

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH PERCOCO,)
) Petitioner,)
) v.) No. 21-1158
UNITED STATES,)
) Respondent.)

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JOSEPH PERCOCO,)

Petitioner,)

v.) No. 21-1158

UNITED STATES,)

Respondent.)

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Washington, D.C.

Monday, November 28, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

JACOB M. ROTH, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

NICOLE F. REAVES, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-1158, Percoco versus United States.

Mr. Roth.

ORAL ARGUMENT OF JACOB M. ROTH

ON BEHALF OF THE PETITIONER

MR. ROTH: Mr. Chief Justice, and may it please the Court:

Bribery presupposes an agent who exercises some authority on behalf of a principal. The agent is forbidden to trade that power for private gain. A public official is an agent of the public and, therefore, violates the bribery laws if he sells his official authority.

This concept is fundamentally inapplicable to someone who is not a public official, someone who is not an agent of the public and has no official authority to sell.

At all relevant times, Petitioner here was a private citizen. He took no oath of public office. He received no salary from the public fisc. He possessed no legal authority to bind the state or make decisions for it.

1 What he did have, like many lobbyists
2 and donors and interest groups and others, was
3 influence, in his case, influence drawn from
4 years of public service, from a close
5 relationship to the Cuomo family, and from his
6 senior campaign role.

7 But none of that creates a fiduciary
8 duty to the public. None of it entrusts
9 official power to exercise on the public's
10 behalf. And so none of it can be the predicate
11 for a bribery conviction.

12 By trying to stretch Section 1346 to
13 prohibit the sale of influence, the government
14 also contradicts this Court's decision in
15 Skilling, which saved the statute from a due
16 process challenge only by narrowing it to its
17 core and excluding novel outlier theories.

18 And by pressing this influence theory
19 in particular, the government strolls recklessly
20 into a constitutional minefield. Judge Winter
21 was right to call the government's theory a
22 catch-all political crime which has no use but
23 misuse. This Court should reject that theory
24 and reverse the decision below.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Counsel, let's assume
2 that Petitioner did not resign much more than,
3 say, one afternoon and then engaged in this
4 conduct. Do you think you would still be able
5 to make the exact same argument?

6 MR. ROTH: I don't think it would be
7 the exact same argument, Your Honor, because I
8 think, if it were that short a period of time,
9 it's very likely that the government would be
10 able to show that the agreement contemplated the
11 use of official power upon his return to office,
12 right? If he was only out of office --

13 JUSTICE THOMAS: Well, couldn't you
14 make --

15 MR. ROTH: -- for a few hours --

16 JUSTICE THOMAS: -- that exact same
17 assumption here, even though the period is a bit
18 longer?

19 MR. ROTH: Well, Your Honor, the --
20 the most important response to that is that that
21 wasn't the government's theory in this case.
22 That wasn't the theory on which Percoco was
23 tried. It wasn't the theory of the jury
24 instructions. It wasn't the theory the Second
25 Circuit upheld.

1 I think the reason for that is
2 because, factually, it doesn't really work
3 because the agreement here was reached no later
4 than, everyone agrees, July of 2014. At that
5 point, even Percoco was not anticipating that he
6 would return to public service after the
7 campaign. And there's certainly no evidence in
8 the record to suggest that Aiello, the person
9 who paid him, believed that he would be
10 returning to public office.

11 In fact, the district court
12 specifically addressed this point at pages 549
13 to 550 of the JA in a post-trial order
14 addressing the Hobbs Act count, and the court
15 said, well, sure, you could have a theory of
16 Hobbs Act extortion if someone was threatening
17 to use their future powers upon return to
18 office, but that wasn't the theory here, and the
19 -- the evidence doesn't support it in this case.

20 So I -- I don't think that alternative
21 theory that we see in the government's brief can
22 -- can be a basis to affirm this conviction.

23 JUSTICE KAGAN: So, Mr. Roth, I
24 understand what you're saying, that the -- that
25 the government didn't prove the kind of facts

1 that Justice Thomas was indicating. But you're
2 asking us -- the theory of your case is
3 basically, as long as he wasn't in public
4 office, you can't charge him under this statute.

5 And I think, you know, if we put aside
6 the facts of this case and test that theory,
7 Justice Thomas's hypothetical, I mean, you can
8 spin lots of different versions on it, you know,
9 or -- up to the point where a public official
10 just, like, resigns his office every time he
11 wants to take a bribe and then picks up his
12 office again when he's completed the bribe.

13 And there has to be something wrong
14 with that. But your theory would suggest that
15 you can't prosecute that public official under
16 this statute. So how are we going to adjust
17 your theory so that you can prosecute that
18 public official under this statute?

19 MR. ROTH: Right. Your Honor, I think
20 that that doesn't quite capture our theory. Our
21 theory is there needs to be a nexus to official
22 power. That needs to be what the deal
23 contemplates, that you are selling your official
24 power. It can be official power you have right
25 now. It could be official power that you expect

1 to have tomorrow or next week. But the
2 agreement has to call for that use of official
3 power because that's the basis for the fiduciary
4 relationship. The -- the defendant has to owe a
5 fiduciary duty to the public. He owes that duty
6 when he is exercising some power in a
7 representative capacity.

8 JUSTICE KAGAN: But, as I understood
9 your theory, you're suggesting that official
10 power can only arise when he has the formal
11 trappings of an office, when he, you know, is
12 being paid by the government.

13 And -- and, you know, official power,
14 I'm going to suggest, is a little bit more fluid
15 than that. And, you know, in the kind of scheme
16 the -- which is a scheme of circumvention that I
17 was suggesting, it's like, well, he's not being
18 paid by the government anymore and he's not
19 formally, you know, on the books as a government
20 employee, but everybody knows that -- you know,
21 what's going on here and -- and that he is
22 exercising official power, even though not tied
23 to a -- an official position.

24 MR. ROTH: Your Honor, I think you
25 could be exercising official power, number one,

1 as an official; number two, as an employee;
2 number three -- and maybe this is what Your
3 Honor's question was getting at -- as an agent.
4 So you could have perhaps a situation where
5 somebody is delegated official power as an agent
6 even though it was sort of off the books, right?
7 That would -- but that would still require an
8 agency relationship to exist between the
9 defendant and the state.

10 JUSTICE BARRETT: Mr. Roth -- oh,
11 sorry. Go ahead. I thought you were done.

12 MR. ROTH: I -- I -- I just want to --
13 the -- that's not their theory here. So they --
14 the government is not making a -- any type of
15 agency argument. In fact, their whole brief in
16 this Court is about how you supposedly don't
17 need an agency relationship. And I -- I would
18 suggest, without an agency relationship, there
19 -- the whole concept of bribery really doesn't
20 make any sense because you need to be acting in
21 that representative capacity in order for the
22 bribe to have the opportunity to corrupt the
23 principal/agent relationship. That's what
24 corruption is all about.

25 JUSTICE ALITO: What do you think --

1 JUSTICE BARRETT: Can I -- oh, sorry.
2 Go ahead.

3 JUSTICE ALITO: What do you think
4 needs to be shown to establish an agency
5 relationship? Let me give you this example.

6 Suppose there is a situation in which
7 the person who formally holds official power
8 doesn't exercise it and everybody knows that.
9 So suppose it's a -- a popular governor who
10 cannot run for reelection again, but the spouse
11 of the governor runs, and everybody knows that
12 the former governor is really the one pulling
13 the strings. Everybody knows that. And if
14 anybody asks the person who is -- holds the
15 office as a formal matter, that person will say
16 don't bother me with this, just ask my spouse.

17 Would that be -- would that person be
18 -- could that person be convicted under the
19 statute?

20 MR. ROTH: Your Honor, I think that
21 there's room to have a disagreement about what
22 level of -- of evidence would allow a jury to
23 infer an agency relationship. And maybe on
24 those facts, I think a jury potentially could
25 say, look, in that situation, the spouse has

1 assumed the role of an agent. She understands
2 that. He understands that. Everyone else
3 understands that. And he -- and she really is
4 exercising the power as an agent.

5 However, in this case, we know the
6 government cannot be relying on an agency theory
7 because the government had a count that depended
8 on agency. Section 666 on its face says agency,
9 and the jury acquitted Percoco on that count.

10 JUSTICE ALITO: Well, I -- I
11 understand that, although I -- I don't know
12 whether it's necessary for a jury's verdict on
13 all counts to be consistent, that you have to
14 read them as being consistent, but putting the
15 -- the facts of the case aside, and, of course,
16 I know that's what's all important to you, but
17 we need to articulate the correct legal
18 principle.

19 MR. ROTH: Right.

20 JUSTICE ALITO: And I thought your
21 argument was that we should draw a bright line,
22 either you have the formal power or you don't.
23 You've taken the oath of office. You're in
24 office. If you haven't done that, you can't be
25 convicted.

