

The Stakes of the Supreme Court's Pro-Corruption Rulings in the Age of Trump: Why the Supreme Court Should Have Taken Judicial Notice of the Post-January 6 Reality in *Percoco*

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ABSTRACT. In *Percoco*, the Supreme Court squandered opportunities to contextualize political corruption. This Essay argues that the Supreme Court should have taken judicial notice of the post-January 6 circumstances which surround the decision. This is a perilous time in American democracy for the Justices to make prosecuting corrupt campaign managers arduous.

INTRODUCTION

At the opening of the *Sound of Music*, Mother Superior sings, “How do you solve a problem like Maria?”¹ The Chief Justice of the United States Supreme Court has a similar conundrum on his hands. Essentially, “How do you solve a problem like ‘The Donald?’”² In this Essay, I argue that the Supreme Court’s refusal to acknowledge Donald J. Trump in cases about political corruption like *Percoco v. United States*³ will not solve the risk of corruption that Trump poses,

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1. Oscar Hammerstein II, *Maria*, ROGERS & HAMMERSTEIN, <https://rodgersandhammerstein.com/song/the-sound-of-music/maria> [<https://perma.cc/92R3-CEQG>].
 2. Paul Farhi, *Without Ivana Trump, There Would Be No Donald Trump*, WASH. POST (July 15, 2022), <https://www.washingtonpost.com/lifestyle/2022/07/15/ivana-trump-created-donald-trump-the-donald> [<https://perma.cc/WF97-GT8E>].
 3. 598 U.S. 319 (2023).

especially in light of the political violence he unleashed at the Capitol on January 6, 2021, in an attempt to remain in power for an unearned second term.⁴

Percoco deals with one type of corruption: the desire of Joseph Percoco to make money by leveraging his relationship with a sitting governor, thereby perverting how government would normally work, for his personal gain.⁵ As the Supreme Court once explained, this type of “[c]orruption is a subversion of the political process. . . . The hallmark of [this brand of] corruption is the financial quid pro quo: dollars for political favors.”⁶ By contrast, Trump’s attempts to overturn a presidential election raise a different and distinct type of corruption: the desire to remain in power despite the will of the people, thereby perverting the entire constitutionally prescribed way that U.S. Presidents are elected four years at a time.⁷ As Judge David Carter of the District Court for the Central District of California concluded, “[b]ased on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress [from counting electoral college votes] on January 6, 2021.”⁸ Both of these strains of political corruption are worthy of criminal prosecution.

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4. See Sam Cabral, *Capitol Riots: Did Trump’s Words at Rally Incite Violence?*, BBC NEWS (Feb. 13, 2021), <https://www.bbc.com/news/world-us-canada-55640437> [<https://perma.cc/RR7N-EL2B>]; Hannah Jacobs Wiseman, Samuel Wiseman & David Landau, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE, 96, 99 (2021) (“[I]n the wake of former President Trump’s determined effort to refute the election, experts have described recent events as ‘one of the gravest threats to democracy,’ noting that they ‘never would have imagined seeing something like this in America.’”); see also Laurence H. Tribe & Dennis Aftergut, *Ban Trump from 2024 Ballot? Why Courts Should Rule He Can’t Serve as President Again*, USA TODAY (Oct. 31, 2023), <https://www.usatoday.com/story/opinion/2023/10/31/trump-2024-ballot-disqualification-trial-reelection/71379874007> [<https://perma.cc/9TT9-BR9M>] (“Nothing is more central to our Constitution’s design than the process for electing a president every four years. . . . [That process was embodied in the] Vesting Clause: ‘The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years.’”).
 5. See Adam Liptak & Luis Ferré-Sadurní, *Supreme Court Throws Out Fraud Convictions in Albany Scandals*, N.Y. TIMES (May 11, 2023), <https://www.nytimes.com/2023/05/11/us/politics/supreme-court-fraud-albany-percoco-ciminelli.html> [<https://perma.cc/BN45-UCS4>] (“One case concerned Joseph Percoco, a former aide to Mr. Cuomo convicted of taking illicit payments to benefit a Syracuse-area developer.”).
 6. Fed. Election Comm’n v. Nat’l Conservative Pol. Action Comm., 470 U.S. 480, 497 (1985).
 7. See Adam Serwer, *Trump’s Plans for a Coup Are Now Public*, ATL. MONTHLY (Sept. 23, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/five-ways-donald-trump-tried-coup/620157> [<https://perma.cc/XR7H-W3S9>]; Ed Kilgore, *Trump’s Long Campaign to Steal the Presidency: A Timeline*, N.Y. MAG. (July 14, 2022), <https://nymag.com/intelligencer/article/trump-campaign-steal-presidency-timeline.html> [<https://perma.cc/7V7V-BRCY>].
 8. Eastman v. Thompson, 594 F. Supp. 3d 1156, 1193 (C.D. Cal. 2022) (ruling that the crime-fraud exception applied to Eastman’s communications with Trump).

Indeed, although the means of corruption differed, the ultimate end was the same: the subversion of the political process.

So far, Chief Justice Roberts and his fellow Justices have largely been able to sidestep former President Donald Trump's norm-breaking and Constitution-undermining behavior, and his increasingly long list of criminal legal problems ranging from allegedly falsifying business records, to allegedly unlawfully retaining military secrets, allegedly violating Georgia's Racketeer Influenced and Corrupt Organizations (RICO) statute, and allegedly attempting to overthrow the 2020 election.⁹ The Supreme Court seemed to be running out the clock on Trump's presidency, ultimately not ruling on certain key matters like Trump's alleged violation of the Constitution's Emoluments Clause and Trump's various baseless challenges to the way the 2020 election was administered, thus rendering them moot.¹⁰ Even during his presidency, the Justices only decided cases related to his norm-breaking conduct when compelled to resolve unavoidable conflicts.¹¹ And the Court has continued to dodge Trump cases after his presidency.¹² This refusal to reckon with the risks of political corruption posed

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9. See Statement of Facts at 7, *New York v. Trump*, IND-71543-23 (N.Y. App. Div. 2023); Indictment at 10-17, *United States v. Trump*, No. 23-cr-80101 (S.D. Fla. 2023); Indictment at 3, *United States v. Trump*, Case No. 23-cr-00257 (D.D.C. 2023); Indictment at 20, *Georgia v. Trump*, No. 23-SC-188947 (Ga. 2023).
 10. See *Trump v. Citizens for Resp. & Ethics in Wash.*, 141 S. Ct. 1262, 1262 (2021) (mooting a case about foreign and domestic Emoluments Clauses); *Trump v. District of Columbia*, 141 S. Ct. 1262, 1262 (2021) (mooting a case about Emoluments Clauses); *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mooting a case about the 2020 election in Pennsylvania); *Bognet v. Degraffenreid*, 141 S. Ct. 2508, 2508 (2021) (same); *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020), *cert. denied*, 141 S. Ct. 1449 (mem.) (2021) (contesting various aspects of the 2020 vote in Michigan); *Ward v. Jackson*, No. CV-20-0343, 2020 WL 8617817, at *3 (Ariz. 2020), *cert. denied*, 141 S. Ct. 1381 (mem.) (2021) ("affirming the trial court decision and confirming the election of the Biden Electors."); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020), *aff'd*, 981 F.3d 1307 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1379 (mem.) (2021) (contesting various aspects of the 2020 vote in Georgia); *Kelly v. Commonwealth*, 240 A.3d 1255, 1257 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021) (refusing to hear an appeal about the 2020 vote in Pennsylvania); *Trump v. Biden*, 951 N.W.2d 568, 577 (Wis. 2020), *cert. denied*, 141 S. Ct. 1387 (mem.) (2021) (contesting various aspects of the 2020 vote in Wisconsin); see also *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 1289 (mem.) (2021) (mooting a case about Migrant Protection Protocols); *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (mooting a case about President Trump blocking Twitter users).
 11. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (resolving a conflict between a state and the President); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) (resolving a conflict between Congress and the President); *Trump v. Vance*, 140 S. Ct. 2412 (2020) (resolving a conflict between a district attorney and the President).
 12. See *Trump v. Thompson*, 142 S. Ct. 1350 (2022) (mem.) (denying certiorari in a case challenging the January 6th Select Committee's record requests); *Trump v. United States*, 143 S. Ct. 349 (2022) (mem.) (rejecting Trump's request to vacate the Eleventh Circuit's stay in the Mar-

by Trump, exacerbates the risk of potential political violence ahead of the 2024 election.

Against the post-January 6 backdrop, the Supreme Court issued *Percoco v. United States* and *Ciminelli v. United States*, which make corruption harder to prosecute.¹³ The Congressional Research Service summarized the state of public-corruption law in 2023:

While Congress has passed broadly worded legislation to cover the self-interested actions of . . . state . . . officials . . . the Supreme Court has repeatedly adopted narrow interpretations of the statutes . . . signaling that broad constructions could raise constitutional concerns about vagueness or federalism. This trend continued in . . . *Ciminelli* [] and *Percoco*.¹⁴

With a political figure like Trump – who was twice impeached (once for January 6) and faces a quadruplet of indictments (including two for January 6), yet is still a leading candidate for the presidency in 2024 – this continuing deregulation of corruption by the Roberts Court is bafflingly obtuse.¹⁵ Here I borrow the

a-Lago documents dispute); *Brunson v. Adams*, 143 S. Ct. 569 (2023) (mem.) (denying certiorari in a case asking that Biden be removed from office); *Eastman v. Thompson*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022), *cert. denied*, No. 22-1138, 2023 WL 6379015 (U.S. Oct. 2, 2023) (refusing to hear Eastman's appeal of the crime-fraud exception case regarding Trump).

13. See *Percoco v. United States*, 143 S. Ct. 1130, 1133 (2023) (“*Percoco* was convicted . . . based on . . . jury [instructions] to determine whether he had a ‘special relationship’ with the government and had ‘dominated and controlled’ government business. . . . [T]his is not the proper test for determining whether a private person may be convicted of honest-services fraud”); *Ciminelli v. United States*, 143 S. Ct. 1121, 1124 (2023) (“Because ‘potentially valuable economic information’ ‘necessary to make discretionary economic decisions’ is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under § 1343.”); see also Michael Volkov, *Supreme Court Cuts Back Wire Fraud Prosecutions*, JD SUPRA (May 19, 2023), <https://www.jdsupra.com/legalnews/supreme-court-cuts-back-wire-fraud-8790461> [<https://perma.cc/TV8Q-ACQS>] (reporting that “in a pair of criminal cases [*Percoco* and *Ciminelli*], the U.S. Supreme Court delivered a one-two punch to the Justice Department’s prosecution of corruption cases based on violations of the criminal wire fraud statute”).
14. Peter G. Berris & Michael A. Foster, *Public Corruption and the Limits of Federal Fraud Statutes*, CONG. RSCH. SERV. (Aug. 21, 2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB11025> [<https://perma.cc/BA3A-2654>].
15. See Ed Kilgore, *Two Indictments Later, Trump Is Still the Republican Front-Runner*, N.Y. MAG. (June 15, 2023), <https://nymag.com/intelligencer/2023/06/two-indictments-later-trump-is-still-the-gop-front-runner.html> [<https://perma.cc/9QAJ-39PU>]; see generally Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL’Y REV. 471 (2019) (“The actions of the Roberts Court in defining corruption to mean less and less have been a welcome development among dishonest politicians.”); Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1622 (2017) (“[T]he Court has . . . consistently overturned convictions of public servants charged with abusing their offices.”); Michael Linhorst, *The Supreme*

definition of “corrupt” from *Arthur Anderson LLP v. United States*, wherein the words “[c]orrupt’ and ‘corruptly’ are normally associated with wrongful, immoral, depraved, or evil [acts].”¹⁶

Although *Percoco* and *Ciminelli* are interrelated and both have the potential to make future prosecutions of corrupt behavior more difficult,¹⁷ I will focus primarily on the former. *Percoco* has the greater potential to impact ongoing prosecutions of Donald Trump or the potential prosecution of his campaign and PACs for their fundraising practices after the 2020 election.¹⁸ My argument here is that the Supreme Court in *Percoco* should have taken judicial notice of the peculiar post-January 6 reality in which the case was decided.¹⁹ By judicial notice, I mean the Court’s practice of noting the momentous political or economic events of the nation that provide context for a particular legal decision outside of the four corners of the case they are deciding. If the Court took judicial notice of how the events of January 6 imperiled the basic constitutional underpinnings of how presidents are elected and exacerbated the risk of an unelected president corruptly remaining in power, then this may have prompted one or more Justices to reconsider and change their vote in *Percoco*. The Justices might have better realized that this is a particularly fraught time for the Supreme Court to signal increased judicial tolerance for corrupt political behavior. Had five Justices looked at this case from this capacious vantage point, the case may even have been decided the other way affirming *Percoco*’s conviction.

