No. 25-461

In the Supreme Court of the United States

EDWARD MANGANO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ELIZABETH NIELSON
Wilson Sonsini Goodrich & Rosati, P.C.
95 S. State St., Ste 1000
Salt Lake City, UT 84111

MORRIS J. FODEMAN
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Avenue of the Americas, 40th Floor
New York, NY 10019

KELSEY C. CATINA
Wilson Sonsini Goodrich & Rosati, P.C.
701 Fifth Ave., Ste 5100
Seattle, WA 98104

FRED A. ROWLEY, JR.
Counsel of Record
MARK R. YOHALEM
Wilson Sonsini Goodrich & Rosati, P.C.
953 E. Third St., Ste 100
Los Angeles, CA 90013
(323) 210-2900
fred.rowley@wsgr.com

JOHN B. KENNEY
PAUL N. HAROLD
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K St. NW, 5th Floor
Washington, DC 20006

Counsel for Petitioner

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INTRODUCTION

The government's brief emphasizes irrelevant points and ignores critical ones, and in both ways confirms review is warranted.

The government focuses on two lower-court decisions that, it contends, sustained honest-services-fraud convictions for "pressur[ing] officials in a distinct governmental body" and were "approv[ed]" by *Skilling* v. *United States*. BIO14. This misreads the lower-court decisions, which did not actually involve cross-jurisdictional political influence, and *Skilling*, which used "honest-services cases" only to distill a general "bribe-and-kickback core." 561 U.S. 358, 407-409 (2010).

At the same time, the government fails to engage *McDonnell*'s formulation of indirect "official action" and the Second Circuit's expansion of its limitations. That expansion means an official may be prosecuted for exercising mere "political clout" (Pet.App.50a) in a *separate* government, on matters undisputedly outside his "specific duties" or "the authority of his office," *McDonnell* v. *United States*, 579 U.S. 550, 570 (2016). The government likewise sidesteps this Court's reasoning in *Percoco* v. *United States*, which made clear that "an agent of the government has a fiduciary duty to the government and thus to the public it serves," 598 U.S. 319, 329-330 (2023). Yet under the Second Circuit's novel fiduciary-duty theory, an officeholder may now face prosecution for influencing a "distinct governmental body"—even without breaching any duty to that government—if it happens to geographically overlap with his jurisdiction. BIO14.

The government also ignores the serious constitutional and chilling concerns raised by these interrelated expansions, which only strengthen "the freeswinging club" of honest services fraud in an environment where prosecutors may be eager to use it. *United States* v. *Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting).

These issues are urgent and have long divided the courts. This is the right case, at the right time, to provide the guidance courts, prosecutors, and officeholders all need. Mangano challenged the government's cross-jurisdictional theory from indictment through appeal, and the official-action and fiduciary-duty issues are squarely presented. While Mangano served, and owed a fiduciary duty to, Nassau County, he was *acquitted* of the government's County scheme. His only conviction was for exerting influence on the Town of Oyster Bay—a "distinct governmental entit[y]" (Pet.App.48a-49a) that he neither served nor owed a duty. That conviction is final, with no "further proceedings" (BIO19) remaining.

I. The decision below expands the limits contemplated by *McDonnell* and *Percoco*.

***McDonnell*:** The government does not dispute that Mangano's honest-services-fraud conviction rested solely on his use of "tremendous political clout" to influence actions taken by the Town (Pet.App.50a), where Mangano held no office or authority. The government insists, however, that this informal influence constitutes "pressure on another official to perform an official act" under *McDonnell*. BIO15. *McDonnell*'s reasoning shows otherwise.

1. *McDonnell* held that an "official act" requires "a decision or action on" a "formal exercise of governmental power." 579 U.S. at 574. An official may take such action indirectly by "using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Ibid*. This reasoning confirms that two officials must share a formal, institutional relationship, such that one's "official position" gives his input to "another official" formal authority. That requirement was met in *Birdsall*, the Court explained, because the defendants were "subordinates" who gave "reports and advice" to their superior. *Id.* at 572 (quoting *United States* v. *Birdsall*, 233 U.S. 223, 234 (1914)). But Mangano lacked such formal responsibility here; he did not serve the Town, and "the government repeatedly conceded [he] was not an agent of the Town." Pet.App.4a.

