No. 21-1161

In the
Supreme Court of the United States

STEVEN AIELLO AND JOSEPH GERARDI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In case after case, this Court has articulated well-defined limits for the federal fraud statutes and rejected their use to enforce notions of "moral uprightness." The opinions below defy these decisions and invite prosecutors to criminalize vast swaths of ordinary behavior. In the Second Circuit, paying an influential private citizen to lobby public officials constitutes honest-services fraud if a jury finds the lobbyist "dominates and controls" officials who "rely" on his advice. And people can commit property fraud if they fail to disclose "potentially valuable economic information" in business dealings. These expansive holdings conflict with rulings by the Third Circuit as to honest-services fraud and the Sixth, Ninth, and Eleventh Circuits as to property fraud.

The government does not seriously dispute that if these decisions raise the questions presented, they are wrongly decided, divide the circuits, and raise serious constitutional problems. Instead, it strains to recast them as innocuous one-offs. But no reasonable reader —or prosecutor intent on punishing whatever she deems unethical—can interpret these precedential rulings so narrowly. Fraud offenses are among the most commonly-charged federal crimes, and a disproportionate number are brought in the Second Circuit. This Court's intervention is critical to prevent further abuses of these serious federal felonies.

I. HONEST-SERVICES FRAUD

By unequivocally "reaffirm[ing]" its long-abrogated *Margiotta* decision, Pet.App.25a, the Second

Circuit vastly expanded honest-services fraud. A person who lacks public office or authority can be imprisoned if a jury thinks he "dominated or controlled any governmental business" and government officials somehow "relied" on him. Under the Second Circuit's holding, lobbying and many other protected democratic activities constitute federal offenses. Pet.14-22.

The government doesn't dispute that such a result would be unconstitutional and would conflict with the Third Circuit's pointed rejection of *Margiotta*. Instead, it pretends the decision below covers only two types of private citizens: those about to take public office, and former officials who never really left. *E.g.*, BIO.(I), BIO.14. The government ignores the myriad other scenarios swept in by the circuit's expansive holding. Its attempts to defend the opinion below are unavailing.

A. The Government's Attempt To Narrow The Second Circuit's Holding Fails

The government's "once-and-future" limitation is a figment of its imagination. The Second Circuit unambiguously held that §1346 reaches all "private individuals who are relied on by the government and who in fact control some aspect of government business." Pet.App.26a. It expressly "reaffirm[ed] *Margiotta*'s reliance-and-control theory in the public-sector context"—categorically and without qualification. Pet.App.25a. That unequivocal reaffirmance of *Margiotta* refutes the government's claim that the circuit did "not directly address, or expressly embrace, th[e] result" in or breadth of *Margiotta*. BIO.15-16.

The government's revisionist history is also inconsistent with how this case was tried. The alleged conspiracy concerned assistance Percoco was to provide when *not* in government. The Second Circuit identified the basis for the conspiratorial agreement as Aiello's email requesting Percoco's "help" with the LPA issue "*while he is off the 2nd floor* working on the Campaign." Pet.App.7a. The jury wasn't instructed to consider Percoco's prior or future government employment. Instead, jurors were told to apply *Margiotta*'s reliance-and-control standard for fiduciary status, Pet.App.86a—the same broad, amorphous test the Second Circuit affirmed.

The consequences are breathtaking. Under the circuit's decision, paying a private citizen to lobby the government is a crime if a jury thinks his influence in government affairs is "control" or "domination." A person's liberty should not turn on such a subjective and indeterminate standard.

B. The Government Fails To Refute The Conflicts

1. This Court has already recognized that read literally, §1346 would be unconstitutionally vague. That is why it confined §1346 to bribes and kickbacks received in violation of known fiduciary duties. *Skilling v. United States*, 561 U.S. 358, 407-08 & n.41 (2010). The ruling below defies that directive. Pet.15-18.

The government claims *Skilling* provided only "examples" of fiduciary relationships. BIO.17-18. But it ignores the passage's context. The Court was responding to Justice Scalia's argument that even if limited to

bribes and kickbacks, §1346 violates due process because of the "fundamental indeterminacy" of fiduciary duty law—which he illustrated with *Margiotta* itself. 561 U.S. at 417-21. To alleviate that concern, the Court insisted §1346 applies only where "[t]he existence of a fiduciary relationship" is "*beyond dispute*," such as with public officials and constituents. *Id.* at 407 n.41.

