IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

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

Applicants,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR STAY OF MANDATE OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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January 17, 2025

PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Louis Ciminelli, Steven Aiello, Joseph Gerardi, and Alain Kaloyeros. Respondent (appellee below) is the United States of America. Joseph Percoco, Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler (co-defendants in the district court) also qualify as parties under this Court's Rule 12.6.

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

This case sounds familiar for a reason. Just two Terms ago, in *Ciminelli v. United States*, 598 U.S. 306 (2023), this Court unanimously held that the Second Circuit applied an incorrect legal standard (the so-called right-to-control theory) in finding sufficient evidence in the trial record to support Applicants' wire fraud convictions. *See also Aiello v. United States*, 143 S.Ct. 2491 (2023); *Kaloyeros v. United States*, 143 S.Ct. 2490 (2023). This Court then remanded for further proceedings consistent with its opinion. What followed on remand was *inconsistent* with not only this Court's opinion, but with the bedrock principles of Double Jeopardy and retroactivity as well. Rather than judge the sufficiency of the evidence in the first trial by the yardstick of the requirements for wire fraud that this Court set forth in *Ciminelli*, the Second Circuit ordered a second trial while refusing to address Applicants' preserved sufficiency challenge. The Second Circuit's justification for ordering a second jeopardy without resolving a preserved sufficiency objection to the first jeopardy was that this Court's "change in the law" converted a sufficiency challenge into a mere trial error. That is doubly erroneous. This Court's precedents make crystal clear that this Court's decision establishes what the law has always been, and that sufficiency challenges are not like instructional or other trial errors.

The Second Circuit's decision defies this Court's mandate and precedents. It is thus a strong candidate for plenary review or even summary reversal. But the Second Circuit has refused to stay its mandate, which the court is scheduled to issue on Friday, January 24, 2025. As a result, Applicants face the precise irreparable

harm that the Double Jeopardy Clause seeks to guard against—namely, a second prosecution for the same offense. That irreparable injury is particularly unfair here, as Applicants have already suffered the irreparable injury of months of unjustified imprisonment based on the Second Circuit's literally indefensible right-to-control theory. There is no reason to layer irreparable injury on top of irreparable injury here. The government will suffer no meaningful prejudice from the short interval necessary to brief and allow this Court to decide whether to grant plenary review or summary reversal. In short, the decision below is no more defensible than the Second Circuit's first decision in this case, and there is no basis for imposing further irreparable injury on Applicants before this Court can consider the forthcoming petition.

OPINIONS AND ORDERS BELOW

The Second Circuit's opinion on remand is reported at 118 F.4th 291 and attached as Exhibit 1. The Second Circuit's December 6, 2024 order denying rehearing is attached as Exhibit 2. The Second Circuit's January 17, 2025 order refusing to stay its mandate is attached as Exhibit 3.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254(a) and 28 U.S.C. §2101(f).

STATEMENT OF THE CASE

A. Historical & Constitutional Background

The principle that a person not be twice put in jeopardy for the same offense long pre-dates our Constitution, *see, e.g.*, Ger Coffey, *A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era*, 8 Athens J.L.

253, 256 (2022), and was well-established by the framing, *see* 4 William Blackstone, *Commentaries on the Laws of England* 329 (1769) (describing a "universal maxim" that "no man is to be brought into jeopardy of his life, more than once, for the same offence"). It is thus no surprise that this universal maxim was reflected in the Bill of Rights. The Double Jeopardy Clause provides that "[n]o person shall … be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V, cl. 2. As the text and title of the Clause underscore, the protection is not merely, or even principally, against being twice convicted or punished for the same crime, but against even having to suffer through the "embarrassment, expense and ordeal" and "continuing state of anxiety and insecurity" inherent in a second prosecution after once being acquitted of the same offense. *Evans v. Michigan*, 568 U.S. 313, 319 (2013). For that reason, this Court has long afforded defendants an interlocutory appeal to avoid the constitutional injury of a second criminal trial. *See Abney v. United States*, 431 U.S. 651 (1977).

As this Court explained nearly 50 years ago in *Burks v. United States*, 437 U.S. 1 (1978), a "central" objective of the Double Jeopardy Clause is to "forbid[] a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. Thus, when an appellate court makes a "finding of insufficient evidence to convict on appeal from a judgment of conviction," that appellate determination is "the equivalent of an acquittal" "for double jeopardy purposes," *Richardson v. United States*, 468 U.S. 317, 325 (1984), and irrevocably ends prosecution.

Because an appellate determination of evidentiary insufficiency is no different from an acquittal in the first instance and thus shields the defendant from retrial, this Court has recognized that, before a court of appeals may remand for retrial, it is constitutionally required to address a defendant's preserved sufficiency-of-evidence challenge—*i.e.*, to determine whether there is enough evidence in the trial record to support a conviction under the legal requirements of the offense. That duty is central to preserving the defendant's Double Jeopardy protections and thus is non-negotiable. It applies even when trial errors obviously necessitate a new trial (at a minimum) and when resolving the sufficiency question is more difficult. And it applies even when the legal standards used to measure the sufficiency of the evidence have been clarified on appeal. *See, e.g.*, *McDonnell v. United States*, 579 U.S. 550, 556, 580 (2016) ("clarify[ing]" the official-act requirement in the federal bribery statute and specifying that on remand: "If the [Fourth Circuit] determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial. If the court instead determines that the evidence is insufficient, the charges against him must be dismissed.").

