No. 21-1158

IN THE

Supreme Court of the United States

JOSEPH PERCOCO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Does a private citizen owe a fiduciary duty to the public just by virtue of exercising sufficient influence over government decisionmaking? The Second Circuit said yes in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), over one of the late Judge Winter's most fiery dissents. Chief Judge Becker adopted his dissent in *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003). Then this Court narrowed the honest-services statute to its "core" in *Skilling v. United States*, 561 U.S. 358 (2010). *Margiotta* was left discredited and abandoned, an aberrational vestige of judicial history.

Until now. The decision below expressly revived *Margiotta*, embracing its reasoning and blessing jury instructions that sent Petitioner to prison because "people working in the government actually relied on him" even though he had relinquished his public title, duties, and salary. Pet.App.142a. That decision renewed a circuit split and opened a dangerous new frontier for prosecutors to pursue lobbyists, donors, constituents, and even officials' family members.

Unable to defend the decision, the Government tries to rewrite it. But the limits it offers are both arbitrary and imagined. Nothing in the jury instructions or the panel decision hinges on whether one *previously* held public office or *later* returned to it. Nor do obscure details of the federal-officer bribery statute have any bearing on this case. The panel adopted "*Margiotta*'s reliance-and-control theory." Pet.App.25a. That is the theory that conflicts with *Murphy*, cannot be squared with *Skilling* or this Court's other precedents, and invites the mischief Judge Winter presciently warned about. This Court should grant review.

ARGUMENT

I. THE *MARGIOTTA* THEORY HAS DIVIDED THE CIRCUITS.

Margiotta held that private citizens owe a fiduciary duty to act in the best interests of the general public if they exercise "de facto control" over "governmental decisions." 688 F.2d at 122. Chief Judge Becker, writing for the Third Circuit, expressly rejected the "*Margiotta* theory"—*i.e.*, that a person can attain "such a dominant role in the political system … that he could be considered the equivalent of" a public official. *Murphy*, 323 F.3d at 104. The Third Circuit instead agreed "with Judge Winter" that this theory of private corruption extends the honest-services statute "beyond any reasonable bounds." *Id.*

Although *Margiotta* had technically been overruled by this Court's categorical rejection of the honest-services theory in *McNally v. United States*, 483 U.S. 350 (1987), the decision below "reinstated" *Margiotta* (Pet.App.29a) under the aegis of 18 U.S.C. § 1346. The panel unabashedly "reaffirm[ed] *Margiotta*'s reliance-and-control theory" (Pet.App.25a)—and thus created a clear circuit conflict over its validity.

The Government acknowledges that *Murphy* openly "disavowed" *Margiotta*. BIO.19. The Government argues, however, that the decision below did not "expressly embrace" *Margiotta*'s holding (BIO.16), and by extension is not "squarely foreclose[d]" by *Murphy*'s rejection of *Margiotta* either (BIO.19). It claims the decision below is limited to "once-and-future" officials like Percoco, but does not reach other private citizens, like the party officials in *Margiotta*. *Id.*

There is a reason the Government is forced to quote *its own brief* for this supposed distinction. BIO.15 (quoting its appellate brief's observation that this case "does not go as far as *Margiotta*"). There is nothing in the decision below to support its wishful thinking.

A. To the contrary, the panel framed the issue before it as whether *Margiotta* remained good law. It correctly observed that the fiduciary-duty jury charge "fits comfortably within our decision in" *Margiotta*; indeed, the jury instructions treated as dispositive *Margiotta*'s test "of reliance, and de facto control and dominance." Pet.App.25a. The panel then "decline[d]" defendants' plea "to revisit *Margiotta*," and instead "reaffirm[ed] *Margiotta*'s reliance-and-control theory in the public-sector context." *Id.* Adopting *Margiotta*'s conclusion, the court held that § 1346 covers "private individuals who are relied on by the government and who in fact control some aspect of government business." Pet.App.27a. The panel reasoned that the statute's "capacious language" was "broad enough" to reach that far, and inferred that Congress "effectively reinstated the *Margiotta*-theory cases" by enacting the honest-services statute. Pet.App.27a, 29a.

