No. 24-958

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the retrial of petitioners where sufficient evidence supported their original convictions under the circuit precedent in effect at the time of trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is available at 118 F.4th 291.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2024. A petition for rehearing was denied on December 6, 2024 (Pet. App. 27-28). The petition for a writ of certiorari was filed on March 4, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner Aiello was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343, and two counts of conspiring to

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

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

The court of appeals affirmed. 13 F.4th 158. This Court granted Ciminelli's petition for a writ of certiorari, reversed, and remanded the case to the court of appeals. 598 U.S. 306. In light of that decision, the Court also granted the other petitioners' petitions for writs of certiorari, vacated the court of appeals' judgments, and remanded. 143 S. Ct. 2491; 143 S. Ct. 2490. On remand, the court of appeals vacated petitioners'

convictions for wire fraud and wire-fraud conspiracy, affirmed Gerardi's false-statements conviction, and remanded to the district court for further proceedings. Pet. App. 1-26.

The court of appeals denied petitioners' motion to stay its mandate. 18-3710 C.A. Doc. 387 (Jan. 17, 2025). Petitioners then sought a stay from this Court, which Justice Sotomayor likewise denied.

1. This case arises from a conspiracy to steer taxpayer-funded construction contracts worth hundreds of millions of dollars to companies owned by petitioners Ciminelli, Aiello, and Gerardi. 598 U.S. at 309-310; 13 F.4th at 164-165. In 2012, New York Governor Andrew Cuomo "launched an initiative to develop the greater Buffalo area through the investment of $1 billion in taxpayer funds; the project became known as the 'Buffalo Billion' initiative." 13 F.4th at 164-165.

The nonprofit Fort Schuyler Management Corporation ran the Buffalo Billion initiative, and petitioner Kaloyeros, a member of Fort Schuyler's board of directors, "was in charge of developing project proposals" for the initiative. 598 U.S. at 309. Kaloyeros secured that role by making monthly payments of "$25,000 in state funds" to Todd Howe, "a lobbyist who had deep ties to the Cuomo administration." *Ibid.* Howe also had arrangements with Ciminelli, Aiello, and Gerardi, who paid him for help obtaining state-funded construction contracts for Ciminelli's company, LPCiminelli, and Aiello's and Gerardi's company, COR Development. *Id.* at 310; see 13 F.4th at 165.

"Howe and Kaloyeros devised a scheme whereby Kaloyeros would tailor Fort Schuyler's bid process to smooth the way" for Ciminelli, Aiello, and Gerardi "to receive major Buffalo Billion contracts." 598 U.S. at

310. First, Kaloyeros successfully convinced Fort Schuyler to establish a request-for-proposal (RFP) process "for selecting 'preferred developers' that would be given the first opportunity to negotiate with Fort Schuyler for specific projects." *Ibid.* Kaloyeros and Howe then worked to develop RFPs that incorporated specific "qualifications or attributes" of LPCiminelli and COR Development "so that the bidding process would favor the selection of these companies as preferred developers." 13 F.4th at 166.

For example, "the final Syracuse RFP contained a fifteen-year experience requirement, which directly matched the experience of COR Development, along with a requirement that the preferred developer use a particular type of software (which COR Development also used)." 13 F.4th at 166. And "the final Buffalo RFP contained specifications unique to LPCiminelli, including 'over 50 years of proven experience' in the field"—a specification Kaloyeros modified when an investigative reporter started asking questions—as well as "a requirement that the preferred developer be headquartered in Buffalo, and additional language lifted directly from talking points provided to Kaloyeros from Ciminelli" and an LPCiminelli executive. *Id.* at 166-167 (brackets and citation omitted).

The plan worked. Fort Schuyler chose COR Development as the preferred developer for Syracuse, and it chose LPCiminelli and another company as the preferred developers for Buffalo. 13 F.4th at 167. Contracts worth about $105 million were awarded to COR Development, and "the marquee $750 million 'Riverbend project' in Buffalo" went to LPCiminelli. 598 U.S. at 310; see 13 F.4th at 168.

2. In 2017, a grand jury in the Southern District of New York charged petitioners and other defendants with wire fraud and conspiring to commit wire fraud in connection with the bid-rigging for the Buffalo Billion projects. 13 F.4th at 168. The grand jury also charged Gerardi with making false statements to federal officers, along with other counts (including charges for honest-services fraud that this Court would address in *Percoco* v. *United States*, 598 U.S. 319 (2023)). See 13 F.4th at 168; 13 F.4th 180, 186-187, rev'd and remanded, 598 U.S. 319.

The wire-fraud statute prohibits using the 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. At the time of petitioners' indictment, the Second Circuit had for nearly 30 years approved a "right to control" theory of fraud, under which "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.'" 598 U.S. at 309 (citation omitted); see *id.* at 308 (describing the right-to-control theory as "longstanding"); *United States* v. *Wallach*, 935 F.2d 445, 461-464 (2d Cir. 1991) (accepting and developing the theory).