The government insists *McDonnell* "contains no such same-government limitation." BIO15. But *McDonnell* stressed that the *Birdsall* defendants' actions "fit[] neatly within [its] understanding" of official action because they "advise[d] another official *on* the pending question." 579 U.S. at 574. That only makes sense; an official could hardly use advice or pressure to take action "on" a matter decided by "another official" free to ignore him. *Ibid.* Nor can the Court's discussion of *Birdsall* be dismissed as a mere "example" lacking significance beyond "[*Birdsall*'s] particular fact pattern." BIO16. *McDonnell* drew on *Birdsall* to fix limits on "official action," and *Birdsall* "does not support" the "broad[] proposition that any public official who tries to influence another public official takes an 'official act' herself, regardless of the

relationship between the two officials." *United States* v. *Lee*, 919 F.3d 340, 360 (6th Cir. 2019) (Nalbandian, J., concurring).

This leaves the government straining to broaden *McDonnell* by suggesting the defendant governor "claimed 'limited decision-making power'" over the "state-university" officials he purportedly influenced. BIO15. But that scenario—unlike Mangano's—involved pressure between officials serving the same government. What's more, the quoted language was the governor's attempt to minimize his power to *the briber*; Virginia law actually gives the governor significant authority over state universities. *E.g.*, Va. Code § 23.1-1300(A). The prosecution's "official action" showing failed not because the governor lacked power to "advise or pressure" these officials, but because it rested on merely "arranging meetings, hosting events, and contacting other government officials." *McDonnell*, 579 U.S. at 564.

2. By unmooring the "official act" requirement from an officeholder's "official position" and formal authority, *id.* at 574, the decision here criminalizes the sort of "normal political interaction" *McDonnell* sought to protect, *id.* at 576. That the jury instructions "accurately track[ed]" *McDonnell* (BIO14) misses the point; that decision's "advice" and "pressure" language, by its own terms, was inapplicable to the Town Loan Scheme because the government never argued or showed that Mangano had *formal authority* in the Town. Its case rested, instead, on his "political clout." Pet.App.50a.

More fundamentally, Mangano challenged the Town Scheme charges themselves, arguing that they impermissibly "expand[ed] *McDonnell* well beyond its

self-evident parameters," which required "the use of the authority which is attendant to a public office, in order to effectuate an official act." Mot.Dismiss.33. That defect ran through the evidence at trial, which showed, at most, that Mangano attended a meeting hosted by *Town* Supervisor Venditto and "implored *Town* officials" to support Singh's loan guarantees. BIO15 (emphasis added). Under *McDonnell*, "[s]imply expressing support" for a matter "at a meeting, event, or call" is not official action, 579 U.S. at 573—especially when the matter lies outside the official's own government.

***Percoco*:** The opposition likewise confirms that the decision below contravenes *Percoco*'s fiduciary-duty analysis.

1. Under *Percoco*, a public official's fiduciary duty to "the public" runs through his office: honest services fraud "deprive[s] the relevant government unit (and thus, *by extension*, the public) of the right to receive honest services." 598 U.S. at 326 (emphasis added). That *Percoco* recognized these limitations in resolving whether a "private citizen" could "owe a fiduciary duty to the public" hardly renders them "artificial[]" (BIO12-13) in cases involving public officeholders. After all, such officials will necessarily have a "duty to the[ir] government and thus to the public." 598 U.S. at 330.

The government elides *Percoco*'s essential point in arguing that "[t]he 'public official-public' relationship is a prototypical [fiduciary] situation." BIO13. In prototypical situations—like "a city mayor" accepting "a bribe … in exchange for awarding that party a city contract"—the official is charged with breaching his fiduciary duties to his own government. *Cf. Skilling*,

561 U.S. at 400. But the situation here is manifestly *a*typical: Mangano was acquitted of the charges involving the County he served, and the government never suggested his involvement in the *Town* Scheme breached his *County* duties. Regardless of whether the Town *geographically* "lay within" the County (BIO18), Mangano had *no governmental authority* over the Town, a "distinct governmental body" (BIO14). Indeed, the Second Circuit reversed Mangano's bribery conviction for precisely this reason. Pet.App.36a.

