No. 21-1158

In the Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and amici in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United and Citizens United Foundation as *Amici Curiae* in Support of Respondent, *Securities and Exchange Commission v. Cochran*, No. 21-1239 (U.S. Jul. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research,

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[1] No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. The parties have provided written consent to the filing of the brief.

and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization founded to educate the American public on the value of having principled leadership at all levels of government.

It is hardly a secret that *amici* are not aligned on policy or allied politically with former Governor Andrew Cuomo or his campaigns. *Amici* write in support of Governor Cuomo's former campaign manager because the rule of law requires applying the law fairly to both your friends and your adversaries, and *amici* support the rule of law.

INTRODUCTION

This case is about the continued criminalization of politics.

The Petitioner in this case held no formal government position at the time of the alleged conduct, nor was his conviction dependent upon either his previous role in government or any anticipated return to government. Instead, he "was a longtime friend of the Cuomo family" who previously served in government "as Executive Deputy Secretary in the Governor's Office" and who was then serving as campaign manager to Governor Andrew Cuomo's reelection campaign. Petition for a Writ of Certiorari,

at 5, *Percoco v. United States*, No. 21-1158 (U.S. Feb. 2022); *see also* Brief for the United States in Opposition, at 4, *Percoco v. United States*, No. 21-1158 (May 2022). He was convicted, and the court upheld his conviction, on a theory that any private citizens who are "relied on by the government and who in fact control some aspect of government business" owe the same fiduciary duty to the government as public officials. *United States v. Percoco*, 13 F.4th 180, 195 (2d Cir. 2021).

This theory has the potential to impose criminal liability on any politically active citizen who federal prosecutors believe is too effective, disregards the ability of States to set ethical standards for their own government officials, provides little concrete notice to citizens of where the line between legal and illegal conduct lies, and risks chilling and criminalizing, protected First Amendment activity. Accordingly, the ruling below should be reversed.

SUMMARY OF THE ARGUMENT

The Court has made clear "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analysis because it is unbounded and susceptible to no limiting principle.'" *Citizens United*, 558 U.S. at 359 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part). Notwithstanding its protestations to the contrary, this is precisely the theory that the Second Circuit has brought to bear for honest services cases: that ordinary politics or lobbying becomes a

federal crime when a private citizen becomes too influential or effective.

Similar to the conduct underlying prior honest services prosecutions that have been either overturned or called into question by this Court or some of its justices, the Petitioner's actions in this matter hardly constitute the Platonic form of ethical conduct. But that is not the issue before the Court. "There is no doubt this case is distasteful; it may be worse than that. But our concern is not with tawdry tales . . . . It is instead with the broader legal implications of the Government's boundless interpretation" of federal law. *McDonnell v. United States*, 579 U.S. 550, 580-81 (2016). "'Bad men, like good men, are entitled to be tried and sentenced in accordance with the law.'" *Sorich v. United States*, 129 S.Ct. 1308, 1311 (2009) (Scalia, J., dissenting from a denial of certiorari) (quoting *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)); *see also Kelly v. United States*, 140 S.Ct. 1565, 1574 (2020) ("[N]ot every corrupt act by state or local officials is a federal crime."). Here, the Second Circuit's interpretation of honest services does not comport with the law.

It is a "cardinal principle" that "has for so long been applied by this Court that it is beyond debate" that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Courts will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades*

Council, 485 U.S. 568, 575 (1988); *see also generally United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

Importantly, this canon of statutory construction "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247-48 (2012) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

The Second Circuit's approach to honest services disregards this "cardinal principle" and invites grave constitutional doubt. First, the Second Circuit's test for who owes a fiduciary duty is not compelled by the text of the statute. Second, the Second Circuit's test is impermissibly vague, leaving persons of ordinary intelligence to guess at what it means to "dominate and control" governmental business, whether they are "actually relied upon" by officeholders (or just humored by politicians seeking to ingratiate themselves with potential supporters), and what qualifies as "some special relationship." Third,

it violates principles of federalism by substituting the judgment of federal prosecutors for the judgment of the people of the State. Fourth, the Second Circuit's test is impermissibly broad, thereby criminalizing protected First Amendment activities. Finally, consistent with the Court's precedent, these defects cannot be cured by the judicious exercise of prosecutorial discretion, nor has the government's past approach to public integrity prosecutions demonstrated the level of humility necessary to do so.

