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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH PERCOCO,)

Petitioner,)

v.) No. 21-1158

UNITED STATES,)

Respondent.)

- - - - -

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 mine field. 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, can you make --

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

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

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

25 I think the reason for that is

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

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

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

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

1 asking us -- the theory of your case is
2 basically, as long as he wasn't in public
3 office, you can't charge him under this statute.

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

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

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

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

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

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

23 MR. ROTH: Your Honor, I think you
24 could be exercising official power, number one,
25 as an official; number two, as an employee;

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

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

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

24 JUSTICE ALITO: What do you think --

25 JUSTICE BARRETT: Can I -- oh, sorry.

1 Go ahead.

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

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

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

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

1 understands that. Everyone else understands
2 that. And he -- and she really is exercising
3 the power as an agent.

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

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

17 MR. ROTH: Right.

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

24 But now you seem to be buying into at
25 least some aspects of the Second Circuit's idea

1 that someone can be functionally an official.

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

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

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

24 MR. ROTH: Well, Your Honor, under the
25 666 count, it was put to the jury to determine

1 is there an agency relationship. Of course, as
2 in any case, you could have facts that don't
3 rise to the level of triggering a -- a jury
4 question, and then there would be entitlement to
5 acquittal.

6 But, in this case, on these facts, the
7 agency question was put to the jury in the
8 context of Section 666.

9 CHIEF JUSTICE ROBERTS: And you think
10 that -- and you think that was appropriate?

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

22 They're saying people in the office
23 listened to him because of his political
24 influence, because of his relationship to the
25 governor, because they cared what he had to say

1 for all those reasons, and that that reliance
2 alone somehow creates a fiduciary duty.

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

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

19 And so, you know, suppose that
20 there's, you know, an informal, in your words,
21 but clear understanding that even as he goes on
22 to the campaign payroll, he's going to continue
23 to do government functions. So, you know, he's
24 not labeled -- you know, he's not called the
25 executive secretary anymore, but there's no

1 other executive secretary around, and he has the
2 trust of the governor.

3 And -- and you can argue with me on
4 the facts, and you can say that's not this case.
5 You know, all he was doing was he -- all the
6 government proved was he did, like, a few
7 isolated things.

8 But suppose another case where, in
9 fact, he -- he's basically now just doing two
10 jobs. What happens there?

11 MR. ROTH: Your Honor, I think that if
12 the government wanted to prosecute that -- those
13 facts, they would have to proceed under an
14 agency theory, and they would have to convince
15 the jury there was an agency relationship formed
16 and, yes, he's not on the books anymore, but he
17 was delegated official power, he's exercising
18 official power, not just that people are
19 listening to him, but they actually understand
20 and he understands that he is holding this
21 authority as a representative of the public,
22 notwithstanding his title. You would have to
23 proceed under that sort of agency theory.

24 There aren't a lot of cases like that,
25 and I think it's sort of unusual to find, but --

1 but I think that's how they would have to
2 prosecute it.

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

17 That would be fine, but it's not --
18 it's not bribery. It's not bribery because that
19 person -- at least in the absence of an agency
20 relationship, that person doesn't -- is not
21 representing anyone else and doesn't have a
22 fiduciary duty to anyone else other than his new
23 employer.

24 JUSTICE JACKSON: But we have a
25 statute, 201, that addresses bribery in the

1 federal context, and you mentioned a few minutes
2 ago that you thought this scenario really didn't
3 fit that statute.

4 MR. ROTH: Right.

5 JUSTICE JACKSON: So can you say more?

6 MR. ROTH: Yeah.

7 JUSTICE JACKSON: And, in particular,
8 the statute contains a definition of public
9 official that seems to contemplate someone who
10 has been informed that they will be nominated or
11 appointed, but they don't currently --

12 MR. ROTH: Right.

13 JUSTICE JACKSON: -- hold the
14 position.

15 MR. ROTH: Right. Sure, Your Honor.
16 Let -- let me actually make two points about
17 Section 201.

18 Okay. So, first, dealing with the
19 government's principal theory of functional
20 official exercising the functions of the office,
21 they point to Dixson as sort of the -- the key
22 case under Section 201. And I think it's fair
23 to characterize Dixson as sort of the high
24 watermark of Section 201.

25 But the facts of Dixson are so

1 dramatically different from this case that I
2 think it sort of proves our point that
3 Section 201 doesn't allow for this theory.
4 Dixson involved a nonprofit organization that
5 had been formally delegated the authority to
6 make spending decisions under a federal spending
7 program.

8 And this Court said they were -- you
9 know, the Act vested those -- the employees of
10 the nonprofit with legal authority to make the
11 decisions. The Court emphasized the official
12 nature of their duties. It was indirect, but
13 they were -- those individuals were authorized
14 to make those federal spending decisions.

15 So not -- not surprising they would be
16 considered public officials. That doesn't get
17 you anywhere close to the reliance-and-control
18 theory of Margiotta and the decision below.

19 Now the government also invoked
20 Section 201 for their alternative future
21 official theory, which Your Honor's question
22 focused on that language in the statute, and --
23 and we don't have any issue with that either,
24 but, as I was saying earlier, if the theory is
25 that you have sold your future powers because

1 you've been identified as someone who is going
2 to assume office, you haven't done it yet, but
3 you know you're getting that authority in some
4 fixed period of time, the agreement -- the
5 bribery agreement then has to contemplate that
6 you are going to use those powers, that official
7 authority, for private gain.

8 JUSTICE JACKSON: But why isn't that
9 Justice Kagan's scenario? You know, you just
10 got out of office. You're a part of the
11 campaign to get the official for whom you've
12 been working --

13 MR. ROTH: Yeah.

14 JUSTICE JACKSON: -- reelected. And
15 sort of the assumption is that you will be
16 returning to the government post because you're,
17 you know, part of the machinery of getting that
18 person back into office.

19 Why in that window of time don't we
20 have the future government official scenario?

21 MR. ROTH: Your Honor, depending on --
22 on the facts, you may well have a scenario that
23 would allow the government to prosecute on that
24 theory. My point is just you need to have that
25 nexus to the sale of -- of future powers.

1 So the agreement itself, the bribery
2 agreement between the person who is temporarily
3 out of office and the payor, has to call for:
4 Hey, you're going to take office again. When
5 you do, you're going to help me in some fashion
6 or another exercising your official power.

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

16 But, at the time of the agreement,
17 which is the key moment -- remember, this is a
18 conspiracy count, so it all comes down to the
19 agreement between Percoco and Aiello. At that
20 moment, neither side was anticipating a return
21 to office. And, you know, the key e-mail that
22 actually initiated this arrangement is where
23 Aiello says, you know, can he help us "while he
24 is off the second floor working on the
25 campaign?" That's at JA 594.

1 So, in fact, the whole point of the
2 deal, as the district court recognized, was that
3 they wanted to use his unofficial influence
4 while he was out of office, not that they wanted
5 him to help through official channels once he
6 had returned later, which they didn't anticipate
7 at the time.

