No. _____

IN THE
Supreme Court of the United States

MOSHE PORAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
AVERY D. MEDJUCK
SHAPIRO ARATO BACH LLP
1140 Avenue of the Americas
17th Floor
New York, New York 10036
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

January 31, 2024

QUESTION PRESENTED

Whether deception to induce a commercial exchange can constitute mail or wire fraud under 18 U.S.C. §§ 1341 and 1343, even if the defendant does not intend to cause economic harm and the alleged victim receives the goods or services for which it paid.

PARTIES TO THE PROCEEDING

Petitioner Moshe Porat was the defendant and appellant below.

Respondent United States of America was the appellee below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Moshe Porat v. United States, No. 23A418 (U.S.), application granted on November 15, 2023;

United States v. Porat, No. 22-313 (3d Cir.), judgment entered on August 7, 2023;

United States v. Porat, No. 21-cr-170 (GJP) (E.D. Pa.), judgment entered on March 4, 2022.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Briefs

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTRODUCTION

The federal mail and wire fraud statutes are among the most important in the federal criminal code. Since the mid-twentieth century, federal prosecutors have invoked these statutes to enforce vague notions of "fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." But the text, structure, and history of the statutes, as well as constitutional principles including federalism and due process, do not permit such a broad and elastic interpretation. For that reason, this Court has had to step in, time and again, to halt efforts by prosecutors and lower courts to evade the narrow bounds of the statutes. Inevitably, however, the government tries to find a new end-run around the Court's decisions narrowly interpreting the statutes, which prohibit only fraudulent schemes to deprive people of "money or property."

For instance, in *McNally v. United States*, 483 U.S. 350 (1987), the Court put an end to decades of efforts to prosecute fraud targeting "intangible interests unconnected to traditional property rights." *Ciminelli v. United States*, 598 U.S. 306, 312 (2023). To circumvent *McNally*, prosecutors and lower courts invented the "right to control" theory of fraud. Under that theory, a defendant could be guilty of property fraud if he schemed to deprive another of "potentially valuable economic information necessary to make discretionary economic decisions." For 36 years, the government used that doctrine to prosecute fraud cases in which it could not prove that defendants schemed to obtain any "money or property." Then last Term, in *Ciminelli*,

the Court terminated that attempt to skirt the statute's limits. It held that the "right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Id.* at 316. This case raises a question about another theory prosecutors have invoked to stretch the statutes beyond their textual and historic limits. That theory has split the circuits, and the government is already seizing upon it to resurrect its expansive interpretation in the wake of *Ciminelli*.

The government began that effort in *Ciminelli* itself. There, the government conceded that the right-to-control theory was invalid, but attempted to save the conviction with yet another malleable and overbroad theory—fraudulent inducement. The fraudulent-inducement theory finds its classic statement in a century-old opinion by Learned Hand: "A man is none the less cheated out of his property, when he is induced to part with it by fraud" even if "he gets a quid pro quo of equal value." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932). Six circuits—the Fourth, Fifth, Seventh, Eighth, Tenth, and now the Third—have endorsed the fraudulent-inducement theory. They have held that when deception induces a transaction, it does not matter whether the defendant performs the services promised or provides full value.

The fraudulent-inducement doctrine originated in the Second Circuit, but that court later repudiated it. Four other circuits—the Sixth, Ninth, Eleventh, and D.C. Circuits—have since joined the Second in rejecting the doctrine. They have held that fraud only encompasses lies that go to some essential element of the bargain, and that there is no fraud where the victims receive exactly what they paid for. They have held, in

other words, that fraud requires a showing of some actual or contemplated loss.

This Court has not provided clear guidance. On one hand, it has repeatedly held that "loss to the victim" must be "an object of the fraud." *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020). On the other hand, it quoted Judge Hand's dictum in *Rowe* with approval in a bank fraud case, *Shaw v. United States*, 580 U.S. 63, 67 (2016). As Chief Judge Shelby of the District of Utah recently wrote, "[i]t may be true the Supreme Court has not affirmatively approved the theory, but the inverse is also true. As of now, the Supreme Court has not rejected the so-called fraudulent inducement theory." *United States v. Tuchinsky*, --- F. Supp. 3d ---, 2023 WL 8188423, at *5 (D. Utah Nov. 27, 2023). Lower courts have therefore produced confused and contradictory results—including the result below.

Petitioner Moshe Porat, the former Dean of Temple University's Fox Business School, was prosecuted on a fraudulent-inducement theory. Prosecutors alleged that he submitted false information to U.S. News to inflate Fox's rankings, and that this led students to enroll in Fox and pay tuition. Porat argued that he was not guilty as a matter of law because students received exactly what they paid for—a high-quality education and a degree. The Third Circuit disagreed, affirming the conviction because, according to the court, Porat deprived students of tuition money.

This Court should grant certiorari to resolve the circuit split on whether fraudulent inducement, without actual or contemplated loss, proves fraud.

OPINIONS BELOW

The Third Circuit's opinion (Pet.App.1a) is published at 76 F.4th 213.

JURISDICTION

The Third Circuit issued its opinion and entered judgment on August 7, 2023, and denied rehearing on October 3, 2023. Pet.App.1a, 33a. On November 15, 2023, this Court extended the time to file a petition for certiorari until January 31, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

The wire fraud statute, 18 U.S.C. § 1343, is reproduced in the appendix to this petition. Pet.App.34a.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Moshe Porat was the long-time dean of Fox Business School at Temple University. The charges in this case were based on allegations that he directed Fox employees to submit false responses to the U.S. News rankings survey.

For example, in its survey responses, Fox claimed that 100% of its students had taken the GMAT, when in fact only a portion of them had taken the GMAT. Pet.App.4a. That percentage matters in the arcane and somewhat arbitrary algorithm employed by U.S. News. In part (but only in part) because of these false survey responses, Fox rose in the rankings for online and part-time MBA programs. *Id.*

The government's own witnesses at trial characterized the U.S. News rankings as "stupid," "dishonest," "meaningless," and "pernicious." C.A.App.159-60, 233. They are, nonetheless, influential. Porat touted Fox's rankings, and Fox's enrollment rose. Pet.App.5a-6a. The cost of Fox tuition did not, however, increase due to its rise in the rankings. Eventually the false survey responses were exposed, and Fox was removed from the rankings. It was later ranked again, at a lower level. *Id.* at 7a-8a.

The government called two students as witnesses at trial. They testified that they had chosen to go to Fox in part because of its ranking, and that they felt cheated when its ranking fell. *Id.* at 6a. One student said that he had lost "the prestige that was promised to me." C.A.App.181. He testified: "I paid for fine dining and I got McDonald's." *Id.* But both students admitted they had received an excellent, high-quality education, which had helped them go on to successful careers in business. As one testified, "I still think the program was a great MBA program." *Id.* at 281.

Both also did well after graduating from the program. One of the students got a significant promotion after receiving his MBA. *Id.* at 282-83. The other student witness got a management job at Facebook, even though he graduated from Fox several months *after* the rankings scandal broke. *Id.* at 178, 186. While he felt stung by the loss of prestige, his career in business was apparently unharmed.

The defense also called former students as witnesses. Unlike the government's witnesses, they testified that the rankings did not matter to them. Like the government witnesses, they testified that they received an excellent education at Fox. They testified that the Fox program was rigorous and "extremely challenging," giving a "fantastic" business education. *E.g.*, *id.* at 292-95. They praised Fox's online and part-time programs as offering a "top notch education" to nontraditional students who "came from families that couldn't afford" traditional MBA programs. *Id.* at 290.

In short, the government sought a conviction on the basis that Porat and others had submitted false information to U.S. News, which had induced students to attend Fox. But it was undisputed that the students received a high-quality education and a business degree in exchange for the tuition they paid.

B. District Court Proceedings

Porat was indicted on April 15, 2021. The indictment alleged one count of wire fraud, 18 U.S.C. § 1343, and one count of wire fraud conspiracy, 18 U.S.C. § 371. The indictment alleged that Porat, along with two others who worked under him at Fox, conspired "to deceive readers of U.S. News by providing false and misleading information to U.S. News . . . in order fraudulently inflate Fox's rankings in the U.S. News," thus inducing students to attend. Pet.App.8a.

Prior to trial, Porat filed a motion to dismiss the indictment for failure to state an offense. He argued that "submitting inaccurate information to U.S. News

. . . is [not] a federal crime under the wire fraud statute" because it did not implicate any cognizable property interest. D.Ct.Dkt.24 at 1, 8-10. He argued that students were not deprived of any money or property, and that he did not obtain or seek to obtain any money or property. The district court denied the motion. Pet.App.9a.

The case proceeded to trial. The jury returned a guilty verdict on both counts on November 29, 2021.

Porat filed a motion for acquittal under Rule 29. He again argued that even if the government had sufficiently proven deception, it had not sufficiently proven the deprivation of a property interest. "[E]ven if students were induced to attend Fox because of inaccurate rankings, that still does not constitute wire fraud for the straightforward reason that the affected students received exactly what they paid for: an education at Fox." D.Ct.Dkt.139 at 34. The district court denied the motion. Pet.App.9a.

At sentencing, the government sought 10 years' imprisonment based on a claimed loss figure of millions of dollars. The district court rejected the government's proposed loss amount because it was "impossible to determine the 'fair market value' of a Fox degree" and thus impossible to ascertain what, if anything, the students had lost. C.A.App.576. The district court also noted that it was impossible to determine whether Porat had accrued any monetary gain, because his salary as dean was "too attenuated from the fraud." *Id.* at 579.

The district court also criticized the draconian sentence proposed by the government as demonstrating "a loss of perspective on the case by the Government." *Id.* at 557. It sentenced Porat principally to a term of 14 months' imprisonment.

C. Third Circuit Proceedings

On appeal, Porat again argued that the government had not proved money or property fraud. "While the students may have lost a sense of prestige, prestige is not property, and loss of prestige is not the sort of loss protected by the federal fraud statutes." C.A.Dkt.21 at 20-21. He admitted, of course, that the students had paid tuition dollars to the university. But he argued that mere payment of tuition dollars, even if induced by deception, is not sufficient to prove fraud. *Id.* at 3, 20-35.

Relying on cases from those circuits that have rejected the fraudulent-inducement doctrine, Porat argued that "[d]eception inducing a transaction is not itself sufficient for fraud, because there is no fraud where the alleged victims 'received exactly what they paid for.'" *Id.* at 26 (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)). He argued that students had received exactly what they paid for—namely, an education and a degree.

The government argued that this was a "simpl[e]" case of "false advertising," and that false advertising constitutes fraud. C.A.Dkt.48 at 34. It argued that the object of the fraud was students' tuition money, and that "money, of course, is a form of property." *Id.*

at 39 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979)).