1 But now you seem to be buying into at
2 least some aspects of the Second Circuit's idea
3 that someone can be functionally an official.

4 MR. ROTH: Your Honor, I -- I think
5 we've always said official employee or agent.
6 But the key point is that even an agent has been
7 delegated authority to act on behalf of the
8 principal. It may be not through a written
9 contract. It may be not through holding an
10 office. But there is a delegation when you have
11 an agency relationship. And I don't think we've
12 ever suggested that that's not enough.

13 But that's not what the Second
14 Circuit's decision is all about. Second
15 Circuit's decision is about reliance and
16 control, which is not about delegating power.
17 It's about exercising influence. And that
18 doesn't distinguish a situation like our case
19 from a really influential lobbyist or a top
20 donor.

21 CHIEF JUSTICE ROBERTS: Well, I -- I
22 understand. And -- and Justice Alito made the
23 point you're -- you want to win your case, which
24 is -- which is good. But is an agency
25 relationship a question for -- a fact for the

1 jury to determine?

2 MR. ROTH: Well, Your Honor, under the
3 666 count, it was put to the jury to determine
4 is there an agency relationship. Of course, as
5 in any case, you could have facts that don't
6 rise to the level of triggering a -- a jury
7 question, and then there would be entitlement to
8 acquittal.

9 But, in -- on -- in this case, on
10 these facts, the agency question was put to the
11 jury in the context of Section 666.

12 CHIEF JUSTICE ROBERTS: You -- and you
13 think that -- and you think that was
14 appropriate?

15 MR. ROTH: Well, we -- I -- I think --
16 I -- I'm not sure, Your Honor, but given that it
17 was put to the jury and the jury acquitted, I'm
18 not saying that the -- the verdicts necessarily
19 have to be consistent, but I think it does
20 explain why the government is making the
21 argument that it's making here, which is not to
22 say, oh, you can infer an informal agency
23 relationship. Percoco actually held official
24 power that was delegated by the governor.
25 That's not what they're saying.

1 They're saying people in the office
2 listened to him because of his political
3 influence, because of his relationship to the
4 governor, because they cared what he had to say
5 for all those reasons, and that that reliance
6 alone somehow creates a fiduciary duty.

7 But it -- it doesn't, not as a matter
8 of sort of common law background principles,
9 and, certainly, under Skilling, which said, you
10 know, we're narrowing the statute to the core,
11 to bribery. And to figure out what bribery
12 means, we can look at other federal bribery
13 statutes, like Section 666, like Section 201.
14 Well, this theory doesn't fit under any of those
15 alternative set-asides.

16 JUSTICE KAGAN: Well, just thinking
17 about this kind of case, and it -- you know,
18 it's a common thing where a very high-level
19 public official goes off the government payroll
20 and on to the campaign payroll, only to come
21 back on again after one hopes the -- you know,
22 the -- he hopes the -- the -- the public
23 official wins reelection.

24 And so, you know, suppose that
25 there's, you know, an informal, in your words,

1 but clear understanding that even as he goes on
2 to the campaign payroll, he's going to continue
3 to do government functions. So, you know, he's
4 not -- you know, he's not called the executive
5 secretary anymore, but there's no other
6 executive secretary around, and he has the trust
7 of the governor.

8 And -- and you can argue with me on
9 the facts, and you can say that's not this case.
10 You know, all he was doing was he -- all the
11 government proved was he did, like, a few
12 isolated things.

13 But suppose another case where, in
14 fact, he's -- he's basically now just doing two
15 jobs. What happens there?

16 MR. ROTH: Your Honor, I think that if
17 the government wanted to prosecute that -- those
18 facts, they would have to proceed under an
19 agency theory, and they would have to convince
20 the jury there was an agency relationship formed
21 and, yes, he's not on the books anymore, but he
22 was delegated official power, he's exercising
23 official power, not just that people are
24 listening to him, but they actually understand
25 and he understands that he is holding this

1 authority as a representative of the public,
2 notwithstanding his title. You would have to
3 proceed under that sort of agency theory.

4 I -- there aren't a lot of cases like
5 that, and I think it's sort of unusual to find,
6 but -- but I think that's how they would have to
7 prosecute it.

8 Now I understand Your Honor's sort of
9 point about this is common, people go work on
10 that campaign, they come back, and I would
11 suggest that's sort of the perfect situation
12 where you could imagine a state ethics rule that
13 says, if you've left office and you're a --
14 you're working in a campaign capacity, you know,
15 we're going to have a -- some sort of
16 cooling-off period or we're going to have some
17 sort of categorical rule that we don't want you
18 to be involved in advocacy activity or lobbying
19 during that period because of the perception
20 that you still have residual influence or
21 something like that.

22 That would be fine, but it's not --
23 it's not bribery. It's not bribery because that
24 person -- it -- at least in the absence of an
25 agency relationship, that person doesn't -- is

1 not representing anyone else and doesn't have a
2 fiduciary duty to anyone else other than his new
3 employer.

4 JUSTICE JACKSON: But we have a
5 statute, 201, that addresses bribery in the
6 federal context, and you mentioned a few minutes
7 ago that you thought this scenario really didn't
8 fit that statute.

9 MR. ROTH: Right.

10 JUSTICE JACKSON: So can you say more?

11 MR. ROTH: Yeah.

12 JUSTICE JACKSON: And -- and, in
13 particular, the statute contains a definition of
14 public official that seems to contemplate
15 someone who has been informed that they will be
16 nominated or appointed, but they don't
17 currently --

18 MR. ROTH: Right.

19 JUSTICE JACKSON: -- hold the
20 position.

21 MR. ROTH: Right. Sure, Your Honor.
22 Let -- let me actually make two points about
23 Section 201.

24 Okay. So, first, dealing with the
25 government's principal theory of functional

1 official exercising the functions of the office,
2 they point to Dixson as sort of the -- the --
3 the key case under Section 201. And I think
4 it's fair to characterize Dixson as sort of the
5 high watermark of Section 201.

6 But the facts of Dixson are so
7 dramatically different from this case that I
8 think it sort of proves our point that
9 Section 201 doesn't allow for this theory.
10 Dixson involved a nonprofit organization that
11 had been formally delegated the authority to
12 make spending decisions under a federal spending
13 program.

14 And this Court said they were -- you
15 know, the Act vested those -- the employees of
16 the nonprofit with legal authority to make the
17 decisions. The Court emphasized the official
18 nature of their duties. It was indirect, but
19 they were -- those individuals were authorized
20 to make those federal spending decisions.

21 So not -- not surprising they would be
22 considered public officials. That doesn't get
23 you anywhere close to the reliance-and-control
24 theory of Margiotta and the decision below.

25 Now the government also invokes

1 Section 201 for their alternative future
2 official theory, which Your Honor's question
3 focused on that language in the statute, and --
4 and we don't have any issue with that either,
5 but, as I was saying earlier, if the theory is
6 that you have sold your future powers because
7 you've been identified as someone who is going
8 to assume office, you haven't done it yet, but
9 you know you're getting that authority in some
10 fixed period of time, the agreement -- the
11 bribery agreement then has to contemplate that
12 you are going to use those powers, that official
13 authority, for private gain.

14 JUSTICE JACKSON: But why isn't that
15 Justice Kagan's scenario? You know, you just
16 got out of office. You're a part of the
17 campaign to get the official for whom you've
18 been working --

19 MR. ROTH: Yeah.

20 JUSTICE JACKSON: -- reelected. And
21 it's sort of the assumption is that you will be
22 returning to the government post because you're,
23 you know, part of the machinery of getting that
24 person back into office.

25 Why in that window of time don't we

1 have the future government official scenario?

2 MR. ROTH: Your Honor, depending on --
3 on the facts, you may well have a scenario that
4 would allow the government to prosecute on that
5 theory. My point is just you need to have that
6 nexus to the sale of -- of future powers.

7 So the agreement itself, the bribery
8 agreement between the person who is temporarily
9 out of office and the payor, has to call for:
10 Hey, you're going to take office again. When
11 you do, you're going to help me in some fashion
12 or another exercising your official power.

13 Our point is just that wasn't the
14 theory here. That wasn't the jury instruction
15 here. And, factually, it doesn't really make a
16 lot of sense here because, at the time of the
17 agreement, they actually were not anticipating
18 that Percoco would return. He had told people
19 he has to go make money in the private sector.
20 He's not coming back. He later changed his
21 mind.

22 But, at the time of the agreement,
23 which is the key moment -- remember, this is a
24 conspiracy count, so it all comes down to the
25 agreement between Percoco and Aiello. At that

1 moment, neither side was anticipating a return
2 to office. And, you know, the key e-mail that
3 actually initiated this arrangement is where
4 Aiello says, you know, can he help us "while he
5 is off the second floor working on the
6 campaign?" That's at JA 594.

