No. 21-1158

In the Supreme Court of the United States

JOSEPH PERCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
JOHN-ALEX ROMANO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

No. 21-1158

JOSEPH PERCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 641-686) is reported at 13 F.4th 180. The opinion and order of the district court (J.A. 111-172) is not published in the Federal Supplement but is available at 2017 WL 6314146.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2021. Petitions for rehearing were denied on November 1, 2021 (Pet. App. 47a-54a). On January 7, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 1, 2022. The petition for a writ of certiorari was filed on February 17, 2022, and granted on June 30, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire-fraud statute provides in relevant part:

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

18 U.S.C. 1343. The federal honest-services-fraud statute provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Other pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1349, and one count of soliciting bribes and gratuities, in violation of 18 U.S.C. 666(a)(1)(B). J.A. 577-578. He was sentenced to 72 months of imprisonment, to be followed by three years of supervised release. J.A. 579-580, 587. The court of appeals affirmed. J.A. 641-686.

1. From 2011 to 2016, petitioner was a senior aide to Andrew Cuomo, then the Governor of New York. J.A. 179. Throughout that period, petitioner formally served

as the Governor's Executive Deputy Secretary, except for approximately eight months in 2014 when he managed Governor Cuomo's reelection campaign, and the Executive Deputy Secretary post was formally vacant. J.A. 178-180, 533-534, 536, 682. The Executive Deputy Secretary was among the most senior officials in the Governor's Office, which was also known as the "[E]xecutive [C]hamber." J.A. 174, 177-178. Among other duties, petitioner oversaw budget and personnel decisions (including hiring and salary raises) for the Executive Chamber, labor union relations, intergovernmental affairs, and legislative affairs. J.A. 177-178, 182-183, 186-187, 316-317. Petitioner's convictions stem from his involvement in two bribery schemes, the first beginning in 2012, and the second—the principal focus of petitioner's claims in this Court—beginning in 2014. See J.A. 644-649.

a. The first bribery scheme began when petitioner confided in a state lobbyist, Todd Howe, that he was in a tight financial situation, and asked Howe if any of Howe's clients would hire petitioner's wife. J.A. 645. Howe then approached Galbraith Kelly, Jr., the head of an energy company, Competitive Power Venture (CPV), that was seeking a power contract with the State of New York. J.A. 644-645. CPV eventually hired petitioner's wife to work as an "education consultant," paying her $7500 per month ($90,000 per year) for only a few hours of work each week. J.A. 645; see J.A. 646.

To conceal the arrangement, the payments were routed through a third-party contractor, and petitioner's wife's name was omitted from CPV materials. J.A. 646. In exchange, petitioner agreed to help CPV obtain a power purchase agreement from the State. *Ibid.* Petitioner also "push[ed] on" a supervisor of state

agencies to discourage the State from awarding a power purchase agreement to one of CPV's competitors. *Ibid.* And petitioner pressured state officials to secure an agreement between New York and New Jersey that would facilitate CPV's construction of a power plant in New Jersey. J.A. 646-647.

All of petitioner's actions in support of the CPV scheme occurred while he was Executive Deputy Secretary and before he began running the governor's campaign in 2014. D. Ct. Doc. 978, at 42-43 (Feb. 8, 2019) (Order Denying Bail).

b. In mid-April 2014, petitioner temporarily left state employment for approximately eight months to manage Governor Cuomo's reelection campaign. J.A. 192-193, 380, 636. During that time, no one else was named Executive Deputy Secretary, J.A. 178-180, 682, and petitioner continued to enjoy many of both the physical and functional prerogatives of that position. See, *e.g.*, J.A. 681-683. He also informed others that he intended formally to return to that office after the election, and he did formally return to it roughly a month after Governor Cuomo was re-elected. See J.A. 647-649.

As Executive Deputy Secretary, petitioner had two offices in the Executive Chamber, one in Albany and one in New York City, and he continued to use them "to conduct state business" while working on the campaign; no one else moved into them or used them on a regular basis. J.A. 682; see J.A. 194-196, 294, 309, 432-433. Petitioner also continued to make phone calls on his government line and to conduct business from those offices; phone records showed 837 calls on 68 days from petitioner's Executive Chamber desk telephone in New York City while petitioner was working on the campaign—including over 100 calls to his wife's cell phone, his

home, and Howe. J.A. 286-288, 607-608, 682. During that time, petitioner also instructed numerous people to reach him by calling his executive assistant in the Executive Chamber. J.A. 289-291.

In addition, throughout his time on the reelection campaign, petitioner continued to participate in state operations and policy decisions, often from his state offices. One of his associates testified that petitioner's "grip on power never changed, diminished, or dissipated as he managed the campaign," and petitioner "'instruct[ed]'" the governor's staff "'on various non-campaign topics'" while formally designated solely as the campaign manager. J.A. 682 (brackets and citation omitted). Among other things, petitioner planned a state government event, gave input and instruction on a state project, and attended an internal state meeting. J.A. 318-324. He also pressured state employees not to leave state government and was involved in state hiring and salary decisions. J.A. 344-345, 380-385, 438-445, 465-467, 474-475. And the Acting Counsel to the Governor understood that petitioner "spoke for the governor" on legislative matters and accordingly sought petitioner's views on them. J.A. 311; see J.A. 310.

In August 2014, petitioner informed a bank that his "[e]mployment post-election" would be in "Governor Andrew Cuomo['s] * * * administration." Gov't C.A. App. 110; see J.A. 647-648. Around the same time, he told Howe of his intention to return to the Executive Chamber. J.A. 424-427. On November 25, after Governor Cuomo had been reelected, petitioner signed forms related to his reinstatement. J.A. 212-214, 468-472, 618-619, 621-634. On December 1, he executed those forms in front of a notary. J.A. 634. By December 3, a number of people (in addition to Howe) knew that petitioner was

returning to his prior role. J.A. 307-308, 355, 368, 468-471, 647-648. Petitioner formally resumed the Executive Deputy Secretary position on December 8. J.A. 472.

c. The second bribery scheme evolved from petitioner's request to Howe in early 2014—around three months before petitioner joined the governor's reelection campaign—to find petitioner a client who would pay him while he was working on the campaign. J.A. 357, 377-379. Petitioner needed funds to assist him in paying off a real-estate debt that was coming due. J.A. 357, 378, 386-387. Howe identified respondent Steven Aiello, whose company, COR Development, wanted to obtain funding from a state agency, Empire State Development (ESD), for a construction project without entering into a potentially costly labor peace agreement. J.A. 332-334, 357-359, 377-379, 534-535. Howe had attempted for "months" to "resolve" the labor peace agreement issue "with other folks in the governor's office," but had been unsuccessful. J.A. 388; see J.A. 388-389. Howe believed that petitioner had the authority to ensure that the State did not require COR Development to enter into the agreement. See J.A. 387-389.

In July 2014, while petitioner was on the reelection campaign, ESD informed COR Development that ESD's legal counsel (whose department had authority over the matter) had determined that a labor peace agreement was in fact "require[d]" to receive project funding. J.A. 597; see J.A. 222-223, 331, 334-335, 338, 390, 597-598. Later that month, Aiello e-mailed Howe asking whether "there [is] any way Joe P" (a shortened version of petitioner's name) "can help us with" the labor peace agreement issue "while he is off the 2nd floor working on the

Campaign." J.A. 594; see J.A. 392. The next day, Aiello e-mailed Howe again about the labor peace agreement, asking Howe to call petitioner and stating that he "[n]eed[ed] help on this." J.A. 393.

