No. 21-1158

In the
Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

BRIEF FOR RESPONDENT STEVEN AIELLO IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether paying an influential private citizen to advocate one's position before a government agency can constitute honest-services fraud under 18 U.S.C. § 1346.

PARTIES TO THE PROCEEDING

Petitioner Joseph Percoco was a Defendant-Appellant in the Second Circuit.

Steven Aiello was also a Defendant-Appellant in the Second Circuit and, pursuant to Rule 12.6 of this Court's Rules, is a Respondent herein.

Respondent United States of America was Appellee in the Second Circuit.

Joseph Gerardi, Louis Ciminelli, and Alain Kaloyeros were also Defendants-Appellants in the Second Circuit. Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler were Defendants in the district court.

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INTRODUCTION

Suppose you own a small business. For months a state agency has been mulling a measure that would increase your company's costs. Although you believe a favorable decision is likely and, in fact, required by law, the agency's waffling and bureaucratic delay create uncertainty and hamper your company's ability to do business. Then you learn that an influential adviser to the governor has recently left the administration and is looking for private consulting work. You also learn that the adviser has received a written legal opinion, which says the state's law permits him to "engage in backroom services for compensation before" state agencies. Your company retains the former adviser and pays his fee to advocate on your behalf to the agency. He makes a phone call to a state official and explains your position on the issue, and the agency resolves the question in your favor.

Have you committed a federal crime? Could you have reasonably imagined that the former adviser had the same legal duties as a government employee because of his continuing influence, making your payment to him a corrupt "bribe"? Can you be imprisoned for conspiring to defraud the public of the former adviser's "honest services," as though he was an actual public official?

That is what happened to Respondent Steven Aiello. Even though the lobbyist he retained, Petitioner Joseph Percoco, lacked any governmental authority at the time, the Second Circuit held that Percoco owed a fiduciary duty to the public because he retained significant influence over state employees. From this

premise, the Second Circuit concluded that the payment to Percoco was not a fee for lobbying services but, instead, a criminal bribe under the federal honest-services statute, 18 U.S.C. § 1346. Thus, under the Second Circuit's expansive interpretation of § 1346, it can be a federal crime to pay an influential private individual to lobby the government.

But paying a person to advocate one's interests before the government does not violate § 1346 if the person has no public authority, no matter how influential he might be. Aiello's conduct was constitutionally protected political advocacy, not a federal crime.

To affirm the convictions here, the Second Circuit resurrected a long-criticized 40-year-old decision that this Court abrogated in 1987. The Second Circuit held that a private individual has the same fiduciary duty to the public as a state employee if the individual "dominates and controls" and is "relied on" by public officials. That holding conflicts with this Court's two decisions interpreting—and sharply limiting the scope of—§ 1346. *See Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 579 U.S. 550 (2016). It also defies this Court's directives in *Skilling*, *McDonnell*, and many other decisions to construe criminal statutes narrowly to avoid serious due process, First Amendment, and federalism problems. And it has dangerous implications for American democracy and individual liberty.

Under the Second Circuit's theory, a vast range of ordinary political interactions could be federal felonies. A senior White House official who remains close to the President could be charged with defrauding the public if she later makes a phone call to a federal

agency for a client. An influential party official could be prosecuted for paid lobbying because politicians are eager to please him. And there are no ascertainable limits to the Second Circuit's theory. How will anyone know when a former official's access crosses the line from mere influence to "dominance and control"? Such a slippery rule provides no fair notice and invites varying and inconsistent determinations depending on the whims of prosecutors, juries, and judges; it is a quintessential due process violation. The First Amendment and federalism concerns with involving the federal government in regulating the political activities of former state and local officials are equally obvious.

This prosecution epitomizes why the Second Circuit's ruling is so dangerous, and why it is statutorily and constitutionally untenable. There was no way for Aiello to suspect that retaining Percoco could be a criminal "bribe." He hired Percoco *because* Percoco had left the government, and because Percoco had been told he *could* legally lobby state agencies. What is more, he had a First Amendment right to do so. Yet he was prosecuted and convicted of participating in a conspiracy to commit honest-services fraud.

The judgment should be reversed.

STATEMENT OF THE CASE

A. Legal Background

The honest-services fraud doctrine originated as a judicially created expansion of the federal mail fraud statute, 18 U.S.C. § 1341. That statute prohibits "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," but prosecutors in the mid-twentieth century began using it to target public corruption by state and local officials. They argued that the statute reached beyond schemes to obtain money or property, and also prohibited "schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally v. United States*, 483 U.S. 350, 355 (1987). Lower courts endorsed this "honest services" fraud theory, which prosecutors applied to corruption involving public officials as well as analogous private-sector conduct. In public corruption cases, the idea was that public officials are public fiduciaries; if a public official takes a bribe but fails to disclose that payment, he defrauds constituents who have placed their trust in him to faithfully and honestly represent their interests. The bribe payor may be equally guilty as a co-conspirator, on the theory that he agreed to deprive the public of the official's honest services.

But the nascent "honest services" theory of mail fraud was not limited to the prototypical example of a bribe to a public official. For several decades, prosecutors experimented with novel theories of honest-services fraud, and the lower courts developed and ex-

panded the doctrine. This led to "considerable disarray over the statute's application." *Skilling v. United States*, 561 U.S. 358, 405 (2010).

During this period of prosecutorial and judicial expansion of the honest-services fraud concept, a divided Second Circuit panel decided *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). The defendant there, Joseph Margiotta, was a longtime local Republican Party chairman who held no public office. He was convicted of mail fraud for persuading a Long Island town to select an insurance broker who paid kickbacks to some of Margiotta's cronies. He challenged his conviction on the ground that the mail fraud statute "does not embrace a theory of fiduciary fraud by individuals who participate in the political process but who do not occupy public office," and argued that he "owed no fiduciary duty to the general citizenry" of the town or surrounding county under federal or state law. *Id.* at 112.

The panel majority rejected that argument. Starting from the premise (subsequently rejected in *McNally*, as discussed below) that schemes to cause intangible losses "clearly come within the terms of the statute," the majority held that "a formal employment relationship, that is, public office" is not a "prerequisite to a finding of fiduciary duty in the public sector." *Id.* at 121-22. The majority conceded it was unable to articulate any "precise litmus paper test" for determining if a private citizen has public fiduciary status, but it offered two "helpful" factors: (1) whether "others rely upon him because of a special relationship in the government," and (2) whether the person "control[s]" or "dominate[s] governmental affairs" by "in fact

mak[ing] governmental decisions." *Id.* at 122. The majority affirmed the district court's jury instruction because it communicated these concepts. *Id.* at 125. And it found the evidence that Margiotta was a public fiduciary sufficient because he was "deeply involved in governmental affairs," had a "role in giving political clearance for certain high-level appointments," and exercised "similar power" over the selection of the town's broker of record. *Id.* at 127.

Judge Ralph Winter dissented. He criticized the majority for transforming the mail fraud statute into "a catch-all prohibition of political disingenuousness" that would "create[] a real danger of prosecutorial abuse for partisan political purposes." *Id.* at 139. The majority's expansive view of public-sector honest-services fraud, he observed, artificially and improvidently interposed fiduciary duties "between politically active persons and the general citizenry in a pluralistic, partisan, political system." *Id.* at 142.

The *Margiotta* decision was heavily criticized by contemporary courts and commentators. Judge Posner, for instance, decried it as one of "the worst abuses of the mail fraud statute" because it authorizes federal conviction "for conduct not even wrongful under state law." *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988). *See also* John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 239 (1985) (*Margiotta* created "an exceedingly ill-defined prospect of criminal liability for influential private citizens whose participation in the political process falls short of civics-book standards"); John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of A

White-Collar Crime, 21 Am. Crim. L. Rev. 1, 16 (1983) (*Margiotta* cast a "potential chilling effect on the actions of public fiduciaries" and raised the prospect of "significant, selective enforcement").