7 So, in fact, the whole point of the
8 deal, as the district court recognized, was that
9 they wanted to use his unofficial influence
10 while he was out of office, not that they wanted
11 him to help through official channels once he
12 had returned later, which they didn't anticipate
13 at the time.

14 JUSTICE BARRETT: Mr. Roth, can I ask
15 you a question about Justice Kagan's
16 hypothetical about the manipulative public
17 official who goes in and out of office for an
18 afternoon to peddle influence?

19 Could you say in that case, maybe
20 because such manipulation obviously would be a
21 problem, that that is a breach of the duty of
22 honest services to manipulate in that manner?
23 You know, you owe a duty to the public at 8:00
24 that morning when you're a public official, and
25 if you go out of office, you're breaching your

1 duty of honest services because you're doing it
2 to the end of circumventing the prohibition on
3 sale of honest services, and, you know, by
4 extension here, there was no fiduciary duty owed
5 because, as you would say, those facts are not
6 present.

7 MR. ROTH: Your Honor, I -- I would --
8 I would frame it a little differently. It -- to
9 me, the -- the key question is, when that person
10 leaves office and makes some deal, okay, what
11 does the deal call for him to do?

12 If the deal anticipates that he's --
13 he's going back tomorrow, we all know that, and
14 when he goes back, we want him to tell his
15 subordinates, you know, make this decision or
16 hire this person or give this contract, then,
17 sure, he -- he --

18 JUSTICE BARRETT: No, he does it in
19 the window. It's not -- it's not an incoming
20 public official or someone who is going to sell
21 future influence. It's something he does in the
22 present.

23 MR. ROTH: If -- if it's all happening
24 in a period when he is out of office and holds
25 no official authority, I would resist the idea

1 that that violates this statute.

2 JUSTICE BARRETT: So you're asking for
3 a bright line even if it leads to the situation
4 Justice Kagan hypothesizes?

5 MR. ROTH: Well, I -- I -- I think, in
6 practice, most of -- the real concern of that
7 hypothetical is the situation where somebody is
8 coming back and is going to be using official
9 power. If the power that's -- if -- if what the
10 arrangement calls for is simply the use of
11 unofficial influence during the interregnum, I
12 don't think that's different in a meaningful way
13 from anyone else who might have substantial
14 influence over government decision-making,
15 whether that's, you know, the official's family
16 member or the most important donor to the
17 campaign, and everyone in the office knows, you
18 know, we really need to keep that person happy.

19 I mean, there are all sorts of
20 examples where private citizens are active
21 participants in the political process and have
22 unofficial influence over government
23 decision-making, but that doesn't create a
24 fiduciary duty to the public.

25 JUSTICE GORSUCH: Well -- well, I

1 guess I -- I want to explore that just a little
2 bit further. That -- that was one of the
3 criticisms, of course, of the dissent in
4 Skilling, was that if you allow fiduciary duty
5 to do this kind of work, if we write that into
6 the statute, the concept of fiduciary duty or
7 agency is nearly boundless, and so you -- you --
8 you might have lobbyists who you might say owe a
9 fiduciary duty or spouses, to use Justice
10 Alito's example.

11 And I guess I'm wondering what the
12 limiting principle is. If it isn't -- if we
13 were to reject your bright-line test of -- of
14 selling services while in office, what would you
15 have us do? I mean, is the statute
16 constitutional in those circumstances, or is
17 there some constitutional applications we could
18 still save or -- or what?

19 MR. ROTH: Well, Your Honor, I think
20 that the way Skilling intended to address that
21 problem was to say, look, in most core bribery
22 cases, we're dealing with a fixed set of
23 fiduciary obligations that are known --

24 JUSTICE GORSUCH: I accept that,
25 right. I think Skilling took the -- the core

1 and tried to preserve it.

2 MR. ROTH: Yeah.

3 JUSTICE GORSUCH: And that might be
4 the in-office argument, I -- your bright line.
5 I -- I understand that. But, if the Court were
6 to go beyond that, is there any stopping point?
7 Is this statute cover all lobbying potentially?

8 MR. ROTH: Well, Your Honor, I think
9 that is the problem with the Second Circuit's
10 approach and with reading sort of the idea of
11 fiduciary very broadly, is, you know, where --
12 where does it end? And I haven't seen a good
13 explanation for why the government's theory here
14 and the Margiotta theory would not cover the
15 really influential lobbyist. Maybe somebody who
16 used to be chief of staff in the office has
17 left, still knows everybody there, still can
18 pick up the phone and get things done, as they
19 said about Percoco. You know, why would that
20 not be enough?

21 And I think that's a major problem.
22 It's a problem from a due process standpoint
23 because of the indeterminacy. And it's a
24 problem from a First Amendment standpoint
25 because lobbying is constitutionally protected

1 conduct. We're talking about petitioning the
2 government for redress of grievances, and when
3 you're chilling that type of conduct, that's a
4 -- that's a major problem.

5 JUSTICE ALITO: Well, now you're back
6 to your -- the argument I thought you were going
7 to make when you -- when you stood up. And you
8 -- you've marched away from the concession that
9 there could be somebody who could be convicted
10 based on a theory of agency.

11 MR. ROTH: But -- but, Your Honor, I
12 don't think agency presents the same concerns.

13 First of all, we have a long history
14 and well-established rules about what
15 constitutes an agency relationship.

16 Number two, we have Section 666, which
17 already embraces the -- the agency line. And we
18 haven't really seen, I would say that, these
19 kind of problems with that.

20 I think agency is a meaningful
21 constraint. Everyone understands an agent owes
22 fiduciary duties to a principal. Once you get
23 beyond that, though, then I -- we start to
24 worry, I think, about the lack of limiting
25 principles.

1 JUSTICE ALITO: Okay. Well, if an
2 agency relationship is enough and you don't need
3 a formal contract delegating authority to the
4 agent, I -- I guess the next step is that it's
5 possible to infer from circumstances, the
6 behavior of the parties, that this individual
7 is, in fact, an agent of the office holder,
8 right?

9 MR. ROTH: Yes, you could imagine a
10 situation where -- where it's in -- where it's
11 inferred. And, again, we can have a -- a -- we
12 can have a discussion about where -- you know,
13 how much evidence is enough to allow the jury to
14 draw that conclusion and draw that inference.

15 We don't have to do that in this case
16 because that's not their theory, and I think
17 we've talked about why -- why that's not their
18 theory, because of the -- the adverse jury
19 verdict on Section 666.

20 JUSTICE ALITO: Well, I don't know
21 about the adverse jury verdict because, if we
22 were to -- if the question is a sufficiency of
23 the evidence -- if the evidence is sufficient to
24 establish an agency relationship, then that's --
25 that's a -- that -- you know, the fact that the

1 jury found no agency relationship under another
2 count, that doesn't matter, right?

3 MR. ROTH: Fair -- fair enough, Your
4 Honor, but that still leaves the point that they
5 haven't -- they haven't argued that. And --
6 and, again, if you go through their brief and do
7 a search for the word "agency," it comes up a
8 bunch of times where they say you don't need to
9 have an agency relationship, you don't need to
10 have -- so that's their test. That test is
11 wrong. If that test is wrong, Count 10 has to
12 be reversed. And whether an agency theory would
13 work in some other case is -- is really not
14 before the Court at this point.

15 JUSTICE SOTOMAYOR: Two questions.
16 This does sound to me like 201, which is what
17 Justice Jackson said, if we have in other
18 situations, including in Dixson and -- not in
19 Dixson -- in Skilling -- I believe it was
20 Skilling -- said that we borrow from the
21 concepts of 201. So that's what you're doing
22 here, correct?

23 MR. ROTH: I think we're borrowing
24 from both 666 and 201 at least to the extent
25 that they overlap. But I would say we --

1 JUSTICE SOTOMAYOR: So, basically, you
2 accept that you can be either an agent or have
3 been formally delegated authority from the
4 government, correct?

5 MR. ROTH: Yes. Yes.

6 JUSTICE SOTOMAYOR: And you accept the
7 future public official, meaning you don't have
8 to be an official today as long as you're taking
9 money to perform an act in the future?

10 MR. ROTH: Correct, Your Honor.

11 JUSTICE SOTOMAYOR: All right. Having
12 said --

13 CHIEF JUSTICE ROBERTS: Thank you --

14 JUSTICE SOTOMAYOR: -- all of that --
15 I'm sorry.

16 CHIEF JUSTICE ROBERTS: No, go ahead.

17 JUSTICE SOTOMAYOR: What if we agree
18 with you? And I think the government has agreed
19 that the instruction here based on Second
20 Circuit case law was wrong, okay? Do we vacate?
21 Do we reverse and order judgment for your
22 client? Or do we remand to let the court below
23 decide whether they get a second bite at the
24 apple or -- what do we do?