The superseding indictment in this case, in turn, alleged that petitioners committed wire fraud by "devis[ing] a scheme to defraud Fort Schuyler of its right to control its assets, and thereby expos[ing] Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding processes" for the Buffalo Billion projects were "fair, open, and competitive" when in fact they were not. 21-1158 J.A. 91. And at petitioners' trial, the district court instructed the jury

that the relevant "property" targeted by a wire-fraud scheme can include "intangible interests such as the right to control the use of one's assets" and that "[t]he victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." 21-1170 J.A. 41.

The jury found petitioners guilty on all counts. 13 F.4th at 169. The district court sentenced Ciminelli to 28 months of imprisonment, Gerardi to 30 months of imprisonment, Aiello to 36 months of imprisonment, and Kaloyeros to 42 months of imprisonment. *Ibid.*

3. On direct appeal, the court of appeals rejected petitioners' argument that the evidence was insufficient to convict them under the right-to-control theory of wire fraud. 13 F.4th at 170-173. The court of appeals also rejected petitioners' argument "that the district court erred in instructing the jury on the right-to-control theory of wire fraud." *Id.* at 174; see *id.* at 174-176. The court of appeals noted that the relevant instructions "clearly explained the right-to-control theory" and "closely tracked the language set forth in [the Second Circuit's] prior opinions." *Id.* at 175.

4. Petitioners filed petitions for writs of certiorari, and this Court granted Ciminelli's petition and reversed. 598 U.S. 306. The Court rejected the right-to-control theory of wire fraud, reasoning that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests," *id.* at 309, and that the "'economic information'" withheld in a right-to-control scheme "is not a traditional property interest," *ibid.* (citation omitted). Concluding that the right-to-control theory was inconsistent with the fraud statutes' text, structure, and history, the Court held that

the theory "cannot form the basis for a conviction under the federal fraud statutes." *Id.* at 316.

The Court observed that in Ciminelli's case, the government had relied on the right-to-control theory "[t]hroughout the grand jury proceedings, trial, and appeal" and that the government's "indictment and trial strategy rested solely on that theory." *Id.* at 310-311. And the Court noted that the district court's jury instructions had likewise incorporated the right-to-control concept. See *id.* at 311.

Finally, the Court rejected the government's argument that Ciminelli's convictions should be affirmed "on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory"—namely, that Ciminelli conspired to obtain, and did obtain, valuable contracts. 598 U.S. at 316. In the Court's view, that request effectively asked the Court to apply the facts presented at trial "to the elements of a *different* wire fraud theory in the first instance." *Id.* at 316-317. The Court described such an undertaking as the "function" of "a jury." *Id.* at 317 (citing *McCormick* v. *United States*, 500 U.S. 257, 270-271 n.8 (1991)). The Court instead reversed the judgment affirming the convictions and "remand[ed] the case for further proceedings consistent with this opinion." *Ibid.*

Justice Alito filed a concurring opinion. 598 U.S. at 317-318. He agreed with the Court's rejection of the right-to-control theory and explained that because "[t]he jury instructions embody that theory, * * * this error, unless harmless, requires the reversal of the judgment below." *Id.* at 317. Justice Alito also explained that he did not understand the Court's opinion to "address fact-specific issues on remedy outside the question presented," including "the Government's abil-

ity to retry [Ciminelli] on the theory that he conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts." *Id.* at 317-318.

In light of its disposition in Ciminelli's case, this Court granted the other petitioners' petitions for writs of certiorari, vacated the decisions in their cases, and remanded to the court of appeals for further proceedings. 143 S. Ct. 2491; 143 S. Ct. 2490.

5. On remand, the court of appeals vacated petitioners' wire-fraud and wire-fraud-conspiracy convictions, affirmed Gerardi's false-statements conviction, and remanded to the district court for further proceedings. Pet. App. 26. The court of appeals rejected petitioners' contention that they were entitled to outright judgments of acquittal on the wire-fraud counts rather than vacatur and remand for retrial. *Id.* at 10-18.

The court of appeals explained that the Double Jeopardy Clause of the Fifth Amendment does not preclude the government from retrying petitioners on a traditional property-fraud theory. Pet. App. 10-13. The court observed that double jeopardy does not bar retrial when a defendant's convictions are vacated for "trial error," as opposed to vacatur resulting from the government's "'fail[ure] to prove its case.'" *Id.* at 11 (citation omitted). As the court explained, "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.'" *Ibid.* (quoting *Burks* v. *United States*, 437 U.S. 1, 15 (1978)).

The court of appeals further explained that "a change in the governing law after trial"—including

when "the Supreme Court invalidates a legal theory that formed the basis for a conviction at trial"—gives rise to a trial error for which retrial is permissible. Pet. App. 12. And the court concluded that because the error here—the invalidation of the right-to-control theory that had "long been accepted" in the Second Circuit and was employed at trial—was of that type, double jeopardy did not bar a retrial. *Id.* at 12-13.

