta's innovation was extending that duty from *de jure* officials—agents of the public—to citizens whose *de facto* power flows only from their influence. That was an "erroneous analogy." 688 F.2d at 142 (Winter, J., dissenting in part). Public officials exercise sovereign power by virtue of having accepted their role as public representatives. That binds them to use those powers to serve the public, rather than to benefit themselves. By contrast, a private citizen has not agreed to serve as an agent of the public, and is not entrusted with any authority to exercise on its behalf. Even an influential citizen has no relationship to the public that creates a duty to serve it. *See Murphy*, 323 F.3d at 117. "Unlike elected officials, few political leaders, lobbyists, influence peddlers, or activists hold themselves out as acting for the general welfare of all citizens." Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 440 (1983).

Indeed, our republic presumes that private citizens will advance their own self-interests, and expects public officials to exercise independent judgment as to the public good. In his famous Federalist No. 10, James Madison recounted how men are driven by "self-love" to press their "distinct interests," which leads to the concern of "factions." Madison's solution was republicanism: choosing "representatives of the people" to serve as "guardians of the public weal" and whose voice would be "more consonant to the public good." Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961). By treating influential private citizens as guardian-representatives of the public good, *Margiotta* inverted that basic structure.

2. *Margiotta* worried about private citizens pulling strings of government from behind the scenes, with no accountability to the public. A fair concern, perhaps, but easily addressed. "Private individuals who control government action must necessarily rely on public officials to do their bidding." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 241-42 (1985). If those officials blindly defer to others, they are "in abdication of their own responsibilities," Hurson, *supra*, at 440, and can be held accountable—but their failure does not transfer their duties to the private citizens. There is every reason to enforce the duties *officials already* owe to the public, but no basis to invent *new* duties running from *private citizens* to the public. Finally, if the hurdle is that public officials are deceived by the self-interested motives of private citizens who lobby them, the solution—as this Court has emphasized—is robust disclosure of paid lobbying. *United States v. Harriss*, 347 U.S. 612, 625-26 (1954).

B. Reliance and Control Do Not Generate a Duty To Provide Honest Services.

Margiotta purported to rely on the common law for its premise that one's "reliance" on another—and the latter's ensuing "control"—can give rise to fiduciary obligations. 688 F.2d at 122. Even setting aside the obstacles to importing private duties into the public sector willy-nilly, that premise was vastly overstated. Reliance and control alone typically do *not* generate a fiduciary relationship, much less an affirmative duty to provide "services" to another.

1. Fiduciary duties usually arise from specific legal relationships. Often these are agency relationships, such as between an employer and employee or a public official and the public. *See supra* at 5-6. "A fiduciary relationship may [also] be created by contract, such as the relationship between a trust and trustee," *Zastrow v. Journal Commc'ns, Inc.*, 718 N.W.2d 51, 60 (Wis. 2006), or by court appointment to representative roles like guardian or executor, *e.g.*, *Hall v. Schoenwetter*, 686 A.2d 980, 985 (Conn. 1996).

Crucially, all of these relationships involve *consent*: the fiduciary has agreed to act on behalf of a principal, beneficiary, estate, etc. That tracks the common law's historic reluctance to impose involuntary duties to act for others. *Cf.* Restatement (Second) of Torts § 314 (1965) (no affirmative duty to protect). Accordingly, "[b]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142, 150 (Cal. 2008).

The flip-side of that consent principle is that a duty "is not created by a unilateral decision to repose trust and confidence." *Lee v. LPP Mortg. Ltd.*, 74 P.3d 152, 162 (Wyo. 2003); *see also Regions Bank v. Schmauch*, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003) ("As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party."). Nor do fiduciary duties "arise 'merely because one party relies on … the specialized skill of the other.'" *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 822-23 (Pa. 2017). After all, if that sufficed, "the vast multitude of ordinary arm's-length transactions" would become fiduciary ones. *Id.*; *see also, e.g.*, *United States v. Reed*, 601 F. Supp. 685, 715 (S.D.N.Y.) (explaining that fiduciary duties arise from a "mutually recognized relationship of fidelity," not "unilateral investment of confidence by one party in the other"), *rev'd on other grounds*, 773 F.2d 477 (2d Cir. 1985).

Margiotta contradicts these principles. It treats a public official's "reliance" on a private citizen—and the "de facto control" over government decisions that allegedly flows from that unilateral reliance—as the source of a fiduciary duty running from the citizen to the public, even absent any undertaking by the citizen to act on another's behalf. In effect: If others *listen to you*, you are bound to act in their interests. That concept is alien to the common law and, indeed, to American jurisprudence more generally.

2. *Margiotta* did cite some cases for its description of "reliance" and "de facto control" as "two time-tested measures of fiduciary status." 688 F.2d at 122. But a closer examination reveals that those cases (and the lines of authority they exemplify) cannot support the weight *Margiotta* placed upon them.

To start, some courts consider reliance and control to evaluate whether an undisputed legal relationship rises to the fiduciary level—but not to create a duty in the absence of any legal relationship. *Margiotta* cited two examples. In *Cheese Shop International, Inc. v. Steele*, the court considered whether the relationship of parties who had entered a contract was fiduciary in nature. 303 A.2d 689, 691 (Del. Ch. 1973). It was not, given the absence of "dependency on or superiority of the one alleged to be a fiduciary." *Id.* Likewise, *Mobil Oil Corp. v. Rubenfeld* assessed whether parties to a franchise agreement intended to create a fiduciary relationship, inquiring whether the contract reposed "confidence" in one party based on "superiority and influence." 339 N.Y.S.2d 623, 632 (Civ. Ct. 1972).

None of that supports *Margiotta*'s use of reliance, influence, or control to divine a fiduciary duty in the *absence* of any legal relationship between the parties. In "any analysis of a claimed breach of fiduciary duty," the first "central question[]" is "was the relationship a fiduciary relationship[?]" *Zastrow*, 718 N.W.2d at 59. For a citizen who has *no* relationship with the public, the answer—by definition—must be "no."

There is a second line of authority in which courts look to "trust and reliance" or "dominance and control" to create a fiduciary relationship. *Margiotta*, 688 F.2d at 122. But they do so for a fundamentally different purpose: to equitably set aside a prior transaction or legal act as tainted by undue influence—not to impose the affirmative duties required for an honest-services conviction. As courts have long recognized, "equity has occasionally established a *less rigorous* threshold for a fiduciary-like relationship in order to right civil wrongs arising from non-compliance with the statute

of frauds, statute of wills and parol evidence rule." *United States v. Chestman*, 947 F.2d 551, 569 (2d Cir. 1991) (en banc) (emphasis added) (citing G.G. Bogert, *The Law of Trusts and Trustees* § 482 (rev. 2d ed. 1978)). So, for example, *In re Jennings' Estate*, 55 N.W.2d 812 (Mich. 1952), involved a will contest, and *Trustees of Jesse Parker Williams Hospital v. Nisbet*, 14 S.E.2d 64 (Ga. 1941), was an action to set aside a contract.

Those cases exemplify the "boundless nature of relations of trust and confidence" that "equity has occasionally established … to right civil wrongs." *Chestman*, 947 F.2d at 569. But they do not support *Margiotta*'s imposition of an affirmative duty to act for another—which is what the text of the honest-services statute demands. One cannot be deprived of "the intangible right of honest services," 18 U.S.C. § 1346, if there is no right to services at all. Thus, "implicit in the plain meaning of § 1346" is a "limiting principle[]": that "the law … must recognize an enforceable right to the services at issue." *United States v. Rybicki*, 354 F.3d 124, 153 (2d Cir. 2003) (en banc) (Raggi, J., concurring in the judgment). And that is the critical distinction between "a formal government employee" and what the panel dubbed a "functional employee," meaning someone with no official role but *de facto* control. JA.668. The public has a "legally enforceable right" to the services of actual employees. It has no right to the services of a private citizen who is a "functional employee" simply because public officials listen to him. The "less rigorous" fiduciary standard that equity courts sometimes apply in undue-influence cases cannot bridge that fundamental gap.

The "less rigorous" undue-influence standard is also clearly inappropriate in defining fiduciary duties for *criminal* purposes. "Useful as such an elastic and expedient definition … may be in the civil context, it has no place in the criminal law." *Chestman*, 947 F.2d at 570. Indeed, employing such "outer permutations of chancery relief" "for determining the presence of criminal fraud would offend not only the rule of lenity but due process as well." *Id.*; *see also infra* Part III.C.

3. A final flaw in *Margiotta*'s fiduciary analysis is the mismatch between the "fiduciary" relationship and the duty drawn from it. *Margiotta* turned on the reliance placed on the private citizen by public officials, and the citizen's concomitant *de facto* control over official decisions. But even if that could create a fiduciary relationship, and even if that relationship could spawn affirmative duties, the citizen would at most owe those duties to the *official*, not to the *public*. An agent cannot appoint a subagent unless he has been "empowered" to do so. Restatement (Second) of Agency § 5. A public official has neither actual nor apparent authority to outsource decisions to private citizens. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). So a public official's reliance on a private citizen certainly cannot generate a transitive duty of that citizen to represent the public as a whole.

* * *

Margiotta has no first principles to commend it. Influence and unilateral reliance alone do not give rise to affirmative duties to others. And particularly in the public sector, such a proposition is fundamentally out of place in our constitutional republic. Judge Winter got this right back in 1982.

II. *MARGIOTTA* IS NOW ALSO FORECLOSED BY THIS COURT'S PRECEDENTS.

Even if *Margiotta* were conceptually coherent, there is no way to reconcile it with this Court's more recent precedents concerning the honest-services statute. In *Skilling*, this Court preserved § 1346 only by reading it narrowly as limited to "core" or "paramount" cases. Yet *Margiotta* was, by its own admission, a "novel" application of the honest-services concept, which drew widespread criticism. It is an aberration that cannot be described as part of the pre-*McNally* doctrinal core. Confirming as much, this Court in *McDonnell* defined public-sector bribery as the sale of "governmental powers"—which, by definition, only a public official can undertake. *Margiotta* is a vestige of a bygone era; this Court's modern decisions compel its extinction.

A. *Skilling* Shut the Door on Novel Theories of Honest-Services Fraud.

Margiotta cannot be reconciled with *Skilling*, which sharply cabined the scope of honest-services fraud to "heartland" cases to avoid constitutional concerns. 561 U.S. at 409 n.43. *Margiotta* is no heartland case. And the panel below ignored the conflict.

1. As set forth above, *Skilling* construed § 1346, the statute that Congress enacted to overrule *McNally*'s rejection of the honest-services doctrine. But, to avoid a constitutional vagueness challenge, the *Skilling* majority held that Congress *did not* adopt wholesale the chaotic pre-*McNally* doctrine. Rather, the Court limited § 1346 to "paramount," "classic," "heartland," "paradigmatic" cases involving "bribes or kickbacks." *Id.* at 404, 409-11 & n.43.

The relevant question under *Skilling* is therefore whether a given theory of bribery or kickbacks falls within the pre-*McNally* "doctrine's solid core." *Id.* at 407. Such "core pre-*McNally* applications" are all that this Court "salvaged." *Id.* at 408. Conduct beyond "paradigmatic cases of bribes and kickbacks," on the other hand, are outside the scope of § 1346. *Id.* at 411. Although some lower courts had construed the honest-services theory more broadly, *Skilling* treated the lack of "consensus" about those fact patterns, and the "relative infrequency" of those prosecutions, as placing that "amorphous category of cases" outside the statute's reach. *Id.* at 410.

There can hardly be any question that *Margiotta* is outside the bounds of § 1346 as *Skilling* construed it. There is nothing "paramount," "classic," "heartland," or "paradigmatic" about imputing fiduciary duties to private citizens based on their *de facto* influence over government decisions. Even *Margiotta* admitted this was a "novel issue." 688 F.2d at 121; *see also* Jeffries, *supra*, at 239-40 (recounting how "until *Margiotta*, that [honest-services] theory apparently applied only to public officials").

Nor did *Margiotta* induce a wave of agreement, let alone a "consensus" of the sort that *Skilling* demanded. To the contrary, courts long observed that "*Margiotta* has been 'widely criticized by practically everybody.'" *Smith*, 985 F. Supp. 2d at 603. Early on, Judge Posner called it one of the "worst abuses of the mail fraud statute." *Holzer*, 840 F.2d at 1348. And, writing for the Third Circuit, Chief Judge Becker refused to follow *Margiotta*'s "oft-criticized holding" and instead agreed with Judge Winter that the Second Circuit's approach "extends the mail fraud

statute beyond any reasonable bounds." *Murphy*, 323 F.3d at 104, 109; *see also Warner*, 292 F. Supp. 2d at 1062 (calling *Margiotta* "roundly criticized" and refusing to follow it). Perhaps most powerfully, even district courts *in the Second Circuit* came to discount *Margiotta* as bad law. *See Adler*, 274 F. Supp. 2d at 587 ("*Margiotta* was wrongly decided and is no longer good law in this Circuit or anyplace, as found by the Third Circuit in *Murphy*.").

Scholars were likewise unimpressed by *Margiotta*, and have criticized it for decades. *See, e.g.*, Hurson, *supra*, at 439-40; John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of A White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 15-16 (1983); Jeffries, *supra*, at 239-40; Craig M. Bradley, *Foreword: Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 583-84 (1988); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 209 (1994); Robert Batey, *Vagueness and the Construction of Criminal Statutes-Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 57-61 (1997); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 435-36 (1998); David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1402 (2008). And that is only a selective listing.

In short, like the other honest-services theories that *Skilling* excluded from § 1346, *Margiotta* was always a controversial outlier. The statute therefore cannot be read to have resurrected it.

2. The *Skilling* majority's response to Justice Scalia's concurrence about "the source and scope of fiduciary duties," 561 U.S. at 407 n.41, confirms that *Margiotta* fell outside the "core" this Court salvaged.

Justice Scalia objected that the body of pre-*McNally* caselaw never "defined the nature and content of the fiduciary duty central to the 'fraud' offense." *Id.* at 417 (concurring in part and in the judgment). He pointed to divisions among lower courts over the "*source* of the fiduciary obligation" as well as *who* owed those duties. *Id.* at 417-18. As to the latter, he specifically cited *Margiotta* as an exemplar of a decision extending the duty to "private individuals who merely participated in public decisions." *Id.* at 417.

The majority blunted that objection by maintaining that, in bribery or kickback cases, "[t]he existence of a fiduciary relationship" was "usually beyond dispute." *Id.* at 407 n.41 (majority op.). It pointed to examples of "public official-public," "employee-employer," and "union official-union members" relationships. *Id.* And it cited the "established doctrine that a fiduciary duty arises from a *specific relationship between two parties*." *Id.* (emphasis added) (brackets omitted).

By highlighting that fiduciary duties were usually "beyond dispute," the Court designated *those* cases—to the exclusion of others—as the "solid core" that was "salvaged." *Id.* at 407-08 & n.41. By listing the typical fiduciary relationships and omitting the *Margiotta* aberration ("private citizen-public") Justice Scalia had flagged, the Court sent the same signal. And, by citing the "established" rule that fiduciary duties arise from specific legal relationships, the Court again implicitly dismissed the *Margiotta* novelty.

3. Even though *Skilling* is this Court's most recent governing precedent on the scope of § 1346, the panel below cited it just twice in its discussion of *Margiotta*, both times for mere recitations of doctrinal history. *See* JA.666. Nowhere did the court grapple with *Skilling*'s limitation of § 1346 to "core" or "classic" pre-*McNally* fact patterns. Instead, the panel undertook its own construction of the "capacious" statutory text. *See* JA.667-68. The panel also treated as persuasive the whole body of law "*McNally* overruled," without mentioning *Skilling*'s life-saving (but deeply invasive) surgery on that corpus. JA.668-69.

In addressing a distinct issue earlier in its opinion, the panel said *Skilling* "circumscribed" the honest-services statute so it "only criminalizes bribes and kickbacks." JA.654. Perhaps the panel believed any case involving a purported "bribe" falls within the "core" *Skilling* upheld. But that is too simplistic. The whole question in cases like *Margiotta* is whether the benefit can be called a "bribe" at all—as opposed to a lawful payment for services. Bribery has traditionally meant paying an *agent* to influence conduct on behalf of a *principal*; but as explained, a private citizen is not an agent of the public. Prosecutors cannot evade *Skilling* by expanding the definition of a bribe to cover conduct outside the pre-*McNally* core; that would "let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). Indeed, doing so would present the same vagueness and other constitutional problems *Skilling* bypassed. Rather, § 1346 forbids only *paradigmatic* "bribes"—and *Margiotta*'s novel and contested theory of bribery assuredly does not qualify.

B. *McDonnell* Limited Federal Bribery Law to the Sale of Official Powers.

The other problem with characterizing the conduct here and in *Margiotta* as a "bribe" is that it *cannot be* a bribe under this Court's most recent explication of federal bribery law in *McDonnell*, which pinpointed the sale of governmental power as its defining feature. Private citizens have no such power to sell.

1. The issue in *McDonnell* concerned the *quo* aspect of bribery's *quid pro quo*. Specifically, what actions is an official forbidden to trade for something of value? The bribery statute governing federal officials calls that category "official act[s]," 18 U.S.C. § 201(a)(3), and *McDonnell* construed its scope for the first time in a century. *See* 579 U.S. at 566.

Against a backdrop of constitutional considerations, the Court held that official acts are limited to those involving a "formal exercise of governmental power." *Id.* at 569, 571. An official takes an official act when he exercises such formal governmental power on his own, or when he "uses his official position" to either pressure or advise "another official" to exercise formal governmental power. *Id.* at 572. Either way, an official act must fall "within the specific duties of an official's position—the function conferred by the authority of his office." *Id.* at 570. The key takeaway from *McDonnell* is that federal bribery law forbids the sale of one's "official position" in connection with "a formal exercise of governmental power." Meanwhile, the Court unanimously rejected the Government's broader approach, under which any sale of "influence" over government decisions would be criminal, even without a nexus to the use of office. *Id.* at 577.

2. The *Margiotta* theory stands directly opposed to *McDonnell*. A private citizen may hold "influence" over government decisions, if others listen to him. But *influence* is not official action. *See id.* Meanwhile, a private citizen has no "official position" and cannot exercise any "governmental power." He is thus *legally incapable* of taking official action—the *sine qua non* of bribery—within the meaning of *McDonnell*.

To be sure, *McDonnell* made clear that an official need not *personally* exercise governmental power to take official action. It suffices if the person "us[es] his official position to exert pressure on *another* official to perform an 'official act'" or "uses his official position to provide advice to another official." *Id.* at 572. But the common denominator is that the official "*uses his official position*." That may mean imposing pressure through the "threat" of legislation, as in *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008). It may mean exploiting an official duty to make "reports and recommendations" to superiors, as in *United States v. Birdsall*, where officials were bribed to advise their principal to grant clemency. 233 U.S. 223, 231, 235 (1914). But it does not mean taking actions that just leverage influence without exploiting one's official duties or powers—*e.g.*, writing an op-ed, or asking for a favor. Rather, the official takes *official* action only by using his *office* to induce a formal exercise of governmental power. And, again, a private citizen has no "office" to "use"—not directly, and not indirectly as a source of official pressure or official advice. Thus, if a private citizen had recommended clemency in *Birdsall*, that would not have been official action. A private citizen cannot take "official action," and so cannot be guilty of accepting a "bribe."

At minimum, the disconnect between the *Margiotta* theory and *McDonnell*'s definition of § 201 bribery confirms the former is not among the "*paradigmatic* cases of bribes and kickbacks," *Skilling*, 561 U.S. at 411 (emphasis added), that § 1346 forbids.

3. The panel responded that *McDonnell* gave it "no reason to doubt" *Margiotta*'s viability. JA.671. But neither of the panel's points is persuasive.

First, the panel insisted "the definition of 'official act'" says nothing about the distinct issue of "*who* can violate the honest-services statute." JA.670. But the two questions are inextricably linked. The definition of "official act" makes it impossible for a private citizen with no official powers or duties to undertake one. In turn, that means such a private citizen cannot commit honest-services fraud of this sort—or, at least, that such a transaction is not "core" bribery.

Second, the panel claimed *Dixson v. United States*, 465 U.S. 482 (1984), proves that private citizens can be guilty of taking bribes under § 201. JA.670-71. That badly overreads *Dixson*. The majority there held that § 201's definition of "public official" reached grant administrators who exercised "official responsibility for carrying out a federal program" and were paid with federal funds. 465 U.S. at 488, 499. It reasoned that one who "occupies a position of public trust *with official federal responsibilities*," and assumes "duties of an *official nature*," falls within the statutory reach. *Id.* at 496-500 (emphasis added). Lower courts have applied *Dixson* to contractors hired to fulfill official federal functions. *See, e.g.*, *United States v. Thomas*, 240 F.3d 445, 448 (5th Cir. 2001); *United States v. Kenney*, 185 F.3d 1217, 1221-22 (11th Cir. 1999).

All of that is perfectly consistent with *McDonnell*, since federal contractors and their agents *do* exercise official powers, albeit through contractual delegation. It follows that they cannot sell those official powers for private gain. But nothing in *Dixson* supports the *Margiotta* theory that someone who has *no* "official" duties, responsibilities, or salary can still be a "public official," under § 201 or otherwise, by virtue of having political influence. *McDonnell* confirms the latter theory is foreign to federal bribery law—and most certainly is not part of § 1346's salvaged "core."[1]

* * *

Margiotta's free-wheeling, common-law approach to defining honest-services fraud could not be any less aligned with the trajectory set by this Court's modern precedents. Under *Skilling*, § 1346 forbids only a predictable and well-understood set of "paradigmatic" bribery and kickback offenses. And under *McDonnell*, bribery means an agent's sale of his official powers. No longer does federal criminal law sweep in anything that sets off a prosecutor's sense of moral indignation, or any transaction that offends a jury's sense of civic duty. Following those precedents, this Court should relegate *Margiotta* to the jurisprudential dustbin.

[1] Four Justices thought even *Dixson* construed the statute too expansively, 465 U.S. at 501 (O'Connor, J., dissenting), and Justice Scalia later condemned its use of legislative history to construe an "ambiguous" law against a criminal defendant, *see United States v. R.L.C.*, 503 U.S. 291, 310 (1992) (Scalia, J., concurring in part and in the judgment). Those are good reasons not to *extend* the decision.

III. *MARGIOTTA* OFFENDS CONSTITUTIONAL NORMS.

As if all of this were not enough, *Margiotta* invites a raft of constitutional concerns. Time and again, this Court has read federal corruption statutes narrowly to protect the First Amendment, federalism, and fair notice. These principles resolve any remaining doubt firmly against the decision below.

A. The Second Circuit's Standard Chills First Amendment Activity.

In construing statutes, this Court has been careful to stay away from readings that could chill activity at the core of the First Amendment. Yet *Margiotta*'s hazy standard leaves lobbyists, donors, and virtually every other politically active individual at the mercy of headline-hungry prosecutors.

1. This Court has repeatedly adopted narrowing constructions of broadly worded statutes so as to not deter the exercise of First Amendment rights. Under the *Noerr-Pennington* doctrine, for example, it read the capacious Sherman Act to exempt conduct "aimed at influencing decisionmaking by the government" in order "to avoid chilling the exercise of the First Amendment right to petition," *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014), and to protect "the citizens' participation in government," *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383 (1991). In *McDonnell*, too, this Court rejected the Government's position that "nearly anything a public official does … counts as a *quo*" for bribery purposes, warning that such an interpretation "could cast a pall of potential prosecution over" basic interactions between public officials and their constituents. 579 U.S. at 575.

Margiotta and the decision below nevertheless "run[] the risk … of deterring commonplace political behavior in which most Americans would assume they and others had a right to engage." Batey, *supra*, at 57-61; *see also* Jeffries, *supra*, at 240 (observing that this "extremely open-ended" standard "casts a shadow over" political conduct). These decisions threaten to chill protected speech of politically active individuals, impairing their ability to petition the government and impeding officials' ability to hear from and make decisions based on voices of their constituents.

Start with lobbyists, whose work is constitutionally protected. *See Citizens United v. FEC*, 558 U.S. 310, 369 (2010). They are often former officials or employees who intimately know the office and the people in it. Indeed, when the *Washingtonian* came out with a "50 Top Lobbyists" list, almost every person had a government or staffer past. Kim Eisler, *Hired Guns: The City's 50 Top Lobbyists*, Washingtonian (June 1, 2007). And about a third of the Members of Congress who left office in January 2019 have taken lobbying jobs. *Revolving Door: Former Members of the 115th Congress*, OpenSecrets, https://bit.ly/3RKAhL6 (last visited Aug. 25, 2022). At least part of what makes these former officials and staff effective is their network. It is no secret that "ex-officials are sought out and paid to use their influence in the government to achieve their clients' ends." *United States v. McClain*, 934 F.2d 822, 831 (7th Cir. 1991). The value of these relationships is empirically demonstrable: One study found that lobbyists who had worked for a senator suffered a 24% income drop when the senator left office. *See* Jordi Blanes i Vidal *et al.*, *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731 (2012).

In light of this, it would be easy for a *Margiotta*-armed prosecutor with a distaste for "swamp" culture to criminalize it: Allege that the lobbyist maintained influence and control, and all his fees become bribes. After all, it would be surprising to find a lobbyist who does *not* "brag[]" to clients that he "retained 'a bit of clout'" with the government "after formally leaving" public service. JA.682. In fact, the more influential a lobbyist is, the more likely he is to satisfy *Margiotta*'s reliance-and-control test. Criminalizing "private persons with a 'vise-like grip' on public power" therefore "might simply prohibit being too successful a lobbyist." *McClain*, 934 F.2d at 831. But it is hornbook law that "the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights," *McCutcheon v. FEC*, 572 U.S. 185, 205 (2014) (plurality op.)—including his right to petition public officials.

Moving on, campaign donors "may garner 'influence over or access to' elected officials or political parties" through their contributions. *Id.* at 208. That too is protected speech. *See id.* With *Margiotta* in hand, however, what would stop a prosecutor eager to "get money out of politics" from asking a jury to conclude that the donors have breached fiduciary duties to the public? After all, many Americans believe wealthy donors "dominate[] and control[] … governmental business" and are "relied on" by those "working in the government." JA.511. *Margiotta* thus exposes "to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions." *McCormick v. United States*, 500 U.S. 257, 272 (1991).

And there is no need to stop there. *Margiotta* "subjects virtually every active participant in the political process"—from the party boss to the part-time activist—"to potential criminal investigation and prosecution." 688 F.2d at 143 (Winter, J., dissenting in part). As one scholar observed, Margiotta's power "'to influence appointments'" by Republican officials was arguably "'no greater than,'" say, "'that held by the head of the AFL-CIO to influence the appointment of the Secretary of Labor'" in "a Democratic administration." Jeffries, *supra*, at 240 n.135. That encroachment on core First Amendment activity is why the "danger of corruption to the democratic system" posed by the Second Circuit's "catch-all political crime" is far "greater" than the problem it purports to solve. *Margiotta*, 688 F.2d at 144 (Winter, J., dissenting in part).

2. *Margiotta* conceded that its "theory" could be "misapplied to constitutionally protected conduct," but deemed that threat of "misuse[]" beside the point. *Id.* at 129 (majority op.). This Court is more solicitous toward constitutional rights, refusing to "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 579 U.S. at 576. It will not "rely on 'the Government's discretion' to protect against overzealous prosecutions," *id.*, as the mere threat is enough to chill protected speech. *See Citizens United*, 558 U.S. at 333-36; *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) ("First Amendment freedoms need breathing space to survive."). And *Margiotta*'s chill on core political speech is both "evident and inherent." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745 (2011).

For its part, the court below brushed off the First Amendment in this roundabout way: It pointed to cases applying the "reliance-and-control theory" in the private sector, even though the Constitution "protects the right of a person to speak persuasively to a private company." JA.671-72. Then the panel said it was "not obvious why speech directed to the government" deserved "special treatment." JA.672. But as explained, the private analogies fail. *Supra* at 25-28. Plus, it *is* obvious that greater concern should attach to the risk of "chilling political speech, speech that is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329. Whatever may be true for purely private contexts, the Court cannot tolerate a standard that chills the communications fundamental to a republic—those between public officials and their constituents. *Cf. McDonnell*, 579 U.S. at 575.

B. The Second Circuit's Standard Interferes with State Prerogatives.

Margiotta also tramples on state sovereignty in at least two respects. To start, a "State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.'" *McDonnell*, 579 U.S. at 576. For Congress to "defin[e]" who qualifies as a State's "officers" would therefore "upset the usual constitutional balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Yet *Margiotta*'s upshot is that federal prosecutors, juries, and judges can decide if a private citizen is "in reality … the government" of a State. 688 F.2d at 124, 129. Nothing in the relevant statutes comes close to providing a "clear statement" to justify that theory. *Gregory*, 501 U.S. at 461.

This case proves the point. Far from imposing duties on campaign staff, New York law recognizes the difference between a public servant and a private political figure. That is why Percoco had to resign from his Executive Chamber position to work full-time on the Governor's reelection. *See* N.Y. Civ. Serv. Law § 107(1)-(2); N.Y. Pub. Off. Law § 74(3)(d). Percoco's removal from the state payroll severed his relationship with the public under state law, changing his role from a public servant to a private individual seeking political gain. Yet for the panel below, that was immaterial. In its view, § 1346's "capacious language" was "broad enough" to treat Percoco as a "functional employee" of New York for purposes of federal criminal law. JA.667-68.

Relatedly, *Margiotta* trenches on the States' power "to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 579 U.S. at 576. State ethics rules already govern when former officials and staff can engage in lobbying or other advocacy, reflecting a balancing of competing policy interests. New York forbids former employees of the executive chamber from "appear[ing] or practic[ing] before any state agency" for two years. N.Y. Pub. Off. Law § 73(8)(a)(iv). The panel below overrode that bright-line state ethics rule with an open-ended federal criminal standard.

In lieu of heeding this Court's federalism principles, *Margiotta* dismissed state law as irrelevant, declaring "federal public policy" paramount. 688 F.2d at 124. But it is not the role of federal courts "to 'set[] standards of … good government for local and state officials,'" *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020), much less define who is one in the first place.

C. The Second Circuit's Standard Is Vague, Open-Ended, and Subject to Abuse.

The final nail in *Margiotta*'s once-closed coffin is its indeterminacy. Its test leaves citizens wondering when they might cross the line from political activism to prison, and all but invites prosecutors to pursue partisan adversaries in a host of new, troubling ways.

1. In the fraught context of political corruption, "a statute ... that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). That flows from the rule of lenity—the canon that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60. And it ducks due-process concerns by ensuring that federal crimes have "sufficient definiteness that ordinary people can understand what conduct is prohibited," without fear of "arbitrary and discriminatory enforcement." *McDonnell*, 579 U.S. at 576.

Yet despite acknowledging that "[t]he drawing of standards in this area is a most difficult enterprise," *Margiotta*, 688 F.2d at 122, and that § 1346 cannot be "precisely defined," the Second Circuit thought the law was "broad enough" to support its fact-intensive "reliance and control" standard, JA.667. The result was to create "an exceedingly ill-defined prospect of criminal liability for influential private citizens whose participation in the political process falls short of civics-book standards." Jeffries, *supra*, at 239.

There is no end to the mischief a prosecutor could wreak when constrained only by a jury's application (after a high-profile indictment and trial) of a fact-intensive "control and reliance" standard. "[S]elective enforcement becomes possible, and even a politicized war of indictments and counter-indictments between prosecutors of different political persuasions is conceivable." Coffee, *Metastasis*, *supra*, at 15-16. Decades before the rise of modern lawfare, Judge Winter predicted how *Margiotta*'s vagaries would "lodge[] unbridled power in federal prosecutors to prosecute political activists" and threaten "abuse." 688 F.2d at 143-44. While *McNally* interred that theory shortly thereafter, its resurrection in today's political climate brings those dangers home.

Once the line between public officials and private citizens is blurred, the list of viable targets increases exponentially. There are countless examples of friends, campaign donors, media personalities, former officials, or others—on both sides of the aisle—who have exercised influence over government decisions, even without formal office or title. *See, e.g.*, Evan Minsker, *Kanye West and Kim Kardashian Lobbied Trump in Effort to Free A$AP Rocky*, PITCHFORK (July 18, 2019); Ashley Parker & Josh Dawsey, *Trump's Cable Cabinet: New Texts Reveal the Influence of Fox Hosts on Previous White House*, WASH. POST (Jan. 9, 2022); Ron Elving, *Who Is Clinton Confidant Sidney Blumenthal?*, NPR (May 20, 2015); Thomas Franck & Dan Mangan, *Senate GOP Suggests Biden Fed Nominee Sarah Bloom Raskin Used Government Ties To Help Financial Tech Firm*, CNBC (Feb. 3, 2022). It is easy to imagine an ambitious prosecutor charging these informal advisors as *de facto* officials.

Perhaps most pernicious, the revival of *Margiotta* gives federal prosecutors a way to pursue the *family members* of public officials. Relatives of high-ranking officials—a President's father or son, for example, or a Governor's brother—hold unparalleled access and influence. And their independent business interests may be in a position to benefit from state action. No specific examples are necessary to appreciate that this too is a bipartisan reality that provides a uniquely attractive set of targets. Under the decision below, prosecutors could characterize these benefits as breaches of the family members' duties to the public, effectively prosecuting public officials by proxy.

These examples raise real ethical concerns. But "enforcement of inchoate obligations should be by political rather than criminal sanctions." *Margiotta*, 688 F.2d at 143 (Winter, J., dissenting in part). By contrast, after-the-fact, case-by-case adjudication by juries asked to evaluate whether a private citizen exercised sufficient "control" or commanded sufficient "reliance" is a recipe for prosecutorial abuse.

2. Neither *Margiotta* nor the panel below seriously engaged with these concerns. *Margiotta* responded only that a "defendant must have acted willfully and with a specific intent to defraud." *Id.* at 129 (majority op.). But if that were enough to dodge a vagueness problem, there would have been no need for *Skilling* to "pare" the body of pre-*McNally* cases "to its core." 561 U.S. at 404. As the Court has noted in many contexts, an "intent-based test" is utterly inadequate, as no reasonable party would act "if its only defense to a criminal prosecution would be that its motives were pure." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.).

Margiotta also claimed its test provided a "safe harbor" so long as a politically active person does not cross "the point at which he dominates government." 688 F.2d at 122. But it left unspecified where that point lies. That was by design. The court rejected a "hard-and-fast distinction" because it wanted to skirt "the Scylla of a rule" that would criminalize "mere influence" and "the Charybdis of a rule" that would insulate those who "in fact" are "conducting the business of government." *Id.* at 122-23. *Margiotta*, in other words, treated the mushiness of its "guidelines" as a feature rather than a bug. *Id.* at 122. But in this Court, employing a "shapeless" standard "to condemn someone to prison" is no triumph, *McDonnell*, 579 U.S. at 576, and a "safe harbor" whose "contours" must be "guess[ed] at" is no haven at all, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-49 (1991).

* * *

Margiotta is thus not only legally and doctrinally baseless; it is also a constitutional anathema. Any doubt should be resolved in favor of its demise.

IV. REJECTING *MARGIOTTA* REQUIRES REVERSAL.

For the reasons explained, the *Margiotta* theory is legally invalid. The consequence for this case is that Percoco is entitled to acquittal on Count Ten, and a new trial on the other charges.

1. Acquittal is required on Count Ten because the evidence supported, at most, an inference that Percoco agreed to help COR with its LPA issue in exchange for payment. JA.361-62. Both the alleged agreement and that "official act" occurred when Percoco was a private citizen, so he owed no duties to the public and cannot be guilty of depriving the public of honest services.

The Government below also advanced a "retainer" theory, contending that Percoco agreed to help COR "as opportunities arose," and had indeed helped COR on unrelated matters nearly a year after his return to office. JA.648-49, 653. But there was no evidence to link those actions to the earlier payments. *See id*. As the panel admitted, the LPA was the "front and center issue" for which Percoco was hired (JA.664 n.3), and the panel relied on that act alone to support the conviction (JA.680-81). Moreover, the Second Circuit has held that, after *McDonnell*, a "retainer" theory is only viable if the "particular *question or matter*" was identified when the official accepted payment. *United States v. Silver*, 948 F.3d 538, 545 (2d Cir. 2020). There was no evidence that the issues Percoco later helped with (a pay raise earned by Aiello's son, and the release of funds the state duly owed COR) were even *foreseen* when he accepted the $35,000.

2. At minimum, Percoco is entitled to a new trial on Count Ten due to the erroneous jury instructions. The instructions reflected *Margiotta*'s legal rule. *See* JA.511. Because the jury thus almost certainly convicted "for conduct that is not unlawful," vacatur is required. *McDonnell*, 579 U.S. at 579-80.

The alternative "retainer" theory cannot render harmless the instructional error. Beyond the points above, the panel admitted that the jury had *also* been wrongly instructed about the retainer theory. JA.653-57. The panel found *that* error harmless based solely on the *Margiotta* theory: that Percoco agreed to press a state agency "to reverse its position on the need for a [LPA]." JA.661. With *both* theories now tainted by instructional error, there is no avoiding vacatur on Count Ten, at minimum.

3. The *Margiotta* error also requires a new trial on the CPV counts. As to those counts, the Government argued that Percoco took "official acts" while he was a private citizen. *See* JA.374, 484. The instructional error therefore may well have influenced the verdict. Moreover, because the evidence as to CPV was so thin, prosecutors leaned heavily on the COR conduct to insinuate a corrupt pattern. But the COR conduct was not criminal and should not have been admitted. Fairness thus requires a new trial on the CPV counts too. *See United States v. Rooney*, 37 F.3d 847, 855-57 (2d Cir. 1994); *Murphy*, 323 F.3d at 118-22.

CONCLUSION

This Court should reverse the decision below and remand for further proceedings.

AUGUST 2022

Respectfully submitted,

BARRY A. BOHRER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.
666 Third Ave.
New York, NY 10017

MICHAEL L. YAEGER
CARLTON FIELDS, P.A.
405 Lexington Ave., 36th Floor
New York, NY 10174

YAAKOV M. ROTH
Counsel of Record
BRINTON LUCAS
BRETT WIERENGA
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th St.
Minneapolis, MN 55402

Counsel for Petitioner

No. 21-1158

In the

Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

---

BRIEF FOR RESPONDENT STEVEN AIELLO IN SUPPORT OF PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondent Steven Aiello

August 31, 2022

QUESTION PRESENTED

Whether paying an influential private citizen to advocate one's position before a government agency can constitute honest-services fraud under 18 U.S.C. § 1346.

PARTIES TO THE PROCEEDING

Petitioner Joseph Percoco was a Defendant-Appellant in the Second Circuit.

Steven Aiello was also a Defendant-Appellant in the Second Circuit and, pursuant to Rule 12.6 of this Court's Rules, is a Respondent herein.

Respondent United States of America was Appellee in the Second Circuit.

Joseph Gerardi, Louis Ciminelli, and Alain Kaloyeros were also Defendants-Appellants in the Second Circuit. Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler were Defendants in the district court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. Legal Background 4

B. Factual Background 8

C. Trial Proceedings 13

D. Second Circuit Decision 15

SUMMARY OF ARGUMENT 18

ARGUMENT 22

I. PAYING A PRIVATE CITIZEN TO LOBBY THE GOVERNMENT DOES NOT VIOLATE 18 U.S.C. § 1346 22

A. Section 1346 Requires Proof That The Recipient Of A Bribe Breached A *Clear* Fiduciary Duty That Is "Beyond Dispute" 22

B. Private Citizens Who Lack Governmental Authority Have No Duty—Much Less One "Beyond Dispute"—To The Public 26

TABLE OF CONTENTS
(Continued)

C. Only A Public Official Or Person Authorized To Exercise Governmental Authority Can Take "Official Action" Under § 1346 28

II. CONSTITUTIONAL PRINCIPLES REQUIRE A NARROW CONSTRUCTION OF THE HONEST-SERVICES STATUTE 31

A. The *Margiotta* Theory Is Unconstitutionally Vague 32

B. The *Margiotta* Theory Violates The First Amendment 38

C. The *Margiotta* Theory Violates Federalism Principles 42

III. THE HONEST-SERVICES STATUTE IS UNCONSTITUTIONALLY VAGUE 45

A. Absent Any Clear Statutory Guidance, The Fiduciary Duty Concept Underlying Honest-Services Fraud Is Indeterminate 45

B. Section 1346 Is Unconstitutional As Applied 48

IV. AIELLO'S CONVICTION SHOULD BE REVERSED 51

CONCLUSION 51

TABLE OF AUTHORITIES

Cases **Page(s)**

AG Capital Funding Partners, L.P. v. State St. Bank & Tr. Co., 11 N.Y.3d 146 (2008) 27

Bond v. United States, 572 U.S. 844 (2014) 32, 42, 45

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 39

Citizens United v. FEC, 558 U.S. 310 (2010) 40

Cleveland v. United States, 531 U.S. 12 (2000) 43

Dixson v. United States, 465 U.S. 482 (1984) 30, 31

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 39, 40

FEC v. Cruz, 142 S. Ct. 1638 (2022) 40

First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) 40

Gregory v. Ashcroft, 501 U.S. 452 (1991) 42

TABLE OF AUTHORITIES (continued)

Page(s)

Jones v. United States,
529 U.S. 848 (2000) 42

Kelly v. United States,
140 S. Ct. 1565 (2020) 19, 31, 42, 43

Kolender v. Lawson,
461 U.S. 352 (1983) 23, 35

Lewis v. United States,
523 U.S. 155 (1998) 26

Marinello v. United States,
138 S. Ct. 1101 (2018) 32

McConnell v. FEC,
540 U.S. 93 (2003) 40

McCutcheon v. FEC,
572 U.S. 185 (2014) 40

McDonnell v. United States,
579 U.S. 550 (2016) .... *passim*

McNally v. United States,
483 U.S. 350 (1987) .... *passim*

Palmer v. City of Euclid,
402 U.S. 544 (1971) 48

TABLE OF AUTHORITIES
(continued)

Page(s)

Rosemond v. United States,
572 U.S. 65 (2014) 49

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 46

Sessions v. Dimaya,
138 S. Ct. 1204 (2018) 38

Shushan v. United States,
117 F.2d 110 (5th Cir. 1941) 28

Skilling v. United States,
561 U.S. 358 (2010) .... *passim*

Staples v. United States,
511 U.S. 600 (1994) 33, 49

United States v. Chestman,
947 F.2d 551 (2d Cir. 1991).................................... 27

United States v. Davis,
139 S. Ct. 2319 (2019) 31, 33

United States v. deVegter,
198 F.3d 1324 (11th Cir. 1999) 27

United States v. Gray,
790 F.2d 1290 (6th Cir. 1986) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Holzer,
840 F.2d 1343 (7th Cir. 1988) 6

United States v. Hudson,
7 Cranch 32 (1812) 47

United States v. Jain,
93 F.3d 436 (8th Cir. 1996) 27

United States v. L. Cohen Grocery Co.,
255 U.S. 81 (1921) 38

United States v. Lanier,
520 U.S. 259 (1997) 47

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982)............................ *passim*

United States v. Murphy,
323 F.3d 102 (3d Cir. 2003)................................ 8, 34

United States v. Oakland Cannabis Buyers' Co-op.,
532 U.S. 483 (2001) 47

United States v. Silvano,
812 F.2d 754 (1st Cir. 1987)................................... 27

United States v. Stevens,
559 U.S. 460 (2010) 39

TABLE OF AUTHORITIES (continued)

Page(s)

United States v. Sun-Diamond Growers of Cal.,
526 U.S. 398 (1999) 19, 39

United States v. Wiltberger,
18 U.S. 76 (1820) 32

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 50

Wal-Mart Stores, Inc. v. AIG Life Ins. Co.,
901 A.2d 106 (Del. 2006) 27

Williams v. United States,
458 U.S. 279 (1982) 47

Yates v. United States,
574 U.S. 528 (2015) 32, 33

Statutes

18 U.S.C. § 201 .... 16, 28, 30, 31

18 U.S.C. § 203 45

18 U.S.C. § 205 45

18 U.S.C. § 207 36

18 U.S.C. § 666 .... 9, 15, 31

18 U.S.C. § 1341 .... 4, 7

TABLE OF AUTHORITIES (continued)

Page(s)

18 U.S.C. § 1346 .... *passim*

18 U.S.C. § 1951 15

Ariz. Rev. Stat. Ann. § 38-504 44

Ariz. Rev. Stat. Ann. § 38-510 44

Mo. Ann. Stat. § 105.455 44

Mo. Ann. Stat. § 105.478 44

N.J. Stat. Ann. § 52:13C-21.4 44

N.Y. Pub. Off. Law § 73 44

Other Authorities

John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of A White-Collar Crime*, 21 Am. Crim. L. Rev. 1 (1983) 6

John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985) 6

INTRODUCTION

Suppose you own a small business. For months a state agency has been mulling a measure that would increase your company's costs. Although you believe a favorable decision is likely and, in fact, required by law, the agency's waffling and bureaucratic delay create uncertainty and hamper your company's ability to do business. Then you learn that an influential adviser to the governor has recently left the administration and is looking for private consulting work. You also learn that the adviser has received a written legal opinion, which says the state's law permits him to "engage in backroom services for compensation before" state agencies. Your company retains the former adviser and pays his fee to advocate on your behalf to the agency. He makes a phone call to a state official and explains your position on the issue, and the agency resolves the question in your favor.

Have you committed a federal crime? Could you have reasonably imagined that the former adviser had the same legal duties as a government employee because of his continuing influence, making your payment to him a corrupt "bribe"? Can you be imprisoned for conspiring to defraud the public of the former adviser's "honest services," as though he was an actual public official?

