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 PETITIONER

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QUESTION PRESENTED

Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant-Appellant in the Second Circuit, is Joseph Percoco.

Steven Aiello was also a Defendant-Appellant in the Second Circuit and, pursuant to Rule 12.6 of this Court's Rules, is a Respondent herein.

Respondent, who was the Appellee in the Second Circuit, is the United States.

Joseph Gerardi, Louis Ciminelli, and Alain Kaloyeros were also Defendants-Appellants in the Second Circuit. Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler were Defendants in the district court.

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INTRODUCTION

When a public official accepts money to convince the government to do something, we call him a crook. But when a private citizen accepts money to convince the government to do something, we call him a lobbyist. That is not an arbitrary distinction. It reflects the fact that public officials hold a fiduciary obligation to act in the public's best interests, while private citizens do not. That basic dichotomy lies at the foundation of our system of representative democracy: Citizens are constitutionally entitled to petition the government in service of their self-interests, while public officials are entrusted with making decisions in the public good.

Yet in the decision below, the Second Circuit held that *private citizens* can owe a fiduciary duty *to the public* and thus be guilty of honest-services fraud for accepting "bribes" to influence government decisions. Under its test, if a jury concludes that a private person exercises *de facto* control over government actions by virtue of officials' reliance on him, the jury can send him to prison—even if he had no official title, official powers, official salary, or official duties.

Indeed, that was the sole basis to convict Petitioner Joseph Percoco—who was the campaign manager for then-Governor Andrew Cuomo—for being paid $35,000 by a real estate developer, allegedly to help navigate New York's bureaucracy surrounding labor law. According to the panel, Percoco owed a duty of honest services to the public because, as a former senior staffer and longtime friend of the Governor's family, he continued to command "clout" with state agencies and officials. JA.681-82.

In upholding this conviction, the Second Circuit breathed new life into *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), an aberrational precedent dating back four decades. Issued over a fierce dissent by the late Judge Winter, *Margiotta* broadly expanded the then-nascent theory of "honest services" fraud by extending to influential private citizens the fiduciary duties owed by public officials. Scholars and judges widely condemned the decision, and developments in the law left it so discredited that even district courts within the Second Circuit declared that "*Margiotta* was wrongly decided and is no longer good law in this Circuit or anyplace." *United States v. Adler*, 274 F. Supp. 2d 583, 587 (S.D.N.Y. 2003). In the decision below, however, the panel exhumed *Margiotta*.

This Court should reverse. The notion that private citizens owe a duty of honest services to the public so long as a jury deems them sufficiently influential lacks any foothold in law or common sense. The public has no right to *any* "services" of a private citizen. *Margiotta* erred by transforming one's *influence* over others into a source of *affirmative duties*, without any agency or representative relationship. And then, importing that flawed premise into the public sphere, *Margiotta* blurred the fundamental line that defines the distinct roles of citizens and officials. To be sure, officials who abdicate their power to party bosses, campaign operatives, or lobbyists may violate their *own* fiduciary duties to the public. But such failure does not somehow *transfer* the duties to those private citizens and expose them to criminal prosecution for corruption. In short, Judge Winter was right; *Margiotta* was wrong.

Even if *Margiotta* had a theoretical basis, however, it has since been uprooted by this Court's decisions. This Court has refused to indulge exotic applications of the federal fraud laws, especially the vague honest-services statute. In *Skilling v. United States*, a majority upheld that ill-defined provision against a constitutional challenge, but only through a limiting construction that narrowed its scope to "core" and "paramount" applications. 561 U.S. 358, 404 (2010). The *Margiotta* theory is anything but. To the contrary, treating payments to a private citizen as "bribes" runs smack into *McDonnell v. United States*, which explained that bribery law is concerned not with influence in the abstract, but rather with the sale of one's "official position." 579 U.S. 550, 552 (2016). No official position means no bribery. And no bribery means no honest-services fraud.

Finally, a host of constitutional principles condemn *Margiotta*, resolving any remaining doubt. Foremost is the First Amendment. *Margiotta* offered no basis to distinguish its conception of *de facto* control from effective lobbying, and thus puts an entire sphere of constitutionally protected conduct in the crosshairs. Next is federalism. By inventing a new federal fiduciary duty, *Margiotta* also intruded on the States' power to structure their own democratic systems and norms. And, as Judge Winter warned, the Second Circuit's malleable test offends due process too, by depriving citizens of fair notice and empowering prosecutors to engage in mischief.

Once again, the lower courts' startling expansion of federal bribery law is both wrong and dangerous. The Court should reverse the decision below and vacate Percoco's convictions.

OPINION BELOW

The decision of the U.S. Court of Appeals for the Second Circuit affirming Petitioner's judgment of conviction (JA.641) is reported at 13 F.4th 180.

JURISDICTION

The Second Circuit entered judgment on September 8, 2021, and denied rehearing on November 1, 2021. JA.641; Pet.App.47a-54a. Justice Sotomayor extended the time to file a petition for certiorari until March 1, 2022. No. 21A298 (U.S.). This Court granted a timely filed petition on June 30, 2022, and has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

While serving as campaign manager for Governor Andrew Cuomo's reelection, Petitioner Joseph Percoco accepted $35,000, allegedly in exchange for helping a real estate developer secure a release of certain labor law duties from a state agency. Even though Percoco was a private citizen during this entire period, he was charged with depriving the public of his "honest services" by accepting a "bribe." The theory was that Percoco's past employment as an aide to Cuomo, and his ongoing relationship with the Governor, put him in a position of "dominance" over state affairs.

The district court instructed the jury that Percoco owed a fiduciary duty to the people of New York if he exercised control over government decisions and state officials relied on him. In doing so, the court relied on the Second Circuit's divided decision in *Margiotta*. On appeal, the Second Circuit affirmed, resurrecting *Margiotta* notwithstanding its flaws and a series of intervening legal developments.

A. The Honest-Services Doctrine.

Understanding this case requires some background on the convoluted history of "honest services" fraud. The doctrine began as a circuit-level gloss on the mail and wire fraud statutes. This Court rejected it. After Congress subsequently adopted it in vague terms, this Court narrowed it in a saving construction.

1. The honest-services theory of fraud originated in *Shushan v. United States*, which held that bribery is a "scheme to defraud the public" and thus falls within the mail fraud statute's prohibition of any "scheme to defraud." 117 F.2d 110, 115 (5th Cir. 1941). The court reasoned that public officials owe "sacred duties," and that bribes induce "betrayal" of those duties and deprive the public of the official's "fair judgment." *Id.*

The theory took off in the 1970s, with the Courts of Appeals agreeing that depriving the "citizens" of their officials' "honest and faithful services" by a "breach of fiduciary duty" can be mail or wire fraud, even absent "property loss." *United States v. Isaacs*, 493 F.2d 1124, 1149-50 (7th Cir. 1974); *see, e.g.*, *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979) ("A fraud is perpetrated upon the public to whom the official owes fiduciary duties"); *see also Skilling*, 561 U.S. at 400-01 (recounting this history).

Lower courts applied the same theory to criminalize "employee disloyalty," *i.e.*, a "scheme to defraud an employer of loyal service." *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980). The premise was, again, that employees are agents who owe a "fiduciary duty" to provide "honest and loyal services," and that bribes and kickbacks deprive their employers (the principals) of that "honest and faithful performance." *United States v. George*, 477 F.2d 508, 512-13 (7th Cir. 1973); *see also United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (citing Restatement of Agency for proposition that a "normal relationship of employer and employee implies that the employee will be loyal and honest in all his actions with or on behalf of his employer").

2. This Court rejected the honest-services theory—overturning this lower-court consensus—in *McNally v. United States*, 483 U.S. 350 (1987). The Court held that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. *McNally* invoked the rule of lenity, explaining "that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60. Declining to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," this Court read it "as limited in scope to the protection of property rights." *Id.* at 360. "If Congress desires to go further, it must speak more clearly than it has." *Id.*

As this Court later recounted, *McNally* "stopped the development of the intangible-rights doctrine in its tracks." *Skilling*, 561 U.S. at 401.

3. Congress responded the next year by enacting the honest-services statute. Just 28 words long, it defined "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

Section 1346's brevity and imprecision, however, gave rise to "chaos," as the lower courts "attempt[ed] to cabin [its] breadth … through a variety of limiting principles." *Sorich v. United States*, 555 U.S. 1204, 1206, 1208 (2009) (Scalia, J., dissenting from denial of certiorari). Courts agreed that "some coherent limiting principle" was needed to prevent "abuse," but "[n]o consensus" emerged as to that principle. *Id.* at 1206. In the absence of clear lines, courts upheld convictions for everything from patronage hiring, *see United States v. Sorich*, 523 F.3d 702, 711 (7th Cir. 2008), to academic plagiarism, *see United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997).