The court of appeals declined to conduct its "own sufficiency review of the evidence based on a traditional property theory of wire fraud" before remanding. Pet. App. 13; see *id.* at 13-18. The court explained that although it typically reviews sufficiency claims before resolving other claims of trial error, "[e]ngaging in [petitioners' requested] sufficiency review at this stage" would, in light of this Court's post-trial rejection of the prosecution's original legal theory, "'deny the government an opportunity to present its evidence' under the correct legal standard." *Id.* at 15 (quoting *United States* v. *Bruno*, 661 F.3d 733, 743 (2d Cir. 2011)).

In reaching that conclusion, the court of appeals observed that "[o]ther circuit courts have * * * declined to review the sufficiency of the [existing trial] evidence in these circumstances before remanding for further proceedings." Pet. App. 14 (citing decisions from the Sixth, Ninth, and D.C. Circuits). And the court emphasized that its approach was in line with this Court's own review of this case, observing that "[a]s a practical matter, it is unclear how [the court of appeals] 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." *Id.* at 16; see *id.* at 16-17 (citing and quoting 598 U.S. at 316-317). Finally, the court re-

jected petitioners' contention, presented for the first time in their remand reply brief, that the court actually had no discretion on the matter and was "*require*[*d*]" to conduct such a sufficiency review before ordering retrial. *Id.* at 15 n.3; see *id.* at 17 n.4.

6. The court of appeals denied petitioners' request for rehearing and their motion to stay the court's mandate pending the filing and disposition of a petition for a writ of certiorari. Pet. App. 27-28; 18-3710 C.A. Doc. 387 (Jan. 17, 2025).

On January 17, 2025, petitioners filed an application in this Court renewing their request for a stay. See *Aiello* v. *United States* (No. 24A712). On February 3, Justice Sotomayor denied petitioners' application.

ARGUMENT

Petitioners contend (Pet. 16-35) that the Double Jeopardy Clause prohibited the court of appeals from remanding for a retrial unless and until the court had first evaluated the trial evidence against a legal standard different from the one applied at the first trial, which reflected controlling circuit precedent at the time. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or the controlling precedent of any other court of appeals. This Court has previously denied certiorari in cases raising similar claims. See *Ford* v. *United States*, 571 U.S. 832 (2013) (No. 12-9746); *McWane, Inc.* v. *United States*, 555 U.S. 1045 (2008) (No. 08-364); *Huls* v. *United States*, 505 U.S. 1220 (1992) (No. 91-1617); *Davis* v. *United States*, 493 U.S. 923 (1989) (No. 89-67). And this case would be a poor vehicle for exploring any such issues, not least because the government would prevail if the court below were to conduct the additional analysis that petitioners insist

upon. The petition for a writ of certiorari should be denied.

1. "It 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, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988); *Burks* v. *United States*, 437 U.S. 1, 14-15 (1978); see *United States* v. *Ball*, 163 U.S. 662, 672 (1896). This Court has identified only one exception to that rule. In *Burks* v. *United States*, the Court held that the Double Jeopardy Clause bars retrial "when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict." *Lockhart*, 488 U.S. at 39 (citing *Burks*, 437 U.S. at 18).

That singular exception reflects the principle that "the protection of the Double Jeopardy Clause by its terms applies only 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). "[A]n appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal." *Ibid.* An appellate reversal based on insufficient evidence thus "terminate[s] the initial jeopardy," and the Double Jeopardy Clause prohibits a successive prosecution. *Justices of Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984).

No double-jeopardy bar applies, however, when a defendant's conviction has been set aside based on a successful claim of error in the trial proceedings. In that

circumstance, the defendant remains in "continuing jeopardy" because the proceedings "have not run their full course." *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). A fundamental prerequisite for application of the Double Jeopardy Clause is not satisfied, and the Clause does not prohibit retrial. See *Lydon*, 466 U.S. at 308.

Accordingly, in *Richardson* v. *United States*, this Court held that "[r]egardless of the sufficiency of the evidence at [his] first trial," a defendant had no double-jeopardy claim when the trial court had declared a mistrial following a hung jury, because such a ruling "is not an event that terminates the original jeopardy." 468 U.S. at 326. Without a termination of the original jeopardy, "*Burks* simply does not require that an appellate court rule on the sufficiency of the evidence" just because "retrial might be barred by the Double Jeopardy Clause." *Id.* at 323.

Similarly, in *Justices of Boston Municipal Court* v. *Lydon*, this Court rejected the claim of a defendant who was convicted at a bench trial, had invoked a state procedure allowing for a de novo jury trial, and then had argued that the jury trial was barred because the evidence at the bench trial had been insufficient. 466 U.S. at 307. The Court reasoned that the defendant had "fail[ed] to identify any stage of the state proceedings that can be held to have terminated jeopardy," emphasizing the difference between a mere "claim of evidentiary failure" and an actual "legal judgment to that effect." *Id.* at 309.

