Nos. 21-1158, 21-1161, 21-1169, and 21-1170

In the Supreme Court of the United States

JOSEPH PERCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Additional Captions Listed on Inside Cover

STEVEN AIELLO AND JOSEPH GERARDI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ALAIN KALOYEROS, PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS CIMINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

QUESTIONS PRESENTED

1. Whether a person who continues to exercise a public office in fact after leaving it in name, and who has been selected to return to the office, is obliged to provide honest services within the meaning of the federal honest-services fraud statute, 18 U.S.C. 1346, in carrying out that role.

2. Whether the jury instructions in this case reflected a valid theory of money or property fraud under the federal wire fraud statute, 18 U.S.C. 1343.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-46a; Aiello Pet. App. 1a-37a)* are reported at 13 F.4th 180 and 13 F.4th 158. The order of the district court (Pet. App. 55a-117a) is unreported but is available at 2017 WL 6314146.

JURISDICTION

The judgments of the court of appeals were entered on September 8, 2021. Petitions for rehearing were denied on November 1, 2021 (Pet. App. 47a-54a). On January 7, 2022, Justice Sotomayor extended the time within which to file petitions for writs of certiorari to and including March 1, 2022. The petitions were filed on February 17, 2022 (No. 21-1158), and February 18, 2022 (Nos. 21-1161, 21-1169, and 21-1170). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner Joseph Percoco was convicted on two counts of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1346 and 1349, and one count of soliciting bribes or gratuities, in violation of 18 U.S.C. 666(a)(1)(B). Percoco Am. Judgment 1. Petitioner Steven Aiello was convicted on one count of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1346 and 1349. Aiello Judgment 1.

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* This brief uses "Pet." and "Pet. App." to refer to the petition and appendix in No. 21-1158; "Aiello Pet." and "Aiello Pet. App." to refer to the petition and appendix in No. 21-1161; "Kaloyeros Pet." to refer to the petition in No. 21-1169; and "Ciminelli Pet." to refer to the petition in No. 21-1170.

Following a second jury trial, Aiello was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349. Aiello Judgment 1. Petitioner Louis Ciminelli was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349. Ciminelli Judgment 1. Petitioner Joseph Gerardi was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343, one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349, and one count of making false statements to federal officers, in violation of 18 U.S.C. 1001. Gerardi Judgment 1. Petitioner Alain Kaloyeros was convicted on two counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Kaloyeros Judgment 1.

The district court sentenced Percoco to 72 months of imprisonment, to be followed by three years of supervised release. Percoco Am. Judgment 2-3. The court sentenced Aiello to 36 months of imprisonment, to be followed by two years of supervised release. Aiello Judgment 2-3. The court sentenced Ciminelli to 28 months of imprisonment, to be followed by two years of supervised release. Ciminelli Judgment 2-3. The court sentenced Gerardi to 30 months of imprisonment, to be followed by two years of supervised release. Gerardi Judgment 2-3. The court sentenced Kaloyeros to 42 months of imprisonment, to be followed by two years of supervised release. Kaloyeros Judgment 2-3.

In two decisions issued on the same day, the court of appeals affirmed. Aiello Pet. App. 1a-80a.

1. The first case below arose out of a bribery scheme in 2014 involving Percoco and Aiello. Pet. App. 4a-5a.

a. Percoco, the bribe recipient, was an aide to Andrew Cuomo, then the Governor of New York. Pet. App. 4a. Percoco had served as Executive Deputy Secretary in the Executive Chamber (*i.e.*, the Govenor's office). *Id.* at 4a, 41a. At the time of the scheme's inception, he had temporarily left his state job to manage Governor Cuomo's reelection campaign. *Id.* at 5a; see *id.* at 7a. Despite formally leaving state employment, however, Percoco "held onto and used his Executive Chamber telephone, desk, and office, where he continued to conduct state business." *Id.* at 41a. And Percoco represented that he "had a guaranteed position with Cuomo's administration after the election." *Ibid.*

Aiello, the bribe payer, was the owner of a real-estate development company. Pet. App. 7a. In August 2014, Aiello used an intermediary to funnel $15,000 to Percoco's wife. *Ibid.* Then, in October 2014, after Percoco had told "several others that he intended to return to the Governor's Office," Aiello "sent an additional $20,000 to Percoco [using] the same circuitous route." *Ibid.* In return, Percoco used his position to secure favors for Aiello, the first of which was helping him to secure a waiver of a requirement to enter into a potentially costly labor peace agreement as a condition of receiving state funding for a project. *Ibid.*

After receiving Aiello's payments, Percoco "directed a state agency * * * to reverse its previous decision requiring [Aiello's company] to enter into a Labor Peace Agreement." Pet. App. 8a. Then, after Governor Cuomo was reelected and Percoco signed his rein-

statement forms, but "a few days" before Percoco's new term in the Executive Chamber formally began, Percoco called a state official and directed him to waive the required labor peace agreement. *Ibid.* Percoco placed that call from his desk in the Executive Chamber, and the recipient of the call interpreted it as "pressure" from one of his "principals." *Ibid.* (citation omitted). State officials later reversed their position and waived the required agreement. *Id.* at 8a-9a.