25 MR. ROTH: That's a good question,

1 Your Honor. I -- I think, on Count 10, the
2 right course is to reverse and direct acquittal
3 because the only argument they've made on Count
4 10 is to defend the Second Circuit's theory, and
5 -- and that doesn't work.

6 I think, with respect to the other
7 counts, that's an issue for remand because we do
8 have concerns about spillover from Count 10.
9 And so I think, there, it would be remanded to
10 the Second Circuit to take a closer look at the
11 impact on -- on those counts. That would be
12 what I would suggest.

13 JUSTICE SOTOMAYOR: They -- well, they
14 are not defending Margiotta. They're defending
15 --

16 MR. ROTH: Well --

17 JUSTICE SOTOMAYOR: -- a different
18 theory.

19 MR. ROTH: -- they -- they say they're
20 not defending --

21 JUSTICE SOTOMAYOR: That's why I'm a
22 little confused.

23 MR. ROTH: Sorry. They say they're
24 not defending Margiotta. I -- I'm not sure what
25 the difference is between what they're saying,

1 functional official, and Margiotta. They sound
2 the same to me. I haven't been able to figure
3 out the difference. So I think that theory
4 doesn't work.

5 The -- the -- you're right, Your
6 Honor, they do talk about the future official
7 theory, but the district court has already
8 rejected that. Again, if you look at pages 549
9 to 550, the district court's already said that
10 theory doesn't work. It wasn't the theory he
11 was tried on. It wasn't the theory supported by
12 the evidence.

13 So I don't think that theory would
14 warrant a remand for a new trial because I don't
15 think it's been properly preserved or supported
16 by the evidence, as the district court's already
17 explained.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. ROTH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas?

24 Justice Alito, anything further?

25 Justice Barrett?

1 Justice Jackson, anything further?

2 MR. ROTH: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Reaves.

6 ORAL ARGUMENT OF NICOLE F. REAVES

7 ON BEHALF OF THE RESPONDENT

8 MS. REAVES: Mr. Chief Justice, and
9 may it please the Court:

10 Petitioner's theory of this case would
11 require this Court to reverse course in numerous
12 ways. He would limit Dixson in a manner
13 unsupported by that decision or the text of
14 Section 201.

15 He would have this Court backtrack
16 from Skilling's instruction to look at
17 Section 666 and Section 201 when interpreting
18 the honest services fraud statute.

19 And he would have this Court limit
20 prosecutions that Congress intended to cover
21 when it adopted Section 1346. In that
22 provision, Congress reinstated the honest
23 services fraud doctrine that had developed
24 before McNally.

25 McNally itself noted that the doctrine

1 provided that an individual without formal
2 office may be held to be a public fiduciary if
3 others rely on him because of a special
4 relationship with the government and he, in
5 fact, makes governmental decisions.

6 But perhaps most troubling,
7 Petitioner's approach, at least as laid out in
8 his briefing, would permit individuals who
9 function as government officials to accept
10 bribes and kickbacks. His rule would allow an
11 individual to formally leave government for a
12 single day, accept a bribe in exchange for
13 ordering government employees to take official
14 action, and return to formal employment without
15 penalty.

16 His rule would also allow someone
17 nominated to a Cabinet position to accept a
18 bribe in exchange for instructing the agency he
19 is about to lead to withdraw pending
20 regulations. And his rule would likewise permit
21 Petitioner's conduct.

22 Although Petitioner asserts that his
23 conviction is solely premised on him being an
24 influential lobbyist, that argument is based on
25 a caricature of both the government's proposed

1 legal framework and the facts of this case.

2 While functioning as a government
3 official and after he had decided to return to
4 formal government employment, Petitioner
5 accepted multiple bribes in exchange for
6 commanding a government agency to reverse a
7 final decision.

8 The relevant agreement occurred after
9 August 6, which was the time that Petitioner
10 indicated that he was returning to government.
11 That was a violation of his duty of honest
12 services as this Court has always understood
13 that duty.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Counsel, what is
16 curious about this case is that the State of New
17 York doesn't seem to be upset about this
18 arrangement.

19 MS. REAVES: Justice Thomas, I'm not
20 sure that the fact that New York hasn't
21 prosecuted him, particularly when there has been
22 a federal prosecution, suggests that the State
23 of New York finds any problem with what he did.

24 And, as indicated in our brief, New
25 York public law appears in -- in two different

1 places. Both its ethics law and its public
2 servant law appears to prohibit Petitioner's
3 conduct. Its bribery statute closely tracks the
4 language of Section 201, which indicates that he
5 did commit bribery under state law as well even
6 if the state decided not to prosecute him.

7 JUSTICE THOMAS: But doesn't that work
8 against you? It suggests that if New York
9 actually wanted to prosecute it -- this
10 activity, it had the authority to do so and the
11 statutory basis for it.

12 MS. REAVES: That a state could
13 prosecute someone for a federal crime doesn't
14 suggest that the federal statute isn't valid.

15 JUSTICE THOMAS: No, that's -- I don't
16 think that's the problem that -- that I'm
17 pointing to. Rather, that it's rather odd that
18 this broad federal prosecution is taking place
19 under what some have termed a cat -- termed a
20 catch-all provision is being used rather than
21 the specific state law that you suggested.

22 MS. REAVES: Again, I don't think that
23 this Court has ever suggested that the existence
24 of potentially overlapping federal and state
25 statutes, even if one is broader than the other,

1 means that we shouldn't -- that the Court
2 shouldn't interpret the federal statute to the
3 full extent --

4 JUSTICE THOMAS: No, it's -- I think
5 my point is rather that it seems as though we
6 are using a federal law to impose ethical
7 standards on state activity.

8 MS. REAVES: I think that was always
9 part of what Section 1346 was intended to cover.
10 The development of the honest services fraud
11 doctrine started in the 1940s. And this Court
12 stopped that with McNally in the 1980s. And
13 Congress reinstated that doctrine by using this
14 text.

15 And, as this Court noted in Skilling,
16 most of the prosecutions that occurred under the
17 pre-McNally theory were of public officials. So
18 I don't --

19 JUSTICE THOMAS: But isn't it curious
20 -- under that, could you give me the specific
21 elements of a -- a violation of -- of -- of
22 1346?

23 MS. REAVES: So the individual needs
24 to have engaged in a scheme to violate fiduciary
25 or honest services duties. The individual also

1 needs to have had the appropriate mens rea,
2 which is knowledge, willfulness, and a specific
3 intent to defraud, the individual needs -- the
4 deception needs to have involved a material
5 fact, and the mails or interstate wires need to
6 be -- have been used in furtherance of the
7 fraud.

8 JUSTICE THOMAS: So now just -- let's
9 just take one of those, and -- and now -- I'll
10 stop, but let's just take fiduciary duty.

11 So how do you determine the contours
12 of that? Usually, in the -- in the civil
13 context, you have a trust agreement. You have
14 common law. You have some basis for determining
15 who is covered by fiduciary duties and what the
16 contours of those duties are.

17 How do we determine that in this case?

18 MS. REAVES: The Court has indicated
19 in -- in cases like Skilling that the
20 appropriate way to do that is to look at the
21 body of pre-McNally case law and to also look at
22 federal statutes defining similar duties, and
23 that -- here, that would be Section 201 and
24 Section 666.

25 And because Petitioner's conduct is

1 clearly covered at least by Section 201, this
2 case doesn't implicate sort of the outer bounds
3 of potential fiduciary duties or other duties
4 that might trigger an honest services fraud
5 prosecution.

6 CHIEF JUSTICE ROBERTS: Counsel, at
7 the beginning of your summary of argument, you
8 say that the Petitioner's covered by 1346
9 because he accepted bribes as a former, future,
10 and functional public official.

11 But, under your theory, I gather it
12 doesn't matter whether he was either former or
13 future, right? It's just a question of -- of
14 functional status in the -- in the abstract.

15 MS. REAVES: The primary theory in
16 this case has always been the functional status,
17 and, here, I think the facts that he was
18 formerly and about to become also support that.

19 CHIEF JUSTICE ROBERTS: Right, right.
20 I understand that. But you would not suggest
21 that the coverage under 1346 depends upon any
22 governmental employment relationship, right?

23 MS. REAVES: That's correct.

24 CHIEF JUSTICE ROBERTS: Okay. So give
25 me a short definition of what constitutes

1 functional when there's no former and there's no
2 future.

3 MS. REAVES: I think there are three
4 indicia that are helpful to look at when
5 determining whether someone's formally -- acting
6 functionally as a government employee.

7 The first is that there's approval and
8 acquiescence by others in the government to
9 treat him as a functional government employee;
10 the second, that he's able to command government
11 employees to take specific government acts; and
12 the third, that there -- is that there are some
13 additional indicia and trappings of a government
14 role.

15 CHIEF JUSTICE ROBERTS: So it sounds
16 like that's an effort to break down the concept
17 of -- of political power.

18 MS. REAVES: I don't think it is
19 because, if someone is merely influential, an
20 influential person can't order specific
21 government actors to take specific government
22 acts.

