No. 21-1158

In the
Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

REPLY BRIEF FOR RESPONDENT STEVEN AIELLO IN SUPPORT OF PETITIONER

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INTRODUCTION

The government makes no serious effort to defend *Margiotta*, presumably because it is indefensible under this Court's § 1346 decisions and the Constitution. Instead, the government attempts to salvage the convictions based on two new theories not charged in the indictment, presented to the jury, or passed upon by the Second Circuit. Neither provides a valid basis for affirmance.

The government's first, "functional official" theory finds no support in the text of the honest-services statute or the caselaw construing it. The government therefore attempts to import provisions from two *other* bribery offenses into § 1346, disregarding their markedly different statutory language and distinct legislative purposes. But there is no basis in § 1346 or this Court's decisions to think Congress intended to incorporate, *sub silentio*, every clause, cross-reference, and nuance of other, more detailed, bribery statutes into the honest-services statute. And neither of the two statutes (18 U.S.C. § 201 and § 666) supports the government's theory anyway. Both treat private parties like public officials only when they exercise *actual* government power pursuant to some *formal*, legal delegation of authority.

The "functional official" theory also suffers from all the same constitutional problems presented by the Second Circuit's dominance, control, and reliance "test." It raises due process and vagueness concerns, because an individual lacking legal authority to take official acts cannot "function" as a public official in any real sense; the most he can do is leverage his sway

with those who actually hold the reins. And the government provides no clear line that would enable someone in Aiello's shoes to determine when his chosen lobbyist is so influential that he amounts to a "functional official." Paying a politically influential person to petition the government is protected by the First Amendment if the person has no legal authority to take official action; it cannot be a crime. Criminalizing such protected activity would also encroach on States' sovereign prerogatives to regulate whether, and to what extent, their former employees may represent private parties with matters pending before state and local government.

The government's "future official" theory fares no better because, whatever its merits, it is irrelevant to this case. The government first surfaced the theory in opposition to certiorari. But this is "a court of final review and not first view," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001), which ordinarily does "not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). In a criminal case, moreover, due process precludes affirmance of "a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980). And upholding the convictions under the new "future official" theory would be particularly unjust here, because no record evidence supports it. COR paid Percoco to use his influence only for a "few months" when he was "off the 2nd floor working on the Campaign" and *not* a public official. There is simply no evidence that Aiello knew Percoco intended to return to office before Percoco actually did so, as the government implicitly concedes.

The Court should decide only the question actually presented. It should hold that paying for political advocacy is not a bribe, and does not violate § 1346, if the person being paid merely has informal influence and lacks official authority.

ARGUMENT

I. THE "FUNCTIONAL OFFICIAL" THEORY IS UNSUPPORTED BY ANY LEGAL AUTHORITY AND RAISES SERIOUS CONSTITUTIONAL CONCERNS

The government does not even pretend to defend the *Margiotta* theory. Instead, it tries to recast that legal theory in different terminology—the idea of a "functional official." Under this theory, a person can owe a fiduciary duty to the public—even if he has no official title and no formal responsibility or legal authority to make government decisions. According to the government, paying a person lacking any legal authority to take official action to urge an actual public official to take such action is a serious federal felony, so long as a jury finds the person was a "functional official"—whatever that means.

But the "functional official" theory is nowhere to be found in § 1346 or either of the other statutes on which the government relies. And this newly-invented theory is no less malleable, illusory, and dangerous than the *Margiotta* theory the government hopes to disguise in new, more appealing garb. A wolf dressed in sheep's clothing is still a wolf.

A. There Is No Legal Basis For The "Functional Official" Theory

The government is unable to cite a single § 1346 case from this Court, or even any lower court, supporting its "functional official" theory. Nor does it attempt to ground the theory in the principles underlying the honest-services fraud doctrine or the essential characteristics of fiduciary relationships—presumably because the theory is incompatible with both. *See* Percoco.Reply.4-6.

Instead, the government pivots to two other statutes, 18 U.S.C. § 201 and § 666. But § 1346 does not incorporate the far more detailed provisions of those other statutes. And even if it did, neither statute creates liability for so-called "functional officials."

