No. 21-1158

In the Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community. As relevant here, the Chamber has filed amicus briefs seeking to ensure that the standards for criminal liability are clear and predictable so that businesses can plan and conduct their affairs accordingly without fear of prosecution. *See, e.g.*, *Ruan v. United States*, 142 S. Ct. 2370 (2022) (Nos. 20-1410, 21-5261). The Chamber also regularly files amicus briefs where the business community's First Amendment rights are implicated. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205); *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410 (2006) (No. 04-1581); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521); *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis.) (No.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amicus curiae*, its members, and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

98-0596), *cert. denied*, 528 U.S. 969 (1999); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (No. 85-701). The Chamber has also litigated to preserve its own First Amendment rights. *See, e.g.*, *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir.), *cert. denied*, 537 U.S. 1018 2002); *Chamber of Commerce of the United States v. Fed. Election Comm'n*, 69 F.3d 600 (D.C. Cir. 1995).

The Chamber and its members have a strong interest in this case because the decision below imposed an overbroad and unpredictable standard for determining when a private individual's public policy advocacy—core First Amendment activity—becomes a criminal violation of the federal fraud statutes. Under the Second Circuit's rule, a business, union, or nonprofit risks criminal liability by partnering with a private lobbyist who has "too much" political influence, though the court provided no clear guidance on how and when that line is crossed. The Chamber and its members have a strong interest in clarifying the governing legal standard to ensure that businesses can carry out their affairs and exercise their First Amendment rights without fear of criminal liability.

SUMMARY OF ARGUMENT

Private individuals have engaged in lobbying and policy advocacy to the government since the Founding. Such petitioning for redress is a central component of American politics and self-governance. It is also socially useful, constitutionally protected, and highly regulated. Yet, in the decision below, the Second Circuit ignored or dismissed these considerations when it revived its rule from *United*

States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983), which potentially criminalizes such advocacy by influential individuals in the private sector. The theory is that those individuals can become "fiduciaries" of the general public if they have de facto "control" over (and are relied on by) government officials, thereby owing the public their "honest services." According to the Second Circuit, when such individuals receive money to engage in government advocacy that is not in the public interest, they potentially commit a federal felony punishable by up to 20 years in prison. *See* 18 U.S.C. §§ 1341, 1343, 1346.

The decision below is deeply flawed in multiple respects. Petitioner ably explains how the *Margiotta* reliance-and-control rule is premised on a mistaken view of fiduciary obligations. Pet'r Br. 21-28. Petitioner also correctly explains why *Margiotta* is foreclosed by this Court's precedents, *see id.* at 29-37, and why allowing it to stand offends constitutional norms and risks criminalizing innocent conduct, *see id.* at 38-44.

This brief takes no position on how the law should apply on the facts of this particular case. Rather, amicus seeks to inform the Court's consideration of the question presented in three additional ways. *First*, this brief sets out the broader context of lobbying and professional public policy advocacy at the federal, state, and local levels. That form of advocacy is a longstanding means of exercising the First Amendment right to petition the government. It is also increasingly necessary for businesses as the government occupies larger portions of the national economy and establishes more complex regulatory schemes. In that environment, many companies *must*

conduct business with the government, and public policy advocates are indispensable in facilitating those interactions. Such advocacy is legitimate, socially useful, and plays an important role in avoiding gridlock and partisan division. Moreover, lobbying is highly regulated by comprehensive restrictions enacted at the federal, state, and local levels.

Second, this brief highlights the significant constitutional concerns raised by the Second Court's *Margiotta* rule. That rule imposes criminal liability on private individuals based on the extent to which they exercise informal "control" over government officials, who unduly "rel[y]" on them. JA667. That standard is hopelessly vague: It fails to provide fair notice of what conduct is prohibited under Section 1346, lends itself to arbitrary enforcement by overzealous prosecutors, and chills the exercise of First Amendment rights. This Court should reject the *Margiotta* rule as inconsistent with core constitutional values.

Finally, the brief offers two options for what a clear and administrable test might look like. The most straightforward approach is petitioner's proposed categorical rule that only actual government officials owe fiduciary duties to the public that can give rise to honest-services fraud liability. A second option would be to recognize a fiduciary duty by private individuals only in situations where a government employee briefly exits and reenters government service, while retaining de facto control over his position during the interim—a test that might capture petitioner's case, but would exclude many others engaging in ordinary public policy advocacy.

Whatever approach the Court ultimately embraces should ensure clear and objective criteria to guide legitimate businesses and organizations when they exercise their First Amendment rights to petition the government. Above all else, the Court should reject the Second Circuit's hopelessly vague *Margiotta* rule.