This Essay will proceed in four parts. In Part I, I will discuss the culture of corruption in Albany to contextualize *Percoco*’s prosecution by the U.S. Attorney’s Office for the Southern District of New York. In Part II, I will explore how the *Percoco* decision exacerbates the Roberts Court’s ongoing deregulation of corruption. In Part III, I will argue that the Supreme Court in *Percoco* squandered an opportunity to take judicial notice of the post-January 6 context in which it rendered the *Percoco* decision. Finally, in Part IV, I discuss how *Percoco* may be

Court Might Be on the Brink of Making Corruption Easier—Again, NEW REPUBLIC (Oct. 5, 2022), <https://newrepublic.com/article/167949/supreme-court-corruption-percoco> [<https://perma.cc/5S85-S7NC>] (quoting Tara Malloy of the Campaign Legal Center stating that “[t]hese [pre-*Percoco* Roberts Court] decisions have really narrowed the tools prosecutors have to combat official corruption as well as limited the public’s ability to ensure ethical government.”).

16. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005).

17. Liptak & Ferré-Sadurní, *supra* note 5.

18. See Ciara Torres-Spelliscy, *The Perils of Fundraising Using the Disinformation of the Big Lie*, in DISINFORMATION, MISINFORMATION AND DEMOCRACY (forthcoming 2024), <https://ssrn.com/abstract=4541489> [<https://perma.cc/6676-PCJL>].

19. See generally H.R. REP. NO. 117-663 (2022) (compiling the findings of the Select Committee to Investigate the January 6 Attack on the United States Capitol).

used by future campaign managers and even former President Trump to avoid criminal liability.

I. ALBANY'S CULTURE OF CORRUPTION

When Joseph Percoco and Louis Ciminelli were prosecuted, their indictments were part of a broad effort by the U.S. Attorney of the Southern District of New York (SDNY) Preet Bharara to address bribery in New York's capital, Albany. That U.S. Attorney Bharara would prosecute a bribery scheme against Percoco, who worked in Governor Andrew Cuomo's administration and reelection campaign wasn't surprising to Albany watchers as Bharara had been trying to clean up corruption in Albany for years.²⁰ What has been troubling is how much the Supreme Court has run interference with anticorruption federal prosecutors like Bharara through a string of white-collar crime rulings like *Skilling v. United States*, *McDonnell v. United States*, *Kelly v. United States*, and now, *Percoco*.²¹

The Percoco/Ciminelli tale is partially a story about money in politics, as one actor was a campaign manager and the other was a campaign donor. Percoco (who raised \$45 million for Governor Cuomo's successful reelection in 2014)²² and Ciminelli (who gave \$92,300 in political contributions to Cuomo over two

20. See Grace Segers, *Percoco Verdict Proves Corruption Won't Go Unpunished, After All*, CITY & STATE (Mar. 13, 2018), <https://www.cityandstateny.com/politics/2018/03/percoco-verdict-proves-corruption-wont-go-unpunished-after-all/178677> [<https://perma.cc/4WB2-V57B>].

21. *Skilling v. United States*, 561 U.S. 358, 368 (2010) (limiting the reach of a statute to vacate a conviction); *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (adopting “a more bounded interpretation of ‘official act’” to limit the reach of a federal bribery statute); *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (“The property fraud statutes . . . bar only schemes for obtaining property”); *Percoco v. United States*, 143 S. Ct. 1130, 1133 (2023) (rejecting the lower court's test to determine whether a person may be convicted of honest-services fraud); see also Amy Howe, *Court Throws Out Conviction of Former Cuomo Aide*, SCOTUSBLOG (May 11, 2023, 3:22 PM), <https://www.scotusblog.com/2023/05/court-throws-out-conviction-of-former-cuomo-aide> [<https://perma.cc/YM6U-9XQU>] (“The [*Percoco*] ruling was the latest in a series of cases, dating back more than a decade, in which the justices have narrowed the reach of federal public-corruption laws.”).

22. See David Klepper, *Gov. Andrew Cuomo Wins Re-election, Defeating Astorino in New York Governor's Race*, ASSOCIATED PRESS (Nov. 4, 2014), <https://abc7ny.com/andrew-cuomo-rob-astorino-new-york-governor-politics/378371> [<https://perma.cc/ZY9G-FE6W>]; Chris Bragg, *State Resources Went to Cuomo Campaign Effort, Records Show*, TIMES UNION (July 15, 2018, 12:05 AM), <https://www.timesunion.com/local/article/State-resources-went-to-Cuomo-campaign-effort-13073450.php> [<https://perma.cc/KG3P-8K6R>] (“Percoco's role in the 2014 campaign was expansive . . . [he] assumed what sources described as an oversight role in fundraising, campaign events, influence and political strategy.”).

election cycles)²³ were originally charged in the same indictment for their roles in two overlapping criminal schemes related to the Buffalo Billion development project during Governor Cuomo’s administration.²⁴

This is also a story about when and how the government is allowed to police corruption. There was a time not long ago when Albany gave Washington, D.C. a run for its money in how many public-corruption prosecutions it generated.²⁵ During this time, as Columbia Law School Professor Richard Briffault explained, “[i]t was said more people [in Albany] left office from indictments than electoral defeats.”²⁶ The Percoco/Ciminelli prosecutions were spearheaded by Bharara, who was trying to wipe out the fetid culture of corruption in Albany.²⁷ During this time, Bharara brought anticorruption prosecutions against Democratic Speaker of the Assembly Sheldon “Shelly” Silver as well as Republican Senate Majority Leaders Joseph Bruno and Dean Skelos.²⁸ The New York

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23. See Ciminelli, *Louis P*, FOLLOW THE MONEY, <https://www.followthemoney.org/entity-details?eid=641118> [<https://perma.cc/27XK-4FUE>]; see also Liptak & Ferré-Sadurní, *supra* note 5 (“Ciminelli, a developer and a donor to Mr. Cuomo’s campaigns, was prosecuted for his role in a scheme to rig bids for contracts . . . [which] aimed to invest \$1 billion in Buffalo.”).
24. See Ciminelli v. United States, 143 S. Ct. 1121, 1125 (2023) (“This case begins with then-New York Governor Andrew Cuomo’s ‘Buffalo Billion’ initiative.”); Greg Stohr, *Convicted Former Cuomo Aide Percoco Wins Supreme Court Case*, BLOOMBERG L. (May 11, 2023, 11:04 AM), <https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X9T17AoC000000> [<https://perma.cc/WL9N-TE74>] (“Ciminelli’s Buffalo firm won a \$750 million development contract after he took part in what prosecutors said was an effort to rig the bidding criteria.”).
25. See *Albany on Trial*, N.Y. TIMES (Aug. 25, 2016), <https://www.nytimes.com/news-event/albany-corruption-trials> [<https://perma.cc/ASS2-Z4GM>] (“In the past decade, the state capital has been rocked by a seemingly endless barrage of scandals and arrests involving officeholders.”); see also Michael Cooper, *So How Bad Is Albany? Well, Notorious*, N.Y. TIMES (July 22, 2004), <https://www.nytimes.com/2004/07/22/nyregion/so-how-bad-is-albany-well-notorious.html> [<https://perma.cc/44YD-R2FM>] (describing a report that found that New York’s legislature was “at once stiflingly autocratic and strikingly inefficient”).
26. *The Moreland Commission: What Happened?*, COLUM. L. SCH. (Dec. 5, 2014), <https://www.law.columbia.edu/news/archive/moreland-commission-what-happened> [<https://perma.cc/C6JU-SFMU>].
27. See Marc Santora, *U.S. Attorney Criticizes Albany’s ‘Three Men in a Room’ Culture*, N.Y. TIMES (Jan. 23, 2015), <https://www.nytimes.com/2015/01/24/nyregion/us-attorney-preet-bharara-criticizes-albanys-three-men-in-a-room-culture.html> [<https://perma.cc/8Q9G-Y2F4>].
28. See *United States v. Silver*, 184 F. Supp. 3d 33, 37 (S.D.N.Y. 2016), *vacated and remanded*, 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018); *United States v. Silver*, Docket No. 15-cr-00093 (May 11, 2018) (showing the jury verdict of guilty on all counts); *United States v. Silver*, 948 F.3d 538, 575 (2d Cir. 2020) (affirming Silver’s convictions on some counts and reversing others), *cert. denied*, 141 S. Ct. 656 (2021); *United States v. Bruno*, 531 F. App’x 47, 48 (2d Cir. 2013); *United States v. Bruno*, Docket No. 09-cr-00029 (May 16, 2014); Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., New York State Senate Majority Leader Dean Skelos and Son Arrested on Corruption Charges (May 4, 2015), <https://www.justice.gov/usao->

executive branch in Albany had a well-earned reputation for an illegal pay-to-play culture that spanned several governorships and infected both political parties.²⁹

One episode stands out in particular: Governor Cuomo's decision in 2014 to disband the Moreland Commission to Investigate Public Corruption.³⁰ Once the Moreland Commission's work started getting too close to his political allies, Cuomo shuttered the investigation.³¹ As investigative reporter Ronan Farrow would later uncover, "interviews with a dozen former officials with ties to the commission, along with hundreds of pages of internal documents, text messages, and personal notes obtained by *The New Yorker*, reveal that Cuomo and his team used increasingly heavy-handed tactics to limit inquiries that might implicate him or his allies."³²

The ethically challenged culture surrounding New York State government generally – and Governor Cuomo in particular – provides context for the corruption charges leveled against Percoco. It also illustrates that the ability of federal prosecutors to fight state corruption is particularly necessary because local or state prosecutors might disregard the criminality of a powerful governor or a fellow local partisan.³³ Moreover, had Percoco been charged with a state crime, then-Governor Cuomo could have pardoned him, essentially walling off a corrupt man from any legal consequences and thwarting the rule of law. Allowing

sdny/pr/new-york-state-senate-majority-leader-dean-skelos-and-son-arrested-corruption-charges [https://perma.cc/H74G-5LR8].

29. See Liptak & Ferré-Sadurní, *supra* note 5 ("The cases were among the blockbuster public corruption prosecutions brought by Preet Bharara . . . that fed into Albany's reputation as a cesspool of corruption.").
30. See Andrew Prokop, *The Andrew Cuomo Scandal, Explained*, VOX (Aug. 15, 2014, 9:00 AM EDT), <https://www.vox.com/2014/8/15/5999975/andrew-cuomo-scandal-ethics> [https://perma.cc/6VNR-6MNK].
31. See *id.*
32. Ronan Farrow, *Andrew Cuomo's War Against a Federal Prosecutor*, NEW YORKER (Aug. 10, 2021), <https://www.newyorker.com/news/news-desk/andrew-cuomos-war-against-a-federal-prosecutor> [https://perma.cc/R5NV-63EA].
33. See Michael K. Avery, *Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and Wire Fraud Prosecutions*, 49 B.C. L. REV. 1431, 1450 (2008) ("A more persuasive argument for the need for federal honest services mail and wire fraud prosecutions is that the unique nature of political corruption inhibits the states' ability to deal with it internally."); Arlo Devlin-Brown, Peter Koski & Kevin Coleman, *The Supreme Court's Continued Reshaping of Public Corruption Law*, BLOOMBERG L. (July 2023), <https://www.bloomberglaw.com/external/document/XAGS3N8S000000/litigation-professional-perspective-the-supreme-courts-continue> [https://perma.cc/4CEW-TV3H] ("[F]ederal prosecutors can be expected to continue aggressively pursuing state and local corruption cases – especially where states are unable or unwilling to address corruption issues themselves.").

federal prosecutions of state-level officials short-circuits this potential corruption doom cycle.

With that context on the necessity of federal prosecution in mind, the factual background of *Percoco* is as follows. Governor Andrew Cuomo was the son of Governor Mario Cuomo. Percoco worked for both governors. While eulogizing his late father, Andrew Cuomo even referred to Percoco as Mario Cuomo’s “third son.”³⁴ The *New York Post* referred to Percoco as the younger Cuomo’s “enforcer.”³⁵ As the judge in his criminal trial summed up, “[a]s a longtime friend of Cuomo, Percoco was one of the most powerful members of the Governor’s administration.”³⁶ Percoco was the executive deputy secretary to Governor Cuomo between January 2012 and mid-2014, and again in 2015 (during the period that the Moreland Commission was abortively probing corruption in New York). Cuomo would later step down from the governorship after a grueling report on his alleged sexual harassment and bullying of his accusers, and the Assembly’s exploration of possible impeachment.³⁷

A jury convicted Percoco in 2018 of accepting \$315,000 in bribes in exchange for helping a corporation get business with New York State.³⁸ In his certiorari