2. The Double Jeopardy Clause poses no bar to petitioners' retrial in this case because they are similarly situated to the defendants in *Richardson* and *Lydon*. The error identified by this Court in *Ciminelli* was not "the equivalent of an acquittal." *Richardson*, 468 U.S.

at 325. Instead, the error was that "the [trial] court applied the wrong legal standard" and "misinstructed the jury," which are trial errors warranting a new trial. 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.4(b) (4th ed. 2015) (LaFave). Petitioners thus remained in continuing jeopardy throughout the proceedings in this Court and on remand before the court of appeals, and there is no Fifth Amendment bar to their retrial under the now-clarified standards for wire-fraud liability.

The theory that the Double Jeopardy Clause prohibits retrial when the government's evidence was sufficient under the law as it existed at the time of trial, but would be insufficient following a post-trial change in controlling law, is inconsistent not only with *Richardson* and *Lydon* but also this Court's decision in *Lockhart* v. *Nelson*. There, the Court held that the Double Jeopardy Clause did not forbid retrial of a defendant under a habitual-offender statute where his sentence had been set aside because he had received a pardon for one of the convictions supporting the enhancement. *Lockhart*, 488 U.S. at 34-37. The evidence presented at the original trial was necessarily insufficient to sustain the habitual-offender determination: the statute required a finding of four prior convictions, but without the pardoned conviction, the prosecution had presented evidence of only three. See *id.* at 36.

Rather than prohibit a retrial—or conduct or require an appellate sufficiency review that the prosecution would never satisfy—this Court held that when a conviction is reversed because the trial court has erroneously admitted certain evidence, a new trial is permissible even if the rest of the evidence alone would have been insufficient to sustain the conviction. *Lockhart*, 488 U.S. at 40-42. The Court explained that the "basis

for the *Burks* exception" to the "general rule" permitting retrial after reversal of a conviction "is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence." *Id.* at 41. And the Court further explained that because "[a] trial court in passing on such a[n acquittal] motion considers all of the evidence it has admitted," to "make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court." *Id.* at 41-42.

The Court additionally reasoned that permitting retrial when the prior trial record is insufficient due to error is "not the sort of governmental oppression at which the Double Jeopardy Clause is aimed." *Lockhart*, 488 U.S. at 42. A retrial in such circumstances "serves the interest of the defendant by affording him an opportunity to 'obtain a fair readjudication of his guilt free from error,'" *ibid.* (quoting *Burks*, 437 U.S. at 15) (brackets omitted), while also serving "the societal interest in punishing one whose guilt is clear after he has obtained such a trial," *id.* at 38 (citation omitted). As the Court observed, "it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 38 (brackets and citation omitted). In *Lockhart*, for example, if the district court had correctly excluded evidence of the pardoned conviction, the prosecutor would have had an opportunity to offer additional evidence regarding other convictions. *Id.* at 42. Thus, allowing retrial "merely recreate[d] the situation" that would have existed if the trial court had ruled correctly in the first instance. *Ibid.*

The same logic applies to the situation where, as in this case, a defendant's conviction is reversed because the law applied at the time of trial is later held incorrect. See Pet. App. 12-13. An accurate analogy to the trial court's ruling on a motion for a judgment of acquittal, see *Lockhart*, 488 U.S. at 40-42, requires the appellate court to assess the sufficiency of the evidence under the legal framework *applied by the trial court*, not the legal standard that came into effect only after the trial concluded. As Judge Sutton observed on behalf of the Sixth Circuit, were the rule otherwise, courts "would be forced 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 [a missing] element." *United States* v. *Houston*, 792 F.3d 663, 670 (6th Cir. 2015); see *United States* v. *Kim*, 65 F.3d 123, 126-127 (9th Cir. 1995) ("We do not examine the sufficiency of evidence of an element that the Government was not required to prove under the law of our circuit at the time of trial because the Government had no reason to introduce such evidence in the first place.").

Moreover, allowing the government to retry the defendant under the correct legal standard "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed." *Lockhart*, 488 U.S. at 42. "Remanding for retrial in this case does not give the government the opportunity to supply evidence it 'failed' to muster at the first trial," because the government "had no reason to introduce such evidence" under controlling circuit law. *United States* v. *Weems*, 49 F.3d 528, 531 (9th Cir. 1995); see Pet. App. 16-17. "The government therefore is not being given a second opportunity to

prove what it should have proved earlier." *Weems*, 49 F.3d at 531.

