APPENDIX

APPENDIX A

18-2990 (L)

United States v. Percoco

United States Court of Appeals
For the Second Circuit

August Term 2019

Argued: March 12, 2020
Decided: September 8, 2021

Nos. 18-2990, 18-3710, 19-1272

UNITED STATES OF AMERICA,

Appellee,

v.

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

Defendants-Appellants,

PETER GALBRAITH KELLY, JR., MICHAEL LAIPPLE, KEVIN SHULER,

Defendants.*

Appeal from the United States District Court
for the Southern District of New York
No. 16-cr-776, Valerie E. Caproni, *Judge*.

* The Clerk of Court is respectfully directed to amend the case caption to conform with the caption above.

Before: RAGGI, CHIN, AND SULLIVAN, *Circuit Judges*.

Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of one count of conspiracy to commit honest-services wire fraud and found Percoco guilty of two counts of conspiracy to commit honest-services wire fraud, as well as one count of solicitation of bribes and gratuities. On appeal, the defendants principally challenge the district court's instruction that (1) the jury could convict them of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber "as opportunities arise" and (2) the defendants could be liable for conspiracy to commit honest-services fraud for actions that Percoco agreed to undertake while he was not formally employed as a state official. Although the as-opportunities-arise instruction fell short of our recently clarified standard, which requires that the honest-services fraud involve a commitment to take official action on a particular matter or question, that error was harmless. The second contested instruction was not error at all. In so concluding, we reaffirm our decades-old decision holding that a person who is not technically employed by the government may nevertheless owe a fiduciary duty to the public if he dominates and controls governmental business, and is actually relied on by people in the government because of some special relationship. Finding no merit in the other arguments raised on appeal, we **AFFIRM** the judgment of the district court.

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Michael L. Yaeger, Carlton Fields, P.A., New York, NY (Walter P. Loughlin, New York, NY, *on the brief*), *for Defendant-Appellant* Joseph Percoco.

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RICHARD J. SULLIVAN, CIRCUIT JUDGE:

This case, which concerns public corruption in New York State, requires us to again consider the reach of the federal fraud and bribery statutes. Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and found Percoco guilty of both conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and solicitation of bribes or gratuities, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2.[1]

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[1] The district court held a second trial on separate, fraud-related counts in which Aiello, Alain Kaloyeros, Joseph Gerardi, and Louis Ciminelli were convicted on several conspiracy and substantive wire fraud counts, and Gerardi was convicted on a false statement count. Although the cases were consolidated upon appeal, the fraud trial is addressed in a separate opinion in

On appeal, the defendants argue that the district court committed reversible error when it (1) instructed the jury that it could convict defendants of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber "as opportunities ar[i]se"; (2) charged the jury that the defendants could be liable for conspiracy to commit honest-services fraud for actions Percoco took while he was not formally employed as a state official; (3) instructed the jury that Percoco could be liable under § 666 for soliciting, demanding, accepting, or agreeing to accept a gratuity as a reward for certain action; (4) constructively amended Aiello's indictment by permitting his conviction to be based on acts Percoco committed while he was not a public official; (5) denied defendants' motions for a judgment of acquittal based on the insufficiency of the evidence at trial; and (6) ordered forfeiture against Percoco in the amount of $320,000. Finding none of these arguments persuasive, we **AFFIRM**.

I. BACKGROUND

A. Facts

This case involves two schemes in which Percoco—a longtime friend and top aide to former Governor Andrew Cuomo—accepted payment in exchange for promising to use his position to perform official actions. For the first scheme, Percoco promised to further the interests of an energy company named Competitive Power Venture ("CPV"). For the second, Percoco agreed with Aiello to advance the interests of

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United States v. Aiello, Nos. 18-3710-cr, 18-3712-cr, 18-3715-cr, and 18-3850-cr.

Aiello's real estate development company, COR Development Company. Drawing from the evidence introduced at trial, we briefly describe the facts of these schemes in the light most favorable to the government. *See United States v. Silver*, 948 F.3d 538, 546 n.1 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 656 (2021).

1. The CPV Scheme

The CPV scheme started in 2012, when Percoco served as a high-level official in the Governor's Office, also called the Executive Chamber. For all his political influence, Percoco found himself financially constrained. So he reached out to his friend Todd Howe, who was an influential and corrupt lobbyist. Percoco confided in Howe that money was tight, and he asked if any of Howe's clients would hire Percoco's wife. Sometime later, Howe approached Peter Galbraith Kelly, Jr., whose energy company, CPV, was angling for a so-called "Power Purchase Agreement" that would have required New York State to purchase power from CPV.

Percoco, Howe, and Kelly met over dinner to discuss an arrangement whereby Percoco would help CPV secure the Power Purchase Agreement in exchange for securing employment for—and sending payments to—Percoco's wife. Throughout the fall of 2012, Percoco pressured Howe to close the deal with Kelly so that Percoco could earn what he and Howe code-named "ziti"—a reference to the term for payoffs featured in the mafia-themed television show "The Sopranos." *See* Suppl. App'x at 1–3; App'x at 553. CPV later hired Percoco's wife as an "education consultant" paying her $7,500 a month for a few hours of work each week. To

conceal this arrangement, Kelly instructed his employees to omit the last name of Percoco's wife from CPV materials, and routed the payments through a third-party contractor, whom Percoco referred to as Kelly's "money guy." Suppl. App'x at 212. Invoices from Kelly's "money guy" likewise excluded any reference to Percoco's wife.

In exchange for these payments, Percoco agreed to help CPV obtain a Power Purchase Agreement from New York State. Later, while serving as Executive Deputy Secretary in Cuomo's administration, Percoco confirmed in an email that he would "push on" the supervisor of New York's state agencies, Howard Glaser, to discourage the state from awarding a Power Purchase Agreement to one of CPV's competitors. Howe replied that Percoco had to "[h]old [Glaser's] feet to the fire" to "keep the ziti flowing." *Id.* at 30.

Percoco also accepted continued payments to influence New York State officials to approve a so-called "Reciprocity Agreement" between New York and New Jersey, which was designed to allow CPV to build a power plant in New Jersey by purchasing relatively inexpensive emission credits in New York. After an assistant commissioner in New York's Department of Environmental Conservation ("DEC") told Kelly that he would need a "push from above" to secure the agreement, *id.* at 8–10, Kelly, through Howe, reached out to Percoco for that push. In response, Percoco stated that he would contact the Commissioner of the DEC. When Howe followed up with Percoco about a week later, Percoco indicated that his mother was not well, and referred Howe to Glaser and another high-ranking official in Governor Cuomo's administration who could contact the DEC

Commissioner. Copying Percoco on the email, Howe forwarded the message to Glaser and the other official. Glaser and the other official then successfully directed the Commissioner to have the state agency enter into the Reciprocity Agreement with New Jersey.

2. The COR Development Scheme

The second scheme began while Percoco was temporarily managing Governor Cuomo's reelection campaign in 2014. Pursuant to this scheme, Aiello arranged for his company, COR Development, to pay Percoco to take action to benefit the company. Initially, Aiello sought out Percoco's assistance so that COR Development could avoid entering into a potentially costly agreement with a local union, known as a "Labor Peace Agreement," prior to receiving state funding for a project. On July 30, 2014, Aiello emailed Howe asking whether "there is any way Joe P can help us" with the Labor Peace Agreement "while he is off the 2nd floor working on the Campaign." App'x at 680. The next day, Aiello followed up with an email to Howe asking him to "call Joe P." for "help" on the Labor Peace Agreement. Suppl. App'x at 59. Less than two weeks later, COR Development transferred $15,000 to an entity that Howe controlled, prompting Howe to cut a $15,000 check to Percoco's wife. In October 2014, after several emails were exchanged but before Percoco had taken any action concerning the Labor Peace Agreement, COR Development sent an additional $20,000 to Percoco through the same circuitous route. Percoco received both payments after he had told his bank and several others that he intended to return to the Governor's Office.

After receiving payment, Percoco directed a state agency, Empire State Development ("ESD"), to reverse its previous decision requiring COR Development to enter into a Labor Peace Agreement. On December 3, 2014, Howe forwarded Percoco an email from Aiello's partner, Joseph Gerardi, pressing Howe to have Percoco resolve the issue. Percoco responded that Howe should stand by; within an hour, Percoco called Andrew Kennedy, who oversaw ESD, and urged him to move forward without the Labor Peace Agreement.

At that point, Percoco was a few days from formally returning to his position in the Governor's Office and had already signed and submitted his reinstatement forms. In fact, Percoco's swipe-card and telephone records revealed that he was at his desk in the Executive Chamber when he directed Kennedy to resolve the Labor Peace Agreement in COR Development's favor. Kennedy testified that he interpreted Percoco's call as "pressure" coming from one of his "principals," who was a "senior staff member[]," and that he relayed this sentiment to another senior executive at the agency when encouraging that official to waive the required Labor Peace Agreement. App'x at 535. After his call with Kennedy, Percoco contacted Howe to confirm that the state agency would soon reach out to Gerardi "with a different perspective" on the need for a Labor Peace Agreement. *Id.* at 710 (internal quotation marks omitted). The following morning, the agency did as Percoco predicted.

After he resumed his official role in Governor Cuomo's administration, Percoco pressured subordinate state officials to prioritize and release outstanding funds that the state owed COR

Development. Percoco also ordered the Director of Administrative Services for the Executive Chamber and employees of the Office of General Services to process a stalled pay raise for Aiello's son, who at that time worked in the Executive Chamber. Recognizing Percoco's role in procuring a raise for his son, Howe encouraged Aiello to send Percoco a thank-you note.

B. Procedural History

The federal government eventually caught wind of the schemes, and in November 2016, a grand jury indicted Percoco, Aeillo, Kelly, and Gerardi for their alleged roles in them. The operative indictment, a second superseding indictment filed in September 2017, charged eighteen counts, eleven of which concern the CPV and COR Development schemes relevant to this appeal. Count Six charged Percoco with conspiracy to commit extortion in connection with both schemes, in violation of 18 U.S.C. § 1951. Counts Seven and Eight charged Percoco with Hobbs Act extortion in connection with the CPV scheme and the COR Development scheme, in violation of 18 U.S.C. §§ 1951 and 2. Count Nine charged Percoco and Kelly with conspiracy to commit honest-services wire fraud during the CPV scheme, in violation of 18 U.S.C. § 1349. Count Ten charged Percoco, Aiello, and Gerardi with conspiracy to commit honest-services wire fraud tied to the COR Development scheme, in violation of 18 U.S.C. § 1349. Counts Eleven and Twelve charged Percoco with solicitation of bribes and gratuities for his efforts in the CPV scheme and the COR Development scheme, respectively, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2. Count Thirteen charged Kelly with payment of bribes and gratuities as part of the CPV scheme, in violation of 18 U.S.C.

§§ 666(a)(2) and 2, while Count Fourteen charged Aiello and Gerardi with violating the same law by paying bribes and gratuities for the COR Development scheme. Finally, Counts Seventeen and Eighteen charged that Aiello and Gerardi, respectively, violated 18 U.S.C. § 1001(a)(2) by making false statements to federal officers during the investigation into the COR Development scheme.

Percoco, Aiello, Gerardi, and Kelly proceeded to a jury trial, which lasted from January 22, 2018 until March 13, 2018. After the government rested, the trial defendants each moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court reserved decision, ultimately denying the motions in an opinion issued after trial. Prior to charging the jury, however, the district court dismissed the Count Eight extortion charge, reasoning in a later-issued opinion that, as a matter of law, Percoco could not have committed Hobbs Act extortion under color of official right, because he did not have an official position in the administration when he received bribe payments tied to the COR Development scheme.

After dismissing the extortion count, the district court instructed the jury. In relevant part, the court stated that to convict the defendants of conspiracy to commit honest-services wire fraud (Counts Nine and Ten) and soliciting or accepting a bribe (Count Eleven), the jury was required to find the existence of a quid pro quo, meaning that a payment was made or solicited or accepted with the intent that "the payment or benefit . . . be in exchange for official actions." App'x at 655–57; *see also id.* at 652–53. Though the court instructed that "[a]n official act or official action is a

decision or action on a specific matter that may be pending or may by law be brought before a public official," the court also stated that the quid-pro-quo element would be satisfied if Percoco wrongfully "obtained . . . property . . . in exchange [for] official acts as the opportunities arose." *Id.* at 652–53.

In addition, the district court instructed the jury about Percoco's fiduciary duty for the purposes of Counts Nine and Ten, stating that "[a] person does not need to have a formal employment relationship with the state in order to owe a duty of . . . honest services to the public." *Id.* at 655. According to the district court's instruction, the jury could find that Percoco "owed the public a duty of honest services when he was not a state employee if" (1) "he dominated and controlled any governmental business" and (2) "people working in the government actually relied on him because of a special relationship he had with the government." *Id.* at 655.

The jury ultimately found Percoco and Aiello guilty of conspiracy to commit honest-services wire fraud linked to the COR Development scheme (Count Ten). The jury also returned a guilty verdict against Percoco for conspiring to commit wire fraud related to the CPV scheme (Count Nine) and for soliciting bribes or gratuities during the CPV scheme (Count Eleven). The jury acquitted Percoco, Aiello, and Gerardi on the remaining counts, and deadlocked on the charges against Kelly, who later pleaded guilty to one count of conspiracy to commit wire fraud in connection with the CPV scheme.

The district court sentenced Percoco to a term of 72 months' imprisonment, to be followed by three years'

supervised release; imposed a $300 mandatory special assessment; and ordered Percoco to forfeit funds in an amount later determined to be $320,000. The district court sentenced Aiello, who was also convicted on all relevant counts during a separate trial for fraud, to a term of 36 months' imprisonment, to be followed by two years' supervised release; imposed a $500,000 fine, along with a $300 mandatory special assessment; and ordered Aiello to forfeit funds in an amount later determined to be $898,954.20.

Percoco and Aiello timely appealed. They now challenge three of the district court's jury instructions, along with the sufficiency of the evidence supporting their convictions; assert that the government improperly amended the indictment by relying on acts Percoco committed when he was not a public official; and contend that the district court erred when it ordered Percoco to forfeit $320,000.

II. STANDARD OF REVIEW

We review de novo challenges to the district court's jury instructions, as well as claims of constructive amendment to, or prejudicial variance from, the indictment. *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015); *United States v. Dove*, 884 F.3d 138, 146, 149 (2d Cir. 2018). We also review de novo the sufficiency of the evidence, *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010), recognizing, of course, that a defendant raising such a challenge "bears a heavy burden because a reviewing court must consider the evidence 'in the light most favorable to the prosecution' and uphold the conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'"

United States v. Aguilar, 585 F.3d 652, 656 (2d Cir. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also United States v. Harvey*, 746 F.3d 87, 89 (2d Cir. 2014). Finally, when a defendant objects to his forfeiture order in the district court, we review the district court's finding of facts with respect to forfeiture for clear error and its legal conclusions de novo. *See Sabhnani*, 599 F.3d at 261.

III. DISCUSSION

A. The "As Opportunities Arise" Jury Instruction

The defendants first argue that the district court committed reversible error by instructing the jury that it could convict the defendants of conspiracy to commit honest-services fraud if Percoco had accepted a bribe to take official actions to benefit the payors "as opportunities arose." The government concedes that, in light of the Second Circuit's intervening decision in *United States v. Silver*, the district court's bribery instructions were erroneous; it contends, however, that the error here was harmless. We agree with the parties that the district court's instruction falls short of the legal standard as clarified by *Silver*, but conclude that the error was harmless.

1. The "As Opportunities Arise" Instructions Were Erroneous.

Federal law criminalizes the use of wire communications to effectuate a "scheme or artifice to defraud." 18 U.S.C. § 1343. Among the frauds covered by the wire fraud statute are schemes "to deprive another of the intangible right of honest services." *Id.* § 1346. When a public official commits "honest services" fraud, he may be held liable on the "theory

that a public official acts as trustee for the citizens and the State and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them." *See Silver*, 948 F.3d at 551 (quoting *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987)). Honest-services fraud is carefully circumscribed, however, and only criminalizes bribes and kickbacks. *Skilling v. United States*, 561 U.S. 358, 409 (2010).

Here, the parties stipulated before the district court that "bribery" for the purposes of the honest-services fraud statute is defined by reference to 18 U.S.C. § 201, which makes it a crime for "a public official" to "corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value . . . in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A); s*ee United States v. Percoco*, No. 16-cr-776 (VEC), 2019 WL 493962, at *5 n.12 (S.D.N.Y. Feb. 8, 2019) (noting parties' agreement to charge jury that the "official act" requirement applies); *accord McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) ("The parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U.S.C. § 201."). To prove bribery under § 201, the government must establish a quid pro quo, proving that Percoco "committed (or agreed to commit) an 'official act' in exchange for" some benefit. *McDonnell*, 136 S. Ct. at 2361.

Although our Court in *United States v. Ganim* held that that the government can satisfy the quid pro quo requirement merely by showing that a government official promised to act for the bribing party's benefit "as the opportunities arise," 510 F.3d 134, 142 (2d Cir. 2007), we recently clarified the limits of this theory in

light of the Supreme Court's decision in *McDonnell v. United States*. *See generally Silver*, 948 F.3d at 550–58; *United States v. Skelos*, 988 F.3d 645, 655–56 (2d Cir. 2021). In *McDonnell*, the Supreme Court considered the meaning of the phrase "official act" for the purposes of 18 U.S.C. § 201, and determined that the term referred to "something specific and focused that is 'pending' or 'may by law be brought before any public official.'" 136 S. Ct. at 2374 (quoting 18 U.S.C. § 201(a)(3)). It further held that an official act must be "something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 2369.

In *Silver*, we considered the impact of *McDonnell* on the "as opportunities arise" theory of honest-services fraud. As an initial matter, we rejected the argument that *McDonnell* "eliminated" this theory of bribery. *Silver*, 948 F.3d at 552. But while we held that *McDonnell* does not "require[] identification of a particular *act* of influence," we also concluded that *McDonnell* does "require[] identification of a particular *question or matter* to be influenced." *Id.* That is to say, the promisor must at least commit "to take official action *on a particular question or matter* as the opportunity to influence that same question or matter arises." *Id.* at 552–53. So the offered "quo" must have "enough definition and focus to be properly understood as promising, in return for some quid, the formal exercise of governmental power." *Id.* at 557–58.