34. WSJ Staff, *Transcript: Gov. Andrew Cuomo’s Eulogy for His Father Mario Cuomo*, WALL ST. J. (Jan. 6, 2015, 4:30 PM ET), <https://www.wsj.com/articles/BL-METROB-22293> [<https://perma.cc/M9N4-ACFC>].
35. Carl Campanile, *Cuomo Pal Joe Percoco Released from Halfway House After Serving Time for Fraud*, N.Y. POST (Apr. 27, 2023, 8:35 PM ET), <https://nypost.com/2023/04/27/cuomo-fraudster-pal-joe-percoco-released-from-halfway-house> [<https://perma.cc/52VM-MMX9>].
36. *United States v. Percoco*, No. 16-776, 2019 WL 493962, at *2 (S.D.N.Y. Feb. 8, 2019).
37. See Anne L. Clark, Yannick Grant, Joon H. Kim, Jennifer Kennedy Park, Abena Mainoo & Rahul Mukhi, *Report of Investigation into Allegations of Sexual Harassment by Governor Andrew M. Cuomo*, N.Y. OFF. OF THE ATT’Y GEN. LETITIA JAMES 1-13 (Aug. 3, 2021), https://ag.ny.gov/sites/default/files/2021.08.03_nyag_-_investigative_report.pdf [<https://perma.cc/RMX7-KWVK>]; *Impeachment Investigation Report to Judiciary Committee Chair Charles Lavine and the New York State Assembly Judiciary Committee*, DAVIS POLK & WARDWELL LLP 5-6 (Nov. 22, 2021), https://nyassembly.gov/write/upload/postings/2021/pdfs/20211122_99809a.pdf [<https://perma.cc/F7DZ-348V>]; Nicholas Fandos, *The Secret Hand Behind the Women Who Stood by Cuomo? His Sister*, N.Y. TIMES (Aug. 10, 2023), <https://www.nytimes.com/2023/08/07/nyregion/cuomo-women-sister-madeline.html> [<https://perma.cc/8M8S-4Q4D>]; Samuel Chamberlain, *His Final Farewell: Cuomo Submits His Resignation Letter*, N.Y. POST (Aug. 24, 2021, 1:48 AM ET), <https://nypost.com/2021/08/23/his-final-farewell-cuomo-submits-his-resignation-letter> [<https://perma.cc/CU5C-92ZC>].
38. *Percoco v. United States*, 598 U.S. 319, 325 (2023) (“The jury convicted Percoco . . .”); Vivian Wang & Benjamin Weiser, *Joseph Percoco, Ex-Cuomo Aide, Found Guilty in Corruption Trial*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/nyregion/percoco-corruption-bribery-trial-cuomo-guilty.html> [<https://perma.cc/XT5S-VVEX>] (“A former top aide to Gov. Andrew M. Cuomo was found guilty . . . of three corruption-related charges, a repudiation of the murky back-room dealings in Albany . . .”); Press Release, U.S. Att’y’s

petition, Percoco's lawyers argued that "[w]hen a public official accepts money to convince the government to do something, we call him a crook. But when a private citizen accepts money to convince the government to do something, we call him a lobbyist."³⁹ They thus tried to draw a rhetorical line between lobbyists and crooks. But this can be a distinction without a difference.⁴⁰ There is nothing about being a lobbyist which makes such a person an angel or immune from criminal prosecution. Consider the case of fallen lobbyist Jack Abramoff, who pleaded guilty to conspiracy, honest-services fraud, and tax evasion.⁴¹

There was ample evidence that Percoco and the businessmen charged in his conspiracy were conscious that they were participating in a crime. Had Percoco been a mere lobbyist, then presumably he would have just sent normal invoices requesting payment for his lobbying services. But instead, in emails among the coconspirators, the group referred to the money changing hands as "ziti," thereby copying verbiage from HBO's mob-boss crime drama, *The Sopranos*.⁴² Prosecutors hammered this point during closing arguments:

[SDNY] prosecutor, David Zhou, cited emails from Mr. Percoco . . . "begging, requesting, demanding ziti." "Where the hell is the ziti?" "I have no ziti," Mr. Zhou said, quoting from emails Mr. Percoco

Off., S. Dist. of N.Y., Joseph Percoco, Former Executive Aide And Campaign Manager To N.Y. Governor, Sentenced To 6 Years In Prison For Accepting Bribes (Sept. 20, 2018), <https://www.justice.gov/usao-sdny/pr/joseph-percoco-former-executive-aide-and-campaign-manager-ny-governor-sentenced-6-years> [<https://perma.cc/FVN6-KJXB>].

39. Petition for a Writ of Certiorari at 1, *Percoco*, 598 U.S. 319 (No. 21-1158).

40. See, e.g., Press Release, U.S. Att'y's Off., Cent. Dist. of Cal., Lobbyist Agrees to Plead Guilty in City Hall Bribery Scheme in Which City Councilman Jose Huizar Supported Developer in Exchange for PAC Donations (Aug. 25, 2020), <https://www.justice.gov/usao-cdca/pr/lobbyist-agrees-plead-guilty-city-hall-bribery-scheme-which-city-councilman-jose-huizar> [<https://perma.cc/FW4R-XVLH>]; Press Release, U.S. Att'y's Off., S. Dist. of Ohio, Political Strategist & Lobbyist Each Plead Guilty in Federal Public Corruption Racketeering Conspiracy Involving More than \$60 Million (Oct. 29, 2020), <https://www.justice.gov/usao-sdoh/pr/political-strategist-lobbyist-each-plead-guilty-federal-public-corruption-racketeering> [<https://perma.cc/DZ2K-PFUF>].

41. Press Release, Dep't of Just., Former Lobbyist Jack Abramoff Sentenced to 48 Months in Prison on Charges Involving Corruption, Fraud, Conspiracy and Tax Evasion (Sept. 4, 2008), <https://www.justice.gov/archive/opa/pr/2008/September/08-crm-779.html> [<https://perma.cc/HN37-397Y>].

42. See Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Joseph Percoco, Former Executive Aide and Campaign Manager to N.Y. Governor, Sentenced to 6 Years in Prison for Accepting Bribes (Sept. 20, 2018), <https://www.justice.gov/usao-sdny/pr/joseph-percoco-former-executive-aide-and-campaign-manager-ny-governor-sentenced-6-years> [<https://perma.cc/S792-RAZ2>]; *Mafia Code Phrases*, SOPRANOS WIKI, https://sopranos.fandom.com/wiki/Mafia_code_phrases [<https://perma.cc/MZW8-YZGV>] (clarifying that "[b]ox of ziti" means \$1,000).

sent . . . adding that jurors should know “exactly what Joe Percoco was demanding.” “He was demanding cash bribes,” Mr. Zhou said.⁴³

Zhou ended by emphasizing to the jury, “[t]his is not how honest and honorable public servants talk This is how criminals talk.”⁴⁴

In a letter to Judge Valerie Caproni written after he was convicted and before sentencing, Percoco expressed remorse and responsibility for his crimes, saying, “I regret that I made even a single New Yorker question the integrity of their government.”⁴⁵ He added, “Your Honor, the choices that have brought me before this Court . . . were my choices and my choices alone.”⁴⁶ Judge Caproni said at Percoco’s sentencing, “I hope this sentence will be heard in Albany,” adding that “[i]f you can’t live on a public sector salary, get out of government.”⁴⁷ Percoco was sentenced to six years.⁴⁸ After his sentencing, even Governor Cuomo said, “Joe Percoco is paying the price for violating the public trust.”⁴⁹

However, in May 2023, the Supreme Court reversed Percoco’s conviction on the honest-services-fraud count.⁵⁰ Because the appeals process is so slow, Percoco had already served his full sentence when the Court decided his case in his favor.⁵¹ In *Percoco*, the Court ruled that the jury instructions about the honest-services charge were too vague and thus his conviction on that count could not stand.⁵² In so ruling, the Court reversed over forty years of precedent in the

43. Jesse McKinley & Vivian Wang, *This Is How Criminals Talk’: Closing Arguments Focus on Ziti*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/nyregion/percoco-albany-corruption-trial.html> [https://perma.cc/RYE9-2PET].

44. *Id.*

45. Bob Fredericks, *Convicted Ex-Cuomo Aide Tells Judge He’s ‘Sorry’ Now*, N.Y. POST (Sept. 14, 2018, 3:56 PM ET), <https://nypost.com/2018/09/14/convicted-ex-cuomo-aide-tells-judges-sorry-now> [https://perma.cc/396M-LBHG] (quoting Percoco’s letter).

46. *Id.*

47. Kaja Whitehouse, *Ex-Cuomo Aide Gets 6 Years in Prison for Corruption*, N.Y. POST (Sept. 20, 2018, 10:31 PM ET), <https://nypost.com/2018/09/20/ex-cuomo-aide-gets-6-years-in-prison-for-corruption> [https://perma.cc/Q84T-YHF5].

48. *Percoco v. United States*, 598 U.S. 319, 325 (2023) (“[Percoco] was sentenced to 72 months’ imprisonment.”).

49. Brian M. Rosenthal & J. David Goodman, *Cuomo’s Inner Circle Raised Money for Aide Who Was Convicted of Bribery*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2021/06/15/nyregion/cuomo-percoco-bribery.html> [https://perma.cc/E5AS-XZXK] (quoting Governor Andrew Cuomo in 2018).

50. *Percoco*, 598 U.S. at 322.

51. Carl Campanile, *Cuomo Pal Joe Percoco Released from Halfway House After Serving Time for Fraud*, N.Y. POST (Apr. 27, 2023, 8:35 PM ET), <https://nypost.com/2023/04/27/cuomo-fraudster-pal-joe-percoco-released-from-halfway-house> [https://perma.cc/52VM-MMX9].

52. *Percoco*, 598 U.S. at 330-31.

Second Circuit about honest-services-fraud charges for private individuals who “dominated and controlled” government business.⁵³ Recall that Percoco was able to achieve the government action the business bribing him wanted done.⁵⁴

Key to the *Percoco* decision was that his malfeasance happened during the interregnum between his stints in state government while he was working as campaign manager for Cuomo’s 2014 successful reelection campaign as a private citizen.⁵⁵ As the Supreme Court wrote in *Percoco*: “the intangible right of honest services’ codified in § 1346 plainly does not extend a duty to the public to *all* private persons”⁵⁶ However, as the government pointed out in its brief before the Court, Percoco kept his New York State offices while he was Cuomo’s campaign manager: “As Executive Deputy Secretary, petitioner [Percoco] had two offices in the Executive Chamber, one in Albany and one in New York City, and he continued to use them ‘to conduct state business’ while working on the campaign”⁵⁷ Percoco also used a New York government phone approximately 837 times while he was running the Cuomo reelection campaign.⁵⁸ Thus, the Court’s conclusion that Percoco was not a state employee, or at the very least clothed with state authority, is undermined by his actual actions and his use of state-owned equipment and office space during the key period. Only in a footnote did the Court address and then reserve judgment on whether Percoco’s exit

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53. See Isabelle Kirshner & Brian D. Linder, *Expect More Vagueness Challenges in Honest Services Cases*, PROGRAM ON CORP. COMPLIANCE & ENF’T AT N.Y.U. SCH. OF L. (May 18, 2023), https://wp.nyu.edu/compliance_enforcement/2023/05/18/experts-react-to-supreme-court-decisions-on-honest-services-fraud-and-the-right-to-control-theory [<https://perma.cc/5ZU6-SERV>] (noting that *Margiotta*, the Second Circuit case that *Percoco* overruled, “stood as the law of the Second Circuit for over forty years”).
54. *Percoco*, 598 U.S. at 323 (“Percoco called a senior official [at a New York State government agency] and urged him to drop the labor-peace requirement. [The government agency] promptly reversed course the next day and informed Aiello that the agreement was not necessary.”).
55. See Greg Stohr, *Convicted Former Cuomo Aide Percoco Wins Supreme Court Case*, BLOOMBERG L. (May 11, 2023, 11:04 AM), <https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X9T17AoC000000> [<https://perma.cc/C2VX-5D96>] (“The justices unanimously said jury instructions in Joseph Percoco’s case were flawed given that he was working for Cuomo’s reelection campaign – and not the government”).
56. *Percoco*, 598 U.S. at 330.
57. Brief for the United States at 4, *Percoco*, 598 U.S. 319 (2023) (No. 21-1158) (quoting Joint Appendix at 682).
58. Tim Knauss, *Corruption Trial: Percoco Used Government Office While Running Cuomo Campaign*, SYRACUSE.COM (Jan. 29, 2018, 8:01 PM), https://www.syracuse.com/state/2018/01/campaign_worker_percoco_made_up_to_837_calls_from_old_desk_in_governors_office.html [<https://perma.cc/84S2-PS3G>].

from government was just a sham.⁵⁹ On remand, the Second Circuit vacated Count Ten of Percoco's conviction on honest-services fraud in accordance with the Supreme Court's ruling in his favor.⁶⁰

When *Percoco* was pending at the Supreme Court, Dean of the University of Wisconsin Law School Daniel Tokaji predicted that Percoco's argument, "that he could not be guilty of bribery because he was technically a private citizen at the time, would 'open a gaping hole in our public corruption laws.'"⁶¹ With the Supreme Court ruling in Percoco's favor, this gaping hole is now a reality. As lawyers for the government argued in oral arguments before the Supreme Court, "[Percoco's proposed] rule would allow an individual to formally leave government for a single day, accept a bribe in exchange for ordering government employees to take official action, and return to formal employment without penalty."⁶² This extreme hypothetical is permissible under the holding in *Percoco*.⁶³

There is still some hope for state courts to apply state anticorruption laws, as the New Jersey Supreme Court ruled post-*Percoco* that a candidate could be charged with bribery under a state statute even though he was not a public official.⁶⁴ But at the federal level, as lawyers Lindsay E. Ray and Matthew S. Chester noted right after *Percoco* was handed down, "honest-services fraud remains an important, though weakened, tool in the Government's prosecutorial toolbox. But the *Percoco* decision will, no doubt, make it more difficult for the [federal] Government to assert honest-services fraud theories against private individuals moving forward."⁶⁵

59. *Percoco*, 598 U.S. at 332 n.3 ("To the extent this is a belated argument that Percoco's leaving office was to some degree a sham, we express no view on the viability of this alternative theory of conviction in this case on the evidence presented.").

