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PERSPECTIVE

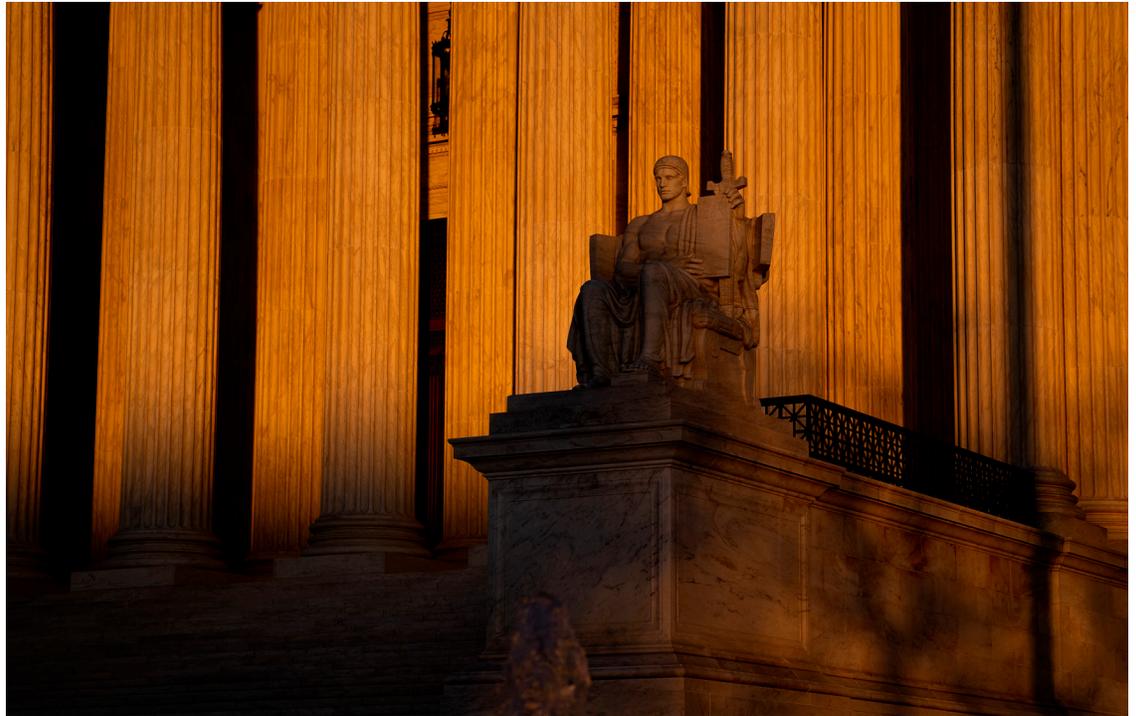
GUEST COLUMN

# Supreme Court to review corruption cases

By Agustin D. Orozco  
and David Griffith

The Supreme Court has, yet again, agreed to review the reach of federal prosecutors under the wire fraud and honest services fraud statutes. The statutes have long been used by prosecutors to penalize what many would consider to be unethical behavior but might not strictly fall into the categories of fraud or corruption. The wire fraud statute, 18 U.S.C. § 1343, makes it illegal for anyone to use a wire communication for the purpose of executing “any scheme or artifice to defraud,” or for obtaining money or property by means of false pretenses. The honest services fraud statute, 18 U.S.C. § 1346, expands on that, explaining that the term “scheme or artifice to defraud” includes a scheme to deprive another of the intangible right of honest services.

The Supreme Court has granted certiorari in two cases arising out of corruption investigations in New York state government. In *Ciminelli v. United States*, 21-1271 (U.S. June 30, 2022), the Court agreed to review whether the “right to control” theory of fraud is a valid basis for culpability under the federal wire fraud statute. The Court also granted certiorari in *Percoco v. United States*, 21-1158 (U.S. June 30, 2022), to review whether a private citizen can owe a fiduciary duty to the general public such that he can be convicted of honest services fraud. The Court has reined in past attempts by pros-



The “Authority of Law” sculpture outside the Supreme Court building in Washington, Dec. 12, 2021. New York Times News Service

ecutors to extend the reach of these statutes, and these prior decisions could indicate that the Court has granted certiorari to rein in prosecutors once more.

