

No. 21-1158

In the
Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

**MOTION OF RESPONDENT IN SUPPORT
OF PETITIONER STEVEN AIELLO
FOR DIVIDED ARGUMENT**

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Pursuant to Supreme Court Rules 21 and 28.4, Respondent in Support of Petitioner Steven Aiello moves for divided oral argument. Aiello requests dividing the time allotted to Petitioner Joseph Percoco as follows: 20 minutes to Percoco and 10 minutes to Aiello. Percoco consents to this division of argument time, and Respondent United States has no objection.

1. This case concerns the scope of the “honest services” statute, 18 U.S.C. § 1346. In mid-2014, Aiello’s real estate development firm retained Percoco in connection with a matter pending before a New York State agency. Percoco had been a top aide to the governor but was no longer in government either when Aiello sought his assistance or later, when Percoco called a state official on Aiello’s behalf. Nonetheless, after a joint trial, both were convicted of conspiracy to defraud the public of Percoco’s honest services. The Second Circuit affirmed the convictions. In so doing it resuscitated a decades-old decision, *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *abrogated by McNally v. United States*, 483 U.S. 350 (1987), and held that even a private citizen can owe the public a fiduciary duty if, behind the scenes, that individual “dominates and controls” and is “relied on” by actual public officials.

2. The question presented thus asks whether a private citizen who holds no elected office or government employment, but who has informal political or other influence over governmental decisionmaking, owes a fiduciary duty to the public, such that paying for that person’s influence is a “bribe,” and both payor and recipient can be convicted of honest-services fraud as if the recipient was a public official, not a private citizen. Argument has been set for November 28, 2022.

3. Aiello's liberty is at stake in this criminal case, and he has a substantial interest in representing his own interests and presenting his own distinct perspective. Indeed, Percoco and Aiello have been represented by separate counsel throughout this litigation. They had their own attorneys at trial, filed separate briefs and argued separately in the Second Circuit, and separately petitioned for writs of *certiorari* in this Court (*see* No. 21-1161). Under Supreme Court Rule 12.6, Aiello is a Respondent in this case and filed a brief supporting Petitioner.

4. Although generally aligned in their position that § 1346 does not and cannot reach the type of conduct at issue here, Aiello and Percoco approach the issue from different perspectives. Dividing argument between the two will materially assist the Court by enabling it to hear both perspectives at oral argument. *See* Stephen M. Shapiro, et al., Supreme Court Practice § 14.5 (11th ed. 2019) ("Having more than one lawyer argue on a side is justifiable ... when they represent different parties with different interests or positions.").

5. Specifically, Percoco is the former public official who continued to owe the public a fiduciary duty, according to the Second Circuit's theory, because of the nature of his interactions with those still in government. Percoco argues, *inter alia*, that the *Margiotta* theory is fundamentally wrong because his "removal from the state payroll severed his relationship with the public under state law, changing his role from a public servant to a private individual seeking political gain." Pet. Br. 43. "True fiduciary obligations," Percoco argues, "arise from agency or analogous legal relationships," and only "[p]ublic officials exercise power as agents of the people;

private citizens are agents of nobody and possess no state power, only the capacity to influence.” *Id.* at 21.

6. Aiello, by contrast, is the business owner who sought help persuading a state agency that a particularly onerous labor condition was not required on one of his company’s projects. He retained Percoco specifically because he wanted assistance from someone *outside* government—in his words, “off the 2nd floor” of the state capitol building—and only after learning that Percoco had received an ethics opinion expressly advising that New York law permitted him to “engage in backroom services for compensation before a state agency, departments, etc.” *See* Aiello Br. 11-12. While Percoco and Aiello both argue that the Second Circuit’s dominance, control, and reliance standard for public fiduciary status is unconstitutionally vague, Aiello is uniquely situated to address why that standard renders the honest-services fraud offense vague from the standpoint of a person who seeks to retain a lobbyist but is not privy to the inner workings of government. Aiello argues that it is particularly difficult for a person in his position to determine whether a former government official is merely influential or has crossed the line into the “dominance and control” of, or “reliance” by, government officials that the Second Circuit held could convert a constitutionally protected payment into a bribe. As Aiello argues, “[t]he *Margiotta* theory is hopelessly amorphous and indeterminate, particularly to someone seeking to divine which government lobbyists he can or cannot lawfully hire.” Aiello Br. 34.

7. Similarly, both Percoco and Aiello argue that the Second Circuit’s decision criminalizes constitutionally protected democratic activities and thus raises

serious concerns under the First Amendment. But it is Aiello’s First Amendment rights that are implicated here. As he argues, “[t]he First Amendment protects citizens’ rights not only to petition their government, but to employ influential advocates for that purpose”; in retaining Percoco to advocate for Aiello’s company, Aiello was “exercis[ing] ... core constitutional rights.” Aiello Br. 39-40. The Court will benefit from engaging directly with Aiello’s counsel on these important points.

8. In its brief, the government presents an alternative to the *Margiotta* theory on which the jury was instructed. It repeatedly emphasizes that Percoco ultimately decided to return to public office and maintains that, once he decided to do so, his status as a future public official independently gave rise to a duty of honest services. *E.g.*, Gov’t Br. 21, 25-26, 39. But, for reasons similar to those discussed above, in most cases someone in Aiello’s shoes—a private citizen lacking any direct ties to government—would be unable to identify a *prospective* gubernatorial staff member, let alone the moment at which he or she decided to seek public employment.¹ As a result, Aiello has a distinct perspective here too, and permitting him to participate in oral argument could materially assist the Court on this issue as well.

9. Further, dividing argument will not necessitate expanding the total time the Court has allocated for oral argument.

10. This Court routinely grants motions to hear from counsel for a respondent in support of petitioner in addition to counsel for petitioner. *See, e.g.*,

¹ Indeed, there is no evidence Aiello ever knew in advance that Percoco would return to office.

Kelly v. United States, 140 S. Ct. 661 (2019) (mem.); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 35 (2019) (mem.); *Lucia v. SEC*, 138 S. Ct. 1543 (2018) (mem.); *Ohio v. Am. Express Co.*, 138 S. Ct. 974 (2018) (mem.); *McDonald v. City of Chicago*, 559 U.S. 902 (2010). *See also Rucho v. Common Cause*, 139 S. Ct. 1316 (2019) (mem.) (granting divided argument where parties aligned but emphasized different arguments).

11. Aiello respectfully requests that the Court do so here and grant his motion to divide argument as requested.

Respectfully submitted,

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