Applying this standard in *Silver*, we found that the district court improperly instructed the jury that the defendants need only have "expected to exercise

official influence or take official action *for the benefit of the payor*." *Id.* at 568. That "open-ended" charge "failed to convey that [the defendant] could not be convicted of honest services fraud unless the [g]overnment proved that, at the time the bribe was accepted, [he] promised to take official action on a *specific and focused question or matter* as the opportunities to take such action arose." *Id.* at 569. We reached the same conclusion in *United States v. Skelos*, which applied *Silver* to a jury instruction predicating liability on the defendant's agreement to "perform official acts in exchange for . . . property." 988 F.3d at 656. That instruction likewise impermissibly "left open the possibility that the jury could convict even if [the defendant] was expected to take official action on *any* question or matter in return for the payment." *Id.*

The district court here instructed the jury that the quid-pro-quo element was satisfied if "Percoco obtained . . . property to which he was not entitled by his public office, knowing that it was given in exchange [for] official acts as the opportunities arose." App'x at 653. As in *Silver* and *Skelos*, which were decided after conclusion of the trial in this matter, the jury instruction here was "too open-ended" because it failed to convey that the defendants could not be convicted of honest-services fraud unless they promised to undertake official action on a specific question or matter as the opportunities arose. *Silver*, 948 F.3d at 569; *see also Skelos*, 988 F.3d at 656.[2]

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[2] Percoco contends that the "as opportunities arise" error "infected the instructions for every count of conviction in Percoco's case, including § 666," because "[a]ll counts and their

2. The Erroneous Bribery Instructions Were Harmless.

But the mere fact that the district court's jury charge was erroneous does not end the inquiry. Having found the bribery instructions deficient, we must now consider whether that error is harmless. It is well-settled that "we will not reverse a conviction if the government can show harmlessness, *i.e.*, show that it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Ng Lap Seng*, 934 F.3d 110, 129 (2d Cir. 2019) (internal quotation marks omitted); *see also* Fed. R. Crim. P. 52(a). To conclude that the faulty jury instructions were harmless, "we must be convinced that a rational jury would have found that [the defendants] entered into the alleged quid pro quos understanding that [Percoco] was expected to influence 'specific,' 'focused, and concrete' questions or matters." *Silver*, 948 F.3d at 569; *see also United States v. Bah*, 574 F.3d 106, 114 (2d Cir. 2009). Of course, "[c]ircumstantial evidence demonstrating an understanding between the payor and the official will often be sufficient for the [g]overnment to identify a properly focused and concrete question or matter." *Skelos*, 988 F.3d at 656–57 (first alteration in original)

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instructions alleged Percoco agreed to take 'official action' 'as opportunities arose.'" Percoco Suppl. Br. at 1. But as we have repeatedly explained, "*McDonnell*'s 'official act' standard for the quo component of bribery as proscribed by § 201 does not apply to the 'more expansive' language of § 666." *United States v. Ng Lap Seng*, 934 F.3d 110, 133 (2d Cir. 2019) (quoting *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017)), *cert. denied*, 141 S. Ct. 161 (2020). Accordingly, Percoco's passing commentary about his § 666 conviction misses the mark.

(quoting *Silver*, 948 F.3d at 557). We first address Percoco's conviction for conspiracy to commit honest-services fraud related to the CPV scheme (Count Nine), before turning to both defendants' conviction for conspiracy to commit honest-services fraud connected to the COR Development scheme (Count Ten).

a. The CPV Scheme

The evidence presented at trial overwhelmingly showed that, from the beginning of the CPV scheme, Percoco and his co-conspirators understood that the payments made to Percoco's wife were in exchange for action on the Power Purchase Agreement. Recall that Percoco approached Howe because he needed an influx of cash, and Howe, playing the role of matchmaker, connected Percoco to Kelly because CPV needed assistance to secure the Power Purchase Agreement. Howe testified that the plan was solidified during a 2012 dinner in Danbury, Connecticut—and even Percoco concedes that the Power Purchase Agreement was discussed over dinner. The evidence further reflects that Percoco pressured Howe to seal the deal with Kelly so that Percoco could get his "ziti." And only after CPV began paying Percoco's wife for her low-show job did Percoco exert his influence to secure the Power Purchase Agreement for CPV. *See United States v. Biaggi*, 909 F.2d 662, 684 (2d Cir. 1990) ("[E]vidence of the receipt of benefits followed by favorable treatment may suffice to establish circumstantially that the benefits were received for the purpose of being influenced in the future performance of official duties, thereby satisfying the quid pro quo element of bribery."). Howe's testimony, the email evidence, and the timing of the payments expel any doubt: From the get-go, Percoco agreed to

act on the Power Purchase Agreement—a "specific" and "focused" matter as required by *McDonnell* and *Silver*.

We also consider the other specific matter involved in the CPV scheme—the Reciprocity Agreement. The government's theory at trial was that, in exchange for continued monthly payments for his wife's low-show job, Percoco agreed to undertake official action on the Reciprocity Agreement—all to keep the "ziti" flowing. Percoco contends that the Reciprocity Agreement cannot be the basis for his Count Nine conviction, because the jury could at most find that he promised to act on the Reciprocity Agreement a year *after* the CPV conspiracy was hatched. But our caselaw does not support this argument.

As far as timing goes, our caselaw requires that "a particular question or matter must be identified at the time the official makes a promise or accepts a payment." *Silver*, 948 F.3d at 558 (emphasis omitted). This rule hardly precludes a conviction based on an official's follow-on agreements—after an initial deal is reached—to take additional action in exchange for additional money. It would be strange indeed to hold that an original deal between an official and payor somehow froze their agreement in time, excluding the possibility that an official could later commit to take more acts in order to maintain a revenue stream. Rather, it is enough that the parties identified the "particular question or matter . . . at the time" that they agreed to the official action that would be taken in exchange for additional money. *See id.*

Nothing in *Silver* is to the contrary. In fact, *Silver* explicitly limited its holding to the "'as the

opportunities arise' theory as set forth in *Ganim*." *Id.* at 553 n.7. There, we were presented with an unfettered "as opportunities arise" theory, which would have permitted a conviction based on a promise "to take—as the opportunities arise—'*any* decision or action on any question, matter, cause, suit, proceeding or controversy [that] may at any time be pending.'" *Id.* at 556 (alteration in original) (quoting 18 U.S.C. § 201(a)(3)). In *Silver*, we recognized that such a promise was "so vague as to be meaningless," leaving the illusory agreement without any definable quo. *Id.* at 556–57.

Here, the evidence demonstrated a clear quid pro quo on a new, specific matter for additional money in the form of continued monthly payments. While payments were ongoing, Kelly informed Percoco (through Howe) that he needed a "push from above" to secure the Reciprocity Agreement. Suppl. App'x at 4–7. Percoco, in turn, instructed Howe to ask other officials for help; Howe forwarded Percoco's message, copying Percoco, which prompted the state officials who received the email to approve the Reciprocity Agreement. All of this was done to keep the "ziti" flowing. This evidence, combined with the surreptitious method of paying Percoco, strongly supports a finding of guilt—especially because the jury instructions explained that payments to cultivate goodwill were insufficient to establish a quid pro quo. *See Silver*, 948 F.3d at 571.

We therefore have no reasonable doubt that a properly instructed jury would necessarily have found Percoco guilty of the CPV honest-services fraud scheme, and we affirm his conviction on Count Nine. *See Ng Lap Seng*, 934 F.3d at 129.

b. The COR Development Scheme

We also find that the erroneous jury instruction was harmless with respect to the charges related to the COR Development scheme, as there can be no doubt that both Aiello and Percoco understood that the payments to Percoco were made to procure his assistance in pressuring ESD to reverse its position on the need for a Labor Peace Agreement.

For starters, neither defendant contested the fact that Aiello sought—and Percoco gave—assistance on the Labor Peace Agreement, which was undoubtedly a specific matter. Percoco, who on appeal primarily piggybacks on Aiello's harmlessness analysis as it relates to the COR Development scheme, effectively conceded in summation that COR Development paid him to advance the company's interests with respect to the Labor Peace Agreement. Tr. at 6354 ("Less than three weeks after COR made its first payment to Joe [Percoco], he was asked to take action, action related to [a Labor Peace Agreement], in fact."). His theory, instead, was that he never agreed to undertake *official* action, in part because he committed to lobby for COR Development while he was on the campaign trail. Though we assess and reject this argument below, the key point here is that the "concreteness" of the question or matter awaiting action was not in doubt.

Indeed, Aiello did not dispute the concreteness of the matter. Instead, Aiello's theory at trial was that he in fact *refused* to pay Percoco and merely sought Howe's help as a consultant. *See id.* at 6084 (arguing during summation that "Steve [Aiello] says, I'm not hiring Percoco. . . . I am paying you [(Howe)] $14,000 a month. . . . You've been telling me for six years, and

you've proven it, you've got contacts with the state. Why do I need [Percoco]? No. Gerardi and I talked, we're not hiring him."); *see also id.* at 6087 ("There is no reason why Steve Aiello on his own could have given the money to Joe Percoco."). Aiello argued that Howe, when facing pressure from Percoco about securing a consulting job, transferred funds he received from COR Development without Aiello's knowledge. *See id.* at 6093 (arguing during summation that "[Howe] tells Joe Percoco that the [money] comes from COR, and he lies to him. . . . It comes from checks that he steals from COR . . . ."). But in convicting Aiello and Percoco of honest-services fraud, the jury necessarily rejected Aiello's denials by finding a quid pro quo between him and Percoco. *See United States v. Jenning*s, 160 F.3d 1006, 1022 (4th Cir. 1998) (concluding, on plain error review, that the failure to provide a quid pro quo instruction at trial was not reversible error because the defendant "testified that he did not pay [the official] a dime, and [the defendant's] lawyer pressed this point at length in his closing," which the "jury completely rejected" in finding him guilty).

In addition, the evidence overwhelmingly established that Percoco's action on the Labor Peace Agreement was part of the quid pro quo. Howe testified that he encouraged Aiello to hire Percoco because Aiello had been struggling to avoid the Labor Peace Agreement requirement, Aiello agreed to pay Percoco through Howe's firm, and Aiello "wanted that [L]abor [P]eace [A]greement to go away and realized that Joe [Percoco] was in a position that . . . could make that happen, and that's what they were asking" when they agreed to hire him. App'x at 552. Additional

evidence introduced at trial corroborated this account. For example, Aiello emailed Howe about the Labor Peace Agreement, asking if there "is there any way Joe P can help us with this issue while he is off the 2nd floor working on the Campaign. We can't seem to put it behind us. . . . I could really use a[n] advocate with regard to labor issues over the next few months." *Id.* at 680. Moreover, Howe's invoices and the memo line in one of the Percoco's paychecks referenced the labor assistance, expressly linking the payment with the official action on a specific matter.

In light of this clear evidence and the fact that the defendants did not contest the specificity or the concreteness of the Labor Peace Agreement, we have no doubt that the jury would have reached the same conclusion on that issue notwithstanding the pre-*Silver* instructional error. *See Neder v. United States*, 527 U.S. 1, 17 (1999) ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."). And because the evidence of an agreement on the Labor Peace Agreement is so overwhelming, we need not address the other official acts identified by the government in connection with the COR Development scheme—namely, the pay raise for Aiello's son or the release of state funds to COR Development. *See United States v. Eldridge*, 2 F.4th 27, 42 (2d Cir. 2021) ("In light of the overwhelming evidence of [the defendant's] guilt and the jury's verdicts on other counts, there can be no doubt that the jury still would have returned a guilty verdict . . .

even if the only theory presented had been" a valid predicate for conviction.).[3]

B. The Fiduciary-Duty Jury Instruction

The defendants also argue that the district court erred when it instructed the jury that the defendants could be guilty of honest-services fraud based on actions Percoco took in 2014, after he resigned from state government to manage Governor Cuomo's reelection campaign. Specifically, the district court charged the jury that Percoco did "not need to have a formal employment relationship with the state in order to owe a duty of . . . honest services to the public," so long as he "owed the public a fiduciary duty." App'x at 655. According to the district court's further instruction, Percoco owed a fiduciary duty to the public if, and only if, (1) "he dominated and controlled any governmental business," and (2) "people working in the government actually relied on him because of a special relationship he had with the government." *Id.* The court also explained that both factors were required, and that "[m]ere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty." *Id.*

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[3] Aiello nevertheless argues that the jury might have convicted him for his efforts to influence his son's pay raise as the jury acquitted Gerardi, who had nothing to do with the salary bump. But our precedent has cautioned against guessing why a jury delivered differing verdicts for co-defendants. *See United States v. Acosta*, 17 F.3d 538, 545 (2d Cir. 1994). It is enough that a reasonable jury would have found that Aiello, as Howe put it, "agreed to hire Joe [Percoco] as a consultant, and the foremost and front and center issue was th[e] [L]abor [P]eace [A]greement." App'x at 567.

The district court's fiduciary-duty instruction fits comfortably within our decision in *United States v. Margiotta*, where we held that "a formal employment relationship, that is, public office," is not a "rigid prerequisite to a finding of fiduciary duty in the public sector." 688 F.2d 108, 122 (2d Cir. 1982). Rather, a private citizen's "dominance in municipal government" may "give[] rise to certain minimum duties to the general citizenry." *Id.* at 124. Indeed, "[i]t requires little imaginative leap to conclude that individuals who in reality or effect are the government owe a fiduciary duty to the citizenry," just as much as those who are formally employed by a government. *Id.* To spell out the bounds of this fiduciary duty, we looked to common law generally and New York law specifically, ultimately concluding that "the concepts of reliance, and de facto control and dominance" lie "at the heart of the fiduciary relationship." *Id.* at 125.

Although the defendants seem to agree that the district court's fiduciary-duty instruct falls within *Margiotta*, they nonetheless urge us to revisit *Margiotta* and to chart a new course in light of the Supreme Court's decisions in *McDonnell* and *McNally v. United States*, 483 U.S. 350 (1987), as well as various constitutional considerations. We decline to follow that path, and reaffirm *Margiotta*'s reliance-and-control theory in the public-sector context.

1. *Margiotta* Remains Valid After *McNally*.

The text of § 1346, coupled with the history of its enactment, makes clear that Congress adopted *Margiotta*'s fiduciary-duty theory. Before *McNally*, all federal Courts of Appeals interpreted the mail and wire fraud statutes as prohibiting honest-services

fraud. *United States v. Napout*, 963 F.3d 163, 180 (2d Cir. 2020). But *McNally* "stopped the development of th[is] intangible-rights doctrine in its tracks." *Id.* (quoting *Skilling*, 561 U.S. at 401). There, the Supreme Court considered a Sixth Circuit case that, following *Margiotta*, had decided that "an individual without formal office [was] held to be a public fiduciary" because he "substantially participated in governmental affairs and exercised significant, if not exclusive, control" of certain governmental decisions. *McNally*, 483 U.S. at 355–56 (internal quotation marks omitted). The Court reversed, interpreting the mail fraud statute "as limited in scope to the protection of property rights." *Id.* at 360. At the same time, the Court invited Congress to "speak more clearly" if it "desires to go further." *Id.*

Congress answered this call the following year by enacting § 1346, the honest-services statute. *See Skilling*, 561 U.S. at 402. By doing so, "Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.'" *Cleveland v. United States*, 531 U.S. 12, 19–20 (2000) (quoting 18 U.S.C. § 1346). Put simply, Congress "effectively overruled *McNally*." *United States v. Bahel*, 662 F.3d 610, 631 n.4 (2d Cir. 2011) (citing *United States v. Rybicki*, 354 F.3d 124, 136–37 (2d Cir. 2003) (en banc)).

That said, the enactment of § 1346 did not automatically revive all pre-*McNally* cases dealing with honest-services fraud. Instead, as we concluded in *Rybicki*, our pre-*McNally* caselaw in that space remains "pertinent," but not "'precedent' in the sense that it sets forth rules of law that we are bound to

follow." 354 F.3d at 145. While *Rybicki* held that honest-services fraud in the *private* sector covered those "who assume a legal duty of loyalty comparable to that owed by an officer or employee," *id.* at 142 n.17, it expressly avoided discussing the reach of the honest-services fraud statute with respect to public corruption cases, *id.* at 138–39. Nor have we had occasion to revisit *Margiotta* to determine if its fiduciary-duty theory survives in the public-sector context after *McNally* and the enactment of § 1346.

In our view, § 1346 covers those individuals who are government officials as well as private individuals who are relied on by the government and who in fact control some aspect of government business. Our analysis begins, as it must, with the text of § 1346, *see N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 216 (2d Cir. 2021), which prohibits a "scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. § 1346. Although this language cannot be precisely defined "simply by consulting a dictionary for the literal, 'plain' meaning of the phrase," *Rybicki*, 354 F.3d at 135, the core meaning of the text encompasses "a legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception," *id.* at 153 (Raggi, J., concurring in the judgment). On its face, the statute's capacious language is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary.

This reading of the statute finds support from the historical understanding of the statute's language. As explained in *Rybicki*, we can "look to the case law from the various circuits that *McNally* overruled,"

understanding that the statute's language may have developed a "well-settled meaning" that Congress incorporated when adopting § 1346. *Id.* at 136–37 (majority opinion). In other words, those pre-*McNally* cases, while not technically binding, may shed useful light on what Congress meant when it spoke of "the intangible right of honest services," 18 U.S.C. § 1346. *See id.*

There is no question that many cases before *McNally* applied the honest-services doctrine to government officials. *McNally*, 483 U.S. at 362 & n.1 (Stevens, J., dissenting) (collecting cases). Our caselaw since the enactment of § 1346 has done the same. *See, e.g.*, *Skelos*, 988 F.3d at 650, 653–54; *Silver*, 948 F.3d at 545, 575. We see no statutory basis for distinguishing a formal government employee, who is clearly covered by § 1346, from a functional employee who owes a comparable duty. *Cf. Rybicki*, 354 F.3d at 142 n.17 ("Although the bulk of the pre-*McNally* honest-services cases involved employees, we see no reason the principle they establish would not apply to other persons who assume a legal duty of loyalty comparable to that owed by an officer or employee to a private entity.").

Importantly, *McNally* directly overruled a Sixth Circuit case, *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), that leaned heavily on *Margiotta*'s reliance-and-control theory. *See* 483 U.S. at 355–56. In fact, in language that foreshadowed the text of § 1346, *McNally* described that Sixth Circuit case as being part and parcel of "a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their *intangible rights to honest* and impartial government."

Id. at 355 (emphasis added). And drawing from *Margiotta*, the Court then explained that, under this theory, "an individual without formal office may be held to be a public fiduciary if others rely on him "'because of a special relationship in the government'" and he in fact makes governmental decisions." *Id.* (quoting *Gray*, 790 F.2d at 1296 (quoting *Margiotta*, 688 F.2d at 122)).

Because the Court in *McNally* outright rejected the entire doctrine of honest-services fraud, it had no occasion to directly rule on the *Margiotta*-based theory. But the Supreme Court's description of the settled doctrine nonetheless underscores the tight connection between *Margiotta*'s fiduciary-duty theory and the "intangible right of honest services." 18 U.S.C. § 1346. Based on the cases that *McNally* overturned, it stands to reason that Congress effectively reinstated the *Margiotta*-theory cases by adopting statutory language that covered the theory. *See Rybicki*, 354 F.3d at 136–37; *see also* 134 Cong. Rec. 32,708 (1988) (statement of Sen. Biden) (observing that the "intent [of § 1346] is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change").

In the end, both the text and history of § 1346 lead us to conclude that the statute validates the instruction the district court gave here.

2. *McDonnell* Does Not Undermine *Margiotta*.

Rather than wrestle with the text or history of § 1346, the defendants mainly ground their challenge to *Margiotta* on the Supreme Court's decision in *McDonnell*, arguing that an "official act" can only be performed by an "official" with de jure authority,

because "to be official, the act must be something 'within the specific duties of [one's] official[] position—the function conferred by the authority of [one's] office.'" Percoco Br. at 30 (second alteration in original) (quoting *McDonnell*, 136 S. Ct. at 2369). But *McDonnell* merely interpreted the definition of "official act," which is "quite [a] different issue" from *who* can violate the honest-services statute. *United States v. Halloran*, 821 F.3d 321, 340 n.13 (2d Cir. 2016). It did not hold that only a formal government officer could perform an "official act."