In order to prevent grave constitutional doubts, the application of the honest services provision, 18 U.S.C. § 1346, should be limited to people who exercise formal authority. Accordingly, the judgment of the court below should be reversed, and this case should be remanded to the lower court for proceedings consistent with a proper reading of the statute.

ARGUMENT

I. The Second Circuit's Interpretation is Not Compelled by the Statute

The federal "honest services" statute reads, in its entirety, "[f]or purposes of this chapter [Mail Fraud and Other Fraud Offenses], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. There is nothing in the text that explicitly requires, or even suggests, that the courts must adopt something akin to the Second Circuit's test.

To the contrary, the surrounding circumstances and legislative history make clear that the purpose of section 1346 was narrow, reversing the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), and was limited to public officials. *See*, *e.g.* Report of the Select Committee on Narcotics Abuse and Control, The Anti-Drug Abuse Act of 1988: A Guide to Programs for State and Local Anti-Drug Assistance, at 124, H. Rep. 101-74 (1989) ("This amendment overturns the 1987 Supreme Court decision in *McNally v. United States* and is intended to permit prosecution of corrupt *public officials* under Federal mail and wire fraud laws." (emphasis added)); 134 Cong. Rec. H11,108–01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) (commenting that § 1346 makes "it no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the McNally decision. No other change in the law is intended"); *but see* 134 Cong. Rec. S17, 360–02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (declaring that the "intent [of § 1346] is to reinstate all of the pre-McNally case law pertaining to the mail and wire fraud statutes without change").

The Second Circuit claimed that "[t]he text of § 1346, coupled with the history of its enactment, makes clear that Congress adopted *Margiotta's* fiduciary-duty theory." *Percoco*, 13 F.4th at 194 (referencing *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982)). This claim is unsupported by the text of § 1346, inconsistent with the set of issues addressed in *McNally*, and belied by the Second Circuit's own statements noting "[t]he bulk of the pre-*McNally*

honest-services cases involved employees . . . ." *United States v. Rybicki*, 354 F.3d 124, 142 n.17 (2d Cir. 2003). Moreover, the Second Circuit's claim that since the case *McNally* overruled "leaned heavily on *Margiotta's* reliance-and-control theory," Congress must have also adopted the reliance-and-control theory when it sought to overturn *McNally, see Percoco*, 13 F.4th at 195, drastically over-reads Congress' action.

McNally addresses *what* constituted mail fraud, not *who* had an applicable duty. *McNally* was not decided based on the reliance-and-control theory. Instead, in *McNally* the Court looked at the history of the federal mail fraud statute and concluded, contrary to the Court of Appeals at the time, that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *McNally*, 483 U.S. at 356. The Court went on to hold "[r]ather 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, we read [18 U.S.C.] § 1341 as limited in scope to the protection of property rights" and advised "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. As even the Second Circuit acknowledged, "[b]ecause the Court in *McNally* outright rejected the entire doctrine of honest-services fraud, it had no occasion to directly rule on the *Margiotta*-based theory." *Percoco*, 13 F.4th at 196. Thus, *McNally* did not explicitly address *who* constituted a state and local official.

In this context, "[i]t bears emphasis that before *McNally* the doctrine of honest services was not a unified set of rules." *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997). While it is clear that Congress sought to criminalize violations of the intangible right to honest services that developed in the courts prior to *McNally*, "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion. *Id.*

Section 1346 is best understood as accepting the Court's invitation to speak more clearly regarding whether federal fraud statutes were limited to frauds involving money or property or whether they reach more broadly into "intangible" ideals of good governance. Nothing in the text of section 1346 or the history of *McNally* supports, must less compels, the Second Circuit's test of *who* can commit honest services fraud.