That is what happened to Respondent Steven Aiello. Even though the lobbyist he retained, Petitioner Joseph Percoco, lacked any governmental authority at the time, the Second Circuit held that Percoco owed a fiduciary duty to the public because he retained significant influence over state employees. From this

premise, the Second Circuit concluded that the payment to Percoco was not a fee for lobbying services but, instead, a criminal bribe under the federal honest-services statute, 18 U.S.C. § 1346. Thus, under the Second Circuit's expansive interpretation of § 1346, it can be a federal crime to pay an influential private individual to lobby the government.

But paying a person to advocate one's interests before the government does not violate § 1346 if the person has no public authority, no matter how influential he might be. Aiello's conduct was constitutionally protected political advocacy, not a federal crime.

To affirm the convictions here, the Second Circuit resurrected a long-criticized 40-year-old decision that this Court abrogated in 1987. The Second Circuit held that a private individual has the same fiduciary duty to the public as a state employee if the individual "dominates and controls" and is "relied on" by public officials. That holding conflicts with this Court's two decisions interpreting—and sharply limiting the scope of—§ 1346. *See Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 579 U.S. 550 (2016). It also defies this Court's directives in *Skilling*, *McDonnell*, and many other decisions to construe criminal statutes narrowly to avoid serious due process, First Amendment, and federalism problems. And it has dangerous implications for American democracy and individual liberty.

Under the Second Circuit's theory, a vast range of ordinary political interactions could be federal felonies. A senior White House official who remains close to the President could be charged with defrauding the public if she later makes a phone call to a federal

agency for a client. An influential party official could be prosecuted for paid lobbying because politicians are eager to please him. And there are no ascertainable limits to the Second Circuit's theory. How will anyone know when a former official's access crosses the line from mere influence to "dominance and control"? Such a slippery rule provides no fair notice and invites varying and inconsistent determinations depending on the whims of prosecutors, juries, and judges; it is a quintessential due process violation. The First Amendment and federalism concerns with involving the federal government in regulating the political activities of former state and local officials are equally obvious.

This prosecution epitomizes why the Second Circuit's ruling is so dangerous, and why it is statutorily and constitutionally untenable. There was no way for Aiello to suspect that retaining Percoco could be a criminal "bribe." He hired Percoco *because* Percoco had left the government, and because Percoco had been told he *could* legally lobby state agencies. What is more, he had a First Amendment right to do so. Yet he was prosecuted and convicted of participating in a conspiracy to commit honest-services fraud.

The judgment should be reversed.

STATEMENT OF THE CASE

A. Legal Background

The honest-services fraud doctrine originated as a judicially created expansion of the federal mail fraud statute, 18 U.S.C. § 1341. That statute prohibits "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," but prosecutors in the mid-twentieth century began using it to target public corruption by state and local officials. They argued that the statute reached beyond schemes to obtain money or property, and also prohibited "schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally v. United States*, 483 U.S. 350, 355 (1987). Lower courts endorsed this "honest services" fraud theory, which prosecutors applied to corruption involving public officials as well as analogous private-sector conduct. In public corruption cases, the idea was that public officials are public fiduciaries; if a public official takes a bribe but fails to disclose that payment, he defrauds constituents who have placed their trust in him to faithfully and honestly represent their interests. The bribe payor may be equally guilty as a co-conspirator, on the theory that he agreed to deprive the public of the official's honest services.

But the nascent "honest services" theory of mail fraud was not limited to the prototypical example of a bribe to a public official. For several decades, prosecutors experimented with novel theories of honest-services fraud, and the lower courts developed and ex-

panded the doctrine. This led to "considerable disarray over the statute's application." *Skilling v. United States*, 561 U.S. 358, 405 (2010).

During this period of prosecutorial and judicial expansion of the honest-services fraud concept, a divided Second Circuit panel decided *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). The defendant there, Joseph Margiotta, was a longtime local Republican Party chairman who held no public office. He was convicted of mail fraud for persuading a Long Island town to select an insurance broker who paid kickbacks to some of Margiotta's cronies. He challenged his conviction on the ground that the mail fraud statute "does not embrace a theory of fiduciary fraud by individuals who participate in the political process but who do not occupy public office," and argued that he "owed no fiduciary duty to the general citizenry" of the town or surrounding county under federal or state law. *Id.* at 112.

The panel majority rejected that argument. Starting from the premise (subsequently rejected in *McNally*, as discussed below) that schemes to cause intangible losses "clearly come within the terms of the statute," the majority held that "a formal employment relationship, that is, public office" is not a "prerequisite to a finding of fiduciary duty in the public sector." *Id.* at 121-22. The majority conceded it was unable to articulate any "precise litmus paper test" for determining if a private citizen has public fiduciary status, but it offered two "helpful" factors: (1) whether "others rely upon him because of a special relationship in the government," and (2) whether the person "control[s]" or "dominate[s] governmental affairs" by "in fact

mak[ing] governmental decisions." *Id.* at 122. The majority affirmed the district court's jury instruction because it communicated these concepts. *Id.* at 125. And it found the evidence that Margiotta was a public fiduciary sufficient because he was "deeply involved in governmental affairs," had a "role in giving political clearance for certain high-level appointments," and exercised "similar power" over the selection of the town's broker of record. *Id.* at 127.

Judge Ralph Winter dissented. He criticized the majority for transforming the mail fraud statute into "a catch-all prohibition of political disingenuousness" that would "create[] a real danger of prosecutorial abuse for partisan political purposes." *Id.* at 139. The majority's expansive view of public-sector honest-services fraud, he observed, artificially and improvidently interposed fiduciary duties "between politically active persons and the general citizenry in a pluralistic, partisan, political system." *Id.* at 142.

The *Margiotta* decision was heavily criticized by contemporary courts and commentators. Judge Posner, for instance, decried it as one of "the worst abuses of the mail fraud statute" because it authorizes federal conviction "for conduct not even wrongful under state law." *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988). *See also* John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 239 (1985) (*Margiotta* created "an exceedingly ill-defined prospect of criminal liability for influential private citizens whose participation in the political process falls short of civics-book standards"); John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of A

White-Collar Crime, 21 Am. Crim. L. Rev. 1, 16 (1983) (*Margiotta* cast a "potential chilling effect on the actions of public fiduciaries" and raised the prospect of "significant, selective enforcement").

Five years later in *McNally*, however, this Court jettisoned the developing judge-made "honest services" doctrine, including *Margiotta*. *McNally*, 483 U.S. at 355 (citing *Margiotta*). The Court explained that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the Court limited § 1341 to the protection of property rights. *Id.* at 360.

In 1988, Congress responded by enacting 18 U.S.C. § 1346, which expanded mail and wire fraud liability by establishing that the term "scheme or artifice to defraud," as used in Title 18's fraud statutes, includes any "scheme or artifice to deprive another of the intangible right of honest services." Section 1346's facially vast language spawned many constitutional challenges. Eventually, in *Skilling*, this Court confronted the statute's obvious due process problems. To avoid holding § 1346 unconstitutional, this Court strictly limited the statute's scope and confined it to "core" bribery and kickback schemes only. *Id.* at 404-09. Justice Scalia (joined by Justices Thomas and Kennedy) concurred in the judgment but would have held § 1346 unconstitutionally vague, rather than

narrow it, because the statute provides no ascertainable standard of guilt. He pointed out that lower courts were all over the map as to what the "intangible right of honest services" entailed and that the nature, content, and source of the required fiduciary duty was hopelessly indeterminate. *Id.* at 416-20. Responding to these concerns, the majority insisted that the fiduciary relationships in "core" bribery and kickback cases were confined to those in which the duty was "beyond dispute," such as the relationships between "employee-employer," "union official-union members," and "public official-public." *Id.* at 407 n.41.

Until this case, no court had ever affirmed a § 1346 conviction based on *Margiotta*'s theory that a private citizen can owe a fiduciary duty to the public. And the Third Circuit had expressly rejected *Margiotta* and reversed a § 1346 conviction relying on that theory. *See United States v. Murphy*, 323 F.3d 102, 104-05 (3d Cir. 2003) (Becker, J.). As described below, however, the Second Circuit resurrected *Margiotta* here to affirm the novel § 1346 convictions in this case.

B. Factual Background

Respondent Steven Aiello founded and co-owned COR Development Company, a real estate construction firm in Syracuse, New York. COR was involved with various state-funded projects in upstate New York.

The question presented here pertains to a single count of the indictment charging a conspiracy to violate 18 U.S.C. § 1346. That count alleged that from August through October 2014, COR paid "approxi-

mately $35,000 in bribe payments" to Petitioner Joseph Percoco and that Percoco conspired with Aiello and another COR executive, Joseph Gerardi, to "take official action in exchange for bribes" and "deprive the public of its intangible right" to Percoco's honest services. JA89, 100-01.[1] But Percoco was not a public official for most of 2014—including the entire period during which COR asked for his help and paid for his services. Nonetheless, the jury convicted Percoco and Aiello of the charged § 1346 conspiracy, while acquitting Gerardi. The indictment also charged the same conduct under 18 U.S.C. § 666, a statute that addresses bribery of "agents" of state governments. But the jury acquitted all three defendants of those charges, presumably because it found Percoco was not a state "agent."

1. Percoco had been a top aide to then-Governor Andrew Cuomo. In April 2014, he formally resigned from government to manage Cuomo's re-election campaign. JA456-58. Numerous government witnesses testified that Percoco's resignation marked a definite break with public office and that he expressed no intent to return. JA192-93, 201, 297-98. He could have simply taken a leave of absence if he intended to separate only briefly, but as Percoco told one administration official, "he needed to make money for his family" after the campaign and so "was not coming back" to a

[1] The indictment also charged Aiello and Gerardi with participating in an unrelated fraud arising from Howe's involvement in another matter. Those charges were tried separately, and Aiello and Gerardi were convicted of wire fraud and wire-fraud conspiracy under the Second Circuit's "right to control" theory. This Court granted certiorari to consider the validity of that theory in the related case of *Ciminelli v. United States*, No. 21-1170.

government job. JA201. Percoco even obtained an ethics opinion from an attorney in the Governor's office concerning what private work a *former government employee* may undertake. JA298-300.

During the campaign, however, several senior members of Cuomo's staff departed, and Cuomo's father became ill. Sensing that Cuomo needed him for "stability," Percoco reversed course and rejoined the Governor's office on December 8, 2014, after Cuomo's re-election. JA193, 472.

2. It was undisputed at trial that COR had no agreement to pay Percoco while he was in government. COR's financial connection to Percoco came about during the 8-month period when Percoco was *not* a public official and concerned an issue with Syracuse's Inner Harbor that was resolved *before* he returned to government.

The Inner Harbor, a former industrial and shipping center, had fallen into neglect. C.A.App.511, 531. In 2011, Cuomo launched an initiative to revitalize the area as a retail, hotel, and residential center. C.A.App.531-32. Syracuse selected COR as its developer, and the State's Empire State Development agency ("ESD") agreed to reimburse COR for public infrastructure elements such as sewers, streets, and sidewalks. C.A.App.511-13.

In the summer of 2014, COR began constructing a hotel and planned to build a parking lot nearby. C.A.App.513, 532. COR asked ESD to include the lot in its infrastructure financing, but because the lot would serve not only the public but also the hotel, ESD

had to determine whether such funding required a Labor Peace Agreement ("LPA"). C.A.App.513, 532. An LPA is mandated when a project has a hotel as its "principal function" and allows the hospitality union to meet with workers at the facility. C.A.App.532, 630-32.

ESD's deputy general counsel, Maria Cassidy, testified that the mixed-use nature of the parking lot presented a unique situation with "no guidance in the law." C.A.App.633. Although she initially assumed that an LPA would be required, she reached the opposite conclusion after learning that the hotel was only one small element of the broader Inner Harbor project. But for over five months, ESD wrestled internally and with Andrew Kennedy, the Assistant Secretary for Economic Development, over whether an LPA was needed. *E.g.*, C.A.App.534, 632-35, 661-72, 692-96.

COR's government relations consultant, Todd Howe, assisted the company on the Inner Harbor project. Howe was also a close friend of Percoco. In early 2014, Percoco advised Howe that he had "a significant mortgage payment" coming up at the end of 2014 and suggested that he might be able to do consulting work for some of Howe's clients after Percoco left his government post. JA357, 378. Accordingly, in June or July 2014 Howe approached Aiello about the possibility of hiring Percoco with respect to the LPA issue. JA378.

On July 10, 2014, Percoco emailed Howe a copy of the written legal opinion explaining the applicable "Post-Employment Ethics Rules/Restrictions" and what government-related work he could and could not

do. The ethics opinion stated, among other things, that as a former employee in the "Executive Chamber" (the Governor's office), Percoco "is permitted to engage in backroom services for compensation before a state agency, departments, etc. other than the Executive Chamber so long as the services do not constitute an appearance or practice before the agency, department, etc." JA593. A few days later, Howe forwarded the ethics opinion to his partner, copying Aiello, and wrote, "Steve needs labor relations help on inner harbor and Joe would like to assist." JA590.

On July 30, 2014, Aiello followed up by email, asking Howe if Percoco could assist COR with the LPA issue now that he was out of government. Aiello wrote: "Todd, is there any way Joe P can help us with this issue *while he is off the 2nd floor working on the Campaign*[?]" JA594 (emphasis added). (The Governor's executive staff sits on the Capitol's second floor.) He explained that unions were lobbying ESD to demand an LPA and so COR "could really use a[n] advocate with regard to labor issues over the next few months." *Ibid.*

COR subsequently paid Percoco $35,000 through Howe, in two separate payments in August and October 2014. JA647; C.A.App. 728-29. Both payments were made while Percoco was out of government.

On December 3, *before* he returned to state government, Percoco called assistant secretary Kennedy about the LPA matter; shortly thereafter ESD agreed an LPA was unnecessary and approved COR for state funding without that additional condition. JA648. Nonetheless, although COR built the parking lot for

the Inner Harbor, it did not pursue the grant. C.A.App.516.

As noted, Percoco returned to state government on December 8, 2014, after his work for COR on the LPA issue was complete. Just as Aiello had requested, Percoco assisted only for a "few months," and only while he was "off the 2nd floor working on the Campaign." There was no evidence Aiello had any inkling that Percoco would ever re-join the Governor's office. Nor was there evidence that Aiello knew the details of Percoco's interactions with his former colleagues once he started working on the campaign. All Aiello knew was that Percoco was no longer a public official at that time and, like any effective lobbyist, could use his contacts to help COR with ESD.

C. Trial Proceedings

At trial, after the government rested, Aiello moved for a judgment of acquittal. He joined Percoco's argument that "nothing in the record" suggested Percoco accepted funds to take an "official act," since the payments from COR were "in connection with a short-term agreement within the period in which [Percoco] was no longer a state employee." JA447-48. Aiello further argued that at the time of the allegedly corrupt agreement, Percoco was "not a state official" and had "an ethics opinion which was made known to Mr. Aiello … that purported to allow [Percoco] to do some form of consulting work while he was off the Second Floor." JA449-50. He pointed out that there was no evidence Aiello knew Percoco stood on the same footing as an actual state official or "had some sort of duty or obligation to provide honest services to the people

of the State of New York." *Ibid.* The court denied the motion following the trial. JA650.

In draft instructions circulated prior to the charge conference, the district court proposed a jury instruction that Percoco could "owe[] the public a duty of honest services when he was not a state employee, if you find that during that time he owed the public a fiduciary duty." Pet.App.133a; C.A.App.765. The defendants objected. They urged the court to specify that the conspiracy's object must be the deprivation of Percoco's "honest services *as a public official*," but the court refused. JA479-80. The defendants also objected that the instructions needed to specify that only a public official "can perform an official act," but the court once again refused: "No, I'm definitely not going to say that. I don't even think that's a correct statement of the law." JA477-78.

As a result, the district court instructed the jury that Percoco could owe the public a duty of honest services not only when he was employed by the State, *but even when he was not*. The court charged the jury that Percoco did "not need to have a formal employment relationship with the state in order to owe a duty of … honest services to the public." JA511. Instead, the jury could find Percoco "owed the public a fiduciary duty" if (1) "he dominated and controlled any governmental business," and (2) "people working in the government actually relied on him because of a special relationship he had with the government." *Ibid.* The court charged the jury that it had to distinguish this dominance, control, and reliance from "[m]ere influence and participation in the processes of govern-

ment," which "standing alone are not enough to impose a fiduciary duty." *Ibid.* By contrast, as to the related federal program bribery count under 18 U.S.C. § 666, the district court instructed the jury it could not convict unless Percoco was "an agent of New York State," meaning "a person who is authorized to act on behalf of state government." JA516.[2]

After deliberating for eight days and requiring two *Allen* charges, the jury convicted Aiello and Percoco of honest-services fraud conspiracy and convicted Percoco on other charges that are not before this Court. The jury acquitted Aiello, Percoco, and Gerardi on the § 666 counts, and acquitted Aiello and Gerardi of all other counts.

D. Second Circuit Decision

The Second Circuit affirmed the honest-services fraud conviction based on COR's payments for Percoco's assistance with the LPA matter. The court rejected the defendants' challenge to the fiduciary duty instruction by resurrecting its much-criticized 40-year-old decision in *Margiotta*.

Even though this Court abrogated *Margiotta* in *McNally* and sharply circumscribed the scope of § 1346 in *Skilling*, the Second Circuit reaffirmed and revived *Margiotta*'s holding that "a finding of fiduciary duty in the public sector" is not limited to public officials and that "a private citizen's 'dominance in

[2] The district court dismissed a Hobbs Act extortion count against Percoco that also related to COR's payment, on the ground that he was incapable of acting "under color of official right" within the meaning of 18 U.S.C. § 1951 because he was not a public official at the relevant time. JA532-61.

municipal government' may 'give[] rise to certain minimum duties to the general citizenry.'" JA665. The court held that, for purposes of § 1346, it would look to "common law generally and New York law specifically" for "the bounds of this fiduciary duty." *Ibid.*

The Second Circuit thus held that "§ 1346 covers those individuals who are government officials as well as private individuals who are relied on by the government and who in fact control some aspect of government business." JA667. In so doing, the court reasoned that the "capacious language" of § 1346—*i.e.*, "scheme or artifice to deprive another of the intangible right of honest services"—"is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." JA667-68. But the court failed to acknowledge or apply this Court's clear directive in *Skilling* to construe § 1346 narrowly precisely because that "capacious" language presents an obvious constitutional "vagueness problem." 561 U.S. at 403-04.

The Second Circuit also dismissed the significance of *McDonnell*'s holding that bribery in federal public corruption cases requires a quid pro quo involving an official act in which a person uses their "official position" to carry out "a formal exercise of governmental power." 579 U.S. at 568, 574. The Second Circuit said that *McDonnell* "merely interpreted the definition of 'official act,' which is "quite a different issue from *who* can violate the honest-services statute." JA670. The court also pointed out that 18 U.S.C. § 201, relating to bribery of federal officials, reaches people who are not directly employed by the federal government but are

authorized to act on its behalf. *Ibid.* Finally, the court dismissed any constitutional concerns based on the Due Process Clause, First Amendment, and federalism principles, because it found no basis "for carving out an exception to § 1346 that would require formal employment *only* when defrauding the government (as opposed to a private party)." JA671-72.

Based on this analysis, the court "reaffirm[ed] *Margiotta*'s reliance-and-control theory in the public-sector context" and affirmed the defendants' convictions even though the "bribery" conspiracy took place while Percoco was out of government. JA665. It approved the district court's fiduciary duty jury instruction. And it found the evidence sufficient to establish Percoco's duty to the public because, for example, Percoco occasionally used his old "telephone, desk, and office" while working on the governor's reelection campaign and once "helped organize a state event." JA682.

Aiello, of course, could not possibly know what telephone, desk, or office Percoco used, or how he interacted with others who were still in government. Nonetheless, the Second Circuit held the proof of Aiello's knowledge of Percoco's supposed "control" sufficient on the basis that "Aiello specifically sought out Percoco" to help COR with the LPA issue and paid him through COR's government relations consultant, Howe. JA683. The court construed Aiello's inquiry about Percoco's availability while "off the 2nd floor working on the Campaign" as proof that Aiello understood that Percoco wielded "power"—not just influence—during this period and thus owed the public the

same duty of honest services as an actual public official. *Ibid.*[3]

SUMMARY OF ARGUMENT

I. Permitting a jury to find that *former* officials retain a duty to the public because they remain particularly influential would defy this Court's § 1346 precedents.

In *Skilling v. United States*, 561 U.S. 358 (2010), the Court recognized that read literally, § 1346's text would be impermissibly vague, malleable, and subject to prosecutorial abuse. Accordingly, the Court adopted a limiting construction to avoid that serious constitutional concern and provide fair notice of what the statute proscribes. The Court pared the statute down to "core" cases involving bribery and kickback schemes violating *clear* fiduciary duties that are "beyond dispute," such as those owed by public officials to the public and by employees to their employers. The duty here was hardly "beyond dispute." It has no basis in state law or any federal statute. Instead, the

[3] At trial, the government introduced evidence that months after Percoco returned to state government, he assisted COR or Aiello on two other matters, by directing other officials: (1) to pay an outstanding bill for services COR had rendered; and (2) to implement a salary increase to which Aiello's son, a state employee, was entitled. Percoco was not paid for these actions, which occurred long after COR's last payment and were not contemplated at the time COR procured Percoco's services. The Second Circuit ruled that a jury instruction permitting conviction based on these later acts was erroneous under *McDonnell*. But it deemed that error harmless because "there can be no doubt that both Aiello and Percoco understood that the payments to Percoco were made to procure his assistance in pressuring ESD to reverse its position on the need for a Labor Peace Agreement." JA661.

Second Circuit created the duty out of whole cloth in the early 1980s, typifying the excesses of a bygone era before the Court's modern jurisprudence on interpreting criminal statutes.

This Court's only other decision involving § 1346, *McDonnell v. United States*, 579 U.S. 550 (2016), also precludes extending the statute to private citizens who lack official authority. In *McDonnell*—again driven by vagueness and other constitutional concerns—the Court limited the scope of the statute's public-sector bribery crimes to quid pro quo exchanges for only limited categories of acts by public officials: "formal exercise[s] of governmental power" or using one's "official position to exert pressure on *another* official." *Id.* at 574. No matter how influential a private citizen might be, he cannot perform an "official act" under *McDonnell*. Indeed, the notion that such a person could owe the public a fiduciary duty is nonsensical.

II. Permitting a jury to find that former public officials owe a duty to the public after they leave government would violate fundamental principles of statutory interpretation. This Court's precedents dictate that criminal statutes—particularly open-ended corruption laws—must be construed narrowly to avoid serious constitutional problems. *See*, *e.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1571-74 (2020); *McDonnell*, 579 U.S. at 574-77; *Skilling*, 561 U.S. at 405-06; *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). The Court has been particularly insistent on limiting constructions where necessary to provide fair notice, avoid criminalizing

protected political speech, and prevent federal prosecutors and courts from "setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987).

The principle of constitutional avoidance requires reversal here. The Second Circuit held that a private citizen becomes a public fiduciary if he "dominate[s] and control[s] any governmental business" through his influence over actual government officials. That is an impermissibly vague standard. The line separating "dominance and control" from mere "influence" is hopelessly indeterminate and subject to widely divergent, subjective interpretations by prosecutors, juries, and judges. The theory also criminalizes a vast range of ordinary political interactions and violates core First Amendment rights of citizens to petition their elected officials. If paying influential private individuals to advocate before the government was a federal crime, our system of representative democracy could not function as the Framers designed it. The Second Circuit's theory also raises serious federalism concerns, because it would interfere with states' prerogatives about whether, and to what extent, to restrict their own public officials from engaging in lobbying after leaving office.

III. This case illustrates that § 1346 remains unconstitutionally vague even as limited by *Skilling* to concealed "bribes and kickbacks" "in violation of a fiduciary duty." That is because the term "fiduciary duty" is not defined by statute but instead developed through evolving common law. As Justice Scalia warned in his *Skilling* concurrence, fiduciary duty caselaw is inconsistent and unpredictable and utterly

fails to produce any ascertainable standard of guilt. More than a decade has elapsed since *Skilling*, but this due process problem persists unabated.

At a minimum, § 1346 is unconstitutionally vague as applied here. How could Aiello have known whether paying Percoco would be deemed a "bribe" under § 1346? He specifically sought Percoco's assistance only *after* Percoco left government and precisely *because* Percoco was no longer in office, after being informed that state law permitted Percoco to lobby state agencies. While he obviously knew that Percoco remained influential, he had no way to predict that a jury could later find this influence so significant that it amounted to "dominance and control" of government business. Section 1346 does not give any reasonable person in Aiello's shoes fair notice that compensating Percoco for lobbying a state agency was a federal felony.

IV. Each of these points requires reversal of Aiello's conviction for conspiracy to commit honest-services fraud. The relevant conduct involved an agreement, payment, and act that all occurred while Percoco was a private citizen, not a public official, and the *Margiotta* theory was the Second Circuit's sole basis for affirming Aiello's conviction.

ARGUMENT

I. PAYING A PRIVATE CITIZEN TO LOBBY THE GOVERNMENT DOES NOT VIOLATE 18 U.S.C. § 1346

A. Section 1346 Requires Proof That The Recipient Of A Bribe Breached A *Clear* Fiduciary Duty That Is "Beyond Dispute"

Under the Second Circuit's decision, a person can be convicted of violating § 1346 for paying a government relations consultant who doesn't work for the government or have any formal authority to act on its behalf. The court's ruling allows a jury to find that a "private individual" owed a fiduciary duty to the public if the jury concludes the individual was so influential that he "in fact control[led] some aspect of government business" and was "relied on by the government." JA667. In other words, under the Second Circuit's holding, if a jury decides that a private citizen was sufficiently influential in government affairs, what would otherwise have been a legal payment for advocacy becomes a criminal "bribe" punishable under § 1346.

But extending public-sector honest-services fraud to private citizens based on some nebulous, unquantifiable measure of influence conflicts with this Court's decision in *Skilling*. There, the Court ruled that § 1346 must be construed narrowly because otherwise its facially broad language—covering any "scheme or artifice to deprive another of the intangible right of honest services"—would be unconstitutionally vague. And it confined § 1346 to classic, indisputably fiduci-

ary relationships such as "public official-public," "employee-employer," and "union official-union members" to avoid constitutional problems caused by the inherent vagueness in "the source and scope of fiduciary duties" that are necessary to support a criminal conviction under § 1346. 561 U.S. at 407 n.41.

As this Court explained, to satisfy the Due Process Clause, "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." *Id.* at 402-03 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The Court found "force" in Skilling's arguments that § 1346 was unconstitutionally vague because it failed both requirements: The phrase "the intangible right of honest services" does not clearly define what conduct the statute prohibits, and the statute's "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections" and thus invites arbitrary enforcement. *Id.* at 403, 405. The Court recognized that "honest-services decisions preceding *McNally* were not models of clarity or consistency." *Id.* at 405 (citing numerous examples in Skilling's brief as well as Justice Scalia's opinion). And the Court acknowledged that Congress failed to cure this problem in § 1346. It observed that, in the two decades following the statute's enactment, the circuits had "divided on how best to interpret the statute," disagreeing on issues including, among others, whether "§ 1346 prosecutions must be based on a violation of state law," "whether a defendant must contemplate that the victim suffer economic harm," and

"whether the defendant must act in pursuit of private gain." *Id.* at 403 & n.36.

The Court agreed with Skilling that the "potential breadth" of § 1346 could render it unconstitutional. *Id.* at 403. Nevertheless, the Court concluded that § 1346 "should be construed rather than invalidated." *Id.* at 404. "To preserve the statute without transgressing constitutional limitations," this Court "pare[d]" § 1346 "down to its core." *Id.* at 404, 408-09. That "solid core," the Court held, was represented in the subset of pre-*McNally* decisions that involved "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 407.

Justice Scalia (joined by Justices Thomas and Kennedy) agreed that Skilling's honest-services fraud conviction had to be reversed, but argued that the statute was unconstitutionally vague and was not susceptible to any narrowing construction. Critical here is that he found the statute's "most fundamental indeterminacy" to be ascertaining the existence and scope of fiduciary duties. *Id.* at 421 (Scalia, J., concurring in judgment). None of the pre-*McNally* cases, he explained, "defined the nature and content of the fiduciary duty central to the 'fraud' offense"; "the duty remained hopelessly undefined." *Id.* at 417-18. Even limiting the statute to bribes and kickbacks, Justice Scalia argued, would not solve its incurable vagueness, because of further questions about "the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, includ-

ing the corporate officer here?" *Id.* at 421. The indefiniteness of the fiduciary element, Justice Scalia maintained, made it impossible for ordinary citizens to ascertain "the criterion of guilt." *Ibid.*

The majority responded that the limits it was imposing on § 1346 would avoid difficult questions about who is or is not a fiduciary. The majority emphasized that in the "core" pre-*McNally* bribery and kickback cases to which it was confining § 1346, "[t]he existence of a fiduciary relationship, under any definition of that term, was usually *beyond dispute*." *Id.* at 407 n.41 (emphasis added). The Court specifically identified "public official-public" as a quintessential fiduciary relationship to which § 1346 applies. But the Court did *not* suggest a "private citizen-public" relationship would qualify. That omission was telling, because in his concurrence Justice Scalia singled out *Margiotta* and the decision reversed in *McNally*[4] as exemplifying why "[t]he indefiniteness of … fiduciary duty" deprives § 1346 of any "ascertainable standard of guilt." 561 U.S. at 416-17, 419. The Court's response was to cabin fiduciary relationships to a much narrower category—those "beyond dispute"—thus excluding the *Margiotta* theory.

This Court was clear that the way to deal with the inherent vagueness in the malleable fiduciary duty concept is to confine the term to limited situations in which it is "beyond dispute" that a relationship is fiduciary. *Skilling* precludes prosecutors, juries, or

[4] *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), which held that the Kentucky Democratic Party chairman was a de facto public official.

lower courts from inventing new fiduciary duties, especially the counterintuitive notion that a private citizen—a campaign official—can owe the public a fiduciary duty, or that retaining such an individual to advocate on one's behalf is a federal felony punishable by up to 20 years in prison.

B. Private Citizens Who Lack Governmental Authority Have No Duty—Much Less One "Beyond Dispute"—To The Public

Margiotta was wrong when it was decided. The *Margiotta* majority relied on an analogy to duties created by private employment or contract for its "reliance and de facto control" test for criminal liability. 688 F.2d at 121-22. But federal courts cannot "supplement … statutory crimes through the use of the common law." *Lewis v. United States*, 523 U.S. 155, 160 (1998). Moreover, as Percoco explains in his brief, *Margiotta*'s core premise is flawed because it is only by accepting the role of a public representative that a private citizen binds himself to act for the general welfare of the citizenry. And the majority failed to provide any sound legal basis for its reliance-and-control test. Fiduciary duties cannot be generated unilaterally through either reliance or control. Moreover, the cases that employ a reliance-and-control test use it to determine whether an existing relationship rose to the fiduciary level, not to create duties absent a preexisting legal relationship. Thus, the court in *Margiotta* presumed a fiduciary relationship where none exists, between a private citizen who has influence over the government and others who do not. Its novel theory of honest-services fraud finds no legal basis in any statute or judicial caselaw. *See* Percoco Brief, Point I.

In any event, *Margiotta*'s fiduciary test is ill-suited to the public sector. The thrust of a fiduciary relationship is that, rather than undertake certain tasks herself, an individual trusts someone with superior knowledge or skill in the area to manage those tasks on her behalf. Courts describe fiduciary relationships as "special relationships" that exist only "where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006). *See United States v. Chestman*, 947 F.2d 551, 569 (2d Cir. 1991) (en banc) ("A fiduciary relationship involves discretionary authority and dependency: One person depends on another—the fiduciary—to serve his interests."); *AG Capital Funding Partners, L.P. v. State St. Bank & Tr. Co.*, 11 N.Y.3d 146, 158 (2008) (fiduciary relation "when confidence is reposed on one side and there is resulting superiority and influence on the other"). But the public does not repose trust or confidence in individuals who are not public officials and who are neither known to be working for the government nor on the public payroll, or otherwise vested with official authority.

Similarly, the premise of public-sector honest-services fraud is that "in a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated." *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (quoting *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996)); *see also United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) ("[A] public official acts as trustee for the citizens and the State … and thus

owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them."); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("No trustee has more sacred duties than a public official."). That rationale collapses when the supposed conspiracy concerns acts of a private individual, who has no "political contract" with citizens to breach.

C. Only A Public Official Or Person Authorized To Exercise Governmental Authority Can Take "Official Action" Under § 1346

Allowing a jury to find that paying an influential person with no official government position or authority violates § 1346 would also contravene this Court's decision in *McDonnell*. Public-sector bribery under § 1346 requires a quid pro quo in which a payment is exchanged for an "official act" (a term borrowed from 18 U.S.C. § 201, a bribery statute pertaining to federal officials). *See*, *e.g.*, *McDonnell*, 579 U.S. at 572-73. No private citizen—no matter how influential he might be—is capable of performing an "official act." Accordingly, private citizens cannot enter the type of quid pro quo required to sustain a public-sector bribery conviction under § 1346.

In *McDonnell*, this Court defined "official act" in the public corruption prosecution of a former governor of Virginia who had been convicted of violating several federal criminal statutes, including § 1346. The Court held that there is no "official act," and thus no criminal quid pro quo, unless two requirements are satisfied. First, the act must involve the "formal exercise of governmental power"; it must relate to a matter that is "within the specific duties of an official's position—the function conferred by the authority of his office," and

that is "pending either before the public official who is performing the official act, or before another public official." *Id.* at 567-70, 574. Second, "the public official" in question "must make a decision or take an action on th[e] question or matter, or agree to do so," or "us[e] his official position to exert pressure on *another* official to perform an 'official act.'" *Id.* at 572, 574.

A private citizen who is not expressly authorized to act on behalf of the government lacks formal "governmental power," "authority of … office," or an "official position." Such a private citizen is thus *legally incapable* of performing an official act as *McDonnell* defines it. The Second Circuit dismissed *McDonnell* as about "the definition of 'official act'" and not "*who* can violate the honest-services statute." JA670. But the two are inextricably intertwined. It makes no sense to speak of a private citizen who lacks official authority taking "official action" on a matter "pending" before him or using his "official position to exert pressure on *another* official." (Notably, the emphasis on "another" was in this Court's opinion.)

Of course, *McDonnell's* analysis of the meaning of "official action" does not apply to all § 1346 cases, because § 1346 also bars commercial bribery in violation of a fiduciary duty to a private employer. But the Court's reasoning plainly applies to all public-sector § 1346 cases, especially because it settled on a narrow construction of "official act" in part due to the "significant constitutional concerns" (elaborated further below) posed by expansive interpretations of public-sector bribery crimes. 579 U.S. at 574-77.

Under *McDonnell*, only a person vested with governmental power and authority can perform an official

act. That is not to suggest, however, that one must be *formally employed* by the government to have a fiduciary duty to the public for purposes of § 1346. For instance, the "federal official" anti-bribery statute reaches not only federal officers and employees, but also "person[s] *acting for or on behalf of* the United States, or any department, agency or branch of Government thereof … in any official function, *under or by authority of* any such department, agency, or branch of Government." 18 U.S.C. § 201(a)(1) (emphasis added). Accordingly, this Court has held that § 201 applies to anyone "with official federal responsibilities" for the federal government. *Dixson v. United States*, 465 U.S. 482, 496 (1984). The defendants in *Dixson*—private individuals who were formally designated as the City of Peoria's subgrantee to administer federal funds—were thus covered, because they were formally "charged with abiding by federal guidelines" and had "official federal responsibilities" to "allocat[e] federal resources, pursuant to complex statutory and regulatory guidelines." *Id.* at 497.

The government and the Second Circuit have asserted that § 201 and *Dixson* support finding Percoco a public fiduciary, because they illustrate that formal government employment is not always required for federal public corruption crimes. *E.g.*, BIO.13, 18; JA670-71. But Percoco would not be covered by § 201 even if it applied to state government. He had no official governmental duties at any relevant time. He had no such duties when COR retained him to assist it with the LPA issue; he had none when COR paid him; and he had none when he called a state official to advocate COR's position. He was not a government em-

ployee. Nor was he charged with any "official responsibilities," or serving "any official function" for New York State, or authorized to act on behalf of the State's government. Instead, as Aiello understood, at all pertinent times Percoco was "off the 2nd floor working on the [Governor's] Campaign." JA594.

Moreover, the jury's findings directly contradict the government's and Second Circuit's contentions about § 201 and *Dixson*. The standard in § 201, as elaborated in *Dixson*, is virtually identical to the test for an "agent" under the federal program bribery statute, which defines the term to include "a person authorized to act on behalf of … a government." 18 U.S.C. § 666(d)(1). Consistent with that statutory definition, the jurors were instructed that they could convict the defendants of violating § 666 only if they found that Percoco was "authorized to act on behalf of state government" and *not* if he merely "exercise[d] responsibility *or control*." JA516. Because the jury acquitted all defendants on those counts, it did not find Percoco was *authorized* to make official government decisions, as would be required under § 201 and *Dixson*.

II. CONSTITUTIONAL PRINCIPLES REQUIRE A NARROW CONSTRUCTION OF THE HONEST-SERVICES STATUTE

The principle of constitutional avoidance also requires limiting the scope of the fiduciary duty element of honest-services fraud. In case after case (including *Skilling* and *McDonnell*), this Court has construed criminal statutes narrowly to avoid serious constitutional problems. *See*, *e.g., Kelly v. United States*, 140 S. Ct. 1565 (2020); *United States v. Davis*, 139 S. Ct.

2319 (2019); *Marinello v. United States*, 138 S. Ct. 1101 (2018); *Yates v. United States*, 574 U.S. 528 (2015); *Bond v. United* States, 572 U.S. 844 (2014). The Court has been particularly vigilant in enforcing this canon of constitutional avoidance when interpreting open-ended fraud and public corruption statutes. As explained in *McDonnell*, the government's expansive readings of public-sector bribery crimes trigger "significant constitutional concerns." 579 U.S. at 574. The Court adopted its limiting construction of the term "official act" in part because the government's broader interpretation raised grave questions under the Due Process Clause, the First Amendment, and federalism principles. *Id*. at 574-77. Those concerns apply with equal—if not greater—force here, and dictate that public-sector honest-services fraud must be limited to payments to individuals who are actual public officials, or otherwise formally vested with official governmental power.

A. The *Margiotta* Theory Is Unconstitutionally Vague

Due process requires criminal statutes to supply "sufficient definiteness" that "ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402. And under the constitutional separation of powers doctrine, "[p]enal laws are to be construed strictly," because only "the legislature" can define a crime. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The vagueness doctrine vindicates both of these constitutional principles, because it ensures that crimes are clearly defined by the legislature, rather than written by courts through common law decision making. As this Court has explained, vague

laws "transgress" both the rule requiring Congress "to write statutes that give ordinary people fair warning about what the law demands of them," and the requirement that "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *Davis*, 139 S. Ct. at 2323. "They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *Ibid.* The fair notice principle also underlies the corollary rule of lenity, which holds that "an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *see also Yates*, 574 U.S. at 547-48.

This Court repeatedly invokes these fundamental due process and separation of powers principles to limit the reach of criminal statutes in public corruption cases. In *McNally*, for instance, the Court limited the mail fraud statute to schemes to obtain "money or property" and rejected the government's broader reading, because Congress had not "spoken in clear and definite language" if its intent was to go further. 483 U.S. at 359-60. The Court refused to "construe the statute in a manner that leaves its outer boundaries ambiguous." *Id.* at 360. Likewise in *Skilling*, the Court again adopted a limiting construction and narrowly construed the honest-services statute, which otherwise would be unconstitutionally vague. 561 U.S. at 408-09. Only when "[c]onfined to … paramount applications," the Court explained, could it be said that "§ 1346 presents no vagueness problem." *Id.* at 404; *see id.* at 410-11 (invoking rule of lenity). Yet

again, in *McDonnell*, the Court cited due process concerns with the government's "standardless," "shapeless" view of the "official act" requirement. 579 U.S. at 576. To "avoid[] this vagueness shoal," the Court held that the term had to be construed in accord with the Court's "more constrained interpretation." *Ibid.*

The same approach is critical here. The *Margiotta* theory is hopelessly amorphous and indeterminate, particularly to someone seeking to divine which government lobbyists he can or cannot lawfully hire. As the Second Circuit readily conceded, "there is no precise litmus paper test" for determining when a private citizen's influence over government official rises to a fiduciary level. *Margiotta*, 688 F.2d at 122. Instead, the court adopted "a gestalt approach" that leaves it up to juries to determine, on a case-by-case basis, whether someone who is not a public official is a public fiduciary. *United States v. Murphy*, 323 F.3d 102, 112 (3d Cir. 2003).

That is the antithesis of what the Constitution requires. It is one thing to presume that people have fair notice that *public officials* owe the public a duty, and quite another to allow prosecutors, courts, or juries, without any legislative guidance, to create such a duty for private citizens out of whole cloth. The jury in this case was instructed that Percoco could be a public fiduciary if he "dominated and controlled" some government business and government employees "relied on him" in some way, but that he was not a public fiduciary if he merely "participat[ed]" in government business and had "influence" over others. JA511. But what is the difference between the two? How is a jury

to know where to draw the line, and what ensures that the next jury will draw the line in the same place?

The *Margiotta* "rule" provides no clear standard, and no way to prevent arbitrary results. Instead, juries are left "to pursue their personal predilections," which facilitates opportunistic and discriminatory prosecutions. *Kolender*, 461 U.S. at 358. As Judge Winter warned, "there is talk of a line between legitimate patronage and mail fraud, [but] there is no description of its location." *Margiotta*, 688 F.2d at 143. In short, the *Margiotta* theory raises the very same due process concerns that this Court sought to foreclose in *Skilling*.

The Second Circuit's reasons for finding the evidence sufficient to establish Percoco's fiduciary duty under *Margiotta* epitomize the problem. The facts it seized on could easily be spun the other way, and many are unlikely to be known to someone, like Aiello, who is not privy to the inner workings of government. The Second Circuit's analysis exposes why the theory is hopelessly indeterminate and readily manipulated in ways that can easily trap the unwary.

For instance, the court started by highlighting evidence that Percoco was powerful when he served as the Governor's top aide, *before* COR retained him. It observed that Percoco had "among the highest-ranking positions in New York State's executive department," a "unique relationship" with Governor Cuomo," and was "close to him and his family." JA681.

But none of this sheds light on whether, *after he left* the government, Percoco "dominated and controlled," as opposed to merely "influenced," his former

colleagues. If this type of evidence proved "dominance and control" and disproved mere "influence," virtually any former high-ranking public official could be deemed a public fiduciary and could not work as a lobbyist. Percoco's role in the Governor's office and his close relationship with his boss are hardly unique in American politics. If having power, influence, and access in office creates a continuing duty to the public even after a person departs, any number of staffers who serve as the right-hands to presidents, governors, or mayors would be forever precluded from earning a living in the private sector, solely because they successfully forged connections with others while in government. Some people dislike the "revolving door," but unless a former staffer's activities violate some specific criminal statute[5] (and there is none here), it is not a crime. If it were, untold numbers of politically active people in Washington and around the country who enlist advisers and lobbyists with prior government experience would be federal felons.

The Second Circuit also relied on evidence about Percoco's time on the campaign. For instance, Percoco once stated that he "retained 'a bit of clout' even after formally leaving the administration," and one witness remarked that Percoco "had the ability to pick up the phone and get things done." JA682. And an official testified "that *she* called Percoco to solicit his advice

---

[5] *See*, *e.g.*, 18 U.S.C. § 207(c)-(d) (making it a crime for certain former federal executive branch employees to lobby or appear before "any officer or employee of the department or agency in which such person served," or for the Vice President and other very senior executive branch personnel to lobby or appear before certain federal officials for two years after their employment ends).

on pending legislation." JA683. But the court was unable to articulate why any of this demonstrates anything more than ordinary influence and advice.

The court also noted that Percoco "continued to be an advisor to the Governor and to coordinate both the Governor's official and campaign schedules," and that he "helped organize a state event, attended a government briefing about an impending winter storm, and discussed the terms of a redevelopment project with government employees." JA682-83. But once again, it is unclear how any of this shows dominance and control rather than mere influence. If these types of prosaic interactions create a duty to the public, then anyone managing an incumbent's re-election campaign could be deemed a de facto public official. An incumbent's campaign staff must coordinate logistics with his official staff, because otherwise the candidate could be booked in two places at once. And incumbent candidates and their staffers routinely consult with campaign managers and political advisers about government policies. Politics and policy are unalterably intertwined in representative government, and only the most naïve civics student would believe that elected officials make decisions divorced from any consideration of how those decisions could impact the next election. No ordinary person in Aiello's position would even know about such mundane communications, let alone think that they could transform campaign staffers into public fiduciaries.

Finally, the Second Circuit stressed that Percoco "was at his desk in the Executive Chamber" when he made the call to advocate for COR with respect to the LPA issue. JA648, 682. But is it unusual or nefarious

for an incumbent's campaign advisers to use a government office or a government phone line? Should the *location* of a campaign manager's conversations determine whether he is committing federal honest-services fraud? How can any ordinary person who hires him know such trivial details, and how can a person's liberty turn on such facts, particularly without any guidance from Congress?

What all this illustrates is that the facts supposedly evidencing the requisite dominance, control, and reliance under *Margiotta* could just as easily be deemed mere influence—depending on *who* is deciding which side of the "line" his status fits. Different judges or jurors can come to different conclusions about whether the very same facts create a duty to the public, because the "test" provides no "ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Ultimately, it leaves the public "in the dark about what the law demands." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring in judgment).