At oral argument, the government cited Judge Hand's formulation of the fraudulent-inducement theory: "A man is nonetheless [sic] cheated out of his property when he is induced to part with it by fraud, even if he gets a quid pro quo of equal value." C.A.Dkt.72 at 35. It argued that this Court endorsed that theory in *Shaw*. According to the government, this Court in *Shaw* already rejected "the entire argument that the Appellant is making that it matters whether they [the students] get the benefit of the bargain." *Id.*

The Third Circuit agreed with the government and affirmed the conviction. It recognized that money or property must be an object of fraud, but it held that the students' tuition money fulfilled that requirement. The government had sufficiently proven "that Porat engaged in the kind of scheme the wire fraud statute criminalizes: that is, that Porat trumpeted Fox's knowingly false, inflated rankings to students for the purpose of enticing his victims to pay tuition money." Pet.App.10a. In other words, according to the court, "Porat was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*." *Id.* at 12a. Thus, the court concluded, "the jury necessarily found that he sought to defraud his victims of money," and this "finding was reasonable, given evidence that Porat employed a scheme to 'add . . . students' and thereby, their tuition . . . through materially false representations of Fox's rankings." *Id.*

By finding that use of the purportedly "false, inflated rankings" to induce students to pay tuition to Fox was sufficient to support the fraud conviction, the court held that fraudulent inducement is sufficient to support a wire fraud conviction. In so doing, the Third Circuit addressed, somewhat opaquely, the cases from other circuits rejecting the fraudulent-inducement theory and suggested those cases might be incorrectly decided: "To the extent these cases are still good law and rely on other theories of fraud not explicitly endorsed by this Circuit, we do not opine on those matters nor adopt any positions here." *Id.* at 13a n.5. But it also suggested, in the alternative, that the "nature of the bargain between Fox and the students included not only the actual education afforded them," but also the "value" of the school's place in the rankings. *Id.* at 14a.

Judge Krause separately concurred. Unlike the panel majority, she rejected the fraudulent-inducement doctrine. She argued that the out-of-circuit cases rejecting the doctrine "make[] good sense" because "if a putative victim of wire fraud got exactly what he paid for, how exactly is he a victim at all?" *Id.* at 26a. But she went on to conclude that the rankings are an essential part of the educational bargain. *Id.* at 32a.

REASONS FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER DECEIT THAT MERELY INDUCES A FAIR COMMERCIAL EXCHANGE CAN CONSTITUTE FRAUD

A. This Court Has Held That The Object Of Fraud Must Be Loss, But Has Not Directly Addressed Fraudulent Inducement

1. In *Ciminelli*, the government asked this Court to endorse the fraudulent-inducement theory, but this Court declined to do so.

The Court granted certiorari in *Ciminelli* to assess the validity of the "right-to-control" theory of fraud. The government, however, refused to defend the right-to-control theory, even though it had used the theory to obtain the convictions. Instead, the government asked this Court to affirm the convictions on alternate grounds: the fraudulent-inducement doctrine. Brief for Respondent United States at 16, 21-22, *Ciminelli*, 598 U.S. 306 (No. 21-1170) (citing *Rowe* and *Shaw*).

This Court, however, "decline[d] the Government's request to affirm Ciminelli's convictions on alternative grounds." 598 U.S. at 317. Noting that appellate courts are not courts of "first view," this Court held that it could not "cherry-pick facts presented to a jury charged on the right-to-control theory and apply them

to the elements of a *different* wire fraud theory in the first instance." *Id.* at 316-17.

2. This Court has repeatedly held that fraud requires actual or contemplated loss or injury to the victim. A century ago, this Court held that mail fraud requires the "wrongful purpose of *injuring* one in his property rights." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (emphasis added). That conception—that the object of fraud must be to cause loss or injury to the victim—has animated this Court's cases ever since.

In *McNally*, this Court held that federal fraud statutes are limited to those schemes "aimed at causing *deprivation* of money or property." 483 U.S. at 358 (emphasis added). Quoting *Hammerschmidt*, it explained that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id.* The dissent argued fraud "does not require any evidence that the [victim] has suffered any property or pecuniary loss." *Id.* at 369 (Stevens, J., dissenting). In rejecting the honest-services doctrine, however, the majority rejected that proposition.

These notions—that fraud requires loss, injury, and deprivation—have undergirded this Court's more recent cases as well. In *Pasquantino v. United States*, for example, this Court held that a scheme constituted mail fraud because it "inflict[ed] an economic injury" on the victim. 544 U.S. 349, 356 (2005). In *Skilling v. United States*, this Court held that under traditional

property fraud (unlike honest-services fraud), "the victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other." 561 U.S. 358, 400 (2010).

Most recently, in *Kelly*, this Court held that "loss to the victim" must be "an 'object of the fraud.'" 140 S. Ct. at 1573 (quoting *Pasquantino*). Moreover, *Kelly* held that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.*; *see id.* at 1573 n.2 ("[T]he victim's loss must be an objective of the [deceitful] scheme rather than a byproduct of it.") (quoting *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (alterations in *Kelly*)). If an incidental loss is insufficient to prove fraud, then *a fortiori*, no loss is also insufficient.

In requiring some showing of actual or intended *loss* or *deprivation* of money or property, these cases indicate that fraudulent inducement is insufficient, by itself, to establish a mail or wire fraud scheme. Lower court cases rejecting the fraudulent-inducement theory have so reasoned.

3. However, the government often invokes *Shaw* in support of the fraudulent-inducement theory. In *Shaw*, this Court quoted Judge Hand's dictum in *Rowe*: "'a man is none the less cheated out of his property, when he is induced to part with it by fraud' even if 'he gets a quid pro quo of equal value.'" 580 U.S. at 67.

Federal prosecutors have repeatedly argued—in this case, in *Ciminelli*, and in numerous other cases

around the country, especially after *Ciminelli* was decided—that *Shaw* adopted a broad form of the fraudulent-inducement doctrine, and that it applies with equal force to the mail and wire fraud statutes as it does to the bank fraud statute. Those arguments are based on a misreading of *Shaw*. That case had nothing to do with bargained-for exchanges of value. Rather, it involved an outright theft: the defendant used a bank customer's account number "to transfer funds from [the] account" to himself. *Shaw*, 580 U.S. at 65.[1]

But regardless, the confusion will persist until this Court squarely addresses the question.

B. Five Circuits Have Rejected The Fraudulent-Inducement Theory

1. In the absence of clear guidance from this Court, lower courts have reached varying results, with some adopting and others rejecting the fraudulent-inducement doctrine.

As discussed, the most famous and frequently cited endorsement of the doctrine came from the Second Circuit in *Rowe*—though the same court later disavowed that endorsement. But even revered judges are sometimes wrong, and Judge Hand's statement in *Rowe* was poorly reasoned. To say that a victim has "lost the chance to bargain with the facts before him"

---

[1] On appeal, Shaw argued he wasn't guilty of bank fraud because he had intended to cheat the bank *depositor*, not the bank, which would be reimbursed for its loss by an insurer. *Id.* This Court rejected that argument because "the bank, too had property rights in [the] bank account" as either an "owner" or a "bailee." *Id.* at 66.

is simply to say that he has been deceived. Judge Hand thus conflated the deception element of fraud with the money and property element. Moreover, that it is difficult to measure loss in court does not mean that loss is irrelevant. Finally, Judge Hand's formulation bears a striking resemblance to the very right-to-control doctrine that was rejected by this Court in *Ciminelli*. To say that a victim was deprived of "the chance to bargain with the facts before him" is no different from saying that the victim was deprived of "'potentially valuable economic information' 'necessary to make discretionary economic decisions.'" 598 U.S. at 309.

In part for those reasons, modern Second Circuit cases rejected the broad fraudulent-inducement theory. In fact, in *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970), the Second Circuit expressly disavowed the broadest reading of *Rowe*: "neither the *Rowe* case nor the language quoted will support the conclusion that no definable harm need be contemplated by the accused to find him guilty of mail fraud." It thus rejected the government's argument that "false representations, in the context of a commercial transaction, are per se fraudulent despite the absence of any proof of actual injury to any customer." *Id.* Rather, it held that false representations must go to the essence of the bargain—that is, they must be "directed to the quality, adequacy or price of the goods themselves." *Id.* at 1182.

Since *Regent Office*, the Second Circuit has consistently rejected the fraudulent-inducement theory. In *United States v. Mittelstaedt*, it "disagree[d]" with the government's contention that "it does not matter

whether the [victim] would have suffered some economic loss if the scheme had been successful" and held that fraud requires proof that the defendant's deceit "can or does result in some tangible harm" 31 F.3d 1208, 1217 (2d Cir. 1994). In *United States v. Starr*, the Second Circuit clarified a critical distinction—that while the fraud statutes create liability for inchoate offenses, and thus proof of *actual* loss is not required, the government must nonetheless prove the goal of the scheme was to cause loss: "Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims." 816 F.2d 94, 98 (2d Cir. 1987).

The *Starr* court also recognized that Judge Hand's dictum in *Rowe* was a dead letter in light of *Regent Office* and other intervening cases: "After *Regent*, therefore, there can be no doubt that *Rowe* has been deprived of much of its vitality." *Id.* at 101.

As it stands in the Second Circuit today, not all deceptions that induce a transaction constitute fraud. Rather, to constitute fraud, deceptions must go to an "essential element of the bargain" such that they affect the very "nature of the bargain." *Shellef*, 507 F.3d at 108 (quoting *Starr* and *Regent Office*). There is no fraud "where the alleged victims received exactly what they paid for." *Id.* (internal quotation marks omitted). Thus, when prosecutors cite *Rowe* in support of the fraudulent-inducement theory, they are cit-

ing a case that has been repeatedly and thoroughly repudiated by the Second Circuit over the last half century.

2. Four other circuits have joined the Second in rejecting the fraudulent-inducement theory.

In *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), the Ninth Circuit reversed the conviction of a defendant who had lied to technology suppliers. He told them that he was purchasing their products solely for use in the United States, when in fact he was transferring them to Soviet Bloc countries. The technology providers "would never have sold to Bruchhausen had they known the truth." *Id.* at 466. Although the defendant's lies had induced the transactions, the Ninth Circuit held that there was no fraud. While the putative victims "may have been deceived into entering sales that they had the right to refuse," they had not suffered a loss of money or property because they "received the full sale price for their products." *Id.* at 467; *see also United States v. Miller*, 953 F.3d 1095, 1103 (9th Cir. 2020) ("[W]ire fraud requires the intent to deceive *and* cheat — in other words, to deprive the victim of money or property by means of deception.").

The Eleventh Circuit has also followed the Second Circuit in rejecting the fraudulent-inducement doctrine. "That a defendant merely 'induced the victim to enter into a transaction' that he otherwise would have avoided is therefore 'insufficient' to show wire fraud." *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (quoting *Starr*, 816 F.2d at 98) (alterations

adopted). In *Takhalov*, the defendants had lied to potential customers, and those lies had induced the customers to enter their club and spend money. They had, in other words, "tricked the victims into entering a transaction but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay." *Id.* The Eleventh Circuit reversed the convictions because the jury instructions had mistakenly suggested that fraudulent inducement was sufficient to convict. "[E]ven if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims 'received exactly what they paid for.'" *Id.* at 1314 (quoting *Shellef*, 507 F.3d at 108).