8 JUSTICE BARRETT: Mr. Roth, can I ask
9 you a question about Justice Kagan's
10 hypothetical about the manipulative public
11 official who goes in and out of office for an
12 afternoon to peddle influence?

13 Could you say in that case, maybe
14 because such manipulation obviously would be a
15 problem, that that is a breach of the duty of
16 honest services to manipulate in that manner?
17 You know, you owe a duty to the public at 8:00
18 that morning when you're a public official, and
19 if you go out of office, you're breaching your
20 duty of honest services because you're doing it
21 to the end of circumventing the prohibition on
22 sale of honest services, and, you know, by
23 extension here, there was no fiduciary duty owed
24 because, as you would say, those facts are not
25 present.

1 MR. ROTH: Your Honor, I would -- I
2 would frame it a little differently. To me, the
3 -- the key question is, when that person leaves
4 office and makes some deal, okay, what does the
5 deal call for him to do?

6 If the deal anticipates that he's --
7 he's going back tomorrow, we all know that, and
8 when he goes back, we want him to tell his
9 subordinates, you know, make this decision or
10 hire this person or give this contract, then,
11 sure, he is --

12 JUSTICE BARRETT: No, he does it in
13 the window. It's not -- it's not an incoming
14 public official or someone who is going to sell
15 future influence. It's something he does in the
16 present.

17 MR. ROTH: If -- if it's all happening
18 in a period when he is out of office and holds
19 no official authority, I would resist the idea
20 that that violates this statute.

21 JUSTICE BARRETT: So you're asking for
22 a bright line even if it leads to the situation
23 Justice Kagan hypothesizes?

24 MR. ROTH: Well, I -- I -- I think, in
25 practice, most of -- the real concern of that

1 hypothetical is the situation where somebody is
2 coming back and is going to be using official
3 power. If the power that's -- if -- if what the
4 arrangement calls for is simply the use of
5 unofficial influence during the interregnum, I
6 don't think that's different in a meaningful way
7 from anyone else who might have substantial
8 influence over government decisionmaking,
9 whether that's, you know, the official's family
10 member or the most important donor to the
11 campaign, and everyone in the office knows, you
12 know, we really need to keep that person happy.

13 I mean, there are all sorts of
14 examples where private citizens are active
15 participants in the political process and have
16 unofficial influence over government
17 decisionmaking, but that doesn't create a
18 fiduciary duty to the public.

19 JUSTICE GORSUCH: Well, I guess I want
20 to explore that just a little bit further. That
21 was one of the criticisms, of course, of the
22 dissent in Skilling, was that if you allow
23 fiduciary duty to do this kind of work, if we
24 write that into the statute, the concept of
25 fiduciary duty or agency is nearly boundless,

1 and so you -- you -- you might have lobbyists
2 who you might say owe a fiduciary duty or
3 spouses, to use Justice Alito's example.

4 And I guess I'm wondering what the
5 limiting principle is. If it isn't -- if we
6 were to reject your bright-line test of -- of
7 selling services while in office, what would you
8 have us do? I mean, is the statute
9 constitutional in those circumstances, or is
10 there some constitutional applications we could
11 still save or -- or what?

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

17 JUSTICE GORSUCH: I accept that,
18 right. I think Skilling took the core and tried
19 to preserve it.

20 MR. ROTH: Yeah.

21 JUSTICE GORSUCH: And that might be
22 the in-office argument, your bright line. I --
23 I understand that. But, if the Court were to go
24 beyond that, is there any stopping point? Does
25 this statute cover all lobbying potentially?

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

14 And I think that's a major problem.
15 It's a problem from a due process standpoint
16 because of the indeterminacy. And it's a
17 problem from a First Amendment standpoint
18 because lobbying is constitutionally protected
19 conduct. We're talking about petitioning the
20 government for redress of grievances, and when
21 you're chilling that type of conduct, that's a
22 -- that's a major problem.

23 JUSTICE ALITO: Well, now you're back
24 to your -- the argument I thought you were going
25 to make when you -- when you stood up. And you

1 -- you've marched away from the concession that
2 there could be somebody who could be convicted
3 based on a theory of agency.

4 MR. ROTH: But, Your Honor, I don't
5 think agency presents the same concerns.

6 First of all, we have a long history
7 and well-established rules about what
8 constitutes an agency relationship.

9 Number two, we have Section 666, which
10 already embraces the -- the agency line. And we
11 haven't really seen, I would say, these kind of
12 problems with that.

13 I think agency is a meaningful
14 constraint. Everyone understands an agent owes
15 fiduciary duties to a principal. Once you get
16 beyond that, though, then I -- we start to
17 worry, I think, about the lack of limiting
18 principles.

19 JUSTICE ALITO: Okay. Well, if an
20 agency relationship is enough and you don't need
21 a formal contract delegating authority to the
22 agent, I guess the next step is that it's
23 possible to infer from circumstances, the
24 behavior of the parties, that this individual
25 is, in fact, an agent of the office holder,

1 right?

2 MR. ROTH: Yes, you could imagine a
3 situation where -- where it's in -- where it's
4 inferred. And, again, we can have a -- we can
5 have a discussion about where -- you know, how
6 much evidence is enough to allow the jury to
7 draw that conclusion and draw that inference.

8 We don't have to do that in this case
9 because that's not their theory, and I think
10 we've talked about why -- why that's not their
11 theory, because of the -- the adverse jury
12 verdict on Section 666.

13 JUSTICE ALITO: Well, I don't know
14 about the adverse jury verdict because, if we
15 were to -- if the question is a sufficiency of
16 the evidence -- if the evidence is sufficient to
17 establish an agency relationship, then that's --
18 that's -- you know, the fact that the jury found
19 no agency relationship under another count, that
20 doesn't matter, right?

21 MR. ROTH: Fair enough, Your Honor,
22 but that still leaves the point that they
23 haven't -- they haven't argued that. And --
24 and, again, if you go through their brief and do
25 a search for the word "agency," it comes up a

1 bunch of times where they say you don't need to
2 have an agency relationship, you don't need to
3 have -- so that's their test. That test is
4 wrong. If that test is wrong, Count 10 has to
5 be reversed. And whether an agency theory would
6 work in some other case is -- is really not
7 before the Court at this point.

8 JUSTICE SOTOMAYOR: Two questions.
9 This does sound to me like 201, which is what
10 Justice Jackson said, if we have in other
11 situations, including in Dixson and -- not in
12 Dixson -- in Skilling -- I believe it was
13 Skilling -- said that we borrow from the
14 concepts of 201. So that's what you're doing
15 here, correct?

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

19 JUSTICE SOTOMAYOR: So, basically, you
20 accept that you can be either an agent or have
21 been formally delegated authority from the
22 government, correct?