Percoco continued to repay Aiello's bribe after resuming his official role in the Executive Chamber. For example, Percoco "pressured subordinate state officials to prioritize and release outstanding funds that the state owed" to Aiello's company. Pet. App. 8a. He also directed state officials to "process a stalled pay raise for Aiello's son," who had by then become a state employee. *Id.* at 9a.

b. A federal grand jury returned a multi-count indictment against Percoco, Aiello, and other defendants. Pet. App. 9a-10a. The indictment charged Percoco and Aiello with, *inter alia*, conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1346 and 1349, based on the 2014 bribery scheme. Pet. App. 9a-10a.

Before trial, the district court denied Percoco's motion to dismiss the indictment. Pet. App. 55a-116a. The court rejected Percoco's contention that the charges against him had to be dismissed to the extent that they rested on actions he took while he was not formally employed in state government, but was running Governor Cuomo's re-election campaign. *Id.* at 77a. The court observed that the indictment alleged that even in that capacity, Percoco "continued to function in a senior advisory and supervisory role with re-

gard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities." *Ibid.* (citation omitted). The court also explained that the government may properly "rely on conduct occurring when the defendant is temporarily out of office if the scheme includes actions taken or to be taken when the defendant returns to government." *Ibid.*

At trial, the district court instructed the jury that, in order to find guilt on the honest-services count, the government was required to prove that Percoco owed a duty of honest services to the public. Pet. App. 141a-142a. The court explained that, "[w]hile Mr. Percoco was employed by the state, he owed * * * the public a duty of honest services by virtue of his official position." *Id.* at 142a. The court added, over a defense objection, that "[a] person does not need to have a formal employment relationship with the state in order to owe * * * a duty of honest services to the public." *Ibid.* The court instructed the jury that it could find that Percoco owed the public such a duty if it found both that "he dominated and controlled any governmental business" and also that "people working in the government actually relied on him because of a special relationship he had with the government." *Ibid.* The court cautioned that "[m]ere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty." *Id.* at 142a-143a.

The jury found Percoco and Aiello guilty of conspiring to commit honest-services wire fraud based on the bribery scheme described above. Pet. App. 11a. It also found Percoco guilty on two additional charges

based on separate conduct, and it found Percoco and Aiello not guilty on the remaining counts. *Ibid.*

c. The court of appeals affirmed. Pet. App. 1a-46a.

The court of appeals rejected Percoco's and Aiello's contention that the district court erred by instructing the jury that Percoco's liability for honest-services fraud did not depend solely on whether he was a formal state employee. Pet. App. 24a; see *id.* at 24a-32a. The court of appeals observed that, under its decision in *United States* v. *Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983), "a formal employment relationship" is not a "rigid prerequisite to a finding of fiduciary duty in the public sector." Pet. App. 24a (citation omitted). The court noted that, under *Margiotta*, private individuals "who in reality or effect are the government" can "owe a fiduciary duty to the citizenry." *Id.* at 25a (citation omitted).

The court of appeals rejected petitioners' arguments that the jury instructions were inconsistent with the text of the honest-services fraud statute, 18 U.S.C. 1346. Pet. App. 25a-32a. The court observed that, "[o]n its face," Section 1346's "capacious language is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." *Id.* at 27a. And the court found "no statutory basis for distinguishing a formal government employee, who is clearly covered by § 1346, from a functional employee who owes a comparable duty." *Id.* at 28a.

The court of appeals also rejected petitioners' contention that the jury instructions were inconsistent with this Court's decision in *McDonnell* v. *United States*, 579 U.S. 550 (2016), which interpreted the term

"official act" in the federal bribery statute, 18 U.S.C. 201. Pet. App. 29a-30a. The court observed that *McDonnell* "did not hold that only a formal government officer could perform an 'official act.'" *Id.* at 30a. It also took note that the statute in *McDonnell* prohibited acts not only by an "officer or employee" of the federal government, but also by a "person acting for or on behalf of the United States." *Ibid.* (quoting 18 U.S.C. 201(a)(1)).

Finally, the court of appeals rejected Aiello's argument that the jury instructions raised "First Amendment, due process, and federalism" concerns. Pet. App. 31a. The court saw nothing in the Constitution that required it "to introduce a new requirement of formal governmental employment" into Section 1346. *Ibid.* (emphasis omitted).

2. The second case below arose out of a bid-rigging scheme involving Aiello, Ciminelli, Gerardi, and Kaloyeros.

a. The scheme aimed to take advantage of Governor Cuomo's "Buffalo Billion" initiative, under which the State aimed to invest one billion dollars of public money in the Buffalo area. Aiello Pet. App. 49a. The State authorized a non-profit corporation, the Fort Schuyler Management Corporation, to award contracts under that initiative. *Id.* at 51a; Gov't C.A. Br. 27. In choosing contractors, "Fort Schuyler employed a request-for-proposal * * * process under which it would announce its needs for each project through [a request for proposals] and then permit interested parties to compete for the projects by submitting bids and a description of their qualifications." Aiello Pet. App. 51a. Kaloyeros, a member of Fort Schuyler's Board of Directors, manipulated that process to benefit a com-

pany owned by Aiello and Gerardi and another company owned by Ciminelli. *Id.* at 50a-56a.