1. There is no basis for the government's argument that other federal bribery statutes that proscribe *different* conduct using *different* statutory language somehow expand the scope of § 1346 as narrowed by this Court in *Skilling v. United States*, 561 U.S. 358 (2010).

The government relies on the Court's observation in *Skilling* that § 1346 "draws content" from § 201 and § 666. Govt.Br.18-19. But the Court did not remotely suggest that Congress intended to incorporate every detail of those far more specific statutes into § 1346, which says only this: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." In *Skilling*, the Court pared that broad text down to bribe and kickback schemes

and, in the passage the government cites, merely explained what those terms mean. All the Court said was that § 1346's "*prohibition on bribes and kickbacks* draws content … from federal statutes proscribing—and defining—similar crimes." 561 U.S. at 412 (emphasis added). That is why the opinion went on to cite statutory subsections that define those terms (and not provisions defining who qualifies as a public official capable of being bribed). Specifically, the Court cited 18 U.S.C. § 201(b), defining "bribery" of federal public officials, 18 U.S.C. § 666(a)(2), defining "bribery" in federal programs, and 41 U.S.C. § 52(2) (now 41 U.S.C. § 8701(2)), defining "kickback."

In short, the Court said nothing in that passage about *who* owes "honest services" to the public or whether anyone other than a public official can be a public fiduciary. And nowhere in *Skilling* did the Court suggest that § 1346 somehow silently incorporates other bribery statutes' definitions of terms like "public official" and "agent"—along with any and all caselaw construing those statutory terms. *See* Percoco.Reply.8-9.

2. Section 201 does not support a "functional official" theory anyway. The government chiefly relies on *Dixson v. United States*, 465 U.S. 482 (1984), which held that § 201 does not require a direct "employment or agency relationship" with the government. But as Percoco explains, *Dixson* does not treat a private citizen as a "public official" under § 201 unless there has been some delegation of authority to the person to exercise "official federal responsibilities" and "duties." Percoco.Reply.10-13.

The court of appeals decisions the government cites (Govt.Br.23) likewise fail to support any "functional official" test. All are consistent with the proposition that a "bribe" under § 201 must be solicited by or paid to a person who has been legally charged with exercising governmental power. In each case, the court found that the defendant was a "public official" only because—whether by contract, government oversight, or otherwise—there was some formal and objectively clear nexus between the defendant's employment and the federal government.

In *United States v. Thomas*, 240 F.3d 445 (5th Cir. 2001), for example, the defendant was a guard at a private prison that contracted with the federal government to house INS detainees. By virtue of that contract, the defendant "acted on behalf of the United States under the authority of a federal agency," "had to abide by federal regulations," and was subject to dismissal by INS itself. *Id.* at 448. Similarly, in *United States v. Velazquez*, 847 F.2d 140 (4th Cir. 1988), a deputy sheriff working in a county jail had "federal responsibilities" because he supervised federal inmates pursuant to a contract with the federal government, and the jail was "subject to inspections by the federal prison authorities." *Id.* at 142. In *United States v. Kenney*, 185 F.3d 1217 (11th Cir. 1999) (per curiam), the defendant had "official responsibility for the carrying out of a government program" pursuant to a contract that conferred responsibility to monitor procurement for the Air Force. *Id.* at 1222. In *United States v. Hang*, 75 F.3d 1275 (8th Cir. 1996), the defendant worked for a company "organized for the exclusive purpose of implementing" federal housing subsidy programs and was "subject to exacting

oversight" by HUD. *Id.* at 1280. And in *United States v. Madeoy*, 912 F.2d 1486 (D.C. Cir. 1990), a government-retained property appraiser had "official federal responsibilities" because he had to follow "applicable regulations" and his appraisals determined the amounts of loans the government would insure. *Id.* at 1494.

The government's "functional official" theory, by contrast, treats a private party as a public fiduciary whenever the person supposedly "exercises" government powers and others "acquiesce." Govt.Br.15. It requires no delegated authority, no official responsibility or duties, no contract, and no government oversight. As such, the theory is fundamentally distinct from § 201 under *Dixson* and its progeny, and would sweep in a substantially broader category of private parties.