In early August, COR Development made an initial payment of $15,000 to petitioner. J.A. 395-397; see J.A. 379. At Aiello's suggestion, to avoid paying petitioner directly, COR Development made out the $15,000 check to an entity controlled by Howe, who in turn had a $15,000 check made out and sent to petitioner's wife. J.A. 394-397; see J.A. 421-423. In October, after Aiello, Howe, and petitioner had exchanged e-mails about the labor peace agreement, COR Development paid petitioner an additional $20,000, again routing the money through Howe and petitioner's wife. J.A. 397-400. Petitioner received both payments after advising the bank that, and around the time he informed Howe that, he would soon be re-employed by the Cuomo administration. See J.A. 424-427, 647-648; Gov't C.A. App. 110.

On December 3—after petitioner had signed the forms for formal reinstatement as Executive Deputy Secretary, and less than a week before he formally reclaimed the title—Aiello's partner, Joseph Gerardi, pressured Howe by e-mail to have petitioner resolve the labor peace agreement issue in COR Development's favor. J.A. 611, 648. Howe quickly forwarded Gerardi's e-mail to petitioner, who instructed Howe to stand by. *Ibid.* Within an hour of receiving Howe's e-mail, petitioner called the Deputy Director of State Operations, the Executive Chamber official responsible for overseeing ESD, from his own Executive Chamber office. J.A. 279, 341-342, 344, 611-612, 648.

Petitioner told the Deputy Director that an ESD attorney had been holding up the project based on the

need for a labor peace agreement and that the project should move forward without that requirement. J.A. 341-343. Petitioner then called Howe and informed him that ESD would soon reach out to Gerardi with a "different perspective" on the need for the labor peace agreement. J.A. 612. The Deputy Director—who knew at that time that petitioner was formally returning to his role in the Executive Chamber—understood petitioner's directions as "pressure" from his "principal[]," who was a "senior staff member[]." J.A. 342-343; see J.A. 355. The Deputy Director instructed senior officials at ESD "that a labor peace agreement * * * should not be required as part of this project." J.A. 343; see J.A. 612.

The next day, an ESD official informed COR Development that it would not have to enter into a labor peace agreement in order to receive state funding for its project. J.A. 224-226, 613; see J.A. 334. The Deputy Director was not aware of any other instance in which ESD had determined that a labor peace agreement was required and then reversed its determination. J.A. 344. In subsequent e-mails, Aiello and Howe attributed ESD's reversal to petitioner's intervention. J.A. 404-406, 613.

After officially returning to office, petitioner took additional actions benefiting COR Development and Aiello, by instructing officials to prioritize the release of funds owed to COR Development, see J.A. 229-249, 346-354, 415-419, 609, 649, and by securing an additional raise for Aiello's son, who worked in the Executive Chamber, see J.A. 253-260, 263-278, 407-412, 429-430, 610, 649.

2. In 2017, a federal grand jury returned an 18-count indictment against petitioner, Aiello, Gerardi, Kelly, and other defendants. J.A. 74-109. Eleven counts related to

the CPV and COR Development bribery schemes. J.A. 649-650.[1]

a. Petitioner was charged with two counts of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 1349; two counts of soliciting bribes and gratuities, in violation of 18 U.S.C. 666(a)(1)(B); and three counts of Hobbs Act extortion, in violation of 18 U.S.C. 1951. J.A. 96-103. The honest-services-fraud statute, 18 U.S.C. 1346, makes clear that the scope of frauds criminalized by the federal wire-fraud statute "includes a scheme or artifice to deprive another of the intangible right of honest services."

The district court rejected petitioner's pretrial motion to dismiss the charges to the extent that they rested on actions he took while he was running Governor Cuomo's reelection campaign. J.A. 111-172. The court highlighted the indictment's allegations that, while attached to the campaign, petitioner "continued to function in a senior advisory and supervisory role with regard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities . . . among other responsibilities." J.A. 133 (citation omitted). The court also explained that the charges could properly "rely on conduct occurring when [petitioner] [wa]s

---

[1] The remaining seven counts in the indictment charged Aiello and other defendants, but not petitioner, with fraud and false-statement offenses in connection with schemes to rig the bidding processes for state-funded projects. See J.A. 75, 82-86. Those counts were severed from the counts relating to the CPV and COR Development schemes, and some of those counts were the subject of a separate jury trial. See J.A. 643-644. This Court granted a petition for a writ of certiorari filed by one of the defendants in that case in *Ciminelli* v. *United States*, 142 S. Ct. 2901 (2022) (No. 21-1170).

temporarily out of office if the scheme include[d] actions taken or to be taken when [petitioner] return[ed] to government." *Ibid.*

At trial, however, before charging the jury, the district court dismissed a Hobbs Act extortion count against petitioner related to the COR Development scheme on the view that the relevant extortion theory could apply only to a formal public official. J.A. 532-561.

b. For the honest-services counts, the district court instructed the jury that the government was required to prove that petitioner owed a duty of honest services to the public. J.A. 511. The court observed, as a threshold matter, that petitioner owed such a duty "[w]hile [he] was employed by the state * * * by virtue of his official position." *Ibid.* The court also explained, over a defense objection, that

> [a] person does not need to have a formal employment relationship with the state in order to owe a duty * * * of honest services to the public, however. You may find that [petitioner] owed the public a duty of honest services when he was not a state employee if you find that at the time he owed the public a fiduciary duty. To determine whether [petitioner] owed the public a fiduciary duty when he was not employed by the state, you must determine, first, whether he dominated and controlled any governmental business and, second, whether people working in the government actually relied on him because of a special relationship he had with the government. Both factors must be present for you to find that he owed the public a fiduciary duty. Mere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty.

Ibid.; see J.A. 477-480.

The jury found petitioner guilty of conspiring to commit honest-services wire fraud related to the COR Development scheme. J.A. 651. The jury also found petitioner guilty of conspiring to commit honest-services wire fraud related to the CPV scheme and soliciting bribes or gratuities related to the CPV scheme. *Ibid.* The jury acquitted petitioner on the remaining counts. *Ibid.*[2]

3. The court of appeals affirmed. J.A. 641-686.

a. The court of appeals rejected petitioner's contention that the district court erred by instructing the jury that petitioner could be found guilty of honest-services fraud based on conduct that occurred while he was not formally a state employee. J.A. 664-672. The court of appeals noted that, under its decision in *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983), "a formal employment relationship" is not a "rigid prerequisite to a finding of [a] fiduciary duty in the public sector." J.A. 665 (citation omitted). And the court explained that private individuals "who in reality or effect are the government owe a fiduciary duty to the citizenry." *Ibid.* (citation omitted).

The court of appeals observed that, "[o]n its face," the "capacious language" of Section 1346 "is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." J.A. 667-668. The court accordingly found "no

---

[2] Aiello was convicted of conspiring to commit honest-services wire fraud related to the COR Development scheme and acquitted on the remaining counts. J.A. 651. The jury deadlocked on the charges against Kelly, who later pleaded guilty to conspiring to commit wire fraud in connection with the CPV scheme. J.A. 651-652. Gerardi was acquitted on all counts. J.A. 651.

statutory basis for distinguishing a formal government employee, who is clearly covered by § 1346, from a functional employee who owes a comparable duty." J.A. 668. The court also found that the history of Section 1346 supported its understanding of the statute's text. J.A. 668-670.

