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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government admits Percoco was "nominally" a private citizen when he agreed to work for COR, when he accepted payment from COR, and when he called a staffer on COR's behalf. But the Government derides as too "rigid" and "formalist" the notion that only an official, employee, or agent of the state owes a duty of honest services to the public. Govt.Br.25. It insists Percoco owed the public a duty despite being none of those, and so committed bribery by agreeing to work for COR. Specifically, the Government says a private citizen owes the public his honest services if he either "exercises the functions of a government position with the acquiescence of relevant government personnel," or "has been selected to work for the government." *Id.* And it claims Percoco satisfied both tests.

Neither theory justifies the convictions. The first—the "functional official" theory—appears to be just a restatement of *Margiotta*'s reliance-and-control test, notwithstanding the Government's efforts to distance itself from that much-maligned aberration. If officials *listen to you*, the Government claims, because you are a friend, family member, important constituent, major donor, former official, future official, or for any other reason—you become a functional official, bound to act in the public interest. But it offers no foundation for that bizarre, unprecedented conception of fiduciary duty, which turns *political influence* into *affirmative obligation*. Instead, the Government rests almost entirely on a *different* bribery statute, 18 U.S.C. § 201. Yet even that law does not stretch nearly far enough to encompass *Margiotta*. Nor does the Government ever explain why another statute's outer boundaries should define § 1346's core.

To the contrary, both this Court's precedents and constitutional principles prohibit such a reading. This Court in *Skilling v. United States* saved § 1346 by narrowing it to "core," "classic," "paradigmatic" cases. 561 U.S. 358, 409-11 & n.43 (2010). That hardly invites prosecutors to take the broadest text they can find in any other bribery statute, identify the harshest precedent construing it, stretch still further—and jam all that into § 1346. That is a rule *against* lenity. And the Government is equally cavalier in dismissing the other constitutional objections. Judge Winter, Chief Judge Becker, and many scholars warned about how *Margiotta*'s breadth threatened the First Amendment and its indeterminacy offended due process, but they were apparently all seeing ghosts: The Government reassures that donors, lobbyists, and family members "clearly" face no threat. Govt.Br.40. But it articulates no reasoned distinction, let alone a clear one.

That leaves the Government's alternative theory—that "future officials" categorically owe duties to the public. But even the Government implicitly admits that theory was never charged to the jury, making it a non-starter. In any event, the Government is only half-right on the law. Future officials owe no duties until taking office. Of course, it is a crime for them to take bribes *now* in exchange for exploiting the *future* powers they will assume upon taking office. But this case does not present that "sale of future office" scenario—which is why *that* crime was never charged. As the district court observed, there was no evidence that Percoco committed to help COR by leveraging the powers he would gain on return to state employment. Indeed, he did not even decide to return until *after* entering the allegedly corrupt agreement.

Ultimately, the correct rule of law is exactly what one would expect: When a citizen enters service as an official, employee, or agent of the state, he assumes *de jure* powers and is bound to use those powers in the public interest. But private citizens are otherwise free to advance their own interests through whatever *de facto* influence they may exert. Percoco had no official powers at the relevant times, only political influence. Section 1346 does not criminalize the sale of influence. For that simple reason, this Court should reverse.

ARGUMENT

I. THE "FUNCTIONAL OFFICIAL" THEORY FAILS.

The Government argues that anyone owes a duty of honest services to the public if he "exercises functions of a government office and is treated by other relevant parties as possessing powers of the office." Govt.Br. 26. That requires some unpacking. Someone who is not *legally* an official cannot *legally* exercise official power. Nor is the Government referring to a scenario where there is confusion over whether someone holds office. Rather, what the Government means is that if state employees "treat someone as an officeholder" by *listening to him*, that person becomes a "functional" official and assumes a duty to the public. Govt.Br.27.

Applying that theory, the Government says Percoco was "functionally a public official" because state employees continued to seek out his views and follow his lead even after he left state employment to work on the campaign. Govt.Br.30-32. As one witness put it, Percoco "spoke for the governor" in the sense that he "knew how the governor felt and thought" on issues and therefore was a "good guide" to what they should do, despite carrying no "legal authority." JA.314.