If the Double Jeopardy Clause automatically barred retrial whenever the prosecution's evidence was deemed insufficient under a standard that was not required at the time of trial, the government could not rely on prevailing law and on the trial court's rulings, but instead could be forced to proffer evidence in support of multiple legal standards to guard against the risk of a change in circuit law. But evidence focused on (for instance) an element of a criminal offense whose existence has been squarely rejected by controlling precedent could well be disallowed as irrelevant, unnecessarily duplicative, confusing, or prejudicial. And all of that would simply be to hedge against a legal development that might be highly unlikely to occur. The Double Jeopardy Clause does not require any such approach.

3. a. Petitioners assert (Pet. 23) that the court of appeals made a "category mistake" in treating as trial error what petitioners labeled a sufficiency claim.[1] But as

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[1] Petitioners emphasize (Pet. 18, 28-29) that before this Court in *Ciminelli*, the government characterized the case as a sufficiency-of-the-evidence dispute and not one concerning instructional error. But as explained further below, the Court appeared to disagree with that understanding. See pp. 20-21, *infra*; see also 598 U.S. at 311, 316-317; *id.* at 317 (Alito, J., concurring) (explaining that because the jury instructions at trial "embody [the right-to-control] theory" there had been reversible error unless the government could demonstrate harmlessness). Regardless, the government did not previously represent that Ciminelli was asserting a sufficiency-of-the-evidence challenge in the sense relevant to the *Burks* exception. See U.S. Br. 32 in *Ciminelli*, *supra* (No. 21-1170) (U.S. *Ciminelli* Br.); see also *United States* v. *Harrington*, 997 F.3d 812, 817 (8th Cir. 2021).

Lockhart illustrates—and as the courts of appeals have uniformly recognized—a finding of insufficient evidence is the equivalent of an acquittal for double-jeopardy purposes only if the reviewing court is standing in the shoes of the jury and applying the same legal standard to the same evidence. See, *e.g.*, *United States* v. *Reynoso*, 38 F.4th 1083, 1091 (D.C. Cir. 2022); *United States* v. *Harrington*, 997 F.3d 812, 817 (8th Cir. 2021); *United States* v. *Gonzalez*, 93 F.3d 311, 323 (7th Cir. 1996); *United States* v. *Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995).[2]

This case does not present a *Burks* situation where "the government failed to meet its burden of proof" under the prevailing legal standard, such that a rational jury should have acquitted based on the evidence and instructions that it received. *Reynoso*, 38 F.4th at 1091; see *Burks*, 437 U.S. at 10-11, 16 (making clear that the case was one in which it had been determined "that the jury could not properly have returned a verdict of guilty"). A conclusion that the evidence introduced at the original trial would have been insufficient under a

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[2] In arguing to the contrary, petitioners rely (Pet. 27) on this Court's decision in *Musacchio* v. *United States*, 577 U.S. 237 (2016). But *Musacchio* held that "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Id.* at 243. The Court did not address whether *Burks* might preclude a retrial when circuit law interpreting the statute of conviction is overturned on appeal. Cf. U.S. Br. at 19 n.7, *Musacchio*, *supra* (No. 14-1095) (advocating for the position this Court adopted in *Musacchio* while maintaining that for double-jeopardy purposes, "the law at the time of trial (which is usually reflected in the [jury] instructions) controls the sufficiency analysis in order to avoid a windfall acquittal").

different standard would not be a finding that a jury reached an irrational result, such that its verdict of guilt must be replaced with an acquittal. It would simply be a determination that the jury should have been instructed differently, and that the evidence should have been directed at the legal elements reflected in those instructions. That is the basis for a new trial—not outright acquittal.

It is no answer to say, as petitioners do, that decisions interpreting the elements of a federal statute are "clarifying what the statute '*always* meant.'" Pet. 23-24 (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). The same could be said of an appellate finding of instructional error, that prosecution evidence was wrongly admitted, or—as in *Lockhart*—that a prior conviction had been pardoned and was thus irrelevant for purposes of a statutory enhancement. In all of those situations, a defendant would presumably contend that the ruling simply enforced the correct meaning of the law or rule applicable at the time of trial, as it should have been enforced then.

Nor are petitioners correct to suggest (Pet. 25-26) that the Double Jeopardy Clause should operate as a bar when the government purportedly had "notice" that a defendant's claim of legal error might ultimately succeed. As a threshold matter, it is unclear what kind of "notice" would suffice under such an exception to the general rule permitting retrial. It is rare for a legal decision to come truly out of left field. Instead, reviewing courts—and certainly this Court—base such pronouncements on interpretations of statutes, precedents, and other legal principles that were available at the time of trial. It makes little sense, and has no sound basis in this Court's precedents, to require the prosecution to

prophylactically acquiesce in every plausible legal argument—whether or not consistent with then-current circuit law—that a defendant makes at trial about the interpretation of a statute, or else risk the ability to ever obtain a conviction for a crime that the government could prove beyond a reasonable doubt even under the later-adopted standard. See, *e.g.*, *Houston*, 792 F.3d at 666, 668, 670 (remanding true-threat prosecution for new trial based on instructional error in light of this Court's intervening decision in *Elonis* v. *United States*, 575 U.S. 723 (2015), which the Court based on a well-established presumption of mens rea in criminal statutes).

