22-1560

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MOSHE PORAT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR DEFENDANT-APPELLANT
AND APPENDIX VOLUME I OF II
(Pages A-1 to A-77)

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INTRODUCTION

Imagine that an excellent but unheralded lawyer procures false nominations to be named a "Super Lawyer." A client hires the lawyer based on the honor, and the lawyer provides top-notch counsel. The lawyer's conduct is dishonest and morally questionable, but has the lawyer committed federal property fraud? The answer is plainly no—even if the client later learns the truth about the fake honor, and even if the client feels duped and would have hired a different lawyer had he known the truth. There is no federal property fraud because the client got the benefit of his bargain—he paid the lawyer money and got exactly what he paid for—excellent legal services.

The allegations in this case are materially indistinguishable. The question presented on appeal is whether submitting false information to a publisher of higher education rankings is a federal crime. Appellant Moshe Porat served as dean of the Fox School of Business at Temple University for over 20 years. At age 75, he was convicted of wire fraud and sentenced to 14 months in prison based on allegations that he directed a subordinate to give false answers to rankings surveys by U.S. News and World Report. The answers were on topics like how many Fox MBA students had taken the GMAT. These answers were irrelevant to the underlying quality of the education, but they affected the school's rankings in the magazine. The government contended that submitting the false answers

constituted fraud because they somehow deprived Fox students of money or property.

To call the U.S. News rankings suspect is a gross understatement. The rankings have been the subject of persistent criticism. They have been aptly characterized as a "farce," based on "faux-precise formulas" that are "riven with statistical misconceptions."[1] Indeed, the government's own witnesses at trial admitted the rankings are "stupid," "dishonest," "meaningless," and "pernicious." The rankings *are* pernicious, as they contribute to many of the worst aspects of higher education—credentialism, elitism, inequity. They cause schools to expend resources chasing rankings factors rather than improving the quality of education.

And yet the government contends that rankings its own witnesses conceded are stupid and meaningless are nonetheless so important they must be policed by the federal government and protected by the full force of federal criminal law. The government's position is akin to arguing that even though the emperor has no clothes, it is a crime to steal them.

This case exemplifies the tendency of federal prosecutors to stretch the fraud statutes far beyond the limits established by the Supreme Court. In the mid-20th

[1] Colin Diver, *The Rankings Farce*, Chronicle of Higher Education (April 15, 2022); *see* Alia Wong, *The Commodification of Higher Education*, The Atlantic (March 30, 2016); Malcolm Gladwell, *The Order of Things*, The New Yorker (Feb. 6, 2011).

century, lower courts commonly stated that the fraud statutes were designed to protect "moral uprightness" in society. Under that vague and virtually limitless conception, nearly any immoral or deceptive conduct could be prosecuted as fraud. But in a series of subsequent cases—from *McNally v. United States*, 483 U.S. 350 (1987) to *Kelly v. United States*, 140 S. Ct. 1565 (2020)—the Supreme Court has rejected that notion. It has held that the federal fraud statutes must be limited in scope to their common-law roots. The fraud statutes only cover schemes to "obtain[] money or property." 18 U.S.C. §1343. Thus, deception alone is insufficient—"the deceit must also have had the 'object' of obtaining the [victim's] money or property." *Kelly*, 140 S. Ct. at 1572.

Here, however, the Fox students who were the purported victims of the charged fraud did not lose money or property. They paid ordinary tuition, and they received exactly the high-quality education they were promised. Nor did Porat obtain (or try to obtain) any money or property from them. Indeed, it was undisputed at trial that the quality of Fox's educational program was excellent. Porat and students certainly cared about prestige and the reputational interest in the rankings. But that interest is not a property interest. As Justice Alito aptly put it, "the term 'property' plainly does not reach everything that a person may hold dear." *Sekhar v. United States*, 570 U.S. 729, 740 (2013) (Alito, J., concurring).

The U.S. News rankings are not students' property, and submitting false survey answers to U.S. News did not deprive anyone of property. Under the Supreme Court's property fraud decisions, the government's theory of this prosecution is fatally flawed, and Porat's convictions must be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on March 14, 2022. (A-69). Porat timely filed a notice of appeal on March 25, 2022. (A-76). This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether submitting false information to publishers of rankings such as U.S. News constitutes wire fraud under 18 U.S.C. §1343.

Porat raised and briefed this claim in his pre-trial motion to dismiss. (Dkt.24). Likewise, in his Rule 29 motion, he argued that the evidence was insufficient because the government had not proven a deprivation of money or property and that "even 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." (Dkt.139 at 29, 34). The district court denied both motions. (A-1-68).

2. Whether the wire fraud statute requires proof that the defendant sought to "obtain money or property" and whether (a) the government sufficiently pleaded and proved that element and (b) the jury instructions erroneously failed to require a proper finding on that element.

In his motion to dismiss, Porat argued that the indictment was deficient because it lacked "any allegation that Dr. Porat personally benefitted from the alleged scheme or had a financial interest in it." (Dkt.24 at 13). He reiterated this argument in his Rule 29 motion. (Dkt.139 at 29). The district court denied both motions. (A-1-68). Citing *Kelly*, Porat also requested jury instructions that would have required a finding that he engaged in a scheme to obtain money from the alleged victims in order to convict. (A-131). The district court refused this request and instead relied on Model Instructions inconsistent with *Kelly*. (A-309-312, A-323-29, A-335-37; *see also* A-332-33) (confirming that Porat's objection was preserved).

3. Whether the wire fraud statute requires convergence—meaning that the defendant's deceit is directed at the person whose money or property he seeks to obtain.

Porat raised this argument in his motion to dismiss and his Rule 29 motion. (Dkt.24 at 21-22; Dkt.139 at 33-34). The district court denied both motions. (A-1-68).

STATEMENT OF RELATED CASES

This case has not previously been before this Court and Appellant is not aware of any other case or proceeding that is related, completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

STATEMENT OF THE CASE

Porat was convicted of conspiracy and fraud based on allegations that he instructed a subordinate to submit false responses to surveys from rankings organizations such as U.S. News. Although at trial he vigorously disputed his knowledge of and involvement in these false submissions, that dispute is irrelevant to this appeal. Accordingly, in this brief we assume the truth of the government's allegations and proof and focus on whether Porat's conduct amounted to federal property fraud.

A. Indictment

Porat was indicted on April 15, 2021. The indictment alleged one count of wire fraud conspiracy (18 U.S.C. §371), and one count of wire fraud (18 U.S.C. §1343). The core charge was that Porat, along with Isaac Gottlieb and Marjorie O'Neill, 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 surveys" of top online and part-time business school programs. (A-98-99 ¶44).

The primary falsehood alleged in the indictment related to the percentage of students in Fox's online MBA program who had taken the GMAT. (A-100-01 ¶¶49-60). U.S. News rankings are based in part on standardized test scores, but U.S. News discounts scores if too few matriculating students take the test. The indictment alleged that O'Neill, taking direction from Porat, reported that all of Fox's entering students had taken the GMAT when in fact far fewer had. (A-99-101 ¶¶46-58).

Secondarily, the indictment alleged that the "conspirators" had provided false information about how Fox classified its programs. Fox had several different MBA programs, including a traditional program, an online program, a part-time program, and an executive program. Gottlieb, a professor with statistics expertise, determined that the part-time program would be ranked higher if Fox combined several of these programs in its survey response. The indictment alleged that O'Neill, at the direction of Gottlieb and Porat, gave false answers about the number of students in each program and their years of work experience. (A-105-09 ¶¶77-96).

Both of these alleged lies were described in the indictment as a "conspiracy to defraud U.S. News." (A-99, A-105). The indictment alleged that the conspiracy was a success, which caused Fox's rankings to rise and led to an increase in enrollment and tuition revenue. (A-109-110 ¶¶97-107).

