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 *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL supports Petitioner Joseph Percoco and his co-defendant Stephen Aiello[2] in their challenge to the Second Circuit's holding that private citizens can owe a duty of honest services to the public by virtue of exercising influence over government decisions. The Second Circuit's overbroad application of the honest-services fraud statute implicates NYCDL's core concern of combatting the unwarranted extension of criminal statutes and promoting constitutionally definite standards for criminal liability. If affirmed,

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[1] The parties have consented in writing to the participation of *amicus*. No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

[2] Mr. Aiello, whose petition for certiorari remains pending, filed a brief as Respondent in support of Petitioner Percoco. For convenience, Mr. Percoco and Mr. Aiello are collectively referred to herein as "Petitioners."

the Second Circuit's extension of honest-services fraud to private citizens who prosecutors deem to have "dominated and controlled" government business poses dangers to political expression in addition to principles of fair warning, lenity, and federalism. In addition, as attorneys who regularly advise clients about the legality of planned conduct, NYCDL has a particular interest in ensuring that definitions of crimes satisfy the constitutional requirements of being clear and readily understood. The Second Circuit's ruling fails to provide this guidance and is therefore likely to lead to the prosecution of individuals who did not know, and indeed could not have known, that their conduct was wrong and illegal.

SUMMARY OF ARGUMENT

In both *Skilling v. United States*, 561 U.S. 358 (2010), and *McDonnell v. United States*, 579 U.S. 550 (2016), this Court cautioned that 18 U.S.C. § 1346 is limited in official corruption cases to bribes paid in exchange for "official act[s]"—acts relating to a "formal exercise of governmental power" by one using an "official position," *McDonnell*, 579 U.S. at 574.

In this case, the Second Circuit failed to observe these boundaries on the scope of honest-services fraud. Petitioners Percoco and Aiello were convicted of honest-services fraud conspiracy based on payments to an individual, Mr. Percoco, who was not a public official but instead a campaign executive. In order to affirm these convictions, the Second Circuit needed to revive *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), a 40-year old precedent that predated

Skilling and *McDonnell* and which was overruled by the Supreme Court in *McNally v. United States*, 430 U.S. 350 (1987). *McNally* held that the mail and wire fraud statutes could not be used to charge individuals who may have deprived the public of its right to good government. *Id.* at 355-56.

In this case, the Second Circuit insisted that *Margiotta* "remains valid" after *McNally*, and it approved of jury instructions that Mr. Percoco could be deemed to owe a duty of good government, even without "a formal employment relationship with the state," so long as he "dominated and controlled any governmental business" and those government officials "relied" on him because of his "special relationship" with the government. *United States v. Percoco*, 13 F.4th 180, 187, 193-94 (2d Cir. 2021).

The Second Circuit's expansive interpretation of the honest-services statute, 18 U.S.C. § 1346, creates the very risk of arbitrary enforcement that this Court has warned about over and over again. The court below evaded this Court's precedents, deeming *McDonnell* irrelevant to whether a private citizen could owe a fiduciary duty of good government to the public. *Percoco*, 13 F.4th at 196. The Second Circuit's abandonment of "ascertainable standard[s] of guilt," *Skilling*, 561 U.S. at 416 (Scalia, J., concurring), puts private citizens who lobby, advise, or advocate at risk of federal criminal prosecution—in direct proportion to how successful they are. The danger to expression and democracy, no less than that of arbitrariness and unfairness, is apparent.

The Second Circuit's revival of the discredited doctrine of *Margiotta* is a cause for serious concern. This Court should overrule that court's overly broad definition of honest-services fraud and make plain that only government employees and those who conspire with them can be held criminally liable for honest-services fraud.

ARGUMENT

I. THE SECOND CIRCUIT INCORRECTLY HELD THAT NON-GOVERNMENT OFFICIALS MAY OWE A FIDUCIARY DUTY TO THE PUBLIC.

A. This Court Has Limited The Doctrine Of Honest-Services Fraud In Order To Avoid Criminalizing Legitimate Political Activity.

