WAS "VARSITY BLUES" ACTUALLY A CRIME? THE SUPREME COURT'S CRUSADE AGAINST THE FEDERAL MAIL AND WIRE FRAUD STATUTES

Abstract: On March 12, 2019, the U.S. Department of Justice (DOJ) shocked the nation when it unveiled an extensive college admissions scandal. Operation Varsity Blues, as the DOJ dubbed its investigation, resulted in fifty-seven people being charged with mail fraud, wire fraud, and variations thereof. Of those charged, fifty-one pleaded guilty and two were convicted by federal juries. Although these numbers suggest that Operation Varsity Blues has been a resounding success for federal prosecutors, many of those implicated are appealing their guilty pleas and convictions. Specifically, many argue that they never committed a crime at all because college entrance exam test scores and college admission are not "property" for the purposes of the federal mail and wire fraud statutes. Though the assertion that the college admissions scandal did not involve illegal conduct may be shocking given the American public's visceral reaction to it, many worry that the Varsity Blues defendants may indeed be right. After all, when given the opportunity, the U.S. Supreme Court often confines the scope of mail and wire fraud by narrowly construing the statutes' "money or property" element. In fact, in 2020, in *Kelly v. United States*, the Supreme Court did so yet again. This Note outlines the statutory and common law background of the mail and wire fraud statutes, specifically with respect to the "money or property" element. It then analyzes judicial interpretations of property under the mail and wire fraud statutes. Finally, this Note argues that the statutes and their interpretations should not doom the federal government's efforts to prosecute Varsity Blues defendants. This is so because under *Carpenter v. United States* and its progeny, college admission arguably constitutes an "intangible property right" that satisfies the "money or property" requirement in the federal mail and wire fraud statutes.

INTRODUCTION

In approximately 2011, William "Rick" Singer began using his companies, The Edge College & Career Network LLC and The Key Worldwide Foundation, to facilitate a fraudulent college admissions scheme involving numerous parents, sports coaches, and collegiate athletic personnel.[1] Singer's

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[1] Press Release, U.S. Att'y's Off., Dist. of Mass., *Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme*, DEP'T OF JUST. (Mar. 12, 2019), https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic [https://perma.cc/CC5F-NGUB] (indicating that Singer's college admissions scheme

scheme worked in two ways.[2] First, parents could pay Singer to increase their child's SAT or ACT test score.[3] As part of this service, Singer would arrange for a third party to either take a student's exam, provide a student with correct answers while they sat for the exam, or fix a student's answers on the backend.[4] Second, parents could pay Singer to bribe collegiate athletic coaches and administrators to falsely label their children as athletic recruits, thereby securing their admission.[5] Infamously, as part of this service, Singer would compile a fake athletic resumé to support the student's college application and designation as an athletic recruit.[6]

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lasted from around 2011 to 2019 and involved Singer's two companies, Edge College & Career Network LLC (The Key) and The Key Worldwide Foundation (KWF)).

[2] *See id.* (outlining Singer's SAT and ACT cheating scheme and athletic recruit college admissions scheme). In addition, Singer created a tax fraud scheme wherein parents misrepresented bribes as tax-deductible charitable donations. *Id.*

[3] *See id.* (describing the innerworkings of Singer's test score scheme and indicating that parents paid Singer anywhere from $15,000 to $75,000 for this service). Notably, many students whose parents paid Singer for this service were unaware that he manipulated their scores. *Id.*

[4] *See id.* (overviewing the three ways Singer helped parents inflate their children's SAT and ACT scores); *Here's How the F.B.I. Says Parents Cheated to Get Their Kids into Elite Colleges*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/us/admissions-scandal.html [https://perma.cc/U39P-FLUZ] (same). Singer accomplished this by having parents secure extra time for their children to sit for college entrance exams on account of learning disabilities and then by having parents schedule their children to take their college entrance exams at one of two testing sites. Press Release, U.S. Att'y's Off., *supra* note 1. Additionally, Singer bribed Igor Dvorskiy and Niki Williams, test administrators at these two sites, to permit a third party—frequently Mark Riddell—to cheat on the exams by taking them for students, giving students answers, or modifying student answers after the fact. *Id.* Singer paid Williams, Dvorskiy, and Riddell bribes of around $10,000 per test. *Id.*

[5] *See* Press Release, U.S. Att'y's Off., *supra* note 1 (describing the mechanics of Singer's college athlete admissions scheme). Singer characterized this service as the "side door" into college. *Id.* According to Singer, there were three "doors" through which a student could gain college admission: the "front door"—or through merit, the "back door"—or through donations, and the "side door." *Here's How the F.B.I. Says Parents Cheated to Get Their Kids into Elite Colleges*, *supra* note 4. To use this "side door," parents would donate money to KWF, which Singer would redirect to collegiate athletic programs. Press Release, U.S. Att'y's Off., *supra* note 1. Then, the coaches, many of whom also received personal bribes from Singer, would mark the students as "recruited athletes" notwithstanding their athletic skills or background. *Id.* In total, the U.S. Department of Justice (DOJ) found that parents paid Singer and, by extension, coaches and administrators, around $25 million in bribes to take advantage of this "side door." *Id.* As with the SAT and ACT scheme, some students fraudulently flagged as athletic recruits were unaware of their involvement. *See id.* (indicating that many students did not know their parents paid Singer to help them cheat on the ACT and SAT); *Here's How the F.B.I. Says Parents Cheated to Get Their Kids into Elite Colleges*, *supra* note 4 (describing one Varsity Blues student's surprise when someone asked him about being on the University of Southern California (USC) track and field team).

[6] *See* Press Release, U.S. Att'y's Off., *supra* note 1 (explaining how Singer, via his employees, fabricated athletic resumés featuring made-up honors, illustrious athletic credentials, and doctored photographs); *Here's How the F.B.I. Says Parents Cheated to Get Their Kids into Elite Colleges*, *supra* note 4 (stating that Singer portrayed one student as a water polo player by photoshopping a photograph and misrepresenting her as a varsity player and M.V.P. award-recipient, and secured another student admission as a soccer player despite that she did not play by billing her as an excellent player and a leader on an elite team). Parents would sometimes assist in the creation of these fake

For approximately eight years, Singer's scheme helped parents secure their children coveted spots at prestigious schools in exchange for greasing the pockets of test administrators, athletic coaches, and collegiate sports programs.[7] This all came crashing down on March 12, 2019, however, when the U.S. Department of Justice (DOJ) unveiled "Operation Varsity Blues" by arresting and charging numerous people across the country.[8] Specifically, the DOJ charged fifty-seven individuals, including Singer, coaches, and numerous parents for their participation in what has become known as the college admissions scandal or "Varsity Blues."[9] Notably, the scandal implicated a number of well-known parents, ranging from CEOs and famous actresses to high-powered attorneys and financiers.[10] For example, Lori Loughlin, a "Full House" actress, and her husband, Mossimo Giannulli, a designer, paid $500,000 in bribes to have their daughters designated as rowers and admitted to the University of Southern California.[11] Incredulously, neither of Loughlin's

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athletic resumés by providing Singer with "staged photos." Press Release, U.S. Att'y's Off., *supra* note 1.

[7] *See* Press Release, U.S. Att'y's Off., *supra* note 1 (describing the 2011 through 2019 timeline and scope of Singer's schemes). Singer facilitated fraudulent admission into colleges and universities such as Georgetown University, Stanford University, USC, Yale University, and Wake Forest University. *Id.*

[8] Anemona Hartocollis, *2 Parents Are Convicted in the Varsity Blues Admissions Trial*, N.Y. TIMES, https://www.nytimes.com/2021/10/08/us/varsity-blues-trial-wilson-abdelaziz.html [https://perma.cc/6GFW-37A7] (Oct. 9, 2021) (stating that federal prosecutors charged fifty-plus coaches, SAT and ACT proctors, and parents for their involvement in a college admissions scheme); Press Release, U.S. Att'y's Off., *supra* note 1 (announcing that prosecutors implicated and charged fifty people for their participation in national college admissions and college standardized test cheating schemes). Federal investigators first learned about the college admissions scheme from Morrie Tobin, who was investigated for securities fraud and disclosed a bribe he paid to a Yale women's soccer coach to secure his daughter's Yale admission. Mark Morales, *How Investigators Looking into a Separate Case Stumbled Across the Largest College Admission Scam Ever Prosecuted*, CNN, https://www.cnn.com/2019/03/14/us/college-cheating-scam-how-authorities-found-out/index.html [https://perma.cc/775Y-T7CW] (Mar. 20, 2019). Subsequently, Operation Varsity Blues investigators traced money transfers back to Singer, who, realizing the evidence against him and his precarious situation, began cooperating in the investigation. *Id.* As part of his cooperation with federal investigators, Singer kept working with parents and wore a wire. *Id.*

[9] *See* Sophia Kasakove, *The College Admissions Scandal: Where Some of the Defendants Are Now*, N.Y. TIMES (Oct. 9, 2021), https://www.nytimes.com/2021/10/09/us/varsity-blues-scandal-verdict.html [https://perma.cc/9DZU-QSYB] (specifying that fifty-seven individuals were charged as a result of Operation Varsity Blues); Press Release, U.S. Att'y's Off., *supra* note 1 (listing the names and backgrounds of fifty defendants implicated in Operation Varsity Blues).

[10] *See* Press Release, U.S. Att'y's Off., *supra* note 1 (detailing the illustrious backgrounds of many Varsity Blues defendants); *infra* notes 11–14 and accompanying text (detailing the allegations against Varsity Blues defendants Lori Loughlin and Felicity Huffman).

[11] Sopan Deb, *Felicity Huffman and Lori Loughlin: How College Admission Scandal Ensnared Stars*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/arts/huffman-loughlin-college-scandal.html [https://perma.cc/H27M-FJGU]; Kasakove, *supra* note 9. For each daughter, Loughlin and Giannulli paid a $50,000 bribe to a USC athletic director and a $200,000 bribe to KWF. Deb, *supra*. After initially pleading not guilty, on May 22, 2020, Loughlin pleaded guilty to conspiracy to commit mail fraud and wire fraud and Giannulli pleaded guilty to conspiracy to commit mail

daughters rowed.[12] The DOJ also prosecuted "Desperate Housewives" star Felicity Huffman.[13] Unlike Loughlin, though, Huffman paid $15,000 to Singer to have a third party correct her daughter's incorrect SAT answers.[14]

Given the flexibility and power of the mail and wire fraud statutes, federal prosecutors heavily relied on these statutes in prosecuting the Varsity Blues defendants.[15] Despite the breadth of mail and wire fraud and the fifty-one guilty

fraud, wire fraud, and honest services mail fraud and wire fraud. *See* Kate Taylor, *Photos Show Lori Loughlin's Daughters Posing as Rowers, Prosecutors Say*, N.Y. TIMES (May 22, 2022), https://www.nytimes.com/2020/04/10/us/lori-loughlin-rowing-photograph.html [https://perma.cc/XUQ2-EYXA] (indicating that Loughlin and Giannulli originally pleaded not guilty and attempted to characterize their Varsity Blues payments as legal, charitable donations that would simply provide their daughters with a strategic advantage in the admissions process); *Investigations of College Admissions and Testing Bribery Scheme*, DEP'T OF JUST., https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme [https://perma.cc/6URP-QEXQ] (Jan. 6, 2023) (detailing the status of Loughlin and Giannulli's Varsity Blues charges).

[12] *See* Gregory Korte, *The Rise of Rick Singer: How the Mastermind of College Admissions Scandal Built an Empire on Lies, Exploited a Broken System*, USA TODAY, https://www.usatoday.com/in-depth/news/nation/2019/06/19/college-admission-bribery-scandal-rick-singer-exploited-broken-system-loughlin-huffman/1133729001/ [https://perma.cc/Q7SL-WYB5] (Dec. 15, 2019) (noting that USC admitted Loughlin's daughters as rowers even though they had never been members of a crew team). Notably, Loughlin and Giannulli used staged photos of their daughters on rowing machines to support their designations as college-worthy athletes. Taylor, *supra* note 11.