23 MR. ROTH: Yes. Yes.

24 JUSTICE SOTOMAYOR: And you accept the
25 future public official, meaning you don't have

1 to be an official today as long as you're taking
2 money to perform an act in the future?

3 MR. ROTH: Correct, Your Honor.

4 JUSTICE SOTOMAYOR: All right. Having
5 said --

6 CHIEF JUSTICE ROBERTS: Thank you --

7 JUSTICE SOTOMAYOR: -- all of that --
8 I'm sorry.

9 CHIEF JUSTICE ROBERTS: No, go ahead.

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

18 MR. ROTH: That's a good question,
19 Your Honor. I think, on Count 10, the right
20 course is to reverse and direct acquittal
21 because the only argument they've made on Count
22 10 is to defend the Second Circuit's theory, and
23 -- and that doesn't work.

24 I think, with respect to the other
25 counts, that's an issue for remand because we do

1 have concerns about spillover from Count 10.
2 And so I think, there, it would be remanded to
3 the Second Circuit to take a closer look at the
4 impact on -- on those counts. That would be
5 what I would suggest.

6 JUSTICE SOTOMAYOR: They -- well, they
7 are not defending Margiotta. They're defending
8 --

9 MR. ROTH: Well --

10 JUSTICE SOTOMAYOR: -- a different
11 theory.

12 MR. ROTH: -- they -- they say they're
13 not defending --

14 JUSTICE SOTOMAYOR: That's why I'm a
15 little confused.

16 MR. ROTH: Sorry. They say they're
17 not defending Margiotta. I'm not sure what the
18 difference is between what they're saying,
19 functional official, and Margiotta. They sound
20 the same to me. I haven't been able to figure
21 out the difference. So I think that theory
22 doesn't work.

23 The -- you're right, Your Honor, they
24 do talk about the future official theory, but
25 the district court has already rejected that.

1 Again, if you look at pages 549 to 550, the
2 district court's already said that theory
3 doesn't work. It wasn't the theory he was tried
4 on. It wasn't the theory supported by the
5 evidence.

6 So I don't think that theory would
7 warrant a remand for a new trial because I don't
8 think it's been properly preserved or supported
9 by the evidence, as the district court's already
10 explained.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. ROTH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas?

17 Justice Alito, anything further?

18 Justice Barrett?

19 Justice Jackson, anything further?

20 MR. ROTH: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Reaves.

24

25

1 ORAL ARGUMENT OF NICOLE F. REAVES
2 ON BEHALF OF THE RESPONDENT
3 MS. REAVES: Mr. Chief Justice, and
4 may it please the Court:

5 Petitioner's theory of this case would
6 require this Court to reverse course in numerous
7 ways. He would limit Dixson in a manner
8 unsupported by that decision or the text of
9 Section 201.

10 He would have this Court backtrack
11 from Skilling's instruction to look at
12 Section 666 and Section 201 when interpreting
13 the honest services fraud statute.

14 And he would have this Court limit
15 prosecutions that Congress intended to cover
16 when it adopted Section 1346. In that
17 provision, Congress reinstated the honest
18 services fraud doctrine that had developed
19 before McNally.

20 McNally itself noted that the doctrine
21 provided that an individual without formal
22 office may be held to be a public fiduciary if
23 others rely on him because of a special
24 relationship with the government and he, in
25 fact, makes governmental decisions.

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

11 His rule would also allow someone
12 nominated to a Cabinet position to accept a
13 bribe in exchange for instructing the agency he
14 is about to lead to withdraw pending
15 regulations. And his rule would likewise permit
16 Petitioner's conduct.

17 Although Petitioner asserts that his
18 conviction is solely premised on him being an
19 influential lobbyist, that argument is based on
20 a caricature of both the government's proposed
21 legal framework and the facts of this case.

22 While functioning as a government
23 official and after he had decided to return to
24 formal government employment, Petitioner
25 accepted multiple bribes in exchange for

1 commanding a government agency to reverse a
2 final decision.

3 The relevant agreement occurred after
4 August 6, which was the time that Petitioner
5 indicated that he was returning to government.
6 That was a violation of his duty of honest
7 services as this Court has always understood
8 that duty.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Counsel, what is
11 curious about this case is that the State of New
12 York doesn't seem to be upset about this
13 arrangement.

14 MS. REAVES: Justice Thomas, I'm not
15 sure that the fact that New York hasn't
16 prosecuted him, particularly when there has been
17 a federal prosecution, suggests that the State
18 of New York finds any problem with what he did.

19 And, as indicated in our brief, New
20 York public law appears in two different places.
21 Both its ethics law and its public servant law
22 appears to prohibit Petitioner's conduct. Its
23 bribery statute closely tracks the language of
24 Section 201, which indicates that he did commit
25 bribery under state law as well even if the

1 state decided not to prosecute him.

2 JUSTICE THOMAS: But doesn't that work
3 against you? It suggests that if New York
4 actually wanted to prosecute this activity, it
5 had the authority to do so and the statutory
6 basis for it.

7 MS. REAVES: That a state could
8 prosecute someone for a federal crime doesn't
9 suggest that the federal statute isn't valid.

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

17 MS. REAVES: Again, I don't think that
18 this Court has ever suggested that the existence
19 of potentially overlapping federal and state
20 statutes, even if one is broader than the other,
21 means that we shouldn't -- that the Court
22 shouldn't interpret the federal statute to the
23 full extent --

24 JUSTICE THOMAS: No, I think my point
25 is rather that it seems as though we are using a

1 federal law to impose ethical standards on state
2 activity.

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

10 And, as this Court noted in Skilling,
11 most of the prosecutions that occurred under the
12 pre-McNally theory were of public officials. So
13 I don't --

14 JUSTICE THOMAS: But isn't it curious
15 -- under that, could you give me the specific
16 elements of a -- a violation of -- of 1346?

17 MS. REAVES: So the individual needs
18 to have engaged in a scheme to violate fiduciary
19 or honest services duties. The individual also
20 needs to have had the appropriate mens rea,
21 which is knowledge, willfulness, and a specific
22 intent to defraud, the individual needs -- the
23 deception needs to have involved a material
24 fact, and the mail or interstate wires need to
25 be -- have been used in furtherance of the

1 fraud.

2 JUSTICE THOMAS: So now just -- let's
3 just take one of those, and -- and now -- then
4 I'll stop, but let's just take fiduciary duty.

5 So how do you determine the contours
6 of that? Usually, in the -- in the civil
7 context, you have a trust agreement. You have
8 common law. You have some basis for determining
9 who is covered by fiduciary duties and what the
10 contours of those duties are.

11 How do we determine that in this case?

12 MS. REAVES: The Court has indicated
13 in -- in cases like Skilling that the
14 appropriate way to do that is to look at the
15 body of pre-McNally case law and to also look at
16 federal statutes defining similar duties, and,
17 here, that would be Section 201 and Section 666.