Such a holding could not be reconciled with the text of § 201 in any event, since that provision defines the term "public official" to include both a traditional public officer, like a "Member of Congress," as well as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of [g]overnment thereof, . . . in any official function, *under or by authority of* any such department, agency, or branch of [g]overnment." 18 U.S.C. § 201(a)(1) (emphasis added). As the Supreme Court noted in *Dixson v. United States*, the "proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the [g]overnment's agent, but rather whether the person occupies a position of public trust with official federal responsibilities." 465 U.S. 482, 496 (1984). In other words, it is not the formal employment role, but rather the fiduciary duty to the public, that defines an "official action."

Accordingly, *McDonnell*'s passing reference to "an official position" gives us no reason to doubt that someone who is functionally a government official can violate the honest-services fraud.

3. Constitutional Considerations Do Not Require Overturning *Margiotta*.

Aiello further argues that "three 'significant constitutional concerns'"—based on the First Amendment, due process, and federalism—should drive us to read § 1346 more narrowly to foreclose *Margiotta*'s fiduciary-duty theory. Aiello Br. at 32 (quoting *McDonnell*, 136 S. Ct. at 2372–73). Unfortunately for Aiello, we have repeatedly applied the reliance-and-control theory to § 1346 frauds committed in a variety of other contexts where no formal employment relationship existed. *See, e.g.*, *Halloran*, 821 F.3d at 337–40 (party chair accepting payment to influence party); *Rybicki*, 354 F.3d at 142 n.17 (collecting cases). Because the constitutional avoidance principles Aiello raises apply equally to these other cases, we see no reason to introduce a new requirement of formal *governmental* employment before a fiduciary duty may be deemed to arise under § 1346.

While Aiello insists that the First Amendment affords unique protection for citizens to petition and seek to influence the government, the First Amendment also protects the right of a person to speak persuasively to a private company. Indeed, the right of free speech and the right to petition the government are "cognate rights" that "share substantial common ground." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) (internal quotation marks omitted). Cases implicating these rights are thus "generally subject to the same constitutional analysis." *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (internal quotation marks omitted); *accord McEvoy v. Spencer*,

124 F.3d 92, 97 n.1 (2d Cir. 1997). Consequently, it is not obvious why speech directed to the government would necessarily require special treatment. We therefore detect no First Amendment rationale for carving out an exception to § 1346 that would require formal employment *only* when defrauding the government (as opposed to a private party).

C. The Gratuity Jury Instruction

Percoco next contends that it was error for the district court to instruct the jury that it could convict him for violating § 666 on the theory that he solicited or received a gratuity as a reward for some action. Although the precise basis for Percoco's argument is unclear, he does not appear to question that a conviction under § 666 can be based on acceptance of gratuities. Nor could he. *See Skelos*, 988 F.3d at 660 (recognizing that, under binding caselaw, § 666 applies to gratuities and bribes). Rather, without any elaboration, Percoco argues that the jury instructions distinguished between a bribery theory and a gratuity theory only in "a perfunctory way," suggesting that the gratuity instruction, which did not track the government's bribery theory of the case, led to jury confusion and "paradoxical and contradictory verdicts." Percoco Br. at 53–54.

None of these unsupported arguments, however, rebuts "the law's general assumption that juries follow the instructions they are given." *United States v. Agrawal*, 726 F.3d 235, 258 (2d Cir. 2013); *see also United States v. Acosta*, 17 F.3d 538, 545 (2d Cir. 1994) ("[I]t has long been established that inconsistency in jury verdicts of guilty on some counts and not guilty on others is not a ground for reversal of the verdicts of

guilty."). And because Percoco neither challenges the instruction as being inconsistent with the law nor contests the sufficiency of the evidence on this charge, we see no ground for reversal here.

D. The Constructive Amendment Challenge

Aiello next contends that the district court's *Margiotta*-based instruction and the trial evidence introduced to support the fiduciary-duty theory amounted to a constructive amendment of, or a prejudicial variance from, the indictment, which never explicitly alleged that Percoco owed a fiduciary duty when he was running the Governor's reelection campaign. Again, his argument is wide of the mark.

"[A] constructive amendment occurs either where (1) an additional element, sufficient for conviction, is added, or (2) an element essential to the crime charged is altered." *Dove*, 884 F.3d at 146 (internal citation omitted). Our precedent has "consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core* of criminality to be proven at trial." *United States v. Banki*, 685 F.3d 99, 118 (2d Cir. 2012) (internal quotation marks omitted). Put differently, the indictment must alert a defendant to "the essence of a crime, in general terms," but need not specify "the particulars of how a defendant effected the crime." *United States v. D'Amelio*, 683 F.3d 412, 418 (2d Cir. 2012). So, to prevail on a constructive amendment argument, a defendant "must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's

indictment." *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks omitted).

Even if a defendant is unable to show a constructive amendment, he can still obtain relief if there was a prejudicial variance. A variance occurs "when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *D'Amelio*, 683 F.3d at 417 (citing *Salmonese*, 352 F.3d at 621). A "defendant alleging variance must show 'substantial prejudice'" to warrant relief. *United States v. Rigas*, 490 F.3d 208, 226 (2d Cir. 2007) (quoting *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir. 1990)). A variance is prejudicial only when it "infringes on the substantial rights that indictments exist to protect—to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006) (internal quotation marks omitted).

Here, the indictment was not constructively amended as it clearly identified "the core of criminality to be proven at trial." *D'Amelio*, 683 F.3d at 417 (emphasis and internal quotation marks omitted). For starters, Count Ten of the indictment alleged that the honest-services fraud conspiracy occurred from 2014 until 2015, which covers the period when Percoco left state office to run the reelection campaign. Moreover, the indictment set out the specific dates for Percoco's departure from state office and his return to his government, alleging that he was bribed during that time "in exchange for [his] official assistance." App'x at 292. And the indictment asserted that even after

Percoco "officially left New York State employment to serve as campaign manager," he nevertheless "continued to function in a senior advisory and supervisory role with regard to the Governor's Office." *Id.* at 278–79.

Although the indictment did not expressly state that Percoco owed a fiduciary duty to the public after he formally resigned as Executive Deputy Secretary, the indictment's "generally framed" language "encompasse[d]" the *Margiotta* theory, *Salmonese*, 352 F.3d at 620 (internal quotation marks omitted), providing ample notice that the honest-services charge could include acts that occurred while Percoco technically lacked an official role in state government. Without a mismatch between the generally framed indictment and the *Margiotta* jury instruction, "there is no constructive amendment." *Id.*

Our conclusion is not at all disturbed by *United States v. Hassan*, in which we held that a conviction based on a particular type of drug that differed from the drug alleged in the indictment would be an impermissible constructive amendment. 578 F.3d 108, 133–34 (2d Cir. 2008). Unlike this case, *Hassan* involved "'unique' due process issues" on account of the regulatory scheme tied to the narcotics at issue in that case, and consequently "required us to 'scrutinize the . . . instructions . . . very closely.'" *United States v. Andino*, 627 F.3d 41, 48 n.4 (2d Cir. 2010) (quoting *Hassan*, 578 F.3d at 132). The jury instruction there would have permitted a conviction for an offense distinct from what was charged in the indictment and in fact would have carried different penalties. *See Hassan*, 578 F.3d at 133–34; *see also D'Amelio*, 683 F.3d at 423 (distinguishing *Hassan* on the same

grounds). Aiello falls far short of establishing that any of the purported amendments modified his offense or the range of penalties that he faced.

Nor has he shown any prejudicial variance between the indictment and evidence introduced at trial. To begin, there is no basis to conclude that "the evidence at trial prove[d] facts materially different from those alleged in the indictment," *D'Amelio*, 683 F.3d at 417 (quoting *Salmonese*, 352 F.3d at 621), since the indictment was far-reaching on its face. But even if Aiello could satisfy this prong, his argument would founder on the prejudice requirement. While Aiello contends that he had "no reason to lay an evidentiary foundation for arguments that Percoco neither 'dominated' nor 'controlled' governmental business and that no one in state government—let alone the public—relied on him once he walked away from public office," Aiello Br. at 27, Aiello actually had significant incentive to develop such evidence at trial. After all, the § 666 bribery charge encompassed Percoco's time out of the office, and to prove that Aiello illegally paid a bribe or gratuity during that time, the government needed to establish that Percoco was an "agent" of the State of New York. 18 U.S.C. § 666(a)(2). Because Aiello already had every incentive to mount a defense distancing Percoco from the state government, we find that there was no prejudicial variance.

E. The Sufficiency of the Evidence

Percoco and Aiello also contest the sufficiency of the evidence supporting their convictions, arguing that there was no proof that Percoco agreed to take official action as to either scheme, and that the evidence failed

to establish that he owed a fiduciary duty under *Margiotta*. Recall that a defendant making such a challenge "bears a heavy burden," *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010) (internal quotation marks omitted), because we "cannot substitute [our] own judgment for that of the jury as to the weight of the evidence and the reasonable inferences to be drawn therefrom," *Ng Lap Seng*, 934 F.3d at 130. Instead, we "must consider the evidence in the light most favorable to the prosecution and uphold the conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 129 (internal quotation marks omitted). Viewed in this light, there can be no doubt that the evidence proved the challenged elements.[4]

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[4] Noting that the defendants did not renew their Rule 29 motions for acquittal at the close of all evidence, the government contends that the defendants must further bear the burden to demonstrate "plain error or manifest injustice." Gov't Br. at 106 (quoting *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001)). But the case on which the government relies, *United States v. Finley*, applied the "plain error or manifest injustice" standard where the defendant moved for acquittal, the district court then denied the motion, and the defendant subsequently failed to renew that motion at the end of the trial. *See* 245 F.3d at 202. Here, by contrast, the district court reserved decision on the defendants' Rule 29 motions, opting to deny them after the jury returned its verdict. Under this scenario, it would appear that "the defendant is not required to take any additional procedural steps to preserve the issue for appellate review." *United States v. Wahl*, 290 F.3d 370, 374 (D.C. Cir. 2002). We need not definitively resolve the issue, however, because Percoco and Aiello cannot bear the ordinary "heavy burden" that applies to sufficiency challenges. *See Heras*, 609 F.3d at 105.

1. The Evidence Was Sufficient to Prove an Agreement to Perform Official Acts in the CPV Scheme.

First, Percoco contends that there was insufficient evidence that he agreed to commit any official act related to the CPV scheme because he simply set up meetings, which under *McDonnell* would not qualify as official acts. *See McDonnell*, 136 S. Ct. at 2371. But the Supreme Court did not hold that setting up a meeting can *never* evince an intent to take official action. To the contrary, the Court explained that, "[i]f an official sets up a meeting . . . on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act" because a jury could conclude "that the official was attempting to pressure or advise another official on a pending matter." *Id*. That is exactly what the evidence demonstrated here. Take, for instance, the email from Howe advising Percoco that, to "keep the ziti flowing," Percoco had to "[h]old" another official's "feet to the fire" to obtain the Power Purchase Agreement. Suppl. App'x at 30. And in the same exchange, Percoco agreed to "push" the official to discourage the state from awarding a Power Purchase Agreement to a competitor of CPV. *Id.*

In addition, Kelly specifically requested that Percoco act on the Reciprocity Agreement, as he needed a "push from above." *Id.* at 8–10. In response, Percoco—whose wife was then receiving monthly payments for a low-show job—agreed to contact a state commissioner, which alone bolsters a finding of the bribery scheme. *See United States v. Triumph Cap. Grp.*, 544 F.3d 149, 162 (2d Cir. 2008) (noting that pay for unperformed work provided "strong support" for

the existence of a bribery scheme); *see also Biaggi*, 909 F.2d at 684. When the illness of Percoco's mother made it impossible for him to directly intervene, Percoco then emailed Kelly to refer him to two other government officials in the Executive Chamber. Kelly, in turn, forwarded this email to a state official—copying Percoco to show his tacit agreement—to move it forward. Although Percoco contends that, by directing Kelly to two other officials in the Executive Chamber, he showed his intent *not* to act on the Reciprocity Agreement, the evidence allowed the jury to reach the exact opposite conclusion. From the series of communications between Percoco and Kelly, the jury was entitled to infer that Percoco intended to influence a pending government matter, even when personal circumstances prevented him from doing so directly, by means of a referral. *See United States v. White*, 7 F.4th 90, 101 (2d Cir. 2021) ("We defer to the jury's rational . . . choice of the competing inferences that can be drawn from the evidence." (internal quotation marks omitted)).

2. The Evidence Was Sufficient to Prove an Agreement to Perform Official Acts in the COR Development Scheme.

Percoco also argues that the evidence was inadequate to prove that he agreed to perform an official act as to the COR Development scheme. Specifically, Percoco argues that his call to Kennedy about the Labor Peace Agreement was not an official act because Kennedy and other senior officials already believed the Labor Peace Agreement was not required. But the testimony at trial demonstrated that COR Development had struggled unsuccessfully to remove

the Labor Peace Agreement requirement—until Percoco stepped in and pressured Kennedy to act.

In any event, Percoco's argument is really beside the point: All that ultimately matters is Percoco's *agreement* to perform official action, not his execution of the deal. *See Silver*, 948 F.3d at 551–52. It is enough that the evidence introduced at trial demonstrated that Percoco, owing a fiduciary duty to the public, nevertheless accepted Aiello's invitation to become COR Development's "advocate with regard to labor issues." App'x at 680. And the mere fact that Kennedy or other officials were inclined to take the steps that Percoco pushed them to take is not a defense. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 378 (1991) (noting that an official "is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid"); *United States v. Alfisi*, 308 F.3d 144, 150–51 (2d Cir. 2002) (rejecting argument that bribery "requires evidence of an intent to procure a violation of the public official's duty," and stating there "there is no lack of sound legislative purpose in defining bribery to include payments in exchange for an act to which the payor is legally entitled").

3. The Evidence Was Sufficient to Establish Percoco's Fiduciary Duty.

Aiello and Percoco further argue that there was insufficient evidence that Percoco owed New York State a duty of honest services while he was managing the Governor's campaign. But when viewed in the light most favorable to the government, the evidence reflects that Percoco exercised sufficient control and

reliance to trigger a duty of honest services under *Margiotta*. *See* 688 F.2d at 125.

Before he left the government to manage the sitting Governor's reelection campaign, Percoco's official role was that of Executive Deputy Secretary to the Governor. To many in the administration, this role was among the highest-ranking positions in New York State's executive department. Among other things, Percoco had power over the Executive Chamber's budget, personnel decisions, and operations. He also had a significant role in overseeing labor relations, governmental affairs, and legislative affairs, and he worked closely with the Governor and other senior officials in the Executive Chamber. Percoco's power was amplified by his unique relationship with Governor Cuomo; he had worked with Governor Cuomo in a number of roles, and was known for being close to him and his family.

The government's theory at trial was that, for all practical purposes, Percoco maintained the same position of power and trust in the state throughout his time on the campaign trail. And that theory finds ample record support. For starters, no one ever formally replaced Percoco in his role as Executive Deputy Secretary. Rather, as early as August 7, 2014, Percoco represented that he had a guaranteed position with Cuomo's administration after the election, and he did in fact return—as Executive Deputy Secretary—four months later. Throughout the election campaign, Percoco also held onto and used his Executive Chamber telephone, desk, and office, where he continued to conduct state business. Percoco himself bragged in an email that he retained "a bit of clout"

even after formally leaving the administration. App'x at 697.

Several individuals testified that Percoco maintained control over official matters. Howe, for instance, testified that "regardless of whether he was in the campaign or he was in the governor's office physically, [Percoco] had the ability to pick up the phone and get things done." *Id.* at 552. Howe witnessed Percoco "pick up the phone and call the governor's staff from the campaign on many occasions" to discuss "campaign and non-campaign business" alike, and overheard Percoco "instruct them on various [non-campaign] topics." Suppl. App'x at 437–38; *see also* App'x at 567–69 (testimony regarding pressure Percoco exerted to prevent staff from leaving the administration). From Howe's perspective, Percoco's grip on power never changed, diminished, or dissipated as he managed the campaign.

This was generally consistent with the testimony of those in the Governor's administration. For instance, Kennedy testified that Percoco helped organize a state event, attended a government briefing about an impending winter storm, and discussed the terms of a redevelopment project with government employees—all while Percoco was technically out of office. Another government employee stated that Percoco continued to be an advisor to the Governor and to coordinate both the Governor's official and campaign schedules. And another testified that she called Percoco to solicit his advice on pending legislation related to public-sector unions.

While Aiello views Percoco as failing to exercise the same level of control as the defendant in *Margiotta*, a

rational jury could certainly disagree. In at least some respects, Percoco maintained firmer control over the government's decisions than the defendant in *Margiotta*, who never officially held public office. *See* 688 F.2d at 113, 122. Percoco, of course, held an official position as the Executive Deputy Secretary to the Governor, returned to that position after managing the campaign, and maintained significant control over government decisions throughout the campaign.

And though Aiello disputes his knowledge of Percoco's control, the trial evidence reflected that Aiello specifically sought out Percoco to use his position of power to push the Labor Peace Agreement through. He explicitly recognized the power that Percoco wielded to accomplish this, even while "he [wa]s off the 2nd floor working on the Campaign." App'x at 680. Importantly, Aiello's payments to Percoco took a circuitous route through an entity Howe controlled, which likewise could have prompted a rational jury to conclude that Aiello understood that the payments were designed to compensate Percoco for unlawful conduct. *Cf. Rybicki*, 354 F.3d at 142 ("At the end of the day, we simply cannot believe that [the defendants] did not know that they were courting prosecution and conviction for mail and wire fraud when they undertook to use the wires and the mails, in effect, to pay off insurance adjustors, while assiduously covering their tracks."). We therefore affirm the defendants' convictions on Counts Nine, Ten, and Eleven.

F. The Forfeiture Order

Finally, Percoco argues that the district court erred in finding that all of the funds paid to his wife pursuant to the CPV scheme were forfeitable. Federal law provides for the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" certain identified offenses, including "bribery of a public official." *See* 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7)(B)(iv). For crimes "involving . . . illegal services [or] unlawful activities, . . . the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto," so "proceeds" are "not limited to the net gain or profit realized from the offense." *Id.* § 981(a)(2)(A). "'[U]nlawful activities' include 'inherently unlawful activit[ies], like say the sale of foodstamps, or a robbery.'" *See United States v. Bodouva*, 853 F.3d 76, 80 (2d Cir. 2017) (second alteration in original) (quoting *United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012)). In other words, where the criminal conduct cannot ever be conducted legally, the gross proceeds of the crime are forfeitable.

By contrast, "[i]n cases involving . . . lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." 18 U.S.C. § 981(a)(2)(B). Section "981(a)(2)(B) applies in, for example, insider trading cases because [a] security is a lawful good[] for the purposes of § 981(a)(2)(B), . . . which, if [purchased or sold] based upon improperly obtained material

nonpublic inside information, is sold . . . in an illegal manner." *Bodouva*, 853 F.3d at 79–80 (alterations in original) (internal quotation marks omitted). In such cases, the defendant has "the burden of proof with respect to the issue of direct costs." 18 U.S.C. § 981(a)(2)(B); *see also United States v. Mandell*, 752 F.3d 544, 554 (2d Cir. 2014).