B. Motion to Dismiss

Porat filed a pre-trial motion to dismiss the indictment for failure to state an offense. (Dkt.24). In his motion, Porat argued that "submitting inaccurate information to U.S. News...is [not] a federal crime under the wire fraud statute" because it does not implicate a property interest (*id*. at 1); that there is no property interest in reputational rankings (*id*. at 8-10); that the indictment failed to plead the "obtain property" element in part because it did not contain "any allegation that Dr. Porat personally benefitted from the alleged scheme or had a financial interest in it" (*id*. at 13); and that the indictment failed to plead convergence because the deceived party—U.S. News—was not deprived of any money or property. (*Id*. at 21-23).

The district court denied the motion. (A-1-5).

C. Trial

On November 10, 2021, trial commenced in the Eastern District of Pennsylvania before the Honorable Gerald J. Pappert and a jury.

1. The U.S. News Rankings

It was undisputed at trial that the U.S. News rankings are both highly influential and deeply flawed. The government's first witness was John Byrne, a journalist whom the government proffered as an expert on higher education

rankings. The first piece of evidence that the jury heard was Byrne's testimony that "Unfortunately, the rankings are very important." (A-150).

One of the most influential and prominent rankings comes from the U.S. News, which markets and sells annual rankings of undergraduate and graduate institutions. (A-147, A-156). The government presented some limited evidence regarding other rankings organizations, but trial centered almost exclusively on the U.S. News rankings. The U.S. News rankings are generally based on two primary components: peer assessment surveys and school data surveys. For the peer assessments, U.S. News sends a survey to deans and faculty and asks them to rank other schools. (A-151). There are hundreds of business schools, and most business school professors have no idea whether, for example, Emory's executive MBA program is better than Rice's executive MBA program. Consequently, as Byrne testified, those who fill out the peer survey largely rely on previous years' rankings, thus making the peer assessment a "self-fulfilling prophecy." (*Id.*).

The other component of the U.S. News rankings comes from schools' own self-reported data regarding admissions and career placement. (A-154). U.S. News sends schools surveys and asks them to report admissions statistics such as the average GMAT score for the entering class and placement statistics such as the percentage of its graduates who have jobs and what their starting salaries are. (A-155).

Byrne also testified to what everyone in higher education already knows: the U.S. News rankings are deeply flawed. According to Byrne, the rankings are "statistically meaningless," based on "arbitrary" decisions about how to weigh various factors; they are essentially click-bait created by the publication in order to sell advertisements and subscriptions. (A-160, A-165). Byrne testified that errors in the rankings often resulted in large unexplained swings and false results, in part because U.S. News does little to audit the data it receives. (A-166). In sum, Byrne agreed that the rankings "are dishonest, meaningless, stupid, and motivated by money and made by people that don't know anything about education." (A-164-65).

The jury heard similar testimony from other witnesses. Former Temple Provost Joanne Epps, who also testified for the government, agreed that it was "sadly" true that rankings had such undeserved influence in higher education. (A-229). She testified that the rankings served as an unfortunate "placeholder for quality" and a "bragging right." (*Id.*). She said that the rankings hurt schools like Temple, since rankings are largely a measure of institutional wealth: "schools that are highly ranked had more money than we did," and "we didn't have enough money to spend on all the things that U.S. News counts." (A-232). And she testified that rankings had a "pernicious" effect on higher education as schools chase rankings points rather than educational quality. (A-233).

But despite the flaws, it is also undeniable that the culture of American higher education is, as Byrne said, "obsessed" with rankings. (A-150).

2. False Submissions and Fox's Rise in the Rankings

Porat became dean of the Fox School of Business in 1996. Like everyone in higher education, Porat knew the importance of the rankings. Several Fox employees and administrators testified that from the time he became dean, Porat was "focused on the rankings," and that improving Fox's position in the rankings became a "major strategic objective of the school." (A-252). Porat knew that it "was important for the prestige of the school that we should have strong rankings and that it would improve the profile of the school." (*Id.*).

Fox initially had a "rankings committee" that studied the rankings and handled the school's responses to rankings surveys. Responding to the U.S. News survey was not always straightforward; some questions were ambiguous. Porat instructed the committee to answer such questions in whatever way would be most favorable to Fox's rankings, yet to "be consistent." (A-255-58; A-522). This approach at times caused internal conflict at Fox. In 2010, for example, Fox employee Christine Kiely complained to Porat and others that the school was being too aggressive in responding to some survey questions. (A-468).

The rankings committee's role was eventually taken over by Marjorie O'Neill, a financial analyst Fox hired in 2010. (A-262). She took primary

responsibility for collecting survey data and submitting Fox's responses to U.S. News and other rankings surveys. And Isaac Gottlieb, a Fox statistics professor, performed statistical analysis to help determine how Fox could improve its rankings.

As explained, the indictment alleged that O'Neill and Gottlieb were Porat's sole coconspirators. But while the government had a cooperation agreement with O'Neill and a plea agreement with Gottlieb, it did not call either of them as witnesses at trial. As a result, the government relied largely on documentary evidence, including hearsay statements by O'Neill and the testimony of other Fox employees who lacked direct knowledge.

The particular false statement at the core of the government's case at trial was Fox's claim to U.S. News that 100% of its students had taken the GMAT. In the summer of 2014, O'Neill was working to respond to the annual U.S. News survey. Only 8 of Fox's incoming online MBA students had taken the GMAT. (A-480). O'Neill filled out the survey indicating that 100% of its students had taken the GMAT. She wrote to Gottlieb in July 2014: "I changed our response to include 100% entrants providing GMAT and GPA so we receive 100% credit for our GMAT and GPA scores." (A-492). Gottlieb approved. (A-497).

Porat was not copied on those emails, but the government claimed that he knew about O'Neill's false submission. Since the government did not call her as a

witness, it relied on circumstantial evidence: emails where O'Neill said she had met with Porat prior to submitting the surveys. (A-494-96). But those contemporaneous emails merely indicated that O'Neill met with Porat to discuss survey responses—they did not reference false survey responses. The defense relied on competing documentary evidence, such as a 2015 email in which O'Neill assured Porat that she would "never" have sent any "unethical survey submissions" and had "backup for each metric submitted." (A-531).

When the U.S. News rankings were released several months later, Fox's online ranking rose substantially. Everyone at Fox, including O'Neill and Porat, celebrated the accomplishment. (A-499-501). In subsequent years, O'Neill continued to report that 100% of Fox students had taken the GMAT.

The government also argued that Fox submitted false answers regarding its part-time MBA program. In the summer of 2014, Gottlieb determined that Fox's part-time rankings were suffering due to the low reported work experience of its students. (A-509-513). He also concluded that if Fox were to combine its executive MBA students with the part-time MBA students for purposes of this calculation, it would obtain a higher ranking. He argued that such a response was accurate, since all students in the executive program MBA program were, in fact, part-time students. (A-514-15, A-521). After a long email discussion among

several Fox administrators, O'Neill combined the numbers, and as a result, Fox's part-time ranking rose.

In short, in part as a result of these survey responses, Fox's online MBA rankings rose substantially. Fox's online MBA program rose from #28 to #9 to #1 in the U.S. News rankings over the course of three years, and its part-time MBA program rose from the mid-40s to the top-10. (A-467). The false responses were not *solely* responsible for the rise—the government's evidence showed that, in 2018 for example, if Fox had accurately reported the percentage of students who had taken the GMAT, its ranking likely would have been around #6 rather than #1. Nonetheless, the false statements to U.S. News played a role. Porat, Fox, and Temple University aggressively marketed the school's strong rankings, and student enrollment rose. The government told the jury that it was a "wildly successful scheme." (A-406).

3. 2018 Exposure and Fallout

Fox's false submissions came to light in January 2018 when Byrne published an article questioning Fox's rankings. Byrne noted that Temple reported that 100% of its students had taken the GMAT, which was far higher than peer schools. (A-461-63). Byrne's article immediately caused a great deal of concern at Fox, as many employees knew it was not possible that 100% of Fox students had taken the GMAT. (A-195-97). Porat initially sought to downplay the error, stating

it might have been a simple data entry error or would not have significantly affected the school's ranking anyway. (A-203-07; A-236-37). He went ahead with a planned annual champagne toast with online MBA students celebrating the ranking. (A-205-07, A-210-11).