23 CHIEF JUSTICE ROBERTS: Yeah, but
24 the -- the things you just went through, they
25 don't require that. You said whether there's

1 acquiescence or whether someone follows the
2 authority. I mean, you know, that doesn't
3 require any official responsibilities.

4 MS. REAVES: So --

5 CHIEF JUSTICE ROBERTS: Right? They
6 just -- they go along with it.

7 MS. REAVES: I'd -- I disagree with
8 that. I think there needs -- the approval and
9 acquiescence inquiry suggests, as -- as we
10 argued in our brief, that both an individual's
11 supervisors and support -- subordinates need to
12 recognize that he's functionally a government
13 official. That's not the same as an individual
14 having influence over one particular member of
15 the government.

16 And I think the facts of this case are
17 actually pretty helpful when trying to look at
18 some of these things. When it comes to approval
19 and acquiescence, you know, Petitioner continued
20 to have access to the same meetings, the same
21 building, the same phone, the same secretary
22 that he had when he was formerly --

23 JUSTICE KAGAN: So, Ms. Reaves,
24 it's -- it strikes me that those are things that
25 insiders might know, very well, you know,

1 probably would know. The problem is that
2 outsiders don't really have any reason to know
3 those things, and an outsider can also be on the
4 hook under this statute, right, for doing the
5 paying.

6 But your test gives the outsider no
7 real notice, does it?

8 MS. REAVES: No, because the mens rea
9 requirement here and the mens rea requirement
10 that the jury was instructed on also applied to
11 outsiders like Aiello, and that required the
12 jury to find that everyone who was convicted
13 knowingly and willfully participated in the
14 scheme to defraud with knowledge of its
15 fraudulent nature, with a specific intent to
16 defraud, and that -- and that included specific
17 intent to deceive for the purpose of depriving
18 another of the intangible right of honest
19 services.

20 And the jury was also instructed that
21 good faith on the part of a defendant was a
22 complete defense. So the jury had to find that
23 even the outsiders who paid Petitioner here did,
24 in fact, have this requisite knowledge and
25 knowledge of his -- of him being official in

1 order to convict --

2 JUSTICE GORSUCH: On this --

3 MS. REAVES: -- the outsiders.

4 JUSTICE GORSUCH: -- on this
5 functional official test, you say it's a
6 three-part test, and I -- I guess I'm wondering
7 where that comes from. It's certainly not in
8 the text of 1346.

9 Do you have someplace you can point me
10 to in the law where that that would be an
11 appropriate basis for us to write that into the
12 statute?

13 MS. REAVES: Skilling indicated that
14 when we're looking at the text of 1346, it's
15 appropriate to look at things like 201, 666, and
16 this Court's cases and other cases that predate
17 McNally.

18 JUSTICE GORSUCH: I --

19 MS. REAVES: And --

20 JUSTICE GORSUCH: -- I understand
21 that, but the functional official test, you said
22 it's a distinct three-part test. Where -- where
23 is that in the law?

24 MS. REAVES: So I -- I think I
25 indicated that those were the sort of things --

1 the three things required to show that someone
2 was functionally a government official.

3 JUSTICE GORSUCH: Yeah. Where do they
4 come from, is my question.

5 MS. REAVES: I think from a couple of
6 places. One, they're inherent in the nature of
7 being a public official. It's the sort of
8 things we would look at to see whether someone
9 is, in fact, acting as a public official.

10 JUSTICE GORSUCH: The -- the brooding
11 omnipresence of the law.

12 (Laughter.)

13 MS. REAVES: And -- and, second, I
14 think, well, if you look at Dixson and its
15 interpretation of 201, the -- Dixson clearly
16 held that someone doesn't need to be formally a
17 public official or formally an agent. It --

18 JUSTICE BARRETT: But, in Dixson,
19 there was the exercise of official federal
20 responsibilities. I mean, that was part of what
21 the agency had agreed to. So I don't know that
22 Dixson gets you that far because we don't have
23 official state responsibilities here.

24 MS. REAVES: So two responses to that.

25 First, Dixson was very explicit that

1 no formal government agency employment or
2 delegation was required, and the individual
3 defendants in Dixson were just responsible for
4 administering federal funds.

5 Here, Petitioner actually did a lot
6 more than that. He made employment decisions
7 for the state and made decisions about how much
8 people would be making when they were employed.
9 So that's a funding decision. And he did so
10 with -- you may call -- it -- it would be an --
11 an informal approval of his superiors, but he
12 did so with approval of his superiors.

13 And there are a number of facts that
14 indicated it, that, as I mentioned, he had
15 access to a lot of different government meetings
16 and to his office. I think it's notable -- this
17 is on page 320 of the JA -- he attended an
18 internal government meeting while he was not
19 formally an employee, and that meeting was
20 called by Governor Cuomo, and Governor Cuomo was
21 present at that meeting, which indicates that
22 both his superiors and his inferiors were
23 treating him as actually wielding state
24 authority.

25 JUSTICE BARRETT: Well, given what you

1 just said, let me return to your point about the
2 mens rea requirement when Justice Kagan asked
3 you about that before.

4 Doesn't the knowledge requirement --
5 you said, well, the mens rea of the person on
6 the outside, the outsider has to know that they
7 were functioning as a public official. So
8 you've offered these indicia and this multipart
9 test. Justice Gorsuch has pressed you on
10 whether it come -- where it comes from.

11 But it seems to me then your -- your
12 mens rea and the protection of notice requires
13 the outsider to make that functional judgment.
14 How much is too much? Is he really -- you know,
15 did -- did they know that he went to the
16 internal government meeting you just referenced?
17 Isn't that a notice problem?

18 MS. REAVES: A -- a couple of
19 responses on that. First, I don't think
20 Aiello's conviction is directly at issue here,
21 as this Court didn't grant his cert petition,
22 which did tee up these notice-of-an-outsider
23 questions.

24 But just -- just setting that aside,
25 when it comes to the knowledge requirement that

1 was at issue in this case, the jury was
2 instructed that good faith was a complete
3 defense. So, if an outsider made a good faith
4 attempt to determine whether someone was
5 functionally a public official and made a
6 mistake, he could not be convicted under this
7 statute.

8 JUSTICE JACKSON: Can I ask you about
9 Sentencing Guideline 2.C.1.1? Are you familiar
10 with that?

11 MS. REAVES: Not at the moment, no.

12 JUSTICE JACKSON: No? Okay. Sorry.

13 MS. REAVES: But I -- I'll take it if
14 you read it to me.

15 JUSTICE JACKSON: Well, no. I -- I --
16 I'm focusing on the fact that that guideline
17 defines public official for the purpose of
18 public corruption in reference to 201, and it
19 seems to suggest that 201 does not cover de
20 facto government employees because it says that
21 a public official -- you know, it -- it puts in
22 one category public officials who are covered by
23 201, and then it says, if they're not otherwise
24 covered by 201, they are subject to the
25 guideline if they participate so substantially

1 in government operations as to possess de facto
2 authority to make a government decision.

3 So at least the Sentencing Commission
4 saw 201 officials as not including de facto
5 government employees.

6 MS. REAVES: So, as an initial matter,
7 you know, Petitioner is not directly covered by
8 201 because state employees are not directly
9 covered by 201. So you're not going to have a--
10 any conviction of a state officer under 201.

11 So that portion of the guideline that
12 you've referenced, the latter portion that
13 doesn't refer to 201, is going to cover
14 everyone, I would assume, who is a state or
15 local official who's prosecuted under 1346.

16 JUSTICE JACKSON: But is your position
17 that 201 should be referenced in relation to our
18 consideration of whether a functional government
19 official --

20 MS. REAVES: Yes, absolutely.

21 JUSTICE JACKSON: But, as Justice
22 Gorsuch was pointing out, the -- the statute in
23 201, its definition of public official doesn't
24 seem to have the three-part test or any
25 characteristics that you've described. It just

1 says if someone has been officially informed
2 that they will be nominated or appointed or if
3 they have been nominated or appointed.

4 MS. REAVES: And -- and it also
5 includes someone who's an officer, employee, or
6 person acting for or on behalf of the United
7 States. And that's the portion that the Court
8 was interpreting in Dixson, and that's the
9 portion that's most helpful when looking at
10 whether an individual is a functional government
11 employee.

12 Now, obviously, we also think that
13 Petitioner's conduct violated Section 1346 by
14 reference to 201 because he had been nominated
15 and appointed to be in the position that he --
16 he eventually took.

17 And I'd also just like to flag that we
18 disagree with Petitioner's view of the timeline
19 as to when he was selected to be a public
20 official. Petitioner has said that the corrupt
21 agreement occurred in July 2014. But the only
22 evidence Petitioner cites to that effect is that
23 Aiello sent an e-mail to Howe asking for help.

