No. 21-1161
Vided 21-1158, 21-1169, 21-1170

IN THE

Supreme Court of the United States

No. 21-1161

STEVEN AIELLO and JOSEPH GERARDI,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

(*Captions continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONERS FOR A WRIT OF CERTIORARI

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—v.—

UNITED STATES OF AMERICA,

Respondent.

No. 21-1170

LOUIS CIMINELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL supports the petitions for *certiorari* of Louis Ciminelli, Steven Aiello, Joseph Gerardi, Alain Kaloyeros, and Joseph Percoco in their challenges to two features of Second Circuit case law, each of which has split the Circuit Courts of Appeals: (1) the court's adoption of and longstanding adherence to the right-to-control theory of property fraud; and (2) the court's holding that private citizens can owe a duty of honest services to the public by virtue of exercising influence over government decisions.[1]

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided their written consent to the filing of this brief. To avoid redundancy, this brief is being filed only in No. 21-1161, but it also supports the petitions filed in Nos. 21-1158, 21-1169, and 21-1170.

The Second Circuit's overbroad application of the federal fraud statutes implicates NYCDL's core concern of combatting the unwarranted extension of criminal statutes and promoting constitutionally definite standards for criminal liability.

NYCDL is in a unique position to substantiate that the amorphousness of the right-to-control theory has enabled prosecutors to criminalize mere deceit—to use federal fraud statutes intended to protect property rights to prosecute conduct that may be undesirable or unethical but contemplated no harm to property. The Second Circuit's decision that private citizens can be convicted of honest services fraud if they dominate or control government officials equally invites Circuit-to-Circuit disparities in enforcement and prosecution cabined only by the discretion of prosecutors. That holding poses dangers to political expression in addition to principles of fair warning, lenity, and federalism.

SUMMARY OF ARGUMENT

In a line of cases stretching from *McNally v. United States*, 483 U.S. 350 (1987), to *Kelly v. United States*, 140 S. Ct. 1565 (2020), this Court has made clear that the mail and wire fraud statutes are limited to the protection of property rights and are implicated only where the object of the defendant's scheme is to obtain property. Similarly, in cases such as *Skilling v. United States*, 561 U.S. 358 (2010), and *McDonnell v. United States*, 136 S. Ct. 2355 (2016), this Court has cautioned that 18 U.S.C. § 1346 is limited in official

corruption cases to bribes paid in exchange for "official act[s]"—acts relating to a "formal exercise of governmental power" by one using an "official position," *McDonnell*, 136 S. Ct. at 2371-72.

This case is a perfect illustration of the Second Circuit's failure to observe these boundaries on the scope of both property and honest-services fraud. Petitioners Aiello, Gerardi, Ciminelli, and Kaloyeros were convicted of conspiring to commit wire fraud because they deprived Fort Schuyler of "the ability to make an informed economic decision," *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021), thereby interfering with its "right to control" the use of its assets, *id.* at 175, although the government never proved that Fort Schuyler could have negotiated more advantageous terms with any company other than those of which Petitioners were executives. The advantage gained was a "first opportunity to negotiate" that was not binding, not guaranteed, and did not set the terms of any contract. Ciminelli App. 7a-8a; C.A. App. 1066.[2] The Second Circuit nonetheless affirmed the convictions based on reasoning that Petitioners' deceit went to an "essential element" of the bargain. 13 F.4th at 171. It made this *post hoc* judgment while simultaneously declining to find error in the trial court's refusal to instruct the jury to weigh whether Fort Schuyler "was

[2] "[Name] Pet." refers to the petition of the named petitioner, "[Name] App." refers to the Appendix of the named petitioner, and "C.A. App." refers to the single appendix filed by the Petitioners in the court of appeals.

intended to receive . . . the full economic benefit of the bargain." *Id*. at 175-76.

Petitioners Percoco and Aiello were convicted of honest services fraud conspiracy based on the payment of bribes to an individual, Mr. Percoco, who was not a public official but instead a campaign executive. Reviving *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), a 40-year-old precedent that pre-dated *Skilling* and *McDonnell*, the Second Circuit approved instructions that Percoco could be deemed to owe a duty of good government, without "a formal relationship with the state," so long as he "dominated and controlled any governmental business" and those in government "relied" on him because of his "special relationship" with the government. *United States v. Percoco*, 13 F.4th 180, 187, 193-94 (2d Cir. 2021).