After a brief discussion, however, O'Neill and two other administrators called U.S. News—at Porat's direction—and reported that the 100% GMAT response was erroneous. (A-211-15). That eventually led to U.S. News removing Fox from its rankings. (A-527). Temple then decided to conduct a more extensive inquiry into how the error occurred and hired Jones Day to investigate. (A-238-39, A-243). In July 2018, Temple's president terminated Porat's employment as dean of Fox. (A-244-48). Porat subsequently filed a defamation lawsuit against Temple; the government admitted portions of his civil deposition from that lawsuit at the trial below. (*E.g.*, A-502-03).

4. Student Testimony

At trial the government presented evidence that students were the victims of the alleged fraud.[2] The government called two former Fox students as witnesses. Both testified that, while they were happy with the quality of the education they

[2] The indictment also suggested that Fox donors were victims. But the government called no donors at trial and introduced no evidence suggesting donors were influenced by the rankings. Indeed, the only donors who testified were defense witnesses who testified that their donations were not influenced by the rankings. (*E.g.*, A-286-87; A-302).

received, they were upset when the scandal about Fox's rankings came to light and the school's rankings fell. Both student-witnesses were plaintiffs in a class action lawsuit against Temple, and both testified that they were disappointed with the civil settlement they received. (A-192-93; A-280-81).

The government's first student-witness was Ibrahim Fetahi. He testified that when he was choosing among online MBA programs, he wanted a school with a good "brand" and "reputation," by which he meant a school with "a really good ranking." (A-169, A-171). He applied to Syracuse and Fox and considered Carnegie Mellon. Both Syracuse and Carnegie Mellon were significantly more expensive than Fox. (A-189). But he ultimately chose Fox based largely on the "prestige" he sought by attending the #1 ranked online MBA program. (A-174). When he learned of the rankings scandal, he was shocked, upset and disappointed. (A-180). He said that he did not receive "the prestige that was promised to me." (A-181). In a colorful metaphor that was repeated several times in the proceedings below, Fetahi testified: "I paid for fine dining and I got McDonald's." (*Id*).

But rankings prestige aside, Fetahi had no complaints about the quality of the educational program itself. He described an "intense" and comprehensive business training. (A-174, A-177). Among other things, his Fox program included foreign case studies in Israel, Stockholm, and Chile. (A-177). After he received his degree, he got a job at Facebook, and even after the rankings scandal, he still

advertised his Fox degree prominently on his LinkedIn page and his personal website. (A-187-88).[3]

The government's second student-witness was Ara Sardarbegiens. He testified that when he was considering online MBA programs, he considered both cost and reputation. (A-273-74). He applied to Maryland and Fox; Maryland was the more expensive of the two. (A-274). He ultimately chose Fox in large part due to its #1 ranking in U.S. News. (A-276). When Fox later dropped out of the rankings after the scandal, he was shocked and upset. (A-278-79). He testified that he felt cheated as a result: "I was kind of promised one thing and then delivered another in terms of going to the Number 1 online MBA accredited program." (A-279).

But like Fetahi, Sardarbegiens had no complaints about the quality of the education he received. To the contrary, he testified: "I still think the program was a great MBA program." (A-281). And after he got his Fox degree, he was promoted to a position as Manager of Capital Investments at the United States Postal Service. (A-282).

* * * *

[3] The government implied that Fetahi was saddled with student loans, but the evidence showed that he had a successful career and that his life was full of exotic international travel and trips to Burning Man. (A-191-92).

The defense also called witnesses who had attended Fox. They disagreed with the government's student-witnesses about the importance of the U.S. News rankings, but agreed that Fox had an excellent MBA program. Defense witness Alex Vaccaro, for example, is a spine surgeon and President of the Rothman Institute who received an online MBA from Fox. He testified that the program was rigorous and "extremely challenging," and that he received a "great" education at Fox that benefited his career. (A-293). He recommended Fox to others and said Fox's online program and ongoing involvement with business education was "fantastic." (A-295). Dr. Raza Bokhari received an executive MBA from Fox. He later taught there and donated a million dollars because he was "inspired by Dr. Porat and his vision and mission for the Fox School." (A-303).

The defense called others who taught at Fox. Michael Siegel, for example, was a successful businessman who began teaching at Fox after meeting Porat. He praised the educational program that Porat had created: It was a "topnotch education" and was geared toward aspiring businesspeople who "came from families that couldn't afford" more traditional programs. (A-290). Dr. Arvind Phatak, who taught at Fox for decades, testified that while prior deans had done little, Porat was a "forward thinker" who worked tirelessly to improve the school. (A-297-98).

In sum, there was no evidence at trial that the underlying quality of the educational program at Fox was anything less than excellent. The government's theory of the case was that the students were nonetheless defrauded because the rankings were inaccurate.

D. Verdict and Post-Trial Proceedings

The jury returned a guilty verdict on both counts on November 29, 2021. After trial, Porat renewed his Rule 29 motion for acquittal and moved in the alternative for a new trial under Rule 33. (Dkts.109, 139). The motion reiterated some of the arguments made in the motion to dismiss and also argued that because the government had not called O'Neill or Gottlieb as witnesses, it had not sufficiently proven Porat's involvement in the false submissions to U.S. News. The district court denied the motions. (A-68).

The government argued that Porat had caused students to lose millions of dollars and requested a sentence of approximately 10 years' imprisonment. (Dkt.155 at 19, 23). The district court rejected the government's proposed loss amount, because based on the trial record, 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. (A-576). It also held that Porat's salary as dean could not serve as an estimate of gain, because "students' tuition dollars went to Fox and

Temple, not Porat himself" and because his salary was "too attenuated from the fraud." (A-579).

Consequently, the district court found that no loss amount had been proven. The court also expressed incredulity that the government had sought such an extreme sentence for a 75-year-old non-violent first-time offender. The district judge said the prosecution's proposed sentence "signals to me a bit of a loss of perspective on the case by the Government." (A-557). He imposed a sentence of 14 months' incarceration, a $250,000 fine, and other conditions. (A-561).

Porat filed a notice of appeal and sought continued release pending appeal. (A-76; Dkt.170). The district court denied the motion. (Dkts.173, 174). Porat thus filed an emergency motion for bail with this Court. This Court granted his motion, finding that his appeal would present a "substantial question" that, if successful, would likely result in reversal of his conviction. (A-582).

SUMMARY OF ARGUMENT

The conduct charged and proven in this case does not constitute a federal offense. Submitting false information to a rankings organization such as U.S. News is not property fraud under the federal fraud statutes.

First, the fraud statutes only protect traditional forms of property, and there is no property interest in reputational rankings. 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. Moreover, the fact that students paid tuition money is insufficient to establish an offense, because the students received the essential benefit of the educational bargain.

Second, even if the students in some sense lost money or property, Porat did not obtain or seek to obtain their money or property. As the Supreme Court recently clarified in *Kelly*, fraud requires that defendants seek to *obtain* money or property from their victims. That must be the "object of the fraud," not merely "an incidental byproduct." 140 S. Ct. at 1573. Porat worked tirelessly to improve Fox, in part (but not solely) by improving its prestige through higher rankings. He did *not* obtain money from the supposed victims—Fox students; he only received a salary from his employer. As numerous courts have held, the mere desire to maintain a salary does not satisfy the *obtain property* element of mail or wire fraud. Yet the jury instructions erroneously failed to require a jury finding on this element.

Third, the convergence requirement of fraud was not satisfied. The alleged false statements in this case were made to U.S. News, but the government did not even attempt to prove that U.S. News suffered any loss.

For those three related reasons, the government's theory of criminality was fatally flawed. Even assuming the truth of all the allegations in the indictment, and even accepting as true all the government's evidence at trial, the conduct in this

case does not amount to a federal crime. It does not come within the ambit of the federal wire fraud statute, nor does it constitute conspiracy to commit wire fraud. The convictions must therefore be reversed.

STANDARD OF REVIEW

This Court exercises plenary review of questions of statutory interpretation, including the scope of federal criminal statutes, *United States v. Howerter*, 248 F.3d 198, 200 (3d Cir. 2001); sufficiency of the evidence, *United States v. Rowe*, 919 F.3d 752, 758 (3d Cir. 2019); and "whether a district court's instructions misstated the law," *United States v. Dobson*, 419 F.3d 231, 236 (3d Cir. 2005).