The court of appeals further determined that the jury instructions were consistent with this Court's decision in *McDonnell* v. *United States*, 579 U.S. 550 (2016), which interpreted the term "official act" in the federal-official bribery statute, 18 U.S.C. 201. J.A. 670-671. The court of appeals observed that *McDonnell* "did not hold that only a formal government officer could perform an 'official act.'" J.A. 670. And the court explained that "[s]uch a holding could not be reconciled with the text" of Section 201, which prohibits acts not only by an "'officer or employee'" of the federal government, but also by a "'person acting for or on behalf of the United States.'" *Ibid.* (quoting 18 U.S.C. 201(a)(1)).

The court of appeals also observed that this Court's decision in *Dixson* v. *United States*, 465 U.S. 482 (1984) —which determined that the "'proper inquiry'" under Section 201 "'is not simply whether the person had signed a contract with the United States or agreed to serve as the government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities'"—indicated "that someone who is functionally a government official" can commit honest-services fraud. J.A. 670-671 (quoting *Dixson*, 465 U.S. at 496) (brackets omitted). And the court of appeals saw nothing in the Constitution that required it "to introduce a new requirement of formal governmental employment" into Section 1346 based on asserted

"First Amendment, due process, and federalism" concerns. J.A. 671 (emphasis omitted).

b. Turning to the record, the court of appeals found sufficient evidence that petitioner entered into agreements to perform official acts in both the CPV and COR Development schemes. J.A. 678-681. With respect to the COR Development scheme, the court also found sufficient evidence that petitioner owed a duty of honest services while he was managing the governor's reelection campaign. J.A. 681-684.

The court of appeals observed that "throughout his time on the campaign trail" petitioner "maintained the same position of power and trust in the state" that he enjoyed while formally employed as Executive Deputy Secretary. J.A. 681-682. The court emphasized, *inter alia*, that "no one ever formally replaced [petitioner] in his role as Executive Deputy Secretary"; "as early as August 7, 2014, [petitioner] represented that he had a guaranteed position with Cuomo's administration after the election"; "he did in fact return—as Executive Deputy Secretary—four months later"; he "held onto and used his Executive Chamber telephone, desk, and office, where he continued to conduct state business"; and "[s]everal individuals testified that [petitioner] maintained control over official matters." J.A. 682; see J.A. 682-683 (summarizing testimony regarding petitioner's continuing control over official matters).[3]

---

[3] The court of appeals also rejected Aiello's challenge to the sufficiency of the evidence of "his knowledge of [petitioner's] control" as relevant to his mens rea for honest-services fraud. J.A. 683. The court observed that Aiello "specifically sought out [petitioner] to use his position of power to push the Labor Peace Agreement through." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner committed honest-services fraud, as specified in 18 U.S.C. 1346, when he accepted bribes as a former, future, and functional public official. Petitioner is wrong to contend that the lack of a formal employment or agency relationship immunized him from such liability.

Section 1346 expressly applies the federal mail- and wire-fraud statutes to "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. Congress enacted Section 1346 in response to *McNally* v. *United States*, 483 U.S. 350 (1987), which had disapproved of the circuits' view that the mail- and wire-fraud statutes already covered honest-services fraud. In *Skilling* v. *United States*, 561 U.S. 358 (2010), this Court defined the "'intangible right of honest services'" to encompass the "violation of a fiduciary duty" through a "bribery or kickback scheme[]" and rejected a vagueness challenge to the statute as so defined. *Id.* at 404, 407. The Court explained that the definition is informed both by pre-*McNally* case law and by federal bribery prohibitions like 18 U.S.C. 201 and 18 U.S.C. 666. *Skilling*, 561 U.S. at 412.

The relevant authorities do not support an invariable requirement that a person must have a formal relationship with a government in order to owe the public a duty of honest services. Section 666, which prohibits federal program bribery, applies to "agent[s]," 18 U.S.C. 666(a)(1), broadly defined to include "person[s] authorized to act on behalf of * * * a government * * * includ[ing] a servant or employee, and a partner, director, officer, manager, and representative," 18 U.S.C. 666(d)(1). And Section 201 prohibits bribery of both a federal "public official" and a "person selected to be a

public official." 18 U.S.C. 201(c)(1)(B). Section 201 then defines "'public official'" itself to include not only "an officer or employee," but also a "person acting for or on behalf of the United States * * * in any official function." 18 U.S.C. 201(a)(1).

In *Dixson* v. *United States*, 465 U.S. 482 (1984), this Court explicitly rejected an interpretation of Section 201 that would have limited it to "persons in a formal employment or agency relationship" with a government. *Id.* at 494. And the Court has recognized, in the fraud context, that a relationship giving rise to relevant duties can be either a formal "fiduciary" relationship or a "similar relation of trust and confidence." *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980) (citation omitted). Pre-*McNally* circuit law, including decisions that this Court has approvingly cited, likewise supports a realistic, rather than purely formalist, approach to the inquiry. The relevant authorities thus make clear that a person who is not a formal employee or agent of a government can still owe a duty of honest services to the public under Section 1346 when the person has been selected to work for the government, or when the person actually exercises the powers of a government position with the acquiescence of the relevant government personnel.

In this case, the evidence overwhelmingly demonstrated that petitioner owed the public a duty of honest services when he engaged in the COR Development scheme. At that time, he was both (1) slated to return as the Executive Deputy Secretary, and (2) acting as a functional public official, insofar as he continued to use the government offices and phones, participate in government affairs, and issue directives to government employees who understood that they should comply.

Either basis alone is sufficient to support his conviction, and the jury instructions required a finding of the latter—a finding that petitioner provides no sound reason to disturb.

Petitioner's objections to his conviction are unsound. The Court's discussion of honest-services fraud in *Skilling* supports, rather than undercuts, the application of the honest-services fraud statute to petitioner's conduct. Petitioner's conviction is also consistent with the definition of "official act" in *McDonnell* v. *United States*, 579 U.S. 550 (2016), which includes "exert[ing] pressure on another official" who is making a decision. *Id.* at 572 (emphasis omitted). Applying Section 1346 in this case does not raise lenity or vagueness concerns because both the similar federal bribery statutes and Section 1346's mens rea requirement ensure fair notice that conduct like petitioner's is unlawful. The conviction likewise raises no First Amendment concerns because lobbyists, family members, and the like are neither incoming nor functional government officials, as petitioner was, and will not be chilled from engaging in legitimate speech. Finally, the judgment below does not infringe on federalism principles because even assuming a violation of state law were required for conviction, state bribery and ethics laws do not suggest that petitioner's conduct was permissible. Petitioner's conviction for illegal schemes to defraud the public by accepting bribes in return for official acts should be affirmed.

ARGUMENT

PETITIONER COMMITTED HONEST-SERVICES FRAUD BY ACCEPTING BRIBES WHEN SELECTED AS, AND FUNCTIONALLY SERVING AS, A PUBLIC OFFICIAL

Petitioner committed honest-services fraud, in violation of 18 U.S.C. 1346, by accepting bribes in exchange for official acts that depended on his past, future, and functional role as a public official. His previous formal title of Executive Deputy Secretary for the Governor of New York was never conferred on anyone else while petitioner was attached to the governor's reelection campaign; he made clear his intent to reassume the title—which he eventually did; and while the position remained nominally vacant, he carried out functions of that role. Petitioner's claim (Br. 2, 21) of categorical "private citizen" immunity rests on the mistaken premise that no matter how clear a defendant's authority over government business may be, he avoids a duty to the public simply by abstaining from a formal employment contract or its equivalent. Nothing in the statute, or the sources on which this Court has relied to interpret it, supports such a readily manipulable exception to the law.