This case is also part of a broader pattern that shows that the dangers of which Petitioners warn are all too real. If the mail and wire fraud statutes are the federal prosecutor's "Stradivarius," Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980), "right-to-control" is a favored composition. Prosecutors have invoked the doctrine in scores of cases in recent years limited only by their imagination. As in Petitioners' cases, the right-to-control doctrine has enabled prosecutors to criminalize deceit without contemplation of economic harm. Prosecutors have used the theory to criminalize undisclosed self-dealing, made federal crimes out of misconduct previously left to the states to police, and targeted unsavory but widely accepted and unregulated business conduct. Each time it is

used, the doctrine enables prosecutors to increase penalties or otherwise gain power and leverage over defendants who did not intend economic harm.

Once prosecutors invoke the right-to-control doctrine, moreover, it is illusory to believe that juries reliably navigate the same drawing of a "fine line between schemes," 13 F.4th at 171 (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)), that has bedeviled and divided the courts. A jury is instructed to deem a "right to control the use of one's assets" to be "property" and to consider that "property" to be "injured" when the victim "is deprived of potentially valuable economic information." *Id.* at 175 (quoting jury instructions below). The juror hearing this can too easily convict based on reasoning that all information has economic value and that anyone would assess the value of a transaction differently with knowledge that he or she had been lied to. This transforms deceit into property fraud, contrary to this Court's longstanding precedent.

The Second Circuit's expansive interpretation of the honest services statute, 18 U.S.C. § 1346, opens yet another playing field to arbitrary enforcement. The opinion below evaded this Court's precedents, deeming *McDonnell* irrelevant to whether a private citizen could owe a fiduciary duty of good government to the public. *Percoco*, 13 F.4th at 196. The abandonment of "ascertainable standard[s] of guilt," *Skilling*, 561 U.S. at 416 (Scalia, J., concurring), puts private citizens who lobby, advise, or advocate at risk of federal criminal prosecution—in direct proportion to how successful they are. The danger to expression

and democracy, no less than that of arbitrariness and unfairness, is apparent.

A disproportionate number of white-collar and public corruption prosecutions are brought in the Second Circuit.[3] Consequently, the Circuit's widespread deployment of the right-to-control theory and revival of the discredited doctrine of *Margiotta* are a cause for serious concern. Beyond this, the court's rulings have spawned circuit splits so that whether a defendant is prosecuted depends on which U.S. Attorney's Office asserts jurisdiction, another troubling inequity.

This Court should grant *certiorari* to overrule the Second Circuit's overly broad definitions of property fraud and honest services fraud.

ARGUMENT

I. THE RIGHT-TO-CONTROL DOCTRINE IS DEPLOYED IN THE SECOND CIRCUIT TO PROCURE CONVICTIONS WITHOUT PROOF OF PROPERTY FRAUD

By the Second Circuit's own description, the right-to-control theory is an "alternative" to the "classic" theory of property fraud. *United States v. Muratov*, 849 F. App'x 301, 306 (2d Cir. 2021). As

[3] Even the single district of the Southern District of New York brings a disproportionate number of federal fraud cases. Kaloyeros Pet. 27 (citing statistics on Department of Justice wire fraud prosecutions).

demonstrated in the Petitioners' briefs, this alternative theory wrongly counts as "property" an intangible right-to-control that is not a traditional property right and cannot be "obtained." *E.g.*, Aiello & Gerardi Pet. 25, 28-33. And it wrongly equates mere interference with a right *incident* to property with the requisite deprivation of *property* itself. *E.g.*, Ciminelli Pet. 19. The consequence is to permit the non-disclosure of information to be prosecuted as federal property fraud. *E.g.*, Aiello & Gerardi Pet. 2.

A key rationale for giving "limiting" interpretations to the essential elements of federal fraud statutes is to protect against prosecutorial overreach. *Skilling*, 561 U.S. at 405, 412-13; *see also McDonnell*, 136 S. Ct. at 2372-73 ("we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly'" (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010))). Prosecutors in the Second Circuit have demonstrated that the danger of arbitrary enforcement arising from the availability of the "alternative" doctrine is real, vesting excessive latitude in the hands of prosecutors, with the attendant dangers of vagueness, lack of notice, and encroachment on criminal jurisdiction traditionally reserved to states.