Specifically, Kaloyeros steered the Board to designate "preferred developers" and to grant them the first opportunity to negotiate for specific projects. Aiello Pet. App. 52a; see *id.* at 50a-56a. He then drafted the requests for proposals for those positions "in a way that would give [his co-conspirators' companies] an advantage." *Id.* at 52a. For example, one request for proposals required the developer to have 15 years of experience, to use a particular type of software, and to satisfy other requirements "lifted directly from the list of qualifications Aiello and Gerardi had prepared and sent." *Id.* at 53a. Another request for proposals "contained specifications unique to" Ciminelli's company, including a 50-year experience requirement, "a requirement that the preferred developer be headquartered in Buffalo, and additional language lifted directly from talking points provided to Kaloyeros from Ciminelli." *Ibid.*

The Board—without knowledge of Kaloyeros's ties to Aiello, Gerardi, and Ciminelli—chose Aiello's and Gerardi's company under one request for proposals and Ciminelli's company under another. Aiello Pet. App. 55a. Aiello's and Gerardi's company ultimately received construction projects worth $105 million, and Ciminelli's company ultimately received a project worth $750 million. *Ibid.*

b. The grand jury charged Kaloyeros, Aiello, Ciminelli, and Gerardi with multiple crimes, including wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1343, 1349. See Aiello Pet. App. 56a-57a.

At trial, the district court instructed the jury that it could find guilt on those counts only if it found beyond a reasonable doubt that "the alleged scheme contemplated depriving Fort Schuyler of money or property." Aiello Pet. App. 87a. The court told the jury that "[p]roperty" includes "intangible interests such as the right to control the use of one's assets" and that a defendant deprives a victim of that right when he deprives the victim of "potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Id.* at 87a-88a. The court made clear that, to prove the charge on that basis, the government was required to show that petitioners had exposed Fort Schuyler to "tangible economic harm," such as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." *Id.* at 88a. "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," the court instructed, "then the government will not have met its burden of proof." *Ibid.*

The jury found petitioners guilty on all counts. Aiello Pet. App. 57a.

c. The court of appeals affirmed. Aiello Pet. App. 45a-80a. The court rejected petitioners' contention that "the right-to-control theory of wire fraud is itself invalid," noting that the theory was "well-established in Circuit precedent." *Id.* at 48a n.2. It also rejected Aiello and Kaloyeros' contention that the right-to-control instruction erroneously "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." *Id.* at 70a. The court observed that, contrary to petitioners' interpretation, the instructions allowed the jury to find petitioners guilty only if the scheme contemplated "tangible economic harm." *Id.* at 71a (citation omitted). It determined that "there was no error, and certainly no harmful error, in the district court's right-to-control jury instruction." *Id.* at 72a.

ARGUMENT

Percoco and Aiello contend (Pet. 21-30; Aiello Pet. 14-22) that the jury instructions in their case were flawed because they did not treat a current formal employment relationship with the State as an invariably necessary component of a duty to provide honest services to the public. Aiello, Ciminelli, Gerardi, and Kaloyeros contend (Aiello Pet. 28-36; Kaloyeros Pet. 18-26; Ciminelli Pet. 11-25) that their convictions rest on a legally invalid "right to control" theory. The court of appeals correctly rejected petitioners' contentions. Its decisions do not conflict with any decision of this Court or any other court of appeals. And these cases also would be poor vehicles for reviewing petitioners' contentions. The petitions for writs of certiorari should be denied.

1. Percoco's and Aiello's challenge to their convictions for conspiring to commit honest-services fraud does not warrant further review.

a. Federal law has long prohibited fraud committed by means of interstate mail or wires. See 18 U.S.C. 1341 and 1343. In a line of cases that began in the 1940s, the courts of appeals held that the mail and wire fraud statutes prohibited schemes to deprive others of

the right to "honest services." See *Skilling* v. *United States*, 561 U.S. 358, 400-401 (2010). In *McNally* v. *United States*, 483 U.S. 350 (1987), however, this Court rejected the honest-services theory of fraud. Congress responded by enacting 18 U.S.C. 1346, which expressly provided that the fraud statutes covered a "scheme or artifice to deprive * * * another of the intangible right of honest services." *Ibid.*; see *Skilling*, 561 U.S. at 402.

In *Skilling* v. *United States*, *supra*, this Court rejected the claim that the honest-services statute is void for vagueness. 561 U.S. at 399-413. Avoiding vagueness concerns, the Court read the statute "to encompass only bribery and kickback schemes." *Id.* at 412. The Court explained that the "prohibition on bribes and kickbacks draws content not only from pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Ibid.* In particular, the court highlighted 18 U.S.C. 201, which prohibits bribery involving federal officials; the court read the honest-services fraud statute to reach similar schemes involving "state and local corruption" and "private-sector fraud." *Skilling*, 561 U.S. at 413 n.45; see, *e.g.*, *McDonnell* v. *United States*, 579 U.S. 550, 580 (2016) (defining honest-services fraud with reference to Section 201).