4. Two decades after § 1346's enactment, this Court addressed it in *Skilling*. The petitioners there argued that the statute was unconstitutionally vague because it did not define the "honest services" covered or provide any guidance on the scope or breadth of the criminal prohibition. Justices Scalia, Kennedy, and Thomas agreed and would have deemed the statute unconstitutional, *see* 561 U.S. at 415 (Scalia, J., concurring in part and in the judgment), but the majority concluded that it could "preserve" the statute by construing it narrowly, *id.* at 404 (majority op.).

Specifically, the Court said it could "pare" the body of pre-*McNally* cases "down to its core"—"paramount" instances of "bribes or kickbacks"—and treat § 1346 as reinstating the doctrine to that extent. *Id.*; *see also id.* at 405 (noting that courts "consistently applied the fraud statute to bribery and kickback schemes"). The Court therefore read § 1346 to forbid "paradigmatic" violations: *i.e.*, when defendants, "in violation of a fiduciary duty, participate[] in bribery or kickback schemes." *Id.* at 407.

B. The *Margiotta* Theory.

This case presents a unique extension of the honest-services concept developed in its pre-*McNally* heyday. *Margiotta* held that a citizen "who holds no official government office but who participates substantially" in government decisions owes a duty of honest services to the public, just like a public official. 688 F.2d at 111. In recognizing this novel duty, the Second Circuit drew an impassioned dissent from Judge Winter. And it was that dissent, not the majority's analysis, that ultimately earned the favor of other courts and commentators.

1. Joseph M. Margiotta served as Chairman of the Republican Committees of Nassau County and the Town of Hempstead. *Id.* at 112. He was charged with fraud for helping an insurance agency obtain an exclusive broker position with the county and town in alleged exchange for kicking back a portion of its commissions. *Id.* at 120. Although Margiotta held no public office, the prosecutors argued that he owed a fiduciary duty to the public because his "power and prestige" as a party boss gave him "influence" over local Republican officials. *Id.* at 113.

The panel framed the question as whether the fraud statutes prohibit political misconduct "by individuals who participate in the political process but who do not occupy public office." *Id.* at 112. It recognized this was a "novel application" of the law and purported to "tread most cautiously." *Id.* at 120. Indeed, the panel acknowledged that the "seemingly limitless" language of the fraud statutes created a "danger of sweeping within [their] ambit … conduct, such as lobbying and party association, which has been deemed central to the functioning of our democratic system since at least the days of Andrew Jackson." *Id.* But the panel was equally if not more concerned about "eliminat[ing] a potential safeguard of the public's interest in honest and efficient government." *Id.*

The panel ultimately held that "we do not believe that a formal employment relationship, that is, public office, should be a rigid prerequisite to a finding of fiduciary duty in the public sector." *Id.* at 122. In lieu of a "precise litmus paper test" (which it deemed impossible, because "[t]he drawing of standards in this area is a most difficult enterprise"), the majority cited two tests to govern whether a private individual owes a duty to the public: "(1) a reliance test, under which one may be a fiduciary when others rely upon him"; and "(2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary." *Id.* Almost wishfully, the panel claimed these "guidelines" would "permit[] a party official to act in accordance with partisan preferences or even whim, up to the point at which he dominates government." *Id.* Exactly where that point is, the court did not specify.

Committed to its new private-public fiduciary duty, the court rejected any constitutional challenges to its approach. The majority acknowledged that the rights of "lobbyists and others who seek to exercise influence in the political process are basic in our democratic system." *Id.* at 128-29. Yet those First Amendment concerns were merely "a chimera," it said, because "there is no indication that the application of the mail fraud statute in this specific case would deter protected political activities in other contexts," even if the same "theory" could admittedly be "misapplied to constitutionally protected conduct." *Id.* at 129.

The majority likewise recognized, "[t]heoretically," that there may be "federalism concerns" in finding a fiduciary duty absent "reference to state law." *Id.* at 124. Nonetheless, the court held that "a violation of local law is not an essential element" of the offense. *Id.* It sufficed that "federal public policy" ostensibly condemned Margiotta's conduct. *Id.*

Finally, quoting the adage that "[m]en must turn square corners when they deal with the Government," the panel reasoned that it "requires little imaginative leap to conclude that individuals who in reality *or effect* are the government owe a fiduciary duty to the citizenry." *Id.* (emphasis added). It therefore found no "fair notice" concerns. *Id.* at 129.

2. In a scathing dissent, Judge Winter described the majority's reading of the fraud statute "as a catch-all prohibition of political disingenuousness" that "expands [the statute] beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes." *Id.* at 139 (Winter, J., dissenting in part).

While Judge Winter recognized the then-existing honest-services theory, he explained that the majority added "one seemingly small element"—that "a jury may find that a politically active person has sufficient influence and power over the acts of elective officials to be subjected to the same duty as those officials." *Id.* at 142. And that innovation "subjects virtually every active participant in the political process to potential criminal investigation and prosecution." *Id.* at 143.

Turning to first principles, Judge Winter faulted the majority for analogizing fiduciary duties between private parties to those between citizens and the public "in a pluralistic, partisan, political system." *Id.* at 142. The former cannot be imported into the latter context "simply by mouthing the word fiduciary." *Id.* Rather, Judge Winter urged that "we should recognize that a pluralistic political system assumes politically active persons will pursue power and self-interest," not the public good. *Id.* at 143.

Judge Winter proceeded to explain the effects of the majority's standard: "Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Id.* at 142. That malleable test, in turn, creates a "potential for abuse through selective prosecution." *Id.* at 143; And it also threatens the First Amendment, since the theory "subjects politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs." *Id.* at 140. "When the first corrupt prosecutor prosecutes a political enemy for mail fraud," Judge Winter warned, "the rhetoric of the majority about good government will ring hollow indeed." *Id.* at 144.

Of course, Judge Winter "hope[d] that public affairs are conducted honestly and on behalf of the entire citizenry," but "shudder[ed] at the prospect of partisan political activists being indicted for failing to act 'impartially' in influencing governmental acts." *Id.* at 143. "Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions." *Id.* He decried the majority's creation of a new "catch-all political crime which has no use but misuse." *Id.* at 144.

3. *Margiotta* barely escaped en banc review even in the famously collegial Second Circuit, leaving the convictions undisturbed over four judges' dissent after other judges recused themselves from the vote. *See* 811 F.2d 46 (2d Cir. 1982); *Adler*, 274 F. Supp. 2d at 586 (describing *Margiotta*'s en banc vote).

4. *Margiotta* was "widely criticized by practically everybody." *United States v. Smith*, 985 F. Supp. 2d 547, 603 (S.D.N.Y. 2014); *see, e.g.*, *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988) (calling *Margiotta* one of the "worst abuses of the mail fraud statute"). Other courts expressly rejected it—including the Third Circuit. *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003) (Becker, C.J.); *see also United States v. Warner*, 292 F. Supp. 2d 1051, 1061 (N.D. Ill. 2003). And even courts in the Second Circuit declared that *Margiotta* "was wrongly decided and is no longer good law." *Adler*, 274 F. Supp. 2d at 587.

Only the Sixth Circuit followed *Margiotta*, in *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986). Ironically, *Gray* was the decision this Court reversed under a new caption, *McNally*.

C. The Underlying Facts.

Joseph Percoco was a longtime friend of the Cuomo family who served as Executive Deputy Secretary in the Governor's Office. JA.198-99, 681. In April 2014, he resigned from that role to manage the Governor's reelection campaign. JA.179, 203, 664. At that time, Percoco did not intend to return to government thereafter. JA.193, 201, 205. Indeed, he voluntarily sought an ethics opinion regarding what consulting or other work he could undertake as a *former* employee. JA.298-301, 315, 591-93.

After he left government for the campaign, Percoco had no legal control or authority; his official duties were transferred to others. JA.206-08, 260-61, 304-05, 434-35, 464; *see also* JA.549 ("Percoco was clearly not a 'public official' at the time that he worked on Governor Cuomo's campaign."). Nor did Percoco ever suggest otherwise. There was "no evidence that Percoco held himself out to be a public official when he was working on the campaign." JA.541 n.10.