2. The government also misreads *McDonnell v. United States*, 579 U.S. 550 (2016), emphasizing its proviso that "official act" includes "exerting pressure" on officials. BIO.18. But what this Court said was: "A *public official*" may perform an official act "*by using his official position* to exert pressure on *another official* to perform an 'official act.'" 579 U.S. at 572. Under *McDonnell*, mere pressure is insufficient. The person applying the pressure must be a public official *and* must use her official position to exert the pressure. Otherwise, pressuring a public official is just lobbying—not fraud.

3. The government emphasizes *Skilling*'s observation that §1346's "prohibition on bribes and kickbacks draws content" from federal statutes that proscribe "similar crimes," including 18 U.S.C. §201. BIO.12-14, 16-18.

But the Court was addressing the meaning of "bribe" and "kickback." *Skilling* didn't import all the provisions of §201 or any other statute into §1346. And *Skilling* cited 18 U.S.C. §666, which *excludes* private citizens, in the same string as §201. Section 666 requires a government "agent"—someone with actual authority "to act on behalf of another person or a government." 18 U.S.C. §666(d)(1). Here, the jury found,

through its §666 acquittals, that Percoco lacked such authority.

Regardless, §201 sheds no light here. True, its "public official" definition includes those serving "any official function" for the federal government. BIO.13 (citing *Dixson v. United States*, 465 U.S. 482 (1984)). But this only covers parties like the *Dixson* defendants, who were formally "charged with abiding by federal guidelines," and thus had "official federal responsibilities" to administer federal funds. *Id*. at 497. Indeed, the §201/*Dixson* standard is virtually identical to that applied to the §666 count here; the jury was instructed to convict only if Percoco was "authorized to act on behalf of state government" and not if he merely "exercise[d] responsibility or control." C.A.App.656. And it acquitted on that count.

The government highlights §201's coverage of those "selected to be a public official," to ensure they don't sell their office in advance. BIO.13-14. But this was not the government's theory below. The jury was never asked to consider it, nor was it the basis for affirming the conviction. As the Second Circuit explained, the agreement was for Percoco to assist COR only while "off the 2nd floor working on the Campaign." Pet.App.7a.

4. For the same reasons, §201 provided no fair "notice." BIO.16-17. Nor could "pre-*McNally* case law," *ibid.*; as the Second Circuit acknowledged, *Margiotta* ceased being "precedent" once abrogated by *McNally*. Pet.App.26a.

5. The government claims the Third Circuit never considered a "once-and-future state official like

Percoco." BIO.19-20. But as discussed, the decision below embraces the entire *Margiotta* theory. The Third Circuit considered and expressly rejected *Margiotta*, because it "extends the mail fraud statute beyond any reasonable bounds." *United States v. Murphy*, 323 F.3d 102, 104 (3d Cir. 2003). The circuit split could not be any riper for review.

* * *

This case presents an ideal vehicle. The government says Percoco took other acts after returning to office (BIO.15, 20), but the Second Circuit deemed them irrelevant because of a separate erroneous jury instruction. It affirmed the honest-services conviction solely because Aiello requested Percoco's assistance while "off the 2nd floor." Pet.App.20a-23a.

The issue is squarely presented. The ruling below tramples First Amendment rights to meaningfully petition one's elected representatives, intrudes on the province of state and local governments, and cries out for review.

II. PROPERTY FRAUD

The government effectively concedes §1343 requires "tangible economic harm" and that withholding "potentially valuable economic information" is not property fraud. Instead of defending right-to-control's merits, it pretends the question is not presented.

But the Second Circuit's decision could not be clearer. It affirmed convictions on the theory that depriving FSMC of "potentially valuable economic infor-

mation" proves property fraud. This holding is irreconcilable with the law of several circuits and this Court's precedents. The government's tactic of securing convictions under right-to-control and then recasting them as lies-for-money to oppose certiorari has worked before. But this case represents the most extreme application of the doctrine ever. It is time for this Court to put an end to the dangerously manipulable theory.

