No. 21-_______

In the
Supreme Court of the United States

STEVEN AIELLO AND JOSEPH GERARDI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 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.

2. Whether deception that deprives a person of "potentially valuable economic information," without more, can constitute "money or property" fraud under the federal mail and wire fraud statutes, 18 U.S.C. §1341 and §1343.

PARTIES TO THE PROCEEDING

Petitioners are Steven Aiello and Joseph Gerardi, defendants and appellants below. Louis Ciminelli, Joseph Percoco, and Alain Kaloyeros were Petitioners' co-defendants and appellants below and are filing separate petitions in this Court.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Steven Aiello, et al. v. United States, No. 21A298 (U.S.), application granted January 7, 2022;

United States of America v. Joseph Percoco, et al., Nos. 18-3710, 18-3712, 18-3715, and 18-3850 (2d Cir.), consolidated judgment entered September 8, 2021;

United States of America v. Joseph Percoco, et al., Nos. 18-2990, 18-3710, and 19-1272 (2d. Cir.), consolidated judgment entered September 8, 2021; and

United States of America v. Joseph Percoco, et al., No. 16 Cr. 776 (VEC) (S.D.N.Y.), judgments as to Steven Aiello and Joseph Gerardi entered on December 11, 2018.

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INTRODUCTION

In recent years, this Court has been forced—again and again—to rein in federal prosecutors whose charging decisions, particularly in fraud cases, reflect little regard for the statutory text enacted by Congress, principles of fair notice, or federalism. *See*, *e.g.*, *Kelly v. United States*, 140 S. Ct. 1565 (2020); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Bond v. United States*, 572 U.S. 844 (2014); *Skilling v. United States*, 561 U.S. 368 (2010). This is another such case. In a pair of opinions, the Second Circuit endorsed sweeping and malleable interpretations of the federal honest-services fraud statute, 18 U.S.C. §1346, and property fraud statutes, 18 U.S.C. §1341 and §1343. These decisions raise serious constitutional concerns and present two important questions on which the circuits are divided.

First, the Second Circuit held that engaging a private citizen to lobby the government can constitute honest-services fraud if the person has substantial influence in government affairs. Under its decision, a private citizen can owe a fiduciary duty to the public, supposedly because §1346's text is "capacious" and should be read expansively. But this Court's decision in *Skilling* stands for precisely the opposite proposition—§1346 must be construed very narrowly, because otherwise it would be unconstitutionally vague.

Second, the Second Circuit held, under its "right to control" doctrine, that the wire fraud statute doesn't require the government to prove any actual or contemplated economic loss. Rather, merely failing to disclose information a person might find valuable in de-

ciding how to expend his assets can be federal property fraud—even without evidence of any harm to property. But as this Court has repeatedly held, the federal mail and wire fraud statutes reach only schemes to obtain "money or property." *See*, *e.g.*, *McNally v. United States*, 483 U.S. 350 (1987); *Cleveland v. United States*, 531 U.S. 12 (2000); *Kelly*, 140 S. Ct. 1565.

Both decisions cry out for this Court's intervention. The honest-services fraud ruling criminalizes a vast range of ordinary political interactions. For instance, a senior White House official departing the administration could be charged with defrauding the public if she later uses her influence to make a phone call for a client. A career lobbyist who has spent decades working legislative backrooms could be prosecuted simply for being too good at his job. If paying "influential" private citizens to advocate before the government is criminal fraud, that has profound implications for our system of representative government. The Second Circuit's decision defies this Court's decisions in *Skilling* and *McDonnell* and provides no ascertainable standard. It relies on a long-criticized, abrogated decision that the Third Circuit has expressly rejected. And this case presents a perfect opportunity for this Court to resolve disagreements among the circuits as to the source and scope of the "fiduciary duty" required to establish honest-services fraud.

Likewise, the malleable "right to control" theory gives federal prosecutors unbridled power to convert almost any non-disclosure into federal wire fraud, because most modern communications involve interstate wires. Under the decision below, for instance,

virtually any undisclosed financial interest could constitute federal fraud, even if its object is not to cause economic harm and there is no bribe or kickback. This would criminalize conduct this Court has long held does not violate either the property fraud (*McNally*) or honest-services fraud statutes (*Skilling*). The decision also exacerbates a longstanding split with other circuits that find no cognizable property interest in "the ethereal right to accurate information" and require property fraud schemes to target property and aim to inflict pecuniary loss. *E.g.*, *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021); *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (Sutton, J.).

Both Second Circuit decisions give prosecutors unchecked power to set standards of "moral uprightness"—in government and business dealings. *Skilling*, 561 U.S. at 418 (Scalia, J., concurring in judgment). That power vastly exceeds the more targeted and limited reach of the statutes. This case presents an ideal vehicle to decide both exceptionally important questions about the scope of federal criminal fraud.

OPINIONS BELOW

The Second Circuit's opinions are published at 13 F.4th 180 and 13 F.4th 158.

JURISDICTION

The Second Circuit issued its opinions and entered judgment on September 8, 2021, and denied rehearing on November 1, 2021. Pet.App.1a, 45a, 81a, 83a. On January 7, 2022, this Court extended the time to file a petition for certiorari until March 1, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The relevant statutes are reproduced in the appendix to this petition. Pet.App.90a-91a.

STATEMENT OF THE CASE

COR Development Company is a real estate firm in Syracuse. Petitioners Steven Aiello and Joseph Gerardi are COR's co-founders and principals. In 2010 COR retained Todd Howe, a government relations consultant, to assist with potential state-funded work. Howe had ties to state officials including then-Governor Andrew Cuomo and Joseph Percoco, a high-ranking official in Cuomo's administration. C.A.App.511-12, 555-58, 604-05.

The charges against Petitioners arose from Howe's work for COR. The indictment alleged that Petitioners participated in a scheme to bribe Percoco and a separate property fraud scheme pertaining to Fort Schuyler Management Corporation ("FSMC"), a private non-profit company. The district court held two jury trials.

The first trial concerned Percoco-related charges. Gerardi was acquitted on all counts; Aiello was acquitted of bribery and false statements but convicted on one honest-services fraud conspiracy count, which raises the first question presented.

The second trial concerned FSMC. Petitioners were convicted of one wire-fraud and one wire-fraud conspiracy count, giving rise to the second question presented.

A. Honest-Services Fraud Case

1. Background

The indictment alleged that from August through October 2014, "Howe arranged for [COR] to pay approximately $35,000 in bribe payments" to Percoco, and that Percoco and Petitioners conspired to "take official action in exchange for bribes" and "deprive the public of its intangible right" to Percoco's honest services, in violation of 18 U.S.C. §1349. C.A.App.292, 306.