ARGUMENT

I. LOBBYING IS CONSTITUTIONALLY PROTECTED, SOCIALLY USEFUL, AND HIGHLY REGULATED

The decision below, and the *Margiotta* rule that it revived, overextended the application of "honest services" under 18 U.S.C. § 1346 in an effort to combat corruption. In doing so, however, the Second Circuit failed to appreciate the ways in which public policy advocacy and lobbying are part of a longstanding constitutional tradition, offer substantial benefits to both the private and public sectors, and are already subject to extensive regulation. This Court should take account of these considerations when crafting the rule of Section 1346 liability that will shape the conduct of law-abiding businesses going forward.

A. Lobbying Is Deeply Rooted In Our History And Constitutional Tradition

1. Since colonial times, the right to petition the government to redress grievances has been a central feature of the American tradition.[2] Given the general

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[2] Some commentators trace the right to petition as far back as the Magna Carta. *See, e.g.*, Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right*

dispersion of the colonies, individuals or groups seeking redress often petitioned through an agent hired to advocate on their behalf. *See* Mateo Forero, *Distorting Access to Government: How Lobbying Disclosure Laws Breach A Core Value of the Petition Clause*, 67 Ala. L. Rev. 327, 343-44 (2015) ("Forero"). This form of agent-based petitioning was often used to "lobb[y] for regulations on local trades and professions, and [to seek] legislation on the sale of alcohol and lottery tickets." *Id.* at 344 (citing Mary Patterson Clarke, *Parliamentary Privilege In The American Colonies* 209-10 (1943)).

The Commonwealth of Virginia had a particularly strong petitioning culture. In the 1710s, for example, agents of planters from the Chesapeake Bay lobbied Virginia authorities for "legislation . . . prohibiting the export of bulk tobacco from that colony, for regulation of the trade to prevent Scottish smuggling, for a long period of grace between the landing of tobacco and the paying of customs duties, and for the prevention of tobacco planting in England." Alison G. Olson, *The Virginia Merchants of London: A Study in Eighteenth-Century Interest-Group Politics*, 40 Wm. & Mary Q. 363, 368-70 (1989). In Pennsylvania, Quaker lobbyists used similar tactics to advocate for a variety of goals, including "a Pennsylvania act forbidding the importation of slaves," "keep[ing] the Three Lower Counties (now Delaware) part of Pennsylvania," and "separat[ing] New York and New Jersey." Alison G.

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to Lobby, 16 Harv. J.L. & Pub. Pol'y 149, 181-82 (1993) (citing Raymond C. Bailey, *Popular Influence Upon Public Policy: Petitioning in Eighteenth-Century Virginia* 9 (1979)); 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, 38 & n.43 (2008).

Olson, *The Lobbying of London Quakers for Pennsylvania Friends*, 117 Pa. Mag. Hist. & Biography 131, 135 (1993).

The Founders viewed the right to petition as a basic requirement of liberty. They expressly invoked the right in the Declaration of Independence, saying:

> In every stage of these Oppressions, We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

The Declaration of Independence para. 30 (U.S. 1776).

The First Amendment's Petition Clause subsequently provided an express textual guarantee of the right of private citizens to petition government officials: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. *See generally* Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 Harv. J.L. & Pub. Pol'y 149, 180 (1993) ("Thomas") (reviewing history of the Petition Clause). By guaranteeing that the people can communicate their concerns to their elected officials, the Petition Clause provides a basic underpinning for democratic self-governance.

The tradition of petitioning through lobbyists carried over immediately into the newly formed Republic. In fact, the first petition to arrive at the House of Representatives was from the Baltimore business community requesting the enactment of certain trade policies. *See* Forero, *supra*, at 346 &

n.141. In 1792, the Virginia veterans of the Continental army hired one of the country's first lobbyists, William Hull, "to lobby for additional compensation for their war services." U.S. Senate, Legislation & Records, Lobbyists (updated 1989), https://www.senate.gov/legislative/common/briefing/Byrd_History_Lobbying.htm, *in* 2 Senator Robert C. Byrd, *The Senate, 1789-1989: Addresses on the History of the United States Senate*, S. Doc. No. 100-20 (Mary Sharon Hall ed., 1989) ("Byrd").

Since then, this Court has confirmed that the Petition Clause protects lobbying. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court relied on the Petition Clause to narrowly construe the Sherman Act and hold that the statute did not prevent an association of railroads from hiring lobbyists to advocate for policies adverse to the trucking industry. 365 U.S. 127, 129, 137-38 (1961). The Court explained that in a representative democracy, "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." *Id.* at 137. It further explained that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138; *see also FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (explaining that *Noerr* interpreted the Sherman Act "in the light of the First Amendment[]"); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring)

("[L]obbying is protected by the First Amendment . . . .").[3]

2. The right to lobby the government is not only deeply entrenched in our constitutional tradition; it also plays a critical role in the practical functioning of the government. Indeed, one of the reasons lobbying is protected is because it—along with the rights of free association and assembly—helps the people to *effectively* advocate for their views. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."); *United States v. Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting) ("[F]reedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively."). Lobbyists effectuate First Amendment values by rendering concrete services that are practically beneficial both to the private and public sectors.