24 As to when Petitioner became involved
25 and when there was actually a corrupt agreement,

1 the first indication we have of that is when
2 Petitioner received the payments from COR
3 Development, and those occurred in mid-August
4 2014 and October 2014.

5 Those acts both occurred after
6 Petitioner filed the letter with his bank saying
7 that his employment post-election would be with
8 the Cuomo Administration.

9 JUSTICE ALITO: What do you say about
10 somebody who is a super-super-effective
11 lobbyist? So let's say this person is a
12 childhood friend of the person, the elected
13 public official. They played together on the
14 high school football team. This person was the
15 elected official's best man or maid of honor at
16 the wedding. Spearheaded the person's political
17 career. Campaign manager for every campaign.
18 Helped this elected public official out of
19 numerous political scrapes that everybody
20 thought meant the end of the person's political
21 career. Now is a lobbyist, lobbies lots of
22 different public officials, has lots of clients.
23 Has a 100 percent success rate with respect to
24 this public official.

25 There's a concern about having this --

1 interpreting this statute to sweep in lobbying,
2 but the -- would that person be covered in your
3 view?

4 MS. REAVES: No. And our position in
5 this case has consistently been that mere
6 influence is not enough to trigger 1346, and
7 that's so because, even if an individual is
8 influential, even if they're extremely
9 influential over one particular government
10 employee, that person doesn't have the indicia
11 of actually functioning as a government
12 employee.

13 JUSTICE GORSUCH: Well, why -- why
14 not? This town is full of such persons. And
15 presidents have had kitchen cabinets since the
16 beginning of time. And those people are often
17 taken quite seriously in the halls of
18 government. Whether they should or not, it's an
19 interesting public policy question.

20 But I would have thought that many of
21 those persons would -- would function as -- be
22 functional -- functional government --
23 government officials. Is that your phrase?

24 MS. REAVES: Yes.

25 JUSTICE GORSUCH: Under your

1 three-part test. Or at least they'd have to
2 have a very long trial to figure out what --
3 what the answer is.

4 MS. REAVES: You know, such an
5 individual doesn't have the approval of both
6 superiors and inferiors that --

7 JUSTICE GORSUCH: Well, let's --

8 MS. REAVES: -- they're actually
9 operating in a government role.

10 JUSTICE GORSUCH: -- let's say he
11 does, that, you know, that -- that he's in the
12 White House or in the halls of Congress on a
13 regular basis, and -- and people know that he is
14 taken very seriously by the elected official and
15 that they have to -- they have to listen to that
16 fellow and do as he says because they know he
17 speaks for the president or the senator or
18 whatever.

19 MS. REAVES: And yet, just because
20 someone's very influential, you have to go
21 through the -- these factors --

22 JUSTICE GORSUCH: I -- I know you keep
23 saying they're influential and that's not
24 enough. But why isn't it enough under your
25 three-part test?

1 MS. REAVES: Because a person like
2 that isn't able to --

3 JUSTICE GORSUCH: What -- what -- what
4 part of that test do they fail --

5 MS. REAVES: Yeah.

6 JUSTICE GORSUCH: -- specifically?
7 One, two, three? Which -- which portion and
8 why?

9 MS. REAVES: All three.

10 JUSTICE GORSUCH: All three? Okay.
11 All right, let's --

12 MS. REAVES: Yes. If you'd allow me
13 to unpack that --

14 JUSTICE GORSUCH: Please.

15 MS. REAVES: -- a little bit. I think
16 the first reason is that the individual --
17 there's no indication from what you said that
18 this person would have both superiors and
19 inferiors actually treating him as functionally
20 a government official operating in a role.

21 JUSTICE GORSUCH: But -- but --

22 MS. REAVES: I think, second --

23 JUSTICE GORSUCH: -- but -- but -- but
24 that kind of begs the question, right? You're
25 defining the term "functional government

1 employee" by reference to whether people think
2 he's a functional government employee. That
3 doesn't --

4 MS. REAVES: That's one component of
5 it.

6 JUSTICE GORSUCH: Well, but that --

7 MS. REAVES: That's not all of it.

8 JUSTICE GORSUCH: -- normally, we
9 don't define things circularly like that, right?

10 MS. REAVES: It's not --

11 JUSTICE GORSUCH: So --

12 MS. REAVES: -- circularly. It's one
13 way to get at whether someone is -- let -- so
14 let's imagine that there's a situation in which
15 we have a very decentralized form of management
16 in a company, and a bunch of individuals
17 perceive someone to be their boss because --

18 JUSTICE GORSUCH: Yeah.

19 MS. REAVES: -- all of these indicia
20 meet that.

21 JUSTICE GORSUCH: Yeah.

22 MS. REAVES: That can be a way to
23 figure out --

24 JUSTICE GORSUCH: And that -- that is
25 the person I'm --

1 MS. REAVES: -- whether they
2 functionally are, in fact, their boss. And
3 that's the sort of thing that we're trying to do
4 here, and that's only one part of it.

5 JUSTICE GORSUCH: So if people think
6 they are functionally their boss helps define
7 whether they are functionally their boss?

8 MS. REAVES: It helps --

9 JUSTICE GORSUCH: Got it.

10 MS. REAVES: -- it's not sufficient.

11 JUSTICE GORSUCH: Okay. And I'm
12 saying check that box here.

13 MS. REAVES: Okay.

14 JUSTICE GORSUCH: Then what?

15 MS. REAVES: So then you would need to
16 look at whether he's able to command government
17 employees to take government action. And that's
18 occurred -- I think the facts of this case are
19 helpful there because it wasn't just one
20 particular government action, it was a whole
21 variety of government actions and a variety of
22 different government officials, you know.

23 JUSTICE GORSUCH: So, again, check
24 that box because we have under Justice Alito's
25 example a very effective --

1 MS. REAVES: No. There's a
2 different -- I -- I'd push back on that a little
3 bit --

4 JUSTICE GORSUCH: Okay.

5 MS. REAVES: -- because I think that
6 someone can be effective and, you know, have a
7 hundred percent rate without actually being the
8 final say on something and being able to
9 actually command government employees to take
10 government acts.

11 A superior saying listen to this
12 person is not the same as a superior saying
13 implement every single thing this person --

14 JUSTICE GORSUCH: Okay. What if we
15 have that, though, because the superior says do
16 everything my friend says?

17 MS. REAVES: I think then you'd look
18 at the third portion of this and you'd see if
19 this individual is -- has additional trappings
20 of a government role.

21 Here, Petitioner was able to attend
22 internal government meetings that no one else
23 from outside the government was able to attend.
24 He was able to -- he continued to have key card
25 access. He continued to order his -- his former

1 secretary around. He continued to use
2 government phones and offices. And, because of
3 this, because of these three things on the facts
4 of this case, Petitioner was operating
5 essentially in the exact same role that he had
6 previously formally held.

7 JUSTICE GORSUCH: Thank you.

8 JUSTICE ALITO: I don't understand the
9 question of whether the person can command
10 government employees to do actions. Only a
11 person who holds official power can actually
12 command a -- a -- a government official to do
13 something.

14 But you -- you draw a distinction
15 between the power to command and the power to
16 influence, but I don't understand where -- where
17 you draw that line or how we determine whether
18 the line is crossed.

19 MS. REAVES: So it may be rare that
20 someone outside the government is able to
21 command government action, but, on the facts of
22 certain cases, that can happen. And the facts
23 of the case here are a good example of that.

24 You know, the relevant acts for the
25 bribery scheme that occurred in this case

1 happened when Petitioner called the deputy
2 director of state operations and instructed him
3 to reverse the requirement of a labor peace
4 agreement for a contract that COR Development
5 was going to have, and --

6 JUSTICE GORSUCH: You're asking us, I
7 think, to -- I'm sorry to interrupt, but I --
8 just I -- I think Justice Alito's question is,
9 you'd -- you'd have to agree that the defendant
10 here didn't have the legal authority to command
11 anyone when he was out of government.

12 And you're asking for a different
13 test, not whether he is statutorily or legally
14 empowered but whether a jury could find that he
15 has enough influence to effectuate some
16 governmental action, even though he's not
17 legally empowered to do so.

18 Isn't that -- doesn't that have to be
19 that -- the -- the -- part -- your argument?

20 MS. REAVES: The question of whether
21 he was legally empowered may be a close question
22 because it depends on -- on what you conceive
23 legally empowered to mean.

24 JUSTICE GORSUCH: Well, I -- I think
25 Justice Alito's point is that only an official

1 government employee has the power to command the
2 resources of the government, okay, or some --
3 somebody who's officially employed to make the
4 kinds of decisions certainly in this case.

5 And your -- your -- I think your
6 argument is, okay, he didn't have legal
7 authority to do that, but everyone thought he
8 did. It kind of collapses back into your first
9 point in some ways.