A. Section 1346 Criminalizes Schemes To Defraud That Involve Bribes And Kickbacks Received In Violation Of A Duty Of Honest Services

Federal law has long prohibited "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" committed by means of the mail or interstate wires. 18 U.S.C. 1341, 1343; see, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 399-400 (2010). In a line of cases that began in the 1940s, the courts of appeals

construed the mail- and wire- fraud statutes to prohibit schemes to deprive others of intangible rights, including the right to "honest services." See *Skilling*, 561 U.S. at 400-401. In *McNally* v. *United States*, 483 U.S. 350 (1987), however, this Court disagreed with that line of cases, explaining that "Congress * * * must speak more clearly" in order to prohibit honest-services fraud. *Id.* at 360.

The following year, Congress responded by enacting 18 U.S.C. 1346, which states that, for purposes of the mail- and wire-fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." As this Court has recognized, Congress employed the phrase "the intangible right of honest services," *ibid.*, to "reinstate the body of pre-*McNally* honest-services law." *Skilling*, 561 U.S. at 405 (citation omitted). Accordingly, in *Skilling*, this Court interpreted the phrase specifically to refer to the "bribery and kickback schemes" that constituted the "'vast majority'" of the pre-*McNally* case law, which "involved offenders who, in violation of a fiduciary duty, participated in" such schemes. *Id.* at 407, 412 (citation omitted).

The Court found no due-process infirmity in the statute as so defined. *Skilling*, 561 U.S. at 412-413. The Court explained that "it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud"; that Section 1346's "*mens rea* requirement further blunts any notice concern"; and that the "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Id.* at 412. The Court highlighted 18 U.S.C.

666(a), which prohibits bribery of state or local officials in relation to federally funded programs, and 18 U.S.C. 201, which prohibits bribery of federal officials. *Skilling*, 561 U.S. at 412.

After *Skilling*, to convict a defendant of honest-services mail or wire fraud the government must prove that the defendant engaged in a scheme to breach a fiduciary duty through bribes or kickbacks. See *Skilling*, 561 U.S. at 407 & n.41, 408-409. The government must also prove that the defendant acted with intent to defraud (*i.e.*, an intent to deceive or cheat), see *Durland* v. *United States*, 161 U.S. 306, 313-314 (1896); that the deception concerned a material fact, see *Neder* v. *United States*, 527 U.S. 1, 22-25 (1999); and that the mail or interstate wires were used in furtherance of the fraudulent scheme, see 18 U.S.C. 1341, 1343.

B. An Individual May Owe A Duty Of Honest Services To The Public Without A Formal Employment Or Agency Relationship

The statutes and other legal authorities that inform the "content" of the honest-services-fraud statute, *Skilling*, 561 U.S. at 412, illustrate that in certain limited circumstances someone without a formal employment or agency relationship with a public employer may still owe the public a duty of honest services. Someone like petitioner, who is simply on a brief formal hiatus from a government position, but who continues to functionally exercise the relevant authority of that position in the meantime, may be treated as what he plainly is: someone who wields public power.

1. One of the two statutes that *Skilling* highlighted, 18 U.S.C. 666, prohibits not just a formal employee, but also any "agent * * * of a State [or] local * * *

government, or any agency thereof," from (*inter alia*) accepting bribes in connection with federally funded programs. 18 U.S.C. 666(a)(1). An "'agent'" is defined as any "person authorized to act on behalf of * * * a government," which "includes"—but would not be limited to—"a servant or employee, and a partner, director, officer, manager, and representative." 18 U.S.C. 666(d)(1); see, *e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 131 n.3 (2008) ("The word 'includes' is usually a term of enlargement, and not of limitation.") (brackets and citation omitted). Petitioner accordingly acknowledges (Br. 22, 24, 33, 37), that a common-law agency relationship would suffice under the honest-services-fraud statute. And courts have recognized that Section 666 includes individuals who are in fact permitted to exercise the "authori[ty] * * * of * * * a government," 18 U.S.C. 666(d)(1), even when they may lack the formal trappings of employment or agency.[4]

Even assuming that Section 666 incorporated the common law of agency, further context illuminates that

---

[4] See, *e.g.*, *United States* v. *Lupton*, 620 F.3d 790, 800-801 (7th Cir. 2010) (finding that a private real-estate agent whose firm's state contract disclaimed an agency relationship with the State was covered by Section 666), cert. denied, 562 U.S. 1247 (2011); *United States* v. *Hudson*, 491 F.3d 590, 595 (6th Cir.) ("Employment labels * * * may bring some employment relationships within the sphere of agency status [under Section 666(d)(1)] but they do not necessarily squeeze all other employment relationships out of that sphere.") (emphases omitted), cert. denied, 552 U.S. 1081 (2007); *United States* v. *Vitillo*, 490 F.3d 314, 323 (3d Cir. 2007) (finding that Section 666(d)(1) encompasses individuals who do not "necessarily control[] federal funds" and who are "independent contractor[s] who act[] on behalf of" a government); *United States* v. *Sotomayor-Vázquez*, 249 F.3d 1, 8 (1st Cir. 2001) (emphasizing Section 666(d)(1)'s "expansive" definition of "'agent'").

no legal agency relationship is invariably required under the honest-services-fraud statute. The parties in this case "stipulated before the district court that 'bribery' for the purposes of the honest-services-fraud statute is defined by reference to [Section] 201," the other statute highlighted in *Skilling*. J.A. 654; cf. *McDonnell* v. *United States*, 579 U.S. 550, 580 (2016) ("For purposes of this case, the parties defined honest services fraud * * * with reference to § 201."). Section 201 expressly prohibits bribery involving not only a federal "public official" but also a person who has been "*selected to be* a public official," namely, "any person who has been nominated or appointed to be a public official, or has been officially informed that such a person will be so nominated or appointed." 18 U.S.C. 201(a)(2) and (c)(1)(B) (emphasis added). And even beyond its application to a current or incoming "public official," Section 201 expressly applies to any "person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof * * * in any official function." 18 U.S.C. 201(a)(2).

In *Dixson* v. *United States*, 465 U.S. 482 (1984), this Court rejected a formal employment or agency relationship as a prerequisite for the application of Section 201. *Dixson* held that "officers of a private, nonprofit corporation administering and expending federal community development block grants"—using funds that the nonprofit had received from a city, which had in turn received the funds from the federal government—"are 'public officials' for purposes of the federal bribery statute." *Id.* at 484 (citation omitted). In so doing, the Court repeatedly and explicitly rejected a requirement that an individual have "some formal bond with the United States, such as an agency relationship, an

employment contract, or a direct contractual obligation" in order to be covered by the bribery prohibition. *Id.* at 490; see *ibid.* (observing that neither the petitioners nor their employer "ever entered into any agreement with the United States or any subdivision of the Federal Government"); *id.* at 493-494 ("Congress could not have meant to restrict the definition, as petitioners argue, to those persons in an employment or agency relationship with the Federal Government."); *id.* at 496 ("[T]he phrase 'acting for or on behalf of the United States' covers something more than a direct contractual bond."); *id.* at 498 ("[E]mployment by the United States or some other similarly formal contractual or agency bond is not a prerequisite to prosecution under the federal bribery statute.").