Lobbyists and public policy experts play crucial roles in helping companies, labor unions, and

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[3] *See also, e.g.*, *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) (Burger, J.) ("While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged, as this one allegedly has been, in trying to persuade Congressional action is exercising the First Amendment right of petition."); Trevor Potter et al., *Political Activity, Lobbying Laws & Gift Rules Guide* § 1:1 (3d ed. 2021, update) ("Advocacy through lobbying has been a central part of the ebb and flow of activity in the nation's capital since the early days of the Republic . . . . [It] embod[ies] one of the basic hallmarks of the American form of representative democracy: the right to petition the government.").

nonprofits understand, navigate, and improve the complex regulatory environments in which they operate. *See* 3 Robert L. Haig, *Successful Partnering Between Inside and Outside Counsel* § 44:14 (2021, Westlaw) ("Haig"). That role has become especially important for businesses as the government occupies increasingly larger portions of the economy. In recent years, federal spending has made up approximately 30% of the country's total gross domestic product, with overall government spending rising to 47% after factoring in state and local spending.[4] In that economic context, many companies have no choice but to do business with the government in order to participate in their relevant market. But doing so comes with a catch: They must decipher and ensure compliance with a host of burdensome government regulations.

The magnitude and scope of federal regulations have grown at a staggering pace: Between 1995 and 2016, federal agencies published 88,127 final rules—or 15 rules every working calendar day.[5] To conduct business in that regulatory environment—while ensuring compliance and ideally advocating for

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[4] *See* USAspending.gov, Data Lab, *Spending*, https://datalab.usaspending.gov/americas-finance-guide/spending/ (last visited Sept. 5, 2022) (select "U.S. Economy" under "How does federal spending compare to Federal revenue and the size of the economy"); Organisation for Economic Co-operation and Development, *General Government Spending (Indicator)*, https://data.oecd.org/gga/general-government-spending.htm (last visited Sept. 5, 2022).

[5] *See* U.S. Chamber of Commerce, *The Regulatory Impact On Small Business: Complex. Cumbersome. Costly.* at 15 (Mar. 2017), https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf.

regulatory improvements—companies often require assistance from public policy advocates who specialize in issues of a "highly technical nature," including "legislation regulating such complex areas as the environment, health insurance, financial services, tax policy, and other issues." *Haig*, *supra*, § 44:14. For example, pharmacists have partnered with lobbyists to advocate for a larger role in combatting the spread of monkeypox. *See* Frank Diamon, *Pharmacists Lobby To Administer Monkeypox Vaccine*, FIERCE Healthcare (Aug. 24, 2022), https://www.fiercehealthcare.com/payers/pharmacists-lobby-administer-monkeypox-vaccine. And nonprofits with expertise in the dense body of regulations pertaining to veterans affairs have successfully lobbied for a wide range of significant legislation. *See, e.g.*, Veterans of Foreign Wars, *Legislative Victories* (Jan. 2022), https://vfworg-cdn.azureedge.net/-/media/VFWSite/Files/Media-and-Events/Press-Room/VFWLegislativeVictories.pdf (listing examples).

Beyond their subject matter expertise, lobbyists and policy experts also provide advice and support to their business clients on "the complex and often arcane mechanisms of the legislative and rulemaking processes." *Haig*, *supra*, § 44:14. They must "be experts in the often abstruse routines and procedures of government decision-making" and "understand 'the rules of how the various institutions work, internally and with each other.'" 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, 49 (2008) ("Allard") (citation omitted).

In addition to educating private sector actors, lobbyists provide valuable information and insight to government entities. "Government has become

sufficiently complex that, without the information lobbyists bring to legislators, decision making would be—at best—poorly informed." *Id.* at 43 (citation omitted). That is unsurprising, given that one of the core premises underlying the First Amendment is that societal and governmental decision making benefit from the free and open exchange of different perspectives—the "marketplace of ideas." *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Lobbyists help ensure that the concerns and perspectives from different regulated companies enter the marketplace of ideas under consideration, after which legislators can engage in informed and vigorous debate before deciding how to proceed.

In addition to their educational role, public policy advocates help disparate parts of the citizenry coordinate and advocate more effectively. By having a deep familiarity with the political environment in which they work—for instance, by knowing key stakeholders and their policy priorities—professional advocates can propose and facilitate creative policy solutions overlooked by others. *See* Allard, *supra*, at 42. And by "providing focused expertise and analysis to help public officials make informed decisions and often bridging the gaps in divided and gridlocked government, lobbyists sustain and advance the policy process." *Id.*; *see also* Haig, *supra*, § 44:15-16 (explaining that successful public policy advocates have developed valuable political insight that enables them to build coalitions and foster compromise).