In *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (Sutton, J.), the Sixth Circuit also reversed a conviction resting on a fraudulent-inducement theory. There, the defendant lied to pharmaceutical companies to trick them into selling opioids. The government proved that the defendant's lies "convinced the distributors to sell controlled substances that they would not have sold had they known the truth." *Id.* at 590. That alone could not support a conviction, the court held, without a further showing of an intent to deprive the victim of property. The government countered that the drugs themselves were the property of the pharmaceutical companies, and that the companies had been deprived of that property when they transferred it to the defendant. The Sixth Circuit disagreed: "paying the going rate for a product does not square with the conventional understanding of 'deprive.'" *Id.*

Most recently, the D.C. Circuit rejected the fraudulent-inducement theory in an employment context. *United States v. Guertin*, 67 F.4th 445 (D.C. Cir. 2023). The government had proved that the defendant had lied to his employer to maintain his security clearance, which allowed him to keep his job and his salary. Citing *Takhalov* and *Shellef*, the court held that although the lies had induced the employer to keep paying a salary, there was no wire fraud.

> If an employee's untruths do not deprive the employer of the benefit of its bargain, the employer is not meaningfully defrauded of 'money or property' when it pays the employee his or her salary. Rather, when the employer receives the benefit of its bargain, the employee's lie merely deprives the employer of honesty as such, which cannot serve as the predicate for a wire fraud conviction.

Id. at 451.

In all these cases, the defendants' lies induced the alleged victim into parting with money or property in an exchange. In all these cases, the courts held that such fraudulent inducement was insufficient to support a fraud conviction because the alleged victim received the essential benefit of the bargain. They held that fraud requires more than deceptive inducement—it requires contemplated loss or harm.

Thus, the Sixth, Ninth, Eleventh, and D.C. Circuits have joined the Second Circuit in rejecting the fraudulent-inducement theory.

C. Six Circuits Have Endorsed The Fraudulent-Inducement Theory

1. Six circuits, however, have adopted the fraudulent-inducement theory. In so doing, they have often cited *Rowe* as support, even though *Rowe* has been repudiated in its home circuit.

In *United States v. George*, 477 F.2d 508 (7th Cir. 1973), the Seventh Circuit affirmed the mail fraud conviction of an employee who had received kickbacks from suppliers. The defendant argued that there was no fraud because the employer suffered no loss. The Seventh Circuit, quoting *Rowe*, held that the lack of loss was irrelevant: "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value." *Id.* at 513 (quoting *Rowe*).

And the fraudulent-inducement theory remains the law in the Seventh Circuit. *See United States v. Black*, 625 F.3d 386, 391-92 (7th Cir. 2010) (quoting *Rowe* and affirming a fraud conviction); *United States v. Leahy*, 464 F.3d 773, 787-89 (7th Cir. 2006) (rejecting challenge to sufficiency of indictment even though deceived party suffered no loss because "it does not matter" whether the victims received "a service worth every dime in the contracts").

The Seventh Circuit has also recognized the existence of a circuit split. It "respectfully disagrees" with the Ninth Circuit's holding in *Bruchhausen*, expressly holding that "'property' is not so narrow as to exclude any tangible good or service for which fair market

value is paid." *United States v. Kelerchian*, 937 F.3d 895, 913-14 (7th Cir. 2019).

2. Other circuits have followed the Seventh. In *United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987), another employee kickback case, the Fifth Circuit endorsed the Seventh Circuit's reasoning in *George*. In *Fagan*, as in *George*, the defendant argued that there was no fraud because the employer suffered no loss as a result of the side payments he received. In *Fagan*, as in *George*, the court held that the lack of loss was irrelevant because the employer was "fraudulently induced to part with its" money. *Id.* at 1010. The court quoted Judge Hand's famous dictum: "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value." *Id.* (quoting *Rowe*).

Like the Seventh, the Tenth Circuit has expressly rejected the reasoning *Bruchhausen* and adopted the fraudulent-inducement theory. In *United States v. Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015), it affirmed a fraud conviction even though there was no loss because "services that were paid for were actually performed." According to the court, fraudulent inducement is sufficient: "payments made in exchange for services provided under a contract induced by false representations, even where the services are performed, constitute a deprivation of money or property sufficient to invoke the federal fraud statutes." *Id.* The *Richter* court rejected the Ninth Circuit's rationale. "The Ninth Circuit's decision in *Bruchhausen* does not persuade us to reach a similar conclusion here." *Id.* at 1194.

The Eighth and Fourth Circuits have also endorsed the fraudulent-inducement theory. *See United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (affirming fraud conviction because the victim "has been deprived of money in the very elementary sense that its money has gone to a person who would not have received it if all of the facts had been known"); *United States v. Bunn*, 26 F. App'x 139, 142-43 (4th Cir. 2001) ("The Government's evidence established that Appellants obtained money to which they were otherwise not entitled by falsely representing that subcontract work would be performed by [minority-owned businesses]. Nothing more is required.").

In sum, before the Third Circuit decided this case, five circuits—the Fourth, Fifth, Seventh, Eighth, and Tenth—had adopted the fraudulent-inducement theory.[2] Following the rationale of *Rowe*, they have held that the government proves fraud when it proves that lies induced an exchange—even if the victim received the essential benefit of the bargain.

3. With the decision below, the Third Circuit has now sided with those courts endorsing fraudulent inducement as a valid theory of mail and wire fraud. The Third Circuit held that Porat's conviction could be affirmed because the jury found he "trumpeted Fox's knowingly false, inflated rankings to students for the

---

[2] The First Circuit has not taken a clear stance. Shortly after *McNally*, then-judge Breyer issued an opinion appearing to endorse the fraudulent-inducement doctrine. *See United States v. Doherty*, 867 F.2d 47, 55-57 (1st Cir. 1989). But then last year, in one of the Varsity Blues cases, the First Circuit appeared to endorse the reasoning of *Bruchhausen* and *Sadler*. *See United States v. Abdelaziz*, 68 F.4th 1, 37-38 (1st Cir. 2023).

purpose of enticing his victims to pay tuition money." Pet.App.10a; *see also id.* at 12a (Porat "was convicted for depriving [the students] of *tuition money*").

Its decision is also consistent with prior cases in which the Third Circuit had cited *Rowe* with approval. *United States v. Hird*, 913 F.3d 332, 343-44 (3d Cir. 2019); *United States v. Berg*, 144 F.2d 173, 176 (3d Cir. 1944). And in general, the Third Circuit has taken a broad view of the fraud statutes. In *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987), for example, it held that the phrase "scheme to defraud" is "not capable of precise definition" and is instead "measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." *But see Skilling*, 561 U.S. at 418 (Scalia, J., concurring in judgment) (criticizing the "grandiloquence" and "astoundingly broad language" of this formulation of fraud). Citing the Seventh Circuit's decision *George*, the *Goldblatt* court suggested that proof of loss or gain is not necessary. 813 F.2d at 624-25.[3]

Those earlier cases presaged two cases last year—*Kousisis* and *Porat*—where the Third Circuit affirmed convictions on a fraudulent-inducement theory. *Kousisis* involved defendants who lied about minority business certification in order to obtain government construction contracts. *United States v. Kousisis*, 82 F.4th 230, 233-35 (3d Cir. 2023). The defendants argued that they were not guilty of fraud because the

[3] The government relied upon *Goldblatt* in its brief to the Third Circuit below. C.A.Dkt.48 at 30, 49.

government agency had received the full benefit of the bargain—that is, it "received the repairs it paid for." *Id.* at 240.

The Third Circuit rejected that argument. It held that the government's payment of funds under the contract satisfied the "money or property" element of fraud. The object of the defendant's scheme, according to the court, was the "millions of dollars that they would not have received but for their fraudulent misrepresentations." *Id.* Indeed, as the court characterized the case, "the 'entire point' of Appellants' scheme was to obtain [the victim's] money." *Id.* In short, the *Kousisis* court held that it did not matter that the agency received precisely the services it paid for under the contract, because it was induced to pay money to the defendants by deception.

The panel below followed *Kousisis* and affirmed petitioner's conviction. Porat argued on appeal that even if false statements to U.S. News had induced students to attend Fox and thus pay tuition dollars, they had received the essential benefit of the bargain. He argued, in other words, that they had not suffered any cognizable loss—because they received the high-quality education promised, and only lost the intangible reputational interest in the rankings, which is neither money nor property. The panel responded simply: "Porat was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*." Pet.App.12a. It held that the jury validly found that money—namely, tuition dollars—"was an object of his scheme." *Id.*

The Third Circuit has thus joined five others in affirming fraud convictions based on a fraudulent-inducement theory, making this case an excellent vehicle for resolving the split.

D. The Question Arises Frequently, And The Division Of Authority Has Led To Confusion And Inconsistent Results

1. Whether fraudulent inducement is a valid theory of mail and wire fraud affects the outcome in many cases. The question arose frequently even before *Ciminelli*—as reflected in the circuit split that has developed over the last several decades—and it is certain to come up even more frequently now.

As discussed, when this Court strictly enforced the fraud statutes' "money or property" requirement in the past, federal prosecutors responded by relying more heavily on the right-to-control doctrine. Doing so allowed them to prosecute the same conduct with a different legal label attached. Now that this Court has rejected the right-to-control doctrine, federal prosecutors have already responded by relying more heavily on the fraudulent-inducement theory.

In recent months, numerous defendants have argued that they are entitled to various forms of relief under *Ciminelli*, with the government typically responding with some version of a fraudulent inducement argument. The lower court opinions addressing these arguments are hardly a model of clarity or consistency, but they have generally sided with the government. *E.g.*, *United States v. Griffin*, 76 F.4th 724, 738-39 (7th Cir. 2023); *United States v. Mansouri*,

2023 WL 8430239, at *4-5 (W.D.N.Y. Dec. 5, 2023); *United States v. Miller* 2023 WL 7346276, at *4-5 (N.D. Cal. Nov. 6, 2023); *United States v. Hayman*, 2023 WL 5488429, at *6-7 (E.D. Pa. Aug. 24, 2023); *United States v. Ryan*, 2023 WL 4561627, at *5 (E.D. La. July 17, 2023); *United States v. Pierre*, 2023 WL 4493511, at *15 (S.D.N.Y. July 12, 2023); *United States v. Pasternak*, 2023 WL 4217719, at *2 (E.D.N.Y. June 27, 2023); *United States v. Jenesik*, 2023 WL 3455638, at *2 (D. Or. May 15, 2023). In short, it did not take long for prosecutors to try to limit *Ciminelli* to its facts and find another way around the "money or property" requirement—fraudulent inducement.

2. The government has gone so far as to argue that this Court's decision in *Ciminelli* does not control the result in *Ciminelli* itself. After this Court reversed the convictions and remanded for further proceedings, prosecutors' first move was to seek the same result using a fraudulent-inducement theory.

In its brief on remand to the Second Circuit, federal prosecutors have defended the sufficiency of the evidence on an alternate ground: fraudulent inducement. "[I]f a defendant induces a victim to enter into a transaction through material misrepresentations, his performance of his end of the bargain does not alter the fact that he 'obtained' the victim's funds." Brief on Remand for the United States at 24, *United States v. Percoco*, No. 18-2990(L) (2d Cir. Nov. 7, 2023), ECF No. 551. Predictably, the government cited Judge Learned Hand. *Id.* at 27 (quoting *Rowe*).