Simply put, there is no daylight between *Margiotta* and the decision below, as even a cursory reading of the opinion reveals. Even the decision's *subheadings* confirm that the court understood it was reviving *Margiotta*: "*Margiotta* Remains Valid after *McNally*"; "*McDonnell* Does Not Undermine *Margiotta*"; and "Constitutional Considerations Do Not Require Overturning *Margiotta*." Pet.App.25a, 29a, 31a. This Court should take the panel at its word: *Margiotta* is back. And that creates a circuit conflict.

B. Conversely, nothing in the decision purports to limit its rationale to "once-and-future" officials like Percoco. Neither his past public service nor his after-the-fact return to government played any role in the jury instructions or in the Second Circuit's legal ruling imposing fiduciary duties on private citizens.

1. Start with the past—Percoco's service, *before* the events at issue, as the Governor's Executive Deputy Secretary. That fact is not mentioned *once* in the panel's analysis of the fiduciary-duty instruction. *See* Pet.App.24a-32a. That is because the instructions did not attach any legal significance to a defendant's past office. It instead directed, per *Margiotta*, that *any* private citizen may owe the public a fiduciary duty, if he "dominated and controlled" government business and "people working in the government actually relied on him." Pet.App.142a. That sweeping rule is what the panel "validate[d]." Pet.App.29a.

In evaluating the sufficiency of the evidence under that legal standard—*i.e.*, whether Percoco "exercised sufficient control and reliance to trigger a duty of honest services under *Margiotta*," Pet.App.40a-41a—Percoco's past role was *relevant*. *See* Pet.App.41a. The jury could have found that he amassed considerable "power" in that position, and "maintained" it after formally leaving office. *Id.* But that was not the *only* factor the court invoked: Percoco's authority was also "amplified" because he was "known for being close to [Governor Cuomo] and his family." *Id.* And nothing in the decision suggests that the court was narrowing the "duty of honest services under *Margiotta*" (*id.*) by making past formal office a new *necessary* factor. *See* Pet.App.43a (noting that Margiotta himself "never officially held public office").

Nor would such a distinction make any sense. The premise of *Margiotta* and the decision below is that a private citizen assumes a fiduciary relationship with the public when "others rely upon him" or he exercises "de facto control." *Margiotta*, 688 F.2d at 122; *see also* Pet.App.25a (same). There is no principled basis to distinguish a private citizen who exercises *de facto* control by virtue of prior government service from one who exercises that same *de facto* control by virtue of being the governor's friend, the president's son, a top fundraiser, or the head honcho of a party machine. So it is hardly surprising that the decision below did not even hint at that arbitrary distinction.

2. Turn next to the future—Percoco's decision, months *after* the alleged agreement, to return to public service. That is a red herring that likewise played no role in the jury instructions or the panel's legal rule.

Of course, a private citizen who expects to assume public office commits a crime by accepting payment in exchange for a promised exercise of his future power. But that is not because the citizen owes any fiduciary duty *now*. *See Laverpool v. N.Y.C. Transit Auth.*, 835 F. Supp. 1440, 1462 (E.D.N.Y. 1993) (person who was offered a state job was "neither a public official [n]or a public officer at the time"). Rather, it is because that person *will* owe such a duty when he takes office, and has committed to breach it. This case does not present that (relatively simple) scenario. In defining when someone who is "not a state employee" owes the public a fiduciary duty, the challenged jury instruction said nothing about future public office or future official power. Pet.App.142a. Nor did the panel suggest that "*Margiotta*'s reliance-and-control theory" hinges on an expectation of future office. Pet.App.25a.

The courts below did not address the sale-of-future-office scenario because it is not presented here. Aiello wanted Percoco to "help … *while he is off the 2nd floor*." Pet.App.23a (emphasis added). The point was to deploy Percoco while he was *out* of office. Indeed, at the time of the alleged agreement, Percoco (like every campaign manager) may have had a "guaranteed" job back in government *if he wanted it* (BIO.4)—but was planning *not* to return. Pet.App.120a-22a. While he later changed his mind, "[a]ll that ultimately matters is Percoco's *agreement* to perform official action." Pet.App.40a. In any event, even Percoco's "execution of the deal"—by calling a staffer about the Labor Peace Agreement (LPA)—predated his resumption of state employment. Pet.App.39a-40a; *see also* BIO.15.