Juries left to draw the "fine" line that purportedly separates fraud from deceit, 13 F.4th at 171, have returned guilty verdicts against defendants proven to have engaged in only deceit. This case is a paradigm of how the malleability of the right-to-control doctrine permits a court to affirm convictions based on line-drawing that a jury cannot reasonably

be asked to undertake, and that the jury in this case was not even tasked to undertake.

A. Prosecutors Rely On The Elastic Doctrine When There Is Deceit But They Cannot Prove Contemplated Economic Harm

The use of the right-to-control theory by prosecutors in the Second Circuit has taken root and proliferated in the decades since the Second Circuit approved the theory. As NYCDL has substantiated elsewhere, even during the last ten to twelve years, scores of prosecutions in the Second Circuit, brought against over 100 defendants, have been founded in whole or in part on the right-to-control doctrine.[4] Far from being an obscure or disfavored alternative, the right-to-control doctrine has become the prosecutor's bread-and-butter in complex wire and mail fraud prosecutions in the Second Circuit.

The abuses of the right-to-control theory of which Petitioners warn, *e.g.* Aiello & Gerardi Pet. 2-3, 34-35, Ciminelli Pet. 21-22, are already reality. Non-disclosure of information has been converted to mail and wire fraud without a showing of contemplated economic harm. Prosecutors deploy the doctrine to criminalize deceit, without more, in diverse factual contexts, targeting conduct Congress has chosen not to regulate, the breaking of rules of private

[4] *See* Appendix to Brief for *Amicus Curiae* New York Council of Defense Lawyers, *Gatto v. United States*, No. 21-169 (chart compiling right-to-control prosecutions).

organizations, and breaches of oral promises that would be unenforceable as a matter of contract law.

The ability of prosecutors to pluck out and punish misrepresentation or non-disclosure, without an objective to obtain property, has effectively enabled them to use the fraud statutes as an instrument of regulatory power. Novel right-to-control cases announced to great media fanfare have criminalized business conduct that—before prosecutors stepped in—was addressed at most through state civil remedies and, because of the absence of harm, uncomplained of, even by those prosecutors later called "victims." The blunt and unpredictable instrument of prosecutorial discretion has displaced and upended longstanding mechanisms to enforce standards of conduct: regulation, contract law, and codes of ethics.

Defendants of whom the prosecutors choose to make examples suffer the most punishing and direct consequences. Some have been convicted and sentenced based on the right-to-control theory. Others have been acquitted, either at or after trial. The government has also brought and later abandoned charges based on the theory. Even defendants who ultimately prevail, however, do so only after suffering crushing reputational harm and spending years and substantial resources fending off the allegation that they deprived others of an intangible right.

We offer some examples of how the doctrine has been used in the Second Circuit to prosecute cases

that are beyond the reach of the property fraud statutes:

Turning Deceit in the Job Hiring Process into Federal Property Fraud. Two related cases, *see* Info. at 1-5, *United States v. Dunn*, 20 Cr. 181 (D. Conn. Oct. 5, 2020); Info. at 1-4, *United States v. Perez*, 20 Cr. 180 (D. Conn. Oct. 5, 2020), are examples of the use of the right-to-control doctrine to prosecute city officials for steering a municipal hiring process. *Dunn* and *Perez* illustrate that the same right-to-control theory at issue in Petitioners' case supports federal prosecutions of the prosaic misconduct of cheating on a civil service examination or lying in a job application.

In *Dunn* and *Perez*, two Bridgeport city officials were charged with conspiring to commit wire fraud after one defendant, the city's personnel director, misappropriated information concerning the City's process for hiring a police chief to ensure that his preferred candidate (who received a preview of examination questions stolen by the director) would get the job. While the scheme steered the City's hiring process to a favored candidate, it did not target the City's property. The money budgeted for hiring and salary would have been spent regardless of the scheme. Nevertheless, prosecutors secured guilty pleas by casting the offense as "depriving the City of financially valuable information relevant to its decision on how to allocate the permanent police chief position and the resulting employment contract." *Id.*

Evidently the government felt it would be difficult to prove that the defendants sought to wrongly obtain property from the city, so it reframed the allegations in right-to-control terms. This is a primary function of the right-to-control doctrine as applied in practice: to dilute the property component of property fraud to such a degree that misrepresentation or deceit itself—depriving an alleged victim of the ability to make an informed economic decision—becomes the offense. *Dunn* and *Perez* show that, taken to its logical conclusion, this short-cut can be used to turn into a federal offense any misrepresentation in an employment application, or any misuse of workplace information, in either the public or private sector.