Percoco, however, was not a public official for most of 2014—including the period in which COR asked for his help and paid for his services. He formally resigned from government in April 2014 to manage Cuomo's re-election campaign. C.A.App.636. Although he occasionally used his old office and coordinated with Cuomo's staff about scheduling and other matters, he transitioned his duties to others and relinquished his title and responsibilities in the Governor's Office. C.A.App.508-10, 528.

Numerous government witnesses testified that Percoco's resignation marked a definite break with public office and that he expressed no intent to return. C.A.App.508-09, 525. He could have taken a leave of absence if he intended to separate only briefly, but as Percoco told one administration official, "he was not coming back" because "he needed to make money for his family" after the campaign. C.A.App.509. And when he left government, Percoco obtained an ethics opinion about what private work a *former government employee* may undertake. C.A.App.525-26.

During the campaign, however, several senior members of Cuomo's staff departed, and Cuomo's father became ill. C.A.App.508. 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. C.A.App.508, 637.

In July 2014, while Percoco was out of government, COR was awaiting a decision about whether New York State could finance a construction project without a Labor Peace Agreement ("LPA"). C.A.App.513-14, 631-32. For months State officials waffled on that question, and COR grew frustrated with the uncertainty. C.A.App.680.

On July 30, 2014, Aiello emailed COR's consultant, Howe, "[I]s there any way Joe P can help us with this issue *while he is off the 2nd floor working on the Campaign*[?]" Pet.App.7a, 22a (emphasis added). (The Governor's executive staff sits on the Capitol's second floor.) Aiello asked if Percoco could be COR's "advocate with regard to labor issues over the next few months." Pet.App.22a.

COR subsequently paid Percoco $35,000 through Howe, while Percoco was out of government. Pet.App.8a. There was no evidence Aiello knew Percoco had any plans to return to state government at the time, although Percoco remained influential with his former colleagues.

On December 3, *before* he returned to state government, Percoco called a state official about the LPA matter; shortly thereafter the State agreed an LPA

was unnecessary. Pet.App.8a-9a. Nonetheless, COR did not pursue the grant and never received funding. C.A.App.516.[1]

2. District Court Proceedings

Over the defendants' strenuous objections, 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.'" Pet.App.24a, 86a. Instead, it 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." *Id.*

By contrast, as to the related bribery charge, the jury 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." C.A.App.656.

After deliberating for eight days and requiring two *Allen* charges (Tr.6683-84, 6802-03), the jury convicted Aiello of honest-services fraud conspiracy but acquitted him of the remaining charges, acquitted

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[1] The government also introduced evidence that Percoco assisted COR or Aiello on two other matters months after Percoco returned to state government. However, the court affirmed Aiello's conviction solely based on the LPA issue. Pet.App.23a.

Gerardi, and convicted Percoco for this and other unrelated conduct.

3. Second Circuit Decision

The Second Circuit approved the fiduciary-duty instruction and affirmed Aiello's conviction based on a 40-year-old decision, *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). The court reaffirmed *Margiotta*'s holding that "'a formal employment relationship, that is, public office,' is not a 'rigid prerequisite to a finding of fiduciary duty in the public sector,'" and a "private citizen's 'dominance in municipal government' may 'give[] rise to certain minimum duties to the general citizenry.'" Pet.App.24a.

In *Margiotta*, over Judge Winter's dissent, two judges affirmed an influential Republican party official's honest-services fraud conviction for a patronage scheme. This Court subsequently abrogated *Margiotta,* holding that the mail fraud statute protects property rights but not "the intangible right of the citizenry to good government." *McNally,* 483 U.S. at 356.

In 1988, in response, Congress enacted §1346, which applies to schemes "to deprive another of the intangible right of honest services." Section 1346's facially vast language spawned many due process challenges. Eventually, to avoid serious vagueness problems that would render §1346 unconstitutional, this Court strictly limited the statute's scope to bribery and kickback schemes in breach of fiduciary duties that are "usually beyond dispute." *Skilling*, 561 U.S. at 404-09 & n.41.

Here, the Second Circuit applied *Margiotta*'s holding to §1346. Pet.App.26a. It said the "capacious language" of §1346's text was "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." Pet.App.27a. It "reaffirm[ed] *Margiotta*'s reliance-and-control theory in the public-sector context" and affirmed Aiello's conviction even though the "bribery" conspiracy took place while Percoco was not in government. Pet.App.25a.

B. Property Fraud Case

1. Background

The property fraud charges relate to an economic development program for upstate New York, which was implemented through FSMC, a private non-profit affiliated with the State's university system. FSMC was not bound by cumbersome state procurement rules and could proceed with greater speed and flexibility than a government agency. Alain Kaloyeros served on FSMC's board and managed the program. Pet.App.49a-50a; C.A.App.1041.

FSMC sought partnerships with qualified construction firms in the communities where it would pursue development projects. C.A.App.1046. To identify local partners in several cities, FSMC issued requests for proposals ("RFPs"). The RFPs did not identify any specific projects, and at the time FSMC had no specific Syracuse projects in mind. Pet.App.51a-52a. Rather, the RFPs outlined FSMC's desired qual-

ifications for developers. The RFP winners ("preferred developers") got a "leg up" in the ability to pursue contracts but were not guaranteed any contract. Pet.App. 51a-52a, 62a.

COR won an RFP, became a "preferred developer," and subsequently entered contracts to build two projects in Syracuse, which were successfully completed. The indictment charged Petitioners and Kaloyeros with wire fraud and wire-fraud conspiracy (18 U.S.C. §1343 and §1349) for "tailoring" the "preferred developer" RFP to COR. The conspiracy count also named Buffalo developer Louis Ciminelli, who was charged with "tailoring" the Buffalo RFP. (Petitioners were uninvolved in the Buffalo RFP and unconnected to the Buffalo defendants.)

The alleged "tailoring" worked as follows. Howe told Petitioners FSMC wanted to work with COR and sought COR's input concerning the Syracuse RFP. In response, Gerardi sent Howe COR's qualifications. C.A.App.1700-02. Howe later sent Petitioners a draft RFP he said FSMC was "fine tuning." C.A.App.1650.

In response, Gerardi suggested several edits that would have made it easier for other developers to qualify. For instance, even though COR satisfied these criteria, Gerardi questioned the draft RFP's requirement that developers have 15 years' experience and proposed omitting a requirement that developers use specific software, broadening the categories of relevant prior experience, and eliminating a performance-bond requirement. C.A.App.1656-60, 1328, 1420-21.

Howe forwarded these comments to Kaloyeros. The final RFP included only some of Gerardi's suggestions. Pet.App.53a; C.A.App.1656-60, 1675-78.