The Court recognized that, had "Congress intended courts to restrict" Section 201 "to persons in a formal employment or agency relationship with the Government, it would have had no reason to" include "the 'acting for or on behalf of' language" that expands the statute's scope beyond any such limits. *Dixson*, 465 U.S. at 494. The Court accordingly emphasized that Section 201 is "a 'comprehensive statute applicable to all persons performing activities for or on behalf of the United States,' whatever the form of delegation of authority." *Id.* at 496 (citation omitted). And the Court adopted the straightforward rule that, "[t]o determine whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities." *Ibid.* "Persons who hold such positions," the Court instructed, "are public officials

within the meaning of § 201 and liable for prosecution under the federal bribery statute." *Ibid.*

2. In accord with *Dixson*'s directive, courts of appeals since *Dixson* have found certain individuals who lack a direct employment or agency relationship with the federal government to be covered by Section 201. See, *e.g.*, *United States* v. *Thomas*, 240 F.3d 445, 446-449 (5th Cir.) (employee of private prison), cert. denied, 532 U.S. 1073 (2001); *United States* v. *Kenney*, 185 F.3d 1217, 1220-1222 (11th Cir. 1999) (per curiam) (employee of government contractor); *United States* v. *Hang*, 75 F.3d 1275, 1279-1281 (8th Cir. 1996) (employee of independent public corporation); *United States* v. *Madeoy*, 912 F.2d 1486, 1494-1495 (D.C. Cir. 1990) (fee appraiser who was not agent of the government), cert. denied, 498 U.S. 1105, and 498 U.S. 1110 (1991); *United States* v. *Velazquez*, 847 F.2d 140, 141-142 (4th Cir. 1988) (employee of county).

Circuit decisions employing a contextual approach to an individual's duty under Section 201 accord not only with the holding of *Dixson*, but also with this Court's understanding of how the lower courts would apply the law—including the honest-services-fraud statute. The Court in *Dixson*, for example, relied on a Second Circuit decision that had recognized that the category of federal "public official[s]" included a "low-level official in a decentralized federal assistance program" who "simply compiled data that was submitted to the [federal government] for eventual disbursement" and was "neither employed by the United States nor paid with federal funds." 465 U.S. at 495-497 (citing *United States* v. *Levine*, 129 F.2d 745 (2d Cir. 1942)). And when the Court later addressed the honest-services-fraud statute in *Skilling*, it "suggest[ed]" that bribes solicited in violation

of informal fiduciary relationships likewise "are susceptible to prosecution" under Section 1346. *United States* v. *Milovanovic*, 678 F.3d 713, 723 (9th Cir. 2012) (en banc), cert. denied, 568 U.S. 1126 (2013).

Skilling observed that "debates" about "the source and scope of fiduciary duties" were "rare in bribe and kickback cases" because the "existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute." 561 U.S. at 407 n.41. To illustrate that point, the Court not only cited specific "examples" of fiduciary relationships, but also cited its own prior decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980), as a general description of "the 'established doctrine that a fiduciary duty arises from a specific relationship between two parties.'" *Skilling*, 561 U.S. at 407 n.41 (brackets and citation omitted). *Chiarella*, in turn, was a securities-fraud case that recognized that the relationship giving rise to relevant duties could be either a "fiduciary" relationship "or other similar relation of trust and confidence." 445 U.S. at 228 (quoting Restatement (Second) of Torts § 551(2)(a) (1977)); see *United States* v. *O'Hagan*, 521 U.S. 642, 652 (1997) (duty applies to both employees and "attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation"); *Dirks* v. *SEC*, 463 U.S. 646, 655 n.14 (1983) (similar).

In addition, a circuit decision that *Skilling* favorably cited for the proposition that Section 1346 covers only "that 'intangible right of honest services,' which had been protected before *McNally*" described that pre-*McNally* understanding as incorporating a non-rigid approach in accord with *Dixson*. *Skilling*, 561 U.S. at 405 (quoting *United States* v. *Rybicki*, 354 F.3d 124, 138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809

(2004)) (emphasis omitted). Specifically, that decision surveyed pre-*McNally* case law and recognized that "a person in a relationship that gives rise to a duty of loyalty *comparable* to that owed by employees to employers" is covered by Section 1346. *Rybicki*, 354 F.3d at 141-142 (emphasis added); see *id.* at 142 n.17 (collecting cases); see also *McNally*, 483 U.S. at 355 (noting that pre-*McNally* court of appeals decisions recognized that "an individual without formal office may be held to be a public fiduciary if others rely on him 'because of a special relationship in the government' and he in fact makes governmental decisions") (citation omitted). Thus the case law as well as the statutes that inform the definition of Section 1346 decline to adopt a rigid, formalist approach that would require actual employment or legal agency no matter how obvious a particular defendant's public-official role might otherwise be.

C. Section 1346 Applies To Individuals Selected For Formal Government Employment Or Actually Exercising The Functions Of A Government Official

As applicable here, the relevant authorities illustrate that a person who lacks a formal employment or agency relationship with a government can still owe a duty of honest services to the public in two discrete circumstances: (1) when the person has been selected to work for the government, and (2) when the person exercises the functions of a government position with the acquiescence of relevant government personnel. A person in either of those capacities who accepts a bribe or kickback with the requisite intent violates his duty of honest services to the public.

1. Under the Section 201-informed definition of honest-services fraud, a person who has been "selected to be a public official" owes the public a duty of honest

services under Section 1346 even if his term of office has not yet begun. 18 U.S.C. 201(a)(2); see *Skilling*, 561 U.S. at 412. If, before taking office, such a person solicits, accepts, or agrees to accept a thing of value in exchange for influencing or being influenced in the performance of an official act, he has engaged in a "scheme or artifice to * * * deprive another of the intangible right of honest services" within the meaning of Section 1346. 18 U.S.C. 1346.

Such a violation of Section 1346 does not require proof that the incoming official performed the bargained-for actions at a particular time in relation to his assumption of formal office—or even performed them at all. Section 201's prohibition on bribing an incoming official does not impose any such time constraint, see 18 U.S.C. 201(b)(1)(A), and a bribery "offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense," *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (prosecution under 18 U.S.C. 1951 (1988)). The violation of the public trust is the same regardless of whether or when an act that is the subject of the bribery scheme is performed. Cf. *Neder*, 527 U.S. at 25 (observing that a proof-of-damage requirement would be incompatible with the textual prohibition on a "scheme to defraud").

2. A similar duty to provide honest services arises when a person in fact exercises functions of a government office and is treated by other relevant parties as possessing powers of the office. Such a person is acting "for or on behalf of" the government. 18 U.S.C. 201(a)(1). When an individual is exercising functions of a government office, the absence of formal recognition

as an employee or agent does not undermine the existence of a fiduciary duty, or otherwise provide a basis for permitting him to solicit or accept a bribe in exchange for official action.

As *Dixson* held in the analogous Section 201 context, "the proper inquiry is not simply whether the person had signed a contract with the [government] or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official * * * responsibilities." 465 U.S. at 496; see *Milovanovic*, 678 F.3d at 721-727; *United States* v. *Lupton*, 620 F.3d 790, 800-801 (7th Cir. 2010), cert. denied, 562 U.S. 1247 (2011); *United States* v. *Hudson*, 491 F.3d 590, 594-595 (6th Cir.), cert. denied, 552 U.S. 1081 (2007); cf. Restatement (Third) of Agency § 1.02 (2006). Even if not formally attached to the government, a person cannot order government employees around in the way that a public officeholder would or otherwise exercise the powers of a public officeholder without bearing responsibility for the government activities that he directs.