60. *United States v. Percoco*, 80 F.4th 393, 395 (2d Cir. 2023).

61. Linhorst, *supra* note 15 (quoting Daniel Tokaji).

62. Transcript of Oral Argument at 33, *Percoco*, 598 U.S. 319 (2023) (No. 21-1158), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1158_1bn2.pdf [<https://perma.cc/W5B9-JB3J>].

63. *Percoco*, 598 U.S. at 322 ("We conclude that this [test derived from *United States v. Margiotta*, 688 F.2d 108 (1982)] is not the proper test for determining whether a private person may be convicted of honest-services fraud, and we therefore reverse and remand for further proceedings.").

64. *State v. O'Donnell*, 299 A.3d 700, 708, 713 (N.J. 2023).

65. Matthew S. Chester & Lindsay E. Ray, *Reining It in: Supreme Court Again Restricts Honest-Services Fraud*, BAKER DONELSON (May 16, 2023), <https://www.bakerdonelson.com/reining-it-in-supreme-court-again-restricts-honest-services-fraud> [<https://perma.cc/FN4J-8ELL>].

II. THE ROBERTS COURT'S DEREGULATING CORRUPTION

The *Percoco* ruling is just the latest in a long string of pro-corruption rulings by the Roberts Supreme Court. As recent indictments against Republican Congressman George Santos and Democratic Senator Bob Menendez show,⁶⁶ no political party has a monopoly on political corruption and prosecutors across the political spectrum have used honest-services-fraud charges to punish this behavior, or at least they did until the Roberts Court interfered.⁶⁷ Both Republican and Democratic governors have been charged with honest-services fraud and bribery⁶⁸—and both Republican and Democratic members of Congress have been charged with fraud.⁶⁹

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66. Press Release, U.S. Att’y’s Off., E. Dist. of N.Y., Congressman George Santos Charged with Conspiracy, Wire Fraud, False Statements, Falsification of Records, Aggravated Identity Theft, and Credit Card Fraud (Oct. 10, 2023), <https://www.justice.gov/usao-edny/pr/congressman-george-santos-charged-conspiracy-wire-fraud-false-statements-o> [<https://perma.cc/3CAT-J758>]; Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., U.S. Senator Robert Menendez, His Wife, and Three New Jersey Businessmen Charged with Bribery Offenses (Sept. 22, 2023), <https://www.justice.gov/usao-sdny/pr/us-senator-robert-menendez-his-wife-and-three-new-jersey-businessmen-charged-bribery> [<https://perma.cc/BC6F-GSGR>].
67. See Lori A. McMillan, *Honest Services Update: Directors’ Liability Concerns After Skilling and Black*, 18 TEX. WESLEYAN L. REV. 149, 156-57 (2011) (“The honest services fraud statute has . . . been a tool for federal prosecutors to apply the federal government’s standard of good and honest government at both the state and local level. The underlying idea is that a public official involved in bribery or a conflict of interest is defrauding the people of their intangible right to that public official’s honest services.” (footnote omitted)); Linhorst, *supra* note 15 (quoting Fred Wertheimer, the president of Democracy 21, as saying that the Supreme Court’s decisions have “made it very, very difficult for prosecutors to bring and win cases of bribery and other forms of corruption”).
68. See, e.g., Press Release, U.S. Att’y’s Off., Dist. of Conn., Former Governor Convicted of Illegal Activity in Two Congressional Campaigns (Sept. 19, 2014), <https://www.justice.gov/usao-ct/pr/former-governor-convicted-illegal-activity-two-congressional-campaigns> [<https://perma.cc/UHY9-GMZ3>] (“In December 2004, [Republican Governor John] ROWLAND pleaded guilty to conspiracy to commit honest services mail fraud and tax fraud.”); Press Release, U.S. Att’y’s Off., N. Dist. of Ill., Former Illinois Governor Rod R. Blagojevich Sentenced to 14 Years in Prison for Corruption in Office (Dec. 7, 2011), <https://archives.fbi.gov/archives/chicago/press-releases/2011/former-illinois-governor-rod-r.-blagojevich-sentenced-to-14-years-in-prison-for-corruption-in-office> [<https://perma.cc/6RWZ-UDW3>] (“[Democratic Governor Rod Blagojevich] . . . was convicted on . . . 10 counts of wire fraud, two counts of attempted extortion, two counts of conspiracy to commit extortion, one count of soliciting bribes, and two counts of conspiracy to solicit and accept bribes.”).
69. See, e.g., Press Release, U.S. Att’y’s Off., Middle Dist. of Fla., Congresswoman Corrine Brown and Chief of Staff Charged with Fraud Scheme Involving Bogus Non-Profit Scholarship Entity (July 8, 2016), <https://www.justice.gov/usao-mdfl/pr/congresswoman-corrine-brown-and-chief-staff-charged-fraud-scheme-involving-bogus-non> [<https://perma.cc/39NP-Y>

Previous Supreme Courts cared more about corruption.⁷⁰ Unfortunately, the Roberts Court has been redefining corruption in increasingly restrictive ways in both campaign-finance and white-collar crime cases since 2006.⁷¹ In campaign-finance cases like *Randall v. Sorrell*, *Davis v. FEC*, *FEC v. Wisconsin Right to Life* (“*WRTL II*”), *Citizens United v. FEC*, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, and *McCutcheon v. FEC*, the Supreme Court has narrowed corruption to mean only quid pro quo exchanges, thereby making it easier to rule that certain campaign-finance laws are not narrowly tailored or sufficiently justified by a compelling state interest.⁷²

Simultaneously, in white-collar crime cases, the Roberts Court also ruled in favor of convicted criminal defendants in *Skilling*, *McDonnell*, and *Kelly*.⁷³ *Percoco* follows this wrongheaded pattern of the Supreme Court giving corrupt

2NT] (announcing fraud charges against Democratic Representative Corrine Brown); Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., Congressman Christopher Collins Pleads Guilty to Insider Trading Scheme and Lying to Federal Law Enforcement Agents (Oct. 1, 2019), <https://www.justice.gov/usao-sdny/pr/congressman-christopher-collins-pleads-guilty-insider-trading-scheme-and-lying-federal> [https://perma.cc/H4FL-BZSE] (reporting that Republican Representative Christopher Collins pled guilty to securities fraud).

70. *McConnell v. FEC*, 540 U.S. 93, 188-89, 223-24, 233-34 (2003) (upholding an anticorruption law, the Bipartisan Campaign Reform Act); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390-98 (2000) (upholding Missouri campaign-finance law because it was justified by fear of corruption or the appearance of corruption); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (recognizing “the Government’s interest in preventing exchanges of large financial contributions for political favors”); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (acknowledging that corruption extends beyond explicit cash-for-votes agreements to “undue influence on an officeholder’s judgment”); *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam) (“To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”); *Fletcher v. Peck*, 10 U.S. 87, 130-31 (1810) (discussing whether a legislative act may be nullified if procured by corruption).
71. See CIARA TORRES-SPELLISCY, *POLITICAL BRANDS* 41-65 (2019).
72. See *Randall v. Sorrell*, 548 U.S. 230, 262-63 (2006); *Davis v. FEC*, 554 U.S. 724, 744-45 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478-79 (2007); *Citizens United v. FEC*, 558 U.S. 310, 357-61 (2010); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 749-55 (2011); *McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014).
73. See *Skilling v. United States*, 561 U.S. 358, 368 (2010) (“In proscribing fraudulent deprivations of ‘the intangible right of honest services,’ [18 U.S.C.] § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks.”); *McDonnell v. United States*, 579 U.S. 550, 575 (2016) (“[C]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time.”); *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) (“The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct.”).

individuals a free pass.⁷⁴ This Part discusses in more detail the negative fallout from the Supreme Court's white-collar crime cases, from *Skilling* to *Percoco*, below.

A. *The Fallout from Skilling*

In *Skilling v. United States*, a case about Jeff Skilling, the CEO who ran Enron fraudulently into bankruptcy, the Supreme Court narrowed the definition of honest-services fraud to cover only bribery and kickbacks.⁷⁵ Winning this Supreme Court case spared Skilling from ten years of his original twenty-four-year prison sentence.⁷⁶

The *Skilling* decision was part of the Roberts Court's pattern in white-collar crime decisions of excusing corrupt acts from criminal liability and undoing convictions of individuals for honest-services fraud all over the nation. For example, in Democratic Governor of Alabama Don Siegelman's case involving bribery by a health care executive named Richard Scrushy and the exchange of \$500,000, the Eleventh Circuit ruled that because of *Skilling*, "[a]s to Siegelman, we . . . reverse as to Counts 8 and 9 [to deprive the public of their right to honest services] and vacate the convictions on these counts."⁷⁷

74. See Aidan Mulry, Murad Hussain, Alex S. Tepler, Michael Kim Krouse & Baruch Weiss, *Ciminelli and Percoco – Federal Public Corruption Prosecutors Suffer Two More Unanimous Losses at the Supreme Court*, ARNOLD & PORTER (May 24, 2023), <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2023/05/ciminelli-and-percoco-federal-public-corruption> [<https://perma.cc/JNN7-SPM6>] ("These two unanimous decisions [in *Percoco* and *Ciminelli*] confirm the Court's continued skepticism about the use of federal fraud laws to prosecute state and local corruption schemes."); Brian A. Jacobs, *Percoco and Ciminelli May Drive Prosecutors to Rely on Other Federal Laws*, PROGRAM ON CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF L. (May 18, 2023), https://wp.nyu.edu/compliance_enforcement/2023/05/18/experts-react-to-supreme-court-decisions-on-honest-services-fraud-and-the-right-to-control-theory [<https://perma.cc/5ZU6-SERV>] ("In *Percoco* and *Ciminelli*, the Supreme Court has continued its efforts to narrow the scope of certain federal anti-corruption laws.").

75. *Skilling*, 561 U.S. at 368; see also Brian H. Connor, *The Quid Pro Quo Quark: Unstable Elementary Particle of Honest Services Fraud*, 65 CATH. U. L. REV. 335, 351 (2015) ("[A]fter *Skilling*, [the Supreme Court] conceded that in cases involving campaign contributions, a *quid pro quo* might be required in order to protect the donor's First Amendment rights.").

76. Press Release, Off. of Pub. Affs., Dep't of Just., Former Enron CEO Jeffrey Skilling Resentenced to 168 Months for Fraud, Conspiracy Charges (June 21, 2013), <https://www.justice.gov/opa/pr/former-enron-ceo-jeffrey-skilling-resentenced-168-months-fraud-conspiracy-charges> [<https://perma.cc/RE5Y-L4BQ>].

77. *United States v. Siegelman*, 640 F.3d 1159, 1190 (11th Cir. 2011).

Democratic Mayor of Newark Sharpe James was convicted of a corrupt scheme to allow his girlfriend to purchase cheap city-owned properties.⁷⁸ The Third Circuit decided that “in light of the Supreme Court’s decision in *Skilling*, we will reverse the . . . convictions as to James.”⁷⁹

In December 2009, Republican Majority Leader of New York Senate Joseph L. Bruno was convicted of two counts of honest-services mail fraud for his failure to disclose conflicts of interest while serving as a senator.⁸⁰ Bruno appealed his conviction to the Second Circuit, citing *Skilling*. The Second Circuit agreed with Bruno’s argument, stating that, “[i]n light of *Skilling*, we vacated Bruno’s conviction.”⁸¹ The Department of Justice (DOJ) filed a superseding indictment against Bruno to comply with *Skilling*.⁸² Bruno faced a second trial in 2014, but this time the jury acquitted him on all charges.⁸³ Thus, *Skilling* invalidated convictions and required prosecutors to retry individuals whom juries had already convicted.

B. *The Fallout from McDonnell*

In *McDonnell v. United States*, the Supreme Court saved the former governor of Virginia from any prison time even after his receiving a Rolex, money, a free wedding for his daughter, free clothes for his wife, and a ride in a Ferrari in exchange for political favors.⁸⁴ Similar to the fallout from the Court’s *Skilling*

78. *United States v. Riley*, 621 F.3d 312, 317-18 (3d Cir. 2010) (“The jury convicted Sharpe James and Tamika Riley of the Land Fraud Counts . . .”).

79. *Id.* at 339.

80. Press Release, U.S. Att’y’s Off., N. Dist. of N.Y., Former New York State Senate Majority Leader Joseph L. Bruno Convicted of Scheming to Defraud the Citizens of New York of His Honest Services (Dec. 7, 2009), <https://archives.fbi.gov/archives/albany/press-releases/2009/alfo120709a.htm> [<https://perma.cc/LWP7-S7EN>].

81. *United States v. Bruno*, 531 F. App’x 47, 48 (2d Cir. 2013) (unpublished opinion).

82. Press Release, U.S. Att’y’s Off., N. Dist. of N.Y., Superseding Indictment Charges Former New York State Senate Majority Leader Joseph L. Bruno with Scheme to Defraud Citizens of His Honest Services (May 3, 2012), <https://archives.fbi.gov/archives/albany/press-releases/2012/superseding-indictment-charges-former-new-york-state-senate-majority-leader-joseph-l-bruno-with-scheme-to-defraud-citizens-of-his-honest-services> [<https://perma.cc/L5ZX-8BXC>].