COR was the only developer that responded to the Syracuse RFP. Pet.App.55a. There was no evidence the allegedly "tailored" RFP provisions disfavored or discouraged any other Syracuse developer from competing with COR. After COR was selected, it conducted arm's-length negotiations with FSMC procurement staff, who tried "to get the best deal they could get." C.A.App.1096-97. COR subsequently contracted with FSMC to build a film hub and a manufacturing plant. Pet.App.55a.

COR performed its obligations under the contract. There was no evidence that FSMC got less than it paid for, that any other developer would have provided a better deal, or that Petitioners intended to cheat FSMC. Indeed, even after the indictment, FSMC continued to work with COR, paid it millions of dollars, and hired it for additional work. C.A.App.2601.

2. District Court Proceedings

The indictment did not allege that FSMC suffered any pecuniary harm, and the government conceded preferred-developer status was not "property" under the wire fraud statute. C.A.App.996. The sole prosecution theory was that Petitioners schemed to "defraud [FSMC] of its right to control its assets" by "secretly tailor[ing]" the RFP so COR "would be favored to win in the selection process." C.A.App.953.

The defendants repeatedly argued that this theory was legally invalid and that the government had to prove FSMC 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 (citing, *inter alia*, *United States v. Finazzo*, 850 F.3d 94, 110 (2d Cir. 2017)). The court therefore precluded defense evidence that the developers charged a fair price and did excellent work. C.A.App.999-1002.

The district court also instructed the jury, over objection, 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." Pet.App.70a, 87a-88a. And the court refused to instruct the jury to acquit Petitioners if FSMC "received, and was intended to receive, the full economic benefit of its bargain." C.A.App.960-61, 1439, 1449.

At sentencing, the district court was "unable to make a determination of pecuniary loss without engaging in pure speculation," and therefore found no actual or intended loss for Sentencing Guidelines purposes. C.A.App.2627; *see also* C.A.App.2645. It sentenced Gerardi to 30 months' and Aiello to 36 months' imprisonment. Pet.App.57a.[2]

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[2] Gerardi was also convicted under 18 U.S.C. §1001 for stating that he never asked to tailor the RFP to COR and his edits were intended to broaden the RFP. Pet.App.55a-57a. He argued that

3. Second Circuit Decision

The Second Circuit affirmed Petitioners' 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.60a (quoting *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019)). 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.61a (quoting *United States v. Binday*, 804 F.3d 558, 579 (2d Cir. 2015)).

The court concluded that "in rigging the RFPs to favor their companies, defendants deprived [FSMC] of 'potentially valuable economic information' that would have resulted from a truly fair and competitive RFP process." Pet.App.61a-62a. It acknowledged that the developers "were not guaranteed any project once they were chosen preferred developers." Pet.App.62a. However, it held that "a competitive process was 'essential' both to the selection of preferred developers and—in light of the preferred developers' 'leg up' for

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this false-statements count would fail due to spillover prejudice if the wire fraud convictions were reversed. The court below did not address that issue because it affirmed those convictions. Pet.App.78a n.13.

projects that then arose—to the award of the subsequent development contracts." Pet.App.63a.

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." *Id.* It 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." Pet.App.64a. However, it held this irrelevant, because the wire fraud statute does not require proof the victim "suffered harm." *Id.*

REASONS FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER PAYING A PRIVATE CITIZEN TO LOBBY THE GOVERNMENT CAN VIOLATE 18 U.S.C. §1346

Under the Second Circuit's expansive interpretation of §1346, it is a federal crime to pay an influential *private* citizen to lobby the government. This ruling conflicts with this Court's decisions in *Skilling* and *McDonnell*; threatens to chill fundamental First Amendment rights to free speech and petitioning the government; admits of no ascertainable limits to the types of fiduciary duties that can trigger an honest-services fraud prosecution; and tramples States' rights to regulate the conduct of former public officials. This Court should grant certiorari to ensure that §1346, a dangerously malleable statute, is interpreted narrowly as a "scalpel" rather than a "meat axe," *United States v. Sun-Diamond Growers of Cal.*,

526 U.S. 398, 412 (1999), and to provide lower courts with much-needed direction on what fiduciary relationships are sufficiently "beyond dispute" to trigger §1346 liability.

A. The Decision Below Contravenes This Court's Precedents

1.a. In *Skilling*, this 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. This Court explained that the "potential breadth" of §1346 could invalidate it and found "force" in the petitioner's vagueness challenge. 561 U.S. at 403-05. Accordingly, the Court "pare[d]" §1346 "down to its core," in order "[t]o preserve the statute without transgressing constitutional limitations." *Id.* at 404, 408-09.

That "solid core," the Court held, was pre-*McNally* decisions involving "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 407. Critically, the Court confined "fiduciary duty" to classic, indisputably fiduciary relationships such as "public official-public," "employee-employer," and "union official-union members" in response to criticism by Justice Scalia about the inherent vagueness in "the source and scope of fiduciary duties." *Id.* at 407n.41.

Justice Scalia (and Justices Thomas and Kennedy) would have held the statute unconstitutionally vague rather than adopt a narrowing construction. He found the statute's "most fundamental indeterminacy" was

ascertaining the existence and scope of fiduciary duties. *Id.* at 421 (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"; courts disagreed as to such basic questions as "the *source* of the fiduciary obligation—whether it must be positive state or federal law…or merely general principles," and whether it derived from general trust or agency law. *Id.* at 417-18. Moreover, even assuming development of a "federal, common-law fiduciary duty," "the duty remained hopelessly undefined." *Id.* at 418.

The majority responded by eliminating that uncertainty. It held that §1346's "core" encompasses only situations where "[t]he existence of a fiduciary relationship" is "*beyond dispute*." *Id.* at 407 n.41 (emphasis added). The Court specifically identified "public official-public" as such a quintessential fiduciary relationship but 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*[3] 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 that excludes the *Margiotta* theory.

b. The Second Circuit's decision defies *Skilling*. *First*, as explained, *Skilling* clearly precludes any conclusion that prosecutors, juries, or lower courts are free to create new fiduciary duties out of whole cloth,

[3] *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986).

especially the nonsensical notion that a private citizen—a campaign official—can owe the public a fiduciary duty. The Court was clear that the way to deal with the inherent vagueness in the malleable concept of fiduciary duty is to confine the term to limited situations in which it is "beyond dispute" that a relationship is fiduciary. Yet the Second Circuit completely ignored this.