The lower courts correctly eschewed an invariable requirement that a person "have a formal employment relationship with the state in order to owe * * * a duty of honest services to the public." Pet. App. 142a. A person who lacks such a relationship can still owe such a duty in limited circumstances. For example, the court of appeals' "pre-*McNally* case law" and Section 201, both of which give "content" to the honest-

services fraud statute, *Skilling*, 561 U.S. at 412, illustrate that a person who has nominally relinquished a public office but who "in reality" continues to exercise that office can qualify as a "de facto" public official who owes a duty to provide honest services. Pet. App. 25a (citations omitted).

As this Court observed in *McNally*, the honest-services doctrine established in the courts of appeals—which Congress revived in 18 U.S.C. 1346—could treat "an individual without formal office" as "a public fiduciary if others rely on him because of a special relationship with the government and he in fact makes governmental decisions." 483 U.S. at 355 (citation and internal quotation marks omitted); see *Skilling*, 561 U.S. at 402. In addition, Section 201, which likewise informs the scope of honest-services fraud, defines a "'public official'" subject to federal bribery law to include not only "an officer or employee," but also a "person acting for or on behalf of the United States * * * in any official function." 18 U.S.C. 201(a)(1); see *Skilling*, 561 U.S. at 412. As this Court has recognized, Section 201's text is therefore not limited to "persons in a formal employment or agency relationship with the Government." *Dixson* v. *United States*, 465 U.S. 482, 494 (1984). Because a person can qualify as a "'public official'" if he in fact acts for or on behalf of the government, even if he does not formally qualify as an "'officer or employee,'" "employment by the United States or some other similarly formal contractual or agency bond is not a prerequisite to prosecution under the federal bribery statute." *Id.* at 490, 498 (quoting 18 U.S.C. 201).

Relatedly, a person who has been selected to serve as a public official can owe a duty of honest services

even if his term of office has not yet begun. Section 201, by its express terms, covers not only bribery involving a public official but also bribery involving a "'person who has been selected to be a public official'"—a term it defines to include "any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed." 18 U.S.C. 201(a)(2). Thus, just as a federal appointee can violate Section 201 by accepting bribes before his term of federal office begins, so too can a state appointee commit honest-services fraud by accepting bribes before his term of state office begins.

Here, Percoco owed a duty to provide honest services on both of those grounds during his temporary break, to run the governor's reelection campaign, from his once-and-future position as a formally state-employed governor's aide. The evidence showed that Percoco was "in reality" a public official at the time of the bribery scheme at issue. Pet. App. 25a (citation omitted). Although Percoco had nominally left his post in the Executive Chamber, he in fact continued to carry out that role: he "held onto and used his Executive Chamber telephone, desk, and office"; he "continued to conduct state business"; and he "maintained control over official matters." *Id.* at 41a-42a. In fact, Percoco "was at his desk in the Executive Chamber" when he called another state official to pressure him to waive the required labor peace agreement. *Id.* at 8a.

The evidence also showed that Percoco had been "selected to be a public official" in New York. 18 U.S.C. 201(a)(2). Percoco "represented that he had a guaranteed position with Cuomo's administration after the election" and "had told his bank and several others

that he intended to return to the Governor's Office." Pet. App. 7a, 41a. Then, after he "had already signed and submitted his reinstatement forms" but a few days before he formally returned to his position, Percoco called another state official to pressure him to help Aiello's company. *Id.* at 8a. And Percoco continued to repay Aiello's bribe with favors after formally returning to state employment, for instance by pressuring state officials to release outstanding funds to Aiello's company and to process a stalled pay raise for Aiello's son. *Id.* at 8a-9a.

b. Petitioners' contrary arguments lack merit. Petitioners principally criticize the court of appeals' decision in a different case from four decades ago, *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983). As the government observed below, however, "this case does not go as far as *Margiotta*." Gov't C.A. Br. 90. Although the decision below "reaffirm[ed] *Margiotta*'s reliance-and-control *theory* in the public-sector context," Pet. App. 25a (emphasis added), it did not—and had no occasion to—apply or uphold it in the type of circumstances on which petitioners focus. As a result, petitioners' criticisms of *Margiotta* are largely misplaced in the context of this case.

In *Margiotta*, the chairman of a local political party was convicted of honest-services fraud for accepting payments in return for exercising his political influence over local officials. 688 F.2d at 113. Unlike Percoco, the chairman did not occupy a public office and had not been selected to serve as a public official. *Id.* at 112. The court of appeals concluded, however, that the chairman's "prestige," "political power," and "influence and control over governmental processes"

were sufficiently "substantial" to give rise to a fiduciary duty to the public. *Id.* at 111, 113, 122.

The decision below does not directly address, or expressly embrace, that result. As the court of appeals noted, the district court here explicitly instructed the jury that "mere influence and participation standing alone are *not* enough to impose a fiduciary duty." Pet. App. 24a (emphasis added; brackets and citation omitted). And Percoco's fiduciary duty did not rest solely on his "prestige," "political power," or informal "influence." *Margiotta*, 688 F.2d at 111, 113, 122. Instead, the facts demonstrated that (1) Percoco continued to function as a public official even after nominally leaving the office and (2) Percoco had been selected to (and then did) serve again as a public official in the same position. See pp. 14-15, *supra*. The questions presented in the petitions—whether a private citizen owes a fiduciary duty by virtue of his "informal political or other influence over governmental decisionmaking" (Pet. i) or whether "paying an influential private citizen to advocate one's position" constitutes honest-services fraud (Aiello Pet. i)—thus encompass a broader amount of conduct than the actual decision below. Contrary to petitioners' suggestion (*e.g.*, Pet. 20) the court did not have occasion to, and thus did not, consider the vitality of *Margiotta*'s conclusion that a party leader's informal "influence" can give rise to a fiduciary duty. *Margiotta*, 688 F.2d at 122.