No ordinary person would have reason to suspect that paying Percoco while he was "off the 2nd floor" to lobby the state was a federal felony. The *Margiotta* theory is quintessentially vague.

B. The *Margiotta* Theory Violates The First Amendment

The First Amendment problems with *Margiotta* are equally serious. In *McDonnell*, the Court expressed concern that expansive interpretations of public corruption crimes could chill protected commu-

nications between government officials and their constituents. This would undermine "[t]he basic compact underlying representative government," which "*assumes* that public officials will hear from their constituents and act appropriately on their concerns." 579 U.S. at 575. *McDonnell* involved "extravagant gifts" and "large sums of money" paid to a sitting governor and his wife and thus did not "typify normal political interaction between public officials and their constituents." *Id.* at 576. Nonetheless, the Court declared, "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Ibid.* (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Instead, "'a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.'" *Ibid.* (quoting *Sun-Diamond*, 526 U.S. at 412).

The need for a scalpel is, if anything, even more acute here. Unlike Governor McDonnell, Aiello did not make large payments or give luxury items to a public official (or an official's spouse). His company, COR, believed it was entitled by law to participate in a state program without having to enter an LPA, which was "a potentially costly agreement with a local union." JA647. COR merely paid an influential *former* official to lobby the relevant agency on its behalf. That is not corruption; it is the exercise of core constitutional rights.

The First Amendment expressly protects "freedom of speech" and "the right of the people … to petition the Government for a redress of grievances." U.S. Const. Amend. I; *see generally Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *E. R.R.*

Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives" in government. *Noerr*, 365 U.S. at 137.

That is exactly what Aiello sought to do here. Percoco was well-connected, influential, and had previously held a powerful position in the Governor's office. But that does not criminalize COR's decision to retain his political services. The First Amendment protects citizens' rights not only to petition their government, but to employ influential advocates for that purpose. *See generally Citizens United v. FEC*, 558 U.S. 310, 355 (2010); *see also ibid.* (First Amendment "protects the right of corporations to petition … administrative bodies") (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 n.31 (1978)).

Indeed, the ability not just to access, but to influence, public officials is critical to our system of government. "[I]nfluence and access 'embody a central feature of democracy,' such that '"the Government may not seek to limit the appearance of mere influence or access."' *FEC v. Cruz*, 142 S. Ct. 1638, 1653 (2022) (quoting *McCutcheon v. FEC*, 572 U.S. 185, 192, 208 (2014)). *See also Citizens United*, 558 U.S. at 359 (because "[d]emocracy is premised on responsiveness," "[f]avoritism and influence are not … avoidable in representative politics.") (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)). In short, having "influence over or access to" public officials is not "corruption," *McCutcheon*, 572 U.S. at 208; it is integral to the constitutional protections guaranteed by the First Amendment. A private citizen's decision to

amplify his influence or access by engaging another private citizen to advocate for him is not corruption either. Criminalizing such political activity—as the decision below purports to do—violates the First Amendment.

And the chilling effect of treating payments to people who are not public officials as bribes cannot be understated. As Judge Winter warned in his *Margiotta* dissent, it "creates a real danger of prosecutorial abuse for partisan political purposes." 688 F.2d at 139. If courts thrust a duty to the public on "a politically active person" merely because of his "great influence," "there is no end to the common political practices which may now be swept within the ambit of mail [and wire] fraud." *Id.* at 139-40. For instance, a neighborhood group publicly calling for government intervention over noxious fumes emanating from a nearby chemical plant could face years in prison if its members enlist a retired state legislator to spearhead their lobbying efforts. A career lobbyist who has spent decades working legislative backrooms could be prosecuted simply for being too good at his job. The *Margiotta* theory "creates a danger of corruption to the democratic system greater than anything Margiotta [or Aiello] is alleged to have done. It not only creates a political crime where Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists." *Id.* at 144.

All of this illustrates just how dangerous the *Margiotta* doctrine can be, and why a *clear* line must be drawn in this context: People who are formally employed by the government or formally vested with governmental authority do owe a fiduciary duty to the

public. People who have no official governmental authority do not. Drawing this bright-line rule (the "litmus paper test" the Second Circuit eschewed) is necessary to avoid serious First Amendment problems.

C. The *Margiotta* Theory Violates Federalism Principles

This Court has frequently warned of the need to reject broad readings of criminal statutes that would "significantly change[] the federal-state balance." *Bond*, 572 U.S. at 859; *see also*, *e.g.*, *Jones v. United States*, 529 U.S. 848, 857-58 (2000). Under the Second Circuit's interpretation of § 1346, payments to former officials like those here are fraudulent bribes even without any violation of state or local laws regulating lobbying by former state and local government employees. This raises serious federalism concerns. Courts should "not be quick to assume that Congress intended to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bond*, 572 U.S. at 858-59.

Federalism concerns are particularly pronounced when it comes to the prosecution of public corruption. A state defines itself as a sovereign "[t]hrough the structure of its government, and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 579 U.S. at 576. Thus, as this Court has repeatedly held, "[f]ederal prosecutors may not use the … fraud statutes to 'set[] standards of disclosure and good government for local and state officials.'" *Kelly*, 140 S. Ct. at 1574 (quoting *McNally*, 483 U.S.

at 360). That was among the reasons the Court refused to extend the mail fraud statute to "schemes to defraud citizens of their intangible rights to honest and impartial government" in *McNally*, 483 U.S. at 355, and limited the meaning of "official act" in *McDonnell*, 579 U.S. at 576-77. And most recently, the Court cited federalism principles in reversing the property fraud convictions in *Kelly*, where officials had lied about a regulatory decision to close lanes on a bridge. The Court pointed out that "[i]f U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be … 'a sweeping expansion of federal criminal jurisdiction.'" *Kelly*, 140 S. Ct. at 1574 (quoting *Cleveland v. United States*, 531 U.S. 12, 24 (2000)). "But not every corrupt act by state or local officials is a federal crime." *Ibid.*

That concern is, if anything, even greater here, because the purported "corrupt act" was protected political activity, and application of the *Margiotta* theory does not depend on any violation of state or local law. Many states have their own laws regulating when their public officials are permitted to lobby the state after they leave office. Such laws reflect each state's considered judgment concerning, among other things, the level of seniority within state government that warrants post-employment restrictions; the "cooling off" period—if any—that must elapse before a former official can appear before the state government; the types of lobbying or other activities in which such individuals may not engage; and the penalties for noncompliance with those rules. Notably, not every state makes unauthorized lobbying criminal. New York, for example, prohibits former employees of the governor's

executive chamber from formally "appear[ing] or practic[ing] before" a state agency for two years, but provides no criminal penalty for a violation. N.Y. Pub. Off. Law § 73(8)(a)(iv) (civil penalty up to $40,000). Other states' laws vary widely. *See*, *e.g.*, Ariz. Rev. Stat. Ann. §§ 38-504, 38-510 (one-year prohibition applies only to practice before one's own agency on matters "with which the officer or employee was directly concerned and … personally participated"; criminal sanction); Mo. Ann. Stat. §§ 105.455, 105.478 (six-month lobbying ban; class B misdemeanor for first violation); N.J. Stat. Ann. § 52:13C-21.4 (lobbying restriction applies only to former legislators, governors, lieutenant governors, and department heads; $10,000 civil penalty). And at least six states[6] appear not to restrict former state officials from lobbying in any manner whatsoever.

Yet the malleable *Margiotta* doctrine gives federal prosecutors carte blanche to act as roving enforcers of their own notions of ethics in government, irrespective of state and local governments' own determinations as to what should be permitted. Indeed, Aiello was prosecuted and convicted even though he was sent an ethics opinion stating that New York law permitted Percoco to engage in certain political activities once he left the Governor's office. The Second Circuit's expansive, malleable reading of § 1346 would displace the sovereign prerogative of state and local governments to regulate their former officials' activity. Accordingly, "basic principles of federalism" require this

[6] Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Wyoming.

Court to construe the statute narrowly to avoid upsetting the "usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 858-59.

III. THE HONEST-SERVICES STATUTE IS UNCONSTITUTIONALLY VAGUE

A. Absent Any Clear Statutory Guidance, The Fiduciary Duty Concept Underlying Honest-Services Fraud Is Indeterminate

Despite this Court's effort in *Skilling* to "construe, not condemn," § 1346 through a limiting construction, this case illustrates that the "fundamental indeterminacy" Justice Scalia identified in the statute persists today. Even limited to conduct involving "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes," *Skilling*, 561 U.S. at 407, § 1346 continues to prove unworkable and to be unconstitutionally vague because of the flexible and evolving nature of the "fiduciary duty" concept and the ease with which it can be expanded to fit novel prosecution theories.

As Justice Scalia explained, the term "fiduciary" provides a perilously vague hook on which to hang criminal liability. Indeed, one searches in vain to find more than a passing reference to the term within all the criminal provisions of Title 18. *Cf.* 18 U.S.C. §§ 203(d), 205(e) (clarifying that those provisions do not prevent a federal officer or employee "from acting … as agent or attorney … or other personal fiduciary"). And for good reason. "Fiduciary" is neither defined in the federal criminal code nor self-defining. It is a quasi-legal, quasi-factual term that describes the

relationships between certain parties, in certain contexts. But there are myriad potential sources to which one could look for guidance on whether a particular relationship is a fiduciary one, including caselaw from federal courts as well as from whichever state or states might arguably govern the relationship, over a wide range of subject areas such as corporate governance, ERISA, joint venture and partnership law, and basic tort law. Different sources may and often do yield inconsistent, irreconcilable, or at least inconclusive guidance. *See Skilling*, 561 U.S. at 417 (Scalia, J., concurring in judgment) (using *Margiotta* to illustrate the point).

What is more, as Justice Frankfurter famously observed, "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943). The contours of fiduciary duty are as variable, nebulous, and fact-dependent as the existence of the duty itself—perhaps more so. Here, too, courts have grappled with whether the source of the duty "must be positive state or federal law, or merely general principles, such as the 'obligations of loyalty and fidelity' that inhere in the 'employment relationship.'" *Skilling*, 561 U.S. at 417 (Scalia, J., concurring in judgment) (citations omitted). Some courts have looked to trust law, while others have looked to the general law of agency, each of which may vary in significant ways from state-to-state. *Id.* at 417-18. And to the extent honest-services fraud cases

have developed their own "federal, common-law fiduciary duty," that caselaw leaves the duty "hopelessly undefined." *Id.* at 418.

The indeterminacy of this body of law is inevitable, because fiduciary duties are developed primarily through common-law judicial decision-making rather than legislation. An ever-morphing body of fiduciary-duty common law may be appropriate and even useful when it comes to corporate shareholder actions and other civil disputes, but it cannot provide the constitutionally required clear line in a federal criminal statute that defines whether conduct is *criminal* or not. "[U]nder our constitutional system … federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 490 (2001) (citing *United States v. Hudson*, 7 Cranch 32, 34 (1812)). Federal criminal law cannot evolve and expand over time to fit new situations that Congress did not contemplate proscribing when it enacted the statute. Rather, as explained, the Due Process clause requires Congress to "have spoken in language that is clear and definite." *Williams v. United States*, 458 U.S. 279, 290 (1982). Allowing the definition of an essential element of a crime to change over time based on common-law adjudication violates the fundamental due process requirement that criminal statutes must provide fair notice to citizens of precisely what conduct they proscribe. *See*, *e.g.*, *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) ("The fair warning requirement … reflects the deference due to the legislature, which possesses the power to define crimes and their punishment.").

Section 1346 does not even use the word "fiduciary," let alone employ the term in a "clear and definite" manner that would provide fair notice of precisely what relationships it encompasses. As this case illustrates, the inherent vagueness of the fiduciary concept continues to plague the statute in spite of *Skilling*'s limiting construction. Section 1346 remains unconstitutionally and irremediably vague.

B. Section 1346 Is Unconstitutional As Applied

At a minimum, if the *Margiotta* theory is a valid basis for a prosecution under § 1346, the statute is unconstitutionally vague as applied to Aiello here. *See*, *e.g.*, *Palmer v. City of Euclid*, 402 U.S. 544 (1971) (reversing judgment as to petitioner because statute unconstitutionally vague as applied).

It is undisputed that Aiello sought Percoco's assistance while he was "off the 2nd floor working on the campaign" and only for a "few months." JA594. Aiello retained Percoco to advocate for COR precisely *because* he was a private citizen and no longer in government; COR paid Percoco only when he was *not* in public office; and Percoco was still out of office when he made a phone call to an official advocating COR's position concerning the LPA issue. Moreover, Aiello knew Percoco had obtained a written legal opinion about what work he could legally undertake after he left office. And he knew that this opinion advised Percoco he could engage in certain political activities involving the state government he had just left, including "backroom services for compensation before a state agency, departments, etc." JA593. In other

words, Aiello understood that it was permissible under the law to retain Percoco to informally lobby state officials about the LPA issue.

To be sure, Aiello knew that Percoco remained influential even while he was on the campaign; that is why COR hired him. But there was no evidence that Aiello—who had no ties to Albany—knew anything about fions with actual government officials during this time or what, if anything, Percoco did to assist his former colleagues in the Executive Chamber, or how those still in government regarded Percoco. Nor could Aiello possibly know where Percoco was physically located when he made his call about the LPA, or what telephone he used to make that call. And there was no evidence to suggest that Aiello knew Percoco would later return to government. *Cf.* JA681-83.

In short, Aiello knew none of the facts that the Second Circuit found indicative of Percoco's continuing fiduciary duty to the public. But no individual should be convicted of a criminal conspiracy to defraud the public unless he had the requisite "knowledge that enables him to make the relevant legal (and indeed, moral) choice" of whether to perpetrate honest-services fraud. *See Rosemond v. United States*, 572 U.S. 65, 78 (2014); *see also Staples*, 511 U.S. at 605 (scienter generally "require[s] that the defendant know the facts that make his conduct illegal"). How could Aiello be guilty of conspiracy to commit honest-services fraud if he did not know that Percoco was sitting in his old office when he made the call about the LPA, or any of the other facts the Second Circuit held demonstrate Percoco's duty of honest services? And how could Aiello have predicted that a jury might find that

Percoco's influence in the state government was more than just that, and instead amounted to "dominance and control" of government business? The Second Circuit's standardless "test" makes it impossible for a defendant to know the dispositive facts that "separat[e] legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994).

The Second Circuit's opinion underscores the point. In concluding that Aiello had the requisite knowledge of Percoco's fiduciary duty, the court could not point to any evidence that Aiello knew any of the supposedly relevant facts. Instead it held that this scienter element was satisfied because "Aiello specifically sought out Percoco" to assist with the LPA and thus "explicitly recognized the power that Percoco wielded." JA683. But anyone who hires a lobbyist presumably does so for similar reasons. The court was merely describing Percoco's influence—*i.e.*, that Aiello retained him because he believed Percoco could be an effective advocate due to his knowledge of state government and his many contacts in the capital. In other words, Aiello believed Percoco would be a good lobbyist. And there was no evidence that the supposed "power" Aiello understood Percoco to have was "dominance and control," as opposed to the ordinary "influence" of a well-connected private citizen who had spent many years in and around government.

The *Margiotta* "test" gave Aiello no fair notice that Percoco had the requisite reliance, dominance, and control, and no fair notice that retaining Percoco was criminal honest-services fraud, rather than perfectly legal political advocacy. Section 1346 is unconstitutionally vague as applied here.

IV. AIELLO'S CONVICTION SHOULD BE REVERSED

For the reasons set forth in Point IV of Percoco's brief, Aiello is entitled to an acquittal on the honest-services fraud conspiracy count or, at a minimum, a new trial on that count due to the erroneous jury instructions.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondent Steven Aiello

August 31, 2022

No. 21-1158

In The Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

CHRISTINE H. CHUNG
CHRISTINE H. CHUNG PLLC
14 Murray Street, No. 236
New York, New York 10007
(917) 685-0423

HARRY SANDICK
Counsel of Record
JACOB I. CHEFITZ
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
hsandick@pbwt.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

I. The Second Circuit Incorrectly Held That Non-Government Officials May Owe A Fiduciary Duty To The Public. 4

 A. This Court Has Limited The Doctrine Of Honest-Services Fraud In Order To Avoid Criminalizing Legitimate Political Activity. 4

 B. To Prevent The Punishment Of Ordinary Advocacy, The Court Should Hold That A Defendant Must Have An "Official Position" To Owe A Duty Of Honest Services To The Public. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Kelly v. United States,
140 S. Ct. 1565 (2020) 4

Marinello v. United States,
138 S. Ct. 1101 (2018) 11

McDonnell v. United States,
579 U.S. 550 (2016) ....*passim*

McNally v. United States,
430 U.S. 350 (1987) ....*passim*

Skilling v. United States,
561 U.S. 358 (2010) 2, 3, 7

United States v. Holzer,
840 F.2d 1343 (7th Cir. 1988) 6

United States v. Kosinski,
976 F.3d 135 (2d Cir. 2020).................................... 7

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982)..........................*passim*

United States v. Percoco,
13 F.4th 180 (2d Cir. 2021) 3, 5, 8

Van Buren v. United States,
141 S. Ct. 1648 (2021) 10

Statutes

18 U.S.C. § 1346.. 2, 3

Other Authorities

Karl Evers-Hillstrom, Open Secrets, *Lobbying Spending Nears Record High In 2020 Amid Pandemic* (Jan. 27, 2021)... 9

INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL supports Petitioner Joseph Percoco and his co-defendant Stephen Aiello[2] in their challenge to the Second Circuit's holding that private citizens can owe a duty of honest services to the public by virtue of exercising influence over government decisions. The Second Circuit's overbroad application of the honest-services fraud statute implicates NYCDL's core concern of combatting the unwarranted extension of criminal statutes and promoting constitutionally definite standards for criminal liability. If affirmed,

---

[1] The parties have consented in writing to the participation of *amicus*. No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

[2] Mr. Aiello, whose petition for certiorari remains pending, filed a brief as Respondent in support of Petitioner Percoco. For convenience, Mr. Percoco and Mr. Aiello are collectively referred to herein as "Petitioners."

the Second Circuit's extension of honest-services fraud to private citizens who prosecutors deem to have "dominated and controlled" government business poses dangers to political expression in addition to principles of fair warning, lenity, and federalism. In addition, as attorneys who regularly advise clients about the legality of planned conduct, NYCDL has a particular interest in ensuring that definitions of crimes satisfy the constitutional requirements of being clear and readily understood. The Second Circuit's ruling fails to provide this guidance and is therefore likely to lead to the prosecution of individuals who did not know, and indeed could not have known, that their conduct was wrong and illegal.

SUMMARY OF ARGUMENT

In both *Skilling v. United States*, 561 U.S. 358 (2010), and *McDonnell v. United States*, 579 U.S. 550 (2016), this Court cautioned that 18 U.S.C. § 1346 is limited in official corruption cases to bribes paid in exchange for "official act[s]"—acts relating to a "formal exercise of governmental power" by one using an "official position," *McDonnell*, 579 U.S. at 574.

In this case, the Second Circuit failed to observe these boundaries on the scope of honest-services fraud. Petitioners Percoco and Aiello were convicted of honest-services fraud conspiracy based on payments to an individual, Mr. Percoco, who was not a public official but instead a campaign executive. In order to affirm these convictions, the Second Circuit needed to revive *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), a 40-year old precedent that predated

Skilling and *McDonnell* and which was overruled by the Supreme Court in *McNally v. United States*, 430 U.S. 350 (1987). *McNally* held that the mail and wire fraud statutes could not be used to charge individuals who may have deprived the public of its right to good government. *Id*. at 355-56.

In this case, the Second Circuit insisted that *Margiotta* "remains valid" after *McNally*, and it approved of jury instructions that Mr. Percoco could be deemed to owe a duty of good government, even without "a formal employment relationship with the state," so long as he "dominated and controlled any governmental business" and those government officials "relied" on him because of his "special relationship" with the government. *United States v. Percoco*, 13 F.4th 180, 187, 193-94 (2d Cir. 2021).

The Second Circuit's expansive interpretation of the honest-services statute, 18 U.S.C. § 1346, creates the very risk of arbitrary enforcement that this Court has warned about over and over again. The court below evaded this Court's precedents, deeming *McDonnell* irrelevant to whether a private citizen could owe a fiduciary duty of good government to the public. *Percoco*, 13 F.4th at 196. The Second Circuit's abandonment of "ascertainable standard[s] of guilt," *Skilling*, 561 U.S. at 416 (Scalia, J., concurring), puts private citizens who lobby, advise, or advocate at risk of federal criminal prosecution—in direct proportion to how successful they are. The danger to expression and democracy, no less than that of arbitrariness and unfairness, is apparent.

The Second Circuit's revival of the discredited doctrine of *Margiotta* is a cause for serious concern. This Court should overrule that court's overly broad definition of honest-services fraud and make plain that only government employees and those who conspire with them can be held criminally liable for honest-services fraud.

ARGUMENT

I. THE SECOND CIRCUIT INCORRECTLY HELD THAT NON-GOVERNMENT OFFICIALS MAY OWE A FIDUCIARY DUTY TO THE PUBLIC.

A. This Court Has Limited The Doctrine Of Honest-Services Fraud In Order To Avoid Criminalizing Legitimate Political Activity.

Over thirty years ago, in *McNally*, the Court rejected "honest services" fraud entirely, holding that wire and mail fraud crimes require a scheme to deprive a victim of tangible property. 483 U.S. at 360, 363. In doing so, the Court rejected a concept with "outer boundaries" that were "ambiguous" and "involve[d] the Federal Government in setting standards . . . of good government for local and state officials." *Id*. at 360; *see also Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (stating that the federal government is not permitted "to use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking").

One key limitation on honest-services fraud in the context of a public corruption prosecution is that the defendant must have committed an "official act," a

term borrowed from the federal bribery statute. *See McDonnell*, 579 U.S. at 567. The district court in this case also charged the jury that it must conclude that a payment or benefit was made or solicited or accepted with the intent that the payment or benefit be made in exchange for an "official action." *Percoco*, 13 F. 4th at 187. An official act "must involve a *formal exercise of governmental power* that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 579 U.S. at 574 (emphasis supplied). Without the "official act" requirement, a government official could be prosecuted for honest-services fraud just for engaging in legitimate constituent services, like arranging a meeting between a supporter and a government agency.

The "official act" in question must also be committed by a public *official* and not by some well-placed lobbyist or government insider. *See id.* at 567-68. The Court's insistence that there be "a formal exercise of governmental power" demonstrates that honest-services fraud is intended to protect the public from fraudulent schemes by government officials and not by their friends, family, or associates. *Id*. at 568.

This is not mere inference from the logic of *McDonnell*. It is supported by the very text of the decision. The Court used the term "official position" three times when it described the requirements of an official act. *See id.* at 572 (two mentions), 574 ("[A public official's] decision or action may include using his official position to exert pressure on another official to perform an 'official act' . . . ."). Yet despite this express reference to an "official position," the

court below dismissed this portion of *McDonnell* as merely dictum, a "passing reference." 13 F.4th at 196.

In addition, *McDonnell* rejected an expansive and ambiguous reading offered by the government that shares similarities with the government's position in this case. In *McDonnell*, the government argued that "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." *McDonnell*, 579 U.S. at 574-75.

The Court's rejection of the government's view was based on its concern not to "cast a pall of potential prosecution over" legitimate interactions between public officials and their constituents, "rais[ing] significant constitutional concerns." *Id.* Faced with such a shapeless definition of honest-services fraud, "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.* at 575. This case implicates similar concerns, both from the perspective of former government officials such as Mr. Percoco who might wish to advocate for clients, and those individuals like Mr. Aiello who might hire former officials to advocate for their views.

In affirming in this case, the Second Circuit relied almost exclusively on *Margiotta*, a case that extended the judicially-created version of honest-services fraud beyond formal government officials. But *Margiotta* predates and was abrogated by *McNally*, and has since been criticized by other Circuit Courts of Appeals. *E.g.*, Percoco Br. 12 (citing, *e.g.*, *United States v.*

Holzer, 840 F.2d 1343, 1348 (7th Cir. 1988), which described *Margiotta* as one of the "worst abuses of the mail fraud statute"). *Margiotta* was wrongly decided from the start, *e.g.*, Percoco Br. 28, Aiello Br. 26, and there is surely no basis to use that decision to extend honest-services fraud in a manner that conflicts with this Court's jurisprudence in *McNally*, *Skilling*, and *McDonnell*. Despite all this, the Second Circuit continues to treat *Margiotta* as good law, in this case and in others. *See, e.g., United States v. Kosinski*, 976 F.3d 135, 150-51 (2d Cir. 2020) (considering *Margiotta* in a case under federal securities law). Only a decision by this Court will end the Second Circuit's reliance on *Margiotta*.

B. To Prevent The Punishment Of Ordinary Advocacy, The Court Should Hold That A Defendant Must Have An "Official Position" To Owe A Duty Of Honest Services To The Public.

The Second Circuit's decision here implicates the same types of concerns that animated this Court's decisions limiting the definition of honest-services fraud. At the time of the conduct alleged in the indictment, Mr. Percoco held no government office; he was a private citizen working for the re-election campaign of then-Governor Andrew Cuomo. Without an official position, Mr. Percoco lacked both a fiduciary duty to the public and the ability to undertake an "official act" that is an essential requirement of honest-services fraud. Likewise, Mr. Aiello should not have been prosecuted on the theory that he participated in a scheme to "bribe" Mr. Percoco—a person who held no official position.

The trial court's jury instructions lay bare the danger of a legal rule that official acts can be committed by people who are not government officials. Here, the jury was instructed that Mr. Percoco "d[id] not need to have a formal employment relationship with the state in order to owe a duty of . . . honest services to the public," so long as he "dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government." 13 F.4th at 187.

In other words, any person who "dominated and controlled any government business," and who had a "special relationship" with a government official, is liable to be prosecuted for honest-services fraud. With such a blurry line between legal and illegal conduct, it will be impossible for lawyers to give reliable advice to their clients about whether their intended conduct is permitted.

The Court should resolve this uncertainty by making explicit what it suggested in *McNally* (in which the petitioners' co-defendant, Hunt, was not a government employee but rather the leader of a state political party, 483 U.S. at 352) and stated in *McDonnell*: that the defendant in an honest-services fraud prosecution must hold an "official position." Absent such clarification, the government's overly broad application of honest-services fraud will sow uncertainty about the line between criminal honest-services fraud and legitimate and constitutionally protected government advocacy.

In our democratic system, many private actors exert various degrees of influence or even "control" over the federal, state, and local governments.

Individuals and companies spent approximately $3.5 billion lobbying the government in 2020—no doubt because they expect their efforts to affect government decisions. *See* Karl Evers-Hillstrom, *Lobbying Spending Nears Record High In 2020 Amid Pandemic*, Open Secrets (Jan. 27, 2021).[3] And beyond professional lobbyists, there are a plethora of interest groups, political action committees, and think tanks that play a role in government decisions. Public officials' families and friends inevitably have influence, often very substantial influence, over that official's thinking and decision making. Their involvement now can be scrutinized and subjected to prosecution.

If the government can prosecute a private campaign operative such as Mr. Percoco, it might be able to prosecute private citizens for honest-services fraud in a host of other inequitable circumstances. For example, could prosecutors charge, as honest-services fraud, the retention of a lobbyist who previously worked as a staffer for the Senate Finance Committee in order to advocate for a bill that would cut taxes? An influential lobbyist might be said to "dominate" or "control" governmental business, based on his special relationship with the members of that committee. Under the Second Circuit's rule, anyone who hired that lobbyist, and the lobbyist too, could be subject to prosecution. Yet this is the sort of political advocacy that happens every day and is protected by our First Amendment.

---

[3] https://www.opensecrets.org/news/2021/01/lobbying-spending-nears-record-high-in-2020-amid-pandemic/ (last visited Sep. 6, 2022).

Or consider the leader of an environmental advocacy group who is known to have a close relationship with the Secretary of the Interior based on their shared work experience. If someone makes large donations to the environmental group in hopes that its leader can persuade the Secretary to adopt more restrictive policies with respect to mining in national parks, have the donor and the group leader committed honest-services fraud? On the Second Circuit's test, these people seemingly could also be prosecuted for honest-services fraud for engaging in protected political activity.

Likewise, should it be a federal crime to hire a close relative of a state governor as a lobbyist, on the theory that this close relative "dominate[s] and control[s]" governmental business based on his relationship, and that the governor "relied" on the lobbyist because of his "special relationship" with the governor? Is it fair to either the relative or to the person hiring the relative to treat this transaction as honest-services fraud?

Nothing would stop the government from pursuing these cases, which is why this Court should step in—as it has in other cases where the government was afforded undue discretion to decide the difference between legal and illegal conduct. *See*, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (rejecting an interpretation of a criminal statute that would turn "millions of otherwise law-abiding citizens [into] criminals"). The line between illegal and legal conduct in the examples above is thin, if it exists at all. Such uncertainty is impermissible, including for the reason that criminal defense attorneys are unable to advise clients who are deciding whether to engage lobbyists,

make donations, or affect the business of government in other ways.

As was the case in *McDonnell*, the particular conduct prosecuted by the government in this case can seem easy to fault. Even so, the solution to a crisis of confidence in our public officials is not over-criminalization or allowing prosecutors to decide how to interpret federal statutes. "[F]air warning and related kinds of unfairness" are undermined. *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). The overbroad interpretation also creates the risk of diminishing public participation in government—the very same concern that caused the Court to define an "official act" strictly in *McDonnell*. *See* 579 U.S. at 574.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit.

Dated: September 7, 2022

Respectfully submitted,

HARRY SANDICK
Counsel of Record
JACOB I. CHEFITZ
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
hsandick@pbwt.com

CHRISTINE H. CHUNG
CHRISTINE H. CHUNG PLLC
14 Murray St., No. 236
New York, New York 10007
Telephone (917) 685-0423

Attorneys for Amicus Curiae
New York Council of Defense Lawyers

No. 21-1158

In the Supreme Court of the United States

JOSEPH PERCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
JOHN-ALEX ROMANO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a person who continues to exercise functions of a public office in fact after leaving it in name, and who has been selected to return to the office, is obliged to provide honest services within the meaning of the federal honest-services fraud statute, 18 U.S.C. 1346, in carrying out that role.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statutory provisions involved ... 2
Statement ... 2
Summary of argument ... 14
Argument:
Petitioner committed honest-services fraud by accepting bribes when selected as, and functionally serving as, a public official ... 17
A. Section 1346 criminalizes schemes to defraud that involve bribes and kickbacks received in violation of a duty of honest services ... 17
B. An individual may owe a duty of honest services to the public without a formal employment or agency relationship ... 19
C. Section 1346 applies to individuals selected for formal government employment or actually exercising the functions of a government official ... 25
D. The jury validly found that petitioner owed the public a duty of honest services ... 28
1. Petitioner had been selected to be a public official when he carried out his corrupt agreement with Aiello and COR Development ... 29
2. Petitioner was functionally a public official when he participated in the COR Development scheme ... 30
3. The jury was adequately instructed on the COR Development count ... 32
E. Applying Section 1346 to petitioner's conduct is consistent with this Court's decisions and creates no constitutional problems ... 35

Table of Contents—Continued: Page

1. Applying Section 1346 to incoming and functional public officials is consistent with the Court's decisions in *Skilling* and *McDonnell* 36
2. The rule of lenity and the vagueness doctrine do not preclude Section 1346's application in this case 38
3. Section 1346's application in this case does not invite First Amendment concerns 40
4. Petitioner's conviction is consistent with principles of federalism 41

Conclusion 43
Appendix—Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Burgess v. *United States*, 553 U.S. 124 (2008) 20
Chiarella v. *United States*, 445 U.S. 222 (1980) 15, 24
Ciminelli v. *United States*, 142 S. Ct. 2901 (2022) 9
Dirks v. *SEC*, 463 U.S. 646 (1983) 24
Dixson v. *United States*, 465 U.S. 482 (1984) .... *passim*
Durland v. *United States*, 161 U.S. 306 (1896) 19
Evans v. *United States*, 504 U.S. 255 (1992) 26
Gamble v. *United States*, 139 S. Ct. 1960 (2019) 41
McDonnell v. *United States*, 579 U.S. 550 (2016) 12, 16, 21, 37, 38
McNally v. *United States*, 483 U.S. 350 (1987) 14, 18, 25
Neder v. *United States*, 527 U.S. 1 (1999) 19, 26
Onandaga Cnty. Dist. Att'y's Office, In re, 92 A.D.2d 32 (N.Y. App. Div. 1983) 42
People v. *Kruger*, 87 A.D.2d 473 (N.Y. App. Div. 1982) 41

Cases—Continued: Page

People v. *Samilenko*,
814 N.Y.S.2d 564, 2005 WL 3626772
(N.Y. Sup. Ct. 2005) 41

Skilling v. *United States*, 561 U.S. 358 (2010) .... *passim*

Smith v. *United States*, 568 U.S. 106 (2013) 30

United States v. *Castleman*, 572 U.S. 157 (2014) 38

United States v. *Hang*, 75 F.3d 1275 (8th Cir. 1996) 23

United States v. *Hudson*,
491 F.3d 590 (6th Cir.), cert. denied,
552 U.S. 1081 (2007) 20, 27

United States v. *Kenney*,
185 F.3d 1217 (11th Cir. 1999) 23

United States v. *Lanier*, 520 U.S. 259 (1997) 39

United States v. *Levine*, 129 F.2d 745 (2d Cir. 1942) 23

United States v. *Lupton*,
620 F.3d 790 (7th Cir. 2010), cert. denied,
562 U.S. 1247 (2011) 20, 27

United States v. *Madeoy*,
912 F.2d 1486 (D.C. Cir. 1990), cert. denied,
498 U.S. 1105, and 498 U.S. 1110 (1991) 23

United States v. *Mandel*,
591 F.2d 1347 (4th Cir. 1979) 28

United States v. *Margiotta*,
688 F.2d 108 (2d Cir. 1982), cert. denied,
461 U.S. 913 (1983) 11, 35

United States v. *Milovanovic*,
678 F.3d 713 (9th Cir. 2012), cert. denied,
568 U.S. 1126 (2013) 24, 27

United States v. *O'Hagan*, 521 U.S. 642 (1997) 24

United States v. *Park*, 421 U.S. 658 (1975) 33

United States v. *Rybicki*,
354 F.3d 124 (2d Cir. 2003), cert. denied,
543 U.S. 809 (2004) 24, 25

Cases—Continued: Page

United States v. *Sotomayor-Vázquez*,
249 F.3d 1 (1st Cir. 2001) 20
United States v. *Thomas*,
240 F.3d 445 (5th Cir.), cert. denied,
532 U.S. 1073 (2001) 23
United States v. *Velazquez*,
847 F.2d 140 (4th Cir. 1988) 23
United States v. *Vitillo*,
490 F.3d 314 (3d Cir. 2007) 20
United States v. *Williams*, 553 U.S. 285 (2008) 39
Victor v. *Nebraska*, 511 U.S. 1 (1994) 33

Constitution and statutes:

U.S. Const. Amend. I 16, 36, 40
Hobbs Act:
18 U.S.C. 1951 (1988) 26
18 U.S.C. 1951 9
18 U.S.C. 201 .... *passim*, 1a
18 U.S.C. 201(a)(1) 12, 15, 26, 1a
18 U.S.C. 201(a)(2) 21, 26, 30, 1a
18 U.S.C. 201(a)(3) 37, 1a
18 U.S.C. 201(b)(1)(A) 26, 2a
18 U.S.C. 201(b)(2) 30, 2a
18 U.S.C. 201(c)(1)(B) 15, 21, 36, 4a
18 U.S.C. 666 .... 14, 19, 20, 5a
18 U.S.C. 666(a) 18, 5a
18 U.S.C. 666(a)(1) 14, 20, 5a
18 U.S.C. 666(a)(1)(B) 2, 9, 6a
18 U.S.C. 666(d)(1) 14, 20, 6a
18 U.S.C. 1341 .... 17, 19, 8a
18 U.S.C. 1343 .... 2, 17, 19

Statutes—Continued: Page

18 U.S.C. 1346 .... *passim*
18 U.S.C. 1349 .... 2, 9, 9a
N.Y. Penal Law (McKinney Supp. 2022):
§ 10.00(15) 41
§ 200.00 (McKinney 2010) 41
§ 200.03 41
§ 200.04 41
§§ 200.10-200.12 41
N.Y. Pub. Off. Law (McKinney 2021):
§ 73(8)(a)(i) 42
§ 73(18) 42

Miscellaneous:

Comm'n on Ethics & Lobbying in Gov't, N.Y. State, Advisory Op. No. 99-7, 1999 WL 1791790 (Apr. 14, 1999) 42
Restatement (Second) of Torts (1977) 24
Restatement (Third) of Agency (2006) 27

In the Supreme Court of the United States

No. 21-1158

JOSEPH PERCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 641-686) is reported at 13 F.4th 180. The opinion and order of the district court (J.A. 111-172) is not published in the Federal Supplement but is available at 2017 WL 6314146.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2021. Petitions for rehearing were denied on November 1, 2021 (Pet. App. 47a-54a). On January 7, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 1, 2022. The petition for a writ of certiorari was filed on February 17, 2022, and granted on June 30, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire-fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 1343. The federal honest-services-fraud statute provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Other pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1349, and one count of soliciting bribes and gratuities, in violation of 18 U.S.C. 666(a)(1)(B). J.A. 577-578. He was sentenced to 72 months of imprisonment, to be followed by three years of supervised release. J.A. 579-580, 587. The court of appeals affirmed. J.A. 641-686.

1. From 2011 to 2016, petitioner was a senior aide to Andrew Cuomo, then the Governor of New York. J.A. 179. Throughout that period, petitioner formally served

as the Governor's Executive Deputy Secretary, except for approximately eight months in 2014 when he managed Governor Cuomo's reelection campaign, and the Executive Deputy Secretary post was formally vacant. J.A. 178-180, 533-534, 536, 682. The Executive Deputy Secretary was among the most senior officials in the Governor's Office, which was also known as the "[E]xecutive [C]hamber." J.A. 174, 177-178. Among other duties, petitioner oversaw budget and personnel decisions (including hiring and salary raises) for the Executive Chamber, labor union relations, intergovernmental affairs, and legislative affairs. J.A. 177-178, 182-183, 186-187, 316-317. Petitioner's convictions stem from his involvement in two bribery schemes, the first beginning in 2012, and the second—the principal focus of petitioner's claims in this Court—beginning in 2014. See J.A. 644-649.

a. The first bribery scheme began when petitioner confided in a state lobbyist, Todd Howe, that he was in a tight financial situation, and asked Howe if any of Howe's clients would hire petitioner's wife. J.A. 645. Howe then approached Galbraith Kelly, Jr., the head of an energy company, Competitive Power Venture (CPV), that was seeking a power contract with the State of New York. J.A. 644-645. CPV eventually hired petitioner's wife to work as an "education consultant," paying her $7500 per month ($90,000 per year) for only a few hours of work each week. J.A. 645; see J.A. 646.

To conceal the arrangement, the payments were routed through a third-party contractor, and petitioner's wife's name was omitted from CPV materials. J.A. 646. In exchange, petitioner agreed to help CPV obtain a power purchase agreement from the State. *Ibid.* Petitioner also "push[ed] on" a supervisor of state

agencies to discourage the State from awarding a power purchase agreement to one of CPV's competitors. *Ibid.* And petitioner pressured state officials to secure an agreement between New York and New Jersey that would facilitate CPV's construction of a power plant in New Jersey. J.A. 646-647.

All of petitioner's actions in support of the CPV scheme occurred while he was Executive Deputy Secretary and before he began running the governor's campaign in 2014. D. Ct. Doc. 978, at 42-43 (Feb. 8, 2019) (Order Denying Bail).

b. In mid-April 2014, petitioner temporarily left state employment for approximately eight months to manage Governor Cuomo's reelection campaign. J.A. 192-193, 380, 636. During that time, no one else was named Executive Deputy Secretary, J.A. 178-180, 682, and petitioner continued to enjoy many of both the physical and functional prerogatives of that position. See, *e.g.*, J.A. 681-683. He also informed others that he intended formally to return to that office after the election, and he did formally return to it roughly a month after Governor Cuomo was re-elected. See J.A. 647-649.

As Executive Deputy Secretary, petitioner had two offices in the Executive Chamber, one in Albany and one in New York City, and he continued to use them "to conduct state business" while working on the campaign; no one else moved into them or used them on a regular basis. J.A. 682; see J.A. 194-196, 294, 309, 432-433. Petitioner also continued to make phone calls on his government line and to conduct business from those offices; phone records showed 837 calls on 68 days from petitioner's Executive Chamber desk telephone in New York City while petitioner was working on the campaign—including over 100 calls to his wife's cell phone, his

home, and Howe. J.A. 286-288, 607-608, 682. During that time, petitioner also instructed numerous people to reach him by calling his executive assistant in the Executive Chamber. J.A. 289-291.

In addition, throughout his time on the reelection campaign, petitioner continued to participate in state operations and policy decisions, often from his state offices. One of his associates testified that petitioner's "grip on power never changed, diminished, or dissipated as he managed the campaign," and petitioner "'instruct[ed]'" the governor's staff "'on various non-campaign topics'" while formally designated solely as the campaign manager. J.A. 682 (brackets and citation omitted). Among other things, petitioner planned a state government event, gave input and instruction on a state project, and attended an internal state meeting. J.A. 318-324. He also pressured state employees not to leave state government and was involved in state hiring and salary decisions. J.A. 344-345, 380-385, 438-445, 465-467, 474-475. And the Acting Counsel to the Governor understood that petitioner "spoke for the governor" on legislative matters and accordingly sought petitioner's views on them. J.A. 311; see J.A. 310.

In August 2014, petitioner informed a bank that his "[e]mployment post-election" would be in "Governor Andrew Cuomo['s] * * * administration." Gov't C.A. App. 110; see J.A. 647-648. Around the same time, he told Howe of his intention to return to the Executive Chamber. J.A. 424-427. On November 25, after Governor Cuomo had been reelected, petitioner signed forms related to his reinstatement. J.A. 212-214, 468-472, 618-619, 621-634. On December 1, he executed those forms in front of a notary. J.A. 634. By December 3, a number of people (in addition to Howe) knew that petitioner was

returning to his prior role. J.A. 307-308, 355, 368, 468-471, 647-648. Petitioner formally resumed the Executive Deputy Secretary position on December 8. J.A. 472.

c. The second bribery scheme evolved from petitioner's request to Howe in early 2014—around three months before petitioner joined the governor's reelection campaign—to find petitioner a client who would pay him while he was working on the campaign. J.A. 357, 377-379. Petitioner needed funds to assist him in paying off a real-estate debt that was coming due. J.A. 357, 378, 386-387. Howe identified respondent Steven Aiello, whose company, COR Development, wanted to obtain funding from a state agency, Empire State Development (ESD), for a construction project without entering into a potentially costly labor peace agreement. J.A. 332-334, 357-359, 377-379, 534-535. Howe had attempted for "months" to "resolve" the labor peace agreement issue "with other folks in the governor's office," but had been unsuccessful. J.A. 388; see J.A. 388-389. Howe believed that petitioner had the authority to ensure that the State did not require COR Development to enter into the agreement. See J.A. 387-389.

In July 2014, while petitioner was on the reelection campaign, ESD informed COR Development that ESD's legal counsel (whose department had authority over the matter) had determined that a labor peace agreement was in fact "require[d]" to receive project funding. J.A. 597; see J.A. 222-223, 331, 334-335, 338, 390, 597-598. Later that month, Aiello e-mailed Howe asking whether "there [is] any way Joe P" (a shortened version of petitioner's name) "can help us with" the labor peace agreement issue "while he is off the 2nd floor working on the

Campaign." J.A. 594; see J.A. 392. The next day, Aiello e-mailed Howe again about the labor peace agreement, asking Howe to call petitioner and stating that he "[n]eed[ed] help on this." J.A. 393.

In early August, COR Development made an initial payment of $15,000 to petitioner. J.A. 395-397; see J.A. 379. At Aiello's suggestion, to avoid paying petitioner directly, COR Development made out the $15,000 check to an entity controlled by Howe, who in turn had a $15,000 check made out and sent to petitioner's wife. J.A. 394-397; see J.A. 421-423. In October, after Aiello, Howe, and petitioner had exchanged e-mails about the labor peace agreement, COR Development paid petitioner an additional $20,000, again routing the money through Howe and petitioner's wife. J.A. 397-400. Petitioner received both payments after advising the bank that, and around the time he informed Howe that, he would soon be re-employed by the Cuomo administration. See J.A. 424-427, 647-648; Gov't C.A. App. 110.

On December 3—after petitioner had signed the forms for formal reinstatement as Executive Deputy Secretary, and less than a week before he formally reclaimed the title—Aiello's partner, Joseph Gerardi, pressured Howe by e-mail to have petitioner resolve the labor peace agreement issue in COR Development's favor. J.A. 611, 648. Howe quickly forwarded Gerardi's e-mail to petitioner, who instructed Howe to stand by. *Ibid.* Within an hour of receiving Howe's e-mail, petitioner called the Deputy Director of State Operations, the Executive Chamber official responsible for overseeing ESD, from his own Executive Chamber office. J.A. 279, 341-342, 344, 611-612, 648.

Petitioner told the Deputy Director that an ESD attorney had been holding up the project based on the

need for a labor peace agreement and that the project should move forward without that requirement. J.A. 341-343. Petitioner then called Howe and informed him that ESD would soon reach out to Gerardi with a "different perspective" on the need for the labor peace agreement. J.A. 612. The Deputy Director—who knew at that time that petitioner was formally returning to his role in the Executive Chamber—understood petitioner's directions as "pressure" from his "principal[]," who was a "senior staff member[]." J.A. 342-343; see J.A. 355. The Deputy Director instructed senior officials at ESD "that a labor peace agreement * * * should not be required as part of this project." J.A. 343; see J.A. 612.