During the campaign period, Percoco's former office in New York City remained vacant, and he used it on occasion while dropping by—with "a long time" between visits—to address campaign strategy or to coordinate the Governor's schedule. *See* JA.194-95, 207-09, 307, 313-14. State employees also regularly used the vacant office and its telephone. JA.437.

Toward the close of the campaign, Percoco's plans changed. Several members of the Governor's "senior staff" left government, and the Governor's father fell "ill and ultimately died within a matter of weeks." JA.193. Attempting to sustain "some stability in the office," Percoco determined to return. *Id.*

He therefore filled out new-hire paperwork, including disclosure of outside income he had received while working on the campaign. *See* JA.213-14, 469-70, 626. Percoco resumed his state employment on December 8, 2014. *See* JA.472.

The events here occurred when Percoco was a private citizen (*i.e.*, between April 18 and December 8, 2014). Percoco told a lobbyist, Todd Howe, that he was interested in doing consulting work during the campaign, as ethics officials had advised he could. JA.357. Meanwhile, Steve Aiello, co-owner of a real estate company known as COR Development (COR), needed labor relations help on a project in Syracuse. JA.358. Among other things, a state agency was insisting COR enter a costly deal (a labor peace agreement or LPA) with local unions. JA.330-33, 378. Aiello emailed Howe to ask if "Joe P can help us with this issue while he is off the 2nd floor working on the Campaign." JA.392, 594. (The Executive Chamber is on the second floor of the state capitol. JA.174.)

For Percoco's work, COR wrote two checks, totaling $35,000, in August and October 2014. JA.362-63. Percoco later disclosed COR as a source of outside income in his new-hire paperwork. JA.213-14, 626.

On December 3, 2014, before Percoco's return to state employment, he called a staffer in the Executive Chamber to inquire why the state agency was still insisting COR enter an LPA even though all parties had previously agreed no LPA was needed. JA.337-42. The staffer, who agreed that no LPA was required, relayed to an agency executive that he was facing "pressure" from his "principals." JA.342. The agency then confirmed no LPA was needed. JA.339.

Many months later, Percoco assisted in processing a pay raise for Aiello's son (a state employee), and also inquired about the status of outstanding funds that the state owed COR. *See* JA.649. No evidence linked either act to the mid-2014 payments.

D. The Indictment and Trial.

In November 2016, Percoco was charged with a variety of offenses. Most relevant here, Count Ten alleged that Percoco had conspired to commit honest-services wire fraud, *see* 18 U.S.C. §§ 1343, 1346, 1349, through his work for COR. JA.649. For that same COR conduct, he was also charged with Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Eight); and solicitation of bribes or gratuities, in violation of 18 U.S.C. § 666(a)(1)(b) (Count Twelve). JA.649-50. Percoco was also indicted for Hobbs Act extortion, honest-services fraud, and solicitation of bribes or gratuities arising from a different scheme involving a company known as CPV. *Id.* One count of Hobbs Act conspiracy (Count Six) was premised on both of the alleged schemes. *Id.*

Percoco moved to dismiss the COR charges on the ground that he could not commit these offenses when he was out of public office. The district court denied that motion. JA.133. As to Hobbs Act bribery, however, the court agreed that only "persons who hold official positions within the government … are capable of committing the substantive offense of extortion under color of official right." JA.548. And Percoco was "clearly not a 'public official'" when he received the payments from COR. JA.549. The court therefore granted acquittal on Count Eight. JA.561.

After the government rested, Percoco moved for a judgment of acquittal on Count Ten. JA.650. He argued that "nothing in the record" showed that he accepted money to take an "official act," as he had accepted funds only "within the period in which he was no longer a state employee" and therefore *could not* take official action. JA.447. The court denied that motion after trial. JA.650.

Near the end of trial, the district court proposed a jury instruction that Percoco could "owe[] the public a duty of honest services when he was not a state employee, if you find that during that time he owed the public a fiduciary duty." Pet.App.133a. Percoco objected, asking that the court instruct that he owed "honest services" only "as a public official." The court disagreed, saying that was "not the law" since "you can owe honest services if you have a fiduciary duty, even if you're not a public official at the time." JA.479-80. Consistent with *Margiotta*, the final instructions directed the jury to assess whether Percoco "dominated and controlled any governmental business" and also whether "people working in the government actually relied on him." JA.511.

After a lengthy deliberation and two *Allen* charges, the jury reached a split verdict. It convicted Percoco on Count Ten (honest-services fraud conspiracy), but acquitted him on the other COR charges, Counts Six and Twelve (Hobbs Act conspiracy, and § 666 bribery). JA.651. The jury also convicted Percoco on two of the three counts arising from the CPV scheme, but acquitted on the third. *Id.*

E. The Second Circuit's Decision.

The Second Circuit affirmed. JA.641-86. The panel upheld the honest-services instruction as falling "comfortably within our decision in [*Margiotta*]." JA.665. The panel acknowledged that *Margiotta* was no longer binding in light of *McNally*, but held that Congress's revival of the honest-services rubric in § 1346 had "effectively reinstated" it. JA.669. The panel reasoned that § 1346's "capacious language is certainly broad enough to cover the honest services that members of the public are owed by their fiduciaries, even if those fiduciaries happen to lack a government title and salary." JA.667-68. And the court called *Margiotta*'s fiduciary-duty theory "settled doctrine" before *McNally*. JA.666-70.

The panel stated the law as follows: "In our view, § 1346 covers those individuals who are government officials as well as private individuals who are relied on by the government and who in fact control some aspect of government business." JA.667. In effect, the test is whether public officials *listen* to the citizen, thereby handing him *de facto* control.

The panel denied that *Margiotta* had been undercut by *McDonnell*. *McDonnell* held that an "official act" under federal bribery law "must involve a formal exercise of governmental power." 579 U.S. at 574. But the panel thought *McDonnell* did not address *who* could take an "official act," *i.e.*, whether someone without office could be guilty of taking a bribe for influencing state action. JA.670. The panel also dismissed constitutional concerns, framing the issue as whether the Constitution required an *exception* for those who are not formal employees. JA.671-72.

Consistent with its articulation of the law, the panel found sufficient evidence that Percoco owed a fiduciary duty to the public. JA.677, 681-84. That was because he "maintained" a "position of power and trust," attributable mainly to his "unique relationship with Governor Cuomo," "being close to him and his family," plus the likelihood that he would regain the same position after the campaign, and his continued access to the Governor's Office during the campaign period. JA.681-82. And the panel found sufficient evidence that Percoco had agreed to take official action by calling a staffer about the LPA issue in early December 2014. JA.680-81. The panel did not, however, rely on the acts Percoco took following his return to state employment. *Id.*

Under the panel's logic, Percoco was a victim of his own success: The fact that he was able "to use his position of power" to oppose the LPA itself proved the influence and dominance that supposedly gave rise to a fiduciary duty to the public. JA.683.

SUMMARY OF ARGUMENT

I. *Margiotta* was wrong on its own terms. Unlike public officials, private citizens owe no fiduciary duty to act in the public interest. They are not agents of the public; they exercise no authority on its behalf. To the contrary, the premise of republican government is that private citizens and factions will advance their own parochial self-interests, while public officials are tasked with filtering those interests for the common good. *Margiotta* inverts that paradigm by treating private citizens as assuming fiduciary obligations just because officials rely on them to make decisions.

Even in the private sector, the law does not support *Margiotta*'s notion that reliance and control give rise to fiduciary duties. Fiduciary obligations arise from legal relationships (usually principal-agent), not from one party's unilateral reliance on another. Equity courts sometimes use a looser approach to set aside legal instruments or transactions as tainted by undue influence, but that has nothing to do with imposing affirmative duties to act on behalf of others—much less duties with sufficient definiteness and certainty to serve as predicates for criminal prosecution.

II. Whatever may have been true when *Margiotta* was decided, the theory cannot survive this Court's recent decisions. In *Skilling*, the Court saved § 1346 from constitutional challenge by narrowly reading it to reinstate only the "core" of the pre-*McNally* honest-services doctrine, described as "paradigmatic cases of bribes and kickbacks." There is nothing paradigmatic about *Margiotta*'s novel and broadly criticized notion that private citizens can be guilty of accepting bribes. *Margiotta* lacks the foundation and consensus to be elevated to part of the pre-*McNally* "core."