18 And because Petitioner's conduct is
19 clearly covered at least by Section 201, this
20 case doesn't implicate sort of the outer bounds
21 of potential fiduciary duties or other duties
22 that might trigger an honest services fraud
23 prosecution.

24 CHIEF JUSTICE ROBERTS: Counsel, at
25 the beginning of your summary of argument, you

1 say that the Petitioner's covered by 1346
2 because he accepted bribes as a former, future,
3 and functional public official.

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

8 MS. REAVES: The primary theory in
9 this case has always been the functional status,
10 and, here, I think the facts that he was
11 formerly and about to become also support that.

12 CHIEF JUSTICE ROBERTS: Right, right.
13 I understand that. But you would not suggest
14 that the coverage under 1346 depends upon any
15 governmental employment relationship, right?

16 MS. REAVES: That's correct.

17 CHIEF JUSTICE ROBERTS: Okay. So give
18 me a short definition of what constitutes
19 functional when there's no former and there's no
20 future.

21 MS. REAVES: I think there are three
22 indicia that are helpful to look at when
23 determining whether someone's formally -- acting
24 functionally as a government employee.

25 The first is that there's approval and

1 acquiescence by others in the government to
2 treat him as a functional government employee;
3 the second, that he's able to command government
4 employees to take specific government acts; and
5 the third, that there -- is that there are some
6 additional indicia and trappings of a government
7 role.

8 CHIEF JUSTICE ROBERTS: So it sounds
9 like that's an effort to break down the concept
10 of -- of political power.

11 MS. REAVES: I don't think it is
12 because, if someone is merely influential, an
13 influential person can't order specific
14 government actors to take specific government
15 acts.

16 CHIEF JUSTICE ROBERTS: Yeah, but
17 the -- the things you just went through, they
18 don't require that. You say whether there's
19 acquiescence or whether someone follows the
20 authority. I mean, you know, that doesn't
21 require any official responsibilities.

22 MS. REAVES: So --

23 CHIEF JUSTICE ROBERTS: Right? They
24 just -- they go along with it.

25 MS. REAVES: I -- I disagree with

1 that. I think there needs -- the approval and
2 acquiescence inquiry suggests, as we argued in
3 our brief, that both an individual's supervisors
4 and support -- subordinates need to recognize
5 that he's functionally a government official.
6 That's not the same as an individual having
7 influence over one particular member of the
8 government.

9 And I think the facts of this case are
10 actually pretty helpful when trying to look at
11 some of these things. When it comes to approval
12 and acquiescence, you know, Petitioner continued
13 to have access to the same meetings, the same
14 building, the same phone, the same secretary
15 that he had when he was formerly --

16 JUSTICE KAGAN: So, Ms. Reaves, it --
17 it strikes me that those are things that
18 insiders might know, very well, you know,
19 probably would know. The problem is that
20 outsiders don't really have any reason to know
21 those things, and an outsider can also be on the
22 hook under this statute, right, for doing the
23 paying.

24 But your test gives the outsider no
25 real notice, does it?

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

13 And the jury was also instructed that
14 good faith on the part of a defendant was a
15 complete defense. So the jury had to find that
16 even the outsiders who paid Petitioner here did,
17 in fact, have this requisite knowledge and
18 knowledge of his functional -- of him being a
19 functional official in order to convict --

20 JUSTICE GORSUCH: On this --

21 MS. REAVES: -- the outsiders.

22 JUSTICE GORSUCH: -- on this
23 functional official test, you say it's a
24 three-part test, and I guess I'm wondering where
25 that comes from. It's certainly not in the text

1 of 1346.

2 Do you have someplace you can point me
3 to in the law where that would be an appropriate
4 basis for us to write that into the statute?

5 MS. REAVES: Skilling indicated that
6 when we're looking at the text of 1346, it's
7 appropriate to look at things like 201, 666, and
8 this Court's cases and other cases that predate
9 McNally.

10 JUSTICE GORSUCH: I --

11 MS. REAVES: And --

12 JUSTICE GORSUCH: -- I understand
13 that, but the functional official test, you said
14 it's a distinct three-part test. Where -- where
15 is that in the law?

16 MS. REAVES: So I think I indicated
17 that those were the sort of things -- the three
18 things required to show that someone was
19 functionally a government official.

20 JUSTICE GORSUCH: Yeah. Where do they
21 come from, is my question.

22 MS. REAVES: I think from a couple of
23 places. One, they're inherent in the nature of
24 being a public official. It's the sort of
25 things we would look at to see whether someone

1 is, in fact, acting as a public official.

2 JUSTICE GORSUCH: The -- the brooding
3 omnipresence of the law.

4 (Laughter.)

5 MS. REAVES: And, second, I think, if
6 you look at Dixson and its interpretation of
7 201, the -- Dixson clearly held that someone
8 doesn't need to be formally a public official or
9 formally an agent.

10 JUSTICE BARRETT: But, in Dixson,
11 there was the exercise of official federal
12 responsibilities. I mean, that was part of what
13 the agency had agreed to. So I don't know that
14 Dixson gets you that far because we don't have
15 official state responsibilities here.

16 MS. REAVES: So two responses to that.

17 First, Dixson was very explicit that
18 no formal government agency employment or
19 delegation was required, and the individual
20 defendants in Dixson were just responsible for
21 administering federal funds.

22 Here, Petitioner actually did a lot
23 more than that. He made employment decisions
24 for the state and made decisions about how much
25 people would be making when they were employed.

1 So that's a funding decision. And he did so
2 with -- you may recall -- it would be an
3 informal approval of his superiors, but he did
4 so with approval of his superiors.

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

17 JUSTICE BARRETT: Well, given what you
18 just said, let me return to your point about the
19 mens rea requirement when Justice Kagan asked
20 you about that before.

21 Doesn't the knowledge requirement --
22 you said, well, the mens rea of the person on
23 the outside, the outsider has to know that they
24 were functioning as a public official. So
25 you've offered these indicia and this multipart

1 test. Justice Gorsuch has pressed you on
2 whether it -- where it comes from.

3 But it seems to me then your -- your
4 mens rea and the protection of notice requires
5 the outsider to make that functional judgment.
6 How much is too much? Was he really -- you
7 know, did they know that he went to the internal
8 government meeting you just referenced? Isn't
9 that a notice problem?

10 MS. REAVES: A couple of responses on
11 that. First, I don't think Aiello's conviction
12 is directly at issue here, as this Court didn't
13 grant his cert petition, which did tee up these
14 notice-of-an-outsider questions.

15 But just setting that aside, when it
16 comes to the knowledge requirement that was at
17 issue in this case, the jury was instructed that
18 good faith was a complete defense. So, if an
19 outsider made a good faith attempt to determine
20 whether someone was functionally a public
21 official and made a mistake, he could not be
22 convicted under this statute.