3. Given everything discussed above, it should come as no surprise that virtually every major corporation, labor union, issue-advocacy non-profit, and trade association has an arm devoted to lobbying

and public policy advocacy. Whether they employ their own advocates, or hire outside lobbying firms, such entities "engage in a multitude of activities," such as "conducting technical studies, with the ultimate goal of influencing the course of legislation and government policy." Byrd, *supra*.

In 2021, there were 12,183 registered federal lobbyists, a slight uptick from recent years but still lower than the average throughout the 2000s. *See* Open Secrets, *Lobbying Data Summary,* Total Spending & Lobbying, https://www.opensecrets.org/federal-lobbying (last visited Sept. 5, 2022). The total amount spent on federal lobbying that year was $3.77 billion. *See id.*; Jonathan O'Connell & Anu Narayanswamy, *Lobbying Broke All-Time Mark In 2021 Amid Flurry Of Government Spending*, Wash. Post (Mar. 12, 2022), https://www.washingtonpost.com/business/2022/03/12/lobbying-record-government-spending/.

Those lobbyists are members of both major political parties, and many have prior experience serving in important positions in federal, state, and local governments.[6] Indeed, former government officials play essential roles in policy advocacy at private companies, non-profit advocacy groups, and lobbying firms around the country. Such former officials are valued for their policy expertise, their

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[6] *See, e.g.*, ProPublica, *Lobbyists*, https://projects.propublica.org/trump-town/staffers/category/lobbyists (last updated Oct. 2019) (listing hundreds of lobbyists who worked in the Trump administration); Open Secrets, *Revolving Door*, *Obama Officials who have spun through the Revolving Door*, https://www.opensecrets.org/obama/rev.php (last visited Sept. 5, 2002) (listing hundreds of lobbyists who worked in the Obama administration).

government experience and relationships, and their knowledge of the day-to-day operations of government agencies and legislatures.

B. Lobbying Is Heavily Regulated At The Federal, State, And Local Levels

To promote transparency and integrity, lobbying is subject to extensive regulation. As Senator Byrd put it: "Congress has always had, and always will have, lobbyists"; "they have a job to do, and most of them do it very well"; but Congress must have "eternal vigilance to ensure that lobbyists do not abuse their role." *See* Byrd, *supra*. Over time, "lobbying has proved to be a legislation magnet," attracting a wide range of civil, ethical, and criminal restrictions from federal, state, and local governments. Thomas, *supra*, at 149-50.

At the federal level, the central lobbying restrictions and disclosures were developed through four main statutes: the Foreign Agent Registration Act (FARA) of 1938;[7] the Regulation of Lobbying Act (RLA) of 1946;[8] the Lobbying Disclosure Act (LDA) of 1995;[9] and the Honest Leadership and Open

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[7] 22 U.S.C. §§ 611-21.

[8] Pub. L. No. 79-601, §§ 301-11, 60 Stat. 812, 839-42 (1946). Title III of the Legislative Reorganization Act of 1946 was the "Federal Regulation of Lobbying Act." It was the first law that required persons who lobbied Congress to register with the House of Representatives and the Senate.

[9] Pub. L. No. 104-65, 109 Stat. 691 (1995), as amended by Pub. L. No. 105-166, 112 Stat. 38 (1998); 2 U.S.C. §§ 1601-14. The LDA repealed the RLA.

Government Act (HLOGA) of 2007.[10] FARA governs public policy advocacy in the United States on behalf of certain foreign entities. *See* Trevor Potter et al., *Political Activity, Lobbying Laws & Gift Rules Guide* § 2:1 (3d ed. 2021, Westlaw). The LDA, which superseded the RLA, established an expanded definition of "lobbyist" and created a broad registration and disclosure regime. *See id.* § 1:2. The LDA was directed at paid lobbyists, and it required them to register and report certain identifying information and financial data in quarterly reports. *Id.* § 4:4. The reporting requirements included information about "money received and expended, persons to whom funds were paid and the purposes of the funding," the names of articles published for lobbying purposes, and "the proposed legislation [the lobbyist] sought to influence." *Id.*

HLOGA extended the LDA's disclosure requirements and imposed new prohibitions on what lobbyists may do in the course of their work—including stringent gift restrictions. *Id.* § 4:8. It also enacted stricter criminal penalties for non-compliance. *Id.* §§ 4:8, 1:3.[11] HLOGA thus required lobbyists "to devote considerable time and resources to compliance" through a "combination of quarterly lobbying reports, semiannual expenditure disclosure

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[10] Pub. L. No. 110-81, 121 Stat. 735 (2007). HLOGA amended the 1995 act to further enhance disclosure and reporting requirements for lobbyists and lobbying firms.