Over thirty years ago, in *McNally*, the Court rejected "honest services" fraud entirely, holding that wire and mail fraud crimes require a scheme to deprive a victim of tangible property. 483 U.S. at 360, 363. In doing so, the Court rejected a concept with "outer boundaries" that were "ambiguous" and "involve[d] the Federal Government in setting standards . . . of good government for local and state officials." *Id*. at 360; *see also Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (stating that the federal government is not permitted "to use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking").

One key limitation on honest-services fraud in the context of a public corruption prosecution is that the defendant must have committed an "official act," a

term borrowed from the federal bribery statute. *See McDonnell*, 579 U.S. at 567. The district court in this case also charged the jury that it must conclude that a payment or benefit was made or solicited or accepted with the intent that the payment or benefit be made in exchange for an "official action." *Percoco*, 13 F. 4th at 187. An official act "must involve a *formal exercise of governmental power* that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 579 U.S. at 574 (emphasis supplied). Without the "official act" requirement, a government official could be prosecuted for honest-services fraud just for engaging in legitimate constituent services, like arranging a meeting between a supporter and a government agency.

The "official act" in question must also be committed by a public *official* and not by some well-placed lobbyist or government insider. *See id.* at 567-68. The Court's insistence that there be "a formal exercise of governmental power" demonstrates that honest-services fraud is intended to protect the public from fraudulent schemes by government officials and not by their friends, family, or associates. *Id.* at 568.

This is not mere inference from the logic of *McDonnell*. It is supported by the very text of the decision. The Court used the term "official position" three times when it described the requirements of an official act. *See id.* at 572 (two mentions), 574 ("[A public official's] decision or action may include using his official position to exert pressure on another official to perform an 'official act' . . . ."). Yet despite this express reference to an "official position," the

court below dismissed this portion of *McDonnell* as merely dictum, a "passing reference." 13 F.4th at 196.

In addition, *McDonnell* rejected an expansive and ambiguous reading offered by the government that shares similarities with the government's position in this case. In *McDonnell*, the government argued that "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." *McDonnell*, 579 U.S. at 574-75.

The Court's rejection of the government's view was based on its concern not to "cast a pall of potential prosecution over" legitimate interactions between public officials and their constituents, "rais[ing] significant constitutional concerns." *Id.* Faced with such a shapeless definition of honest-services fraud, "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.* at 575. This case implicates similar concerns, both from the perspective of former government officials such as Mr. Percoco who might wish to advocate for clients, and those individuals like Mr. Aiello who might hire former officials to advocate for their views.

In affirming in this case, the Second Circuit relied almost exclusively on *Margiotta*, a case that extended the judicially-created version of honest-services fraud beyond formal government officials. But *Margiotta* predates and was abrogated by *McNally*, and has since been criticized by other Circuit Courts of Appeals. *E.g.*, Percoco Br. 12 (citing, *e.g.*, *United States v.*

Holzer, 840 F.2d 1343, 1348 (7th Cir. 1988), which described *Margiotta* as one of the "worst abuses of the mail fraud statute"). *Margiotta* was wrongly decided from the start, *e.g.*, Percoco Br. 28, Aiello Br. 26, and there is surely no basis to use that decision to extend honest-services fraud in a manner that conflicts with this Court's jurisprudence in *McNally*, *Skilling*, and *McDonnell*. Despite all this, the Second Circuit continues to treat *Margiotta* as good law, in this case and in others. *See, e.g., United States v. Kosinski*, 976 F.3d 135, 150-51 (2d Cir. 2020) (considering *Margiotta* in a case under federal securities law). Only a decision by this Court will end the Second Circuit's reliance on *Margiotta*.

B. To Prevent The Punishment Of Ordinary Advocacy, The Court Should Hold That A Defendant Must Have An "Official Position" To Owe A Duty Of Honest Services To The Public.

The Second Circuit's decision here implicates the same types of concerns that animated this Court's decisions limiting the definition of honest-services fraud. At the time of the conduct alleged in the indictment, Mr. Percoco held no government office; he was a private citizen working for the re-election campaign of then-Governor Andrew Cuomo. Without an official position, Mr. Percoco lacked both a fiduciary duty to the public and the ability to undertake an "official act" that is an essential requirement of honest-services fraud. Likewise, Mr. Aiello should not have been prosecuted on the theory that he participated in a scheme to "bribe" Mr. Percoco—a person who held no official position.