The district court ordered Percoco to forfeit $320,000, which included the $35,000 consulting fee related to COR Development and $285,000 that his wife, Lisa Percoco, received as compensation for leading an education program.

Percoco argues on appeal, as he did before the district court, that Lisa Percoco's actions were not "inherently unlawful," and thus the bona fide services she rendered to CPV, which Percoco calculated to be $2,500 per month, should be subtracted from the forfeiture amount. But this argument misunderstands the criminal conduct at the heart of this case. *See Bodouva*, 853 F.3d at 80. At issue here was not an education-consultant position conducted unlawfully; rather, the position was a farce—merely the means to execute and conceal an illegal bribery scheme. As the district court found, regardless of the value Lisa Percoco provided as an educator, she would not have received the job absent the bribery scheme, which obviously could not be carried out lawfully. Her low-show job was a cover for, and in furtherance of, the illegal bribery scheme; any legitimate value she added was, at most, an incidental by-product of the fraud. Accordingly, the criminal conduct involved "unlawful activities" under subsection (A), rather than "lawful services" sold in an illegal manner under subsection

(B). 18 U.S.C. § 981(a)(2); *see also Bodouva*, 853 F.3d at 80. We thus affirm the forfeiture order.

IV. CONCLUSION

For the reasons stated above, the judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Joseph Percoco, Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, AKA Dr. K,

Defendants - Appellants,

Peter Galbraith Kelly, Jr., Michael Laipple, Kevin Schuler,

Defendants.

ORDER

Docket Nos:
18-2990 (Lead)
18-3710 (Con)
18-3712 (Con)
18-3715 (Con)
18-3850 (Con)
19-1272 (Con)

Appellant, Steven Aiello, 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

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Joseph Percoco, Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, AKA Dr. K,

Defendants - Appellants,

Peter Galbraith Kelly, Jr., Michael Laipple, Kevin Schuler,

Defendants.

ORDER

Docket Nos:
18-2990 (Lead)
18-3710 (Con)
18-3712 (Con)
18-3715 (Con)
18-3850 (Con)
19-1272 (Con)

Appellant, Louis Ciminelli, 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 D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Joseph Percoco, Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, AKA Dr. K,

Defendants - Appellants,

Peter Galbraith Kelly, Jr., Michael Laipple, Kevin Schuler,

Defendants.

ORDER

Docket Nos:
18-2990 (Lead)
18-3710 (Con)
18-3712 (Con)
18-3715 (Con)
18-3850 (Con)
19-1272 (Con)

Appellant, Joseph Gerardi, 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 E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Joseph Percoco, Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, AKA Dr. K,

Defendants - Appellants,

Peter Galbraith Kelly, Jr., Michael Laipple, Kevin Schuler,

Defendants.

ORDER

Docket Nos:
18-2990 (Lead)
18-3710 (Con)
18-3712 (Con)
18-3715 (Con)
18-3850 (Con)
19-1272 (Con)

Appellant, Alain Kaloyeros, 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 F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #:_____ DATE FILED: 12/11/2017
-against-	:	
JOSEPH PERCOCO, a/k/a "Herb,"	:	
ALAIN KALOYEROS, a/k/a "Dr. K,"	:	
PETER GALBRAITH KELLY, JR., a/k/a "Braith,"	:	16-CR-776 (VEC)
STEVEN AIELLO,	:	ORDER AND OPINION
JOSEPH GERARDI,	:	
LOUIS CIMINELLI,	:	
MICHAEL LAIPPLE, and	:	
KEVIN SCHULER,	:	
Defendants.	:	

VALERIE CAPRONI, United States District Judge:

The allegations in this matter, which are captured in a 79-page Complaint and a 41-page Superseding Indictment, encompass a range of federal crimes including Hobbs Act extortion, honest services wire

fraud, federal funds bribery, and false statements. *See* Complaint ("Compl.") [Dkt. 1]; Second Superseding Indictment ("S2" or "the Indictment") [Dkt. 321]. Defendants include individuals who were high-ranking state officials as well as private citizens, and collectively they have filed dozens of motions in advance of trial. These motions challenge, *inter alia*, the sufficiency of the Indictment, the constitutionality of a criminal statute, the joinder of the Defendants in their respective trials, the trials' venue in the Southern District of New York, the prosecution's conduct and pre-indictment public statements, and the lawfulness of certain searches.

These motions are largely without merit. As discussed below, the Court grants only portions of one of the Defendants' motions, primarily to ensure that the Government complies with the pretrial obligations it has already acknowledged that it bears. The balance of the motions misread or overstate the law, or are an unsuccessful attempt to evade the relatively low thresholds that apply at the pretrial stage of a prosecution.

I. BACKGROUND

The Indictment alleges an overlapping set of crimes involving eight Defendants: Joseph Percoco, formerly a senior aide to Andrew Cuomo, New York's Governor; Alain Kaloyeros, who formerly served as the head of SUNY Polytechnic Institute ("SUNY Poly") and as a board member of Fort Schuyler Management Corporation ("Fort Schuyler"), a SUNY Poly affiliate; Steven Aiello and Joseph Gerardi (the "Syracuse Defendants"), who founded a Syracuse-based real estate development company that received lucrative

state contracts; Louis Ciminelli, Michael Laipple, and Kevin Schuler (the "Buffalo Defendants"), who were senior executives at a Buffalo-based real estate development company that also received lucrative state contracts; and Peter Kelly, an officer at an energy company, who was responsible for public and governmental affairs related to power plant development. S2 ¶¶ 3–4, 8, 13–15, 16–19, 20–21. The schemes also involved Todd Howe, a lobbyist and consultant who had connections to SUNY Poly and the Governor's office and who was a paid consultant for the Syracuse Defendants', Buffalo Defendants', and Kelly's companies. S2 ¶¶ 5, 9–12.

According to the Indictment, Howe worked with the Syracuse Defendants, Buffalo Defendants, and Kaloyeros to manipulate and tailor Fort Schuyler's Request for Proposal ("RFP") process to select preferred developers for SUNY Poly development projects. After providing the Syracuse and Buffalo Defendants with advance copies of the RFPs, Kaloyeros and Howe inserted qualifications into the RFPs that were favorable to these Defendants. That manipulation set up their companies for selection as preferred developers, which led to development contracts that were free from competitive bidding. S2 ¶¶ 22–27.

Additionally, Howe worked with the Syracuse Defendants and Kelly to obtain illicit favors from Percoco. Kelly allegedly gave Percoco's wife a low-show job in exchange for favorable action related to emissions credits and a power purchase agreement. Howe also allegedly arranged for the Syracuse Defendants to bribe Percoco in exchange for favorable treatment, including actions related to a labor union

agreement, the release of state development funding, and a raise for Aiello's son, who worked in Governor Cuomo's office. S2 ¶¶ 28–36.

II. DISCUSSION

A. Motions to Dismiss the Indictment

The Defendants seek to dismiss the Indictment on various grounds. They argue that: 18 U.S.C. § 666, one of the criminal statutes with which they are charged, is unconstitutional; the Indictment fails to sufficiently charge certain legal theories; and the Indictment fails to align the factual allegations with the elements of the respective criminal statutes. Each argument is addressed in turn below.

A defendant challenging the sufficiency of an indictment on a motion to dismiss faces a high hurdle. Pursuant to Federal Rule of Criminal Procedure 7, an indictment need only contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." "An indictment is sufficient if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). "[T]o satisfy the pleading requirements of Rule 7(c)(1), an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Stringer*, 730 F.3d at 124

(quoting *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000)) (internal quotation marks omitted).

"'Unless the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial[,] the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.'" *United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009) (quoting *United States v. Alfonso*, 143 F.3d 772, 776–77 (2d Cir. 1998)) (alteration omitted). Instead, the indictment's allegations are taken as true, and the Court reads the indictment in its entirety. *United States v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992); *United States v. Goldberg*, 756 F.2d 949, 950 (2d Cir. 1985).

1. 18 U.S.C. § 666 Is Constitutional

Percoco and Kelly challenge the constitutionality of the federal funds bribery statute, 18 U.S.C. § 666, in light of the Supreme Court's decision in *United States v. McDonnell*, 136 S. Ct. 2355 (2016). More specifically, they claim that the *McDonnell* Court's construction of the term "official act" in 18 U.S.C. § 201(a)(3) was motivated by constitutional concerns that implicitly require all federal bribery statutes to contain an "official act" element. Because section 666 on its face does not require an "official act," they contend, it is unconstitutionally vague and overbroad and violates principles of federalism.[1]

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[1] *See* Memorandum of Law in Support of Joseph Percoco's Motion to Dismiss the Superseding Indictment ("Percoco Dismissal Mem.") [Dkt. 187] at 32–37; Memorandum of Law in Support of Defendant Peter Galbraith Kelly, Jr.'s Motion to Dismiss ("Kelly Dismissal Mem.") [Dkt. 230] at 12–42; Reply

A statute is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or] if it authorizes or even encourages arbitrary and discriminatory enforcement." *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)) (internal quotation marks omitted).

Relatedly, a statute is unconstitutionally overbroad if it prohibits constitutionally-protected conduct. *Farrell*, 449 F.3d. at 498–99 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)). "In order to prevail on an overbreadth challenge, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 499 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) (internal quotation marks omitted).

Section 666 criminalizes bribery relating to organizations that receive more than $10,000 annually in federal funds. *See* 18 U.S.C. § 666. In particular, it prohibits corruptly soliciting, accepting, or agreeing to accept, and corruptly giving, offering, or agreeing to give, "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or

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Memorandum of Law in Further Support of Defendant Peter Galbraith Kelly, Jr.'s Motion to Dismiss ("Kelly Dismissal Reply Mem.") [Dkt. 290] at 3–25; Reply Memorandum of Law in Support of Joseph Percoco's Motion to Dismiss the Superseding Indictment ("Percoco Dismissal Reply Mem.") [Dkt. 298] at 5–8.

more . . . ." *Id.* The statute is intended to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." *Sabri v. United States*, 541 U.S. 600, 606 (2004) (internal quotation marks and citation omitted).

Defendants' argument that *McDonnell* renders 18 U.S.C. § 666 unconstitutional is rooted in a misreading of *McDonnell*. The Court granted certiorari in *McDonnell* "to clarify the meaning of 'official act'" in the federal bribery statute, 18 U.S.C. § 201(a)(3). 136 S. Ct. at 2361, 2365. During the trial of Virginia's Governor McDonnell and his wife, that statutory definition had been used, per the parties' agreement, in the jury instructions for Hobbs Act extortion and honest services fraud. *Id.* at 2365–67. Seeking to determine the proper interpretation of "official act," the Court "adopt[ed] a more bounded interpretation [such that] setting up a meeting, calling another public official, or hosting an event [would] not, standing alone, qualify as an 'official act.'" *Id.* at 2368. The Court, considering the text of the statute and its own precedents, as well as constitutional concerns related to constituent representation and federalism, defined an "official act" as

> [A] decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is

> "pending" or "may by law be brought" before a public official.

Id. at 2371–72, 73. The Court vacated the McDonnells' convictions and remanded the case in light of the improper jury instructions that had defined "official act" too broadly. The Court rejected, however, the McDonnells' request to invalidate the honest services fraud and Hobbs Act extortion statutes themselves because the Court's clarification of what constitutes an "official act" obviated the constitutional vagueness concerns that the McDonnells had raised. *Id.* at 2373–75.

While the *McDonnell* opinion touches on constitutional concerns as to the outer bounds of what might qualify as an "official act," it in no way states or implies that all federal bribery statutes that implicate the conduct of government officials are *required* to have such an element to be constitutional. The Court clarified the definition in section 201(a)(3) because the parties had elected to use that statutory definition in the instructions charging extortion and honest services fraud (federal funds bribery was not charged in *McDonnell*). Moreover, the Court explicitly avoided broader constitutional questions surrounding those criminal statutes by, in effect, supplying a more limited definition of what constitutes an "official act" that can serve as the quid pro quo in honest services fraud or in color of official right extortion.

In any event, the Second Circuit has already held that *McDonnell* does not reach the federal funds bribery statute. In reviewing a challenge to the jury instructions given during the trial of a New York State Assemblyman, the Court determined that the

instructions given for honest services fraud and Hobbs Act extortion were flawed in light of *McDonnell* but reached a different "conclusion with respect to the instructions given for [the bribery counts under] 18 U.S.C. § 666." *United States v. Boyland*, 862 F.3d 279, 290–91 (2d Cir. 2017). Section 666, the Court found, "is more expansive than § 201" because, rather than limiting potential criminality to "official acts," section 666 "prohibits individuals from 'solicit[ing] . . . anything of value from any person, *intending to be influenced* or rewarded *in connection with any* business, transaction, or series of transactions of [an] organization, government, or agency.'" *Id.* (citing 18 U.S.C. § 666(a)(1)(B)) (emphases in original). The Second Circuit thus found that the *McDonnell* standard did not apply to the section 666 counts. *Id.*

For these reasons, the Defendants' motions to dismiss based on the alleged unconstitutionality of section 666 are denied.[2]

2. *McDonnell* Did Not Invalidate the Retainer Theory of Bribery

Percoco and Kelly next argue that the Indictment must be dismissed because, under *McDonnell*, there must be a quid pro quo exchange related to a "specific" and "focused" matter determined at the time of the exchange in order to violate section 666 or to constitute extortion or honest services fraud. *McDonnell*, they argue, thus overruled the "as-opportunities-arise" or

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[2] Even if *McDonnell* did reach section 666, the cure for such a constitutional concern would be a jury instruction that appropriately cabins the jury's considerations, rather than a ruling that the criminal statute is unconstitutional.

"retainer theory" of bribery, pursuant to which, for example, a public official accepts a bribe in return for taking an unspecified action in the future that would benefit the payor.[3]

The Second Circuit has held that, with regards to federal bribery-related crimes (including Hobbs Act extortion, honest services fraud, and federal funds bribery), "the requisite quid pro quo for the crimes at issue may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts as the opportunities arise." *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007). This type of scheme is sometimes referred to as the "retainer theory" of bribery. *See, e.g.*, *United States v. Ring*, 628 F. Supp. 2d 195, 208 (D.D.C. 2009) (citing, *inter alia*, *Ganim*, 510 F.3d at 147–50).

The Court in *McDonnell* found that, under 18 U.S.C. § 201(a)(3), "an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy' [that] must involve a formal exercise of governmental power . . . [and] must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." 136 S. Ct. at 2371–72. More specifically, the Court found that an official action must relate to something "more specific and focused than a broad policy objective," and contrasted "Virginia business and economic development" with a properly-focused question on the initiation of research studies for a specific chemical compound. *Id.* at 2374.

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[3] *See* Percoco Dismissal Mem. at 29–32; Kelly Dismissal Mem. at 43–61; Kelly Dismissal Reply Mem. at 26–38; Percoco Dismissal Reply Mem. at 3.

Defendants again misread *McDonnell* in arguing that the Supreme Court found the "retainer theory" of bribery impermissible and that the acts to be performed must be specified at the time of the quid pro quo agreement. The Court did no such thing. *McDonnell* held only that the matter on which official action is *ultimately* taken must be specific and focused, as evidenced by the contrast the Court drew between acts taken to further "Virginia business and economic development" (too diffuse to be an "official act") and the decision to initiate research studies (sufficiently focused to be an "official act"). The Court acknowledged that, under its precedents, "a public official is not required to actually make a decision or take an action . . . ; it is enough that the official agree to do so." 136 S. Ct. at 2370–71 (citing *Evans v. United States*, 504 U.S. 255, 268 (1992)). "A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given *with the expectation that the official would perform an 'official act' in return*." *Id.* at 2371 (citing *Evans*, 504 U.S. at 268) (emphasis added).

In describing the background of the case, the Court noted that Governor McDonnell had been "indicted for accepting payments, loans, gifts, and other things of value . . . in exchange for performing official actions on an as-needed basis, as opportunities arose . . . ." 136 S. Ct. at 2364–65. The Court made *no other mention* of the fact that McDonnell had been charged on a retainer theory, and it is apparent that the retainer theory was of no import to the Court's decision relative

to the proper definition of "official act" under section 201.[4]

Meanwhile, the Second Circuit has clearly held that a retainer theory of bribery is permissible. *See, e.g.*, *Ganim*, 510 F.3d at 142. Accordingly, the Defendants' motions to dismiss on the ground that the retainer theory is no longer permissible are denied.

3. The Indictment Sufficiently Alleges a Gratuity Theory

Percoco and Kelly contend that the Indictment insufficiently alleges a gratuity theory for their respective federal funds bribery counts. First, they contend that the Indictment uses the term "reward," understood to connote a gratuity theory, in the wrong places and an insufficient number of times. They also argue that the gratuities charge is invalid because a gratuity theory is incompatible with a retainer theory and with 18 U.S.C. § 666.[5]

An indictment's allegations are to be taken as true, and the Court reads the indictment as a whole. *Goldberg*, 756 F.2d at 950; *Hernandez*, 980 F.2d at 871. A court properly considers the "to wit" clauses in

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[4] As a matter of public policy, it is incomprehensible that Congress would not have intended for bribes paid as "retainers" to be made unlawful. The purpose of the anticorruption statutes is broadly to ensure honesty in government. Whether a government official takes a bribe for a specific act known at the time the bribe is paid or takes a bribe to compromise the public good as the opportunity arises to assist the bribe-giver is of no moment—both are corrupt and both corrode the very foundation of good government.

[5] *See* Percoco Dismissal Mem. at 37–39; Kelly Dismissal Mem. at 61–64; Kelly Dismissal Reply Mem. at 38–39; Percoco Dismissal Reply Mem. at 3.

an indictment when assessing its sufficiency under Rule 7(c). *See, e.g.*, *United States v. Ashfaq*, No. 08 CR. 1240 (HB), 2009 WL 1787717, at *3 (S.D.N.Y. June 23, 2009) ("Moreover, both counts went beyond the statutory language to include clauses that further described the acts that Ashfaq was alleged to have committed. These 'to wit' clauses in both counts of the Indictment were sufficient to place Ashfaq on notice of the offenses with which he was charged and served the salutary purposes espoused by Rule 7(c).").

The Second Circuit has held that section 666 applies to both bribes and gratuities, and has interpreted the word "reward" to connote a gratuity theory. *United States v. Bahel*, 662 F.3d 610, 636–37 (2d Cir. 2011). An indictment may properly charge both bribery and gratuity theories in a single count "if those acts could be characterized as part of a single continuing scheme." *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006) (quoting *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989)).

The Indictment properly alleges a violation of section 666 utilizing a gratuity theory. Under the headings for the respective section 666 counts are parenthetical descriptions that include the term "Gratuities." *See, e.g.*, S2 at 31 ("COUNT ELEVEN (Solicitation of Bribes and Gratuities from the Energy Company)"). The "to wit" clauses also include a form of the term "reward," which is understood to connote a gratuity theory. *See, e.g.*, S2 ¶ 61 ("[T]o wit, a senior official in the Office of the Governor . . . corruptly solicited and demanded for the benefit of a person, and accepted and agreed to accept, a thing of value from a person, intending to be influenced and *rewarded* . . . ." (emphasis added)).