Although the Government strenuously avoids citing or endorsing *Margiotta*—it appears on only two pages of the Government's brief (*see* Govt.Br.V)—this test is not materially different from the Second Circuit's "de facto control" and "reliance" standards. *United States v. Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982); *accord* JA.667 (holding that private citizens owe duties to the public if they are "relied on by the government" and so "in fact control" government decisions). Indeed, the Government admits as much by contending that the jury instructions—drawn from *Margiotta*—"correctly conveyed" this functional-official theory. Govt.Br.33. So while the Government continues to maintain that "this case does not go as far as *Margiotta*" on its *facts* (Govt.Br.35), the Government advances a rule of *law* that appears to be identical to *Margiotta*'s.

That rule, purporting to reach the power behind the throne, fails for the same reasons as *Margiotta*'s does. It is legally groundless, doctrinally foreclosed, and constitutionally offensive.

A. The Government Offers No Foundation for Its Novel Theory of Fiduciary Duty.

As the Government admits, honest-services fraud requires the existence of a predicate "fiduciary duty." Govt.Br.19. And Percoco showed that—as a matter of common law—one party's unilateral reliance does not create a fiduciary duty. Percoco.Br.24-25. The fact that someone listens to you does not generate an affirmative obligation to act for his benefit; there must instead be consent to assume a fiduciary role. *Id.* While *Margiotta* tried to root its fiduciary theory in common law principles, the court misunderstood the authorities it cited. *See* Percoco.Br.25-28.

In response, the Government says … nothing at all. *Margiotta* at least tried to articulate some historical foundation for its theory; the Government makes no such effort. Nowhere does it explain how a public employee's willingness to be "order[ed] … around" by a private citizen (Govt.Br.27) imposes a fiduciary duty on the latter. This concession-by-omission means the key premise of *Margiotta* and the "functional official" theory—that if your instructions are followed, you owe a duty of honest services—has no basis in law. Nor, despite its repeated emphasis of these facts, does the Government explain how intermittent use of a phone, office, or desk creates any duty to the public.

These omissions are not academic. *Skilling* limited § 1346 to certain schemes undertaken "in violation of a fiduciary duty." 561 U.S. at 407. Rejecting a vagueness objection to that framework, the Court reasoned that background law identifies the "specific relationship[s] between two parties" that give rise to fiduciary obligations, gave a series of examples, and observed that the existence of a duty is usually "beyond dispute." *Id.* at 407 n.41. The Government responds that *Skilling*'s examples did not cover the "universe" and the Court did not require a fiduciary duty to be beyond dispute "in every case." Govt.Br.37. Even if so, the Government does nothing to establish that any fiduciary duty properly exists *here*.

Instead of establishing any *duty* to the public, the Government claims there is *harm* to the public from letting private citizens exert influence for payment. Govt.Br.28. That puts the cart before the horse. *Any* act of lobbying might be said to "harm" the public, by pushing a parochial agenda. Without a *duty* to the public, however, that "harm" is no crime.

The Government's claim of harm to the public is also overstated on its own terms. Its concern is that the private citizen is "outwardly purporting" to act in the public interest when "in reality he 'has been paid.'" *Id.* But if the problem is concealment, the solution is disclosure. This Court has long upheld registration and disclosure rules for lobbyists. *See United States v. Harriss*, 347 U.S. 612, 625-26 (1954). Meanwhile, if officials kowtow to private citizens despite knowing the latter's self-interests, the only breach of fiduciary duty (and of oath of office) is by those abdicating officials, not the citizens they happen to heed.

Turning from law to theory, the Government's lack of foundation is equally glaring. As Percoco explained, our republican form of government presumes that private citizens will press their own self-interests to the officials who serve as guardians of the public good. Percoco.Br.21-23. Treating a citizen as a functional official because the real officials *choose to listen to him* blurs the dichotomy at the core of our political system.

Failing to respect that distinction, the Government frames the issue as whether Percoco could "immunize" himself by "abstaining" from a legal relationship with the state. Govt.Br.17, 28. That almost presupposes that citizens are vassals of the state and fiduciaries of the public. At least in the United States, that is backwards. Private citizens are not tools of the state; only by assuming public office and taking an "oath" does one become "set apart from ordinary citizens" and "subject to special restraints." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 57-58 (2015) (Alito, J., concurring). Accordingly, it is not Percoco who must show "immunity"; it is the Government that must prove he owed a legal duty. It has failed to do so.