II. The Second Circuit's Approach Renders the Statute Impermissibly Vague

The Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fed. Commc'ns Comm'n v. Fox Television Station*, 567 U.S. 239, 253 (2012) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Thus, the Court's

"cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see also generally United States v. Williams*, 553 U.S. 285, 304 (2008) (noting "[v]agueness doctrine is an outgrowth . . . of the Due Process Clause of the Fifth Amendment."); *Connally*, 296 U.S. at 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."); *United States v. Davis*, 139 S.Ct. 2319, 2325 (2019) (quoting *Connally*); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018) (quoting *Johnson*, also quoting *Connally*).

"That the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." *Connally*, 269 U.S. at 391. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306; *see also Fox Television Station*, 567 U.S. at 253 ("As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but

rather because it is unclear what fact must be proved.").

A. The Federal Honest Services Statute Itself is Vague and Has Only Been Saved by a Limiting Construction

"Though it consists of only 28 words, the [honest services] statute has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior." *Sorich*, 129 S.Ct. at 1309 (Scalia, J., dissenting from denial of certiorari). As a result, even before the adoption of section 1346, the application of federal fraud statutes to intangible services has faced vagueness questions. In *McNally*, the Court alluded to vagueness concerns while applying the constitutional avoidance canon, stating "[r]ather 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, we read [18 U.S.C.] § 1341 as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360.

As described above, rather than take the hint, Congress pressed forward, explicitly codifying the "ambiguous" right to intangible honest services at section 1346. This proved problematic.

In *Skilling v. United States*, the Court adopted a limiting construction of section 1346 to avoid "encounter[ing] a vagueness shoal," holding "that § 1346 covers only bribery and kickback schemes." 561 U.S. 358, 368 (2010). Tellingly, the Court in *Skilling*

was unanimous that, as written, section 1346 is potentially vague. *Compare* 561 U.S. 358 (opinion of the Court) *with id.* at 415 (Scalia, J., concurring in part and concurring in judgment).[2] The main dispute between the opinion of the Court and Justice Scalia's concurrence is whether section 1346 is so vague that it is void or whether it may be saved by a limiting construction. *See also Black v. United States*, 561 U.S. 465 (2010) (rejecting the government's theory of honest services fraud on the same grounds as in *Skilling*); *Id.* at 474-75 (Scalia, J., concurring in part and concurring in judgment) ("For the reasons set forth in my opinion in [*Skilling*], 18 U.S.C. § 1346 is unconstitutionally vague."); *id.* at 475 (Kennedy, J., concurring in part and concurring in judgment) ("To convict a defendant based on an honest-services-fraud theory, even one limited to bribes or kickbacks, would violate his or her rights under the Due Process Clause of the Fifth Amendment.").

The Court has not revisited whether the "intangible right of honest services" is inherently vague since *Skilling*, thought it has repeatedly cited the limiting construction in *Skilling* to avoid vagueness concerns in other public corruption cases. *See, e.g.*, *Kelly*, 140 S.Ct. at 1571 (citing *Skilling*); *see also McDonnell*, 579 U.S. at 580 (citing *Skilling*).

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[2] The opinions of Justice Alito, concurring in part and concurring in judgment, and Justice Sotomayor (joined by Justices Stevens and Breyer), concurring in part and dissenting in part, are focused on the petitioner's jury trial arguments, rather than his honest services claims.

Thus, section 1346 itself is inherently vague, and has only been saved by a limiting construction.