[11] *See generally* U.S. Senate Select Comm. on Ethics, *Gifts*, https://www.ethics.senate.gov/public/index.cfm/gifts (last visited Sept. 5, 2022); U.S. House of Rep. Comm. on Ethics, *FAQs about Gifts*, https://ethics.house.gov/gifts/gifts-faqs (last visited Sept. 5, 2022).

reports, and the semiannual gift rule certification." *Id.* § 1:3.

In addition, HLOGA enhanced post-employment restrictions for Members of Congress, their staff, and certain Executive Branch personnel. After such officials leave their positions in the government, they are subject to "cooling off" periods of one or two years, depending on various factors, during which they are substantially limited in their ability to engage in certain forms of public policy advocacy. *See* Allard, *supra*, at 53 & n.123 (detailing the various restrictions); Haig, *supra*, § 44:41. In recent years, political appointees in the Executive Branch have also been subject to additional post-employment restrictions imposed by executive order. *See Political Activity, Lobbying Laws & Gift Rules Guide* § 1:4.[12]

State regulations on lobbying have likewise proliferated, and they impose a wide array of disclosure requirements and lobbying prohibitions. *See, e.g.*, Haig, *supra*, § 44:45 (providing "State Lobbyist Registration and Disclosure Laws 50-State Statutory Survey"). In New York, in particular, the State's lobbying rules for procurement "are broad and complex." *Political Activity, Lobbying Laws & Gift Rules Guide* § 7:6. For example, New York provides that individuals and companies who anticipate spending or receiving more than $5,000 on lobbying must register with the State and file disclosure

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[12] The Judicial Branch is subject to an assortment of statutory ethics requirements that apply generally to federal employees, but otherwise is largely governed by its ethics regulations and policies. *See generally* U.S. Courts, *Ethics Policies*, https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies (last visited Sept. 5, 2022).

reports bi-monthly (for lobbyists) or semi-annually (clients). *Id.* In addition, procurement lobbyists must comply with a number of specific procurement lobbying rules and limitations, such as rules limiting contact during the procurement process to specific officials designated to receive such contact. *Id.* And former government officials are generally restricted from lobbying for two years. *See* N.Y. Pub. Off. Law § 73(8).[13]

On top of that, many cities and counties regulate various forms of advocacy. *Political Activity, Lobbying Laws & Gift Rules Guide* § 7:1. And lobbyists who are lawyers may be subject to additional ethics requirements under the Rules of Professional Conduct. Haig, *supra*, § 44:3. In addition, the major lobbying trade association—the Association of Government Relations Professionals—has adopted a code of ethics. *See* Ass'n of Gov't Relations Professionals, *Code of Ethics,* http://grprofessionals.org/join-agrp/code-of-ethics (last visited Sept. 5, 2022).

The result of this regulatory web is that lobbyists must monitor and understand "many complex, overlapping, and shifting restrictions," and "companies must tread carefully, particularly because the legal penalties and reputational costs for violating these rules are potentially severe." *Political Activity, Lobbying Laws & Gift Rules Guide* § 7:1. The stakes

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[13] *See generally* Nat'l Conference of State Legislatures, *Revolving Door Prohibitions* (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx (listing state-by-state requirements for mandatory cooling-off periods for former state officials before they can lobby in the private sector).

are high because penalties can lead to exclusion from participating in government programs, and given the government's economic footprint, that exclusion can be the death knell for a company. The civil and criminal penalties are also stiff in their own right. For example, the LDA provides that a corporation or its employees may be liable for civil penalties of up to $200,000 per violation, and criminal penalties that include up to five years' imprisonment. *Id.* § 5:33.

Finally, as a backstop to these civil and criminal lobbying restrictions, Congress has enacted a series of criminal statutes specifically targeting government corruption. The federal bribery statute criminalizes offering or receiving bribes and illegal gratuities. *See* 18 U.S.C. § 201. The Hobbs Act criminalizes extortion involving government officials. *Id.* § 1951. And the federal program integrity statute targets a public official who demands or receives a payment "intending to be influenced" in connection with federally funded programs. *Id.* § 666(a)(1)(B). And many states have similar criminal prohibitions. *See* Nat'l Conference of State Legislatures, *Ethics and Public Corruption Laws: Penalties* (Sept. 15, 2021), https://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx ("The range of penalties includes censure, removal from office, permanent disqualification from holding any state position, restitution, decades in prison, and fines up into the hundreds of thousands of dollars."). These criminal statutes provide yet another layer of protection against the risk of corruption.

In sum, federal, state, and local governments have established a thorough, multilayered regulatory regime that punishes and deters unethical lobbying practices while accounting for lobbying's social utility

and protected constitutional status. Despite that extensive body of law, the Second Circuit in the decision below turned to an entirely different source—the federal fraud statutes—to punish petitioner's apparent misconduct. As explained below, that decision was not only unnecessary, but also raises a series of constitutional problems.