At the same time, the Double Jeopardy Clause's prohibition against retrial does not preclude retrying a defendant when there is sufficient evidence to support the conviction, but the conviction cannot stand because of instructional or other trial error. *See, e.g.*, *Burks*, 437 U.S. at 15; *Smith v. United States*, 599 U.S. 236, 241 (2023). That is precisely why it is imperative to address preserved sufficiency

challenges, which give the defendant the greater remedy of protection against retrial, even when obvious trial errors would invalidate a conviction but allow for retrial. And the essential protection of the Double Jeopardy Clause cannot be evaded by relabeling a sufficiency challenge as mere trial error. Instead, this Court has expressly "distinguished" "trial error" from "evidentiary insufficiency": The former "implies nothing with respect to the guilt or innocence of the defendant," whereas the latter "constitute[s] a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15. And when there is "failure of proof at trial" after the government "has been given one fair opportunity to offer whatever proof it could assemble," "the purposes of the [Double Jeopardy] Clause would be negated were [a court] to afford the government an opportunity for the proverbial 'second bite at the apple.'" *Id.* at 16-17.

B. Factual & Procedural Background

1. This Court is well-acquainted with the background of this case, including the government's decision to abandon a traditional property-fraud theory in favor of a right-to-control theory at trial only to have the Solicitor General decline to defend the right-to-control theory in this Court. In 2012, New York announced that it would invest $1 billion of taxpayer money into development projects benefitting upstate New York, a program known as the "Buffalo Billion" initiative. *See Ciminelli*, 598 U.S. at 309. The state administered that initiative through a non-profit entity named Fort Schuyler Management Corporation, which established a process in which it would issue "requests for proposals" (RFPs) and then "select[]

'preferred developers' that would be given the first opportunity to negotiate with Fort Schuyler for specific projects." *Id.* at 309-10.

Applicant Kaloyeros served on Fort Schuyler's board of directors, while Applicants Ciminelli, Aiello, and Gerardi led development companies—LPCiminelli and COR Development—that sought work on the Buffalo Billion initiative. *See* Ex.1 at 6-7. Although the entire Fort Schuyler board—and not Kaloyeros alone—"had ultimate authority to award the contracts" for the Buffalo Billion initiative, "Kaloyeros was in charge of designing and drafting the documents for the [RFP] process, which he did for one RFP for the Buffalo project (the 'Buffalo RFP') and one RFP for the Syracuse project (the 'Syracuse RFP')." Ex.1 at 6. Kaloyeros allegedly "manipulate[d]" that RFP process so that Ciminelli, Aiello, and Gerardi "were able to gain an unfair advantage"—*e.g.*, Kaloyeros supposedly "incorporated requirements into the RFPs that were tailored to match the qualifications or attributes" of LPCiminelli and COR Development. Ex.1 at 7. After selecting those companies as preferred developers and negotiating with them, "Fort Schuyler's board announced" in December 2013 and January 2014 that "COR Development won the Syracuse RFP and that LPCiminelli and another firm won the Buffalo RFP." Ex.1 at 7.

2. Federal investigators responded to this localized contracting process with federal criminal charges. In 2016, prosecutors obtained an indictment charging Applicants with violations of the federal wire fraud statute, which criminalizes "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of

false or fraudulent pretenses, representations, or promises."[1] 18 U.S.C. §1343; *see* D.Ct.Dkt.49. In 2017, prosecutors obtained a superseding indictment. *See* D.Ct.Dkt.162. Each of those two indictments charged a "traditional" property-fraud theory—*viz.*, that the Buffalo Billion contracts constituted the "property" for purposes of the wire fraud statute, *see Ciminelli*, 598 U.S. at 310 n.1—consistent with this Court's holding that the wire fraud statute focuses on "traditional concepts of property." *Cleveland v. United States*, 531 U.S. 12, 24 (2000).

The government, however, decided to change course soon thereafter to take advantage of permissive Second Circuit precedent that excused the government from marshaling evidence of traditional property fraud. In response to Applicants' motions to dismiss, the government abandoned its traditional property-fraud theory and obtained a second superseding indictment that relied on a different theory—that Applicants' alleged "scheme 'defraud[ed] Fort Schuyler of its right to control its assets.'" *Ciminelli*, 598 U.S. at 310 n.1 (alterations in original); *see* D.Ct.Dkt.319-2 (redline of indictment showing traditional property-fraud theory crossed out). That theory invoked the Second Circuit's so-called "right-to-control" decisions, which had held that "a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information' 'necessary to make discretionary economic decisions.'" *Ciminelli*, 598 U.S. at 309. The district court then proceeded

[1] As noted, the indictment also charged Applicants with conspiracy to commit wire fraud, in violation of 18 U.S.C. §1349. Those conspiracy charges "stand or fall with the substantive offenses." *Kelly v. United States*, 590 U.S. 391, 398 n.1 (2020).

to "rel[y] expressly on the right-to-control theory in denying the motion[s] to dismiss." *Id.* at 310 n.1.