ARGUMENT

I. THE GOVERNMENT FAILED TO PLEAD OR PROVE THAT THE ALLEGED VICTIMS WERE DEPRIVED OF MONEY OR PROPERTY

Wire fraud requires more than simple deception—it requires a scheme to deprive another of money or property. Deceiving a rankings organization such as U.S. News does not constitute wire fraud, since the deceit does not deprive anyone of property. While students and administrators alike undoubtedly value the prestige and reputation associated with the U.S. News rankings, those feelings of prestige do not amount to a property interest. The government's fallback argument that the students were deprived of money since they paid tuition dollars also fails, because students received the full benefit of the bargain: a top-notch education. As

numerous courts have held, there is no fraud where the deceived "victim" receives the essential elements of the bargain, even where deception induced the transaction. The government's theory of the case, which underlay both its indictment and its proof at trial, is thus legally invalid.

A. The Fraud Statutes Only Protect Property Rights, And There Is No Property Right In Reputational Rankings

The federal mail and wire fraud statutes are "limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360. In common usage, "fraud" has a broader meaning, often referring more generally to dishonest behavior of all sorts. For a time in the middle of the twentieth century, lower courts occasionally interpreted the federal fraud statutes in accordance with that non-legal usage. They stated that the fraud statutes were broad enough to cover all conduct inconsistent with "moral uprightness" and "fundamental honesty" in business dealings and society. *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958); *see United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987). *But see Skilling v. United States*, 561 U.S. 358, 418 (2010) (Scalia, J., concurring in judgment) (criticizing the "grandiloquence" and "astoundingly broad language" of those older formulations).

The Supreme Court has held, however, that the *legal* meaning of fraud is not so broad. "[W]hen Congress enacted the wire fraud and bank fraud statutes, actionable 'fraud' had a well-settled meaning at common law." *Neder v. United*

States, 527 U.S. 1, 22 (1999). The Supreme Court has held that the federal mail and wire fraud statutes must be interpreted consistently with the common-law meaning—and limited accordingly.

Consequently, not all deception in business dealings constitutes fraud. The "[i]ntent to deceive and intent to defraud are not synonymous." *United States v. Yermian*, 468 U.S. 63, 73 n.12 (1984). The mail and wire fraud statutes require more: They require that the defendant sought to "obtain[] money or property" from the victim. 18 U.S.C. §1343. And "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'" *Kelly*, 140 S. Ct. at 1573. Thus, in *Kelly*, even though the defendants lied and their deceptive conduct caused harm to the victims, there was no fraud because the defendants did not seek to obtain money or property from the victims.

Likewise, what counts as "property" is limited by common-law principles. In *Cleveland v. United States*, the Supreme Court reiterated that the fraud statutes "protect[] property rights only," and it held that the mere fact that a defendant harms a victim's "economic stake" in some enterprise is insufficient for fraud. 531 U.S. 12, 19, 22 (2000). The offense of fraud "requires the object of the fraud to be 'property' in the victim's hands," and in that case, the state's regulatory interest—while admittedly valuable—was "not 'property.'" *Id*. at 26-27. Put simply, "the

term 'property' plainly does not reach everything that a person may hold dear." *Sekhar*, 570 U.S. at 740 (Alito, J., concurring).

Even before *Cleveland*, this Court recognized the same fundamental point in *United States v. Henry*, 29 F.3d 112 (3d Cir. 1994). Following *McNally*, it held that the fraud statutes cover "only proscribed schemes to defraud their victims of money or property." *Id*. at 113. And it held that "to determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right." *Id.* at 115; *accord United States v. Al Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004).

The U.S. News rankings are not property. The law has not traditionally recognized and enforced the interest in reputational rankings such as U.S News higher education rankings as a property right. While those rankings undeniably confer a sense of pride and prestige upon students, they are not "'property' in the victim's hands." *Cleveland*, 531 U.S. at 26. One of the government's student-witnesses testified that he felt cheated because he did not receive "the prestige that was promised to me." (A-181). While that sentiment is understandable, it does not prove a federal offense.

B. There Is No Property Fraud Where The Putative Victim Receives The Essential Benefit Of The Bargain

Indeed, the government has conceded that reputational interest in U.S. News rankings are not property. (3d Cir. Dkt.15 at 9). In defending its prosecution

theory, the government relied on a different argument: The students were deprived of *money* when they paid tuition. That argument is circular, and it ultimately collapses upon itself. As several other circuits have held, there is no fraud where the victim receives *the essential benefit of the bargain*—even if the victim was induced to enter into the transaction by deception, and even if the victim would not have entered into the transaction had he known the truth. The fickle and dubious U.S. News rankings are *not* part of the essential educational bargain between tuition-paying students and their schools.

1. Deception inducing a transaction is not itself sufficient for fraud, because there is no fraud where the alleged victims "received exactly what they paid for." *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). This principle is a critical limitation on the scope of the federal fraud statutes.

The Eleventh Circuit applied this limiting principle in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016). The supposed victims there paid money to the defendants' business because of the defendants' deception. The Eleventh Circuit nonetheless reversed the wire-fraud convictions. "[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); *see also United States v. Hu*, No. 3:20-cr-21, 2021 WL 4130515, at *14

(E.D. Tenn. Sept. 9, 2021) (following *Takhalov* and granting motion for acquittal because "the fact that a defendant merely induced a victim to enter into a transaction that he otherwise would have avoided is insufficient to establish the offense of wire fraud"). The government's theory in *Takhalov* was indistinguishable from its theory here.

The question is not simply whether deception caused a supposed victim to hand over money or property. Rather, the question is whether the supposed victims "received the full benefit of their bargain." *United States v. Binday*, 804 F.3d 558, 599 n.46 (2d Cir. 2015). On this basis, the Sixth Circuit reversed a fraud conviction in *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (Sutton, J.). There, the supposed victims gave property (pharmaceutical products) to the defendants in exchange for money because of the defendants' deception. It was undisputed that there was deception, and it was undisputed that money and property changed hands. But the Sixth Circuit held that there was no fraud because the defendants "paid full price" for the property. *Id*. at 590. The fraud statutes do not "stretch...to cover the right to accurate information before making an otherwise fair exchange." *Id.* at 591.

The Ninth Circuit recently applied the same principle in *United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021). There, the defendants lied to a bank, their employer, which caused the banks to distribute loan funds and pay salaries based

on the lies. *Id.* at 262-64. But, relying on *Sadler* and the Supreme Court's recent property fraud cases, the Ninth Circuit reversed the convictions. "Recognizing accurate information as property would transform all deception into fraud." *Id*. at 265; *see also United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) ("[A] defendant must intend to deceive *and* cheat").

All these holdings are based on the same fundamental principle—that merely inducing a financial exchange with deception is not sufficient for fraud. As this Court has held, fraud requires the "intent to harm" the victims, *Anderson v. Ayling*, 396 F.3d 265, 270 (3d Cir. 2005), and if the victims receive the benefit of the bargain, they are not harmed in their property rights.

2. The government nonetheless claims that the property element was satisfied here by the students' tuition dollars. Money is of course property, and the students paid tuition money, but the government's argument is flatly inconsistent with the cases discussed above. In all these cases—*Shellef*, *Takhalov*, *Hu*, *Sadler*, and *Yates*—the supposed victims handed over money or property to the defendants in an exchange. (The same was true in *Henry*, where this Court held it "irrelevant" that the defendants received "tangible benefits" including millions of dollars in bank deposits. 29 F.3d at 116.) And in all these cases, the supposed victims would not have entered into the exchange but for the defendants' deception. Yet each

time, the courts found the theory of fraud insufficient because the victim received the essential benefit of the bargain.

Thus, this case cannot be resolved merely by pointing to the fact that students paid tuition to Fox. The question is whether the students received what they paid for. It was undisputed at trial that the quality of the actual educational program was excellent and exactly as advertised. The only matter about which the students were deceived was the U.S. News rankings. Thus, the only way the conviction can be affirmed would be if this Court holds that the school's U.S News rankings were *an essential part of the bargain*. That is no different from holding that there is an independent property interest in the U.S. News rankings.