Reading the Indictment in its entirety, Defendants are on sufficient notice that they are being charged on a gratuity theory, and it is legally permissible for those counts to charge both bribery and gratuity theories because they are alleged as part of a single scheme.[6] Accordingly, the Court denies the Defendants' motion to dismiss the gratuities charges.

4. The Indictment Sufficiently Alleges Wire Fraud

The Buffalo Defendants and Kaloyeros assert that the Indictment fails sufficiently to allege wire fraud. They essentially attack each element of the crime, arguing that the Indictment fails sufficiently to allege a scheme to defraud because: the Defendants did not violate any statute, rule, or guideline with regard to the process for selecting preferred developers; there are no allegations that the Buffalo Defendants knew

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[6] To the extent that the Defendants are relying on *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), to argue that gratuity and retainer theories are incompatible, the Second Circuit in *Ganim* noted "that there is good reason to limit *Sun-Diamond*'s holding to the statute at issue in that case, as it was the very text of the illegal gratuity statute—'for or because of *any official act*'—that led the Court to its conclusion that a direct nexus was required to sustain a conviction under § 201(c)(1)(A)." 510 F.3d at 146. Section 666 does not require an official act at all, as discussed above. Therefore, the Court need not examine any tension that might exist between *Ganim*, which held that *Sun-Diamond* did not extend to extortion and bribery charges because "it is the requirement of an intent to perform an act in exchange for a benefit—*i.e.*, the quid pro quo agreement—that distinguishes those crimes from both legal and illegal gratuities," and *Bahel*, which held that section 666 applies to both bribes and gratuities. 510 F.3d 146–47; 662 F.3d at 636–37.

of misrepresentations that bidding was fair and open; there is no evidence of an intent to harm Fort Schuyler, the entity that managed the RFP process; there are insufficient allegations of how the RFP was tailored to benefit the Buffalo developers; any misrepresentations made in the course of the RFP process were not material; the Indictment insufficiently alleges any property as the object of the scheme, arguing that the "right to control" theory is no longer tenable; and the Indictment insufficiently alleges the use of wires as part of the scheme.[7]

The elements of wire fraud are "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme." *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015) (quoting *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004)) (internal quotation marks omitted). While the victims need not ultimately

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[7] *See* Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Dismiss Under Federal Rule of Criminal Procedure 12 ("Kaloyeros R. 12 Mem.") [Dkt. 177] at 11–20; Joint Memorandum of Law in Support of the Buffalo Defendants' Motion to Dismiss the Indictment Pursuant to Federal Rule of Criminal Procedure 12 ("Buffalo R. 12 Mem.") [Dkt. 220] at 11–43; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Dismiss Under Federal Rule of Criminal Procedure 12 ("Kaloyeros R. 12 Reply Mem.") [Dkt. 286] at 2–9; Omnibus Reply Memorandum of Law in Further Support of Buffalo Defendants' Pretrial Motions ("Buffalo Omnibus Reply Mem.") [Dkt. 299] at 16–50; Kaloyeros Letter, October 6, 2017 ("Kaloyeros Letter") [Dkt. 333] at 2–4; Ciminelli Letter, October 6, 2017 ("Ciminelli Letter") [Dkt. 334] at 1–7; Schuler Letter, October 6, 2017 ("Schuler Letter") [Dkt. 335] at 1–4; Ciminelli Reply Letter, October 18, 2017 ("Ciminelli Reply Letter") [Dkt. 337] at 1–5; Kaloyeros Reply Letter, October 18, 2017 ("Kaloyeros Reply Letter") [Dkt. 338] at 1–6.

suffer harm, the defendants must contemplate actual harm or injury to them. *Id.* (quoting *United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006)).

In other words, the government must prove that the defendant acted "with specific intent to obtain money or property by means of a fraudulent scheme that contemplated harm to the property interests of the victim." *United States v. Carlo*, 507 F.3d 799, 801 (2d Cir. 2007) (citing *United States v. Walker*, 191 F.3d 326, 334–35 (2d Cir. 1999); *McNally v. United States*, 483 U.S. 350 (1987)). Such property interests may include intangible interests, such as the victim's right to control its own assets. *Id.* at 801–02 (citing *Carpenter v. United States*, 484 U.S. 19, 25 (1987); *Walker*, 191 F.3d at 335; *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998)). *See generally United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017). In a prosecution pursuant to the right to control theory, the victim must be deprived of material, potentially valuable economic information that would have affected a decision relating to its assets. *See Finazzo*, 850 F.3d at 107–12 (citations omitted). Materiality is a question for the jury, and an indictment should only be dismissed on materiality grounds if it is facially insufficient, meaning that no reasonable juror could find the alleged misstatement to be material. *United States v. Forde*, 740 F. Supp. 2d 406, 412 (S.D.N.Y. 2010) (citing *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995); *United States v. Ferro*, 252 F.3d 964, 968 (8th Cir. 2001)).

The sufficiency of the Government's evidence of intent cannot be considered on a motion to dismiss the indictment, and the indictment need only track the language of the statute. *United States v. Martin*, 411

F. Supp. 2d 370, 373 (S.D.N.Y. 2006) (citing *United States v. Flaharty*, 295 F.3d 182, 198 (2d Cir. 2002)).

The Indictment adequately alleges wire fraud as to the Buffalo Defendants and Kaloyeros. According to the Indictment, the Buffalo Defendants' development company was selected as a preferred developer for SUNY Poly projects, which enabled it to be chosen for development projects without further competitive bidding (and which ultimately yielded a high-value contract). S2 ¶¶ 16–19. The company had allegedly been pre-selected by Kaloyeros and Howe to become a preferred developer in exchange for payments and campaign contributions. That pre-selection allegedly led the Buffalo Defendants, Kaloyeros, and Howe to tailor the RFP to the Buffalo Defendants' company's qualifications. Notwithstanding that tailoring of the process, Kaloyeros—who held influence over Fort Schuyler—allegedly falsely represented to Fort Schuyler's Board of Directors that the process was fair, open, and competitive, and the Buffalo Defendants' company allegedly falsely certified that no one had been retained, employed, or designated by or on behalf of their company to attempt to influence the RFP process. S2 ¶¶ 8–12, 22–27.

Taking these allegations as true, the Indictment adequately alleges a scheme to defraud. Violation of any particular rule or practice is not an element of the charge, so any argument that no violation was alleged is misplaced. Whether and how the RFP was tailored is a question for the jury, and it is sufficient that the Indictment alleges that Kaloyeros and Howe provided advance copies of the RFP to the Buffalo Defendants and tailored its specifications to benefit them. The Indictment also need not specifically allege that the

Buffalo Defendants knew of Kaloyeros's misrepresentations to Fort Schuyler, because it is apparent from the Indictment that his role in the scheme was understood to be facilitating what appeared to be a competitive RFP process that was, in fact, rigged to favor the Buffalo Defendants; making misrepresentations to Fort Schuyler was inherent in the scheme.

The intent element is sufficiently alleged, as the Indictment need only track the language of the statute. The Indictment tracks the language of the statute, alleging that Defendants' actions were taken "willfully and knowingly." *See* S2 ¶ 45. Additionally, the Indictment sufficiently alleges money or property as an object of the scheme, alleging that the Defendants "devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm. . . ." *Id.* The "right to control" theory is well-established in the Second Circuit, and is clearly invoked by this language.

The materiality of the misrepresentation in the context of the right to control is also sufficiently alleged. The Court finds that a reasonable juror could determine that the Defendants' misrepresentations deprived Fort Schuyler of material, economically-valuable information when it made its decision to grant the Buffalo Defendants' company preferred developer status, as Fort Schuyler then proceeded to negotiate the ultimate development contract with the Buffalo Defendants' company, mistakenly believing that it had been selected as a preferred developer because it was the best-suited for Fort Schuyler's development projects. *See* S2 ¶¶ 25, 25(a), 25(c).

Although winning the RFP process did not itself guarantee a contract for the Defendants, it put Fort Schuyler opposite a "preferred developer" that had paid for its designation (and therefore its seat at the negotiating table), rather than a preferred developer that, as Fort Schuyler's representatives were led to believe, had earned its designation based on its qualifications and fitness for the projects on which the RFP was premised.

Lastly, wire transmissions are sufficiently alleged:

> In the course of, and in furtherance of, the criminal scheme . . . the defendants, and Todd Howe, as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the "Assistant Secretary"), who worked part-time at the Governor's offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State's main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer.

S2 ¶ 26. For purposes of deciding a pretrial motion to dismiss, the Court must accept the statements in the Indictment as true, and thus, the Indictment adequately alleges wire communications in furtherance of the criminal scheme. Of course the Government will have to prove at trial that these wire transmissions occurred and their relevance to the

alleged scheme, but for now the allegations in the Indictment are adequate.

For these reasons, the Defendants' motions to dismiss the wire fraud charges are denied.

5. The Indictment Sufficiently Alleges Bribery

Percoco and Kelly move to dismiss the Indictment arguing that Percoco was not an official government actor for the purposes of the charged crimes during the time he stepped away from his official role in the Governor's office to run the Governor's reelection campaign. As a private citizen during this several-month-long period, they argue, he could not take actions as an agent of the government, nor, as a matter of law, could he accept anything that would amount to a bribe of a government official.[8]

The Buffalo Defendants raise similar arguments with respect to Todd Howe, the lobbyist and consultant who facilitated the various schemes alleged in the Indictment. *See generally* S2. Specifically, they argue that Howe was not a government official capable of taking official actions; that his affiliation with SUNY Poly would not allow him to take actions on behalf of Fort Schuyler, the non-profit corporation affiliated with SUNY Poly that managed the allegedly-rigged RFP process; that the allegations do not sufficiently allege a qualifying organization receiving federal funds under section 666 because of the legal

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[8] *See* Percoco Dismissal Mem. at 9–28; Kelly Dismissal Mem. at 64–65; Kelly Dismissal Reply Mem. at 39–40; Percoco Dismissal Reply Mem. at 3–23.

separation between SUNY Poly and Fort Schuyler; and that the payments Howe allegedly received were proper payments made to a law firm that just happened to employ Howe.[9]

Section 666 criminalizes the solicitation and offering of bribes relating to organizations receiving more than $10,000 annually in federal funds, including solicitation by an "agent of . . . a State, local, or Indian tribal government, or any agency thereof." 18 U.S.C. § 666(a)(1), (a)(1)(B), (a)(2). For the purposes of this statute, an agent is someone "authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." 18 U.S.C. § 666(d)(1). In *United States v. Sotomayor-Vasquez*, the Court of Appeals for the First Circuit interpreted this definition broadly, relying on the generally expansive approach the Supreme Court has taken in interpreting the statute. 249 F.3d 1, 8 (1st Cir. 2001) (citing *Salinas v. United States*, 522 U.S. 52, 55–61 (1997)). The First Circuit found that an "agent" includes individuals acting as directors, managers, or representatives of an organization covered by the statute, even if they are not employed by the organization.[10] *Id.* The transaction at issue need not itself use federal funds,

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[9] *See* Buffalo R. 12 Mem. at 43–66; Buffalo Omnibus Reply Mem. at 50–70; Ciminelli Letter at 8–9.

[10] The Second Circuit does not appear to have had an opportunity to interpret this particular provision, although the District Court for the District of Vermont adopted the First Circuit's approach in *United States v. Roebuck*, No. 1:11-CR-127-JGM-1, 2012 WL 4955208, at *2 (D. Vt. Oct. 17, 2012).

nor does the Government need to establish a nexus between the bribery and federal funds. *Salinas*, 522 U.S. at 57; *Sabri*, 541 U.S. at 605.

The elements of wire fraud are described above. Section 1346 provides that a scheme to defraud includes a scheme "to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. "[T]o violate the right to honest services, the charged conduct must involve a quid pro quo, *i.e.*, an intent to give or receive something of value in exchange for an act." *United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013) (quoting *United States v. Bruno*, 661 F.3d 733, 743–44 (2d Cir. 2011)) (internal quotation marks and alteration omitted).

The Hobbs Act, in relevant part, criminalizes extortion, which it defines as "obtaining [] property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(a), (b)(2). Extortion under color of official right encompasses bribe-taking for which a prosecution "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Ocasio v. United States*, 136 S. Ct. 1423, 1428 (2016) (quoting *Evans*, 504 U.S. at 260, 268) (internal quotation marks omitted). "[T]he government does not have to prove an explicit promise to perform a particular act made at the time of payment, [as it is] sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence—*i.e.*, on behalf of the payor—as specific opportunities arise." *United States v. Coyne*, 4 F.3d 100, 114 (2d Cir. 1993) (citing *United States v. Garcia*, 992 F.2d 409, 419 (2d Cir. 1993)).

Percoco's and Kelly's arguments that the Indictment is insufficient because it relies on actions Percoco took while running Governor Cuomo's 2014 reelection campaign are without merit. First, Percoco qualifies as an "agent" under section 666, which includes non-employees of covered organizations, because he allegedly "continued to function in a senior advisory and supervisory role with regard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities . . . among other responsibilities." S2 ¶ 4. Percoco's alleged continued involvement with the Governor's office suffices under all of the charged statutes. Additionally, case law suggests that when the Government pursues bribery charges based on a retainer theory, it can rely on conduct occurring when the defendant is temporarily out of office if the scheme includes actions taken or to be taken when the defendant returns to government. *See United States v. Meyers*, 529 F.2d 1033, 1035–36 (7th Cir. 1976). *See also* S2 ¶¶ 4, 35.

As for the Buffalo Defendants and Kaloyeros, their arguments are also without merit. The Indictment sufficiently alleges that Howe was a government agent in that he was retained as a consultant for SUNY Poly, maintained an office there, and served as an advisor to Kaloyeros, the head of SUNY Poly. S2 ¶ 11. He allegedly took legally-sufficient acts: "Howe acted as an agent of SUNY Poly with respect to, among other things, SUNY Poly's development projects, including large, State-funded development projects in Syracuse and Buffalo, New York. Howe also served as a primary liaison between SUNY Poly and the Governor's senior staff." *Id.*

Although the Defendants contend that the payments to the Albany law firm that had retained Howe were part of a separate, innocent retainer agreement, the Government's allegation that this arrangement facilitated illicit payments to Howe is sufficient at this stage. *See* Compl. ¶ 72. The Court must accept the allegations in the Indictment as true, although the Government will obviously have to prove at trial that the arrangement was as nefarious as they allege it to have been.

The remaining arguments rest on what the Buffalo Defendants and Kelly believe is a legally-significant distinction between SUNY Poly and Fort Schuyler. They argue that Howe, as an agent of only SUNY Poly, could not take actions that bound Fort Schuyler, and that Fort Schuyler is not a covered organization under section 666 because it did not receive qualifying federal funds.

The Court finds this argument unconvincing at this stage. To start, Kaloyeros was allegedly both the head of SUNY Poly and a director of Fort Schuyler and able to act for both entities, suggesting significant overlap between the two. S2 ¶ 8. Moreover, Fort Schuyler was created as a SUNY Poly-affiliate for the express purpose of entering into contracts and carrying out development projects on SUNY Poly's behalf. *Id.* ¶ 7. Accordingly, the Court finds that Fort Schuyler's RFP process, initiated to facilitate development projects for SUNY Poly, which received federal funds, could be found to constitute the business of both SUNY Poly and Fort Schuyler. Accordingly, a jury could find that Howe's and Kaloyeros's alleged bribery scheme "related to" SUNY Poly, even if the actual contracting entity was Fort Schuyler.

For the reasons above, Defendants' motions to dismiss the bribery charges are denied.

B. Defendants' Requests to Review Grand Jury Transcripts Are Denied

The Buffalo Defendants request disclosure of the grand jury transcripts. They argue that the grand jury must have been improperly instructed on the law, relying on the same arguments they raised to challenge the Indictment's sufficiency.[11]

Grand jury proceedings "shall generally remain secret." *In re Petition of Craig*, 131 F.3d 99, 101 (2d Cir. 1997) (quoting *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973)). Courts may, however, direct the disclosure of information regarding the grand jury proceedings "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). A defendant seeking disclosure of grand jury materials must demonstrate a "particularized need that outweighs the presumption of secrecy." *United States v. Moten*, 582 F.2d 654, 662 (2d Cir. 1978) (citations omitted). "Speculation and surmise as to what occurred before the grand jury is not a substitute for fact." *United States v. Shaw*, No. S1 06-CR-41 (CM), 2007 WL 4208365, at *6 (S.D.N.Y. Nov. 20, 2007) (quoting *United States v. Wilson*, 565 F. Supp. 1416, 1436 (S.D.N.Y. 1983)). Where the proceedings have concluded, the public interest in maintaining the

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[11] *See* Joint Memorandum of Law in Support of the Buffalo Defendants' Motion for an Order Compelling Disclosure of the Grand Jury Transcripts ("Buffalo G.J. Mem.") [Dkt. 224] at 1–16; Buffalo Omnibus Reply Mem. at 71–73; Ciminelli Letter at 7–8.

secrecy of grand jury records is reduced, but it is not eliminated. *See Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979); *United States v. Sobotka*, 623 F.2d 764, 767 (2d Cir. 1980) ("We conclude that while the necessity here be less compelling in view of the termination of the grand jury, nonetheless some necessity need be shown by the party seeking disclosure.").

The Buffalo Defendants have failed to make a sufficient showing to warrant the release of the grand jury's transcripts. In essentially recycling the arguments already made with respect to the Indictment's sufficiency, the Defendants infer, without any other evidence, that the grand jury must not have been properly instructed on the law. Just as the Court rejected those legal arguments above, it rejects them here. The Defendants have not put forward a particularized need to review the minutes of the grand jury proceedings, and they point to no other information that might overcome the presumption of secrecy. Accordingly, the Defendants' motion to disclose the grand jury transcripts is denied.

C. Count One is Not Duplicitous

The Buffalo Defendants and Kaloyeros contend that Count One of the Indictment is duplicitous because it combines multiple conspiracies, namely separate conspiracies related to each preferred developer RFP, into one count. They contend that there is no evidence of mutual dependence or overlap between the two alleged RFP schemes aside from two common participants (Howe and Kaloyeros). They also assert that the conspiracy charge must be duplicitous because the Indictment otherwise charges separate

substantive counts for the Buffalo and Syracuse RFP allegations.[12]

"An indictment is impermissibly duplicitous where: 1) it combines two or more distinct crimes into one count in contravention of Fed. R. Crim. P. 8(a)'s requirement that there be a separate count for each offense, and 2) the defendant is prejudiced thereby." *United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001) (citing *United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980); *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981)). The policy considerations underlying courts' wariness of duplicitous charges include:

> avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in subsequent prosecutions.

Margiotta, 646 F.2d at 733.

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[12] *See* Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Dismiss Count One Due to Duplicity ("Kaloyeros Duplicity Mem.") [Dkt. 188] at 2–6; Joint Memorandum of Law in Support of the Buffalo Defendants' Motion to Dismiss Count One of the Superseding Indictment Due to Duplicity ("Buffalo Duplicity Mem.") [Dkt. 213] at 1–2; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Dismiss Count One Due to Duplicity ("Kaloyeros Duplicity Reply Mem.") [Dkt. 293] at 2–4. *See also* S2 ¶¶ 37–47.