3. Petitioner's attempt (Br. 27-28) to draw a distinction between the fiduciary duty that such an individual owes to the government and the one that he correspondingly owes to the public is misplaced. It is undisputed that an individual owes not just the government, but also the public, a duty to provide honest services when he is formally an officeholder. See *Skilling*, 561 U.S. at 407 & n.41. And when a person is either on the threshold of becoming the formal officeholder, or steps into the officeholder's functional role by enjoying prerogatives and authority of the office, he assumes the fiduciary duty owed to the public that accompanies the role.

If government employees treat someone as an officeholder, he possesses public power commensurate with a

formal officeholder, and he is required to use it responsibly. In such a situation, the harm to the public from a bribe—the promise to take official action based on a corrupt payment—is no different than if the official were a formal government employee. Like a formal official, a person who is about to be or functionally is one would be "outwardly purporting to be exercising independent judgment" in a government action that he agrees to undertake, when in reality he "has been paid for his decisions, perhaps without even considering the merits of the matter." *United States* v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979). His actions on the matter will thus affect the public just the same as a formal officeholder's would.

D. The Jury Validly Found That Petitioner Owed The Public A Duty Of Honest Services

Petitioner did not immunize himself from a bribery prosecution for his participation in the COR Development scheme by temporarily switching his formal employment status from the Executive Deputy Secretary for the Governor of New York to the campaign manager for the Governor of New York. Petitioner was only days away from formally resuming the Executive Deputy Secretary position—and had already submitted the relevant employment paperwork—when he took official action by directing ESD to rescind the requirement that COR Development enter into a potentially costly labor peace agreement. And even independent of that, petitioner continued to function as a public official by continuing to carry out functions of the Executive Deputy Secretary while attached to the campaign.

1. Petitioner had been selected to be a public official when he carried out his corrupt agreement with Aiello and COR Development

The evidence presented at trial demonstrated that petitioner would be returning to his official position in the Executive Chamber when he participated in the bribery scheme involving COR Development. As a future official, his engagement in a bribery scheme violated a duty of honest services to the public.

The relevant timeline is straightforward. On August 7, 2014, petitioner informed a bank that his "[e]mployment post-election" would be in "Governor Andrew Cuomo['s] * * * administration." Gov't C.A. App. 110; see J.A. 647-648. In August or September, petitioner similarly informed others that he would be returning to the Executive Chamber. J.A. 368, 424-427, 647-648. During the same period, petitioner, Howe, and Aiello, exchanged e-mails about eliminating the requirement that COR Development enter into a labor peace agreement to receive government funds. J.A. 647. COR Development then made two payments to petitioner (through his wife), with one payment in mid-August and the other in October. J.A. 647-648.

On November 25, petitioner signed reinstatement forms to reassume the Executive Deputy Secretary title. J.A. 212-214, 468-472, 618-619, 621-634. On December 1, he again executed those reinstatement forms, this time in front of a notary. J.A. 634. And after twice signing his reinstatement papers, petitioner took the action for which he had been paid. On December 3, he made the call from the office and phone of the Executive Deputy Secretary to the Deputy Director of State Operations—who knew when the call was made that petitioner would be formally resuming his role as Executive Deputy

Secretary—and instructed the Deputy Director that the COR Development project should move forward without the labor peace agreement. J.A. 341-343, 355, 611-612. The Deputy Director promptly did what petitioner wanted. J.A. 342-343, 612. Five days later, petitioner formally reassumed the title of Executive Deputy Secretary. J.A. 472.

It was accordingly clear throughout the course of the bribery scheme that petitioner would be returning to his position in the Executive Chamber. Even if the relevant timeframe were restricted solely to the period after he signed his reinstatement papers, that period would encompass his instructions to the Deputy Director, which reaffirmed and effectuated the bribery scheme that he was convicted of conspiring to commit. See, *e.g.*, *Smith* v. *United States*, 568 U.S. 106, 107 (2013) ("Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws."). It is unsurprising that COR Development was willing to pay petitioner, and that the Deputy Director felt beholden to follow petitioner's instruction—just as the Deputy Director would have felt beholden to follow the instruction of the formal public official that petitioner was to become less than a week later. Cf. 18 U.S.C. 201(a)(2) and (b)(2).

2. Petitioner was functionally a public official when he participated in the COR Development scheme

The evidence separately showed that petitioner was in fact exercising the functions of a government office when he participated in the COR Development scheme. Although petitioner had nominally left his post in the Executive Chamber, no one else served as Executive Deputy Secretary during petitioner's eight-month hiatus. J.A. 178-180, 682. Petitioner also did not relinquish

his physical offices in the Executive Chamber, which he continued to use, along with his government phone, to conduct state business while attached to the reelection campaign. See pp. 4-5, *supra*. Indeed, petitioner was in his Executive Chamber office on December 3, when he directed ESD to rescind the labor peace agreement requirement. J.A. 279, 611-612, 648.

As the court of appeals recognized, petitioner's "grip on power never changed, diminished, or dissipated as he managed the campaign." J.A. 682. The court emphasized that petitioner conducted state business in various ways, was involved in a variety of state projects, and continued to use his state offices and phones during his purported absence from the Executive Chamber. See, *e.g.*, J.A. 279, 607-608, 681-683. He participated in, and exercised influence over, state operations and policy throughout that period, including by planning a state government event, providing instructions on a state project, and attending an internal government meeting. See p. 5, *supra*. He also made hiring and salary decisions for state employees and pressured employees to remain in their government jobs. See *ibid.* Individuals inside and outside state government accordingly understood that petitioner continued to exercise functions of the Executive Deputy Secretary while managing the reelection campaign. See, *e.g.*, J.A. 682-683.

For example, the Acting Counsel to the Governor sought petitioner's views on legislative policy matters precisely because the Acting Counsel understood that petitioner "spoke for the governor" on such issues. J.A. 311. Similarly, Howe repeatedly witnessed petitioner "instruct[ing]" the governor's staff "on various non-campaign topics" while formally attached to the campaign. J.A. 682 (brackets and citation omitted). And

when petitioner instructed the Deputy Director to ensure that the COR Development project proceeded without a labor peace agreement, the Deputy Director interpreted that call as "pressure" from a "principal[]" who was a "senior staff member[]" in the government. J.A. 342-343. The Deputy Director immediately directed ESD to undertake the unprecedented act of reversing its prior decision on the labor peace agreement. J.A. 342-343, 612.

Petitioner asserts (Br. 13) that he lacked "legal control or authority" and was simply acting as a private citizen lobbyist while he was working on the campaign. But the evidence clearly showed that he had the *functional* control and authority that mattered. Among other things, the Deputy Director viewed him as a "principal[]," not a lobbyist. J.A. 343. And if petitioner had not still been functioning as a public official, the Executive Deputy Secretary position would have been filled by someone else, who would then have occupied the state offices that petitioner enjoyed, taken control of the state phones that petitioner used, and conducted all of the state business that petitioner carried out.