This Court's decision in *McDonnell* confirms that the *Margiotta* conduct is not bribery, let alone "core" bribery. That case clarified that the evil prohibited by federal bribery law is the *sale of official authority*—the use of one's office to control the formal exercise of government power in exchange for private benefit. A private citizen who has no office cannot sell his office; one who exercises no power cannot trade that power. A private citizen may have *influence*, but *McDonnell* refused to conflate that slippery concept with "official action" that triggers federal bribery law.

III. Any residual doubt is resolved by the serious constitutional concerns posed by *Margiotta*.

To start, the First Amendment guarantees citizens the right to petition the government for redress of grievances, yet *Margiotta* would allow prosecutors to charge any half-decent lobbyist in the country with bribery by treating their influence as the source of a fiduciary obligation. Core advocacy by politically active individuals—from campaign donors to union leaders to media influencers—could also be chilled by *Margiotta*'s amorphous test.

Beyond that, the Second Circuit's approach improperly puts federal courts in the position of regulating how private citizens interact with the government and its officials—thereby interfering in this fundamental aspect of state sovereignty. Section 1346, of course, includes nothing resembling a clear statement sufficient to justify that disruption of the federal-state balance.

Finally, *Margiotta*'s "guidelines," 688 F.2d at 122, offend due process by letting a jury convict on nothing more "than the rhetoric of sixth grade civics classes," *id.* at 142 (Winter, J., dissenting in part). At best, this vague theory deprives citizens of the notice to which they are constitutionally entitled. At worst, it invites partisan abuse and selective prosecution.

IV. Rejecting *Margiotta* compels reversal of the convictions here. For Count Ten, all of the relevant conduct occurred while Percoco was a private citizen, so he is entitled to acquittal. The other two counts spanned the public and private time periods; as to those, Percoco is entitled to a new trial based on the flawed jury instructions and prejudicial spillover.

ARGUMENT

I. *MARGIOTTA* WAS WRONG FROM ITS INCEPTION.

Margiotta was indefensible. Its core premise was that private citizens must act in the public's best interest if they exercise *de facto* "control" over government by virtue of their influence or officials' reliance on them. As Judge Winter explained, that contradicts the basic theory of our republic: private citizens may advance their self-interests, while agents of the public try to serve the common good. Nor, contrary to the panel's claim, is *Margiotta* rooted in the common law. True fiduciary obligations arise from agency or analogous legal relationships; in the criminal context especially, they cannot be left to the whim of a jury's ill-defined moral intuitions.

A. Private Citizens Owe No Duties To Act in the Public Interest.

The foundational premise of *Margiotta* is the notion that private citizens who exercise *de facto* control over government decisions assume a duty to serve the public. That is not how our government was designed. Public officials exercise power as agents of the people; private citizens are agents of nobody and possess no state power, only the capacity to influence.

1. The honest-services theory has always presumed an underlying fiduciary duty, because without one there is no obligation to provide "honest, faithful and disinterested service" to another. *Mandel*, 591 F.2d at 1362. This Court construed the theory's codification in § 1346 to require that element. *Skilling*, 561 U.S. at 407 (describing pre-*McNally* core as covering those "who, in violation of a fiduciary duty, participated in bribery or kickback schemes").

The threshold question in any honest-services case is therefore whether the defendant owed a fiduciary duty to provide faithful service to the victim of the scheme. In typical bribery cases, the answer is yes. In a *representative* democracy, public officials exercise power as *representatives*—or agents—of the public. *See United States v. Sprague*, 282 U.S. 716, 733 (1931) (describing Congress as "agent of the people"); *Loving v. United States*, 517 U.S. 748, 777 (1996) (Scalia, J., concurring in part and in the judgment) (describing executive branch as "agent of the People"). Agents are fiduciary-bound to act in their principals' interests. *See* Restatement (Second) of Agency § 387 (1958). And an employee is just a species of agent. *See Carpenter v. United States*, 484 U.S. 19, 27 (1987).

Margiotta's innovation was extending that duty from *de jure* officials—agents of the public—to citizens whose *de facto* power flows only from their influence. That was an "erroneous analogy." 688 F.2d at 142 (Winter, J., dissenting in part). Public officials exercise sovereign power by virtue of having accepted their role as public representatives. That binds them to use those powers to serve the public, rather than to benefit themselves. By contrast, a private citizen has not agreed to serve as an agent of the public, and is not entrusted with any authority to exercise on its behalf. Even an influential citizen has no relationship to the public that creates a duty to serve it. *See Murphy*, 323 F.3d at 117. "Unlike elected officials, few political leaders, lobbyists, influence peddlers, or activists hold themselves out as acting for the general welfare of all citizens." Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 440 (1983).

Indeed, our republic presumes that private citizens will advance their own self-interests, and expects public officials to exercise independent judgment as to the public good. In his famous Federalist No. 10, James Madison recounted how men are driven by "self-love" to press their "distinct interests," which leads to the concern of "factions." Madison's solution was republicanism: choosing "representatives of the people" to serve as "guardians of the public weal" and whose voice would be "more consonant to the public good." Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961). By treating influential private citizens as guardian-representatives of the public good, *Margiotta* inverted that basic structure.

2. *Margiotta* worried about private citizens pulling strings of government from behind the scenes, with no accountability to the public. A fair concern, perhaps, but easily addressed. "Private individuals who control government action must necessarily rely on public officials to do their bidding." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 241-42 (1985). If those officials blindly defer to others, they are "in abdication of their own responsibilities," Hurson, *supra*, at 440, and can be held accountable—but their failure does not transfer their duties to the private citizens. There is every reason to enforce the duties *officials already* owe to the public, but no basis to invent *new* duties running from *private citizens* to the public. Finally, if the hurdle is that public officials are deceived by the self-interested motives of private citizens who lobby them, the solution—as this Court has emphasized—is robust disclosure of paid lobbying. *United States v. Harriss*, 347 U.S. 612, 625-26 (1954).

B. Reliance and Control Do Not Generate a Duty To Provide Honest Services.

Margiotta purported to rely on the common law for its premise that one's "reliance" on another—and the latter's ensuing "control"—can give rise to fiduciary obligations. 688 F.2d at 122. Even setting aside the obstacles to importing private duties into the public sector willy-nilly, that premise was vastly overstated. Reliance and control alone typically do *not* generate a fiduciary relationship, much less an affirmative duty to provide "services" to another.

1. Fiduciary duties usually arise from specific legal relationships. Often these are agency relationships, such as between an employer and employee or a public official and the public. *See supra* at 5-6. "A fiduciary relationship may [also] be created by contract, such as the relationship between a trust and trustee," *Zastrow v. Journal Commc'ns, Inc.*, 718 N.W.2d 51, 60 (Wis. 2006), or by court appointment to representative roles like guardian or executor, *e.g.*, *Hall v. Schoenwetter*, 686 A.2d 980, 985 (Conn. 1996).

Crucially, all of these relationships involve *consent*: the fiduciary has agreed to act on behalf of a principal, beneficiary, estate, etc. That tracks the common law's historic reluctance to impose involuntary duties to act for others. *Cf.* Restatement (Second) of Torts § 314 (1965) (no affirmative duty to protect). Accordingly, "[b]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142, 150 (Cal. 2008).

The flip-side of that consent principle is that a duty "is not created by a unilateral decision to repose trust and confidence." *Lee v. LPP Mortg. Ltd.*, 74 P.3d 152, 162 (Wyo. 2003); *see also Regions Bank v. Schmauch*, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003) ("As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party."). Nor do fiduciary duties "arise 'merely because one party relies on … the specialized skill of the other.'" *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 822-23 (Pa. 2017). After all, if that sufficed, "the vast multitude of ordinary arm's-length transactions" would become fiduciary ones. *Id.*; *see also, e.g.*, *United States v. Reed*, 601 F. Supp. 685, 715 (S.D.N.Y.) (explaining that fiduciary duties arise from a "mutually recognized relationship of fidelity," not "unilateral investment of confidence by one party in the other"), *rev'd on other grounds*, 773 F.2d 477 (2d Cir. 1985).

Margiotta contradicts these principles. It treats a public official's "reliance" on a private citizen—and the "de facto control" over government decisions that allegedly flows from that unilateral reliance—as the source of a fiduciary duty running from the citizen to the public, even absent any undertaking by the citizen to act on another's behalf. In effect: If others *listen to you*, you are bound to act in their interests. That concept is alien to the common law and, indeed, to American jurisprudence more generally.

2. *Margiotta* did cite some cases for its description of "reliance" and "de facto control" as "two time-tested measures of fiduciary status." 688 F.2d at 122. But a closer examination reveals that those cases (and the lines of authority they exemplify) cannot support the weight *Margiotta* placed upon them.