Charging Undisclosed Self-Dealing as Property Fraud. Both *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017), and *United States v. Viloski*, 557 F. App'x 28 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1698 (2015), involved employees who failed to disclose kickbacks that gave them a financial interest in transactions they authorized on behalf of their employers.

In both cases, the transactions that generated the kickbacks did not harm the employer, which got the goods or services it paid for. The defendants in both cases were convicted on the right-to-control theory; indeed, the jury in *Finazzo acquitted* the defendant on charges of mail and wire fraud based on the classic theory that he "inten[ded] to deprive [his employer] of money." *Finazzo*, 850 F.3d at 96-97. The Second Circuit nonetheless found that the defendants' failure to disclose their kickbacks deprived their

employers of "potentially valuable economic information" and could have caused tangible economic harm because the employers "could have negotiated . . . better deal[s] for [themselves]" had they known of the kickbacks. *Finazzo*, 850 F.3d at 110-12; *Viloski*, 557 F. App'x at 34.

No less than *Dunn* and *Perez, Finazzo* and *Viloski* illustrate how the right-to-control doctrine renders the "property" element of property fraud essentially meaningless. Any scheme that induces someone to enter into a contract on the basis of inaccurate information necessarily deprives that person of the opportunity to enter into the contract on better terms. Unfaithful employees who accept kickbacks may violate state commercial bribery laws or 18 U.S.C. § 1346. But unless an object of their scheme is to cause their employer to enter into an economically disadvantageous transaction, they are not guilty of property fraud.

Criminalizing Unethical Behavior In Businesses and Private Organizations. Prosecutors also have reached for the right-to-control doctrine in high-profile cases to criminalize conduct falling outside of property fraud that was common in the affected industry. In these cases, too, prosecutors backstopped the classic property fraud theory with the "alternative" right-to-control theory because of the difficulty, or impossibility, of proving intended loss.

Convictions were affirmed in reliance on the alternative theory.

One prominent example was the prosecution of two Adidas personnel and a sports agent based on payments to parents of student-athletes in violation of NCAA amateurism rules. *United States v. Gatto*, 986 F.3d 104 (2d Cir.), *cert. denied*, 142 S. Ct. 710 (2021). The defendants did not seek to obtain property from the universities that were the purported victims of the wire fraud charges; rather, defendants stood to gain only if students attended the Adidas-sponsored universities and the university sports teams generated greater revenues for themselves and Adidas. Convictions were nevertheless obtained and affirmed on appeal because "[d]efendants deprived the Universities of information that would have helped them decide whether to award the Recruits athletic based aid." *Id*. at 116. Previously, the NCAA rules at issue were enforced through internal disciplinary measures like fines or suspensions or, in most cases, not enforced at all.

Other cases targeted unregulated dealings in the financial industry among sophisticated counterparties. Prosecutors in the District of Connecticut commenced one of the few federal prosecutions of senior traders of residential mortgage backed securities ("RMBS") after the 2008 mortgage meltdown. *United States v. Gramins*, 939 F.3d 429, (2d Cir. 2019). The indictment alleged that three senior traders at Nomura Securities had schemed to defraud their customers "to obtain money or property, including the right to make a discretionary economic

decision." Third Superseding Indictment, ¶ 32.a, *United States v. Shapiro et al.*, 15 Cr. 155 (D. Conn. March 6, 2017), ECF No. 307. The customers were themselves sophisticated institutional investors to whom the Nomura traders owed no duty, and defendants presented proof at trial—apparently largely credited by the jury—that their admittedly deceitful bluffing about simultaneous price negotiations with other counterparties was widespread in the RMBS market and not relied on by their customers.[5] In *United States v. Johnson*, 945 F.3d 606 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 687 (2020), prosecutors charged a senior bank executive with wire fraud for having driven up the price of currency that was the subject of a foreign exchange contract, in violation of an oral promise to the counterparty, despite failing to contest that the counterparty received the full benefit to which it was entitled under the contract or that the contract contained an integration and merger clause. *Id.* at 613; Brief for the United States at 10-11, *United States v. Johnson*, No. 18-1503 (2d Cir. May 18, 2018), ECF No. 57. The Second Circuit affirmed on the ground that Johnson had deprived the counterparty of