10 MS. REAVES: I -- I disagree.

11 JUSTICE GORSUCH: Okay.

12 MS. REAVES: I -- I think, on the
13 facts of this case, he was --

14 JUSTICE GORSUCH: He legally was
15 empowered to do --

16 MS. REAVES: He --

17 JUSTICE GORSUCH: -- to act as a
18 government official?

19 MS. REAVES: Whether it was legal or
20 not, he exercised government --

21 JUSTICE GORSUCH: He did.

22 MS. REAVES: -- authority in this
23 case.

24 JUSTICE GORSUCH: Sure. As a
25 practical matter, people thought he had -- they

1 had to abide his -- his orders even though
2 maybe, legally, they didn't.

3 Isn't that -- isn't that really the
4 government's argument?

5 MS. REAVES: I don't think so. He --
6 he did have the -- he was exercising government
7 authority here. And I think it's similar to a
8 situation in which imagine someone was formally
9 hired due -- as a -- as a result of a hiring
10 process that shouldn't have happened. Let's say
11 it was racially biased and this person should
12 not have been hired.

13 Even if that was inappropriate and
14 legally impermissible, that person is still
15 wielding government authority.

16 JUSTICE GORSUCH: He's still an
17 officer of the government in that case and he
18 has the power vested in him by the government.
19 Now maybe that should be undone, but during the
20 period in which he holds the office, no one
21 would question that he had the lawful authority
22 to act.

23 So I don't think that example works
24 because, here, we're dealing with someone out of
25 government who -- who's not holding an office

1 of -- of -- of the government, right?

2 MS. REAVES: He's not formally holding
3 an office, but he is functionally holding it,
4 and --

5 JUSTICE GORSUCH: Functionally because
6 people think he is.

7 MS. REAVES: -- and that -- I think
8 you -- you could view it as an improper
9 delegation of authority, but I don't think that
10 that suggests he wasn't actually wielding real
11 government authority.

12 JUSTICE JACKSON: How much does it
13 matter that he is going to return to office?
14 Because your three-part test seems to me to
15 sweep in people who, as you've suggested, just
16 overstay their welcome. They're -- they're out
17 of office, but they keep the same key card and
18 they're in the same office and they have the
19 same secretary.

20 And it seems to me that a person like
21 that would still be covered under your
22 three-part test. So does it matter that the
23 person is planning to return?

24 MS. REAVES: I think there could be a
25 conviction under the functional theory without

1 someone planning to return to office, but on the
2 facts of this case, it's certainly helpful that
3 he was planning to return to the same role that
4 he was --

5 JUSTICE JACKSON: But how do you
6 distinguish that person from a lobbyist? Lots
7 of people leave their former employment. Maybe
8 their key card hasn't been turned off yet. They
9 -- they continue to engage in relations with
10 people that they formerly worked with.

11 I -- I'm worried -- I -- I thought
12 part of your test or the -- the way in which we
13 were to think about functionality was that, as
14 your opposing counsel suggested, there's
15 something about the person coming back or
16 trading on their potential future influence, but
17 if the person is just sort of lingering as a
18 result of their former engagement, why -- why
19 isn't that just a lobbyist?

20 MS. REAVES: So someone who is
21 lingering still would need to not just be doing
22 some one-off things or be remaining influential.
23 He would still need to be functioning, you know,
24 in his entirety as a government officer and
25 would still need to meet these three

1 requirements.

2 It's certainly helpful -- and, you
3 know, the Court doesn't need to get into that
4 hypothetical because Petitioner here was
5 planning to return to office. So it's certainly
6 helpful if they're planning to return.

7 JUSTICE JACKSON: Yeah, but we're
8 trying to figure out the test. And I guess
9 what -- what suddenly makes me a little
10 concerned is we're talking about bribery, and,
11 you know, opposing counsel says you really do
12 have to be in a world in which you are trading
13 on your actual influence.

14 And maybe it's going to happen in the
15 future, it -- and that's a part of the scheme,
16 but if it's not going to happen in the future
17 and it can't happen in the present because
18 you're not actually an official, then what
19 really is the basis for a 1346 conviction?

20 MS. REAVES: I think it's that an
21 individual at the time that the bribery scheme
22 occurs, not before, not after, is functioning as
23 a government official and that individuals who
24 are superiors and inferiors are continuing to
25 treat him as such. He's able to make actual

1 commands for government actions to occur.

2 JUSTICE KAGAN: Ms. Reaves, it's -- it
3 strikes me that the strongest part of your case
4 is the fact that this is a guy who was a former
5 government official and who will be a former
6 government official, and this is just this
7 little hiatus that he's taken and not even to go
8 into private service but to go into sort of the
9 governor's private service, right? So that -- I
10 mean, that's the strongest part of your case.

11 But you're proposing a test which, as
12 the Chief Justice suggested, doesn't need to
13 have any of that. You don't have to be a former
14 official. You don't need to be a future
15 official.

16 And I guess what I would like to know
17 is, like, can you give me a hypothetical of a --
18 of a person who is not a former official and who
19 is not a future official, so doesn't have those
20 periods of real status-based control, who is
21 going to meet your test? And what kind of
22 person would that be?

23 MS. REAVES: So --

24 JUSTICE KAGAN: Because then it seems
25 to me -- I mean, you know -- you know, I'll give

1 the -- the -- the point of the question away --
2 I don't think you can give me that test without
3 making it look like the guy is just a really,
4 really good lobbyist.

5 MS. REAVES: I think imagine that the
6 governor took someone who hadn't formal --
7 formerly worked for him and said: I'm going to
8 treat this person as the equivalent of my deputy
9 executive secretary. I'm not going to pay him,
10 but, in every other way, he will hold this
11 office. In every other way, he will speak to
12 me. In every other way, you're required to
13 follow his commands. And he gives full access
14 to the building.

15 JUSTICE KAGAN: Okay. I think Mr.
16 Roth would say that's an agent, all right? I
17 mean, because Mr. Roth has a way to deal with
18 that. He -- he says, you know, you don't have
19 to be, like, on the books if there's been that
20 clear a delegation from the principal.

21 MS. REAVES: So I -- I think that
22 person still would also fit under our test. And
23 I think there's -- there's enough evidence in
24 this case for the jury to infer that Petitioner
25 had had that sort of delegation. You know, it's

1 not explicit, but there are indicia throughout
2 this case that Petitioner was just acting in the
3 role in this case that he had previously
4 formally held.

5 JUSTICE SOTOMAYOR: So please tell me
6 why it can't be simply an agent, meaning, why
7 can't we just simply -- instead of this
8 functional whatever, government official, or
9 reliance and control, as the Second Circuit
10 called it, why can't the charge be something as
11 simple as are you acting as an agent?

12 MS. REAVES: So I think this Court
13 would have to overrule Dixson in order to say
14 that because Dixson explicitly said that no
15 formal bond, such as an agency relationship, an
16 employment contract, or a direct contractual
17 obligation, is required.

18 JUSTICE SOTOMAYOR: Well, I -- I'm not
19 sure what -- 666 says you could be an agent of a
20 state or an agent of a government. So how did
21 you charge 666? Or it -- it -- was the jury
22 right in acquitting on 666?

23 MS. REAVES: So, as Justice Alito
24 previously said, this Court has repeatedly
25 indicated that an acquittal on one count --

1 JUSTICE SOTOMAYOR: I don't want to go
2 to that.

3 MS. REAVES: -- doesn't call into
4 question --

5 JUSTICE SOTOMAYOR: I'm asking you a
6 simple question.

7 MS. REAVES: I believe we did charge
8 that on an agency relationship.

9 JUSTICE SOTOMAYOR: All right.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Given the arguments in your brief and
13 your argument this morning, is it fair to say
14 that U.S. attorneys around the country should
15 not be invoking United States versus Margiotta
16 anymore?

17 MS. REAVES: I think -- as we've
18 mentioned, I don't think the Court needs to
19 decide whether Margiotta is, in fact, good law.
20 And we've repeatedly litigated this case as
21 saying it doesn't go that far. I think the --

22 CHIEF JUSTICE ROBERTS: Well, it's
23 kind of the big -- I don't want to say elephant
24 in the room, but it's -- it's kind of been a big
25 focus in this area, and you cite it a grand

1 total of two times in your brief, each time to
2 say don't worry, this isn't Margiotta.

3 MS. REAVES: So I think that the rule
4 -- the bottom-line decision in Margiotta that he
5 had, in fact, violated 1346 is correct under a
6 proper interpretation, but I think some of the
7 language in Margiotta is too broad.

8 The jury instructions there were not
9 even a reliance-and-control jury instruction.
10 They were much looser. And to the extent that
11 decision suggests that prestige alone is enough,
12 we -- we would agree that that's not enough,
13 although the jury instructions here, which,
14 again, weren't the same as the jury instructions
15 in Margiotta, did go far enough under our
16 current view.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Justice Thomas?