II. THE *MARGIOTTA* RULE RAISES SERIOUS CONSTITUTIONAL CONCERNS AND SHOULD BE REJECTED

The Second Circuit's decision below expressly reaffirmed its ruling from *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). *See* JA666-67. In *Margiotta*, the court held that a private citizen advocating for a cause before the government may have a "fiduciary duty" to "the general citizenry" and thus be criminally liable for defrauding the public of his "honest and faithful services" if his advocacy is dishonest. 688 F.2d at 122, 138.

The decision below embraced *Margiotta* and applied its reasoning to interpret 18 U.S.C. § 1346, which defines the phrase "scheme or artifice to defraud" in the federal fraud statutes as including "a deprivation of the intangible right of honest services." The Second Circuit held that "private individuals who are relied on by the government and who in fact control some aspect of government business" are subject to liability under Section 1346, because such individuals are "fiduciaries" of the general public and thus owe the public their "honest services." JA667-68. That holding and its reliance-and-control standard raise substantial constitutional concerns—namely, the lack of fair notice about what conduct the

statute prohibits, and relatedly, the chill on First Amendment rights that will result when businesses operate under that cloud of uncertainty.

The Court has long instructed federal courts to "avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible." *Skilling v. United States*, 561 U.S. 358, 406 & n.40 (2010) (alteration in original) (quoting *Boos v. Barry*, 485 U.S. 312, 331 (1988), and collecting cases). Such a construction is plainly possible here. This Court should reject *Margiotta* and embrace a clear standard for Section 1346 liability that provides fair notice to those who exercise their First Amendment rights by lobbying the government on public policy matters.

A. *Margiotta* Raises Substantial Due Process And First Amendment Concerns

1. The Second Circuit's interpretation of Section 1346 raises substantial constitutional concerns under the Due Process Clause. A statute does not comport with due process if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972)).

The Second Circuit's interpretation of Section 1346 creates just such a problem. Under its view, a private individual engaging in ordinary lobbying becomes a criminal fraudster if the individual (1) is "relied on by the government" and (2) "in fact control[s] some aspect of government

business." JA667. But the court provided no clear standard that would put a person of ordinary intelligence on notice as to when those conditions are satisfied. Government officials regularly "rely" on public policy advocates from the private sector. "Reliance" merely means "[d]ependence or trust by a person," *Reliance*, *Black's Law Dictionary* (11th ed. 2019), and that is a central part of a lobbyist's job, *see supra* at 9-14. When and how does that reliance become criminal under the first prong of the Second Circuit's rule? Neither the decision below nor *Margiotta* offers any clear answer.

The same uncertainties equally infect the second prong. What does it mean for a private individual to in fact "control" some aspect of government business? JA667. That word typically means to "exercise power or influence over." *Control*, *Black's Law Dictionary*. Based on the Second Circuit's application of this prong to the facts of petitioner's case, "sufficient control" appears to be no more than political influence. JA681. The court noted, for instance, that petitioner's political "power was amplified by his unique relationship with Governor Cuomo," because "he had worked for Governor Cuomo in a number of roles, and was known for being close to him and his family." *Id.* But that type of freewheeling analysis could be applied to almost any influential private advocate who is close with government officials. *See supra* at 13 & n.6. And under its wholesale adoption of *Margiotta*, the Second Circuit's rule does not require such a private individual to have *ever* held a government position. *See* JA683 (noting that the defendant in *Margiotta* "never officially held public office").

This amorphous criminal prohibition is precisely the danger Judge Winter forewarned in his dissent in *Margiotta*, 688 F.2d at 139-44 (Winter, J., concurring in part and dissenting in part). There, he explained that the majority's open-ended standard meant that there was "no end to the common political practices which may now be swept within the ambit of mail fraud." *Id.* at 140. For example, a private partisan political leader "who causes elected officials to fail to modernize government to retain jobs for the party faithful is guilty of mail fraud unless that fact is disclosed." *Id.* The "logic would easily extend to the content of campaign literature" or even "public speeches." *Id.* at 140-41. And from there it would be only a short step for an aggressive prosecutor to target campaign donors that she deems unduly influential. *See* Pet'r Br. 40, 44-47.

To determine whether such conduct is ordinary public policy advocacy or a crime, "[j]uries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Margiotta*, 688 F.2d at 142 (Winter, J., concurring in part and dissenting in part). And as a result, the *Margiotta* rule "subjects virtually every active participant in the political process to potential criminal investigation and prosecution," an arbitrary standard that invites "abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors." *Id.* at 143; *see also United States v. Murphy*, 323 F.3d 102, 117-18 (3d Cir. 2003) (agreeing with Judge Winter's dissent and rejecting *Margiotta*).