b. Petitioners rely heavily (Pet. 2, 16, 20-22, 27-28) on this Court's remand instructions in *McDonnell* v. *United States*, 579 U.S. 550 (2016). There, after determining that a former governor's convictions for honest-services fraud and Hobbs Act extortion were based on an incorrect definition of "official act," this Court vacated the convictions and remanded for the Fourth Circuit to determine whether there was "sufficient evidence for a jury to convict Governor McDonnell" under the proper official-act definition, and if so, to order "a new trial." *Id.* at 580. The Court also stated that if the Fourth Circuit "determines that the evidence is insufficient, the charges * * * must be dismissed." *Ibid.*

But the opinion in *McDonnell* did not say anything about the Double Jeopardy Clause or otherwise convey that the Court's remand instructions were the result of a constitutional imperative. Indeed, the *McDonnell* parties' briefs did not address the Double Jeopardy Clause. And had this Court intended to newly expand the *Burks* exception—notwithstanding the contrary analysis in *Richardson*, *Lydon*, and *Lockhart*—a dis-

cussion of those precedents would have been expected. See pp. 11-16, *supra*; cf. *Central Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (this Court is "not bound to follow" "dicta" or "assumption[s]" in opinions in cases "in which the point now at issue was not fully debated"). Accordingly, no court of appeals has interpreted the remand guidance in *McDonnell* to establish the constitutional rule that petitioners purport to identify. See pp. 21-23, *infra*.

Moreover, in *Ciminelli*, the Court provided different remand guidance. Emphasizing that the jury had been "charged on the right-to-control theory," the Court declined the government's request to "affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory." 598 U.S. 306, 316-317. Citing cases addressing erroneous jury instructions, the Court explained that were it to undertake that evaluation, it would not only be acting as "a court of first view," but would also usurp the role of a "a jury." *Id.* at 317; see *McCormick* v. *United States*, 500 U.S. 257, 269-271 & n.8 (1991); *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980).

As Justice Alito's concurrence reinforces, the Court did not suggest that the court of appeals must itself conduct sufficiency review under the new standard as a prerequisite to a retrial—let alone that the Double Jeopardy Clause requires that result. 598 U.S. at 317-318 (Alito, J., concurring) ("I do not understand the Court's opinion to address fact-specific issues on remedy * * * including * * * 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."). Instead, by

framing the key dispute between the parties as akin to (or exactly) instructional error, the Court placed this prosecution in the class of cases in which the Double Jeopardy Clause has long been understood to permit a retrial.

Petitioners also assert (Pet. 23-24) that the court of appeals' post-remand decision has "deprive[d]" them "of the benefit of this Court's decision" in *Ciminelli*. That is incorrect. Petitioners' wire-fraud convictions have been vacated, and the government must now meet its burden of proof in a new trial in which the jury will be properly instructed on the elements of wire fraud, as explicated by this Court. Petitioners are not entitled to prevent a correctly instructed jury from rendering a just verdict. That is not a benefit—it would be a windfall.

4. Petitioners contend (Pet. 29-33) that certiorari is necessary to resolve a conflict in the courts of appeals regarding "whether sufficiency review on appeal is mandatory or discretionary" and "whether [courts] should measure the sufficiency of the evidence against current/correct law or some earlier erroneous view of the legal requirements." But as the court of appeals recognized below, its approach to the situation at hand is consistent with decisions of its sister circuits. See Pet. App. 14.

a. In addition to the Second Circuit, the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have all recognized that when a defendant is convicted under a legal standard that is later deemed erroneous, that is a trial error for which retrial is permissible, not a sufficiency-of-the-evidence problem triggering the *Burks* exception. See, *e.g.*, *United States* v. *Ford*, 703 F.3d 708, 711-712 (4th Cir.), cert. de-

nied, 571 U.S. 832 (2013); *United States* v. *Miller*, 952 F.2d 866, 870-874 (5th Cir.), cert. denied, 505 U.S. 1220 (1992); *Houston*, 792 F.3d at 670 (6th Cir.); *Gonzalez*, 93 F.3d at 322-323 (7th Cir.); *Harrington*, 997 F.3d at 817-819 (8th Cir.); *Weems*, 49 F.3d at 530-531 (9th Cir.); *Wacker*, 72 F.3d at 1465 (10th Cir.); *United States* v. *Robison*, 505 F.3d 1208, 1224-1225 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008); *Reynoso*, 38 F.4th at 1090-1091 (D.C. Cir.); see also *United States* v. *Nasir*, 982 F.3d 144, 176 (3d Cir. 2020) (en banc) ("Though a failure of proof usually results in acquittal, the Double Jeopardy Clause is not implicated when the law has changed on appeal."), cert. granted, judgment vacated on other grounds, 142 S. Ct. 56 (2021), cert. denied, 142 S. Ct. 275 (2021).