It is in that sense that the government's argument is some combination of contradictory and circular. While it denies arguing that the rankings are themselves property, the government nonetheless argues that the rankings are so important that they are an essential part of the educational bargain between a school and its students and thus protected by the property fraud statutes. That argument should be rejected.

C. The U.S. News Rankings Are Not An Essential Element Of The Transaction Between Schools And Students

No federal case has previously held that U.S. News rankings are an essential part of the educational bargain. More generally, no federal case has previously held that reputational rankings are an essential part of the bargain between

businesses and their customers. This Court should not be the first to do so. Rankings can be a useful tool, but they are not property, and they are not a core part of the bargain in any transaction. Deception to improve rankings is not a federal crime under the property fraud statutes.

One of the core analogies underlying this prosecution was the testimony of student-witness Fetahi: "I paid for fine dining and I got McDonald's." That analogy was repeated by the government in closing. (A-415-16). It was repeated again by the district court at the sentencing hearing. (A-550). Fetahi's analogy, however, while colorful, does not accurately reflect what happened in this case. In fact, unpacking the flawed analogy reveals exactly why the government's legal theory fails.

The primary difference between fine dining and McDonald's is the underlying quality of the food and dining experience. At a fine dining establishment, customers get high-quality ingredients carefully prepared by skilled and experienced cooks. At McDonald's by contrast, customers get low-quality, mass-produced fast food. At a fine dining establishment, customers are in a beautiful setting served by attentive waiters, whereas at McDonald's, customers order at a counter. And so on—it is not simply that the *reputation* is different, it is that the *quality of the product itself* is vastly different.

In this case, the government did not present any evidence that the Fox education was low quality—to the contrary, the government's own student-witnesses admitted that they were very pleased with the underlying quality of the education. In terms of the education itself, they *did* receive "fine dining"—but, as Fetahi put it, he did not receive the "prestige" that he felt he was "promised." Put differently, the students were upset that *others* might not *perceive* Fox as fine dining based on Fox's "true" place in the rankings.[4] Again, given the world's obsession with rankings and prestige, it is understandable that the students were upset, but that does not suffice to show property fraud.

An analogy more apt than Fetahi's would be this: Consider a restaurant owner who solicits her friends to post numerous rave reviews on Yelp, making false claims like "I ate the carbonara last night and it was the best I ever had, five

[4] In its opposition to bail, the government relied on a different analogy: A land seller who "falsely states an attribute of land that does not exist," by selling "swamp land at an inflated price by assuring that he has already received commitments from established developers to improve the land." (3d Cir. Dkt.15 at 11 n.3). That *would* be property fraud. On the other hand, if a seller falsely stated that a property was located in an all-white neighborhood to appeal to the buyer's preferences, that would not be property fraud. In both instances, a falsehood induces the buyer to enter a transaction he would have otherwise avoided. The difference is that in the former analogy, the deception goes to an essential element of the bargain, whereas in the latter, it does not. In the latter case, the buyer received exactly what he paid for, whereas in the former, he did not. This again demonstrates the point of *Takhalov*, *Yates*, and similar cases: The mere fact that money is exchanged does not prove a property fraud.

stars!" As a result of these fake reviews, the restaurant obtains a 4.7-star average rating, whereas without the fake reviews, the restaurant would only have a 4.1-star average rating. If other customers read the reviews and decide to eat at the restaurant, has the owner committed property fraud? The answer is no—even though the customers were deceived, even though they paid money to the restaurant. The reason is that the reviews are not "property" in the customers' hands, *Cleveland*, 531 U.S. at 26, and the customers "received exactly what they paid for," *Takhalov*, 827 F.3d at 1314.

Or, closer to home, consider the excellent but unheralded lawyer discussed in the Introduction who procured false nominations to be named as a "Super Lawyer." Clearly, that lawyer has not committed federal property fraud even if the client feels that he "paid for fine dining and got McDonald's." There is no fraud because there is no "discrepancy between benefits reasonably anticipated and actual benefits received" that went to an "essential element" of the bargain. *Shellef*, 507 F.3d at 108.

The same is true here. The educational program at the Fox School of Business was excellent, and students received exactly the training they were promised as well as prestigious post-graduation jobs. The U.S. News rankings may have affected their sense of pride and prestige in the brand associated with their degree, but it did not affect the underlying quality of the product.

That point is even more true considering the underlying falsehoods. The primary lie alleged by the government was that Fox misrepresented the percentage of students who had taken the GMAT. The second lie had to do with the way Fox combined its various non-standard MBA programs in responding to the U.S News surveys. Neither of these responses misled students about the underlying quality of the educational program. For example, for a student attending a Fox class in business accounting, whether other students took the GMAT does not affect the quality of the class. The significance of those metrics derives solely from the arbitrary weight they are given by U.S. News. The alleged harm here is about prestige for the sake of prestige, unmoored from anything to do with quality education.

D. Absent Further Direction From Congress, The Wire Fraud Statute Should Be Narrowly Construed To Avoid Criminalizing A Wide Variety Of Conduct

Congress *could* pass a law making it a crime to submit false information to reputational rankings organizations. But it has not yet done so, and there is no indication that Congress intended the mail and wire fraud statutes to cover such conduct. As with all criminal statutes, any doubt regarding their scope must be resolved in favor of lenity. Indeed, the Supreme Court has stated that it is "especially appropriate" to apply lenity to the fraud statutes given their potential breadth. *Cleveland*, 531 U.S. at 25. "In deciding what is 'property' under § 1341

[and § 1343], we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.*

Congress has not clearly and definitely stated that deceiving rankings organizations is a crime, and there are good reasons to believe it would not want to do so. For starters, it could lead to a large amount of both civil and criminal litigation in federal courts. It is not uncommon for schools to submit false information to U.S. News—just in the last several months, for example, several other schools have been accused of doing just that.[5] Outside the context of higher education, rankings, ratings, and reviews are ubiquitous, and efforts to influence them are common. Considering such rankings to be property, or an essential element of a transaction between buyer and seller, would dramatically expand the scope of the fraud statutes.

Nor would it necessarily make sense to have the federal government assume the role of policing the accuracy of reputational rankings. One of the ironies of

[5] *See* Anemona Hartocollis, *U.S. News Ranked Columbia No. 2, but a Math Professor Has His Doubts*, N.Y. Times (March 17, 2022); Susan Snyder & Craig R. McCoy, *Rutgers business school accused of rankings fraud, hiring own grads in temp jobs to boost its scores*, Philadelphia Inquirer (April 22, 2022); Scott Jaschik, *Blame the Deans: Law firm says former dean of education left out data that would bring down University of Southern California's score from 2013 to 2020, and the current dean did so in 2021, before coming clean to the provost*, Inside Higher Ed (May 2, 2022).

this case is that U.S. News itself does little to confirm the accuracy of the survey data it receives—presumably because it is either unable or unwilling to expend the resources necessary to do so. Yet if this conviction is affirmed, it will mean that *the federal government* has taken over the role of ensuring the accuracy and integrity of the (highly dubious) U.S. News rankings. Affirming this conviction will only serve to *increase* the importance of the U.S. News rankings by placing the imprimatur of the federal government behind them. A better message would be to state the truth: The rankings are deeply suspect, and prospective students should view them with caution. Regardless, moving to enforce the validity of the rankings through federal criminal prosecutions is not a step that should be taken lightly—and it is a step better left to Congress.

For the purposes of this appeal, however, it is enough to say that the wire fraud statute—as it is currently written and construed by federal courts—does not make it a federal offense to submit false information to U.S. News. Students do not have a property interest in the rankings, and the warm glow of prestige conferred by rankings is not an essential component of the bargain between a university and its students. Even assuming all the government's allegations and evidence are true, the government failed to plead and prove wire fraud or conspiracy to commit wire fraud. The convictions must therefore be reversed.