3. Nor does § 666 support the government's "functional official" argument. Section 666 prohibits bribery involving "agents" of state, local, or tribal governments or other organizations that receive federal funds. 18 U.S.C. § 666(a). But it cabins government "agents" to persons specifically "authorized to act on behalf of" the government. *Id.* § 666(d)(1). The government's "functional official" theory, by contrast, is far more expansive. It would sweep in individuals like Percoco who have no authority to act on the government's behalf and cannot legally bind the government in any way. Under the government's view, all that matters is that the person has appropriated a government function to himself, and that actual government

employees supposedly have "acquiesced" in that behavior. That theory finds no support in § 666's definition of "agent."

The government also ignores the jury instructions and verdict here, which confirm that the term "agent" in § 666 is far more circumscribed than the government's "functional official" idea—and that the jury did not find Percoco was an "agent" under § 666. *See* Aiello.Br.31. The indictment charged the same conduct—COR's payments to Percoco for assistance on the LPA issue—as both a conspiracy to commit honest-services fraud and a violation of § 666. The principal difference between the jury instructions on the two counts had to do with the necessary finding as to Percoco's status. The instructions said that to convict either defendant on the § 666 count, the jury must find that Percoco was "an agent of New York State," defined to mean "a person who is authorized to act on behalf of state government." JA516. In other words, the jury was told to apply the exact same definition the government now contends is the source for its "functional official" theory. But the jury *acquitted* all defendants on that count, while convicting for honest-services fraud based on the *Margiotta*-based dominance, control, and reliance instruction. In other words, the jury concluded that Percoco was *not* an "agent" within the meaning of § 666. Thus, even if § 666 applied to § 1346, it would not provide any basis to affirm these convictions.

4. As Percoco explains, the government's "functional official" theory also conflicts with this Court's § 1346 precedents, which require a narrowing construction to avoid serious constitutional problems.

Permitting conviction in circumstances in which the existence of a fiduciary relationship is hardly "beyond dispute" would contravene *Skilling*. *See* Percoco.Reply.5. Likewise, permitting bribery prosecutions of individuals who are legally incapable of performing an "official act" is irreconcilable with the Court's holding in *McDonnell v. United States*, 579 U.S. 550 (2016). *See* Percoco.Reply.13.

B. The "Functional Official" Theory Creates The Same Serious Constitutional Problems As *Margiotta*

As explained in the opening briefs, *Margiotta* raises serious due process, First Amendment, and federalism concerns. Aiello.Br.32-45; Percoco.Br.38-47. In response, the government makes no attempt to defend the Second Circuit's resurrection of *Margiotta*. It completely ignores the *Margiotta* "test" set forth in the jury instructions and "reaffirmed" by the Second Circuit. JA665. Indeed, it mentions *Margiotta* just twice—and then only to dissuade the Court from addressing that much-criticized 1982 decision. Govt.Br.11, 35.

Instead, the government hopes to duck the constitutional problems by pretending its "functional official" idea is significantly narrower than the *Margiotta* formulation. But as a practical matter, it suffers from the same fatal flaws.

1. The government claims its "functional official" theory raises no vagueness concerns because *Dixson* and other cases made clear that bribery offenses are not limited to government employees. Govt.Br.39. But as discussed, *Dixson* is far more circumscribed

and is limited to people formally charged with exercising governmental power. The formal delegation of authority to take official action—whether through statute, regulation, contract, or otherwise—provides the clear line necessary to avoid any vagueness issue.

The "functional official" theory, by contrast, is amorphous and provides no ascertainable standard. According to the government, an individual assumes the duties of a public fiduciary when he "exercises" "the powers of a government position" or "the functions of a government position" "with the acquiescence of the relevant government personnel." Govt.Br.15, 25. But how can anyone exercise the "powers" or "functions of a government position" without having the formal legal authority to make a decision for the government?

Take, for example, a town building inspector whose job it is to issue construction permits. Under what circumstances could a private citizen be said to exercise that power and function without having been delegated any legal authority to make the permit decisions? Suppose a private citizen gives the inspector advice about which permits to grant. Suppose further that the inspector follows that advice unwaveringly because the advice comes from her father, who has decades of experience in the construction industry. Is the father "exercising" the "powers" and "functions" of the inspector's position, even though the inspector herself retains the sole responsibility and authority to act?