To start, some courts consider reliance and control to evaluate whether an undisputed legal relationship rises to the fiduciary level—but not to create a duty in the absence of any legal relationship. *Margiotta* cited two examples. In *Cheese Shop International, Inc. v. Steele*, the court considered whether the relationship of parties who had entered a contract was fiduciary in nature. 303 A.2d 689, 691 (Del. Ch. 1973). It was not, given the absence of "dependency on or superiority of the one alleged to be a fiduciary." *Id.* Likewise, *Mobil Oil Corp. v. Rubenfeld* assessed whether parties to a franchise agreement intended to create a fiduciary relationship, inquiring whether the contract reposed "confidence" in one party based on "superiority and influence." 339 N.Y.S.2d 623, 632 (Civ. Ct. 1972).

None of that supports *Margiotta*'s use of reliance, influence, or control to divine a fiduciary duty in the *absence* of any legal relationship between the parties. In "any analysis of a claimed breach of fiduciary duty," the first "central question[]" is "was the relationship a fiduciary relationship[?]" *Zastrow*, 718 N.W.2d at 59. For a citizen who has *no* relationship with the public, the answer—by definition—must be "no."

There is a second line of authority in which courts look to "trust and reliance" or "dominance and control" to create a fiduciary relationship. *Margiotta*, 688 F.2d at 122. But they do so for a fundamentally different purpose: to equitably set aside a prior transaction or legal act as tainted by undue influence—not to impose the affirmative duties required for an honest-services conviction. As courts have long recognized, "equity has occasionally established a *less rigorous* threshold for a fiduciary-like relationship in order to right civil wrongs arising from non-compliance with the statute

of frauds, statute of wills and parol evidence rule." *United States v. Chestman*, 947 F.2d 551, 569 (2d Cir. 1991) (en banc) (emphasis added) (citing G.G. Bogert, *The Law of Trusts and Trustees* § 482 (rev. 2d ed. 1978)). So, for example, *In re Jennings' Estate*, 55 N.W.2d 812 (Mich. 1952), involved a will contest, and *Trustees of Jesse Parker Williams Hospital v. Nisbet*, 14 S.E.2d 64 (Ga. 1941), was an action to set aside a contract.

Those cases exemplify the "boundless nature of relations of trust and confidence" that "equity has occasionally established … to right civil wrongs." *Chestman*, 947 F.2d at 569. But they do not support *Margiotta*'s imposition of an affirmative duty to act for another—which is what the text of the honest-services statute demands. One cannot be deprived of "the intangible right of honest services," 18 U.S.C. § 1346, if there is no right to services at all. Thus, "implicit in the plain meaning of § 1346" is a "limiting principle[]": that "the law … must recognize an enforceable right to the services at issue." *United States v. Rybicki*, 354 F.3d 124, 153 (2d Cir. 2003) (en banc) (Raggi, J., concurring in the judgment). And that is the critical distinction between "a formal government employee" and what the panel dubbed a "functional employee," meaning someone with no official role but *de facto* control. JA.668. The public has a "legally enforceable right" to the services of actual employees. It has no right to the services of a private citizen who is a "functional employee" simply because public officials listen to him. The "less rigorous" fiduciary standard that equity courts sometimes apply in undue-influence cases cannot bridge that fundamental gap.

The "less rigorous" undue-influence standard is also clearly inappropriate in defining fiduciary duties for *criminal* purposes. "Useful as such an elastic and expedient definition … may be in the civil context, it has no place in the criminal law." *Chestman*, 947 F.2d at 570. Indeed, employing such "outer permutations of chancery relief" "for determining the presence of criminal fraud would offend not only the rule of lenity but due process as well." *Id.*; *see also infra* Part III.C.

3. A final flaw in *Margiotta*'s fiduciary analysis is the mismatch between the "fiduciary" relationship and the duty drawn from it. *Margiotta* turned on the reliance placed on the private citizen by public officials, and the citizen's concomitant *de facto* control over official decisions. But even if that could create a fiduciary relationship, and even if that relationship could spawn affirmative duties, the citizen would at most owe those duties to the *official*, not to the *public*. An agent cannot appoint a subagent unless he has been "empowered" to do so. Restatement (Second) of Agency § 5. A public official has neither actual nor apparent authority to outsource decisions to private citizens. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). So a public official's reliance on a private citizen certainly cannot generate a transitive duty of that citizen to represent the public as a whole.

* * *

Margiotta has no first principles to commend it. Influence and unilateral reliance alone do not give rise to affirmative duties to others. And particularly in the public sector, such a proposition is fundamentally out of place in our constitutional republic. Judge Winter got this right back in 1982.

II. *MARGIOTTA* IS NOW ALSO FORECLOSED BY THIS COURT'S PRECEDENTS.

Even if *Margiotta* were conceptually coherent, there is no way to reconcile it with this Court's more recent precedents concerning the honest-services statute. In *Skilling*, this Court preserved § 1346 only by reading it narrowly as limited to "core" or "paramount" cases. Yet *Margiotta* was, by its own admission, a "novel" application of the honest-services concept, which drew widespread criticism. It is an aberration that cannot be described as part of the pre-*McNally* doctrinal core. Confirming as much, this Court in *McDonnell* defined public-sector bribery as the sale of "governmental powers"—which, by definition, only a public official can undertake. *Margiotta* is a vestige of a bygone era; this Court's modern decisions compel its extinction.

A. *Skilling* Shut the Door on Novel Theories of Honest-Services Fraud.

Margiotta cannot be reconciled with *Skilling*, which sharply cabined the scope of honest-services fraud to "heartland" cases to avoid constitutional concerns. 561 U.S. at 409 n.43. *Margiotta* is no heartland case. And the panel below ignored the conflict.

1. As set forth above, *Skilling* construed § 1346, the statute that Congress enacted to overrule *McNally*'s rejection of the honest-services doctrine. But, to avoid a constitutional vagueness challenge, the *Skilling* majority held that Congress *did not* adopt wholesale the chaotic pre-*McNally* doctrine. Rather, the Court limited § 1346 to "paramount," "classic," "heartland," "paradigmatic" cases involving "bribes or kickbacks." *Id.* at 404, 409-11 & n.43.

The relevant question under *Skilling* is therefore whether a given theory of bribery or kickbacks falls within the pre-*McNally* "doctrine's solid core." *Id.* at 407. Such "core pre-*McNally* applications" are all that this Court "salvaged." *Id.* at 408. Conduct beyond "paradigmatic cases of bribes and kickbacks," on the other hand, are outside the scope of § 1346. *Id.* at 411. Although some lower courts had construed the honest-services theory more broadly, *Skilling* treated the lack of "consensus" about those fact patterns, and the "relative infrequency" of those prosecutions, as placing that "amorphous category of cases" outside the statute's reach. *Id.* at 410.

There can hardly be any question that *Margiotta* is outside the bounds of § 1346 as *Skilling* construed it. There is nothing "paramount," "classic," "heartland," or "paradigmatic" about imputing fiduciary duties to private citizens based on their *de facto* influence over government decisions. Even *Margiotta* admitted this was a "novel issue." 688 F.2d at 121; *see also* Jeffries, *supra*, at 239-40 (recounting how "until *Margiotta*, that [honest-services] theory apparently applied only to public officials").

Nor did *Margiotta* induce a wave of agreement, let alone a "consensus" of the sort that *Skilling* demanded. To the contrary, courts long observed that "*Margiotta* has been 'widely criticized by practically everybody.'" *Smith*, 985 F. Supp. 2d at 603. Early on, Judge Posner called it one of the "worst abuses of the mail fraud statute." *Holzer*, 840 F.2d at 1348. And, writing for the Third Circuit, Chief Judge Becker refused to follow *Margiotta*'s "oft-criticized holding" and instead agreed with Judge Winter that the Second Circuit's approach "extends the mail fraud

statute beyond any reasonable bounds." *Murphy*, 323 F.3d at 104, 109; *see also Warner*, 292 F. Supp. 2d at 1062 (calling *Margiotta* "roundly criticized" and refusing to follow it). Perhaps most powerfully, even district courts *in the Second Circuit* came to discount *Margiotta* as bad law. *See Adler*, 274 F. Supp. 2d at 587 ("*Margiotta* was wrongly decided and is no longer good law in this Circuit or anyplace, as found by the Third Circuit in *Murphy*.").