23 JUSTICE JACKSON: Can I ask you about
24 Sentencing Guideline 2.C.1.1? Are you familiar
25 with that?

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

2 JUSTICE JACKSON: No? Okay. All
3 right.

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

6 JUSTICE JACKSON: Well, no. I -- I --
7 I'm focusing on the fact that that guideline
8 defines public official for the purpose of
9 public corruption in reference to 201, and it
10 seems to suggest that 201 does not cover de
11 facto government employees because it says that
12 a public official -- you know, it puts in one
13 category public officials who are covered by
14 201, and then it says, if they're not otherwise
15 covered by 201, they are subject to the
16 guideline if they participate so substantially
17 in government operations as to possess de facto
18 authority to make a government decision.

19 So at least the Sentencing Commission
20 saw 201 officials as not including de facto
21 government employees.

22 MS. REAVES: So, as an initial matter,
23 you know, Petitioner is not directly covered by
24 201 because state employees are not directly
25 covered by 201. So you're not going to have any

1 conviction of a state officer under 201.

2 So that portion of the guideline that
3 you've referenced, the latter portion that
4 doesn't refer to 201, is going to cover
5 everyone, I would assume, who is a state or
6 local official who's prosecuted under 1346.

7 JUSTICE JACKSON: But is your position
8 that 201 should be referenced in relation to our
9 consideration of whether a functional government
10 official --

11 MS. REAVES: Yes, absolutely.

12 JUSTICE JACKSON: But, as Justice
13 Gorsuch was pointing out, the -- the statute in
14 201, its definition of public official doesn't
15 seem to have the three-part test or any
16 characteristics that you've described. It just
17 says if someone has been officially informed
18 that they will be nominated or appointed or if
19 they have been nominated or appointed.

20 MS. REAVES: And it also includes
21 someone who's an officer, employee, or person
22 acting for or on behalf of the United States.
23 And that's the portion that the Court was
24 interpreting in Dixson, and that's the portion
25 that's most helpful when looking at whether an

1 individual is a functional government employee.

2 Now, obviously, we also think that
3 Petitioner's conduct violated Section 1346 by
4 reference to 201 because he had been nominated
5 and appointed to be in the position that he --
6 he eventually took.

7 And I'd also just like to flag that we
8 disagree with Petitioner's view of the timeline
9 as to when he was selected to be a public
10 official. Petitioner has said that the corrupt
11 agreement occurred in July 2014. But the only
12 evidence Petitioner cites to that effect is that
13 Aiello sent an e-mail to Howe asking for help.

14 As to when Petitioner became involved
15 and when there was actually a corrupt agreement,
16 the first indication we have of that is when
17 Petitioner received the payments from COR
18 Development, and those occurred in mid-August
19 2014 and October 2014.

20 Those acts both occurred after
21 Petitioner filed the letter with his bank saying
22 that his employment post-election would be with
23 the Cuomo Administration.

24 JUSTICE ALITO: What do you say about
25 somebody who is a super-super-effective

1 lobbyist? So let's say this person is a
2 childhood friend of the person, the elected
3 public official. They played together on the
4 high school football team. This person was the
5 elected official's best man or maid of honor at
6 the wedding. Spearheaded the person's political
7 career. Campaign manager for every campaign.
8 Helped this elected public official out of
9 numerous political scrapes that everybody
10 thought meant the end of the person's political
11 career. Now is a lobbyist, lobbies lots of
12 different public officials, has lots of clients.
13 Has a 100 percent success rate with respect to
14 this public official.

15 There's a concern about having this --
16 interpreting this statute to sweep in lobbying,
17 but would that person be covered in your view?

18 MS. REAVES: No. And our position in
19 this case has consistently been that mere
20 influence is not enough to trigger 1346, and
21 that's so because, even if an individual is
22 influential, even if they're extremely
23 influential over one particular government
24 employee, that person doesn't have the indicia
25 of actually functioning as a government

1 employee.

2 JUSTICE GORSUCH: Well, why -- why
3 not? This town is full of such persons. And
4 presidents have had kitchen cabinets since the
5 beginning of time. And those people are often
6 taken quite seriously in the halls of
7 government. Whether they should or not is an
8 interesting public policy question.

9 But I would have thought that many of
10 those persons would -- would function as -- be
11 functional -- functional government --
12 government officials. Is that your phrase?

13 MS. REAVES: Yes.

14 JUSTICE GORSUCH: Under your
15 three-part test. Or at least they'd have to
16 have a very long trial to figure out what the
17 answer is.

18 MS. REAVES: You know, such an
19 individual doesn't have the approval of both
20 superiors and inferiors that --

21 JUSTICE GORSUCH: Well, let's --

22 MS. REAVES: -- they're actually
23 operating in a government role.

24 JUSTICE GORSUCH: -- let's say he
25 does, you know, that -- that he's in the White

1 House or in the halls of Congress on a regular
2 basis, and -- and people know that he is taken
3 very seriously by the elected official and that
4 they have to -- they have to listen to that
5 fellow and do as he says because they know he
6 speaks for the president or the senator or
7 whatever.

8 MS. REAVES: And yet, just because
9 someone's very influential, you have to go
10 through the -- the factors --

11 JUSTICE GORSUCH: I know you keep
12 saying they're influential and that's not
13 enough. But why isn't it enough under your
14 three-part test?

15 MS. REAVES: Because a person like
16 that isn't able to --

17 JUSTICE GORSUCH: What -- what part of
18 that test do they fail --

19 MS. REAVES: Yeah.

20 JUSTICE GORSUCH: -- specifically?
21 One, two, three? Which -- which portion and
22 why?

23 MS. REAVES: All three.

24 JUSTICE GORSUCH: All three? Okay.

25 MS. REAVES: Yes. If you'd allow me

1 to unpack that --

2 JUSTICE GORSUCH: Please.

3 MS. REAVES: -- a little bit. I think
4 the first reason is that the individual --
5 there's no indication from what you said that
6 this person would have both superiors and
7 inferiors actually treating him as functionally
8 a government official who's operating in a role.

9 JUSTICE GORSUCH: But --

10 MS. REAVES: I think, second --

11 JUSTICE GORSUCH: -- but that kind of
12 begs the question, right? You're defining the
13 term "functional government employee" by
14 reference to whether people think he's a
15 functional government employee. That doesn't --

16 MS. REAVES: That's one component of
17 it.

18 JUSTICE GORSUCH: Well, but that --

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

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

22 MS. REAVES: It's not --

23 JUSTICE GORSUCH: So --

24 MS. REAVES: -- circularly. It's one
25 way to get at whether someone is -- so let's

1 imagine that there's a situation in which we
2 have a very decentralized form of management in
3 a company, and a bunch of individuals perceive
4 someone to be their boss because --

5 JUSTICE GORSUCH: Yeah.

6 MS. REAVES: -- all of these indicia
7 meet that.

8 JUSTICE GORSUCH: Yeah.

9 MS. REAVES: That can be a way to
10 figure out --

11 JUSTICE GORSUCH: And that is the
12 person I'm --

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

17 JUSTICE GORSUCH: So if people think
18 they are functionally their boss helps define
19 whether they are functionally their boss?