The trial court's jury instructions lay bare the danger of a legal rule that official acts can be committed by people who are not government officials. Here, the jury was instructed that Mr. Percoco "d[id] not need to have a formal employment relationship with the state in order to owe a duty of . . . honest services to the public," so long as 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." 13 F.4th at 187.

In other words, any person who "dominated and controlled any government business," and who had a "special relationship" with a government official, is liable to be prosecuted for honest-services fraud. With such a blurry line between legal and illegal conduct, it will be impossible for lawyers to give reliable advice to their clients about whether their intended conduct is permitted.

The Court should resolve this uncertainty by making explicit what it suggested in *McNally* (in which the petitioners' co-defendant, Hunt, was not a government employee but rather the leader of a state political party, 483 U.S. at 352) and stated in *McDonnell*: that the defendant in an honest-services fraud prosecution must hold an "official position." Absent such clarification, the government's overly broad application of honest-services fraud will sow uncertainty about the line between criminal honest-services fraud and legitimate and constitutionally protected government advocacy.

In our democratic system, many private actors exert various degrees of influence or even "control" over the federal, state, and local governments.

Individuals and companies spent approximately $3.5 billion lobbying the government in 2020—no doubt because they expect their efforts to affect government decisions. *See* Karl Evers-Hillstrom, *Lobbying Spending Nears Record High In 2020 Amid Pandemic*, Open Secrets (Jan. 27, 2021).[3] And beyond professional lobbyists, there are a plethora of interest groups, political action committees, and think tanks that play a role in government decisions. Public officials' families and friends inevitably have influence, often very substantial influence, over that official's thinking and decision making. Their involvement now can be scrutinized and subjected to prosecution.

If the government can prosecute a private campaign operative such as Mr. Percoco, it might be able to prosecute private citizens for honest-services fraud in a host of other inequitable circumstances. For example, could prosecutors charge, as honest-services fraud, the retention of a lobbyist who previously worked as a staffer for the Senate Finance Committee in order to advocate for a bill that would cut taxes? An influential lobbyist might be said to "dominate" or "control" governmental business, based on his special relationship with the members of that committee. Under the Second Circuit's rule, anyone who hired that lobbyist, and the lobbyist too, could be subject to prosecution. Yet this is the sort of political advocacy that happens every day and is protected by our First Amendment.

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[3] https://www.opensecrets.org/news/2021/01/lobbying-spending-nears-record-high-in-2020-amid-pandemic/ (last visited Sep. 6, 2022).

Or consider the leader of an environmental advocacy group who is known to have a close relationship with the Secretary of the Interior based on their shared work experience. If someone makes large donations to the environmental group in hopes that its leader can persuade the Secretary to adopt more restrictive policies with respect to mining in national parks, have the donor and the group leader committed honest-services fraud? On the Second Circuit's test, these people seemingly could also be prosecuted for honest-services fraud for engaging in protected political activity.

Likewise, should it be a federal crime to hire a close relative of a state governor as a lobbyist, on the theory that this close relative "dominate[s] and control[s]" governmental business based on his relationship, and that the governor "relied" on the lobbyist because of his "special relationship" with the governor? Is it fair to either the relative or to the person hiring the relative to treat this transaction as honest-services fraud?

Nothing would stop the government from pursuing these cases, which is why this Court should step in—as it has in other cases where the government was afforded undue discretion to decide the difference between legal and illegal conduct. *See*, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (rejecting an interpretation of a criminal statute that would turn "millions of otherwise law-abiding citizens [into] criminals"). The line between illegal and legal conduct in the examples above is thin, if it exists at all. Such uncertainty is impermissible, including for the reason that criminal defense attorneys are unable to advise clients who are deciding whether to engage lobbyists,

make donations, or affect the business of government in other ways.

As was the case in *McDonnell*, the particular conduct prosecuted by the government in this case can seem easy to fault. Even so, the solution to a crisis of confidence in our public officials is not over-criminalization or allowing prosecutors to decide how to interpret federal statutes. "[F]air warning and related kinds of unfairness" are undermined. *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). The overbroad interpretation also creates the risk of diminishing public participation in government—the very same concern that caused the Court to define an "official act" strictly in *McDonnell*. *See* 579 U.S. at 574.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit.

Dated: September 7, 2022

Respectfully submitted,

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