Ciminelli will be rendered a dead letter if everything formerly called right-to-control can now be recast as fraudulent inducement. Yet that is exactly what prosecutors are already trying to do. Given the ubiquity of federal fraud prosecutions, it is imperative that this Court directly resolve, once and for all, whether mere fraudulent inducement satisfies the statutes' "money or property" requirement. For the reasons set forth below, it should nip in the bud these efforts to circumvent *Ciminelli* and the entire line of fraud cases that began with *McNally*.

3. The question will continue to arise frequently, and because of the division of authority, lower courts will be left in a state of confusion until this Court steps in. Indeed, the decision below, which is hardly a model of clarity, exacerbates that confusion. The court began with a simple—and indeed simplistic—endorsement of a fraudulent-inducement theory. It held that Porat was validly convicted of "depriving [students] of *tuition money*," and that was sufficient to sustain a conviction for wire fraud. Pet.App.12a.

It then went on to address Porat's argument, based on *Takhalov* and like cases, that merely inducing an exchange for money was insufficient. *Id.* at 12a-13a. Inscrutably, it suggested that somehow those cases might have been overruled by *Ciminelli*, and in any event, that they were inapplicable:

> To the extent these cases are still good law and rely on other theories of fraud not explicitly endorsed by this Circuit, we do not opine on those matters nor adopt any positions here. Rather, we note that the broader fraud principles set

> forth in the cited cases do not ultimately support Porat's position.

Id. at 13a n.5.

That passage makes no sense, and the Third Circuit's opinion provides no clear guidance to lower courts. When the next defendant is charged with fraud, can he receive a jury instruction that the jury must acquit if it finds that the putative victim got exactly what he paid for? That question has no clear answer, either in the Third Circuit or around the country. The uncertainty will persist until this Court squarely addresses the validity of the fraudulent-inducement theory.

II. THE DECISION BELOW IS AN EXCELLENT VEHICLE TO RESOLVE THE ISSUE AND HAS DANGEROUS IMPLICATIONS

1. The implications are profound. If the fraudulent-inducement theory is accepted, it will significantly expand the scope of the mail and wire fraud statutes.

This case presents an optimal vehicle in which to address the issue, because it exemplifies how prosecutors use fraudulent inducement to stretch the fraud statutes far beyond the bounds of the "traditional property interests" Congress intended to protect.

Indeed, the implications for higher education are reason enough to grant certiorari. The U.S. News rankings have been widely and justifiably criticized. As one leading academic commentator described

them, the rankings are a "farce," based on "faux-precise formulas" that are "riven with statistical misconceptions."[4] Other commentators have persuasively shown that the rankings are arbitrary and unscientific, measuring institutional wealth and reputational inertia rather than educational quality.[5] They have unfortunately been influential nonetheless, and they have distorted American higher education. It would be better if the U.S. News rankings were ignored altogether. And yet the adoption of the fraudulent-inducement doctrine in this case now places the federal government in the position of policing their integrity—with the paradoxical effect of making them more rather than less important.

Errors and false submissions, moreover, are widespread. Many other schools have been engulfed in rankings scandals. Columbia University, for example, fell from #2 to #18 in the undergraduate rankings after it admitted to false survey responses.[6] According to the panel opinion below, the "present and future

---

[4] Colin Diver, *The Rankings Farce*, Chron. of Higher Educ. (April 6, 2022), https://www.chronicle.com/article/the-rankings-farce.

[5] *E.g.*, Alia Wong, *The Commodification of Higher Education*, Atlantic (March 30, 2016), https://www.theatlantic.com/education/archive/2016/03/the-commodification-of-higher-education/475947/; Malcolm Gladwell, *The Order of Things*, New Yorker (Feb. 6, 2011), https://www.newyorker.com/magazine/2011/02/14/the-order-of-things.

[6] Anemona Hartocollis, *U.S. News Ranked Columbia No. 2, but a Math Professor Has His Doubts*, N.Y. Times (March 17, 2022), https://www.nytimes.com/2022/03/17/us/columbia-university-rank.html; Anemona Hartocollis, *U.S. News Dropped Columbia's Ranking, but Its Own Methods Are Now Questioned*, N.Y. Times (Sept. 12, 2022), https://www.nytimes.com/2022/09/12/us/columbia-university-us-news-ranking.html.

value" of a Columbia degree is now apparently lower, so current and former students have an actionable claim for fraud—and all involved administrators could face time in a federal prison. *See* Pet.App.14a n.6.

Nor are the consequences limited to rankings deception. Under the panel's opinion, any deceptive advertising by a school that induces students to attend would constitute wire fraud. If, for example, University of Alabama officials knew that Coach Saban was considering retirement but told prospective students that he'd remain for years into the future, those officials would be guilty of a federal crime because, according to the panel, they lied "to students for the purpose of enticing [their] victims to pay tuition money." Pet.App.10a. After all, for better or worse, the quality of a football program is very important to many prospective students, and it affects the university's national brand and reputation.

A sensible ruling would hold that only lies affecting the essential bargain constitute fraud, and that "the essence of the transaction" between students and their school is "a semester of education in exchange for a semester of tuition." *Squeri v. Mt. Ida College*, 954 F.3d 56, 71 (1st Cir. 2020). But the fraudulent-inducement doctrine, applied to universities, means that any false advertising—even about something as vapid as the U.S. News rankings—constitutes a federal offense.

2. The implications of the doctrine spread far beyond the educational context. In an era where online rankings and reviews are ubiquitous, adoption of the fraudulent-inducement doctrine would mean that any

dishonesty in procuring false ratings would constitute a federal crime. A small restaurateur who had friends write fake five-star reviews on Yelp would be guilty of wire fraud if those reviews induced customers to show up—even if those customers got a great meal at a fair price. An attorney who procured false nominations to be named a Super Lawyer would be guilty of wire fraud if that designation induced a client to hire him—even if the attorney provided superb representation.

Indeed, the government has itself embraced such broad readings. It argued below that this case is simply a case of false advertising, and that false advertising of course constitutes federal wire fraud. C.A.Dkt.48 at 34. If that were true, it would mark a significant federal encroachment on an area that has traditionally been regulated by the States.

And then there is the employment context. Adoption of the fraudulent-inducement theory would mean that an employee is guilty of a federal offense if she deceives an employer to get a job. Again, the government has embraced this broad reading: "An applicant who obtains a job (and the accompanying salary) by materially misrepresenting her qualifications commits fraud even if she intends to, and does, perform the required work." Brief for Respondent United States at 23, *Ciminelli*, 598 U.S. 306 (No. 21-1170). Moreover, under the government's theory, an existing employee who deceives his employer in order to maintain his job and keep his salary would also be guilty of fraud.

Thus, for example, an employee who violated workplace policies on computer use (or anything else) and

then lied about it or failed to disclose it would be guilty of a federal offense. Among other things, this would render this Court's decision in *Van Buren v. United States*, 141 S. Ct. 1648 (2021), a dead letter. In *Van Buren*, this Court limited the scope of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, in order to prevent it from covering routine violations of workplace policies. Allowing such broad coverage "would attach criminal penalties to a breathtaking amount" of common workplace behavior and would make criminals of "millions of otherwise law-abiding citizens." *Id.* at 1661. But if the fraudulent-inducement theory is correct, then all that behavior—and much more—is criminalized by the mail and wire fraud statutes anyway.

The fraudulent-inducement theory would similarly render meaningless this Court's limitations on the honest-services doctrine. What was formerly cast as depriving a victim—whether employer or government agency—of honest services could now be re-cast as depriving a victim of any money obtained through salary or contract. In *McNally* and *Skilling*, for example, the defendants received salaries. *Skilling*, 561 U.S. at 413; *McNally*, 483 U.S. at 353. If deception inducing payment of a salary is sufficient to prove traditional property fraud, there would almost never be a need to charge honest services fraud.

3. The fraudulent-inducement doctrine has one thing to say in its favor: It is simple. It would save courts and juries from having to answer sometimes difficult questions about whether a defendant had provided the essential benefit of the bargain, and whether

the victim received what she paid for. But that simplicity comes at a great cost—a vast expansion of the federal mail and wire fraud statutes "without statutory authorization" that would "make[] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law"—exactly the result this Court warned against in *Ciminelli*, 598 U.S. at 316. Adopting the fraudulent-inducement doctrine would eviscerate many of the limitations this Court has placed on the fraud statutes, and it would place federal courts back in the position of policing the "fundamental honesty, moral uprightness . . . fair play and candid dealings in the general life of the community." *Goldblatt*, 813 F.2d at 624. That approach would once again "leave it to prosecutors and judges to make things up as they go along." *Percoco v. United States*, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring).

At the very least, whether that expansion is consistent with the text, history, and structure of the fraud statutes is a question that this Court should answer. It is time for this Court to settle the longstanding circuit split and determine whether fraudulent inducement is a valid theory of mail and wire fraud.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
AVERY D. MEDJUCK
SHAPIRO ARATO BACH LLP
1140 Avenue of the Americas
17th Floor
New York, New York 10036
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

January 31, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1560

UNITED STATES OF AMERICA

v.

MOSHE PORAT,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-21-cr-00170-001)
District Judge: Honorable Gerald J. Pappert

Argued May 18, 2023

Before: KRAUSE, PHIPPS, and CHUNG, *Circuit Judges*.

(Filed: August 7, 2023)

Mark B. Dubnoff [ARGUED]
Nancy E. Potts
Mary Teresa Soltis
Office of the United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

Counsel for Appellee

Avery D. Medjuck
Theodore D. Sampsell-Jones
Alexandra A.E. Shapiro [ARGUED]
Shapiro Arato Bach
1140 Avenue of the Americas
17th Floor
New York, NY 10036

Counsel for Appellant

Tai H. Park
1140 Avenue of the Americas
17th Floor
New York, NY 10036

Counsel for Amicus Appellants Professor Stephen F. Smith and Notre Dame Law School

Michael D. Pepson
Americans for Prosperity Foundation
1310 N Courthouse Road
Suite 700
Arlington, VA 22201

Counsel for Amicus Appellant Americans for Prosperity Foundation

---

OPINION OF THE COURT

CHUNG, *Circuit Judge.*

Moshe Porat, the former Dean of the Fox School of Business at Temple University ("Fox"), appeals his convictions for conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, and wire fraud, in violation of 18 U.S.C. § 1343.

On appeal, Porat argues that the government did not plead or prove by sufficient evidence (1) that he sought to deprive his victims of money, (2) that he

sought to personally obtain money, or (3) that the party he deceived was the same party he defrauded of money (*i.e.*, "convergence"). With regard to the second issue, Porat also argues that the District Court erred in refusing to provide the jury with the instructions he sought. Because the evidence was sufficient for a rational jury to convict him, and because the government need not prove either that the scheme was intended to personally benefit Porat or "convergence," we will affirm.