20 MS. REAVES: It helps --

21 JUSTICE GORSUCH: Got it.

22 MS. REAVES: -- if it's sufficient.

23 JUSTICE GORSUCH: Okay. And I'm
24 saying check that box here.

25 MS. REAVES: Okay.

1 JUSTICE GORSUCH: Then what?

2 MS. REAVES: So then you would need to
3 look at whether he's able to command government
4 employees to take government action. And that's
5 occurred -- I think the facts of this case are
6 helpful there because it wasn't just one
7 particular government action, it was a whole
8 variety of government actions and a variety of
9 different government officials, you know.

10 JUSTICE GORSUCH: So, again, check
11 that box because we have under Justice Alito's
12 example a very effective --

13 MS. REAVES: No. There's a
14 different -- I -- I'd push back on that a little
15 bit --

16 JUSTICE GORSUCH: Okay.

17 MS. REAVES: -- because I think that
18 someone can be effective and, you know, have a
19 hundred percent rate without actually being the
20 final say on something and being able to
21 actually command government employees to take
22 government acts.

23 A superior saying listen to this
24 person is not the same as a superior saying
25 implement every single thing this person says.

1 JUSTICE GORSUCH: Okay. What if we
2 have that, though, because the superior says do
3 everything my friend says?

4 MS. REAVES: I think then you'd look
5 at the third portion of this and you'd see if
6 this individual has additional trappings of a
7 government role.

8 Here, Petitioner was able to attend
9 internal government meetings that no one else
10 from outside the government was able to attend.
11 He was able to -- he continued to have key card
12 access. He continued to order his secretary --
13 his former secretary around. He continued to
14 use government phones and offices. And, because
15 of this, because of these three things on the
16 facts of this case, Petitioner was operating
17 essentially in the exact same role that he had
18 previously formally held.

19 JUSTICE GORSUCH: Thank you.

20 JUSTICE ALITO: I don't understand the
21 question of whether the person can command
22 government employees to do actions. Only a
23 person who holds official power can actually
24 command a government official to do something.

25 But you -- you draw a distinction

1 between the power to command and the power to
2 influence, but I don't understand where -- where
3 you draw that line or how we determine whether
4 the line is crossed.

5 MS. REAVES: So it may be rare that
6 someone outside the government is able to
7 command government action, but, on the facts of
8 certain cases, that can happen. And the facts
9 of the case here are a good example of that.

10 You know, the relevant acts for the
11 bribery scheme that occurred in this case
12 happened when Petitioner called the deputy
13 director of state operations and instructed him
14 to reverse the requirement of a labor peace
15 agreement for a contract that COR Development
16 was going to have, and --

17 JUSTICE GORSUCH: You're asking us, I
18 think, to -- I'm sorry to interrupt, but just I
19 think Justice Alito's question is, you'd have to
20 agree that the defendant here didn't have the
21 legal authority to command anyone when he was
22 out of government.

23 And you're asking for a different
24 test, not whether he is statutorily or legally
25 empowered but whether a jury could find that he

1 has enough influence to effectuate some
2 governmental action, even though he's not
3 legally empowered to do so.

4 Isn't that -- doesn't that have to be
5 your argument?

6 MS. REAVES: The question of whether
7 he was legally empowered may be a close question
8 because it depends on -- on what you conceive
9 legally empowered to mean.

10 JUSTICE GORSUCH: Well, I -- I think
11 Justice Alito's point is that only an official
12 government employee has the power to command the
13 resources of the government, okay, or somebody
14 who's officially employed to make the kinds of
15 decisions certainly in this case.

16 And your -- your -- I think your
17 argument is, okay, he didn't have legal
18 authority to do that, but everyone thought he
19 did. It kind of collapses back into your first
20 point in some ways.

21 MS. REAVES: I -- I disagree.

22 JUSTICE GORSUCH: Okay.

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

25 JUSTICE GORSUCH: He legally was

1 empowered to do --

2 MS. REAVES: He --

3 JUSTICE GORSUCH: -- to act as a
4 government official?

5 MS. REAVES: Whether it was legal or
6 not, he exercised government --

7 JUSTICE GORSUCH: He did.

8 MS. REAVES: -- authority in this
9 case.

10 JUSTICE GORSUCH: Sure. As a
11 practical matter, people thought he had -- they
12 had to abide his -- his orders even though
13 maybe, legally, they didn't.

14 Isn't that -- isn't that really the
15 government's argument?

16 MS. REAVES: I don't think so. He did
17 have the -- he was exercising government
18 authority here. And I think it's similar to a
19 situation in which imagine someone was formally
20 hired due -- as a -- as a result of a hiring
21 process that shouldn't have happened. Let's say
22 it was racially biased and this person should
23 not have been hired.

24 Even if that was inappropriate and
25 legally impermissible, that person is still

1 wielding government authority.

2 JUSTICE GORSUCH: He's still an
3 officer of the government in that case and he
4 has the power vested in him by the government.
5 Now maybe that should be undone, but during the
6 period in which he holds the office, no one
7 would question that he had the lawful authority
8 to act.

9 So I don't think that example works
10 because, here, we're dealing with someone out of
11 government who -- who's not holding an office
12 of -- of -- of the government, right?

13 MS. REAVES: He's not formally holding
14 an office, but he is functionally holding it,
15 and --

16 JUSTICE GORSUCH: Functionally because
17 people think he is.

18 MS. REAVES: -- and I think you could
19 view it as an improper delegation of authority,
20 but I don't think that that suggests he wasn't
21 actually wielding real government authority.

22 JUSTICE JACKSON: How much does it
23 matter that he is going to return to office?
24 Because your three-part test seems to me to
25 sweep in people who, as you've suggested, just

1 overstay their welcome. They're -- they're out
2 of office, but they keep the same key card and
3 they're in the same office and they have the
4 same secretary.

5 And it seems to me that a person like
6 that would still be covered under your
7 three-part test. So does it matter that the
8 person is planning to return?

9 MS. REAVES: I think there could be a
10 conviction under the functional theory without
11 someone planning to return to office, but on the
12 facts of this case, it's certainly helpful that
13 he was planning to return to the same role.

14 JUSTICE JACKSON: But how do you
15 distinguish that person from a lobbyist? Lots
16 of people leave their former employment. Maybe
17 their key card hasn't been turned off yet. They
18 -- they continue to engage in relations with
19 people that they formerly worked with.

20 I -- I'm worried -- I -- I thought
21 part of your test or the -- the way in which we
22 were to think about functionality was that, as
23 your opposing counsel suggested, there's
24 something about the person coming back or
25 trading on their potential future influence, but

1 if the person is just sort of lingering as a
2 result of their former engagement, why -- why
3 isn't that just a lobbyist?

4 MS. REAVES: So someone who is
5 lingering still would need to not just be doing
6 some one-off things or be remaining influential.
7 He would still need to be functioning, you know,
8 in his entirety as a government officer and
9 would still need to meet these three
10 requirements.

