No. _____

In the
# Supreme Court of the United States

LOUIS CIMINELLI, STEVEN AIELLO, JOSEPH GERARDI, ALAIN KALOYEROS, also known as Dr. K,

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

In its prior decision in this case two Terms ago, this Court unanimously held in *Ciminelli v. United States*, 598 U.S. 306 (2023), that the Second Circuit applied an incorrect legal standard—the so-called "right-to-control" theory—in finding the trial evidence sufficient to support petitioners' convictions under the federal wire-fraud statute. After clarifying that the statute reaches only traditional concepts of property fraud, the Court declined to address petitioners' preserved sufficiency challenge itself but remanded for further proceedings consistent with its opinion.

What transpired on remand was inconsistent with this Court's opinion and established law. Rather than judge the sufficiency of the evidence in the trial record by the standard that this Court set forth in *Ciminelli*, the Second Circuit simply remanded for a new trial on a new indictment while refusing to address petitioners' preserved sufficiency challenge. The court of appeals justified that refusal by labeling this Court's *Ciminelli* decision a "change" in the law that entitled the government to another attempt to convict using new evidence that it chose not to muster the first time around. That decision defies the Double Jeopardy Clause and this Court's retroactivity precedents, is flatly inconsistent with this Court's mandate in *Ciminelli*, and entrenches a circuit conflict on a critical issue that affects all criminal defendants.

The question presented is:

Whether, before remanding for retrial, the Double Jeopardy Clause requires an appellate court to resolve a preserved sufficiency challenge applying the current and correct law as articulated by this Court.

## PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Louis Ciminelli, Steven Aiello, Joseph Gerardi, and Alain Kaloyeros.

Respondent (appellee below) is the United States of America.

Joseph Percoco, Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler (co-defendants in the district court) also qualify as parties under this Court's Rule 12.6.

## STATEMENT OF RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

*United States v. Kaloyeros*,
No. 16-cr-776-VEC-2 (Dec. 11, 2018)

*United States v. Aiello*,
No. 16-cr-776-VEC-4 (Dec. 7, 2018)

*United States v. Gerardi*,
No. 16-cr-776-VEC-5 (Dec. 6, 2018)

*United States v. Ciminelli*,
No. 16-cr-776-VEC-6 (Dec. 3, 2018)

United States Court of Appeals (2d Cir.):

*United States v. Percoco*,
Nos. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850 (Jan. 17, 2025) (order denying stay of mandate)

*United States v. Percoco*,
Nos. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850 (Sept. 23, 2024) (judgment on remand)

*United States v. Percoco*,
Nos. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272 (Sept. 8, 2021) (judgment affirming convictions)

United States Supreme Court:

*Aiello v. United States*,
No. 21-1161 (May 22, 2023)

*Kaloyeros v. United States*,
No. 21-1169 (May 22, 2023)

*Ciminelli v. United States*,
No. 21-1170 (May 11, 2023)

*Aiello v. United States*, 24A712 (Feb. 3, 2025)

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## PETITION FOR WRIT OF CERTIORARI

This criminal case sounds familiar for a reason. Just two Terms ago, in *Ciminelli v. United States*, 598 U.S. 306 (2023), this Court unanimously held (and the government ultimately conceded) that the Second Circuit applied an incorrect legal standard—the so-called "right-to-control" theory—in finding the trial evidence sufficient to support petitioners' convictions under the federal wire-fraud statute. *See also Aiello v. United States*, 143 S.Ct. 2491 (2023); *Kaloyeros v. United States*, 143 S.Ct. 2490 (2023). After clarifying that the wire-fraud statute reaches only traditional property fraud, the Court remanded to the court of appeals for further proceedings consistent with its opinion. The decision on remand was anything but. It is, if anything, even less defensible than the earlier opinion, as it managed to flout not only this Court's mandate, but basic protections of the Double Jeopardy Clause and principles of retroactivity to boot.

Rather than judge the sufficiency of the evidence in the first trial by the yardstick of the requirements for wire fraud set forth by this Court in *Ciminelli*, the Second Circuit ordered a second trial while refusing to address petitioners' preserved sufficiency challenge. The court of appeals justified that refusal on the ground that the purported "change in the law" effected by *Ciminelli* somehow converted the government's failure to prove wire fraud into a mere trial error akin to an erroneous jury instruction. Accordingly, the court ordered a second jeopardy without resolving a preserved sufficiency challenge to the first jeopardy. The court gave the government a second chance to prove its case even though it had previously made the

tactical choice to waive a traditional property-fraud theory in favor of a right-to-control theory the first time around.

The Second Circuit's decision is doubly erroneous and cannot stand. This Court's precedents make crystal clear that, when this Court interprets a federal statute, it is clarifying what the law always meant—not "changing" the law—and that criminal defendants always get the benefit of clarified law on direct appeal. And this Court's precedents likewise confirm that challenges to the sufficiency of the evidence are not like instructional or other trial errors—and that appellate courts have a non-negotiable duty to resolve preserved sufficiency challenges before ordering a second trial. For good reason: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). If an appellate court could bypass a preserved sufficiency challenge and remand for retrial "to afford the government an opportunity for the proverbial 'second bite at the apple,'" "the purposes of the Clause would be negated." *Id.* at 17. That is why this Court expressly ordered the Fourth Circuit to resolve a preserved sufficiency challenge in light of clarified law in *McDonnell v. United States*, 579 U.S. 550 (2016). That same mandate was implicit here, and the Second Circuit grievously erred by refusing to give petitioners the benefit of this Court's ruling in their own case.

That is reason enough for this Court to intervene here again, but it is hardly the only one. Notwithstanding this Court's clear Double Jeopardy

Clause and retroactivity precedents, there is an acknowledged circuit split on the question whether sufficiency review is mandatory for appellate courts under the Double Jeopardy Clause. Furthermore, the courts of appeals that have correctly answered that question in the affirmative are nonetheless divided over whether to apply the law in effect at the time of their sufficiency review. This Court cannot allow that split to fester given the "vitally important interests" that the Double Jeopardy Clause protects. *Yeager v. United States*, 557 U.S. 110, 117 (2009).

This Court should provide uniformity in this case—and do so now. Absent this Court's intervention, petitioners will face a second jeopardy without any court resolving their preserved sufficiency challenge to their first jeopardy. That would violate the basic promise of the Double Jeopardy Clause, which "protects an individual against more than being subjected to double punishments"—"[i]t is a guarantee against being twice put to trial for the same offense." *Abney v. United States*, 431 U.S. 651, 660-61 (1977). With the end of the Term drawing closer, now is the time to intervene. Petitioners have already endured years of trial proceedings and months of prison time based on a legal theory that the Solicitor General literally refused to defend. They at least deserve to hear from the full Court whether the Double Jeopardy Clause really does allow the government to obtain a do-over based on a theory that it affirmatively disavowed in the first trial.

## OPINIONS & ORDERS BELOW

The Second Circuit's opinion below is reported at 118 F.4th 291 and reproduced at Pet.App.1-26. The Second Circuit's order denying rehearing is reproduced at Pet.App.27-28. This Court's previous opinion in this case is reported at 598 U.S. 306 and reproduced at Pet.App.29-40.

## JURISDICTION

The Second Circuit entered its judgment on September 23, 2024 and denied rehearing on December 6, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment is reproduced at Pet.App.41.

## STATEMENT OF THE CASE

### A. Historical & Constitutional Background

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Gamble v. United States*, 587 U.S. 678, 738 (2019) (Gorsuch, J., dissenting). Blackstone deemed it a "universal maxim" that "no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, *Commentaries on the Laws of England* 329 (1769). Consistent with that maxim, English courts rejected efforts by prosecutors to retry defendants "at a future day" using "better evidence" whenever it seemed as though the evidence at the first trial "would be insufficient to convict." *Arizona v. Washington*, 434 U.S. 497, 507-08 & n.23 (1978).

These principles are reflected in the Bill of Rights. *See United States v. DiFrancesco*, 449 U.S. 117, 134 (1980). The Double Jeopardy Clause provides that "[n]o person shall … be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V, cl. 2. As the title and text of the Clause underscore, the protection is not merely, or even principally, against suffering double punishments for the same crime, *see, e.g., Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting), but against even having to suffer through the "embarrassment, expense and ordeal" and "continuing state of anxiety and insecurity" inherent when facing a second jeopardy after once securing "acquittal" for the same offense, *Green v. United States*, 355 U.S. 184, 187-88 (1957). Reflecting those principles, this Court has long afforded defendants an interlocutory appeal before facing a second trial. *See Abney*, 431 U.S. 651.

Nearly 50 years ago, this Court explained in *Burks* that a "central" objective of the Double Jeopardy Clause is to "forbid[] a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U.S. at 11. Just as a district court "must" grant a motion of acquittal under Federal Rule of Criminal Procedure 29(a) if it finds insufficient evidence in the trial record to convict, so too must an appellate court. And when an appellate court makes a "finding of insufficient evidence to convict on appeal from a judgment of conviction," that appellate determination is "the equivalent of an acquittal" "for double jeopardy purposes," *Richardson v. United States*, 468 U.S. 317,

325 (1984), and irrevocably ends prosecution. *See also United States v. Wittig*, 575 F.3d 1085, 1094 (10th Cir. 2009) (Gorsuch, J.).

For that reason, just as a district court cannot refuse to rule on a Rule 29 motion for acquittal in favor of granting a motion for new trial under Rule 33, an appellate court is not free to bypass a preserved sufficiency challenge by remanding for a new trial based on errors committed in the first. This Court has recognized that, before an appellate court may remand for retrial, it is constitutionally required to address a defendant's preserved sufficiency challenge—*i.e.*, to determine whether there is enough evidence in the existing record to support a conviction under the legal requirements of the offense. That duty is central to preserving the defendant's protections under the Double Jeopardy Clause and thus is non-negotiable. It applies even when trial errors would otherwise obviously necessitate a new trial and even when resolving the sufficiency question is more difficult. And it applies even when a higher court has clarified the legal standards used to measure the sufficiency of the evidence on appeal, as this Court's decision in *McDonnell* demonstrates. There, after "clarify[ing]" the official-act requirement in the federal bribery statute and vacating the conviction, the Court provided the following instructions for the Fourth Circuit on remand: "If the court below determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial. If the court instead determines that the evidence is insufficient, the charges against him must be dismissed." *McDonnell*, 579 U.S. at 556, 580.

At the same time, the Double Jeopardy Clause's prohibition against retrial does not preclude retrying a defendant where a conviction is reversed due to instructional or other trial error, but only if there is sufficient evidence to support the conviction. *See, e.g.*, *Burks*, 437 U.S. at 15. That is precisely why it is imperative to address preserved sufficiency challenges, which give the defendant the greater remedy of protection against retrial, even when trial errors would invalidate a conviction but allow for retrial. And the essential protections of the Double Jeopardy Clause cannot be evaded just by relabeling legally insufficient evidence as mere trial error. Instead, this Court has expressly "distinguished" "trial error" from "evidentiary insufficiency": The former "implies nothing with respect to the guilt or innocence of the defendant," whereas the latter "constitute[s] a decision to the effect that the government has failed to prove its case." *Id.* And when there is "failure of proof at trial" after the government "has been given one fair opportunity to offer whatever proof it could assemble," "the purposes of the [Double Jeopardy] Clause would be negated were [a court] to afford the government an opportunity for the proverbial 'second bite at the apple.'" *Id.* at 16-17.

### B. Factual & Procedural Background

This Court is well-acquainted with this case, including the government's decision to abandon a traditional property-fraud theory in favor of a non-traditional and easier-to-prove right-to-control theory—only to have the Solicitor General abandon any defense of the right-to-control theory in this

Court, given its plain inconsistency with this Court's precedents.

1. In 2012, New York announced its "Buffalo Billion" initiative to invest $1 billion of taxpayer money into development projects benefitting upstate New York. *See Ciminelli*, 598 U.S. at 309. The state administered that initiative through a non-profit entity named Fort Schuyler Management Corporation, which would issue "requests for proposals" (RFPs) and then "select[] 'preferred developers' that would be given the first opportunity to negotiate with Fort Schuyler for specific projects." *Id.* at 309-10.