Petitioners err in asserting (Pet. 21-30; Aiello Pet. 19-22) that the court of appeals' decision in this case raises constitutional and practical problems. The decision does not raise lenity or vagueness concerns (Pet. 28; Aiello Pet. 17), because pre-*McNally* case law and Section 201 provide notice that a person who functions

as a public official or has been selected to serve as a public official does not immunize himself to commit federal fraud merely by avoiding contemporaneous formal employment. The decision also does not raise federalism concerns (Pet. 29-30; Aiello Pet. 21); to the contrary, the recognition of a fiduciary duty in these circumstances is fully consistent with "New York law." Pet. App. 25a; see, *e.g.*, N.Y. Penal Code §§ 10.00(15), 200.00, 200.10 (McKinney Supp. 2022) (prohibiting bribery of public servants, a term defined to include persons who have been selected to serve as public servants). Nor does the decision below raise First Amendment concerns (Pet. 30; Aiello Pet. 19-20). Percoco was not, as petitioners suggest, a "private citizen" who received money to "lobby the government, Aiello Pet. 14 (capitalization and emphasis omitted); he was a high-ranking government official who continued to oversee official business despite taking an effective leave of absence from his post, and he accepted large bribes in return for wielding his authority to pressure subordinate government officials to perform official acts.

c. Petitioners are incorrect in claiming (Pet. 26-28; Aiello Pet. 15-18) that the decision below conflicts with this Court's decisions in *Skilling* and *McDonnell* v. *United States*, *supra*. In the footnote of *Skilling* on which petitioners rely (Pet. 26-28), the Court noted that, in pre-*McNally* cases, "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute; examples include public official-public, * * * employee-employer, * * * and union official-union members." 561 U.S. at 407 n.41. That footnote sets forth "examples" of cases in which a person can owe a fiduciary duty; it does not provide an exhaustive list, or even indicate that the existence of a

fiduciary duty must be "beyond dispute" in every case. *Ibid.* In addition, its list of examples includes the duty of a "public official" to the "public," *ibid.*; the decision in *Skilling* goes on to identify Section 201 bribery as a source of "content" for honest-services fraud, *id.* at 412; and under Section 201, a person can qualify as a "public official" bribe-taker without "formal employment," so long as he "occupies a position of public trust with official federal responsibilities," *Dixson*, 465 U.S. at 494, 496, as may be true for someone who in fact wields authoritative executive power.

In *McDonnell*, this Court explained that a payment qualifies as a bribe for purposes of a Section 201 charge, or equivalent honest-services charge, only if given with the intent to influence an official act. 579 U.S. at 572; see *id.* at 562. Consistent with that requirement, "the jury [in this case] 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.'" Pet. App. 10a (citation omitted). Contrary to petitioners' suggestion (Aiello Pet. 18), a person who does not have a formal employment relationship with the government can still agree to perform an official act. Cf. *Dixson*, 465 U.S. at 496 (referring to "official federal responsibilities").

McDonnell defines an official act to include not only rendering an official decision on a question or matter, but also exerting "pressure on *another* official" to render such a decision. 579 U.S. at 572. A person who lacks a formal employment relationship with the government can still exert such pressure; indeed, in this case, Percoco called another state official to pressure him to excuse Aiello's company from having to obtain a

labor peace agreement. Pet. App. 8a. Further, *McDonnell* does not require that the official actually perform the official act; "it is enough that the official agree to do so." 579 U.S. at 572. Even if a person who has been selected for public office could not yet perform an official act, he could still agree to perform such an act after he takes office.

d. Petitioners also err in asserting (Pet. 17-18; Aiello Pet. 22), that certiorari is warranted based on a conflict between the decision below and the Third Circuit's decision in *United States* v. *Murphy*, 323 F.3d 102 (2003). *Murphy*—like *Margiotta* but unlike this case—involved a party chairman who accepted payments in return for exercising his influence over local politics. *Id.* at 105-108. The Third Circuit concluded that the party chairman could not be convicted of honest-services fraud, declining to treat "private party officials in the same manner as public officials." *Id.* at 118. But although *Murphy* disavowed *Margiotta* in that way, see *id.* at 114-118, it did not squarely foreclose the possibility of an honest-services-fraud conviction of a defendant who was not a formal state employee. In particular, it did not address whether a once-and-future state official like Percoco, who continued to exercise authority over state actors, could owe a fiduciary duty to the public.