11 It's certainly helpful -- and, you
12 know, the Court doesn't need to get into that
13 hypothetical because Petitioner here was
14 planning to return to office. So it's certainly
15 helpful if they're planning to return.

16 JUSTICE JACKSON: Yeah, but we're
17 trying to figure out the test. And I guess
18 what -- what suddenly makes me a little
19 concerned is we're talking about bribery, and,
20 you know, opposing counsel says you really do
21 have to be in a world in which you are trading
22 on your actual influence.

23 And maybe it's going to happen in the
24 future and that's a part of the scheme, but if
25 it's not going to happen in the future and it

1 can't happen in the present because you're not
2 actually an official, then what really is the
3 basis for a 1346 conviction?

4 MS. REAVES: I think it's that an
5 individual at the time that the bribery scheme
6 occurs, not before, not after, is functioning as
7 a government official and that individuals who
8 are superiors and inferiors are continuing to
9 treat him as such. He's able to make actual
10 commands for government actions to occur.

11 JUSTICE KAGAN: Ms. Reaves, it -- it
12 strikes me that the strongest part of your case
13 is the fact that this is a guy who was a former
14 government official and who will be a former
15 government official, and this is just this
16 little hiatus that he's taken and not even to go
17 into private service but to go into sort of the
18 governor's private service, right? So that -- I
19 mean, that's the strongest part of your case.

20 But you're proposing a test which, as
21 the Chief Justice suggested, doesn't need to
22 have any of that. You don't have to be a former
23 official. You don't need to be a future
24 official.

25 And I guess what I would like to know

1 is, can you give me a hypothetical of a -- of a
2 person who is not a former official and who is
3 not a future official, so doesn't have those
4 periods of real status-based control, who is
5 going to meet your test? And what kind of
6 person would that be?

7 MS. REAVES: So --

8 JUSTICE KAGAN: Because then it seems
9 to me -- I mean, you know, I'll give the --
10 the -- the point of the question away -- I don't
11 think you can give me that test without making
12 it look like the guy is just a really, really
13 good lobbyist.

14 MS. REAVES: I think imagine that the
15 governor took someone who hadn't formal --
16 formerly worked for him and said: I'm going to
17 treat this person as the equivalent of my deputy
18 executive secretary. I'm not going to pay him,
19 but, in every other way, he will hold this
20 office. In every other way, he will speak to
21 me. In every other way, you're required to
22 follow his commands. And he gives full access
23 to the building.

24 JUSTICE KAGAN: Okay. I think Mr.
25 Roth would say that's an agent, all right? I

1 mean, because Mr. Roth has a way to deal with
2 that. He -- he says, you know, you don't have
3 to be, like, on the books if there's been that
4 clear a delegation from the principal.

5 MS. REAVES: So I -- I think that
6 person still would also fit under our test. And
7 I think there's -- there's enough evidence in
8 this case for the jury to infer that Petitioner
9 had had that sort of delegation. You know, it's
10 not explicit, but there are indicia throughout
11 this case that Petitioner was just acting in the
12 role in this case that he had previously
13 formally held.

14 JUSTICE SOTOMAYOR: So please tell me
15 why it can't be simply an agent, meaning, why
16 can't we just simply -- instead of this
17 functional whatever, government official, or
18 reliance and control, as the Second Circuit
19 called it, why can't the charge be something as
20 simple as are you acting as an agent?

21 MS. REAVES: So I think this Court
22 would have to overrule Dixson in order to say
23 that because Dixson explicitly said that no
24 formal bond, such as an agency relationship, an
25 employment contract, or a direct contractual

1 obligation, is required.

2 JUSTICE SOTOMAYOR: Well, I'm not sure
3 what -- 666 says you could be an agent of a
4 state or an agent of a government. So how did
5 you charge 666? Or was the jury right in
6 acquitting on 666?

7 MS. REAVES: So, as Justice Alito
8 previously said, this Court has repeatedly
9 indicated that an acquittal on one count --

10 JUSTICE SOTOMAYOR: I don't want to go
11 to that.

12 MS. REAVES: -- doesn't call into
13 question --

14 JUSTICE SOTOMAYOR: I'm asking you a
15 simple question.

16 MS. REAVES: I believe we did charge
17 that on an agency relationship.

18 JUSTICE SOTOMAYOR: All right.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Given the arguments in your brief and
22 your argument this morning, is it fair to say
23 that U.S. attorneys around the country should
24 not be invoking United States versus Margiotta
25 anymore?

1 MS. REAVES: I think -- as we've
2 mentioned, I don't think the Court needs to
3 decide whether Margiotta is, in fact, good law.
4 And we've repeatedly litigated this case as
5 saying it doesn't go that far. I think the --

6 CHIEF JUSTICE ROBERTS: Well, it's
7 kind of the big -- I don't want to say elephant
8 in the room, but it's kind of been a big focus
9 in this area, and you cite it a grand total of
10 two times in your brief, each time to say don't
11 worry, this isn't Margiotta.

12 MS. REAVES: So I think that the --
13 the bottom-line decision in Margiotta that he
14 had, in fact, violated 1346 is correct under a
15 proper interpretation, but I think some of the
16 language in Margiotta is too broad.

17 The jury instructions there were not
18 even a reliance-and-control jury instruction.
19 They were much looser. And to the extent that
20 decision suggests that prestige alone is enough,
21 we would agree that that's not enough, although
22 the jury instructions here, which, again,
23 weren't the same as the jury instructions in
24 Margiotta, did go far enough under our current
25 view.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas?

3 Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: They -- they went
6 far enough or they --

7 MS. REAVES: The jury instructions
8 here went far enough, yes.

9 JUSTICE SOTOMAYOR: Yeah, for you to
10 win, but that's not the question. The question
11 is, did they -- did they reflect Margiotta's
12 broad theory?

13 MS. REAVES: No, they did not, not in
14 the context of this case. You know, the jury
15 here was instructed that Petitioner had to
16 dominate and control a governmental business.
17 That's not dominate and control an individual.
18 That's dominate and control a governmental
19 business. And also that people in the
20 government actually relied on him because of a
21 special relationship he had with the government.
22 And that mere influence and participation in the
23 process of the government, standing alone, are
24 not enough to impose a fiduciary duty.

25 JUSTICE SOTOMAYOR: So is your

1 functional government official test any
2 different than the Second Circuit's reliance and
3 control test as set out in Margiotta?

4 MS. REAVES: Again, I -- I -- I just
5 want to emphasize that the reliance and control
6 test was -- while the Court in Margiotta
7 referenced reliance and control, that is not the
8 test that the jury applied in that case. That's
9 just some loose language itself in Margiotta.
10 And --

11 JUSTICE SOTOMAYOR: Was that language
12 used in the jury instruction here?

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

16 JUSTICE SOTOMAYOR: Yeah. You're --

17 MS. REAVES: -- test.

18 JUSTICE SOTOMAYOR: -- you're
19 cherry-picking.

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

21 JUSTICE SOTOMAYOR: Meaning, does the
22 instruction as a whole reflect the
23 reliance-and-control theory that you're
24 disavowing in Margiotta?