Consistent with the analysis above, those courts have recognized that the *Burks* exception applies only when the trial evidence was insufficient under the legal standards actually applied at trial, including any standard later found erroneous. See, *e.g.*, *Robison*, 505 F.3d at 1224-1225 (acquittal not appropriate in Clean Water Act prosecution that proceeded under a definition of "navigable waters" that was later invalidated by *Rapanos* v. *United States*, 547 U.S. 715 (2006)); *Houston*, 792 F.34d at 670. And drawing guidance from this Court's decision in *Lockhart*, those courts have reasoned that "[a]ny insufficiency in the proof was caused by the subsequent change in law," not "the government's failure to muster evidence." *Ford*, 703 F.3d at 711 (quoting *United States* v. *Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003)); see, *e.g.*, *Wacker*, 72 F.3d at 1465; *Houston*, 792 F.3d at 670.

In *United States* v. *Harrington*, for example, the Eighth Circuit found that *Burks* did not preclude retrial where this Court's decision in *Burrage* v. *United States*,

571 U.S. 204 (2014), had clarified a drug-distribution statute's "resulting in death" element in a manner that invalidated the defendant's convictions. *Harrington*, 997 F.3d at 816-819. Reasoning that in such a change-in-law scenario, the "conviction is then set aside not because the government failed to prove its case but because the incorrect instructions allowed the jury to convict under the wrong legal standard," *id.* at 817, the Eighth Circuit explained that a retrial merely gives the government "a first opportunity to prove what it did not need to prove before but needs to prove now," *id.* at 818.

Similarly, in *United States* v. *Reynoso*, the D.C. Circuit considered how to proceed in the aftermath of this Court's decision in *Rehaif* v. *United States*, 588 U.S. 225 (2019), which held that under 18 U.S.C. 922(g), the government must prove the defendant's knowledge of the relevant status (like being a felon) that prohibited him from possessing a firearm. In reviewing a case that had gone to trial before *Rehaif*, Chief Judge Srinivasan explained for the court that "insufficiency of the evidence is not 'the correct way to conceive of' the error," and concluded that the Double Jeopardy Clause was no bar to retrial. *Reynoso*, 38 F.4th at 1091 (quoting *United States* v. *Johnson*, 979 F.3d 632, 636 (9th Cir. 2020), cert. denied, 141 S. Ct. 2823 (2021)); see*United States* v. *Benton*, 98 F.4th 1119, 1131-1132 (D.C. Cir. 2024) (applying *Reynoso* in the context of a campaign-finance offense).

Petitioners' only arguably contrary authority (Pet. 30-31) is *United States* v. *Barrow*, 109 F.4th 521 (D.C. Cir. 2024). In *Barrow*, an intervening circuit decision had invalidated the theory underlying the defendant's wire-fraud prosecution, and a panel of the D.C. Circuit concluded that because the trial evidence was insuffi-

cient under the new standard, acquittal was appropriate. *Id.* at 527-529 & n.3. But the government's brief in *Barrow* did not request the opportunity to retry the defendant, see Gov't C.A. Br. at 18-27, *Barrow*, *supra* (No. 21-3081), or even mention the D.C. Circuit's earlier decision in *Reynoso*, see *Barrow*, 109 F.4th at 527 n.3. The *Barrow* court nonetheless recognized the tension between the result in that case and *Reynoso*. See *ibid.* Accordingly, to "alleviate[]" "any concerns regarding *Reynoso*'s applicability"—including the question whether the *Barrow* defendant's claim should instead have been understood "as a claim of trial error"—the court noted that the government had failed to cite *Reynoso* and therefore "forfeit[ed]" such arguments. *Ibid.* Thus, at most, those two D.C. Circuit decisions present an intracircuit conflict that does not warrant this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. Petitioners reference "an acknowledged conflict over whether sufficiency review on appeal is mandatory or discretionary." Pet. 29 (citing *Hoffler* v. *Bezio*, 726 F.3d 144, 161 (2d Cir. 2013), and LaFave § 25.4(c)). But that asserted conflict does not address the legal question presented here. Instead, any disagreement those authorities may reflect concerns whether appellate courts, faced with multiple challenges to a conviction, must first adjudicate a claim that the evidence was insufficient under the law applied *at trial* before assessing other claims of error. See *Hoffler*, 726 F.3d at 160-162; LaFave § 25.4(c).[3] And there is no dispute that

[3] Even on that issue, "the federal 'courts of appeals . . . are unanimous in concluding that such review is warranted . . . as a matter of prudent policy.'" LaFave § 25.4(c) (quoting *Hoffler*, 726 F.3d at

the Second Circuit already evaluated the sufficiency of the evidence at petitioners' trial under the circuit law applicable at the time. See 13 F.4th 158, 170-173 (finding that the evidence was sufficient under the right-to-control theory).