The next day, an ESD official informed COR Development that it would not have to enter into a labor peace agreement in order to receive state funding for its project. J.A. 224-226, 613; see J.A. 334. The Deputy Director was not aware of any other instance in which ESD had determined that a labor peace agreement was required and then reversed its determination. J.A. 344. In subsequent e-mails, Aiello and Howe attributed ESD's reversal to petitioner's intervention. J.A. 404-406, 613.

After officially returning to office, petitioner took additional actions benefiting COR Development and Aiello, by instructing officials to prioritize the release of funds owed to COR Development, see J.A. 229-249, 346-354, 415-419, 609, 649, and by securing an additional raise for Aiello's son, who worked in the Executive Chamber, see J.A. 253-260, 263-278, 407-412, 429-430, 610, 649.

2. In 2017, a federal grand jury returned an 18-count indictment against petitioner, Aiello, Gerardi, Kelly, and other defendants. J.A. 74-109. Eleven counts related to

the CPV and COR Development bribery schemes. J.A. 649-650.[1]

a. Petitioner was charged with two counts of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 1349; two counts of soliciting bribes and gratuities, in violation of 18 U.S.C. 666(a)(1)(B); and three counts of Hobbs Act extortion, in violation of 18 U.S.C. 1951. J.A. 96-103. The honest-services-fraud statute, 18 U.S.C. 1346, makes clear that the scope of frauds criminalized by the federal wire-fraud statute "includes a scheme or artifice to deprive another of the intangible right of honest services."

The district court rejected petitioner's pretrial motion to dismiss the charges to the extent that they rested on actions he took while he was running Governor Cuomo's reelection campaign. J.A. 111-172. The court highlighted the indictment's allegations that, while attached to the campaign, petitioner "continued to function in a senior advisory and supervisory role with regard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities . . . among other responsibilities." J.A. 133 (citation omitted). The court also explained that the charges could properly "rely on conduct occurring when [petitioner] [wa]s

[1] The remaining seven counts in the indictment charged Aiello and other defendants, but not petitioner, with fraud and false-statement offenses in connection with schemes to rig the bidding processes for state-funded projects. See J.A. 75, 82-86. Those counts were severed from the counts relating to the CPV and COR Development schemes, and some of those counts were the subject of a separate jury trial. See J.A. 643-644. This Court granted a petition for a writ of certiorari filed by one of the defendants in that case in *Ciminelli* v. *United States*, 142 S. Ct. 2901 (2022) (No. 21-1170).

temporarily out of office if the scheme include[d] actions taken or to be taken when [petitioner] return[ed] to government." *Ibid.*

At trial, however, before charging the jury, the district court dismissed a Hobbs Act extortion count against petitioner related to the COR Development scheme on the view that the relevant extortion theory could apply only to a formal public official. J.A. 532-561.

b. For the honest-services counts, the district court instructed the jury that the government was required to prove that petitioner owed a duty of honest services to the public. J.A. 511. The court observed, as a threshold matter, that petitioner owed such a duty "[w]hile [he] was employed by the state * * * by virtue of his official position." *Ibid.* The court also explained, over a defense objection, that

> [a] person does not need to have a formal employment relationship with the state in order to owe a duty * * * of honest services to the public, however. You may find that [petitioner] owed the public a duty of honest services when he was not a state employee if you find that at the time he owed the public a fiduciary duty. To determine whether [petitioner] owed the public a fiduciary duty when he was not employed by the state, you must determine, first, whether he dominated and controlled any governmental business and, second, whether people working in the government actually relied on him because of a special relationship he had with the government. Both factors must be present for you to find that he owed the public a fiduciary duty. Mere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty.

Ibid.; see J.A. 477-480.

The jury found petitioner guilty of conspiring to commit honest-services wire fraud related to the COR Development scheme. J.A. 651. The jury also found petitioner guilty of conspiring to commit honest-services wire fraud related to the CPV scheme and soliciting bribes or gratuities related to the CPV scheme. *Ibid.* The jury acquitted petitioner on the remaining counts. *Ibid.*[2]

3. The court of appeals affirmed. J.A. 641-686.

a. The court of appeals rejected petitioner's contention that the district court erred by instructing the jury that petitioner could be found guilty of honest-services fraud based on conduct that occurred while he was not formally a state employee. J.A. 664-672. The court of appeals noted that, under its decision in *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983), "a formal employment relationship" is not a "rigid prerequisite to a finding of [a] fiduciary duty in the public sector." J.A. 665 (citation omitted). And the court explained that private individuals "who in reality or effect are the government owe a fiduciary duty to the citizenry." *Ibid.* (citation omitted).

The court of appeals observed that, "[o]n its face," the "capacious language" of Section 1346 "is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." J.A. 667-668. The court accordingly found "no

---

[2] Aiello was convicted of conspiring to commit honest-services wire fraud related to the COR Development scheme and acquitted on the remaining counts. J.A. 651. The jury deadlocked on the charges against Kelly, who later pleaded guilty to conspiring to commit wire fraud in connection with the CPV scheme. J.A. 651-652. Gerardi was acquitted on all counts. J.A. 651.

statutory basis for distinguishing a formal government employee, who is clearly covered by § 1346, from a functional employee who owes a comparable duty." J.A. 668. The court also found that the history of Section 1346 supported its understanding of the statute's text. J.A. 668-670.

The court of appeals further determined that the jury instructions were consistent with this Court's decision in *McDonnell* v. *United States*, 579 U.S. 550 (2016), which interpreted the term "official act" in the federal-official bribery statute, 18 U.S.C. 201. J.A. 670-671. The court of appeals observed that *McDonnell* "did not hold that only a formal government officer could perform an 'official act.'" J.A. 670. And the court explained that "[s]uch a holding could not be reconciled with the text" of Section 201, which prohibits acts not only by an "'officer or employee'" of the federal government, but also by a "'person acting for or on behalf of the United States.'" *Ibid.* (quoting 18 U.S.C. 201(a)(1)).

The court of appeals also observed that this Court's decision in *Dixson* v. *United States*, 465 U.S. 482 (1984) —which determined that the "'proper inquiry'" under Section 201 "'is not simply whether the person had signed a contract with the United States or agreed to serve as the government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities'"—indicated "that someone who is functionally a government official" can commit honest-services fraud. J.A. 670-671 (quoting *Dixson*, 465 U.S. at 496) (brackets omitted). And the court of appeals saw nothing in the Constitution that required it "to introduce a new requirement of formal governmental employment" into Section 1346 based on asserted

"First Amendment, due process, and federalism" concerns. J.A. 671 (emphasis omitted).

b. Turning to the record, the court of appeals found sufficient evidence that petitioner entered into agreements to perform official acts in both the CPV and COR Development schemes. J.A. 678-681. With respect to the COR Development scheme, the court also found sufficient evidence that petitioner owed a duty of honest services while he was managing the governor's reelection campaign. J.A. 681-684.

The court of appeals observed that "throughout his time on the campaign trail" petitioner "maintained the same position of power and trust in the state" that he enjoyed while formally employed as Executive Deputy Secretary. J.A. 681-682. The court emphasized, *inter alia*, that "no one ever formally replaced [petitioner] in his role as Executive Deputy Secretary"; "as early as August 7, 2014, [petitioner] represented that he had a guaranteed position with Cuomo's administration after the election"; "he did in fact return—as Executive Deputy Secretary—four months later"; he "held onto and used his Executive Chamber telephone, desk, and office, where he continued to conduct state business"; and "[s]everal individuals testified that [petitioner] maintained control over official matters." J.A. 682; see J.A. 682-683 (summarizing testimony regarding petitioner's continuing control over official matters).[3]

[3] The court of appeals also rejected Aiello's challenge to the sufficiency of the evidence of "his knowledge of [petitioner's] control" as relevant to his mens rea for honest-services fraud. J.A. 683. The court observed that Aiello "specifically sought out [petitioner] to use his position of power to push the Labor Peace Agreement through." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner committed honest-services fraud, as specified in 18 U.S.C. 1346, when he accepted bribes as a former, future, and functional public official. Petitioner is wrong to contend that the lack of a formal employment or agency relationship immunized him from such liability.

Section 1346 expressly applies the federal mail- and wire-fraud statutes to "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. Congress enacted Section 1346 in response to *McNally* v. *United States*, 483 U.S. 350 (1987), which had disapproved of the circuits' view that the mail- and wire-fraud statutes already covered honest-services fraud. In *Skilling* v. *United States*, 561 U.S. 358 (2010), this Court defined the "'intangible right of honest services'" to encompass the "violation of a fiduciary duty" through a "bribery or kickback scheme[]" and rejected a vagueness challenge to the statute as so defined. *Id.* at 404, 407. The Court explained that the definition is informed both by pre-*McNally* case law and by federal bribery prohibitions like 18 U.S.C. 201 and 18 U.S.C. 666. *Skilling*, 561 U.S. at 412.

The relevant authorities do not support an invariable requirement that a person must have a formal relationship with a government in order to owe the public a duty of honest services. Section 666, which prohibits federal program bribery, applies to "agent[s]," 18 U.S.C. 666(a)(1), broadly defined to include "person[s] authorized to act on behalf of * * * a government * * * includ[ing] a servant or employee, and a partner, director, officer, manager, and representative," 18 U.S.C. 666(d)(1). And Section 201 prohibits bribery of both a federal "public official" and a "person selected to be a

public official." 18 U.S.C. 201(c)(1)(B). Section 201 then defines "'public official'" itself to include not only "an officer or employee," but also a "person acting for or on behalf of the United States * * * in any official function." 18 U.S.C. 201(a)(1).

In *Dixson* v. *United States*, 465 U.S. 482 (1984), this Court explicitly rejected an interpretation of Section 201 that would have limited it to "persons in a formal employment or agency relationship" with a government. *Id.* at 494. And the Court has recognized, in the fraud context, that a relationship giving rise to relevant duties can be either a formal "fiduciary" relationship or a "similar relation of trust and confidence." *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980) (citation omitted). Pre-*McNally* circuit law, including decisions that this Court has approvingly cited, likewise supports a realistic, rather than purely formalist, approach to the inquiry. The relevant authorities thus make clear that a person who is not a formal employee or agent of a government can still owe a duty of honest services to the public under Section 1346 when the person has been selected to work for the government, or when the person actually exercises the powers of a government position with the acquiescence of the relevant government personnel.

In this case, the evidence overwhelmingly demonstrated that petitioner owed the public a duty of honest services when he engaged in the COR Development scheme. At that time, he was both (1) slated to return as the Executive Deputy Secretary, and (2) acting as a functional public official, insofar as he continued to use the government offices and phones, participate in government affairs, and issue directives to government employees who understood that they should comply.

Either basis alone is sufficient to support his conviction, and the jury instructions required a finding of the latter—a finding that petitioner provides no sound reason to disturb.

Petitioner's objections to his conviction are unsound. The Court's discussion of honest-services fraud in *Skilling* supports, rather than undercuts, the application of the honest-services fraud statute to petitioner's conduct. Petitioner's conviction is also consistent with the definition of "official act" in *McDonnell* v. *United States*, 579 U.S. 550 (2016), which includes "exert[ing] pressure on another official" who is making a decision. *Id.* at 572 (emphasis omitted). Applying Section 1346 in this case does not raise lenity or vagueness concerns because both the similar federal bribery statutes and Section 1346's mens rea requirement ensure fair notice that conduct like petitioner's is unlawful. The conviction likewise raises no First Amendment concerns because lobbyists, family members, and the like are neither incoming nor functional government officials, as petitioner was, and will not be chilled from engaging in legitimate speech. Finally, the judgment below does not infringe on federalism principles because even assuming a violation of state law were required for conviction, state bribery and ethics laws do not suggest that petitioner's conduct was permissible. Petitioner's conviction for illegal schemes to defraud the public by accepting bribes in return for official acts should be affirmed.

ARGUMENT

PETITIONER COMMITTED HONEST-SERVICES FRAUD BY ACCEPTING BRIBES WHEN SELECTED AS, AND FUNCTIONALLY SERVING AS, A PUBLIC OFFICIAL

Petitioner committed honest-services fraud, in violation of 18 U.S.C. 1346, by accepting bribes in exchange for official acts that depended on his past, future, and functional role as a public official. His previous formal title of Executive Deputy Secretary for the Governor of New York was never conferred on anyone else while petitioner was attached to the governor's reelection campaign; he made clear his intent to reassume the title—which he eventually did; and while the position remained nominally vacant, he carried out functions of that role. Petitioner's claim (Br. 2, 21) of categorical "private citizen" immunity rests on the mistaken premise that no matter how clear a defendant's authority over government business may be, he avoids a duty to the public simply by abstaining from a formal employment contract or its equivalent. Nothing in the statute, or the sources on which this Court has relied to interpret it, supports such a readily manipulable exception to the law.

A. Section 1346 Criminalizes Schemes To Defraud That Involve Bribes And Kickbacks Received In Violation Of A Duty Of Honest Services

Federal law has long prohibited "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" committed by means of the mail or interstate wires. 18 U.S.C. 1341, 1343; see, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 399-400 (2010). In a line of cases that began in the 1940s, the courts of appeals

construed the mail- and wire- fraud statutes to prohibit schemes to deprive others of intangible rights, including the right to "honest services." See *Skilling*, 561 U.S. at 400-401. In *McNally* v. *United States*, 483 U.S. 350 (1987), however, this Court disagreed with that line of cases, explaining that "Congress * * * must speak more clearly" in order to prohibit honest-services fraud. *Id.* at 360.

The following year, Congress responded by enacting 18 U.S.C. 1346, which states that, for purposes of the mail- and wire-fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." As this Court has recognized, Congress employed the phrase "the intangible right of honest services," *ibid.*, to "reinstate the body of pre-*McNally* honest-services law." *Skilling*, 561 U.S. at 405 (citation omitted). Accordingly, in *Skilling*, this Court interpreted the phrase specifically to refer to the "bribery and kickback schemes" that constituted the "'vast majority'" of the pre-*McNally* case law, which "involved offenders who, in violation of a fiduciary duty, participated in" such schemes. *Id.* at 407, 412 (citation omitted).

The Court found no due-process infirmity in the statute as so defined. *Skilling*, 561 U.S. at 412-413. The Court explained that "it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud"; that Section 1346's "*mens rea* requirement further blunts any notice concern"; and that the "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Id.* at 412. The Court highlighted 18 U.S.C.

666(a), which prohibits bribery of state or local officials in relation to federally funded programs, and 18 U.S.C. 201, which prohibits bribery of federal officials. *Skilling*, 561 U.S. at 412.

After *Skilling*, to convict a defendant of honest-services mail or wire fraud the government must prove that the defendant engaged in a scheme to breach a fiduciary duty through bribes or kickbacks. See *Skilling*, 561 U.S. at 407 & n.41, 408-409. The government must also prove that the defendant acted with intent to defraud (*i.e.*, an intent to deceive or cheat), see *Durland* v. *United States*, 161 U.S. 306, 313-314 (1896); that the deception concerned a material fact, see *Neder* v. *United States*, 527 U.S. 1, 22-25 (1999); and that the mail or interstate wires were used in furtherance of the fraudulent scheme, see 18 U.S.C. 1341, 1343.

B. An Individual May Owe A Duty Of Honest Services To The Public Without A Formal Employment Or Agency Relationship

The statutes and other legal authorities that inform the "content" of the honest-services-fraud statute, *Skilling*, 561 U.S. at 412, illustrate that in certain limited circumstances someone without a formal employment or agency relationship with a public employer may still owe the public a duty of honest services. Someone like petitioner, who is simply on a brief formal hiatus from a government position, but who continues to functionally exercise the relevant authority of that position in the meantime, may be treated as what he plainly is: someone who wields public power.

1. One of the two statutes that *Skilling* highlighted, 18 U.S.C. 666, prohibits not just a formal employee, but also any "agent * * * of a State [or] local * * *

government, or any agency thereof," from (*inter alia*) accepting bribes in connection with federally funded programs. 18 U.S.C. 666(a)(1). An "'agent'" is defined as any "person authorized to act on behalf of * * * a government," which "includes"—but would not be limited to—"a servant or employee, and a partner, director, officer, manager, and representative." 18 U.S.C. 666(d)(1); see, *e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 131 n.3 (2008) ("The word 'includes' is usually a term of enlargement, and not of limitation.") (brackets and citation omitted). Petitioner accordingly acknowledges (Br. 22, 24, 33, 37), that a common-law agency relationship would suffice under the honest-services-fraud statute. And courts have recognized that Section 666 includes individuals who are in fact permitted to exercise the "authori[ty] * * * of * * * a government," 18 U.S.C. 666(d)(1), even when they may lack the formal trappings of employment or agency.[4]

Even assuming that Section 666 incorporated the common law of agency, further context illuminates that

---

[4] See, *e.g.*, *United States* v. *Lupton*, 620 F.3d 790, 800-801 (7th Cir. 2010) (finding that a private real-estate agent whose firm's state contract disclaimed an agency relationship with the State was covered by Section 666), cert. denied, 562 U.S. 1247 (2011); *United States* v. *Hudson*, 491 F.3d 590, 595 (6th Cir.) ("Employment labels * * * may bring some employment relationships within the sphere of agency status [under Section 666(d)(1)] but they do not necessarily squeeze all other employment relationships out of that sphere.") (emphases omitted), cert. denied, 552 U.S. 1081 (2007); *United States* v. *Vitillo*, 490 F.3d 314, 323 (3d Cir. 2007) (finding that Section 666(d)(1) encompasses individuals who do not "necessarily control[] federal funds" and who are "independent contractor[s] who act[] on behalf of" a government); *United States* v. *Sotomayor-Vázquez*, 249 F.3d 1, 8 (1st Cir. 2001) (emphasizing Section 666(d)(1)'s "expansive" definition of "'agent'").

no legal agency relationship is invariably required under the honest-services-fraud statute. The parties in this case "stipulated before the district court that 'bribery' for the purposes of the honest-services-fraud statute is defined by reference to [Section] 201," the other statute highlighted in *Skilling*. J.A. 654; cf. *McDonnell* v. *United States*, 579 U.S. 550, 580 (2016) ("For purposes of this case, the parties defined honest services fraud * * * with reference to § 201."). Section 201 expressly prohibits bribery involving not only a federal "public official" but also a person who has been "*selected to be* a public official," namely, "any person who has been nominated or appointed to be a public official, or has been officially informed that such a person will be so nominated or appointed." 18 U.S.C. 201(a)(2) and (c)(1)(B) (emphasis added). And even beyond its application to a current or incoming "public official," Section 201 expressly applies to any "person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof * * * in any official function." 18 U.S.C. 201(a)(2).

In *Dixson* v. *United States*, 465 U.S. 482 (1984), this Court rejected a formal employment or agency relationship as a prerequisite for the application of Section 201. *Dixson* held that "officers of a private, nonprofit corporation administering and expending federal community development block grants"—using funds that the nonprofit had received from a city, which had in turn received the funds from the federal government—"are 'public officials' for purposes of the federal bribery statute." *Id.* at 484 (citation omitted). In so doing, the Court repeatedly and explicitly rejected a requirement that an individual have "some formal bond with the United States, such as an agency relationship, an

employment contract, or a direct contractual obligation" in order to be covered by the bribery prohibition. *Id.* at 490; see *ibid.* (observing that neither the petitioners nor their employer "ever entered into any agreement with the United States or any subdivision of the Federal Government"); *id.* at 493-494 ("Congress could not have meant to restrict the definition, as petitioners argue, to those persons in an employment or agency relationship with the Federal Government."); *id.* at 496 ("[T]he phrase 'acting for or on behalf of the United States' covers something more than a direct contractual bond."); *id.* at 498 ("[E]mployment by the United States or some other similarly formal contractual or agency bond is not a prerequisite to prosecution under the federal bribery statute.").

The Court recognized that, had "Congress intended courts to restrict" Section 201 "to persons in a formal employment or agency relationship with the Government, it would have had no reason to" include "the 'acting for or on behalf of' language" that expands the statute's scope beyond any such limits. *Dixson*, 465 U.S. at 494. The Court accordingly emphasized that Section 201 is "a 'comprehensive statute applicable to all persons performing activities for or on behalf of the United States,' whatever the form of delegation of authority." *Id.* at 496 (citation omitted). And the Court adopted the straightforward rule that, "[t]o determine whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities." *Ibid.* "Persons who hold such positions," the Court instructed, "are public officials

within the meaning of § 201 and liable for prosecution under the federal bribery statute." *Ibid.*

2. In accord with *Dixson*'s directive, courts of appeals since *Dixson* have found certain individuals who lack a direct employment or agency relationship with the federal government to be covered by Section 201. See, *e.g.*, *United States* v. *Thomas*, 240 F.3d 445, 446-449 (5th Cir.) (employee of private prison), cert. denied, 532 U.S. 1073 (2001); *United States* v. *Kenney*, 185 F.3d 1217, 1220-1222 (11th Cir. 1999) (per curiam) (employee of government contractor); *United States* v. *Hang*, 75 F.3d 1275, 1279-1281 (8th Cir. 1996) (employee of independent public corporation); *United States* v. *Madeoy*, 912 F.2d 1486, 1494-1495 (D.C. Cir. 1990) (fee appraiser who was not agent of the government), cert. denied, 498 U.S. 1105, and 498 U.S. 1110 (1991); *United States* v. *Velazquez*, 847 F.2d 140, 141-142 (4th Cir. 1988) (employee of county).

Circuit decisions employing a contextual approach to an individual's duty under Section 201 accord not only with the holding of *Dixson*, but also with this Court's understanding of how the lower courts would apply the law—including the honest-services-fraud statute. The Court in *Dixson*, for example, relied on a Second Circuit decision that had recognized that the category of federal "public official[s]" included a "low-level official in a decentralized federal assistance program" who "simply compiled data that was submitted to the [federal government] for eventual disbursement" and was "neither employed by the United States nor paid with federal funds." 465 U.S. at 495-497 (citing *United States* v. *Levine*, 129 F.2d 745 (2d Cir. 1942)). And when the Court later addressed the honest-services-fraud statute in *Skilling*, it "suggest[ed]" that bribes solicited in violation

of informal fiduciary relationships likewise "are susceptible to prosecution" under Section 1346. *United States* v. *Milovanovic*, 678 F.3d 713, 723 (9th Cir. 2012) (en banc), cert. denied, 568 U.S. 1126 (2013).

Skilling observed that "debates" about "the source and scope of fiduciary duties" were "rare in bribe and kickback cases" because the "existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute." 561 U.S. at 407 n.41. To illustrate that point, the Court not only cited specific "examples" of fiduciary relationships, but also cited its own prior decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980), as a general description of "the 'established doctrine that a fiduciary duty arises from a specific relationship between two parties.'" *Skilling*, 561 U.S. at 407 n.41 (brackets and citation omitted). *Chiarella*, in turn, was a securities-fraud case that recognized that the relationship giving rise to relevant duties could be either a "fiduciary" relationship "or other similar relation of trust and confidence." 445 U.S. at 228 (quoting Restatement (Second) of Torts § 551(2)(a) (1977)); see *United States* v. *O'Hagan*, 521 U.S. 642, 652 (1997) (duty applies to both employees and "attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation"); *Dirks* v. *SEC*, 463 U.S. 646, 655 n.14 (1983) (similar).

In addition, a circuit decision that *Skilling* favorably cited for the proposition that Section 1346 covers only "that 'intangible right of honest services,' which had been protected before *McNally*" described that pre-*McNally* understanding as incorporating a non-rigid approach in accord with *Dixson*. *Skilling*, 561 U.S. at 405 (quoting *United States* v. *Rybicki*, 354 F.3d 124, 138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809

(2004)) (emphasis omitted). Specifically, that decision surveyed pre-*McNally* case law and recognized that "a person in a relationship that gives rise to a duty of loyalty *comparable* to that owed by employees to employers" is covered by Section 1346. *Rybicki*, 354 F.3d at 141-142 (emphasis added); see *id.* at 142 n.17 (collecting cases); see also *McNally*, 483 U.S. at 355 (noting that pre-*McNally* court of appeals decisions recognized that "an individual without formal office may be held to be a public fiduciary if others rely on him 'because of a special relationship in the government' and he in fact makes governmental decisions") (citation omitted). Thus the case law as well as the statutes that inform the definition of Section 1346 decline to adopt a rigid, formalist approach that would require actual employment or legal agency no matter how obvious a particular defendant's public-official role might otherwise be.

C. Section 1346 Applies To Individuals Selected For Formal Government Employment Or Actually Exercising The Functions Of A Government Official

As applicable here, the relevant authorities illustrate that a person who lacks a formal employment or agency relationship with a government can still owe a duty of honest services to the public in two discrete circumstances: (1) when the person has been selected to work for the government, and (2) when the person exercises the functions of a government position with the acquiescence of relevant government personnel. A person in either of those capacities who accepts a bribe or kickback with the requisite intent violates his duty of honest services to the public.

1. Under the Section 201-informed definition of honest-services fraud, a person who has been "selected to be a public official" owes the public a duty of honest

services under Section 1346 even if his term of office has not yet begun. 18 U.S.C. 201(a)(2); see *Skilling*, 561 U.S. at 412. If, before taking office, such a person solicits, accepts, or agrees to accept a thing of value in exchange for influencing or being influenced in the performance of an official act, he has engaged in a "scheme or artifice to * * * deprive another of the intangible right of honest services" within the meaning of Section 1346. 18 U.S.C. 1346.

Such a violation of Section 1346 does not require proof that the incoming official performed the bargained-for actions at a particular time in relation to his assumption of formal office—or even performed them at all. Section 201's prohibition on bribing an incoming official does not impose any such time constraint, see 18 U.S.C. 201(b)(1)(A), and a bribery "offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense," *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (prosecution under 18 U.S.C. 1951 (1988)). The violation of the public trust is the same regardless of whether or when an act that is the subject of the bribery scheme is performed. Cf. *Neder*, 527 U.S. at 25 (observing that a proof-of-damage requirement would be incompatible with the textual prohibition on a "scheme to defraud").

2. A similar duty to provide honest services arises when a person in fact exercises functions of a government office and is treated by other relevant parties as possessing powers of the office. Such a person is acting "for or on behalf of" the government. 18 U.S.C. 201(a)(1). When an individual is exercising functions of a government office, the absence of formal recognition

as an employee or agent does not undermine the existence of a fiduciary duty, or otherwise provide a basis for permitting him to solicit or accept a bribe in exchange for official action.

As *Dixson* held in the analogous Section 201 context, "the proper inquiry is not simply whether the person had signed a contract with the [government] or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official * * * responsibilities." 465 U.S. at 496; see *Milovanovic*, 678 F.3d at 721-727; *United States* v. *Lupton*, 620 F.3d 790, 800-801 (7th Cir. 2010), cert. denied, 562 U.S. 1247 (2011); *United States* v. *Hudson*, 491 F.3d 590, 594-595 (6th Cir.), cert. denied, 552 U.S. 1081 (2007); cf. Restatement (Third) of Agency § 1.02 (2006). Even if not formally attached to the government, a person cannot order government employees around in the way that a public officeholder would or otherwise exercise the powers of a public officeholder without bearing responsibility for the government activities that he directs.

3. Petitioner's attempt (Br. 27-28) to draw a distinction between the fiduciary duty that such an individual owes to the government and the one that he correspondingly owes to the public is misplaced. It is undisputed that an individual owes not just the government, but also the public, a duty to provide honest services when he is formally an officeholder. See *Skilling*, 561 U.S. at 407 & n.41. And when a person is either on the threshold of becoming the formal officeholder, or steps into the officeholder's functional role by enjoying prerogatives and authority of the office, he assumes the fiduciary duty owed to the public that accompanies the role.

If government employees treat someone as an officeholder, he possesses public power commensurate with a

formal officeholder, and he is required to use it responsibly. In such a situation, the harm to the public from a bribe—the promise to take official action based on a corrupt payment—is no different than if the official were a formal government employee. Like a formal official, a person who is about to be or functionally is one would be "outwardly purporting to be exercising independent judgment" in a government action that he agrees to undertake, when in reality he "has been paid for his decisions, perhaps without even considering the merits of the matter." *United States* v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979). His actions on the matter will thus affect the public just the same as a formal officeholder's would.

D. The Jury Validly Found That Petitioner Owed The Public A Duty Of Honest Services

Petitioner did not immunize himself from a bribery prosecution for his participation in the COR Development scheme by temporarily switching his formal employment status from the Executive Deputy Secretary for the Governor of New York to the campaign manager for the Governor of New York. Petitioner was only days away from formally resuming the Executive Deputy Secretary position—and had already submitted the relevant employment paperwork—when he took official action by directing ESD to rescind the requirement that COR Development enter into a potentially costly labor peace agreement. And even independent of that, petitioner continued to function as a public official by continuing to carry out functions of the Executive Deputy Secretary while attached to the campaign.

1. Petitioner had been selected to be a public official when he carried out his corrupt agreement with Aiello and COR Development

The evidence presented at trial demonstrated that petitioner would be returning to his official position in the Executive Chamber when he participated in the bribery scheme involving COR Development. As a future official, his engagement in a bribery scheme violated a duty of honest services to the public.

The relevant timeline is straightforward. On August 7, 2014, petitioner informed a bank that his "[e]mployment post-election" would be in "Governor Andrew Cuomo['s] * * * administration." Gov't C.A. App. 110; see J.A. 647-648. In August or September, petitioner similarly informed others that he would be returning to the Executive Chamber. J.A. 368, 424-427, 647-648. During the same period, petitioner, Howe, and Aiello, exchanged e-mails about eliminating the requirement that COR Development enter into a labor peace agreement to receive government funds. J.A. 647. COR Development then made two payments to petitioner (through his wife), with one payment in mid-August and the other in October. J.A. 647-648.

On November 25, petitioner signed reinstatement forms to reassume the Executive Deputy Secretary title. J.A. 212-214, 468-472, 618-619, 621-634. On December 1, he again executed those reinstatement forms, this time in front of a notary. J.A. 634. And after twice signing his reinstatement papers, petitioner took the action for which he had been paid. On December 3, he made the call from the office and phone of the Executive Deputy Secretary to the Deputy Director of State Operations—who knew when the call was made that petitioner would be formally resuming his role as Executive Deputy

Secretary—and instructed the Deputy Director that the COR Development project should move forward without the labor peace agreement. J.A. 341-343, 355, 611-612. The Deputy Director promptly did what petitioner wanted. J.A. 342-343, 612. Five days later, petitioner formally reassumed the title of Executive Deputy Secretary. J.A. 472.

It was accordingly clear throughout the course of the bribery scheme that petitioner would be returning to his position in the Executive Chamber. Even if the relevant timeframe were restricted solely to the period after he signed his reinstatement papers, that period would encompass his instructions to the Deputy Director, which reaffirmed and effectuated the bribery scheme that he was convicted of conspiring to commit. See, *e.g.*, *Smith* v. *United States*, 568 U.S. 106, 107 (2013) ("Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws."). It is unsurprising that COR Development was willing to pay petitioner, and that the Deputy Director felt beholden to follow petitioner's instruction—just as the Deputy Director would have felt beholden to follow the instruction of the formal public official that petitioner was to become less than a week later. Cf. 18 U.S.C. 201(a)(2) and (b)(2).

2. *Petitioner was functionally a public official when he participated in the COR Development scheme*

The evidence separately showed that petitioner was in fact exercising the functions of a government office when he participated in the COR Development scheme. Although petitioner had nominally left his post in the Executive Chamber, no one else served as Executive Deputy Secretary during petitioner's eight-month hiatus. J.A. 178-180, 682. Petitioner also did not relinquish

his physical offices in the Executive Chamber, which he continued to use, along with his government phone, to conduct state business while attached to the reelection campaign. See pp. 4-5, *supra*. Indeed, petitioner was in his Executive Chamber office on December 3, when he directed ESD to rescind the labor peace agreement requirement. J.A. 279, 611-612, 648.

As the court of appeals recognized, petitioner's "grip on power never changed, diminished, or dissipated as he managed the campaign." J.A. 682. The court emphasized that petitioner conducted state business in various ways, was involved in a variety of state projects, and continued to use his state offices and phones during his purported absence from the Executive Chamber. See, *e.g.*, J.A. 279, 607-608, 681-683. He participated in, and exercised influence over, state operations and policy throughout that period, including by planning a state government event, providing instructions on a state project, and attending an internal government meeting. See p. 5, *supra*. He also made hiring and salary decisions for state employees and pressured employees to remain in their government jobs. See *ibid.* Individuals inside and outside state government accordingly understood that petitioner continued to exercise functions of the Executive Deputy Secretary while managing the reelection campaign. See, *e.g.*, J.A. 682-683.

For example, the Acting Counsel to the Governor sought petitioner's views on legislative policy matters precisely because the Acting Counsel understood that petitioner "spoke for the governor" on such issues. J.A. 311. Similarly, Howe repeatedly witnessed petitioner "instruct[ing]" the governor's staff "on various non-campaign topics" while formally attached to the campaign. J.A. 682 (brackets and citation omitted). And

when petitioner instructed the Deputy Director to ensure that the COR Development project proceeded without a labor peace agreement, the Deputy Director interpreted that call as "pressure" from a "principal[]" who was a "senior staff member[]" in the government. J.A. 342-343. The Deputy Director immediately directed ESD to undertake the unprecedented act of reversing its prior decision on the labor peace agreement. J.A. 342-343, 612.

Petitioner asserts (Br. 13) that he lacked "legal control or authority" and was simply acting as a private citizen lobbyist while he was working on the campaign. But the evidence clearly showed that he had the *functional* control and authority that mattered. Among other things, the Deputy Director viewed him as a "principal[]," not a lobbyist. J.A. 343. And if petitioner had not still been functioning as a public official, the Executive Deputy Secretary position would have been filled by someone else, who would then have occupied the state offices that petitioner enjoyed, taken control of the state phones that petitioner used, and conducted all of the state business that petitioner carried out.

3. The jury was adequately instructed on the COR Development count

To the extent that petitioner suggests (Br. 48) that even if the evidence was sufficient to support his conviction for participating in the COR Development scheme, a new trial is warranted because the jury instructions were defective, that suggestion is unsound. The jury's determination that petitioner owed the public a duty of honest services, and that he violated that duty by accepting bribes from COR Development, was based on instructions that in the context of this case correctly

conveyed the duty owed by an individual who acts as the functional equivalent of a public official.

The district court instructed the jury that a "person does not need to have a formal employment relationship with the state * * * in order to owe a duty of honest services to the public" if "at the time" the person "owed the public a fiduciary duty." J.A. 511. The court explained that to find that petitioner "owed the public a fiduciary duty when he was not employed by the state," the jury was required to find both that petitioner "dominated and controlled a[] governmental business" and that "people working in the government actually relied on him because of a special relationship he had with the government." *Ibid.* The court emphasized that "[m]ere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty." *Ibid.*

Taken as a whole and in the context of this case, those instructions correctly conveyed a proper legal test. See *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994) (jury instructions sufficient when, "taken as a whole," they "correctly convey" the relevant "concept") (brackets and citation omitted); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975) ("[I]n reviewing jury instructions," a court must "view the charge itself as part of the whole trial" and "'consider[] * * * the context of the entire record of the trial.'") (citation and emphasis omitted). The jury would have understood the inquiries into whether petitioner "dominated and controlled a[] governmental business," and whether people in government "relied on him" because of a "special relationship he had with government," to ask whether he was acting as the functional equivalent of a public official during his brief hiatus from formal state employment. J.A. 511.

Both the prosecution and defense presentations at trial reflected that contemporaneous understanding of the jury instructions. As the court of appeals observed, "[t]he government's theory at trial was that, for all practical purposes, [petitioner] maintained the same position of power and trust in the state throughout his time on the campaign trail." J.A. 681-682. And petitioner's counsel argued to the jury that, for petitioner to be treated as a public official while he was working on the campaign, he must have been an "agent * * * authorized to act on behalf of the state government" who wielded "authority"; it was not enough that he was "influential or respected." J.A. 488.

In making that argument, petitioner's counsel expressly recognized the government's theory to be that petitioner "was acting with authority of the state and never really left the state," J.A. 490-491, and argued that the evidence did not support that theory, see J.A. 487-497. Petitioner's current contention that the jury would have understood the instructions to permit a finding of guilt on a different theory is accordingly misplaced.[5]

[5] Notwithstanding his assertion at the petition stage that his separate CPV scheme is "not relevant here," Pet. 8, petitioner now briefly contends (Br. 49) that he is entitled to a new trial on those counts as well. Petitioner identifies no error in the district court's instruction to the jury that he "owed the public a duty of honest services by virtue of his official position" when he was "employed by the state." J.A. 511. And the CPV scheme was carried out almost entirely in 2012 and 2013, while petitioner was both formally and functionally the Executive Deputy Secretary. See Order Denying Bail 42-43. During that period, CPV paid petitioner's wife in exchange for petitioner's assistance in obtaining a power purchase agreement from the State. *Id.* at 42. In late 2013, "it became clear" to petitioner "that CPV was unlikely to be awarded" the agreement,

E. Applying Section 1346 To Petitioner's Conduct Is Consistent With This Court's Decisions And Creates No Constitutional Problems

Petitioner's arguments in this Court largely focus on attacking the Second Circuit's decision in *United States* v. *Margiotta*, 688 F.2d 108 (1982), cert. denied, 461 U.S. 913 (1983). See Pet. Br. 2-49 (referring to *Marigotta* 123 times). But as the government explained in the court of appeals, "this case does not go as far as *Margiotta*," Gov't C.A. Br. 90, which involved a defendant who had not been selected to be a public official and who did not engage in functions of a specific government role that he had previously held—and would soon again formally hold, see *Margiotta*, 688 F.2d at 113. This Court therefore need not address *Marigotta* in order to affirm. And petitioner's remaining doctrinal objections to affirming his conviction are unsound; affirmance on these facts is consistent with this Court's decisions in

---

and "[t]hroughout 2014 and 2015"—including while he briefly was attached to the campaign—petitioner represented "that CPV could still win the [agreement], in order to create the illusion that [he] was still worth bribing." *Id.* at 43. "[A]ll relevant parts of the CPV Scheme * * * took place when [petitioner] was a state employee." *Id.* at 42-43. The prosecution "did not argue that [petitioner] performed any official actions" in the CPV scheme while he was working on the campaign; instead, the prosecution's "theory of the case" was that petitioner "merely pretended to do so," in an effort to appear to prolong an already-complete scheme and thereby "ensure that CPV would continue paying him." *Id.* at 43. And petitioner's claim (Br. 49) of spillover prejudice from the COR Development count discounts both the separate presentation of the two bribery schemes at trial and the strength of the government's evidence about the CPV scheme. Cf. J.A. 678-679 (finding evidence sufficient to support CPV convictions without relying on evidence of the COR Development scheme).

Skilling and *McDonnell*, and does not raise lenity, vagueness, First Amendment, or federalism concerns.

***1. Applying Section 1346 to incoming and functional public officials is consistent with the Court's decisions in* Skilling *and* McDonnell**

Petitioner is incorrect in claiming (Br. 29-37) that this Court's precedents invalidate his conviction. Contrary to his contentions, nothing in *Skilling* or *McDonnell* is inconsistent with the prosecution of his conduct as honest-services fraud.

a. *Skilling* addressed the types of schemes that Section 1346 covers, limiting them to fraudulent schemes involving bribes or kickbacks. 561 U.S. at 409. *Skilling* did not, however, limit the nature or scope of duties covered by Section 1346. Instead, as explained above, see pp. 19-21, 23-25, *supra*, to the extent that *Skilling* addressed the potential class of honest-services-fraud defendants, the decision supports petitioner's conviction on the facts of this case.

Petitioner asserts that criminalizing bribery or kickback schemes involving an incoming or functional public official falls outside the "pre-*McNally* 'doctrine's solid core'" that *Skilling* reaffirmed. Pet. Br. 30 (citation omitted). Among other things, however, as previously discussed, *Skilling* recognizes that "federal statutes" like Section 201's federal-bribery prohibition likewise inform the honest-services-fraud statute. 561 U.S. at 412. And Section 201 covers both persons who have been "selected to be a public official," 18 U.S.C. 201(c)(1)(B), and—as the Court made clear in *Dixson*—persons who may not have a "formal employment or agency relationship" with a government, 465 U.S. at 494. In addition, *Dixson* undercuts petitioner's premise that the circumstances here fall outside pre-*McNally* case law; both

Dixson itself and the similar circuit decisions that it favorably cites predate *McNally*, and thus themselves shape the content of the pre-*McNally* doctrine's core.

Contrary to petitioner's reading (Br. 32) of footnote 41 in the opinion, *Skilling* neither determined that only individuals formally employed by a government owe the public a duty of honest services nor required that the existence of a formal fiduciary duty be "beyond dispute" in every case. 561 U.S. at 407 n.41. That footnote simply responded to an argument asserting vagueness in the duty inquiry by providing "examples" of fiduciary relationships in "bribe and kickback cases" that were "beyond dispute." *Ibid.* The Court did not purport to define the universe of covered relationships. Much less did it immunize someone who has been selected to become a public official, or who steps into (or in this case continues to wear) the shoes of a public official by exercising that official's powers, from potential liability for honest-services fraud.

b. Petitioner's reliance on *McDonnell* (Br. 34-37) is likewise flawed. In *McDonnell*, the Court interpreted the meaning of "'official act'" in Section 201—which defines that term to include "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official," 18 U.S.C. 201(a)(3)—as limited to circumstances where a public official "make[s] a decision or take[s] an action" on a particular "'question, matter, cause, suit, proceeding or controversy,' or agree[s] to do so." 579 U.S. at 574. The Court made clear that an "'official act' * * * may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will

form the basis for an 'official act' by another official." *Ibid.* That definition neither doctrinally nor logically requires that a person who himself takes an official act by pressuring another official to take an official act be a formal government employee or legal agent.

Dixson's rejection of that requirement as a prerequisite for liability under Section 201 overall necessarily means that it cannot be a prerequisite for the element of taking—or at least "agreeing to" take, *McDonnell*, 579 U.S. at 573—an official act. And in this case, petitioner's application of pressure on another official to excuse COR Development from having to obtain a labor peace agreement qualifies as an "official act." See *ibid.* A person selected to be a public official, especially one who has continuously been functioning as a public official, is fully capable of leveraging his position to exert pressure on another official to perform an official act, as petitioner did in this case.

2. The rule of lenity and the vagueness doctrine do not preclude Section 1346's application in this case

Contrary to petitioner's assertion, neither the lenity canon nor the void-for-vagueness doctrine requires limiting the application of Section 1346 to individuals formally employed by, or legal agents of, a government. Pet. Br. 44-47; see Aiello Br. 32-38. The rule of lenity does not apply unless, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (citation omitted). Similarly, a criminal law is not vague so long as "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was

criminal," *United States* v. *Lanier*, 520 U.S. 259, 267 (1997)—even if "[c]lose cases can be imagined," or "it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved," *United States* v. *Williams*, 553 U.S. 285, 306 (2008).

Applying Section 1346 to once-and-future public officials such as petitioner does not implicate either doctrine. Both longstanding case law (including, but not limited to, *Dixson*) and the federal bribery statutes provide sufficient notice that a person selected to serve as a public official—particularly one who is actively functioning as a public official by performing duties that fall within the role that he previously held formally—does not immunize himself from prosecution for bribery merely by avoiding formal contemporaneous employment. See, *e.g.*, pp. 19-28, *supra*; cf. *Skilling*, 561 U.S. at 412-413. And *Dixson*'s nearly 40-year pedigree demonstrates that a functional approach is not unworkable in practice.

Moreover, as in *Skilling*, Section 1346's "*mens rea* requirement" of an intent to defraud "further blunts any notice concern" in this case. 561 U.S. at 412; see *Williams*, 553 U.S. at 294 (rejecting vagueness challenge based in part on a statute's scienter requirements). A defendant who satisfies the specific-intent requirement for honest-services fraud had fair notice of the implications of his scheme. The jury here, for example, was instructed that it must find that petitioner acted "knowingly" ("voluntarily and deliberately, rather than mistakenly or inadvertently"); "willfully" ("purposely, with an intent to do something the law forbids"); and "with a specific intent to deceive for the

purpose of depriving another of the intangible right of honest services." J.A. 512-513.[6]

3. Section 1346's application in this case does not invite First Amendment concerns

Petitioner asserts (Br. 38-42) that criminalizing conduct like his raises First Amendment concerns by suggesting the possibility of prosecuting lobbyists and political donors who engage in protected speech. But when lobbyists and donors act in their traditional roles, their conduct clearly falls outside the two categories of behavior at issue in this case.

Lobbyists and donors are not selected to be public officials. And they do not exercise the functions of official government positions. Whatever influence a lobbyist —or a friend, media personality, or family member, see Pet. Br. 45-46—might have, such a person cannot reasonably fear that his communications with the government will be treated as official directives, as petitioner's were in the quite different circumstances here. See, *e.g.*, J.A. 310-311, 341-343.

---

[6] Aiello contends (Br. 48-50) that Section 1346 is unconstitutionally vague as applied to him. But the Court did not grant certiorari to consider that question. In any event, to the extent that Aiello's vagueness and other arguments rely on the assertion that he lacked the requisite mens rea to support his conviction, see Aiello Br. 49-50, that assertion lacks merit. The same mental-state jury instructions that applied to petitioner also applied to Aiello. J.A. 509, 512-513. And, as the court of appeals recognized, J.A. 683-684, sufficient evidence supported the jury's finding that Aiello knew of petitioner's control over state government while attached to the reelection campaign.