Scholars were likewise unimpressed by *Margiotta*, and have criticized it for decades. *See, e.g.*, Hurson, *supra*, at 439-40; John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of A White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 15-16 (1983); Jeffries, *supra*, at 239-40; Craig M. Bradley, *Foreword: Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 583-84 (1988); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 209 (1994); Robert Batey, *Vagueness and the Construction of Criminal Statutes-Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 57-61 (1997); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 435-36 (1998); David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1402 (2008). And that is only a selective listing.

In short, like the other honest-services theories that *Skilling* excluded from § 1346, *Margiotta* was always a controversial outlier. The statute therefore cannot be read to have resurrected it.

2. The *Skilling* majority's response to Justice Scalia's concurrence about "the source and scope of fiduciary duties," 561 U.S. at 407 n.41, confirms that *Margiotta* fell outside the "core" this Court salvaged.

Justice Scalia objected that the body of pre-*McNally* caselaw never "defined the nature and content of the fiduciary duty central to the 'fraud' offense." *Id.* at 417 (concurring in part and in the judgment). He pointed to divisions among lower courts over the "*source* of the fiduciary obligation" as well as *who* owed those duties. *Id.* at 417-18. As to the latter, he specifically cited *Margiotta* as an exemplar of a decision extending the duty to "private individuals who merely participated in public decisions." *Id.* at 417.

The majority blunted that objection by maintaining that, in bribery or kickback cases, "[t]he existence of a fiduciary relationship" was "usually beyond dispute." *Id.* at 407 n.41 (majority op.). It pointed to examples of "public official-public," "employee-employer," and "union official-union members" relationships. *Id.* And it cited the "established doctrine that a fiduciary duty arises from a *specific relationship between two parties*." *Id.* (emphasis added) (brackets omitted).

By highlighting that fiduciary duties were usually "beyond dispute," the Court designated *those* cases—to the exclusion of others—as the "solid core" that was "salvaged." *Id.* at 407-08 & n.41. By listing the typical fiduciary relationships and omitting the *Margiotta* aberration ("private citizen-public") Justice Scalia had flagged, the Court sent the same signal. And, by citing the "established" rule that fiduciary duties arise from specific legal relationships, the Court again implicitly dismissed the *Margiotta* novelty.

3. Even though *Skilling* is this Court's most recent governing precedent on the scope of § 1346, the panel below cited it just twice in its discussion of *Margiotta*, both times for mere recitations of doctrinal history. *See* JA.666. Nowhere did the court grapple with *Skilling*'s limitation of § 1346 to "core" or "classic" pre-*McNally* fact patterns. Instead, the panel undertook its own construction of the "capacious" statutory text. *See* JA.667-68. The panel also treated as persuasive the whole body of law "*McNally* overruled," without mentioning *Skilling*'s life-saving (but deeply invasive) surgery on that corpus. JA.668-69.

In addressing a distinct issue earlier in its opinion, the panel said *Skilling* "circumscribed" the honest-services statute so it "only criminalizes bribes and kickbacks." JA.654. Perhaps the panel believed any case involving a purported "bribe" falls within the "core" *Skilling* upheld. But that is too simplistic. The whole question in cases like *Margiotta* is whether the benefit can be called a "bribe" at all—as opposed to a lawful payment for services. Bribery has traditionally meant paying an *agent* to influence conduct on behalf of a *principal*; but as explained, a private citizen is not an agent of the public. Prosecutors cannot evade *Skilling* by expanding the definition of a bribe to cover conduct outside the pre-*McNally* core; that would "let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). Indeed, doing so would present the same vagueness and other constitutional problems *Skilling* bypassed. Rather, § 1346 forbids only *paradigmatic* "bribes"—and *Margiotta*'s novel and contested theory of bribery assuredly does not qualify.

B. *McDonnell* Limited Federal Bribery Law to the Sale of Official Powers.

The other problem with characterizing the conduct here and in *Margiotta* as a "bribe" is that it *cannot be* a bribe under this Court's most recent explication of federal bribery law in *McDonnell*, which pinpointed the sale of governmental power as its defining feature. Private citizens have no such power to sell.

1. The issue in *McDonnell* concerned the *quo* aspect of bribery's *quid pro quo*. Specifically, what actions is an official forbidden to trade for something of value? The bribery statute governing federal officials calls that category "official act[s]," 18 U.S.C. § 201(a)(3), and *McDonnell* construed its scope for the first time in a century. *See* 579 U.S. at 566.

Against a backdrop of constitutional considerations, the Court held that official acts are limited to those involving a "formal exercise of governmental power." *Id.* at 569, 571. An official takes an official act when he exercises such formal governmental power on his own, or when he "uses his official position" to either pressure or advise "another official" to exercise formal governmental power. *Id.* at 572. Either way, an official act must fall "within the specific duties of an official's position—the function conferred by the authority of his office." *Id.* at 570. The key takeaway from *McDonnell* is that federal bribery law forbids the sale of one's "official position" in connection with "a formal exercise of governmental power." Meanwhile, the Court unanimously rejected the Government's broader approach, under which any sale of "influence" over government decisions would be criminal, even without a nexus to the use of office. *Id.* at 577.

2. The *Margiotta* theory stands directly opposed to *McDonnell*. A private citizen may hold "influence" over government decisions, if others listen to him. But *influence* is not official action. *See id.* Meanwhile, a private citizen has no "official position" and cannot exercise any "governmental power." He is thus *legally incapable* of taking official action—the *sine qua non* of bribery—within the meaning of *McDonnell*.

To be sure, *McDonnell* made clear that an official need not *personally* exercise governmental power to take official action. It suffices if the person "us[es] his official position to exert pressure on *another* official to perform an 'official act'" or "uses his official position to provide advice to another official." *Id.* at 572. But the common denominator is that the official "*uses his official position*." That may mean imposing pressure through the "threat" of legislation, as in *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008). It may mean exploiting an official duty to make "reports and recommendations" to superiors, as in *United States v. Birdsall*, where officials were bribed to advise their principal to grant clemency. 233 U.S. 223, 231, 235 (1914). But it does not mean taking actions that just leverage influence without exploiting one's official duties or powers—*e.g.*, writing an op-ed, or asking for a favor. Rather, the official takes *official* action only by using his *office* to induce a formal exercise of governmental power. And, again, a private citizen has no "office" to "use"—not directly, and not indirectly as a source of official pressure or official advice. Thus, if a private citizen had recommended clemency in *Birdsall*, that would not have been official action. A private citizen cannot take "official action," and so cannot be guilty of accepting a "bribe."

At minimum, the disconnect between the *Margiotta* theory and *McDonnell*'s definition of § 201 bribery confirms the former is not among the "*paradigmatic* cases of bribes and kickbacks," *Skilling*, 561 U.S. at 411 (emphasis added), that § 1346 forbids.

3. The panel responded that *McDonnell* gave it "no reason to doubt" *Margiotta*'s viability. JA.671. But neither of the panel's points is persuasive.

First, the panel insisted "the definition of 'official act'" says nothing about the distinct issue of "*who* can violate the honest-services statute." JA.670. But the two questions are inextricably linked. The definition of "official act" makes it impossible for a private citizen with no official powers or duties to undertake one. In turn, that means such a private citizen cannot commit honest-services fraud of this sort—or, at least, that such a transaction is not "core" bribery.

Second, the panel claimed *Dixson v. United States*, 465 U.S. 482 (1984), proves that private citizens can be guilty of taking bribes under § 201. JA.670-71. That badly overreads *Dixson*. The majority there held that § 201's definition of "public official" reached grant administrators who exercised "official responsibility for carrying out a federal program" and were paid with federal funds. 465 U.S. at 488, 499. It reasoned that one who "occupies a position of public trust *with official federal responsibilities*," and assumes "duties of an *official nature*," falls within the statutory reach. *Id.* at 496-500 (emphasis added). Lower courts have applied *Dixson* to contractors hired to fulfill official federal functions. *See, e.g.*, *United States v. Thomas*, 240 F.3d 445, 448 (5th Cir. 2001); *United States v. Kenney*, 185 F.3d 1217, 1221-22 (11th Cir. 1999).