Five years later in *McNally*, however, this Court jettisoned the developing judge-made "honest services" doctrine, including *Margiotta*. *McNally*, 483 U.S. at 355 (citing *Margiotta*). The Court explained that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the Court limited § 1341 to the protection of property rights. *Id.* at 360.

In 1988, Congress responded by enacting 18 U.S.C. § 1346, which expanded mail and wire fraud liability by establishing that the term "scheme or artifice to defraud," as used in Title 18's fraud statutes, includes any "scheme or artifice to deprive another of the intangible right of honest services." Section 1346's facially vast language spawned many constitutional challenges. Eventually, in *Skilling*, this Court confronted the statute's obvious due process problems. To avoid holding § 1346 unconstitutional, this Court strictly limited the statute's scope and confined it to "core" bribery and kickback schemes only. *Id.* at 404-09. Justice Scalia (joined by Justices Thomas and Kennedy) concurred in the judgment but would have held § 1346 unconstitutionally vague, rather than

narrow it, because the statute provides no ascertainable standard of guilt. He pointed out that lower courts were all over the map as to what the "intangible right of honest services" entailed and that the nature, content, and source of the required fiduciary duty was hopelessly indeterminate. *Id.* at 416-20. Responding to these concerns, the majority insisted that the fiduciary relationships in "core" bribery and kickback cases were confined to those in which the duty was "beyond dispute," such as the relationships between "employee-employer," "union official-union members," and "public official-public." *Id.* at 407 n.41.

Until this case, no court had ever affirmed a § 1346 conviction based on *Margiotta*'s theory that a private citizen can owe a fiduciary duty to the public. And the Third Circuit had expressly rejected *Margiotta* and reversed a § 1346 conviction relying on that theory. *See United States v. Murphy*, 323 F.3d 102, 104-05 (3d Cir. 2003) (Becker, J.). As described below, however, the Second Circuit resurrected *Margiotta* here to affirm the novel § 1346 convictions in this case.

B. Factual Background

Respondent Steven Aiello founded and co-owned COR Development Company, a real estate construction firm in Syracuse, New York. COR was involved with various state-funded projects in upstate New York.

The question presented here pertains to a single count of the indictment charging a conspiracy to violate 18 U.S.C. § 1346. That count alleged that from August through October 2014, COR paid "approxi-

mately $35,000 in bribe payments" to Petitioner Joseph Percoco and that Percoco conspired with Aiello and another COR executive, Joseph Gerardi, to "take official action in exchange for bribes" and "deprive the public of its intangible right" to Percoco's honest services. JA89, 100-01.[1] But Percoco was not a public official for most of 2014—including the entire period during which COR asked for his help and paid for his services. Nonetheless, the jury convicted Percoco and Aiello of the charged § 1346 conspiracy, while acquitting Gerardi. The indictment also charged the same conduct under 18 U.S.C. § 666, a statute that addresses bribery of "agents" of state governments. But the jury acquitted all three defendants of those charges, presumably because it found Percoco was not a state "agent."

1. Percoco had been a top aide to then-Governor Andrew Cuomo. In April 2014, he formally resigned from government to manage Cuomo's re-election campaign. JA456-58. Numerous government witnesses testified that Percoco's resignation marked a definite break with public office and that he expressed no intent to return. JA192-93, 201, 297-98. He could have simply taken a leave of absence if he intended to separate only briefly, but as Percoco told one administration official, "he needed to make money for his family" after the campaign and so "was not coming back" to a

[1] The indictment also charged Aiello and Gerardi with participating in an unrelated fraud arising from Howe's involvement in another matter. Those charges were tried separately, and Aiello and Gerardi were convicted of wire fraud and wire-fraud conspiracy under the Second Circuit's "right to control" theory. This Court granted certiorari to consider the validity of that theory in the related case of *Ciminelli v. United States*, No. 21-1170.

government job. JA201. Percoco even obtained an ethics opinion from an attorney in the Governor's office concerning what private work a *former government employee* may undertake. JA298-300.

During the campaign, however, several senior members of Cuomo's staff departed, and Cuomo's father became ill. Sensing that Cuomo needed him for "stability," Percoco reversed course and rejoined the Governor's office on December 8, 2014, after Cuomo's re-election. JA193, 472.

2. It was undisputed at trial that COR had no agreement to pay Percoco while he was in government. COR's financial connection to Percoco came about during the 8-month period when Percoco was *not* a public official and concerned an issue with Syracuse's Inner Harbor that was resolved *before* he returned to government.

The Inner Harbor, a former industrial and shipping center, had fallen into neglect. C.A.App.511, 531. In 2011, Cuomo launched an initiative to revitalize the area as a retail, hotel, and residential center. C.A.App.531-32. Syracuse selected COR as its developer, and the State's Empire State Development agency ("ESD") agreed to reimburse COR for public infrastructure elements such as sewers, streets, and sidewalks. C.A.App.511-13.

In the summer of 2014, COR began constructing a hotel and planned to build a parking lot nearby. C.A.App.513, 532. COR asked ESD to include the lot in its infrastructure financing, but because the lot would serve not only the public but also the hotel, ESD

had to determine whether such funding required a Labor Peace Agreement ("LPA"). C.A.App.513, 532. An LPA is mandated when a project has a hotel as its "principal function" and allows the hospitality union to meet with workers at the facility. C.A.App.532, 630-32.

ESD's deputy general counsel, Maria Cassidy, testified that the mixed-use nature of the parking lot presented a unique situation with "no guidance in the law." C.A.App.633. Although she initially assumed that an LPA would be required, she reached the opposite conclusion after learning that the hotel was only one small element of the broader Inner Harbor project. But for over five months, ESD wrestled internally and with Andrew Kennedy, the Assistant Secretary for Economic Development, over whether an LPA was needed. *E.g.*, C.A.App.534, 632-35, 661-72, 692-96.

COR's government relations consultant, Todd Howe, assisted the company on the Inner Harbor project. Howe was also a close friend of Percoco. In early 2014, Percoco advised Howe that he had "a significant mortgage payment" coming up at the end of 2014 and suggested that he might be able to do consulting work for some of Howe's clients after Percoco left his government post. JA357, 378. Accordingly, in June or July 2014 Howe approached Aiello about the possibility of hiring Percoco with respect to the LPA issue. JA378.

On July 10, 2014, Percoco emailed Howe a copy of the written legal opinion explaining the applicable "Post-Employment Ethics Rules/Restrictions" and what government-related work he could and could not

do. The ethics opinion stated, among other things, that as a former employee in the "Executive Chamber" (the Governor's office), Percoco "is permitted to engage in backroom services for compensation before a state agency, departments, etc. other than the Executive Chamber so long as the services do not constitute an appearance or practice before the agency, department, etc." JA593. A few days later, Howe forwarded the ethics opinion to his partner, copying Aiello, and wrote, "Steve needs labor relations help on inner harbor and Joe would like to assist." JA590.

On July 30, 2014, Aiello followed up by email, asking Howe if Percoco could assist COR with the LPA issue now that he was out of government. Aiello wrote: "Todd, is there any way Joe P can help us with this issue *while he is off the 2nd floor working on the Campaign*[?]" JA594 (emphasis added). (The Governor's executive staff sits on the Capitol's second floor.) He explained that unions were lobbying ESD to demand an LPA and so COR "could really use a[n] advocate with regard to labor issues over the next few months." *Ibid.*

COR subsequently paid Percoco $35,000 through Howe, in two separate payments in August and October 2014. JA647; C.A.App. 728-29. Both payments were made while Percoco was out of government.

On December 3, *before* he returned to state government, Percoco called assistant secretary Kennedy about the LPA matter; shortly thereafter ESD agreed an LPA was unnecessary and approved COR for state funding without that additional condition. JA648. Nonetheless, although COR built the parking lot for

the Inner Harbor, it did not pursue the grant. C.A.App.516.

As noted, Percoco returned to state government on December 8, 2014, after his work for COR on the LPA issue was complete. Just as Aiello had requested, Percoco assisted only for a "few months," and only while he was "off the 2nd floor working on the Campaign." There was no evidence Aiello had any inkling that Percoco would ever re-join the Governor's office. Nor was there evidence that Aiello knew the details of Percoco's interactions with his former colleagues once he started working on the campaign. All Aiello knew was that Percoco was no longer a public official at that time and, like any effective lobbyist, could use his contacts to help COR with ESD.