B. The Second Circuit's Test Renders the Honest Services Provision Impermissibly Vague

The Second Circuit's test would undo the Court's efforts to save section 1346 from itself and render the honest services provision impermissibly vague. In this case, the Second Circuit reaffirmed its test from an early case, *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), by concluding that a person who was not employed by the government nevertheless owed the government a fiduciary duty if "he dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government." *Percoco*, 13 F.4th at 194. As the Second Circuit candidly acknowledged, "there is no precise litmus paper test" for determining whether a non-governmental official is a fiduciary. *Margiotta*, 688 F.2d at 122. The result is a stunningly vague gloss on top of an already dubious statute.

i. Persons of Ordinary Intelligence have No Fair Notice of What Facts Establish "Domination and Control" of Government Business

The Second Circuit provides little guidance for what facts establish domination and control of governmental business. *Margiotta* and the lower court opinion in this case make clear that it relates to

getting your way in dealing with the government, but provide little guidance to separate permissible influence from criminalized domination. Is getting nine out of ten people you recommend hired "domination and control?" What about six? Does it mean government officials drop what they are doing to take your call? The result is that persons of ordinary intelligence have to guess how much winning is too much, or, perhaps more accurately, how much winning will be too much for the federal prosecutor in their jurisdiction. This is the epitome of a vague, "know it when I see it," standard that deprives "ordinary people," *Johnson,* 576 U.S. at 595, fair or meaningful notice of what is prohibited and encourages arbitrary enforcement.

ii. People Outside of Government May Not Know Whether Public Officials "Actually Relied" on Them nor What Level of Reliance is Suspect

The Second Circuit looks to whether people in government "actually relied" on a defendant. This is problematic for multiple reasons.

First, the "actually relied" on standard depends on something that is outside of potential defendants' control. A defendant does not know and often cannot know what other factors may have influenced a public official. Public officials are presented with a wide variety of viewpoints on a daily basis and, when it comes to making a decision, correlation is not necessarily causation. Just because a person asked a public official to take an action and that official

actually took that action does not mean that the public official "actually relied" on the person making the request. *See* Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 Stan. L. & Pol'y Rev. 23, 31 (2008) ("Lawmakers and their staff, if they are any good, as most are, do not rely on a single source of information when making policy decisions. . . . So, while lobbyists have an opportunity to influence policy decisions by informing lawmakers of their client's view, they are generally not the only source a lawmaker relies on . . . .").

Moreover, public officials (particularly elected officials) have a strong incentive to want to be liked by their constituents and lobbyists have a strong financial incentive to appear effective to their clients. Accordingly, it is often in both the official and the requester's interests to allow the requester to take credit for the official action, particularly when the requester is reporting back to their client or when the requester represents an influential constituency, whether or not the public official "actually relied" on the requester.

Second, as with the first prong, "actual reliance" presumably requires something more than just being influential. But the Second Circuit does not (and cannot) provide much guidance on what that more is.

For example, a rarely acknowledged fact in American politics is that lobbyists and interest groups often ghost write legislation. A 2019 study "found at least 10,000 bills almost entirely copied from model

legislation were introduced nationwide in the past eight years, and more than 2,100 of those bills were signed into law." Rob O'Dell and Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do It Instead*, Center for Public Integrity (Apr. 4, 2019), https://publicintegrity.org/politics/state-politics/copy-paste-legislate/you-elected-them-to-write-new-laws-theyre-letting-corporations-do-it-instead/. Whether this practice is beneficial, because it reduces redundant uses of resources, promotes consistency, and minimizes unintended consequences, or harmful, because outside groups may craft model legislation in a way that serves their parochial interests, it is a very widespread occurrence that happens on a bipartisan basis.

Do legislators "actually rely" on lobbyists or other outside groups when they introduce and pass legislation drafted by outside parties? If so, where is the line between "reliance" and effective lobbying?

Finally, as discussed further *infra* section IV, focusing on "actual reliance" raises thorny questions about protected political activities. The core idea behind the American republic is that government is supposed to be responsive to the people in whose name it acts. Particularly in dealing with elected officials, citizens groups and effective lobbyists often pitch their preferred policy outcomes in terms of the associated public and political benefits. Does a public official "actually rely" on a third party if they trust their judgment and accept their representations of the political consequences of taking or not taking a

preferred action? Persons of ordinary intelligence do not and cannot know.

iii. Persons of Ordinary Intelligence have No Prior Notice of What Makes a Relationship with a Public Official Sufficiently "Special" as to be Suspect[3]

The Second Circuit looks to whether reliance is based on a "special relationship" between the defendant and the government. But it is unclear what makes these relationships "special" other than other people rightly or wrongly perceived these individuals as powerful.