The government then stuck with the right-to-control theory and its relaxed evidentiary demands all the way through verdict. For example, it convinced the district court "to exclude certain defense evidence as irrelevant to that theory." *Id.* at 311. Indeed, the government's entire "trial strategy rested solely on that theory." *Id.* at 310. And the government "relied on that theory in its summation to the jury" too. *Id.* at 311.

As the government eventually conceded in a moment of "perfect[] cand[or]," it ditched a traditional property-fraud theory and shifted to a non-traditional right-to-control theory because the latter offered an "easier route to prove to a jury" that it should convict Applicants. *Ciminelli*.Oral.Arg.Tr.60. For instance, because the government did not invoke traditional fraud concepts, it claimed that it did not need to introduce evidence to prove an intent to cause economic harm or an intent to deprive Fort Schuyler of the benefits of the construction contracts—only an intent to deprive Fort Schuyler of "potentially valuable economic information." As a result of the government's tactics, the trial record is bereft of evidence that would satisfy a traditional theory of fraud.

Regardless, a jury convicted Applicants in July 2018 under the right-to-control theory, and the district court denied Applicants' motions under Federal Rule of Criminal Procedure 29 challenging the sufficiency of the evidence. *See* Ex.1 at 11. The district court then sentenced Applicants to prison terms ranging from 28-42

months, and ordered them to surrender to the Bureau of Prisons 60 days after the mandate issued on appeal. *See* D.Ct.Dkt.939, 945, 946, 953.

3. Applicants appealed to the Second Circuit, where they again "challenged the sufficiency of the evidence, contending that a 'right-to-control theory of wire fraud' is 'invalid' because 'the right to control one's own assets is not "property" within the meaning of the wire fraud statute.'" *Ciminelli*.U.S.Br.9. The government defended those convictions based "solely on the right-to-control theory," *Ciminelli*, 598 U.S. at 311, and the court of appeals rejected the challenge because "the right-to-control theory of wire fraud is well-established in Circuit precedent," *United States v. Percoco*, 13 F.4th 158, 164 n.2 (2d Cir. 2021). The court then rejected Applicants' record-based challenges to the sufficiency of the evidence, applying the right-to-control theory. *See id.* at 170-72. It further denied Applicants' motion to stay the mandate, thus requiring Applicants to report to federal custody.

4. Applicants sought this Court's review, asking whether the right-to-control theory that the Second Circuit applied when conducting its sufficiency-of-evidence review was a legally valid standard. *See, e.g.*, *Ciminelli*.Cert.Reply.3 ("This petition focuses on the sufficiency issue alone, contending that the Second Circuit used a *legally invalid* definition of the elements in finding the evidence sufficient to support petitioner's conviction"). The Court granted certiorari, and Applicants were released from Bureau of Prisons custody after serving over 100 days in prison. Despite the government's earlier efforts to resist this Court's plenary review, once this Court granted certiorari, the Solicitor General declined to defend the Second

Circuit's right-to-control theory. The government nonetheless urged this Court not to reverse the decision below, but to affirm it on the theory that the record could support conviction on a traditional property-fraud theory. In doing so, the government emphasized in both briefing and at oral argument that the question presented involved only a sufficiency issue and not instructional error. *See, e.g.*, *Ciminelli*.U.S.Br.13 ("In this Court, petitioner has disclaimed any challenge to the district court's right-to-control instructions and instead contests only the evidence supporting his convictions."); *Ciminelli*.U.S.Br.31 ("In seeking this Court's review, petitioner explicitly disclaimed any challenge to 'the adequacy of the jury instructions' and emphasized that his sole claim in this Court is that the evidence was insufficient to support his wire fraud convictions."); *Ciminelli*.Oral.Arg.Tr.41 (Deputy Solicitor General: "[A]ll they have made here is a sufficiency of the evidence challenge."); *Ciminelli*.Oral.Arg.Tr.56 (Deputy Solicitor General: "[A]s the case comes to this Court, it's just a pure sufficiency of the evidence challenge."); *Ciminelli*.Oral.Arg.Tr.57 (Deputy Solicitor General: A "challenge" to the "jury instructions" is "forfeited.").

This Court unanimously declared that "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes," rejected the government's invitation to affirm on any alternative theory, and reversed and remanded for further proceedings consistent with the Court's opinion. *Ciminelli*, 598 U.S. at 316. In rejecting the right-to-control theory, the Court pointed to decades-old precedents explaining that "the federal fraud statutes criminalize only schemes to deprive people

of traditional property interests," and "[b]ecause 'potentially valuable economic information' 'necessary to make discretionary economic decisions' is not a traditional property interest, … the right-to-control theory is not a valid basis for liability" under the wire fraud statute. *Id.* at 309. The Court further stated that "[t]he right-to-control theory cannot be squared with the text of the federal fraud statutes" and is "inconsistent with the structure and history of the federal fraud statutes." *Id.* at 314-15.

The Court emphasized that, "[d]espite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-control theory, the Government now *concedes* that the theory as articulated below is erroneous." *Id.* at 316 (emphasis added). Although the Court indicated that this concession "should be the end of the case," it acknowledged that the government had made the late-breaking argument that the Court could "affirm [the] convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory"—*i.e.*, the very theory that the government had disavowed in the district court in 2017. *Id.* The Court rejected that request. After reiterating that "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury," the Court "reverse[d] the judgment of the Court of Appeals and remand[ed] the case for further proceedings consistent with this opinion." *Id.* at 317.