83. Verdict Form at 2, *United States v. Bruno*, No. 09-cr-00029 (N.D.N.Y. May 16, 2014) (“As to Count[s] [One and Two] charging Mr. Bruno with Honest Services Mail Fraud: Not Guilty”); Press Release, U.S. Att’y’s Off., N. Dist. of N.Y., Bruno Acquitted of Honest Services Mail Fraud Involving Bribery (May 16, 2014), <https://www.justice.gov/usao-ndny/pr/bruno-acquitted-honest-services-mail-fraud-involving-bribery> [<https://perma.cc/EM6H-UY45>].

84. *McDonnell v. United States*, 579 U.S. 550, 580 (2016); see also Daniel P. Tokaji, *Bribery and Campaign Finance: McDonnell’s Double-Edged Sword*, 14 OHIO ST. J. CRIM. L. AMICI BRIEFS 15,

decision, the damage done to corruption prosecutions by *McDonnell* was significant. For example, Democrat Chaka Fattah, Sr., a former member of Congress, was convicted of a complicated scheme involving his run for mayor of Philadelphia, personal use of campaign funds, an illicit loan, misuse of federal funds, and theft from nonprofits.⁸⁵ He used Governor McDonnell's win at the Supreme Court to his legal advantage. The Third Circuit agreed with Fattah's reading of *McDonnell* and stated, "[w]e hold that the District Court erred in upholding the jury verdict in light of *McDonnell*, and we will therefore reverse and remand for retrial."⁸⁶

Democrat Sheldon Silver was the Speaker of the Assembly in New York when he was convicted on several bribery counts.⁸⁷ He appealed using *McDonnell*.⁸⁸ The Second Circuit agreed with him that "the jury should have been instructed that, to convict on honest services fraud, the Government must prove that, at the time the bribe was accepted, Silver promised to take official action on a *specific and focused question or matter* as the opportunities to take such action arose."⁸⁹ The Second Circuit thus determined that post-*McDonnell*, "[a]n official who merely accepts a thing of value in an otherwise-legal manner (*e.g.*, client referrals, as permitted under New York law) has not committed a crime" and thereby vacated three of Silver's criminal counts.⁹⁰ Silver was retried and convicted again.⁹¹ Silver was originally indicted in 2015, but because of his clever use of the Supreme Court's pro-corruption decisions discussed here, he did not see the inside of prison until 2020.⁹² Arguably, this five-year saga shows the

15 (2017) ("*McDonnell* clarifies that making phone calls and arranging meetings aren't themselves official acts, but pressure . . . to other public officials could be, so long as there's an agreement to exchange such acts for something of value.").

85. United States v. Fattah, 914 F.3d 112, 127 (3d Cir. 2019).

86. *Id.* at 146.

87. Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Former New York State Assembly Speaker Sheldon Silver Sentenced in Manhattan Federal Court to 12 Years in Prison (May 3, 2016), <https://www.justice.gov/usao-sdny/pr/former-new-york-state-assembly-speaker-sheldon-silver-sentenced-manhattan-federal-court> [<https://perma.cc/LGM4-KJGM>].

88. United States v. Silver, 948 F.3d 538, 545 (2d Cir. 2020).

89. *Id.* at 568.

90. *Id.* at 577.

91. Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Former New York State Assembly Speaker Sheldon Silver Sentenced to 7 Years in Prison (July 27, 2018), <https://www.justice.gov/usao-sdny/pr/former-new-york-state-assembly-speaker-sheldon-silver-sentenced-7-years-prison> [<https://perma.cc/8LWV-6H6B>].

92. See Press Release, U.S. Att'y's Off., S. Dist. of N.Y., New York State Assembly Speaker Sheldon Silver Arrested on Corruption Charges (Jan. 22, 2015), <https://www.justice.gov/usao-sdny/pr/new-york-state-assembly-speaker-sheldon-silver-arrested-corruption-charges>

prosecutorial and judicial resources that have been squandered to put one corrupt politician behind bars.

Republican Dean Skelos was the on-again-off-again New York Senate Majority Leader between 2008 and 2015. He was indicted in 2015. Following a jury trial in 2015, Skelos and his son, Adam, were convicted of Hobbs Act conspiracy, Hobbs Act extortion, honest-services wire fraud, conspiracy and federal program bribery.⁹³ They appealed their convictions to the Second Circuit.⁹⁴ The appeals court agreed that, applying *McDonnell* to the case, the jury instruction on an “official act” was too expansive, and vacated the convictions.⁹⁵ Dean Skelos was retried. He argued in 2018 that his indictment should be dismissed because the grand jury was not instructed properly under *McDonnell*.⁹⁶ The judge overseeing his case denied this request,⁹⁷ and on July 17, 2018, Skelos and his son were convicted for a second time.⁹⁸ Again, instead of one trial, two trials were needed before the Skelos pair were brought to justice.

C. *The Fallout from Kelly*

In *Kelly v. United States*, the Supreme Court spared Bridget Anne Kelly—the woman behind the Bridgegate scandal in New Jersey where the George Washington Bridge was purposefully clogged with traffic as political retribution against the Mayor of Fort Lee—from the prison term a jury thought she

[<https://perma.cc/HWH3-8ZQJ>]; Tom Hays & Michael Balsamo, *Sheldon Silver Begins Prison Sentence in Corruption Case*, ASSOCIATED PRESS (Aug. 26, 2020, 12:13 PM EDT), <https://ap-news.com/article/virus-outbreak-ny-state-wire-politics-nyc-wire-trump-investigations-8fadd004ee6c54ac818a9c4bfabf4cb5> [<https://perma.cc/346B-YGMM>].

93. See Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., Former New York State Senate Majority Leader Dean Skelos and His Son, Adam Skelos, Convicted Again of Corruption Offenses in Manhattan Federal Court (July 17, 2018), <https://www.justice.gov/usao-sdny/pr/former-new-york-state-senate-majority-leader-dean-skelos-and-his-son-adam-skelos> [<https://perma.cc/F58A-Y7Z4>].
94. *United States v. Skelos*, 707 F. App’x 733, 735-36 (2d Cir. 2017).
95. *Id.* at 736 (“We identify charging error in light of *McDonnell v. United States* . . . we are obliged to vacate the convictions.”).
96. *United States v. Skelos*, No. 15-CR-317, 2018 WL 2849712, at *2 (S.D.N.Y. 2018) (“[Skelos] contend[s] that when the grand jury indicted Defendants in July 2015, the Government likely instructed the grand jury using this Circuit’s then-controlling definition of ‘official action,’ which was much broader than the current definition provided by the Supreme Court in *McDonnell v. United States*.”).
97. *Id.* at *1.
98. Vivian Wang, *Guilty, Again: Dean Skelos, Former Senate Leader, Is Convicted of Corruption in Retrial*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/nyregion/dean-skelos-corruption-son-senate-ny.html> [<https://perma.cc/5JTF-F6XB>].

deserved.⁹⁹ The *Kelly* case is far more recent, as it was decided in 2020.¹⁰⁰ Nonetheless, criminal defendants are already putting it to work.¹⁰¹ For example, Mary Elgin was the elected Trustee of Calumet Township, Indiana¹⁰² and Ethel Shelton was her administrative assistant.¹⁰³ They were convicted of wire fraud and honest-services crimes related to their misuse of the Trustee office for nonofficial business including conducting election work and selling tickets to raise campaign funds.¹⁰⁴ Shelton challenged her conviction under *Kelly*.¹⁰⁵ The Seventh Circuit agreed that, “*Kelly* made clear that employee salaries that were the by-product of a fraudulent scheme could not support an honest services charge. In the ticket-selling kickback scheme, employee labor was not the object of the scheme; it was the byproduct of running the scheme.”¹⁰⁶ And thus, the Seventh Circuit reversed Shelton’s convictions.¹⁰⁷

Finally, in *Ciminelli*, the Supreme Court itself built on *Kelly*. Specifically, in *Ciminelli*, the Court goes further down the path of exonerating an individual

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99. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (“As Kelly’s own lawyer acknowledged, this case involves an ‘abuse of power.’ For no reason other than political payback, Baroni and Kelly used deception to reduce Fort Lee’s access lanes to the George Washington Bridge—and thereby jeopardized the safety of the town’s residents. But not every corrupt act by state or local officials is a federal crime.”) (citation omitted); see also Sami Azhari & Sergio Lopez, *Guilty Until Proven Guilty: The Prosecution of Public Corruption and White Collar Crime*, 44 CHAMPION 32, 36 (Dec. 2020) (“[T]he Supreme Court spared no words, calling the defendants’ behavior deceptive and corrupt, and saying they abused the power of their office.”); George D. Brown, *Defending Bridgegate*, 77 WASH. & LEE L. REV. ONLINE 141, 143 (2020) (“[Justice Kagan] viewed the lane realignment as a regulatory decision that did not involve the required gain or loss of property. . . . [The defendants’] conduct may have been fraudulent, even ‘corrupt,’ but it did not constitute a violation of federal law.”).
100. *Kelly*, 140 S. Ct. at 1565; see Ciara Torres-Spelliscy, *Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars*, 69 AM. U. L. REV. 1689, 1701 (Aug. 2020) (“The gravamen of Kelly’s claims to the Supreme Court is that she was allowed to use political ‘spin’ (e.g., her lies) without triggering criminal penalties.”); Jocelyn Strauber, Caroline Ferris White & Mary Ross, *Why ‘Bridgegate’ Ruling Could Allow for New Defenses in Future Fraud Cases*, NAT’L L.J. (May 14, 2020, 11:03 AM), <https://www.law.com/nationallawjournal/2020/05/14/why-bridgegate-ruling-could-allow-for-new-defenses-in-future-fraud-cases> [<https://perma.cc/2N5K-USZP>].
101. See, e.g., *United States v. Blaszcak*, 56 F.4th 230, 233 (2d Cir. 2022); *United States v. Yates*, 16 F.4th 256, 268 (9th Cir. 2021).
102. *United States v. Shelton*, 997 F.3d 749, 754 (7th Cir. 2021).
103. *Id.* at 753.
104. *Id.* (“After Elgin took a plea deal, a jury convicted Ethel Shelton of . . . conspiracy to commit honest services wire fraud related to her actions . . . [in the] Trustee’s Office.”).
105. See *Shelton*, 997 F.3d at 773.
106. *Id.* at 776.
107. *Id.* at 778.

from a federal prosecution of corrupt behavior at the state level. It criticized and reversed the Second Circuit for “affirm[ing] federal convictions regulating the ethics (or lack thereof) of state employees and contractors – despite our admonition that “[f]ederal prosecutors may not use property fraud statutes to set standards of disclosure and good government for state and local officials.”¹⁰⁸ *Kelly*, like *McDonnell* and *Skilling* before it, exonerated those who abused government positions of power.

D. *The Fallout from Percoco*

The Supreme Court cited *Percoco* and *Ciminelli* when vacating the convictions of two other men, Steven Aiello and Joseph Gerardi, who were involved in the Buffalo Billion scandal.¹⁰⁹ Other criminal defendants are already citing these two cases in the hopes that they will result in exonerations. For instance, in 2023, the Republican former Speaker of the House in Ohio, Larry Householder, and his codefendant Matthew Borges, the former chair of the Ohio GOP, were convicted of conspiracy in a RICO bribery case involving at least sixty million dollars in bribes from a company called FirstEnergy.¹¹⁰ Perhaps this outcome was inevitable given DOJ’s prosecutors were “armed with guilty pleas from accomplices, implicating texts, phone recordings, bank statements, and a 49-page mea culpa from . . . FirstEnergy – which admitted to funding the scheme in exchange for a \$1.3 billion energy bailout bill meant to support Ohio’s two struggling nuclear power plants.”¹¹¹ Borges is already trying to use *Ciminelli* and *Percoco* to challenge his conviction.¹¹²

¹⁰⁸. *Ciminelli v. United States*, 143 S. Ct. 1121, 1128 (2023) (quoting *Kelly v. United States*, 140 S. Ct. 1565, 1574).

¹⁰⁹. *Aiello v. United States*, 143 S. Ct. 2491, 2491 (2023) (“Judgment vacated, and case remanded . . . for further consideration in light of *Percoco* . . . and *Ciminelli*.”).

¹¹⁰. See Press Release, U.S. Att’y’s Off., S. Dist. of Ohio, Jury Convicts Former Ohio House Speaker, Former Chair of Ohio Republican Party of Participating in Racketeering Conspiracy (Mar. 9, 2023), <https://www.justice.gov/usao-sdoh/pr/jury-convicts-former-ohio-house-speaker-former-chair-ohio-republican-party> [<https://perma.cc/6GC5-ZUSG>].

¹¹¹. Alex Ebert, *Ohio’s Historic Corruption Case Tests Limits of Citizens United*, BLOOMBERG L. (Jan. 20, 2023, 5:15 AM EST), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ohios-historic-corruption-case-tests-limits-of-citizens-united> [<https://perma.cc/5MGT-Q46S>].

¹¹². See Jessie Balmert, *Will 2 Supreme Court Rulings Help Former Ohio GOP Chair Matt Borges Appeal His Conviction?*, CIN. ENQUIRER (May 16, 2023, 10:23 AM), <https://sports.yahoo.com/2-supreme-court-rulings-help-142353624.html> [<https://perma.cc/7JC4-M873>].