Second, the Circuit's mode of analysis flouts this Court's directive on how to interpret §1346. As discussed, *Skilling* forbids courts from reading what the court below described as §1346's "capacious language" (Pet.App.27a) literally, because that "capacious language" triggers "the due process concerns underlying the vagueness doctrine." 561 U.S. at 408. This mandates a narrow construction, not a broad one. *Id.* at 403-04, 408-09. For instance, taken at face value, "depriving another of the intangible right of honest services" easily encompasses a fiduciary's undisclosed self-dealing, but *Skilling* squarely excluded it from §1346's ambit, instead cabining §1346 "in favor of lenity." *Id.* at 410-11.

Yet the Second Circuit proceeded as if this Court had never decided *Skilling*. It relied on the statute's expansive and malleable text *without even discussing Skilling*. The Circuit's approach also defies this Court's oft-repeated edict that criminal statutes—particularly those touching the political arena—must be construed narrowly to avoid constitutional problems. *See*, *e.g.*, *Kelly*, 140 S. Ct. at 1571-74, *McDonnell*, 136

S. Ct. at 2372-73; *Sun-Diamond Growers of Cal.*, 526 U.S. at 412.

2. The Second Circuit's decision also defies *McDonnell*, where this Court reiterated its "vagueness concerns" with §1346. 136 S. Ct. at 2375. The Court identified "significant constitutional concerns" with an expansive interpretation of public-sector bribery crimes in which payments are made in exchange for official acts. *Id*. at 2372-73. The Court held that an "official act" must satisfy two requirements. First, it must relate to the "formal exercise of governmental power," "within the specific duties of an official's position—the function conferred by the authority of his office," that is "pending either before the public official who is performing the official act, or before another public official." *Id*. at 2368-69. Second, "the public official 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 2370.

A private citizen who is not expressly authorized to act on behalf of the government lacks "governmental power," "authority of…office," or an "official position." A private citizen is thus *legally incapable* of performing an official act as *McDonnell* defines it. The Second Circuit dismissed *McDonnell* as only about "the definition of 'official act,'" not "*who* can violate the honest-services statute." Pet.App.29a. But the two are inextricably intertwined. Under *McDonnell*, only those vested with governmental power and authority can perform an official act.

B. The Second Circuit's Decision Raises Grave Constitutional Concerns

The Second Circuit's ruling creates the very same serious constitutional problems this Court strained to avoid in *McDonnell*.

1. In *McDonnell*, the Court expressed concern that interpreting "official act" expansively could chill protected communications between government officials and their constituents and thereby undermine "[t]he basic compact underlying representative government," which "*assumes* that public officials will hear from their constituents and act appropriately on their concerns." 136 S. Ct. at 2372. The Second Circuit's decision creates the same fundamental problem. The First Amendment protects the right to petition the government, including through well-connected, influential lobbyists who were previously government officials. *See generally Citizens United v. FEC*, 558 U.S. 310 (2010); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). And the ability of lobbyists and others not just to access, but to influence, public officials is critical to our system of government. "Favoritism and influence are not…avoidable in representative politics…. Democracy is premised on responsiveness." *Citizens United*, 558 U.S. at 359.

The extension of public corruption laws beyond public officials—to others whose influence "controls" actual officials or government business—threatens to chill citizens, lobbyists, and especially former officials "from participating in democratic discourse." *McDonnell*, 136 S. Ct. at 2372. As Judge Winter warned in

his *Margiotta* dissent, this type of expansion of honest-services fraud "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 fraud." *Id.* at 139-40.

2. In *McDonnell*, this Court also insisted on a narrow construction to avoid a "vagueness shoal." 136 S. Ct. at 2373. The Second Circuit's decision here raises the same serious fair notice and arbitrary enforcement concerns. Under its test, a private citizen owes a fiduciary duty to the public whenever he is "relied on by the government and...in fact control[s] some aspect of government business." Pet.App.26a. On the other hand, "[m]ere influence and participation in the processes of government standing alone are not enough." Pet.App.24a. But how is an ordinary citizen to know when another individual—particularly a former government official—has crossed over the line from innocuous, pro-democratic "influence" and "participation," to potentially unlawful "reliance" and "control"? According to the Second Circuit, for example, Percoco's "ability to pick up the phone and get things done" while on the campaign signified the latter. Pet.App.41a. But a reasonable person could just as easily label that mere "influence."

Similarly, the court found "reliance" and "control" because Percoco "helped organize a state event" and "discussed the terms of a [public] project with government employees." Pet.App.41a. But these episodes could reasonably be viewed as "participation in the

processes of government." How can anyone reliably predict what facts elevate a private citizen to public fiduciary status and create potential criminal liability?

The decision here is emblematic of the Second Circuit's dangerously malleable, "we know it when we see it" approach to fiduciary relationships needed to establish federal fraud. For instance, in a criminal securities fraud case, the court pointedly refused to articulate any "exclusive test of fiduciary status" and instead announced that there are many "appropriate standard[s] from which [a] jury could find the requisite fiduciary relationship." *United States v. Kosinski*, 976 F.3d 135, 149, 151 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2755 (2021). The result grants juries carte blanche to decide, after-the-fact, whether such a relationship existed and affords private citizens no clear guidance about whether they fall within or beyond a fraud statute's orbit.

3. Finally, the court's decision raises troubling federalism concerns. 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 857; *see also*, *e.g.*, *Jones v. United States*, 529 U.S. 848, 857-58 (2000). That concern is particularly acute here, because a broad interpretation would effectively displace state and local governments' decisions about how to regulate their own former officials' ability to lobby the government after they leave office. This Court's review is necessary to prevent federal prosecutors from deploying §1346 to police unethical behavior in a manner that "'involves the Federal Government in setting

standards' of 'good government for local and state officials.'" *McDonnell*, 136 S. Ct. at 2373.

C. The Circuits Disagree On *Margiotta* And, Post-*Skilling*, How To Define Fiduciary Relationships Required For §1346

The courts of appeals disagree as to the source and scope of fiduciary duties that can trigger honest-services fraud liability—even after *Skilling*. Given the importance of §1346, which gives rise to numerous federal prosecutions every year, this Court's guidance on this issue is sorely needed.

First, the Third Circuit rejected the *Margiotta* theory underlying the decision below. In a similar case involving a party official, the Third Circuit endorsed Judge Winter's dissent. It held that *Margiotta* provides no "logical rationale for treating private party officials in the same manner as public officials" and "creates 'a catch-all political crime which has no use but misuse.'" *United States v. Murphy*, 323 F.3d 102, 104-05, 117-18 (3d Cir. 2003). The *Margiotta* theory, Judge Becker explained, "extends the mail fraud statute beyond any reasonable bounds." *Id.* at 104. Because no "criminal statute creates [a fiduciary] relationship between a [private citizen] and the public," the court found it "improper for the District Court to allow the jury to create one," and reversed the conviction. *Id.* Likewise, in *United States v. Holzer*, the Seventh Circuit said *Margiotta* was one of "the worst abuses of the mail fraud statute" because it authorizes conviction "for conduct not even wrongful under state law." 840 F.2d 1343, 1348 (7th Cir. 1988) (Posner, J.).