Or what if the public official is a senior aide to an elected representative. The "powers" and "functions" of such an official are primarily to assist and advise.

Does a close friend or relative who similarly offers the representative his or her personal thoughts and insights thereby "exercise" the "powers" and "functions" of the senior aide and become a public fiduciary if the representative follows that advice? *See*, *e.g.*, Hailey Fuchs, *He has 'Kevin's ear' and could become the most powerful unelected man in DC*, Politico (Nov. 8, 2022).[1] Or, as the government suggests, does it depend on what office or phone the individual happens to be using at the time? *See* Govt.Br.31. And how is an outsider like Aiello supposed to know when such assistance and advice has crossed the line into exercising official "powers" and "functions" of the public official, with the latter's "acquiescence"?

The government's characterization of Percoco's role confirms how nebulous and malleable its theory really is. It asserts that "petitioner continued to function as a public official by continuing to carry out functions of the Executive Deputy Secretary" and that he "conducted state business" while on the campaign. Govt.Br.28, 31. What functions? What state business? Like the Second Circuit, *see* JA682-83, the government offers no specifics indicating that Percoco actually made any official decisions. Instead, it cites evidence of his continuing influence, and the fact that government officials listened to him because they "understood that petitioner 'spoke for the governor'" on certain issues. Govt.Br.31. Its appendix citations are to evidence that Percoco "swiped in" to the Governor's office, made phone calls there, and "was involved" in personnel decisions. *E.g.*, JA279, 607-08, 682-83;

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[1] https://www.politico.com/news/2022/11/08/jeff-miller-mccarthy-ally-k-street-00065588.

Govt.Br.5. That one witness used the word "instructed" to describe his advice to the governor's staff (Govt.Br.5) does not change the fact that Percoco lacked legal authority to instruct anyone to do anything.

Further, the idea that the individual operate "with the acquiescence of the relevant government personnel" is itself inherently vague and amorphous. Who are the "relevant" personnel, and how is a person hiring a lobbyist supposed to know? One might think the most relevant "acquiescence" would come from high-level officials, the people with the power to grant or withhold authority, to delegate or reclaim responsibility, to hire or fire. In this case, that would mean the governor, Andrew Cuomo. But the government does not point to any evidence that Governor Cuomo understood Percoco to be operating as a public official—let alone that he "acquiesced" to Percoco performing official acts.

And so instead the government suggests the "relevant" personnel are subordinates and perhaps colleagues, but not superiors. It asserts that Percoco was a functional official because he "issue[d] directives to government employees who understood that they should comply." Govt.Br.15. It emphasizes that the Deputy Director of State Operations felt "pressure[d]" by Percoco and "the governor's staff" took instruction from Percoco. Govt.Br.31-32. The government also finds it significant that one individual in a separate part of the Governor's office—the Acting Counsel to the Governor—"sought petitioner's views" on policy matters. Govt.Br.31. Yet the government does not ex-

plain why these particular individuals are "the relevant government personnel," whether they or similar individuals will be the relevant personnel in every case, or whether other categories of individuals—such as superiors—could also be "relevant."

Nor does the government explain what counts as "acquiescence." It discusses personnel soliciting Percoco's views, feeling "pressured" by Percoco, and taking instruction from Percoco. Yet these are three very different interactions; are they all "acquiescence" and, if so, what's the common thread? How does one acquiesce to another's "power" simply by seeking his views? And if the significance of "pressure" and "instruction" is that the official "acquiesces" by taking an act as a result, it treads dangerously close to mere influence, to which one can also "acquiesce." For example, a state senator who adds his support to a pending bill after repeated calls and meetings with an industry lobbyist also "acquiesces" to the lobbyist's entreaties. But the government provides no way to distinguish that sort of powerful influence and acquiescence from the acquiescence to advice, pressure, and instruction that it says can make someone a "functional official."