I. BACKGROUND

A. Factual Background

Porat was convicted for his scheme to raise Fox's "rankings" in U.S. News and World Report ("U.S. News"), a publication that rates colleges and graduate schools, including business schools.[1] The government offered evidence that, while some have criticized these rankings as poor measures of a school's quality, many people rely on them to compare business schools. These include applicants, students, alumni, donors, employers, faculty, and the schools themselves.

Porat was Fox's Dean from 1996 to 2018. During his time at Fox, he was "almost obsessed with rankings." Suppl. App. ("SA") 399. Sometime in the early 2000s, Porat created a committee that met regularly to consider the data that Fox would provide for use by U.S. News in formulating rankings. It also studied the rankings and strategized ways by which Fox could improve its

[1] On appeal, Porat does not challenge the truth of the evidence presented at trial, but only whether it was sufficient to convict him. And in reviewing Porat's appeal of his conviction, "we must consider the evidence in the light most favorable to the government." *United States v. Rowe*, 919 F.3d 752, 758 (3d Cir. 2019). Accordingly, we state the facts as shown at trial.

rankings. Over time, Porat came to work most closely on rankings with two Fox employees, Isaac Gottlieb and Marjorie O'Neill. Porat eventually eliminated the committee and consolidated responsibility for Fox's survey submissions in O'Neill, who reported directly to him. After that, Porat continued to confer with both Gottlieb and O'Neill on rankings strategy.

At some point, Porat's efforts to raise Fox's rankings crossed the line from strategy to falsification. Evidence at trial showed that Fox may have submitted false data to rankings publications as early as 2010. By 2014, having reverse-engineered the methodology behind the U.S. News rankings, Porat, Gottlieb, and O'Neill used falsifications to manipulate Fox's rankings—in particular, the rankings for its Online MBA ("OMBA") and Part-Time MBA ("PMBA") programs. To better Fox's OMBA ranking, they falsely stated that 100 percent of Fox's OMBA students had taken the Graduate Management Admission Test ("GMAT"), when the actual number was much lower. They also misreported data on offers of admission, student debt, and average undergraduate grade point average. To better Fox's PMBA ranking, they combined data for Fox's PMBA program with data for its OMBA and Executive MBA ("EMBA") programs to overstate the PMBA students' average work experience and the percentage of Fox's MBA students who were PMBA students. As with the OMBA program, they also falsely reported that 100 percent of Fox's PMBA students had taken the GMAT.

Partly because of these deceptions, Fox's OMBA program rose from its U.S. News rank of Number Nine in 2014 to Number One in 2015—a position that it held for four straight years. Fox's PMBA ranking climbed steadily over three years from Number Fifty-Three in 2014 to Number Seven in 2017.

Porat viewed Fox's high rankings as a key way to market Fox to students and to thus generate more tuition money.[2] One Fox administrator testified that Porat believed Fox needed "good rankings and to publicize good rankings for enrollment." SA475. In a book manuscript, Porat boasted about Fox's OMBA ranking as Number One and wrote that "enhancing the school's image" is "the single most important factor in assuring continuous demand from the students, the parents, and employees." *Id.* at 299. And with Porat's knowledge and involvement, Fox aggressively marketed its false high rankings. Fox advertised its deceptively obtained rankings on its website, on social media, and on billboards and signs. Porat also sent or approved emails touting Fox's false rankings to students, student recruiters, and donors. Porat also represented to students that Fox's high rankings would bring them continuing—and even increasing—benefits. In a 2017 speech, Porat told graduating Fox students, "I often say that your diploma is like a share of stock in an enterprise . . . in which you remain shareholder long after you have graduated." Gov't Ex. 148. He further said that "many leading publications"—including "U.S. News"—"rank our programs among the best in the world and they agree that our stock indeed has been appreciating in value." *Id.* During a 2017 "champagne toast" held to celebrate the rankings, Porat posed for a photo with

---

[2] Although the Indictment alleged that Porat sought to defraud "Fox applicants, students, *and donors*" of money, Appendix ("A") 98, 115 (emphasis added), Porat notes that most of the government's evidence at trial concerned applicants and students only. On appeal, Porat's arguments mainly concern his scheme to defraud applicants and students of tuition money. Because Porat's arguments on appeal focus on tuition money, and because proof that he defrauded students and applicants is enough to convict him, the discussion that follows focuses on this element of the scheme.

students in front of a banner that read "YOUR STOCK IS SOARING." SA733–35. Fox printed the banner and arranged the photo to use it for "PR." *Id.* at 734.

The advertising worked. At trial, former students testified that they chose Fox because of its rankings. One former student testified that he "decid[ed] to go with Temple University because of [its] Number 1 ranking." *Id.* at 502. He further explained that he chose Fox because he knew that "people look at [rankings]," and that "once [he] graduat[ed]," he wanted to have "been a part of" a program that "was ranked Number 1." *Id.* at 503. After learning that Fox's rankings were inflated, he regretted not choosing a school that would have given him the "same piece of paper" at a much lower cost. *Id.* at 507. Another former student testified that he believed employers hire students from schools with the best "brand" and that Fox's highly ranked brand would help him "compete in the marketplace." A172. Ultimately, Fox's Number One ranking "was the only factor in [his] decision making" in choosing Fox over another school. SA133. Enrollment numbers corroborate that Fox's falsely inflated ranking influenced students' enrollment decisions. Between the 2014–2015 and 2017–2018 academic years, enrollment in Fox's OMBA and PMBA programs spiked from 133 students to 336 students and 88 students to 194 students, respectively. The increased enrollment was tremendously lucrative. The government estimated that Fox gained nearly $40 million in tuition from the additional students who enrolled during this period (2014– 2018).

As the money poured in, Porat's team discussed how to keep the rankings high and make even more money. In a January 2015 email to Porat, Gottlieb emphasized Fox's need to maintain its high rankings, cautioning

that just as "being number one can potentially add over 1–200 students a year" and bring corresponding "financial value" to Fox, so could "moving down" in the rankings "result in financial losses associated with a reduction of the 100+ students." SA749. Porat responded, "Good stuff." *Id.* In September 2015, Gottlieb copied Porat on an email about rankings for another Fox program, its Global MBA ("GMBA"). Gottlieb noted that Fox's "OMBA and PMBA doubled in intake numbers when we had a striking increase in ranking," and estimated that increasing Fox's GMBA ranking would produce "a profit of over $700,000 a year." *Id.* at 756.

Then, in early 2018, Porat's scheme was exposed. On January 9, 2018, an article discussing Fox's repeated Number One ranking highlighted Fox's self-reported 100-percent GMAT figure. That figure raised an "enormous red flag" among other Fox administrators who knew that it was false. *Id.* at 189. Nonetheless, and despite warnings from administrators that they should not proceed, Porat pushed ahead with a celebratory toast, saying "we're going." *Id.* at 336. At the toast, Porat lauded Fox's OMBA ranking. The next day, Fox administrators decided to disclose the false GMAT data to U.S. News. Yet even then, Porat continued to publicize the rankings. On January 22, 2018, he sent an email to his "Porat 100," a VIP list that included Fox donors and potential donors, with the subject line "#1 Online MBA and #2 Online BBA in the nation AGAIN!" *Id.* at 810. Two days later, on January 24, 2018, U.S. News announced that Fox's "misreported data resulted in the school's numerical rank being higher than it otherwise would have been," and that "[b]ecause of the discrepancies," it would move Fox's OMBA program to the "Unranked" category. A528–29. Fox then withdrew its other programs, including its

PMBA program, from consideration in U.S. News' rankings for that year.

The exposure was a disaster for Fox's rankings. When U.S. News resumed ranking Fox, it placed both Fox's OMBA and PMBA programs in forty-first place. And as Fox's rankings fell, its enrollment did as well. Fox's OMBA enrollment plummeted from its high of 336 students in the 2017–2018 academic year to 144 in 2018–2019, and 106 the year after. Fox's PMBA enrollment dropped in each of the three years after the deception came to light, from its high of 194 students to 145, 117, and 89.

B. Procedural Background

On April 15, 2021, a grand jury charged Porat with one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, and one count of wire fraud in violation of 18 U.S.C. § 1343.

In the conspiracy count, the Indictment alleged that Porat conspired with Gottlieb and O'Neill "to devise a scheme and artifice to defraud and to obtain money and property from Fox applicants, students, and donors, by means of materially false and fraudulent pretenses, representations, and promises." A98. For the "Manner and Means" of the conspiracy, the Indictment alleged that Porat "conspired . . . to deceive readers of U.S. News by providing false and misleading information to U.S. News about Fox's OMBA and PMBA programs in order to fraudulently inflate Fox's ranking in the U.S. News surveys," with "goals . . . includ[ing] attracting more students to apply to Fox, matriculate at Fox, and pay tuition to Fox, and enticing Fox alumni and other benefactors to donate money to Fox." *Id.* at 98–99. In the wire fraud count, the Indictment alleged that Porat "devised and intended to devise a scheme to

defraud Fox applicants, students, and donors out of money and property," and incorporated the "Manner and Means" from the conspiracy count. *Id.* at 115.

Porat moved to dismiss the Indictment for failure to state an offense under Rule 12(b)(3) of the Federal Rules of Criminal Procedure. The District Court denied Porat's motion, and the case went to trial in November 2021. After a two-week trial, the jury convicted Porat on both counts.

Porat filed a post-trial motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure or, in the alternative, for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The District Court denied Porat's motion. The Court entered judgment on March 14, 2022, convicting Porat and sentencing him to fourteen months in prison and $250,200 in fines and assessments.

Porat timely appealed.

II. DISCUSSION

A. The Evidence Was Sufficient to Convict Porat

We conduct plenary review of the sufficiency of the evidence. *Rowe*, 919 F.3d at 758. In doing so, we must affirm Porat's conviction if, considering the evidence in the light most favorable to the government, there is "substantial evidence from which any rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 758–59. We conclude that there is.

We begin by briefly reciting the requirements of wire fraud as relevant to Porat's challenges on appeal. The federal wire fraud statute criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. The Supreme

Court has consistently held that the federal fraud statutes "protec[t] property rights only." *Ciminelli v. United States*, 143 S. Ct. 1121, 1126 (2023) (alteration in original) (quoting *Cleveland v. United States*, 531 U.S. 12, 19 (2000)).[3] Moreover, "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'" *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020) (quoting *Pasquantino*, 544 U.S. at 355). Thus, "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.*

Based on the evidence at trial, a rational jury could have found beyond a reasonable doubt that Porat engaged in the kind of scheme the wire fraud statute criminalizes: that is, that Porat trumpeted Fox's knowingly false, inflated rankings to students for the purpose of enticing his victims to pay tuition money. Moreover, a rational trier of fact could have found that the evidence established that this financial purpose was an object of Porat's scheme. This evidence included Porat's repeated emphasis on using rankings to increase Fox's enrollment and tuition revenues, and expert testimony that rankings are crucial to many students' decisions about where to spend their tuition dollars.