[13] Kasakove, *supra* note 9 (noting that Huffman used Singer's services to increase her daughter's SAT score). Huffman successfully petitioned to get her daughter additional time on the SAT and arranged for her daughter to test under a proctor who would subsequently correct her test answers. Deb, *supra* note 11. On May 13, 2019, Huffman pleaded guilty to conspiracy to commit mail fraud and honest services mail fraud for her part in the college admissions scandal. *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11.

[14] *See* Deb, *supra* note 11 (detailing Loughlin's participation in Singer's athletic recruit scheme and Huffman's participation in Singer's ACT and SAT scheme). As a result of Huffman's efforts, her daughter scored a 1420 on her SAT, about 400 points higher than she independently scored on the PSAT the year before. *Id.*; *see also The PSAT 10*, COLLEGEBOARD, https://satsuite.collegeboard.org/psat-10 [https://perma.cc/QFY9-7NV2] (stating that the PSAT reflects SAT preparedness); *What Is a Good SAT Score?*, COLLEGEBOARD, https://satsuite.collegeboard.org/sat/scores/understanding-scores/what-is-a-good-score [https://perma.cc/WGN3-LPQ4] (identifying 1050 as 2019's average SAT score and 1350 as 2019's ninetieth percentile score, or the score at which an applicant would be increasingly well-positioned for admission into prestigious schools).

[15] *See* 18 U.S.C. § 1341 (making it a federal crime to use the mail in connection with "any scheme or artifice to defraud" for the purpose of "obtaining money or property" through "false or fraudulent" means); *id.* § 1343 (making it a federal crime to use "wire, radio or television communication in interstate or foreign commerce" in connection with "any scheme or artifice to defraud" for the purpose of "obtaining money or property" through "false or fraudulent" means); Emily Wood, *Mail and Wire Fraud*, 58 AM. CRIM. L. REV. 1201, 1201 (2021) (describing mail and wire fraud as "powerful tools" that prosecutors can invoke against "a wide range of conduct"); *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (indicating the charges levied against the Varsity Blues defendants). In addition to pure mail and wire fraud, Varsity Blues defendants were charged with honest services mail and wire fraud, racketeering conspiracy based on mail and wire fraud predicate acts, and conspiracy to commit mail and wire fraud and honest services mail and wire fraud. *See* Information at 17, United States v. Singer, No. 19-cr-10078 (D. Mass. Mar. 5, 2019), ECF No. 1 (detailing the predicate acts underlying Singer's racketeering conspiracy charge); *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (listing the various Varsity Blues charges

pleas and two convictions secured to date, the Varsity Blues legal battles are only just beginning.[16] In fact, one pivotal legal question repeatedly surfaces in Varsity Blues legal proceedings—whether college entrance exam test scores and college admission qualify as "property" under the mail and wire fraud statutes.[17]

As the Varsity Blues prosecutions began, three judges for the U.S. District Court for the District of Massachusetts in separate cases split on the college admission property question.[18] Additionally, four parents who pleaded guilty—William G. McGlashan, Amy Colburn, Gregory Colburn, and I-Hsin Chen—

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and pleas); *see also* Skilling v. United States, 561 U.S. 358, 407–09 (2010) (defining honest services fraud as a scheme in which a defendant dishonestly withholds his or her honest services from another by violating a fiduciary duty and accepting a kickback or bribe); *Conspiracy*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining conspiracy as a decision between multiple people to carry out a crime and noting that conspiracy qualifies as a distinct crime from the one that is planned); *Predicate Act*, BLACK'S LAW DICTIONARY, *supra* (defining predicate act as one of at least two interrelated racketeering activities required to form a pattern under the Racketeer Influenced and Corrupt Organization Act (RICO)); *Racketeering*, BLACK'S LAW DICTIONARY, *supra* (defining racketeering as the pattern of illegality chargeable under RICO); *infra* note 50 (providing additional information about RICO).

[16] *See* Wood, *supra* note 15, at 1201 (describing the broad scope of mail and wire fraud); Brian Dowling, *'Varsity Blues' Enters New Phase with High-Stakes Appeals*, LAW360 (Jan. 3, 2022), https://www-law360-com.eu1.proxy.openathens.net/articles/1451289/-varsity-blues-enters-new-phase-with-high-stakes-appeals [https://perma.cc/HL8P-GHQD] (stating that Varsity Blues litigation continues at the appellate level and may go all the way to the Supreme Court); *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (indicating that fifty-one Varsity Blues defendants have pleaded guilty, that Gamal Abdelaziz and John Wilson were convicted at trial, that one defendant received a deferred prosecution agreement, and that one defendant received a presidential pardon); *see also Deferred Prosecution*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining deferred prosecution as an arrangement where a defendant works with a prosecutor to postpone or altogether avoid prosecution). Notably, only one Varsity Blues defendant, Amin Khoury, received an acquittal at trial. Anemona Hartocollis, *A Businessman Is Acquitted in a Georgetown Admissions Trial*, N.Y. TIMES (June 16, 2022), https://www.nytimes.com/2022/06/16/us/georgetown-admissions-scandal-acquitted.html [https://perma.cc/8BPZ-G3NC]. Additionally, although a third Varsity Blues defendant, Jovan Vavic, was convicted, the judge overseeing his case later ordered a new trail. Nate Raymond, *Former USC Water Polo Coach Wins New U.S. College Admissions Scandal Trial*, REUTERS (Sept. 15, 2022), https://www.reuters.com/legal/former-usc-water-polo-coach-wins-new-trial-us-college-admissions-scandal-2022-09-15/ [https://perma.cc/K693-Z28D].

[17] *See* Dowling, *supra* note 16 (noting that federal judges in Boston disagreed over whether college admission and test scores constituted property at the trial stage and that numerous defendants challenged or planned to challenge prosecutors' property argument on appeal); *see also* 18 U.S.C. § 1341 (making mail fraud—use of the mail in connection with "any scheme or artifice to defraud" for the purpose of "obtaining money or *property*" through "false or fraudulent" means"—a federal crime (emphasis added)); *id.* § 1343 (making wire fraud—use of "wire, radio or television communication in interstate or foreign commerce" in connection with "any scheme or artifice to defraud" for the purpose of "obtaining money or *property*" through "false or fraudulent" means—a federal crime (emphasis added)).

[18] *See* Dowling, *supra* note 16 (describing how, unlike U.S. District Judge Talwani, U.S. District Judges Gorton and Casper found that college admission qualified as property under the federal mail and wire fraud states). The U.S. District Court for the District of Massachusetts is the jurisdiction for all Varsity Blues prosecutions. *See Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (indicating that Varsity Blues defendants have been charged in the U.S. District of Massachusetts).

did so while ensuring they would still be able to appeal whether prosecutors satisfied the mail and wire fraud "money or property" element.[19] Likewise, Gamal Abdelaziz and John Wilson, who were convicted by a federal jury on October 8, 2021 for their involvement in Singer's scheme, appealed their convictions on multiple grounds, including that college admission is not property within the meaning of the statutes.[20]

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[19] 18 U.S.C. §§ 1341, 1343; Dowling, *supra* note 16. *See generally* United States v. McGlashan, No. 21-01421 (1st Cir. argued Feb. 9, 2022) (BL). McGlashan, who has already appealed, pleaded guilty to wire fraud and honest services wire fraud on account of his compensating Singer $50,000 to have a proctor correct his son's incorrect ACT answers. *See* Dowling, *supra* note 16 (detailing McGlashan's pending appeal before the U.S. Court of Appeals for the First Circuit); Melissa Korn, *Former TPG Executive William McGlashan Jr. Sentenced to Three Months in College Admissions Case*, WALL ST. J. (May 12, 2021), https://www.wsj.com/articles/former-tpg-executive-william-mcglashan-jr-sentenced-to-three-months-in-college-admissions-case-11620839820 [https://perma.cc/75E5-GY7F] (detailing McGlashan's involvement in Singer's college entrance exam cheating scheme); *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (describing McGlashan's guilty plea). The Colburns, who pleaded guilty to conspiracy to commit mail fraud, wire fraud, and honest services mail fraud and wire fraud, paid Singer $25,000 to arrange for a third party to amend their son's SAT answers. Press Release, U.S. Att'y's Off., Dist. of Mass., *California Parents Plead Guilty in College Admissions Case*, DEP'T OF JUST. (Dec. 7, 2021), https://www.justice.gov/usao-ma/pr/california-parents-plead-guilty-college-admissions-case [https://perma.cc/7KYA-EZKV]. Chen, who paid Singer $75,000 to arrange for a third party to fix his son's ACT answers, pleaded guilty to wire fraud and honest services wire fraud. Press Release, U.S. Att'y's Off., Dist. of Mass., *California Parent Pleads Guilty in College Admissions Case*, DEP'T OF JUST. (Dec. 15, 2021), https://www.justice.gov/usao-ma/pr/california-parent-pleads-guilty-college-admissions-case-1 [https://perma.cc/E6QF-959H].

[20] Brief of Defendant-Appellant at 28, United States v. Abdelaziz, No. 22-1129 (1st Cir. Apr. 25, 2022); Brief of Defendant-Appellant at 33–43, United States v. Wilson, No. 22-1138 (1st Cir. Apr. 22, 2022); Chris Villani, *Flawed 'Varsity Blues' Theory Skewed Trial, 1st Circ. Told*, LAW360 (Apr. 25, 2022), https://www-law360-com.eu1.proxy.openathens.net/articles/1486872/flawed-varsity-blues-theory-skewed-trial-1st-circ-told [https://perma.cc/Z7HE-3PDK]; Dowling, *supra* note 16; Hartocollis, *supra* note 8; *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11. Abdelaziz and Wilson were the first individuals to face a jury for their involvement in Varsity Blues. Hartocollis, *supra* note 8. Abdelaziz, a casino businessman, paid $300,000 to gain his daughter admission at USC via its basketball team. *See* Tonya Alanez, *Former USC Coach Tells Jurors in Varsity Blues Trial That She Regularly Falsified Student Athletes' Credentials*, BOS. GLOBE, https://www.bostonglobe.com/2021/09/27/metro/former-usc-coach-tells-jurors-varsity-blues-trial-that-she-regularly-falsified-student-athletes-credentials/ [https://perma.cc/P33J-8GP3] (Sept. 27, 2021) (detailing how Abdelaziz's $300,000 payment secured his daughter admission into USC as a basketball recruit despite his daughter's inability to make the varsity basketball team in high school); Hartocollis, *supra* note 8 (same); Press Release, U.S. Att'y's Off., *supra* note 1 (indicating that Abdelaziz served as a senior executive for a Macau, China casino and resort company). A federal jury found Abdelaziz guilty of conspiracy to commit mail fraud, wire fraud, and honest services mail fraud and wire fraud as well as conspiracy to commit federal programs bribery. United States v. Abdelaziz, 578 F. Supp. 3d 110, 113 (D. Mass. 2021); Hartocollis, *supra* note 8; *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11. Wilson, a private equity CEO, paid $220,000 to designate his son as a water polo recruit at USC and arranged to expend $1.5 million to designate his daughters as athletes at Stanford and Harvard. *See* Hartocollis, *supra* note 8 (describing how Wilson paid $220,000 for his son to be admitted as a USC water polo player despite his non-collegiate-level skills and planned to spend $1.5 million for his twin daughters to be admitted as Stanford and Harvard athletes despite their good grades); Press Release, U.S. Att'y's Off., *supra* note 1 (identifying Wilson as a real estate and private

Although one could minimize the debate over whether test scores and college admission are property as isolated or just another attempt by the rich and famous to avoid accountability, the "money or property" element of mail and wire fraud has been a flashpoint between federal prosecutors and the U.S. Supreme Court for decades.[21] In fact, since 1987, when the Supreme Court decided the pivotal case *McNally v. United States*, the Supreme Court has limited the scope of the "money or property" element several times.[22] Critically, in *McNally*'s wake, prosecutors must demonstrate that a defendant's fraudulent scheme deprived another of money, tangible property, or an "intangible property right" rather than an "intangible right" in order to satisfy the element.[23] In 2020, in *Kelly v. United States*, the Supreme Court further restricted this element, leaving many wondering not only about the future of Operation Varsity Blues, but also about the future of mail and wire fraud more broadly.[24] After

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equity executive). Wilson was found guilty of conspiracy to commit mail fraud, wire fraud, and honest services mail fraud and wire fraud; conspiracy to commit federal programs bribery; federal programs bribery; and filing a fraudulent tax return. *Abdelaziz*, 578 F. Supp. 3d at 113; Hartocollis, *supra* note 8; *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11.