Prosecutors cannot be expected to apply the standardless *Margiotta* approach in a fair and consistent manner. Indeed, this Court has

consistently refused to "construe a criminal statute on the assumption that the Government will 'use it responsibly,'" *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (citation omitted), and it should follow the same course here. *Margiotta* and the decision below open up the federal fraud statutes to selective and arbitrary enforcement, and provide no meaningful guidance for individuals to distinguish between lawful public policy advocacy and criminal fraud under Section 1346. "'Invoking so shapeless a provision to condemn someone to prison' . . . raises the serious concern that the provision 'does not comport with the Constitution's guarantee of due process.'" *McDonnell*, 579 U.S. at 576 (quoting *Johnson v. United States*, 576 U.S. 591, 602 (2015)); *see also Murphy*, 323 F.3d at 116.

2. The Second Circuit's fair-notice problem predictably leads to another substantial constitutional concern—chilling private individuals and businesses from exercising their First Amendment right to petition the government. *See Margiotta*, 688 F.2d at 140 (Winter, J., concurring in part and dissenting in part). This provides yet another reason to reject the Second Circuit's interpretation of Section 1346 under principles of constitutional avoidance. *See Skilling*, 561 U.S. at 406.

The First Amendment expressly guarantees the right "to petition the Government for a redress of grievances," U.S. Const. amend. I, and that guarantee includes using lobbyists and public policy advocates to petition effectively, *see supra* at 7-8. The Second Circuit's indeterminate standard under Section 1346 will undoubtedly chill that right through the in terrorem effect of uncertain criminal liability. As this

Court has recognized, First Amendment activity is easily chilled by the threat of criminal penalties. *See Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976). That chilling effect is particularly salient for the Nation's business community, which takes pains to avoid even the appearance of criminal misconduct. *See Political Activity, Lobbying Laws & Gift Rules Guide* § 7:1.

Absent clear rules, the threat of Section 1346 liability will overdeter socially valuable and constitutionally protected conduct. Companies and individuals will shy away from engaging in valuable policy advocacy protected by the First Amendment for fear that a prosecutor and jury might find that their lobbyist was somehow too influential and was therefore defrauding the public.

Providing a clear rule and avoiding overdeterrence is also particularly appropriate in this context given the extensive criminal and civil frameworks that already exists to address the conduct at issue here. Petitioning the government through lobbying raises unique constitutional and political issues, and Congress—along with states and localities—have developed reticulated statutory schemes that account for those concerns. *See supra* at 14-19 (detailing various federal, state, and local restrictions on lobbying). The blunt tool of Section 1346 is unnecessary and even harmful in this context, unless its boundaries are clearly defined.

This Court recently reiterated that the "only . . . permissible ground for restricting political speech [is] the prevention of '*quid pro quo*' corruption or its appearance," and that the "'appearance of mere influence or access'" does *not* suffice. *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1652-53 (2022) (citation omitted). The Second Circuit's rule extends

beyond traditional quid pro quo corruption and moves too far toward criminalizing the appearance of influence and access—an overextension that will substantively deter law-abiding individuals from engaging in the constitutionally protected and socially useful activity of petitioning the government. And even if the line were unclear, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Id.* at 1653 (citation omitted).

In sum, the Second Circuit's interpretation of Section 1346 creates serious due-process and First Amendment concerns. The Court should reject *Margiotta*'s reliance-and-control rule for determining whether private individuals owe fiduciary duties to the public, potentially creating criminal liability.

B. The Court Should Replace *Margiotta* With A Clear, Predictable Standard

The Court should use this case to provide clear guidance about the scope of Section 1346 liability when private individuals lobby the government. Clarity is particularly important because of the nature and importance of the due process and First Amendment principles discussed above. To provide fair notice and avoid chilling protected petitioning, the Court should announce an objective test addressing whether and when a private individual becomes a fiduciary owing a duty of "honest services" to the general public for purposes of Section 1346.

1. The broad language in the federal fraud statutes has been particularly prone to abuse by aggressive prosecutors pushing the boundaries of what counts as a criminal offense. Such extensions and the resulting "overdeterrence is the characteristic

vice of broad [statutory] construction," but it can "be reduced by careful specification of . . . statutory limits." Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 280-81 (1982). And that is what this Court has repeatedly done, pushing back on prosecutions that seek to use the federal fraud statutes as an all-purpose tool for policing unethical conduct and enforcing a clear, predicable statutory construction that gives fair notice of what conduct is criminal.[14]

In *Skilling*, for example, this Court substantially narrowed the scope of honest-service fraud under Section 1346 to avoid "due process concerns" from lack of fair notice. 561 U.S. at 408-09. The Court limited the statute to the "bribery and kickback schemes," which were "uniformly" recognized by the courts of appeals before *McNally* and constituted the "heartland applications" of the statute. *Id.* at 408-09 & n.43. The Court took a similar approach in *McDonnell*, 579 U.S. at 576 and *Kelly v. United States*, 140 S. Ct. 1565, 1571-72 (2020), which were also political corruption cases in which the government stretched the federal fraud and bribery statutes beyond their breaking point. In short, the Court has previously recognized that this precise statute requires precision to avoid constitutional concerns.