Borges is not alone, as other convicted defendants are also citing *Percoco* in their appeals.¹¹³ Disgraced Democratic lawyer Michael Avenatti, who once represented Stormy Daniels against Donald Trump, has tried to use *Percoco* to vacate his fraud conviction.¹¹⁴ And Democratic mega-donor Sam Bankman-Fried, who has been charged with making \$100 million in illegal campaign contributions, among other crimes, tried to use *Ciminelli* and *Percoco* to get several of his federal charges dropped.¹¹⁵ One district court has vacated the convictions of defendants in a Fédération Internationale de Football Association (“FIFA”) bribery case citing *Percoco*.¹¹⁶ In addition, the Eleventh Circuit already cited *Percoco* and *Ciminelli* when exonerating a defendant from criminal contempt.¹¹⁷

Finally, *Percoco* could be used in civil litigation to try to further unravel political-corruption laws such as two-year cooling off periods before ex-lawmakers

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113. See Reply Brief for Defendant-Appellant Edward Mangano at 1, *United States v. Venditto*, No. 22-861 (2d Cir. July 14, 2023), 2023 WL 4638652 (“The upshot is that Mangano was convicted, at most, for ‘promis[ing] to keep [someone] happy as the opportunities to do so arose,’ . . . and for purportedly ‘exercis[ing] very strong influence over government decisions,’ which is insufficient to create a duty of honest services, *Percoco* . . .”); Appellant Jo Ann Macrina’s Opening Brief at 32, *Macrina v. United States*, No. 23-10734-A (11th Cir. July 19, 2023), 2023 WL 4743715 (“Because this Court ‘cannot isolate the jury’s consideration’ of the cash from the other alleged bribes, a new trial is required.” (quoting *United States v. Fattah*, 914 F.3d 112, 154 (3d Cir. 2019))).
114. See *United States v. Avenatti*, 2023 WL 5597835, at *18 & n.27 (2d Cir. 2023) (recognizing Avenatti’s sufficiency challenges based on *Ciminelli* and *Percoco* and concluding that these “recent Supreme Court decisions cited to us after argument by Avenatti . . . do not pertain to his challenges”).
115. See Josh Russell, *New Crypto Bribe Charges Against Bankman-Fried Spun Off for Separate Trial*, COURTHOUSE NEWS SERV. (June 15, 2023), <https://www.courthousenews.com/bankman-fried-says-new-charges-on-crypto-bribe-go-too-far> [<https://perma.cc/B5RE-GWYZ>] (“[Bankman-Fried’s lawyer Christian] Everdell . . . argued . . . that several charges should be thrown out in the wake of two recent decisions by the U.S. Supreme Court that overturned the corruption convictions of Joseph Percoco.”); see also *United States v. Bankman-Fried*, 2023 WL 4194773, at *1 (S.D.N.Y. June 27, 2023) (refusing to dismiss campaign-finance charges against Sam Bankman-Fried); Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., Statement of U.S. Attorney Damian Williams on the Conviction of Samuel Bankman-Fried (Nov. 2, 2023), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-damian-williams-conviction-samuel-bankman-fried> [<https://perma.cc/R3PJ-E5Q4>] (indicating that the convictions were no longer on campaign-finance grounds).
116. *United States v. Full Play Grp., S.A.*, No. 15-252S3, 2023 WL 5672268, at *15 (E.D.N.Y. Sept. 1, 2023).
117. *United States v. Robinson*, 83 F.4th 868, 885 (11th Cir. 2023) (“[T]he Supreme Court has rejected the notion that an appellate court should affirm a conviction on a theory that the government did not advocate and the factfinder did not consider in the district court. For instance, just recently in the fraud context, the Supreme Court refused the government’s efforts to defend an honest-services-fraud conviction . . . The Supreme Court has reached similar conclusions in other fraud cases.”).

can become lobbyists.¹¹⁸ Overall, *Percoco* fits the Roberts Court's pattern of moving the goal posts in corruption cases to the detriment of prosecutors and the public who both want less vice in governance.

III. THE UNSPEAKABLE THING UNSPOKEN: TRUMP

Toni Morrison wrote in her essay *Unspeakable Things Unspoken* that “certain absences . . . are so stressed, so ornate, so planned, they call attention to themselves.”¹¹⁹ Morrison was discussing the nearly palpable absence of chattel slavery in canonical American literature like *Moby-Dick* on the eve of the Civil War, when the nation was literally tearing itself apart over this seminal legal and moral issue. Morrison's framework provides a useful way to realize what is missing from a modern text. While an entirely different context (Morrison's was fiction; while the Supreme Court's is fact), in the Supreme Court's 2023 decision in *Percoco*, there is a similar unspeakable thing unspoken: namely, the corrupt actions of then-President Trump in attempting to subvert the 2020 election.¹²⁰

On the one hand, having no mention in *Percoco* of Trump or the wide wake of his legal problems, including his participation in January 6, makes perfect sense. Obviously, *Percoco* was the campaign manager of then-Democratic Governor of New York Andrew Cuomo, and his conviction has nothing to do with Republican former President Donald Trump. *Percoco*'s actions were in 2014. January 6 was seven years later. But on the other hand, just as slavery was inexplicably missing from books written at a time when slavery was the central legal question of the day, there is a strange and palpable absence from *Percoco* of consideration of how this case exonerating a powerful campaign manager's acts of political corruption could facilitate more corrupt actions by the politically powerful like Donald Trump, as well as his past and present campaign managers, especially after the violence of January 6.¹²¹ Such a contextualizing point could have been made in a dissent or a distinguishing concurrence, but in *Percoco* the win was regrettably 9-0, with a concurrence from Justices Gorsuch and Thomas that is even more hostile to the concept of honest-services fraud than the

118. See *Miller v. Ziegler*, 2023 WL 2719472, at *1 (W.D. Mo. 2023).

119. Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, 28 MICH. Q. REV. 1, 11 (1989).

120. Editorial, *Jan. 6 Committee Report Is Clear: Trump Must Be Held Accountable*, PHILA. INQUIRER (Dec. 22, 2022, 5:00 AM EST), <https://www.inquirer.com/opinion/editorials/trump-jan-6-committee-insurrection-capitol-attack-20221222.html> [<https://perma.cc/98YH-EE44>].

121. See Chris Cillizza, *Steve Bannon Was Knee-Deep in January 6*, CNN (Sept. 24, 2021, 2:27 AM EDT), <https://www.cnn.com/2021/09/23/politics/steve-bannon-january-6-capitol-riot/index.html> [<https://perma.cc/PJ89-C66N>].

majority opinion.¹²² What would have been laudable is if a single Justice had acknowledged that American democracy is in a fragile state post-January 6 and had affirmed that the Supreme Court would do all it could in the future to enforce public-corruption laws to protect the democratic process as well as the rule of law. The Court's silence on these topics will predictably embolden the worst present and future offenders.

The Roberts Court would not have been out of character to have taken cognizance of the larger political context in their *Percoco* decision. In fact, the Supreme Court has a long history of taking judicial notice of all sorts of social, political, and economic conditions when it wishes to do so.¹²³ As the Court explained back in 1875, "Courts will take notice of whatever is generally known within the limits of their jurisdiction."¹²⁴ The Court went on to elaborate that in the sphere of politics, "[f]acts of universal notoriety need not be proved. . . . In this country, such [judicial] notice is taken of the appointment of members of the cabinet [and] the election and resignations of senators."¹²⁵

The Court took judicial notice of the military build-up during the Cold War.¹²⁶ The Court has likewise taken judicial notice of the impact of racism and sexism.¹²⁷ And the Court has taken judicial notice of the *modus operandi* of the Ku Klux Klan.¹²⁸ There have been times when the Court has taken judicial notice

122. See *Percoco v. United States*, 598 U.S. 319 (2023); *id.* at 333 (Gorsuch, J., concurring).

123. See, e.g., *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 382 (1912) ("This court will take judicial notice of political conditions and the general purposes of legislation."); Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 273-74 (1944) ("[T]he court cannot function unless . . . the judge and jury have the fund of information common to all intelligent men in the community as well as the capacity to use the ordinary processes of reasoning This . . . is the rock of reason and policy upon which judicial notice of facts is built.").

124. *Brown v. Piper*, 91 U.S. 37, 38 (1875); see also *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 301 (1937) ("Courts take judicial notice of matters of common knowledge."); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("We take judicial cognizance of all matters of general knowledge.").

125. *Piper*, 91 U.S. at 42.

126. *U.S. v. Reynolds*, 345 U.S. 1, 10 (1953) ("[W]e cannot escape judicial notice that this is a time of vigorous preparation for national defense.").

127. *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [S]uch discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); *Oregon v. Mitchell*, 400 U.S. 112, 234-35 (1970) ("Extensive testimony before both Houses indicated that racial minorities have long received inferior educational opportunities throughout the United States.").

128. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 80 (1928) (McReynolds, J., dissenting) (noting that the Court took judicial notice of the actions of the Ku Klux Klan that "[i]t is a matter of common knowledge that this organization functions largely at night, its members

of a “fact” that later turned out to be factually wrong like its—in retrospect—poor assessment of the health dangers of tobacco.¹²⁹ The Court has taken judicial notice of the impact of multiple wars,¹³⁰ including World War I, World War II, and the Civil War,¹³¹ as well as the Christmas Day pardon by President Andrew Johnson of all Confederates who fought in the Civil War.¹³² The judicial notice of the Civil War and its aftermath is particularly relevant to analysis of the January 6 insurrection as Congress did not declare war in the Civil War, and yet the Court used its common sense to take judicial notice of the obvious American-on-American sectarian violence.¹³³

Moreover, the Supreme Court takes judicial notice of political realities in election cases all the time. In *Richardson v. McChesney*, the Court took judicial notice that Congressional elections had taken place using a particular appointment map.¹³⁴ In *Meyer v. Grant*, the Court took judicial notice of why signature

disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people”).

129. *Austin v. Tennessee*, 179 U.S. 343, 345 (1900) (“From the . . . colony of Virginia . . . tobacco has been one of the most profitable . . . products . . . while its effects may be injurious to some, its extensive use . . . is a remarkable tribute to its popularity and value. . . . [I]t cannot be classed . . . [as] a menace to the health of the entire community.”).
130. See, e.g., *Atwood v. Weems*, 99 U.S. 183, 188 (1878) (Field, J., concurring) (“The court may take judicial notice, from the existence of war, that a whole people are public enemies.”).
131. See, e.g., *Ex parte Milligan*, 71 U.S. 2, 125 (1866) (“This nation, as experience [with the Civil War] has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution.”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 327 (1936) (“We may take judicial notice of the international situation at the time the act of 1916 was passed [i.e., World War I].”); *L.A. Gas & Elec. Corp. v. R.R. Comm’n*, 289 U.S. 287, 308 (1933) (“We . . . take judicial notice of the high level of prices of labor and materials prevailing . . . from 1917, as incident to the war.”); *Hagner v. United States*, 285 U.S. 427, 432 (1932) (“An indictment under the Espionage Act, which denounces certain acts when the United States is at war, has been upheld notwithstanding a failure to allege that when the acts were committed the United States was at war, on the ground that the courts would take judicial notice of that fact.”).
132. *Armstrong v. United States*, 80 U.S. 154, 156 (1871) (“The [presidential] proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect.”).
133. *The Amy Warwick*, 67 U.S. 635, 667 (1862) (“As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.”); *Sprott v. United States*, 87 U.S. 459, 462 (1874) (“It is a fact so well known as to need no finding of the court to establish it, a fact which, like many other historical events, all courts take notice of, that cotton was the principal support of the rebellion . . .”).
134. *Richardson v. McChesney*, 218 U.S. 487, 492 (1910) (“[M]embers of Congress were, in November, 1908, elected under the apportionment act of 1900. They were, as we may judicially

gathering for an election is paid work.¹³⁵ In *Crawford v. Marion County Election Board*, the Supreme Court took judicial notice of the negative impacts voter-identification laws would have on certain citizens and upheld the voter-identification law in question despite this.¹³⁶ In *McCarthy v. Briscoe*, the Court took judicial notice of the seriousness of Eugene McCarthy's candidacy and ordered his name to appear on a Texas ballot.¹³⁷ And several members of the Court found that the partisan impact of America's two-party political system, wherein most of the nation's citizens are wedded to either the Democratic or the Republican Parties, was a matter of common knowledge.¹³⁸

Of particular relevance is *Luther v. Borden*, a case about an insurrection in Rhode Island, in which the Court concluded that once a government established its authority in the state, the Supreme Court would take judicial notice of that power.¹³⁹ (Other courts have also had to deal with ruling on insurrections, as the Circuit Court of Pennsylvania did when considering the Whiskey Rebellion.)¹⁴⁰

know, admitted to the respective seats, and, as we may also take notice, their successors have been elected according to the same scheme of apportionment.”).