[5] *See United States v. Shapiro*, 2018 WL 2694440, at *2, 3 (D. Conn. June 15, 2018), *rev'd and remanded sub nom. Gramins*, 939 F.3d at 429. After seven years of litigation, these prosecutions have ended largely with acquittals or deadlock on most counts. Verdict Form, *United States v. Shapiro et al.*, 15 Cr. 155 (D. Conn. June 15, 2017), ECF No. 431.

its interest "in controlling his or her assets." *Id.* at 612.

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In sum, prosecutors in the Second Circuit have fulfilled the prescient warning that if federal prosecutors "could prosecute as property fraud every lie . . . the result would be . . . a sweeping expansion of federal criminal jurisdiction." *Kelly*, 140 S. Ct. at 1574 (citation omitted). Defendants like the Petitioners have been convicted *solely* on the right-to-control theory, but prosecutors reap undeniable gains simply from gaining the ability to charge and pursue the less-demanding theory. As the Chief Justice has observed, when criminal statutes are afforded their broadest conceivable interpretation, federal prosecutors have "extraordinary leverage" to charge aggressively and to extract guilty pleas. Tr. of Oral Argument at 31, *Yates v. United States*, 574 U.S. 528 (2015) (No. 13-7451). The very real consequence of the expansiveness and ambiguity is that those in government and industry bear the burden of guessing the forms of misconduct that federal prosecutors will next put in their cross-hairs.

B. Jury Instructions On The Right To Control Demonstrate The Doctrine's Elasticity And Incoherence

Another reason to invalidate the right to control theory is that the jury instructions are so unintelligible that juries are not able to reliably apply them, even taking into account the usual presumption

that jurors follow instructions. *See Penry v. Johnson*, 532 U.S. 782, 798-99 (2001) (reversing the denial of a habeas petition in a capital case where a "confusing" jury instruction made it "logically and ethically impossible for a juror" to follow the instructions on consideration of mitigating evidence); *Bollenbach v. United States*, 326 U.S. 607, 613 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue"). The right-to-control theory invites jurors to criminalize deceit without contemplation of harm.

The right-to-control instruction in which the Second Circuit found no infirmity below stated, in relevant part:

> [I]n order to prove a scheme to defraud, the government must prove that the alleged scheme contemplated depriving Fort Schuyler of money or property. Property includes intangible interests such as the right to control the use of one's assets. The victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets. In this context, "potentially valuable economic information" is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or

> the economic risks of the transaction. If all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of proof. In this regard, economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received.

Ciminelli App. 60a-61a; *see also Percoco*, 13 F.4th at 175 (noting that "this charge closely tracked the language set forth in our prior opinions").

This instruction, which aggregates and condenses three decades of at times internally inconsistent Second Circuit law, is complex, dense, and confusing, whether heard or read. Nor does parsing the instruction improve one's ability to apply it reliably. The instructions require the jury to find that the defendants' scheme "contemplated depriving Fort Schuyler of money or property," and permit the

jury to consider a "right to control the use of one's assets" as "property." It adds that this "property" can be deemed "injured" when the victim "is deprived of potentially valuable economic information," which it defines as information "that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction."

These instructions permit a juror to convict based on reasoning that in a transaction, all information has potential economic value, thus making deceit the only issue the juror has to resolve. The juror could think that anyone would assess the "economic risks of the transaction" differently with knowledge that he or she had been lied to. By such reasoning, the deceit itself becomes the basis for finding proven the additional and different element—of contemplated economic harm.

It puts no guardrails around such juror logic, moreover, to instruct that "if all the government proves is that the defendant caused Fort Schuyler . . . to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm," the government will have failed to meet its burden. Under this formulation, the government is only required to prove that "expos[ure] to tangible economic harm" was caused by the scheme (*i.e.*, a consequence), not that defendants intended an exposure to tangible economic harm (*i.e.*, defendant's state of mind). The Second Circuit interpreted the requirement precisely this way below, stating that the law requires

"misrepresentations or non-disclosures [that] can or do *result in* tangible economic harm." 13 F.4th at 170 (emphasis supplied) (quoting *Finazzo*, 850 F.3d at 111).