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[14] *See, e.g.*, *Kelly v. United States*, 140 S. Ct. 1565 (2020); *Marinello v. United States*, 138 S. Ct. 1101 (2018); *McDonnell v. United States*, 579 U.S. 550 (2016); *Yates v. United States*, 574 U.S. 528 (2015); *Bond v. United States*, 572 U.S. 844 (2014); *Sekhar v. United States*, 570 U.S. 729 (2013); *Skilling v. United States*, 561 U.S. 358 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000); *McNally v. United States*, 483 U.S. 350 (1987); *see also United States v. Bonds*, 784 F.3d 582 (9th Cir. 2015) (en banc).

2. There are multiple, plausible ways to construe Section 1346 to provide clear guidance to lobbyists and those who engage them.

a. The most straightforward path to resolving this case is through petitioner's proposed categorical rule, under which private individuals are never fiduciaries that owe honest services to the general public. *See* Pet'r Br. 21-28, 47. In petitioner's view, some *formal* government position is required in order to establish the fiduciary relationship between the individual and the public. *Id.*

Petitioner's approach is straightforward, objective, and removes almost any uncertainty for private individuals exercising their right to petition the government, making clear that they have no fiduciary duty to provide honest services to the general public. It thus avoids *Margiotta*'s problems with fair notice and chilling First Amendment rights. Petitioner's approach would also prevent the blunt tool of the federal fraud statutes from displacing the more nuanced and specific lobbying restrictions enacted by federal, state, and local governments—restrictions that are specifically designed to account for and balance tradeoffs between anticorruption and First Amendment values.

An arguable drawback of this position is that it may allow bad actors to deploy a technical maneuver—formally leaving office during a period of lobbying—to avoid criminal liability. But formal distinctions of that nature are a mainstay of various ethics and lobbying restrictions. *See, e.g.*, *supra* at 14-17 (listing examples). Moreover, Congress, states, and localities already impose heightened restrictions for former government employees during "cooling off" periods—so it is unclear why further criminal liability

is necessary. *See supra* at 16. And, of course, legislators can enact further regulation to close any remaining gaps. Petitioner's approach fully protects fair-notice and First Amendment principles, while leaving the door open for further legislation that is targeted, specific, and clear.

b. If the Court is concerned that petitioner's approach leaves too much leeway for improper conduct, it could replace the Second Circuit's holding with a narrower rule that is limited to short-term revolving-door situations like the one allegedly at issue here. In other words, instead of the Second Circuit's revival of the sweeping reliance-and-control rule from *Margiotta*, JA666-72—a rule that applies even to private individuals who have never held a position in the government, *see* JA683—the Court could instead limit the rule to situations where an individual (1) was previously a government employee and assumed a fiduciary duty of honest services to the public; (2) temporarily left government service with the intention and ability to return shortly thereafter; and (3) maintained functional control over his government position during his sabbatical in the private sector.

This approach, to be sure, would not eliminate all line-drawing issues, such as whether the defendant truly retained functional control over his government position. But it would substantially reduce those issues to a small subset of cases. And that subset would raise substantially fewer concerns about fair notice and chilling First Amendment rights. All individuals in that subset (1) have formally assumed a fiduciary relationship with the public through their prior government service; (2) intend to continue their work as fiduciaries in the near future; and (3)

continue, during the interim period, to in fact conduct the same work that they performed as formal fiduciaries. Limiting the rule to this subset would diminish the chilling effect on ordinary, private individuals who merely seek to exercise their right to petition.

In its opposition brief at the certiorari stage, the government appeared to argue that the decision below adopted this narrower holding instead of fully endorsing *Margiotta*'s sweeping reliance-and-control rule. *See* BIO 15-16. Although that is an unpersuasive reading of the decision below, *see supra* at 19-20, and inconsistent with the challenged jury instruction, *see* JA511, 664-65, this Court could adopt that position now. For the reasons noted, that rule would be a significant improvement over *Margiotta*.

* * *

The options discussed above have various advantages and drawbacks, but the critical point is that they would provide substantially more clarity and predictability than the indeterminate standard adopted by the Second Circuit below. This Court should reject the *Margiotta* rule and provide clear guidance to law-abiding individuals and businesses seeking to exercise their First Amendment rights without risking criminal liability.

CONCLUSION

For the foregoing reasons, the Court should reject the Second Circuit's analysis and clarify the scope of liability under 18 U.S.C. § 1346.

Respectfully submitted,

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