Petitioner Kaloyeros served on Fort Schuyler's board of directors; petitioners Ciminelli, Aiello, and Gerardi led companies—LPCiminelli and COR Development—seeking work on the Buffalo Billion initiative. *See* Pet.App.3-4. Although the entire Fort Schuyler board "had ultimate authority to award the contracts," Kaloyeros "design[ed] and draft[ed] the documents for the [RFP] process, which he did for one RFP for the Buffalo project (the 'Buffalo RFP') and one RFP for the Syracuse project (the 'Syracuse RFP')." Pet.App.4. Kaloyeros allegedly "manipulate[d]" that RFP process so that LPCiminelli and COR Development "gain[ed] an unfair advantage." Pet.App.4. Ultimately, Fort Schuyler identified those companies as preferred developers, and after negotiating with them, entered contracts for development projects in Buffalo and Syracuse.

2. Federal prosecutors responded to this localized contracting process with federal criminal charges. In 2016, prosecutors obtained an indictment charging

petitioners with violations of the federal wire-fraud statute, which criminalizes "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[1] 18 U.S.C. §1343; *see* D.Ct.Dkt.49. In 2017, prosecutors obtained a superseding indictment. *See* D.Ct.Dkt.162. Each of those indictments charged a "traditional" property-fraud theory—*viz.*, that the Buffalo Billion contracts constituted the "property" for purposes of the wire-fraud statute, *see Ciminelli*, 598 U.S. at 310 n.1—consistent with this Court's prior pronouncements that the wire-fraud statute focuses on "traditional concepts of property." *Cleveland v. United States*, 531 U.S. 12, 24 (2000).

The government, however, soon made a tactical shift to take advantage of permissive Second Circuit precedent excusing the government from marshaling evidence of traditional property fraud. In response to petitioners' motions to dismiss, the government jettisoned its traditional property-fraud theory and obtained a second superseding indictment that replaced it with a different theory—that petitioners' alleged "scheme 'defraud[ed] Fort Schuyler of its right to control its assets.'" *Ciminelli*, 598 U.S. at 310 n.1 (alterations in original); *see* D.Ct.Dkt.319-2. That theory invoked the Second Circuit's so-called "right-to-control" decisions, which held that "a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information'

[1] The indictment also charged petitioners with conspiracy to commit wire fraud. *See* 18 U.S.C. §1349. Those charges "stand or fall with the substantive offenses." *Kelly v. United States*, 590 U.S. 391, 398 n.1 (2020).

'necessary to make discretionary economic decisions.'" *Ciminelli*, 598 U.S. at 309. The district court then proceeded to "rel[y] expressly on the right-to-control theory in denying the motion[s] to dismiss." *Id.* at 310 n.1. And the government stuck with the right-to-control theory and its relaxed evidentiary demands all the way through verdict. *See id.* at 310-11.

As the government eventually conceded in a moment of "perfect[] cand[or]," it ditched its traditional property-fraud theory and shifted to the non-traditional right-to-control theory because the latter offered an "easier route to prove to a jury" that it should convict petitioners. *Ciminelli*.Oral.Arg.Tr.60.[2] For instance, by forgoing a traditional property-fraud theory, the government claimed to have obviated the need to prove that petitioners intended to cause economic harm to Fort Schuyler or deprive it of the economic benefits of the construction contracts, because an intent to deprive Fort Schuyler of "potentially valuable economic information" would suffice under the right-to-control theory. *Ciminelli*, 598 U.S. at 311

A jury convicted petitioners in July 2018 under the right-to-control theory, and the district court denied petitioners' Rule 29 motions challenging the sufficiency of the evidence. *See* Pet.App.7-8. The court sentenced petitioners to prison terms ranging from 28-42 months and ordered them to surrender to the Bureau of Prisons 60 days after the mandate issued on appeal. *See* D.Ct.Dkt.939, 945, 946, 953.

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[2] Citations beginning with "*Ciminelli*" are to the prior proceedings in this Court. *See* No. 21-1170.

3. Petitioners appealed to the Second Circuit and "challenged the sufficiency of the evidence, contending that a 'right-to-control theory of wire fraud' is 'invalid' because 'the right to control one's own assets is not "property" within the meaning of the wire-fraud statute.'" *Ciminelli*.U.S.Br.9. The court of appeals rejected the challenge because "the right-to-control theory of wire fraud is well-established in Circuit precedent." *United States v. Percoco*, 13 F.4th 158, 164 n.2 (2d Cir. 2021). The court also rejected petitioners' record-based challenges to the sufficiency of the evidence, applying the right-to-control theory. *See id.* at 170-72. The court then denied petitioners' motion to stay the mandate, thereby requiring petitioners to report to federal custody.

4. While incarcerated, petitioners sought this Court's review and "focuse[d] on the sufficiency issue alone, contending that the Second Circuit used a legally invalid definition of the elements in finding the evidence sufficient to support … conviction." *Ciminelli*.Cert.Reply.3 (emphasis omitted). The Court granted certiorari, and petitioners secured release from prison after serving over 100 days.

Despite the government's cert-stage resistance to this Court's plenary review, the Solicitor General declined to defend the Second Circuit's right-to-control theory on the merits. The government nonetheless urged this Court not to reverse the court of appeals' decision, but to affirm it on the theory that the preexisting record could support conviction on a traditional property-fraud theory. In inviting affirmance on this ground, the government repeatedly emphasized—in both its briefing and oral argument—

that the case involved only a sufficiency challenge, not an alleged instructional error or other trial error.[3]

This Court unanimously declared that "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes," rejected the government's invitation to affirm on an alternative wire-fraud theory, and reversed and remanded for further proceedings consistent with the Court's opinion. *Ciminelli*, 598 U.S. at 316. In rejecting the right-to-control theory, the Court pointed to decades-old precedents explaining that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests," and "[b]ecause 'potentially valuable economic information' 'necessary to make discretionary economic decisions' is not a traditional property interest, … the right-to-control theory is not a valid basis for liability" under the wire-fraud statute. *Id.* at 309.

The Court also emphasized that, "[d]espite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-control theory, the Government now concedes that the theory as

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[3] *See, e.g.*, *Ciminelli*.U.S.Br.13 ("In this Court, petitioner has disclaimed any challenge to the district court's right-to-control instructions and instead contests only the evidence supporting his convictions."); *Ciminelli*.U.S.Br.31 ("In seeking this Court's review, petitioner explicitly disclaimed any challenge to 'the adequacy of the jury instructions' and emphasized that his sole claim in this Court is that the evidence was insufficient to support his wire fraud convictions."); *Ciminelli*.Oral.Arg.Tr.41 (Deputy Solicitor General: "[A]ll they have made here is a sufficiency of the evidence challenge."); *Ciminelli*.Oral.Arg.Tr.56 (Deputy Solicitor General: "[I]t's just a pure sufficiency of the evidence challenge.").

articulated below is erroneous." *Id.* at 316. Although the Court indicated that this concession "should be the end of the case," it acknowledged that the government had made the late-breaking argument that the Court could "affirm [the] convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory"—*i.e.*, the very theory that the government had abandoned in the district court in 2017. *Id.* The Court unanimously rejected that request and "reverse[d] the judgment of the Court of Appeals and remand[ed] the case for further proceedings consistent with this opinion." *Id.* at 317. Justice Alito also wrote a solo concurring opinion, which agreed with the Court's rejection of the right-to-control theory and noted his understanding that the Court's opinion left "fact-specific issues"—like "the Government's ability to retry [petitioners] on the theory that [they] conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts"—for the court below to resolve on remand. *Id.* at 317-18.

5. On remand to the Second Circuit, petitioners argued that "they are entitled to judgments of acquittal … because the government chose to pursue a now-invalid theory of wire fraud at trial," and as a result, the evidence in the existing record "is insufficient to sustain their convictions on a traditional property theory of wire fraud that the government did not pursue at trial." Pet.App.9. The government resisted that conclusion but also contended that the court of appeals "should *not* reach the question of the sufficiency of the evidence"—even though it had just told this Court to do exactly that—"but instead remand for retrial … under a traditional

wire fraud theory" without resolving the sufficiency question. Pet.App.9. (emphasis added).

The Second Circuit accepted the government's extraordinary invitation, vacating the wire-fraud and conspiracy convictions and remanding for a new trial without resolving petitioners' preserved sufficiency challenges. Rather than measure the evidence in the existing record against the statutory requirements as elucidated by this Court in *Ciminelli*, the court of appeals emphasized that this Court's decision "change[d] … the law" from what had previously governed in the circuit. Pet.App.12. In doing so, the court observed that, "[i]n the operative indictment and at trial, the government presented only the now-invalid right-to-control theory of wire fraud." Pet.App.14. Accordingly, the court proclaimed that "it is unclear how [it] could or would evaluate the sufficiency of the evidence of the wire fraud count and wire fraud conspiracy convictions based on a wire fraud theory that the government did not present to the jury," as the government supposedly lacked sufficient "notice" that it would need to prove a traditional property-fraud theory. Pet.App.16, 18 n.2. To rectify this supposed unfairness, the court gave the government an opportunity to "offer new evidence based on a traditional property theory of wire fraud," which "the government indicate[d] that it would offer," Pet.App.15-16 & n.2, despite having eschewed any such theory or evidence in the first trial.

Although petitioners emphasized that the Double Jeopardy Clause did not allow the Second Circuit to bypass their sufficiency challenge or excuse the government's failure to introduce evidence under a

traditional property-fraud theory, the court of appeals thought otherwise. The court held that "the Double Jeopardy Clause is not a bar to a retrial" because this case involved a "trial error" in the form of "a change in the law" on direct review, Pet.App.13, and when there is such a "change" in the legal standard, an appellate court purportedly "may decline to review preserved sufficiency challenges if such a review 'would deny the government an opportunity to present its evidence' under the correct legal standard," Pet.App.17. In a footnote, the court acknowledged that, in *McDonnell*, this Court clarified the governing statutory law, reversed the Fourth Circuit's more lenient understanding of the statutory requirements, and "directed the Fourth Circuit to resolve, in the first instance, the defendant's argument that there was insufficient evidence" to convict "based on the correct interpretation" of the statute. Pet.App.18 n.4. Regardless, the court dismissed *McDonnell* as "inapposite." Pet.App.18 n.4.

6. The Second Circuit denied rehearing, *see* Pet.App.27-28, and a request to stay its mandate. Petitioners submitted a stay application to Justice Sotomayor, who promptly granted an administrative stay and directed the government to file a response. *See* No. 24A712. But after the government indicated that it would await this Court's decision in *Kousisis v. United States*, No. 23-909 (U.S. argued Dec. 9, 2024), before seeking retrial and thus argued that petitioners could not show irreparable harm, *see* U.S.Stay.Opp.4, 27, Justice Sotomayor denied petitioners' request without referring the application to the full Court.

## REASONS FOR GRANTING THE PETITION

The remand proceedings here were neither consistent with this Court's opinion in *Ciminelli* nor compatible with bedrock double-jeopardy and retroactivity principles. In *Ciminelli*, this Court clarified that the wire-fraud statute embodied the traditional property-based concept of fraud and squarely rejected the Second Circuit's outlier right-to-control theory, which the government did not even defend. Both parties agreed that petitioners had preserved their sufficiency challenge. Having settled the legal question, however, this Court left the case-specific question of whether there was sufficient evidence in the trial record to support conviction to the lower court. Accordingly, on remand, the Second Circuit had a duty to evaluate the sufficiency of the government's evidence against the *Ciminelli* standard and order an acquittal unless there was sufficient evidence to justify a new trial before a properly instructed jury. Indeed, this Court's decisions from *Burks* to *McDonnell* make clear that appellate courts are not free to ignore preserved sufficiency challenges on direct appeal before remanding for retrial and that they must use the then-current legal standards when conducting that review. The decision below—which explicitly refused to resolve petitioners' sufficiency challenge and instead ordered a second jeopardy without resolving a fully preserved challenge to the first jeopardy—defies those precedents, this Court's mandate in *Ciminelli*, and the basic guarantee of the Double Jeopardy Clause.

Unfortunately, the court below is not the first to make this mistake (although it is the first to do so on

direct remand from this Court). The Second Circuit itself has acknowledged that there is a circuit split over whether appellate courts are obligated to resolve preserved sufficiency challenges before remanding for retrial. Moreover, among the courts that have correctly read this Court's precedents as mandating consideration of a preserved sufficiency challenge, there is a division over what law to apply in judging sufficiency. Some have held that they are obligated to resolve sufficiency challenges "[o]ddly" by applying out-of-date and erroneous law, *United States v. Houston*, 792 F.3d 663, 670 (6th Cir. 2015), while others adhere to the "longstanding" rule that "an appellate court must apply the law in effect at the time it renders its decision," *United States v. Barrow*, 109 F.4th 521, 527 n.3 (D.C. Cir. 2024). Every court of appeals with criminal jurisdiction has now weighed in on this issue. There is no need for further percolation.