[21] *See, e.g.*, Sarah Lustbader, *Wealthy and Connected Defendants Like Roger Stone Get Off Easy All the Time*, WASH. POST (Feb. 14, 2020), https://www.washingtonpost.com/outlook/2020/02/14/wealthy-connected-defendants-like-roger-stone-get-off-easy-all-time/ [https://perma.cc/ZZ8D-6U6F] (describing the different treatment received by wealthy and non-wealthy defendants as they navigate the American criminal justice system); Kate Taylor, *Parents Paid to Open College Doors. Now They're Spending to Limit Prison Time.*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2019/10/03/us/college-admissions-scandal-consultants.html [https://perma.cc/2EQZ-M5EJ] (indicating that some Varsity Blues defendants used their wealth to hire specialists in hopes of reducing their punishments); *infra* notes 57–135 and accompanying text (discussing Supreme Court holdings regarding the "money or property" element of mail and wire fraud).

[22] *See* 483 U.S. 350, 360 (1987) (holding that intangible rights do not satisfy the "money or property" element of the mail fraud statute); *see also infra* notes 57–135 and accompanying text (analyzing Supreme Court decisions on the "money or property" element of mail and wire fraud).

[23] 18 U.S.C. §§ 1341, 1343; Carpenter v. United States, 484 U.S. 19, 25 (1987); *McNally*, 483 U.S. at 360. Although both intangible property rights and intangible rights concern non-physical possessions, intangible property rights differ from intangible rights in that they have historically been conceived of as property. *See infra* notes 66–80 and accompanying text (defining and distinguishing tangible property, intangible property rights, and intangible rights for the purposes of mail and wire fraud). Notably, after Congress's passage of 18 U.S.C. § 1346, prosecutors can also pursue individuals who defraud others of their "intangible right of honest services." *See* 18 U.S.C. § 1346 (defining "scheme or artifice to defraud" in the mail and wire fraud statutes so that it "includes a scheme or artifice to deprive another of the intangible right of honest services").

[24] *See* 140 S. Ct. 1565, 1572–74 (2020) (holding that changing a state regulatory decision does not qualify as a deprivation of money or property under the wire fraud statute and that fraudulently obtaining money or property must be the underlying goal of a defendant's scheme); David Brodsky, Rahul Mukhi, Matthew Solomon & Victoriya Levina, *Bridgegate Ruling Reins in Federal Prosecutorial Power*, LAW360 (May 12, 2020), https://www.law360.com/articles/1272544/bridgegate-ruling-reins-in-federal-prosecutorial-power [https://perma.cc/W28L-RRDR] (discussing how *Kelly v. United States* may undermine Varsity Blues prosecutors' assertion that college admission is property under the wire fraud statute); Dowling, *supra* note 16 (describing the Supreme Court's jurisprudence narrowing the "money or property" element and its possible impacts on Varsity Blues prosecutions and prosecutors' reliance on "the bread-and-butter fraud law"); Andrey Spektor, *Will Prosecutors Be Sing-*

all, constraints on mail and wire fraud are particularly consequential given federal prosecutors' reliance on these criminal statutes in going after wrongdoers.[25]

Part I of this Note provides an overview of the mail and wire fraud statutes and outlines the Supreme Court's jurisprudence regarding the "money or property" element.[26] Part II discusses which intangible property rights satisfy the element by looking at mail, wire, and related federal fraud cases where prosecutors have or have not carried their burden with respect to the requirement.[27] Finally, Part III argues that college admission, in fact, qualifies as an intangible property right under existing Supreme Court and U.S. Courts of Appeals jurisprudence.[28]

I. The Factual and Legal History of Mail and Wire Fraud

Among prosecutors' most prolific and frequently used criminal statutes are 18 U.S.C. § 1341, which criminalizes mail fraud, and 18 U.S.C. § 1343, which criminalizes wire fraud.[29] Indeed, the flexibility of both statutes empowers prosecutors to successfully charge fraudsters for undertaking countless types of schemes.[30] Mail and wire fraud are also prosecutors' go-to charges for

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ing the Varsity Blues?, BLOOMBERG L. (Nov. 8, 2021), https://news.bloomberglaw.com/e-discovery-and-legal-tech/will-prosecutors-be-singing-the-varsity-blues [https://perma.cc/M88Y-GEZM] (speculating that *Kelly* calls into question whether the college admission slots sought by Varsity Blues parents are property for the purposes of wire fraud).

[25] *See* Paul Mogin, *The Property-Rights Limitation in Mail and Wire Fraud Cases*, THE CHAMPION, Apr. 2008, at 24, 24 (noting that "[t]he uncertainty about what constitutes property for the purposes of the mail and wire fraud statutes is especially problematic because those statutes have long been favorites of prosecutors"); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771–72 (1980) (referring to mail fraud as prosecutors' "Stradivarius, . . . Colt 45, . . . Louisville Slugger, . . . Cuisinart[,] and . . . true love" and describing mail fraud and wire fraud as prosecutors' "first line of defense"); Wood, *supra* note 15, at 1201 (describing how prosecutors depend on mail and wire fraud to prosecute unique frauds until Congress can legislate against those frauds specifically).

[26] *See infra* notes 29–135 and accompanying text.

[27] *See infra* notes 136–187 and accompanying text.

[28] *See infra* notes 188–216 and accompanying text.

[29] *See* 18 U.S.C. § 1341 (making use of the mail to defraud another of his or her money or property a federal offense); *id.* § 1343 (making use of the wires to defraud another of his or her money or property a federal offense); Mogin, *supra* note 25, at 24 (stating that mail and wire fraud are "favorites of prosecutors" because they are widely chargeable, including in cases without a completed fraud and cases involving conduct that might otherwise not be illegal); Rakoff, *supra* note 25, at 771–72 (emphasizing prosecutors' affinity for mail fraud and, by extension, wire fraud and noting that prosecutors revert to mail fraud given its clarity and flexibility); Wood, *supra* note 15, at 1201 (introducing mail and wire fraud as potent statutes that prosecutors can utilize to pursue a variety of criminal activities).

[30] *See* J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 63–64 (Matthew Bender 3d ed. 2011) (highlighting mail and wire frauds' utility against varying conduct); Mogin, *supra* note 25, at 24 (identifying broad applicability as a key advantage of mail and wire fraud); Wood, *supra* note 15, at 1201 (emphasizing the various schemes that prosecutors can target via mail and wire fraud). *See generally* Andrew J. Fishman, Note, *Enforcement of Honest Services Post-*Kelly v. United States, 63 B.C. L. REV. 2349 (2022) (describing prosecutors' use of mail and wire fraud against acts of public corruption).

novel fraud schemes that Congress has yet to specifically outlaw.[31] Moreover, even when Congress legislates against new forms of fraud, it often relies on the structure and interpretation of mail fraud, which preceded—and inspired—wire fraud, to do so.[32]

Accordingly, the DOJ's use of mail and wire fraud to prosecute the Varsity Blues defendants was hardly a surprise.[33] As noted, however, the Varsity Blues guilty pleas and convictions may not be airtight.[34] This largely stems from the Supreme Court's increasingly narrow interpretation of mail and wire frauds' "money or property" element.[35] Because the Varsity Blues cases do not involve defrauding testing companies, colleges, or universities of money, this Note focuses on what qualifies as property—specifically, an intangible property right—for the purposes of mail and wire fraud.[36] Notably, defining property in this context eludes prosecutors, defense counsel, and courts alike because

[31] *See* United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting) (emphasizing that mail fraud provides "a first line of defense" against ever-evolving fraud); Mogin, *supra* note 25, at 24 (describing how the "adaptability" of the mail and wire fraud statutes "permit[s] their use against conduct that cannot be prosecuted under more specific statutes"); Wood, *supra* note 15, at 1201 (noting that mail and wire fraud frequently serve as a "stopgap" against unique frauds that are not otherwise criminalized by Congress).

[32] *See* STRADER, *supra* note 30, at 65 (stating that interpretations of the mail fraud and wire fraud statutes apply to one another); Ellen S. Podgor, *Rear View Mirror: Mail Fraud—Then and Now: Mail Fraud: Keep the Arguments Coming*, 32 THE CHAMPION, Apr. 2008, at 8, 8 (identifying the mail fraud statute as the origin of the wire fraud, bank fraud, and healthcare fraud statutes); *see also infra* notes 43–44 (providing additional information about the consistent interpretations of mail fraud, wire fraud, and other federal fraud statutes).

[33] *See Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (indicating the charges against the Varsity Blues defendants); *supra* notes 29–32 and accompanying text (detailing prosecutors' use of and reliance on mail and wire fraud).

[34] *See supra* notes 16–24 and accompanying text (describing the ongoing legal debate between Varsity Blues defendants and prosecutors over whether test scores and college admission qualify as property under the mail and wire fraud statutes).

[35] 18 U.S.C. §§ 1341, 1343; Brodsky et al., *supra* note 24 (discussing how *Kelly* may undermine Varsity Blues prosecutors' argument that college admission is property under the mail and wire fraud statutes); Spektor, *supra* note 24 (indicating that *Kelly* may complicate the Varsity Blues prosecutions); *see also* Kelly v. United States, 140 S. Ct. 1565, 1568–69, 1572–74 (2020) (holding that schemes that change a regulatory determination do not deprive the government of its money or property and that a deprivation of property must be more than ancillary to satisfy the mail and wire fraud statutes); Cleveland v. United States, 531 U.S. 12, 20 (2000) (holding that a government's interests in its unissued licenses do not qualify as money or property under the mail and wire fraud statutes); Carpenter v. United States, 484 U.S. 19, 25 (1987) (holding that mail and wire frauds' "money or property" element can be satisfied through fraudulent deprivations of another's intangible property rights); McNally v. United States, 483 U.S. 350, 360 (1987) (holding that the intangible right to honest services is not money or property under the mail fraud statute).

[36] *See* Dowling, *supra* note 16 (stating that Varsity Blues prosecutors' case theory is that defendants defrauded victims of college admission and test scores); Press Release, U.S. Att'y's Off., *supra* note 1 (alleging that Singer defrauded testing companies and schools of test scores and college admission).

the Supreme Court opted against providing a concrete standard.[37] To make matters more complicated, the Supreme Court has held that, unlike many other federal statutes, the mail and wire fraud statutes do not use a definition of property that relates back to a state law formulation.[38]

Section A of this Part provides an overview of the legal requirements and advantages of the mail and wire fraud statutes.[39] Section B then outlines the development of the "money or property" element as well as the Supreme Court's recent holdings confining it.[40]

A. An Overview of Mail and Wire Fraud

As currently enacted, the federal mail and wire fraud statutes feature almost identical statutory requirements.[41] To successfully convict a defendant of mail or wire fraud, the government must prove the following elements:

(1) the individual carried out a defrauding scheme;
(2) the individual's defrauding scheme involved a consequential deception;
(3) the individual carried out said defrauding scheme intending to defraud another;
(4) the individual utilized or caused to be utilized the mail system, a private interstate mail carrier, or international or interstate wires; and
(5) the individual's defrauding scheme did or would result in the acquisition of another's money or property.[42]

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[37] *See* Mogin, *supra* note 25, at 24 (noting that the Court limited the reach of mail and wire fraud with respect to property, but failed to supply a standard for property under these statutes).

[38] *See id.* (citing *Cleveland*, 531 U.S. at 25–26 n.4) (stating that the Supreme Court indicated that the mail and wire fraud property definition is distinct from any state property definition).

[39] *See infra* notes 41–56 and accompanying text.

[40] *See infra* notes 57–135 and accompanying text.

[41] *See* 18 U.S.C. § 1341 (criminalizing usage of the mail to defraud others of their property); *id.* § 1343 (criminalizing usage of the wires to defraud others of their property); *see also* Wood, *supra* note 15, at 1202–03 (comparing the largely overlapping elements of mail and wire fraud).