B. The Government Misunderstands This Court's Precedents.

The *Margiotta*-esque "functional official" theory is also directly foreclosed by this Court's precedents. Most obviously, *Skilling* saved § 1346 by confining it to "core," "paramount," "classic," "heartland," "paradigmatic" cases of "bribes or kickbacks," as to which lower courts had reached "consensus" before *McNally v. United States*, 483 U.S. 350 (1987), rejected the honest-services theory. *Skilling*, 561 U.S. at 404, 409-11 & n.43. Yet the "functional official" theory, which is materially indistinguishable from the *Margiotta* test, is exotic (not "core" or "heartland") and the target of widespread criticism (not "consensus"). *See* Percoco.Br.29-31.

The Government denies "the circumstances here fall outside pre-*McNally* case law," pointing to *Dixson v. United States*, 465 U.S. 482 (1984), which construed a different federal bribery statute, 18 U.S.C. § 201. Govt.Br.36-37. Indeed, § 201 and *Dixson*'s reading of it consume the bulk of the Government's defense of its functional-official theory. *See* Govt.Br.21-23, 26-27. The Government also invokes § 201 and *Dixson* in an effort to reconcile its theory with *McDonnell v. United States*, 579 U.S. 550 (2016). Govt.Br.38.

This line of argument has two manifest flaws. To start, *Dixson* was not an honest-services case; it thus is not part of the "body of pre-*McNally honest-services* law" to which *Skilling* referred. 561 U.S. at 405 (emphasis added). Nor is there any reason why the peculiarities of § 201, a detailed statute that occupies nearly five appendix pages (Govt.Br.1a-5a), should be read into the void of the 28-word § 1346.

Even indulging a mix-and-match approach, *Dixson* does not support the Government. It held that those who hold official responsibilities, owe official duties, and exercise official powers are public officials even if they do so pursuant to indirect delegation. That has nothing to do with the question here, which involves citizens who possess *no* official responsibilities, *no* official duties, and *no* official powers—only unofficial *influence*.

1. The threshold problem with reliance on *Dixson* is that it was a § 201 case, not an honest-services case. *Skilling* held that § 1346 refers to the "honest-services doctrine" developed pre-*McNally*. 561 U.S. at 404; *see also id.* at 407, 408, 410. By pointing exclusively to *Dixson*, the Government admits that its theory finds no rooting in *that* doctrine, and certainly cannot be characterized as within its "solid core." *Id.* at 407.

The Government therefore points to another part of *Skilling*, which said that limiting § 1346 to bribes and kickbacks was not too vague because that prohibition "draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes," § 201 included. *Id.* at 412. That hardly grants license to import the harshest jots and strictest tittles prosecutors can find in any other statute. To the contrary, *Skilling*'s point was that the *common core* of these statutes provides sufficient guidance to define "a bribery or kickback scheme." *Id.* That accords with *Skilling*'s consistent theme that limiting a statute to its "core" ameliorates vagueness concerns. *Id.* at 407. In other words, other bribery statutes can inform the meaning of § 1346 *when they converge*. But § 1346 is not some kind of prosecutorial most-favored nation, incorporating the outer reaches

of every federal bribery statute on the books. That would fly in the face of *Skilling*'s concerns about "fair notice" and the rule of lenity. *Id.* at 410, 412; *see also United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999) (rejecting "meat axe" approach).

And the issue here is one on which different bribery statutes take different approaches. Beyond § 201, *Skilling* cited 18 U.S.C. § 666 as a statute from which § 1346 "draws content." And § 666 applies only to "agent[s]," *i.e.*, those "authorized to act on behalf of" the state. 18 U.S.C. § 666(d)(1). The jury *acquitted* Percoco on the corresponding § 666 charge (Count 12), evidently because he was *not* a legal agent of the state. JA.649-51. So the Government must construe § 1346 as sweeping more broadly than § 666. But it never explains why, if the honest-services statute "draws content" from both § 201 and § 666, it should track the former but exceed the latter in this particular respect.

The Government admits that § 666's agency test is consistent with Percoco's position, but observes that lower courts have applied § 666 even in the absence of certain "formal trappings" of agency. Govt.Br.20 & n.4. For example, a contract deeming the agent an independent contractor does not control. *United States v. Hudson*, 491 F.3d 590, 594-95 (6th Cir. 2007). Of course, the same is true of the common-law agency inquiry. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("label of workers as independent contractors is not controlling"). Anyway, this set of cases is a red herring: Because the jury found that Percoco was not an agent, the proper definition of agency is not presented here. The Government must instead establish that even those who are *not* agents owe duties of honest services to the public.