Because a single conspiracy "may encompass multiple illegal objects," a count of conspiracy to commit several crimes is not duplicitous because the conspiratorial agreement *itself* is the crime. *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992) (quoting *Murray*, 618 F.2d at 896). "A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose[,] or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture." *United States v. Vanwort*, 887 F.2d 375, 383 (2d Cir. 1989) (quoting *United States v. Bertolotti*, 529 F.2d 149, 154 (2d Cir. 1975)) (internal quotation marks omitted). The members of a conspiracy are not required to have conspired directly with every co-conspirator and need only be conscious of the general nature and extent of the conspiracy. *United States v. Ohle*, 678 F. Supp. 2d 215, 222 (S.D.N.Y. 2010) (quoting *United States v. Rooney*, 866 F.2d 28, 32 (2d Cir. 1989)). "If the Indictment on its face sufficiently alleges a single conspiracy, the question of whether a single conspiracy or multiple conspiracies exists is a question of fact for the jury." *Id.* (citing Vanwort, 887 F.2d at 383). In other words, "facially alleg[ing] a single conspiracy is enough to warrant denial" of a motion to dismiss an indictment for duplicity. *United States v. Rajaratnam*, 736 F. Supp. 2d 683, 689 (S.D.N.Y. 2010) (citing *Ohle*, 678 F. Supp. 2d at 222).

Count One of the Indictment is not duplicitous. It alleges a conspiracy to rig the RFP processes by the Buffalo Defendants, the Syracuse Defendants,

Kaloyeros, and Howe. This alleged crime is separate and distinct from the substantive wire fraud counts, and includes allegations of cooperation between the Buffalo and Syracuse Defendants that must, at this stage, be taken as true. S2 ¶ 24 (The defendants "collaborated in secretly tailoring the Syracuse and Buffalo RFPs by, among other things, exchanging through Howe ideas for potential qualifications to be included in the Syracuse and Buffalo RFPs."). The fact that this conspiracy led to multiple separate wire fraud charges is irrelevant to assessing whether the conspiracy count is duplicitous. In short, the Defendants' motions to dismiss Count One for duplicity are denied.

D. Defendants' Motions to Sever Are Denied

All of the Defendants have advocated for severance of the parties and claims at trial, and proposed an array of trial combinations that they believe would alleviate their concerns. They raise concerns of improper joinder under Rule 8 based on insufficient overlap amongst participants, schemes, and evidence. They also contend that joint trials would be inefficient and risk spillover prejudice and jury confusion, that Defendants' defenses could conflict, that they will have to prepare with regard to evidence against other Defendants in their trial, and that limiting instructions will be insufficient to cure their concerns.[13]

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[13] *See* Memorandum of Law in Support of Joseph Percoco's Motion for Severance ("Percoco Severance Mem.") [Dkt. 190] at 1–3; Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Severance ("Kaloyeros Severance Mem.")

In its discretion, the Court has already divided the Defendants into a January Trial Group (Percoco, Aiello, Gerardi, and Kelly) and a Second Trial Group (Kaloyeros, Aiello, Gerardi, Ciminelli, Laipple, and Schuler) [Dkt. 279]. That division for trial post-dated the Defendants' initial memoranda seeking severance.

Joinder of defendants is governed by Rule 8(b), which provides:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts

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[Dkt. 195] at 2–12; Joint Memorandum of Law in Support of the Buffalo Defendants' Motion for Severance Pursuant to Federal Rules of Criminal Procedure 8(B) and 14 ("Buffalo Severance Mem.") [Dkt. 222] at 1–33; Memorandum of Law in Support of Defendant Peter Galbraith Kelly, Jr.'s Motion for Severance and to Strike Prejudicial Surplusage ("Kelly Severance Mem.") [Dkt. 234] at 17–48; Memorandum of Law in Support of Defendants Joseph Gerardi's and Steven Aiello's Motion to Dismiss for Prosecutorial Misconduct, Sever, and for a Bill of Particulars ("Syracuse Joint Mem.") [Dkt. 237] at 27–39; Reply Memorandum of Law in Further Support of Defendants Joseph Gerardi's and Steven Aiello's Motion to Dismiss for Prosecutorial Misconduct, Sever, and for a Bill of Particulars ("Syracuse Joint Reply Mem.") [Dkt. 283] at 15–20; Reply Memorandum of Law in Further Support of Defendant Peter Galbraith Kelly, Jr.'s Motion for Severance and to Strike Prejudicial Surplusage ("Kelly Severance Reply Mem.") [Dkt. 291] at 3–17; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Severance ("Kaloyeros Severance Reply Mem.") [Dkt. 295] at 2–5; Buffalo Omnibus Reply Mem. at 4–15.

> together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). Under Rule 8(b), "multiple defendants cannot be tried together on two or more 'similar' but unrelated acts or transactions; multiple defendants may be tried together only if the charged acts are part of a series of acts or transactions constituting an offense or offenses." *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir. 1988) (internal quotation marks and citation omitted). In other words, "joinder is proper where two or more persons' criminal acts are unified by some substantial identity of facts or participants, or arise out of a common plan or scheme." *United States v. Cervone*, 907 F.2d 332, 341 (2d Cir. 1990) (quoting *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)) (internal quotation marks omitted).

Even when a defendant is properly joined, he may seek to sever his case for trial if joinder is prejudicial:

> If the joinder of offenses or defendants in an indictment . . . or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14(a). "Whether to grant or deny a severance motion is 'committed to the sound discretion of the trial judge.'" *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (quoting *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989)). "There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). "This

preference is particularly strong where . . . the defendants are alleged to have participated in a common plan or scheme." *Salameh*, 152 F.3d at 115. The rationale, at least in part, for this preference is that:

> [i]t would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.

Richardson v. Marsh, 481 U.S. 200, 210 (1987).

Given this presumption, a "district court should grant a severance motion only if there is a serious risk that a joint trial would compromise a specific trial right of the moving defendant or prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993) (citing *Zafiro*, 506 U.S. at 539). "[D]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540 (citations omitted). Nor does "the fact that evidence may be admissible against one defendant but not another . . . necessarily require a severance." *United States v. Rittweger*, 524 F.3d 171, 179 (2d Cir. 2008) (quoting *United States v. Carson*, 702 F.2d 351, 367 (2d Cir. 1983)) (internal quotation marks omitted). Many such concerns can be resolved

through the use of limiting instructions. *See United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (citing *Zafiro*, 506 U.S. at 539) ("[L]ess drastic measures—such as limiting instructions—often suffice as an alternative to granting a Rule 14 severance motion."); *United States v. DeVillio*, 983 F.2d 1185, 1192–93 (2d Cir. 1993) (finding that limiting instruction addressed the risk of prejudicial spillover).

Because the Court has already ordered a discretionary severance, it will consider the arguments underlying the motions to sever in the context of each trial.

As to the Second Trial Group (Kaloyeros, Aiello, Gerardi, Ciminelli, Laipple, and Schuler), whose claims revolve around their respective RFPs, it is abundantly clear that these Defendants should be tried together. The Indictment alleges a conspiracy involving all six defendants who are in the Second Trial Group, and litigating the allegations related to each RFP will involve a substantial overlap of testimony and evidence at trial. To the extent that there might be spillover prejudice from evidence against some but not all of these Defendants, limiting instructions will guide the jury in its consideration of the charges and evidence thereof. The joinder of the Second Trial Group is appropriate under Rule 8, and the Defendants have not made a showing that a joint trial will be so prejudicial that further severance is warranted under Rule 14.

The joinder of the January Trial Group Defendants (Percoco, Kelly, Aiello, and Gerardi) presents a closer question. The crimes alleged against those

Defendants are not as similar to each other as the RFP charges are in the Second Trial Group, as they contemplate different types of action from Howe and Percoco for those actions' respective beneficiaries.[14] Proving the charges at trial will, however, involve overlapping evidence as to facts and participants. Moreover, it would be highly inefficient for the Court to order a *third* trial by splitting the January Trial Group into one trial based on the charges involving Kelly and another for those involving the Syracuse Defendants (with Percoco being a defendant in both). Such a division would require the Court to preside over an additional trial with redundant facts and would force Percoco to stand trial twice. The Court is confident that it can properly instruct the jury as to each Defendant's respective charges and evidence to eliminate the risk of unfair prejudice. The joinder of the January Trial Group is appropriate under Rule 8, and Defendants have not made a showing that a joint trial will be so prejudicial that further severance is warranted under Rule 14.

In short, Defendants' motions to sever are denied.[15]

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[14] *See, e.g.*, S2 at ¶¶ 31(a), 35(a) (securing emissions credits for Kelly's energy company and averting a costly labor agreement for the Syracuse Defendants).

[15] While Kelly presents his November 1, 2017, letter as a supplemental brief on his motion to sever, the letter raises the same arguments explored in motions in limine from his fellow Defendants. The Court finds it more appropriate to address these arguments together at a later time, and thus declines to examine Kelly's letter in this opinion. *See* Kelly Motion to Sever Letter, November 1, 2017 ("Kelly Letter") [Dkt. 348].

E. Defendants' Motions to Strike Surplusage Are Denied

Several Defendants ask the Court to strike various phrases and paragraphs of the Indictment as prejudicial surplusage. Kelly asks the Court to strike portions of the Indictment that he believes improperly reassert and reallege earlier allegations in the document, as well as the phrase "Percoco Bribery Scheme." He also objects to the use of summary paragraphs, which, he asserts, unfairly associate the allegations against him with those against other Defendants.[16] The Buffalo Defendants similarly contend that paragraphs discussing the allegations against them as well as allegations against other Defendants should be stricken as prejudicial, and also challenge the incorporation by reference of paragraphs that refer to other Defendants.[17] The Syracuse Defendants ask the Court to strike references to campaign contributions, as they contend the contributions are a proper exercise of First Amendment rights, and their inclusion in the Indictment is irrelevant and prejudicial.[18]

"Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial." *United States v.*

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[16] *See* Kelly Severance Mem. at 48–59; Kelly Severance Reply Mem. at 17–18.

[17] *See* Joint Memorandum of Law in Support of the Buffalo Defendants' Motion to Strike Surplusage ("Buffalo Surplusage Mem.") [Dkt. 217] at 1–5

[18] *See* Syracuse Joint Mem. at 39–42; Syracuse Joint Reply Mem. at 20–21.

Mulder, 273 F.3d 91, 99–100 (2d Cir. 2001) (quoting *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990)) (internal quotation marks omitted). Factual allegations that could either be innocent conduct or evidence of the charged malfeasance need not be stricken. *United States v. Montour*, 944 F.2d 1019, 1027 (2d Cir. 1991) ("While the jury may have been free to characterize these events [innocently], it could also readily conclude that [Defendant's] acts showed the existence of a conspiracy among [Defendant] and others to interfere with the police. It was thus not error for the trial court to refuse to strike [the contested language] from the indictment.").

The Court finds that the portions of the Indictment raised by the Defendants are not so inflammatory or prejudicial to warrant being stricken as surplusage. The Court does not believe that the jury will confuse the separate criminal allegations against each Defendant on the basis of incorporated statements, summary paragraphs, or labels in the Indictment. To the extent that any evidence presented at trial might prejudice other Defendants at the same trial, upon request, the Court will consider appropriate limiting instructions to ensure that only the evidence pertinent to each Defendant is considered against him.

As for the Syracuse Defendants' complaints about references to campaign contributions, allegations that could be either innocent or incriminating do not need to be stricken. The Indictment alleges that the Syracuse Defendants' company was preselected to become the preferred developer for Syracuse "*after* [they had] made sizeable contributions to the Governor's reelection campaign," implying that their selection as the preferred developer for Syracuse was

illicitly connected to their campaign contributions. S2 ¶ 23 (emphasis added). It remains to be seen whether the Government can prove that there was a nefarious purpose behind the contributions, but Defendants have not provided a basis on which to strike the allegation.

Accordingly, the Defendants' motions to strike surplusage are denied.

F. Defendants' Motion to Dismiss for Lack of Venue or To Transfer Are Denied

The Buffalo Defendants and Kaloyeros seek to dismiss the Indictment for lack of venue, or, in the alternative, to transfer the charges against them to the Western District of New York ("WDNY"). The Buffalo Defendants argue that the emails and calls with individuals in Manhattan alleged in the Indictment[19] are remote, tangential, and preparatory relative to the crimes alleged, and thus insufficient to support venue in the Southern District of New York

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[19] "In the course of, and in furtherance of, the criminal scheme, ALAIN KALOYEROS, a/k/a "Dr. K," STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, and Todd Howe, as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the "Assistant Secretary"), who worked part-time at the Governor's offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State's main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer." S2 ¶ 26.

("SDNY"). In moving for transfer, they argue that Buffalo is the center of gravity of the case against them, that they live with their families (whom they cannot support from New York, nor from whom they can receive familial support at trial in Manhattan) and work in Buffalo, that witnesses are in Buffalo, and that it is more expensive for them to stand trial in Manhattan than it would be in Buffalo. Kaloyeros echoes the Buffalo Defendants' arguments.[20]

Federal law requires defendants to be tried in the district in which their crime was "committed." *United States v. Ramirez*, 420 F.3d 134, 138 (2d Cir. 2005) (citing Fed. R. Cr. P. 18; U.S. Const. art iii, § 2, cl. 3). When a statute does not provide specifically for venue, the Supreme Court has instructed courts to determine the "'*locus delicti*' of the charged offense . . . from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-*

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[20] *See* Joint Memorandum of Law in Support of the Buffalo Defendants' Motion to Dismiss and Motion to Transfer ("Buffalo Venue Mem.") [Dkt. 94] at 1–43; Memorandum of Law in Support of Kevin Schuler's Motion to Transfer Venue ("Schuler Venue Mem.") [Dkt. 97] at 2–10; Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Dismiss for Lack of Venue or, Alternatively, Transfer ("Kaloyeros Venue Mem.") [Dkt. 206] at 2–5; Joint Supplemental Memorandum of Law in Support of the Buffalo Defendants' Motion to Dismiss and Motion to Transfer ("Buffalo Supp. Venue Mem.") [Dkt. 208] at 1–9; Joint Reply Memorandum of Law in Further Support of the Buffalo Defendants' Motion to Dismiss and Motion to Transfer ("Buffalo Venue Reply Mem.") [Dkt. 285] at 1–11; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Dismiss for Lack of Venue or, Alternatively, Transfer ("Kaloyeros Venue Reply Mem.") [Dkt. 294] at 1–5; Ciminelli Letter at 9–10.

Moreno, 526 U.S. 275, 279 (1999) (quoting *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998)). In performing this inquiry, the court must "identify the conduct constituting the offense, and then discern the location of the commission" of those acts. *Ramirez*, 420 F.3d at 138 (quoting *Rodriguez-Moreno*, 526 U.S. at 279) (internal quotation marks omitted). The Second Circuit has emphasized that the focus is on the physical conduct—or "essential conduct elements"—criminalized by Congress.[21] *Id.* at 144 (noting that the Supreme Court used the phrase "conduct element" three times in the relevant paragraph of *Rodriguez-Moreno*, 526 U.S. at 280).

The Government bears the burden of proving venue, but it need only do so by a preponderance of the evidence. *Ramirez*, 420 F.3d at 139 (citations omitted). At this stage in the proceedings, the Government need only "allege with specificity that the charged acts support venue in this district," *United States v. Long*, 697 F. Supp. 651, 655 (S.D.N.Y. 1988), and the Court assumes as true the allegations in the Indictment. *Goldberg*, 756 F.2d at 950. Exchanging emails and placing telephone calls in furtherance of the crime with someone located in the district where the crime is charged is sufficient to establish venue for wire fraud and bribery, respectively. *See, e.g.*, *United States v. Kim*, 246 F.3d 186, 191–92 (2d Cir. 2001);

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[21] In this Circuit, courts must also apply the "substantial contacts" test to ensure that "the application of a venue provision in a given prosecution comports with constitutional safeguards . . . ." *United States v. Saavedra*, 223 F.3d 85, 92–93 (2d Cir. 2000) (citing *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)). The Defendants have not argued that trial in the Southern District of New York would be unconstitutional.

United States v. Stephenson, 895 F.2d 867, 874–75 (2d Cir. 1990).

Rule 21(b) provides: "Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed. R. Cr. P. 21(b). "Disposition of a Rule 21(b) motion is vested in the sound discretion of the district court." *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990) (citations omitted). To decide such a motion, a district court is required to consider the factors enumerated in *Platt v. Minnesota Mining & Manufacturing Co.*, none of which is dispositive:

> (a) location of the defendants; (b) location of the possible witnesses; (c) location of the events likely to be at issue; (d) location of relevant documents and records; (e) potential for disruption of the defendants' businesses if transfer is denied; (f) expenses to be incurred by the parties if transfer is denied; (g) location of defense counsel; (h) relative accessibility of the place of trial; (i) docket conditions of each potential district; and (j) any other special circumstance that might bear on the desirability of transfer.

Id. (citing *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243–44 (1964)). Generally, courts presume that a criminal prosecution should stay in the district in which the indictment was returned. *United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 464 (S.D.N.Y. 1997) (quoting *United States v. Posner*, 549 F. Supp. 475, 477 (S.D.N.Y. 1982)).

The Indictment sufficiently alleges venue in this District, stating that

> [i]n the course of, and in furtherance of, the criminal scheme, . . . the [moving Defendants] . . . as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the "Assistant Secretary"), who worked part-time at the Governor's offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State's main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer.

S2 ¶ 26. While these purported contacts appear to be minimal, they sufficiently allege venue for purposes of a pretrial motion to dismiss: the Defendants and others allegedly exchanged emails with, and spoke over the phone to, individuals in this District in furtherance of the crimes. The allegations provide sufficiently specific detail and comport with Circuit precedent on venue. It bears repeating that the Government will have to prove venue at trial and must actually prove that the emails and calls they point to did, in fact, further the alleged crimes.

As for transfer, the Court finds that transfer is not warranted, and the Court's consideration of the *Platt* factors does not overcome the presumption that the prosecution remain in this district. While the moving

Defendants live with their families in Buffalo, and some witnesses reside in Buffalo, there are also important witnesses elsewhere. And while certain relevant events allegedly took place in Buffalo, other events relevant to the allegations against the moving Defendants took place outside of Buffalo. The electronic discovery in this case will be accessible from anywhere, and disruption of the moving Defendants' business is a moot point because they have since resigned. *See* Government's Omnibus Memorandum of Law in Opposition to Defendants' Pretrial Motions ("Omnibus Opp. Mem.") [Dkt. 264] at 110. It is true that trial will be expensive in Manhattan, but it will also be protracted and expensive in Buffalo. At least some of the moving Defendants have counsel in New York City in addition to or in lieu of Buffalo counsel. New York City is clearly an accessible transportation hub, and because trial is already scheduled, docket concerns are not significant.

As to the final catch-all factor, the Defendants emphasize their family obligations in Buffalo, and that their families will be unable to provide emotional support for them while they are on trial in Manhattan. While the Court is sympathetic to the Defendants' position, it finds these concerns ultimately unpersuasive. If the moving Defendants' case were transferred, the non-moving Defendants would still need to be tried in Manhattan, and this "possibility of dual prosecution is a special factor courts have considered in assessing the balance of inconveniences." *United States v. Coriaty*, No. 99CR1251(DAB), 2000 WL 1099920, at *4 (S.D.N.Y. Aug. 7, 2000) (citations omitted). Not only would such a transfer contravene the Court's determination above

as to joinder and severance, but it would also "result in substantial additional government expense and place a double burden on the judiciary [such that this factor] weighs strongly against transfer." *Id.* (citing *United States v. Aronoff*, 463 F. Supp. 454, 458 (S.D.N.Y. 1978)).