[42] 18 U.S.C. §§ 1341, 1343; STRADER, *supra* note 30, at 66 (delineating the various elements of mail and wire fraud); Wood, *supra* note 15, at 1202–03 (same). Although nearly identical, there is, of course, a noticeable difference between the jurisdictional elements—use of the mails versus use of the wires—of mail and wire fraud. *Compare* 18 U.S.C. § 1341 (implicating use of the postal service or an equivalent private sector enterprise, whether intra- or interstate), *with id.* § 1343 (implicating *interstate* or *international* use of the wires, radio, or television). Because the Constitution provides Congress with the authority "[t]o establish Post Offices and post Roads," a defendant's use of the mail need only be *intra*state to confer federal jurisdiction over a fraudulent scheme. U.S. CONST. art. I, § 8, cl. 7; *see* STRADER, *supra* note 30, at 66 (stating that both interstate and intrastate use of the mails satisfies the mail fraud statute given Congress's reliance on its postal authority); Wood, *supra* note 15, at 1203 (noting that mail fraud does not have an interstate requirement because Congress utilized its postal authority to enact the law rather than the Commerce Clause). In enacting wire fraud, however,

In addition, courts interpret the mail and wire fraud statutes "*in pari materia*."[43] Accordingly, interpretation of an element in mail fraud applies to the identical element in wire fraud, as well as in other descendant federal frauds, and vice versa.[44]

Numerous attributes of the mail and wire fraud statutes' text and interpretation contribute to their frequent and varying use by prosecutors.[45] First, the requirement that the defendant utilize or cause to be utilized the mails and wires became little more than jurisdictional over time.[46] In fact, today, almost

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Congress invoked the Commerce Clause, which, in turn, means that wire usage must be interstate or international to come under the statute. *See* U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); STRADER, *supra* note 30, at 67 (connecting the wire fraud statute's interstate and international wire use requirement to Congress's invocation of the Commerce Clause); Wood, *supra* note 15, at 1203 (stating that the wire fraud statute's interstate requirement stems from Congress's use of the Commerce Clause). Notably, although Congress similarly relied on the Commerce Clause to extend mail fraud to "private and commercial interstate carrier" uses, courts find this element satisfied regardless of whether the mailing in question travels interstate so long as the *carrier* in question operates interstate. 18 U.S.C. § 1341; STRADER, *supra* note 30, at 66 (indicating that specific private carrier usage does not have to be interstate if the carrier itself is interstate); Wood, *supra* note 15, at 1203 (noting that Congress's ability to "regulate facilities or instrumentalities of interstate commerce" means that a mailing sent via a private carrier does not have to travel interstate).

[43] *See* Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) (providing that corresponding language within §§ 1341 and 1343 are interpreted "*in pari materia*"); *In Pari Materia*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining *in pari materia* as a doctrine of statutory interpretation whereby statutes "may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject"); *see also infra* note 44 and accompanying text (providing further information about mail and wire fraud interpretations).

[44] *See* STRADER, *supra* note 30, at 65 (noting that cases interpreting the mail fraud statute apply to the wire fraud statute and vice versa); Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 702 (noting that courts jointly interpret mail and wire fraud); Podgor, *supra* note 32, at 8 (indicating that the wire fraud, bank fraud, and healthcare fraud statutes originate from the mail fraud statute); Rakoff, *supra* note 25, at 772 (referring to wire fraud as mail fraud's progeny).

[45] *See* STRADER, *supra* note 30, at 63–64, 66 (detailing a number of reasons for mail and wire frauds' "unique versatility and . . . popularity with prosecutors"); *see also infra* notes 46–50 and accompanying text (describing the advantages that prosecutors have under mail and wire fraud).

[46] *See* STRADER, *supra* note 30, at 66 (indicating that the mail and wire fraud statutes give prosecutors jurisdiction over conduct through wire and mail usage); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 458 (1995) (stating that the Supreme Court rendered the mail use requirement purely jurisdictional in *Schmuck v. United States*, 489 U.S. 705 (1989)); Wood, *supra* note 15, at 1201 n.5 (citing United States v. Sawyer, 85 F.3d 713, 723 n.5 (1st Cir. 1996)) (referencing the mail and wire use requirement as but a means of securing federal jurisdiction). Interestingly, mail and wire usage as a jurisdictional rubber stamp was not always the norm. *See* Rakoff, *supra* note 25, at 783–85 (stating that the mail fraud statute's language and interpretation when first enacted emphasized the mailing element). Indeed, when Congress first criminalized mail fraud in 1872, the statute required that an individual create a defrauding scheme, place a letter or package in the mail as part of that scheme, and intend to effectuate the defrauding scheme through use of the mail. *Id.* at 779, 783–84. As such, the mail fraud statute's original text seemingly focused on misuse of the postal service in pursuit of a "truly *mail*-fraud scheme." *Id.* at 784–85. Even so, there was staunch judicial debate among lower federal courts between so-called "strict constructionists," who viewed the statute as geared toward "mail-dependent

any use of the mails or wires—however limited or unintentional—in connection with a scheme to defraud will satisfy this element.[47] Second, attaching the offense to a use of the mails or wires means that *each* use qualifies as a separate violation, empowering prosecutors to charge defendants with many counts of mail and wire fraud.[48] Third, like conspiracy and attempt, mail and wire fraud are easier for prosecutors to charge because they are inchoate offenses, meaning that a defendant's fraudulent scheme can have failed entirely and still be a crime.[49] Fourth, and finally, prosecutors can charge defendants with more serious crimes, such as racketeering or money laundering, by establishing a foundation of mail and wire fraud violations.[50]

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fraud," and "broad constructionists," who saw the statute as a tool against "any misuse of the mails in furtherance of any kind of fraud." *Id.* at 789–90. Debate over the jurisdictional element's role continued beyond Congress's 1889 amendment—which specified the statute's application to various schemes—and the Supreme Court's critical 1896 interpretive holding until Congress's 1909 amendment to the statute. *Id.* at 809–12, 816; *see also* Durland v. United States, 161 U.S. 306, 313 (1896) (holding that the mail fraud statute "must be read . . . [so as to include] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future"). Among other things, the 1909 amendment removed the language emphasizing the use of the mail and, critically, the element requiring that the individual intend to carry out the defrauding scheme by using the mail system. Rakoff, *supra* note 25, at 816. Thus, after the 1909 amendment, the feasibility of arguments in support of the mail requirement's power diminished greatly. *Id.*

[47] *See* Rakoff, *supra* note 25, at 817 (emphasizing that limited mail usage—even ancillary or inadvertent usage—is enough to satisfy the mail and wire fraud statutes).

[48] *See* 18 U.S.C. § 1341 (requiring use of the mails in pursuit of a defrauding scheme in order to establish liability); *id.* § 1343 (making use of the wires in interstate commerce a prerequisite for liability); STRADER, *supra* note 30, at 64 (stating that because prosecutors can charge a defendant for every separate mail and wire usage, mail and wire fraud provide prosecutors with significant leeway to bring multiple counts); Wood, *supra* note 15, at 1201 n.5, 1203 (quoting *Sawyer*, 85 F.3d at 723 n.5) (noting that mail and wire use is but a "jurisdictional hook" and that each use qualifies as an individual offense).

[49] *See* STRADER, *supra* note 30, at 13, 66 (identifying conspiracy, attempt, and mail and wire fraud as inchoate offenses, and specifying that mail and wire fraud, as inchoate crimes, occur as soon as a defendant commits each element notwithstanding the fraud's ultimate success); Wood, *supra* note 15, at 1204 (noting that mail and wire fraud do not require prosecutors to demonstrate that the defendant prevailed in defrauding others); *see also Attempt*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining attempt as the criminal offense of working toward the commission of a crime); *Conspiracy*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining conspiracy as the criminal offense of multiple people agreeing and intending to commit a crime); *Offense*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining an inchoate offense as one where the defendant took a step toward committing a crime).

[50] *See* STRADER, *supra* note 30, at 63–64 (describing the mail and wire fraud statutes as advantageous for prosecutors because they empower prosecutors to build money laundering and RICO cases); Wood, *supra* note 15, at 1202 (detailing mail and wire frauds' roles in RICO and money laundering prosecutions); *see also* 18 U.S.C. § 1962 (making it an illegal RICO offense to conduct, invest in, or profit from a business through a "pattern of racketeering activity"); *supra* note 15 and accompanying text (defining "racketeering" and "predicate offense").

The Supreme Court, however, tends to see these attributes as vices rather than virtues.[51] For example, landmark mail and wire fraud cases often include warnings about the consequences of broadly construing the mail and wire fraud statutes, namely a significant increase in federal power.[52] Criminal law is traditionally a creature of state law and, according to the Supreme Court, inventive mail and wire fraud theories threaten federalism by encroaching on state criminal jurisdiction.[53] Additionally, what prosecutors laud as flexibility, the Supreme Court repeatedly dings as vagueness.[54] Indeed, the Supreme Court invokes the rule of lenity repeatedly in overturning mail and wire fraud convictions.[55] Furthermore, with respect to mail and wire frauds' statuses as predicate offenses for Racketeer Influenced and Corrupt Organization Act (RICO) and money laundering charges, the Supreme Court found cause for concern rather than a prosecutorial advantage, noting that this weighs in favor of more lenient statutory interpretations when doubts arise.[56]

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[51] *See* STRADER, *supra* note 30, at 64 (suggesting that mail and wire frauds' flexibility and extensive use by prosecutors led to the Supreme Court's efforts to contain the statutes' reaches); Dowling, *supra* note 16 (referencing the Supreme Court's determination to circumscribe mail and wire fraud).

[52] *See* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) (noting that allowing federal prosecutors to charge every lying state or local official with mail or wire fraud would vastly expand the federal government's criminal jurisdiction); Cleveland v. United States, 531 U.S. 12, 24 (2000) (providing that federal prosecutors' interpretation of the mail fraud statute would result in a wide-reaching and unauthorized extension of the federal government's criminal jurisdiction); McNally v. United States, 483 U.S. 350, 360 (1987) (noting that using mail fraud as prosecutors desired would require further congressional action).

[53] *See Cleveland*, 531 U.S. at 24–25 (noting that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities" and "significantly chang[e] the federal-state balance in the prosecution of crimes"); *McNally*, 483 U.S. at 360 (opting against "involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials"); STRADER, *supra* note 30, at 5, 7 (indicating that criminal prosecution predominantly occurs at the state level and that federal prosecutors use mail and wire fraud in instances where state prosecution would be more fitting); George D. Brown, *Defending Bridgegate*, 77 WASH. & LEE L. REV. ONLINE 141, 144, 149 (2020) (identifying federalism concerns as underlying the Supreme Court's holdings in *Kelly* and *McNally*); Mogin, *supra* note 25, at 27 (noting that the Supreme Court may overturn convictions based on unique property theories on account of federalism concerns).

[54] *See Cleveland*, 531 U.S. at 24–25 (noting "the absence of a clear statement by Congress" as well as Congress's failure to "conve[y] its purpose clearly"); *McNally*, 483 U.S. at 360 (stating that Congress must legislate with greater clarity if it seeks to have mail fraud criminalize additional conduct); STRADER, *supra* note 30, at 63–64 (highlighting mail and wire frauds' wide-ranging uses).

[55] *See Cleveland*, 531 U.S. at 25 (noting that the rule of lenity necessitates construing mail fraud's ambiguous "money or property" requirement in the defendant's favor, particularly because mail fraud serves as a money laundering and RICO predicate offense); *McNally*, 483 U.S. at 359–60 (holding that the statute's ambiguity means that it cannot be interpreted more harshly); *see also Rule of Lenity*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining the rule of lenity as a judicial doctrine requiring that courts interpret vague criminal laws in the defendant's favor and as providing for lesser punishment).