4. Petitioner's conviction is consistent with principles of federalism

Petitioner also claims (Br. 42-43) that application of Section 1346 to his conduct violates principles of federalism, suggesting that he complied with New York law. But nothing in the text of Section 1346, or this Court's precedents, requires the government to prove that the defendant violated state law in order to show a duty of honest services. And such a requirement would be difficult to square with the uniform application of a federal statute that reflects independent federal interests. Cf. *Gamble* v. *United States*, 139 S. Ct. 1960, 1966 (2019) (recognizing the Framers' "concern for the different interests of separate sovereigns" in interpreting a constitutional provision). In any event, this case presents no inconsistency between state and federal law because petitioner's conduct appears to run afoul of New York law.

New York criminalizes bribery of a "'[p]ublic servant'" and defines that term to include both "a person who has been elected or designated to become a public servant" and "any person exercising the functions of" a "public officer or employee of the state." N.Y. Penal Laws § 10.00(15) (McKinney Supp. 2022); see *id.* § 200.00 (McKinney 2010); *id.* §§ 200.03, 200.04, 200.10-200.12 (McKinney Supp. 2022). New York courts have applied that definition of "public servant" to, *inter alia*, a Red Cross employee who administered a county program, *People* v. *Samilenko*, 814 N.Y.S.2d 564, 2005 WL 3626772, *1-*2 (N.Y. Sup. Ct. 2005) (Tbl.), unsalaried members of community boards that made land use recommendations, *People* v. *Kruger*, 87 A.D.2d 473, 474-476 (N.Y. App. Div. 1982), and a former state employee who remained an "independent contractor,"

In re Onandaga Cnty. Dist. Att'y's Office, 92 A.D.2d 32, 34 (N.Y. App. Div. 1983).

In addition, New York ethics laws preclude someone in petitioner's position from "appear[ing] or practic[ing]" before the Executive Chamber or "receiv[ing] compensation for any services rendered * * * on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency." N.Y. Pub. Off. Law § 73(8)(a)(i) (McKinney 2021); see *id.* § 73(18) (providing that knowing and intentional violations of that provision may be punished as misdemeanors). As the ethics opinion provided to petitioner explained, that provision prohibited him from "participating in the development of a plan or strategy to influence any decision or action by the Executive Chamber" and "participating in a telephone call with the Executive Chamber." J.A. 592; see Comm'n on Ethics & Lobbying in Gov't, N.Y. State, Advisory Op. No. 99-7, 1999 WL 1791790 (Apr. 14, 1999). Notwithstanding that prohibition, petitioner called the Executive Chamber official responsible for overseeing ESD and instructed the official to reverse the determination that the COR Development project was required to have a labor peace agreement. Petitioner's conviction accordingly is entirely consistent with the relevant state-law prohibitions in this context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
JOHN-ALEX ROMANO
Attorney

OCTOBER 2022

APPENDIX

1. 18 U.S.C. 201 provides:

Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give

anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to

any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act

performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

2. 18 U.S.C. 666 provides:

Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term “agent” means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term “government agency” means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term “local” means of or pertaining to a political subdivision within a State;

(4) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term “in any one-year period” means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

3. 18 U.S.C. 1341 provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

4. 18 U.S.C. 1349 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Bridgegate Has The Potential To Upend A Raft Of Prosecutions

By **Daniel Fetterman and Brian Choi** (May 21, 2020, 3:00 PM EDT)

Daniel Fetterman

Brian Choi

Earlier this month, the U.S. Supreme Court issued its decision in Kelly v. U.S., the final chapter in a long-running political saga whose immediate consequence — gridlock on the George Washington Bridge — was eclipsed by a cascade of events that ultimately vanquished the presidential aspirations of New Jersey's erstwhile Gov. Chris Christie.

In the case aptly coined "Bridgegate," prosecutors charged Christie's deputy chief of staff, Bridget Kelly, and the deputy executive director of the Port Authority of New York and New Jersey, William Baroni, with orchestrating the shutdown of several Manhattan-bound lanes on the George Washington Bridge. As epitomized by Kelly's infamous email hatching the scheme — "Time for some traffic problems in Fort Lee" — its objective was to exact political revenge on the Fort Lee mayor for his refusal to support Christie's reelection efforts.

Against that lurid backdrop, the Supreme Court unanimously reversed Kelly's and Baroni's convictions, holding that because their scheme did not aim to obtain money or property, neither defendant could have committed wire fraud.[1]

While the decision has garnered widespread attention, it reiterates what many courts have long considered settled law given the plain text of the wire fraud statute — that it "prohibits only deceptive schemes to deprive [the victim] of money or property."[2] In Kelly, the court held that the defendants engineered a scheme to retaliate against a mayor by wreaking havoc on his constituents' morning commutes, not to "obtain the Port Authority's money or property."[3]

And, while the government insisted that the Port Authority's resources expended in furtherance of the scheme — toll collectors' and engineers' wages — constituted cognizable property that was an object of the scheme, the court held that the property giving rise to liability "must play more than some bit part in a scheme: It must be an object of the fraud," not an incidental byproduct[4] of it.

Kelly underscores the Supreme Court's continuing displeasure with the government's attempted use of expansive theories of liability in public corruption cases. The decision is another in a progression of cases diminishing the reach of the wire (and mail) fraud statutes, which U.S. District Judge Jed Rakoff of the U.S. District Court for the Southern District of New York colorfully characterized early on as the

federal prosecutor's "Stradivarius, Colt .45, Louisville Slugger, Cuisinart — and true love" because of their "simplicity, adaptability, and comfortable familiarity."[5]

Trend: Restraining the Government's Expansive Public Corruption Prosecutions

In Kelly, the Supreme Court thus continued to rein in the breadth of wire and mail fraud statutes in corruption and fraud cases. Indeed, the court's grant of certiorari on a long-settled issue — and its unanimous decision thereafter — signals its long-standing concern with the proliferation of novel interpretations of the wire fraud statute.

In fact, the court's effort to again make clear the parameters of public corruption cases is not surprising in view of its prior decisions cabining the theories on which the government can prosecute such cases.

The court's 2016 decision in McDonnell v. U.S. unanimously reshaped the notion of a quid pro quo in bribery cases, limiting the definition of an official act to something that must involve a formal exercise of government power by a public official.[6] Under that construct, showering a politician with gifts in exchange for brokering a meeting with another official on behalf of a friend would not run afoul of the bribery statute.

In its wake, McDonnell capsized several high-profile cases, resulting in retrials of powerful New York politicians Sheldon Silver and Dean Skelos, and a mistrial in the case against Sen. Robert Menendez.[7]

Similarly, in 2010, the court in Skilling v. U.S. limited the scope of honest services fraud cases, adding the requirement that a scheme to deprive a victim of honest services must involve the payment of bribes or kickbacks.[8] This decision effectively provided a safe harbor for defendants caught in general financial self-dealing or conflicts of interests but who had not received any bribes or kickbacks.

Kelly's Impact Beyond the Political Realm

Like McDonnell, Kelly has the potential to upend a raft of prosecutions. It signals a tightening of the nexus required between the object of a fraudulent scheme and a victim's loss of a cognizable money or property interest. Under Kelly, the victim's loss must be the object of the fraudulent scheme and not merely "an incidental (even if foreseen) byproduct" of it.[9]

Moreover, Kelly scrutinizes what does and does not constitute a cognizable property interest. This decision will no doubt create further hurdles for prosecutors attempting to prosecute schemes that are venal, deceitful and underhanded but in which the loss of money or property — while foreseeable — was not the objective.

To be sure, Kelly does not so much constitute a sea change in the law as it portends the court's unanimous willingness to clearly articulate and enforce the boundaries of the wire fraud statute. The question that prosecutors must now grapple with in every wire and mail fraud case is twofold: whether a victim's property is the object — rather than the incidental byproduct — of the scheme to defraud, and if so, whether the property interest at issue is cognizable under the wire (and mail) fraud statutes.[10]

Kelly's impact has been swift. Only days after it was issued, the U.S. Court of Appeals for the Second Circuit directed the parties in U.S. v. Gatto to "address[] the impact, if any, of Kelly on the adjudication" of the appeal.[11] Gatto, with U.S. v. Person,[12] are among the National Collegiate Athletic

Association basketball recruiting scandal cases that the government brought against college coaches, athlete advisors and an athletic wear executive for their roles in a bribery scheme to recruit college basketball players.

In Gatto, college basketball recruits were bribed to sign with universities sponsored by a particular athletic wear company. And in Person, college coaches were paid to steer their players toward retaining certain financial advisors once they turned professional.

At the heart of the government's theory in the NCAA recruiting scandal cases is that the defendants deprived colleges of property in two ways: (1) by causing them to award financial scholarships to student-athletes rendered ineligible because they were bribed, and (2) by depriving them of their ability to control their assets (scholarships) and exposing them to the risk of NCAA sanctions.

In a post-Kelly world, the defendants could argue that the object of their scheme was to structure an association between a highly recruited athlete and a sports brand to reap the monetary benefits of that relationship. Stated differently, the scheme was not primarily designed to induce the universities to part with their property or even deprive them of their ability to control their property — they were always going to award scholarships to highly talented athletes.

Rather, those supposed costs, the defendants could argue, "were an incidental (even if foreseen) byproduct" of the defendants' scheme to pair a particular recruit with a sports brand.[13]

The court's use of the word "incidental" also is telling. Under its plain meaning, "incidental" is defined as something that is "less important than the thing [it] is connected with or part of."[14] In the Gatto schemes, the defendants may argue, the universities' property interests — scholarships and even decisions about whom to award such scholarships — were secondary to, or less important than, the objective of partnering high-profile athletes with certain brands.

Equally striking is the Court's observation that it does not matter whether the incidental harm to property interests was foreseen. There is no question that the Gatto defendants contemplated the inevitable expenditure of university resources, but Kelly now arguably relegates those expenditures to the category of implementation costs or what was needed to realize the final plan"[15]

Kelly also may augur future challenges in the Varsity Blues college admission cases, where more than 50 individuals were prosecuted for bribing college administrators to designate applicants as recruited athletes and inflating their credentials to secure their admission into elite universities. In some of those cases, the defendants already contend that the object of the conspiracy was to gain admission to the universities — not deprive a university of any money or property.

In addition, to the extent the government relies on a university's right to control the quality of its scholarship or admissions process, Kelly may signal an increased likelihood that the court would review the issue of whether the universities' right to control constitutes a cognizable property interest under the wire fraud statute should the opportunity be presented. The court in Kelly characterized Kelly's and Baroni's intent to "commandeer" the bridge lanes as an exercise of regulatory power — as opposed to a deprivation of the Port Authority's property interest in controlling the bridge.

The court's willingness to define these boundaries suggests that it might be receptive to arguments that a university's right to control the quality of its student body or the acceptances of its outstanding scholarship offers are not the kinds of property interests cognizable under the wire fraud statute.[16]

For the college admissions cases in particular, whether an offer of admission constitutes the kind of property subject to the reach of the wire fraud statute is a question that courts may want to scrutinize closely going forward.

Whatever its impact on pending prosecutions, the Kelly decision undoubtedly again raises the bar for the government in prosecuting cases involving political corruption and fraudulent schemes affecting nontraditional property interests. It also provides white collar defense lawyers with additional arguments in defense of clients charged with such schemes.

Daniel J. Fetterman and Brian S. Choi are partners at Kasowitz Benson Torres LLP.

The authors would like to thank Gabriel Santos Neves, an associate at the firm, for his contributions with the research and drafting of this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] The Government also charged the defendants with fraud on a federally funded program (18 U.S.C. § 666), which reflects the same property element in the wire fraud statute.

[2] Kelly v. United States , 590 U.S. __, No. 18-1059, slip op. at 6 (May 7, 2020) (quoting McNally v. United States, 483 U.S. 350, 358 (1987)).

[3] Id. at 2.

[4] Id. at 10 (citing Pasquantino v. United States, 544 U.S. 349, 356 (2005)).

[5] Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), Duquesne Law Rev., Vol. 18, No. 4, 1980.

[6] McDonnell v. United States, 136 S.Ct. 2355 (2016).

[7] United States v. Skelos, 707 F. App'x 733, 740 (2d Cir. 2017); United States v. Silver, 864 F.3d 102, 106 (2d Cir. 2017); see United States v. Menendez, 291 F. Supp. 3d 606, 611 (D.N.J. 2018); see also United States' Mot. to Dismiss Superseding Indictment in United States v. Menendez, No. 2:15-cr-155, ECF Dkt. No. 322, Jan. 31, 2018. Silver and Skelos were again convicted under the narrower definition of "official act." Silver appealed again, and the Second Circuit reversed the conviction in part, holding that, post-McDonnell, the jury instructions defined quid pro quo too broadly and thus failed to convey that Silver could not be convicted of honest services fraud unless the Government proved that, at the time the bribe was accepted, Silver promised to take official action on a specific and focused question or matter as the opportunities to take such action arose. United States v. Silver, 948 F.3d 538, 545 (2d Cir. 2020).

[8] Skilling v. United States, 561 U.S. 358 (2010).

[9] Kelly, slip op. at 11.

[10] The scope of this article does not address honest services fraud under 18 U.S.C. § 1346, which provides that a scheme to defraud a victim of honest services does not require the loss of money or

property.

[11] United States v. Gatto, No. 19-783-cr, ECF Dkt. No. 158 (2d Cir. May 8, 2020).

[12] See United States v. Gatto, No. 19-cr-686 (S.D.N.Y.); United States v. Person, No. 17-cr-683 (S.D.N.Y.).

[13] Kelly, slip op. at 11.

[14] "Incidental," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/incidental (May 18, 2020).

[15] Kelly, slip op. at 11, 12.

[16] Such an appeal could jeopardize the "right to control" theory that the Government relies on in Gatto to substantiate the universities' loss of property, particularly given that currently there appears to be a split among Circuit Courts of Appeal on this issue. Compare United States v. Sadler, 750 F.3d 585, 591 (6th Cir. 2014) (rejecting fraud based on "the ethereal right to accurate information"); United States v. Bruchhausen, 977 F.2d 464, 470 (9th Cir. 1992) (holding that the right to control is "not 'property' of the kind that Congress intended to reach in the wire fraud statute"); United States v. Walters, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993) (rejecting argument based on right to control theory because it was "an intangible rights theory once removed—weaker even than the position rejected in [previous cases] because Walters was not the universities' fiduciary"); United States v. Zauber, 857 F.2d 137, 147 (3d Cir. 1988) (rejecting "right to control" theory because it is "too amorphous to constitute a violation of the mail fraud statute as it is currently written") with United States v. Gray, 405 F.3d 227, 234 (4th Cir.) (holding that "the mail fraud and wire fraud statutes cover fraudulent schemes to deprive victims of their rights to control the disposition of their own assets"); United States v. Fagan, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) ("[T]here is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, viz: its control over its money . . .,"); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) (holding that "the right to control a thing, for example, money, is an integral part of the property right in the thing itself"); United States v. Welch, 327 F.3d 1081, 1108 (10th Cir. 2003) (holding that "the intangible right to control one's property is a property interest within the purview of the mail and wire fraud statutes"); United States v. Maxwell, 579 F.3d 1282, 1288 (11th Cir. 2009) (implicitly adopting the "right to control" theory because loss involved agencies' right to control to whom they awarded construction contracts, not substandard performance).

New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

ALM.

VOLUME 266—NO. 29

THURSDAY, AUGUST 11, 2022

WHITE-COLLAR CRIME

SCOTUS to Assess 'Right-to-Control' and Honest Services Fraud

By **Robert J. Anello**

And **Richard F. Albert**

Federal courts long have struggled to define the limits of the mail and wire fraud statutes, laws famously characterized as the prosecutor's true love for their vast breadth and catch-all adaptability. After sidestepping opportunities in the past, the U.S. Supreme Court is now wading into two different and controversial manifestations of that flexibility. The first, which has proved particularly useful to Second Circuit prosecutors in recent years, is the "right-to-control" theory. This approach treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud. Critics have focused on this theory because it allows federal prosecution of a broad range of conduct that may be unsavory or deceptive—like violating NCAA recruiting rules, lying in an employment application or retaliating against a political rival by closing entrance lanes to a busy bridge—but which does not contemplate the concrete economic harm at which fraud statutes are aimed. The second is a line of cases based on the Second Circuit's 1982 decision upholding the conviction of the former Republican leader in Nassau County, Joseph Margiotta, holding that a private citizen who has informal influence over government decision making can be convicted of honest services fraud.

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello, P.C.* CHRISTOPHER M. HURLEY, *an associate at the firm, assisted in the preparation of this article.*

The cases the Supreme Court accepted for review arise from scandals touching New York state government that were the subject of two separate trials in 2018 before Judge Valerie Caproni of the Southern District of New York. On June 30, the last day before its summer recess, the Supreme Court granted a petition for certiorari in *Ciminelli v. United States*, No. 21-1170, often referred to as the "Buffalo Billion" case, arising from alleged bid-rigging regarding contracts for development projects in Buffalo and Syracuse. That same day, the court also granted a petition for certiorari in *Percoco v. United States*, No. 21-1158, which stemmed from a bribery scandal involving one of the defendants in the "Buffalo Billion" case and Joseph Percoco, a top aide to then Governor Andrew Cuomo who was not a state employee at the time of the conduct at issue. Coming in the wake of *Kelly v. United States*, 140 S. Ct. 1565 (2020)—the court's unanimous ruling rejecting an expansive construction of the fraud statutes in overturning the "Bridgegate" convictions—the court's decision to hear both cases suggests it may take the opportunity to further rein in prosecutors' efforts to impose their views of ethical behavior by extending the fraud statutes beyond protecting against classic property fraud.

The 'Right-To-Control' Theory

Wire fraud is defined under 18 U.S.C. §1343 as "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits … by means of wire, radio, or television communication … any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." Its twin statute, 18 U.S.C. §1341, outlaws

the same conduct when executed via the mail. Although stated in the disjunctive, since *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court repeatedly has held that the statutes' reach is limited to schemes that seek to obtain "money or property."

The right-to-control theory entails a dispute about the statutory meaning of "property." A line of Second Circuit decisions holds that a scheme can rise to the level of mail or wire fraud if it intends to deprive "the victim of potentially valuable economic information … necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). The Eighth and Tenth Circuits have joined the Second in recognizing the validity of the theory while the Sixth and Ninth Circuits have rejected it outright. *Ciminelli* provides a particularly apt vehicle for the court to resolve this circuit split because unlike prior efforts to obtain high court review, the petitioners wire fraud convictions are based solely on the deprivation of potentially valuable information, without any proof that the alleged victim suffered economic harm.

Honest Services Fraud

18 U.S.C. §1346, enacted to overturn the Supreme Court rejection of the honest services theory of liability in *McNally*, provides that a "scheme or artifice to defraud" subject to prosecution under the mail or wire fraud statutes "includes a scheme or artifice to deprive another of the intangible right of honest services." In *Skilling v. United States*, the Supreme Court clarified that this section applied only to schemes intended to deprive the public of honest services through "bribes or kickbacks," not mere ethical breaches or conflicts of interest. 561 U.S. 358, 409-10 (2010).

'Buffalo Billion': The Bid-rigging Case

Both *Ciminelli* and *Percoco* arise out of a wide-ranging federal investigation into alleged corruption in New York state government. Defendants in the "Buffalo Billion" bid-rigging case were participants in a state program that aimed to invest $1 billion in upstate development projects centered around the Buffalo region. At the center of this program was the Fort Schuyler Management Corporation (FSMC), a non-profit entity tasked with awarding the state funded projects to developers. Before awarding any specific project, FSMC would issue requests for proposals (RFPs), and companies would first bid to be selected as a "preferred developer," granting the right to negotiate first with FSMC. Notably, FSMC was not bound to preferred developers in any way beyond the obligation to first negotiate with them regarding specific projects. Among others, FSMC selected a company controlled by petitioner Louis Ciminelli and one controlled by petitioners Stephen Aiello and Joseph Gerardi as preferred developers for RFPs in Buffalo and Syracuse, respectively. Petitioners' companies ultimately won bids for projects valued at $750 million (Ciminelli) and $105 million (Aiello/Gerardi).

> In 'Ciminelli' and 'Percoco', the Supreme Court will have the opportunity to further limit prosecutors' use of unduly broad interpretations of the federal fraud laws to impose their own notions of an integrity code onto state government and many other arenas beyond their proper reach.

Investigators discovered that a member of FSMC's board, Dr. Alain Kaloyeros, drafted RFPs to favor the selection of petitioners' companies as preferred developers. For example, in 2013, FSMC issued the RFP for Buffalo requiring, among other things, that preferred developers be headquartered in Buffalo and have at least 50 years of experience "in the construction and operation of mixed-use facilities," a requirement that strongly advantaged Ciminelli's company. A similar pattern held for the Aiello's and Gerardi's company and the Syracuse RFP.

On Sept. 19, 2017, prosecutors charged Ciminelli, Aiello, Gerardi and Kaloyeros with both conspiracy to commit wire fraud and substantive wire fraud based upon their involvement in the alleged RFP bid-rigging scheme. At trial, prosecutors offered no proof that FSMC was deprived of a fair price, fair terms, or quality in the (non-binding) negotiations following the selection of petitioners' companies as preferred developers or in their performance of the contracts they were ultimately awarded. The government likewise introduced no evidence that FSMC could have obtained the same services or outcome for a better price from another provider. The prosecution's theory was the "right to control," which were reflected in jury instructions that provided that a "deprivation of money or property" could include "intangible property," which could include "potentially valuable economic information," that an alleged victim would find valuable when assessing a

transaction or how to use its assets. The jury found each defendant guilty of one count of conspiracy and one count of wire fraud, aside from Kaloyeros, who was found guilty of one count of conspiracy and two counts of wire fraud. Gerardi also was found guilty of making false statements to federal officers.

The Percoco Bribery Case

Investigators also learned that Aiello had arranged for his RFP-bidding company, COR Development Co., to make payments totaling $35,000 for the benefit of Percoco, a top aide to Governor Cuomo who had just left state employment and was working on the re-election campaign at the time. Aiello requested Percoco's assistance in getting COR a waiver from a labor peace agreement that the state would otherwise require. Percoco, who was due to resume official state employment but had not yet done so, reached out to a state official. State officials later reversed their prior decision denying COR state funds, with the official who received Percoco's outreach saying that he felt "pressure" to do so.

Prosecutors brought charges against Aiello, Percoco and Gerardi for bribery and honest services wire fraud that were adjudicated in a separate trial. Aiello and Percoco were found guilty of one and two counts, respectively, of conspiracy to commit honest-services wire fraud, and Percoco was also convicted of one count of soliciting bribes or gratuities. Gerardi was acquitted on all counts, and Aiello was acquitted of bribery and making false statements.

***

The district court sentenced defendants in both cases to multi-year prison terms. The Second Circuit affirmed all convictions on appeal. All defendants had begun serving their sentences, but Percoco was released to a halfway house in late 2021, and the remaining defendants were released from prison following the Supreme Court's grant of review.

Bid-Rigging Petitioners' Arguments

In seeking certiorari, the bid-rigging petitioners make a forceful case that the right-to-control theory of fraud conflicts with current Supreme Court doctrine. They begin with *McNally*'s requirement that the alleged scheme seek to "obtain[] money or property," and subsequent decisions defining such property to mean only what has traditionally qualified as a property interest, including intangible property interests. Petitioners then address how the right to have accurate information about a potential transaction, without any loss of property (realized or intended), is not analogous to any traditional property interest. Petitioners also assert that the right-to-control theory also fails to satisfy the "obtainability/transferability" requirement of the federal fraud statutes because the "property" allegedly lost by FSMC, potentially valuable information, was not, and could not be obtained by petitioners.

> Although many may see the court's grant of review as a signal, it is of course too soon to tell what impact these cases will have on prosecutors' future ability to deploy their longtime favorite statutes.

Petitioners next argue that the expansive and amorphous right-to-control theory undermines the court's decision in *Skilling v. United States*, 561 U.S. 358, 412-13 (2010), which limited the honest services theory of fraud to cases involving bribery and kickbacks and specifically rejected its application to undisclosed conflicts of interest, because prosecutors can always avoid its strictures by charging such a conflict of interest under the right-to-control theory. Petitioners also assert that the right-to-control theory would render the mail and wire fraud statutes impermissibly vague as it leads to "arbitrary and discriminatory prosecutions" and assertions of prosecutorial regulation of an expansive range of conduct that constitutes mere deceit, without the requisite tie to obtaining money or property. Put another way, the right-to-control theory makes it wholly unnecessary for prosecutors to show that even the completed scheme produced tangible economic harm.

Petitioners' briefs are reinforced by an *amicus* brief submitted by the New York Council of Defense lawyers (NYCDL) that argues that, particularly in the Second Circuit, prosecutors increasingly have relied upon the right-to-control theory when they can prove deceit but not contemplated economic harm, with the effect of criminalizing non-disclosure of information that before "was addressed at most through state civil remedies and, because of the absence of harm, uncomplained of." The NYCDL lists examples of wire and mail fraud charges based in whole or in part on a right-to-control theory brought against at least 112 different defendants in the Second Circuit within the last decade, in widely disparate

factual circumstances. NYCDL identifies cases where prosecutors have used the theory to vastly expand the reach of mail and wire fraud to criminalize acts Congress has chosen not to regulate or violations of rules of private organizations like the NCAA, as well as breaches of unenforceable oral promises in the financial markets, and even misrepresentations by job candidates, rendering the fraud statutes' "property" requirement essentially meaningless. NYCDL also points to the unintelligibility of the relevant jury instructions, arguing that they invite jurors to convict without finding the necessary contemplation of economic harm.

Bribery Petitioners' Arguments

Petitioners in the bribery case focus on the conflict between the holding in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), and the Supreme Court's subsequent decisions in *Skilling* and *United States v. McDonnell*, 136 S. Ct. 2355, 2371-72 (2016), the latter of which held that "an official act" for the federal bribery statutes must "involve a formal exercise of governmental power," arguing that close ties to people in public office cannot suffice. As Percoco's petition memorably begins: "When a public official accepts money to convince the government to do something, we call him a crook. But when a private citizen accepts money to convince the government to do something, we call him a lobbyist." Percoco asserts that *Margiotta* was abrogated by *McNally*, and despite's Congress's subsequent passage of 18 U.S.C. §1346, *Margiotta*'s expansive reach and reasoning appropriately have been condemned as no longer good law by courts both within and without the Second Circuit. See, e.g., *United States v. Adler*, 274 F. Supp. 2d 583, 587 (S.D.N.Y. 2003) ("*Margiotta* was wrongly decided and is no longer good law in this Circuit or anyplace.") NYCDL's amicus brief emphasizes *McNally*'s official act requirement and *McDonnell*'s requirement of a formal exercise of governmental power. NYCDL argues that an interpretation of the honest services fraud statute that extends beyond formal acts by government officials becomes impermissibly arbitrary and expansive, sweeping in even ordinary lobbying practices.

Government Arguments

The government's arguments, which of course were limited to opposing the petitions for review, do not address petitioners' "right to control" arguments at length, but do point to the court's previous recognition of intangible property rights similar to those embodied in the right-to-control theory of fraud, such as the general "economic interest" noted in *Pasquantino v. United States*, 544 U.S. 349, 357 (2005), or one's "use of valuable property" as expressed in *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984). As for the circuit split, the government attempts to distinguish the decisions of the Sixth and Ninth Circuits as limited to the facts of those cases to deny that the courts rejected the right-to-control theory of fraud generally.

As for the honest services fraud convictions, the government contends that the facts of this case fall far short of the extent or breadth of the rule in *Margiotta*. The government also argues that the Second Circuit's holding below is not in conflict with *Skilling* because its language allows for someone to qualify as a "public official" without "formal employment" so long as they occupy a position of public trust. It is likewise not in conflict with *McDonnell* because that decision explicitly allows for the notion that exerting "pressure on another official" can constitute an official act without foreclosing the possibility that such pressure can come from someone who lacks a formal employment relationship.

Conclusion

In *Ciminelli* and *Percoco*, the Supreme Court will have the opportunity to further limit prosecutors' use of unduly broad interpretations of the federal fraud laws to impose their own notions of an integrity code onto state government and many other arenas beyond their proper reach. Of the two petitions, a conclusive holding in *Ciminelli* rejecting the right-to-control theory promises to have a broader impact given its frequent and creative application, particularly by prosecutors in the Second Circuit, to a wide range of disparate conduct entailing alleged deceit without economic harm. Although many may see the court's grant of review as a signal, it is of course too soon to tell what impact these cases will have on prosecutors' future ability to deploy their longtime favorite statutes.

Reprinted with permission from the August 11, 2022 edition of the NEW YORK LAW JOURNAL © 2022 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-256-2472 or reprints@alm.com. # NYLJ-8112022-554795

THE "RIGHT TO CONTROL" THEORY OF FRAUD: WHEN DECEPTION WITHOUT HARM BECOMES A CRIME

Tai H. Park†

It is supposed to be well established that mere deceit is insufficient to convict someone of fraud and that there must also be proof the defendant intended to cause harm to a victim's "money or property." Yet, for many decades, federal prosecutors have persisted in pushing expansive theories of criminality to encompass all forms of deceptive behavior, even where the defendants intended no pecuniary harm. The so-called "right to control" theory of fraud is arguably the most extreme (and successful) of these theories. It holds that one's "right to control" his or her assets qualifies as "property." Thus, even if defendants did not intend harm, they may be convicted if they withheld from the putative victims "potentially valuable economic information," thereby depriving them of their right to control their assets. This Article examines the theory and argues that it is flawed on multiple levels. It confuses the right to control assets, which is normally thought to be an attribute of ownership of property, with the property itself, resulting in a conflation of the separate elements of "property," "intent to harm," and "materiality." A material misrepresentation about an economic factor can satisfy all three elements simultaneously. The doctrine thus effectively flouts the principle that mere deceit cannot suffice for fraud convictions. The Supreme Court's recent unanimous decision in Kelly v. United States *suggests that, when the Court addresses the right to control theory, it will reject the confused thesis. Such repudiation will be critical to returning the law of fraud to its core purpose of prohibiting the wrongful taking of property and realigning it with the Due Process Clause's demand for clear notice of criminal laws.*

† Tai H. Park, a former federal prosecutor in the Southern District of New York, is a partner at the law firm Quinn Emanuel Urquhart & Sullivan, LLP. The views expressed here are his own and not necessarily those of the law firm. The author wishes to thank Professor Daniel Richman for his insightful comments to an earlier draft and his former colleagues, Sandra Redivo and Joshua Koenig, for their research and editing assistance. All remaining errors are attributable to the author alone.

TABLE OF CONTENTS

INTRODUCTION 137
I. A CONCEPTION OF FRAUD STATUTES AS REQUIRING "MORAL UPRIGHTNESS" 140
A. *Prosecutions in Search of a Theory of Criminality* 140
B. *The Fraud Statutes: The Prosecutor's "True Love"* 142
C. *Dilution of the Elements of an Already Inchoate Offense* 148
II. PROSECUTIONS OF DEFENDANTS WHO INTENDED NO PECUNIARY HARM CULMINATE IN RIGHT TO CONTROL THEORY 151
A. *Intangible Right to Honest Services* 151
B. *"Harm" as the Deprivation of Economically Valuable Information* 153
1. The Problem of Deceiving Defendants Who Gave Value 153
2. The "Nature-of-the-Bargain" Test 156
3. The "No-Sale" Rule and the Economic Information Requirement 158
C. *Intent to Harm a "Property" Interest in One's Right to Control* 160
III. THE RIGHT TO CONTROL THEORY RENDERS THE HARM ELEMENT LARGELY IMMATERIAL 165
A. *The Theory's Application in Two Recent Cases* 166
1. *United States v. Johnson* 166
2. *United States v. Gatto* 169
B. *A Distorted Concept of Property that Conflates the Elements* 174
1. A Distorted Concept of Property 174
2. Conflation of the Criminal Elements 175
3. A Theory Detached from Its Doctrinal Source 179
IV. *WALTERS* AND *KELLY*: RETURNING THE FRAUD STATUTE TO THE BASICS 184
A. United States v. Walters 184
B. Kelly v. United States 187
C. *Will the Court Reject the Right to Control Theory?* 189
V. ALIGNING FRAUD PROSECUTIONS WITH DUE PROCESS REQUIREMENTS 192
A. *Constitutional Demand for Notice* 193
B. *Notice of Wrongfulness Is Insufficient* 194
C. *The Harm to Our Conceptions of Justice* 196
CONCLUSION 200

INTRODUCTION

For many decades, federal prosecutors have applied criminal statutes to increasingly ambiguous conduct, pushing the limits of the statutory elements and theories of criminality to encompass behavior they deem wrongful. The chief vehicle for such expansive prosecutions has been the mail or wire fraud statute, which many courts have held requires "moral uprightness" in commercial dealings. While other courts have rejected such language as too vague and the late Justice Scalia dismissed it as useless "grandiloquence,"[1] the broad, moralistic reading of the fraud statutes has endured. This is especially true in the Second Circuit, as demonstrated by the court's reiteration of that view earlier this year, in *United States v. Gatto*.[2] In this context, it is perhaps unsurprising that the legal elements of fraud have been steadily diluted, with none affected so much as the intent to harm element, that is, proof the defendant intended to deprive a victim of property. While fraud is typically viewed as a malum in se offense that involves a kind of theft of property through the use of lies, the "theft" prong has become increasingly vestigial, with fraud prosecutions regularly targeting defendants who intended no pecuniary harm. The result is that the deception prong now stands almost by itself as the sole element necessary for criminal conviction.

This conception of fraud runs directly counter to the well-established rule that mere deceit is not enough to establish fraud.[3] Unlike securities laws that criminalize the mere making of a materially false representation (in connection with the purchase or sale of securities),[4] fraud is supposed to require proof of an intent to cheat someone else of "money or property." Thus, implicitly repudiating the "moral uprightness" language embraced by lower courts, the Supreme Court in *Kelly v. United States*[5] recently stated: "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct."[6]

---

1 Skilling v. United States, 561 U.S. 358, 418 (2010) (Scalia, J., concurring).

2 986 F.3d 104, 130 (2d Cir. 2021).

3 Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987).

4 17 C.F.R. § 240.10b-5 (1951); *see also* United States v. Mittelstaedt, 31 F.3d 1208, 1217 (2d Cir. 1994) ("The mail fraud statute, however, does not enforce ethics in government in the way that the securities laws enforce ethics in business, certainly not prior to the addition of § 1346 in 1988.").

5 140 S. Ct. 1565 (2020).

6 *Id.* at 1568.

This principle and others like it, however, have been largely ignored by prosecutors who continue to push for expansive application of the fraud statutes. In their effort, no doctrine has proven more potent than the so-called "right to control" theory of property. It holds that one's "right to control" his or her assets qualifies as "property" such that, even if a defendant did not intend to inflict pecuniary harm, the defendant may yet be convicted if she deprived the victim of his right to control his assets by withholding from the victim "potentially valuable economic information."[7] While not uniformly accepted among the circuit courts, this theory of property is essentially black letter law in the Second Circuit, the court with jurisdiction over the financial capital of the world.

This Article examines the theory and argues that it is fundamentally flawed. After describing its history, the Article describes the theory's application in two recent Second Circuit decisions, *United States v. Johnson* and *United States v. Gatto*.[8] These cases illustrate how the doctrine can easily lead to convictions of defendants who intended no financial harm as long as their deception involved economic information. This Article suggests the theory is defective because the right to control is actually an attribute of *ownership* of property and not the property itself. Anytime someone lies in connection with a commercial negotiation, he attempts to affect his counterparty's decision-making and control over his asset in some way. Thus, the theory conceivably makes every material deception criminal fraud. It conflates the separate elements of "property," "intent to harm," and "materiality" into a single, blurred spectrum where a misrepresentation about an economic factor does the triple duty of satisfying all three elements simultaneously.

The doctrine has yet to be explicitly addressed by the Supreme Court, but the unanimous decision in *Kelly v. United States*[9] suggests that the Court will redirect the judiciary to return the law of fraud to its theft-through-lies core and reject the confused right to control thesis. In some ways, *Kelly* bookends *McNally v. United States*,[10] decided some thirty-four years ago, as the Court tried again to rein in prosecutorial efforts to criminalize the mere act of deception. Rejection of the right to control theory would comport with the plain language and purpose of the statutes and, more broadly, honor the constitutional requirement of clear notice of criminal laws.

---

7 United States v. Wallach, 935 F.2d 445, 462–63 (2d Cir. 1991).

8 United States v. Gatto, 986 F.3d 104 (2d Cir. 2021); United States v. Johnson, 945 F.3d 606 (2d Cir. 2019).

9 140 S. Ct. 1565 (2020).

10 483 U.S. 350 (1987).

This Article proceeds in five Parts. Part I summarizes the expansive use prosecutors have made of the fraud statutes and the tendency of courts to view them as requiring "moral uprightness" in business affairs. Against this backdrop, the criminal elements of fraud have been substantially diluted, with none more so than the intent to harm element.

Part II examines the two separate theories of prosecution that were traditionally used to pursue defendants who intended no pecuniary loss: the honest services doctrine and the benefit of the bargain test. This Part examines how these two theories and the Supreme Court's rejection of the honest services doctrine in *McNally* eventually converged in *United States v. Wallach*[11] to give rise to the right to control doctrine. In the context of corporate shareholders who are owed fiduciary duties by corporate managers, the Second Circuit held that *McNally*'s "property" requirement could be satisfied by the shareholder's right to control their shares and that they are defrauded of that right when a defendant deprives them of "potentially valuable economic information."[12]

Part III examines the application of this theory in two recent Second Circuit decisions, *Johnson* and *Gatto*, where the absence of an intent to cause financial harm became largely irrelevant to the fraud analysis because the deceptive scheme deprived the victims of material economic information. This Part offers a critique of the theory suggesting that it is both analytically flawed and, when applied in a context outside *Wallach*'s unique corporate fiduciary setting, difficult to justify. It distorts the common understanding of property as an asset or object that is separate from an incident of ownership like the right to control the asset, and in so doing, conflates the separate elements of "property," "intent to harm," and "materiality."

Part IV considers the likelihood that the Supreme Court will reject the right to control theory just as it did the honest services doctrine in *McNally*. Just last year, the Court in *Kelly v. United States* rejected a theory of fraud that did not have as its direct object the deprivation of money or property.[13] It cited, with approval, the Seventh Circuit's decision in *United States v. Walters* where the court applied a commonsensical understanding of the fraud statutes to reverse the conviction of a defendant who deceived but did not intend to cause the victim any loss of money or property for his own use. In so ruling, *Walters* rejected the right to control theory.[14]

---

11 935 F.2d 445 (2d Cir. 1991).

12 *Id.* at 463.

13 140 S. Ct. 1565 (2020).

14 United States v. Walters, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993).

Part V argues that the Court's repudiation of the theory will be crucial to bringing the fraud statutes back in line with their theft-through-lies core purpose and due process requirements. Ordinary citizens can better discern the difference between immorality and criminality if the courts insist on proof of an intent to cause pecuniary harm through deception. The common law process of case-by-case judicial rulemaking may be unavoidable, but a reinvigorated intent to harm element helps to ensure fair notice to individuals and also to sustain the public's confidence in the integrity of the criminal justice system.

I. A CONCEPTION OF FRAUD STATUTES AS REQUIRING "MORAL UPRIGHTNESS"

A. *Prosecutions in Search of a Theory of Criminality*

To those who have either participated in or studied the development of white-collar criminal cases in federal courts, the term "overcriminalization" is all too familiar. With regularity and for many decades, scholars have warned against a persistent trend in federal courts toward criminalizing not only civil disputes but conduct having little moral blameworthiness attached.[15] Yet lower courts' approval of prosecutors' ever-expanding theories of crime has proceeded apace, and if anything, the trend has accelerated in recent years. This is remarkable when one considers the repeated efforts by the Supreme Court to rein in prosecutorial zeal through regular reversals of convictions founded on aggressive theories of criminality.[16] Confidence in the soundness of

15 *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 197–98 (1991) [hereinafter Coffee, *Does "Unlawful" Mean "Criminal"?*] (citing prior articles warning against overcriminalization including Henry Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 422 (1958); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 249–364 (1968)); *see also* John C. Coffee Jr., *HUSH!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005); Timothy P. O'Neill, *Confronting the Overcriminalization of America*, 48 J. MARSHALL L. REV. 757, 758 (2015); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012); Stephen F. Smith, Yates v. United States: *A Case Study in Overcriminalization*, 163 U. PA. L. REV. ONLINE 147 (2014).

16 *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 707–08 (2005) (reversing conviction for obstruction because the government failed to prove any corrupt intent behind the

our federal criminal justice system is undermined each time prosecutors win a conviction at trial, send the person to prison, or have a circuit court affirm the conviction, only to have the Supreme Court explain, years later, that the government had it all wrong: no crime was committed.

This unfortunate pattern, however, is sure to continue. While crimes are said to be defined by Congress, the reality is that judges "interpret" loosely formed statutes through common law adjudication so that a new theory of crime and its elements are regularly ascertained.[17] Their decisions are shaped by the cases prosecutors choose to bring and the theories they choose to espouse. Except in specialized areas of prosecution such as narcotics trafficking, securities fraud, sanctions law, and antitrust violations that require specific factual predicates, criminal investigations generally begin with evidence of some moral breach. Once found, the prosecutor turns to locating a statute that can be interpreted as prohibiting the conduct. The broader or more ambiguous the terms of a statute, the more wrongful-seeming conduct can be made to fit within its four corners. It is then left to the lower courts to decide, on a case-by-case basis, whether they agree with the prosecutor's theory or conclude it has burst the constraints of the statute's plain English. All too often, when presented with evidence of wrongful conduct, the lower courts are unwilling to check the government, with the result that its opinions push the envelope of criminality one measure further. This continues until the Supreme Court has occasion to review the prosecutor's handicraft and decide whether it has gone too far.

document destruction at issue); Skilling v. United States, 561 U.S. 358, 414–15 (2010) (reversing conviction because the government was incorrect in claiming that the wire fraud statute prohibited defendant from engaging in self-dealing); Bond v. United States, 572 U.S. 844, 866 (2014) (reversing conviction of a woman who smeared harmful chemicals on a doorknob and mailbox belonging to her husband's lover for violating the Chemical Weapons Convention Implementation Act); Yates v. United States, 574 U.S. 528, 549 (2015) (reversing conviction of a fisherman who had been charged with violating a spoliation statute because he threw fish overboard as a fisheries agent approached his boat); McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016) (reversing conviction of Virginia's Governor for bribery because the payments received by the defendant were not in return for any "official act"); Marinello v. United States, 138 S. Ct. 1101, 1110 (2018) (reversing conviction of defendant charged with obstructing a pending IRS proceeding because the government failed to prove he was aware that any IRS matter was pending).

[17] *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 761 (1999); Daniel C. Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. ON REGUL. (forthcoming 2021) (manuscript at 10–24), https://scholarship.law.columbia.edu/faculty_scholarship/2719 [https://perma.cc/K2RW-S6RQ].

B. *The Fraud Statutes: The Prosecutor's "True Love"*

There is arguably no criminal law that has proven more accommodating to prosecutors than that of fraud. The broad language of the mail and wire fraud statutes imposes criminal penalties on "'[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' uses the mail, 18 U.S.C. § 1341, or wires, [18 U.S.C.] § 1343, for such purposes."[18]

Jed Rakoff, now an influential district court judge, wrote a law review article in 1980 when he was a prosecutor in the Southern District of New York that described the importance of this statutory device:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. . . . [W]e always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.[19]

Other colorful descriptions of this potent statute abound, with the late Judge Ralph Winter of the Second Circuit saying the mail and wire fraud statutes "rank by analogy with hydrogen bombs on stealth aircraft"[20] and Professor Ellen Podgor, a prolific writer on the problems of the generic fraud statutes, referring to them as "the prosecutor's Uzi."[21] Metaphors aside, there are few white-collar prosecutors who would disagree with the extraordinary utility of the fraud statutes.

Before and after Rakoff's study, generations of prosecutors have played the well-worn instruments to attack all forms of conduct in the commercial setting they deemed wrongful. Their efforts have spawned legions of cases as judges struggle with their limits. It is almost an academic ritual among legal scholars to write extensive law review

18 United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 657 (2d Cir. 2016) (citing 18 U.S.C. § 1341 and 18 U.S.C. § 1343). The Supreme Court "construe[s] identical language in the wire and mail fraud statutes *in pari materia*." Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005).

19 Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980). When he wrote the article, Rakoff was Chief of Business Frauds Prosecutions of the U.S. Attorney's Office and about to leave for private practice. Thus, while he included the usual disclaimers about the views being his own and not necessarily those of the Department of Justice, he wrote from deep experience as head of the premier white-collar prosecuting unit in the country.

20 Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993).