5. On remand to the Second Circuit, Applicants argued that "they are entitled to judgments of acquittal … because the government chose to pursue a now-

invalid theory of wire fraud at trial and" as a result the evidence in the trial record "is insufficient to sustain their convictions on a traditional property theory of wire fraud that the government did not pursue at trial." Ex.1 at 13. The government resisted that conclusion but also contended that the court of appeals "should *not* reach the question of the sufficiency of the evidence"—even though it had just told this Court to do exactly that—"but instead remand for retrial … under a traditional wire fraud theory" without resolving the sufficiency question. Ex.1 at 13 (emphasis added).

The Second Circuit accepted that extraordinary invitation, and vacated the wire fraud and conspiracy convictions and remanded for a new trial without ever resolving Applicants' preserved sufficiency challenges. Rather than measure the evidence in the trial record against the statutory requirements as elucidated by this Court in *Ciminelli*, the Second Circuit emphasized that *Ciminelli* changed the law from what had previously governed in the Second Circuit. In doing so, the court of appeals observed that, "[i]n the operative indictment and at trial, the government presented only the now-invalid right-to-control theory of wire fraud." Ex.1 at 19. Accordingly, the court proclaimed that "it is unclear how [it] could or would evaluate the sufficiency of the evidence of the wire fraud count and wire fraud conspiracy convictions based on a wire fraud theory that the government did not present to the jury," as the government supposedly lacked sufficient "notice" that it would need to prove a traditional property-fraud theory. Ex.1 at 18, 21. To rectify this purported unfairness to the government, the court thought it best to give the government an

opportunity to "offer new evidence based on a traditional property theory of wire fraud," which the court thought the government could do after "obtain[ing] another superseding indictment." Ex.1 at 20-21 & n.2.

Although Applicants emphasized that the Double Jeopardy Clause did not allow the Second Circuit to simply bypass the sufficiency question or excuse the government's failure to introduce evidence under a traditional-property theory of fraud, the Second Circuit thought otherwise. It held that "the Double Jeopardy Clause is not a bar to a retrial" because this case involved a "trial error" in the form of "a change in the law" via *Ciminelli*, Ex.1 at 17, and when there is a "change" in the legal standard, an appellate court purportedly "may decline to review preserved sufficiency challenges if such a review 'would deny the government an opportunity to present its evidence' under the correct legal standard." Ex.1 at 22. In a footnote, the Second Circuit acknowledged that this Court, having clarified the governing statutory law and reversing the Fourth Circuit's more lenient understanding of the statutory requirements in *McDonnell*, had "directed the Fourth Circuit to resolve, in the first instance, the defendant's argument that there was insufficient evidence" to convict "based on the correct interpretation" of the statute, but it dismissed *McDonnell* as "inapposite." Ex.1 at 22 n.4. Instead, the court pointed to decisions from "[o]ther circuit courts" that supposedly support its view that it may bypass sufficiency-of-evidence review. Ex.1 at 18-19. But the Second Circuit has previously acknowledged that "[o]ur sister courts of appeals have divided … on the issue of

whether sufficiency review before retrial is prudentially sound or constitutionally required." *Hoffler v. Bezio*, 726 F.3d 144, 161 (2d Cir. 2013).

6. Applicants sought rehearing en banc, asking the Second Circuit to "hold that sufficiency review is mandatory, even when the governing law has changed—and especially where, as here, the government's failure to present evidence resulted from its own tactical choice to forgo a well-established alternative theory." CA2.Dkt.570 at 2. The court of appeals denied the petition. *See* Ex.2. Applicants subsequently filed a motion to stay the mandate pending the filing and disposition of a petition for certiorari that would present at least the following question: "In a direct appeal from a criminal conviction, may an appellate court remand for retrial without considering a preserved challenge to the sufficiency of the evidence without violating Double Jeopardy principles?" CA2.Dkt.583 at 1. The Second Circuit denied that request too, *see* Ex.3, forcing Applicants to file this emergency application.

REASONS FOR GRANTING THE APPLICATION

This Court may stay the mandate of a lower court whose judgment is subject to review by this Court "to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. §2101(f). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). "In close cases," the

Court will also "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190 (per curiam).

Those factors are readily satisfied here. Indeed, the Second Circuit's decision is a candidate not only for plenary review in light of the recognized circuit split, but also summary reversal in light of *Burks* and *McDonnell*, which set forth principles reinforcing that appellate courts must resolve sufficiency-of-evidence challenges applying the newly clarified legal standard before ordering a new trial. Both the Double Jeopardy Clause and the bedrock principle that criminal defendants on direct appeal get the benefit of this Court's clarification of what a statute has always meant require nothing less. Moreover, in the absence of a stay, Applicants (who have already suffered the irreparable harm of months of unjustified imprisonment) stand to suffer the classic irreparable harm that the Double Jeopardy Clause protects against. In contrast, the government can hardly complain of prejudice from a modest stay, as the government's abandonment of a traditional property-fraud theory in favor of a right-to-control theory that the government itself could not defend in this Court is largely responsible for this current mess. All relevant considerations thus lead to the same conclusion: The Court should stay the Second Circuit's mandate.

I. There Is A Reasonable Probability That The Court Will Grant Certiorari In This Case Again And A Fair Prospect That The Court Will Reverse Again.