A. The Government's Attempt To Narrow The Second Circuit's Holding Fails

The government claims the question presented is not implicated because the decision and jury instructions below required "tangible economic harm." BIO.22-24. But this is simply untrue, as key language *omitted* from the opposition brief makes plain.

1. The opinion's "Applicable Law" section defines "harm" as mere deprivation of information. Pet.App.59a-60a. Immediately after mentioning "tangible economic harm," it says: "A '*cognizable harm occurs* where the defendant's scheme denies the victim the right to control its assets *by depriving it of information* necessary to make discretionary economic decisions.'" Pet.App.60a. It then holds: "In a right-to-control case, 'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—*it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision*.'" Pet.App.61a.

The "Analysis" follows the same pattern, finding harm because petitioners failed to disclose the truth

about the RFP: "Thus, in rigging the RFPs to favor their companies, defendants deprived Fort Schuyler of 'potentially valuable economic information' that would have resulted from a fair and competitive RFP process." Pet.App.61a-62a (citation omitted). Ergo, the failure to disclose itself established the harm.

2. The jury instructions likewise failed to require injury to "property." The government selectively quotes language out of context (BIO.23-24) but ignores instructions inviting the jury to find fraud based solely on deprivation of information. Read as a whole, the instructions permitted jurors "to convict based on reasoning that…all information has potential economic value, thus making deceit the only issue the juror has to resolve." NYCDL.Br.18; *id.* at 15-20.

The jury was told FSMC's "right to control the use of its assets" (the "property") "is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." Pet.App.87a-88a. In other words, proof that information was withheld establishes fraud. This low bar was reinforced by the intent instructions. They required "a specific intent to deceive, *for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information*," Pet.App.89a, and said a belief that "Fort Schuyler would get a good deal does *not* mean that the defendant acted in good faith," Pet.App.73a.

The government ignores these instructions, instead focusing on language requiring "expos[ure] to tangible economic harm." BIO.23. But the government omits what immediately followed—an instruction that "*economic harm is not limited to monetary*

loss." Pet.App.88a. How can "harm" be "*economic*" yet not involve "*monetary* loss"? The instructions rendered "harm" meaningless by stripping "tangible economic" out of the analysis.

The instruction that harm would be proven if the scheme "created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received" (Pet.App.88a; BIO.23) adds nothing. If the government had proved defendants "ripped off" FSMC by delivering less than it paid for, that might have cured all the errors. But that wasn't its theory.

Per the Second Circuit, what FSMC expected to "receive" was *not* the thing it actually paid for—the construction of particular buildings—but "a competitive process." Pet.App.63a. The court said: "The bargain at issue was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. *Depriving Fort Schuyler of that information was precisely the object of defendants' fraudulent scheme*…." Pet.App.65a. That was how the government described its theory at trial, and how the district court understood it. *E.g.*, C.A.App.996, 849-52. Petitioners' convictions were obtained and affirmed on that theory, and it is ripe for review.

B. The Government Fails To Refute The Conflicts

The Second Circuit's holding conflicts with other circuits' law and this Court's decisions.

1. Other circuits unambiguously reject the Second Circuit's right-to-control doctrine. The government highlights factual differences, but none matter. The pertinent question is, what would the outcome have been here under the law of the Sixth, Ninth, or Eleventh Circuit? The answer is reversal: In each of those Circuits, merely depriving someone of potentially valuable economic information is not property fraud.

The government says *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), and *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), only apply where defendants are buyers who deceive sellers "about the ultimate disposition of the items that [they] purchased at fair market value." BIO.27. But nothing in *Sadler* supports any such limit. In fact, the *Sadler* court expressly rejected the proposition that "the right to accurate information" is a property right, citing this Court's decisions in *McNally* and *Cleveland*. 750 F.3d at 591. And in *Bruchhausen*, the Ninth Circuit expressly "disagree[d]," 977 F.2d at 468 n.4, with a Second Circuit decision affirming convictions on the basis that a lack of intended or actual "pecuniary harm does not make the fraud statutes inapplicable." *United States v. Schwartz*, 924 F.2d 410, 421 (2d Cir. 1991).