C. Trial Proceedings

At trial, after the government rested, Aiello moved for a judgment of acquittal. He joined Percoco's argument that "nothing in the record" suggested Percoco accepted funds to take an "official act," since the payments from COR were "in connection with a short-term agreement within the period in which [Percoco] was no longer a state employee." JA447-48. Aiello further argued that at the time of the allegedly corrupt agreement, Percoco was "not a state official" and had "an ethics opinion which was made known to Mr. Aiello … that purported to allow [Percoco] to do some form of consulting work while he was off the Second Floor." JA449-50. He pointed out that there was no evidence Aiello knew Percoco stood on the same footing as an actual state official or "had some sort of duty or obligation to provide honest services to the people

of the State of New York." *Ibid.* The court denied the motion following the trial. JA650.

In draft instructions circulated prior to the charge conference, the district court proposed a jury instruction that Percoco could "owe[] the public a duty of honest services when he was not a state employee, if you find that during that time he owed the public a fiduciary duty." Pet.App.133a; C.A.App.765. The defendants objected. They urged the court to specify that the conspiracy's object must be the deprivation of Percoco's "honest services *as a public official*," but the court refused. JA479-80. The defendants also objected that the instructions needed to specify that only a public official "can perform an official act," but the court once again refused: "No, I'm definitely not going to say that. I don't even think that's a correct statement of the law." JA477-78.

As a result, the district court instructed the jury that Percoco could owe the public a duty of honest services not only when he was employed by the State, *but even when he was not*. The court charged the jury that Percoco did "not need to have a formal employment relationship with the state in order to owe a duty of … honest services to the public." JA511. Instead, the jury could find Percoco "owed the public a fiduciary duty" if (1) "he dominated and controlled any governmental business," and (2) "people working in the government actually relied on him because of a special relationship he had with the government." *Ibid.* The court charged the jury that it had to distinguish this dominance, control, and reliance from "[m]ere influence and participation in the processes of govern-

ment," which "standing alone are not enough to impose a fiduciary duty." *Ibid.* By contrast, as to the related federal program bribery count under 18 U.S.C. § 666, the district court instructed the jury it could not convict unless Percoco was "an agent of New York State," meaning "a person who is authorized to act on behalf of state government." JA516.[2]

After deliberating for eight days and requiring two *Allen* charges, the jury convicted Aiello and Percoco of honest-services fraud conspiracy and convicted Percoco on other charges that are not before this Court. The jury acquitted Aiello, Percoco, and Gerardi on the § 666 counts, and acquitted Aiello and Gerardi of all other counts.

D. Second Circuit Decision

The Second Circuit affirmed the honest-services fraud conviction based on COR's payments for Percoco's assistance with the LPA matter. The court rejected the defendants' challenge to the fiduciary duty instruction by resurrecting its much-criticized 40-year-old decision in *Margiotta*.

Even though this Court abrogated *Margiotta* in *McNally* and sharply circumscribed the scope of § 1346 in *Skilling*, the Second Circuit reaffirmed and revived *Margiotta*'s holding that "a finding of fiduciary duty in the public sector" is not limited to public officials and that "a private citizen's 'dominance in

[2] The district court dismissed a Hobbs Act extortion count against Percoco that also related to COR's payment, on the ground that he was incapable of acting "under color of official right" within the meaning of 18 U.S.C. § 1951 because he was not a public official at the relevant time. JA532-61.

municipal government' may 'give[] rise to certain minimum duties to the general citizenry.'" JA665. The court held that, for purposes of § 1346, it would look to "common law generally and New York law specifically" for "the bounds of this fiduciary duty." *Ibid.*

The Second Circuit thus held that "§ 1346 covers those individuals who are government officials as well as private individuals who are relied on by the government and who in fact control some aspect of government business." JA667. In so doing, the court reasoned that the "capacious language" of § 1346—*i.e.*, "scheme or artifice to deprive another of the intangible right of honest services"—"is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." JA667-68. But the court failed to acknowledge or apply this Court's clear directive in *Skilling* to construe § 1346 narrowly precisely because that "capacious" language presents an obvious constitutional "vagueness problem." 561 U.S. at 403-04.

The Second Circuit also dismissed the significance of *McDonnell*'s holding that bribery in federal public corruption cases requires a quid pro quo involving an official act in which a person uses their "official position" to carry out "a formal exercise of governmental power." 579 U.S. at 568, 574. The Second Circuit said that *McDonnell* "merely interpreted the definition of 'official act,' which is "quite a different issue from *who* can violate the honest-services statute." JA670. The court also pointed out that 18 U.S.C. § 201, relating to bribery of federal officials, reaches people who are not directly employed by the federal government but are

authorized to act on its behalf. *Ibid.* Finally, the court dismissed any constitutional concerns based on the Due Process Clause, First Amendment, and federalism principles, because it found no basis "for carving out an exception to § 1346 that would require formal employment *only* when defrauding the government (as opposed to a private party)." JA671-72.

Based on this analysis, the court "reaffirm[ed] *Margiotta*'s reliance-and-control theory in the public-sector context" and affirmed the defendants' convictions even though the "bribery" conspiracy took place while Percoco was out of government. JA665. It approved the district court's fiduciary duty jury instruction. And it found the evidence sufficient to establish Percoco's duty to the public because, for example, Percoco occasionally used his old "telephone, desk, and office" while working on the governor's reelection campaign and once "helped organize a state event." JA682.

Aiello, of course, could not possibly know what telephone, desk, or office Percoco used, or how he interacted with others who were still in government. Nonetheless, the Second Circuit held the proof of Aiello's knowledge of Percoco's supposed "control" sufficient on the basis that "Aiello specifically sought out Percoco" to help COR with the LPA issue and paid him through COR's government relations consultant, Howe. JA683. The court construed Aiello's inquiry about Percoco's availability while "off the 2nd floor working on the Campaign" as proof that Aiello understood that Percoco wielded "power"—not just influence—during this period and thus owed the public the

same duty of honest services as an actual public official. *Ibid.*[3]

SUMMARY OF ARGUMENT

I. Permitting a jury to find that *former* officials retain a duty to the public because they remain particularly influential would defy this Court's § 1346 precedents.

In *Skilling v. United States*, 561 U.S. 358 (2010), the Court recognized that read literally, § 1346's text would be impermissibly vague, malleable, and subject to prosecutorial abuse. Accordingly, the Court adopted a limiting construction to avoid that serious constitutional concern and provide fair notice of what the statute proscribes. The Court pared the statute down to "core" cases involving bribery and kickback schemes violating *clear* fiduciary duties that are "beyond dispute," such as those owed by public officials to the public and by employees to their employers. The duty here was hardly "beyond dispute." It has no basis in state law or any federal statute. Instead, the

[3] At trial, the government introduced evidence that months after Percoco returned to state government, he assisted COR or Aiello on two other matters, by directing other officials: (1) to pay an outstanding bill for services COR had rendered; and (2) to implement a salary increase to which Aiello's son, a state employee, was entitled. Percoco was not paid for these actions, which occurred long after COR's last payment and were not contemplated at the time COR procured Percoco's services. The Second Circuit ruled that a jury instruction permitting conviction based on these later acts was erroneous under *McDonnell*. But it deemed that error harmless because "there can be no doubt that both Aiello and Percoco understood that the payments to Percoco were made to procure his assistance in pressuring ESD to reverse its position on the need for a Labor Peace Agreement." JA661.

Second Circuit created the duty out of whole cloth in the early 1980s, typifying the excesses of a bygone era before the Court's modern jurisprudence on interpreting criminal statutes.