The evidence also reflected that Porat intended the falsely inflated rankings to be used as an indicator of a Fox degree's future value to students. As described above, Porat "often" said that a Fox degree was like a "stock" that was "appreciating in value" as Fox's rankings rose. Gov't Ex. 148. Consistent with Porat's "rising

---

[3] Congress has enacted statutes criminalizing both mail fraud and wire fraud. *See* 18 U.S.C. §§ 1341, 1343. We interpret "identical language in the wire and mail fraud statutes *in pari materia*." *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005).

stock" assessment, the evidence at trial reflected that students viewed rankings as a way to evaluate the future yield of a Fox degree in terms of employment and earnings. Likewise, the government's expert testified that rankings are "a signal to employers that [the] program is a good program." A151.

Further, although success of the scheme is not required to sustain a wire fraud conviction, *see United States v. Frey*, 42 F.3d 795, 800 (3d Cir. 1994), evidence showed that Porat's scheme was wildly profitable for Fox. This evidence included the government's estimate that students drawn in by Porat's deception paid Fox a total of nearly $40 million. It included testimony from Fox alumni that they chose Fox for its rankings. It also included enrollment data showing that the increased rankings changed how students valued Fox's programs. In the 2014–2015 academic year, a combined total of only 221 OMBA and PMBA students were willing to pay Fox's tuition. Three years later, when Fox's rankings were at their zenith, 530 students—nearly two-and-a-half times that number—considered Fox's programs worth the price. And when Fox's rankings plummeted after the deception was exposed, Fox suffered a corresponding drop in enrollment as far fewer students decided that the Fox degree merited the tuition.

Given this substantial evidence, a rational jury could have found beyond a reasonable doubt that Porat engaged in a scheme to defraud victims of their money, and could have found that this financial object was more than an "incidental byproduct" of the scheme. That is sufficient to convict Porat of wire fraud.

B. The Evidence Was Sufficient to Prove Deprivation of Money

Porat argues that he did not deprive his victims of money, and makes two arguments in support. First, Porat argues that students were deprived only of rankings, and "rankings are not property." Porat Opening Br. 25. But Porat was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*. The Indictment charged that Porat used deception to "attract[] more students to apply to Fox, matriculate at Fox, and pay tuition to Fox." A99; *see also id.* at 115. The District Court instructed the jury that to convict Porat, it must find that he engaged in a scheme to defraud Fox "applicants, students, or donors of money," *id.* at 381, and Porat did not object to the basic contours of this instruction.[4] By convicting Porat, the jury necessarily found that he sought to defraud his victims of money. The jury's finding was reasonable, given evidence that Porat employed a scheme to "add . . . students" and thereby, their tuition, producing "financial value" through materially false representations of Fox's rankings. SA749. Thus, despite Porat's attempt to redirect focus to the rankings, money was an object of his scheme.

Second, Porat argues that even if he did aim to take money from his victims, he still did not deprive them of money or property, because they received the "essential benefit of the bargain," an education. Porat Opening Br. 29. Porat further argues that the rankings, as intangible considerations, cannot legally be an essential

---

[4] While Porat did ask for an instruction that the jury must find he personally obtained money (an argument we address below), he did not object to the basic proposition that money satisfies the property element of fraud, nor did he ask for an instruction that a deprivation of a ranking is not a deprivation of "property."

part of the bargain because there is no "independent property interest in the U.S. News rankings." *Id*. Relying on cases from other circuits, Porat contends that there was no fraud here because the victims received a Fox education, which was the "*full* benefit of their bargain" or "*exactly* what they paid for." *Id.* at 27, 32 (emphasis added) (first quoting *United States v. Binday*, 804 F.3d 558, 599 n.46 (2d Cir. 2015), *abrogated by Ciminelli*, 143 S. Ct. at 1121; and then quoting *United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016)). But the cases Porat relies upon do not stand for the proposition that the value of a bargain cannot include intangible considerations; rather, they suggest that a victim is only "deprived" of property when the false representation affects the very nature or value of the bargain. *See, e.g.*, *United States v. Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023) (fraud occurs when "defendant lies about the nature of the bargain itself" (quoting *Takhalov*, 827 F.3d at 1314)); *Binday*, 804 F.3d at 570 ("[W]e have upheld convictions for mail and wire fraud where the deceit affected the victim's economic calculus or the benefits and burdens of the agreement.").[5]

---

[5] Some of these cases, like *Binday*, upheld fraud convictions where no tangible property was taken, but the defendant deprived the victim of the "interest . . . in controlling his or her own assets." 804 F.3d at 570 (quoting *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007)). However, the Supreme Court has since invalidated that theory, as "the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest" protected by the fraud statutes. *Ciminelli*, 143 S. Ct. at 1128. To the extent these cases are still good law and rely on other theories of fraud not explicitly endorsed by this Circuit, we do not opine on those matters nor adopt any positions here. Rather, we note that the broader fraud principles set forth in the cited cases do not ultimately support Porat's position.

Moreover, as set forth more fully above, *see supra* Section II.A, the evidence at trial reflected that the nature of the bargain between Fox and the students included not only the actual education afforded them, but also the current value of a highly ranked program, and even the future value of Fox's MBA degrees. To be sure, it is commonly understood and fully expected that a school's ranking, and the current and future value of a particular school's degree, may fluctuate over time in the normal course, *e.g.*, with changes in a school's administration, faculty, and student body, as well as changes in the overall marketplace. But it is not commonly understood or expected that a ranking will soar or plummet as a result of deceit or misrepresentation. While Porat asserts that the bargain only encompassed an exchange of tuition for education, the jury was free to come to a different conclusion,[6] especially

[6] As noted above, we do not read the cases relied upon by Porat to call the jury's conclusion into question. That is because the bargain here was simply different than the bargains at issue in the cases Porat cites. Those cases often involved situations where the victims set the asking price and did not involve the additional consideration of the future value of the bargained-for items. Even if those cases had involved the same type of bargain, the false representations were not of the kind that could materially affect present and future value. *See, e.g.*, *United States v. Sadler*, 750 F.3d 585, 588–90 (6th Cir. 2014) (creation of fake patients in order to buy pills from distributor at asking price); *United States v. Shellef*, 507 F.3d 82, 89–90 (2d Cir. 2007) (buyers falsely represented intent to redistribute chemicals domestically in bargain to pay distributor asking price for chemicals); *Takhalov*, 827 F.3d at 1310–11 (hostesses posing as customers in sales of alcoholic drinks to bar customers). Unlike the items bargained for in those cases, an MBA is a costly, debt-inducing, once-in-a-lifetime "purchase" expected to have long-term effects on employment and earnings. Thus, in making a cost-benefit analysis, a student-buyer would be prudent to assess the degree's effect on future earnings. While the reality may be that rankings are a poor proxy for present and

in light of the fact that Porat neither requested a jury instruction on this theory, nor argued it to the jury. In addition, and as set forth above, the evidence indicated that Fox's falsely inflated rankings impacted students' valuation of the bargain, impacting their assessment of a Fox education's worth and their assessment of the future yield of a Fox MBA, and causing many more students to enroll at Fox. Accordingly, we conclude that a rational jury could find beyond a reasonable doubt that the students did not receive the full benefit of their bargain, and—in the language from the cases Porat cites—that Porat's false ranking representations affected their "economic calculus," *Binday*, 804 F.3d at 570, and that he "lie[d] about the nature of the bargain itself," *Guertin*, 67 F.4th at 451.

In sum, because the substantial evidence was sufficient for a rational jury to find that Porat knowingly used materially false representations of Fox's rank to obtain students' money in the form of tuition, the evidence satisfies the property element of wire fraud. Accordingly, we will defer to the jury's verdict.

C. The Government Did Not Have to Prove the Object of Porat's Scheme Was to Personally Obtain Money

Porat next argues that even if the government did prove that he sought to deprive his victims of money, it failed to prove a necessary corollary: that he sought to *personally obtain* money or property from his victims. The statutory text and the case law do not compel such a reading.

---

future value, the jury heard evidence that both Porat and the students recognized the influence of rankings in these areas.

The text of the wire fraud statute does not expressly provide that the defendant must seek to personally obtain property. Rather, it broadly criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. The wire fraud statute makes no reference to what the defendant receives. Porat argues that we should narrowly interpret the statutory term "obtaining" to mean bringing "into one's *own* possession." Porat Opening Br. 37 (emphasis added) (quoting *Honeycutt v. United States*, 581 U.S. 443, 450 (2017)). But as the Second Circuit has stated, "[b]y the plain language of the statute, the identity of the ultimate beneficiary is not dispositive and the plain meaning of the word 'obtain' is sufficiently capacious to encompass schemes by defendants to obtain money for the benefit of a favored third party." *United States v. Gatto*, 986 F.3d 104, 124 (2d Cir. 2021). We agree.

Case law also lends no support for a requirement that the defendant seek to personally obtain property. It is true that, at times, the Supreme Court has referred to the money-or-property requirement in terms of either "depriving" the victim of money or property, or "obtaining" money or property. *Compare Kelly*, 140 S. Ct. at 1571 ("The wire fraud statute thus prohibits only deceptive 'schemes to deprive [the victim of] money or property.'" (alteration in original) (quoting *McNally v. United States*, 483 U.S. 350, 356 (1987)), *with id.* at 1572 ("fraudulent schemes violate that law only when, again, they are 'for obtaining money or property'" (quoting 18 U.S.C. § 1343)). But in varying the language it has used to describe the money-or-property element, the Court has never suggested that the defendant must seek to personally obtain property. In addition, in the Third Circuit, we have suggested

that a defendant need not personally benefit from his fraudulent scheme to be criminally liable. *See, e.g.*, *United States v. Riley*, 621 F.3d 312, 332 (3d Cir. 2010) ("To support a fraud conviction it is 'not necessary for the Government to demonstrate that [the defendant] personally benefitted from [the] scheme.'" (alterations in original) (quoting *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987))); *see also United States v. Al Hedaithy*, 392 F.3d 580, at 605 (3d Cir. 2004) ("[T]he mail fraud statute does not require that a scheme be designed to obtain any property from the victim; rather it is sufficient that the scheme is designed to fraudulently deprive the victim of property or an interest in property.").[7]

Porat seeks support in the Supreme Court's statement in *Skilling v. United States*, 561 U.S. 358 (2010), that honest-services fraud lacks the "symmetry" of other kinds of "fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Id.* at 400. He argues that this passage from *Skilling* sets out a "mirror-image" rule for property fraud and means that there is no fraud unless the defendant seeks to personally obtain what the victim loses. But *Skilling* invokes the mirror-image concept only to highlight the basic structural difference between honest-services fraud

[7] The government argues that *United States v. Pabey*, 664 F.3d 1084, 1089 (7th Cir. 2011), and *United States v. Delano*, 55 F.3d 720, 723 (2d Cir. 1995), show that lying to benefit a third party can still be federal fraud. But it is not clear that these cases stand for that proposition, as the defendants in each case still derived at least an indirect economic benefit from their deceptions. In any event, our case law indicates that no direct personal economic benefit is required for a defendant's fraud conviction to stand. *See Riley*, 621 F.3d at 332.

and property fraud. It does not, however, prescribe a necessary condition for property fraud.

