APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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.

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

Filed: Sept. 23, 2024

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

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

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

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.

Filed: Dec. 6, 2024

ORDER

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

No. 21-1170

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

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

OPINION

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.