This Court's only other decision involving § 1346, *McDonnell v. United States*, 579 U.S. 550 (2016), also precludes extending the statute to private citizens who lack official authority. In *McDonnell*—again driven by vagueness and other constitutional concerns—the Court limited the scope of the statute's public-sector bribery crimes to quid pro quo exchanges for only limited categories of acts by public officials: "formal exercise[s] of governmental power" or using one's "official position to exert pressure on *another* official." *Id.* at 574. No matter how influential a private citizen might be, he cannot perform an "official act" under *McDonnell*. Indeed, the notion that such a person could owe the public a fiduciary duty is nonsensical.

II. Permitting a jury to find that former public officials owe a duty to the public after they leave government would violate fundamental principles of statutory interpretation. This Court's precedents dictate that criminal statutes—particularly open-ended corruption laws—must be construed narrowly to avoid serious constitutional problems. *See*, *e.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1571-74 (2020); *McDonnell*, 579 U.S. at 574-77; *Skilling*, 561 U.S. at 405-06; *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). The Court has been particularly insistent on limiting constructions where necessary to provide fair notice, avoid criminalizing

protected political speech, and prevent federal prosecutors and courts from "setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987).

The principle of constitutional avoidance requires reversal here. The Second Circuit held that a private citizen becomes a public fiduciary if he "dominate[s] and control[s] any governmental business" through his influence over actual government officials. That is an impermissibly vague standard. The line separating "dominance and control" from mere "influence" is hopelessly indeterminate and subject to widely divergent, subjective interpretations by prosecutors, juries, and judges. The theory also criminalizes a vast range of ordinary political interactions and violates core First Amendment rights of citizens to petition their elected officials. If paying influential private individuals to advocate before the government was a federal crime, our system of representative democracy could not function as the Framers designed it. The Second Circuit's theory also raises serious federalism concerns, because it would interfere with states' prerogatives about whether, and to what extent, to restrict their own public officials from engaging in lobbying after leaving office.

III. This case illustrates that § 1346 remains unconstitutionally vague even as limited by *Skilling* to concealed "bribes and kickbacks" "in violation of a fiduciary duty." That is because the term "fiduciary duty" is not defined by statute but instead developed through evolving common law. As Justice Scalia warned in his *Skilling* concurrence, fiduciary duty caselaw is inconsistent and unpredictable and utterly

fails to produce any ascertainable standard of guilt. More than a decade has elapsed since *Skilling*, but this due process problem persists unabated.

At a minimum, § 1346 is unconstitutionally vague as applied here. How could Aiello have known whether paying Percoco would be deemed a "bribe" under § 1346? He specifically sought Percoco's assistance only *after* Percoco left government and precisely *because* Percoco was no longer in office, after being informed that state law permitted Percoco to lobby state agencies. While he obviously knew that Percoco remained influential, he had no way to predict that a jury could later find this influence so significant that it amounted to "dominance and control" of government business. Section 1346 does not give any reasonable person in Aiello's shoes fair notice that compensating Percoco for lobbying a state agency was a federal felony.

IV. Each of these points requires reversal of Aiello's conviction for conspiracy to commit honest-services fraud. The relevant conduct involved an agreement, payment, and act that all occurred while Percoco was a private citizen, not a public official, and the *Margiotta* theory was the Second Circuit's sole basis for affirming Aiello's conviction.

ARGUMENT

I. PAYING A PRIVATE CITIZEN TO LOBBY THE GOVERNMENT DOES NOT VIOLATE 18 U.S.C. § 1346

A. Section 1346 Requires Proof That The Recipient Of A Bribe Breached A *Clear* Fiduciary Duty That Is "Beyond Dispute"

Under the Second Circuit's decision, a person can be convicted of violating § 1346 for paying a government relations consultant who doesn't work for the government or have any formal authority to act on its behalf. The court's ruling allows a jury to find that a "private individual" owed a fiduciary duty to the public if the jury concludes the individual was so influential that he "in fact control[led] some aspect of government business" and was "relied on by the government." JA667. In other words, under the Second Circuit's holding, if a jury decides that a private citizen was sufficiently influential in government affairs, what would otherwise have been a legal payment for advocacy becomes a criminal "bribe" punishable under § 1346.

But extending public-sector honest-services fraud to private citizens based on some nebulous, unquantifiable measure of influence conflicts with this Court's decision in *Skilling*. There, the Court ruled that § 1346 must be construed narrowly because otherwise its facially broad language—covering any "scheme or artifice to deprive another of the intangible right of honest services"—would be unconstitutionally vague. And it confined § 1346 to classic, indisputably fiduci-

ary relationships such as "public official-public," "employee-employer," and "union official-union members" to avoid constitutional problems caused by the inherent vagueness in "the source and scope of fiduciary duties" that are necessary to support a criminal conviction under § 1346. 561 U.S. at 407 n.41.

As this Court explained, to satisfy the Due Process Clause, "a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 402-03 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The Court found "force" in Skilling's arguments that § 1346 was unconstitutionally vague because it failed both requirements: The phrase "the intangible right of honest services" does not clearly define what conduct the statute prohibits, and the statute's "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections" and thus invites arbitrary enforcement. *Id.* at 403, 405. The Court recognized that "honest-services decisions preceding *McNally* were not models of clarity or consistency." *Id.* at 405 (citing numerous examples in Skilling's brief as well as Justice Scalia's opinion). And the Court acknowledged that Congress failed to cure this problem in § 1346. It observed that, in the two decades following the statute's enactment, the circuits had "divided on how best to interpret the statute," disagreeing on issues including, among others, whether "§ 1346 prosecutions must be based on a violation of state law," "whether a defendant must contemplate that the victim suffer economic harm," and

"whether the defendant must act in pursuit of private gain." *Id.* at 403 & n.36.

The Court agreed with Skilling that the "potential breadth" of § 1346 could render it unconstitutional. *Id.* at 403. Nevertheless, the Court concluded that § 1346 "should be construed rather than invalidated." *Id.* at 404. "To preserve the statute without transgressing constitutional limitations," this Court "pare[d]" § 1346 "down to its core." *Id.* at 404, 408-09. That "solid core," the Court held, was represented in the subset of pre-*McNally* decisions that involved "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 407.

Justice Scalia (joined by Justices Thomas and Kennedy) agreed that Skilling's honest-services fraud conviction had to be reversed, but argued that the statute was unconstitutionally vague and was not susceptible to any narrowing construction. Critical here is that he found the statute's "most fundamental indeterminacy" to be ascertaining the existence and scope of fiduciary duties. *Id.* at 421 (Scalia, J., concurring in judgment). None of the pre-*McNally* cases, he explained, "defined the nature and content of the fiduciary duty central to the 'fraud' offense"; "the duty remained hopelessly undefined." *Id.* at 417-18. Even limiting the statute to bribes and kickbacks, Justice Scalia argued, would not solve its incurable vagueness, because of further questions about "the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, includ-

ing the corporate officer here?" *Id.* at 421. The indefiniteness of the fiduciary element, Justice Scalia maintained, made it impossible for ordinary citizens to ascertain "the criterion of guilt." *Ibid.*

The majority responded that the limits it was imposing on § 1346 would avoid difficult questions about who is or is not a fiduciary. The majority emphasized that in the "core" pre-*McNally* bribery and kickback cases to which it was confining § 1346, "[t]he existence of a fiduciary relationship, under any definition of that term, was usually *beyond dispute*." *Id.* at 407 n.41 (emphasis added). The Court specifically identified "public official-public" as a quintessential fiduciary relationship to which § 1346 applies. But the Court did *not* suggest a "private citizen-public" relationship would qualify. That omission was telling, because in his concurrence Justice Scalia singled out *Margiotta* and the decision reversed in *McNally*[4] as exemplifying why "[t]he indefiniteness of … fiduciary duty" deprives § 1346 of any "ascertainable standard of guilt." 561 U.S. at 416-17, 419. The Court's response was to cabin fiduciary relationships to a much narrower category—those "beyond dispute"—thus excluding the *Margiotta* theory.