Does it depend on whether the "pressure" comes in the form of a suggestion, a strong suggestion, or a directive, and, if so, what separates one from the other? How, for example, did Percoco's interactions with his former subordinates demonstrate their "acquiescence" to him usurping their authority, as opposed to simply feeling pressure from someone who was formerly their boss and now managing the campaign of—and close friends with—the governor, the employees' ultimate boss? Does the distinction depend on the subjective

perceptions of the State employees who are being influenced or directed? And how could anyone else deduce what they are thinking? Particularly for a person outside government who wants to hire a lobbyist, the government's "functional official" theory provides no way to determine where the line separating lawful from unlawful conduct lies.

2. The government cites *United States v. Williams*, 553 U.S. 285 (2008), for the proposition that the existence of hypothetical "closes cases" does not render a criminal statute vague. Govt.Br.39. True enough, but that is not the issue. The problem with the "functional official" theory is that it makes it impossible to determine exactly what factors separate a lawful payment to a lobbyist from a criminal bribe. As the Court explained in *Williams* itself, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." 553 U.S. at 306.

3. The government also argues that § 1346's *mens rea* element insulates its theory from vagueness. Govt.Br.39. But this Court rejected the same argument in *Skilling* when it pared § 1346 down to its "core meaning" to steer clear of "a vagueness shoal." 561 U.S. at 368. If it is unclear what facts make otherwise innocent conduct criminal, then requiring the defendant to know those facts begs the question—what facts? Requiring the defendant to "know" unknowable facts cannot possibly solve the due process problem.

This case demonstrates the point. The government says the statute was not unconstitutionally applied to

Aiello because the Second Circuit found sufficient evidence of his scienter. Govt.Br.13 n.3, 40 n.6. But the court below did not point to any evidence Aiello *knew* that Percoco dominated and controlled others, or that Percoco was operating as a "functional official." There was none. There was no evidence Aiello knew anything at all about Percoco's interactions with those still in government, let alone the factors the government contends demonstrate he was a functional official. Aiello had no way of knowing, for example, what "offices and phones" Percoco used while on the campaign, whether he "plann[ed] a state government event … and attend[ed] an internal government meeting," whether he issued any "directives" to state employees, or whether those employees "understood that they should comply." Govt.Br.15, 30-31. All he knew was that Percoco had good connections and substantial influence, like any good lobbyist.

As a result, the Second Circuit's ruling on the scienter issue consisted only of *ipse dixit*. The court cited no *evidence* suggesting Aiello believed Percoco had governmental authority at the relevant time. Instead, it concluded that the mere fact Aiello "specifically sought out Percoco" to help "push the [LPA] through" demonstrated Aiello's knowledge that Percoco had "control." JA683. In other words, Aiello must have known he should not hire Percoco because he hired Percoco. Such circular reasoning exposes the lack of any clear standard and the inherent vagueness of the *Margiotta* doctrine and "functional official" theory.[2]

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[2] The government also invents facts. It says, for example, that it was "Aiello's suggestion" that the payments to Percoco be sent to

4. The government does not dispute that criminalizing payments to lobbyists would raise serious First Amendment concerns. *See* Aiello.Br.38-42. But the government insists that its theory does not implicate those concerns because lobbyists "do not exercise the functions of official government positions." Govt.Br.40.

The government's response again begs the question: What does it mean to be "exercis[ing] the functions" of a government official? If the test is limited to actual government decision-making by a person to whom official authority has been delegated, then it is clear that lobbying and lobbyists are indeed excluded. But if it includes speaking to public officials who listen and make decisions based on those discussions—as it must if the theory is to encompass Percoco's conduct—the government's argument fails. To be effective and successful, a lobbyist must be persuasive and influential with public officials; the more an official acquiesces to the lobbyist's wishes, the more effective that lobbyist will be. *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 359-60 (2010). Making lobbyists public fiduciaries because they successfully influence governmental decision-making would severely infringe the First Amendment rights of people like Aiello, who depend on others to make their voices heard in government.

Percoco's wife. Govt.Br.7 (citing JA394-97). Actually, Howe testified that Aiello and Gerardi had authorized him to pay Percoco *directly*, JA394, and that it was Howe who unilaterally decided to write the check to Percoco's wife instead, JA397.