135. 486 U.S. 414, 423-24 (1988) (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)) (“[W]e can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and . . . tiresome—so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless . . . there is some remuneration.”).
136. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 (2008) (“[F]acts of which we may take judicial notice . . . indicate that a somewhat heavier burden may be placed on . . . elderly persons born out of State,” poor persons, “homeless persons[,] and persons with a religious objection to being photographed”).
137. *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976) (Powell, J., granting injunctive relief to a candidate) (“a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support [for a candidate]. . . . It is not seriously contested that Senator McCarthy is a nationally known figure.” (internal citation omitted)).
138. *Newberry v. United States*, 256 U.S. 232, 285-86 (1921) (Pitney, Brandeis & Clarke, JJ., concurring in part) (“It is matter of common knowledge that the great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy . . . and various other influences, sentimental and historical.”).
139. *Luther v. Borden*, 48 U.S. 1, 47 (1849) (“sovereignty . . . resides in the people of the State, . . . [who] may alter . . . their form of government [W]hether they have changed it . . . is . . . settled by the political power. . . . [W]hen that power has decided, the courts are bound to take notice . . . and to follow it.”).
140. *United States v. Mitchell*, 2 U.S. 348, 355 (Pa. Dist. 1795) (concerning an indictment for high treason) (“The first question to be considered is, what was the general object of the insurrection? . . . Taking the testimony in a rational and connected point of view, this was the object: It was of a general nature, and of national concern.”).

Members of the Court were also cognizant of the impact of the House of Representative's impeachment proceedings against President Richard Nixon when considering the interpretation of the Presidential Recording and Materials Preservation Act in *Nixon v. Administrator of General Services*.¹⁴¹ As Nixon-appointed Justice Powell wrote in his concurrence in this case, "Congress legitimately could conclude that . . . the recommendation of impeachment and the resignation of President Nixon[] might lead to destruction of those of the former President's papers that would be most likely to assure public understanding of the unprecedented events that led to the premature termination of the Nixon administration."¹⁴²

Ford-appointed Justice Stevens was even more pointed in his concurrence in *Nixon*, noting that

Like the Court . . . I am persuaded that "appellant [Richard Nixon] constituted a legitimate class of one . . ." . . . Appellant resigned his office under unique circumstances and accepted a pardon for any offenses committed while in office. By so doing, he placed himself in a different class from all other Presidents. Even though unmentioned, it would be unrealistic to assume that historic facts of this consequence did not affect the legislative decision. . . . If I did not consider it appropriate to take judicial notice of those facts, I would be unwilling to uphold the power of Congress to enact special legislation directed only at one former President at a time when his popularity was at its nadir.¹⁴³

Nixon demonstrates that Supreme Court Justices can consider recent, and even politically divisive, events when they so desire. The present Court could have similarly taken judicial notice of Trump's two impeachments, including one for his actions on January 6.

Arguably the Court in *Percoco* already took judicial notice of the fact that "[f]rom time immemorial, there have been *éminence grises*, individuals who lacked any formal government position but nevertheless exercised very strong influence over government decisions. Some of these individuals have been reviled; others have been respected as wise counselors."¹⁴⁴ However, the Court provided no citation for this assertion. The failure of the Court, or even a single Justice in a concurrence or dissent, to take judicial notice of the fact that Trump was impeached twice by the House of Representatives for trying to get a foreign

141. 433 U.S. 425, 486 (1977) (Stevens, J., concurring); *id.* at 499 (Powell, J., concurring in part and in judgment).

142. *Id.* at 499 (Powell, J., concurring in part and in judgment).

143. *Id.* at 486 (Stevens, J., concurring) (citations omitted).

144. *Percoco*, 598 U.S. at 330.

nation to illegally interfere in the 2020 election – the second time for January 6, 2021 – or of the damage these actions have engendered, has created a significant risk that future corrupt political behavior will expand and, worse, that it will go unpunished.¹⁴⁵ As will be discussed below, Trump and some of his inner circle of fundraisers have already drawn the interest of state and federal prosecutors. This group may try to use *Percoco* to their legal advantage in ongoing and future criminal cases.

IV. THE RISK FOR FUTURE CAMPAIGN MANAGERS AND FORMER PRESIDENT TRUMP

What happens when the Supreme Court fails to take judicial notice of contemporary political corruption? The nation gets decisions like *Percoco*, which make some strains of corruption nearly consequence-free and seem as if they are written in some strange, disembodied void where modern political realities do not intrude.¹⁴⁶

The impact of *Percoco* (and *Ciminelli* for that matter) is unlikely to be limited to honest-services-fraud cases or even bribery cases.¹⁴⁷ Just like with *Percoco*'s predecessors *Skilling*, *McDonnell*, and *Kelly*, criminal defendants facing all sorts of prosecutions will claim that *Percoco* exonerates them or gives them the opportunity for a new trial. As lawyers at Sullivan & Cromwell wrote after *Percoco* and *Ciminelli*, “[t]he Court has tended to narrowly reject the governments’ aggressive theory of the day while declining to provide broader interpretive guidance.”¹⁴⁸ This lack of guidance will encourage convicted criminals and accused

145. *About Impeachment: Senate Trials*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-list.htm> [<https://perma.cc/EGU8-P7DW>].

146. See Aidan Mulry, Murad Hussain, Alex S. Tepler, Michael Kim Krouse & Baruch Weiss, *Ciminelli and Percoco – Federal Public Corruption Prosecutors Suffer Two More Unanimous Losses at the Supreme Court*, ARNOLD & PORTER (May 24, 2023), <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2023/05/ciminelli-and-percoco-federal-public-corruption> [<https://perma.cc/3B2C-YB4R>] (“These two unanimous decisions confirm the Court’s continued skepticism about the use of federal fraud laws to prosecute state and local corruption schemes.”).

147. Brief of Appellant at 22, *United States v. Barnes*, 2023 WL 6976040 (6th Cir. Oct. 14, 2023) (“The Government relied on the definition of pyramid scheme in [*Gold*] to pursue its charges. However, *Percoco* . . . held that using a previously unclear definition of a scheme to defraud in a jury instruction is subject to the same constitutional restrictions as statutes. *Percoco* requires reversal.”).

148. *Supreme Court and First Circuit Cut Back on Expansive Theories of Federal Fraud*, SULLIVAN & CROMWELL 5 (May 15, 2023), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-courts-reject-expansive-fraud-theories-abdelaziz-ciminelli-percoco.pdf [<https://perma.cc/D7UQ-8BX9>].

defendants alike to cite *Percoco* hoping it will operate as a get-out-of-jail-free card.

Percoco is only a few months old, and this is already happening. As alluded to above, Matt Borges, ex-chair of the Ohio Republican Party, is trying to use *Percoco* to avoid a federal RICO conviction.¹⁴⁹ Democratic donor Sam Bankman-Fried tried to use *Percoco* to avoid charges of bank fraud and securities fraud.¹⁵⁰ Disbarred lawyer Michael Avenatti tried, and so far has failed, to use *Percoco* to avoid the consequences of defrauding a legal client.¹⁵¹ Citing *Percoco* worked for defendants in a FIFA bribery case and in a criminal contempt case.¹⁵²

A. Campaign Managers and Fundraisers

Is there any real risk that other campaign managers might take *Percoco* as an excuse to evade criminal liability or to act corruptly? In a word, yes. For one, some campaign managers are crooks.¹⁵³ And at the presidential campaign level, two campaign managers from Trump's 2016 campaign faced serious criminal trouble: Paul Manafort and Steve Bannon. Manafort was convicted of filing false

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149. Reply Memorandum in Support of Motion of Defendant-Appellant for Release Pending Appeal at 4, *United States v. Borges*, No. 23-3566 (6th Cir. Aug. 7, 2023), <https://storage.courtlistener.com/recap/gov.uscourts.ca6.148424/gov.uscourts.ca6.148424.11.o.pdf> [<https://perma.cc/CCW5-FF8L>] (“*Ciminelli*’s declaration that ‘the wire fraud statute reaches only traditional property interests,’ and *Percoco*’s rejection of the prosecution’s reliance on outlier pre-*Skilling* case law support the First Circuit’s narrow interpretation of property [in fraud cases.]” (citations omitted)).
150. Memorandum of Law in Support of Samuel Bankman-Fried’s Motion to Dismiss Counts 7 Through 9 and 1 Through 2 of the S5 Indictment for Failure to Allege a Valid Property Right, *United States v. Bankman-Fried*, No. S5 22 Cr. 673 (LAK) at 6-11 (S.D.N.Y. May 8, 2023), <https://cdn.arstechnica.net/wp-content/uploads/2023/05/US-v-Sam-Bankman-Fried-Memo-in-Support-to-Dismiss-Charges-7-9-and-1-2-5-8-2023.pdf> [<https://perma.cc/AQS5-PLZR>] (citing *Percoco* and *Ciminelli*).
151. *United States v. Avenatti*, 81 F.4th 171, 212 n.27 (2d. Cir. 2023) (“No fiduciary duty to the public is at issue in this case, and Avenatti does not – and cannot – argue that he lacked notice that, as an attorney, he owed a fiduciary duty to his client. . . . Insofar as Avenatti points us to *Percoco*’s reiteration of *Skilling*’s ruling that ‘undisclosed self-dealing’ does not constitute honest-services fraud, . . . we discuss why the evidence was sufficient to permit a reasonable jury to conclude that Avenatti [was guilty].” (citation omitted)).
152. *United States v. Full Play Grp., S.A.*, 2023 WL 5672268, at *15-16, 19-26 (E.D.N.Y. 2023); *United States v. Robinson*, 83 F.4th 868, 885 (11th Cir. 2023).
153. Press Release, U.S. Att’y’s Off., E. Dist. of N.Y., Congressional Campaign Treasurer Pleads Guilty to Conspiring with a Congressional Candidate to Defraud (Oct. 5, 2023), <https://www.justice.gov/usao-edny/pr/congressional-campaign-treasurer-pleads-guilty-conspiring-congressional-candidate> [<https://perma.cc/GBM8-FPRR>].

tax returns, bank fraud, and failing to disclose a foreign bank account.¹⁵⁴ He also pled guilty to obstruction of justice for tampering with witnesses in the Robert Mueller investigation into Russian interference in the 2016 election.¹⁵⁵ Bannon was indicted for federal wire fraud in 2020.¹⁵⁶ Additionally, Elliot Broidy, who was a major fundraiser for Trump's 2016 campaign and was the deputy finance chair for the Republican National Committee (RNC) after Trump's election, was convicted of conspiring to violate the Foreign Agent Registration Act.¹⁵⁷ President Trump ultimately pardoned all three men: Manafort, Bannon, and Broidy.¹⁵⁸ As the Supreme Court has recognized, all three men, by accepting their pardons, acknowledged their guilt regarding their respective crimes.¹⁵⁹

However, there have been subsequent charges against Bannon. He was later indicted by the Manhattan District Attorney's Office in 2022 for allegedly defrauding individuals to pay for a private border wall that was never built.¹⁶⁰ That criminal case is ongoing, with a trial date set for May 2024.¹⁶¹ Bannon was also

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154. Miles Parks & Ryan Lucas, *Paul Manafort, Former Trump Campaign Chairman, Sentenced to Just Under 4 Years*, NAT'L PUB. RADIO (Mar. 7, 2019, 7:04 PM ET), <https://www.npr.org/2019/03/07/701045248/paul-manafort-former-trump-campaign-chairman-sentenced-to-just-under-4-years> [https://perma.cc/C7QA-HBHB].
 155. Carrie Johnson, *Manafort Pleads Guilty, Agrees to Cooperate with Mueller Investigation*, NAT'L PUB. RADIO (Sept. 14, 2018, 4:26 PM ET), <https://www.npr.org/2018/09/14/648016156/the-latest-on-paul-manafort-trial> [https://perma.cc/8GBX-2BZ8].
 156. Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Leaders of 'We Build the Wall' Online Fundraising Campaign Charged with Defrauding Hundreds of Thousands of Donors (Aug. 20, 2020), <https://www.justice.gov/usao-sdny/pr/leaders-we-build-wall-online-fundraising-campaign-charged-defrauding-hundreds-thousands> [https://perma.cc/8LYT-6C4X].
 157. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Elliott Broidy Pleads Guilty for Back-Channel Lobbying Campaign to Drop 1MDB Investigation and Remove a Chinese Foreign National (Oct. 20, 2020), <https://www.justice.gov/opa/pr/elliott-broidy-pleads-guilty-back-channel-lobbying-campaign-drop-1mdb-investigation-and> [https://perma.cc/32VE-ZEC7]; Paul Duggan, *GOP Fundraiser Says He Got Millions to Illegally Lobby Trump Administration*, WASH. POST (Apr. 4, 2023, 7:44 PM ET), <https://www.washingtonpost.com/dc-md-va/2023/04/04/broidy-testify-trump-malaysia-fugees> [https://perma.cc/AV3Q-39TZ].
 158. Andrew Prokop, *Trump's Final Pardon Spree, Explained*, VOX (Jan. 20, 2021, 9:50 AM ET), <https://www.vox.com/22238571/trump-pardons-bannon-broidy-corruption> [https://perma.cc/9UWJ-UA4X].
 159. See *Burdick v. United States*, 236 U.S. 79, 94 (1915) (holding that a pardon "carries an imputation of guilt; acceptance a confession of it").
 160. Julian Shen-Berro, *Steve Bannon Charged with Money Laundering, Conspiracy*, POLITICO (Sept. 8, 2022, 9:24 AM ET), <https://www.politico.com/news/2022/09/08/steve-bannon-surrenders-to-manhattan-da-00055427> [https://perma.cc/G8TS-ZKWN].
 161. Michael R. Sisak, *Steve Bannon's 'We Build the Wall' Scheme Trial Set for May 2024*, PBS (May 25, 2023, 4:49 PM ET), <https://www.pbs.org/newshour/politics/steve-bannons-we-build-the-wall-scheme-trial-set-for-may-2024> [https://perma.cc/NTW3-DRNV].

convicted in 2022 of contempt of Congress for refusing to appear for a deposition and for refusing to produce documents in response to a subpoena from the January 6 Select Committee.¹⁶² Bannon has yet to be charged by the Special Counsel, nor does he appear to be listed as an unindicted coconspirator in Trump's January 6 indictment.¹⁶³ But there are open questions about Bannon's actions around January 6.¹⁶⁴ Thus, the idea that campaign managers cannot get into deeply corrupt (or otherwise criminal) activity is disproven by Trump's recent former fundraisers and campaign managers.