This Court was clear that the way to deal with the inherent vagueness in the malleable fiduciary duty concept is to confine the term to limited situations in which it is "beyond dispute" that a relationship is fiduciary. *Skilling* precludes prosecutors, juries, or

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[4] *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), which held that the Kentucky Democratic Party chairman was a de facto public official.

lower courts from inventing new fiduciary duties, especially the counterintuitive notion that a private citizen—a campaign official—can owe the public a fiduciary duty, or that retaining such an individual to advocate on one's behalf is a federal felony punishable by up to 20 years in prison.

B. Private Citizens Who Lack Governmental Authority Have No Duty—Much Less One "Beyond Dispute"—To The Public

Margiotta was wrong when it was decided. The *Margiotta* majority relied on an analogy to duties created by private employment or contract for its "reliance and de facto control" test for criminal liability. 688 F.2d at 121-22. But federal courts cannot "supplement … statutory crimes through the use of the common law." *Lewis v. United States*, 523 U.S. 155, 160 (1998). Moreover, as Percoco explains in his brief, *Margiotta*'s core premise is flawed because it is only by accepting the role of a public representative that a private citizen binds himself to act for the general welfare of the citizenry. And the majority failed to provide any sound legal basis for its reliance-and-control test. Fiduciary duties cannot be generated unilaterally through either reliance or control. Moreover, the cases that employ a reliance-and-control test use it to determine whether an existing relationship rose to the fiduciary level, not to create duties absent a preexisting legal relationship. Thus, the court in *Margiotta* presumed a fiduciary relationship where none exists, between a private citizen who has influence over the government and others who do not. Its novel theory of honest-services fraud finds no legal basis in any statute or judicial caselaw. *See* Percoco Brief, Point I.

In any event, *Margiotta*'s fiduciary test is ill-suited to the public sector. The thrust of a fiduciary relationship is that, rather than undertake certain tasks herself, an individual trusts someone with superior knowledge or skill in the area to manage those tasks on her behalf. Courts describe fiduciary relationships as "special relationships" that exist only "where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006). *See United States v. Chestman*, 947 F.2d 551, 569 (2d Cir. 1991) (en banc) ("A fiduciary relationship involves discretionary authority and dependency: One person depends on another—the fiduciary—to serve his interests."); *AG Capital Funding Partners, L.P. v. State St. Bank & Tr. Co.*, 11 N.Y.3d 146, 158 (2008) (fiduciary relation "when confidence is reposed on one side and there is resulting superiority and influence on the other"). But the public does not repose trust or confidence in individuals who are not public officials and who are neither known to be working for the government nor on the public payroll, or otherwise vested with official authority.

Similarly, the premise of public-sector honest-services fraud is that "in a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated." *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (quoting *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996)); *see also United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) ("[A] public official acts as trustee for the citizens and the State … and thus

owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them."); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("No trustee has more sacred duties than a public official."). That rationale collapses when the supposed conspiracy concerns acts of a private individual, who has no "political contract" with citizens to breach.

C. Only A Public Official Or Person Authorized To Exercise Governmental Authority Can Take "Official Action" Under § 1346

Allowing a jury to find that paying an influential person with no official government position or authority violates § 1346 would also contravene this Court's decision in *McDonnell*. Public-sector bribery under § 1346 requires a quid pro quo in which a payment is exchanged for an "official act" (a term borrowed from 18 U.S.C. § 201, a bribery statute pertaining to federal officials). *See*, *e.g.*, *McDonnell*, 579 U.S. at 572-73. No private citizen—no matter how influential he might be—is capable of performing an "official act." Accordingly, private citizens cannot enter the type of quid pro quo required to sustain a public-sector bribery conviction under § 1346.

In *McDonnell*, this Court defined "official act" in the public corruption prosecution of a former governor of Virginia who had been convicted of violating several federal criminal statutes, including § 1346. The Court held that there is no "official act," and thus no criminal quid pro quo, unless two requirements are satisfied. First, the act must involve the "formal exercise of governmental power"; it must relate to a matter that is "within the specific duties of an official's position—the function conferred by the authority of his office," and

that is "pending either before the public official who is performing the official act, or before another public official." *Id.* at 567-70, 574. Second, "the public official" in question "must make a decision or take an action on th[e] question or matter, or agree to do so," or "us[e] his official position to exert pressure on *another* official to perform an 'official act.'" *Id.* at 572, 574.

A private citizen who is not expressly authorized to act on behalf of the government lacks formal "governmental power," "authority of … office," or an "official position." Such a private citizen is thus *legally incapable* of performing an official act as *McDonnell* defines it. The Second Circuit dismissed *McDonnell* as about "the definition of 'official act'" and not "*who* can violate the honest-services statute." JA670. But the two are inextricably intertwined. It makes no sense to speak of a private citizen who lacks official authority taking "official action" on a matter "pending" before him or using his "official position to exert pressure on *another* official." (Notably, the emphasis on "another" was in this Court's opinion.)

Of course, *McDonnell*'s analysis of the meaning of "official action" does not apply to all § 1346 cases, because § 1346 also bars commercial bribery in violation of a fiduciary duty to a private employer. But the Court's reasoning plainly applies to all public-sector § 1346 cases, especially because it settled on a narrow construction of "official act" in part due to the "significant constitutional concerns" (elaborated further below) posed by expansive interpretations of public-sector bribery crimes. 579 U.S. at 574-77.

Under *McDonnell*, only a person vested with governmental power and authority can perform an official

act. That is not to suggest, however, that one must be *formally employed* by the government to have a fiduciary duty to the public for purposes of § 1346. For instance, the "federal official" anti-bribery statute reaches not only federal officers and employees, but also "person[s] *acting for or on behalf of* the United States, or any department, agency or branch of Government thereof … in any official function, *under or by authority of* any such department, agency, or branch of Government." 18 U.S.C. § 201(a)(1) (emphasis added). Accordingly, this Court has held that § 201 applies to anyone "with official federal responsibilities" for the federal government. *Dixson v. United States*, 465 U.S. 482, 496 (1984). The defendants in *Dixson*—private individuals who were formally designated as the City of Peoria's subgrantee to administer federal funds—were thus covered, because they were formally "charged with abiding by federal guidelines" and had "official federal responsibilities" to "allocat[e] federal resources, pursuant to complex statutory and regulatory guidelines." *Id.* at 497.

The government and the Second Circuit have asserted that § 201 and *Dixson* support finding Percoco a public fiduciary, because they illustrate that formal government employment is not always required for federal public corruption crimes. *E.g.*, BIO.13, 18; JA670-71. But Percoco would not be covered by § 201 even if it applied to state government. He had no official governmental duties at any relevant time. He had no such duties when COR retained him to assist it with the LPA issue; he had none when COR paid him; and he had none when he called a state official to advocate COR's position. He was not a government em-

ployee. Nor was he charged with any "official responsibilities," or serving "any official function" for New York State, or authorized to act on behalf of the State's government. Instead, as Aiello understood, at all pertinent times Percoco was "off the 2nd floor working on the [Governor's] Campaign." JA594.

Moreover, the jury's findings directly contradict the government's and Second Circuit's contentions about § 201 and *Dixson*. The standard in § 201, as elaborated in *Dixson*, is virtually identical to the test for an "agent" under the federal program bribery statute, which defines the term to include "a person authorized to act on behalf of … a government." 18 U.S.C. § 666(d)(1). Consistent with that statutory definition, the jurors were instructed that they could convict the defendants of violating § 666 only if they found that Percoco was "authorized to act on behalf of state government" and *not* if he merely "exercise[d] responsibility *or control*." JA516. Because the jury acquitted all defendants on those counts, it did not find Percoco was *authorized* to make official government decisions, as would be required under § 201 and *Dixson*.

II. CONSTITUTIONAL PRINCIPLES REQUIRE A NARROW CONSTRUCTION OF THE HONEST-SERVICES STATUTE

The principle of constitutional avoidance also requires limiting the scope of the fiduciary duty element of honest-services fraud. In case after case (including *Skilling* and *McDonnell*), this Court has construed criminal statutes narrowly to avoid serious constitutional problems. *See*, *e.g., Kelly v. United States*, 140 S. Ct. 1565 (2020); *United States v. Davis*, 139 S. Ct.