Section 201 is thus ultimately a frolic and detour in this case. It is irrelevant to the pre-*McNally* doctrine that *Skilling* partially incorporated, and there is no other basis to read its outer edges into § 1346. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) ("[W]e 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'").[1]

2. Even assuming that any violation of § 201 would, *mutatis mutandis*, constitute a "core" § 1346 violation, *Dixson* does not embrace the Government's theory.

Dixson involved federal block grants dispensed to a city for "urban renewal programs." 465 U.S. at 484. Under the federal statute, "day-to-day administration of the federal program" was "delegated to State and local authorities." *Id.* at 486. Pursuant to federal regulations, the city officially designated a nonprofit as its "subgrantee" to administer the grants. *Id.* at 484. The nonprofit "voluntarily assumed the status" of federal subgrantee by entering grant agreements that, among other things, allocated federal funds to pay the nonprofit's employees. *Id.* at 487-88.

Two employees of that nonprofit were charged with bribery in connection with administering the federal funds. *Id.* at 485. They argued they were not public

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[1] The Government's only other basis for relying on § 201 is its claim that the parties "stipulated" to define bribery "by reference to" § 201. Govt.Br.21. But there was no such stipulation. The Government cites the decision below (JA.654), which in turn cites the district court's statement that "the parties here agreed to charge the jury" that § 201's "'official act' requirement applies to" § 1346. *United States v. Percoco*, No. 16-cr-776, 2019 WL 493962, at *5 n.12 (S.D.N.Y. Feb. 8, 2019). That agreement thus simply held the Government to § 201's "official act" element.

officials under § 201 because they were not "in privity with the United States." *Id.* at 490. They worked for the nonprofit, which contracted with the city, which in turn had agreed to administer the federal program.

A bare majority of this Court held that the statute was ambiguous, but that legislative history resolved the ambiguity in the Government's favor. *Id.* at 491. It held that the appropriate § 201 inquiry is whether one "occupies a position of public trust with official federal responsibilities," regardless of "the form of delegation of authority" to that person or the existence of a "direct" legal relationship with the United States. *Id.* at 494, 496. What matters is whether the person possesses "official responsibility" and "assume[d] … duties of an official nature." *Id.* at 499-500.

As an example of courts "properly constru[ing] the federal bribery laws," *Dixson* cited *United States v. Levine*, 129 F.2d 745 (2d Cir. 1942), which involved a marketing program whereby the Secretary of Agriculture appointed a "Marketing Administrator." 465 U.S. at 494-96 & n.15. That Administrator hired staff, who were paid "through a levy imposed on milk producers." *Id.* at 495 n.15. *Levine* held that such an employee, "in view of the responsible nature of his position," occupied "an official position acting on behalf of the United States," despite not being paid directly by the federal treasury. 129 F.2d at 747.

As applied to the facts in *Dixson*, the majority held that the nonprofit employees were public officials: "By accepting the responsibility for distributing these federal fiscal resources," the employees "assumed the quintessentially official role of administering a social service program established by the United States

Congress." 465 U.S. at 497. Although their federal authority had been delegated through the city and the nonprofit, these employees ultimately held "a position of public trust with official federal responsibilities." *Id.* Federal law "vest[ed]" in them "power to allocate federal fiscal resources"; that amounted to "positions of national public trust." *Id.* at 500. Moreover, these employees' salaries were "completely funded" by the federal government through the grants. *Id.* at 497.

This description exposes that *Dixson* does not come close to supporting the Government's *Margiotta*-like theory. *Dixson* held that a "direct employment or agency relationship" is not required (Govt.Br.23), but the key word is "*direct*." The employees there wielded official power by *delegation*, and the Court simply held "the form of delegation of authority" to be irrelevant. 465 U.S. at 496. The employees "occupie[d] a position of public trust," held "official federal responsibilities," and owed "duties of an official nature"—all because they assumed a "quintessentially official role." *Id.* at 496, 497, 500. That made them public officials. So too for the milk marketing employee in *Levine*.[2]

None of that remotely suggests that someone with *no* "official" responsibilities, *no* "duties of an official nature," *no* delegated authority, *no* power "vested" by law, and *no* government salary is still a public official. The Government's theory rests on none of that. It instead posits that a private citizen is "functionally" an official if those who *do* have official duties, powers,

[2] As the Government's parentheticals make clear, the lower courts have likewise applied *Dixson* to those who *indirectly* wield federal authority, such as employees of government contractors, private prisons, and other federal delegees. Govt.Br.23.

and responsibilities *defer* to the citizen because of his political influence or other reasons. That has nothing to do with *Dixson* and finds no support in the decision.