That is especially true given the high stakes here. The Double Jeopardy Clause is supposed to shield all defendants from the government's repeated attempts to convict where the government uses new evidence that it failed to muster the first time around. But as matters now stand, only a subset of defendants fully enjoy that protection. That state of affairs cannot continue, and this is the ideal case in which to settle this debate for good. This case cleanly tees up the issue, and the Court is already familiar with the facts of this case. This Court thus can focus solely on the pure legal question whether the Double Jeopardy Clause requires appellate courts to resolve preserved sufficiency challenges based on current/correct law before remanding for retrial. The answer to that

question is clear, but in all events, there is no disputing that certiorari is amply warranted.

## I. The Second Circuit's Decision Is Egregiously Wrong And Violates This Court's Mandate In *Ciminelli*.

This Court has already reversed the Second Circuit once before in this direct appeal. The court of appeals' decision on remand deserves the same fate.

1. Litigants before this Court generally disagree about almost everything. But last time around, petitioners and the government ultimately agreed on at least two critical things: (1) the petition raised only a preserved sufficiency issue, not any species of trial error, and (2) the Second Circuit applied an indefensible right-to-control theory in judging the sufficiency issue. Where the parties parted company was whether, once this Court resolved the essentially uncontested legal issue, it should go further and address the specific evidence in the trial record and could affirm by finding sufficient evidence to support conviction on a traditional property-fraud theory. The government suggested that the Court could do so, emphasizing that the question before this Court pertained only to sufficiency. This Court squarely rejected that invitation and left the case-specific resolution of the preserved sufficiency challenge to the lower courts, "revers[ing] the judgment of the Court of Appeals and remand[ing] the case for further proceedings consistent with this opinion." *Ciminelli*, 598 U.S. at 316-17. This Court's precedents make clear how the Second Circuit should have proceeded consistent with the *Ciminelli* opinion on remand: by evaluating the sufficiency of the evidence in the trial

record as judged by the legal requirements set forth by this Court in *Ciminelli*.

In *Burks*, this Court "granted certiorari to resolve the question of whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict." 437 U.S. at 2. The Court unanimously answered no: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"—"[t]his is central to the objective of the prohibition against successive trials." *Id.* at 11. As a result, the Double Jeopardy Clause "does not allow" the government "'to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Id.* at 11 (alteration in original). Nor are courts free to give the government "the proverbial 'second bite at the apple'" "after 'a balancing of the equities.'" *Id.* at 11 n.6, 17. "[W]here the Double Jeopardy Clause is applicable," the Court admonished, "its sweep is absolute," and "[t]here are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Id.* at 11 n.6.

*Burks* specifically addressed circumstances where an appellate court has in fact "determined that in a prior trial the evidence was insufficient to sustain the

verdict of the jury." *Id.* at 5. But its admonition that the government gets only "one fair opportunity to offer whatever proof it could assemble," *id.* at 16, undoubtedly supports the closely related principle that an appellate court confronted with a sufficiency challenge to a conviction is not at liberty to ignore that issue and remand for retrial for the purpose of giving the government another bite at the apple. As several Justices observed soon after *Burks*, "the protections established in *Burks* … would become illusory" if the decision to even address the sufficiency-of-evidence challenge turned on the "grace of a reviewing court." *Richardson*, 468 U.S. at 331 (Brennan, J., concurring in part and dissenting in part); *see also Florida*, 457 U.S. 31, 51 (1982) (White, J., dissenting); *Justs. of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 319 (1984) (Brennan, J., concurring in part and concurring in the judgment). Simply put, a court cannot order a second jeopardy without addressing a preserved sufficiency challenge to the first jeopardy.

This Court's explicit remand instructions in *McDonnell* underscore the point. *McDonnell* addressed the meaning of "official act" under the federal bribery statute in a prosecution of former Virginia governor Bob McDonnell. *See* 579 U.S. at 555, 566; *see also* 18 U.S.C. §201(a)(3). The Court unanimously rejected the theory embraced by the government and the Fourth Circuit that merely "arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject" satisfied the official-act requirement. *McDonnell*, 579 U.S. at 566-67. Instead, the Court held that an "official act" requires more: a "decision or action" (or an agreement to make a

decision or to take an action) on an actually or potentially "pending" "'question, matter, cause, suit, proceeding or controversy'" that "involve[s] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 574.

Having "clarif[ied] the meaning of 'official act,'" and having concluded that the Fourth Circuit applied an unduly lax test to deem the evidence sufficient, the Court explicitly described the options available to the court of appeals on remand. The Court acknowledged that Governor McDonnell had "argue[d] that the charges must be dismissed because there is insufficient evidence that he committed an 'official act,' or that he agreed to do so." *Id.* at 580. The Court declined to conduct the sufficiency review itself and instead "le[ft] it for the Court of Appeals to resolve" that issue "in the first instance" "in light of the interpretation of [the bribery statute]" that the Court had just "adopted." *Id.* As the Court specifically instructed, "[i]f the court below"—the Fourth Circuit—"determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial." *Id.* But "[i]f the court instead determines that the evidence is insufficient," the Court continued, "the charges against him *must be dismissed*." *Id.* (emphasis added). The Court therefore "remanded for further proceedings consistent with this opinion." *Id.* at 581.

These precedents leave no doubt that the Second Circuit's decision to bypass petitioners' sufficiency

challenge and order petitioners to endure a second jeopardy violates the Double Jeopardy Clause. Indeed, when this Court clarified the meaning of the wire-fraud statute in *Ciminelli* and remanded for the "the Court of Appeals" to conduct "further proceedings consistent with this opinion," 598 U.S. at 317, the court had the same two options available to it as the Fourth Circuit in *McDonnell*. By adopting a third option—and ordering a new trial without first measuring the sufficiency of the evidence in the trial record against the requirements set forth in *Ciminelli*—the Second Circuit engaged in further proceedings *in*consistent with the mandate in *Ciminelli* and the non-negotiable guarantee of the Double Jeopardy Clause. The fact that this Court provided less explicit remand instructions here than in *McDonnell* may explain the error below, but that does not excuse it. To the contrary, between *Burks* and *McDonnell*, the court below should have found it obvious that it had no choice but to address the sufficiency of the evidence in the first trial record in light of *Ciminelli*.

2. The Second Circuit held that it could bypass the sufficiency issue here because (1) "the Double Jeopardy Clause is not a bar to a retrial" when there is a "trial error," and trial error supposedly occurred here because *Ciminelli* "change[d] … the governing law after trial," and (2) "[e]ngaging in sufficiency review … would … 'deny the government an opportunity to present its evidence' under the correct legal standard.'" Pet.App.13-18. That reasoning is deeply flawed.

First, the Second Circuit's effort to label a sufficiency challenge as a mere "trial error" is an egregious category mistake. Indeed, a sufficiency challenge is the quintessential non-trial error that is routinely preserved by a Rule 29 motion for acquittal rather than a Rule 33 motion for new trial. *See* Fed. R. Crim. P. 29(a) ("[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."). Moreover, *Burks* itself expressly "distinguished" "trial error" (like providing "incorrect instructions" to the jury) from "evidentiary sufficiency." 437 U.S. at 15-16. While *Burks* held that retrial is permitted in cases involving mere trial errors, it held that "the Double Jeopardy Clause precludes a second trial"—and demands "a judgment of acquittal" for a defendant—if the evidence is "legally insufficient." *Id.* at 15, 18. That difference is fundamental, and neither courts nor prosecutors can eviscerate the essential protection of the Double Jeopardy Clause by re-classifying a sufficiency challenge as a mere trial error.

The Second Circuit also cannot convert a sufficiency challenge into a trial error by complaining that *Ciminelli* involved a "change" in the law. While this Court reversed the Second Circuit's unduly lenient view of what a criminal statute requires, just as it reversed the Fourth Circuit's unduly lenient view in *McDonnell*, that does not mean that the Court "changed" the law, let alone changed it in a way that could deprive the very defendants who procured the clarifying decision of the benefit of this Court's decision. To the contrary, when this Court interprets a statute, it is clarifying what the statute "*always*

meant," not announcing some prospective-only law as a legislature presumptively does. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 n.12 (1994). Indeed, "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." *United States v. Palomar-Santiago*, 593 U.S. 321, 325 (2021) (emphasis added). As a result, "it is not accurate to say that the Court's decision in [*Ciminelli*] 'changed' the law that previously prevailed in the [Second] Circuit"; rather, "the [*Ciminelli*] opinion finally decided what [the wire-fraud statute] had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Rivers*, 511 U.S. at 312-13 n.12.

Moreover, once this Court established what the wire-fraud statute has always required, the Second Circuit could not deny petitioners the benefit of that decision in determining whether the evidence in the trial record is sufficient. *Griffith v. Kentucky*, 479 U.S. 314 (1987), made abundantly clear that every criminal defendant on direct appeal gets the benefit of favorable decisions from this Court. But even in the bad old days of selective retroactivity, the criminal defendant whose own litigation efforts procured the favorable clarification was entitled to the benefit of that decision. By refusing to give petitioners the benefit of the *Ciminelli* decision in adjudicating their preserved sufficiency challenge, the Second Circuit committed a grave unfairness to petitioners.

The Second Circuit never recognized that grave unfairness because it concerned itself with the

supposed unfairness to the government of having the sufficiency of the trial record judged against the legal standard articulated in *Ciminelli*, rather than the discredited right-to-control theory. Needless to say, the Double Jeopardy Clause is not worried about fairness to the government, and it does not permit a "balancing of the equities" to determine whether a second jeopardy is really so bad. *Burks*, 437 U.S. at 11 n.6. That is why this Court routinely bars retrials even in circumstances that are seemingly unfair to prosecutors. *See, e.g.*, *Martinez v. Illinois*, 572 U.S. 833, 835-42 (2014) (per curiam); *Evans v. Michigan*, 568 U.S. 313, 320 (2013); *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978).

More fundamentally, the Second Circuit lost sight of "the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions … for near a thousand years,'" *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 94 (1993)—a rule that applies even if one views the decision as one that "constitutes a 'clear break' with the past," *Johnson v. United States*, 520 U.S. 461, 467 (1997). There is nothing unfair to the government about applying the ancient and "general rule ... that an appellate court must apply the law in effect at the time it renders its decision" on "direct appellate review." *Henderson v. United States*, 568 U.S. 266, 269, 271 (2013); *see also, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004); *Bousley v. United States*, 523 U.S. 614, 620 (1998); *Griffith*, 479 U.S. at 322.

Furthermore, the Second Circuit's suggestion that the government lacked notice of this Court's holding in *Ciminelli*—that the wire-fraud statute cares only

about traditional property interests—strains all credulity. *Ciminelli* just applied decades-old precedents that "reject[ed] the Government's theories of property rights … because they stray from traditional concepts of property." *Cleveland*, 531 U.S. at 24. And the court below had already found itself unanimously reversed for straying from traditional notions of property in the context of other criminal statutes. *See, e.g., Sekhar v. United States*, 570 U.S. 729, 737 (2013) (relying on, *inter alia*, *Cleveland* to reject the Second Circuit's view that extortion does not require obtaining property via coercion). That is why, once the case got here, the government did not even bother defending the Second Circuit's decision and "concede[d]" that the right-to-control theory "is erroneous" *under existing law*. *Ciminelli*, 598 U.S. at 316.

Thus, contrary to the court of appeals' understanding, the government had every "'opportunity to present its evidence' under the correct legal standard" the first time. Pet.App.17. In fact, as the government recently told this Court in *Kousisis*, it "could have prosecuted the bid-rigging scheme [in *Ciminelli*] on the ground that the defendant[s] obtained … valuable contracts" and "did, in fact, advance a version of that 'traditional property-fraud theory' in that case" at an earlier stage. U.S.Br.46-47, No. 23-909 (U.S. filed Oct. 2, 2024). The only reason that the government dropped that theory is because it consciously decided to take the easy way out by relying exclusively on the dubious right-to-control theory. *See Ciminelli*.Oral.Arg.Tr.60. There is nothing unfair about holding the government to the consequences of that deliberate choice.