Unlike state and federal ethics laws, the Second Circuit's approach does not provide a specific list of covered persons. *See generally* N.Y. Pub. Off. § 73 (Addressing conflicts of interest for New York state government officials); 18 U.S.C. § 208 (prohibiting federal employees from participating "personally and

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[3] There is some ambiguity regarding whether a "special relationship" is a necessary element under the Second Circuit's test. The jury instructions in this case and the court in *Margiotta* both ask whether people in government relied on the defendant based upon a "special relationship." However, at least once the Second Circuit dropped the special relationship qualifier from its description of the fiduciary duty test. *See Percoco*, 13 F.4th at 195 ("In our view, § 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."). While the omission of the "special relationship" might remove one source of concern regarding vagueness, it would substantially heighten the overbreadth concerns discussed *infra* section IV.

substantially" in matters in which enumerated persons have a financial interest); 5 C.F.R. § 26.35.502(b) (defining "covered relationship" for purposes of certain federal ethics obligations).

The defendant in *Margiotta* was a county-level party chairman. Federal Election Commission data indicates that there are 242 qualified political parties registered with the Commission. *See* Political Action and Party Committees, Federal Election Commission (Accessed July 15, 2022), https://www.fec.gov/data/committees/pac-party/?cycle=2022&committee_type=Y. This count does not include all state and local party committees that would not necessarily need to register with the FEC, or committees that are otherwise below the registration threshold. Are the Chairs of all of these committees in "special" relationships with government officials? If so, which officials? If not, which Chairmen are and which are not? The discussion in *Margiotta* suggests that the Second Circuit took a more functionalist view towards the defendant's relationship with government officials, however, this approach just muddies the waters further as to what constitutes a "special" relationship.

Likewise, the defendant in this case was (at the time) a campaign chairman and former state employee. For better or worse, former employees leaving public service and becoming lobbyists is a fairly common career path. In 2011, reports indicated that nearly 5,400 former Congressional staffers left public service to become federal lobbyists in the past ten years, while close to 400 former lawmakers

became lobbyists. T.W. Farnam, *Study Shows Revolving Door of Employment Between Congress, Lobbying Firms*, The Washington Post (Sept. 13, 2011), https://www.washingtonpost.com/study-shows-revolving-door-of-employment-between-congress-lobbying-firms/2011/09/12/gIQAxPYROK_story.html.

Even if determining who is in a "special" relationship with government officials such that additional ethical sidebars are necessary is not an intrinsically unanswerable question, it is an inherently legislative question that requires weighing the pros and cons of different policy choices. *See generally Bond v. United States*, 572 U.S. 844, 867 (2014) (Scalia, J., concurring in judgment) ("It is the responsibility of 'the legislature, not the Court . . . to define a crime, and ordain its punishment.'" (quoting *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820)). Therefore, this sort of line drawing is the type of task that the courts are particularly ill equipped to engage in. Worse, the Second Circuit does not seriously try to do so, which leaves persons of ordinary intelligence to guess if they are in a "special" relationship with a public official.

The result is that the Second Circuit's test for a non-public employee fiduciary is no test at all. To the contrary, it is little better than a "know it when I see it" approach that offers no guideposts for non-public officials to use to gauge their own conduct, provides nearly limitless opportunities for federal prosecutors to target influential political figures for little more reason than they are influential, and risks infringing

upon the prerogative of the people of the various states to set ethical standards for their own officials.

Presciently, Justice Scalia's concurrence in *Skilling* warns that the majority's limiting construction "would not suffice to eliminate the vagueness of the statute" because "it would not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribe and the kickback restriction applies. Does it apply only to public officials?" *Skilling*, 561 U.S. at 421 (Scalia, J., concurring in part and concurring in judgment).