21 Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 224 (1992) [hereinafter Podgor, *Opening Letters*].

articles lamenting the vague and open-ended nature of the statutory language and the ever-new directions that prosecutors have taken the law.[22] And the courts themselves have sought at times to push against the tide of prosecutorial creativity by reversing hard-won convictions.[23] Yet, these efforts have seemed like howling in the wilderness, for federal

---

[22] *See, e.g.*, Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC. 23 (2010); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 735 (1999) [hereinafter Podgor, *Criminal Fraud*] ("[G]eneric fraud statutes exude ambiguity and promote prosecutorial indiscretions."); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 4–5 (1983) (reviewing cases demonstrating the evolution of the mail fraud statute, the expansion of embezzlement to include misappropriation of partnership assets, the inclusion of computer fraud and other privacy invasions in fraud statutes, and the judiciary's disregard of the elements of criminal larceny in fraudulent misrepresentation cases); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) (explaining the expansive nature of the mail fraud statute); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 160–61 (1994) (discussing the courts' broad interpretation of the "scheme to defraud" element of the mail fraud statute); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 151 (1990) (noting the "floating definition of 'a scheme to defraud'"); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 408 (1959) (noting that the terms "conspiracy" and "defraud" have taken on very broad and unspecific meanings); Podgor, *Opening Letters*, *supra* note 21, at 269 ("The mail fraud statute's uncertainty has exceeded the bounds of mere judicial activism and entered the arena of absurdity. A statute beset with legal complications as significant as those evidenced here can only serve to fortify the public's perception of disparity, confusion, and corruption within the legal process. Correction is therefore needed to properly place individuals on notice of what conduct is prohibited and to restore trust in the legal system. Recalibration of the statute is needed to provide consistency and predictability in the translation of the statute's language to actual cases."); Podgor, *Criminal Fraud*, *supra* at 739 ("Although judges differ on whether a narrow or broad application should be given to a fraud statute, there appears to be an acceptance of an 'I know it when I see it' approach.").

[23] *See, e.g.*, United States v. Starr, 816 F.2d 94, 101 (2d Cir. 1987) (reversing conviction because, while defendants had deceived their customers, there was no evidence of intent to harm); United States v. Walters, 997 F.2d 1219, 1227 (7th Cir. 1993) (reversing mail fraud conviction on the ground that the defendant did not seek to obtain the victim's property); United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996) (reversing mail fraud convictions and noting that "fraud statutes do not cover all behavior which strays from the ideal"); *see also* Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 560 (1998) (describing judicial efforts to define boundaries of mail fraud statute by overturning convictions won by prosecutors who applied novel theories); Dean Starkman, *Reversals Imply Government Acted With Too Much Zeal*, WALL ST. J. (July 2, 1997, 12:01 AM), https://www.wsj.com/articles/SB867801437694536500 (last visited Sept. 15, 2021) (discussing courts' reversals of convictions); *cf.* United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 666 (2d Cir. 2016) (reversing judgment, in civil fraud case, finding defendants liable under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 for mail and wire fraud because the government failed to demonstrate that defendants made contractual misrepresentations with a contemporaneous fraudulent intent).

prosecutors have only accelerated their use of this most malleable of instruments to target ever broader forms of conduct.

The problem is that there is no coherent principle in the fraud statutes distinguishing "mere" immorality from criminal conduct. As the Seventh Circuit puzzled in *United States v. Bloom*,[24] "if 'not every breach' is criminal fraud, where is the line drawn? Its location cannot be found by parsing § 1341 or § 1346 [of the mail fraud statute], a profound difficulty in criminal prosecution."[25] Professor Podgor explains that in reality the operative approach is: "I know it when I see it."[26]

Whether the "it" is obscenity[27] or criminal fraud much depends on the beholder. The cases reveal an unresolved tension between judges who view the statutes as requiring moral rectitude in commercial matters and others who find the risk of prosecutorial carte blanche unacceptable. As to the former category of judges, the Fifth Circuit led the way in the 1940s when it stated, "The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."[28] In *Gregory v. United States*,[29] the same court claimed that the term "scheme to defraud" is "a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[30] The Second Circuit agreed, as it cited to *Gregory* for that exact quote in *United States v. Von Barta*[31] and

24 149 F.3d 649 (7th Cir. 1998).

25 *Id.* at 654.

26 Podgor, *Criminal Fraud*, *supra* note 22, at 739.

27 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

28 Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941).

29 253 F.2d 104 (5th Cir. 1958).

30 *Id.* at 109.

31 635 F.2d 999, 1005 n.12 (2d Cir. 1980).

then again in *United States v. Trapilo*.[32] The Third,[33] Fourth,[34] Sixth,[35] Seventh,[36] and Ninth Circuits[37] followed suit, at least for a time.[38]

Against this sweeping view are the contrary opinions of judges (sometimes in the same circuits) eager to find limiting principles to constrain prosecutorial discretion. For example, in *United States v. Urciuoli*,[39] the First Circuit warned that courts must apply interpretations that "assur[e] fair notice to those governed by the statute," and "cabin[] the statute—a serious crime with severe penalties—lest it embrace every kind of legal or ethical abuse . . . ."[40] The mail fraud statute "does not encompass every instance of official misconduct that results in the official's personal gain."[41] Similarly in *United States v. Brown*,[42] the Eleventh Circuit said, "[T]he fraud statutes do not cover all behavior which strays from the ideal; Congress has not yet criminalized all sharp conduct, manipulative acts, or unethical transactions."[43] In *United States v. Dial*,[44] the Seventh Circuit worried that: "[c]ourts have been more concerned with making sure that no fraud escapes punishment than with drawing a bright line between fraudulent, and merely sharp, business practices, even though the

32 130 F.3d 547, 550 n.3 (2d Cir. 1997) ("Because the act of smuggling violates fundamental notions of honesty, fair play and right dealing, it is an act within the meaning of a 'scheme to defraud.'").

33 United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987) ("The term 'scheme to defraud,' however, is not capable of precise definition. Fraud instead is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community."); United States v. Schwartz, 899 F.2d 243, 246–47 (3d Cir. 1990).

34 United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979) (finding that the statute encompasses any scheme that is "contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing").

35 United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); United States v. Daniel, 329 F.3d 480, 486 (6th Cir. 2003).

36 United States v. Serlin, 538 F.2d 737, 744 (7th Cir. 1976); United States v. Keplinger, 776 F.2d 678, 698 (7th Cir. 1985).

37 United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980).

38 This broad, moralistic reading of the mail fraud statute appears to conform to Chief Justice Burger's view that the statute captures any and all forms of "new phenomenon" perpetrated by the "ever-inventive American 'con-artist,'" United States v. Maze, 414 U.S. 395, 406–07 (1974) (Burger, C.J., dissenting), and Rakoff's description of it as "the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit." Rakoff, *supra* note 19, at 772.

39 513 F.3d 290 (1st Cir. 2008).

40 *Id.* at 294 (internal citation omitted).

41 United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996).

42 79 F.3d 1550 (11th Cir. 1996).

43 *Id.* at 1562 (holding that defendants' conduct did not fall within the federal fraud statutes).

44 757 F.2d 163 (7th Cir. 1985).

universality of telephone service has brought virtually the whole commercial world within the reach of the wire-fraud statute."[45] And in *In re EDC, Inc.*,[46] the Seventh Circuit more explicitly rejected *Gregory*'s "hyperbole, of which we were guilty . . . but later repented" and urged that the language "must be taken with a grain of salt. Read literally it would put federal judges in the business of creating new crimes; federal criminal law would be the nation's moral vanguard."[47] For similar reasons, in *United States v. Leahy*,[48] the Third Circuit also regretted its prior decision that "defined fraud with reference to the elastic concepts of morality and fairness," noting that "the ambiguity inherent in concepts such as morality and fairness has been thought to provide constitutionally inadequate notice of what conduct is criminal, involve judges in the creation of common law crimes, and place excessive discretion in federal prosecutors."[49]

There is little question which side of this debate the Supreme Court is on. The late Justice Antonin Scalia dismissed the moralistic language as unhelpful "grandiloquence."[50] For a scheme to fall within the mail or wire fraud statutes, mere deceit is not enough.[51] The Court long ago warned prosecutors that not every scheme that is "calculated to injure another or to deprive him of his property wrongfully" falls within the scope of the mail fraud statute.[52] This caution was more recently reiterated by the Court in *Kelly v. United States*, in the context of public officials' unseemly conduct: "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct."[53]

Yet, *Gregory*'s decades-old formulation stubbornly endures today among lower courts and has not been uniformly repudiated.[54] As

45 *Id.* at 170.

46 930 F.2d 1275 (7th Cir. 1991).

47 *Id.* at 1281.

48 445 F.3d 634 (3d Cir. 2006).

49 *Id.* at 649–50; *see also* Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 207 (noting the unfortunate tendency of judges who "preferred the expansive view that section 1346 authorizes them to continue to 'condemn conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society'" (quoting Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (citing Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)))).

50 Skilling v. United States, 561 U.S. 358, 418 (2010) (Scalia, J., concurring).

51 Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) ("[To defraud] usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.").

52 Fasulo v. United States, 272 U.S. 620, 629 (1926).

53 Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).

54 This is best illustrated by the struggle within the Eleventh Circuit. In 1996, the court appeared to reject *Gregory* noting that "not all of the language of the judges in an opinion has the force of binding precedent." United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996). But in

recently as this year, in *United States v. Gatto*,[55] the Second Circuit reaffirmed its view that "[f]raud involves a departure from fundamental honesty, moral uprightness, or fair play, and depriving one of property through dishonest methods or schemes or trick, deceit, chicane or overreaching."[56] Thus, while some panels in the Second Circuit have occasionally expressed reservations about the perils of expansive interpretations of the fraud statute,[57] district courts within the Circuit regularly recite the view that the fraud statutes are broadly designed to forbid immoral conduct.[58]

The language is, to be sure, dicta, and one may not be able to draw a straight line between it and the adoption of an expansive theory of fraud.[59] But courts that equate fraud with any departure from "moral

2011, the same court in *United States v. Bradley* had a relapse, claiming: "Our definition 'is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" 644 F.3d 1213, 1240 (11th Cir. 2011) (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)). And a few years later, in *United States v. Takhalov*, the same court asserted that the definition of "scheme to defraud" is a "broad one, 'broad[er] . . . than the common law definition of fraud.' It is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" 827 F.3d 1307, 1312 (11th Cir. 2016) (internal citations omitted).

55 986 F.3d 104 (2d Cir. 2021).

56 *Id.* at 130 (internal citations and quotation marks omitted). Similarly, in the context of a civil RICO lawsuit, the Second Circuit in *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018), stated that "[t]he first element, the scheme to defraud, 'is measured by a nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" (quoting United States v. Trapilo, 130 F.3d 547, 550 n.3 (2d Cir. 1997)).

57 *See, e.g.*, United States v. Blackmon, 839 F.2d 900, 906 (2d Cir. 1988) (reversing a bank fraud conviction, the court cited to the House Judiciary Committee's expressed concerns about "the history of expansive interpretations of that language [i.e., 'scheme to defraud' . . .] by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress.").

58 *See, e.g.*, United States v. Falkowitz, 214 F. Supp. 2d 365, 380 (S.D.N.Y. 2002) ("[T]he essence of the fraudulent scheme these hallmarks share reduces to the social evil the artifice defines: that it departs from moral norms; that it transgresses the rules of honest dealing and fair play and breaches the bonds of trust upon which human affairs ordinarily are grounded, and instead corrupts personal and business intercourse with pervasive deceit that falsely exploits and thus undermines these basic values." (citing *Gregory*, 253 F.2d at 109)); United States v. Martin, 411 F. Supp. 2d 370, 373 (S.D.N.Y. 2006) ("[B]reaking the rules of the horserace by doping a horse, like smuggling, violates fundamental notions of honesty, fair play and right dealing and is therefore an act within the meaning of a 'scheme to defraud.'"); Worldwide Directories, S.A. De C.V. v. Yahoo! Inc., No. 14-cv-7349, 2016 U.S. Dist. LEXIS 44265, at *22 (S.D.N.Y. Mar. 31, 2016) (noting in the civil RICO context: "The phrase 'scheme to defraud' does not imply common law fraud, but is instead 'measured by a nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" (quoting *Trapilo*, 130 F.3d at 550 n.3)).

59 In *Takhalov*, for example, while the Eleventh Circuit intoned the moral language, it went on to reject the government's theory of fraud and reversed the conviction of a defendant who was

uprightness"[60] may be more receptive to theories of criminality that support prosecution of immoral conduct. Put another way, applying Podgor's lesson that judges "know [fraud] when [they] see it,"[61] courts like the Second Circuit that continue to adhere to *Gregory* appear more likely to see misconduct as criminal than those that do not.

C. *Dilution of the Elements of an Already Inchoate Offense*

The Second Circuit also happens to be a court where the criminal elements of fraud have steadily been diluted. This is particularly concerning when one considers that the statutory offense is already inchoate in nature. No actual loss need be proven as long as the defendant had the unlawful scheme or intent in mind,[62] and indeed, the offense could theoretically be doubly inchoate, for the statute targets anyone merely "*intending* to devise any scheme or artifice to defraud."[63] Moreover, there is no requirement that the victim actually rely on the misrepresentations, as "[t]he common-law requirement[] of 'justifiable reliance' . . . plainly ha[s] no place in the [mail, wire, or bank] fraud statutes."[64]

Still, the law by its plain terms should only be targeting those with criminal intent to harm someone. The statutes on their face prohibit conduct that essentially amounts to theft by deception. This, then, should be a classically malum in se offense implicating the two biblical prohibitions against lying and thieving. Thus, courts virtually always begin their analysis of the fraud statute by describing the elements of fraud in terms that appear robust and criminal to the core. The following is a typical recitation:

involved in deceiving victim businessmen without causing them to lose the benefit of their commercial bargain. 827 F.3d at 1323–24.

60 *Gregory*, 253 F.2d at 109.

61 Podgor, *Criminal Fraud*, *supra* note 22, at 739.

62 United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 662 (2d Cir. 2016) ("[U]nlike the common law, the statutes punish 'the *scheme*, not its success.'" (quoting United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991)); Durland v. United States, 161 U.S. 306, 313 (1896) (stating that the scheme's fraud lies in "the intent and purpose"); United States v. Males, 459 F.3d 154, 158 (2d Cir. 2006) ("[I]t is sufficient that a defendant's scheme was intended to deprive another of property rights, even if the defendant did not physically 'obtain' any money or property by taking it from the victim.").

63 *See* 18 U.S.C. §§ 1341, 1343 (2008) (emphasis added).

64 Neder v. United States, 527 U.S. 1, 24–25 (1999); *see also* Bridge v. Phoenix Bond & Indemn. Co., 553 U.S. 639, 648 (2008) ("Nothing on the face of the relevant statutory provisions imposes [a justifiable reliance] requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud . . . even if no one relied on any misrepresentation.").

> To prove a violation of the federal wire [or mail] fraud statute, the Government had to establish that [defendant] (1) had an intent to defraud, (2) engaged in a fraudulent scheme to obtain [victim's] money or property "involving material misrepresentations—that is, misrepresentations that would naturally tend to influence, or are capable of influencing," [victim's] decisionmaking, and (3) used the wires [or mail] to further that scheme.[65]

Once these elements are expressed, however, the courts run through the myriad ways in which the elements can be fairly easily satisfied.

First, courts have held that the defendant's deception need not be in the form of any actual statement. "[S]ilence without *any* affirmative statement while under a duty to disclose material information, can constitute fraud under the federal statutes."[66] Moreover, if there was a statement, the government need not necessarily prove that it was false.[67] It is enough if the statement was not made in good faith.[68] Deception, one court held, "irreducibly entails some act that gives the victim a false impression."[69] Thus, when expressing an opinion or an estimate, a defendant can be convicted even if she expressed and intended to express "reasonable, defensible, or even truthful" statements.[70] Indeed, statements may be deemed fraudulent "even where those statements, by . . . design, are factually defensible."[71]

Courts have similarly diluted the other pillar of fraud: the intent to cause property harm. It is this element that any layperson might readily grasp as the difference between merely self-serving deceit and criminal behavior, for it is easy to recognize intentionally injuring others by taking their property as misconduct so grave as to warrant criminal

---

65 United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019).

66 *Countrywide*, 822 F.3d at 663 ("[N]ondisclosure is actionable under the federal fraud statutes where there is a duty to speak." (citing United States v. Gallant, 537 F.3d 1202, 1228 (10th Cir. 2008))) ("[F]ailure to disclose material information while in a fiduciary relationship constituted a scheme to defraud." (citing United States v. Altman, 48 F.3d 96, 102 (2d Cir. 1995))); United States v. Autuori, 212 F.3d 105, 119 (2d Cir. 2000) (ruling that "[a] duty to disclose can also arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading").

67 *See* United States v. Connolly, No. 16 Cr. 370 (CM), 2019 U.S. Dist. LEXIS 77099, at *13 (S.D.N.Y. 2019) ("[C]riminal liability attaches to conduct intended to deceive another party, even when the statements uttered are reasonable, defensible, or even truthful.").

68 United States v. Allen, 160 F. Supp. 3d 698, 701–02 (S.D.N.Y. 2016) ("In the Court's view, the relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made." (citing United States v. Amrep Corp., 560 F.2d 539, 544 (2d Cir. 1977) ("The expression of an opinion not honestly entertained is a factual misrepresentation."))).

69 United States v. Finnerty, 533 F.3d 143, 148 (2d Cir. 2008).

70 *Connolly*, 2019 U.S. Dist. LEXIS 77099, at *13.

71 *Id.* at *12.

sanction, while merely using deception to gain an advantage without causing property harm to the counterparty may not be thought to be criminal. But here again the courts recite a well-established legal standard that suggests a high hurdle before promptly qualifying it into a mere formality. Mere deceit is not enough to establish fraud, the courts declare.[72] Instead, "the government must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims."[73] "[T]he purpose of the scheme must be to injure."[74] It turns out, however, that the requirement can be satisfied if there was a mere reasonable probability of an injury, "however slight,"[75] or if "the jury's finding of intent to deceive is the 'functional equivalent' of a finding of intent to harm."[76] More recently, the Second Circuit explained that "fraudulent intent may be inferred from the scheme itself if the necessary result of the actor's scheme is to injure others,"[77] and such "[i]ntent may be proven through circumstantial evidence, including by showing that [a] defendant made misrepresentations to the victim(s) with knowledge that the statements were false."[78]

A jury could be forgiven for concluding that, despite courts' protestations to the contrary, mere deceit is enough to convict for fraud because deceit can prove an intent to harm.

---

[72] Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); United States v. Regent Off. Supply Co., 421 F.2d 1174, 1181 (2d Cir. 1970); United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987).

[73] United States v. Novak, 443 F.3d 150, 156 (2d Cir. 2006) (internal quotation marks omitted); *see, e.g.*, United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981); United States v. Rodolitz, 786 F.2d 77, 80 (2d Cir. 1986); United States v. Schwartz, 924 F.2d 410, 420 (2d Cir. 1991); United States v. Binday, 804 F.3d 558, 569 (2d Cir. 2015).

[74] *Regent Off. Supply Co.*, 421 F.2d at 1181 (internal quotation marks omitted).

[75] *Id.* at 1182 ("[W]e believe the statute does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful."); United States v. Mandel, 415 F. Supp. 997, 1015 (D. Md. 1976) (denying dismissal of indictment as none of the cases cited by defendant stated "that the harm must be measurable in terms of money" but instead "that 'some actual injury, however slight' must either be intended by the actors or be a reasonably probable result of the deceitful representations if successful"); United States v. Allen, 160 F. Supp. 3d 698, 704 (S.D.N.Y. 2016) ("[A] jury could reasonably have concluded that defendants' scheme 'deprive[d] the victim of potentially valuable economic information' and 'depend[ed] for [its] completion on a misrepresentation of an essential element of the bargain.' The Court therefore determines that a reasonable juror could have found that defendants intended to cause actual harm." (citing *Binday*, 804 F.3d at 570)).

[76] United States v. Chandler, 98 F.3d 711, 715 (2d Cir. 1996) (construing bank fraud statute § 1344, which was modeled on mail and wire fraud statutes and applying "helpful" precedents in fraud case law).

[77] United States v. Gatto, 986 F.3d 104, 113 (2d Cir. 2021) (internal citations and quotation marks omitted).

[78] *Id.*

II. Prosecutions of Defendants Who Intended No Pecuniary Harm Culminate in Right to Control Theory

The dilution of the fraud elements generally occurred in cases where the government prosecuted defendants who deceived without intending financial or pecuniary harm to the victim. Successful prosecutions of such defendants, however, also required a theory of fraud, a plausible explanation for how the harm element could be satisfied. One theory was the so-called right to honest services, which enjoyed success for decades until it was rejected by the Supreme Court in *McNally v. United States*.[79] There, the Court reminded prosecutors and lower courts that the object of the fraud had to be money or property, not something so intangible as honest services. On a different track entirely, another line of cases dealt with defendants who *did* target money or property but provided some benefit to the victim of real financial value. Rather than rejecting prosecutions of such defendants as necessarily insufficient to satisfy the intent to harm element, courts began to accept a theory that such intent could be inferred if the deception related to very important information. Eventually, these two strands of jurisprudence converged in *United States v. Wallach*,[80] giving rise to the right to control theory of fraud. When that happened, the "theft" prong of the fraud statute became largely immaterial, and fraud analysis focused almost exclusively on the nature of the deception.

A. *Intangible Right to Honest Services*

Starting in the 1940s, prosecutors persuaded courts to adopt a theory of fraud where the putative victims lost no money or property, but the defendants profited from corruption or other conflicts of interest. Courts held that employees of public or corporate entities who received an undisclosed kickback for favoring a party that wished to do business with the entity could be charged with fraud because they deprived the public or companies of the right to the employee's honest services. In *Skilling v. United States*, the Supreme Court traced the beginning of the doctrine to a Fifth Circuit case, *Shushan v. United States*,[81] where the court held that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery,

79 483 U.S. 350 (1987).

80 935 F.2d 445 (2d Cir. 1991)

81 117 F.2d 110 (5th Cir. 1941).

but would also be a scheme to defraud the public."[82] While these cases involved bribery of public officials, courts began to recognize private-sector honest services fraud as well,[83] because

> [w]hen one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests.[84]

This surely was a tenuous description of what the plain words of the fraud statute proscribe. Yet, by the 1980s, all the circuit courts had accepted some version of the theory that "'a recreant employee'—public or private—'c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.'"[85]

In 1987, the Supreme Court "in *McNally v. United States*, stopped the development of the intangible-rights doctrine in its tracks. . . . [It] held that the scheme did not qualify as mail fraud."[86] "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the *McNally* Court read the statute "as limited in scope to the protection of property rights."[87] Previously, courts had read the statute as permitting prosecution for either a "scheme or artifice to defraud" that could cause harm *or* "for obtaining money or property by means of false" statements.[88] *McNally* rejected that reading, holding that the disjunctive language must be construed as a unitary whole, so that "the money-or-property requirement of the latter phrase" also limits the former.[89]

The Court found support for this conclusion in both the legislative history evincing an intent to "protect the people from schemes to deprive them of their money or property,"[90] as well as the long-held understanding that the words "to defraud" meant "'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify

82 *Id.* at 115.

83 Skilling v. United States, 561 U.S. 358, 401 (2010).

84 *Id.* (quoting United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942)).

85 *Id.* (quoting United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976)).

86 *Id.* at 401–02.

87 McNally v. United States, 483 U.S. 350, 360 (1987).

88 *Id.* at 356–57.

89 *Id.* at 358.

90 *Id.* at 356.

the deprivation of something of value by trick, deceit, chicane or overreaching.'"[91]

By requiring proof that deprivation of some property interest was the goal of a fraudulent scheme, the *McNally* Court effectively declared over forty years of criminal prosecutions, premised on a fraud theory embraced by all the circuit courts in the country, fundamentally defective.[92]

B. *"Harm" as the Deprivation of Economically Valuable Information*

Independent of the honest services doctrine, the government pursued a separate theory in its bid to prosecute deceivers who intended no pecuniary harm. These defendants owed no duties of honest services to corporations or government agencies but rather engaged in arms-length negotiations with counterparties. In deceiving such counterparties, however, the defendants sought some personal advantage. Rather than rejecting such prosecutions, courts began articulating legal standards for determining whether deception itself could give rise to an inference of an intent to harm.

1. The Problem of Deceiving Defendants Who Gave Value

Deceptive people who intend no pecuniary harm pose special challenges for the legal system because of the nature of fraud itself. In every business negotiation, one party offers the counterparty something of value in return for the counterparty's money or property. Fraud claims arise when a victim (or the government) contends that the defendant lied about the goods or services offered to induce the victim

[91] *Id.* at 358 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

[92] Congress responded to *McNally* by enacting a new statute, § 1346, that simply said: "[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (2012). This legislation did nothing to clarify what honest services means or to otherwise resolve the myriad legal issues raised by the inherently ambiguous terminology pre-*McNally*. Thirteen years after the legislation, the Supreme Court addressed the scope of § 1346 in *Skilling*. Addressing defendant's claim that the statute was unconstitutionally vague, the Court declined to invalidate the statute, holding instead that, properly understood, the statute should be interpreted to prohibit only bribes and kickbacks. Skilling v. United States, 561 U.S. 358, 408–09 (2010). Justice Scalia would have simply adopted the defense position. *See Skilling*, 561 U.S. at 416 (Scalia, J., concurring in part) ("I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally*—what the Court calls 'the pre-*McNally* honest-services doctrine' . . . . The problem is that that doctrine provides no 'ascertainable standard of guilt.'" (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921))).

voluntarily to transfer his or her property to the defendant in exchange. Where the victim gave much for nothing in return, the fraud analysis is easy, as the defendant's intent to wrongfully steal property is inescapable. Where the victim receives from the defendant goods or services of real value, however, the defendant's intent to harm becomes a difficult question.

In an oft-quoted passage, Judge Learned Hand stated in *United States v. Rowe*[93]:

> Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed.[94]

While *Rowe* was not a case involving the intent to harm element and the above language was dicta since the defendant there lied about worthless land, Hand made an important observation: parties to transactions might care about more than just the quid quo pro of a deal. Where defendants give economic value but knowingly misrepresent facts about an important consideration (economic or otherwise), the defendants are attempting to take the victim's assets on false pretenses.

When this happens, the government or the victim might claim the defendant intended to cause property harm even though the victim received substantive economic value. The problem with such cases is that the dispute requires the trier of fact to examine the parties' respective intent and expectations about the value of the goods or services exchanged. What did the defendant genuinely believe about his or her counterparty's expectations in the commercial transaction, and was that belief reasonable?

As between criminal and civil processes, there is little question about which one is likely to lead to more reliable and accurate judgements about intent. If private parties sue deceiving counterparties, civil procedures provide for adversarial discovery, including depositions, interrogatories and exchange of documents, and the trial testimony of both parties to the negotiation who can explain what they were thinking at the relevant time. Judges or juries can then assess which version is more credible and objectively reasonable. In contrast, criminal trials are ill-suited for accurate conclusions about

[93] 56 F.2d 747 (2d Cir. 1932).

[94] *Id.* at 749.

intentionality at such a subtle level. The criminal rules do not afford defendants broad rights of pretrial discovery, and, crucially, defendants rarely testify in criminal cases because of the risks of doing poorly during cross-examination and causing the jury to focus on their credibility rather than holding the government to its burden of proof beyond a reasonable doubt. After all, where the fact of deception is already established, it is the rare defendant who feels confident about testifying that he or she lied but did not intend any harm, even if it happens to be true. Thus, instead of a close assessment of each party's factual assertions about their respective intent and expectations, jurors are forced to decide based largely on lawyers' cross-examinations and arguments about inferences to be drawn.

Still, leaving it to private parties to sue for damages as a means of deterring gross dishonesty may seem inadequate to the task. If the victim received substantive economic value from the transaction, albeit through the defendant's deception, the victim may not be inclined to expend the time and money necessary to sue for damages or to unwind the transaction. Unpunished, the deceiver may be free to repeat his or her misconduct in the future. But some might say this is not an issue the criminal authorities should be trying to solve. If victims do not sue, it could mean that they determined the consideration they received was good enough and the deception not so important as to sue for damages or to unwind the deal to get their property back, or that the amount at issue was too small to justify the costs of litigation. Society might choose to adjust the laws to shift the legal costs to the defendant if the victim succeeds in proving material deception resulting in damages or unwinding the deal. Either way, society would arguably benefit if it left to private parties their decision to vindicate (or not) their legal rights where substantive economic value was exchanged. Criminal prosecutions would appear to be too draconian and unreliable an instrument for social reform in these circumstances.

Yet, instead of rejecting fraud prosecutions on the grounds that there must be clear evidence of intent to cause pecuniary loss, the approach that emerged in the Second Circuit was to examine intent based on the seriousness of the deception. If the deception pertained to very important information, ones that went to the nature of the bargain or potential economic value, the courts have held, the jury could infer intent to harm.

2. The "Nature-of-the-Bargain" Test

This approach appears to have its genesis in *United States v. Regent Office Supply Co*.[95] The Second Circuit rejected the government's bold contention that "false representations, in the context of a commercial transaction, are per se fraudulent despite the absence of any proof of actual injury to any customer."[96] The defendant corporation sold stationery supplies. They lied to the corporate customers about their connections to other members of the companies as a way to "'get by' secretaries on the telephone and to get 'the purchasing agent to listen to'" their pitch.[97] Once in the door, however, the defendants were entirely truthful about the products they were offering and the terms of any sales.[98]

The government nevertheless deemed this case worthy of criminal prosecution, claiming the victim was "entitled to give his patronage based on honest information, and if he wants to do somebody a favor and use his buying power for a charitable purpose or to reward his friends, he is entitled to do that, and not to be misled."[99] The court rejected this theory, but appeared to implicitly agree with the government's general proposition that lies about noneconomic considerations might be sufficient to establish an intent to harm. The standard it set (and held the facts of the case failed to satisfy) was that the deception must be "directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain."[100]

It concluded that the government had failed to prove that "some actual harm or injury was *contemplated* by the schemer."[101] While this can be shown by an "injury to the victim, however slight, [that] is a reasonably probable result of the deceitful representations if they are successful,"[102] the facts could not satisfy even this low standard because the deception only got the defendants in the door; it "was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception."[103] The conviction was vacated.

95 421 F.2d 1174 (2d Cir. 1970).
96 *Id.* at 1181.
97 *Id.* at 1177.
98 *Id.*
99 *Id.*
100 *Id.* at 1179.
101 *Id.* at 1180 (emphasis added).
102 *Id.* at 1182.
103 *Id.*

While the prosecutors lost this case, the government had won an important principle: the intent to harm element need not be proven through evidence of an intent to cause pecuniary loss and could instead be shown by proof of a misrepresentation regarding the nature of the bargain. It bears pausing here to note that in every fraud case, one of the elements is materiality, that is, proof that the misrepresentation had "a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed."[104] The court's ruling could be seen as applying a kind of extra-materiality test, a lie that is not only material in the traditional sense but one that went to the bargain under negotiation. Put another way, deception can itself be sufficient for intent to harm, but only if it is *really* important.

The government tested the limits of this new standard in *United States v. Starr*,[105] where it pursued another defendant who intended no pecuniary harm to the victim but made misrepresentations to conceal the extent of his or her profit from the transactions. The *Starr* defendants provided bulk mail services to their customers. In return for packaging and sending out their customers' bulk mail to the United States Postal Service, the defendants received a fixed sum from their customers. Defendants falsely "represented that funds deposited with them would be used only to pay for their customers' postage fees. In fact, the Starrs used only a portion of those funds to pay postage; the remainder was appropriated to their own use."[106]

Over a strong dissent, the majority rebuffed the government again. While the defendants did deceive the customers, the court's majority concluded there was insufficient evidence of intent to harm. The majority reminded the government that "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim."[107] Reciting the principle announced in *Regent Office Supply*, the majority held:

> The Starrs in no way misrepresented to their customers the nature or quality of the service they were providing. . . . [B]ecause AMS customers received exactly what they paid for, there was no discrepancy between benefits "reasonably anticipated" and actual benefits received. An intent to defraud the lettershoppe customers was not demonstrated either directly or circumstantially.[108]

104 United States v. Corsey, 723 F.3d 366, 373 (2d Cir. 2013).

105 816 F.2d 94 (2d Cir. 1987).

106 *Id.* at 99.

107 *Id.* at 98.

108 *Id.* at 99.

The majority made an important distinction between a defendant who seeks to enrich himself through deception and one who seeks to cause a loss to someone else. It is the latter that is necessary for a criminal conviction. Thus, the court rejected the trial judge's instruction to the jury that "[t]o act with intent to defraud means to act knowingly, and with a specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another *or* bringing about some financial gain to one's self."[109] The disjunctive "or" erroneously permitted jurors "to find an intent to defraud based solely on the defendants' appropriation of a benefit to themselves."[110] They must, instead, find the defendant contemplated some actual harm or injury to the victim.[111]

Judge Van Graafeiland issued a lengthy and detailed dissent. Like the majority, he accepted the *Regent Office Supply* standard of intent to harm but believed the government easily proved "customers were deprived of their chance to bargain with facts material to the bargain before them."[112] It was obvious to this judge that deceiving customers about the amount of money the defendants would be making by fooling the postal service through their scheme was important.

Starr illustrates that reasonable minds can differ about what level of materiality justifies an inference that the defendant intended harm. The defendants were fortunate to find two judges who saw it their way, but the fact of the dissent revealed the troubling indeterminacy of the legal standard.

3. The "No-Sale" Rule and the Economic Information Requirement

The analysis became more complex still when the Second Circuit put a finer point on the benefit of the bargain test by requiring that the deception must pertain to the economics of the bargain. The court imposed a kind of "no-sale" rule in *United States v. Mittelstaedt*,[113] a case that came after *McNally*'s holding that the object of fraud must be money or property.[114]

The defendant, a government employee, concealed his ownership interest in property that his agency agreed to purchase and was

109 *Id.* at 101.

110 *Id.*

111 *Id.*

112 *Id.* at 108 (Van Graafeiland, J., dissenting).

113 31 F.3d 1208, 1218 (2d Cir. 1994).

114 The case was also decided after United States v. Wallach, 935 F.2d 445 (2d Cir. 1991), discussed *infra* Section II.C, which held that right to control was itself a property interest.

convicted of fraud for his nondisclosure. As the prosecution occurred after *McNally* but was premised on conduct prior to the enactment of Section 1346, the defendant could not be prosecuted on an honest services theory since some "property" interest was now required.[115] The court held the government's evidence was insufficient to support a conviction if all it proved was that the government agency, had it known the truth, "would have refused to deal with him on general principles."[116] Instead, "[t]o convict, the government had to establish that the omission caused (or was intended to cause) actual harm to the [purchaser] of a pecuniary nature *or* that the [purchaser] could have negotiated a better deal for itself if it had not been deceived."[117]

Interestingly, the court analyzed the issue in terms of the "materiality" of the information withheld.[118] The Second Circuit later explained:

> Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.[119]

The "fine line" was drawn by economic considerations. If the lie causes a victim to spurn further negotiations on "general principles," such as mere moral scruples, the intent to harm element cannot be satisfied, but pecuniary considerations or striking a better economic deal suffices. As *Mittelstaedt* held, because the jury in that case "could have found that the [victim village] . . . would have been affected by the disclosure only because the village would have refused to deal with him on general principles,"[120] the fraud conviction could not stand.

A general "nature-of-the-bargain" test, then, was too broad, and only economic aspects of the bargain could support a finding of fraudulent intent. But why this should be so is unclear. If a defendant knows how important a noneconomic consideration is for the victim and still lies about it to induce the victim to part with his or her money, there appears to be no principled reason why an intent to harm cannot be found. The fact that *McNally* required the object of fraud to be property does not entirely explain this new requirement since the

---

115 *Mittelstaedt*, 31 F.3d at 1217–18.

116 *Id.* at 1218.

117 *Id.* at 1217.

118 *Id.* ("To be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction.").

119 United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007).

120 *Mittelstaedt*, 31 F.3d at 1218.

deception about noneconomic considerations can deprive the victim of his or her money. Insisting on proof of a lie that had an economic component may make good *policy* sense because it cabins the volume of cases that can be prosecuted, but its analytic rationale is elusive.

In any event, whether *Regent Office Supply* and its nature-of-the-bargain test is better than the "no-sale" rule and its economic considerations test, these legal standards construct an oddly abstract framework within which jurors are to evaluate fraud prosecutions. Instead of judging proof of a defendant's mal-intent, jurors are instructed to focus on the importance of the facts that were omitted or misrepresented.

C. *Intent to Harm a "Property" Interest in One's Right to Control*

This focus on deception became virtually exclusive when the Second Circuit declared that right to control is itself a protected property interest. This theory emerged at the confluence of the above intent to harm case law and the *McNally* Court's rejection of the right to honest services doctrine. In response to *McNally*'s holding that fraud prosecutions must target defendants who sought to take "money or property," and not something so abstract and intangible as honest services, prosecutors persuaded the courts that one's right to control assets qualifies as protected property. Not only did this theory sidestep *McNally*'s "property" requirement, it simultaneously expanded, and further confused, the intent to harm element. Not surprisingly, unlike the honest services doctrine that was accepted by all the circuit courts before *McNally*, the right to control theory has not been uniformly embraced. The Supreme Court has yet to address the theory, but when it does, it will find a tangled mess.

It is the Second Circuit where the theory has been most fully developed since at least 1991. The doctrine has gained virtual black letter law status in that circuit, the seat of the world's financial capital.[121] Summarizing over two decades of development of the doctrine, the court in *United States v. Binday*[122] explained:

> "Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests

[121] *See, e.g.*, United States v. Gatto, 986 F.3d 104, 114 (2d Cir. 2021); United States v. Lebedev, 932 F.3d 40, 48 (2d Cir. 2019); United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019); United States v. Finazzo, 850 F.3d 94 (2d Cir. 2017); United States v. Binday, 804 F.3d 558, 569–70 (2d Cir. 2015); United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007); United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996).

[122] 804 F.3d 558 (2d Cir. 2015).

> protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets." *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007). Accordingly, we have held that a cognizable harm occurs where the defendant's scheme "den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998). It is not sufficient, however, to show merely that the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations. The "right to control one's assets" does not render every transaction induced by deceit actionable under the mail and wire fraud statutes. Rather, the deceit must deprive the victim "of potentially valuable economic information." *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991).[123]

The above quote implicates multiple elements and concepts, some of which are taken from the *Regent Office Supply* line of cases as well as the no-sale rule and its economic information requirement. But with the introduction of the concept that right to control assets is itself protected property, the discrete elements of property, intent to harm and materiality, appear to blur and meld into one another, with economic information as the core of each element.

The origin of this complex doctrine is *United States v. Wallach*.[124] The *Wallach* defendants were corporate managers who schemed to pay themselves undisclosed kickbacks using corporate funds, a classic instance of honest services fraud. At the center of the case was the Wedtech Corporation, a company that began as a small, local metal manufacturing facility in the Bronx that grew in size as it won increasingly lucrative federal government contracts. It became so successful it went public. The defendants were a group of conspirators including a number of corporate officers and directors of Wedtech, who worked with a lobbyist, Eugene Robert Wallach, to pay undisclosed kickbacks to themselves and various coconspirators for steering government contracts to the company. One scheme in particular involved undisclosed payments using Wedtech funds made to corporate insiders totaling $1.14 million. When these improper payments were discovered, the company eventually folded and declared bankruptcy.[125]

The facts of defendants' misconduct occurred before the *McNally* decision, and, but for *McNally*, would undoubtedly have been prosecuted under the honest services theory of fraud. But because they

123 *Id.* at 570; *see also Johnson*, 945 F.3d at 612 (quoting *Binday*, 804 F.3d at 569–70, 575).

124 935 F.2d 445, 463 (2d Cir. 1991).

125 *Id.* at 452–53.

were charged after *McNally*, that theory was unavailable to the government, nor could the government retroactively apply Section 1346 to pre-*McNally* conduct. Required to allege and prove that the scheme targeted "money or property," the indictment "charge[d] that the victims of the alleged 'scheme and artifice' were Wedtech and its shareholders who were defrauded of the $1.14 million in payments as well *as the* '*right to control*' *how the money was spent*."[126]

After a sixteen-week trial culminating in convictions, the Second Circuit reversed and remanded for a new trial because one of the government's key cooperating witnesses perjured himself during cross-examination.[127] Instead of merely remanding, however, the court went on to address the defendants' separate arguments that the indictment should be thrown out altogether as resting on a baseless theory of fraud. The defense arguments were essentially twofold. First, the government could not satisfy the intent to defraud element because "Wedtech received services in return for the payments and that, therefore, the shareholders were not defrauded of any property."[128] Second, *McNally* precluded the government's theory of fraud because the "right to control" is an intangible interest and not a tangible property right.[129]

The court rejected both arguments. Relying in part on Judge Hand's language in *Rowe*, the court gave short shrift to the notion that fraudulent intent could not be proven if the victims received some equivalent pecuniary value: "[P]roviding alternative services does not defeat a fraud charge because the fact remains that the corporation and its shareholders did not receive the services that they believed were being provided."[130] In effect, the court applied a nature-of-the-bargain test to conclude that the property lost by the victim company and its shareholders was the $1.14 million that was funneled to the defendant insiders. The fact that the victims purportedly received some derivative benefit as shareholders of a company that was winning government contracts did not diminish their loss of funds that they would not have released had they known what the fraudsters were really up to. This was largely consistent with the line of reasoning that the Second Circuit had long since established beginning with *Regent Office Supply* in 1970.[131]

The Second Circuit went further, however, to endorse the government's claim that shareholders' right to control was itself a protectable property right. First, it rejected the defense's suggestion that

126 *Id.* at 461 (emphasis added).

127 *Id.* at 455–57.

128 *Id.* at 461.

129 *Id.*

130 *Id.*; *id.* at 463 (citing United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)).

131 *See supra* Section II.B.2.

McNally's property element required some tangible good by citing *Carpenter v. United States*, where the Supreme Court recognized a business entity's intangible property right to commercially valuable confidential information.[132]

The *Wallach* court then said: "[T]he central focus of our inquiry is whether under the government's theory any property right was taken or placed at risk of loss as a result of the defendants' alleged scheme; if no property right was involved, the mail fraud charges cannot survive."[133] In response to the defense argument that shareholders do not have decision-making control over the affairs of a company, the court noted that "[w]hile shareholders have neither a right to manage the corporation nor a right to hold title to corporate property, their ownership of stock in the corporation is nonetheless a property interest."[134]

From this uncontroversial point, the court then analyzed what a shareholder's intangible property interest in company stock consisted of:

> "[S]hares of stock are property, but they are intangible and incorporeal property existing only in abstract legal contemplation." There are, however, other incidents accompanying the property interest that a stockholder owns. The government asserts that the actions taken by the defendants denied the shareholders the "right to control" how corporate assets were spent—an intangible property interest. The "right to control" has been recognized as a property interest that is protected by the mail fraud statute. Despite the recurrent references to a "right to control," we think that use of that terminology can be somewhat misleading and confusing. Examination of the case law exploring the "right to control" reveals that application of the theory is predicated on a showing that some person or entity has been deprived of potentially valuable economic information. Thus, the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution.[135]

This passage contains substantial ambiguity. The language could be read as an endorsement of the government's claim that right to control is itself a property interest, but the court criticizes the use of the phrase "right to control" as "somewhat misleading and confusing," and argues that "application of the theory is predicated on" the deprivation of

132 *Wallach*, 935 F.2d at 461 (citing Carpenter v. United States, 484 U.S. 19 (1987)).

133 *Id.*

134 *Id.* at 462.

135 *Id.* at 462–63 (internal citations omitted).

"potentially valuable economic information."[136] Was the court concluding that the government was correct in claiming that right to control is itself the property, or was it identifying economic information as the property interest?

While not entirely clear, the court's analysis seemed to treat the shareholder's property interest as having different facets or characteristics in a "bundle of rights," as it went on to state that the right to accurate information is "one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest."[137] Thus, at various points, the court states that "[a] stockholder's right to monitor and to police the behavior of the corporation and its officers is a property interest,"[138] that "'[t]he stockholders' right of inspection of the corporation's books and records rests upon the underlying ownership by them of the corporation's assets and property' and is an incident of 'ownership of the corporate property,'"[139] and that "[t]he provision of complete information protects a shareholder's investment—a clear property interest."[140]

Taking all these strands as a whole, the right to control appears to be inextricably tied to the right to accurate information, a right that is an incident of stock ownership. The court's discussion goes on to ground its analysis on public corporate and fiduciary law:

> The importance of this right to information is recognized by the statutes and rules that govern the operation of a publicly held corporation. Indeed, the officers of a publicly held corporation are legally obligated to keep and to maintain books and records which "accurately and fairly reflect the transactions and dispositions of the assets" of the corporation. 15 U.S.C. § 78m(b)(2)(A); 17 C.F.R. § 240.1362-1; *cf. United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983) (mail fraud violation when "a fiduciary fails to disclose material information 'which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other'") (citations omitted). . . . If corporate officers and directors, and those acting in concert with them, were free to conceal the true nature of corporate transactions, it is conceivable that the assets of the corporation could be so dissipated as to render a shareholder's investment valueless.[141]

136 *Id.*

137 *Id.* at 463.

138 *Id.*

139 *Id.* (citing 5A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2213, at 323 (perm. ed. 1990)).

140 *Id.*

141 *Id.* at 463.