3. The Government's "functional official" theory—and its analogy to § 201 to defend that theory—is also irreconcilable with this Court's decision in *McDonnell*. *McDonnell* held that the *quo* of a federal bribe—an "official act"—must involve either a "formal exercise of governmental power" or the use of one's "official position" to provide advice to or impose pressure on another official. 579 U.S. at 571-72. A private citizen, however, has neither *de jure* governmental power to exercise nor an "official position" to leverage, so he *cannot* take official action. Percoco.Br.34-36.

Here too, the Government seeks refuge in *Dixson*, claiming that if the employees there could take official action under § 201, so too could Percoco. Govt.Br.38. But as explained, *Dixson* is far afield. Someone with "official" federal duties and vested federal power can take official action; a private citizen cannot.

The Government maintains that if a private citizen "pressur[es]" an official "to take an official act," that itself is also official action. *Id*. No. Pressure counts only when one "us[es] his *official position* to exert" it; only then is the official abusing his office for private gain. *McDonnell*, 579 U.S. at 572 (emphasis added). That is why a legislator's threat to enact legislation is official action, *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008), but a citizen's threat to campaign against that legislator is not. Both are pressure; only the former is *official*. *McDonnell* thus further forecloses the notion that private citizens with *de facto* influence can be guilty of taking "bribes."

C. The Government Wrongly Dismisses Serious Constitutional Problems.

Finally, the Government offers only weak responses to the array of constitutional problems with its test.

1. Percoco explained why a "functional" standard akin to *Margiotta* would, by blurring the line between public officials who exercise state power and private citizens who influence them, chill the latter activity—including lobbying, petitioning, and political speech.

The Government's short response is the definition of conclusory. It asserts that lobbyists and donors "do not exercise the functions of official government positions"—at least when they "act in their traditional roles," whatever that means—and "cannot reasonably fear" they would be swept up. Govt.Br.40. But on the Government's theory, one exercises the functions of an office if the officeholder listens to his directives. So if a Governor tells his staff to keep an important donor or constituent happy, that person would qualify as a "functional official." Same for a lobbyist who tells an agency director why certain action must be taken. If the director acquiesces, the lobbyist has exercised the functions of that office and is himself an official. And it is easy to imagine an official's son or sibling holding enough sway to make things happen; his petitioning activity would become fodder for prosecution too.

Those scenarios are no different from the facts here; at minimum, it is not credible to claim they "clearly" fall outside the Government's test. *Id.* And that lack of clarity itself "casts a shadow over" core First Amendment activity. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 240 (1985).

In short, the Government is "quite simply wrong in brushing aside the First Amendment." *Margiotta*, 688 F.2d at 140 (Winter, J., dissenting in part).

2. On federalism, the Government claims there is no "inconsistency" because Percoco's conduct "appears to run afoul of New York law." Govt.Br.41.

Even assuming that were true, it would miss the point. For one thing, whatever may "appear" to be true in this case, the Government's theory sweeps more broadly and would criminalize conduct even if state law permitted it. *See Margiotta*, 688 F.2d at 124 (declaring that "federal public policy" supersedes state law). For another, even if Percoco's conduct ran afoul of state "ethics laws" (Govt.Br.42), the Government's theory elevates that violation—a misdemeanor punishable by a $40,000 civil penalty, *see* N.Y. Pub. Off. Law § 73(18))—into a federal felony. That intrudes on the state's power "to 'set[] standards of … good government'" for its own officials. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020).

3. Last, the Government's "functional official" test, like *Margiotta*'s reliance-and-control standard, is too indeterminate to satisfy due process. Why would this test not extend to an official's relatives, former staff, "friends of the office," or others who attract deference for reasons good or bad? The Government points to *mens rea* (Govt.Br.39), but *Skilling* confirms that a subjective intent element cannot save an objectively "amorphous" criminal prohibition. 561 U.S. at 410.

The Government's central response is again *Dixson*; it apparently provided "sufficient notice" and rebuts workability concerns. Govt.Br.39. But as explained, *Dixson* is neither applicable nor analogous.