3. The jury was adequately instructed on the COR Development count

To the extent that petitioner suggests (Br. 48) that even if the evidence was sufficient to support his conviction for participating in the COR Development scheme, a new trial is warranted because the jury instructions were defective, that suggestion is unsound. The jury's determination that petitioner owed the public a duty of honest services, and that he violated that duty by accepting bribes from COR Development, was based on instructions that in the context of this case correctly

conveyed the duty owed by an individual who acts as the functional equivalent of a public official.

The district court instructed the jury that a "person does not need to have a formal employment relationship with the state * * * in order to owe a duty of honest services to the public" if "at the time" the person "owed the public a fiduciary duty." J.A. 511. The court explained that to find that petitioner "owed the public a fiduciary duty when he was not employed by the state," the jury was required to find both that petitioner "dominated and controlled a[] governmental business" and that "people working in the government actually relied on him because of a special relationship he had with the government." *Ibid.* The court emphasized that "[m]ere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty." *Ibid.*

Taken as a whole and in the context of this case, those instructions correctly conveyed a proper legal test. See *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994) (jury instructions sufficient when, "taken as a whole," they "correctly convey" the relevant "concept") (brackets and citation omitted); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975) ("[I]n reviewing jury instructions," a court must "view the charge itself as part of the whole trial" and "'consider[] * * * the context of the entire record of the trial.'") (citation and emphasis omitted). The jury would have understood the inquiries into whether petitioner "dominated and controlled a[] governmental business," and whether people in government "relied on him" because of a "special relationship he had with government," to ask whether he was acting as the functional equivalent of a public official during his brief hiatus from formal state employment. J.A. 511.

Both the prosecution and defense presentations at trial reflected that contemporaneous understanding of the jury instructions. As the court of appeals observed, "[t]he government's theory at trial was that, for all practical purposes, [petitioner] maintained the same position of power and trust in the state throughout his time on the campaign trail." J.A. 681-682. And petitioner's counsel argued to the jury that, for petitioner to be treated as a public official while he was working on the campaign, he must have been an "agent * * * authorized to act on behalf of the state government" who wielded "authority"; it was not enough that he was "influential or respected." J.A. 488.

In making that argument, petitioner's counsel expressly recognized the government's theory to be that petitioner "was acting with authority of the state and never really left the state," J.A. 490-491, and argued that the evidence did not support that theory, see J.A. 487-497. Petitioner's current contention that the jury would have understood the instructions to permit a finding of guilt on a different theory is accordingly misplaced.[5]

---

[5] Notwithstanding his assertion at the petition stage that his separate CPV scheme is "not relevant here," Pet. 8, petitioner now briefly contends (Br. 49) that he is entitled to a new trial on those counts as well. Petitioner identifies no error in the district court's instruction to the jury that he "owed the public a duty of honest services by virtue of his official position" when he was "employed by the state." J.A. 511. And the CPV scheme was carried out almost entirely in 2012 and 2013, while petitioner was both formally and functionally the Executive Deputy Secretary. See Order Denying Bail 42-43. During that period, CPV paid petitioner's wife in exchange for petitioner's assistance in obtaining a power purchase agreement from the State. *Id.* at 42. In late 2013, "it became clear" to petitioner "that CPV was unlikely to be awarded" the agreement,

E. Applying Section 1346 To Petitioner's Conduct Is Consistent With This Court's Decisions And Creates No Constitutional Problems

Petitioner's arguments in this Court largely focus on attacking the Second Circuit's decision in *United States* v. *Margiotta*, 688 F.2d 108 (1982), cert. denied, 461 U.S. 913 (1983). See Pet. Br. 2-49 (referring to *Marigotta* 123 times). But as the government explained in the court of appeals, "this case does not go as far as *Margiotta*," Gov't C.A. Br. 90, which involved a defendant who had not been selected to be a public official and who did not engage in functions of a specific government role that he had previously held—and would soon again formally hold, see *Margiotta*, 688 F.2d at 113. This Court therefore need not address *Marigotta* in order to affirm. And petitioner's remaining doctrinal objections to affirming his conviction are unsound; affirmance on these facts is consistent with this Court's decisions in

---

and "[t]hroughout 2014 and 2015"—including while he briefly was attached to the campaign—petitioner represented "that CPV could still win the [agreement], in order to create the illusion that [he] was still worth bribing." *Id.* at 43. "[A]ll relevant parts of the CPV Scheme * * * took place when [petitioner] was a state employee." *Id.* at 42-43. The prosecution "did not argue that [petitioner] performed any official actions" in the CPV scheme while he was working on the campaign; instead, the prosecution's "theory of the case" was that petitioner "merely pretended to do so," in an effort to appear to prolong an already-complete scheme and thereby "ensure that CPV would continue paying him." *Id.* at 43. And petitioner's claim (Br. 49) of spillover prejudice from the COR Development count discounts both the separate presentation of the two bribery schemes at trial and the strength of the government's evidence about the CPV scheme. Cf. J.A. 678-679 (finding evidence sufficient to support CPV convictions without relying on evidence of the COR Development scheme).

Skilling and *McDonnell*, and does not raise lenity, vagueness, First Amendment, or federalism concerns.

***1. Applying Section 1346 to incoming and functional public officials is consistent with the Court's decisions in* Skilling *and* McDonnell**

Petitioner is incorrect in claiming (Br. 29-37) that this Court's precedents invalidate his conviction. Contrary to his contentions, nothing in *Skilling* or *McDonnell* is inconsistent with the prosecution of his conduct as honest-services fraud.

a. *Skilling* addressed the types of schemes that Section 1346 covers, limiting them to fraudulent schemes involving bribes or kickbacks. 561 U.S. at 409. *Skilling* did not, however, limit the nature or scope of duties covered by Section 1346. Instead, as explained above, see pp. 19-21, 23-25, *supra*, to the extent that *Skilling* addressed the potential class of honest-services-fraud defendants, the decision supports petitioner's conviction on the facts of this case.

Petitioner asserts that criminalizing bribery or kickback schemes involving an incoming or functional public official falls outside the "pre-*McNally* 'doctrine's solid core'" that *Skilling* reaffirmed. Pet. Br. 30 (citation omitted). Among other things, however, as previously discussed, *Skilling* recognizes that "federal statutes" like Section 201's federal-bribery prohibition likewise inform the honest-services-fraud statute. 561 U.S. at 412. And Section 201 covers both persons who have been "selected to be a public official," 18 U.S.C. 201(c)(1)(B), and—as the Court made clear in *Dixson*—persons who may not have a "formal employment or agency relationship" with a government, 465 U.S. at 494. In addition, *Dixson* undercuts petitioner's premise that the circumstances here fall outside pre-*McNally* case law; both

Dixson itself and the similar circuit decisions that it favorably cites predate *McNally*, and thus themselves shape the content of the pre-*McNally* doctrine's core.

Contrary to petitioner's reading (Br. 32) of footnote 41 in the opinion, *Skilling* neither determined that only individuals formally employed by a government owe the public a duty of honest services nor required that the existence of a formal fiduciary duty be "beyond dispute" in every case. 561 U.S. at 407 n.41. That footnote simply responded to an argument asserting vagueness in the duty inquiry by providing "examples" of fiduciary relationships in "bribe and kickback cases" that were "beyond dispute." *Ibid.* The Court did not purport to define the universe of covered relationships. Much less did it immunize someone who has been selected to become a public official, or who steps into (or in this case continues to wear) the shoes of a public official by exercising that official's powers, from potential liability for honest-services fraud.

b. Petitioner's reliance on *McDonnell* (Br. 34-37) is likewise flawed. In *McDonnell*, the Court interpreted the meaning of "'official act'" in Section 201—which defines that term to include "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official," 18 U.S.C. 201(a)(3)—as limited to circumstances where a public official "make[s] a decision or take[s] an action" on a particular "'question, matter, cause, suit, proceeding or controversy,' or agree[s] to do so." 579 U.S. at 574. The Court made clear that an "'official act' * * * may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will

form the basis for an 'official act' by another official." *Ibid.* That definition neither doctrinally nor logically requires that a person who himself takes an official act by pressuring another official to take an official act be a formal government employee or legal agent.