Applying corporate and fiduciary principles, the court appears to value equally (1) accurate information to which shareholders are entitled, (2) the value of the "shareholder's investment," and (3) the right to make informed decisions about the investment. It is this last item that the government's indictment identified as a protected property interest when it charged that shareholders were defrauded of the "'right to control' how the money was spent."[142] The court concluded that "the charges advanced in the indictment are legally sufficient."[143]

As a case that arguably overindulged prosecutorial efforts to evade the impact of *McNally*, *Wallach* makes for a challenging reading with unresolved ambiguities. Yet, if it is limited to the corporate/fiduciary context where the parties are a defendant corporate manager and a victim shareholder, there is some sense to the idea that the right to control is itself property. Under applicable laws, information about a company and a shareholder's right to accuracy of such information take on a special status, one that is inextricably tied to that "intangible and incorporeal property," a creature of law, called stock.[144] As the court said, the right to accurate information is "one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest."[145]

This concept, however, loses all coherence when the underlying asset is not stock but money or some other tangible item, and where the defendant/victim relationship is not fiduciary in nature but an arms-length relationship. Yet *Wallach*'s theory of property has since been lifted from its factual setting to apply in even the most arms-length of commercial transactions involving money, with no court explaining how that can be analytically justified.[146]

III. THE RIGHT TO CONTROL THEORY RENDERS THE HARM ELEMENT LARGELY IMMATERIAL

Two recent cases in the Second Circuit illustrate the ways in which the right to control theory can lead to counterintuitive results for defendants who deceived but without intent to cause financial harm to the putative victims. They also illustrate how the Second Circuit has never answered the basic question of how right to control can ever be

142 *Id.* at 461.
143 *Id.* at 473.
144 *Id.* at 462.
145 *Id.* at 463.
146 *See infra* Part III.

considered "property," as opposed to a mere incident of ownership of property, when taken out of *Wallach*'s corporate fiduciary context. Instead, the court has simply accepted and applied a doctrine where economically material deception satisfies both the elements of property and intent to harm.

A. *The Theory's Application in Two Recent Cases*

1. *United States v. Johnson*

In *United States v. Johnson*,[147] the defendant was convicted of fraud even though his counterparty in a commercial transaction received all the services that were required in a detailed, written contract between them and notwithstanding evidence that the defendant believed the counterparty got all it bargained for. The Second Circuit held that "the evidence was sufficient to convict Johnson of wire fraud and conspiracy to commit wire fraud for depriving [the victim] of the 'right to control' its assets."[148]

Defendant Johnson was the former global head of an international bank's (Bank) foreign exchange trading desk, and he was accused of deceiving a large oil and gas company (Company), during the course of negotiating a foreign exchange transaction (FX transaction).[149] The Company needed to convert approximately four billion dollars into British pounds.[150] It was advised by a sophisticated investment bank. After receiving proposals from several other financial institutions to execute this transaction, the Company selected Johnson and his Bank.[151]

The deception at issue occurred during discussions prior to selection of the Bank. Johnson made statements that strongly suggested that he would engage in a trading strategy that would "more quietly . . . accumulate" pounds for the Company, and avoid having "a lot to buy" that could "cause a lot of noise" in the market.[152] During this conversation, Johnson also said he was "horrified" when he saw other banks offering terms that meant they intended to "ramp the fix" at the expense of the counterparty.[153] Following the call with Johnson, the

[147] 945 F.3d 606 (2d Cir. 2019).

[148] *Id.* at 612.

[149] *Id.* at 608.

[150] *Id.* at 608–09.

[151] *Id.* at 609.

[152] *Id.*

[153] *Id.* The "fix" is a reference to the benchmark exchange rate set by WR Reuters at a set time and in accordance with a set procedure. *Id.*

Company agreed to engage the Bank and use one of two options to complete the currency exchange.[154]

While the court's opinion gives little attention to this fact, the Bank and the Company had spelled out in a written agreement (Mandate Letter), precisely what the Bank was committing to do for the Company.[155] Significantly, the agreement was silent on the trading methods the Bank may or may not employ to effectuate the transaction.[156] It made no representations that the Bank would in fact accumulate the pounds "quietly" in the marketplace or not "ramp the fix"; nor did it make any representation about how much the Bank would profit from the transaction or the mechanisms it would use for doing so.[157] The parties also incorporated the terms of a standard industry agreement, and both the Mandate Letter and the industry agreement made clear that the Bank "[was] not acting as fiduciary for or as an adviser to [the Company]," and that the agreement "shall not be regarded as creating any form of advisory or other relationship."[158] The agreement essentially stipulated that "[n]o communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of that Transaction."[159]

Notwithstanding Johnson's oral assurances prior to the engagement, he caused one of his traders to engage in an aggressive trading strategy and "ramp the fix."[160] The Bank made approximately seven million dollars in profit from the transaction.[161] Moreover, after the trade, when the Company noted how much the market had moved prior to the designated time of the transaction, Johnson and his colleague falsely blamed the dollar-selling activity of the Russian Central Bank for the volatility.[162]

Nevertheless, the Company received the services the Mandate Letter required. Its four billion dollars was converted to pounds applying the fix as stipulated in the letter. The government did not proceed on a theory that the Company lost money or property or was financially disadvantaged by Johnson's conduct and if so, by how much. Presumably it did not do so because it could not prove beyond a

154 *Id.*

155 *See id.* at 610.

156 Brief for Appellant at 18, United States v. Johnson, 945 F.3d 606 (2d Cir. 2019) (No. 18-1503).

157 *Id.* at 18–19.

158 *Id.* at 19.

159 *Id.*

160 *Johnson*, 945 F.3d at 610.

161 *Id.* at 611.

162 *Id.*

reasonable doubt any measurable pecuniary harm to the Company. Instead, the prosecutors staked their case on the theory that Johnson committed wire fraud when his deception deprived the Company of its right to control its assets. The defendant was convicted at trial.

In affirming, the Second Circuit accepted that the written agreement between the two parties was not breached but appeared to consider the fact largely irrelevant.[163] The court recited the right to control doctrine and described at length how Johnson was deceptive about the Bank's trading methods but provided no explanation of how Johnson could have intended harm to the Company, economically or otherwise, from his conduct.[164] Instead, the court reasoned that "fraudulent intent may be 'apparent' where 'the false representations are directed to the quality, adequacy or price of the goods themselves . . . because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain.'"[165]

The court did not explain how statements about the trading method or the Bank's profits can be considered "obviously essential" to the Company if the governing contract between two highly sophisticated institutional counterparties is entirely silent on such issues. As a matter of basic commercial law, any term that is an "essential element of the bargain" should have been set forth in the Mandate Letter.[166] The court also appeared to give no weight to the evidence that the defendant believed the Company was getting exactly the benefits it bargained for: "Johnson calculated, so long as the final cost of the Fixing Transaction that [the Company] requested stayed below what the cost of a Full-Risk Transfer—even with its extra charge—would have been, [the Company] had nothing to complain about."[167]

At bottom, the government's evidence established that Johnson deceptively hid from the Company his plan to have the Bank profit

---

163 *Id.* at 613.

164 In the government's brief in opposition to Johnson's appeal, it asserts that the "evidence showed that the fraudulent scheme increased the price for Pounds that [the Company] paid to [the Bank]," Brief for United States at 32, United States v. Johnson, 945 F.3d 606 (2d Cir. 2019) (No. 18-1503), but understandably makes no effort to quantify this "increase" because that would have required proof of the price that would have been obtained had the Bank not engaged in ramping the fix and some proof that the Mandate Letter assured the Company of such lower price. There was no such base number. Thus, the government's brief relies instead on the legal argument that "[t]he law does not require proof that the victim of the fraudulent scheme in fact lost money, or was even actually defrauded." *Id.*

165 *Johnson*, 945 F.3d at 613 (quoting United States v. Regent Off. Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970)).

166 *See* U.C.C. § 2-202 (2021).

167 *See Johnson*, 945 F.3d at 611.

handsomely from the transaction by engaging in certain trading tactics he suggested he would not employ. But as *Regent Office Supply* and *Starr* had long since established, deception designed to cover up inordinate profits to the defendant does not establish an intent to harm; instead, harm to the victim must be contemplated.[168] Far from establishing such intent or contemplation, the evidence in *Johnson* tended to show the opposite. It is difficult to square these facts and a detailed written contract that the Bank fulfilled in every respect with a conclusion beyond a reasonable doubt that Johnson intended to harm the Company of a property interest.

The right to control theory closes the gap: because the property interest was the Company's right to control its money and Johnson deceived the Company in connection with a commercial transaction, he must have intended harm to the Company's property interest. The fact that Johnson may actually have thought the Company was getting all it bargained for, a belief supported by the written contract between the parties, became largely immaterial.[169]

2. *United States v. Gatto*

The Second Circuit's decision in *United States v. Gatto*[170] is a more recent fraud case presenting a right to control theory of fraud as a partial basis for the conviction. The defendant was an employee of an apparel company who was convicted of fraud on the theory, inter alia, that he participated in a scheme to deprive universities of the right to control their athletic scholarships. Gatto had made secret payments of cash to

---

168 *See supra* Section II.B.2; United States v. Starr, 816 F.2d 94, 101 (2d Cir. 1987) (rejecting jury instruction that permitted jurors "to find an intent to defraud based solely on the defendants' appropriation of a benefit to themselves," rather than finding defendant contemplated actual harm or injury to victim).

169 Another feature to the *Johnson* opinion is its rejection of the defendant's due process challenge. He claimed that his conviction was "unconstitutionally standardless." In response, the court stated: "[T]he standard is clear: A defendant who executes a fixing transaction engages in criminal fraud if he intentionally misrepresents to the victim how he will trade ahead of the fix, thereby deceiving the victim as to how the price of the transaction will be determined." *Johnson*, 945 F.3d at 615. But this is an indictment of the lie alone. In an amicus brief filed by an industry organization, ACI-Financial Markets Association, the organization warned that the Second Circuit's decision effectively criminalizes the routine practice of trading ahead of the fix, to the surprise of market participants, who were "unaware of the potential criminal consequences" of trading ahead and that the decision created "uncertainty" that "threatens a near-term and substantial chilling of FX liquidity as bank dealers become less willing to face unpredictable personal legal peril." Brief for Amicus Curiae ACI-The Financial Markets Association in Support of Defendant-Appellant and Reversal at 26–27, United States v. Johnson, 945 F.3d 606 (2d Cir. 2019) (No. 18-1503).

170 986 F.3d 104 (2d Cir. 2021).

the father of a star high school basketball player to induce the player to join a university's basketball program, in violation of National Collegiate Athletic Association (NCAA) rules. The government had a number of different theories of fraud, but they centered around the accusation that the universities were defrauded by means of false certifications to them submitted by the athletes wherein the athletes represented that they had abided by NCAA rules.[171] The "money or property" identified by the government was the scholarships, as well as the right to control such assets.[172]

In response, the defendants did not dispute that their payments to parents or students violated NCAA rules, but argued such violations are not criminal and, besides, far from seeking to cause any harm to the universities, their conduct was designed to persuade nationally coveted athletes to attend such schools.[173] The apparel company had lucrative sponsorship arrangements with the putative victim universities and thus causing the star athletes to attend those universities would have profited both the universities and the company.[174] Defendants also disputed that the scholarships were a goal of their efforts and that at best the financial scholarships were purely incidental to the chief goal of persuading the athlete to play for the chosen schools.[175]

All defendants were convicted, and the convictions were affirmed on appeal. In a concurring and dissenting opinion, one judge on the panel would have reversed a limited number of counts due to evidentiary errors, while agreeing to affirm other counts of conviction.[176]

With respect to the "property" element, the court might have rested its decision exclusively on the traditional view of property, namely, that the defendants conspired with the athletes and their families to deprive the universities of the money that the scholarships represent through fraudulent misrepresentations (i.e., false certifications of NCAA eligibility). The court concluded that "depriving Universities of athletic-based [monetary] aid was at the *center* of the plan."[177]

Yet, just as in *Wallach*, rather than stopping there, the court went on to rely on the right to control theory of property as well: "Defendants

171 *Id.* at 109–10.

172 *Id.* at 126 ("There is no doubt that the Universities' scholarship money is a property interest with independent economic value.").

173 *Id.* at 110.

174 *Id.*

175 *Id.* at 116.

176 *Id.* at 130 (Lynch, J., concurring in part and dissenting in part).

177 *Id.* at 116.

deprived the Universities of information that would have helped them decide whether to award the Recruits athletic-based aid. This deprivation was enough to support a wire fraud conviction."[178] The jury had been instructed:

> [A] victim can be deprived of money or property also when it is deprived of the ability to make an informed economic decision about what to do with its money or property—in other words, when it is deprived of the right to control the use of its assets. I instruct you that a victim's loss of the right to control the use of its assets constitutes deprivation of money or property if, and only if, the scheme could have caused or did cause tangible economic harm to the victim.[179]

In affirming this instruction, the court held: "[B]ecause the Universities would not have awarded the Recruits this aid had they known the Recruits were ineligible to compete, withholding that information is a quintessential example of depriving a victim of its right to control its assets."[180]

At various points in its opinion, the court rejected the defense theory that they lacked any intent to defraud or harm. It began by reciting the case law that sets the bar very low: "[F]raudulent intent may be inferred from the scheme itself if the necessary result of the actor's scheme is to injure others. Further, [i]ntent may be proven through circumstantial evidence, including by showing that [a] defendant made misrepresentations to the victim(s) with knowledge that the statements were false."[181]

The court then examined the harm element in the context of affirming the district court's preclusion of a defense expert witness who would have testified to the benefits the universities could obtain from the scheme. The court conceded that the evidence might have established that "universities come out net-positive when they commit recruiting violations."[182] But it went on to conclude that such evidence would not help the defendants:

> The law is clear: a defendant cannot negate the fraud he committed by wishing that everything works out for his victim in the end. . . . That the Universities might have ultimately benefitted monetarily from having top tier recruits would not have changed

178 *Id.* (citing United States v. Finazzo, 850 F.3d 94, 111 (2d Cir. 2017)).

179 *Id.* at 126.

180 *Id.*

181 *Id.* at 113 (internal quotations and citations omitted).

182 *Id.* at 118.

whether Defendants were guilty of wire fraud, and the evidence might have clouded the issue for the jury.[183]

This analysis, however, did not answer the thrust of the defendants' arguments about intent. If there was objective evidence that the universities may be financially net-positive from the defendants' deception, how could that not be relevant to the issue of their intent to harm? The court weighed the probative value against its potential prejudice in "cloud[ing] the issue for the jury,"[184] but thereby discounted the importance of the expert's evidence. As for its reasoning that Gatto could not "negate the fraud he committed by wishing that everything works out for his victim in the end,"[185] the court appeared to dismiss the defense's argument. Gatto was not suggesting that wishing it all works out "negates the fraud"; what it does do is negate intent to harm, for how can harm be intended when the goal of the scheme was to benefit the universities? The money the university "loses" in granting financial aid is offset by the financial benefit the university obtains by having the star basketball player on its team, according to the expert witness. This "net-positive" undermines the claim of harm. It is true, of course, that the defendant should have been aware that the scheme may not work and that the deception would be uncovered, but that obviously is not the goal of the scheme. A defendant's awareness of risk is only relevant to criminal intent if foreseeability of harm is the same as intent to harm. But it plainly is not. As the court acknowledged, "[F]raudulent intent may be inferred from the scheme itself if the *necessary* result of the actor's scheme is to injure others."[186] Getting caught is not a necessary result. Moreover, "contemplating" harm means "to have in view as a purpose"[187] such harm, not mere foreseeability of it.

In the end, one is left with the disquieting question of how a defendant who may have believed the putative victim is no worse off for his deception can be said to have intended harm to that victim.[188] The court summed up its analysis by asserting that "the essence of fraud is misrepresentation, made with the intent to induce another person to

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 113 (emphasis added) (internal quotations and citation omitted).

[187] *Id.* (quoting United States v. Gabriel, 125 F.3d 89, 97 (2d Cir. 1997)).

[188] The court also dealt with the intent to harm element in connection with defendants' challenge to the trial court's instructions on "apparent authority." The defense argued that the university coaches wanted the recruits and that defendants believed the coaches were acting for the universities. The court rejected the challenge, concluding that the evidence demonstrated the defendants "knew what they were doing was against the Universities' wishes." *Id.* at 129.

take action without the relevant facts necessary to make an informed . . . decision."[189] In support, the court explained:

> Fraud involves "a departure from fundamental honesty, moral uprightness, or fair play," and depriving one of property through "dishonest methods or schemes" or "trick, deceit, chicane or overreaching." Here, as the jury could have reasonably found, Defendants deprived the Universities of property—athletic-based aid that they could have awarded to students who were eligible to play—by breaking NCAA rules and depriving the Universities of relevant information through fundamentally dishonest means.[190]

The deception completes the crime and defendants' "contemplation" that the universities would actually be financially net-positive became largely irrelevant.

Judge Lynch's opinion, concurring in part and dissenting in part, disagreed with the majority only insofar as it affirmed the exclusion of certain evidence that supported the defense's position that they did not intend to *deceive* the universities.[191] Examining each of the challenged evidentiary rulings, Lynch concluded that evidence of certain calls between the defendants and certain university coaches might have led a jury to conclude that in fact the defendants did not have the requisite intent to deceive, and its exclusion was not harmless error.[192] "If [the coaches] were implicated in the defendants' activities, even as they insisted on hiding their approval, a jury could reasonably have inferred that the defendants held a good faith belief that the attitudes of these coaches reflected the view of the universities involved."[193] Based on this close examination, Lynch would have reversed certain of the counts of conviction. The majority did not disagree with his analysis, saying that

---

189 *Id.* at 129–30 (internal quotations and citations omitted).

190 *Id.* at 130 (internal citations omitted).

191 *Id.* at 131 (Lynch, J., concurring in part and dissenting in part) ("The defendants offered evidence that they maintain would have supported their asserted lack of intent to deceive the universities . . . ."). There is, of course, a difference between intent to defraud and intent to deceive. The former requires proof of intent to harm, while the latter is, as the words imply, an intent to merely mislead someone. *See* United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) ("Only a showing of intended harm will satisfy the element of fraudulent intent."). Lynch's analysis focused on intent to deceive and not the harm element. *See Gatto*, 986 F.3d at 131 (Lynch, J., concurring in part and dissenting in part) ("The defendants offered evidence that they maintain would have supported their asserted lack of intent to deceive the universities, but some of that evidence was excluded by the district court. A principal prong of their appeal relates to those evidentiary rulings.").

192 *Gatto*, 986 F.3d at 143–46 (Lynch, J., concurring in part and dissenting in part).

193 *Id.* at 140.

it gave them "pause," but concluded the district court's evidentiary rulings had not been an abuse of its broad discretion.[194]

B. *A Distorted Concept of Property that Conflates the Elements*

The right to control theory contradicts the core purpose of the fraud statutes to prohibit theft-through-lies as discussed in Part IV. But at a more threshold level, there are at least two distinct problems with the theory. First, it oddly distorts the meaning of "property," and second, even if linguistically plausible, the theory conflates the legal elements of mail and wire fraud in ways that contradict settled law. The result is a doctrine in profound disarray, with no clear explanation for how the Second Circuit came to this point.

1. A Distorted Concept of Property

As discussed *supra* Section II.C, while the *Wallach* right to control theory contains substantial ambiguities, there is some sense to it when applied to stock as the underlying asset and to victim corporate shareholders who are owed fiduciary duties of candor by defendant corporate managers. But the concept loses coherence when it is applied outside that context and in arms-length transactions involving money.

As a matter of common sense, "right to control" is an incident of *ownership* of property, not the property itself. Black's Law Dictionary defined "ownership" as, inter alia, "[t]he exclusive right of possession, enjoyment and disposal; involving as an essential attribute the *right to control*, handle, and dispose."[195] Likewise, it defines "possess" as, inter alia, "to have in one's actual control."[196] In contrast, in common parlance, "property" is understood to be the asset or thing that is owned

---

194 *Id.* at 120 n.8.

195 *Ownership*, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added). This had been the definition in prior editions as well, but, interestingly, in the seventh edition published in 1999, after the *Wallach* decision, the "right to control" reference was dropped from the definition of ownership. It is not clear what to make of this change. One might be tempted to infer that the editors of the dictionary, influenced by *Wallach*, decided that right to control should no longer be tied to "ownership," especially in light of the fact that in later editions, they added to the definition of ownership a reference to "bundle of rights," a phrase that the *Wallach* court had employed to describe property. *See Ownership*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[O]wnership" is "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implied the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable.").

196 *Possess*, BLACK'S LAW DICTIONARY (11th ed. 2019).

or possessed,[197] and thus capable of being controlled by the property owner. There is, thus, a thing (property) and certain attributes of owning that thing (such as the right to control it).

There are, of course, more abstract forms of property that are conferred by operation of law, which are called "rights" or "interests." Even common English dictionaries provide a secondary definition of property as: "the exclusive right to possess, enjoy, and dispose of a thing: ownership."[198] Instead of the "thing" that is owned, "property" is sometimes defined as a "right" and equated with "ownership." In *Pasquantino v. United States*,[199] the Supreme Court cited to Black's Law Dictionary defining "property" as "extend[ing] to every species of valuable right and interest."[200] Thus, for example, a right to access a driveway or other legally protected entitlements might be viewed as "property." But even so, there is a separate identity of the underlying thing (e.g., right to access) that is distinct from the attributes of owning it. The right to access a driveway is separate from my right to control it (by, for example, using it, selling it, or assigning the access right).

The duality may become obscure the more abstract the property interest becomes, as was the case in *Wallach*, but there is an obvious distinction in arms-length commercial transactions about money, as in *Johnson* and *Gatto*. In that setting the idea of an incident of ownership becoming property itself is insupportable, and, as explained *infra* Section III.B.3, no court has attempted to explain it.

2. Conflation of the Criminal Elements

The concept is particularly problematic in the context of the fraud statutes because it violates the principle that the elements of materiality, intent to harm, and property are distinct and must be separately proven. All material deception necessarily implicates a counterparty's right to control his or her asset: by definition, "material misrepresentations" are those "that would naturally tend to influence, or are capable of influencing, [a victim's] decision making" relating to an underlying asset.[201] Decision-making is the means by which assets are "controlled." Thus, lies designed to influence decisions *necessarily* target one's right to control one's asset, and if the protected property is right to control

197 *See, e.g.*, *Property*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2003) ("[S]omething owned or possessed.").

198 *Id.*

199 544 U.S. 349 (2005).

200 *Id.* at 356 (citing BLACK'S LAW DICTIONARY (4th ed. 1951)).

201 United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019).

an asset, every material lie deprives the victim of property, rendering the property element a nullity.

Yet in every case that applies a right to control theory of fraud, jurors are given instructions that effectively lead to that result. The jury instruction the Second Circuit endorsed in *United States v. Finazzo* is typical:

> [I]n order to prove a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property. Property includes intangible interests such as the right to control the use of one's assets. This interest is injured when a victim is deprived of potentially valuable economic information it would consider valuable in deciding how to use its assets.[202]

Or, as the *Finazzo* court suggested as a further improvement on the above: "The loss of the right to control money or property only constitutes deprivation of money or property if the scheme could cause or did cause tangible economic harm to the victim."[203]

The requirement that the deception be "extra" material, relating to "potentially valuable economic information" may prevent all material deceptions from satisfying the property element, but the barrier is tissue thin. For jurors, it may be entirely indiscernible. The law already requires that the misrepresentation have "a natural tendency to influence,"[204] and when applied to the commercial context, that definition of materiality could be just another way of saying that the information wrongfully withheld from the victim must be "potentially valuable economic information." After all, in commercial negotiations, the misrepresentation that typically influences a party's decision is economic in nature.

Moreover, if right to control can be property, there is no doctrinal support for injecting an "economic" requirement as a gatekeeper. The economic nature of a lie cannot conceptually cause an incident of ownership to metamorphosize into property while noneconomic material lies do not. If right to control is the victim's property, it should be property even where the victim was affected by lies regarding noneconomic consideration of value to him or her.

If there is a sound explanation to this linguistic puzzle, it is inaccessible to the ordinary juror, and it is the height of legal fiction to presume they can follow the logic of this doctrine. Rather than parsing through the intellectual labyrinth, the juror is far more apt to conclude that a material lie about economic information is all that is needed to

202 850 F.3d 94, 108 (2d Cir. 2017).

203 *Id.* at 113 n.20.

204 *Johnson*, 945 F.3d at 614.

convict the defendant of fraud. All the key elements of fraud appear to be proven at once, even if no pecuniary harm was intended: (1) there was a material misrepresentation; (2) there was "money or property" since the victim's right to control their asset is itself property; and (3) there was intent to harm since the defendant sought to deprive the victim of their right to control. The right to control "property" logically does the double-duty of satisfying the elements of property and intent to harm simultaneously as long as the lie was economically material.

It is not just jurors who are likely confused about how the elements are separate from each other. The complexity of this doctrine has led the courts themselves down disparate analytic paths. The *Finazzo* court collected the cases that construed the right to control as "being a question of fraudulent intent," and those that analyzed the theory under "the 'money or property' element."[205]

Separately, the courts have had to periodically remind themselves of the "subtle" or "fine" lines that they have had to draw in applying the theory. Thus, they have acknowledged a "subtle line" between the "question of whether a defendant's misrepresentation was capable of influencing a decisionmaker" (i.e., the standard for materiality), and the "requirement that that misrepresentation be capable of resulting in tangible harm" (i.e., the intent to harm standard), and that the two "should not be conflated."[206] There is also a "'fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid'—which do not violate the wire fraud statute—and those schemes that 'depend for their completion on a misrepresentation of an essential element of the bargain.'"[207]

Sorting through these distinctions is work suited for medieval scholastics, not lay jurors who are asked to conclude the factual distinctions unanimously and beyond a reasonable doubt. Even if seasoned lawyers and judges might be able to navigate the shoals successfully (a doubtful proposition), the risk of jurors getting lost in the maze of instructions and simply convicting on the basis of a material deception is indisputably high.

The theory's conflation of distinct elements is especially troubling in those cases where the government may not have needed to rely on the right to control theory at all. In *Gatto*, for example, the court affirmed the government's independent theory that the defendants schemed to deprive the university victims of scholarship money. Similarly, in *Wallach*, as discussed, the court affirmed the theory that

205 *Finazzo*, 850 F.3d at 107 n.15.

206 *Johnson*, 945 F.3d at 615 (citing *Finazzo*, 850 F.3d at 109 n.16).

207 *Id.* at 613 (quoting United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007)).

the defendants' deception deprived the corporate victim of $1.4 million in monies that were funneled to the coconspirators. Prosecutions involving financial institutions that extended loans also present a category of cases where they appear needlessly to rely on a right to control theory. For example, in *United States v. Dinome*, the government relied on a right to control theory as it "sought to prove [defendant's] fraudulent intent based upon the theory that [defendant] deprived Freehold Savings of information relevant to its decision whether it would extend him a loan; i.e., that he lied in order to deprive Freehold Savings of control over its own assets."[208] In rejecting the defendant's argument that the jury instruction on intent to harm was invalid, the court relied on evidence that the bank "would not make a loan to *any* applicant whose income did not constitute twenty-eight percent of the debt service on the mortgage."[209] In short, the defendant deceived the bank into giving him the bank's money without telling it about the potential risks to the bank. "The information withheld in this case significantly diminished 'the ultimate value of the [mortgage] transaction' to the bank as defined by its standard lending practices, whether or not a subsequent default ensued."[210] This surely satisfied both the benefit of the bargain and economic tests, and there appeared to be no need to resort to the idea that the bank's right to control its assets was itself property.

Similarly, in *Binday*, a case involving insurance policies, the government relied on a right to control theory, but, even as the court acknowledged the validity of that theory, it easily disposed of many of the defendant's arguments by applying traditional intent to harm analyses.[211] After reciting the well-established *Regent Office Supply* standard, and the evidence adduced at trial, the court concluded: "[T]he defendants knew that their misrepresentations induced the insurers to enter into economic transactions—ones that entailed considerable financial risk—without the benefit of accurate information about the applicant and the purpose of the policy."[212]

When, in addition to the benefit of the bargain or economic test, the jurors are told that right to control is itself property, whatever

208 86 F.3d 277, 283 (2d Cir. 1996).

209 *Id.* at 284.

210 *Id.* (internal citations omitted).

211 United States v. Binday, 804 F.3d 558, 569–71, 578–80 (2d Cir. 2015).

212 *Id.* at 579.

distinction the *Starr* court intended between mere deceit and criminality vanishes.[213]

3. A Theory Detached from Its Doctrinal Source

It is unclear how the Second Circuit reached this point. The only Second Circuit case to provide a detailed rationale for the right to control doctrine was *Wallach*, and no court has attempted to explain how that doctrine, which arose in the corporate fiduciary context, makes sense in arms-length transactions.

For example, *Johnson* asserts with now-typical certitude that "property interests protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets," citing to *United States v. Binday*.[214] *Binday*, in turn, relies on *United States v. Carlo*, for the same assertion.[215] *Carlo* claims: "Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets."[216] *Carlo* does not cite *Wallach* in support of this assertion and instead cites to *United States v. Walker*,[217] and footnote five in *United States v. Rossomando*,[218] neither of which explained the theory of property as the right to control. Instead, they are more concerned with the intent to harm element as explored in *Regent Office Supply* and its progeny, discussed *supra* Section II.B.2, which emerged before *Wallach* and the right to control theory. *Walker* merely recites, without explanation, the proposition that "[t]he second element [which is concrete harm] can also be satisfied when the defendant's scheme is intended to deprive its victims of 'the intangible right of honest services,' 18 U.S.C. § 1346, or of the right to control their own assets."[219] In support, *Walker* cites as authority *Rossomondo*'s discussion in

213 United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim.").

214 United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019) (quoting *Binday*, 804 F.3d at 570). Other Second Circuit cases decided in 2019 cite to the same cases in reciting the right to control theory. *See* United States v. Calderon, 944 F.3d 72, 88–89 (2d Cir. 2019); United States v. Lebedev, 932 F.3d 40, 48 (2d Cir. 2019).

215 *Binday*, 804 F.3d at 570 (quoting United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007)).

216 *Carlo*, 507 F.3d at 802.

217 191 F.3d 326, 335 (2d Cir. 1999).

218 144 F.3d 197, 201 n.5 (2d Cir. 1998).

219 *Walker*, 191 F.3d at 335.

footnote five and *United States v. Dinome*.[220] Like *Walker*, however, *Rossomando* offers no real discussion of the property element or the theory of right to control, other than taking it as a given. It too cites *Dinome* as "an example of a case in which the concrete harm contemplated by the defendant is to deny the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions."[221] But *Dinome* disappoints as well because it too sheds no greater light on the theory, merely citing to *United States v. D'Amato* as "quoting *Wallach*, 935 F.2d at 462–63."[222] Then, instead of examining the idea of right to control as a theory of property, the court turns to the materiality of the information that was deceptively withheld. Relying on *United States v. Mittelstaedt*,[223] discussed *supra* Section II.B.3, where the court required that "the information withheld either must be of some independent value or must bear on the ultimate value of the transaction,"[224] the *Dinome* court concluded that the jury instruction in that case was sufficient.

If *Dinome* does not illuminate the right to control theory outside the corporate/fiduciary context, one might have expected the case that both *Dinome* and *Walker* cited, *United States v. D'Amato*,[225] to do so. But *D'Amato* is also unhelpful because while it does cite *Wallach* extensively, it was a case that also involved deception in the corporate/fiduciary context. Thus, if anything, it reinforced the conclusion that the right to control doctrine is limited to that context.

Defendant D'Amato was an attorney who was hired to provide services for a public company but, at the instruction of a corporate manager, invoiced the company in a deceptive way to obscure the fact that the company sought access to the defendant's brother, Senator Alfonse D'Amato.[226] The Second Circuit reversed D'Amato's conviction because the government failed to establish an intent to defraud by showing intent to harm.[227] Not surprisingly, the government had relied heavily on the *Wallach* decision to ground their prosecution, but the court easily distinguished *Wallach* on the facts. First, it recounted *Wallach*'s theory of right to control[228] and said the property right was "defined by (i) state law concerning access to the company's books and

220 *Rossomando*, 144 F.3d at 201 n.5; United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996).

221 *Rossomando*, 144 F.3d at 201 n.5.

222 *Dinome*, 86 F.3d at 283.

223 31 F.3d 1208 (2d Cir. 1994).

224 *Id.* at 1217.

225 39 F.3d 1249 (2d Cir. 1994).

226 *Id.* at 1254.

227 *Id.* at 1256–60.

228 *Id.* at 1257.

records and the fiduciary obligations of management and (ii) the law of fraud concerning corporate information that is public."[229]

It then went on to hold that where the corporate manager directed the contractor defendant to engage in deceptive billing in order to help the company avoid the embarrassing publicity of seeking access to a senator and where the manager was not receiving any kickbacks or laboring under any other conflict of interest, one could not infer an intent to harm shareholders' right to control:

> [U]nconflicted business decisions of management are protected from shareholder challenge by the business judgment rule. A policy of concealment that is protected by the business judgment rule, therefore, does not deprive shareholders of anything useful, and those responsible for the inaccuracy cannot have intended to defraud shareholders.[230]

Thus, tracing the right to control doctrine from *Johnson* in 2019 leads to the *D'Amato* and *Wallach* decisions that confine the theory to the corporate/fiduciary context, with no case in between explaining how or why that doctrine can extend to arms-length commercial transactions.

There is yet one other case that promises an answer but also fails to deliver: *United States v. Finazzo*.[231] Unlike the *Binday* line of cases discussed above, *Finazzo* addressed the right to control theory, not from the perspective of the intent to harm element but more directly under the "property" element.[232] Defendant Finazzo was an executive for an apparel company, who essentially steered supply contracts to a supplier in exchange for a secret kickback to himself.[233] He was convicted after trial of mail and wire fraud on a right to control theory of fraud. On appeal, among other challenges,[234] he argued that the jury instructions on "right to control" were erroneous.

[229] *Id.* at 1258.

[230] *Id.* (citations omitted).

[231] 850 F.3d 94 (2d Cir. 2017). *Johnson* does cite this case for assertions related to the kinds of information necessary to infer intent to harm. *See* United States v. Johnson, 945 F.3d 606, 614, 615 (2d Cir. 2019).

[232] *Finazzo*, 850 F.3d at 107 n.15 (noting that prior case law had examined the theory under either the intent to harm element or that of property and that "this case is best understood as a question of whether Aéropostale's property rights were implicated. Therefore, we analyze it under the 'money or property' element, while still applying our decisions under the fraudulent-intent requirement.").

[233] *Id.* at 96.

[234] He also challenged the right to control theory of property on the grounds that the fraud statutes require that the protected "property" must be "obtainable" by the defendant from the victim. *Id.* at 105–06. As discussed *infra* Part IV, the Second Circuit rejected this argument, and, in light of *Kelly v. United States*, that portion of *Finazzo* may no longer be good law.

In rejecting the defendant's challenge, the court cited *Wallach*:

> We explained that application of the [right to control] theory is predicated on a showing that some person or entity has been deprived of potentially valuable economic information. Thus, the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution.[235]

The court then exhaustively examined the various Second Circuit cases subsequent to *Wallach* that stressed the importance of "potentially valuable economic information" as the key to the right to control "theory."[236] But notably absent from the discussion is any analysis of how or in what sense right to control assets becomes a "property" interest, or how that concept can apply when taken outside the context of a corporate shareholder who owns stock comprised of a "bundle" of legal rights including that of control and who is owed fiduciary duties by corporate managers.

Finazzo thus identifies *Wallach* as the source of the right to control doctrine, but just as in *Carlo*, *Binday*, and *Johnson*, the opinion fails to examine how that concept can transform from an incident of ownership into "property" or how the degree of economic value to the withheld information can add to or detract from the "propertyness" of the right to control when taken outside the corporate/fiduciary context.

***

For all its legal subtleties and complexity, the right to control doctrine is now firmly rooted in Second Circuit jurisprudence.[237] Some

---

235 *Finazzo*, 850 F.3d at 108 (internal citations and quotation marks omitted).

236 *Id.* at 108–13.

237 Two other recent Second Circuit cases, not discussed herein, similarly treat right to control as a given and affirm conviction on the basis that victims who were deprived of valuable information were harmed in their property right to control their assets. *See* United States v. Lebedev, 932 F.3d 40, 49 (2d Cir. 2019) (finding that defendant who disguised risky bitcoin company's transactions so that banks could process and approve them was guilty of fraud because he "deprived the financial institutions of the right to control their assets by misrepresenting potentially valuable economic information"); United States v. Calderon, 944 F.3d 72, 89 (2d Cir. 2019) (affirming fraud conviction of defendant who falsified letters of credit submitted to banks on right to control theory because the victim banks did not receive "'what they bargained for' because they bargained for [and did not receive] a set of documents that complied with the letters of credit and satisfied the USDA guarantee requirements").

circuits, like the Eighth,[238] Tenth,[239] and Fourth[240] Circuits, have similarly embraced the doctrine or variants of it. But others, like the Sixth[241] and Ninth[242] Circuits, appear to have rejected it. The Sixth Circuit called this property right to control "ethereal"[243] and, unlike the Second Circuit, declined to proceed down the increasingly complex lines of reasoning the doctrine requires. The Seventh Circuit,[244] like the Third Circuit,[245] has issued decisions that appear to go both ways.

Johnson pointed to this circuit split in his effort to get the Supreme Court to accept his certiorari petition.[246] The Court, however, declined to hear it,[247] and so participants in the criminal justice system are required to wait for another opportunity to learn the Court's judgment about the legitimacy of the right to control doctrine. Until then, we are

---

238 *See* United States v. Shyres, 898 F.2d 647, 652 (8th Cir. 1990) ("We determine that the right to control spending constitutes a property right. This position draws support from the Supreme Court's statement in *McNally* that there the jury instructions were flawed because the jury was not 'charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.'").

239 United States v. Welch, 327 F.3d 1081, 1108 (10th Cir. 2003) ("[W]e have recognized the intangible right to control one's property is a property interest within the purview of the mail and wire fraud statutes.").

240 United States v. Gray, 405 F.3d 227, 234 (4th Cir. 2005) (recognizing victim's "right to control the disposition of its assets").

241 United States v. Sadler, 750 F.3d 585, 591 (6th Cir. 2014) ("[The] right to control" is "not the kind of 'property' right[] safeguarded by the fraud statutes"; the fraud statute "is 'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description." (quoting McNally v. United States, 483 U.S. 350, 360 (1987))).

242 United States v. Bruchhausen, 977 F.2d 464, 468 (9th Cir. 1992) (reversing fraud conviction because "the interest of the [victim] manufacturers in seeing that the products they sold were not shipped to the Soviet Bloc in violation of federal law is not 'property' of the kind that Congress intended to reach in the wire fraud statute"); United States v. Lewis, 67 F.3d 225, 233 (9th Cir. 1995).

243 *Sadler*, 750 F.3d at 591.

244 *Compare* United States v. Catalfo, 64 F.3d 1070, 1077 (7th Cir. 1995) (recognizing victim's "right to control its risk of loss"), *with* United States v. Walters, 997 F.2d 1219, 1226 (7th Cir. 1993) (finding that a university's "right to control" who receives scholarships is not a cognizable property right under the fraud statutes: "[A] university that loses the benefits of [the] amateurism [of an athlete] . . . has been deprived only of an intangible right" not cognizable under the fraud statutes).

245 United States v. Zauber, 857 F.2d 137, 142 (3d Cir. 1988) (contrasting "[p]urely intangible rights" with "rights in intangibles which nevertheless constitute 'property'"); United States v. Henry, 29 F.3d 112, 113–14 (3d Cir. 1994) (affirming that under the mail and wire fraud statutes, property rights need not be tangible and can include intangible forms of property); United States v. Al Hedaithy, 392 F.3d 580, 603 (3d Cir. 2004) (distinguishing *Zauber* by stating that the deprivation of property in question related to the "right to *exclusive* use of [the] property," rather than the right to control its property in a manner different than the defendant).

246 Petition for Writ of Certiorari at 16–18, Johnson v. United States, 945 F.3d 606 (2d Cir. June 19, 2020) (No. 19-1412).

247 Johnson v. United States, 141 S. Ct. 687 (2020) *denying cert. to* 945 F.3d 606 (2d Cir. 2019).

left in the odd condition that, depending on where one is charged, a person engaged in identical conduct might either be found guilty of a federal crime (New York City) or not at all (Los Angeles), or maybe (Chicago).

IV. *WALTERS* AND *KELLY*: RETURNING THE FRAUD STATUTE TO THE BASICS

This intolerable ambiguity in a broadly applied federal criminal law cannot be remedied unless the Supreme Court steps in again, as it did in *McNally*, to restore the law to the core purposes of the fraud statutes. The Seventh Circuit's approach in *United States v. Walters*,[248] and that of the Supreme Court in *Kelly v. United States*,[249] offer a guide on how the judiciary may curtail the expansion of fraud law and reject the right to control theory of fraud.

A. United States v. Walters

The Seventh Circuit's straightforward analysis of fraud in *United States v. Walters* stands in stark contrast to the complex legal standards that have emerged in the Second Circuit after *Wallach*. Following just two years after *Wallach*, the *Walters* decision explained why the fraud statute is not violated unless the defendant's deceit was designed to wrongfully take a victim's money or property, and in so doing, dismissed the idea of right to control as a theory of property.

Walters was a consultant who used deceitful representations and processes to enable his client applicants to obtain or retain athletic scholarships at universities, in return for a fee. He was convicted of mail fraud on the theory that the universities were victimized by his conduct.[250]

A central question on appeal was whether the alleged victims, the universities, were deprived of any "money or property" by Walters's devious scheme. The court held they were, reasoning that the universities "lost their scholarship money [and that m]oney is property" within the meaning of the fraud statute.[251] Thus, it rejected Walters's argument that the schools lost no scholarship money because they "did

248 997 F.2d 1219 (7th Cir. 1993).

249 140 S. Ct. 1565 (2020).

250 *Walters,* 997 F.2d at 1221.

251 *Id.* at 1224.

not pay a penny more than they planned to do."[252] The court reasoned that had Walters's clients told the truth about their ineligibility, "the colleges would have stopped their scholarships, thus saving money. So we must assume that the universities lost property by reason of Walters' deeds."[253]

Yet, Walters could not be said to have committed criminal fraud because the universities "were not out of pocket *to Walters*; he planned to profit by taking a percentage of the players' professional incomes, not of their scholarships."[254] Quoting the mail fraud statute that prohibits "any scheme or artifice to defraud, or *for obtaining* money or property," the court asked, "If the universities were the victims, how did [Walters] 'obtain' their property?"[255] Answering this rhetorical question, the court rejected the government's contention that "neither an actual nor a potential transfer of property from the victim to the defendant is essential. It is enough that the victim lose; what (if anything) the schemer hopes to gain plays no role in the definition of the offense."[256]

As the court warned, "[A]ny theory that makes criminals of cheaters raises a red flag. Cheaters are not self-conscious champions of the public weal. They are in it for profit, as rapacious and mendacious as those who hope to collect monopoly rents."[257] The court found in the plain language of the mail fraud statute a requisite nexus between the scheming defendant and the victim's money or property: "'[A]ny scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' reads like a description of schemes to *get* money or property by fraud rather than methods of doing business that *incidentally* cause losses."[258]

Unlike the Second Circuit's contrary conclusion in *Finazzo*,[259] the *Walters* court held that the fraud statute requires proof that the defendant sought to obtain the victim's property. It found support in the Supreme Court's decision in *Tanner v. United States*,[260] "that [the conspiracy statute 18 U.S.C.] § 371 applies only when the United States is a '*target*' of the fraud; schemes that cause *indirect* losses do not violate that statute. *McNally* tells us that § 371 covers a broader range of frauds

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.* at 1225.

258 *Id.* (second emphasis added).

259 United States v. Finazzo, 850 F.3d 94, 105 (2d Cir. 2017) ("We . . . hold that the mail and wire fraud statutes do not require that the property involved in the fraud be 'obtainable.'").

260 483 U.S. 107, 130 (1987).

than does § 1341."[261] Hence, the court found, "[I]t follows that business plans causing incidental losses are not mail fraud."[262]

Moreover, the court addressed and rejected the government's belatedly "recast[]" theory of a "right to control."[263] The government had argued that Walters's scheme deprived the universities of "the benefits of amateurism," and thus "lost (and Walters gained) the 'right to control' who received the scholarships."[264] The court summarily rejected it as "an intangible rights theory once removed . . . because Walters was not the *universities' fiduciary*."[265] In this connection, the court cited, among other cases, to *United States v. Holzer*,[266] in which the Seventh Circuit had held that, in light of *McNally*, the honest services theory of fraud against a defendant state court judge who accepted bribes could not stand. The government's theory had been that the judge deprived the State of Illinois of its right to honest services from the judge and, in the principal appeal heard before *McNally*, the Seventh Circuit held:

> Fraud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud.[267]

The *Walters* court held that the government could not resort to this theory of fraud because unlike the defendant in *Holzer*, Walters had no fiduciary duty to the universities and thus could not be charged for having withheld material information.[268]

Walters offers a straightforward analysis that begins and ends with the question whether the defendant lied to commit what amounts to theft, a "design to separate the universities from their money."[269] If not, he could not be guilty of defrauding the universities, because "only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient

261 *Walters*, 997 F.2d at 1225–26 (emphasis added) (citing McNally v. United States, 483 U.S. 350, 358–59 n.8 (1987)).

262 *Id.* at 1226.

263 *Id.* at 1226 n.3.

264 *Id.* at 1226 & n.3.

265 *Id.* at 1226 n.3 (emphasis added).

266 840 F.2d 1343 (7th Cir. 1988).

267 United States v. Holzer, 816 F.2d 304, 307 (7th Cir. 1987).

268 *Walters*, 997 F.2d at 1226 n.3.

269 *Id.* at 1226.

condition of mail fraud. Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement."[270]

B. Kelly v. United States

The Supreme Court's most recent case construing the fraud statutes in *Kelly v. United States*[271] effectively endorsed the *Walters* approach, clearly emphasizing the elements of property and defendants' intent and goal to obtain that property. In some ways, it provides a bookend to the *McNally* decision issued thirty-four years before, as the Court attempted again to limit the reach of the fraud statutes to its core purpose.