Accordingly, we reject Porat's contention that wire fraud requires proof that the defendant sought to personally obtain money or property. Because we reject this requirement, we need not address Porat's argument that the District Court erred in failing to provide his requested jury instructions on this point.[8]

D. The Government Did Not Have to Prove Convergence

Finally, Porat asks us to adopt a "convergence" requirement for wire fraud—that is, a requirement that the defendant deceive the same party he defrauds of money. Porat argues that the government neither pleaded nor proved convergence here because its theory was that he deceived U.S. News, but sought to take money from students, applicants, and donors.

The Ninth Circuit is the only Court of Appeals that has required convergence. *See United States v. Lew*, 875 F.2d 219, 221–22 (9th Cir. 1989).[9] Other Courts of Appeal have considered and rejected it. *See, e.g.*, *United States v. Christopher*, 142 F.3d 46, 54 (1st Cir. 1998); *United States v. Greenberg*, 835 F.3d 295, 306–07 (2d Cir. 2016); *United States v. McMillan*, 600 F.3d 434, 449–50 (5th Cir. 2010); *United States v. Seidling*, 737 F.3d 1155, 1161 (7th Cir. 2013); *United States v. Blumeyer*, 114 F.3d 758, 767–68 (8th Cir. 1997); *United*

---

[8] We also need not address the government's arguments that Porat did not properly preserve his arguments on this point in the District Court.

[9] The District of Columbia Circuit has also "assume[d] without deciding" that convergence was required where "the indictment properly allege[d] convergence." *United States v. Abou-Khatwa*, 40 F.4th 666, 675 (D.C. Cir. 2022).

States v. Kennedy, 64 F.3d 1465, 1476 (10th Cir. 1995). In *United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011), we addressed a defendant's convergence argument, and noted that "[w]e have yet to decide this issue." *Id.* at 249. We also determined that "we need not make that decision" in *Bryant* because the evidence showed convergence in any event. *Id.* at 250.

Here, although the evidence did show that Porat sought to deceive U.S. News, it also showed that he made false statements directly to his victims. For example, evidence showed that Porat approved emails to students and student recruiters touting the rankings, celebrated the high rankings with students, represented that the high rankings would bring students future benefits, and was involved in Fox's marketing campaigns to advertise its rankings to potential applicants. Thus, as in *Bryant*, the evidence was sufficient to convict Porat even if convergence were required.

However, we also reject Porat's argument because we hold that the wire fraud statute does not require convergence. Nothing in the text of the statute supports such a requirement. *See, e.g.*, *Christopher*, 142 F.3d at 54 ("Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived."). Neither do our precedents limit wire fraud in this way. Accordingly, we join our sister circuits in rejecting the so-called convergence requirement and hold that a defendant need not deceive the same party he defrauds of money.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's judgment and conviction order.

KRAUSE, *Circuit Judge*, concurring.

I join my learned colleague's excellent opinion in full. In this case, we did not need to expound on the line between deceit and federal wire fraud because a rational jury could easily conclude on this record that it was crossed by Porat. I write separately to reinforce that the Supreme Court and our sister circuits have identified such a line, and the Constitution requires us to police it rigorously.

Not every tort or breach of contract claim can (or should) be prosecuted as a federal crime. In the context of the myriad state-law civil claims and criminal offenses that are available to vindicate the rights of victims of deceits or mere fraudulent inducements, the Supreme Court and appellate courts have repeatedly emphasized that due process and federalism principles require the government to proceed with caution when bringing fraud prosecutions. And yet, there is a continued need for vigilance, lest prosecutors convert the fraud statutes—and the lengthy prison sentences that they can trigger—into tools to regulate good morals and business ethics.

In an effort to reduce that risk, I will review, first, the historical treatment of intangible property rights and the need to cabin what counts as criminal fraud; and, second, the recent appellate decisions engaged in this line-drawing exercise and the lessons they teach for distinguishing tortious misrepresentations from criminal fraud offenses.

I. The Historical Treatment of Intangible Property Rights

The problem that Porat's appeal poses is not new. There long has been a tug-of-war over the breadth of the fraud statutes. Originally passed in 1872, the first mail fraud law fell into prosecutors' lap at a time when Congress was articulating a broad role for the federal government in protecting all Americans, whether it be from racist violence or new, dangerous drugs. *See* Erin C. Blondel, *The Structure of Criminal Federalism*, 98 Notre Dame L. Rev. 1037, 1068–69 (2023). At the same time, the national economy was rapidly growing and integrating, presenting opportunities for deception on a previously unthinkable scale. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 780 (1980).

While defrauding someone always has required "wronging one in his property rights,"[1] *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924), prosecutors, with the courts' approval, defined "property" impossibly broadly, transforming the mail fraud statute into a scheme to enforce "moral rectitude in commercial matters," Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 144 (2021). Guilty verdicts could stand even when no one had lost tangible property; the bar to securing a conviction was low, and our circuit was no exception. *See, e.g.*, *United States v. Clapps*, 732 F.2d 1148, 1150 (3d Cir. 1984). In this era, the fraud statutes became federal prosecutors' "Stradivarius,

[1] Even in the fraud statute's earliest form, materially misleading false advertising that went beyond mere puffery could form the basis for a conviction. *See United States v. New S. Farm & Home Co.*, 241 U.S. 64, 71 (1916).

our Colt 45, our Louisville Slugger, our Cuisinart—and our true love." Rakoff, *supra*, at 771.

That era should have come to a grinding halt thirty-six years ago, when the Supreme Court held in *McNally v. United States* that the fraud statutes are "limited in scope to the protection of *property* rights" only. 483 U.S. 350, 360 (1987) (emphasis added). And in the decades since then, the Court has made clear that the fraud statutes do not enact Article III judges' sense "of moral uprightness, of fundamental honesty, fair play and right dealing," *Skilling v. United States*, 561 U.S. 358, 418 (2010) (Scalia, J., concurring) (quoting *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)), or "standards of disclosure and good government for local and state officials," *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (quotation omitted). "If Congress desires to go further," the Court has admonished, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

Yet federal prosecutors have continued to proffer novel theories of liability that run afoul of these dictates, each time requiring the Supreme Court to step in and overturn the conviction. In *Skilling*, to avoid due process problems, the Court limited prosecutions for the deprivation of "honest services" under 18 U.S.C. § 1346 to bribes or kickbacks.[2] 561 U.S. at 404.

---

[2] In *Skilling*, the former CEO of Enron had been charged, *inter alia*, with honest services fraud for participating in a wide-ranging conspiracy to misrepresent the company's financial health. 561 U.S. at 369. The indictment alleged that, by participating in this conspiracy, Skilling had deprived the company and its investors of his honest services—an interpretation of § 1346 that the Court agreed with Skilling would have been void for vagueness, *id.* at 412—so his conduct fell outside the statute's reach when properly construed, *id.* at 413.

In *Kelly*, it held that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme," 140 S. Ct. at 1573, regardless of whether the deprivation of cognizable property was "foreseen," *id.* at 1574. It still must be "an 'object of the fraud.'"[3] *Id.* at 1573 (citation omitted).

And just this spring, the Court negated the so-called "right to control" theory of property fraud, *Ciminelli v. United States*, 143 S. Ct. 1121, 1128 (2023), rejecting the Second Circuit's view that the victim's "right to control . . . his or her own assets" was cognizable property protected by the fraud statutes, *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (quoting *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007)). The Second Circuit treated the deprivation "of information necessary to make discretionary economic decisions," *id.* (quoting *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998)), coupled with a material misrepresentation, as sufficient to constitute federal criminal fraud, even when the victim was not any worse off economically.

The Supreme Court found that theory bereft of longstanding roots "in traditional property notions." *Ciminelli*, 143 S. Ct. at 1128. Congress may have expanded the definition of property to reach some intangible rights in some contexts (as narrowed by *Skilling*, bribes and kickbacks), but it had said nothing about "other such intangible interests." *Id.* (alteration omitted) (quoting *United States v. Sadler*, 750 F.3d

[3] The defendants in *Kelly* had deprived the Port Authority of New York and New Jersey of the money it used to pay traffic engineers and toll collectors as part of their scheme to take revenge on a political opponent, but that was not enough to sustain their convictions. That money, the Court concluded, "was incidental to—the mere cost of implementing"—the scheme. *Id.* at 1572.

585, 591 (6th Cir. 2014)). And the infirmities the Court identified with the right to control theory went beyond precedent, text, or structure. The theory also "vastly expand[ed] federal jurisdiction without statutory authorization. Because the theory treat[ed] mere information as the protected interest, almost any deceptive act could be criminal . . . mak[ing] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Id.*

As apparent from this review, three important constitutional principles undergird this jurisprudence: notice, federalism, and self-governance. First, the Fifth Amendment bars enforcement of impermissibly vague criminal laws. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591, 595 (2015). This "void-for-vagueness doctrine . . . guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)); *see also United States v. Amirnazmi*, 645 F.3d 564, 588 (3d Cir. 2011) ("A statute is void on vagueness grounds if it . . . fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." (internal quotation marks and citation omitted)). Otherwise, the criminal laws would unduly chill perfectly legal conduct, and law-abiding people would have to "steer far wider of the unlawful zone" than necessary to mitigate the risk of prosecution. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The constraints that the Court has imposed in *McNally*, *Skilling*, *Kelly*, and *Ciminelli* promote this due process principle.

Second, principles of federalism also inform the bounds of federal criminal law. *See Bond v. United States*, 572 U.S. 844, 859 (2014). The Supreme Court

has long been concerned with the constitutional problems that arise where federal statutes "render [] 'traditionally local criminal conduct' . . . 'a matter for federal enforcement.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). Thus, "[u]nless the text requires us to do so, we should not construe [criminal statutes] as a plenary ban on fraud," because doing so would "'effect a significant change in the sensitive relation between federal and state criminal jurisdiction.'" *Loughrin v. United States*, 573 U.S. 351, 362 (2014) (quoting *Bond*, 572 U.S. at 858–59); *see also Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States."). Limitations on the fraud statutes therefore respect the distinct spheres of federal and state prosecutors.[4]

Third, meaningful bounds on theories of fraud liability are also essential to self-governance and a republican form of government: "[I]f failure to meet the aspirational standards of moral rectitude" articulated in cases like *Blachly* "were a crime, all but the most saintly would be wholly at the mercy of federal prosecutors[.]" Park, *supra*, at 195. Novel theories of liability like the right to control thus create "a new line of criminality" lacking "the imprimatur of democratic

[4] The canon of construction articulated in *Cleveland* is consistent with recent scholarship recounting the legislative history of the fraud statutes, which concludes that Congress "designed the [original mail fraud] statute primarily to protect against harms to a direct federal interest: the postal system and the post office establishment." Norman Abrams, *Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction*, 2021 Utah L. Rev. 1079, 1081.

consensus" and reflecting only what "prosecutors and judges . . . 'personally disapprove . . . for no better reason than that [they] disapprove it.'" *Id.* at 193 (quoting *Jordan v. De George*, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)). Cases like *Ciminelli* and *Skilling* thus also protect the constitutionality of the fraud statutes by ensuring that they cover only conduct proscribed by the people's representatives.