II. THE GOVERNMENT FAILED TO PLEAD OR PROVE THAT THE DEFENDANT "OBTAINED MONEY OR PROPERTY"

The government's legal theory is fatally flawed in a second respect: Even assuming the students suffered some loss of money or property, that does not end the matter. The wire fraud statute requires that the defendant engage in a scheme to *obtain* money or property. The phrase "obtain property" is a common-law term of art: It means the defendant must seek to acquire something that the victim gives up.

In this case, while the government *did* show that Porat cared a great deal about the prestige attached to the U.S. News rankings, it *did not* show that he sought to obtain any money or property from students. Students paid tuition to Temple University, not to Porat, who received only his salary as dean. As the district court recognized, the evidence showed that Porat's salary was highly "attenuated" from the alleged fraud. (A-579). Moreover, as several other circuits have held, the mere desire of an employee to maintain employment and a salary does not satisfy the "obtain property" element of the offense.

A. Obtaining Money Or Property Is A Necessary Element Of The Offense

The federal wire fraud statute prohibits schemes "for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. §1343. As the Supreme Court held in *Kelly*, defendants violate the federal fraud statute "only if

an object of their dishonesty was to obtain the [victim's] money or property." 140 S. Ct. at 1568; *see also id*. at 1572 (holding that deceit alone is insufficient—"the deceit must also have had the 'object' of obtaining the [victim's] money or property").

To *obtain money or property* means to acquire something that the victim gives up. As the Supreme Court has held when interpreting other federal statutes, the phrase "obtain property" is a common-law term of art. That common-law meaning of "[o]btaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar*, 570 U.S. at 734. And as the Supreme Court held interpreting the same phrase in the federal forfeiture statutes, the common-law meaning accords with the ordinary English meaning of the transitive verb "obtain." The verb means "to bring into one's own possession; to procure." *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017) (quoting *Black's Law Dictionary* 1247 (10th ed. 2014)).

Thus, as the Supreme Court put it in *Skilling*, with traditional property fraud (as opposed to 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. at 400. To be sure, a defendant need not succeed in obtaining money or property, because the fraud statute covers inchoate liability such as attempts. Nonetheless,

the object of the scheme—whether successful or unsuccessful—must be to obtain money or property.

The Supreme Court applied these principles in *Kelly*. It explained that although the victim was deprived of its employees' services because of the defendants' deception, that was insufficient for fraud because "[n]either defendant sought to obtain the services that the employees provided." 140 S. Ct. at 1574. Similarly, the defendants "did not hope to obtain the data that the traffic engineers spent their time collecting." *Id.*; *see also United States v. Walters*, 997 F.2d 1219, 1225 (7th Cir. 1993) (Easterbrook, J). (stating that even where the victim suffers loss, there is no crime if "the defendant neither obtained nor tried to obtain the victim's property") (cited by *Kelly*, 140 S. Ct. at 1573 n.2). Consequently, even though the victim may have lost money or property due to the defendants' lies, there was no property fraud, because the object of their scheme was not to obtain anything from the victims.

Applying those principles here, the government's allegations and proof were insufficient as a matter of law because Porat did not obtain or try to obtain money from the putative victims. Students paid tuition dollars to Temple University, not to Porat. Temple is a nonprofit institution, and Porat had no ownership stake in its tuition receipts. All he received was his salary, which was not tied to rankings or tuition receipts. (A-233-34). As the district court held in its sentencing order,

"students' tuition dollars went to Fox and Temple, not Porat himself," and the connection between the alleged fraud and Porat's salary was "attenuated" and "abstract." (A-579). Consequently, just as in *Kelly*, there was no fraud here, because even if the victims lost some money or property, Porat did not seek to obtain their money or property.

B. The Wire Fraud Statute Prohibits Only One Offense

The government did not offer any evidence that Porat sought to obtain money or property from students. In fact, the government did not even attempt such a showing—because according to the government, no such showing is required. According to the government, proof of a scheme to defraud does not require that the defendant even seek to *obtain anything*. The government's argument relies on the word "or" in the text of §1343.[6] "The word 'or' makes it clear that a person can be guilty of wire fraud if that person devises or intends to devise a scheme or artifice to defraud, even if the scheme or artifice is not one to personally obtain money or property." (3d Cir. Dkt.15 at 14). In so arguing, the government seeks to revive the discredited "two types" of fraud theory—i.e., that

[6] *See* 18 U.S.C. §1343 ("[w]hoever, 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 [interstate wires]" commits a felony) (emphasis added).

there are two separate offenses defined by the statute, one which requires obtaining property and one which does not.

That theory was widely accepted several decades ago. This Court, like most circuits, held at one point that "the 'scheme or artifice to defraud' clause is to be read independently of the 'obtaining money or property by...false...pretenses' clause." *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984). And it held that the former clause is "quite broad," covering a wide variety of misconduct. *Id*.

But in *McNally*, the Supreme Court squarely rejected that interpretation. It held that when Congress added the disjunctive language, it was merely clarifying the meaning of the first clause. 483 U.S. at 358-59. Justice Stevens in dissent argued that "one could violate the first clause by devising a scheme or artifice to defraud, even though one did not violate the second clause by seeking to obtain money or property from his victim through false pretenses." *Id*. at 365. But the majority rejected that interpretation and held that all versions of fraud require an intent to obtain money or property. Indeed, the *McNally* majority specifically cited and rejected this Court's holding in *Clapps*. 483 U.S. at 358. *Clapps*' holding that there are two types of fraud is no longer good law.

Notwithstanding *McNally*'s clear holding, federal prosecutors for some time continued to argue that there are two types of fraud. In *Cleveland*, the Supreme Court once again rejected the government's argument that "that the second phrase

of § 1341 defines a separate offense." 531 U.S. at 26 (citing *McNally*). Again in *Loughrin*, the Court reaffirmed that the mail and wire fraud statutes define "just one offense." *Loughrin v. United States*, 573 U.S. 351, 359 (2014). And yet again in *Kelly*, the Court reiterated that the statutes' two clauses comprise a "unitary whole." 140 S. Ct. at 1571. Accordingly, other circuits have now clearly recognized that the old "two types" of fraud theory is no longer tenable. *See United States v. Kalu*, 791 F.3d 1194, 1202-03 & n.11 (10th Cir. 2015) ("In light of *Cleveland* and *Loughrin*, our previous precedent indicating § 1341 contains two separate offenses appears untenable.").

This Court should rebuff the government's attempt to revive that discredited theory. Its prior holding in *Clapps* is no longer good law in light of *McNally*, *Cleveland*, and *Loughrin*. The wire fraud statute defines just one offense, and that offense requires that the defendant's scheme "had the 'object' of obtaining the [victim's] money or property." *Kelly*, 140 S. Ct. at 1572.

C. The Desire To Maintain A Salary Is Insufficient To Prove The "Obtain Money Or Property" Element Of Fraud

Perhaps because the government rested its hopes on the "two types" of fraud argument, it did not present evidence at trial to support a finding that Porat obtained anything from the alleged fraud. The government did present evidence that Porat cared a great deal about the rankings and perhaps gained a sense of reputational pride. But pride is not money or property. The only evidence of

money or property gain had to do with Porat's salary as dean of the business school. The government argued in closing that Porat "wanted to keep receiving his 600,000-dollar-a-year salary." (A-438). In its opposition to bail, the government similarly argued that Porat obtained money "by continuing to earn a $600,000 annual salary as Fox's dean." (3d Cir. Dkt.15 at 16).

That argument is both legally and factually flawed.

1. As a legal matter, an employee's desire to maintain a salary cannot satisfy the "obtaining money or property" element of the federal fraud statutes. As the Ninth Circuit held in *Yates*, a scheme whose object is merely to "continu[e] to draw an existing salary" or "avoid[] being fired" is not fraud. 16 F.4th at 266. Put differently, "a scheme to 'maintain' a pre-existing salary cannot support a wire-fraud conviction." *United States v. Guertin*, -- F. Supp. 3d --, 2022 WL 203467, at *2 (D.D.C. Jan. 24, 2022).

The reason for this is obvious: If maintaining employment and a salary satisfied the property element of the fraud statute, then nearly every instance of employee misconduct would be converted into a federal offense. "If an employee violates § 1343 any time he engages in a fraudulent scheme to keep his job, then *McNally*'s honest-services holding contains an exception so vast it swallows the rule." *Id*. at *6. Indeed, in *McNally* itself, the majority declined to adopt the dissent's position that a salary-maintenance theory satisfies the property element.