2319 (2019); *Marinello v. United States*, 138 S. Ct. 1101 (2018); *Yates v. United States*, 574 U.S. 528 (2015); *Bond v. United* States, 572 U.S. 844 (2014). The Court has been particularly vigilant in enforcing this canon of constitutional avoidance when interpreting open-ended fraud and public corruption statutes. As explained in *McDonnell*, the government's expansive readings of public-sector bribery crimes trigger "significant constitutional concerns." 579 U.S. at 574. The Court adopted its limiting construction of the term "official act" in part because the government's broader interpretation raised grave questions under the Due Process Clause, the First Amendment, and federalism principles. *Id*. at 574-77. Those concerns apply with equal—if not greater—force here, and dictate that public-sector honest-services fraud must be limited to payments to individuals who are actual public officials, or otherwise formally vested with official governmental power.

A. The *Margiotta* Theory Is Unconstitutionally Vague

Due process requires criminal statutes to supply "sufficient definiteness" that "ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402. And under the constitutional separation of powers doctrine, "[p]enal laws are to be construed strictly," because only "the legislature" can define a crime. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The vagueness doctrine vindicates both of these constitutional principles, because it ensures that crimes are clearly defined by the legislature, rather than written by courts through common law decision making. As this Court has explained, vague

laws "transgress" both the rule requiring Congress "to write statutes that give ordinary people fair warning about what the law demands of them," and the requirement that "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *Davis*, 139 S. Ct. at 2323. "They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *Ibid.* The fair notice principle also underlies the corollary rule of lenity, which holds that "an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *see also Yates*, 574 U.S. at 547-48.

This Court repeatedly invokes these fundamental due process and separation of powers principles to limit the reach of criminal statutes in public corruption cases. In *McNally*, for instance, the Court limited the mail fraud statute to schemes to obtain "money or property" and rejected the government's broader reading, because Congress had not "spoken in clear and definite language" if its intent was to go further. 483 U.S. at 359-60. The Court refused to "construe the statute in a manner that leaves its outer boundaries ambiguous." *Id.* at 360. Likewise in *Skilling*, the Court again adopted a limiting construction and narrowly construed the honest-services statute, which otherwise would be unconstitutionally vague. 561 U.S. at 408-09. Only when "[c]onfined to … paramount applications," the Court explained, could it be said that "§ 1346 presents no vagueness problem." *Id.* at 404; *see id.* at 410-11 (invoking rule of lenity). Yet

again, in *McDonnell*, the Court cited due process concerns with the government's "standardless," "shapeless" view of the "official act" requirement. 579 U.S. at 576. To "avoid[] this vagueness shoal," the Court held that the term had to be construed in accord with the Court's "more constrained interpretation." *Ibid.*

The same approach is critical here. The *Margiotta* theory is hopelessly amorphous and indeterminate, particularly to someone seeking to divine which government lobbyists he can or cannot lawfully hire. As the Second Circuit readily conceded, "there is no precise litmus paper test" for determining when a private citizen's influence over government official rises to a fiduciary level. *Margiotta*, 688 F.2d at 122. Instead, the court adopted "a gestalt approach" that leaves it up to juries to determine, on a case-by-case basis, whether someone who is not a public official is a public fiduciary. *United States v. Murphy*, 323 F.3d 102, 112 (3d Cir. 2003).

That is the antithesis of what the Constitution requires. It is one thing to presume that people have fair notice that *public officials* owe the public a duty, and quite another to allow prosecutors, courts, or juries, without any legislative guidance, to create such a duty for private citizens out of whole cloth. The jury in this case was instructed that Percoco could be a public fiduciary if he "dominated and controlled" some government business and government employees "relied on him" in some way, but that he was not a public fiduciary if he merely "participat[ed]" in government business and had "influence" over others. JA511. But what is the difference between the two? How is a jury

to know where to draw the line, and what ensures that the next jury will draw the line in the same place?

The *Margiotta* "rule" provides no clear standard, and no way to prevent arbitrary results. Instead, juries are left "to pursue their personal predilections," which facilitates opportunistic and discriminatory prosecutions. *Kolender*, 461 U.S. at 358. As Judge Winter warned, "there is talk of a line between legitimate patronage and mail fraud, [but] there is no description of its location." *Margiotta*, 688 F.2d at 143. In short, the *Margiotta* theory raises the very same due process concerns that this Court sought to foreclose in *Skilling*.

The Second Circuit's reasons for finding the evidence sufficient to establish Percoco's fiduciary duty under *Margiotta* epitomize the problem. The facts it seized on could easily be spun the other way, and many are unlikely to be known to someone, like Aiello, who is not privy to the inner workings of government. The Second Circuit's analysis exposes why the theory is hopelessly indeterminate and readily manipulated in ways that can easily trap the unwary.

For instance, the court started by highlighting evidence that Percoco was powerful when he served as the Governor's top aide, *before* COR retained him. It observed that Percoco had "among the highest-ranking positions in New York State's executive department," a "unique relationship" with Governor Cuomo," and was "close to him and his family." JA681.

But none of this sheds light on whether, *after he left* the government, Percoco "dominated and controlled," as opposed to merely "influenced," his former

colleagues. If this type of evidence proved "dominance and control" and disproved mere "influence," virtually any former high-ranking public official could be deemed a public fiduciary and could not work as a lobbyist. Percoco's role in the Governor's office and his close relationship with his boss are hardly unique in American politics. If having power, influence, and access in office creates a continuing duty to the public even after a person departs, any number of staffers who serve as the right-hands to presidents, governors, or mayors would be forever precluded from earning a living in the private sector, solely because they successfully forged connections with others while in government. Some people dislike the "revolving door," but unless a former staffer's activities violate some specific criminal statute[5] (and there is none here), it is not a crime. If it were, untold numbers of politically active people in Washington and around the country who enlist advisers and lobbyists with prior government experience would be federal felons.

The Second Circuit also relied on evidence about Percoco's time on the campaign. For instance, Percoco once stated that he "retained 'a bit of clout' even after formally leaving the administration," and one witness remarked that Percoco "had the ability to pick up the phone and get things done." JA682. And an official testified "that *she* called Percoco to solicit his advice

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[5] *See*, *e.g.*, 18 U.S.C. § 207(c)-(d) (making it a crime for certain former federal executive branch employees to lobby or appear before "any officer or employee of the department or agency in which such person served," or for the Vice President and other very senior executive branch personnel to lobby or appear before certain federal officials for two years after their employment ends).

on pending legislation." JA683. But the court was unable to articulate why any of this demonstrates anything more than ordinary influence and advice.

The court also noted that Percoco "continued to be an advisor to the Governor and to coordinate both the Governor's official and campaign schedules," and that he "helped organize a state event, attended a government briefing about an impending winter storm, and discussed the terms of a redevelopment project with government employees." JA682-83. But once again, it is unclear how any of this shows dominance and control rather than mere influence. If these types of prosaic interactions create a duty to the public, then anyone managing an incumbent's re-election campaign could be deemed a de facto public official. An incumbent's campaign staff must coordinate logistics with his official staff, because otherwise the candidate could be booked in two places at once. And incumbent candidates and their staffers routinely consult with campaign managers and political advisers about government policies. Politics and policy are unalterably intertwined in representative government, and only the most naïve civics student would believe that elected officials make decisions divorced from any consideration of how those decisions could impact the next election. No ordinary person in Aiello's position would even know about such mundane communications, let alone think that they could transform campaign staffers into public fiduciaries.

Finally, the Second Circuit stressed that Percoco "was at his desk in the Executive Chamber" when he made the call to advocate for COR with respect to the LPA issue. JA648, 682. But is it unusual or nefarious

for an incumbent's campaign advisers to use a government office or a government phone line? Should the *location* of a campaign manager's conversations determine whether he is committing federal honest-services fraud? How can any ordinary person who hires him know such trivial details, and how can a person's liberty turn on such facts, particularly without any guidance from Congress?