This Court has already granted certiorari and reversed the Second Circuit in this case once before. There is both "a reasonable probability" that the Court will grant certiorari again and a "fair prospect" that the Court will reverse again. Indeed, the Second Circuit's decision on remand is so flatly inconsistent with bedrock double-

jeopardy principles and this Court's precedent (including this Court's mandate in this very case) that there is a reasonable prospect that this Court will summarily reverse if it does not grant plenary review.

1. Litigants before this Court generally disagree about almost everything. But last time around, Applicants and the government ultimately agreed on at least two important things: (1) the petition raised only a sufficiency-of-evidence issue, not an instructional-error issue; and (2) the Second Circuit's right-to-control theory (the sole theory tried) was indefensible on the merits. The one thing that they disagreed about is whether this Court could affirm the convictions based on a traditional property-fraud theory. The government suggested that the Court could simply affirm, and in doing so, emphasized that the only question before this Court was sufficiency. This Court squarely rejected that invitation. After unanimously holding that the "right-to-control" theory used by the Second Circuit to uphold the sufficiency of the trial evidence "cannot form the basis for a conviction," the Court "reverse[d] the judgment of the Court of Appeals and remand[ed] the case for further proceedings consistent with this opinion." *Ciminelli*, 598 U.S. at 316-17.

This Court's precedents make clear how the Second Circuit should have proceeded consistent with the *Ciminelli* opinion on remand. *Burks* makes clear that the Double Jeopardy Clause required the Second Circuit to evaluate the sufficiency of the evidence in the trial record as judged by the legal requirements set forth in *Ciminelli*. Simply ordering a new trial while bypassing that preserved sufficiency challenge was not a permissible option.

In *Burks*, the Court "granted certiorari to resolve the question of whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict." 437 U.S. at 2. The Court unanimously answered in the negative. As the Court reasoned, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"—"[t]his is central to the objective of the prohibition against successive trials." *Id.* at 11. As a result, the Double Jeopardy Clause "does not allow" the government "'to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Id.* at 11 (alteration in original). Nor are courts free to give the government "the proverbial 'second bite at the apple'" "after 'a balancing of the equities.'" *Id.* at 11 n.6, 17. "[W]here the Double Jeopardy Clause is applicable," the Court explained, "its sweep is absolute," and "[t]here are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Id.* at 11 n.6.

Burks specifically addressed circumstances where an appellate court has in fact "determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Id.* at 5. But its admonition that the government gets only "one fair opportunity to offer whatever proof it could assemble," *id.* at 16, plainly supports

the closely related principle that an appellate court confronted with a sufficiency-of-evidence challenge to a conviction is not at liberty to refuse to decide that issue and remand for retrial for the purpose of giving the government another bite at the apple. As Justice Brennan observed soon after *Burks*, "the protections established in *Burks* … would become illusory" if the decision to even address the sufficiency-of-evidence challenge turned on the "grace of a reviewing court." *Richardson*, 468 U.S. at 331 (Brennan, J., concurring in part and dissenting in part); *Justs. of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 319 (1984) (Brennan, J., concurring in part and concurring in the judgment). Justice White likewise recognized that *Burks* did not leave appellate courts with the option of ordering a second jeopardy while leaving the sufficiency of the evidence in the first trial record unresolved: "[U]nder *Burks*," "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional] standard," and "the [sufficiency-of-evidence] issue cannot be avoided" by an appellate court: "[I]f retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict." *Tibbs v. Florida*, 457 U.S. 31, 51 (1982) (White, J., dissenting); *see also Lydon* at 321-22 (Brennan, J., concurring in part and concurring in the judgment) ("[W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with the rule of *Burks* … , ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial.").

This Court's explicit remand instructions in *McDonnell* underscore the point. *McDonnell* addressed the meaning of "official act" under the federal bribery statute in a prosecution of former Virginia governor Bob McDonnell. *See* 579 U.S. at 555, 566; *see also* 18 U.S.C. §201(a)(3). The Court unanimously rejected the theory embraced by the government and the Fourth Circuit that the official act requirement could be satisfied by merely "arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject." *McDonnell*, 579 U.S. at 566-67. Instead, the Court held that an "official act" requires more: a "decision or action" (or an agreement to make a decision or to take an action) on an actually or potentially "pending" "'question, matter, cause, suit, proceeding or controversy'" that "involve[s] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 574.

Having "clarif[ied] the meaning of 'official act,'" and concluded that the Fourth Circuit test under which the trial evidence was previously deemed sufficient was unduly lax, the Court specified the options available to the Fourth Circuit on remand. The Court acknowledged that Governor McDonnell had "argue[d] that the charges must be dismissed because there is insufficient evidence that he committed an 'official act,' or that he agreed to do so." *Id.* at 580. The Court declined to undertake the sufficiency-of-evidence review itself, and instead "le[ft] it for the Court of Appeals to resolve" that issue "in the first instance" "in light of the interpretation of [the bribery statute]" that the Court had just "adopted." *Id.* As the Court specifically instructed,

"[i]f the court below"—*i.e.*, the Fourth Circuit—"determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial." *Id.* But "[i]f the court instead determines that the evidence is insufficient," the Court continued, "the charges against him *must be dismissed*." *Id.* (emphasis added). The Court therefore "remanded for further proceedings consistent with this opinion." *Id.* at 581.