All of that is perfectly consistent with *McDonnell*, since federal contractors and their agents *do* exercise official powers, albeit through contractual delegation. It follows that they cannot sell those official powers for private gain. But nothing in *Dixson* supports the *Margiotta* theory that someone who has *no* "official" duties, responsibilities, or salary can still be a "public official," under § 201 or otherwise, by virtue of having political influence. *McDonnell* confirms the latter theory is foreign to federal bribery law—and most certainly is not part of § 1346's salvaged "core."[1]

* * *

Margiotta's free-wheeling, common-law approach to defining honest-services fraud could not be any less aligned with the trajectory set by this Court's modern precedents. Under *Skilling*, § 1346 forbids only a predictable and well-understood set of "paradigmatic" bribery and kickback offenses. And under *McDonnell*, bribery means an agent's sale of his official powers. No longer does federal criminal law sweep in anything that sets off a prosecutor's sense of moral indignation, or any transaction that offends a jury's sense of civic duty. Following those precedents, this Court should relegate *Margiotta* to the jurisprudential dustbin.

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[1] Four Justices thought even *Dixson* construed the statute too expansively, 465 U.S. at 501 (O'Connor, J., dissenting), and Justice Scalia later condemned its use of legislative history to construe an "ambiguous" law against a criminal defendant, *see United States v. R.L.C.*, 503 U.S. 291, 310 (1992) (Scalia, J., concurring in part and in the judgment). Those are good reasons not to *extend* the decision.

III. *MARGIOTTA* OFFENDS CONSTITUTIONAL NORMS.

As if all of this were not enough, *Margiotta* invites a raft of constitutional concerns. Time and again, this Court has read federal corruption statutes narrowly to protect the First Amendment, federalism, and fair notice. These principles resolve any remaining doubt firmly against the decision below.

A. The Second Circuit's Standard Chills First Amendment Activity.

In construing statutes, this Court has been careful to stay away from readings that could chill activity at the core of the First Amendment. Yet *Margiotta*'s hazy standard leaves lobbyists, donors, and virtually every other politically active individual at the mercy of headline-hungry prosecutors.

1. This Court has repeatedly adopted narrowing constructions of broadly worded statutes so as to not deter the exercise of First Amendment rights. Under the *Noerr-Pennington* doctrine, for example, it read the capacious Sherman Act to exempt conduct "aimed at influencing decisionmaking by the government" in order "to avoid chilling the exercise of the First Amendment right to petition," *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014), and to protect "the citizens' participation in government," *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383 (1991). In *McDonnell*, too, this Court rejected the Government's position that "nearly anything a public official does … counts as a *quo*" for bribery purposes, warning that such an interpretation "could cast a pall of potential prosecution over" basic interactions between public officials and their constituents. 579 U.S. at 575.

Margiotta and the decision below nevertheless "run[] the risk … of deterring commonplace political behavior in which most Americans would assume they and others had a right to engage." Batey, *supra*, at 57-61; *see also* Jeffries, *supra*, at 240 (observing that this "extremely open-ended" standard "casts a shadow over" political conduct). These decisions threaten to chill protected speech of politically active individuals, impairing their ability to petition the government and impeding officials' ability to hear from and make decisions based on voices of their constituents.

Start with lobbyists, whose work is constitutionally protected. *See Citizens United v. FEC*, 558 U.S. 310, 369 (2010). They are often former officials or employees who intimately know the office and the people in it. Indeed, when the *Washingtonian* came out with a "50 Top Lobbyists" list, almost every person had a government or staffer past. Kim Eisler, *Hired Guns: The City's 50 Top Lobbyists*, Washingtonian (June 1, 2007). And about a third of the Members of Congress who left office in January 2019 have taken lobbying jobs. *Revolving Door: Former Members of the 115th Congress*, OpenSecrets, https://bit.ly/3RKAhL6 (last visited Aug. 25, 2022). At least part of what makes these former officials and staff effective is their network. It is no secret that "ex-officials are sought out and paid to use their influence in the government to achieve their clients' ends." *United States v. McClain*, 934 F.2d 822, 831 (7th Cir. 1991). The value of these relationships is empirically demonstrable: One study found that lobbyists who had worked for a senator suffered a 24% income drop when the senator left office. *See* Jordi Blanes i Vidal *et al.*, *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731 (2012).

In light of this, it would be easy for a *Margiotta*-armed prosecutor with a distaste for "swamp" culture to criminalize it: Allege that the lobbyist maintained influence and control, and all his fees become bribes. After all, it would be surprising to find a lobbyist who does *not* "brag[]" to clients that he "retained 'a bit of clout'" with the government "after formally leaving" public service. JA.682. In fact, the more influential a lobbyist is, the more likely he is to satisfy *Margiotta*'s reliance-and-control test. Criminalizing "private persons with a 'vise-like grip' on public power" therefore "might simply prohibit being too successful a lobbyist." *McClain*, 934 F.2d at 831. But it is hornbook law that "the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights," *McCutcheon v. FEC*, 572 U.S. 185, 205 (2014) (plurality op.)—including his right to petition public officials.

Moving on, campaign donors "may garner 'influence over or access to' elected officials or political parties" through their contributions. *Id.* at 208. That too is protected speech. *See id.* With *Margiotta* in hand, however, what would stop a prosecutor eager to "get money out of politics" from asking a jury to conclude that the donors have breached fiduciary duties to the public? After all, many Americans believe wealthy donors "dominate[] and control[] … governmental business" and are "relied on" by those "working in the government." JA.511. *Margiotta* thus exposes "to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions." *McCormick v. United States*, 500 U.S. 257, 272 (1991).

And there is no need to stop there. *Margiotta* "subjects virtually every active participant in the political process"—from the party boss to the part-time activist—"to potential criminal investigation and prosecution." 688 F.2d at 143 (Winter, J., dissenting in part). As one scholar observed, Margiotta's power "'to influence appointments'" by Republican officials was arguably "'no greater than,'" say, "'that held by the head of the AFL-CIO to influence the appointment of the Secretary of Labor'" in "a Democratic administration." Jeffries, *supra*, at 240 n.135. That encroachment on core First Amendment activity is why the "danger of corruption to the democratic system" posed by the Second Circuit's "catch-all political crime" is far "greater" than the problem it purports to solve. *Margiotta*, 688 F.2d at 144 (Winter, J., dissenting in part).

2. *Margiotta* conceded that its "theory" could be "misapplied to constitutionally protected conduct," but deemed that threat of "misuse[]" beside the point. *Id.* at 129 (majority op.). This Court is more solicitous toward constitutional rights, refusing to "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 579 U.S. at 576. It will not "rely on 'the Government's discretion' to protect against overzealous prosecutions," *id.*, as the mere threat is enough to chill protected speech. *See Citizens United*, 558 U.S. at 333-36; *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) ("First Amendment freedoms need breathing space to survive."). And *Margiotta*'s chill on core political speech is both "evident and inherent." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745 (2011).

For its part, the court below brushed off the First Amendment in this roundabout way: It pointed to cases applying the "reliance-and-control theory" in the private sector, even though the Constitution "protects the right of a person to speak persuasively to a private company." JA.671-72. Then the panel said it was "not obvious why speech directed to the government" deserved "special treatment." JA.672. But as explained, the private analogies fail. *Supra* at 25-28. Plus, it *is* obvious that greater concern should attach to the risk of "chilling political speech, speech that is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329. Whatever may be true for purely private contexts, the Court cannot tolerate a standard that chills the communications fundamental to a republic—those between public officials and their constituents. *Cf. McDonnell*, 579 U.S. at 575.

B. The Second Circuit's Standard Interferes with State Prerogatives.

Margiotta also tramples on state sovereignty in at least two respects. To start, a "State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.'" *McDonnell*, 579 U.S. at 576. For Congress to "defin[e]" who qualifies as a State's "officers" would therefore "upset the usual constitutional balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Yet *Margiotta*'s upshot is that federal prosecutors, juries, and judges can decide if a private citizen is "in reality … the government" of a State. 688 F.2d at 124, 129. Nothing in the relevant statutes comes close to providing a "clear statement" to justify that theory. *Gregory*, 501 U.S. at 461.

This case proves the point. Far from imposing duties on campaign staff, New York law recognizes the difference between a public servant and a private political figure. That is why Percoco had to resign from his Executive Chamber position to work full-time on the Governor's reelection. *See* N.Y. Civ. Serv. Law § 107(1)-(2); N.Y. Pub. Off. Law § 74(3)(d). Percoco's 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. Yet for the panel below, that was immaterial. In its view, § 1346's "capacious language" was "broad enough" to treat Percoco as a "functional employee" of New York for purposes of federal criminal law. JA.667-68.