The Third Circuit instead resolved *Murphy* on the ground that the government had failed to "identify any clearly established fiduciary relationship or legal duty in either federal or state law between Murphy and Passaic County or its citizens * * * beyond a criminal statute," which the Third Circuit did "not believe can create a fiduciary relationship." 323 F.3d at 117. As explained above, the convictions in this case do not rest

on the theory that a party official can owe a fiduciary duty to the public by virtue of his political influence, or solely on the basis of a state criminal-bribery law. It instead rests on Percoco's role as a de facto public official while nominally, and temporarily, having relinquished a public office to which he was slated to return. That was not at issue in *Murphy*, which also predates *Skilling*'s explication of the relevant sources of law for an honest-services prosecution. Nothing in that two-decade-old decision warrants the Court's review of this case.

Indeed, this case also would be a poor vehicle for resolving any circuit conflict. The government relied below on a "retainer theory" of bribery, arguing that Percoco agreed to provide Aiello a stream of benefits in return for payments from Aiello. Pet. App. 64a. Although Percoco provided some of those benefits (such as pressuring a state official to waive the labor peace agreement) after he had submitted his reinstatement forms but before he formally resumed his official position, he provided other benefits (such as pressuring state officials to release outstanding funds to Aiello's company and to process a stalled pay raise for Aiello's son) "[a]fter he resumed his official role in Governor Cuomo's administration." *Id.* at 8a. Even if Percoco did not owe a duty to provide honest services when he provided the former benefits, he indisputably owed such a duty when he provided the latter benefits —and the agreement to provide the latter benefits would suffice to support petitioners' convictions. See Gov't C.A. Br. 92-94 (arguing harmlessness).

2. Petitioners Aiello, Ciminelli, Gerardi, and Kaloyeros independently contend (Aiello Pet. 24-36; Kaloyeros Pet. 18-25; Ciminelli Pet. 11-24) that their con-

victions rest on a legally invalid "right to control" theory of wire fraud. That contention lacks merit, and this Court has recently and repeatedly denied certiorari petitions raising similar claims. See *Gatto* v. *United States*, 142 S. Ct. 710 (2021) (No. 21-169); *Johnson* v. *United States*, 141 S. Ct. 687 (2020) (No. 19-1412); *Kelerchian* v. *United States*, 140 S. Ct. 2825 (2020) (No. 19-782); *Aldissi* v. *United States*, 140 S. Ct. 1129 (2020) (No. 19-5805); *Binday* v. *United States*, 140 S. Ct. 1105 (2020) (No. 19-273); *Viloski* v. *United States*, 137 S. Ct. 1223 (2017) (No. 16-508); *Kergil* v. *United States*, 136 S. Ct. 2488 (2016) (No. 15-1177); *Resnick* v. *United States*, 579 U.S. 918 (2016) (No. 15-8582); *Binday* v. *United States*, 579 U.S. 917 (2016) (No. 15-1140); *Viloski* v. *United States*, 575 U.S. 935 (2015) (No. 14-472). The same result is warranted here.

a. The federal wire fraud statute makes it a crime to use 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." 18 U.S.C. 1343. The statutory phrase "scheme or artifice to defraud" covers "schemes to deprive [people] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000) (citations omitted). And the term "'property'" includes "intangible property rights." See *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (quoting 18 U.S.C. 1341); see also, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 20-21 (1999) (treating mail and wire fraud statutes similarly).

The district court here correctly instructed the jury that "[p]roperty" includes "intangible interests such as the right to control the use of one's assets." Aiello Pet. App. 87a. The court further instructed the jury that a

scheme aims to deprive a person of that right if it contemplates causing the person to enter into an agreement or transaction that would cause the person "tangible economic harm." *Id.* at 88a. Such an "'economic' interest," *Pasquantino* v. *United States*, 544 U.S. 349, 357 (2005), is a form of property covered by the wire-fraud statute. See, *e.g.*, *Dickman* v. *Commissioner*, 465 U.S. 330, 336 (1984) ("[T]he use of valuable property * * * is itself a legally protectible property interest.").

The jury permissibly found that petitioners' scheme—which involved "falsely representing to Fort Schuyler that the bidding processes * * * were fair, open, and competitive, when, in truth, [they] were tailored so that Messrs. Aiello and Gerardi's company * * * and Mr. Ciminelli's company * * * would be selected as preferred developers," C.A. R.O.A. 1554—caused tangible economic harm to Fort Schuyler. The prosecution's evidence showed that the scheme deceived Fort Schuyler into awarding contracts to those companies, rather than other companies that could have provided better rates or superior services. Aiello Pet. App. 64a n.8. The evidence showed, for instance, that "absent the fraud, Fort Schuyler would have considered more, and perhaps stronger, applications in response to the [requests for proposals]." *Ibid.* It also showed that, in the absence of the misrepresentations, Fort Schuyler "might have been able to select a preferred developer who could offer more favorable economic terms for development contracts." *Ibid.*

b. Petitioners' arguments are unsound. First and foremost, petitioners err in suggesting that the instructions in this case allowed, and the court of appeals' decision countenanced, a finding of fraud based

solely on falsehoods directed at causing another person to use his property in way that he would not otherwise have done—even if the person faced no economic harm as a result of that use. See Aiello Pet. 1 ("[T]he 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 deciding how to expend his assets can be federal property fraud—even without evidence of any harm."); Kaloyeros Pet. 10 ("Nor did the government allege or attempt to prove contemplated or actual loss to Fort Schuyler."); Ciminelli Pet. 9-10 ("[T]he right-to-control theory made it unnecessary for the government to show that even the *completed* scheme produced tangible economic harm to Fort Schuyler.").