[56] *See Cleveland*, 531 U.S. at 25 (indicating that using the rule of lenity in interpreting mail fraud is particularly fitting given that it serves as both a money laundering and RICO predicate offense); STRADER, *supra* note 30, at 64 (attributing mail and wire frauds' frequent use by prosecutors to mail

B. The "Money or Property" Requirement in Mail and Wire Fraud

The "money or property" element first appeared in the mail fraud statute through a 1909 amendment and in the wire fraud statute through its 1952 enacting statute.[57] As with the original mail fraud statute—enacted in 1872—and an 1889 mail fraud amendment, however, Congress provided no legislative history for the 1909 mail fraud amendment that created the "money or property" element.[58] This, coupled with the statutes' textual construction, resulted in confusion about the "money or property" element's reach and, ultimately, in prosecutors applying the statutes in ways the Supreme Court would later deem improper.[59]

In 1987, in *McNally v. United States*, the Supreme Court sought to clarify this disconnect by eliminating the so-called "intangible rights doctrine," but conflict over the "money or property" element's scope continued.[60] Indeed, in the wake of *McNally*, prosecutors turned to innovative intangible property rights theories to carry mail and wire fraud convictions.[61] Predictably, repeated

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and wire fraud being RICO and money laundering predicate offenses); Wood, *supra* note 15, at 1202 (stating that prosecutors can build RICO and money laundering cases against defendants with mail and wire fraud charges); *supra* notes 15, 50 and accompanying text (providing additional context regarding RICO).

[57] *See* Moohr, supra note 44, at 702 (noting that Congress initially passed the wire fraud statute in 1952); Rakoff, *supra* note 25, at 772 n.6, 816 n.206 (indicating that the "money or property" element appeared in the mail fraud statute in 1909 and that Congress included similar language in the wire fraud statute during its 1952 enactment). *Compare* Rakoff, *supra* note 25, at 816 n.206 (providing that, as amended in 1909, the mail fraud statute included the language "or for obtaining money or property"), *with id.* at 809 (indicating the language Congress added to the mail fraud statute in an 1889 amendment did not contain a "money or property" element), *and id.* at 783 (specifying that the mail fraud statute did not contain a "money or property" element when first enacted in 1872).

[58] *See* Rakoff, *supra* note 25, at 779, 809, 816 n.205 (describing how the original mail fraud statute, the 1889 amendment, and 1909 amendment lacked legislative history). Interestingly, although the original mail fraud statute lacks significant legislative history, it allegedly materialized after the Civil War in response to a feeling that the federal government needed to address rampant fraud with its now greater national power. *Id.* at 779–80. The limited congressional history surrounding the 1889 amendment contributed to continued judicial debate over whether to construe the statute broadly or strictly. *Id.* at 809.

[59] *See infra* notes 81–93 and accompanying text (describing how § 1341's use of the disjunctive "or" to introduce the "money or property" element led to prosecutors interpreting said element to include intangible rights only for the Supreme Court to determine otherwise in *McNally v. United States*).

[60] *See McNally*, 483 U.S. at 360 (holding that mail fraud does not apply to intangible rights); *infra* notes 81–135 and accompanying text (detailing case law concerning the "money or property" element's interpretation); *see also* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 163 (1993) (stating that the intangible rights doctrine "defines 'a scheme to defraud' to include conduct that does not cause a victim to lose money or property"); *Intangible Rights Doctrine*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining the intangible rights doctrine as "[t]he rule that a person is entitled to receive honest services from those in the public sector or in the private sector who have fiduciary duties to the person").

[61] *See infra* notes 103–135 and accompanying text (describing prosecutors' attempts to use intangible property rights to secure mail and wire fraud convictions).

clashes ensued between prosecutors and the Supreme Court over the scope of what constitutes an intangible property right.[62]

Subsection 1 of this Section distinguishes between money and tangible property, intangible property rights, and intangible rights under the mail and wire fraud statutes.[63] Subsection 2 analyzes the Supreme Court's *McNally* holding, which eliminated intangible rights as a possible object of mail and wire fraud.[64] Finally, Subsection 3 discusses the Supreme Court's holdings permitting and, later, constraining federal prosecutors' ability to allege a deprivation of an intangible property right when charging mail or wire fraud.[65]

1. Surveying the Three Conceptions of "Property" Under the Mail and Wire Fraud Statutes

As noted, the mail and wire fraud statutes require acquisition of, or an intent to acquire, "money or property" through a defrauding scheme.[66] Although the Supreme Court has considered the scope of this element several times, it has yet to establish a test for what constitutes "property."[67] Even so, three general conceptions of property dominate mail and wire fraud case law: (1) money or tangible property; (2) intangible property rights; and (3) intangible rights.[68]

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[62] *See* Dowling, *supra* note 16 (characterizing the Supreme Court as working to confine prosecutors' use of mail and wire fraud by restricting the "money or property" element); Paul Monnin & Reagan Drake, *DOJ May Face Hurdles in Individual Wire Fraud Prosecutions*, LAW360 (Dec. 10, 2021), https://www.law360.com/articles/1447383/doj-may-face-hurdles-in-individual-wire-fraud-prosecutions [https://perma.cc/7XF3-RPNS] (stating that the Supreme Court's recent, narrow interpretations of mail and wire fraud indicate that federal prosecutors may face difficulties in continuing to rely on these statutes); Eddie Jauregui, Dan Small & Gary Klubok, *Bank Scheme Ruling Spotlights Clash Over Limits of Fraud*, LAW360 (Nov. 3, 2021), https://www.law360.com/articles/1436809/bank-scheme-ruling-spotlights-clash-over-limits-of-fraud [https://perma.cc/KFN8-YL7L] (discussing the Supreme Court's opposition to the DOJ's attempts to broaden federal fraud statutes' scopes); *infra* notes 103–135 and accompanying text (analyzing the Supreme Court's seminal cases concerning mail and wire fraud-related intangible property rights).

[63] *See infra* notes 66–80 and accompanying text.

[64] *See infra* notes 81–102 and accompanying text.

[65] *See infra* notes 103–135 and accompanying text.

[66] *See* 18 U.S.C. § 1341 (specifying that a mail fraud scheme must be directed toward acquiring money or property); *id.* § 1343 (providing that a wire fraud scheme must be geared toward acquiring money or property).

[67] Mogin, *supra* note 25, at 24 (indicating that the Supreme Court evaluated the reach of the "money or property" element on numerous occasions, but chose not to outline specific property requirements for these statutes).

[68] *See* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) (differentiating between tangible and intangible property rights and intangible rights for the purposes of wire fraud); Cleveland v. United States, 531 U.S. 12, 18–19 (2000) (differentiating tangible and intangible property rights from "'intangible rights' unrelated to money or property"); Carpenter v. United States, 484 U.S. 19, 25 (1987) (providing that mail fraud applies to deprivations of tangible and intangible property rights, but not intangible rights); McNally v. United States, 483 U.S. 350, 360 (1987) (confining mail fraud's application to deprivation of property rights as opposed to intangible rights); Wood, *supra* note 15, at 1212

The first conception—money or tangible property—stems from both statutory text and the common law formulation of fraud.[69] It empowers prosecutors to target traditional defrauding schemes where the victim is deprived of their money or *physical* property.[70]

The second conception—intangible property rights—is a Supreme Court creation.[71] As the phrase suggests, "intangible" property rights are *non-physical*.[72] Intangibility alone does not remove a deprivation from the scope of mail and wire fraud, *if* the intangible possession has historically been considered property.[73] Notable examples of intangible property rights include private business information and the right to control the use of property or money.[74]

Finally, the third conception—intangible rights—comes from the intangible rights doctrine created by the U.S. Court of Appeals for the Fifth Circuit.[75]

(discussing the use of mail and wire fraud against seizures of tangible money or property, intangible property rights, and the intangible right to honest services).

[69] *See* 18 U.S.C. § 1341 (prohibiting defrauding schemes geared toward acquiring another's money or property through use of the mails); *id.* § 1343 (criminalizing defrauding schemes geared toward acquiring another's money or property through use of the wires); *McNally*, 483 U.S. at 356 (noting that mail fraud undoubtedly protects property rights); Moohr, *supra* note 60, at 163 (associating the mail fraud statute's requirement for a deprivation of money or tangible property with common law fraud's requirement of "tangible loss").

[70] *See Carpenter*, 484 U.S. at 25 (indicating that mail and wire fraud protect tangible property); *McNally*, 483 U.S. at 358, 360 (noting that "'to defraud' commonly refer[s] 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signif[ies] the deprivation of something of value,'" and limiting § 1341's scope to protection of property rights rather than intangible rights (quoting Hammerschmidt v. United States 265 U.S. 182, 188 (1924))); Wood, *supra* note 15, at 1212–13 (stating that the mail and wire fraud statutes target "traditional frauds" that seek to defraud people of tangible property or money, and identifying "false insurance claims, fraudulent investment schemes, misrepresentations in the sale of used automobiles, [and] false application forms for loans," among other schemes, as "traditional fraudulent schemes"); *Property*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining tangible property as property featuring a "physical form and characteristics").

[71] *See Carpenter*, 484 U.S. at 25 (providing for the first time that the mail fraud statute covers tangible property *and* intangible property rights).

[72] *See id.* at 25 (differentiating between tangible and intangible property); *Property*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining intangible property as property without "a physical existence," such as goodwill or stock options).

[73] *See Carpenter*, 484 U.S. at 25–26 (holding that the "intangible nature [of the *Wall Street Journal*'s confidential business information] does not make it any less 'property' protected by the mail and wire fraud statutes[]" because "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights" and because "[c]onfidential information has long been recognized as property"); Wood, *supra* note 15, at 1213–14 (noting that the Supreme Court limited intangible property rights to those "that have 'long been recognized as property,'" which means that "not all interests that might qualify as 'intangible property' will receive the protection of the statutes").

[74] *See Carpenter*, 484 U.S. at 25–26 (holding that the *Wall Street Journal* possessed an intangible property right in its private business information and in such information's "exclusive use"); STRADER, *supra* note 30, at 81 (identifying a "victim's ability to control how the victim's money or property was used" as an intangible property right).

[75] *See* Skilling v. United States, 561 U.S. 358, 400 (2010) (stating that in 1941, in *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), the U.S. Court of Appeals for the Fifth Circuit created the intangible rights doctrine); Moohr, *supra* note 60, at 163 (providing that the intangible rights doctrine

Like intangible property rights, intangible rights are non-physical.[76] In contrast to intangible property rights, however, intangible rights lack a track record of being conceived of as property.[77] Crucially, intangible rights split into two categories: (1) the intangible right to honest services and (2) all other intangible rights, such as the right to a lawyer's loyalty and the right to integrous elections.[78] Although 18 U.S.C. § 1346 empowers prosecutors to use mail and wire fraud to prosecute individuals who defraud others of their intangible right to honest services, Supreme Court precedent precludes prosecutors from using § 1346 to safeguard other intangible rights.[79] Furthermore, the Supreme Court

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targets defrauding schemes that do not involve money or property losses); Wood, *supra* note 15, at 1214–15, 1215 n.103 (identifying the intangible rights doctrine as the "interpret[ation of] the mail and wire fraud statutes to include the intangible right to honest services"); John J. O'Connor, Note, McNally v. United States*: Intangible Rights Mail Fraud Declared a Dead Letter*, 37 CATH. U. L. REV. 851, 853 (1988) (first citing *Shushan*, 117 F.2d at 115; and then citing United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942)) (indicating that courts first articulated the intangible rights doctrine in dicta); *see also Dictum*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining dicta as "persuasive," but non-binding language in a judicial opinion). Although courts find interpreting honest services an "elusive task," the phrase comprises services performed by a public servant or employee in the public or employer's interest and without the interference of kickbacks and bribes. *See Skilling*, 561 U.S. at 407–09 (holding that individuals commit honest services fraud when they violate their fiduciary duties and receive kickbacks and bribes); STRADER, *supra* note 30, at 78 (highlighting the difficulties in construing honest services fraud); Wood, *supra* note 15, at 1215–16 (noting that a 18 U.S.C. § 1346 violation occurs when a person breaks a fiduciary duty and partakes in bribery or kickback schemes); *see also* 18 U.S.C. § 1346 (broadening mail and wire fraud to incorporate the intangible right to honest services); *Bribe*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining bribe as an improper inducement that compromises someone's decision-making or conduct); *Fiduciary*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining fiduciary as an individual with a duty to elevate another's interests when working on his or her behalf); *Kickback*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining kickback as illicit compensation to an authority figure in exchange for facilitating a business deal).

[76] *See Carpenter*, 484 U.S. at 25 (referring to the intangible right to honest services as "ethereal").

[77] *See id.* at 25–26 (differentiating intangible property rights from intangible rights on the basis that intangible property rights are those historically regarded as property).