These precedents make clear that the Second Circuit's decision to bypass the Applicants' sufficiency objection and order them to endure a second jeopardy was inconsistent with the Double Jeopardy Clause. Indeed, when this Court clarified the meaning of the wire fraud statute in *Ciminelli* and remanded for the Second Circuit to conduct "further proceedings consistent with this opinion," 598 U.S. at 317, the options available to the Second Circuit were no different from those available to the Fourth Circuit in *McDonnell*. By adopting a third option—and ordering a new trial without first measuring the sufficiency of the evidence in the trial record against the requirements set forth in *Ciminelli*—the Second Circuit engaged in further proceedings flatly *in*consistent with the mandate in *Ciminelli* and the non-negotiable guarantee of the Double Jeopardy Clause. The fact that this Court's remand instructions were less explicit here than in *McDonnell* may explain the Second Circuit's error, but it does not excuse it. To the contrary, between *Burks* and *McDonnell*, it should have been obvious that addressing the sufficiency of the evidence in the first trial record in light of *Ciminelli* was not optional.

Given those obvious errors, it cannot seriously be disputed that there is "a reasonable probability" that the Court will grant certiorari and a "fair prospect" of reversal. Indeed, because the decision below brazenly defies this Court's mandate in *Ciminelli*, which required the court below to follow this Court's clear precedent, this case is a strong candidate for summary reversal.

2. The Second Circuit believed it could bypass the sufficiency-of-evidence issue here because (1) "the Double Jeopardy Clause is not a bar to a retrial" when there is a "trial error," and trial error purportedly occurred here because this Court's *Ciminelli* decision "change[d] … the governing law after trial," and (2) "[e]ngaging in sufficiency review … would … 'deny the government an opportunity to present its evidence' under the correct legal standard.'" Ex.1 at 14-23. That reasoning is deeply flawed.

First, the Second Circuit's effort to label a sufficiency challenge as a mere "trial error" is an egregious category mistake. Indeed, a sufficiency challenge is the quintessential non-trial error that is routinely preserved by a Rule 29 motion for acquittal rather than a Rule 33 motion for new trial. *See* Fed. R. Crim. P. 29(a) ("After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."). Moreover, *Burks itself* expressly "distinguished" "trial error" (like providing "incorrect instructions" to the jury) from "evidentiary sufficiency." 437 U.S. at 15-16. While *Burks* held that retrial is permitted in cases involving mere trial errors, it held that "the Double Jeopardy

Clause precludes a second trial"—and necessitates "a judgment of acquittal" for a defendant—if the evidence is "legally insufficient." *Id.* at 15, 18. That difference is fundamental, and the essential protection of the Double Jeopardy Clause cannot be eviscerated by re-classifying a sufficiency challenge as a mere trial error.

The Second Circuit cannot convert a sufficiency challenge into a trial error by complaining that *Ciminelli* involved a "change" in the law. While this Court reversed the Second Circuit's unduly lenient view of what a criminal statute requires, just as it reversed the Fourth Circuit's unduly lenient view in *McDonnell*, that does not mean this Court "changed" the law, let alone changed it in a way that could deprive the very defendants who procured the clarifying decision of the benefit of this Court's decision. To the contrary, when this Court interprets a statute (like the wire fraud statute), it is clarifying what the statute "*always* meant," not announcing some prospective-only law as a legislature presumptively does. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). Indeed, "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." *United States v. Palomar-Santiago*, 593 U.S. 321, 325 (2021) (emphasis added). As a result, "it is not accurate to say that the Court's decision in [*Ciminelli*] 'changed' the law that previously prevailed in the [Second] Circuit"; rather, "the [*Ciminelli*] opinion finally decided what [the wire fraud statute] had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Rivers*, 511 U.S. at 313 n.12.

Moreover, once this Court established what the wire fraud statute has always required, Applicants could not be denied the benefit of the decision in determining whether the evidence in the trial record was sufficient. Indeed, it has been clear since *Griffith v. Kentucky*, 479 U.S. 314 (1987), that every defendant on direct appeal gets the benefit of this Court's decision favorable to criminal defendants. But even in the bad old days of selective retroactivity, the criminal defendants whose own litigation efforts procured the favorable clarification were entitled to the benefit of that decision. By refusing to give Applicants the benefit of the *Ciminelli* decision in adjudicating their preserved sufficiency challenge, the Second Circuit committed a grave unfairness to the Applicants.

The Second Circuit, however, was blind to that grave unfairness because it was more concerned with the unfairness to the government of having the sufficiency of the trial record judged against the legal standard articulated in *Ciminelli*, rather than the discredited right-to-control theory. Needless to say, the Double Jeopardy Clause is not concerned about fairness to the government, and does not permit a "balancing of the equities" to determine whether a second jeopardy is really so bad. *Burks*, 437 U.S. at 11 n.6. That is why this Court routinely bars retrials even in circumstances that are seemingly unfair to prosecutors. *See, e.g.*, *Martinez v. Illinois*, 572 U.S. 833, 835-42 (2014) (per curiam) (Double Jeopardy Clause barred retrial when the district judge denied a continuance that prosecutors needed to assemble their witnesses); *Evans*, 568 U.S. at 320 (Double Jeopardy Clause barred retrial when record insufficient because the trial judge misunderstood the law); *Sanabria v. United*

States, 437 U.S. 54, 68-69 (1978) (Double Jeopardy Clause barred retrial when record insufficient because the district judge erroneously excluded evidence).