Honest services fraud requires a fiduciary duty arising "from a specific relationship between two parties." *Skilling*, 561 U.S. at 407 n.41. Yet, the government *still* points to no analogous fiduciary relationship that supports bypassing an officeholder's government, and recognizing independent fiduciary obligations to "the public, *i.e.*, his 'electorate.'" Pet.App.49a. There is none; under *Percoco*'s reasoning, an official's fiduciary duties to "the public" are bounded by his office within his government.

2. The government falls back on the decision below, arguing that because some Nassau County citizens are *also* Town citizens, Mangano incurred a duty to avoid taking any "action that w[ould] harm" constituents "liv[ing] in the Town." BIO12. This argument underscores the "indeterminacy" and "indefiniteness of the [Second Circuit's] fiduciary duty" requirement, *cf. Skilling*, 561 U.S. at 418-419 (Scalia, J., concurring). Governments with overlapping jurisdictions are often in conflict (Pet.25), meaning their constituencies' interests will not necessarily align. And the interests that constituents have as residents of the *Town* fall outside the "obligations [Mangano] owe[s] as a fiduciary" to *Nassau County*. *SEC* v. *Chenery Corp.*, 318 U.S.

80, 86 (1943). Neither the government nor the decision below offers a coherent theory for how an officeholder could parse fiduciary duties detached from his actual office. Under duties running to every government with shared constituents, officeholders would be left "questioning" when using political clout will "suffic[e] to give rise to a duty of honest services." *Percoco*, 598 U.S. at 336 (Gorsuch, J., concurring).

Shushan*/*Mandel. Rather than reconciling the result here with *McDonnell* and *Percoco*, the government devotes its lead argument to two pre-*McNally* circuit cases: *Shushan* v. *United States*, 117 F.2d 110 (5th Cir. 1941), and *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979). *See* BIO10-14. Because *Skilling* cited these decisions in analyzing honest services fraud's "core," the government insists *Skilling* endorsed extending the "official action" and fiduciary requirements beyond "the specific government body in which [an official] serves," to actions taken by "a distinct governmental body." BIO13-14. Not so.

1. *Skilling* did not consider, much less endorse, any cross-jurisdictional aspects of honest services fraud. The Court looked to "pre-*McNally* honest-services doctrine" cases solely to identify "the[ir] bribe-and-kickback core." 561 U.S. at 407-409. It discussed *Shushan* merely as the wellspring of the "intangible-rights theory." *Id.* at 400. And it cited *Mandel* primarily as an example of a "public official-public" fiduciary relationship "in bribe and kickback cases." *Id.* at 407 n.41.

Skilling did not go beyond the "bribe-and-kickback" core of these cases. The government's attempt to venture farther falls into the very trap Justice Scalia warned about: "None of the 'honest services' cases …

defined the nature and content of the fiduciary duty central to the 'fraud' offense," so reaching beyond *Skilling*'s narrow "core" to elements of individual cases is just another "step out of the frying pan into the fire." 561 U.S. at 417-420.

2. Regardless, *Shushan* and *Mandel* do not support the decision below.

a. Like the Second Circuit, the government misreads *Shushan* as centering on "a local utility board member who accepted a bribe to influence an official from a distinct governmental entity—the state governor." Pet.App.46a-47a; *accord* BIO11. But *Shushan* involved the "prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging *city action*." *Skilling*, 561 U.S. at 400 (emphasis added). The bribed board member "corruptly influenced and persuaded the other [board] members" to approve a bond repayment plan. *Shushan*, 117 F.2d at 115. While another participant, Shushan, was tasked with "lobby[ing] the governor" on the plan (BIO11), this was not cross-jurisdictional because Shushan, having recently resigned, "was not an officeholder" during the scheme, 117 F.2d at 114, 116 ("lately a member" of the board). Indeed, Shushan's lack of office would have foreclosed prosecution under *Percoco*.