[78] *See* Mogin, *supra* note 25, at 25 (identifying intangible rights recognized before, but not after, *McNally* and Congress's enactment of § 1346); *infra* note 79 and accompanying text (indicating how 18 U.S.C. § 1346 and subsequent Supreme Court cases divide intangible rights into two groups, one within the reach of mail and wire fraud and one without).

[79] *See* 18 U.S.C. § 1346 (expanding the meaning of "scheme or artifice to defraud" within the mail and wire fraud statutes to include schemes targeting another's intangible right to honest services); *see Skilling*, 561 U.S. at 407–09 (holding that § 1346 only permits prosecutors to charge mail or wire fraud when a defendant has deprived an individual of his or her intangible right to honest services by taking kickbacks and bribes in violation of a fiduciary duty); Cleveland v. United States, 531 U.S. 12, 19–20 (2000) (noting that, in enacting § 1346, Congress solely extended mail and wire fraud to include the intangible right to honest services, not other intangible rights); STRADER, *supra* note 30, at 79, 85 (stating that mail and wire fraud are only available to protect against deprivations of money, tangible and intangible property, and honest services). Enacted in 1988, the year after *McNally*, § 1346's text and legislative history suggests that Congress enacted it to overrule the Supreme Court's elimination of the intangible rights doctrine. 18 U.S.C. § 1346; *see* Mogin, *supra* note 25, at 25 (billing § 1346 as a congressional response to *McNally*, noting that the statute re-legitimized the intangible right to honest services, and stating that legislative history suggested that § 1346 "restore[d] the law to what it had

has strictly construed the intangible right to honest services, finding that it only encompasses schemes where a defendant violated a fiduciary duty and received a kickback or bribe.[80]

2. The Beginning, End, and (Limited) Rebirth of the Intangible Rights Doctrine

Sections 1341 and 1343 introduce the "money or property" element with the word "or."[81] As "or" is traditionally disjunctive, in the 1970s and 1980s, prosecutors used the mail fraud and wire fraud statutes not only to go after perpetrators of money or tangible property fraud, but also to prosecute those who used fraudulent means to deny someone of their intangible right to something.[82] Specifically, prosecutors employed the intangible rights doctrine to charge defendants with mail and wire fraud for defrauding someone of their intangible rights to honest government services, honest employee services, attorney loyalty, and fair elections.[83] In fact, at the time, U.S. Courts of Appeals exclusively held that the mail and wire fraud statutes reached fraudulent schemes targeting intangible rights.[84]

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been before *McNally*"). The Supreme Court addressed and limited the effect of § 1346 in two cases, though, leaving prosecutors with only the intangible right to honest services at their disposal. *See Skilling*, 561 U.S. at 407–09 (limiting application of the intangible right to honest services to instances where the defendant accepted bribes or kickbacks in violation of a fiduciary duty); *Cleveland*, 531 U.S. at 19–20 (limiting § 1346 to the intangible right to honest services).

[80] *See Skilling*, 561 U.S. at 407–09 (holding that honest services fraud only occurs if defendants breach fiduciary duties and accept kickbacks and bribes); Wood, *supra* note 15, at 1215–16 (stating that honest services fraud requires both fiduciary duty violations and bribe or kickback acceptances).

[81] *See* 18 U.S.C. § 1341 (reading "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, *or* for obtaining money or property . . . ." (emphasis added)); *id.* § 1343 (same).

[82] *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 427–28 (1998) (describing the intangible rights doctrine as developing rapidly between the 1970s and the 1980s); Mogin, *supra* note 25, at 25 (noting that courts permitted mail and wire fraud charges where schemes targeted intangible rights rather than property); O'Connor, *supra* note 75, at 852 ("[Because of the statute's use of 'or,'] the statute appeared to prohibit use of the mails in connection with two different activities: undefined schemes to defraud, or schemes to obtain money or property by fraud."); *Conjunctive/Disjunctive Canon*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining the conjunctive/disjunctive canon as providing that "in a legal instrument, *and* joins a conjunctive list to combine items, while *or* joins a disjunctive list to create alternatives").

[83] McNally v. United States, 483 U.S. 350, 355 (1987); Mogin, *supra* note 25, at 25 (noting that before *McNally* mail or wire fraud charges could rest on deprivations of intangible rights rather than property and providing examples of successful intangible rights theories); Wood, *supra* note 15, at 1214–15 (stating that prior to the 1988 enactment of 18 U.S.C. § 1346, courts held that mail and wire fraud extended to the intangible right to honest services).

[84] *See Skilling*, 561 U.S. at 400 ("Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights."); *McNally*, 483 U.S. at 358 (providing that all federal appellate courts to weigh in held in favor of the intangible rights doctrine); O'Connor, *supra* note 75, at 853 n.22 (noting that all U.S. Courts of Appeals agreed that mail and wire fraud extended to deprivations of intangible rights by 1987).

In 1987, in *McNally*, the Supreme Court put a stop to this interpretation, however, by holding that mail fraud did not apply when individuals were defrauded of intangible rights.[85] In *McNally*, the defendants were convicted of mail fraud for defrauding the Commonwealth of Kentucky of its intangible right to have its business carried out honestly through their involvement in an insurance commission scheme.[86] Notwithstanding the affirmance of similar convictions by other federal appeals courts at the time, the Supreme Court reversed these convictions because of their reliance on the intangible rights doctrine.[87]

Although the Supreme Court acknowledged that Congress's use of the disjunctive "or" could mean that the phrase "or for obtaining money or property" was independent from the phrase "any scheme or artifice to defraud," the Supreme Court found that the original mail fraud statute's purpose and the longstanding, property-centric interpretation of "to defraud" suggested otherwise.[88] Specifically, looking back to the original 1872 enactment, the Supreme Court ascertained that Congress's goal had always been to safeguard Americans from schemes wrongfully targeting their property or money.[89] Additionally, the Supreme Court explained that mail fraud's preexisting "to defraud" language had long been interpreted as securing money or property interests and that Congress's 1909 amendment did not appear to change that.[90] Furthermore,

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[85] *See McNally*, 483 U.S. at 356 (finding that § 1341 undoubtedly covers property rights, but not "the intangible right of the citizenry to good government"); O'Connor, *supra* note 75, at 854–55 (noting that the Supreme Court granted certiorari for *McNally* after years of debate over the legality of extending mail fraud to intangible rights and after years of denying certiorari on cases implicating this question). Recall that because courts interpret mail fraud and wire fraud elements consistently, holdings specifically concerning mail fraud, such as *McNally*, extend to wire fraud. *See* STRADER, *supra* note 30, at 65 (indicating that interpretations of mail fraud apply to wire fraud and vice versa).

[86] *McNally*, 483 U.S. at 352. At the time of the scheme, defendant Gray worked in Kentucky's government, serving first as Secretary of Public Protection and Regulation and then as Secretary of the Governor's Cabinet. *Id.* at 352–53. Defendant McNally, on the other hand, was a private citizen. *Id.* at 352. The scheme began in 1975 when Hunt, another implicated individual, brokered an agreement with Wombell Insurance Company of Lexington, Kentucky whereby Wombell would share commissions with insurance agencies that were flagged by Hunt. *Id.* at 352. These flagged insurance companies were controlled by Hunt, Gray, and McNally, and improperly received $851,000 in commissions from Wombell between 1975 and 1979. *Id.* at 353.

[87] *Id.* at 355, 356, 360.

[88] *Id.* at 356–59. In reaching this conclusion, the Supreme Court seemingly relies on the notion that mail fraud was intended and written to target property fraud schemes notwithstanding the absence of any explicit mention of property in the statute prior to 1909. *See id.* (characterizing legislative history and Supreme Court holdings from before and after the 1909 amendment as demonstrating that mail fraud has always been property focused).

[89] *Id.* at 356 (stating that the inaugural mail fraud statute's limited legislative history shows a focus on money and property protection).

[90] *Id.* at 358–59 (stating that the 1909 amendment failed to demonstrate a congressional deviation from the Supreme Court's traditional assessment of "to defraud" as a crime against an individual's property interests through deception); *see also* Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (providing that "to defraud" frequently means "deprivation of something of value by trick, deceit, chicane or overreaching" or "wronging one in his property rights by dishonest methods or

the Supreme Court invoked the rule of lenity, noting that it could only adopt a more punitive statutory interpretation when clearly authorized by Congress.[91] In totality, these factors led the Supreme Court to interpret the "money or property" language to be conjunctive—and modifying—rather than disjunctive.[92] Accordingly, the Supreme Court found the defendants' convictions, which did not involve property or money deprivations, beyond § 1341's scope.[93]

Congress immediately disagreed with the Supreme Court's *McNally* holding and, in 1988, acted against it by enacting 18 U.S.C. § 1346.[94] Section 1346 amended the mail and wire fraud statutes to incorporate the intangible right to honest services in the "money or property" requirement.[95] This amendment, however, proved confusing to both prosecutors and lower courts.[96] Although prosecutors in the pre-*McNally* era used the intangible rights doctrine to protect several intangible rights, § 1346 only referenced the intangible right to

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schemes"). Indeed, according to the Supreme Court, the 1909 amendment served a different purpose altogether—codifying the Court's previous extension of the mail fraud statute to promissory schemes. *See McNally*, 483 U.S. at 356–59 (characterizing the 1909 mail fraud amendment as codifying its holding in *Durland v. United States*, 161 U.S. 306 (1896), rather than adding a novel "money or property" requirement). In 1896, in *Durland*, the Supreme Court evaluated the scope of the phrase "any scheme or artifice to defraud." 161 U.S. at 313. The case involved a scheme wherein the defendant sold bonds, promised to secure a return for purchasers, and instead absconded with the money. *Id.* at 312. The defendant appealed his mail fraud charge, arguing that "a mere promise as to the future" does not qualify as "any scheme or artifice to defraud." *Id.* The Supreme Court, however, interpreted mail fraud more expansively and held that mail fraud "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.* at 313. Later, in *McNally*, the Supreme Court clarified that Congress's 1909 amendment codified *Durland*'s holding, albeit with different language. *See McNally*, 483 U.S. at 357–58 (stating that Congress codified *Durland* by inserting the phrase "[any scheme or artifice] for obtaining money or property" into the mail fraud statute rather than the phrase "everything designed to defraud" (alteration in original)). Notably, although *Durland* never explicitly mentioned property, *McNally* characterized *Durland* as providing for a broad interpretation of property, but not an interpretation of mail fraud that goes beyond property. *See id.* at 356 (considering *Durland*'s impact on the scope of mail fraud's property element and mail fraud generally); *Durland*, 161 U.S. at 313 (evaluating whether mail fraud applies to misrepresentations about the future rather than any property-related mail fraud requirements).

[91] *McNally*, 483 U.S. at 359–60 ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous . . . we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."); *see Rule of Lenity*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining the rule of lenity as a statutory canon of construction providing for the interpretation of unclear statutes in the defendant's favor).

[92] *See McNally*, 483 U.S. at 356–60 ("As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.").

[93] *Id.* at 360–61.

[94] *See* Mogin, *supra* note 25, at 25 (characterizing § 1346 as Congress reverting the "money or property" scope to where it was prior to *McNally*); Wood, *supra* note 15, at 1215 (stating that § 1346 superseded *McNally* with respect to the intangible right to honest services).

[95] 18 U.S.C. § 1346.

[96] *See* STRADER, *supra* note 30, at 85–86 (noting that § 1346 resulted in unclear and inconsistent case law because courts had difficulty determining its scope).

honest services.[97] Contrastingly, the limited legislative history regarding § 1346 suggested that Congress intended to turn back the clock on the intangible rights doctrine completely.[98]

Ultimately, in resolving this debate, the Supreme Court interpreted § 1346 conservatively.[99] First, in 2000, in *Cleveland v. United States*, the Supreme Court specified that § 1346 restored the mail and wire fraud statutes' application only to the intangible right to honest services.[100] Later, in 2010, in *Skilling v. United States*, the Supreme Court further restricted § 1346 by curtailing use of the intangible right to honest services to instances where the defendant violated a fiduciary duty by participating in a bribery or kickback scheme.[101] Thus, despite Congress's possibly broad intent for § 1346, *McNally*'s holding continues to meaningfully constrain prosecutors' ability to rely on intangible rights in mail and wire fraud cases.[102]

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[97] *See* 18 U.S.C. § 1346 (mentioning only the intangible right to honest services); Mogin, *supra* note 25, at 25 (stating that although numerous intangible rights were acknowledged prior to *McNally*, § 1346 only specifically incorporated the intangible right to honest services).