5. The government claims its expansive view of § 1346 implicates no federalism issues because nothing requires the government to prove a violation of state law. Govt.Br.41. That misses the point. Regulating the political activity of former state officials is quintessentially within the province of States' sovereign powers. *See* Aiello.Br.42-44. Expanding § 1346 to restrict the political activity of influential former officials intrudes on States' individual prerogatives and raises substantial federalism concerns.

Nor is the federalism problem solved by the fact that New York's penal law also criminalizes the bribery of "any person exercising the functions of … [a] public officer." Govt.Br.41-42 (quoting N.Y. Penal Law § 10.00(15)). The very cases the government cites make clear that the New York provision mirrors *Dixson*; it covers only individuals with official responsibilities and duties because of a formal, legal delegation of governmental authority or government supervision. One case involved statutorily created community boards that "exercise[d] specific statutory functions in connection with land-use decisions," a "sovereign power of the State." *People v. Kruger*, 452 N.Y.S.2d 78, 79-80 (App. Div. 1982). Another involved an individual who, pursuant to a contract between the Red Cross and the county government, oversaw a community service program for criminal defendants given non-incarcerative sentences. *People v. Samilenko*, 814 N.Y.S.2d 564 (Tbl.), 2005 WL 3626772, at *1 (Sup. Ct. 2005). She "was directly answerable to the Courts themselves" and performed "'governmental services' in the true meaning of the word." *Id.*[3] The Penal Law

[3] In the third case, *In re Onondaga County District Attorney's Office*, 459 N.Y.S.2d 507 (App. Div. 1983), the defendant was an

does not embrace the government's loosey-goosey "functional official" formulation.

The government argues that New York's ethics laws prohibited Percoco's LPA phone call to someone in the Executive Chamber. Govt.Br.42. But ethics laws imposing minor civil penalties cannot deprive anyone of their liberty. Criminalizing this conduct as federal honest-services fraud is not consistent with how New York itself has chosen to police it. And again, the government misses the point. The federalism problem does not turn on whether or not New York prohibited this conduct. The issue is that different States have different rules, and each is permitted to regulate this conduct—or not—as it sees fit, as a matter of its sovereign prerogative. *See* Aiello.Br.43-44. Indeed, some States freely permit their officials to appear in matters before state government as soon as they leave office, *see* Aiello.Br.44 n.6, and nothing in § 1346 suggests Congress intended to interfere with those decisions.

In any event, even if Percoco breached some ethics law in making his phone call to the Executive Chamber, that was not within the scope of the alleged conspiratorial agreement. The LPA issue was pending before a state agency, not the Executive Chamber, and Aiello requested Percoco's assistance after receiving an ethics opinion stating that New York law permitted Percoco to "engage in backroom services for com-

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employee of the City of Syracuse. He resigned and entered a consulting agreement with the city specifically to circumvent the penal sanction, but the court saw through that "subterfuge." *Id.* at 510.

pensation before a state agency" as soon as he left office. JA593. After receiving that opinion, Aiello retained Percoco "to help [COR] with this issue" and "advocate with regard to labor issues" for a "few months." JA594. The government does not contest that there was zero evidence that Aiello knew who Percoco would call—let alone that he would place a call to someone other than the agency itself—or that Percoco might transgress state ethics laws in assisting COR.

II. THE "FUTURE OFFICIAL" THEORY ALSO FAILS

1. The government's alternative argument—that a person who "has been selected to work for the government" has a fiduciary duty to the public under § 1346 (Govt.Br.25)—fares no better. Even if this "future official" concept had legal merit, it provides no basis for affirmance, because it was not charged in the indictment, found by the petit jury, or ruled upon by the Second Circuit.

The indictment does not allege that the source of Percoco's supposed fiduciary duty was his anticipated return to government. Nor did the government make such an argument to the jury. Instead, the government argued that Percoco was a public fiduciary while serving on Governor Cuomo's reelection campaign because of his interactions with those in government at that time, not because he later returned to state government. *See*, *e.g.*, C.A.App.649 ("The evidence that he continued to exercise official power *during the campaign* is overwhelming.") (emphasis added). Accordingly, the jury was instructed to decide whether Percoco owed a duty to the public based on "whether he dominated and controlled" others and whether they

"relied on him" when he was *out of* government. JA511. The jury was never instructed that it could find that Percoco owed a fiduciary duty to the public based upon his potential *future* employment in the Governor's office. Indeed, the government implicitly concedes that the jury made no such finding. Govt.Br.16, 33.