For the reasons discussed above, Defendants' motions to dismiss for lack of venue or to transfer to the Western District of New York are denied.

G. Defendants' Motions to Suppress Are Denied

The Buffalo Defendants, and Ciminelli in particular, seek to suppress evidence from two sources. The first relates to the collection of Ciminelli's cell phone location, which is moot,[22] and the second relates to a search of his personal email account. Defendants claim that the December 2015 warrant for the search of Ciminelli's email lacked probable cause, lacked particularity, was overbroad, and that the search is not subject to the good faith exception. The details of their arguments mirror Kaloyeros's challenges described below.[23]

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[22] "Ciminelli also moves to suppress certain cellphone location information obtained pursuant to a judicially authorized search warrant. The Government does not intend to introduce such evidence at trial. . . ." Omnibus Opp. Mem. at 112 n.38.

[23] *See* Memorandum of Law in Support of Defendant Louis Ciminelli's Motion to Suppress Cellphone Location Information ("Ciminelli Cell Mem.") [Dkt. 211] at 1–10; Memorandum of Law in Support of Defendant Louis Ciminelli's Motion to Suppress the Email Search ("Ciminelli Email Mem.") [Dkt. 226] at 1–11; Buffalo Omnibus Reply Mem. at 73–76.

Kaloyeros moves to suppress evidence gathered from his email account based on warrants issued in December 2015 and May 2016. He argues that the initial warrant (which also covered the Ciminelli email search) lacked probable cause by, *inter alia*, not articulating why pre-RFP communications he may have had with other Defendants were prohibited, how the tailored RFPs favored other Defendants, and why his use of a personal e-mail account was improper, and because the RFP itself was not attached. He argues that the second warrant lacked probable cause for the same reasons. He raises overbreadth and particularity challenges to the warrants as well, claiming that the warrants do not link to the alleged crimes or describe what areas are to be searched. He also challenges the approximately three-year time period (beginning in December 2012) for which the email accounts' contents could be reviewed.[24]

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[24] *See* Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Suppression of Search Warrant Evidence ("Kaloyeros Suppress Mem.") [Dkt. 172] at 2–21; Declaration of Michael C. Miller in Support of Motion for Suppression of Search Warrant Evidence ("Miller Decl.") [Dkt. 173], Exs. A–F (attaching the warrants at issue); Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Suppression of Search Warrant Evidence ("Kaloyeros Suppression Reply Mem.") [Dkt. 287] at 2–13; Kaloyeros Letter at 68; Kaloyeros Reply Letter at 7; Federal Kaloyeros Cell Phone Warrant, November 7, 2017 ("Cell Warrant") [Dkt. 353-1]; Federal Kaloyeros Cell Phone Warrant Application, November 7, 2017 ("Cell Warrant App.") [Dkt. 353-2]; Kaloyeros Suppression Letter, November 17, 2017 ("Kaloyeros Suppression Letter") [Dkt. 356] at 1–3.

Kaloyeros also seeks to suppress evidence recovered from a search of his cell phone. *See* Kaloyeros Suppress Mem. at 14–22. The Court has permitted supplementary briefing on the motion

"The Fourth Amendment to the Constitution provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" *United States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000) (quoting U.S. Const. amend. IV). Probable cause exists if the information in the warrant's supporting affidavit supplies "a fair probability that contraband or evidence of a crime will be found in a particular place." *Canfield*, 212 F.3d at 718 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

A warrant is sufficiently particular if it identifies the specific offenses for which probable cause has been established, the place to be searched, and the items to be seized in relation to the designated crimes. *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017) (quoting *United States v. Galpin*, 720 F.3d 436, 445–46 (2d Cir. 2013)). "[A] warrant is overbroad if its description of the objects to be seized is broader than can be justified by the probable cause upon which the warrant is based." *United States v. Lustyik*, 57 F. Supp. 3d 213, 228 (S.D.N.Y. 2014) (quoting *Galpin*, 720 F.3d at 446) (internal quotation marks omitted).

A defendant may challenge a search warrant when the supporting affidavit contains deliberately or recklessly false or misleading information. *Canfield*, 212 F.3d at 717 (citing *Franks v. Delaware*, 438 U.S.

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to suppress the search of the cell phone and therefore does not resolve that motion in this Order. The Government has represented that it will not introduce evidence recovered from the search of Kaloyeros's cell phone at the January Trial. *See* Oral Argument Transcript, Dec. 6, 2017, Dkt. 386, at 36:20–22.

154, 164–72 (1978)). But "[e]very statement in a warrant affidavit does not have to be true." *United States v. Trzaska*, 111 F.3d 1019, 1027 (2d Cir. 1997) (citing *Franks*, 438 U.S. at 165). "To suppress evidence obtained pursuant to an affidavit containing erroneous information, the defendant must show that: (1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the [issuing] judge's probable cause finding." *Canfield*, 212 F.3d at 717–18 (quoting *Salameh*, 152 F.3d at 113) (internal quotation marks omitted).

To assess whether alleged misstatements were material to the probable cause determination, a reviewing court must set aside the falsehoods in the supporting affidavit and examine whether the untainted remainder supports a finding of probable cause. *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d Cir. 2013) (citing *United States v. Coreas*, 419 F.3d 151, 155 (2d Cir. 2005); *United States v. Nanni*, 59 F.3d 1425, 1433 (2d Cir. 1995)). The reviewing court should also supplement the affidavit with any facts that were omitted from the affidavit, without which the statements in the affidavit were misleading. *Id.* (citing *United States v. Ippolito*, 774 F.2d 1482, 1487 n.1 (9th Cir. 1985)).

If the corrected warrant application supports a finding of probable cause, "then the misstatements are not 'material' and suppression is not required." *Rajaratnam*, 719 F.3d at 146; *see also Canfield*, 212 F.3d at 718 ("The ultimate inquiry is whether, after putting aside erroneous information and material omissions, there remains a residue of independent and

lawful information sufficient to support probable cause.") (citing *United States v. Ferguson*, 758 F.2d 843, 849 (2d Cir. 1985)) (internal quotation marks omitted). A court reviews this "corrected" affidavit *de novo*. *Canfield*, 212 F.3d at 718.

Even if a court deems a warrant invalid, "[w]hen an officer genuinely believes that he has obtained a valid warrant from a magistrate and executes that warrant in good faith, there is no conscious violation of the Fourth Amendment, and thus [no future violation] to deter" by excluding the evidence. *United States v. Raymonda*, 780 F.3d 105, 118 (2d Cir. 2015) (quoting *United States v. Leon*, 468 U.S. 897, 920–21 (1984)) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 433 (2015). To warrant admission of seized evidence under this so-called "good faith exception," the officer's reliance on the warrant must be objectively reasonable. *Id.* (quoting *Leon*, 468 U.S. at 922). But this good faith exception is inapplicable "(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable." *Id.* (quoting *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011)) (internal quotation marks omitted).

The Defendants' motions to suppress with regard to the email searches fail as a matter of law. The warrants for the two email accounts were supported by probable cause. The applications for these warrants contain extensive detail regarding questionable communications among the Defendants

and tailoring of the Buffalo RFP prior to its public issuance, as well as background information on the individuals involved, their use of these email accounts, and additional content related to other criminal schemes. Based on this information, it was probable that the email accounts contained evidence of the crimes referenced in the warrants (federal funds bribery, honest services wire fraud, and related conspiracy). The Court finds that failing to attach the full RFPs was not a material omission because the applications would have demonstrated probable cause even if the RFPs had been attached.

Further, the email warrants were properly bounded so as not to be overbroad or to lack particularity. The time period over which emails were seized and searched corresponded to the initiation of the Buffalo Billion initiative until the time of each warrant's execution, as the relevant development projects for the warrants were ongoing at the time of the applications. *See* Omnibus Opp. Mem. at 127. It was therefore appropriate for the warrants to allow a search of emails for evidence throughout this period. Additionally, the warrants guided agents in their searches by instructing them to review the emails for evidence, fruits, and instrumentalities of specifically enumerated criminal charges, and provided examples of what to look for, such as evidence related to transmitting, drafting, and modifying the RFP.

Accordingly, the Defendants' motions to suppress, with the exception of Kaloyeros's motion regarding his cellular phone, are denied.

H. The Motion for a Bill of Particulars Is Denied

All Defendants move for bills of particulars with regard to the charges against them. Percoco seeks particulars to the extent that the Indictment does not identify whom he pressured or advised, insufficiently limits the time period of allegations by using the phrase "from at least in or about," does not detail Percoco's duties and authority during different time periods, and fails to name unindicted co-conspirators. He also argues that the volume of discovery is so great that it puts him in an unfair position to make his defense. Kelly's requests are similar, asserting that the Indictment fails to name which officials were pressured, when, and how; does not detail the payments constituting the alleged gratuity; and fails to name unindicted co-conspirators. He also claims that the massive discovery produced by the Government is unhelpful in refining the allegations, as he does not know what to search for, and argues that the guidance from the Government features excessively broad page ranges.[25]

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[25] *See* Memorandum of Law in Support of Joseph Percoco's Motion for a Bill of Particulars ("Percoco Particulars Mem.") [Dkt. 199] at 1–18; Memorandum of Law in Support of Defendant Peter Galbraith Kelly, Jr.'s Motion for a Bill of Particulars, Motion for Brady Material, and Joinder in His Codefendants' Applications ("Kelly Joint Mem.") [Dkt. 232] at 3–26; Reply Memorandum of Law in Further Support of Defendant Peter Galbraith Kelly, Jr.'s Motion for a Bill of Particulars and Brady Material, and Joinder in His Codefendants' Applications ("Kelly Joint Reply Mem.") [Dkt. 289] at 2–11; Reply Memorandum of Law in Support of

The Buffalo Defendants seek particulars essentially aligning with the elements of the charges against them, requesting detail regarding the offending wire transmissions, the scheme to defraud, the types of actions they sought from Howe, the actions Howe took or agreed to take, and the means of improper payments.[26]

Kaloyeros requests the identification of unindicted co-conspirators, additional details of the alleged fraudulent scheme, and identification of particular wire transmissions. He also complains about the volume of the Government's discovery production.[27]

Lastly, the Syracuse Defendants also seek the identification of unindicted co-conspirators, particulars regarding the wire transmissions underlying the alleged crimes, and their alleged false, fictitious, or fraudulent statements. They also seek particulars as to the property of which they deprived their alleged victim and the official acts taken for their benefit, raising arguments similar to those made by

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Joseph Percoco's Motion for a Bill of Particulars ("Percoco Particulars Reply Mem.") [Dkt. 297] at 1–8.

[26] *See* Buffalo R. 12 Mem. at 66–70; Buffalo Omnibus Reply Mem. at 70 n.28.

[27] *See* Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for a Bill of Particulars ("Kaloyeros Particulars Mem.") [Dkt. 181] at 2–15; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for a Bill of Particulars ("Kaloyeros Particulars Reply Mem.") [Dkt. 292] at 2–7.

other Defendants in motions to dismiss under Rules 7 and 12.[28]

A defendant may seek a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f) in order to obtain sufficient information about the charged conduct to prepare for trial, to avoid surprise, and to prevent double jeopardy. *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (citations omitted). "A bill of particulars is not meant to be a tool to compel disclosure of the Government's case before trial." *United States v. Fruchter*, 104 F. Supp. 2d 289, 311 (S.D.N.Y. 2000) (citing *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974)). "A bill of particulars is required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *United States v. Ojeda*, 412 F. App'x 410, 411 (2d Cir. 2011) (quoting *United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004)) (internal quotation marks omitted). "The ultimate test is whether the information sought is necessary, not whether it is helpful." *United States v. Morgan*, 690 F. Supp. 2d 274, 285 (S.D.N.Y. 2010) (citing *United States v. Trippe*, 171 F. Supp. 2d 230, 240 (S.D.N.Y.2001)). It is within the Court's discretion to make that determination and order a bill of particulars if appropriate. *Bortnovsky*, 820 F.2d at 574 (citing *United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984)).

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[28] *See* Syracuse Joint Mem. at 6–27; Syracuse Joint Reply Mem. at 3–15. The Syracuse Defendants also move to dismiss the charges against them to the extent that their requests for particulars are not granted. *See* Syracuse Joint Reply Mem. at 6–27; Syracuse Joint Reply Mem. at 3–15.

Defendants' requests for particulars are without merit. The Government has provided them with an Indictment and Complaint with more than sufficient detail to enable them to adequately prepare for trial. Moreover, the Government's discovery production, although voluminous, has been accompanied by additional guidance that, in conjunction with the detail in the Indictment and Complaint, allows the Defendants to conduct a focused review of the production. *See* Omnibus Opp. Mem., Ex. A.

The Court, however, does believe that the Government should identify the specific wires on which it bases its wire fraud allegations. The Government committed to producing a list of wire transmissions in advance of trial. Omnibus Opp. Mem. at 60, 145 n.43.[29] To the extent the Government has not yet disclosed the wires on which its wire fraud claims rely, it must do so for the January Trial by **December 18, 2017** and for the Second Trial by **May 25, 2018**.

Accordingly, the Defendants' motions for a Bill of Particulars are denied.[30]

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[29] The Government also committed to providing trial exhibits, a witness list, and 3500 material to Defendants reasonably in advance of trial, offering additional clarity on the charges, which further militates against ordering bills of particulars. Omnibus Opp. Mem. at 136 & n.40.

[30] The Court also denies the Syracuse Defendants' related motions to dismiss. *See* Syracuse Joint Reply Mem. at 6–27; Syracuse Joint Reply Mem. at 3–15.

I. The Motion to Compel Disclosure of *Brady* Material Is Granted in Part

Kelly moves to compel disclosure of three categories of *Brady* material. First, he seeks material regarding Howe's alterations of documents, which Kelly contends was done to deceive him. While the Government has turned over all such instances of Howe's alterations, and asserts that Howe was, in part, motivated to convey greater enthusiasm for and progress in their scheme than actually existed, Kelly seeks information regarding any other motive Howe had to alter the documents. Next, Kelly seeks material regarding an ethics opinion that allegedly authorized Kelly to hire Percoco's wife. While the Government contends that it has provided any information it has regarding the existence of such an opinion, Kelly, parsing the Government's statement, seeks additional information in the Government's possession as to *what Kelly believed* or *was told* regarding such an ethics opinion. Third, Kelly—as does Percoco, by his own motion—seeks material showing that officials whom the Government contends Percoco pressured or advised in the course of the alleged schemes denied receiving such advice or having felt such pressure.[31]

Kaloyeros, joined by the Buffalo Defendants, seeks the disclosure of various categories of alleged *Brady*

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[31] *See* Memorandum of Law in Support of Defendant Joseph Percoco's Motion to Compel Production of Brady Materials ("Percoco Brady Mem.") [Dkt. 193] at 1–5; Kelly Joint Mem. at 26–39; Omnibus Opp. Mem. at 152–53; Kelly Joint Reply Mem. at 11–17; Reply Memorandum of Law in Support of Defendant Joseph Percoco's Motion to Compel Production of Brady Materials ("Percoco Brady Reply Mem.") [Dkt. 296] at 1–2.

materials. First, he seeks material from Howe and other witnesses, inferring generally from the scope of the charges against him and to what he presumes those individuals testified that additional *Brady* material must exist. He also broadly requests, for the reasons stated above, and because he believes the Government failed to properly memorialize its interviews with the Syracuse Defendants, that the Government: (1) articulate its criteria for identifying *Brady* material, (2) produce all statements by witnesses or their attorneys, (3) memorialize and disclose any unrecorded statements by witnesses or attorneys, and (4) produce a disclosure containing all communications it has had with counsel and witnesses. Lastly, because the most recent Indictment alleges that Kaloyeros and Howe "designed" the RFP process to lead to the awarding of contracts to the Buffalo and Syracuse Defendants, while the previous Indictment alleged that Kaloyeros and Howe had "predetermined" the outcome of the RFP process, Kaloyeros seeks information explaining that change in word choice.[32]

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[32] *See* Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Compel Production of Brady Materials ("Kaloyeros Brady Mem.") [Dkt. 201] at 2–10; Declaration of Timothy W. Hoover in Support of the Buffalo Defendants' Motion to Compel the Production of *Brady* Material ("Hoover Decl.") [Dkt. 215] at 1–3; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion to Compel Production of Brady Materials ("Kaloyeros Brady Reply Mem.") [Dkt. 288] at 2–6; Kaloyeros Letter at 4–6; Kaloyeros Reply Letter at 6–7. In addition to the materials discussed above, Kaloyeros also sought the Syracuse Defendants' statements denying having tailored the RFPs. That material has been produced, thus mooting this request. *See* Kaloyeros Brady Reply Mem. at 3.

Under *Brady v. Maryland*, "[t]he prosecution has a constitutional duty to disclose evidence favorable to an accused when such evidence is material to guilt or punishment." *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The Government must disclose such material when it is reasonably probable that the outcome of a trial in which the evidence had been disclosed would differ from one in which it had not been. *Id.* at 142. "[A]s long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law simply because it did not produce the evidence sooner." *Id.* at 144.

To start, the Court notes that the Government has explicitly acknowledged the *Brady* obligations it owes the Defendants. *See* Omnibus Opp. Mem. at 147. Should it identify exculpatory material, the Government has committed to producing it.

Looking to Kelly's first request regarding Howe's document alterations, the Court appreciates his argument, but finds that it cannot assess whether any other reasons Howe may have had to alter documents should be disclosed without knowing whether each reason is itself exculpatory. Accordingly, the Court orders the Government to review and assess any other reason Howe has provided, and, no later than **December 18, 2017**, disclose any other reason if that reason would tend to exculpate Kelly.

Next, regarding evidence of an ethics opinion related to hiring Percoco's wife, the Court believes Kelly may be over-reading the Government's response when it argues that the Government has disclosed

only evidence relating to the "existence" of the alleged ethics opinion. It appears to the Court that the Government understands the request and has provided any such information that it possesses. *See* Omnibus Opp. Mem. at 152–53. Nonetheless, out of an abundance of caution, the Court orders the Government to produce any other evidence it has that speaks to Kelly's belief or understanding that hiring Percoco's wife had been authorized by an ethics opinion, to the extent that such evidence exists and has not been turned over already. The Government must do so no later than **December 18, 2017**.

Third, as to Kelly's and Percoco's requests for material that shows officials whom Percoco allegedly pressured or advised deny having felt such pressure or having received such advice, it appears to the Court that the Defendants and Government agree that such information would constitute *Brady* material.[33] The Government has committed to providing any such evidence that it has, satisfying its *Brady* obligation. Once again, the Government must produce this information no later than **December 18, 2017**, to the extent it has not done so already.

Kaloyeros's *Brady* requests, in contrast, largely rely on unreasonable inferences he has gleaned from the Indictment and the testimony he surmises that others have given. Aside from his request for the Syracuse Defendants' statements, which has been mooted, Kaloyeros's demands are extreme and excessive, and

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[33] *See* Omnibus Opp. Mem. at 153–54; Kelly Joint Reply Mem. at 14–16; Percoco Brady Reply Mem. at 1–2.

go beyond the Government's obligations under *Brady*. Those requests are denied.