Justice Scalia returned to these concerns in *Sorich*, noting "[t]here is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct" and expressing concern that "[w]ithout some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." 129 S.Ct. at 1310 (Scalia, J., dissenting from a denial of certiorari).

The Second Circuit's test breathes life into Justice Scalia's fears. Either the Second Circuit's test is incorrect or the honest services provision is impermissibly vague and cannot continue to stand.

III. The Second Circuit's Test Raises Serious Federalism Concerns

The Second Circuit's test raises serious federalism concerns by supplanting the ethics judgments of State and local governments with those of federal courts and prosecutors.

It is axiomatic that "[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond*, 572 U.S. at 854. Thus, it is a "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)) (additional citation omitted). This certainty requires at least a "clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States."); *see also Bond*, 572 U.S. at 858-59 (The Court "'will not be quick to assume that Congress has meant to effect a significant change in the sensitive relationship between federal and state criminal jurisdiction.'" (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

The State of New York has already adopted ethics rules that spell out who owes the public a duty and a what that duty entails. Unlike the Second Circuit's test, these rules do not depend on ambiguous

understandings of "domination and control" or case-by-case determinations of who is in a "special relationship."

For example, under New York ethics laws, "[n]o person who has served as an officer or employee in the executive chamber of the governor shall within a period of two years after termination of such service appear or practice before any state agency." N.Y. Pub. Off. § 73(8)(a)(iv).

Statewide elected officials, state employees, and members of the legislature are prohibited from participating in certain hiring and employment decisions, contracting decisions, and public fund investment decisions related to "relative[s]," N.Y. Pub. Off. §§ 73(14)-(15), where the term "relative[s]" is specially defined as "any person living in the same household as the individual and any person who is a direct descendant of that individual's grandparents or the spouse of such descendant." N.Y. Pub. Off. § 73(1)(m).

"Political party chairman," such as the appellee in *Margiotta*, is also a specifically defined class of persons under New York law, subject to at least five separate ethics restrictions. *See* N.Y. Pub. Off. § 73(4)(a) (prohibiting certain political party chairmen, association of which they are a member, or company of which they own or control ten percent or more of the stock from selling goods or services in valued over $25 to the state or contracting with a private entity to do so); *Id.* at (4)(b) (prohibiting certain political party chairmen, association of which

they are a member, or company of which they own or control ten percent or more of the stock from selling goods or services in valued over $25 to the a city agency or contracting with a private entity to do so); *id*. at 7(a) (prohibiting a political party chairman from receiving compensation to appear before or render services in relation to an enumerated set of proceedings before state agencies, including licensing proceedings); *id*. at 7(b) (prohibiting certain political party chairmen from receiving compensation to appear before or render services in relation to an enumerated set of proceedings before city agencies, including licensing proceedings); *id*. at (12) (prohibiting political party chairmen who hold certain positions in a firm, association, or corporation from orally communicating with or without compensation as to the merits of a matter described in (7)(a) and (7)(b) with an officer or employee of the relevant agency).

Under the Second Circuit's test for honest services, Congress has superseded these state-level determinations *sub silento*. This falls well short of the need to be "certain" of Congressional intent before overriding state criminal law, particularly where, as here, the criminal law relates to sensitive issues of self-government. *See generally* Brief for Members of the Virginia General Assembly as *Amici Curiae* in Support of Petitioner, at 13-17, *McDonnell v. United States*, No. 15-474 (Mar. 7, 2016) (expressing concern that a prior expansive reading of federal corruption laws improperly displaced state law by federally criminalizing conduct that was legal under state law); *Amici Curiae* Brief of 77 Former State Attorneys

General (Non-Virginia) Supporting Petitioner Robert McDonnell, at 12-17, *McDonnell v. United States*, No. 15-474 (Mar. 7, 2016) (arguing that the constitution forbids courts from construing vague federal statutes to criminalize conduct that is legal under state law).