United States v. Yates deepens the Ninth Circuit's conflict with the Second. The Ninth Circuit held the government's theory "legally insufficient," per *Sadler*, because "there is no cognizable property interest" in "accurate information" about a bank's "financial condition." 16 F.4th 256, 265 (9th Cir. 2021). The government tries to distinguish *Yates* and *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), by re-

hashing its spurious argument that the jury instructions here required economic harm. As explained, that is false.

2. The government's half-hearted defense of right-to-control's merits is equally specious.

It suggests the right to control one's assets is an "economic interest" that "is a form of property covered by the wire-fraud statute." BIO.22. But the cases it cites say no such thing. The "'economic' interest" discussed in *Pasquantino v. United States*, 544 U.S. 349, 357 (2005), was "the right to be paid money"—a right that (unlike the right to control one's own money[1]) "has long been thought to be a species of property," *id.* at 356. And *Dickman v. Commissioner*, 465 U.S. 330 (1984), did not concern wire fraud; it held that providing an interest-free loan is a "gift" under the tax code, because "there is a measurable economic value associated with the use of the" transferred property. *Id.* at 337.

Treating the right to control property as *itself* property defies the statutory text, which requires a scheme "for obtaining money or property" *from the victim*. 18 U.S.C. §§1341, 1343. A fundamental difference between honest-services and property fraud is that in traditional property fraud, "the victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other, [whereas] the honest-services doctrine target[s] corruption that lack[s] sim-

[1] Pet.28-30; Scholars'.Br.12-15.

ilar symmetry." *Skilling*, 561 U.S. at 400. Withholding "potentially valuable economic information" that a defendant already possesses lacks this symmetry.

The government disagrees, citing *Carpenter v. United States*, 484 U.S. 19 (1987). BIO.24. But the information there *was* property, and defendants *obtained* it through fraud. The victim's exclusive *right* to use its confidential business information gave the information its financial value, but the information itself, not the right to use it, was the "property." As the Court explained, a newspaper's articles are its "stock in trade…to be distributed and sold to those who will pay money for it." *Id*. at 26. By using deceitful means to *obtain* the information before the newspaper published it, defendants inflicted financial harm, because the newspaper could no longer sell its information. Here, by contrast, the defendants did not take or obtain anything with financial value from FSMC. As the Ninth Circuit explained, the information in *Carpenter* had value, whereas "'the right to make an informed business decision'…cannot." *Yates*, 16 F.4th at 265.

The government strains to distinguish *Sekhar v. United States*, 570 U.S. 729 (2013), because the Hobbs Act speaks of "obtaining of property from another," whereas "from another" is absent from the fraud statutes. BIO.25. But *Sekhar* deemed this distinction immaterial. It held that Hobbs Act "property" includes only things defendants can "obtain" from victims, in part because *that is how this Court had interpreted the mail fraud statute*: "We held [in *Cleveland*] that a 'license' is not 'property' while in the State's hands and so cannot be 'obtained' from the State." 570 U.S. at

737 (quoting *Cleveland v. United States*, 531 U.S. 12, 20-22 (2000)).

3. This is an ideal vehicle, because the government's theory, the jury's verdict, and the circuit's affirmance were all premised on the notion that depriving someone of "potentially valuable economic information" constitutes property fraud. Unlike prior cases where certiorari was denied, the proof here would not have supported a legally valid theory even if the jury had been asked to consider one. The government presented no evidence that any other developer was deterred from competing for the Syracuse RFP or could have offered a better deal. Indeed, post-indictment, FSMC continued paying COR and hired it for additional work. C.A.App.2601. And the Buffalo witnesses (BIO.22, 29) didn't say what they would have charged for *any of* the particular projects FSMC commissioned. As the district court emphasized, they couldn't know "what the development fee should be in this case." C.A.App.1291.

The government couldn't prove property fraud, so it relied on the right-to-control. True to its playbook, after securing a conviction on that basis, the government now refuses to defend the doctrine it invoked. This Court should disregard the government's prevarication, and at last settle whether that doctrine is valid.

CONCLUSION

This Court should grant certiorari and reverse.

Respectfully submitted,

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