Dixson's rejection of that requirement as a prerequisite for liability under Section 201 overall necessarily means that it cannot be a prerequisite for the element of taking—or at least "agreeing to" take, *McDonnell*, 579 U.S. at 573—an official act. And in this case, petitioner's application of pressure on another official to excuse COR Development from having to obtain a labor peace agreement qualifies as an "official act." See *ibid.* A person selected to be a public official, especially one who has continuously been functioning as a public official, is fully capable of leveraging his position to exert pressure on another official to perform an official act, as petitioner did in this case.

2. The rule of lenity and the vagueness doctrine do not preclude Section 1346's application in this case

Contrary to petitioner's assertion, neither the lenity canon nor the void-for-vagueness doctrine requires limiting the application of Section 1346 to individuals formally employed by, or legal agents of, a government. Pet. Br. 44-47; see Aiello Br. 32-38. The rule of lenity does not apply unless, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (citation omitted). Similarly, a criminal law is not vague so long as "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was

criminal," *United States* v. *Lanier*, 520 U.S. 259, 267 (1997)—even if "[c]lose cases can be imagined," or "it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved," *United States* v. *Williams*, 553 U.S. 285, 306 (2008).

Applying Section 1346 to once-and-future public officials such as petitioner does not implicate either doctrine. Both longstanding case law (including, but not limited to, *Dixson*) and the federal bribery statutes provide sufficient notice that a person selected to serve as a public official—particularly one who is actively functioning as a public official by performing duties that fall within the role that he previously held formally—does not immunize himself from prosecution for bribery merely by avoiding formal contemporaneous employment. See, *e.g.*, pp. 19-28, *supra*; cf. *Skilling*, 561 U.S. at 412-413. And *Dixson*'s nearly 40-year pedigree demonstrates that a functional approach is not unworkable in practice.

Moreover, as in *Skilling*, Section 1346's "*mens rea* requirement" of an intent to defraud "further blunts any notice concern" in this case. 561 U.S. at 412; see *Williams*, 553 U.S. at 294 (rejecting vagueness challenge based in part on a statute's scienter requirements). A defendant who satisfies the specific-intent requirement for honest-services fraud had fair notice of the implications of his scheme. The jury here, for example, was instructed that it must find that petitioner acted "knowingly" ("voluntarily and deliberately, rather than mistakenly or inadvertently"); "willfully" ("purposely, with an intent to do something the law forbids"); and "with a specific intent to deceive for the

purpose of depriving another of the intangible right of honest services." J.A. 512-513.[6]

3. Section 1346's application in this case does not invite First Amendment concerns

Petitioner asserts (Br. 38-42) that criminalizing conduct like his raises First Amendment concerns by suggesting the possibility of prosecuting lobbyists and political donors who engage in protected speech. But when lobbyists and donors act in their traditional roles, their conduct clearly falls outside the two categories of behavior at issue in this case.

Lobbyists and donors are not selected to be public officials. And they do not exercise the functions of official government positions. Whatever influence a lobbyist —or a friend, media personality, or family member, see Pet. Br. 45-46—might have, such a person cannot reasonably fear that his communications with the government will be treated as official directives, as petitioner's were in the quite different circumstances here. See, *e.g.*, J.A. 310-311, 341-343.

---

[6] Aiello contends (Br. 48-50) that Section 1346 is unconstitutionally vague as applied to him. But the Court did not grant certiorari to consider that question. In any event, to the extent that Aiello's vagueness and other arguments rely on the assertion that he lacked the requisite mens rea to support his conviction, see Aiello Br. 49-50, that assertion lacks merit. The same mental-state jury instructions that applied to petitioner also applied to Aiello. J.A. 509, 512-513. And, as the court of appeals recognized, J.A. 683-684, sufficient evidence supported the jury's finding that Aiello knew of petitioner's control over state government while attached to the reelection campaign.

4. Petitioner's conviction is consistent with principles of federalism

Petitioner also claims (Br. 42-43) that application of Section 1346 to his conduct violates principles of federalism, suggesting that he complied with New York law. But nothing in the text of Section 1346, or this Court's precedents, requires the government to prove that the defendant violated state law in order to show a duty of honest services. And such a requirement would be difficult to square with the uniform application of a federal statute that reflects independent federal interests. Cf. *Gamble* v. *United States*, 139 S. Ct. 1960, 1966 (2019) (recognizing the Framers' "concern for the different interests of separate sovereigns" in interpreting a constitutional provision). In any event, this case presents no inconsistency between state and federal law because petitioner's conduct appears to run afoul of New York law.

New York criminalizes bribery of a "'[p]ublic servant'" and defines that term to include both "a person who has been elected or designated to become a public servant" and "any person exercising the functions of" a "public officer or employee of the state." N.Y. Penal Laws § 10.00(15) (McKinney Supp. 2022); see *id.* § 200.00 (McKinney 2010); *id.* §§ 200.03, 200.04, 200.10-200.12 (McKinney Supp. 2022). New York courts have applied that definition of "public servant" to, *inter alia*, a Red Cross employee who administered a county program, *People* v. *Samilenko*, 814 N.Y.S.2d 564, 2005 WL 3626772, *1-*2 (N.Y. Sup. Ct. 2005) (Tbl.), unsalaried members of community boards that made land use recommendations, *People* v. *Kruger*, 87 A.D.2d 473, 474-476 (N.Y. App. Div. 1982), and a former state employee who remained an "independent contractor,"

In re Onandaga Cnty. Dist. Att'y's Office, 92 A.D.2d 32, 34 (N.Y. App. Div. 1983).

In addition, New York ethics laws preclude someone in petitioner's position from "appear[ing] or practic[ing]" before the Executive Chamber or "receiv[ing] compensation for any services rendered * * * on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency." N.Y. Pub. Off. Law § 73(8)(a)(i) (McKinney 2021); see *id.* § 73(18) (providing that knowing and intentional violations of that provision may be punished as misdemeanors). As the ethics opinion provided to petitioner explained, that provision prohibited him from "participating in the development of a plan or strategy to influence any decision or action by the Executive Chamber" and "participating in a telephone call with the Executive Chamber." J.A. 592; see Comm'n on Ethics & Lobbying in Gov't, N.Y. State, Advisory Op. No. 99-7, 1999 WL 1791790 (Apr. 14, 1999). Notwithstanding that prohibition, petitioner called the Executive Chamber official responsible for overseeing ESD and instructed the official to reverse the determination that the COR Development project was required to have a labor peace agreement. Petitioner's conviction accordingly is entirely consistent with the relevant state-law prohibitions in this context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
JOHN-ALEX ROMANO
Attorney

OCTOBER 2022

APPENDIX

1. 18 U.S.C. 201 provides:

Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give

anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to

any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act

performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

2. 18 U.S.C. 666 provides:

Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

3. 18 U.S.C. 1341 provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

4. 18 U.S.C. 1349 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.