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 OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes.

NACDL was founded in 1958. It has a nationwide membership of thousands of members, including private

[1] All parties received timely notice of this brief and consented to its filing. No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, or its counsel made such a contribution.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. Each year, NACDL files *amicus* briefs in this Court and others in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL has a particular interest in reducing overcriminalization. It regularly opposes overbroad interpretations of criminal laws and has filed multiple *amicus* briefs regarding the proper interpretation of the honest services fraud statute.

SUMMARY OF ARGUMENT

The Second Circuit's reliance-and-control theory of honest services fraud epitomizes the dangers of importing equitable doctrines into the criminal law. That theory goes far beyond the core of honest services fraud. It is – by design – a fact-dependent, elastic theory incapable of precise definition. The Court should reject it and reaffirm that malleable equitable principles have no place in honest services fraud or the criminal law generally.

ARGUMENT

I. THE "RELIANCE-AND-CONTROL" THEORY ERODES ESSENTIAL LIMITS ON HONEST SERVICES FRAUD

This Court has limited honest services fraud "to its core." *Skilling* v. *United States*, 561 U.S. 358, 404 (2010). That core encompasses only "paradigmatic cases of bribes and kickbacks" – fraudulent schemes to deprive another of the right to "honest services," *id.* at 411, by accepting a private benefit in exchange for an "official act," *McDonnell* v. *United States*, 579 U.S. 550, 574-575 (2016).

Mr. Percoco was neither a government employee nor an agent with "official [governmental] responsibilities." *Dixson* v. *United States*, 465 U.S. 482, 496 (1984). He was accordingly in no position to perform the kind of "official act" needed to commit "paradigmatic" bribery. Yet the Second Circuit nevertheless affirmed his conviction, holding that even a ***private citizen*** owes the public a "fiduciary duty" to provide honest services if he ***informally*** "dominated and controlled any governmental business" and anyone "in the government actually relied on him." Pet. App. 24a.

By dispensing with the element of an official act, the Second Circuit's approach threatens to transform even such core political activity as using one's informal influence to advance private interests into a federal crime. That expands honest services fraud far beyond the bounds this Court has set.

The Court initially rejected the honest services theory precisely because "its outer boundaries [were] ambiguous." *McNally* v. *United States*, 483 U.S. 350, 360 (1987). The Court later narrowed § 1346 to its "bribe-and-kickback core" because a broader reading would deprive defendants of fair notice and invite "arbitrary and discriminatory prosecutions." *Skilling*, 561 U.S. at 409, 412. That narrow version of honest services fraud created "'a uniform national standard'" and defined "honest services with clarity." *Id.* at 411. It ensured that "[t]he existence of a fiduciary relationship" would be "beyond dispute" because core "bribe and kickback cases" involve indisputable fiduciary relationships like "public official-public" or "employee-employer." *Id.* at 407 n.41.

The reliance-and-control theory erases the bright line this Court drew in *Skilling*. As an equitable theory involving "most difficult" line drawing, its outer boundaries are

necessarily ambiguous. *United States* v. *Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982). The *de facto* "reliance" and "control" often can be assessed only after the fact. Thus, there is no notice – let alone the ***fair*** notice due process demands. By drawing on equity and common law, the theory ***guarantees*** there can be no uniform national standard for honest services fraud.

The Second Circuit divined its reliance-and-control theory from § 1346's "capacious language," Pet. App. 27a; its legislative history, Pet. App. 29a (relying on legislative history); and the "federal public policy" against fraud, *Margiotta*, 688 F.2d at 124. That ignores that criminal laws must "be construed strictly," *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 94 (1820); ambiguities must be resolved "in favor of the defendant," *Hughey* v. *United States*, 495 U.S. 411, 422 (1979); and courts cannot expand criminal laws based on "general declarations of policy in the statute and legislative history," *ibid.*

The reliance-and-control theory forces individuals "at peril of life, liberty or property to speculate" as to the lawfulness of their conduct. *Bouie* v. *City of Columbia*, 378 U.S. 347, 351 (1964). It condemns defendants "for failing to * * * comb through obscure legislative history" and violating an amorphous public policy expressed in vague language. *United States* v. *Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting); see *Wooden* v. *United States*, 142 S. Ct. 1063, 1085-1085 (Gorsuch, J., concurring in the judgment) ("legislative history and purpose" no basis to "expand" criminal liability). That defies this Court's honest services fraud precedent and basic principles of criminal law.

II. Equitable Principles Are Fundamentally Incompatible With Criminal Law

The Second Circuit's reliance on equitable principles to expand the scope of § 1346 threatens consequences far beyond the scope of honest services fraud.

This Court has said repeatedly that criminal laws "are solely creatures of statute." *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). There are "no judge-made offenses." *Krulewitch* v. *United States*, 336 U.S. 440, 456-457 (1949) (Jackson, J., concurring). Courts may not "punish a crime not enumerated in the statute" merely "because it is of equal atrocity, or of kindred character, with those which are enumerated." *Wiltberger*, 18 U.S. (5 Wheat.) at 96. Criminal statutes "must provide explicit standards." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

Yet the whole purpose of equity is to supply "relief ***in extraordinary cases***, which are ***exceptions*** to general rules." *The Federalist* No. 83, at 505 (Hamilton) (C. Rossiter ed. 1961). Equity depends "upon the particular circumstances of each individual case." 1 W. Blackstone, *Commentaries on the Laws of England* *61 (1765). Indeed, to reduce equitable principles to "established rules and fixed precepts" would "destroy[ ] it's [sic] very essence." *Id.* at *61-62.

To the extent American criminal law has ever incorporated equitable principles, it has been to ***protect*** defendants. Equity works "to ***soften*** and ***mollify*** the extremity of the law." J. Baker, *An Introduction to English Legal History* 115 (5th ed. 2019) (emphasis added). That softening impulse "found expression in the criminal law in th[e] insistence upon community participation in the determination of guilt or innocence." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). The writ of *coram nobis* has a similar equitable flair, allowing criminal defendants to correct legal or

factual errors after trial where necessary "to achieve justice." *United States* v. *Morgan*, 346 U.S. 502, 511 (1954); see also *Wooden*, 142 S. Ct. at 1085 (Gorsuch, J., concurring in the judgment) (rule of lenity works "to limit, never expand, punishment").

Weaponizing equitable principles to ***expand*** criminal liability – as the reliance-and-control theory does – is a dangerous innovation. Civil law standards, particularly those sounding in equity, are often "aspirational" and "inherently open-ended." J. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 201 (1991). Imposing such shifting standards onto the criminal law threatens the "distinctly American version of the rule of law" grounded in fair notice and lenity. *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment). It inverts the rule that, "where uncertainty exists, the law gives way to liberty" and renders "liberties dependent on 'the private opinions of judges.'" *Id.* at 1082, 1083.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

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