Relatedly, *Margiotta* trenches on the States' power "to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 579 U.S. at 576. State ethics rules already govern when former officials and staff can engage in lobbying or other advocacy, reflecting a balancing of competing policy interests. New York forbids former employees of the executive chamber from "appear[ing] or practic[ing] before any state agency" for two years. N.Y. Pub. Off. Law § 73(8)(a)(iv). The panel below overrode that bright-line state ethics rule with an open-ended federal criminal standard.

In lieu of heeding this Court's federalism principles, *Margiotta* dismissed state law as irrelevant, declaring "federal public policy" paramount. 688 F.2d at 124. But it is not the role of federal courts "to 'set[] standards of … good government for local and state officials,'" *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020), much less define who is one in the first place.

C. The Second Circuit's Standard Is Vague, Open-Ended, and Subject to Abuse.

The final nail in *Margiotta*'s once-closed coffin is its indeterminacy. Its test leaves citizens wondering when they might cross the line from political activism to prison, and all but invites prosecutors to pursue partisan adversaries in a host of new, troubling ways.

1. In the fraught context of political corruption, "a statute ... that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). That flows from the rule of lenity—the canon that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60. And it ducks due-process concerns by ensuring that federal crimes have "sufficient definiteness that ordinary people can understand what conduct is prohibited," without fear of "arbitrary and discriminatory enforcement." *McDonnell*, 579 U.S. at 576.

Yet despite acknowledging that "[t]he drawing of standards in this area is a most difficult enterprise," *Margiotta*, 688 F.2d at 122, and that § 1346 cannot be "precisely defined," the Second Circuit thought the law was "broad enough" to support its fact-intensive "reliance and control" standard, JA.667. The result was to create "an exceedingly ill-defined prospect of criminal liability for influential private citizens whose participation in the political process falls short of civics-book standards." Jeffries, *supra*, at 239.

There is no end to the mischief a prosecutor could wreak when constrained only by a jury's application (after a high-profile indictment and trial) of a fact-intensive "control and reliance" standard. "[S]elective enforcement becomes possible, and even a politicized war of indictments and counter-indictments between prosecutors of different political persuasions is conceivable." Coffee, *Metastasis*, *supra*, at 15-16. Decades before the rise of modern lawfare, Judge Winter predicted how *Margiotta*'s vagaries would "lodge[] unbridled power in federal prosecutors to prosecute political activists" and threaten "abuse." 688 F.2d at 143-44. While *McNally* interred that theory shortly thereafter, its resurrection in today's political climate brings those dangers home.

Once the line between public officials and private citizens is blurred, the list of viable targets increases exponentially. There are countless examples of friends, campaign donors, media personalities, former officials, or others—on both sides of the aisle—who have exercised influence over government decisions, even without formal office or title. *See, e.g.*, Evan Minsker, *Kanye West and Kim Kardashian Lobbied Trump in Effort to Free A$AP Rocky*, PITCHFORK (July 18, 2019); Ashley Parker & Josh Dawsey, *Trump's Cable Cabinet: New Texts Reveal the Influence of Fox Hosts on Previous White House*, WASH. POST (Jan. 9, 2022); Ron Elving, *Who Is Clinton Confidant Sidney Blumenthal?*, NPR (May 20, 2015); Thomas Franck & Dan Mangan, *Senate GOP Suggests Biden Fed Nominee Sarah Bloom Raskin Used Government Ties To Help Financial Tech Firm*, CNBC (Feb. 3, 2022). It is easy to imagine an ambitious prosecutor charging these informal advisors as *de facto* officials.

Perhaps most pernicious, the revival of *Margiotta* gives federal prosecutors a way to pursue the *family members* of public officials. Relatives of high-ranking officials—a President's father or son, for example, or a Governor's brother—hold unparalleled access and influence. And their independent business interests may be in a position to benefit from state action. No specific examples are necessary to appreciate that this too is a bipartisan reality that provides a uniquely attractive set of targets. Under the decision below, prosecutors could characterize these benefits as breaches of the family members' duties to the public, effectively prosecuting public officials by proxy.

These examples raise real ethical concerns. But "enforcement of inchoate obligations should be by political rather than criminal sanctions." *Margiotta*, 688 F.2d at 143 (Winter, J., dissenting in part). By contrast, after-the-fact, case-by-case adjudication by juries asked to evaluate whether a private citizen exercised sufficient "control" or commanded sufficient "reliance" is a recipe for prosecutorial abuse.

2. Neither *Margiotta* nor the panel below seriously engaged with these concerns. *Margiotta* responded only that a "defendant must have acted willfully and with a specific intent to defraud." *Id.* at 129 (majority op.). But if that were enough to dodge a vagueness problem, there would have been no need for *Skilling* to "pare" the body of pre-*McNally* cases "to its core." 561 U.S. at 404. As the Court has noted in many contexts, an "intent-based test" is utterly inadequate, as no reasonable party would act "if its only defense to a criminal prosecution would be that its motives were pure." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.).

Margiotta also claimed its test provided a "safe harbor" so long as a politically active person does not cross "the point at which he dominates government." 688 F.2d at 122. But it left unspecified where that point lies. That was by design. The court rejected a "hard-and-fast distinction" because it wanted to skirt "the Scylla of a rule" that would criminalize "mere influence" and "the Charybdis of a rule" that would insulate those who "in fact" are "conducting the business of government." *Id.* at 122-23. *Margiotta*, in other words, treated the mushiness of its "guidelines" as a feature rather than a bug. *Id.* at 122. But in this Court, employing a "shapeless" standard "to condemn someone to prison" is no triumph, *McDonnell*, 579 U.S. at 576, and a "safe harbor" whose "contours" must be "guess[ed] at" is no haven at all, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-49 (1991).

* * *

Margiotta is thus not only legally and doctrinally baseless; it is also a constitutional anathema. Any doubt should be resolved in favor of its demise.

IV. REJECTING *MARGIOTTA* REQUIRES REVERSAL.

For the reasons explained, the *Margiotta* theory is legally invalid. The consequence for this case is that Percoco is entitled to acquittal on Count Ten, and a new trial on the other charges.

1. Acquittal is required on Count Ten because the evidence supported, at most, an inference that Percoco agreed to help COR with its LPA issue in exchange for payment. JA.361-62. Both the alleged agreement and that "official act" occurred when Percoco was a private citizen, so he owed no duties to the public and cannot be guilty of depriving the public of honest services.

The Government below also advanced a "retainer" theory, contending that Percoco agreed to help COR "as opportunities arose," and had indeed helped COR on unrelated matters nearly a year after his return to office. JA.648-49, 653. But there was no evidence to link those actions to the earlier payments. *See id.* As the panel admitted, the LPA was the "front and center issue" for which Percoco was hired (JA.664 n.3), and the panel relied on that act alone to support the conviction (JA.680-81). Moreover, the Second Circuit has held that, after *McDonnell*, a "retainer" theory is only viable if the "particular *question or matter*" was identified when the official accepted payment. *United States v. Silver*, 948 F.3d 538, 545 (2d Cir. 2020). There was no evidence that the issues Percoco later helped with (a pay raise earned by Aiello's son, and the release of funds the state duly owed COR) were even *foreseen* when he accepted the $35,000.

2. At minimum, Percoco is entitled to a new trial on Count Ten due to the erroneous jury instructions. The instructions reflected *Margiotta*'s legal rule. *See* JA.511. Because the jury thus almost certainly convicted "for conduct that is not unlawful," vacatur is required. *McDonnell*, 579 U.S. at 579-80.

The alternative "retainer" theory cannot render harmless the instructional error. Beyond the points above, the panel admitted that the jury had *also* been wrongly instructed about the retainer theory. JA.653-57. The panel found *that* error harmless based solely on the *Margiotta* theory: that Percoco agreed to press a state agency "to reverse its position on the need for a [LPA]." JA.661. With *both* theories now tainted by instructional error, there is no avoiding vacatur on Count Ten, at minimum.

3. The *Margiotta* error also requires a new trial on the CPV counts. As to those counts, the Government argued that Percoco took "official acts" while he was a private citizen. *See* JA.374, 484. The instructional error therefore may well have influenced the verdict. Moreover, because the evidence as to CPV was so thin, prosecutors leaned heavily on the COR conduct to insinuate a corrupt pattern. But the COR conduct was not criminal and should not have been admitted. Fairness thus requires a new trial on the CPV counts too. *See United States v. Rooney*, 37 F.3d 847, 855-57 (2d Cir. 1994); *Murphy*, 323 F.3d at 118-22.

CONCLUSION

This Court should reverse the decision below and remand for further proceedings.

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Respectfully submitted,

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