b. *Mandel* is equally unhelpful to the government. Unlike the prosecution theory here—which rested on Mangano's influence on a distinct government—*Mandel* involved a governor's efforts to influence his state's legislature on statewide legislation. 591 F.2d at 1362. The governor served the *same government* as the legislature, and had a structural role—including veto

power—in the legislative process. It makes no difference that he "lobbied *legislators* whose districts would have encompassed only a fraction of the State" (BIO12 (emphasis added)), for his fiduciary duty ran to the state's government and statewide "citizens," *Mandel*, 591 F.2d at 1359. Even if *Mandel* could be read to support a generalized fiduciary duty to "the public" (BIO13), that would merely place the Fifth Circuit alongside the Second Circuit in expanding *Percoco*'s limitations.

II. The decision below conflicts with other courts.

***Official Act*:** The government does not contest that the Third Circuit vacated a cross-jurisdictional bribery conviction because *McDonnell* and *Birdsall* limit "official acts" to actions within an official's "legal duties," consistent with the term's "common law roots." *United States* v. *DeFreitas*, 29 F.4th 135, 143-147, n.12 (3d Cir. 2022). The government's sole response—that *DeFreitas* "does not suggest that [Mangano] was a mere private actor" when he sought to "pressure officials of the Town" (BIO18)—is a non sequitur. *DeFreitas* confirms that being a public actor does not make "pressure" official action if it was not "within the specific duties of [the] official's position." 29 F.4th at 145-146. As with DeFreitas, no "regulation, guideline, or statute" gave Mangano any power over Town business. *Cf. id.* at 147.

The government also acknowledges the confusion in the Eighth Circuit. BIO18-19. *United States* v. *Rabbitt* reversed a legislator's honest-services-fraud conviction because he lacked power, "in his official capacity," to "control the award[] of state contracts" sought by the briber, 583 F.2d 1014, 1026 (8th Cir. 1978),

while *United States* v. *Chastain* upheld a conviction resting in part on cross-jurisdictional pressure, 979 F.3d 586, 590-592 (8th Cir. 2020). The government attempts to dismiss these results as mere "intra-circuit conflict" (BIO19), but *Rabbitt*'s reasoning aligns with *DeFreitas* and contradicts the Second Circuit's sweeping "political clout" theory. Nor can the government minimize *Rabbitt* on the theory that Rabbitt's actions "do[] not amount to an official act under *McDonnell*." BIO18. Rabbitt did not "merely mak[e] an introduction" (*cf. ibid.*)—he also "recommended" the briber, and used his "influence to aid [the briber] in obtaining contracts," 583 F.2d at 1020, 1026.

That this Court declined to review petitions from *Lee*, 919 F.3d 340, and *United States* v. *Kimbrew*, 944 F.3d 810 (9th Cir. 2019), neither diminishes the lower-court confusion regarding indirect "official acts" (*see* Pet.28-30) nor weighs against review (*cf.* BIO10). Only Lee's petition raised the cross-jurisdictional aspect of his conviction (No.19-6076, *i), and that merely confirms the issue is recurring.

***Fiduciary Duty*:** The government's attempt to harmonize *United States* v. *Murphy*, 323 F.3d 102 (3d Cir. 2003), with the decision below (BIO17) is equally meritless. Like *Percoco*, *Murphy* focused on the prosecution's failure to identify any "clearly established fiduciary relationship … between Murphy and [the County] or its citizens," 323 F.3d at 117, a defect as apparent in Mangano's prosecution as the party-leader prosecutions in those cases. The Second Circuit's novel fiduciary duty to "distinct governmental entities" (Pet.App.48a-49a) is the antithesis of "clearly established"—it has no analogue in American law.