[98] *See* STRADER, *supra* note 30, at 85 n.104, 85–86 (quoting 134 CONG. REC. H11251 (daily ed. Oct. 21, 1988) (statement of Rep. John Conyers)) (noting the limitedness of legislative history for § 1346 and Representative Conyers' claim that § 1346 returns mail and wire fraud to its status before *McNally*); Mogin, *supra* note 25, at 25 (first citing 134 CONG. REC. H11251 (daily ed. Oct. 21, 1988) (statement of Rep. John Conyers); and then citing 134 CONG. REC. 32708 (Oct. 21, 1988) (statement of Sen. Joseph Biden)) (detailing congressional characterization of § 1346 as overturning *McNally* and describing how some courts used legislative history to interpret § 1346 instead of its language); Thomas J. Miles, *Dupes and Losers in Mail Fraud*, 77 U. CHI. L. REV. 1111, 1136 (2010) (citing 134 CONG. REC. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Joseph Biden)) (indicating that legislative history paints § 1346 as Congress overturning *McNally*); Michael J. Morgan, Note, *Bridging the Gap: Assessing the State of Federal Corruption Law After* Kelly v. United States, 89 FORDHAM L. REV. 2339, 2345 (2021) (first quoting 134 CONG. REC. 32639 (1988) (statement of Sen. Mitch McConnell); and then citing 134 CONG. REC. S17376 (daily ed. Nov. 10, 1988) (statement of Sen. Joseph Biden)) (describing § 1346's legislative history as lean, but supportive of pre-*McNally* use of the intangible rights doctrine).

[99] *See* Skilling v. United States, 561 U.S. 358, 407–11 (2010) (interpreting § 1346 as Congress overturning *McNally* "on its facts" and confining the intangible right to honest services to its "core pre-*McNally* applications" against kickback and bribery schemes that involve fiduciary violations); Cleveland v. United States, 531 U.S. 12, 19–20 (2000) (characterizing § 1346 as incorporating just one of the intangible rights—the intangible right to honest services—recognized by lower courts before *McNally*); Mogin, *supra* note 25, at 25 (noting that *Cleveland* indicated § 1346 applied to the intangible right to honest services alone); Wood, *supra* note 15, at 1215 (describing *Skilling* as limiting § 1346's breadth).

[100] *Cleveland*, 531 U.S. at 19–20; *see also infra* notes 117–123 and accompanying text (discussing the facts and principal holding of *Cleveland* in detail).

[101] *Skilling*, 561 U.S. at 407–11; *see also infra* note 185 (detailing the *Skilling* decision).

[102] *See* Mogin, *supra* note 25, at 25 (stating that *McNally*'s limitation of mail and wire fraud to property rights remains powerful because most mail and wire fraud cases are not honest services fraud cases); Wood, *supra* note 15, at 1218 (noting that post-*Skilling*, prosecutors have increasingly opted to charge mail and wire fraud offenses by alleging tangible or intangible property fraud rather than honest services fraud).

3. The Incorporation of Intangible Property Rights into Mail and Wire Fraud Prosecutions

Unable to rely on intangible rights theories after *McNally*, prosecutors innovated and started prosecuting offenders who defrauded others of their intangible *property* rights under §§ 1341 and 1343, the mail and wire fraud statutes.[103] Although the Supreme Court permitted prosecutors to stretch property's boundaries in this way, it also carefully defined—and often narrowed—the scope of intangible property rights and, by extension, mail and wire fraud.[104]

In 1987, in *Carpenter v. United States*, the Supreme Court first recognized that the "money or property" element encompassed intangible property rights.[105] *Carpenter* concerned a scheme undertaken by R. Foster Winans, a *Wall Street Journal* columnist.[106] Although the *Wall Street Journal*'s policies specified that article contents were its proprietary private information before publication, Winans pre-disclosed information from his stock-related articles in exchange for profits earned by his co-conspirators' stock trades based on this information.[107] Authorities ultimately uncovered the scheme, however, and a federal jury convicted the defendants of mail and wire fraud.[108]

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[103] *See* McNally v. United States, 483 U.S. 350, 360 (1987) (confining the reach of mail fraud's "money or property" element to property rights); STRADER, *supra* note 30, at 81 (describing prosecutors' efforts to bypass *McNally* by generously construing property); Wood, *supra* note 15, at 1218 (detailing prosecutors' reliance on "novel" property theories in mail and wire fraud cases after *McNally*).

[104] *See* Carpenter v. United States, 484 U.S. 19, 25 (1987) (holding that the mail and wire fraud statutes protect against schemes to defraud another of their intangible property rights); Ciara Torres-Spelliscy, *Elegy for Anti-corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars*, 69 AM. U. L. REV. 1689, 1694–95 (2020) (noting that the Roberts Court altered the scope of various white collar crimes through its holding in *Skilling* limiting honest services fraud to schemes involving kickbacks or bribes and its holding in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), limiting "quid pro quo exchange[s]" to those involving a public servant's "official act"); Wood, *supra* note 15, at 1213–14 (discussing the line of Supreme Court mail and wire fraud cases concerning intangible property rights); Monnin & Drake, *supra* note 62 (noting that the Supreme Court's narrow mail and wire fraud construction in recent cases could be problematic for federal prosecutors); Jauregui et al., *supra* note 62 (stating that the Supreme Court objects to prosecutors' efforts to broadly construe federal fraud statutes).

[105] *See* 484 U.S. at 25 (holding that although intangible rights are not within the mail and wire fraud statutes' scopes, intangible property rights are covered).

[106] *Id.* at 20, 22–23. Specifically, Winans wrote the *Wall Street Journal*'s daily "Heard on the Street" article. *Id.* at 22. "Heard on the Street" evaluated specific stocks' investment potential. *Id.* According to the Supreme Court, its recommendations were seen as reputable and, thus, could impact an evaluated stock's price. *Id.*

[107] *Id.* at 23. Winans provided information to Peter Brant and Kenneth Felis, who worked at brokerage Kidder Peabody. *Id.* at 20, 23. Together, David Clark—a Kidder Peabody client—Brant, and Felis would trade stock to take advantage of the "Heard on the Street" article's expected market effect. *Id.* at 23. In total, the scheme involved approximately twenty-seven "Heard on the Street" articles and netted $690,000 in profits. *Id.*

[108] *Id.* at 21, 23. The Securities and Exchange Commission (SEC) launched an investigation after Kidder Peabody identified consistencies between Felis and Clark's trades and the column. *Id.* at 23. Although everyone initially denied the existence of such a scheme, infighting among the conspirators

Although the defendants argued that they had not committed mail or wire fraud because they had not deprived the *Wall Street Journal* of its money or property, the Supreme Court affirmed their convictions.[109] The Supreme Court reiterated *McNally*'s holding that mail and wire fraud required wrongful appropriation of money or property, but distinguished *Carpenter* on the grounds that the defendants defrauded the *Wall Street Journal* of its private business information.[110] The Supreme Court found that private business information, although intangible, qualified as "property" for the purposes of mail and wire fraud because private business information was historically considered to be property.[111] It also held that the *Wall Street Journal* had an intangible property right in exclusively using its private business information, which entailed the right to determine its pre-publication use.[112] In reaching this conclusion, the Supreme Court reasoned that businesses could historically defend such information in a court of equity.[113] Additionally, it likened the *Wall Street Journal*'s private business information to a business commodity that it invests in, disseminates, and sells as part of its trade.[114] On this basis, the Supreme Court

began and Winans and his roommate, David Carpenter, ultimately confessed. *Id.* at 22, 23. In addition to mail and wire fraud, Winans and Felis were also convicted of insider trading and conspiracy. *Id.* at 20–21, 24. Carpenter was found guilty of aiding and abetting. *Id.* at 22.

[109] *Id.* at 25, 28. Notably, they based this argument on the Supreme Court's *McNally* decision that was decided in the immediately preceding Supreme Court term. *Id.* at 25.

[110] *Id.* at 25 ("The Journal, as Winans' employer, was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute . . . .").

[111] *Id.* at 25–26 ("Here, the object of the scheme was to take the Journal's confidential business information . . . and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes."). Notably, some characterize the Supreme Court's requirement that intangible property rights be historically considered property as consistent with its invocation of the rule of lenity within the mail and wire fraud context. *See* Mogin, *supra* note 25, at 25 (indicating a likely correlation between schemes targeting nontraditional property interests and the unclear applicability of mail and wire fraud).

[112] *Carpenter*, 484 U.S. at 26–27 (providing that the *Wall Street Journal* likewise possessed an intangible property right in "making exclusive use" of its private business information because "exclusivity is an important aspect of confidential business information and most private property"). The conspirators argued, among other things, that because they did not deny the *Wall Street Journal* initial use of the information, they did not prevent its exclusive use of its private business information. *Id.* at 26. The Supreme Court deemed this irrelevant given the significance of the "right to exclusive use" in the context of property, however. *Id.* at 26–27; *see also* Moohr, *supra* note 44, at 707 (characterizing *Carpenter* as thinking of property "as a bundle of rights against others" and framing the Supreme Court's rejection of defendants' above argument as asserting that the loss of one right in the bundle of rights is sufficient under mail and wire fraud); *Property*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining property as "rights in a valued resource," including an intangible resource, and describing the "bundle of rights"—"the right to possess and use, the right to exclude, and the right to transfer"—as a frequent way of characterizing property).

[113] *Carpenter*, 484 U.S. at 26 (describing how courts of equity protect private business information through injunctions among other things).

[114] *Id.* ("[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to

found that the mail and wire fraud statutes reached intangible property rights as well.[115]

The Supreme Court's conception of intangible property rights is not without limits, however.[116] In 2000, in *Cleveland v. United States*, the Supreme Court held that governments do not have intangible property rights in unissued permits and licenses under §§ 1341 and 1343.[117] Specifically, the Supreme Court determined that the defendant in *Cleveland* did not commit mail fraud by making misrepresentations when applying for a video poker operation license.[118] According to the Supreme Court, this was so because the State of Louisiana's interest in issuing licenses was regulatory rather than proprietary and stemmed from its police power.[119]

In reaching this conclusion, the Supreme Court rejected prosecutors' arguments that the State had an intangible property right in its unissued licenses vis-à-vis the revenue it received for them and its control over their issuance.[120] It found the revenue argument unpersuasive because the State did not receive revenue until after it issued the licenses and recognition of a property interest

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be distributed and sold to those who will pay money for it, as for any other merchandise." (alteration in original) (quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918))); *see also Stock in Trade*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining stock in trade as items, such as "tools," "equipment," and "inventory," possessed and required to conduct a business).

[115] *Carpenter*, 484 U.S. at 25 (holding that although mail and wire fraud did not cover intangible right deprivations, they did protect against intangible property right deprivations).

[116] *See* Kelly v. United States, 140 S. Ct. 1565, 1572–74 (2020) (holding that changes to bridge lane allocations by government employees were regulatory decisions rather than deprivations of intangible property rights and that property deprivation must be a fraudster's primary goal); Cleveland v. United States, 531 U.S. 12, 20 (2000) (holding that the government's rights to its unissued licenses do not qualify as intangible property rights under the mail and wire fraud statutes because they are regulatory in nature); Wood, *supra* note 15, at 1214 (providing that *Carpenter* confined §§ 1341 and 1343's applicability to intangible property rights traditionally considered property and specifying that under this interpretation some intangible property rights may not be covered).

[117] 531 U.S. at 15.