Second, although *Skilling* confined §1346 to indisputably fiduciary relationships, courts have continued to struggle to define the source and scope of the fiduciary relationship required to support a conviction under the statute. *See*, *e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 724-25 (9th Cir. 2012) (relying on common-law agency principles in determining the existence of a fiduciary duty); *United States v. Halloran*, 821 F.3d 321, 338-39 (2d Cir. 2016) (analyzing *both* federal and New York law to determine whether one would result in a different outcome); *United States v. Terry*, 707 F.3d 607, 611-12 (6th Cir. 2013) (declining to "wade into the debate over whether a state-law violation is a precondition of honest services fraud"); *United States v. Sanchez*, 502 F. App'x 375, 381 (5th Cir. 2012) (finding state law the only permissible source of the requisite fiduciary duty); *see also United States v. Smith*, 985 F. Supp. 2d 547, 597-98 (S.D.N.Y. 2014) (collecting cases and noting "courts have looked to a smorgasbord of sources to find the fiduciary duty that, after *Skilling*, presumably underpins all honest-services fraud prosecutions").

Thus, even though more than a decade has passed since *Skilling*, the circuits are still struggling to articulate the precise source and scope of the relevant fiduciary duty. Given the importance of §1346, the lack of a uniform standard—or indeed, any ascertainable standard—further underscores the urgent need for this Court's intervention.

II. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER MERELY FAILING TO DISCLOSE "POTENTIALLY VALUABLE ECONOMIC INFORMATION" IS PROPERTY FRAUD UNDER 18 U.S.C. §1343

The Second Circuit's broad approach to "fiduciary duties" owed by private citizens, discussed above, is a relic of pre-*Skilling* case law. The Second Circuit also reaffirmed another relic in this case: the so-called "right-to-control" doctrine. That doctrine traces its roots back to the broadest mid-century circuit cases suggesting that fraud statutes are designed to ensure "moral uprightness" in business dealings. The right-to-control doctrine is fundamentally flawed and inconsistent with this Court's modern jurisprudence on property fraud. It has also been rejected by other circuits, and it is time for this Court to resolve the split.

A. The Circuits Are Split On Whether Deprivation Of "Potentially Valuable Economic Information" Can Be Property Fraud

1. The circuits are divided on a question that underlies hundreds of prosecutions under the mail and wire fraud statutes. Those statutes prohibit schemes "to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§1341, 1343. The Court has construed this disjunctive language as a "unitary whole," meaning the statutes only proscribe schemes to obtain money or property. *Kelly*, 140 S. Ct. at 1571. This narrow interpretation traces its roots to *McNally*.

Since *McNally*, this Court has consistently rejected government efforts to prosecute schemes directed at intangible rights that "stray from traditional concepts of property." *Cleveland*, 531 U.S. at 24; *see also Kelly*, 140 S. Ct. at 1572 (government's "'intangible rights of allocation, exclusion, and control'…do 'not create a property interest'"). As the Court has explained, mere deceit is not property fraud; rather, "the deceit must also have…the 'object' of *obtaining* the [victim's] money or property." *Kelly*, 140 S. Ct. at 1572 (emphasis added); *accord id.* at 1573. Moreover, the "object of the fraud" must be causing "loss to the victim." *Id.* at 1573; *see id.* ("a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme"); *id.* at 1573 n.2 (the "victim's *loss* must be an objective of the…scheme") (emphasis added).

2. Nevertheless, some circuits have endorsed a different kind of intangible rights theory to facilitate prosecutions in the absence of traditional property loss. Most notably, the Second Circuit has recognized an intangible right to "make a fully informed economic decision"—a right protected by the federal fraud statutes. It has affirmed multiple convictions under this theory, known as the "right-to-control" doctrine.

This broad and amorphous doctrine posits that a person can commit federal property fraud merely by depriving others of *information* they might find valuable or important in deciding how to use their assets. As the court stated below, "[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.61a (quoting *Binday*, 804 F.3d at 579). Under the theory, the mere "withholding or inaccurate reporting of information that could impact on economic decisions" can provide the basis for a property fraud prosecution. *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 710 (2021); *see also*, *e.g.*, *Finazzo*, 850 F.3d at 111-12.

Other circuits, however, have rejected the right-to-control doctrine. *See* Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 182-84 (2021) (discussing circuit split). For instance, the Sixth Circuit held that the "right to control" is "not the kind of 'property' right[] safeguarded by the fraud statutes." *Sadler*, 750 F.3d at 591. The *Sadler* defendant illegally distributed controlled substances she purchased from pharmaceutical companies after lying about what she planned to do with their products. The Sixth Circuit reversed her wire fraud conviction, holding that she had not "depriv[ed]" the companies of "property" because she "paid th[eir] asking price." *Id*. at 590. Although her "lies convinced the distributors to sell controlled substances that they would not have sold had they known the truth," 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." *Id*. at 590-91 (quoting *McNally*, 483 U.S. at 360).

The Ninth Circuit recently endorsed the Sixth Circuit's view and rejected the Second Circuit's approach, holding that "[t]here is no cognizable property interest in 'the ethereal right to accurate information.'" *Yates*, 16 F.4th at 265 (quoting *Sadler*, 750 F.3d at 591); *accord id.* at 287 (Bress, J., dissenting) (agreeing with majority on this point). The court explained that whereas one can have a property right "in trade secrets or confidential business information," there is no property right to "make an informed business decision." *Id.* at 265. Accordingly, the court rejected a fraud theory premised on bank officers' concealment of accurate financial information from the bank's board of directors.

And well before *Yates*, the Ninth Circuit expressly "disagree[d] with the Second Circuit's approach" because its right-to-control cases permit property fraud prosecutions without proof that a defendant's conduct exposed the purported victim to any pecuniary harm. *United States v. Bruchhausen*, 977 F.2d 464, 468 n.4 (9th Cir. 1992). In *Bruchhausen*, the defendants deceived manufacturers into sales they otherwise would not have made, but the manufacturers "received the full sale price for their products" and "clearly suffered no monetary loss." *Id.* at 467. Under these circumstances, the court held, the purchasers' deception did not amount to property fraud under *McNally*.