The district court expressly instructed the jury that the government was required to prove that the scheme contemplated "tangible economic harm," such as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." Aiello Pet. App. 88a. The court also instructed the jury that, "[i]f 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." *Ibid.* The court of appeals, in turn, made clear that the "right-to-control theory requires proof that 'misrepresentations or nondisclosures can or do result in tangible economic

harm.'" *Id.* at 60a (citation omitted). And it emphasized that the jury instructions in this case "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.'" *Id.* at 71a (citation omitted).

More generally, contrary to petitioners' contention, the fraud statutes are not limited to property interests "that can be transferred from the alleged victim to the defendant." Aiello Pet. 31; see Kaloyeros Pet. 23; Ciminelli Pet. 17-18. In *Carpenter* v. *United States*, *supra*, this Court upheld mail- and wire-fraud convictions of defendants who conspired to trade on financial information to be published in a forthcoming newspaper column that had not yet become public. 484 U.S. at 22-24. The Court explained that the newspaper "had a property right in keeping confidential and making exclusive use, prior to publication, of the [information contained in the] column." *Id.* at 26. Notwithstanding that the defendants' scheme did not directly transfer a right of confidentiality and exclusivity from the newspaper to themselves, the Court had "little trouble" concluding that the defendants had engaged in a scheme to defraud because the newspaper had "been deprived of its right to exclusive use of the information." *Id.* at 26, 28. Accordingly, although the Court has sometimes paraphrased the statutory requirements in slightly different language, see, *e.g.*, Ciminelli Pet. 18 (citing *Skilling*, 561 U.S. at 400), *Carpenter* forecloses any requirement of precise congruence between an intended loss to the victim and

gain by the defendant. See *Carpenter*, 484 U.S. at 27-28.

Sekhar v. *United States*, 570 U.S. 729 (2013), and *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003)—on which petitioners rely (Aiello Pet. 32; Kaloyeros Pet. 24-25; Ciminelli Pet. 19)—do not show otherwise. Those cases concerned Hobbs Act extortion, see 18 U.S.C. 1951(a), not mail or wire fraud. One element of Hobbs Act extortion is "the obtaining of property from another." 18 U.S.C. 1951(b)(2). This Court interpreted that element to require "'not only the deprivation but also the acquisition of property,'" which in turn means that the "property extorted must * * * be *transferable*." *Sekhar*, 570 U.S. at 734 (quoting *Scheidler*, 537 U.S. at 404). The text of the wire-fraud statute, however, does not specify a particular source for property that the defendant intends to obtain. See 18 U.S.C. 1343 (criminalizing use of wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises").

Petitioners err in arguing (Aiello Pet. 31-32; Kaloyeros Pet. 23; Ciminelli Pet. 17-18) that the decision below conflicts with this Court's decisions in *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), and *Cleveland* v. *United States*, *supra*. In those cases, the Court held that a government's control of a bridge (*Kelly*) or of state gambling licenses (*Cleveland*) did not constitute a "property" right for purposes of the fraud statutes, because those interests were regulatory rather than proprietary. See *Kelly*, 140 S. Ct. at 1572-1573; *Cleveland*, 531 U.S. at 15, 20-22. Petitioners' scheme here, however, was directed not at a state's "sovereign power to regulate," *Kelly*, 140 S. Ct. at 1572 (citation omit-

ted), but at Fort Schuyler's expenditure of its money. They planned to—and did—receive money from Fort Schuyler after manipulating the bid-submission process in a manner that impeded Fort Schuyler's ability to get better services, a lower price, or both from an alternative provider.

Contrary to Kaloyeros's assertion (Kaloyeros Pet. 18-19), the decision below also does not conflict with this Court's decision in *McNally*. Kaloyeros characterizes (Kaloyeros Pet. 18) the "fact pattern of this case" as "almost a mirror of *McNally*: a state official was tried by federal prosecutors for a scheme to steer state contracts to certain favored vendors." In *McNally*, however, this Court reversed the conviction because "there was no charge and the jury was not required to find that the [victim] was defrauded of any money or property." 483 U.S. at 360. In this case, in contrast, the jury was instructed that it could find petitioners guilty only if the scheme "contemplated depriving Fort Schuyler of money or property" and that Fort Schuyler was "exposed to tangible economic harm." Aiello Pet. App. 71a, 87a (citation omitted).

Finally, petitioners' contentions (Aiello Pet. 33-36; Kaloyeros Pet. 25-26; Ciminelli Pet. 22-25) that the decision below raises constitutional concerns are unsound. Those contentions rest on the premise that the decision below extends to schemes "that contemplated no financial harm," Ciminelli Pet. 25, but as explained above, the jury instructions specifically required proof of exposure to "tangible economic harm," Aiello Pet. App. 88a.

c. The decision below is consistent with the decisions of other courts of appeals. Contrary to petitioners' assertions (Aiello Pet. 26-28; Kaloyeros Pet. 14-17;

Ciminelli Pet. 26-28), it does not conflict with *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014), *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), *United States* v. *Yates*, 16 F.4th 256 (9th Cir. 2021), or *United States* v. *Takhalov*, 827 F.3d 1307 (11th Cir. 2016).