3. In opposing a stay of the Second Circuit's mandate before Justice Sotomayor, the government wisely did not defend the court of appeals' "notice"-based reasoning, which the government described as "not" "relevant" or "administrable." U.S.Stay.Opp.17. Instead, the government pressed various other arguments, each of them less convincing than the last.

The government principally contended that the Double Jeopardy Clause precludes retrial *only* when the trial evidence is "insufficient as measured against *the standards on which the jury was charged*"—here, the right-to-control theory repudiated in *Ciminelli*. U.S.Stay.Opp.1-3. That fundamentally misunderstands sufficiency review. Reviewing courts do not (or at least should not) assess the sufficiency of the evidence "standing in the shoes of the jury and applying the same standard, to the same evidence, that the jury applied." *Contra* U.S.Stay.Opp.17. As this Court explained in *Musacchio v. United States*, "[a] reviewing court's … determination on sufficiency review … does *not* rest on how the jury was instructed." 577 U.S. 237, 243 (2016) (emphasis added). Accordingly, if the jury received an "erroneous[] … jury instruction," it has no bearing on a court's sufficiency review, as the reviewing court's job is to assess the evidence against the *correct* "elements of the charged crime." *Id.* Notably, the government itself emphasized this very point two years ago in *Ciminelli*. *See, e.g.*, *Ciminelli*.U.S.Br.31.

The government conceded that the Second Circuit's decision is inconsistent with the remand instructions in *McDonnell* and thus posited that those instructions "were [not] the result of a constitutional

imperative." U.S.Stay.Opp.18. But if the remand instructions in *McDonnell* did not reflect what should generally happen on remand where the Court reverses a criminal conviction and remands for disposition of a preserved sufficiency challenge, those instructions have no coherent explanation. To the extent that the government is suggesting that the Court decided to make Governor McDonnell the "chance beneficiary" of a rule that does not apply to other "similarly situated" criminal defendants, such "selective application" would "violate[] basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322-23. There is no reason to treat the remand instructions as one final gratuity to the Governor.

Finally, the government suggested that this Court in *Ciminelli* did not, in fact, view this case as a "sufficiency-of-the-evidence dispute," but rather viewed it as one involving "instructional error," which "has long been understood to permit a retrial." U.S.Stay.Opp.19 & n.1. The government conceded that such a framing would directly contradict everything that the parties—and the government in particular—told this Court in *Ciminelli*, since both sides "characterized the case as a sufficiency-of-the-evidence dispute and not one concerning instructional error." U.S.Stay.Opp.19 n.1. But the government suggested that this Court "appeared to disagree with that understanding," ostensibly because the Court "[c]it[ed] cases addressing erroneous jury instructions" when it "declined the government's request to 'affirm [the] convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory.'" U.S.Stay.Opp.19 & n.1 (quoting *Ciminelli*, 598 U.S. at

316-17). But merely because the Court declined to *affirm* the convictions based on the government's late-breaking theory does not mean that the sufficiency issue that everyone agreed existed here somehow disappeared. To the contrary, as in *McDonnell*, *Ciminelli* left room for sufficiency review at the appellate level for the Second Circuit to decide whether—in light of the standard adopted in *Ciminelli*—the evidence in the first trial record sufficed to allow the government to pursue a retrial before a properly instructed jury, or instead whether the evidence came up short and mandated an acquittal. Indeed, that is exactly what this Court had in mind when—after granting a "petition focus[ing] on the sufficiency issue alone," *Ciminelli*.Cert.Reply.3—it repudiated the right-to-control theory, confirmed that the wire-fraud statute requires a traditional property-fraud theory, and told the court below to conduct "further proceedings consistent with this opinion." *Ciminelli*, 598 U.S. at 316-17.

* * *

In short, the Second Circuit's decision below is just as wrong as its first one, and the government's strained efforts to rehabilitate it only confirm the point.

## II. The Decision Below Entrenches An Acknowledged Circuit Split.

The Second Circuit's decision is not only wrong, but it also deepens a circuit split. There is an acknowledged conflict over whether sufficiency review on appeal is mandatory or discretionary, *see, e.g.*, *Hoffler v. Bezio*, 726 F.3d 144, 161 (2d Cir. 2013); 6 Wayne R. LaFave et al., *Crim. Proc.* §25.4(c) (4th ed.

2024), and the courts on the mandatory side of the divide disagree over whether they should measure the sufficiency of the evidence against current/correct law or some earlier erroneous view of the legal requirements.

On one side of the divide, the D.C. Circuit has repeatedly held that sufficiency review is compulsory. *See, e.g.*, *United States v. Davis*, 863 F.3d 894, 903 (D.C. Cir. 2017); *United States v. Williams*, 827 F.3d 1134, 1162 (D.C. Cir. 2016) (per curiam). That court of appeals has further recognized that "an appellate court must apply the law in effect at the time it renders its decision" on the sufficiency issue. *Barrow*, 109 F.4th at 527 n.3. If a higher court clarifies the "already existing" elements of the crime after the trial but while the case is still on direct review, the court explained, the "gap in time" between the trial and the legal clarification "is of no effect," as the "longstanding" rule is that judgments must "reflect the current legal standards, even if it means setting aside a ruling that was correct at the time it was rendered."[4] *Id.* As the government thus has acknowledged, "[i]n *Barrow*, an intervening circuit decision invalidated the theory underlying the defendant's wire-fraud prosecution, and a panel of the D.C. Circuit concluded that because the trial evidence

[4] As *Barrow* observed, one prior D.C. Circuit decision—*United States v. Reynoso*, 38 F.4th 1083 (D.C. Cir. 2022)—refused to apply current law to resolve a sufficiency challenge when an intervening decision supposedly added a "new … element" to the crime. 109 F.4th at 527 n.3. That approach is dubious but irrelevant here, as *Ciminelli* added no new wire-fraud elements but rather reaffirmed the already-existing ones. *Barrow* thus directly conflicts with the decision below.

was insufficient under the new standard, acquittal was appropriate." U.S.Stay.Opp.22.

Other courts of appeals agree that sufficiency-of-evidence review is mandatory but can be conducted using something other than the current/correct law based on various "change in law" exceptions. For example, the Sixth Circuit has held that an appellate court "must address" a sufficiency challenge, "because a sufficiency-based reversal would preclude retrial under the Double Jeopardy Clause." *Houston*, 792 F.3d at 669. But that court has held that an appellate court must conduct its sufficiency review "oddly" by "measur[ing] the sufficiency of the evidence … under the wrong instruction" given at trial—"at least when … the defendant fails to object" to that instruction. *Id.* at 669-70.

The Fourth Circuit likewise agrees that it is "necessary" to resolve sufficiency challenges on appeal, because "the double jeopardy clause would bar … retrial" if a defendant "prevail[ed]" on the challenge. *United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990). But that court has determined that it should conduct sufficiency review "based on the law at the time" of the trial. *United States v. Ford*, 703 F.3d 708, 711-12 (4th Cir. 2013). The Eighth Circuit has also held that the Double Jeopardy Clause "does not allow an appellate court to … remand for retrial while ignoring a claim of insufficient evidence," *Palmer v. Grammer*, 863 F.2d 588, 592 (8th Cir. 1988), but that it should measure the sufficiency of the evidence "under the law as it existed at the time of trial," *United States v. Harrington*, 997 F.3d 812, 817 (8th Cir. 2021). Other courts of appeals are in the

same camp. *See, e.g.*, *United States v. Weems*, 49 F.3d 528, 530 (9th Cir. 1995); *United States v. Wiles*, 106 F.3d 1516, 1518 (10th Cir. 1997); *United States v. Wacker*, 72 F.3d 1453, 1464-65 (10th Cir. 1995); *cf. Vogel v. Pennsylvania*, 790 F.2d 368, 373, 376 (3d Cir. 1986).[5]

On the far side of the divide, meanwhile, multiple courts of appeals have held that appellate courts need not resolve sufficiency challenges at all. The First Circuit has made itself "perfectly clear" that it "do[es] not hold that the Double Jeopardy Clause *compels* the review of a properly preserved insufficiency claim before the [defendant] is retried," since sufficiency review is a "prudential matter." *Foxworth v. Maloney*, 515 F.3d 1, 4 (1st Cir. 2008). The Fifth Circuit has likewise stated that sufficiency review is "not mandated by the double jeopardy clause." *United States v. Miller*, 952 F.2d 866, 874 (5th Cir. 1992). And the Seventh and Eleventh Circuits agree. *See United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989); *United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005).

The Second Circuit has now further cemented the lower-court conflict, holding that sufficiency review is always optional—not mandatory—and that it is unfair to the government for courts to exercise that option

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[5] With the exception of the Eighth Circuit's decision in *Harrington*, all decisions in this middle group came before this Court's decisions in *Musacchio* and *McDonnell* (which *Harrington* never even mentioned). But as the decision below illustrates, courts continue to treat these appellate decisions as good law. *See, e.g.*, Pet.App.14 (citing the Sixth Circuit's *Houston* decision and the Ninth Circuit's *Weems* decision).

when the law is clarified on direct appeal. That decision—and all other decisions holding that sufficiency review is optional and/or that it need not apply the current/correct law—is plainly wrong, but regardless, the existence of the lower-court conflict is not open to debate.

## III. The Question Presented Is Vitally Important And Warrants Review Now.

The issue in this case is undeniably important. "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Because the Double Jeopardy Clause "embodies" such "vitally important interests," the Court has "decided an exceptionally large number of cases interpreting this provision." *Yeager*, 557 U.S. at 117.

This case deserves the next spot on that list. The Double Jeopardy Clause is "one of the most frequently litigated provisions of the Bill of Rights," *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting), but one of the most frequently recurring questions in this context is the one presented here: whether an appellate court must conduct sufficiency review using current law before remanding for retrial. Indeed, as detailed above, every court of appeals save the Federal Circuit (which lacks criminal jurisdiction) has confronted that issue, and they have reached wildly different conclusions. It should go without saying that basic constitutional protections for criminal defendants should not differ depending on whether they are prosecuted in Washington, D.C., New York, or elsewhere.

This is the right case for the Court to provide uniformity. The parties thoroughly litigated the question presented after this Court's remand in *Ciminelli*, and the Second Circuit's answer to that question is clear—and clearly wrong. Moreover, because this Court considered this case on the merits only two years ago, the Court is familiar with the case, and there is no need to worry about any vehicle issues lurking in the record.

The government has suggested that this case is a poor vehicle for review because there is sufficient evidence in the trial record to support a conviction under the current/correct legal standard, *i.e.*, under a traditional property-fraud theory. U.S.Stay.Opp.25-26. But that is the precise argument that this Court declined to reach and the Second Circuit bypassed. And the government's confidence is both misplaced and no obstacle in any event. If this Court clarifies that the instructions for further proceedings consistent with its opinion in *Ciminelli* involved the two options laid out in *McDonnell*—and not a third option allowing bypass of sufficiency review entirely—the government can make its case that there is sufficient evidence in the first trial record to support a conviction under *Ciminelli*. But any fair reading of that trial record will lead to the opposite conclusion. That should come as no surprise, as the government deliberately narrowed its indictment to drop a traditional property-fraud theory and put all its eggs in the right-to-control basket for the purpose of lightening its trial burdens. The record thus does not serendipitously contain sufficient evidence to sustain the very theory that the government expressly abandoned. Indeed, even the court below suggested

that *Ciminelli* "rendered" the government's evidence "insufficient," which presumably explains why the government "indicate[d]" below that "it would offer new evidence to prove a property theory of fraud in a trial on remand." Pet.App.12, 15.

There are thus no impediments to this Court's review, and an answer to the question presented is urgently required. Although the government successfully opposed a stay of the Second Circuit's mandate after promising that it "will not seek a trial prior to the issuance of the *Kousisis* decision," U.S.Stay.Opp.27, that decision date is quickly approaching. And it does not make any sense for this Court to postpone review until after the *Kousisis*-informed trial. After all, the Double Jeopardy Clause does more than protect against an adverse second-trial result: "It is a guarantee against being twice put to trial for the same offense," which would force the defendant "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once." *Abney*, 431 U.S. at 660-61. The interest protected thus is not merely the risk of conviction in the second trial, but the right to prevent "the Government" from "hal[ing]" a defendant "into court" to face a second charge after a completed first trial. *Id.* at 659-60. The Second Circuit's decision here authorizes the government to do just that, and that decision is both exceptionally wrong and exceptionally consequential. Further review is imperative.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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March 4, 2025

# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Nos. 18-2990 (L)*, 18-3710, 18-3712,
18-3715, 18-3850

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UNITED STATES OF AMERICA,

*Appellee*,

v.

STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI,
ALAIN KALOYEROS, AKA DR. K.,

*Defendants-Appellants*.

JOSEPH PERCOCO, GALBRAITH KELLY, JR., MICHAEL
LAIPPLE, KEVIN SCHULER,

*Defendants*.

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On Remand from the Supreme Court of the United
States, Nos. 21-1161, 21-1169, 21-1170

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Filed: Sept. 23, 2024

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

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OPINION

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* Nos. 18-2990 (L) and 19-1272 (Con) were determined by opinion filed September 5, 2023. *See United States v. Percoco*, 80 F.4th 393 (2d Cir. 2023) (per curiam). This opinion determines the remaining appeals.

CHIN, *Circuit Judge*:

In 2018, a jury found defendants-appellants Steven Aiello, Joseph Gerardi, Louis Ciminelli, and Alain Kaloyeros (collectively, the "Appellants") guilty of wire fraud and wire-fraud conspiracy in connection with a New York State initiative to use taxpayer dollars to develop the greater Buffalo region. The government obtained those convictions by proceeding on a right-to-control theory of wire fraud, which under this Court's longstanding precedents permitted conviction based on the deprivation of valuable information necessary to make economic decisions rather than the deprivation of traditional property interests. The jury also found Gerardi guilty of making a false statement to federal officers. In a separate trial also in 2018 stemming from the same indictment, the jury found Aiello guilty of conspiracy to commit honest-services wire fraud based on actions taken by a co-defendant who was, at the time, a private individual rather than a state official.

Appellants appealed from judgments of the United States District Court for the Southern District of New York (Caproni, *J.*) convicting them of the above crimes. We affirmed. *See United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021) ("*Percoco I*") (addressing the wire fraud, wire fraud conspiracy, and false statement counts); *United States v. Percoco*, 13 F.4th 180, 184 (2d Cir. 2021) ("*Percoco II*") (addressing the conspiracy to commit honest-services wire fraud count). Appellants then petitioned the Supreme Court for review.

After granting certiorari, the Supreme Court held, in a pair of opinions, that (1) the right-to-control theory of wire fraud does not support liability under

the federal wire fraud statute, and (2) the instructions given to the jury for honest-services wire fraud were erroneous with respect to when a private person may be convicted under the statute. *See Ciminelli v. United States*, 598 U.S. 306, 311-12 (2023) (addressing wire fraud); *Percoco v. United States*, 598 U.S. 319, 322, 330-31 (2023) (addressing honest-services wire fraud). Accordingly, the Supreme Court remanded the cases for further proceedings. *See Ciminelli*, 598 U.S. at 317 (reversing and remanding with respect to Ciminelli); *Aiello v. United States*, 143 S. Ct. 2491 (2023) (vacating and remanding with respect to Aiello and Gerardi); *Kaloyeros v. United States*, 143 S. Ct. 2490 (2023) (vacating and remanding with respect to Kaloyeros).

For the reasons set forth below, we VACATE Appellants' convictions for wire fraud and wire fraud conspiracy, we VACATE Aiello's conviction for conspiracy to commit honest-services wire fraud, we AFFIRM Gerardi's false statement conviction, and we REMAND for further proceedings.

## BACKGROUND

### I. The Facts

The facts are set forth in detail in our prior opinion in this case and are summarized here as relevant to this appeal. *See Percoco I*, 13 F.4th at 164-68.

#### A. The Bid-Rigging Scheme

In 2012, then-Governor Andrew Cuomo launched the "Buffalo Billion" initiative, which aimed to develop the greater Buffalo area with a $1 billion investment of taxpayer funds. The evidence at trial established

that Aiello, Gerardi, Ciminelli, and Kaloyeros entered into a scheme to secure state-funded construction projects in Buffalo, New York, and Syracuse, New York, for their businesses, COR Development Company (Aiello and Gerardi's company) and LPCiminelli (Ciminelli's company), through the Buffalo Billion initiative.

Also in 2012, after hiring consultant and lobbyist Todd Howe to improve his relationship with the governor's office, Kaloyeros was put in charge of developing project proposals for the Buffalo Billion initiative. Because of his board position at the Fort Schuyler Management Corporation ("Fort Schuyler"), Kaloyeros had a position of influence and control in the selection process for Buffalo Billion development projects. Although the Fort Schuyler board of directors had ultimate authority to award the contracts, Kaloyeros was in charge of designing and drafting the documents for the request-for-proposal ("RFP") process, which he did for one RFP for the Buffalo project (the "Buffalo RFP") and one RFP for the Syracuse project (the "Syracuse RFP").

Unbeknownst to others at Fort Schuyler, Kaloyeros and Howe conspired to deliver the Buffalo Billion contracts to Howe's other clients: Aiello, Gerardi, and Ciminelli. Because Kaloyeros was able to manipulate the bid process, Aiello, Gerardi, and Ciminelli were able to gain an unfair advantage. For example, Kaloyeros incorporated requirements into the RFPs that were tailored to match the qualifications or attributes of their companies, COR Development and LPCiminelli.

In December 2013 and January 2014, Fort Schuyler's board announced that COR Development won the Syracuse RFP and that LPCiminelli and another firm won the Buffalo RFP. Pursuant to those announcements, Kaloyeros awarded two construction projects totaling approximately $105 million to COR Development and another construction project ultimately worth $750 million to LPCiminelli.

**B. Gerardi's Proffer Session**

On June 21, 2016, as the government investigated the rigging of the Buffalo and Syracuse RFPs, it held a proffer session with Gerardi. There, Gerardi told federal officers that "he did not ask for the [Syracuse] RFP to be tailored to COR, nor did he feel as though it was tailored to COR." App. at 1330.

Gerardi also told federal officers that he made handwritten notes on a document titled "Fort Schuyler Management Corporation request for proposal." Gov't App. at 903. A special agent, who was at the proffer session, testified that Gerardi told him that he reviewed the draft RFP as a favor to Howe because he was Howe's friend and an attorney, rather than because of his affiliation with COR Development. Gerardi asserted that he was trying to broaden the RFP to permit more companies to compete. Gerardi also sought to explain specific handwritten comments, like his comment that the inclusion of COR Development's software as a qualification in the Syracuse RFP was "too telegraphed" and his recommendation to "leave out the specific programs." App. at 1328. Gerardi stated that he really meant that the language used was "too telescoped" and would not

be broad enough to permit other companies to apply. *Id.*

Gerardi also told federal officers that his request to remove a requirement for audited financials from the Syracuse RFP was not to help COR Development, which did not have audited financials. Instead, he claimed that he made the request to remove a barrier to entry for other private companies, which he asserted typically lacked audited financial statements. And he told officers that he did not know why Howe emailed Gerardi to confirm that Kaloyeros made an adjustment to the RFP permitting the submission of a reference letter from a financial institution in lieu of audited financials, and that he responded "[g]reat" and "[t]hank you" merely to be polite. *Id.* at 1329.

Gerardi was arrested about three months after his proffer session.

## II. Procedural History

On September 19, 2017, a superseding indictment charged Appellants and others with eighteen counts related to alleged corruption and abuse of power. The district court severed the counts into two trials. The first trial involved the counts alleging bribes taken by Joseph Percoco, a former Cuomo administration official, including bribes to advance COR Development's interests, which was the basis for Aiello's honest-services wire fraud conspiracy count. The second trial—largely the focus of this appeal—involved the bid-rigging scheme detailed above. The following counts of the indictment are relevant to this appeal: (1) Count One, charging Kaloyeros, Aiello, Gerardi, Ciminelli, and others with conspiracy to

commit wire fraud in connection with a scheme to rig the bidding processes for the Buffalo Billion project, in violation of 18 U.S.C. § 1349, (2) Count Two, charging Kaloyeros, Aiello, and Gerardi with wire fraud in connection with rigging the bidding process for the projects in Syracuse, New York, in violation of 18 U.S.C. §§ 1343 and 2, (3) Count Four, charging Kaloyeros, Ciminelli, and others with wire fraud in connection with rigging the bidding process for the projects in Buffalo, New York, in violation of 18 U.S.C. §§ 1343 and 2, (4) Count Ten, charging Percoco, Aiello, Gerardi, and others with conspiracy to commit honest-services wire fraud in connection with COR Development, in violation of 18 U.S.C. § 1349, and (5) Count Sixteen, charging Gerardi with making false statements to federal officers in connection with the conduct charged in Counts One and Two, in violation of 18 U.S.C. § 1001(a)(2).

The first trial began on January 22, 2018, and covered Count Ten. At the close of the government's case, Aiello moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 based on insufficient evidence. The court reserved decision on the motion. On March 13, 2018, the jury found Aiello guilty of conspiracy to commit honest-services wire fraud.[1] Aiello did not renew his Rule 29 motion after the jury's verdict, and the court denied the motion after trial.

On June 11, 2018, the trial on Counts One, Two, Four, and Sixteen began. To prove the wire fraud and

[1] The jury also found Percoco guilty on Count Ten but found Gerardi not guilty.

wire fraud conspiracy counts, the government relied solely on the right-to-control theory of wire fraud endorsed by this Court, *see United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017), arguing that Appellants schemed to deprive Fort Schuyler of potentially valuable economic information that it would have otherwise received in a legitimate and competitive RFP process. Appellants challenged the sufficiency of the government's evidence—via oral Rule 29 motions—at the close of the government's case, and the district court reserved decision. Appellants put on a defense case with three witnesses. On July 12, 2018, the jury found Appellants guilty on all counts. Appellants renewed their Rule 29 motions, and the district court denied them.

In four separate hearings in December 2018, the district court sentenced Ciminelli to 28 months' imprisonment, Gerardi to 30 months' imprisonment, Aiello to 36 months' imprisonment, and Kaloyeros to 42 months' imprisonment.

On September 8, 2021, we affirmed the judgments of the district court in two opinions. *See Percoco I*, 13 F.4th at 164; *Percoco II*, 13 F.4th at 184. Percoco, Aiello, Gerardi, Ciminelli, and Kaloyeros then petitioned the Supreme Court for review. The Supreme Court granted certiorari and issued a pair of opinions.

In *Ciminelli*, the Supreme Court held that this Court's right-to-control theory is not a valid basis for liability under the federal wire fraud statute because "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests," which do not include "potentially valuable economic

information necessary to make discretionary economic decisions [under the right-to-control theory]." 598 U.S. at 309 (internal quotation marks omitted). In *Percoco*, the Supreme Court held that the district court's jury instructions about honest-services wire fraud were erroneous. *See* 598 U.S. at 330-31. It concluded that the instructions—directing the jury to consider whether a defendant has a "special relationship" with the government and "dominated and controlled" government business—did not supply the proper test for determining whether a private person may be convicted of honest-services fraud. *Id.* at 322 (internal quotation marks omitted).

In light of these two opinions, the Supreme Court remanded Appellants' cases for further proceedings. *See Ciminelli*, 598 U.S. at 317 (reversing and remanding Ciminelli's case); *Aiello*, 143 S. Ct. at 2491 (vacating and remanding Aiello's and Gerardi's judgments); *Kaloyeros*, 143 S. Ct. at 2490 (vacating and remanding Kaloyeros's judgment).

The parties submitted supplemental briefs.

## DISCUSSION

Appellants first contend that they are entitled to judgments of acquittal on their wire fraud and wire fraud conspiracy counts because the government chose to pursue a now-invalid theory of wire fraud at trial and, alternatively, the evidence is insufficient to sustain their convictions on a traditional property theory of wire fraud that the government did not pursue at trial. The government responds that we should not reach the question of the sufficiency of the evidence but instead remand for retrial of those counts under a traditional wire fraud theory. Second, Aiello

and the government jointly ask this court to vacate Aiello's conviction for conspiracy to commit honest-services wire fraud in light of *Percoco*, 598 U.S. at 322. Third, Gerardi seeks vacatur of his false statement conviction because the evidence is insufficient to sustain it after *Ciminelli* as a matter of law or, alternatively, because of spillover prejudice from the wire fraud counts on his false statement count. We address each issue in turn.