19 Justice Alito?

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: They -- they went
22 far enough or they --

23 MS. REAVES: The jury instructions
24 here went far enough, yes.

25 JUSTICE SOTOMAYOR: Yeah, for you to

1 win, but that's not the question. The question
2 is, did they -- did they reflect Margiotta's
3 broad theory?

4 MS. REAVES: No, they did not, not in
5 the context of this case. You know, the jury
6 here was instructed that Petitioner had to
7 dominate and control a governmental business.
8 That's not dominate and control an individual.
9 That's dominate and control a governmental
10 business. And also that people in the
11 government actually relied on him because of a
12 special relationship he had with the government.
13 And that mere influence and participation in the
14 process of the government, standing alone, are
15 not enough to impose a fiduciary duty.

16 JUSTICE SOTOMAYOR: So is your
17 functional government official test any
18 difference than the Second Circuit's reliance
19 and control test as set out in Margiotta?

20 MS. REAVES: Again, I -- I -- I just
21 want to emphasize that the reliance and control
22 test was -- while the Court in Margiotta
23 referenced reliance and control, that is not the
24 test that the jury applied in that case. That's
25 just some loose language itself in Margiotta.

1 And --

2 JUSTICE SOTOMAYOR: Was that language
3 used in the jury instruction here?

4 MS. REAVES: Some of it was, and as I
5 just laid out the jury instructions, we believe
6 those correctly reflect the functional --

7 JUSTICE SOTOMAYOR: Yeah. You're --

8 MS. REAVES: -- test.

9 JUSTICE SOTOMAYOR: -- you're
10 cherry-picking.

11 MS. REAVES: No, I'm not.

12 JUSTICE SOTOMAYOR: Meaning, does the
13 instruction as a whole reflect the
14 reliance-and-control theory that you're
15 disavowing in Margiotta?

16 MS. REAVES: It does not.

17 JUSTICE SOTOMAYOR: All right. I can
18 read it myself and see.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: One of your
23 hypotheticals in your opening was about a
24 pending Cabinet nominee who's bribed to withdraw
25 pending regulations. I understand the other

1 side to say that would qualify so long as it was
2 an action intended to have the pending Cabinet
3 -- Cabinet nominee withdraw those regulations
4 upon assuming office.

5 So how would it happen under your
6 hypothetical that the pending nominee could even
7 accomplish that? I assume you chose that
8 hypothetical with care. I'm trying to figure
9 out how that would even work.

10 MS. REAVES: So that's obviously a
11 reference to 201 and an individual who's been
12 selected to be a public official. And the text
13 of 201 clearly indicates that there -- an
14 individual who's just been selected or appointed
15 to be one, by that very nature of that
16 appointment or selection, is carrying some
17 authority that in some situations may be wielded
18 to take an official act before the individual
19 actually joins government.

20 So, if that Cabinet official, you
21 know, while the nomination was pending, all
22 these acts occur, were to call up the agency and
23 say, I'm about to be your boss, I want these
24 regulations withdrawn today before I -- I -- I
25 am -- I'm a -- formally take the role, that

1 would be a 201 violation as we understand it and
2 a 1346 violation if a state official was to do
3 that.

4 JUSTICE KAVANAUGH: Well, in the real
5 world, wouldn't the recipient of that call say
6 you're not in office yet?

7 MS. REAVES: I don't --

8 JUSTICE KAVANAUGH: I mean, that --
9 that's at least how my understanding of
10 government works. I guess you're proposing a
11 scenario where that --

12 MS. REAVES: Yes, I am proposing a
13 scenario where the individual obeyed that
14 person's command, which is the scenario that
15 occurred in this case.

16 JUSTICE KAVANAUGH: I understand that.
17 I'm just trying to figure out that hypothetical
18 and how that would work. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: No.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Just to follow up on
25 what Justice Kavanaugh was exploring with you,

1 wouldn't -- wouldn't it have to be a situation
2 in which the person says, I'm a -- I've been
3 nominated to this position and the scheme is
4 that once I get into office I will order that
5 the regulations be removed?

6 I -- I had -- I had understood that
7 opposing counsel was saying that that would be
8 covered under 201. And isn't that the kind of
9 thing that 201 is contemplating?

10 MS. REAVES: So that would be covered
11 by 201, but our reading of 201 is broader to
12 include even if all the acts and the threats and
13 the official action occurred before the
14 individual formally rejoined government -- or
15 formally joined government office.

16 JUSTICE JACKSON: And what is that
17 based on? Where --

18 MS. REAVES: So --

19 JUSTICE JACKSON: -- why is your
20 reading of 201 that broad?

21 MS. REAVES: -- so 201 just on its
22 text provides that an individual who's selected
23 to be a public official can take official acts.
24 I think that Section(b)(2)(A) is probably the
25 best indication of that, that a person selected

1 to be a public official can be influenced in the
2 performance of a -- an official act.

3 And if Congress had wanted to, you
4 know, just address the type of situation that
5 you've thrown out, after -- that -- that an
6 individual could only commit the official act
7 after they were formally in -- in government
8 employment, it wouldn't have had the need to,
9 you know, engage in this whole scheme of
10 separately defining a person selected to be
11 official -- a public official and separately
12 covering them, without in any way suggesting
13 that the official act couldn't occur until the
14 individual took office.

15 JUSTICE JACKSON: Well, you talk about
16 Congress's intent. Wasn't there a situation in
17 which Congress considered a bill that had a
18 broader definition of public official to -- to
19 include the kind of things you're talking about,
20 and they rejected it?

21 MS. REAVES: So I -- I think you might
22 be discussing the -- the anti-corrupt --
23 Anti-Public Corruption Act, which was
24 legislation that was introduced before 1346
25 itself was introduced. Think -- the fact that

1 that legislation didn't go anywhere, I don't
2 think, in -- in -- particularly since it
3 predated 1346, doesn't in any way suggest that
4 1346 should be read more narrowly than McNally
5 and pre-McNally case law and 201 and 666
6 suggest.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Rebuttal,
9 Mr. Roth?

10 REBUTTAL ARGUMENT OF JACOB M. ROTH
11 ON BEHALF OF THE PETITIONER

12 MR. ROTH: Thank you. Just a few
13 quick points.

14 First, counsel tried to avoid the
15 issue of Aiello's knowledge by saying his
16 conviction is not before the Court. But the
17 conviction that is before the Court is a
18 conspiracy count that requires a meeting of the
19 minds to -- on an unlawful objective, and if
20 Aiello didn't know the facts that apparently
21 made this person a public official, then the
22 conspiracy count doesn't work.

23 Second point, counsel tried to avoid
24 some of the hypotheticals by saying, well, mere
25 influence is not enough. It's got to rise to

1 this higher level. And the instructions did say
2 mere influence is not enough.

3 The problem is I don't know what that
4 means. I don't understand where that line is
5 between mere influence and the ability to get
6 something done by making a call or making a
7 request. And -- and that's exactly the
8 vagueness problem that Judge Winter talked about
9 back in Margiotta.

10 And then the final thing I would say
11 -- and this, I think, is probably the most
12 important -- counsel said that when Congress
13 enacted Section 1346 it was trying to reinstate
14 the pre-McNally case law.

15 But, of course, Skilling said that if
16 you read it that way, then it's a -- creates a
17 vagueness problem because the pre-McNally case
18 law was inconsistent on numerous points, and,
19 you know, Justice Scalia said it was in chaos.
20 I mean, there was a lot of confusion about what
21 the pre-McNally case law did.

22 And so what Skilling said was, in
23 order to avoid that problem, we've got to read
24 the statute as limited to its core, which it
25 defined as bribery and kickbacks, and then said,

1 in order to figure out what bribery and
2 kickbacks are, we can look at the statutes that
3 we have on the books that define those,
4 specifically, Section 666 and Section 201.

5 But the government can't point to a
6 single case under either 666 or 201 that gets
7 anywhere close to the theory that they are
8 proposing here. On 666, they concede it
9 requires agency. And there was no agency theory
10 pressed on this count.

11 And then, on 201, the best they can do
12 is Dixson. I would just read from Dixson. I
13 mean, Dixson said, to be a public official under
14 Section 201, an individual must possess some
15 degree of official responsibility for carrying
16 out a federal program or policy.

17 And then it said that in that
18 particular case, when one examines the structure
19 of the program and sees that the act vests in
20 local administrators like petitioners the power
21 to allocate federal fiscal resources and so on,
22 it's clear that they are public officials.

23 I mean, that's not what we have here.
24 And so, because the government can't point to
25 anything in the pre-McNally case law that

1 remotely resembles a consensus, they can't point
2 to anything under 666, and their best example
3 under 201 doesn't get them close, I don't think
4 the conviction can withstand scrutiny.

5 If there are no further questions,
6 thank you, Your Honors.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 11:09 a.m., the case
10 was submitted.)

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