Sadler and *Brucchausen* concerned the application of the federal fraud statutes to buyers who deceived sellers about the use to which the goods being bought at full price would be put—a matter that, in the context of those cases, was not an essential term of the bargain. See *Sadler*, 750 F.3d at 590-591 (false assurances that purchased opiates would be used for poor patients); *Bruchhausen*, 977 F.2d at 466-468 (false assurances that purchased equipment would not be sent to certain foreign countries). The Sixth and Ninth Circuits found that the deception in those cases did not constitute fraud because the seller had no property interest in "accurate information" about the intended use of its products, *Sadler*, 750 F.3d at 591, or "in the disposition of goods it no longer owns," *Bruchhausen*, 977 F.2d at 468. This case, however, does not involve a buyer's deception of a seller about the ultimate disposition of the items that it purchased at fair market value. See Aiello Pet. App. 88a (requiring jury finding of "tangible economic harm"). And unlike those cases, the deception in this case did concern "an essential element of the bargain." *Id.* at 63a (citation omitted).

In *Yates*, the Ninth Circuit concluded that bank executives could not be convicted of bank fraud simply for depriving the bank of "accurate information." 16 F.4th at 265. The Ninth Circuit explained that, to qualify as a scheme to defraud, "the scheme must be one to deceive the bank *and* deprive it of something of

value." *Ibid.* (citation omitted). The convictions in this case, however, do not rest on the premise that petitioners simply deceived Fort Schuyler or deprived it of accurate information. The instructions permitted the jury to find petitioners guilty only if the scheme also contemplated "tangible economic harm" to Fort Schuyler. Aiello Pet. App. 88a.

Finally, in *Takhalov*, the Eleventh Circuit concluded that the defendants did not commit wire fraud by "trick[ing] the victims into entering a transaction but nevertheless g[iving] the victims exactly what they asked for and charg[ing] them exactly what they agreed to pay." 827 F.3d at 1310. In its decision, the Eleventh Circuit observed that "[t]he Second Circuit has interpreted the wire-fraud statute in precisely [the same] way." *Id.* at 1314. And the Second Circuit's decision here is consistent with that understanding; as the court of appeals emphasized, the jury instructions "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" that it would otherwise have avoided. Aiello Pet. App. 71a. The result here differs from the result in *Takhalov* because this case, unlike *Takhalov*, involved "an economic discrepancy between what [the victim] reasonably anticipated it would receive and what it actually received." *Ibid.* (citation omitted).

d. At all events, this case would be a particularly poor vehicle for reviewing petitioners' contentions. The court of appeals determined that "there was no error, *and certainly no harmful error*, in the district court's right-to-control jury instruction." Aiello Pet. App. 72a (emphasis added). Although the court of appeals' reference to "harmful error" is brief, it suggests

that the court's judgment rests on alternative determinations that there was no error and that any error was harmless. Petitioners would therefore need to establish that the court erred on both grounds in order to obtain reversal. See *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924). Petitioners, however, have not addressed harmlessness, and the court of appeals was correct in finding "no harmful error" here. Aiello Pet. App. 72a.

The evidence showed that petitioners' scheme contemplated the deprivation of Fort Schuyler's money, not just the deprivation of its right to control assets. More specifically, the evidence showed that other companies had "management fees" that were "typically lower than those of both" Aiello's and Gerardi's company and Ciminelli's company. Aiello Pet. App. 64a n.8; see C.A. App. 1285, 1296-1297, 1322-1323, 1337-1338, C.A. Supp. App. 766. And the very object of petitioners' bid-rigging scheme was to exclude competitors that might provide better terms or lower prices. Had petitioners been confident that Aiello's and Gerardi's company and Ciminelli's company could prevail in a fair system, they would have had no need for a rigged one. Thus, even if the jury had not been instructed on the right-to-control theory, it would have found that petitioners' scheme was designed to deprive Fort Schuyler of money or property.

Even putting aside that issue, petitioners err in arguing (Aiello Pet. 37-38; Ciminelli Pet. 33-36) that this case is a better vehicle for resolving the question presented than other certiorari petitions that have raised the same question but that the Court has denied. Petitioners attempt to distinguish many of those earlier petitions by arguing that "the scheme at issue did

cause traditional economic harm" (Ciminelli Pet. 35) or that "the jury found the fraud scheme caused or would cause economic harm" (Aiello Pet. 38). In this very case, however, the district court instructed the jury (and the court of appeals agreed) that the government was required to show that the scheme exposed Fort Schuyler to "tangible economic harm." Aiello Pet. App. 88a; see *id.* at 60a. To the extent that petitioners might disagree about the meaning of that instruction in this specific case, that disagreement would not warrant this Court's review. This case thus suffers from the same "vehicle problems" that petitioners attribute to earlier petitions that this Court has denied: "the jury found the fraud scheme caused or would cause economic harm." Aiello Pet. 38.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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