See United States v. Goodrich, 871 F.2d 1011, 1013-14 (11th Cir. 1989) ("[T]his [salary-maintenance] theory tends to find support in Justice Stevens' dissent in *McNally*, but is not endorsed by a majority of the Court."); *see also United States v. Turner*, 465 F.3d 667, 681 (6th Cir. 2006) ("[T]he salary theory does not fall within the scope of a scheme to obtain money or property."). And in *Skilling*, the Supreme Court rejected the government's theory that the defendants had committed fraud because they had benefited "through the receipt of salary and bonuses." 561 U.S. at 413.

Consequently, "the only circuit courts to address the issue have rebuffed the Government's salary-maintenance theory" of wire and mail fraud. *Guertin*, 2022 WL 203467, at *3. This Court should do the same. As a matter of law, even if Porat hoped to maintain his job and salary as dean, that would not satisfy the government's burden of proof on the obtain money or property element.

2. Moreover, as a factual matter, the government's proof was deficient. The government did not show that Porat's position or salary were tied to Fox's rankings. The government's own witness on this point—Provost JoAnne Epps—explicitly *disclaimed* that Porat's performance reviews were tied to the rankings. She testified that Porat had annual reviews, where his performance was reviewed based in part on a "general" sense of "how well the school is doing." (A-221-22). But she testified that those reviews were not directly tied to rankings. (A-233-34).

Her reason was straightforward: It would have been wrong to tie a dean's performance evaluation to such a "pernicious" benchmark. (A-233).

In sum, as the district court held in its post-trial sentencing ruling, "the Government fell short of showing his compensation would have been different had he not engaged in his crimes." (A-580). Consequently, even if deception to maintain a job or salary could constitute wire fraud as a matter of law, the government's own evidence showed that Porat's job and salary were *not* tied to the rankings. And as noted, the district court made a clear factual finding that the government never even proved by a preponderance, much less beyond a reasonable doubt, that Porat's salary would have been different but-for the inflated rankings.

Both the indictment and the conviction rested on an invalid theory of wire fraud. The government did not prove that Porat obtained or sought to obtain money or property as a result of the alleged scheme to inflate Fox's rankings. Therefore, the convictions must be reversed.

D. The Jury Instructions Erroneously Omitted The "Obtain Money Or Property Element" And Are Inconsistent With *Kelly*

The jury instructions were also deficient because they failed to require any finding that Porat obtained or sought to obtain money or property. Thus, even if the indictment sufficiently alleged and the government sufficiently proved the element, a new trial is required because the jury made no finding on that element.

1. The Fifth and Sixth Amendments require that the jury find each element of a criminal offense beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000). In order to fulfill those constitutional requirements, the jury must be clearly instructed on each element of the offense. *See United States v. Grier*, 475 F.3d 556, 561-62 (3d Cir. 2007). Indeed, "the omission of an essential element of an offense in a jury instruction ordinarily constitutes plain error." *United States v. Haywood*, 363 F.3d 200, 207 (3d Cir. 2004) (cleaned up); *see United States v. Brunson*, 416 Fed. App'x 212, 222 (3d Cir. 2011) ("[I]t is beyond dispute that the failure to instruct the jury on all elements of the charged offense is clear error.").

The instruction in this case did not require the jury to find that the defendant obtained money or property in order to find him guilty. If anything, the instructions stated or implied that no such finding was required. The instructions contained several misstatements of law, which collectively had the effect of removing the element from the jury's consideration.

First, the instructions twice used erroneous disjunctive language reflecting the "two types" of fraud doctrine, discussed *supra* in Point II.B. The header of the wire fraud instruction described the offense as a "Scheme to Defraud *or* to Obtain Money or Property." (A-381 (emphasis added)).[7] And the same language was

[7] The jury was given the written instructions. (A-452).

repeated in the district court's instruction defining the first element of the offense: "First: That Dr. Porat knowingly devised a scheme to defraud *or* to obtain money by materially false or fraudulent pretenses, representations, or promises." (A-380).

That disjunctive language wrongly suggests that a scheme to defraud is something *other than* a scheme to obtain money or property. It is a holdover from the *Clapps* doctrine that the "'scheme or artifice to defraud' clause is to be read independently of the 'obtaining money or property by...false...pretenses' clause." 732 F.2d at 1152. As discussed above, the Supreme Court has thoroughly and repeatedly rejected that doctrine. A scheme to defraud *is* a scheme to obtain money or property by deception. The instructions to the jury suggested the contrary. And it only got worse from there.

Second, in the more detailed description of the first element, the district court refused to include an "obtain money" requirement. The defense proposed instructing that the jury could only convict if it found that Porat engaged in a "scheme to defraud and to obtain money" from the alleged victims. (A-130). The government objected to using the word "obtain" anywhere in the instructions. It relied on the disjunctive word "or" in the statutory language, echoing the debunked "two types" of fraud theory discussed above. (A-335-36) Government counsel argued: "I certainly don't think we should add that the object of the scheme was to obtain money." (A-336).

And the district court agreed with the government. (A-336; A-341). It instructed the jury to find guilt simply if it found that Porat knowingly "engaged in a scheme to defraud." That language was watered down further because it was coupled with this overly broad description of fraud: "'Fraud" is a general term which embraces all the various means by which one person can gain an advantage over another by false representations, suppression of the truth, or deliberate disregard for the truth." (A-381).

Third and relatedly, to describe the goal of a scheme, the defense proposed an instruction including the "obtain money" requirement and other language drawn directly from *Kelly*:

> In order to establish a scheme to defraud, the government must also prove that the goal or object of the alleged scheme was to obtain money. In other words, the government must prove that Dr. Porat acted with the purpose of depriving applicants, students, and donors of money when engaging in the alleged scheme. It is not enough that the scheme may have had the incidental effect of depriving others of money, even if that effect was foreseeable; again, the *object* of the scheme must have been for Dr. Porat to deprive others of money.

(A-131). The government objected, arguing that the model instruction was sufficient because "*Kelly* didn't change the law." (A-311). The district court seemingly agreed, stating that it "didn't buy" that *Kelly* had any bearing on this case or justified altering the model. (A-326).

The defense noted the problem that, under the model instruction, the jury could find Porat guilty even if it found he was attempting to increase the school's prestige rather than to obtain money. (A-323-28). The district court responded: "It doesn't matter what the goal or object is." (A-329-30). Consequently, it declined the defense's proposed instruction. Instead, it merely instructed as follows: "In order to establish a scheme to defraud, the government must also prove that an aim of the alleged scheme was to deprive another of money." (A-382).

Nowhere did the court's instructions include the simple requirement that in order to find Porat guilty, the jury had to find that he sought to *obtain money or property* from the scheme. The defense proposed several different instructions including such a requirement, but the district court refused. The instructions it did give stated or implied that the jury could find guilt based on a more general finding of deception and "fraud" in its broader, common-sense usage.

2. The defense proposed instructions that were legally correct statements of the law. The district court refused those instructions. The district court repeatedly stated that it was rejecting the defense proposals because it was reluctant to depart from the Third Circuit Model Instructions. (A-313-14, A-329, A-336-37).

As this Court has warned, however, the Model Instructions are not gospel, and they are not law. The Model Instructions are prepared by a committee

composed primarily of district court judges. They are important and helpful, to be sure, but "a model jury instruction itself is neither law nor precedential." *Robinson v. First State Comm. Action Agency*, 920 F.3d 182, 190 (3d Cir. 2019). "Judges and parties are not free to incorporate incorrect legal principles simply because there is a similar error in these or any model jury instructions." *Id*.

That is particularly true where, as here, the model instructions have not been updated to reflect very recent Supreme Court case law. It is evident that some of the broad language from the instructions still relies on old case law, such as *Goldblatt* and *Clapps*, which are inconsistent with the Supreme Court's modern fraud jurisprudence. In fact, as the commentary to the fraud instructions itself recognizes, the holding in *Kelly* may well invalidate some of the pre-*McNally* case law on which the instructions were based. *See* Comments to Model Crim. Jury Instr. 3d Cir. 6.18.1341-1 (2021) ("It is not clear that this holding [*United States v. Hird*, 913 F.3d 332 (3d Cir. 2019)] is consistent with *Kelly*.").