What all this illustrates is that the facts supposedly evidencing the requisite dominance, control, and reliance under *Margiotta* could just as easily be deemed mere influence—depending on *who* is deciding which side of the "line" his status fits. Different judges or jurors can come to different conclusions about whether the very same facts create a duty to the public, because the "test" provides no "ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Ultimately, it leaves the public "in the dark about what the law demands." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring in judgment).

No ordinary person would have reason to suspect that paying Percoco while he was "off the 2nd floor" to lobby the state was a federal felony. The *Margiotta* theory is quintessentially vague.

B. The *Margiotta* Theory Violates The First Amendment

The First Amendment problems with *Margiotta* are equally serious. In *McDonnell*, the Court expressed concern that expansive interpretations of public corruption crimes could chill protected commu-

nications between government officials and their constituents. This would undermine "[t]he basic compact underlying representative government," which "*assumes* that public officials will hear from their constituents and act appropriately on their concerns." 579 U.S. at 575. *McDonnell* involved "extravagant gifts" and "large sums of money" paid to a sitting governor and his wife and thus did not "typify normal political interaction between public officials and their constituents." *Id.* at 576. Nonetheless, the Court declared, "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Ibid.* (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Instead, "'a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.'" *Ibid.* (quoting *Sun-Diamond*, 526 U.S. at 412).

The need for a scalpel is, if anything, even more acute here. Unlike Governor McDonnell, Aiello did not make large payments or give luxury items to a public official (or an official's spouse). His company, COR, believed it was entitled by law to participate in a state program without having to enter an LPA, which was "a potentially costly agreement with a local union." JA647. COR merely paid an influential *former* official to lobby the relevant agency on its behalf. That is not corruption; it is the exercise of core constitutional rights.

The First Amendment expressly protects "freedom of speech" and "the right of the people … to petition the Government for a redress of grievances." U.S. Const. Amend. I; *see generally Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *E. R.R.*

Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives" in government. *Noerr*, 365 U.S. at 137.

That is exactly what Aiello sought to do here. Percoco was well-connected, influential, and had previously held a powerful position in the Governor's office. But that does not criminalize COR's decision to retain his political services. The First Amendment protects citizens' rights not only to petition their government, but to employ influential advocates for that purpose. *See generally Citizens United v. FEC*, 558 U.S. 310, 355 (2010); *see also ibid.* (First Amendment "protects the right of corporations to petition … administrative bodies") (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 n.31 (1978)).

Indeed, the ability not just to access, but to influence, public officials is critical to our system of government. "[I]nfluence and access 'embody a central feature of democracy," such that "'the Government may not seek to limit the appearance of mere influence or access.'" *FEC v. Cruz*, 142 S. Ct. 1638, 1653 (2022) (quoting *McCutcheon v. FEC*, 572 U.S. 185, 192, 208 (2014)). *See also Citizens United*, 558 U.S. at 359 (because "[d]emocracy is premised on responsiveness," "[f]avoritism and influence are not … avoidable in representative politics.") (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)). In short, having "influence over or access to" public officials is not "corruption," *McCutcheon*, 572 U.S. at 208; it is integral to the constitutional protections guaranteed by the First Amendment. A private citizen's decision to

amplify his influence or access by engaging another private citizen to advocate for him is not corruption either. Criminalizing such political activity—as the decision below purports to do—violates the First Amendment.

And the chilling effect of treating payments to people who are not public officials as bribes cannot be understated. As Judge Winter warned in his *Margiotta* dissent, it "creates a real danger of prosecutorial abuse for partisan political purposes." 688 F.2d at 139. If courts thrust a duty to the public on "a politically active person" merely because of his "great influence," "there is no end to the common political practices which may now be swept within the ambit of mail [and wire] fraud." *Id.* at 139-40. For instance, a neighborhood group publicly calling for government intervention over noxious fumes emanating from a nearby chemical plant could face years in prison if its members enlist a retired state legislator to spearhead their lobbying efforts. A career lobbyist who has spent decades working legislative backrooms could be prosecuted simply for being too good at his job. The *Margiotta* theory "creates a danger of corruption to the democratic system greater than anything Margiotta [or Aiello] is alleged to have done. It not only creates a political crime where Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists." *Id.* at 144.

All of this illustrates just how dangerous the *Margiotta* doctrine can be, and why a *clear* line must be drawn in this context: People who are formally employed by the government or formally vested with governmental authority do owe a fiduciary duty to the

public. People who have no official governmental authority do not. Drawing this bright-line rule (the "litmus paper test" the Second Circuit eschewed) is necessary to avoid serious First Amendment problems.

C. The *Margiotta* Theory Violates Federalism Principles

This Court has frequently warned of the need to reject broad readings of criminal statutes that would "significantly change[] the federal-state balance." *Bond*, 572 U.S. at 859; *see also*, *e.g.*, *Jones v. United States*, 529 U.S. 848, 857-58 (2000). Under the Second Circuit's interpretation of § 1346, payments to former officials like those here are fraudulent bribes even without any violation of state or local laws regulating lobbying by former state and local government employees. This raises serious federalism concerns. Courts should "not be quick to assume that Congress intended to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bond*, 572 U.S. at 858-59.

Federalism concerns are particularly pronounced when it comes to the prosecution of public corruption. A state defines itself as a sovereign "[t]hrough the structure of its government, and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 579 U.S. at 576. Thus, as this Court has repeatedly held, "[f]ederal prosecutors may not use the … fraud statutes to 'set[] standards of disclosure and good government for local and state officials.'" *Kelly*, 140 S. Ct. at 1574 (quoting *McNally*, 483 U.S.

at 360). That was among the reasons the Court refused to extend the mail fraud statute to "schemes to defraud citizens of their intangible rights to honest and impartial government" in *McNally*, 483 U.S. at 355, and limited the meaning of "official act" in *McDonnell*, 579 U.S. at 576-77. And most recently, the Court cited federalism principles in reversing the property fraud convictions in *Kelly*, where officials had lied about a regulatory decision to close lanes on a bridge. The Court pointed out that "[i]f U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be … 'a sweeping expansion of federal criminal jurisdiction.'" *Kelly*, 140 S. Ct. at 1574 (quoting *Cleveland v. United States*, 531 U.S. 12, 24 (2000)). "But not every corrupt act by state or local officials is a federal crime." *Ibid.*

That concern is, if anything, even greater here, because the purported "corrupt act" was protected political activity, and application of the *Margiotta* theory does not depend on any violation of state or local law. Many states have their own laws regulating when their public officials are permitted to lobby the state after they leave office. Such laws reflect each state's considered judgment concerning, among other things, the level of seniority within state government that warrants post-employment restrictions; the "cooling off" period—if any—that must elapse before a former official can appear before the state government; the types of lobbying or other activities in which such individuals may not engage; and the penalties for noncompliance with those rules. Notably, not every state makes unauthorized lobbying criminal. New York, for example, prohibits former employees of the governor's

executive chamber from formally "appear[ing] or practic[ing] before" a state agency for two years, but provides no criminal penalty for a violation. N.Y. Pub. Off. Law § 73(8)(a)(iv) (civil penalty up to $40,000). Other states' laws vary widely. *See*, *e.g.*, Ariz. Rev. Stat. Ann. §§ 38-504, 38-510 (one-year prohibition applies only to practice before one's own agency on matters "with which the officer or employee was directly concerned and … personally participated"; criminal sanction); Mo. Ann. Stat. §§ 105.455, 105.478 (six-month lobbying ban; class B misdemeanor for first violation); N.J. Stat. Ann. § 52:13C-21.4 (lobbying restriction applies only to former legislators, governors, lieutenant governors, and department heads; $10,000 civil penalty). And at least six states[6] appear not to restrict former state officials from lobbying in any manner whatsoever.

Yet the malleable *Margiotta* doctrine gives federal prosecutors carte blanche to act as roving enforcers of their own notions of ethics in government, irrespective of state and local governments' own determinations as to what should be permitted. Indeed, Aiello was prosecuted and convicted even though he was sent an ethics opinion stating that New York law permitted Percoco to engage in certain political activities once he left the Governor's office. The Second Circuit's expansive, malleable reading of § 1346 would displace the sovereign prerogative of state and local governments to regulate their former officials' activity. Accordingly, "basic principles of federalism" require this

[6] Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Wyoming.