II. The Line Between Deceit and Criminal Fraud

To safeguard these principles, prosecutors must not cross, and we must police, the boundary that the Court has drawn around 18 U.S.C. § 1343: "the wire fraud statute reaches only *traditional property interests*." *Ciminelli*, 143 S. Ct. at 1128 (emphasis added); *see also Pasquantino v. United States*, 544 U.S. 349, 356 (2005) (limiting the fraud statutes' reach to what is "ordinarily" understood as property). Nothing more. So where is that line, and how can we be sure that Porat crossed it?

On the one hand, "even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims 'received exactly what they paid for.'" *United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016) (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)). In other words, while "schemes that depend for their completion on a misrepresentation of an essential element of the bargain" can be federal crimes, "schemes that do no more than cause their victims to enter into transactions they would otherwise avoid" are not. *Shellef*, 507 F.3d at 108; *see also United States v. Starr*, 816 F.2d 94, 100 (2d Cir. 1987). And this limitation makes good sense. After all, if a putative victim of wire fraud got exactly what he paid for, how exactly is he a victim at all? What property did he lose?

That was the Sixth Circuit's reasoning in overturning a wire fraud conviction against a defendant who had induced a drug distributor to sell controlled substances by misrepresenting the identity of her customers (in reality, addicts and doctors) but had paid in full:

> All that the evidence shows is that [the defendant] paid full price for all the drugs she purchased and did so on time. How, then, did [she] deprive the distributors of property? The government's opening bid offers this answer: [she] deprived the distributors of their pills. Well, yes, in one sense: The pills were gone after the transaction. But paying the going rate for a product does not square with the conventional understanding of "deprive."

Sadler, 750 F.3d at 590. Nor would the court uphold the defendant's conviction on the ground that her "lies convinced the distributors to sell controlled substances that they would not have sold had they known the truth." *Id.* Instead, presaging the Supreme Court's rejection of the right to control in *Ciminelli*, the Sixth Circuit held that the "ethereal right to accurate information" does not satisfy *McNally*. *Id.* at 591.

That was also the D.C. Circuit's reasoning upholding the dismissal of a wire fraud indictment against a foreign service officer who lied about his relationships and finances to maintain his Top Secret security clearance in *United States v. Guertin*, 67 F.4th 445 (D.C. Cir. 2023). Drawing on *Takhalov* and *Shellef*, the court held that "[i]f an employee's untruths do not deprive the employer of the benefit of its bargain, the employer is not meaningfully defrauded[.]" *Id.* at 451. Absent a "difference between the honest employee and dishonest employee in terms of performance or pay," lies to one's employer "merely deprive[] the employer of honesty as

such, which cannot serve as the predicate for a wire fraud conviction."[5] *Id.* (citing *United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021)). A contrary rule, the court noted, would jeopardize due process by "giv[ing] federal prosecutors carte blanche to set the standards of disclosure and honesty in employment." *Id.* at 452; *see also Ciminelli*, 143 S. Ct. at 1128; *United States v. Abdelaziz*, 68 F.4th 1, 38 (1st Cir. 2023) (rejecting the government's understanding of what constitutes "property" under *McNally* because it would "criminalize a wide swath of conduct" such as "embellishments in a kindergarten application").

On the other hand, we recently affirmed a wire fraud conviction in *United States v. Kousisis*, 66 F.4th 406 (3d Cir. 2023), over protests that the victims had not been deprived of any property and had received the full benefit of the bargain. There, the Pennsylvania Department of Transportation (PennDOT), was administering two construction projects that had "requirements" that a certain percentage of the contracts' value be assigned to "disadvantaged business enterprises" (DBEs). *Id.* at 411. The defendants told PennDOT that they were working with a DBE, but the DBE in fact performed no work and just collected a 2.25% fee for serving as a pass-through for the real, non-DBE subcontractor. *Id.*

---

[5] The D.C. Circuit thus appears to have cast doubt on another innovative interpretation of § 1343: the "salary maintenance" theory of liability. The court rejected "the Government's theory . . . that whenever an employee lies about a specific, concrete condition of employment . . . the employer is defrauded of 'money or property' by paying the employee's salary." *Guertin*, 67 F.4th at 451; *but see id.* at 453 (declining to adopt the Ninth Circuit's distinction between lies to obtain a new salary and lies to maintain an existing one to determine the propriety of fraud indictments).

We identified two harms from this misrepresentation that showed PennDOT did not get what it paid for and distinguished the traditional property right at issue here from a mere right to control the disposition of one's assets based on accurate information as in cases like *Ciminelli*. First, by lying about their DBE affiliation, the defendants had "schemed to have PennDOT pay them millions of dollars that they were clearly not entitled to." *Id.* at 418. Misrepresenting one's eligibility to obtain a contract is a longstanding form of property fraud, *see id.* at 418–19; *United States v. Ruzicka*, 988 F.3d 997, 1008–09 (8th Cir. 2021), so the defendants' scheme had deprived PennDOT of cognizable property. Second, PennDOT had "pa[id] a premium" for a specific service—DBE involvement—that the defendants did not actually deliver. *Id.* at 418. It was thus irrelevant that, as they had argued on appeal, "their 'offense conduct[] involve[d] high quality, timely and fully performed work.'" *Id.* at 413. Regardless of the work's quality, PennDOT had not received the benefit of the bargain.[6]

---

[6] We also observed in a footnote in *Kousisis* that, even if PennDOT had paid no such premium, the defendants' "primary fraudulent objective to obtain [its] funds" would have sufficed to sustain a wire fraud conviction. 66 F.4th at 418 n.69. I understand this to mean that the defendants committed wire fraud whether they actually caused PennDOT to pay the premium or merely intended that it would do so as part of the fraud scheme. Either way, misrepresenting DBE status to secure a contract for which the defendants were not eligible, and to commit PennDOT to paying a premium under that contract, violated § 1343. Obviously, if this footnote were read as saying that the defendants' wire fraud convictions could stand if all they deprived PennDOT of was the right to control how their funds were disbursed, *Ciminelli* would have abrogated that conclusion just weeks later. 143 S. Ct. at 1127–28.

A few overarching lessons emerge from these cases about when deceit rises to the level of fraud, each reinforcing our holding today. First, the defendant's misrepresentations must relate to the transaction that the government alleges was fraudulent, not some earlier transaction that "opened the door" for a later, legitimate exchange. *See* Park, *supra*, at 156. For example, in *United States v. Regent Office Supply Company*, the government prosecuted a stationery company whose salespeople lied and told their prospective customers, *inter alia*, that a mutual friend had referred them, or the stationery belonged to a deceased friend of the salesperson "and that the customer would help to relieve [a] difficult situation by purchasing it." 421 F.2d 1174, 1176 (2d Cir. 1970). But those lies served only "to 'get by' secretaries on the telephone and to get 'the purchasing agent to listen to [the salesperson],'" *id.* at 1177, so they did not affect whether the defendant's counterparty got the benefit of the bargain.

This was not mail fraud. *Id.* at 1179. The salespeople had lied only to get past the door so that they could make their pitch, but, once inside, their sales pitch did not misrepresent "the quality or effectiveness of the thing being sold, or . . . the advantages of the bargain which should accrue" if their customers actually paid for the product. *Id.* at 1180. Convicting a defendant for these lies would valorize a property interest even further removed from tangible "money or property" than the right to control theory that the Court rejected in *Ciminelli*. *See Sadler*, 750 F.3d at 590–91. In contrast, many prospective students who had been walking past Fox's proverbial door for years only decided to stop and pay the entry fee after Fox hung out dozens of new, flashy signs advertising its (false) rankings as a proxy for the quality of its programs. *Cf. Kousisis*, 66 F.4th at 417–18.

Second, as the majority eloquently puts it, the defendant's lies must be "the kind that could materially affect present and future value." Majority Op. at 16 n.6. Thus, in *Sadler*, the court concluded the defendant's lies did nothing to affect the value of the pills in the hands of the victim-distributors. 750 F.3d at 590. The distributors set a price, and she met it. On the other hand, when deciding whether to make "a costly, debt-inducing, once-in-a-lifetime 'purchase'" of a graduate business education, Majority Op. at 16 n.6, a reasonable applicant would consider how matriculating to a given school will affect his or her earnings potential. The evidence here showed that the school's rankings in U.S. News were an important factor in that analysis. *Accord Kousisis*, 66 F.4th at 418. In this way, focusing the analysis on how the misrepresentation in question affected the transaction's value prevents courts from turning the "ethereal right to accurate information" into property that § 1343 protects. *Sadler*, 750 F.3d at 591.

Finally, the defendant must intend some economic harm from the lies. Another Second Circuit opinion is instructive here. In *United States v. Starr*, the government charged the owners of a mail delivery company with fraud for bilking the Postal Service out of over $400,000 by commingling more expensive mail in piles of lower-rate mail and sending them out in a single shipment. 816 F.2d at 96. But this was not "a deceit on their customers," so the defendants' mail fraud convictions could not stand. *Id.* at 99. As the court explained, the defendants "in no way misrepresented to their customers the nature or quality of the service they were providing," so the fact that the defendants had "misappropriat[ed] funds paid to them to cover postage fees," *id.*, while deceitful, "ha[d] no relevance

to the object of the contract,"[7] so "any 'harm' intended by the [defendants] [wa]s, at most, metaphysical and certainly not . . . sufficient to infer fraudulent intent." *Id.* at 100. Intent to cause *economic* harm is the stuff wire fraud charges are made of. And that is where Porat's case differs from the *Starr* defendants. In contrast to fraudulent inducements that deprive the victim of information immaterial to the transaction—the purview of state tort laws, *see Ciminelli*, 143 S. Ct. at 1128—Porat's lies clearly were designed to—and did—convert members of the public into Fox applicants and, ultimately, Fox students, generating some $40 million in additional tuition fees for the school over the course of the conspiracy.

* * * * *

A rational jury could conclude on this record that Porat's lies did more than just "open the door" for a legitimate business transaction to take place; that they affected the students' understanding of the present and future value of their business degree; and that Porat intended to induce them to pay for something that was less valuable in the employment market than they were led to believe. But the Government did not prove, and we would not uphold, a wire fraud conviction predicated on lies immaterial to the ultimate matriculation decision. The line between tortious misrepresentations and federal criminal fraud thus remains bright, illuminated by the principles of notice, federalism, and self-governance. With these understandings in mind, I join the majority's opinion in full and concur in the Judgment.

---

[7] As in *Regent*, the Starrs' lies also merely "opened the door." The fraudulent transaction was between them and the Postal Service, not between them and their customers. *Cf. United States v. Fruchter*, 104 F. Supp. 2d 289, 302 (S.D.N.Y. 2000).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1560

UNITED STATES OF AMERICA

v.

MOSHE PORAT,

Appellant

(D.C. No. 2-21-cr-00170-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, *Circuit Judges*

The petition for rehearing filed by **Appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Cindy K. Chung*
Circuit Judge

Dated: October 3, 2023
Tmm/cc: All Counsel of Record

APPENDIX C

18 U.S.C. § 1343 provides:

Fraud by Wire, Radio, or Television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.