**Right to Control Theory Under The Wire Fraud Statute**  
In *Ciminelli v. United States*, 13 F.4th 158 (2d Cir. 2022), several individuals were convicted of wire fraud after participating in a scheme to rig bids for New York state-funded projects. The individual responsible for developing proposals for the projects and a consultant drafted proposal solicitations to give a competitive advantage to the consultant’s

clients, including LPCiminelli. The government obtained convictions at trial by arguing that the defendants violated the wire fraud statute under the right to control theory of fraud. That is, the defendants deprived the entity responsible for awarding the projects of the information necessary to make an informed decision.

On appeal, defendants argued the right to control theory permitted the jury to convict even if the entity that awarded the projects received the full economic benefit of the bargain. The 2nd Circuit nonetheless affirmed their convictions and reiterated that the

right to control theory allows for conviction on “a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information.” The owner of LPCiminelli, Louis Ciminelli, subsequently petitioned for a writ of certiorari.

## Private Citizens Can Be Guilty Of Honest Services Fraud

The Supreme Court will review *Percoco v. United States*, 13 F.4th 180 (2d Cir. 2022), to decide whether a private citizen can be guilty

of honest services fraud. There, Joseph Percoco, a top aide of Governor Andrew Cuomo, was convicted of conspiracy to commit honest services fraud after accepting \$35,000 from a real estate developer and, in return, directing a state agency to revise its previous position requiring the real estate developer to enter into a labor peace agreement. At the time the scheme took place, however, Percoco was not a public official. He had resigned from state government and was privately retained by Cuomo to manage his reelection campaign.

Percoco appealed his conviction, arguing that the district court erred in instructing the jury that he could be guilty of honest services fraud during the time he was a private citizen. The 2nd Circuit disagreed. In doing so, it relied on past precedent where it held that public office is not a “rigid prerequisite to a finding of fiduciary duty in the public sector.” Rather, a private citizen’s “dominance in municipal government” may “give [ ] rise to certain minimum duties to the general citizenry.”

Will SCOTUS Continue To Limit Prosecutors’ Reach in Corruption Cases?

The Supreme Court has rejected recent attempts to utilize the fraud statutes to expand prosecutorial discretion into new areas of conduct. Recently, in *Kelly v. United States*, 140 S. Ct. 1565 (2020), the Court overturned the convictions of two associates of the then-New Jersey governor involved in the “Bridgegate” scandal, where they reconfigured two lanes of the George Washington Bridge as a form of political retaliation against the mayor of Fort Lee, New Jersey. The Court held that while the defendants engaged in wrongdoing, closing the bridge was not a sufficient taking of money or property to support an honest services or wire fraud conviction.

*Kelly* was not the first time that the Court reversed convictions where prosecutors punished conduct that exceeded the bounds of the law. In *McDonnell v. United States*, 579 U.S. 550 (2016), the Supreme Court overturned the honest services fraud conviction of a former Virginia governor because the government had convicted him of taking actions – setting up meetings, talking to government officials, and hosting events – that did not fall under

the definition of “official act” under the federal bribery statutes. Prior to that, in *Skilling v. United States*, 561 U.S. 358 (2010), the Court reversed the honest services fraud conviction of a former Enron CEO for artificially inflating its stock price, holding that honest services fraud only criminalizes bribes and kickbacks.

It is unclear how the Supreme Court will decide *Ciminelli* and *Percoco*. What we do know is that, *Kelly*, *McDonnell*, and *Skilling*

*ing* demonstrate that the Court may not be willing to allow prosecutors to use the fraud statutes to support theories of prosecution that allow the government to prosecute individuals that engage in conduct that might be considered wrong or unethical, but that nonetheless does not fall under the conduct the fraud statutes were intended to criminalize. It will be interesting to see if the Supreme Court continues this trend.

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**Agustin D. Orozco** is a partner and **David Griffith** is an associate at Crowell & Moring LLP.