Similarly, in the Eleventh Circuit, misrepresentations which merely induce a transaction are not property fraud if the "victim" received the benefit of the bargain. In *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), "Bar Girls" posing as tourists lured businessmen into nightclubs that they would not have

entered if they had known the women were affiliated with the clubs. But "even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if…the alleged victims 'received exactly what they paid for.'" *Id.* at 1314. Accordingly, it was reversible error not to instruct the jury to acquit if the putative victims received the benefit of the bargain (*e.g.*, the drinks they bought). *Id.* at 1310, 1314-16. Here, by contrast, the court held that tricking FSMC into entering contracts was wire fraud and that the jury did not have to be instructed to acquit if FSMC got the benefit of its bargain. Pet.App.64a-65a, 70a-72a.

Other circuits have issued varying and somewhat contrary opinions on the right-to-control doctrine. *Compare United States v. Catalfo*, 64 F.3d 1070, 1077 (7th Cir. 1995) (appearing to endorse right-to-control), *with United States v. Walters*, 997 F.2d 1219, 1226 & n.3 (7th Cir. 1993) (appearing to reject it). Certiorari is warranted so this Court can resolve the confusion in the circuits and determine which approach is most consistent with the text, history, and structure of the federal fraud statutes.

B. The Second Circuit's Interpretation Is Inconsistent With The Property Fraud Statutes' Text And Common-Law Origins

1. Certiorari is also warranted because this Court requires the fraud statutes to be interpreted in accordance with their common-law origins. *E.g.*, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016); *Neder v. United States*, 527 U.S. 1, 21-23

(1999). But the Second Circuit's right-to-control doctrine rests on a confused conception of "property" that has no basis in the common law.

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. It no doubt first appeared as 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.*, 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. While fraud statutes can and should protect types of property that did not exist in the 1700s, they should nonetheless hew to the traditional notion that a piece of property, whether tangible or intangible, is analytically separate from the incidents of ownership.

The idea that the "right to control" is *itself* property finds no basis in the common law.

2. It also conflicts with the plain meaning of the statutory term "property," a term most naturally read in its customary, concrete sense, which is fully consistent with its common-law meaning. Notably, the fraud statutes refer only to "property" rather than "property rights." By contrast, when Congress intends to reach beyond "property" to protect the broader interest in conducting a business or exercising autonomy over 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.

3. The idea that the "right to control" is *itself* property also finds no basis in this Court's caselaw. This Court's repeated insistence on interpreting the federal fraud statutes in a manner consistent with their common-law origins is as true for the property element as it is for other elements. And this Court has interpreted the property element in a way that accords with its common-law meaning.

It has stated, for example, that property must be something that can be transferred from the alleged victim to the defendant; "the victim's loss of money or property [must] suppl[y] the defendant's gain, with one the mirror image of the other." *Skilling*, 561 U.S. at 400. For instance, in *Cleveland*, the Court reversed a mail fraud conviction for lying to obtain a video poker license, because the license was not "property" "in the hands of" the State. 531 U.S. at 20-27. Likewise, in *Kelly*, the government's interest in the "allocation, exclusion, and control" of traffic lanes on the George Washington Bridge was not property the defendants could "obtain," requiring reversal of wire fraud convictions. 140 S. Ct. at 1572-73. Put another way, the victim must be deprived of the same property that the defendant schemed to obtain.

4. In closely related contexts, this Court has also clearly stated that the statutory phrase "obtain prop-

erty" must be given its ordinary, common-law meaning. This Court held that for the Hobbs Act, "[o]btaining property requires 'not only the deprivation but also the acquisition of property'"; the "property extorted must…be *transferable*—that is, capable of passing from one person to another." *Sekhar v. United States*, 570 U.S. 729, 734 (2013). Thus, the Court held that a recommendation was not property because it was not transferable to the defendant, citing *Cleveland* and the mail fraud statute by analogy. *Id.* at 737-38. Similarly, under the federal forfeiture statutes, a defendant only "'obtains' property" if he acquires that property from someone else. *Honeycutt v. United States*, 137 S. Ct. 1626, 1632-33 (2017) (citing *Sekhar*).

The federal fraud statutes have nearly identical language—they require "obtaining money or property." 18 U.S.C. §§1341, 1343. That phrase is grounded in the common law, and when Congress uses common-law terms, it intends to incorporate their well-settled meaning. *Sekhar*, 570 U.S. at 732-33. The unavoidable conclusion is that the fraud statutes require a defendant to seek to acquire some piece of property the victim gives up—the object of the scheme must be that the victim's loss provides the defendant's gain. The amorphous right-to-control doctrine obliterates that requirement.

5. This obtainability/transferability requirement is not satisfied here, nor could it be in any right-to-control case. The right-to-control doctrine posits that property fraud occurs if defendants "deprived [someone] of potentially valuable economic information." Pet.App.60a-61a; *see also* Pet.App.65a ("Depriving

[FSMC]" of "the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process" was "precisely the object of defendants' fraudulent scheme."). But if there was any such information, obviously FSMC didn't have it, and the information wasn't its property. Petitioners did not obtain (and could not have obtained) the information *from* FSMC. And Petitioners did not "obtain" FSMC's right to control its assets and could not have obtained or exercised that right themselves.

The right-to-control doctrine has no basis in the statutory text and is inconsistent with the common law on which that text is based. It rests on a fundamental conflation between the property itself and the rights incident to property. "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*." Park, *supra*, at 189.

It has never been endorsed by this Court, and indeed it has never been considered by this Court. The time for that consideration is past due.

C. The Right-to-Control Doctrine Raises Grave Constitutional Concerns

1. Additionally, the decision below dramatically expands the scope of the property fraud statutes by eviscerating the requirement of intended "loss to the victim." *Kelly*, 140 S. Ct. at 1573. The wire fraud statute "criminalizes the use of interstate wires to further, not mere deception, but…cheat[ing] someone out of something valuable." *United States v. Miller*, 953 F.3d

1095, 1101 (9th Cir. 2020). The Second Circuit eliminated this requirement. It 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 counterparty to enter a transaction without the relevant facts necessary to make an informed decision.'" Pet.App.61a. In other words, in the Second Circuit, it is sufficient if the "defendant's misrepresentations foreseeably concealed economic risk or deprived the victim of the ability to make an informed economic decision." *Id.*

By eliminating the requirement of actual or contemplated pecuniary loss, the Second Circuit granted prosecutors virtually limitless authority to charge almost any conduct they find immoral or unethical as federal criminal fraud. That boundless authority is a holdover from decades-old circuit cases that held fraud statutes were designed to ensure "moral uprightness" in society. Justice Scalia correctly criticized both the "grandiloquence" and the "astounding[]" breadth of those formulations. *Skilling*, 561 U.S. at 418 (Scalia, J., concurring in judgment). And yet, even after this Court rejected them, those broad and textually unmoored formulations live on in the Second Circuit's right-to-control cases.