To be sure, the Government also argued (despite a complete absence of proof) that Percoco agreed to provide a "stream of benefits" that continued "[a]fter he resumed his official role." BIO.20. But the Second Circuit *rejected* that theory due to instructional error. Pet.App.13a-16a. The panel upheld the conviction on harmless-error review based solely on the evidence that Percoco agreed to press a state agency "to reverse its position on the need for a [LPA]." Pet.App.21a. Meanwhile, the panel declined to rest the conviction on either of the alleged official acts that postdated Percoco's return to state office. Pet.App.23a; *see also* Pet.App.39a-40a (finding evidence of official action to be sufficient based solely on LPA theory).[1]

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[1] For the same reasons, this legally invalid alternative theory does not make the case a "poor vehicle." BIO.20. If anything, the panel's reliance solely on *Margiotta* to sustain the conviction makes this a *perfect* vehicle to address that theory.

* * *

In sum, the Government's "once-and-future" refrain is frolic-and-detour. The Third Circuit firmly rejected *Margiotta*'s holding that *de facto* control gives rise to a fiduciary duty to the general public. Yet the decision below embraced that holding with both arms. There is thus a clear circuit conflict over this important legal question.

II. THE *MARGIOTTA* THEORY IS INDEFENSIBLE.

Although the circuit conflict warrants review either way, the Government's efforts to defend *Margiotta* and the decision below are stunningly weak. The notion that a private citizen owes the public a fiduciary duty simply because officials rely on him is foreign to the common law, anathema to our democratic system, and foreclosed by this Court's cases.

A. The petition explained how *Margiotta* went astray by misunderstanding the basic law of fiduciary roles and relationships—and then exacerbated its error by dropping those private-law concepts into the public context. *See* Pet.21-24; *see also Margiotta*, 688 F.2d at 142 (Winter, J., dissenting in part) (condemning "erroneous analogy between fiduciary relationships involving private parties based on express or implied contract and relationships between politically active persons and the general citizenry in a pluralistic, partisan, political system"). Picking up on Judge Winter's critique, scholars have shredded *Margiotta*'s reasoning. *See* Pet.22-24 (citing articles). In response to this, the Government says … nothing. Not a word to defend the premise that *de facto* control can trigger a fiduciary duty in this context.

B. Only barely does the Government respond to the petition's next attack (Pet.26-28)—that *Margiotta* is fundamentally incompatible with *Skilling*'s narrow construction of § 1346 to cover only "paramount," "heartland," and "paradigmatic" cases of bribery. 561 U.S. at 404, 409 n.43, 411. Even the Government is not so brazen as to claim *Margiotta* qualifies.

Instead it responds exclusively to a single footnote in which the Court observed that the "existence of a fiduciary relationship … was usually beyond dispute" in bribe-or-kickback cases. BIO.17 (quoting *Skilling*, 561 U.S. at 407 n.41). That does not mean a duty *must always* be clear, the Government squeals. Actually, it does. The point of this footnote was to blunt Justice Scalia's objection that there was no discernable "core" to pre-*McNally* honest-services law. By responding that most cases involved fiduciary duties that were "beyond dispute," the Court designated those cases as the "solid core" that could be "salvaged." *Skilling*, 561 U.S. at 407-08 & n.41. *Margiotta*—which was one of Justice Scalia's examples of lower-court discord over the scope of fiduciary duties—clearly falls outside that salvaged "core." *See id.* at 417 (Scalia, J., concurring in part and concurring in the judgment).

The Government also tries to rehabilitate *Margiotta* by claiming this Court in *McNally* treated its holding as "established." BIO.13. Actually, the Court merely recounted the decision below, which in turn quoted *Margiotta*. *See* 483 U.S. at 355. The Court, of course, then *reversed* for broader reasons; it had no occasion to address *Margiotta*'s uniquely abusive extension.

C. The Government's one paragraph addressing *Margiotta*'s methodological flaws is equally unserious.

As to lenity, the Government protests that the "pre-*McNally* case law" yielded fair "notice." BIO.16. That is hard to credit when even courts within the Second Circuit thought "*Margiotta* was wrongly decided and is no longer good law." *United States v. Adler*, 274 F. Supp. 2d 583, 587 (S.D.N.Y. 2003). More to the point, the Government (like *Margiotta*) never explains when one crosses the line from permissible "mere influence" to criminal "function[ing] as a public official." BIO.16-17; *see also Margiotta*, 688 F.2d at 122 (calling it "most difficult" to draw these lines); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 239 (1985) (decrying this "ill-defined prospect of criminal liability").