Presently, while candidate Trump has not named a "campaign manager" for his 2024 presidential campaign, the campaign is being run by four senior advisors: Brian Jack, Chris LaCivita, Jason Miller, and Susie Wiles, who is also the CEO of the Save America PAC.¹⁶⁵ In 2022, federal prosecutors were reportedly investigating the creation and expenditures of the Save America PAC, which was formed shortly after Trump's 2020 electoral loss.¹⁶⁶ However, public reporting indicates that the Special Counsel has withdrawn subpoenas seeking

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162. See Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Stephen K. Bannon Indicted for Contempt of Congress (Nov. 12, 2021), <https://www.justice.gov/opa/pr/stephen-k-bannon-indicted-contempt-congress> [<https://perma.cc/G4VV-QWFM>]; Press Release, U.S. Att'y's Off. for D.C., Stephen K. Bannon Sentenced to Four Months in Prison on Two Counts of Contempt of Congress (Oct. 21, 2022), <https://www.justice.gov/usao-dc/pr/stephen-k-bannon-sentenced-four-months-prison-two-counts-contempt-congress> [<https://perma.cc/9PPK-BQ7Z>].
163. See Indictment at 3-4, United States v. Trump, No. 23-cr-00257 (D.D.C. Aug. 1, 2023), <https://int.nyt.com/data/documenttools/trump-jan-6-indictment-2020-election/1f1c76972b25c802/full.pdf> [<https://perma.cc/4S68-PKTD>] (listing six coconspirators, none of whom appear to be Bannon).
164. Ryan Bort, *Steve Bannon Admits He Talked with Trump About 'Killing' Biden Presidency Ahead of Jan. 6th*, ROLLING STONE (Sept. 22, 2021), <https://www.rollingstone.com/politics/politics-news/steve-bannon-january-6-kill-biden-presidency-1230904> [<https://perma.cc/P9Y5-VPZ6>].
165. *Donald Trump Presidential Campaign Staff, 2024*, BALLOTPEDIA (last updated Sept. 19, 2023), https://ballotpedia.org/Donald_Trump_presidential_campaign_staff_2024 [<https://perma.cc/7YWV-BNQE>]; see also Matt Flegenheimer, Maggie Haberman & Michael C. Bender, *DeSantis Tried to Bury Her. Now She's Helping Trump Try to Bury Him*, N.Y. TIMES (Apr. 18, 2023), <https://www.nytimes.com/2023/04/18/us/politics/susie-wiles-trump-desantis.html> [<https://perma.cc/TB8M-C6XF>] ("Ms. Wiles brought in an ally, Brian Jack, to oversee [Trump's] campaign with her alongside Chris LaCivita.").
166. Alan Feuer, Maggie Haberman, Adam Goldman & Kenneth P. Vogel, *Trump's Post-Election Fund-Raising Comes Under Scrutiny by Justice Dept.*, N.Y. TIMES (Sept. 8, 2022), <https://www.nytimes.com/2022/09/08/us/politics/trump-save-america-pac-subpoenas.html> [<https://perma.cc/TJG6-ZYRJ>] ("According to subpoenas issued by the grand jury, the contents of which were described to The New York Times, the Justice Department is interested in the inner workings of Save America PAC, Mr. Trump's main fund-raising vehicle after the election.").

information from Save America and the Trump campaign.¹⁶⁷ So perhaps that investigation has gone cold.

And, of course, the risk of corruption isn't limited to Trump's campaign managers. There are eleven governor races, ten attorney general races, thirty-three U.S. Senate seats, all 435 House seats, thousands of local offices, and the presidency up for grabs in 2024.¹⁶⁸ Each candidate for these offices will likely have a campaign manager as will candidates for many local offices. In the past, campaign managers for congressional and presidential candidates have also run afoul of the law.¹⁶⁹ While most campaign managers are honest people, the temptation for those few dishonest campaign managers to take advantage of opportunities to enrich themselves by selling access to an incumbent is higher after *Percoco*.

B. Defendant Trump

Finally, there is the matter of Donald Trump. During his first impeachment for seeking damaging information about Joe Biden from Ukraine, the House Judiciary Committee concluded that Trump had violated the prohibition on honest-services fraud.¹⁷⁰ As the Committee explained:

[I]n addition to committing the crime of bribery, President Trump knowingly and willfully orchestrated a scheme to defraud the American people of his honest services as President of the United States. In doing

167. Kanishka Singh, *US Special Counsel Withdraws Subpoena on Trump's Political Fundraising Group—Report*, REUTERS (Oct. 17, 2023, 7:58 PM ET), <https://www.reuters.com/world/us/us-special-counsel-withdraws-subpoena-trumps-political-fundraising-group-report-2023-10-17> [https://perma.cc/DR26-FDFT]; Kristen Holmes, *Special Counsel Withdraws Another Subpoena in Trump Fundraising Probe*, CNN (Oct. 27, 2023, 6:35 AM ET), <https://www.cnn.com/2023/10/26/politics/special-counsel-withdraw-subpoena-trump-fundraising/index.html> [https://perma.cc/MLG6-R9PM].

168. See *Gubernatorial Elections 2024*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_elections_2024 [https://perma.cc/PV44-PG9Z]; *Attorney General Elections 2024*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_elections_2024 [https://perma.cc/A6YM-PFBD]; *United State Congress Elections 2024*, BALLOTPEDIA, https://ballotpedia.org/United_States_Congress_elections_2024 [https://perma.cc/DZ7H-FCWT].

169. See, e.g., Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Campaign Manager Sentenced to 24 Months for Coordinated Campaign Contributions and False Statements (June 12, 2015), <https://www.justice.gov/opa/pr/campaign-manager-sentenced-24-months-coordinated-campaign-contributions-and-false-statements> [https://perma.cc/A5EH-EXP4].

170. H. COMM. ON THE JUDICIARY, 116th CONG., REP. ON IMPEACHMENT OF DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES 126-27 (Dec. 13, 2019), <https://docs.house.gov/bills-s/20191216/CRPT-116hrpt346.pdf> [https://perma.cc/B5BM-7M3Y].

so, he betrayed his position of trust and the duty he owed the citizenry to be an honest fiduciary of their trust.¹⁷¹

Specifically, the Committee found that

President Trump conditioned specific “official acts”—the provision of military and security assistance and a White House meeting—on President Zelensky announcing investigations that benefitted him personally, while harming national interests. In doing so, President Trump willfully set out to defraud the American people, through bribery, of his “honest services.”¹⁷²

Trump was not prosecuted for honest-services fraud in 2019 for his actions with Ukraine, in part because he was the sitting president and DOJ has a long-standing policy that sitting presidents cannot be prosecuted.¹⁷³ Nor has he been charged with honest-services fraud after exiting office.

The Judiciary Committee report for Trump’s second impeachment was written in just six days and does not reference honest-services fraud, but it did accuse Trump of the more serious crime of inciting an insurrection.¹⁷⁴ The final report of the January 6 Select Committee made a criminal referral for Trump to DOJ on four possible federal crimes: obstruction of an official proceeding (18 U.S.C. § 1512(c)); conspiracy to defraud the United States (18 U.S.C. § 371); conspiracy to make a false statement (18 U.S.C. §§ 371, 1001); and inciting, assisting or aiding and comforting an insurrection (18 U.S.C. § 2383).¹⁷⁵ And the Select Committee raised the possibility that, depending on the evidence that DOJ finds, Trump could have also run afoul of the law criminalizing seditious conspiracy (18 U.S.C. § 2384). Jack Smith indicted Trump on 18 U.S.C. § 371, 18 U.S.C. § 1512(k), 18 U.S.C. §§ 1512(c)(2), 2, as well as 18 U.S.C. § 241 (Conspiracy Against Rights).¹⁷⁶

Only time will tell what Trump’s lawyers will rely on for a defense. Because of his status as a former president, Trump’s legal team is likely to appeal any conviction all the way to the Supreme Court. If this happens, I predict that his

171. *Id.* at 126.

172. *Id.* at 127.

173. See A Sitting President’s Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222, 260 (2000).

174. MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 117th CONG., REP. ON MATERIALS IN SUPPORT OF H. RES. 24 IMPEACHING DONALD JOHN TRUMP, PRESIDENT OF THE UNITED STATES, FOR HIGH CRIMES AND MISDEMEANORS 26 (Jan. 12, 2021), <https://docs.house.gov/bills-s/20210111/CRPT-117hrpt2.pdf> [<https://perma.cc/53X6-S7MS>].

175. H.R. REP. NO. 117-663, at 103-11 (2022).

176. Indictment at 1, *United States v. Trump*, No. 23-cr-00257 (D.D.C. Aug. 1, 2023).

lawyers are likely to throw corruption-narrowing cases like *Randall*, *Davis*, *WRTL II*, *Citizens United*, *Bennett*, and *McCutcheon*, and corruption-excusing cases like *Skilling*, *McDonnell*, *Kelly*, and *Percoco* back in the Supreme Court's face to assert that he should be exonerated, just as Borges, Bankman-Fried, and Avenatti have already argued.

CONCLUSION

As explained above, *Percoco* continues the Roberts Court's pro-corruption trajectory at a time when the country can least afford to go soft on corruption. The Supreme Court would have better served the nation by taking judicial notice of the post-January 6 reality in which it decided *Percoco*. And depressingly, *Percoco* may well be used by former President Donald Trump or his campaign managers to evade the legal consequences related to January 6.

One final strange coincidence may indicate that I am being too pessimistic in predicting the prospect of Trump circumventing criminal consequences: prosecutors in Governor Bob McDonnell's corruption case included Jack Smith, who was then-Chief of the Criminal Division's Public Integrity Section at DOJ, and his then-Deputy Chief David V. Harbach II.¹⁷⁷ Today, Harbach is on Jack Smith's Special Counsel team investigating Trump for January 6.¹⁷⁸ So if any lawyers might know how to navigate the minefield that the Supreme Court has left for prosecutors in this troubling line of pro-corruption cases including *Percoco*, it is the Special Counsel and his team who are, at the time of writing, prosecuting former President Donald Trump in Florida and Washington, D.C.¹⁷⁹ What's more troubling is the possibility that the Special Counsel did not charge Trump with honest-services fraud in his January 6 indictment, and apparently withdrew his subpoenas seeking information from Trump's Save America PAC and the Trump campaign, because of the utter hash that the Roberts Court has made of

177. Press Release, U.S. Att'y's Off., E. Dist. of Va., Former Virginia Governor and Former First Lady Indicted on Public Corruption and Related Charges (Jan. 21, 2014), <https://www.justice.gov/usao-edva/pr/former-virginia-governor-and-former-first-lady-indicted-public-corruption-and-related> [<https://perma.cc/CRN7-SNC4>].

178. Mike Levine, Katherine Faulders & Alexander Mallin, *As Special Counsel Nears Decision in Trump Cases, Who Are the Lawyers Working with Him*, ABC NEWS (Apr. 28, 2023), <https://abcnews.go.com/Politics/lawyers-working-special-counsel-jack-smith-trump-jan/story?id=98893019> [<https://perma.cc/Z4U6-66ZS>].

179. See Eric Tucker, *New Special Counsel Has Long Career Confronting Corruption*, ASSOCIATED PRESS (Nov. 19, 2022), <https://apnews.com/article/jack-smith-special-counsel-prosecutor-donald-trump-garland-efdb71cfc258bc2be48a8b890a9269b> [<https://perma.cc/495E-JLTZ>].

this federal law in cases from *Skilling* to *Percoco*.¹⁸⁰ Certainly, Trump is not the only criminal defendant that might avail himself of *Percoco*. The *Skilling-through-Percoco* lax-on-corruption precedents are available to any white-collar criminal, public or private, who can try to use these cases for their advantage and to the detriment of our democracy and the rule of law.

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¹⁸⁰. See Indictment at 1, *United States v. Trump*, No. 23-CR-00257, at 1 (D.D.C. Aug. 1, 2023), <https://int.nyt.com/data/documenttools/trump-jan-6-indictment-2020-election/1f1c76972b25c802/full.pdf> [<https://perma.cc/4S68-PKTD>] (charging Count 1: 18 U.S.C. § 371 (Conspiracy to Defraud the United States); Count 2: 18 U.S.C. § 1512(k) (Conspiracy to Obstruct an Official Proceeding); Count 3: 18 U.S.C. §§ 1512(c)(2), 2 (Obstruction of and Attempt to Obstruct an Official Proceeding); and Count 4: 18 U.S.C. § 241 (Conspiracy Against Rights)).