Moreover, the four *Dixson* dissenters plus Justice Scalia doubted that even § 201's relatively precise text supplied fair notice for the relatively official actions in *Dixson*. *See* 465 U.S. at 506 (O'Connor, J., dissenting); *United States v. R.L.C.*, 503 U.S. 291, 310 (1992) (Scalia, J., concurring in part and in the judgment) (condemning *Dixson* for using legislative history to read an "ambiguous" statute against a defendant). The decision thus certainly cannot justify reading the inchoate § 1346 to punish officials' friends, relatives, or informal advisors just because they are listened to.

II. THE ALTERNATIVE "FUTURE OFFICIAL" THEORY CANNOT SAVE THE CONVICTIONS.

Perhaps recognizing the weakness of the *Margiotta* rationale employed below, the Government weaves an alternative theory into its brief. It claims a citizen who "has been selected" as a public employee owes a duty of honest services, "even if his term of office has not yet begun." Govt.Br.25-26. It uses that idea to backstop the convictions, citing Percoco's return to the state payroll *after* the actions at issue. Govt.Br.29-30.

This new theory goes nowhere, because it is neither the one on which Percoco was convicted nor the one that the court below upheld. As the Government implicitly admits, the jury was not even charged on it. And that is because the theory does not fit the facts. There was no evidence that Percoco intended to return to state employment when he agreed to work for COR—the allegedly criminal act—let alone that his co-conspirators knew as much. The Government's new "future official" theory therefore cannot save the convictions here under any circumstances, and does not justify even a remand on Count 10.

In any event, the Government confuses the law. To be sure, unlike its *Margiotta*-type "functional official" test, this "future official" test has a kernel of merit. Although someone selected for office does not owe the public a duty *before* he assumes that office, he *will* owe one in the future—and commits honest-services fraud if he conspires to violate that *future* duty in exchange for bribes. But this case clearly does not involve that scenario, as even the district court agreed.

A. This Prosecution and Conviction Were Not Based on a "Future Official" Theory.

The Government's theory that Percoco owed duties because he had been "selected" for future office is a non-starter, because it was not the one on which he was tried or convicted. And it is well-established that this Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980).

In defining when one who is "not a state employee" nonetheless owes the public a fiduciary duty, the jury instructions said nothing about selection for future office. JA.511. They instead followed *Margiotta* by asking the jury to decide if the person "dominated and controlled" government decisions by virtue of being "relied on" by "people working in the government." *Id.* That is also the instruction the Second Circuit upheld. *See* JA.665. If those instructions were legally wrong, the convictions cannot stand. *Dunn v. United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process.").

The Government implicitly admits as much by arguing only that the instructions "correctly conveyed the duty owed by … the functional equivalent of a public official." Govt.Br.32-33. That, of course, states only one of the Government's two theories on appeal. It is thus undisputed that the Government's "future official" theory was never conveyed to the jury.

This was not an oversight. The Government did not press a "future official" theory at trial because it does not align with the facts. The Government's contrary arguments confuse the chronology. It says Percoco decided by August 2014 to return to state office, and thereafter accepted payments and made the call about the LPA. Govt.Br.29-30. But the Government earlier concedes that a bribery offense is "completed" at the time of the "agreement," not when the agreement is later executed. Govt.Br.26; *see also* JA.680 ("All that ultimately matters is Percoco's *agreement* to perform official action."). And there is no dispute that Percoco reached agreement with COR in *July* 2014, before he was "selected" to return. Govt.Br.6-7; JA.359, 590, 647. That agreement therefore could not have been bribery, even indulging this new theory.[3]

Moreover, Count 10 charges a *conspiracy* to commit honest-services fraud. JA.100. That means Percoco and Aiello must have joined a common "scheme … to defraud." *Pinkerton v. United States*, 328 U.S. 640,

[3] And also indulging the Government's exaggerated account of the chronology. In reality, Percoco did not decide in August to return to the Governor's office. For credit purposes, he told his bank he was "guaranteed" a job in government *if he wanted one*, not that he had decided to take one. JA.491. He decided to do so only in November 2014, after other senior aides resigned and Gov. Cuomo's father took seriously ill. *See* JA.193, 214-15, 307-08.