In short, the question is not whether the district court's instructions were consistent with the model. The question is whether they were consistent with the statute itself and the Supreme Court's case law interpreting that statute. They were not, because they failed to require a finding that the defendant sought to obtain money or property.

3. The failure to instruct on the obtain property element deprived Porat of his constitutional right to a jury finding on each element. Because the error is constitutional in nature, it requires reversal unless this Court finds beyond a reasonable doubt that it was harmless. *Chapman v. California*, 386 U.S. 18 (1967). Indeed, as the Supreme Court held in *Neder*, the failure to instruct on an element can only be held harmless where evidence going to the omitted element is both "overwhelming" and "uncontroverted." 527 U.S. at 18.

The government cannot possibly meet that standard here. For the reasons described above, the government did not meaningfully attempt to prove that Porat obtained money as a result of the alleged fraud. Indeed, the district court held at sentencing "the Government fell short of showing his compensation would have been different had he not engaged in his crimes." (A-580). Obviously, therefore, the government cannot demonstrate beyond a reasonable doubt that the instructional error was harmless.

III. THE GOVERNMENT FAILED TO PLEAD OR PROVE CONVERGENCE

In addition to the other errors discussed above, the government also failed to plead and prove the wire fraud requirement of convergence. The false statements were made to U.S. News—indeed, the indictment described the fraud as a conspiracy "to defraud U.S. News." But it is undisputed that the object of the fraud was not to obtain money or property from U.S. News and that U.S. News lost

neither money or property. Even if someone lost money or property, the target of the deception did not, and therefore there was no wire fraud.

A. The Fraud Statutes Require Convergence

Under the convergence doctrine, there is no fraud when "the party to whom the fraudulent pretenses were made...was not the same as the party from whom money or property would have been taken." *United States v. Bryant*, 655 F.3d 232, 249 (3d Cir. 2011). In *Bryant*, this Court recognized the potential importance of convergence, but refused to decide whether it is required, because the doctrine was unnecessary to resolve the case. *See id.* at 249 ("We have yet to decide this issue in the context of mail fraud.").

Other circuits are divided. For instance, in *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989), the Ninth Circuit, relying on *McNally*, adopted the convergence doctrine and reversed the conviction because "the money was not received from the party deceived." *Id*. at 221. Several other circuits have since rejected the convergence doctrine. *See United States v. Greenberg*, 835 F.3d 295, 306-07 & n.16 (2d Cir. 2016); *United States v. Christopher*, 142 F.3d 46, 54 (1st Cir. 1998). Most of the cases rejecting the doctrine, however, were decided before the most recent Supreme Court cases limiting the scope of the federal fraud statutes.

In *Skilling*, the Supreme Court held that fraud ordinarily requires that "the victim's loss of money or property supplie[s] the defendant's gain." 561 U.S. at 400. The victim, of course, is the person who has been "wrong[ed]...in his property rights by dishonest methods or schemes." *McNally*, 483 U.S. at 358 (cleaned up). It does not make sense to speak of a "victim" as someone who is not deceived or who is not the target of deception.

The understanding of fraud as requiring this convergence is the only understanding that comports with the common-law meaning of the phrase "obtain property." As the Supreme Court has held, that phrase means the defendant must come into possession of something the victim gives up. *Sekhar*, 570 U.S. at 734. To be sure, as the Supreme Court has also recognized, property may transfer from victim to defendant through intermediaries. *See Honeycutt*, 137 S. Ct. at 1633. Nonetheless, recognizing that a defendant may obtain property indirectly from a victim only affects "how a defendant obtains the property; [it] do[es] not negate the requirement that he obtain it at all." *Id*.

Similar reasoning underlay the Court's rationale in *Kelly*. The government prosecuted the case on the theory that the defendants lied, the victim was deprived of money based on the lost hours of employment for engineers and toll collectors, and the defendants gained money in the form of their own salaries. *United States v. Baroni*, 909 F.3d 550, 561 (3d Cir. 2018). This Court affirmed the convictions

on that basis. *Id*. at 563-67. The Supreme Court disagreed. While it was undisputed that the defendants had deceived the Port Authority and that the defendants had gained *something*, they had not obtained money or property *from* the Port Authority. The government proved that the Port Authority was victimized by lies, but it did not prove that the deceit "had the 'object' of obtaining the Port Authority's money or property." *Kelly*, 140 S. Ct. at 1572.

Kelly thus rejected the government's creative arguments for expanding the fraud statutes to cover new and unusual situations. The common-sense and traditional requirement for fraud is both simpler and narrower: It requires that the defendant deceive the victim in order to obtain the victim's money or property. *Kelly* supports the convergence requirement.

B. There Was No Convergence Here

This is another case where the government is using creative arguments in an attempt to expand the fraud statutes to cover a new situation. And this is another case where the requirement of convergence is not satisfied.

The alleged false statements in this case were statements made to U.S. News. The government alleged two lies: first, that Fox lied about the percentage of its students who had taken the GMAT; and second, that Fox deceptively combined several of its programs to increase the size and average work experience of its part-time MBA program. Both of these false statements were made to U.S.

News in answers to its surveys. Indeed, in the indictment, the government specifically described these two alleged lies as a "conspiracy to defraud U.S. News." (A-99, A-105).

But there was no evidence whatsoever that Porat or Fox sought to obtain money or property from U.S. News. The government did not call any U.S. News employees as witnesses. Even if U.S. News was somehow damaged by Fox's false answers, through the loss of reputation or employee time, there was no sense in which Porat sought to "obtain" those from U.S. News. Indeed, that is precisely the theory rejected by the Supreme Court in *Kelly*. *See* 140 S. Ct. at 1574.

The only money that Porat obtained was the salary he received from Temple University. The alleged false statements were not made to Temple, and the government never alleged at trial that Temple was a victim. To the contrary, the government's own evidence showed that Temple benefited through the receipt of tuition dollars. Thus, even assuming that salary-maintenance can sometimes sustain a fraud conviction—which it cannot, for reasons described in Point II.C above—that theory cannot work in *this* case because here the employer was not a victim of the alleged fraud.

The lack of convergence shows just how far the government had to stretch the fraud statutes to try to prosecute Porat. The convergence doctrine flows naturally from the Supreme Court's decisions limiting the fraud statutes, and

provides an additional reason why the allegations and proof in this case were legally deficient. Even assuming the truth of the government's allegations and proof, the conduct in this case did not constitute wire fraud. The false statements were made to U.S. News, which gave up no money or property, and the only money Porat received was salary from Temple, which was not a victim. The lack of convergence requires reversal.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed with directions to enter a judgment of acquittal or, at a minimum, vacated and remanded for a new trial.

Dated: New York, New York
June 24, 2022

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CERTIFICATE OF BAR MEMBERSHIP

In compliance with Third Circuit LAR 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit. Appellant's counsel Theodore Sampsell-Jones and Avery D. Medjuck are also members of the bar of the United States Court of Appeals for the Third Circuit.

Dated: June 24, 2022

/s/ Alexandra A.E. Shapiro
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CERTIFICATE OF COMPLIANCE AND VIRUS SCAN

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Third Circuit LAR 31.1.(c), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Third Circuit LAR 32 because this brief contains 12,856 words as determined by the Microsoft Word for Mac version 16.62 word processing system used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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This brief complies with the electronic filing requirements of Third Circuit LAR Misc. 113 and Third Circuit LAR 31.1 because the text of the electronic brief is identical to the text of the paper copies. A virus scan was performed on the brief using the Symantec Endpoint Protection for Mac 14.2.0 program, and no viruses have been detected.

Dated: June 24, 2022

/s/ Alexandra A.E. Shapiro
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2022, I caused the foregoing brief to be filed in PDF text format with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the Court's CM/ECF system, which will send notice of such filing to registered ECF users.

Dated: June 24, 2022

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