As to federalism, the Government insists there is no conflict because New York law defines public servants to include "persons who have been selected to serve as public servants." BIO.17. But as explained, the point that citizens cannot sell their *future* powers is neither disputed nor relevant here. More generally, *Margiotta* deemed state law beside the point, *see* 688 F.2d at 124, and nothing in the decision below retreated.

As to the First Amendment, the Government says there is no concern about chilling private advocacy, as Percoco was a "government official" who took "bribes" to pressure "subordinate" officials. BIO.17. Literally every quoted word just assumes the conclusion: that *de facto* control makes one a "government official" who has "subordinates" and can be "bribed." If this theory is valid, the same could be said of any influential lobbyist, donor, informal advisor, or constituent. That blurring of the public-private distinction carries major First Amendment risks, as courts and scholars agree. *See* Pet.30; *Murphy*, 323 F.3d at 118.

D. In the face of all this, the Government turns over and over to 18 U.S.C. § 201. But even assuming that every jot and tittle of a distinct statute qualifies as "heartland" bribery under § 1346, neither of § 201's highlighted features actually supports *Margiotta*.

First, the Government says § 201 defines a federal official to include someone who acts "for or on behalf of the United States … in any official function." BIO.13. But all that includes, as this Court held in *Dixson v. United States*, is one who "occupies a position of public trust *with official federal responsibilities*," assuming "duties of an *official nature*." 465 U.S. 482, 496-500 (1984) (emphasis added). There, grant administrators held "official responsibility for carrying out a federal program" and were paid with federal funds. *Id.* at 488, 499. Nothing in *Dixson* suggests that someone with *no* "official" responsibilities, duties, or salary—but who exercises *de facto* control by virtue of his influence—is himself a "public official" under § 201.[2]

Nor have lower courts read *Dixson* to so hold. They instead have applied it to *contractors* who are hired to undertake official federal functions. *See United States v. Thomas*, 240 F.3d 445, 448 (5th Cir. 2001) (officer for private prison under INS contract); *United States v. Kenney*, 185 F.3d 1217, 1221-22 (11th Cir. 1999) (manager of Air Force procurement contractor). That is a far cry from *Margiotta*.

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[2] Four Justices thought even *Dixson* went too far, 465 U.S. at 501 (O'Connor, J., dissenting), and Justice Scalia condemned its use of legislative history to construe an "ambiguous" law against a criminal defendant. *United States v. R.L.C.*, 503 U.S. 291, 310 (1992) (Scalia, J., concurring in part and concurring in judgment).

Second, the Government points to § 201's inclusion of a person "selected to be a public official" through a pending nomination or appointment. BIO.14. Again, that simply confirms the obvious proposition that one who sells his *future* exercise of official power is guilty even before he takes office. 18 U.S.C. § 201(b)(1)(A); *supra* at 5. That does not mean he "owe[s] a duty of honest services" as a private citizen. BIO.13. It means he *will* owe a duty when he takes office, and commits a crime if he agrees now to breach it. This sale-of-future-office scenario offers no support for *Margiotta*'s innovation that *de facto* control can trigger a fiduciary duty. Nor does it support the decision below. This is not a theory the record supports, the jury considered, or the panel upheld. *Supra* at 6.

* * *

The Government cannot and does not truly defend *Margiotta*'s reasoning. It instead resorts to a strained analogy to government contractors, and distracts with a distinct theory of bribery that is neither disputed nor applicable. This Court should vindicate Judge Winter by reversing *Margiotta*'s wrongheaded revival.

III. THE *MARGIOTTA* THEORY IS TOO DANGEROUS TO IGNORE.

Some circuit splits can be left to percolate. Not all errors demand correction. But this case demands the Court's attention because of the practical dangers that Judge Winter warned about. Namely, the *Margiotta* theory "creates a real danger of prosecutorial abuse for partisan political purposes" by exposing "politically active persons to criminal sanctions." 688 F.2d at 139-40 (Winter, J., dissenting in part).

The Government's sole response is its failed effort to rewrite the decision below. But even if this Court does not take the panel at its word that *Margiotta* lives, prosecutors certainly will, and district courts in the Second Circuit will have no choice but to indulge them. That is all they need to launch investigations, return indictments—and create "a danger of corruption to the democratic system greater than anything Margiotta" (or Percoco, for that matter) "is alleged to have done." *Id.* at 144. This Court must act.

CONCLUSION

This Court should grant certiorari and reverse.

June 2022

Respectfully submitted,

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