647 (1946). Yet the Government points to no evidence that Aiello had any idea Percoco was considering a return to state employment—not at the time of the agreement, not at the time of the payments, not even at the time of the call. Tellingly, it says Percoco in "August or September" informed "others" of his plans to return (Govt.Br.29)—but not *Aiello*. And if Aiello did not know the key fact that supposedly made the scheme unlawful, no criminal conspiracy could have been formed. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016) (requiring proof "the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it").

In short, COR hired Percoco to "help … while he is off the 2nd floor," not based on his *return* to that floor. JA.594. That agreement did not retroactively become a criminal conspiracy when Percoco later changed his plans and returned to public service. And, anyway, since the Government did not charge such a theory, it cannot serve as grounds to affirm the convictions.

B. Future Officials Commit Honest-Services Fraud Only if They Conspire To Breach Their Future Fiduciary Duties.

Regardless, the Government's theory is overstated. All agree that an incoming official can commit bribery and honest-services offenses before he takes office. But the Government is wrong about why. A future official does not "owe[] the public a duty of honest services … even if his term of office has not yet begun." Govt.Br.25-26. As the Solicitor General told this Court not long ago, taking the oath of office "marks a profound transition from private life" to "public office," thus triggering the official's "authority" and

"responsibility" to "the Nation." Br. for Petrs., *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 2017 WL 3475820, at *73 (U.S. Aug. 10, 2017); *see also Ass'n of Am. R.Rs.*, 575 U.S. at 57-58 (Alito, J., concurring) (explaining that one cannot exercise official power without taking "oath or affirmation").

Having said that, a private citizen who expects to assume public office does commit a crime by accepting payment in exchange for a promised exercise of his future power. But that is not because the citizen owes a duty *now*. Rather, it is because that person *will* owe a duty upon taking office, and has conspired to breach it. For example, in *United States v. Meyers*, the court sustained an indictment charging bribery conspiracy where two incoming officials accepted payments "in consideration for their future official acts." 529 F.2d 1033, 1035 (7th Cir. 1976). The court held that they were duly "charged with having sold the *de jure* power which they would acquire in the future," not merely the "*de facto* power of influence-peddling." *Id.* at 1038.

Insofar as the Government means to suggest that future officials owe a generalized duty to the public, not merely a duty with respect to their future powers, that is plainly wrong. The Government cites § 201, which covers future officials, and says that it "does not require proof that the incoming official performed the bargained-for actions at a particular time in relation to his assumption of formal office." Govt.Br.26. But those "bargained-for actions" are "official act[s]," 18 U.S.C. § 201(b)(2). And as explained, only officials can take official acts. *Supra* I.B.3. An incoming official can therefore violate § 201 only by selling his *future powers*—such as by promising or threatening to take official action upon assuming office.

The absurd consequences of the Government's interpretation "underscores [its] implausibility." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). Consider a law school graduate hired to clerk for a Justice of this Court starting two Terms hence. If a person "selected to be" a federal employee owes a duty of honest services from the time of selection and thus cannot accept payment to advise or pressure current officials, that future law clerk would be categorically barred from earning a salary for practicing law before federal courts in the intervening years. An incoming DOJ official whose nomination awaits Senate action, likewise, would be barred from interacting with the Department during that period. That is not the law. Nominees may choose to restrict their private work to avoid future recusals, but a nominee's carrying on of private practice is not *criminal bribery*.

Rather, yet again, the law is exactly what one would expect: Future officials are prohibited from abusing their future powers by promising to use them in exchange for private gain. But the district court already held that no evidence supports such a theory here. In considering a Hobbs Act count, it recognized there could be an offense if one "who is in the process of becoming a public official demands payments in exchange for the promise to take official acts after he assumes an official position." JA.550. But the court further recognized "this was not the theory of liability on which the Government tried this case." JA.549. Even "viewing all evidence in the light most favorable to the Government," Percoco "was not using the power of his potential future official position," only "his then-existing unofficial influence and control." JA.550. So "no reasonable jury" could convict on that theory. *Id.*

For the same reasons, even if the Government had charged such a theory of honest-services bribery, the evidence would not have allowed any reasonable jury to convict on it. The Court should therefore reverse the Count 10 conviction and order entry of a judgment of acquittal.[4]

CONCLUSION

This Court should reverse and remand.

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[4] The Government argues that the errors on the COR counts did not infect the CPV counts, through either the instructions or spillover evidence. Govt.Br.34 n.5. The Government is wrong, but that matter is best addressed on remand.