The Court reversed fraud convictions of two former officials in the administration of Governor Chris Christie of New Jersey.[272] Angered by the refusal of the mayor of a local town, Fort Lee, to support Christie's bid for reelection, the defendants Baroni and Kelly caused the Port Authority agency to shut down various traffic lanes on arguably the busiest bridge in the nation, the George Washington Bridge.[273] Timed to occur during rush hour, the result was major disruption to Fort Lee commuters.[274] To effectuate this scheme, the defendants made a number of misrepresentations to the agency to justify the lane closings.[275]

The government charged the defendants, inter alia, with wire fraud; a jury convicted them after trial, and the Third Circuit affirmed the conviction.[276] While the government had proceeded in part on the theory that the Port Authority victim had been deprived of its right to control its traffic lanes, and the circuit approved that theory,[277] the

270 *Id.* at 1227.

271 140 S. Ct. 1565 (2020).

272 *Id.* at 1569.

273 *Id.* at 1569–70.

274 *Id.* at 1570.

275 *Id.* at 1569–70 (explaining that the defendants justified the lane change as part of a traffic study).

276 United States v. Baroni, 909 F.3d 550, 556 (3d Cir. 2018).

277 *Id.* at 566–67 ("[W]e recognize this traditional concept of property [i.e., right to control theory] provides an alternative basis upon which to conclude Defendants defrauded the Port Authority."). Citing Third Circuit precedent, the court noted that "[i]ncluded within the meaning of money or property is the victim's 'right to control' that money or property," and that the "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 567. The court went on to conclude that "Defendants invented a sham traffic study to usurp that exclusive interest, reallocating the flow of traffic and commandeering public employee time in a manner that made no economic or practical sense." *Id.* A review of the

government relied on a more standard theory of property in the Supreme Court, namely that the lane allocation and the employee wages that were diverted by the defendants' effort to sow chaos were the Port Authority "property" taken by the defendants.[278]

The Court thus did not have occasion to address the right to control theory, but as it turned out, even the more traditional theory of property fraud proved insufficient. In rejecting the government's theory, the Court emphasized throughout the opinion that the government "needed to prove *property* fraud."[279] The government "had to show not only that Baroni and Kelly engaged in deception, but that an 'object of the[ir] fraud [was] 'property.'"[280] Here, what the defendants wanted to achieve through their deception was to constrict traffic by reducing traffic lanes servicing Fort Lee, a "quintessential exercise of regulatory power" by the Port Authority, not a property right.[281]

Moreover, while "a public employee's paid time" is indeed a cognizable property interest, the defendants' "plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes."[282] For a scheme to fall within the proscription of the fraud statutes, the "property must play more than some bit part in a scheme: It must be an 'object of the fraud.' Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme."[283] This is true even if the "byproduct" property loss was necessary to the defendants' goal of effectuating a lane allocation change.[284] To rule otherwise would mean "the Federal Government could use the criminal law to enforce (its view of) integrity

government's brief in the Supreme Court reveals that it did not rely on this alternative basis for the Third Circuit's affirmance of the conviction. *See* Brief for the U.S. in Opposition, Kelly v. United States, 140 S. Ct. 1565 (2020) (No. 18-1059), 2019 WL 2153151. The government may have believed that the far surer footing for the conviction was the theory that the defendant deprived the Port Authority of actual money, in the form of employee wages that had been wasted on the lane diversion scheme, and that if it could not win on that theory, there was little chance of winning on the far more controversial theory that lane control was a separate property right protected by the fraud statute.

278 *Kelly*, 140 S. Ct. at 1572.

279 *Id.* at 1571.

280 *Id.* (quoting Cleveland v. United States, 531 U.S. 12, 26 (2000)).

281 *Id.* at 1572.

282 *Id.*

283 *Id.* at 1573 (internal citation omitted).

284 *Id.* at 1573–74. In so ruling, the Court rejected the Third Circuit's conclusion that "the Government presented evidence sufficient to prove Defendants violated the wire fraud statute by depriving the Port Authority of, at a minimum, its money in the form of public employee labor." United States v. Baroni, 909 F.3d 550, 562 (3d Cir. 2018).

in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome."[285]

In an implicit repudiation of the "moral uprightness" principle still in vogue at the Second Circuit, the Court stated: "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct."[286]

If this analysis sounds much like the Seventh Circuit's reasoning in *United States v. Walters*, it is no coincidence. The unanimous Court cited to *Walters* and a hypothetical *Walters* described to illustrate the absurdity of a government theory of fraud that would permit prosecutions even where the alleged victim suffered incidental pecuniary injury.[287]

C. *Will the Court Reject the Right to Control Theory?*

In light of this decision and *McNally*, when the right to control doctrine is addressed, the Court is likely to reject it. A conception of right to control, not as an incident of ownership, but rather a protected property in and of itself essentially nullifies the property requirement so important to both *Kelly* and *McNally*.[288] The *Kelly* Court's refusal to entertain analytic subtleties in an effort to support a fraud conviction follows the approach of the Court in *McNally* and *Cleveland v. United States*.[289]

Indeed, in its efforts to rein in prosecutorial theories, the Court has applied rather controversial reasoning. Thus, in *McNally*, the Court took pains to explain how the word "or" actually meant "and" so that the term "scheme to defraud" could not give rise to a crime independent of an effort to "obtain money or property." Justice Stevens's dissenting opinion understandably challenged this linguistic maneuver: "Until today it was also obvious that one could violate the first clause by devising a scheme or artifice to defraud, even though one did not violate

[285] *Kelly*, 140 S. Ct. at 1574.

[286] *Id.* at 1568.

[287] *Id.* at 1573 n.2 (citing United States v. Walters, 997 F.2d 1219, 1224 (7th Cir. 1993)).

[288] The "obtaining" requirement of course was also important to the *Walters* court and *Kelly* Court as they concluded the defendant's scheme did not seek to obtain "money or property" from the victims. This requirement, however, is unlikely to be the basis for rejecting the right to control theory since one could argue that defendants seek to obtain for their own use the right to control the underlying asset. The argument would flout common sense, but the theory itself crossed that Rubicon long ago, and the argument would be just another one of many abstractions inherent in the theory.

[289] 531 U.S. 12 (2000).

the second clause by seeking to obtain money or property from his victim through false pretenses."[290] Stevens also attributed a much broader purpose to the fraud statute and quoted with approval Jed Rakoff's law review article: "[W]here legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit."[291] But the majority rejected Stevens's grammar and his expansive view of the fraud statute's purpose.[292] Its insistence on the core element of property deprivation was reiterated decades later in *Kelly*, this time unanimously.

The Court's analysis in *Cleveland v. United States*, a precedent key to *Kelly*'s outcome, also suggests that the right to control theory will not survive the Court's scrutiny. As in *McNally*, the question in *Cleveland* centered on whether the target of defendant's scheme was "money or property" within the meaning of the fraud statutes. The scheme involved deceiving the State of Louisiana to issue the defendants video poker licenses, and thus presented the question "whether, for purposes of the federal mail fraud statute, a government regulator parts with 'property' when it issues a license."[293] The Court held that the State's interest was solely regulatory in nature and not a property interest.[294] While the State clearly had an interest in ensuring that gaming activities "are conducted honestly and are free from criminal and corruptive elements,"[295] and, moreover, "[w]ithout doubt, Louisiana has a substantial economic stake in the video poker industry,"[296] the State got paid what it was due. As the Court noted, "[T]here is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995. If Cleveland defrauded the State of 'property,' the nature of that property cannot be economic."[297]

Importantly, the Court expressly rejected a right to control argument: "[F]ar from composing an interest that has long been recognized as property, these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate."[298] Moreover, "[e]ven when tied to an expected

290 McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).

291 *Id.* at 374 (citing Rakoff, *supra* note 19, at 772–73).

292 *See supra* Section II.A.

293 *Cleveland*, 531 U.S. at 20.

294 *Id.*

295 *Id.* at 20–21 (quoting LA. STAT. ANN. § 27:306(A)(1) (2000)).

296 *Id.* at 22.

297 *Id.*

298 *Id.* at 23 (internal quotations and citation omitted).

stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. Such regulations are paradigmatic exercises of the States' traditional police powers."[299] It concluded with the statement that "§ 1341 requires the *object* of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under § 1341."[300]

Notwithstanding the foregoing, there remain some reasons to question whether the Court will so readily discard the right to control theory. First, in *McNally* itself, the Court observed:

> Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.[301]

The Second Circuit in *Wallach* cited to this language as it endorsed the right to control theory of protected property.[302] Whether and how the Court addresses this language remains to be seen. One outcome might be to discard it as mere dicta or to limit its relevance to the public agency fiduciary context.

In another case, *Pasquantino v. United States*,[303] in affirming the conviction of a defendant charged with defrauding Canada of tax revenues, the Court cited to Black's Law Dictionary defining "property" very broadly as "extend[ing] to every species of valuable right and interest."[304] Moreover, in *Shaw v. United States*,[305] the Court endorsed

---

299 *Id.*

300 *Id.* at 26–27 (emphasis added); *see also* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 402 (2003) (expressing skepticism, in the context of the Hobbs Act, about the "right to control" as a cognizable right under criminal law: "We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets.").

301 McNally v. United States, 483 U.S. 350, 360–61 (1987).

302 *See* United States v. Wallach, 935 F.2d 445, 462 (2d Cir. 1991); *see also* United States v. Shyres, 898 F.2d 647, 652 (8th Cir. 1990) ("We determine that the right to control spending constitutes a property right. This position draws support from the Supreme Court's statement in *McNally* that there the jury instructions were flawed because the jury was not 'charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.'").

303 544 U.S. 349 (2005).

304 *Id.* at 356 (citing *Property*, BLACK'S LAW DICTIONARY (4th ed. 1951)).

305 137 S. Ct. 462 (2016).

Judge Hand's language in *Rowe* that fraud can occur where the victim "has lost . . . his chance to bargain with the facts before him."[306]

These references, however, are isolated and fleeting. In contrast, *McNally*, *Cleveland*, and *Kelly* represent a consistent effort by the Court to limit the government's expansive reading of the fraud statutes. They portend a rejection of the right to control theory when the Court has occasion to address it.[307]

V. Aligning Fraud Prosecutions with Due Process Requirements

This course correction from the Supreme Court would ensure more than doctrinal integrity. If the fraud statutes are construed to apply only when a defendant intends to cause a victim pecuniary harm through material deceptions, it would bring the fraud law back in line with basic principles of justice and due process requirements because people generally understand that such intentional efforts to harm someone else are criminal in nature. As Professor Julie O'Sullivan put it, the constitutional protections are

> designed to allow the average citizen to operate securely in the knowledge that he is free to act as he wishes unless he steps over a clearly defined legal, not moral, line. There are many other social means by which those who cross moral lines can be held to account. Prosecutions are, and should be, reserved for those who cause criminal harm.
>
> To contend that that line ought to depend, instead, on prosecutors' views of the "morality" of a defendant's actions is a repudiation of the framers' wisdom.[308]

[306] *Id.* at 467 (quoting United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)).

[307] The ultimate impact of *Kelly* on the evolution of fraud law remains unclear. On the one hand, the Second Circuit easily distinguished *Kelly* in its decision upholding the conviction in *Gatto*, as it largely limited the *Kelly* decision to the facts of its case. United States v. Gatto, 986 F.3d 104, 116 n.4 (2d Cir. 2021). Inasmuch as *Kelly* was not presented with a right to control theory of fraud, the Second Circuit did not even mention the case as it reaffirmed the right to control theory, as discussed *supra* Section IV.B. The *Gatto* defendants are likely to seek certiorari. On the other hand, the Supreme Court relied on *Kelly* to remand to the Second Circuit the holding in *United States v. Blaszczak*, 947 F.3d 19, 45 (2d Cir. 2019), which concluded that confidential government information constituted protected property within the meaning of the fraud statutes. Blaszczak v. United States, 141 S. Ct. 1040 (2021). That matter is now pending in the Second Circuit.

[308] Julie Rose O'Sullivan, Skilling*: More Blind Monks Examining the Elephant*, 39 FORDHAM URB. L.J. 343, 360 (2011). Similarly, in the context of criticizing the honest services doctrine, Professor Coffee asked rhetorically: "What is wrong with such an approach," whereby courts

A. *Constitutional Demand for Notice*

The Supreme Court's robust due process jurisprudence supports O'Sullivan's contention: "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression."[309] The constitutional structure seeks to enhance liberty through a system of laws that enable rational decision-making with predictable outcomes. Vague statutes undermine this effort, as they cause people to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked,"[310] and to "restrict[] their conduct to that which is unquestionably safe."[311] That enfeebling condition is what the Framers sought to avoid.

The need for legal clarity, then, is not only to give notice of what one cannot do, but perhaps more importantly to permit a range of freedom to avidly engage in pursuits that are not forbidden, without fear of a moralizing Javert. Thus, the Constitution prohibits vague laws that enable discriminatory enforcement by "policemen, judges, and juries for resolution on an ad hoc and subjective basis."[312]

Yet, with each expansion of the fraud statute to capture still another form of "property" or "scheme," prosecutors and judges draw a new line of criminality, one that did not have the imprimatur of democratic consensus. In the end, prosecutors and judges "condem[n] all that [they] personally disapprove and for no better reason than that [they] disapprove it."[313]

---

impose their views of moral uprightness? *See* Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 207. He answered: "[A]s a matter of criminal law, this approach should be unacceptable, for several reasons. First, in traditional constitutional terms, it denies fair notice, invites arbitrary and discriminatory enforcement, and violates the separation of powers principle that has traditionally denied federal courts the power to make common law crimes." *Id.* Moreover, "[a]spirational standards imply that there will be shortfalls in performance, and this in turn means that to criminalize such a standard is to ignore the prudential constraint that criminal laws should be capable of even and general enforceability." *Id.*

309 Kolender v. Lawson, 461 U.S. 352, 357 (1983).

310 Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

311 *Id.*

312 Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

313 Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting).

B. *Notice of Wrongfulness Is Insufficient*

Prosecutors and courts that endorse the "moral uprightness" view of the fraud statutes may brush aside these notice concerns on the basis that lying about economically material facts is malum in se and construing the fraud statute to prohibit such plainly wrongful behavior should catch no one by surprise. The ancient common law principle that ignorance of the law is no excuse[314] originates from "a demand that every responsible member of the community understand and respect the community's moral values."[315] As former Judge Richard Posner put it in a different context: "When a defendant is morally culpable for failing to know or guess that he is violating *some* law . . . we rely on conscience to provide all the notice that is required."[316] Moreover, prosecutors would argue, any due process concerns are further allayed by the mens rea element of willfulness. In each fraud case, the prosecution must prove that the defendant knew what he was doing was illegal.[317] Hence, conviction of the innocent due to vague laws is avoided,[318] as "culpable intent," often proven through evidence of so-called "consciousness of wrongdoing," is the assurance of justice.[319]

The trouble with these responses is that moral rectitude is aspirational in nature and thus cannot provide any reliable guide for when conduct passes from mere immorality to criminality. As Professor Coffee reminds us, "Aspirational standards imply that there will be shortfalls in performance, and this in turn means that to criminalize

314 For a description of historical and theoretic sources of the doctrine *ignorantia legis non excusat*, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 350–61 (1998).

315 *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 419 (1958).

316 United States v. Wilson, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, C.J., dissenting).

317 LEONARD SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS & NANCY BATTERMAN, 2 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 44.01 (2021) ("'Willfully' means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.").

318 *See, e.g.*, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (finding that the statute's "requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]" in new or unexpected circumstances is unjust); United States v. O'Hagan, 521 U.S. 642, 665–66 (1997) (reaching same conclusion in approving misappropriation theory under securities anti-fraud law).

319 For a detailed examination of this trend and its causes and problems, see Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 L. & CONTEMP. PROBS. 133, 150–51 (2012) (noting that consciousness of wrongdoing "could . . . make headway on the central problem of disentangling criminal behaviors in financial and market settings from their often benign background settings").

such a standard is to ignore the prudential constraint that criminal laws should be capable of even and general enforceability."[320] Put another way, if failure to meet the aspirational standards of moral rectitude were a crime, all but the most saintly would be wholly at the mercy of federal prosecutors and their potentially arbitrary decision to charge or not.

As for the argument that the "willfulness" element provides a safeguard against unjust convictions, it is, in practice, virtually useless in defending against a fraud charge. The jury is instructed that the element requires proof that the defendant knew what he or she was doing was "illegal."[321] Every deception (other than the whitest of lies) is in some sense immoral and understood to be wrong. Thus, the same evidence of deception to support a fraud charge doubles as evidence of willfulness, because any competent prosecutor inevitably begins and ends his or her jury presentation with a simple and compelling moral narrative about a privileged defendant who was greedy, cheated, and lied to steal from someone else. It is all too easy to argue, "Of course the defendant knew he was breaking the law." The prosecutor supports his or her narrative with some evidence that the defendant engaged in secretive behavior, commonly characterized as "consciousness of guilt,"[322] and jurors generally accept the narrative on the basis of such evidence,[323] because of their "tendency to overweigh indicators of moral failing[s]."[324] Against this narrative, the defense will rarely resort to the argument he knew it was wrong to lie but not illegal to do so. It is a singularly unpersuasive (though sometimes true) assertion. Most jurors, then, have little trouble concluding that the defendant must have understood his or her conduct was both wrong and illegal. Given these realities, treating the willfulness element as any safeguard from improper convictions for fraud is misplaced.

The clearest proof of this, of course, is the regularity with which fraud convictions are overturned on appeal. All the defendants in *Kelly* and the other cases in which the Supreme Court reversed the

---

320 Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 207.

321 SAND, SIFFERT, LOUGHLIN, REISS & BATTERMAN, *supra* note 317, at ¶ 44.01.

322 The term was perhaps first coined by Professor Wigmore. *See* JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 544 (2d ed. 1923).

323 *See* Buell & Griffin, *supra* note 319, at 158 ("[J]urors' basic competence at determining 'what happened' is tested in close cases with ambiguous evidence and amorphous legal standards—as fraud and obstruction cases tend to be. A coherent narrative in these cases is not necessarily a correct one. What makes it coherent is that it accords with expectations about how people usually act."); *id.* at 166 ("The use of stock narratives and the tendency to overweigh indicators of moral failings are risks that could render a consciousness of wrongdoing standard too error-prone to perform its potentially beneficial function.").

324 *Id.* at 166.

convictions were convicted because the jury concluded each of the elements, including willfulness, was proven. As Justice Owen Roberts observed decades ago:

> "Willfully" doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done "willfully." It is true also of a statute that it cannot lift itself up by its bootstraps.[325]

It is, then, mistaken to suggest that the wrongfulness of lies satisfies the Due Process Clause by notifying the perpetrator that he is about to commit a crime. As the First Circuit put it, the problem with the fraud statutes is that they can be "used to prosecute kinds of behavior that, albeit offensive to the morals or aesthetics of federal prosecutors, cannot reasonably be expected by the instigators to form the basis of a federal felony."[326]

C. *The Harm to Our Conceptions of Justice*

The continued expansion of theories of criminality catches citizens by surprise and affects permanent harm to persons who might have been deterred from the conduct had they received true notice of the law. In so doing, our criminal justice system as a whole is impaired as well.

On the whole, successful businesspeople typically are individuals who navigate social rules and who, while capable of taking risks, also appreciate that criminal consequences might be too high a cost. Federal prosecutors embrace this view: "[O]ne of the principal assumptions about the white-collar criminal is that he is calculating and therefore highly deterrable."[327] But this is only true if they are aware their conduct could lead to felony indictments with all the consequences that flow from such charges, including personal and financial ruin. The problem with prosecutors' expansive theories is that they move the criminal line, catching their targets by surprise. This, then, becomes an exercise not in criminal deterrence but retribution for moral infractions.

---

325 Screws v. United States, 325 U.S. 91, 154 (1945) (Roberts, J., dissenting).

326 United States v. Czubinski, 106 F.3d 1069, 1079 (1st Cir. 1997).

327 EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 97 (2016) (quoting former Department of Justice's fraud section chief). Professor Soltes questions this premise as he describes the various social, psychological, and other factors that can lead to conduct that was more intuitive than calculated. The implications of this assertion on the legitimacy of any criminal conviction and punishment are broad and well beyond the scope of this Article.

Take for example one of the defendants in *Kelly*, the New Jersey official who thought it appropriate to divert traffic to punish a local mayor. A Google search reveals that William Baroni was a successful, highly respected attorney and law professor who reportedly taught professional responsibility among other subjects.[328] The notion that such a person would have participated in this stunningly petty activity knowing that he could be charged with a federal crime and put his name, his family's reputation, and his liberty at risk, seems implausible. There was no evidence of any personal benefit to him that would have led him to calculate that the rewards of engaging in the activity was worth the risk of criminal indictment. To be sure, as the Supreme Court found, the conduct he engaged in was unseemly and wrong, but all objective factors suggest that prior notice the conduct would be deemed criminal might have led Baroni to a different decision altogether.

Johnson, the former global head of trading for a major bank's foreign exchange, presents another example. Distilled to its core, the case was about lying to a customer about how big a profit the bank (not he) would make on a trading strategy that, by the express terms of their contract, he was not prohibited from using. Had he understood that that lie would nevertheless subject him to criminal prosecution, it would be odd to conclude he knowingly risked indictment. Yet, even though the alleged victim institution got the services for which it contracted and apparently could not quantify any loss from the bank's aggressive trading, Johnson's extremely successful career and personal life, as he and his family knew it, are now over.[329]

The unnecessary infliction of such severe consequences is unduly harsh even for one whose conviction on a novel theory is never overturned. But it is especially cruel for the defendant who, like Baroni, was prosecuted for conduct that was deemed noncriminal. Writing about the fatally vague honest services doctrine in the fraud statutes, Professor O'Sullivan remarked:

> Hundreds if not thousands of individuals have been subjected to investigations and prosecutions and jail time for conduct that we know, only after the Court belatedly ruled in *McNally* and now *Skilling*, was not in fact criminal.
>
> These investigations and trials are humiliating and often financially disastrous: homes lost and savings ravaged. Such prosecutions are

[328] *Deputy Executive Director: Bill Baroni*, URB. LAND INST. N. N.J., https://ulidigitalmarketing.blob.core.windows.net/ulidcnc/2013/04/Baroni-Bio.pdf [https://perma.cc/S2LJ-B6BC].

[329] Johnson was sentenced to twenty-four months in prison and ordered to pay a fine of $300,000. United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019), *aff'g* No. 16-CR-457-1, 2018 U.S. Dist. LEXIS 71257 (Apr. 27, 2018).

> inevitably highly stressful: they can tear apart families and traumatize the defendant's children. The defendants usually lose their jobs and, not infrequently, their livelihood by virtue of the stigma and collateral consequences of a conviction. . . . It is cold comfort to these defendants—and should be a real scandal—that the Supreme Court, years after their convictions, can say that we were all wrong in believing that the statute covered such conduct.[330]

Apart from the obvious (though often ignored) toll on individual human lives, these surprising prosecutions lead to systemic harms as well. First, the uncertainty of the criminal law degrades respect for it. There is no realistic prospect that people will suddenly become honest en masse, when they feel the criminal laws are uncertain.[331] Instead, they are more likely to treat the criminal law like any tort law, a cost of doing business, as they weigh the sliding scale of risks against the reward. In his study of the deleterious expansion of the honest services doctrine into something that resembles tort liability, Professor Coffee explained that tort law tells us how far we may go at our own risk, while the criminal law is supposed to function as a clear prohibition that commands us to "halt."[332] If it loses that character, the deterrent force of criminal law will be undermined. Even back in 1980, then-prosecutor Jed Rakoff understood the dangers as he warned, if "a substantial element of outright irrationality creeps into the design or interpretation of a criminal statute, an added and more deep-seated difficulty arises: by becoming unfathomable, even to initiates, it ultimately ceases to command any moral force."[333] Yet, when he penned these words, the expansion was still in its early stages. The threat of diluting the moral force of the criminal laws is far greater today.

An alternative and equally deleterious outcome, depending on the risk appetite of the market participant, is an undue terror of criminal prosecution, not a contempt for it. This is perhaps an even worse

330 O'Sullivan, *supra* note 308, at 358.

331 It is accepted among scientists that learning the skills of deception is a typical part of child development. *See* Marjorie Rhodes, *When Children Begin to Lie, There's Actually a Positive Takeaway*, NPR (Oct. 2, 2017, 10:11 AM), https://www.npr.org/sections/13.7/2017/10/02/552860553/when-children-begin-to-lie-theres-actually-a-positive-takeaway [https://perma.cc/Z3R7-NUFL]. *The New York Times* recently reported that, in a randomized experiment performed on 180 adults where a correct answer would reward the participants a mere five dollars, only twenty percent told the truth. The other eighty percent fell in one of three categories of deceiver: (1) they "flat-out lied," (2) they were "radically dishonest," or (3) they were "cheating non-liars," meaning they cheated in the game to avoid having to lie. *See* Benedict Carey, *The Good, the Bad and the 'Radically Dishonest,'* N.Y. TIMES (Sept. 15, 2020) https://www.nytimes.com/2020/09/15/science/psychology-dishonesty-lying-cheating.html [https://perma.cc/98Z8-HQXA].

332 Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 208.

333 Rakoff, *supra* note 19, at 779.

condition for our society for it would devolve into one the Supreme Court warned about decades ago, where citizens would "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[334] They may decline to participate in the marketplace altogether. After all, they would need to worry not only about their personal conduct but that of their colleagues and foreign counterparts on global transactions; words can be easily misconstrued and later deemed sufficient to charge as a conspiracy.

In such conditions, the more risk tolerant participants in the economy might engage in risk analysis with little regard for the moral force of the criminal laws, while the less risk tolerant will leave the field altogether. A third outcome—the expectation that an ominous equivalence between honesty and criminality will eradicate dishonesty in the business community in this competitive global economy—is wholly unrealistic and even utopic. Notwithstanding decades-long, continued expansion of criminality, with ever more spectacular falls of business titans sentenced to ever-increasing terms of imprisonment,[335] there is no evidence that the financial community is any more honest than it was in bygone eras.

Yet another harmful effect of the current trend is that it undermines public confidence in the courts' ability to secure justice. The unresolved struggles with the honest services doctrine, the division among the circuits about the right to control doctrine, the divisions among judges within the same circuit about what constitutes a crime, have been a feature of federal fraud prosecutions for decades. Each time the Supreme Court sweeps aside years of investigation, trial, conviction, and appellate rigor to declare a prosecution completely wrong about something as elemental as whether a crime was committed, the system suffers. Scholars, practitioners, judges, and even the prosecutors and investigating agents themselves are left uncertain. The sense of systemic disarray and doctrinal incoherence is inescapable.

In rejecting the "moral uprightness" language of *Gregory*, the Seventh Circuit in *United States v. Holzer*[336] feared that such a broad definition of fraud "would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by

---

334 Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

335 *See* SOLTES, *supra* note 327, at 17–44; *id.* at 42 (summarizing the decades-long progression of white-collar prosecutions, including research showing that a defendant convicted of inflating earnings and causing $12.5 million loss would have had a recommended prison sentence of 30–37 months in 1987, but by 2003, the same crime would have resulted in recommendation of 151–88 months, "a quintupling of penalties").

336 816 F.2d 304 (7th Cir. 1987).

statute."[337] This is a fear that courts periodically raise as improper derogation of legislative power, but as Professor Richman exhaustively explains, the entire federal criminal justice system has long been rife with examples of judicial rulemaking.[338] The question, thus, is not whether courts will continue to define the limits of fraud—they inevitably will—it is whether they will begin to constrain the law's reach to punish only those who engaged in theft-through-lies.

CONCLUSION

The Supreme Court can return the scope of fraud statutes to their intended purpose. One would have thought that the Court spoke clearly to this purpose in *United States v. Kelly*, but it can reinforce the point by accepting a case that squarely presents the right to control theory and rejecting the doctrine as one that improperly permits convictions based on material deception alone.

337 *Id.* at 309; *see also* United States v. Weimert, 819 F.3d 351, 357 (7th Cir. 2016) ("Not all conduct that strikes a court as sharp dealing or unethical conduct is a scheme or artifice to defraud." (internal quotations and citation omitted)).

338 For a recent description of judicial rulemaking, see Richman, *supra* note 17, at 10–24.

WHITE COLLAR PROGRAM BIOS 2022

Guest Speaker:

Milton L. Williams is a partner with Walden Macht & Haran LLP, a former federal prosecutor, and a former deputy general counsel with deep experience in white collar criminal and regulatory matters, employment law, litigation, and advisory work representing corporations in addition to complex commercial litigation. In the course of his distinguished career, he has tried more than 56 cases – both civil and criminal – to verdict. Prior to joining WMH, Milt was a partner at a nationally recognized law firm, where he handled white collar matters. He also litigated discrimination claims, restrictive covenant, Dodd-Frank, and Sarbanes-Oxley retaliation claims, as well as Securities and Exchange Commission (SEC) and Internal Revenue Service (IRS) whistleblower claims on behalf of employees.

Milt brings to his practice substantial experience in public corruption matters. In 2013, Milt was appointed co-chair of the Moreland Commission to investigate public corruption. In 2018, he led the trial team that successfully defended a corporate client in the "Buffalo Billion cases," a high-profile public corruption case in the Southern District of New York (SDNY). They won the only acquittal in this highly contested and publicized four-defendant trial.

Previously, Milt served as Deputy General Counsel and Chief Compliance Officer at Time Inc., where his responsibilities included internal investigations, compliance, the Foreign Corrupt Practices Act (FCPA), the Office of Foreign Assets Control (OFAC), and Sarbanes-Oxley, as well as intellectual property, privacy, data security, and other cutting-edge areas. At Time, Inc., Milt litigated a variety of employment law matters on behalf of the company concerning race, age, disability, and gender discrimination; restrictive covenants; and independent contractor litigation.

Earlier in his career, Milt was an Assistant U.S. Attorney in the U.S. Attorney's Office (USAO) for the SDNY. His last assigned unit in the USAO was the Securities and Commodities Fraud Force. Milt also served as an Assistant District Attorney in the Manhattan District Attorney's Office. He is a 1983 graduate of Amherst College, and received his law degree from the University of Michigan in 1986.

Milt has received many recognitions and honors for his work, including Notable Diverse Leader in Law, Crain's New York Business (2022); Distinguished Leader, New York Law Journal (2020); Litigation Trailblazer, The National Law Journal (2020); National Practice Area Star and Local Litigation Star, General Commercial Litigation, Intellectual Property, and White Collar Crime, Benchmark Litigation (2021, 2022); Labor and Employment Star, Benchmark Litigation (2019-2021); and 500 Leading Lawyers in America, Lawdragon (2019-2022).

NY American Inn of Court 2022 White Collar Team

Laurie Brecher is a litigator who focused her practice on white-collar criminal and regulatory enforcement defense and prosecutions, internal investigations, and complex federal and state civil litigation. She served for a decade as an AUSA in the Criminal Division of the U.S. Attorney's Office for the Southern District of NY, holding several positions, including Chief of the General Crimes Unit and Senior Trial Counsel of the Securities & Commodities Fraud Task Force. After her government service, Laurie was Deputy General Counsel, Litigation & Regulatory for Pitney Bowes, Inc. Prior to her government service, she was a litigation associate at Cravath, Swaine & Moore, and Howard, Darby & Levin. (now Covington & Burling). She was also honored to have served as a law clerk to the Hon. Jon O. Newman, U.S. Court of Appeals for the Second Circuit. Laurie earned her law degree with highest honors from New York University School of Law (1983), where she was the Senior Articles Editor of the *NYU Law Review.* She received her undergraduate degree, *summa cum laude*, from Union College in 1980, where she was elected to *Phi Beta Kappa.* She has been active in the NY City Bar Assn. (former member of International Law and Judiciary Committees) and the ABA (former Chair of Criminal Litigation Committee and former Division Director for the Litigation Section). She has been a member of the Inn's White Collar Team for 10 years, having served as a co-leader for 5 years. Among her public service commitments, she is a college coach for Yonkers Partners in Education, a former board and founding member of Friends of Chappaqua Performing Arts Center, and a member of the Legal Advisory Council for Sanctuary for Families.

Evan Brustein is the founder of Brustein Law PLLC, where he represents individuals who have had their civil rights violated by their employers, the police, or other institutions. Prior to entering private practice, Evan served as Senior Counsel in the New York City Law Department's Special Federal Litigation Division, where he defended Section 1983 cases in the Southern and Eastern Districts of New York. The New York City Bar Association awarded Evan the Municipal Affairs Award for outstanding achievement for his work representing the City of New York. Evan has also been honored by the New York City Law Department with the Division Chief Awards for both the Special Federal Litigation Division and the Family Court Division. In his spare time, Evan coaches the Brooklyn Latin School Mock Trial team.

Jasmine Chean is an attorney in Holland & Knight's New York office, where she focuses her practice on commercial litigation and white collar defense and investigations. Within the firm, she is among the coordinators for the Women's Initiative and a liaison for the associates committee. Prior to joining the firm, Jasmine clerked for the Honorable Vera M. Scanlon of the U.S. District Court for the Eastern District of New York. She is a cum laude graduate of Fordham University School of Law, and received her B.A. in Economics and Philosophy from Columbia University. While in law school, she was senior notes editor for the *Fordham Journal of Corporate and Financial Law*, an associate editor of the Fordham Law Moot Court Board, and a competitor of the Fordham Law Dispute Resolution Society. At Fordham, she was also part of the Consumer Litigation Clinic and a volunteer lawyer in the New York City Civil Court, where she represented clients in cases involving deceptive and unfair trade practices. In addition, she was a judicial intern in the U.S. District Court for the Southern District of New York.

Brian S. Choi is a partner at Kasowitz Benson Torres, where his practice focuses on complex commercial litigation and white collar defense and investigations. He has represented companies, boards of directors, and individuals under investigation by the United States Department of Justice, the Securities Exchange Commission, and other regulatory enforcement agencies. He also has significant experience representing clients in a broad spectrum of commercial litigation matters in federal and state courts, including securities fraud, antitrust and breach of contract cases. Brian has been recognized on Benchmark Litigation's 40 & Under Hot List. Prior to joining the firm, Brian clerked for the Honorable William H. Pauley III in the Southern District of New York. Brian is a 2011 cum laude graduate of Duke University School of Law, and he received his B.A. with distinction from University of Michigan in 2008.

Glenn Colton is a partner in the White Collar and Government Investigations practice at ArentFox Schiff. He represents individuals, companies, and boards of directors in white collar criminal and civil enforcement investigations. Glenn previously served for nearly 10 years as an Assistant United States Attorney in both the civil and criminal divisions in the Southern District of New York. In that capacity, he was lead or co-lead trial counsel in approximately 25 trials, and all but one ended in conviction, government verdict (in civil cases) or resolution on terms favorable to the government. He has served as an instructor at the FBI Academy at Quantico, the US DOJ National Advocacy Center, and the National Institute of Trial Advocacy. Glenn frequently is called upon to provide expert legal analysis to a wide variety of publications and media outlets, including *The New York Times*, *The Wall Street Journal*, *The National Law Journal*, TruTV, CNBC, CBS Radio, Law360, The Street.com, Reuters.com, and The Deal.com. In addition to his law practice, Glenn is a sports radio host on SiriusXM, and one of approximately 20 members of the Fantasy Sports and Gaming Association Hall of Fame, in large part for his work on the save-the-industry litigation. He received his Bachelor of Science degree, *summa cum laude*, from SUNY-Binghamton, and his J.D. degree from the New York University School of Law.

Mary Diaz is an associate at Walden Macht & Haran LLP where she focuses on white collar defense and investigations. She is a member of the Federal Bar Council, Hispanic National Bar Association, and the Cafecitos Network, and enjoys international travel, cooking, and running during her free time. After graduating from Wesleyan University with a Bachelor of Arts degree in Government in 2014, Mary earned her Juris Doctor from Fordham University School of Law in 2020. While at Fordham Law she was a member of the Fordham Moot Court, Environmental Law Review, Stein Scholars for Public Interest, LALSA, Fordham Law Advocates for Voter Rights, and held internships at the U.S. Securities and Exchange Commission and Department of Justice. Prior to law school, Mary spent three years as a paralegal at the U.S. Attorney's Office for the Southern District of New York in the Securities and Commodities Fraud Unit.

Harry Dixon is a Vice President for Global Exam and Audit Management in the Global Financial Crimes Division of MUFG Bank, Ltd. In this role, he provides reporting, advisory, and oversight to regulatory exams and internal audits across MUFG's global regions in Japan, EMEA, APAC, and the Americas, with a special focus in the Americas. He previously served as a Vice President for Policy Governance and Regulatory Change Management at MUFG from 2019 to earlier this year. In that role, he and subject matter experts developed and managed policy documentation in anti-money laundering, economic sanctions, anti-bribery and corruption, and bank operations

related to financial crimes compliance. He is active on MUFG's Pro Bono Council, and he is a graduate of Leadership New York. He joined the New York American Inn of Court in August 2021. Before moving to New York in 2019, Harry practiced law for almost six years in his home state of Georgia, where he focused on commercial litigation and white-collar criminal defense. He also served as the co-Chair to the American Bar Association's International Anti-Money Laundering Committee; was elected as a Fellow of the American Bar Foundation; and graduated from the State Bar of Georgia's Young Lawyers Division Leadership Academy. He is licensed to practice in both New York and Georgia, and he graduated from the University of Georgia Honors Program and the University of Georgia School of Law, where he served as an Articles Editor on the Journal of Intellectual Property Law.

Milosz Gudzowski is a Trial Attorney at the Department of Justice – Antitrust Division. Milosz has been at the Antitrust Division for ten years and has prosecuted both criminal and civil antitrust matters in a variety of industries, including construction, municipal contracting, airlines, telecommunications, and automotive. Milosz likes to play tennis and lives on the upper east side in Manhattan.

Jeffrey Gross is a partner in the New York office of Reid Collins & Tsai LLP. Jeff has represented clients in a wide variety of high-stakes, complex commercial litigation through trial. He appears in federal and state courts and arbitrations across the country representing plaintiffs in professional-liability litigation, including legal and audit malpractice, financial-fraud-based litigation, and insolvency-related disputes. Jeff received his J.D. from the University of Pennsylvania Law School, where he was an Arthur Littleton Legal Writing Instructor. He is a Phi Beta Kappa graduate of the University of Virginia, where he was an Echols Scholar.

Diana Haladey is happy to be celebrating her 16th anniversary on the White Collar Team, serving as co-leader for 11 years, and winning two national American Inns of Court Outstanding Program awards (for Insider Trading Under the Microscope and Orange is the New Varsity Blue – From Bribe Agreement to Plea Agreement). She was previously at White & Case LLP, and interned at the U.S. Attorney's Office EDNY Civil Division. She went to Fordham University School of Law where she won best oralist in the first-year moot court competition and competed on the Jessup International Law and National Moot Court teams. She received an A.B. in English from Dartmouth College where she co-captained the women's rugby club. She loves being part of a team and wishes to thank all her White Collar teammates over the years.

Meredith Jones is General Counsel of New York City Economic Development Corporation. NYCEDC's mission is to create shared prosperity across the City's five boroughs by strengthening neighborhoods and growing good jobs. It is the City's official economic development corporation. Before joining NYCEDC, she was a transactional lawyer in Palo Alto, California. Prior thereto, she served as Chief of the Cable Services Bureau of the Federal Communication Commission in Washington, D.C., involved in multichannel video and telecom competition issues. Before joining the FCC, she was General Counsel to the National Oceanic and Atmospheric Administration in Washington, D.C., which includes the National Weather Service and is the nation's trustee for marine mammals and anadromous fish and the lead agency for oceanic and atmospheric issues. She was a member of the legal team of the Bechtel group of companies in San Francisco, California and was a partner in a San Francisco law firm. Meredith began her legal career in NY City.

Russell L. Lippman is Deputy General Counsel, Litigation at American International Group, Inc. ("AIG") in New York, NY. As part of his role, Russell leads the litigation function for several different AIG business units including the corporate parent, Investments, and Life & Retirement segments. Russell is also responsible for managing coverage litigation arising out of AIG's Personal and Financial Lines General Insurance businesses. During his tenure at AIG, Russell has litigated numerous high-profile matters including shareholder class actions against AIG arising out of public disclosures during the 2007-08 financial crisis; AIG's RMBS disputes with certain counterparties; consumer class action and contract disputes arising out of AIG's property and casualty and life insurance business; and coverage disputes with insured clients. Prior to joining AIG in 2011, Russell worked as a litigator at Ropes & Gray LLP and Davis Polk & Wardwell LLP, where he specialized in securities litigation, complex commercial disputes and white collar defense.

Walter Ricciardi is a partner at Paul, Weiss and has extensive experience defending a broad variety of investigations conducted by the U.S. Securities and Exchange Commission, the Public Company Accounting Oversight Board and other regulatory authorities. He also has conducted several internal investigations for public companies and audit committees, including investigations related to allegations of accounting and financial fraud. Walter is recognized as a leading individual for Securities Regulation: Enforcement in *Chambers USA* (2013-2022), where clients report he is "terrific and well placed to deal with challenging matters" and "brings a wealth of experience." He also is recognized for Financial Services: Litigation by The *Legal 500 US* (2017), his peers in *U.S. News & World Report/"Best Lawyers"* (2011-2019) for Corporate Governance Law, Litigation - Securities and Securities Regulation and was selected to *Securities Docket*'s 2013 "Enforcement 40" list, a list of the best and brightest securities enforcement defense lawyers. He served as a note and comment editor of the *New York University Law Review.*

Walter was appointed and served a three-year term from 2012 to 2014, on the Public Company Accounting Oversight Board's Standing Advisory Group ("SAG"). The role of the SAG is to assist the Board in reviewing existing auditing and related professional practice standards and evaluating proposed standards, and to recommend to the Board new or amended standards. He was a member of the Independent Standards Council of the Sustainability Accounting Standards Board ("SASB") which oversees the development of SASB's sustainability accounting standards from January 2015 to March 2016.

Prior to joining Paul, Weiss in June 2008, Walter was the Deputy Director of the SEC's Division of Enforcement, where he supervised many of the Commission's most significant investigations related to financial fraud, insider trading, investment advisers and broker-dealers. Upon his departure from the SEC, the Commission's chairman stated that "Walter Ricciardi, as much as anyone in the Commission's modern history, has professionalized the management of the SEC's enforcement program." *The Wall Street Journal* reported that his departure from the SEC was a "blow to the enforcement program - he has won the affections of the staff and has boosted morale." Prior to joining the SEC, Walter spent 20 years with PricewaterhouseCoopers and its predecessor, Coopers & Lybrand, where he was in charge of defending the firm's litigation and regulatory matters. While at PwC, he was elected by his partners to serve on the firm's board, which is responsible for overseeing the management of the firm. He was also elected by the partners to

serve on the Global Oversight Board of the PwC global organization.

Walter lectures and writes extensively on securities litigation and regulatory issues. As an Adjunct Professor at New York University School of Law, he teaches a seminar on issues in SEC enforcement.

Jared M. Rosen is an Assistant District Attorney with the Bronx District Attorney's Office. As an ADA with the Public Integrity Bureau, he is involved in the prosecution and investigation of corruption committed by public servants, including government employees, and appointed and elected officials, as well as excessive uses of force and misconduct by police officers. He was formerly in the Rikers Island Prosecution Bureau, where he was involved in the investigation and prosecution of criminal activity in New York City jails, including gang assaults and contraband smuggling. Previously, Mr. Rosen was an Executive Agency Counsel and the Market Manager at the Business Integrity Commission, an agency tasked with eliminating organized crime influence, anti-competitive practices and corruption from New York City's trade-waste industry and public wholesale markets. Prior to this, Jared was an Assistant Counsel at the Waterfront Commission of New York Harbor, a bi-state agency created to eliminate corruption and unfair hiring practices in the Port of New York/New Jersey. Jared graduated from Cornell University with a B.S. in Industrial & Labor Relations and received his law degree from Brooklyn Law School.

Brian Steinwascher is Special Assistant Attorney General for the State of New York in the Medicaid Fraud Control Unit, where he investigates, prosecutes, and brings civil enforcement actions against, New York State health care providers for abuse of the state Medicaid Program. He also works alongside federal prosecutors and private qui tam relators in false claims act matters involving Medicaid and Medicare fraud. Before that, Brian was an associate at Thompson Hine LLP's New York office, where he split his practice between business litigation and white-collar criminal defense. Brian has been involved in a wide variety of cases and proceedings, from complex international arbitration to federal bank fraud trials, and most recently focusing on health care fraud. Brian also has been a Professor of Lawyering and Legal Writing at his alma mater, Benjamin N. Cardozo School of Law, but is currently taking a break from teaching future lawyers to raise and teach his young daughter.

Steven Tugander is the Acting Assistant Chief in the New York Office of the United States Justice Department's Antitrust Division and has investigated and prosecuted numerous criminal antitrust cases affecting various industries in jurisdictions located throughout the Northeast. In 2017 and 2018, Mr. Tugander served as the Antitrust Division's Criminal Special Projects Coordinator, reporting directly to the Deputy Assistant Attorney General and the Director of Criminal Enforcement. Mr. Tugander has served on the Executive Committee of the New York State Bar Association's Antitrust Law Section since January 2000. He served as Chair of the Section from January 2005 through January 2006, having previously served as Vice-Chair and Secretary of the Section. In addition, he also currently serves on the Section's Cartel and Criminal Practice sub-committee. Since 2004, Steven has been a member of the New York American Inn of Court. During his tenure with the Inn, Steven has organized a number of Continuing Legal Education programs related to various white collar criminal law topics. In December 2017, Steven was honored as the first recipient of Antitrust Division's Ralph T. Giordano Award. The award recognizes excellence in cartel enforcement.