## I. Appellants' Wire Fraud and Wire Fraud Conspiracy Convictions

Appellants' first argument presents two issues: first, whether, as a matter of double jeopardy, they are entitled to judgments of acquittal because the government relied only on a now-invalid theory of wire fraud at trial and should not be given "another opportunity to supply evidence which it failed to muster in the first proceeding," Appellants' Joint Br. on Remand at 17 (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)), and second, whether, assuming the government may proceed on a traditional wire fraud theory, this Court should conduct a sufficiency review of the evidence or simply remand for a retrial without conducting such review.

### A. Double Jeopardy

The Fifth Amendment's Double Jeopardy Clause guarantees that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In other words, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*,

537 U.S. 101, 106 (2003). The Supreme Court thus often describes the Double Jeopardy Clause as prohibiting "successive prosecutions," *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988), or "multiple trials" for the same offense, *McElrath v. Georgia*, 601 U.S. 87, 93-94 (2024) (internal quotation marks omitted).

The Clause only applies, however, "if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). For purposes of the Double Jeopardy Clause, the Supreme Court distinguishes between convictions vacated for insufficient evidence where the "government has failed to prove its case," which are acquittals, and convictions vacated for trial error, which are not. *See Burks*, 437 U.S. at 14-16; *see also Hoffler v. Bezio*, 726 F.3d 144, 160 (2d Cir. 2013) ("[W]here jeopardy has attached and a defendant is convicted, retrial on the same charges is not constitutionally barred where it results from a reversal of conviction based on the defendant's own successful demonstration of *trial error* on appeal." (emphasis in original)).

The reason for this distinction is that vacating a conviction for trial error "implies nothing with respect to the guilt or innocence of the defendant" and instead is simply "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect." *Burks*, 437 U.S. at 15. Because it is in the defendant's interest to obtain a fair and error-free retrial, "[i]t has long been settled . . . that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant

who succeeds in getting his first conviction set aside . . . because of some error in the proceedings leading to conviction." *Lockhart*, 488 U.S. at 38.

One type of trial error is caused by a change in the governing law after trial. *See United States v. Bruno*, 661 F.3d 733, 742 (2d Cir. 2011); *see also United States v. Harrington*, 997 F.3d 812, 817 (8th Cir. 2021) (explaining that when the evidence "offered at trial was sufficient to support the conviction under the law at the time but later was rendered insufficient by a post-conviction change in the law, the setting aside of a conviction on this basis is equivalent to a trial-error reversal rather than to a judgment of acquittal"). This kind of trial error occurs when the Supreme Court invalidates a legal theory that formed the basis for a conviction at trial. *See Bruno*, 661 F.3d at 736. In *Bruno*, for example, after a jury convicted the defendant of honest-services mail fraud based on his "failure to disclose conflicts of interest arising from his receipt of substantial payments from individuals seeking to do business with" the State of New York, the Supreme Court invalidated the conflict-of-interest theory of honest-services wire fraud and held that the statute criminalizes only fraud based on bribes and kickbacks. *Id.* at 735-36. This Court permitted a retrial, and in 2014, Bruno was retried and acquitted.

Here, the trial error was caused by a change in the governing law after trial. Although the right-to-control theory of wire fraud had long been accepted in this Circuit, the government abandoned the theory before the Supreme Court. *See Ciminelli*, 598 U.S. at 316. The Supreme Court held that the wire fraud statute reaches only "traditional property interests"

and that therefore the right-to-control theory of wire fraud was invalid. *Id.* at 309. Because the trial error was a result of a change in the law, the Double Jeopardy Clause is not a bar to a retrial. *See, e.g.*, *Lockhart*, 488 U.S. at 38; *Bruno*, 661 F.3d at 742.

**B. Sufficiency Review**

The question then becomes whether we should conduct our own sufficiency review of the evidence based on a traditional property theory of wire fraud or whether we should simply remand for trial.

When a defendant challenges the sufficiency of the evidence for a conviction based on a trial error, this Court "generally requir[es] reviewing courts to consider preserved sufficiency challenges before ordering retrials based on identified trial error," at least "as a matter of prudent policy." *Hoffler*, 726 F.3d at 162. That general policy is justified by notice. For most trial errors, the government has notice of the elements of a crime it needs to prove at trial. *Bruno*, 661 F.3d at 742. That is not the case, however, where "those elements [are] . . . later altered by a change in the applicable law." *Id.* In *Bruno*, we considered whether sufficiency review "is appropriate where, as here, the error is due to an intervening change in the law." *Id.* Although we determined that the circumstances there justified evaluating the sufficiency of the evidence before remanding for trial, we "recognize[d] that in some cases there may be sound reasons for refusing to consider the sufficiency of the evidence when there has been a subsequent change in the law." *Id.* at 743; *see Hoffler*, 726 F.3d at 162 (characterizing *Bruno* as "stating that court[s]

should review sufficiency challenge absent 'sound reason' for not doing so").

Other circuit courts have also declined to review the sufficiency of the evidence in these circumstances before remanding for further proceedings. *See, e.g., United States v. Reynoso*, 38 F.4th 1083, 1088, 1090-91 (D.C. Cir. 2022) (holding that "sufficiency challenges are unavailable" for subsequent changes in governing law in a case where the Supreme Court, after the defendant's trial, held that a defendant's knowledge of his felon status was an element of the crime of gun possession by a felon); *United States v. Houston*, 792 F.3d 663, 669-70 (6th Cir. 2015) (declining to weigh the sufficiency of the evidence under the correct jury instructions, based on a post-trial change in the governing law, because to do so would force the court "to measure the evidence introduced by the government against a standard it did not know it had to satisfy and potentially prevent it from ever introducing evidence on that element"); *United States v. Weems*, 49 F.3d 528, 530-31 (9th Cir. 1995) (same; and noting that retrial "merely permits the government to prove its case in accordance with the recent change in law").

We conclude that this case fits comfortably within the exception contemplated by *Bruno*, as "sound reasons" exist for this Court to decline to review the sufficiency of the evidence. 661 F.4d at 743. In the operative indictment and at trial, the government presented only the now-invalid right-to-control theory of wire fraud, consistent with this Court's longstanding precedent recognizing that theory. *See,*

*e.g.*, *Finazzo*, 850 F.3d at 108.[2] The government indicates that it would offer new evidence to prove a property theory of fraud in a trial on remand, such as "additional evidence regarding competitors that could have submitted proposals to Fort Schuyler absent the defendants' bid-rigging, including the quality and prices of services that those competitors would have offered, as well as fact and/or expert testimony regarding harm to the victim caused by the defendants' fraud." Gov't Br. on Remand at 11. Engaging in sufficiency review at this stage would, therefore, "deny the government an opportunity to present its evidence" under the correct legal standard. *Bruno*, 661 F.3d at 743.[3]

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[2] Because the operative indictment relied only on the right-to-control theory, to proceed to a second trial on a traditional property theory, the government would likely have to obtain another superseding indictment. The Supreme Court seemingly did not foreclose the government from doing just this. *Ciminelli*, 598 U.S. at 317-18 (Alito, *J.*, concurring) ("I do not understand the Court's opinion to address fact-specific issues on remedy outside the question presented, including . . . the [g]overnment's ability to retry petitioner on the theory that he conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts."). Moreover, as the government points out, this Court in *Bruno* contemplated that the government could change its theory of liability on retrial through a superseding indictment in a change-in-law situation. 661 F.3d at 740 ("It would be preferable and fairer, of course, for the government to proceed on explicit rather than implicit charges, and as the government intends to seek a superseding indictment, we dismiss the [i]ndictment, without prejudice.").

[3] For the first time in their joint reply brief on remand, Appellants argue that controlling precedent, the Double Jeopardy Clause, and the Federal Rules of Criminal Procedure *require* this Court to conduct a sufficiency review before

The government's suggestion that, on remand, it will offer new evidence based on a traditional property theory of wire fraud distinguishes the outcome here from the outcome in *Bruno*. Because the government conceded in *Bruno* that it would not offer any new evidence on retrial, we engaged in sufficiency review before remanding. *See id.*

As a practical matter, it is unclear how this Court could or would evaluate the sufficiency of the evidence of the wire fraud count and wire fraud conspiracy convictions based on a wire fraud theory that the government did not present to the jury. Such fact finding surely "lay[s] within the province of the district court, as the finder of fact." *United States v. Cassiliano*, 137 F.3d 742, 747 (2d Cir. 1998) (making the observation in a different but similarly fact-intensive context). The Supreme Court took a similar

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remanding for a retrial. Although we generally do not consider *issues* raised for the first time on appeal in a reply brief, we will consider *arguments* raised *in response* to arguments made in an appellee's answering brief, as was the case here. *United States v. Bari*, 599 F.3d 176, 180 n.6 (2d Cir. 2010). But for the reasons outlined in this opinion, we have already determined that the prudential rule "generally requiring reviewing courts to consider preserved sufficiency challenges before ordering retrials based on identified trial error" does not apply here. *Hoffler*, 726 F.3d at 162. Moreover, to the extent Appellants argue that sufficiency review is constitutionally compelled by the Double Jeopardy Clause, that argument fails because Appellants have no valid double jeopardy claim regardless of the sufficiency of the evidence at their trials. *See Richardson*, 468 U.S. at 326. As we have explained in this opinion, the Double Jeopardy Clause is inapplicable where, as here, a conviction is set aside by an intervening change in the governing law, which, unlike an acquittal, does not terminate a defendant's original jeopardy.

view when the government requested that it affirm the Appellants' convictions on a traditional property theory of wire fraud after conceding that its right-to-control theory was erroneous. *See Ciminelli*, 598 U.S. at 316-17. It explained:

> With profuse citations to the records below, the [g]overnment asks us to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the [g]overnment asks us to assume not only the function of a court of first view, but also of a jury. That is not our role.

*Id.* (emphasis in original).

This case presents "sound reasons," *Bruno*, 661 F.3d at 743, for departing from this Court's "prudent" practice of reviewing the sufficiency of the evidence before remanding for retrial based on trial error, *Hoffler*, 726 F.3d at 162. We hold that, when trial error is caused by a subsequent change in the governing law, we may decline to review preserved sufficiency challenges if such a review "would deny the government an opportunity to present its evidence" under the correct legal standard. *Bruno*, 661 F.3d at 743.[4] Accordingly, we vacate Appellants' convictions

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[4] In their joint reply brief on remand, Appellants argue that *McDonnell v. United States* mandates that this Court review the sufficiency of the evidence. 579 U.S. 550 (2016). There, the Supreme Court interpreted the term "official act" in the federal bribery statute and, given its interpretation, concluded that the district court's jury instructions "lacked important qualifications, rendering them significantly overinclusive" and erroneous. *Id.* at

for wire fraud and wire fraud conspiracy and remand for further proceedings in the district court without assessing the sufficiency of the evidence.

## II. Aiello's Honest-Services Wire Fraud Conspiracy Conviction

In the first trial, the jury found Aiello guilty of conspiracy to commit honest-services wire fraud, as charged in Count Ten of the indictment, based on instructions about when a private person, rather than a government official, may be convicted of honest-services fraud. We affirmed his conviction as to Count Ten because the jury instructions fit within this Court's decision in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). On appeal, however, the Supreme Court concluded that the *Margiotta*-based jury instructions were erroneous and that it was "far from clear" that the erroneous instructions were harmless. *Percoco*, 598 U.S. at 332. The Supreme Court vacated Percoco's and Aiello's convictions for honest-services wire fraud conspiracy and remanded for further proceedings. *See id.* at 333 (reversing judgment with respect to Percoco and remanding for further proceedings); *Aiello*, 143 S. Ct. at 2491 (vacating judgment with respect to Aiello and remanding for further proceedings).

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577. The Supreme Court directed the Fourth Circuit to resolve, in the first instance, the defendant's argument that there was insufficient evidence that the defendant committed an "official act" based on the correct interpretation. *Id.* at 580. The Supreme Court did not, however, invalidate a long-established theory of liability under the statute as it did here, and the government there had notice that it needed to adduce evidence of an "official act" at trial. Accordingly, *McDonnell* is inapposite.

Now, the government and Aiello jointly ask this Court to vacate Aiello's honest-services wire fraud conspiracy conviction because of the erroneous jury instructions and remand the case to the district court. The government represents that, on remand, it "does not intend to retry Aiello" for conspiracy to commit honest-services wire fraud and "anticipates moving to dismiss that count." Dkt. 525 at 1.