The Second Circuit acknowledged below that the right-to-control theory demands *more* than a "scheme[] that do[es] no more than cause their victims to enter into transactions they would otherwise avoid." 13 F.4th at 171. The court based its affirmance of Petitioners' convictions on its conclusion that Petitioners' conduct crossed the "fine line" that separates such non-crimes from mail and wire fraud because the "scheme[] . . . depend[ed] for [its] completion on a misrepresentation of an essential element of the bargain." *Id.* (citing *Shellef*, 507 F.3d at 108).

But a lie intended to induce the victim to enter into a transaction it would otherwise avoid—deceit—is *all* the jury found if it concluded that the defendant merely deprived a counterparty of potentially valuable economic information without intending to cause economic harm. The *sine qua non* of property fraud—an intent to deprive a victim of property—has been eliminated.

In addition, the very fact the Second Circuit deemed necessary to affirm the convictions was not one the instructions asked the jury to find. The jury was never instructed that it had to find the "misrepresentation of an essential element of the bargain." In fact, the court *rejected* the proposed defense instruction that the jury must acquit

Petitioners if Fort Schuyler "received, and was intended to receive, the full economic benefit of its bargain." C.A. App. 960-61, 1439, 1449.

An individual's liberty should not depend on jury instructions that define the purported crime in such broad and malleable terms as is the case under the Second Circuit's right-to-control theory. If Congress were to enact a statute setting forth an offense in such terms—a virtually unthinkable proposition—such a law surely would be struck down as unconstitutionally vague. *Cf. Skilling*, 561 U.S. at 411 n.44 ("If Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing by a public official or private employee,' it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."). An equally indefinite and manipulable judge-crafted jury instruction, issued without Congress' imprimatur, is no more valid.

II. THE SECOND CIRCUIT'S RULING UNDULY EXPANDS HONEST SERVICES FRAUD TO NON-GOVERNMENT OFFICIALS AND INTRODUCES UNCERTAINTY AS TO WHO OWES A FIDUCIARY DUTY TO THE PUBLIC.

A. This Court Has Repeatedly Limited The Doctrine Of Honest Services Fraud.

Over thirty years ago, in *McNally v. United States*, the Court rejected "honest services fraud"

entirely, holding that wire and mail fraud crimes require a scheme to deprive a victim of tangible property. 483 U.S. at 360. In doing so, the Court rejected a concept with "outer boundaries" that were "ambiguous" and "involve[d] the Federal Government in setting standards . . . of good government for local and state officials." *Id.* Even after Congress codified honest services fraud in 18 U.S.C. § 1346, this Court has made clear that "not every corrupt act by state or local officials is a federal crime," *Kelly*, 140 S. Ct. at 1574.

One key limitation on honest services fraud in the context of a public corruption prosecution is that the defendant must have committed an "official act," a term borrowed from the federal bribery statute. *See McDonnell*, 136 S. Ct. at 2368. An official act "must involve a *formal exercise of governmental power* that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2372 (emphasis supplied). Without the "official act" requirement, a government official could be prosecuted for honest services fraud just for engaging in legitimate constituent services, like arranging a meeting between a supporter and a government agency.

The "official act" in question must also be committed by a public *official* and not by some well-placed lobbyist or government "insider." *See id.* at 2368. The Court's insistence that there be "a formal exercise of governmental power" demonstrates that honest services fraud is intended to protect the public

from fraudulent schemes by government officials and not by their friends, family, or associates. *Id.*

This is not mere inference from the logic of *McDonnell*. It is supported by reference to the very text of the decision. Three times the Court used the term "official position" to describe the requirements of an official act, s*ee id.* at 2370 (two mentions), 2372 ("[A] public official may . . . us[e] his official position to exert pressure on another official to perform an 'official act' . . . ."). Yet despite this express reference to an "official position," the court below dismissed this portion of *McDonnell* as merely dictum, a "passing reference." 13 F.4th at 196.