The consequences are breathtaking. If the Second Circuit is correct, then nearly any deception can be fraud—bluffing in negotiations, puffing on a resume, failing to disclose a conflict of interest, withholding information about future business plans, and so on—because it creates "economic risk" or affects an "eco-

nomic decision." A practical joke could qualify. Suppose A emails B about a party; B drives there, expends gasoline, and finds no party. Under the Second Circuit's decision, this is wire fraud aimed at B's right to control his car. *But see Kelly*, 140 S. Ct. at 1573 n.2.

This Court cannot allow that broad construction to stand. As the Ninth Circuit explained, applying *Kelly*: "Recognizing accurate information as property would transform all deception into fraud. By definition, deception entails depriving the victim of accurate information about the subject of the deception." *Yates*, 16 F.4th at 265.

2. The Second Circuit's interpretation raises grave constitutional concerns. It is not a rule, but rather an amorphous, malleable concept "so standardless that it invites arbitrary enforcement" and deprives people of fair notice about what constitutes federal property fraud. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). The court below declared that 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." Pet.App.63a. But it did not explain why there was "more" than "mere fraudulent inducement to gain access" here or what that "more" was. Nor did the court provide any clues as to where to find the "fine line" supposedly dividing innocent "schemes that do no more than cause their victims to enter into transactions they would otherwise avoid" from fraudulent "schemes that depend for their completion on a misrepresentation of an element of the bargain." *Id.*

What the Second Circuit's decision lays bare is that this "fine line" can be moved at any time on the whim of prosecutors and judges, creating a trap for the unwary. There was no allegation—let alone any proof—that any defendant misrepresented an "element of the bargain." After all, the "bargain" was the terms of the contracts eventually negotiated for specific real estate projects. But the Second Circuit does not limit the "bargain" to the parties' contract; instead, the "bargain" can simply be redefined after-the-fact. That is what the court did here when it said: "The bargain at issue was not the terms of the contracts ultimately negotiated, but instead [FSMC]'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." Pet.App.65a.

This statement is nonsensical. How could the "bargain" be "FSMC's ability to contract"? A "bargain" is "[a]n agreement between parties for the exchange of promises or performances." Black's Law Dictionary (11th ed. 2019); *see* 1 Williston on Contracts §2A, at 7 (3d ed. 1957). It is *not* the ability to enter such an arrangement. This critical passage of the opinion illustrates how the right-to-control doctrine can be manipulated, after the fact, to criminalize virtually any conduct prosecutors, judges, or juries happen to find unsavory—regardless of whether it can harm the purported victim's property. The Second Circuit's decision gives the government a blank check to engage in exactly the sort of "arbitrary and discriminatory enforcement" forbidden by the Constitution. *Skilling*, 561 U.S. at 402-03.

D. This Case Is An Ideal Vehicle

This case provides an ideal vehicle in which to review the right-to-control doctrine. The government's case hinged on its right-to-control theory. That was the sole theory charged in the indictment, the sole theory presented to the jury, and the Second Circuit's sole basis for affirming Petitioners' convictions. The government had to rely on it because there was no economic harm. There was no allegation, and no evidence, of any lie material to the construction contracts ultimately executed. There was also no allegation, and no evidence, that FSMC received less than what it paid for or was otherwise "ripped off." There was no evidence that but for the "deceit," another developer could have provided a better deal on the Syracuse projects.

In short, this case exemplifies how the Second Circuit's doctrine eviscerates the "property" element and enables prosecutors to deploy the property fraud statutes as all-purpose weapons against virtually any deceit. It is the most extreme application of the doctrine thus far and appears to be the first time the Second Circuit has affirmed a conviction where there was no serious argument the alleged fraud scheme harmed any property interest. The Second Circuit acknowledged that in prior cases affirming "right-to-control" convictions there was "more tangible evidence of economic harm than is presented in this case." Pet.App.63a. If this Court grants review and rejects the Second Circuit's statutory interpretation, Petitioners' property fraud convictions would have to be reversed.

By contrast, prior cases in which the Court has declined to review challenges to the right-to-control doctrine suffered from various vehicle problems. In some, the right-to-control theory was not alleged in the indictment or presented to the jury. *See Aldissi v. United States*, No. 19-5805, BIO at 8-9; *Kelerchian v. United States*, No. 19-782, BIO at 7. In others, the jury found the fraud scheme caused or would cause economic harm. *E.g.*, *Binday v. United States*, No. 15-1140, BIO at 15, 19-22, and No. 19-273 (collateral review), BIO at 12-13; *Viloski v. United States*, No. 14-472, BIO at 22-23, and No. 16-508 (collateral review), BIO at 23-25; *Gatto v. United States*, No. 21-169, BIO at 20; *Johnson v. United States*, No. 19-1412, BIO at 9.

Finally, given the Ninth Circuit's October 2021 decision in *Yates*, it is now even clearer that the division among the circuits will not resolve itself. The time has come for this Court to put an end to the Second Circuit's expansion of the property fraud statutes far beyond the clear limits imposed by their text, this Court's decisions, and the Constitution.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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February 18, 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———

Nos. 18-2990, 18-3710, 19-1272

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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.*

———

Appeal from the United States District Court
for the Southern District of New York
No. 16-cr-776, Valerie E. Caproni, *Judge.*

———

August Term 2019
Argued: March 12, 2020
Decided: September 8, 2021

———

Before: RAGGI, CHIN, AND SULLIVAN, *Circuit Judges*.

Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in

* The Clerk of Court is respectfully directed to amend the case caption to conform with the caption above.

the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of one count of conspiracy to commit honest-services wire fraud and found Percoco guilty of two counts of conspiracy to commit honest-services wire fraud, as well as one count of solicitation of bribes and gratuities. On appeal, the defendants principally challenge the district court's instruction that (1) the jury could convict them of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber "as opportunities arise" and (2) the defendants could be liable for conspiracy to commit honest-services fraud for actions that Percoco agreed to undertake while he was not formally employed as a state official. Although the as-opportunities-arise instruction fell short of our recently clarified standard, which requires that the honest-services fraud involve a commitment to take official action on a particular matter or question, that error was harmless. The second contested instruction was not error at all. In so concluding, we reaffirm our decades-old decision holding that a person who is not technically employed by the government may nevertheless owe a fiduciary duty to the public if he dominates and controls governmental business, and is actually relied on by people in the government because of some special relationship. Finding no merit in the other arguments raised on appeal, we **AFFIRM** the judgment of the district court.

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*:

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]

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

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[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.

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*, 141 S. Ct. 656 (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 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.

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 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.