In light of the Supreme Court's decision in *Percoco*, we see no reason not to abide by the agreement between the government and Aiello—especially when we vacated Percoco's conviction for conspiracy to commit honest-services wire fraud based on the same instructional error. *See United States v. Percoco*, 80 F.4th 393, 395 (2d Cir. 2023) (per curiam).

Accordingly, we vacate Aiello's honest-services wire fraud conspiracy conviction and remand for the government to move for dismissal of that count.

**III. Gerardi's False Statement Conviction**

Gerardi's challenge to his false statement conviction requires a discussion of the elements of the crime—particularly materiality—and the concept of prejudicial spillover. We address both in turn.[5]

To the extent that Gerardi's argument about materiality is a challenge to the sufficiency of the evidence, we review such challenges *de novo*. *See United States v. Abdulle*, 564 F.3d 119, 125 (2d Cir. 2009).

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[5] In our previous opinion, we concluded that the district court did not err by denying Gerardi's motion to dismiss his false statement conviction. *Percoco I*, 13 F.4th at 178-80.

### A. Materiality

#### 1. Applicable Law

It is a crime for any person to, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. § 1001(a)(2). "Section 1001 was 'designed to protect the authorized functions of governmental departments and agencies from the perversion which might result from . . . deceptive practices.'" *United States v. Litvak*, 808 F.3d 160, 170 (2d Cir. 2015) (alteration in original) (quoting *United States v. Shanks*, 608 F.2d 73, 75 (2d Cir. 1979)).

A conviction under section 1001(a)(2) requires a statement that is both false and material. *See* 18 U.S.C. § 1001(a)(2). A false statement is material if it has "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (alteration in original) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)).[6]

The decision at issue need not be a decision to prosecute; a decision to investigate suffices. *See Jabar*, 19 F.4th at 84 ("The jury could reasonably conclude that [the defendants'] explanation for whether they properly used the grant was 'capable of influencing'

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[6] We have also described a false statement as material if it "is capable of distracting government investigators' attention away from a critical matter." *United States v. Jabar*, 19 F.4th 66, 84 (2d Cir. 2021) (quoting *United States v. Adekanbi*, 675 F.3d 178, 182 (2d Cir. 2012)).

the investigation, which is all that was required." (quoting *Adekanbki*, 675 F.3d at 182)). Still, "evidence of such a decision cannot be purely theoretical and evidence of such a capability to influence must exceed mere metaphysical possibility." *Litvak*, 808 F.3d at 172-73. Moreover, the decision to prosecute or investigate must be for a crime other than making a false statement, or "the materiality element would be rendered meaningless." *Id.* at 173.

**2. Application**

Gerardi argues that the trial evidence cannot sustain his conviction because *Ciminelli* renders his false statement immaterial as a matter of law; that is, even if he made a false statement, that statement could not have been material because the conduct under investigation did not constitute fraud after *Ciminelli*. The Supreme Court's decision in *Ciminelli*, however, does not affect the materiality analysis at issue in his false statement conviction.

A jury found Gerardi guilty of making false statements to federal officers when he denied his involvement in tailoring the Syracuse RFP for the benefit of his company, COR Development. Gerardi made the statements in a proffer session with the government during its investigation into the rigging of the RFPs for Buffalo and Syracuse. Gerardi's false statements were, therefore, capable of influencing a decision-making body—the Department of Justice, via its prosecutors and special agents in a proffer session—as it determined who to investigate for wire fraud and wire fraud conspiracy. *See Adekanbi*, 675 F.3d at 183 (concluding that the defendant made material false statements in a safety-valve proffer

session when he falsely identified himself to the government, which "has *both* a 'natural tendency to influence' and is 'capable of distracting' those officials," as "there is little doubt that providing a false identity can result in a significant hindrance to law enforcement's investigation or prosecution of crimes" (emphasis in original) (quoting *Gaudin*, 515 U.S. at 509)); *Jabar*, 19 F.4th at 84 (concluding false statements were material where the defendants' "explanation for whether they properly used the grant was 'capable of influencing' the investigation" even where the defendants claimed the agent already knew the answers to their questions (quoting *Adekanbi*, 675 F.3d at 182)). Accordingly, his false statements were material.

### B. Prejudicial Spillover

#### 1. Applicable Law

"When an appellate court reverses some but not all counts of a multicount conviction, the court must determine if prejudicial spillover from evidence introduced in support of the reversed count requires the remaining convictions to be upset." *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994). This Court considers three factors to determine whether prejudicial spillover exists:

> (1) whether the evidence introduced in support of the vacated count 'was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts,' (2) whether the dismissed count and the remaining counts were similar, and

> (3) whether the government's evidence on the remaining counts was weak or strong.

*United States v. Hamilton*, 334 F.3d 170, 182 (2d Cir. 2003) (quoting *United States v. Vebeliunas*, 76 F.3d 1283, 1294 (2d Cir. 1996)).

Where "the evidence that the government presented on the reversed counts was, as a general matter, no more inflammatory than the evidence that it presented on the remaining counts," spillover prejudice is not likely to exist. *United States v. Morales,* 185 F.3d 74, 83 (2d Cir. 1999) (concluding that no prejudicial spillover existed where "all of the evidence related to violent armed robberies"); *see also United States v. Friedman*, 854 F.2d 535, 582 (2d Cir. 1988) (concluding that prejudicial spillover did not exist where the government's subsequently invalid theory of mail fraud was not inflammatory).

Likewise, where "the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both," spillover prejudice will likely not be found. *United States v. Wapnick*, 60 F.3d 948, 954 (2d Cir. 1995); *see also Hamilton*, 334 F.3d at 182 ("[P]rejudicial spillover is unlikely if the dismissed count and the remaining counts were . . . quite similar . . . ."). In contrast, this Court has cautioned that spillover prejudice is "highly likely" from a vacated Racketeering Influenced and Corrupt Organizations ("RICO") count as to a single Hobbs Act robbery charge because "[a] RICO charge allows the government to introduce evidence of criminal activities in which a defendant did not participate to prove the enterprise element," *United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996),

although the fact that a "RICO count . . . was subsequently dismissed does not alone suffice to establish prejudice," *Vebeliunas*, 76 F.3d at 1294. And, of course, a finding of spillover prejudice is not likely where the government's evidence on the remaining counts is strong. *See Wapnick*, 60 F.3d at 954.

Ultimately, "[a] defendant bears an extremely heavy burden when claiming prejudicial spillover." *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002). "It is only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, *and* this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts, that spillover prejudice is likely to occur." *Rooney*, 37 F.3d at 856 (emphasis in original).

**2. Application**

Gerardi contends that the wire fraud counts tainted his false statement count, creating spillover prejudice and requiring vacatur or at least a new trial for his false statement count.[7]

The first factor—the purported inflammatory nature of the evidence on the reversed or vacated counts—does not suggest spillover prejudice. The evidence on the wire fraud counts was no more inflammatory than the evidence on the false statement count, as it all related to the Buffalo Billion

[7] This Court did not reach Gerardi's challenge regarding prejudicial spillover in its previous opinion. Because we did not overturn the wire fraud convictions, the issue of spillover prejudice was not presented. *Percoco I*, 13 F.4th at 178 n.13.

bid-rigging scheme. *See Morales*, 185 F.3d at 83. Gerardi claims that the inflammatory nature of the evidence arises from "lump[ing] all Defendants together—even though Gerardi was not involved in the Buffalo RFP—and . . . disparag[ing] them as fraudsters and liars who took advantage of a non-profit organization." Appellants' Joint Br. on Remand at 38. But Gerardi's involvement in the Syracuse RFP was part of the broader conspiracy to rig the bidding process for Buffalo Billion initiative projects. To prove that Gerardi made a false statement and that it was material, the government had to introduce evidence about the broader conspiracy, including the Buffalo RFP. Accordingly, Gerardi's argument fails to establish the inflammatory nature of the evidence on the vacated counts as opposed to the evidence on the remaining count—all of which involved the Buffalo Billion bid-rigging scheme.

Likewise, because the wire fraud and false statement counts arise from similar facts about the Buffalo Billion bid-rigging scheme, evidence about the overall scheme and Gerardi's role in it "would have been admissible as to both" counts. *Wapnick*, 60 F.3d at 954. The second factor—the similarity between the dismissed count and remaining counts—therefore weighs against a finding of spillover prejudice.

Finally, the third factor—the strength of the government's evidence on the false statement count—also weighs against a finding of spillover prejudice. Gerardi made a handwritten comment on a draft of the Syracuse RFP that the inclusion of COR Development's software as a qualification was "too telegraphed." App. at 1328. Gerardi told federal

officers that he really meant that the language used was "too telescoped" and would not be broad enough to permit other companies to apply and compete. *Id.* Gerardi also told federal officers that, while he suggested removing a requirement for audited financials from the Syracuse RFP, he did so not to help COR Development, which did not have audited financials. He did so, instead, to remove a barrier that might prevent other companies from bidding. And Gerardi told officers that he could not explain why Howe emailed him to confirm that Kaloyeros made that adjustment to the RFP, and that he responded merely to be polite. This evidence strongly supports his conviction for making false statements to federal officers as he denied his involvement in tailoring the Syracuse RFP for the benefit of his company when there was ample evidence of his involvement for that purpose. Accordingly, the strength of the government's evidence also weighs against a finding of spillover prejudice.

Ultimately, "[a] defendant bears an extremely heavy burden when claiming prejudicial spillover," *Griffith*, 284 F.3d at 351, and Gerardi has not met that burden here. Hence, Gerardi's prejudicial spillover claim fails.

## CONCLUSION

For the foregoing reasons, we vacate Appellants' convictions for wire fraud and wire fraud conspiracy, we vacate Aiello's conviction for conspiracy to commit honest-services wire fraud and remand for the government to move for dismissal of that count, we affirm Gerardi's false statement conviction, and we remand for further proceedings.

*Appendix B*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Nos. 18-2990 (L), 18-3710, 18-3712,
18-3715, 18-3850, 19-1272

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UNITED STATES OF AMERICA,

*Appellee*,

v.

STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI,
ALAIN KALOYEROS, AKA DR. K.,

*Defendants-Appellants*.

JOSEPH PERCOCO, GALBRAITH KELLY, JR., MICHAEL
LAIPPLE, KEVIN SCHULER,

*Defendants*.

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Filed: Dec. 6, 2024

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ORDER

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Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the

Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

*Appendix C*

**SUPREME COURT OF THE UNITED STATES**

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No. 21-1170

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LOUIS CIMINELLI, et al.
*Petitioners*,
v.
UNITED STATES,
*Respondents*.

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Argued: Nov. 28, 2022
Filed: May 11, 2023

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OPINION

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JUSTICE THOMAS delivered the opinion of the Court.

In this case, we must decide whether the Second Circuit's longstanding "right to control" theory of fraud describes a valid basis for liability under the federal wire fraud statute, which criminalizes the use of interstate wires for "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. Under the right-to-control theory, a defendant is guilty of wire fraud if he schemes to deprive the victim of "potentially valuable economic information" "necessary to make

discretionary economic decisions." *United States* v. *Percoco*, 13 F.4th 158, 170 (CA2 2021) (internal quotation marks omitted). Petitioner Louis Ciminelli was charged with, tried for, and convicted of wire fraud under this theory. And the Second Circuit affirmed his convictions on that same basis.

We have held, however, that the federal fraud statutes criminalize only schemes to deprive people of traditional property interests. *Cleveland* v. *United States*, 531 U.S. 12, 24 (2000). Because "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under § 1343. Accordingly, we reverse the Second Circuit's judgment.

## I

This case begins with then-New York Governor Andrew Cuomo's "Buffalo Billion" initiative. On its face, the initiative was administered through Fort Schuyler Management Corporation, a nonprofit affiliated with the State University of New York (SUNY) and the SUNY Research Foundation. It aimed to invest $1 billion in development projects in upstate New York. Later investigations, however, uncovered a wide-ranging scheme that involved several of former Governor Cuomo's associates, most notably Alain Kaloyeros and Todd Howe. Kaloyeros was a member of Fort Schuyler's board of directors and was in charge of developing project proposals for Buffalo Billion; Howe was a lobbyist who had deep ties to the Cuomo administration. Each month, Kaloyeros paid Howe $25,000 in state funds to ensure that the Cuomo

administration gave Kaloyeros a prominent position in Buffalo Billion.