More fundamentally, though, the Second Circuit appeared to forget that "[j]udicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910). There is nothing unfair to the government about applying the ancient and "general rule ... that an appellate court must apply the law in effect at the time it renders its decision" on "direct appellate review." *Henderson v. United States*, 568 U.S. 266, 269, 271 (2013); *see also, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (stating that "decisions that narrow the scope of a criminal statute by interpreting its terms" apply to all cases on direct review); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (stating that a "holding that a substantive federal criminal statute does not reach certain conduct" applies to all cases on direct review); *Griffith*, 479 U.S. at 322 ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

Furthermore, the Second Circuit's suggestion that the government lacked notice of this Court's holding in *Ciminelli—i.e.*, that the wire fraud statutes care only about traditional property interests—strains all credulity. After all, *Ciminelli* just applied decades-old precedents that "reject[ed] the Government's theories of property rights … because they stray from traditional concepts of property." *Cleveland*, 531 U.S. at 24. And the Second Circuit itself had been unanimously reversed for straying from traditional notions of property in the context of other criminal statutes. *See,*

e.g., Sekhar v. United States, 570 U.S. 729, 737 (2013) (relying on, *inter alia*, *Cleveland* to reject the Second Circuit's view that extortion does not require obtaining property via coercion). That is why, once the case got here, the government "concede[d]" that the right-to-control theory "is erroneous" *under existing law*. *Ciminelli*, 598 U.S. at 316. Contrary to the Second Circuit's understanding, then, the government had every "'opportunity to present its evidence' under the correct legal standard" the first time around. Ex.1 at 22. In fact, as the government recently told this Court in another case, it "could have prosecuted the bid-rigging scheme [in *Ciminelli*] on the ground that the defendant[s] obtained … valuable contracts" and "did, in fact, advance a version of that 'traditional property-fraud theory' in that case." U.S.Br.46-47, *Kousisis v. United States*, No. 23-909 (U.S. filed Oct. 2, 2024). The only reason that the government did not continue to pursue that theory is because it consciously decided to take the easy way out by relying exclusively on the dubious right-to-control theory. *See Ciminelli*.Oral.Arg.Tr.60. There is nothing remotely unfair about holding the government to the consequences of that deliberate choice.

3. All that said, the Second Circuit is not the first court to make this error, although doing so on direct remand from this Court is unprecedented. In fact, there is an acknowledged "circuit split" on the frequently recurring and important question whether appellate courts are obligated to conduct sufficiency-of-evidence review before remanding for retrial. *Hoffler*, 726 F.3d at 161; *see also* 6 Wayne R. LaFave et al., *Crim. Proc.* §25.4(c) (4th ed. 2024). Hence, while this Court could grant certiorari and summarily reverse, it may wish to grant plenary review and reverse.

On one side of the divide, the D.C. Circuit has held that sufficiency-of-evidence review is mandatory. *See, e.g.*, *United States v. Davis*, 863 F.3d 894, 903 (D.C. Cir. 2017); *United States v. Williams*, 827 F.3d 1134, 1162 (D.C. Cir. 2016) (per curiam). Furthermore, that court of appeals has recognized—in the course of reviewing a conviction under the wire fraud statute, no less—that "an appellate court must apply the law in effect at the time it renders its decision" about the sufficiency of the evidence. *United States v. Barrow*, 109 F.4th 521, 527 n.3 (D.C. Cir. 2024). If a higher court clarifies the elements of the crime after the trial, the court explained, the "gap in time" between the trial and the legal clarification "is of no effect," as the "longstanding" rule is that judgments must "reflect the current legal standards, even if it means setting aside a ruling that was correct at the time it was rendered." *Id.*; *see also id.* ("[J]udicial decisions presumptively apply retroactively to all cases still open on direct review and all events, regardless of whether such events predate or postdate the new rule." (alteration in original)).

Other courts of appeals have staked out a middle ground, holding that sufficiency-of-evidence review is generally constitutionally required but creating limited "change-in-the-law" exceptions. For example, the Eighth Circuit has held that "*Burks* does not allow an appellate court to … remand for retrial while ignoring a claim of insufficient evidence," *Palmer v. Grammer*, 863 F.2d 588, 592 (8th Cir. 1988), but it has also held that, "when evidence offered at trial was sufficient to support the conviction under the law at the time but later was rendered insufficient by a post-conviction change in the law, the setting aside of a conviction on this basis

is equivalent to a trial-error reversal rather than to a judgment of acquittal," *United States v. Harrington*, 997 F.3d 812, 817 (8th Cir. 2021). The Sixth Circuit has also held that an appellate court "must address" a sufficiency-of-evidence challenge "because a sufficiency-based reversal would preclude retrial under the Double Jeopardy Clause," but that an appellate court is obligated to carry out that review—"[o]ddly"—by applying the "wrong" legal standard used during the trial proceedings. *United States v. Houston*, 792 F.3d 663, 669-70 (6th Cir. 2015). Other circuits are in a similar camp. *See, e.g.*, *United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990); *United States v. Ford*, 703 F.3d 708, 711 (4th Cir. 2013); *United States v. Weems*, 49 F.3d 528, 530 (9th Cir. 1995); *United States v. Wiles*, 106 F.3d 1516, 1518-19 (10th Cir. 1997); *United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995); *cf. Vogel v. Pennsylvania*, 790 F.2d 368, 373, 376 (3d Cir. 1986).