Accordingly, this Court cannot affirm the convictions based on the government's "future official" theory, because it was "not presented to the jury." *Chiarella*, 445 U.S. at 236; *accord Rewis v. United States*, 401 U.S. 808, 814 (1971). A "defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury." *Id.*; *see also McNally v. United States*, 483 U.S. 350, 361 (1987) (Court cannot affirm on a basis for which "there was nothing in the jury charge that required such a finding").

2. The government's "future official" theory does not apply to this case for other reasons too.

First, as Percoco explains and the government concedes, any honest-services fraud scheme or conspiracy was complete in July 2014, when Aiello decided to retain Percoco to help COR with the LPA issue. Percoco.Reply.18; Govt.Br.26. Yet Percoco did not decide until later, in August or September 2014, to return to government following the election.

Govt.Br.29. In other words, Percoco had not been "selected" to be a public official, and thus was not a "future official," at the relevant time—when the agreement was reached in July 2014. Indeed, at that time, Aiello specifically requested that "Joe P … help us with this issue *while he is off the 2nd floor working on the Campaign*" "over the next few months"—not after any potential return to state government. JA594.

Second, even if Percoco had already decided to return to office by the time he was paid, there is no evidence Aiello had any inkling of any such decision. The government downplays the period after Percoco left the Governor's office and was working on the campaign as a "temporar[]y" respite or brief "hiatus." Govt.Br.3, 4, 19, 28, 33. But when Percoco formally resigned in April 2014, he told people he was leaving and "not coming back." *E.g.*, JA201. The government says Percoco informed "others" of his plans to return (Govt.Br.29), but conspicuously fails to mention Aiello—because Aiello had no idea there were any such plans.

The "longstanding presumption" in criminal law is that a person cannot be convicted unless the jury finds he knew "the crucial element separating legal innocence from wrongful conduct." *Ruan v. United States*, 142 S. Ct. 2370, 2377-78 (2022) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)). Aiello's conviction cannot stand under a "future official" theory because he did not know the key fact—that Percoco was a future official—necessary under that theory to make his conduct unlawful. Thus, he could not have conspired with Percoco to violate the honest-services statute. *See also* Percoco.Reply.18-19.

Third, as Percoco explains, to the extent one can violate § 1346 by paying a "future official," the payment must be in exchange for official action *by the payee once he or she is actually in office*. Percoco.Reply.19-21. But the arrangement between Aiello and Percoco was for Percoco to help COR only for a "few months" while he was "off the 2nd floor working on the Campaign," JA594, not after any subsequent potential return to office. As the Second Circuit's opinion makes clear, the jury found "that the payments to Percoco were made to procure his assistance in pressuring ESD to reverse its position on the need for a[n LPA]," JA661, not for future acts if and when Percoco returned to office.

III. THE DEFENDANTS ARE ENTITLED TO ACQUITTAL

The convictions in this case were procured on the premise that Percoco continued to owe the public a duty of honest services after he left office, such that paying for his help with the LPA was a bribe. As explained, that theory is legally invalid, because it is unsupported by § 1346 and this Court's caselaw and would create serious constitutional problems. Likewise, the government's alternative "future official" theory fails because it was not presented to the jury, and because the evidence at trial was insufficient to support it anyway.

In these circumstances, the convictions must be reversed, and a retrial is constitutionally barred because the evidence was insufficient to establish an honest-services fraud conspiracy under any valid theory. The Double Jeopardy Clause precludes "af-

ford[ing] the government an opportunity for the proverbial 'second bite at the apple.'" *Burks v. United States*, 437 U.S. 1, 17 (1978). Instead, "the only 'just' remedy available … is the direction of a judgment of acquittal." *Id.* at 18.

CONCLUSION

This Court should reverse the decision below and remand the case with instructions to enter a judgment of acquittal on Count Ten.

Respectfully submitted,

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