Petitioners are now requesting sufficiency review under *different*, changed law. That is a distinct issue, and petitioners identify no decision of another circuit establishing that the circuit would take a different approach in this case than the court of appeals here did. Cf. Pet. App. 14 (court of appeals noting that its decision was consistent with that of other circuit courts); *Ford*, 703 F.3d at 711 ("Other circuits considering this issue agree that where a reviewing court determines that the evidence presented at trial has been rendered insufficient only by a post-trial change in law, double jeopardy concerns do not preclude the government from retrying the defendant."); LaFave § 25.4(c) (noting that "lower courts have held that if the defendant challenges both the sufficiency of the evidence and the jury instructions as omitting or inaccurately describing an element of the offense, a reviewing court must review sufficiency using the instruction actually given, even if erroneous," without mentioning disagreement).

5. Even if there were a meaningful divergence in authority regarding the application of double-jeopardy principles when there has been change in controlling law, two features of petitioners' case make clear that it would not be a suitable vehicle for resolving that issue.

a. First, in deciding how to proceed on remand, the Second Circuit was not writing on a blank slate. See pp. 20-21, *supra*. The court of appeals was instead address-

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161-162). That includes the Second Circuit. See *Hoffler*, 726 F.3d at 161-162; see also Pet. App. 13.

ing the case in light of the decision of this Court that ordered the remand. In that decision, this Court did not appear to view the case as one in which the continuing dispute between the parties was one of sufficiency, such that appellate review under the Court's announced standard was warranted or appropriate. See 598 U.S. at 316-317. And in light of this Court's discussion regarding the proper role of an "[a]ppellate court[]," *id.* at 317 (quoting *McCormick*, 500 U.S. at 270 n.8), it is understandable that the Second Circuit declined to evaluate the sufficiency of the existing trial evidence against a legal standard that was not expressly presented to the jury. Pet. App. 16-17 (court of appeals flagging and block-quoting the relevant *Ciminelli* passage); see *id.* at 21 (similarly observing that "it is unclear how [the court of appeals] 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").

Petitioners now assert that it was unconstitutional for the Second Circuit to not undertake that analysis. But the court of appeals can hardly be faulted for its reasonable understanding of the Court's opinion in this very case. At minimum, the possibility that the Second Circuit was influenced by that portion of the *Ciminelli* opinion to forgo the type of sufficiency analysis that this Court had criticized would complicate the presentation of the double-jeopardy issue that petitioners would have the Court address.

b. Second, further review is unwarranted because resolution of the question presented in petitioners' favor would lead to the same result: a remand for retrial. Petitioners' core contention is that the court of appeals

was required to first evaluate the sufficiency of the existing trial record against a traditional theory of property fraud. As the United States maintained before this Court and again on remand before the Second Circuit, the existing record is more than sufficient under that standard. See U.S. *Ciminelli* Br. 31-43; Gov't C.A. Remand Br. 20-41; Gov't C.A. Stay Opp. 9-10, 18; see also *Musacchio* v. *United States*, 577 U.S. 237, 243 (2016) (a sufficiency challenge must be rejected if "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (citation omitted).[4]

In particular, the evidence presented at trial conclusively showed that: (1) the object of petitioners' scheme was to obtain hundreds of millions of dollars in contract funds from Fort Schuyler, see, *e.g.*, 18-2990 C.A. App. 1012, 1038-1039, 1172; see also U.S. *Ciminelli* Br. 32-33; (2) petitioners' misrepresentations to Fort Schuyler about the RFP process were material, see, *e.g.*, U.S. *Ciminelli* Br. 33-39; and (3) petitioners acted with intent to defraud Fort Schuyler by obtaining those valuable

[4] Petitioners assert that "[e]ven the court below suggested that *Ciminelli* 'rendered' the government's evidence 'insufficient.'" Pet. 34-35 (quoting Pet. App. 12). But nowhere in the decision below did the court of appeals indicate that it found the existing trial evidence insufficient under the *Ciminelli* standard. The language that petitioners quote instead appears to come from an explanatory parenthetical in the court of appeals' opinion describing the analysis in another case. See Pet. App. 12 (quoting *Harrington*, 997 F.3d at 817).

contracts through false and misleading statements, see, *e.g.*, *id.* at 39-40.[5]

As a result, even a decision by this Court that accepted petitioners' mistaken view that sufficiency review must precede retrial would not change the outcome. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties). When all is said and done, this Court's review of the question presented would simply prolong petitioners' criminal proceedings further. Such delay is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Although the wire-fraud statute does not require the government to prove that petitioners' scheme contemplated tangible economic harm to Fort Schuyler, the evidence was also sufficient to show that as well. See U.S. *Ciminelli* Br. 40-43.