III. The decision below will chill routine political activity and invite abusive prosecutions.

The government offers no reasoned response to the constitutional and policy concerns raised by the decision below. Pet.32-34. That the Court has "already upheld the honest services fraud" statute (BIO16) begs the question whether its application *here* implicates the vagueness, lenity, and federalism problems long dogging honest services fraud. The Second Circuit's two-front expansion plainly does.

1. Public officials often exercise political influence across jurisdictions in the ways criminalized here: "[s]etting up a meeting," "calling an official," or "expressing support." *McDonnell*, 579 U.S. at 573. The government does not disclaim *any* of our "hypotheticals," responding only with rhetoric about the facts. BIO16. But as *McDonnell* stressed, this Court's "concern is not with [the] tawdry tales" of this specific case, but "with the broader legal implications of the Government's boundless interpretation." 579 U.S. at 580-581. By failing to explain why routine cross-governmental advice would *not* be covered by its theory, the government tacitly admits that it seeks to revive the power to prosecute "éminence grises" that *Percoco* interred. 598 U.S. at 330.

2. The government ignores the threat of politicized convictions for conduct either acceptable or "within a murky middle: perhaps objectionable, but not clearly illegal." *United States* v. *Householder*, 137 F.4th 454, 503 (6th Cir. 2025) (Thapar, J., concurring). That risk is real (Pet.37), and political polarization has only underscored the need to address "the potential for abuse through selective prosecution," *Margiotta*, 688 F.2d at 143 (Winter, J., dissenting).

IV. This case is an ideal vehicle.

The Court should seize this opportunity to clarify that the official-act and fiduciary-duty requirements foreclose prosecutions for informal, cross-jurisdiction political influence. The government does not, and cannot, dispute that these interrelated issues are squarely presented here. As in *Percoco*, Mangano advanced these issues to challenge the indictment and again in instructional and sufficiency challenges. And Mangano's cross-jurisdictional exercise of informal "political clout" was the *sole* basis for the *only* public corruption convictions here: Mangano was *acquitted* of the scheme involving the County he served, and the *Town* official whom Mangano allegedly influenced was acquitted of defrauding the Town.

The government contests none of this. Instead, it suggests Mangano's impending resentencing due to his reversed bribery convictions creates an "interlocutory posture." BIO19. But the judgment on Mangano's *honest-services-fraud* convictions is final in every relevant sense, and this Court routinely grants certiorari to examine the validity of convictions that have been finally passed upon, even when sentencing proceedings remain on remand. *E.g.*, *United States* v. *Kousisis*, 82 F.4th 230, 250 (3d Cir. 2023), *aff'd*, 605 U.S. 114 (2025); *United States* v. *Smith*, 22 F.4th 1236, 1238 (11th Cir. 2022), *aff'd*, 599 U.S. 236 (2023); *Skilling*, 554 F.3d 529, 595 (5th Cir. 2009), *vacated in relevant part*, 561 U.S. 358.

The Second Circuit affirmed Mangano's honest-services convictions while reversing his bribery convictions, leaving no further proceedings on the government's defective cross-jurisdictional theory. It would

make no sense to force Mangano—who is incarcerated—to await resentencing and a duplicative appeal to present these issues. A reversal by this Court would entitle Mangano to resentencing and, potentially, retrial on his conspiracy-to-obstruct-justice conviction. Pet.36-37.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

ELIZABETH NIELSON
Wilson Sonsini Goodrich & Rosati, P.C.
95 S. State St., Ste 1000
Salt Lake City, UT 84111

MORRIS J. FODEMAN
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Avenue of the Americas, 40th Floor
New York, NY 10019

KELSEY C. CATINA
Wilson Sonsini Goodrich & Rosati, P.C.
701 Fifth Ave., Ste 5100
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FRED A. ROWLEY, JR.
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MARK R. YOHALEM
Wilson Sonsini Goodrich & Rosati, P.C.
953 E. Third St., Ste 100
Los Angeles, CA 90013
(323) 210-2900
fred.rowley@wsgr.com

JOHN B. KENNEY
PAUL N. HAROLD
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K St. NW, 5th Floor
Washington, DC 20006

Counsel for Petitioner

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