For the reasons stated above, Defendants' motions to compel disclosure of *Brady* material are granted in part and denied in part.[34]

J. The Motion to Dismiss Due to Preindictment Publicity Is Denied

The Syracuse Defendants move to dismiss the Indictment based on preindictment publicity. They claim that statements made by the Government prejudiced the grand jury's determination to indict them. In particular, they point to comments and tweets from the then-U.S. Attorney that people should "stay tuned" with regard to anti-corruption

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[34] Percoco and Kelly recently submitted letters alleging that the Government failed to timely disclose certain *Brady* materials related to Percoco's time away from the Governor's office and his intentions to return, and to Kelly's hiring of a union leader's daughter. *See* Percoco Brady Letter, November 22, 2017 ("Percoco Brady Letter") [Dkt. 363], Kelly Brady Letter, November 26, 2017 ("Kelly Brady Letter") [Dkt. 365]. As to the Percoco materials, the Court finds that this information does not constitute *Brady* material for the reasons described in its discussion of the bribery charges and Percoco's time as campaign manager in Section II.A.5. And as to Kelly's hiring the union leader's daughter, the Court finds that the union leader's statements do not exculpate Kelly as they do not undercut the argument that Kelly intended to curry favor with the union leader by hiring his daughter in exchange for support for a power plant project. Moreover, to the extent that these materials might constitute *Brady* material, the Government has disclosed them sufficiently in advance of trial. The relief requested by the Defendants is extraordinary and unwarranted. Accordingly, Percoco's and Kelly's requests are denied.

enforcement; the arrest of the Syracuse Defendants at their homes in lieu of being given the opportunity to surrender themselves; a press conference by the then-U.S. Attorney on the day of the arrests in which he discussed shining a light on corruption in Albany; a speech by the then-U.S. Attorney at St. Rose College, during which he spoke broadly about his office's anti-corruption efforts; and a television appearance by the then-U.S. Attorney on *New York Now*, during which he spoke broadly about corruption.[35]

Courts presume that a grand jury has acted within the legitimate scope of its authority absent a strong showing to the contrary. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300 (1991) (citing *United States v. Mechanik*, 475 U.S. 66, 75 (1986)) (O'Connor, J., concurring in judgment) ("The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process."). *See also United States v. Gibson*, 175 F. Supp. 2d 532, 534 (S.D.N.Y. 2001) ("In order to overcome such presumption, a defendant must demonstrate some grossly prejudicial irregularity or some other particularized need or compelling necessity.") (citing *United States v. Ramirez*, 602 F. Supp. 783, 787 (S.D.N.Y.1985)).

Dismissal of an indictment because of a defect in the grand jury proceedings is a drastic remedy that is rarely used. *United States v. Dyman*, 739 F.2d 762, 768 (2d Cir. 1984) (quoting *United States v. Romano*, 706 F.2d 370, 374 (2d Cir. 1983)). Dismissal is only

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[35] *See* Syracuse Joint Mem. at 42–48; Syracuse Joint Reply Mem. at 21.

appropriate if the violations "substantially influenced the grand jury's decision to indict, or if there is grave doubt that that decision was free from such substantial influence . . . ." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *Mechanik*, 475 U.S. at 78) (O'Connor, J., concurring in judgment) (internal quotation marks omitted). As this Court has noted previously, it is unaware of any case in which a court dismissed an indictment solely on the basis of pre-indictment publicity. *United States v. Silver*, 103 F. Supp. 3d 370, 380 (S.D.N.Y. 2015) (citations omitted).

The statements and actions highlighted by the Syracuse Defendants do not constitute evidence of prejudicial preindictment publicity. The public statements from the then-U.S. Attorney were properly qualified as allegations the Government intended to prove, did not express opinions of guilt, and were couched in generalities. *See* Omnibus Opp. Mem. at 164–66. The Defendants' arrest and alleged "perp walk" did not violate any rule, let alone constitute irremediable prejudice, particularly because those events took place in or near Syracuse, and the grand jury was impaneled in Manhattan. And most importantly, the Syracuse Defendants have not presented any particularized proof that suggests irregularity in the grand jury process. Accordingly, their motion to dismiss on the basis of prejudicial preindictment publicity is denied.[36]

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[36] The January Trial Group Defendants, through Kelly, submitted a request for the Court to remove or cover an exhibit in the courthouse featuring historical corruption cases, which,

K. Defendants' Motion to Dismiss for Prosecutorial Misconduct Is Denied

The Syracuse Defendants move to dismiss the Indictment on the grounds of prosecutorial misconduct. In particular, they claim that, prior to attending a proffer session with the Government, at which they allegedly made the false statements for which they were subsequently indicted,[37] they were informed that they were "subjects" of the investigation. They assert that, after the interview, an Assistant United States Attorney ("AUSA") informed counsel that they were in fact "targets," and claimed to have told them as much in advance of the proffer session.[38] They were later formally notified by letter that they were "targets" of the investigation.

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they argue could prejudice jurors who may come across and view the exhibit. *See* Kelly Exhibit Letter, October 26, 2017 ("Kelly Exhibit Letter") [Dkt. 340]. When the Court last checked, the objected-to exhibit had been replaced by a different exhibit that does not mention corruption cases. Even if the objected-to exhibit returns, the Court will charge the jury that it may not read about this case or any other corruption case. In short, Defendants' request for the Court to take action with reference to the exhibit is denied.

[37] Federal law criminalizes knowingly and willfully making a materially false statement or representation in any matter within the jurisdiction of the United States government. 18 U.S.C. § 1001.

[38] According to the U.S. Attorneys' Manual, a subject is "a person whose conduct is within the scope of the grand jury's investigation," while a target is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." USAM § 9-11.151.

The Syracuse Defendants assert that they would not have attended the proffer session had they known they were targets, and that the Government's deceit was egregious, warranting dismissal of the Indictment.[39]

To dismiss an indictment for prosecutorial misconduct, a prosecutor must knowingly or recklessly mislead a grand jury as to an essential fact, or, as would be relevant here, must engage in a systematic and pervasive pattern of misconduct that undermines the fundamental fairness of the process that generated the indictment. *United States v. Restrepo*, 547 F. App'x 34, 44 (2d Cir. 2013) (quoting *United States v. Lombardozzi*, 491 F.3d 61, 79 (2d Cir. 2007); *United States v. Brito*, 907 F.2d 392, 395 (2d Cir. 1990)).

The Syracuse Defendants' argument that the Government committed prosecutorial misconduct fails. The Government asserts that the Defendants were told that they were subjects of the investigation prior to attending their proffer sessions. The Government contends that the misrepresentations the Defendants made at the proffer session contributed to the decision to change their status to "targets." Omnibus Opp. Mem. at 174. Put differently, according to the Government, the Syracuse Defendants became "targets" of the investigation *after* their proffer session and had been properly informed of their "subject" status prior to the proffer.

It would be of grave concern if a representative of the prosecution intentionally misled targets of an investigation into believing that they were mere

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[39] *See* Syracuse Joint Mem. at 2–6; Syracuse Joint Reply Mem. at 1–3.

subjects in order to lure them into making proffers, and the Government provided no sworn evidence to refute the Defendants' sworn allegation regarding who said what to whom before and after the proffers. Nonetheless, even if a misrepresentation had been made, and even if that misrepresentation had been made *deceitfully* (as the Syracuse Defendants imply), such conduct would not rise to the level of prosecutorial misconduct warranting dismissal of the Indictment, as it would not constitute a "systematic and pervasive pattern of misconduct that undermines the fundamental fairness of the process that generated the indictment." *Restrepo*, 547 F. App'x at 44. Nor would the fact that the Defendants believed they were subjects, rather than targets, of the investigation permit them to lie at their proffer session. Accordingly, the Defendants' motion to dismiss for prosecutorial misconduct is denied.

III. CONCLUSION

For the reasons stated above, the Defendants' Motions to Compel Disclosure of *Brady* Evidence are granted in part and denied in part. The remainder of Defendants' motions, except for Kaloyeros's motion to suppress the search of his cell phone, which is still being briefed, are denied.

The Clerk of Court is instructed to terminate Docket Entries 91, 176, 180, 185, 186, 189, 192, 194, 198, 200, 205, 209, 212, 214, 216, 219, 221, 223, 225, 229, 231, 233, 236, 340, 363, and 365.

SO ORDERED.

Date: December 11, 2017
New York, New York

VALERIE CAPRONI
United States District Judge

APPENDIX G

18-2990(L)

18-3710(CON), 18-3712(CON), 18-3715(CON), 18-3850(CON), 19-1272(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– against –

PETER GALBRAITH KELLY, JR., MICHAEL LAIPPLE, KEVIN SCHULER

Defendants,

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX ON BEHALF OF DEFENDANTS – APPELLANTS
VOLUME II OF X
(Pages A276 TO A556)

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* * *

between ESD, Andrew Kennedy, and the director of state operations?

A. Mr. Kennedy oversaw ESD on a day-to-day basis, and Mr. Kennedy reported to the director of state operations.

Q. And you've mentioned the role of counsel as well?

A. Yes.

Q. Who served in the role of counsel between 2011 and 2016?

A. The first counsel was Mylan Denerstein, and she also left in late 2014. She was replaced by her deputy at the time, Seth Agata. And that may cover the relevant time period. Toward the end, Alphonso David became counsel.

Q. You mentioned at some point during your time working for the governor in the first period, Joe Percoco left to work on the campaign. Can you remind the jury of the time period of that.

A. Yes. It was spring of 2014. I think around April.

Q. At the time he left to work on the campaign, what, if anything, did he say to you about his plans after the election?

A. He said he was leaving and he was not coming back.

Q. Did he return?

A. He did.

Q. Did he tell you why?

A. He said the governor needed him. As I have already testified, some members of the senior staff had left. The governor's father was very ill and ultimately died within a

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matter of weeks, and he believed the governor needed him to have some stability in the office.

* * *

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Q. I guess there are a couple of ways one can leave. He can take a leave of absence, right?

A. He could have.

Q. But he did not do that; correct?

A. Correct.

Q. He resigned; is that correct?

A. Yes.

Q. And when he resigned, he told you it was his intention to run the campaign as campaign manager; correct?

A. Yes.

Q. And then I think you said to do other things; correct?

A. I did not say that.

Q. Well, tell me what you said.

A. I said he was—he told me he was leaving and he was not coming back.

Q. Okay. And by not coming back, you understood him to mean not coming back to the chamber; correct?

A. Yes.

Q. And going somewhere other than the chamber, such as work in the private sector perhaps?

A. He told me only that he was going to the campaign and then he needed to make money for his family.

Q. When one resigns from the executive chamber, does one have to sign a form indicating as much?

A. There is various paperwork involved in leaving the

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on a mortgage application said, I am guaranteed a job with the administration after the election, would you agree with that?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. As you understood it, Mr. Percoco's decision not to return to the chamber was his; correct?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

When he told you. When he told you he wasn't coming back.

THE WITNESS: Corrects, your Honor. Yes, that was his decision for financial reasons.

Q. And to the extent you had any say in his returning to the chamber, did you have any objection to it?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. So while Mr. Percoco managed the campaign, you also had contact with him when he was managing the campaign?

A. Yes.

Q. From time to time, right?

A. Correct.

Q. On a pretty regular basis would you say?

A. Yes.

Q. Managing the campaign was a job of more than 40 hours a week, right?

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A. I don't know.

Q. He was on call at all times as far as you knew?

A. I really don't know.

Q. Would you describe it as an all-consuming job?

A. As campaign manager?

Q. Yes.

A. Certainly at times.

Q. Do you recall having described it as more than a full-time job?

A. I think I said I would imagine it was more than a full-time job, but I don't think I have enough knowledge as to what he was doing on a day-to-day basis for the campaign to know that for sure. That was my perspective.

Q. Suffice it to say while he was running the campaign, he had no role in the executive chamber; correct?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

A. Other than transition matters.

Q. He had no title in the chamber, right?

A. Correct.

Q. And he had resigned from his position in the chamber; correct?

A. Yes.

Q. And you say other than transitional matters. You took over his—some of his responsibilities, right?

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A. Yes.

Q. One of those responsibilities was appointments, right?

A. Yes.

Q. Would that have been one of those transitional matters?

A. Yes, it was.

Q. Okay.

And when he was on the campaign and no longer in the chamber, Mr. Percoco had no ability to make appointments; correct?

A. That's right.

Q. The appointments process was a process that could span many weeks or even months, right?

A. Sometimes, yes.

THE COURT: In this context "appointments" doesn't mean like on a calendar, right? You're talking about hiring people.

THE WITNESS: That's right, your Honor, and putting them on boards and commissions.

MR. BOHRER: Thank you, your Honor.

Q. And so given that Mr. Percoco had had these responsibilities for a long time and you were taking over, by "transition," you're talking about transitioning from his being in charge to your being in charge, right?

A. Yes.

* * *

APPENDIX H

18-2990(L)

18-3710(CON), 18-3712(CON), 18-3715(CON), 18-3850(CON), 19-1272(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– against –

PETER GALBRAITH KELLY, JR., MICHAEL LAIPPLE, KEVIN SCHULER

Defendants,

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX ON BEHALF OF DEFENDANTS – APPELLANTS
VOLUME III OF X
(Pages A557 TO A820)

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* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v. -	:	
JOSEPH PERCOCO, a/k/a "Herb," PETER GALBRAITH KELLY, JR., STEVEN AIELLO, JOSEPH GERARDI,	:	16-CR-776 (VEC) JURY INSTRUCTIONS
Defendants.	:	

VALERIE CAPRONI,
UNITED STATES DISTRICT JUDGE:

* * *

Fourth, that interstate wire communications were used in furtherance of the scheme to defraud.

(i) Element One – Scheme to Defraud the Public of Honest Services

The first element of honest services wire fraud is a scheme or artifice to defraud the State of New York and its citizens of their intangible right to Mr. Percoco's honest services. This element has two parts: first, that Mr. Percoco owed the public a right to his honest services, and, second, the existence of a scheme to defraud the public of those honest services.

As to the first part of this element, "honest services" are the duties that a person owes to the public because of a special trust that the public has reposed in the person. When a person obtains a payment in exchange for official action, that person has breached his duty of honest service. This is because, although the person is outwardly purporting to be exercising independent judgment on behalf of the public, in fact, the person's actions have been paid for. Thus, the public is not receiving what it expects and what it is entitled to, namely, its right to the person's honest and faithful services.

While Mr. Percoco was employed by the state, he owed the public a duty of honest services by virtue of his official position. A person does not need to have a formal employment relationship with the state in order to owe a duty of honest services to the public, however. You may find that Mr. Percoco owed the public a duty of honest services when he was not a state employee, if you find that during that time he owed the public a fiduciary duty. In a fiduciary relationship, the public places special trust and

confidence in an individual to act in the public's best interests, rather than in the individual's own personal interests. The relationship gives that Individual influence, and control over the public's affairs, and the public expects that such an individual will act honestly, forthrightly, and in good faith in handling the public's business. The individual knowingly 1 accepts the public's trust and confidence and thereafter undertakes to act on behalf of the public, rather than for his own interests. Whether Mr. Percoco owed the public a fiduciary duty and, thus, a duty of honest services, when he was not a public employee is a question of fact for you to determine. As noted before, however, as a matter of law, he owed the public a duty of honest services while he was employed by the state.

Turning to the second part of this element, a "scheme or artifice" is simply a plan to accomplish some goal. For ease of reference, I am going to just use the term "scheme."

A scheme to defraud is a scheme that makes false representations regarding material facts if the falsity is reasonably calculated to deceive persons of average prudence. A representation is "false" if it is untrue when made and was known at the time to be untrue by the person making the representation or causing it to be made. A fact is "material" if the fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in making a decision. Deceitful statements of half-truths or the concealment of material facts may also constitute false representations under the law.

It is not necessary for the Government to prove that the State of New York or its citizens actually suffered any pecuniary loss from this scheme. And it is not necessary for the Government to prove that the Defendants realized any gain from it. It is sufficient for the Government to prove that the State of New York and its citizens did not receive the honest and faithful services of Mr. Percoco.

* * *

APPENDIX I

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
v.	:	
JOSEPH PERCOCO, PETER GALBRAITH KELLY, JR., STEVEN AIELLO, JOSEPH GERARDI,	:	16 CR 776 (VEC) JURY TRIAL
Defendants.	:	

New York, N.Y.
February 26, 2018
9:00 a.m.

Before:

HON. VALERIE E. CAPRONI,
District Judge

APPEARANCES

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Special Agent FBI
AASHNA RAO,
Paralegal Specialist, USAO
SYLVIA LEE,
Paralegal Specialist, USAO

* * *

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THE COURT: Anybody got anything before then?

MR. YAEGER: Page 22, line 21.

THE COURT: Yes.

MR. YAEGER: I don't think it should just be intangible right to Mr. Percoco's honest services. I think it

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should be honest services as a public official.

THE COURT: I'm sorry. What do you want to change it to?

MR. YAEGER: I want to add the words as a public official after honest services in 21.

THE COURT: No, because that is actually not the theory and that is not the law. You can owe a public duty and you can—I'm sorry—you can owe honest services if you have a fiduciary duty, even if you're not a public official at the time.

MR. YAEGER: I understand that is not the theory. I do think it is the law. I hear your Honor's ruling.

THE COURT: We disagree.

* * *

APPENDIX J

Page 6379

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
v.	:	
JOSEPH PERCOCO, PETER GALBRAITH KELLY, JR., STEVEN AIELLO, JOSEPH GERARDI,	:	16 CR 776 (VEC) JURY TRIAL
Defendants.	:	

New York, N.Y.
March 1, 2018
10:15 a.m.

Before:

HON. VALERIE E. CAPRONI,
District Judge

APPEARANCES

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Southern District of New York

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Honest services wire fraud involves a scheme to defraud the public of its right to a person's honest services. It has four elements:

First, the existence of a scheme to defraud the state of New York and its citizens of their intangible right to Mr. Percoco's honest services;

Second, that the defendant knowingly and willfully

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participated in the scheme to defraud with knowledge of its fraudulent nature and with a specific intent to defraud;

Third, that the scheme involved the payment or receipt of bribes; and

Fourth, that interstate wire communications were used in furtherance of the scheme to defraud.

The first element of honest services wire fraud is a scheme or artifice to defraud the state of New York and its citizens of their intangible right to Mr. Percoco's honest services. This element has two parts: First, that Mr. Percoco owed the public a right to his honest services; and, second, the existence of a scheme to defraud the public of those honest services.

As to the first part of this element, honest services are the duties that a person owes to the public because of a special trust that the public has reposed in the person. When a person obtains a payment in exchange for official action, that person has breached his duty of honest service. That's because, although the person is outwardly purporting to be exercising independent judgment on behalf of the public, in fact, the person's actions have been paid for. Thus, the public is not receiving what it expects and what it is entitled to, namely, its right to the person's honest and faithful services.

While Mr. Percoco was employed by the state, he owed

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

a fiduciary duty. Whether Mr. Percoco owed the public a fiduciary duty, and thus a duty of honest services, when he was not a public employee is a question of fact for you to determine. As noted before, however, as a matter of law, he owed the public a duty of honest services while he was employed by the state.

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