Meanwhile, multiple other circuits have held that appellate courts need not resolve sufficiency-of-evidence challenges at all. The First Circuit, for instance, has made itself "perfectly clear" that it "do[es] not hold that the Double Jeopardy Clause *compels* the review of a properly preserved insufficiency claim before the [defendant] is retried," since sufficiency-of-evidence review is a "prudential matter." *Foxworth v. Maloney*, 515 F.3d 1, 4 (1st Cir. 2008). The Fifth Circuit has likewise stated that sufficiency-of-evidence review is "not mandated by the double jeopardy clause." *United States v. Miller*, 952 F.2d 866, 874 (5th Cir. 1992). The Seventh Circuit has described itself as "not convinced … that the Double Jeopardy Clause compels an appellate court to review the sufficiency of the evidence offered at trial." *United*

States v. Douglas, 874 F.2d 1145, 1150 (7th Cir. 1989). And the Eleventh Circuit likewise reviews sufficiency-of-evidence challenges only as a "prudential" practice. *United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005).

As these decisions illustrate, the courts of appeals are all over the map in answering the question whether, consistent with the Double Jeopardy Clause, they may remand for retrial in a direct appeal without considering a preserved challenge to the sufficiency of the evidence. The Second Circuit has now deepened that split with the decision below, which makes the "probability" of certiorari review that much more "reasonable."[2] *Hollingsworth*, 558 U.S. at 190 (per curiam). And because the Second Circuit's approach is obviously wrong for all of the reasons provided above, there is still far more than a "fair prospect" of reversal even if this Court grants plenary review in light of the circuit split. *Id.* Thus, no matter which path this Court takes, there is no question that the first two stay factors are amply satisfied.

II. Applicants Are Likely To Suffer Irreparable Harm In The Absence Of A Stay, And The Equities Favor A Stay.

A stay of the mandate is further warranted because, in the absence of a stay, Applicants (who have already suffered the irreparable injury of months of unjustified imprisonment) will further suffer the precise irreparable harm that the Double Jeopardy Clause is designed to prevent. Without a stay, this case will return to the district court for a second trial. Indeed, in opposing a stay of the mandate in the Second Circuit, the government made clear that, on remand, the parties should

[2] The government is also attempting to apply the decision below here to other pending criminal appeals in the Second Circuit. *See, e.g.*, *United States v. Lopez*, No. 23-7183, Dkt.108 (2d Cir.).

promptly "take up … trial preparation" and engage in "motion practice." CA2.Dkt.589 at 17. Quite obviously, subjecting Applicants to such proceedings would "significantly undermine[]" the very "rights conferred on [Applicants] by the Double Jeopardy Clause" that they seek to vindicate in this Court. *Abney*, 431 U.S. at 660. "[T]he Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense," which would force the defendant "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once." *Id.* at 660-61. The interest protected is not merely the risk of conviction in the second trial—it is the right to prevent "the Government" from "hal[ing]" a defendant "into court" at all to face a second charge after a completed first trial. *Id.* at 659-60 (citing *Menna v. New York*, 423 U.S. 61 (1975)). The damage to those rights "cannot be undone" once the Second Circuit's mandate issues.[3] *Hollingsworth*, 558 U.S. at 196 (per curiam); *cf. Coinbase, Inc. v. Bielski*, 599 U.S. 736, 741 (2023) ("Here, as elsewhere, it 'makes no sense for trial to go forward while the [reviewing] court … cogitates on whether there should be one.'").

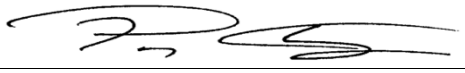
[3] The government told the Second Circuit that this Court's forthcoming decision in *Kousisis v. United States*, No. 23-909 (U.S. argued Dec. 9, 2024), "may contain reasoning that could bear on the jury instructions in the retrial in this case," and "[f]or that reason, the Government does not intend to seek a trial prior to the issuance of that opinion." CA2.Dkt.589 at 17. But the government still fully intends to engage in pre-trial matters that would eviscerate Applicants' rights under the Double Jeopardy Clause. And the fact that the government believes that the just-argued *Kousisis* case will impact this case just underscores that there is no reason to send this case back to the district court at this juncture.

On the other side of the ledger, the government can hardly call foul from a brief stay of the Second Circuit's mandate. To reiterate, the "further proceedings" that the Second Circuit envisions occurring in the district court are proceedings that would enable the government to seek another superseding indictment and develop a traditional property-fraud theory against Applicants. Ex.1 at 21-23. That is the very theory that the government literally redlined out of the now-operative indictment all the way back in September 2017. *See* D.Ct.Dkt.319-2. Having made that tactical decision over seven years ago, it is not too much to ask the government to live with its consequences for a few short months longer to enable this Court to review Applicants' petition for certiorari and ensure that fundamental constitutional rights are not violated.

CONCLUSION

For the foregoing reasons, the Court should grant this application for a stay of the Second Circuit's mandate pending the timely filing and disposition of a petition for writ of certiorari.

Respectfully submitted,



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