Court to construe the statute narrowly to avoid upsetting the "usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 858-59.

III. THE HONEST-SERVICES STATUTE IS UNCONSTITUTIONALLY VAGUE

A. Absent Any Clear Statutory Guidance, The Fiduciary Duty Concept Underlying Honest-Services Fraud Is Indeterminate

Despite this Court's effort in *Skilling* to "construe, not condemn," § 1346 through a limiting construction, this case illustrates that the "fundamental indeterminacy" Justice Scalia identified in the statute persists today. Even limited to conduct involving "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes," *Skilling*, 561 U.S. at 407, § 1346 continues to prove unworkable and to be unconstitutionally vague because of the flexible and evolving nature of the "fiduciary duty" concept and the ease with which it can be expanded to fit novel prosecution theories.

As Justice Scalia explained, the term "fiduciary" provides a perilously vague hook on which to hang criminal liability. Indeed, one searches in vain to find more than a passing reference to the term within all the criminal provisions of Title 18. *Cf.* 18 U.S.C. §§ 203(d), 205(e) (clarifying that those provisions do not prevent a federal officer or employee "from acting … as agent or attorney … or other personal fiduciary"). And for good reason. "Fiduciary" is neither defined in the federal criminal code nor self-defining. It is a quasi-legal, quasi-factual term that describes the

relationships between certain parties, in certain contexts. But there are myriad potential sources to which one could look for guidance on whether a particular relationship is a fiduciary one, including caselaw from federal courts as well as from whichever state or states might arguably govern the relationship, over a wide range of subject areas such as corporate governance, ERISA, joint venture and partnership law, and basic tort law. Different sources may and often do yield inconsistent, irreconcilable, or at least inconclusive guidance. *See Skilling*, 561 U.S. at 417 (Scalia, J., concurring in judgment) (using *Margiotta* to illustrate the point).

What is more, as Justice Frankfurter famously observed, "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943). The contours of fiduciary duty are as variable, nebulous, and fact-dependent as the existence of the duty itself—perhaps more so. Here, too, courts have grappled with whether the source of the duty "must be positive state or federal law, or merely general principles, such as the 'obligations of loyalty and fidelity' that inhere in the 'employment relationship.'" *Skilling*, 561 U.S. at 417 (Scalia, J., concurring in judgment) (citations omitted). Some courts have looked to trust law, while others have looked to the general law of agency, each of which may vary in significant ways from state-to-state. *Id.* at 417-18. And to the extent honest-services fraud cases

have developed their own "federal, common-law fiduciary duty," that caselaw leaves the duty "hopelessly undefined." *Id.* at 418.

The indeterminacy of this body of law is inevitable, because fiduciary duties are developed primarily through common-law judicial decision-making rather than legislation. An ever-morphing body of fiduciary-duty common law may be appropriate and even useful when it comes to corporate shareholder actions and other civil disputes, but it cannot provide the constitutionally required clear line in a federal criminal statute that defines whether conduct is *criminal* or not. "[U]nder our constitutional system … federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (citing *United States v. Hudson*, 7 Cranch 32, 34 (1812)). Federal criminal law cannot evolve and expand over time to fit new situations that Congress did not contemplate proscribing when it enacted the statute. Rather, as explained, the Due Process clause requires Congress to "have spoken in language that is clear and definite." *Williams v. United States*, 458 U.S. 279, 290 (1982). Allowing the definition of an essential element of a crime to change over time based on common-law adjudication violates the fundamental due process requirement that criminal statutes must provide fair notice to citizens of precisely what conduct they proscribe. *See*, *e.g.*, *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) ("The fair warning requirement … reflects the deference due to the legislature, which possesses the power to define crimes and their punishment.").

Section 1346 does not even use the word "fiduciary," let alone employ the term in a "clear and definite" manner that would provide fair notice of precisely what relationships it encompasses. As this case illustrates, the inherent vagueness of the fiduciary concept continues to plague the statute in spite of *Skilling*'s limiting construction. Section 1346 remains unconstitutionally and irremediably vague.

B. Section 1346 Is Unconstitutional As Applied

At a minimum, if the *Margiotta* theory is a valid basis for a prosecution under § 1346, the statute is unconstitutionally vague as applied to Aiello here. *See*, *e.g.*, *Palmer v. City of Euclid*, 402 U.S. 544 (1971) (reversing judgment as to petitioner because statute unconstitutionally vague as applied).

It is undisputed that Aiello sought Percoco's assistance while he was "off the 2nd floor working on the campaign" and only for a "few months." JA594. Aiello retained Percoco to advocate for COR precisely *because* he was a private citizen and no longer in government; COR paid Percoco only when he was *not* in public office; and Percoco was still out of office when he made a phone call to an official advocating COR's position concerning the LPA issue. Moreover, Aiello knew Percoco had obtained a written legal opinion about what work he could legally undertake after he left office. And he knew that this opinion advised Percoco he could engage in certain political activities involving the state government he had just left, including "backroom services for compensation before a state agency, departments, etc." JA593. In other

words, Aiello understood that it was permissible under the law to retain Percoco to informally lobby state officials about the LPA issue.

To be sure, Aiello knew that Percoco remained influential even while he was on the campaign; that is why COR hired him. But there was no evidence that Aiello—who had no ties to Albany—knew anything about fions with actual government officials during this time or what, if anything, Percoco did to assist his former colleagues in the Executive Chamber, or how those still in government regarded Percoco. Nor could Aiello possibly know where Percoco was physically located when he made his call about the LPA, or what telephone he used to make that call. And there was no evidence to suggest that Aiello knew Percoco would later return to government. *Cf.* JA681-83.

In short, Aiello knew none of the facts that the Second Circuit found indicative of Percoco's continuing fiduciary duty to the public. But no individual should be convicted of a criminal conspiracy to defraud the public unless he had the requisite "knowledge that enables him to make the relevant legal (and indeed, moral) choice" of whether to perpetrate honest-services fraud. *See Rosemond v. United States*, 572 U.S. 65, 78 (2014); *see also Staples*, 511 U.S. at 605 (scienter generally "require[s] that the defendant know the facts that make his conduct illegal"). How could Aiello be guilty of conspiracy to commit honest-services fraud if he did not know that Percoco was sitting in his old office when he made the call about the LPA, or any of the other facts the Second Circuit held demonstrate Percoco's duty of honest services? And how could Aiello have predicted that a jury might find that

Percoco's influence in the state government was more than just that, and instead amounted to "dominance and control" of government business? The Second Circuit's standardless "test" makes it impossible for a defendant to know the dispositive facts that "separat[e] legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994).

The Second Circuit's opinion underscores the point. In concluding that Aiello had the requisite knowledge of Percoco's fiduciary duty, the court could not point to any evidence that Aiello knew any of the supposedly relevant facts. Instead it held that this scienter element was satisfied because "Aiello specifically sought out Percoco" to assist with the LPA and thus "explicitly recognized the power that Percoco wielded." JA683. But anyone who hires a lobbyist presumably does so for similar reasons. The court was merely describing Percoco's influence—*i.e.*, that Aiello retained him because he believed Percoco could be an effective advocate due to his knowledge of state government and his many contacts in the capital. In other words, Aiello believed Percoco would be a good lobbyist. And there was no evidence that the supposed "power" Aiello understood Percoco to have was "dominance and control," as opposed to the ordinary "influence" of a well-connected private citizen who had spent many years in and around government.

The *Margiotta* "test" gave Aiello no fair notice that Percoco had the requisite reliance, dominance, and control, and no fair notice that retaining Percoco was criminal honest-services fraud, rather than perfectly legal political advocacy. Section 1346 is unconstitutionally vague as applied here.

IV. AIELLO'S CONVICTION SHOULD BE REVERSED

For the reasons set forth in Point IV of Percoco's brief, Aiello is entitled to an acquittal on the honest-services fraud conspiracy count or, at a minimum, a new trial on that count due to the erroneous jury instructions.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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