McDonnell rejected the same expansive and ambiguous reading the government offered in this case. Here, as in *McDonnell*, "[i]n the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." *McDonnell*, 136 S. Ct. at 2372. The Court's rejection of this view was based on its concern not to "cast a pall of potential prosecution over" legitimate interactions between public officials and their constituents, "rais[ing] significant constitutional concerns." *Id.* Faced with such ambiguous application of honest services fraud "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.*

In affirming, the Second Circuit relied almost exclusively on *Margiotta*, a case that extended the judicially-created version of honest services fraud beyond formal government officials. But *Margiotta* predates and was abrogated by *McNally*, and has since been criticized by other Circuit Courts of Appeals. *E.g.*, Aiello & Gerardi Pet. 22. *Margiotta* was wrongly decided to begin with, *e.g.*, Percoco Pet. 21, and there is surely no basis to use that decision to extend honest services fraud in a manner that conflicts with this Court's jurisprudence in *McNally*, *Skilling*, and *McDonnell*.

B. To Prevent The Punishment Of Ordinary Advocacy, The Court Should Clarify That A Defendant Must Have An "Official Position" To Owe a Duty Of Honest Services To The Public.

The Second Circuit's decision here implicates the same types of concerns that animated this Court's decisions limiting the definition of honest services fraud. At the time of the conduct alleged in the indictment, Mr. Percoco held no government office; he was a private citizen working for the re-election campaign of then-Governor Andrew Cuomo. Without an official position, Mr. Percoco lacked both a fiduciary duty to the public and the ability to undertake an "official act" that is an essential requirement of honest services fraud. Likewise, Mr. Aiello should not have been prosecuted on the theory that he participated in a scheme to "bribe" Mr. Percoco—a person who held no official position.

The trial court's jury instructions lay bare the danger that official acts can be committed by people who are not government officials. Here, the jury was instructed that Mr. Percoco "d[id] not need to have a formal employment relationship with the state in order to owe a duty of . . . honest services to the public," so long as he "dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government." *See* 13 F.4th at 187. In other words, any person who has the ability to persuade a government official to act, based on their having a "special relationship" with that official, is liable to be prosecuted for honest services fraud. With such a blurry line between legal and illegal conduct, it will also be impossible for lawyers to give reliable advice to their clients about whether their intended conduct is permitted.

The Court should resolve this uncertainty by making explicit what it strongly suggested in *McNally* and *McDonnell*: that the defendant in an honest services fraud prosecution must hold an "official position." Absent such clarification, the Government's overly broad application of honest services fraud will sow uncertainty about the line between criminal honest services fraud and legitimate and constitutionally-protected government advocacy.

In our democratic system, many private actors exert various degrees of influence or even "control" over the federal, state, and local governments. Individuals and companies spent approximately $3.5 billion lobbying the government in 2020—no doubt

because they expect their efforts to affect government decisions. *See* Karl Evers-Hillstrom, *Lobbying Spending Nears Record High In 2020 Amid Pandemic*, Open Secrets (Jan. 27, 2021).[6] And beyond professional lobbyists, there are a plethora of interest groups, political action committees, and think tanks that play a role in government decisions. Public officials' families and friends inevitably have influence over that official's thinking and decision making—their involvement now can be scrutinized and subjected to prosecution without any predication.

If the Government can prosecute a private campaign operative such as Mr. Percoco, what stops it from charging an influential lobbyist, an environmental activist, or even a government official's spouse? The answer is nothing, which is why this Court should step in—as it has in other cases where the Government was afforded discretion to decide the difference between legal and illegal conduct. *See*, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (rejecting an interpretation of a criminal statute that would turn "millions of otherwise law-abiding citizens [into] criminals").

As was the case in *McDonnell*, the particular conduct prosecuted by the Government in this case can seem easy to fault. Even so, the solution is not over-criminalization or allowing prosecutors to decide how to interpret federal statutes. "Fair warning and

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[6] https://www.opensecrets.org/news/2021/01/lobbying-spending-nears-record-high-in-2020-amid-pandemic/ (last visited Mar. 21, 2022).

related kinds of unfairness" are undermined. *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). The overbroad interpretation also creates the risk of diminishing public participation in government—the very same concern that caused the Court to define official act strictly in *McDonnell*. *See* 136 S. Ct. at 2372.

CONCLUSION

For the foregoing reasons and those stated in the petitions, the petitions for a writ of *certiorari* should be granted.

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Respectfully submitted,

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