The Second Circuit's test risks replacing the judgment of the people of New York with that of the U.S. Attorney for the Southern District of New York or the case-by-case opinions of federal jurors. As such, the Second Circuit's interpretation raises serious federalism concerns that should be avoided. *See generally Kelly*, 140 S.Ct. at 1574 ("Federal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for local and state officials.' . . . [N]ot every corrupt act by state or local officials is a federal crime." (quoting *McNally*, 483 U.S. at 360)).

IV. The Second Circuit's Test Criminalizes and Chills Protected First Amendment Activities

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably . . . to petition the Government for a redress of grievances." U.S. Const., amend. 1.

The lower court opinion rejected Petitioner's First Amendment concerns, claiming "it is not obvious why speech directed to the government would necessarily require special treatment." *Percoco*, 13 F.4th at 197.

The First Amendment is specifically "[p]remised on mistrust of government power" that recognized "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United*, 558 U.S. at 339, 340. "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Accordingly, laws that constrain the ability of the people to "freely inform the government of their wishes . . . regulate, not business activity, but political activity." *Id.*

"[W]e may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press their selfish interests, with Congress acting as arbiter of their demands and conflicts." *United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J., dissenting). Consistent with this understanding, "lobbying is protected by the First Amendment." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring) (citing *Eastern R.R. Presidents Conf.*., 365 U.S. at 137-38); *see also Margiotta*, 688 F.2d at 128-29 ("One of the essential purposes of the First Amendment is to protect the unfettered discussion of government affairs . . . and the activities of lobbyists and others who seek to exercise influence in the political process are basic in our democratic system.").

This is true, even when people and groups work together to try to influence government agencies. "The First Amendment protects [citizens'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Accordingly, groups of people and companies may band together to pursue what they perceive as their common interests. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) ("[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme . . . .").

People and groups may also pay to hire third parties to help them effectively advance their interests. *See United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."); *see also Meyer*, 486 U.S. at 416 (holding that a state law which prohibited

groups from hiring paid petition circulators violated the First Amendment).

Against this backdrop, the "Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Fed. Election Comm'n v. Cruz*, 142 S.Ct. 1638, 1652 (2022)"[G]eneral influence" does not constitute *quid pro quo* corruption. *Id.* at 1653; *Citizens United*, 558 U.S. at 359 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[4]). This is because "[f]avoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support these policies." *Id.* at 359 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in judgment in part and dissenting in part)).

Moreover, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963); *see also Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (quoting *Button*). "[T]he threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions"

[4] Tellingly, the concern discussed in *Citizens United* and other case law is whether *the elected official* is corrupt, not the person trying to influence them.

because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Similarly, it is well established that "vague laws chill speech." *Citizens United*, 558 U.S. at 324. Thus, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Wisconsin Right to Life, Inc.*, 551 U.S. at 474.

The Second Circuit's test regulates political activity with anything but "narrow specificity."

The jury instructions in this case purport to disclaim that "mere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty." *United States v. Percoco*, No. 16 CR 776 (VEC) (S.D.N.Y. Mar. 1, 2018) (Appendix J at 142a). However, the Second Circuit in *Margiotta* gives the game away by asserting that the "statute properly supported a prosecution for [the defendant's] breach of at least a minimum duty not to sell his *substantial influence* and control over governmental processes." *Margiotta*, 688 F.2d at 122 (emphasis added). Thus, under the Second Circuit's test, at some indeterminate and ethereal point, "mere influence," which is permissible and does not impose a fiduciary duty, passes into "substantial influence and control," which does. *See generally United States v. McClain*, 934 F.2d 822, 831 (7th Cir. 1991) ("[S]aving 'official right' prosecutions only for private persons with a 'vise-like' grip on public power . . . might simply prohibit being too successful a lobbyist.").

Notwithstanding invocations to the contrary, the Second Circuit's attempt to attach a fiduciary duty to persons who exercise "dominance and control" is an impermissible attempt to regulate influence by another name. *See generally* William Shakespeare, *Romeo and Juliet*, act 2, sc. 2 ("What's in a name? That which we call a rose/By any other word would smell as sweet.").