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 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 count of 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 (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 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 (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*, 136 S. Ct. 2355, 2365 (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 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]

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[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

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

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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*, 141 S. Ct. 161 (2020). Accordingly, Percoco's passing commentary about his § 666 conviction misses the mark.

Nine), before 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 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 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 "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 (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 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 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 (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). 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 (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. 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. 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 (2000) (quoting 18 U.S.C. § 1346). Put simply, Congress "effectively overruled *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 Immign 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 (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. In fact, in language that foreshadowed the text of § 1346, *McNally* 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 (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 (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 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 (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 injury 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 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 "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, there can be no doubt that the evidence proved the challenged elements.[4]

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[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

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

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.

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 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 Develop-

ment 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 (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 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, 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 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**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 18-3710(CON), 18-3712(CON),
18-3715(CON), 18-3850(CON)

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.

On Appeal from the United States District Court for
the Southern District of New York

August Term 2019

(Argued: March 12, 2020
Decided: September 8, 2021)

Before: RAGGI, CHIN, and SULLIVAN, *Circuit Judges*.

Consolidated appeals from judgments of the United States District Court for the Southern District of New York (Caproni, J.) convicting defendants-appellants

of engaging in a scheme to rig the bidding processes for New York State-funded projects in Syracuse, New York, and Buffalo, New York. Defendants-appellants appeal their convictions on several grounds, including the sufficiency of the evidence, purported errors in the jury instructions and evidentiary rulings, and prosecutorial misconduct.

AFFIRMED.

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*:

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. Aiello, Gerardi, and Kaloyeros also 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 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]

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

[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.

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]

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.

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[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*, 140 S. Ct. 1565 (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*, 140 S. Ct. 1105 (2020).

BACKGROUND

I. The Facts[3]

A. The Buffalo Billion Initiative

In 2012, then-Governor Andrew Cuomo launched an initiative to develop the greater 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

[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).

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.

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[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 a description of their qualifications.[5] 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.

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

[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.

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

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

drafts that were ultimately submitted to the FS Board for approval.

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 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 precooked 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 Buffalo contracts.

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]

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 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'

[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.

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*, 137 S. Ct. 1170 (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 (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*.

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*, 140 S. Ct. 1224 (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 nondisclosures 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 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.*, *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.

We are similarly unpersuaded by defendants' arguments that rigging the Buffalo and Syracuse RFPs was

[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.

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.").

ii. Fraudulent Intent

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.*,

[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).

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]

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[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 defendant and caused by him to advance the alleged fraud in New York).[11] The trial record contained various wires

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[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 con-

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).

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]

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tracts 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.

[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

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 errors, reversal is not warranted if the error was harmless. *See* Fed. R. Crim. P. 52(a); *United States v. DeMizio*,

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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.

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 (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." 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 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 (1973)); *see also United States v. Valenzuela-*

Bernal, 458 U.S. 858, 867 n.7 (1982) (noting that "the Sixth Amendment does not guarantee criminal defendants 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.

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] 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).

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

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[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.

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 (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. 1979) (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").

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.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

Docket Nos: 18-2990 (Lead)
18-3710 (Con)
18-3712 (Con)
18-3715 (Con)
18-3850 (Con)
19-1272 (Con)

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

ORDER

Appellant, Steven Aiello, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered

the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
[SEAL]
/s/ Catherine O'Hagan Wolfe

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

Docket Nos: 18-2990 (Lead)
18-3710 (Con)
18-3712 (Con)
18-3715 (Con)
18-3850 (Con)
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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

ORDER

Appellant, Joseph Gerardi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc.* The panel that determined the appeal has considered

the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
[SEAL]
/s/ Catherine O'Hagan Wolfe

APPENDIX E

[6379] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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16 CR 776 (VEC)

UNITED STATES OF AMERICA,

v.

JOSEPH PERCOCO, PETER GALBRAITH KELLY, JR.,
STEVEN AIELLO, JOSEPH GERARDI,

Defendants.

JURY TRIAL

New York, N.Y.
March 1, 2018
10:15 a.m.

Before: HON. VALERIE E. CAPRONI, *District Judge*

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* * *

[6445] The first element of honest services wire fraud is a scheme or artifice to defraud the state of New York and its citizens of their intangible right to Mr. Percoco's honest services. This element has two parts: First, that Mr. Percoco owed the public a right to his honest services; and, second, the existence of a scheme to defraud the public of those honest services.

As to the first part of this element, honest services are the duties that a person owes to the public because of a special trust that the public has reposed in the person. When a person obtains a payment in exchange

for official action, that person has breached his duty of honest service. That's because, although the person is outwardly purporting to be exercising independent judgment on behalf of the public, in fact, the person's actions have been paid for. Thus, the public is not receiving what it expects and what it is entitled to, namely, its right to the person's honest and faithful services.

While Mr. Percoco was employed by the state, he owed [6446] the public a duty of honest services by virtue of his official position. A person does not need to have a formal employment relationship with the state in order to owe a duty of public – in order to owe a duty of honest services to the public, however. You may find that Mr. Percoco 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 Mr. Percoco 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. Whether Mr. Percoco owed the public a fiduciary duty, and thus a duty of honest services, when he was not a public employee is a question of fact for you to determine. As noted before, however, as a matter of law, he owed the public a duty of honest services while he was employed by the state.

* * *

APPENDIX F

[2664] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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16 Cr. 776 (VEC)

UNITED STATES OF AMERICA,

v.

ALAIN KALOYEROS, STEVEN AIELLO,
JOSEPH GERARDI, LOUIS CIMINELLI,

Defendants.

New York, N.Y.

Jury Trial
July 10, 2018
9:30 a.m.

Before: HON. VALERIE E. CAPRONI, *District Judge*

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* * *

[2884] In addition to proving that a statement was false or fraudulent and related to a material fact, in 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 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 [2885] 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.

In order to find that there was a scheme to defraud, it is not necessary that the defendant actually realized any gain from the scheme, that Fort Schuyler actually suffered any pecuniary loss, or that the scheme was completed.

* * *

The second element that the government must prove beyond a reasonable doubt is that the defendant you are considering participated in the scheme knowingly, willfully, and with a specific intent to defraud. This element involves the defendant's state of mind, which is a question of fact for [2886] you to determine, like any other fact question. "Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Willfully" means to act knowingly and purposely, with an intent to do

something the law forbids, that is to say, with a bad purpose either to disobey or to disregard the law. "Intent to defraud" means to act 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, as I previously defined that term.

* * *

APPENDIX G

18 U.S.C. § 1343 provides:

Fraud by Wire, Radio, or Television

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. 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.

* * *

18 U.S.C. § 1346 provides:

Definition of "scheme or artifice to defraud"

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.

* * *

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.

* * *