25 MS. REAVES: It does not.

1 JUSTICE SOTOMAYOR: All right. I can
2 read it myself and see.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?
4 Justice Gorsuch?
5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: One of your
7 hypotheticals in your opening was about a
8 pending Cabinet nominee who's bribed to withdraw
9 pending regulations. I understand the other
10 side to say that would qualify so long as it was
11 an action intended to have the pending Cabinet
12 -- Cabinet nominee withdraw those regulations
13 upon assuming office.

14 So how would it happen under your
15 hypothetical that the pending nominee could even
16 accomplish that? I assume you chose that
17 hypothetical with care. I'm trying to figure
18 out how that would even work.

19 MS. REAVES: So that's obviously a
20 reference to 201 and an individual who's been
21 selected to be a public official. And the text
22 of 201 clearly indicates that an individual
23 who's just been selected or appointed to be one,
24 by that very nature of that appointment or
25 selection, is carrying some authority that in

1 some situations may be wielded to take an
2 official act before the individual actually
3 joins government.

4 So, if that Cabinet official, you
5 know, while the nomination was pending, all
6 these acts occur, were to call the agency and
7 say, I'm about to be your boss, I want these
8 regulations withdrawn today before I -- I am --
9 I formally take the role, that would be a 201
10 violation as we understand it and a 1346
11 violation if a state official did that.

12 JUSTICE KAVANAUGH: Well, in the real
13 world, wouldn't the recipient of that call say
14 you're not in office yet?

15 MS. REAVES: I don't --

16 JUSTICE KAVANAUGH: I mean, that --
17 that's at least how my understanding of
18 government works. I guess you're proposing a
19 scenario where that --

20 MS. REAVES: Yes, I am proposing a
21 scenario where the individual obeyed that
22 person's command, which is the scenario that
23 occurred in this case.

24 JUSTICE KAVANAUGH: I understand that.
25 I'm just trying to figure out that hypothetical

1 and how that would work. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: No.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: Just to follow up on
8 what Justice Kavanaugh was exploring with you,
9 wouldn't -- wouldn't it have to be a situation
10 in which the person says, I'm a -- I've been
11 nominated to this position and the scheme is
12 that once I get into office I will order that
13 the regulations be removed?

14 I -- I had understood that opposing
15 counsel was saying that that would be covered
16 under 201. And isn't that the kind of thing
17 that 201 is contemplating?

18 MS. REAVES: So that would be covered
19 by 201, but our reading of 201 is broader to
20 include even if all the acts and the threats and
21 the official action occurred before the
22 individual formally rejoined government -- or
23 formally joined government office.

24 JUSTICE JACKSON: And what is that
25 based on? Where --

1 MS. REAVES: So --

2 JUSTICE JACKSON: -- why is your
3 reading of 201 that broad?

4 MS. REAVES: -- so 201 just on its
5 text provides that an individual who's selected
6 to be a public official can take official acts.
7 I think that Section(b)(2)(A) is probably the
8 best indication of that, that a person selected
9 to be a public official can be influenced in the
10 performance of a -- an official act.

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

22 JUSTICE JACKSON: Well, you talk about
23 Congress's intent. Wasn't there a situation in
24 which Congress considered a bill that had a
25 broader definition of public official to -- to

1 include the kind of things you're talking about,
2 and they rejected it?

3 MS. REAVES: So I think you might be
4 discussing the anti-corrupt -- Anti-Public
5 Corruption Act, which was legislation that was
6 introduced before 1346 itself was introduced.
7 The fact that that legislation didn't go
8 anywhere, I don't think, particularly since it
9 predated 1346, doesn't in any way suggest that
10 1346 should be read more narrowly than McNally
11 and pre-McNally case law and 201 and 666
12 suggest.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Rebuttal,
15 Mr. Roth?

16 REBUTTAL ARGUMENT OF JACOB M. ROTH
17 ON BEHALF OF THE PETITIONER

18 MR. ROTH: Thank you. Just a few
19 quick points.

20 First, counsel tried to avoid the
21 issue of Aiello's knowledge by saying his
22 conviction is not before the Court. But the
23 conviction that is before the Court is a
24 conspiracy count that requires a meeting of the
25 minds to -- on an unlawful objective, and if

1 Aiello didn't know the facts that apparently
2 made this person a public official, then the
3 conspiracy count doesn't work.

4 A second point, counsel tried to avoid
5 some of the hypotheticals by saying, well, mere
6 influence is not enough. It's got to rise to
7 this higher level. And the instructions did say
8 mere influence is not enough.

9 The problem is I don't know what that
10 means. I don't understand where that line is
11 between mere influence and the ability to get
12 something done by making a call or making a
13 request. And that's exactly the vagueness
14 problem that Judge Winter talked about back in
15 Margiotta.

16 And then the final thing I would say
17 -- and this, I think, is probably the most
18 important -- counsel said that when Congress
19 enacted Section 1346 it was trying to reinstate
20 the pre-McNally case law.

21 But, of course, Skilling said that if
22 you read it that way, then it creates a
23 vagueness problem because the pre-McNally case
24 law was inconsistent on numerous points, and,
25 you know, Justice Scalia said it was in chaos.

1 I mean, there was a lot of confusion about what
2 the pre-McNally case law did.

3 And so what Skilling said was, in
4 order to avoid that problem, we've got to read
5 the statute as limited to its core, which it
6 defined as bribery and kickbacks, and then said,
7 in order to figure out what bribery and
8 kickbacks are, we can look at the statutes that
9 we have on the books that define those,
10 specifically, Section 666 and Section 201.

11 But the government can't point to a
12 single case under either 666 or 201 that gets
13 anywhere close to the theory that they are
14 proposing here. On 666, they concede it
15 requires agency. And there was no agency theory
16 pressed on this count.

17 And then, on 201, the best they can do
18 is Dixson. I would just read from Dixson. I
19 mean, Dixson said, to be a public official under
20 Section 201, an individual must possess some
21 degree of official responsibility for carrying
22 out a federal program or policy.

23 And then it said that in that
24 particular case, when one examines the structure
25 of the program and sees that the act vests in

1 local administrators like petitioners the power
2 to allocate federal fiscal resources and so on,
3 it's clear that they are public officials.

4 I mean, that's not what we have here.
5 And so, because the government can't point to
6 anything in the pre-McNally case law that
7 remotely resembles a consensus, they can't point
8 to anything under 666, and their best example
9 under 201 doesn't get them close, I don't think
10 the conviction can withstand scrutiny.

11 If there are no further questions,
12 thank you, Your Honors.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 11:09 a.m., the case
16 was submitted.)

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Official - Subject to Final Review

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