Ciminelli had a similar arrangement. His construction company, LPCiminelli, paid Howe $100,000 to $180,000 each year to help it obtain state-funded jobs. In 2013, Howe and Kaloyeros devised a scheme whereby Kaloyeros would tailor Fort Schuyler's bid process to smooth the way for LPCiminelli to receive major Buffalo Billion contracts. First, on Kaloyeros' suggestion, Fort Schuyler established a process for selecting "preferred developers" that would be given the first opportunity to negotiate with Fort Schuyler for specific projects. Then, Kaloyeros, Howe, and Ciminelli jointly developed a set of requests for proposal (RFPs) that treated unique aspects of LPCiminelli as qualifications for preferred-developer status. Those RFPs effectively guaranteed that LPCiminelli would be (and was) selected as a preferred developer for the Buffalo projects. With that status in hand, LPCiminelli secured the marquee $750 million "Riverbend project" in Buffalo.

After an investigation revealed their scheme, Ciminelli, Howe, Kaloyeros, and several others were indicted by a federal grand jury on 18 counts including, as relevant here, wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit wire fraud in violation of § 1349.

Throughout the grand jury proceedings, trial, and appeal, the Government relied on the Second Circuit's "right to control" theory, under which the Government can establish wire fraud by showing that the defendant schemed to deprive a victim of potentially

valuable economic information necessary to make discretionary economic decisions. The Government's indictment and trial strategy rested solely on that theory.[1] And, it successfully defeated Ciminelli and his co-defendants' motion to dismiss by relying on that theory. In addition, it successfully moved the District Court to exclude certain defense evidence as irrelevant to that theory. The Government also relied on that theory in its summation to the jury.

Consistent with the right-to-control theory, the District Court instructed the jury that the term "property" in § 1343 "includes intangible interests such as the right to control the use of one's assets." App. 41. The jury could thus find that the defendants harmed Fort Schuyler's right to control its assets if Fort Schuyler was "deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Ibid.* The District Court further defined "economically valuable information" as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." *Ibid.* The jury found Ciminelli guilty of wire fraud and conspiracy to commit wire fraud and the District

[1] An earlier indictment alleged that the Buffalo Billion contracts were the property at issue. But, to defend against the defendants' motion to dismiss, the Government relied solely on the theory that the scheme "defraud[ed] Fort Schuyler of its right to control its assets." App. 31-32. The District Court then relied expressly on the right-to-control theory in denying the motion to dismiss. *United States* v. *Percoco*, 2017 WL 6314146, *8 (SDNY, Dec. 11, 2017).

Court sentenced him to 28 months' imprisonment followed by 2 years' supervised release.

On appeal, Ciminelli challenged the right-to-control theory, arguing that the right to control one's assets is not "property" for purposes of the wire fraud statute. Defending the wire fraud convictions, the Government relied solely on the right-to-control theory. The Second Circuit affirmed the convictions based on its longstanding right-to-control precedents, holding that, by "rigging the RFPs to favor their companies, defendants deprived Fort Schuyler of potentially valuable economic information." 13 F.4th, at 171 (internal quotation marks omitted).

We granted certiorari to determine whether the Second Circuit's right-to-control theory of wire fraud is a valid basis for liability under 18 U.S.C. § 1343. 597 U.S. —— (2022). And, we now hold that it is not.

## II

### A

The wire fraud statute criminalizes "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." § 1343. Although the statute is phrased in the disjunctive, we have consistently understood the "money or property" requirement to limit the "scheme or artifice to defraud" element because the "common understanding" of the words "to defraud" when the statute was enacted referred "to wronging one in his property rights." *Cleveland*, 531 U. S., at 19 (internal

quotation marks omitted).[2] This understanding reflects not only the original meaning of the text, but also that the fraud statutes do not vest a general power in "the Federal Government . . . to enforce (its view of) integrity in broad swaths of state and local policymaking." *Kelly* v. *United States*, 590 U.S. ——, —— (2020). Instead, these statutes "protec[t] property rights only." *Cleveland*, 531 U.S., at 19. Accordingly, the Government must prove not only that wire fraud defendants "engaged in deception," but also that money or property was "an object of their fraud." *Kelly*, 590 U.S., at —— (alterations omitted).

Despite these limitations, lower federal courts for decades interpreted the mail and wire fraud statutes to protect intangible interests unconnected to traditional property rights. See *Skilling* v. *United States*, 561 U.S. 358, 400 (2010) (recounting how "the Courts of Appeals, one after the other, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights"). For example, federal courts held the fraud statutes reached such intangible interests as the right to "honest services," *ibid.* (internal quotation marks omitted); the right of the citizenry to an honest election, see *United States* v. *Girdner*, 754 F.2d 877, 880 (CA10 1985); and the right to privacy, *United States* v. *Louderman*, 576 F.2d 1383, 1387 (CA9 1978). In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court halted that trend by confining the federal fraud

[2] Although *Cleveland* involved the mail fraud statute, 18 U.S.C. § 1341, "we have construed identical language in the wire and mail fraud statutes *in pari materia*." *Pasquantino* v. *United States*, 544 U.S. 349, 355, n. 2 (2005).

statutes to their original station, the "protect[ion of] individual property rights." *Id.*, at 359, n. 8. Congress then amended the fraud statutes "specifically to cover one of the 'intangible rights' that lower courts had protected under [the statutes] prior to *McNally*: 'the intangible right of honest services.'" *Cleveland*, 531 U.S., at 19-20 (quoting 18 U.S.C. § 1346).

The right-to-control theory applied below first arose after *McNally* prevented the Government from basing federal fraud convictions on harms to intangible interests unconnected to property. See *United States* v. *Wallach*, 935 F.2d 445, 461-464 (CA2 1991). As developed by the Second Circuit, the theory holds that, "[s]ince a defining feature of most property is the right to control the asset in question," "the property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets." *United States* v. *Lebedev*, 932 F.3d 40, 48 (2019) (alterations omitted). Thus, a "cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States* v. *Binday*, 804 F.3d 558, 570 (CA2 2015) (alterations omitted).[3]

The right-to-control theory cannot be squared with the text of the federal fraud statutes, which are "limited in scope to the protection of property rights."

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[3] At least two Circuits have expressly repudiated the right-to-control theory of wire fraud. *United States* v. *Sadler*, 750 F.3d 585, 590-592 (CA6 2014); *United States* v. *Bruchhausen*, 977 F.2d 464, 467-469 (CA9 1992). Several other Circuits have embraced the theory to varying degrees. See, *e. g.*, *United States* v. *Gray*, 405 F.3d 227, 234 (CA4 2005) (collecting cases).

*McNally*, 483 U.S., at 360. The so-called "right to control" is not an interest that had "long been recognized as property" when the wire fraud statute was enacted. *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987). Significantly, when the Second Circuit first recognized the right-to-control theory in 1991—decades after the wire fraud statute was enacted and over a century after the mail fraud statute was enacted—it could cite no authority that established "potentially valuable economic information" as a traditionally recognized property interest. See *Wallach*, 935 F.2d, at 462-463.[4] And, the Second Circuit has not since attempted to ground the right-to-

[4] The only judicial authority the Second Circuit cited for this key proposition was a 1989 Fifth Circuit opinion that conclusorily asserted that "[t]he economic value of . . . knowledge" was "sufficient 'property' to implicate" the mail fraud statute, and that appears to have misunderstood 18 U.S.C. § 1346 as "eliminating the requirement of property loss" in all cases. *United States* v. *Little*, 889 F.2d 1367, 1368-1369. The Second Circuit then proceeded to rely on the "bundle of sticks" metaphor of property rights. See *United States* v. *Wallach*, 935 F.2d 445, 463 (1991) ("[G]iven the important role that information plays in the valuation of a corporation, the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest"). But that metaphor—whatever its merits in other contexts—cannot compensate for the absence of an interest that itself "has long been recognized as property," *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987), particularly in light of our rejection of attempts to construe the federal fraud statutes "in a manner that leaves [their] outer boundaries ambiguous." *McNally* v. *United States*, 483 U.S. 350, 360 (1987). As noted above, the right to information necessary to make informed economic decisions, while perhaps useful for protecting and making use of one's property, has not itself traditionally been recognized as a property interest.

control theory in traditional property notions. We have consistently rejected such federal fraud theories that "stray from traditional concepts of property." *Cleveland*, 531 U.S., at 24. For its part, the Government—despite relying upon the right-to-control theory for decades, including in this very case—now concedes that if "the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of 'property' giving rise to wire fraud, it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." Brief for United States 25-26. Thus, even the Government now agrees that the Second Circuit's right-to-control theory is unmoored from the federal fraud statutes' text.

The right-to-control theory is also inconsistent with the structure and history of the federal fraud statutes. As recounted above, after *McNally* put an end to federal courts' use of mail and wire fraud to protect an ever-growing swath of intangible interests unconnected to property, Congress responded by enacting § 1346, which—despite the wide array of intangible rights courts protected under the fraud statutes pre-*McNally*—revived "*only* the intangible right of honest services." *Cleveland*, 531 U.S., at 19-20 (emphasis added). "Congress' reverberating silence about other [such] intangible interests" forecloses the expansion of the wire fraud statute to cover the intangible right to control. *United States* v. *Sadler*, 750 F.3d 585, 591 (CA6 2014).

Finally, the right-to-control theory vastly expands federal jurisdiction without statutory authorization.

Because the theory treats mere information as the protected interest, almost any deceptive act could be criminal. See, *e.g.*, *United States* v. *Viloski*, 557 Fed. Appx. 28 (CA2 2014) (affirming right-to-control conviction based on an employee's undisclosed conflict of interest). The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, "[a]bsent [a] clear statement by Congress," courts should "not read the mail [and wire] fraud statute[s] to place under federal superintendence a vast array of conduct traditionally policed by the States." *Cleveland*, 531 U. S., at 27. And, as it did below, the Second Circuit has employed the theory to affirm federal convictions regulating the ethics (or lack thereof) of state employees and contractors—despite our admonition that "[f]ederal prosecutors may not use property fraud statutes to set standards of disclosure and good government for local and state officials." *Kelly*, 590 U.S., at —— (alterations omitted). The right-to-control theory thus criminalizes traditionally civil matters and federalizes traditionally state matters.

In sum, the wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.

**B**

Despite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-

control theory, the Government now concedes that the theory as articulated below is erroneous. Brief for United States 24-26. The Government frankly admits that, "to the extent that language in the [Second Circuit's] opinions might suggest that depriving a victim of economically valuable information, without more, necessarily qualifies as 'obtaining money or property' within the meaning of the fraud statutes, that is incorrect." *Id.*, at 24. That should be the end of the case.

Yet, the Government insists that its concession does not require reversal because we can affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory. *Id.*, at 31-32. With profuse citations to the records below, the Government asks us to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the Government asks us to assume not only the function of a court of first view, but also of a jury. That is not our role. See, *e.g.*, *McCormick* v. *United States*, 500 U.S. 257, 270-271, n. 8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury"); *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980). Accordingly, we decline the Government's request to affirm Ciminelli's convictions on alternative grounds.

**III**

The right-to-control theory is invalid under the federal fraud statutes. We, therefore, reverse the

judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO, concurring.

The opinion of the Court correctly answers the sole question posed to us: whether the right-to-control theory supports liability under the federal wire fraud statute. The jury instructions embody that theory, and therefore this error, unless harmless, requires the reversal of the judgment below. I do not understand the Court's opinion to address fact-specific issues on remedy outside the question presented, including: (1) petitioner's ability to challenge the indictment at this stage of proceedings, see Fed. Rule Crim. Proc. 12(b)(3)(B); (2) the indictment's sufficiency, see *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985) (variance from indictment did not make indictment insufficient); (3) the applicability of harmless error to particular invocations of the right-to-control theory during trial, see *Neder* v. *United States*, 527 U.S. 1, 15 (1999) (omission of element in jury instructions subject to harmless error); and (4) the Government's ability to retry petitioner on the theory that he conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts. On this understanding, I join the Court's opinion.

*Appendix D*

## CONSTITUTIONAL PROVISION

### U.S. Const. amend. V, cl. 2

No person shall … be subject for the same offence to be twice put in jeopardy of life or limb.