Moreover, even if it were permissible to regulate "domination and control" of the policy process by private parties under the honest services statute, the existence of an indeterminate and ethereal line between "mere influence" and "domination and control" alone is enough to chill protected speech. *See Wisconsin Right to Life, Inc.*, 551 U.S. at 475 (quoting *Ashcroft v. Free Speech Coalition*, 553 U.S. 234, 255 (2002)) ("The Government may not suppress lawful speech as the means to suppress unlawful speech.").

"[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). The Second Circuit's fiduciary duty test does not pass muster under the First Amendment and should be rejected accordingly.

V. Prosecutorial Discretion is Insufficient to Save a Vague and Overbroad Interpretation

Finally, it is insufficient to suggest that the government will only apply the Second Circuit test in egregious cases, as the government implicitly does by

focusing on some of the unsavory details of Petitioner's conduct. *See*, *e.g.*, Brief for the United States in Opposition, at 14-17, *Percoco v. United States*, No. 21-1158 (May 2022).

"It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions." *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964)); *see also Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case"). "Prosecutors necessarily enjoy much discretion and generally use it wisely. But the liberty of our citizens cannot rest at the whim of an individual who could have a grudge or, perhaps, just exercise bad judgment." *United States v. Wells*, 519 U.S. 482, 512 n. 15 (1997) (Stevens, J., dissenting).

High profile allegations and findings of misconduct by government investigators and prosecutors in sensitive investigative matters, particularly those involving allegations of public integrity violations, suggest that bad judgment is not just a speculative concern. For example, in 2011 the Department of Justice Office of Professional Responsibility identified multiple *Brady* violations and concluded that several Department of Justice attorneys "engaged in professional misconduct by acting in reckless disregard of his disclosure obligations," while another "exercised poor judgment" in the prosecution of Alaska Senator Ted Stevens. *See*, *e.g.*, Department of Justice, Office of Professional

Responsibly, *Investigation of Allegations of Prosecutorial Misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (ESG)* at 666-71 (Aug. 15, 2011), https://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf.

More recent, a bipartisan group of Senators expressed concern about a 2019 internal audit by the Federal Bureau of Investigation ("FBI") that details a litany of policy violations that the FBI committed between January 2018 and June 2019," including 747 violations in "sensitive investigative matters" ("SIMs"), noting that the audit findings "call into question whether the FBI is rigorously adhering to . . . requirements to consider whether a particular investigative action is the least intrusive method and to consider adverse impacts on civil liberties and public confidence before opening a SIM" and "suggest[] a pattern and practice of evading the rules, which consequently opens the door for political and other improper considerations to infect the investigative decision-making process." Letter from Chairman Dick Durbin and Ranking Member Charles Grassley to Inspector General Michael Horowitz (Mar. 28, 2022), https://www.judiciary.senate.gov/imo/media/doc/2022-03-28%20RJD%20CEG%20to%20DOJ%20OIG%20(FBI%20SIM%20Audit)(001).pdf; *see also* FBI Inspection Division, *2019 Domestic Investigations and Operations Guide Audit 10/21/2019 – 11/01/2019* (Jan. 10, 2020), https://media.washtimes.com/media/misc/2022/03/11/audit.pdf.

Moreover, in both *Kelly* and *McDonnell*, the government adopted highly aggressive theories of the law that were rejected by a unanimous court.

As both a matter of principle and experience, the Court should not rely upon feigns toward the responsible use of prosecutorial discretion to save the Second Circuit's fiduciary duty test. The Court has previously stated that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480. It should not do so in this case.

CONCLUSION

The Second Circuit's interpretation raises serious constitutional concerns related to due process, federalism, and the First Amendment. These concerns can be avoided by rejecting the Second Circuit's expansive and untethered interpretation of honest services provision and limiting honest services in the public sector to people who owe a formal duty to the public. Accordingly, the judgment of the court below should be reversed and this case should be remanded to the lower court for proceedings consistent with a proper reading of the statute.

Respectfully submitted,

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