[118] *Id.* Under Louisiana state law, to receive a video poker machine license, applicants needed to indicate all entities with an interest in the operation so that the State could assess whether prospective licensees had adequate personal and financial qualities. *Id.* at 15–16. Conspirators Fred Goodson and Carl W. Cleveland assembled an application on behalf of Truck Stop Gaming, Ltd. (TSG). *Id.* This application indicated that Goodson's children were the only individuals with interests in TSG. *Id.* at 16. Truthfully, however, Goodson and Cleveland owned TSG and kept their names off the initial and renewal video poker license applications because they had tax and financial issues that they feared would hurt their prospects. *Id.* at 16–17. Notably, the FBI uncovered this scheme while investigating Goodson and Cleveland for bribery of state officials, and the resulting mail fraud charges served as predicate acts for money laundering and racketeering charges. *Id.*

[119] *Id.* at 20–21; *see also Police Power*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining police power as the authority of the government to enact any laws "necessary and proper" to safeguard the people's welfare). The Supreme Court also noted that it was irrelevant that the unissued licenses became the property of the licensee once issued because mail fraud requires that the victim—not the fraudster—be deprived of property. *Cleveland*, 531 U.S. at 15 (finding the license's status as the licensee's property insufficient given § 1341's textual requirements).

[120] *Cleveland*, 531 U.S. at 21–23.

based on this would effectively render any government license or permit "property."[121] Furthermore, the Supreme Court found that the State's control rights over unissued licenses did not qualify as intangible *property* rights because, although intangible, *regulatory* rights were not historically considered property.[122] Significantly, by classifying a government's regulatory rights as intangible rights that are immune from the mail and wire fraud statutes, *Cleveland* created an additional pitfall for public, as opposed to private, victims of fraud with respect to the "money or property" element.[123]

Most recently, in 2020, in *Kelly v. United States* (known colloquially as "the Bridgegate case"), the Supreme Court held that a government official's dishonest and improper use of regulatory authority does not qualify as depriving the government of money or property under the wire fraud statute.[124] It further held that acquiring money or property must be the main objective of the

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[121] *Id.* at 22. Although the Supreme Court acknowledged that the State's receipt of revenue *might* convey an entitlement to license processing fees, it did not believe such a right sufficed to comprise an intangible property right and worried that finding so would make a wide variety of wholly regulatory licenses or permits property. *Id.* (referencing fishing licenses, hunting licenses, medical licenses, and drivers' license as potentially being affected by a holding that governments have an intangible property right in unissued license).

[122] *Id.* at 23 (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987)) (asserting that Louisiana's intangible rights of control, allocation, and exclusion with respect to its unissued licenses constitute a sovereign's regulatory interests rather than a sovereign's historic property interests). The Supreme Court deemed this right exclusively regulatory by differentiating it from a patentee's rights in a yet-to-be-licensed patent and a franchisor's right to pick franchisees. *Id.* at 23–24. Unlike the patentee, who has the right to use, make, exclude others from using, and sell the invention and the right to sell the patent, the State does not undertake poker operations, hold licenses to preserve its right to undertake poker operations, sell poker licenses commercially, and cannot alienate its licensing power. *Id.* at 23. Similarly, unlike the franchisor, whose right to control stems from its ownership of business assets, the State's right to control its licenses stems from it powers as sovereign. *See id.* at 24 (noting that a franchisor's control rights come from its brand name, business strategy, trademarks, and other stock in trade while the State's control rights do not emanate from an asset). Additionally, the Supreme Court rested its decision on a distinction between entering the video poker industry and what the State did: regulating private operators within said industry. *Id.*

[123] *See id.* at 20–24 (emphasizing Louisiana's status as a sovereign in reaching its holding); *see also* Mogin, *supra* note 25, at 26 (noting that *Cleveland*'s holding that regulatory rights are not intangible property rights applies to governments, but not private entities). Notably, the mail and wire fraud statutes do not exclude public victims altogether—only those deprived solely of regulatory rights. *See* Pasquantino v. United States, 544 U.S. 349, 355–57 (2005) (holding that Canada's right to tax revenue is an intangible property right under the mail and wire fraud statutes). In 2005, in *Pasquantino v. United States*, the Supreme Court held that aiming to defraud Canada of tax revenue that it was legally entitled to qualified as deprivation of an intangible property right. *Id.* at 356–57. In addition to characterizing "[t]he right to be paid money" as a historic conception of property, the Supreme Court differentiated this case from *Cleveland* on the basis that Canada was deprived of an "economic" right rather than a "purely regulatory" one. *Id.* at 356–57 (noting that the *Cleveland* defendant did not scheme to deprive Louisiana of license revenue while the *Pasquantino* defendant did scheme to deprive Canada of tax revenue).

[124] 140 S. Ct. 1565, 1568–69, 1572–73 (2020); *see also* Torres-Spelliscy, *supra* note 104, at 1690 (remarking that *Kelly* is also called "the Bridgegate case").

defrauding scheme—not an inadvertent consequence of it.[125] In this case, the defendants, who were state employees, set out to punish Fort Lee, New Jersey's mayor for not endorsing Governor Chris Christie for reelection.[126] To do so, the defendants closed all but one of Fort Lee's dedicated lanes on the George Washington Bridge for four days.[127] In carrying out their scheme, defendants arranged for New Jersey's Port Authority to pay for additional toll workers and for engineers to collect data about the resulting traffic.[128]

A jury later convicted the defendants of wire fraud for perpetrating this scheme, but the Supreme Court overturned these convictions after finding that prosecutors failed to prove property deprivation.[129] Prosecutors argued that defendants defrauded the Port Authority of its property by (1) asserting control over its physical bridge lanes; and (2) causing it to expend money on engineers and toll workers.[130] Although the Supreme Court acknowledged evidence of wrongdoing, it took issue with both property theories.[131] Regarding the first theory, the Supreme Court invoked *Cleveland* and held that the defendants merely schemed to change a regulatory decision, which was not a property deprivation.[132] As for the second theory, the Supreme Court admitted that em-

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[125] *Kelly*, 140 S. Ct. at 1569, 1573–74.

[126] *Id.* at 1569. Defendant Bridget Anne Kelly served as Governor Christie's Deputy Chief of Staff, while defendant William Baroni served as the Port Authority of New Jersey's Executive Director. *Id.* David Wildstein, who served as chief of staff to Baroni, also participated in Bridgegate, but he agreed to cooperate with prosecutors and subsequently pleaded guilty to conspiracy. *Id.* at 1569, 1571.

[127] *Id.* at 1570. After two of Fort Lee's three dedicated lanes (out of twelve total lanes on the bridge) closed on September 9, 2013, Fort Lee's streets were gridlocked. *Id.* at 1568, 1570. The resulting traffic reportedly resembled that on September 11, 2001, with school buses stuck in traffic for hours, ambulances challenged in reaching the sick, and the police impeded in responding to emergencies. *Id.* at 1570.

[128] *Id.* at 1569–70. Although the original plan was to eliminate all of Fort Lee's dedicated lanes, Wildstein, Baroni, and Kelly decided to reserve one lane after being warned that eliminating all of the lanes could increase traffic accidents. *Id.* To ensure that the toll worker manning the reserved Fort Lee lane remained able to take breaks, however, the conspirators opted to pay to have an additional toll worker available to man the reserved lane during the original toll worker's breaks. *Id.* Additionally, to fortify their cover up story—that the lane eliminations were part of a traffic study—the defendants arranged for the Port Authority to pay its engineers to collect data about the resulting traffic. *Id.* at 1569–70. Notably, the conspirators did not even examine the results of the fake traffic study until after a journalist requested it. *Id.* at 1570.

[129] *Id.* at 1571–74. Interestingly, the Supreme Court characterized the issue on appeal as one of "property fraud." *Id.* at 1569.

[130] *Id.* at 1572.

[131] *Id.* at 1568–69, 1572. Despite its unanimous holding that Kelly and Baroni had not committed wire fraud, the Supreme Court made it clear that it viewed Kelly and Baroni's actions as wrong. *See id.* at 1568–69 (asserting that the evidence clearly demonstrates misconduct, including dishonesty, abuse of authority, and immorality).

[132] *Id.* at 1572–73 ("Baroni and Kelly indeed 'plotted to reduce Fort Lee's lanes.' But that realignment was a quintessential exercise of regulatory power. And this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property."). The Supreme Court explained that the defendants hardly "commandeer[ed]" bridge lanes. *Id.* at 1573 (stating that rather than absconding with the lanes, the defendants regulated the lanes' use). Notably, the

ployee labor *could* suffice as "property" under the wire fraud statute, but found that it did not here because obtaining the Port Authority's property was neither defendants' primary aim in effectuating the scheme.[133] Specifically, it reasoned that mail and wire fraud convictions based on tangential property deprivations would undermine its caselaw and extralegally expand the federal government's prosecution powers because all regulatory action involves employee labor.[134]

Thus, despite the mail and wire fraud statutes' text and traditional statutory interpretation principles, the Supreme Court transformed the "money or property" element over the last thirty-five years into one that meaningfully curtails prosecutors' ability to go after some wrongdoers.[135]

II. The Fine Line Between Tangible Property, Intangible Property Rights, and Intangible Rights

The line between money or tangible property, intangible property rights, and intangible rights appears razor thin.[136] In fact, the Supreme Court's only explicit distinction with respect to intangible property rights is that they are non-physical and traditionally regarded as property.[137] As the Supreme Court's "money or property" cases make clear, however, this thin line can be the dif-

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Supreme Court provided that although defendants carried out their scheme through dishonesty and for nefarious purposes, their actions constituted a "run-of-the-mine exercise of regulatory power," which *Cleveland* holds cannot be a property deprivation. *Id.*

[133] *Id.* at 1573–74 (construing mail and wire fraud to require that obtaining money or property be the defendant's principal goal in undertaking the scheme). The Supreme Court characterized the employee labor costs involved in Baroni and Kelly's scheme as "implementation costs" because the defendants were seeking to punish a mayor rather than seeking the employees' services. *Id.* In fact, Kelly and Baroni's original scheme did not involve additional toll workers; they were only brought in on another employee's suggestion for safety reasons. *Id.* at 1574. Likewise, the engineers and their study were only incorporated as part of the cover up. *Id.*

[134] *Id.* at 1574. Specifically, the Supreme Court believed that allowing incidental deprivations of employee labor to carry mail and wire fraud charges would emasculate its statement in *McNally* that prosecutors cannot use mail and wire fraud to implement state and local governance standards. *Id.* (quoting McNally v. United States, 483 U.S. 350, 360 (1987)). Similarly, the Supreme Court reasoned that allowing incidental deprivations to suffice would empower prosecutors to bypass *Cleveland* because regulatory action inherently involves incidental employee labor. *Id.* (noting that in *Cleveland* the incidental cost was a state employee's work to process the fraudulent license applications).

[135] *See supra* notes 81–135 and accompanying text (outlining the Supreme Court's decisions with respect to the "money or property" element).

[136] *See* Carpenter v. United States, 484 U.S. 19, 25–26 (1987) (indicating that intangibles are protected by the mail and wire fraud statutes if they have traditionally been considered property); Wood, *supra* note 15, at 1214 (characterizing the Supreme Court's *Carpenter* decision incorporating intangible property rights into mail and wire fraud as "carefully limited" and noting that only some intangible property rights will fall within the statutes' scope).

[137] *See Carpenter*, 484 U.S. at 25–26 (holding that the *Wall Street Journal*'s private business information, although intangible, fell within § 1341 because private business information has historically been conceived of as property).

ference between fraudsters being held accountable or set free—regardless of their deceit or the harm caused by their actions.[138]

The Supreme Court's tendency to narrowly construe the "money or property" element arguably suggests that prosecutors should take a conservative approach in charging mail and wire fraud.[139] This has not been the legacy of the Supreme Court's 1987 holdings in *McNally v. United States* and *Carpenter v. United States*, though.[140] In fact, following *McNally* and *Carpenter*, prosecutors seemingly leaned into the Supreme Court's challenge by crafting—and often succeeding with—innovative theories of property rights under the mail and wire fraud statutes.[141]

To better understand what qualifies as property under the mail and wire fraud statutes—and whether college admission might—this Part of the Note examines mail, wire, and related federal fraud cases in the U.S. Courts of Appeals focused on the scope of the "money or property" element.[142] Section A discusses cases where courts identified an intangible property right.[143] Section B, on the other hand, looks at cases where courts merely found intangible rights.[144]

A. Successful Mail and Wire Fraud "Money or Property" Theories

In 1997, in *United States v. Frost*, the U.S. Court of Appeals for the Sixth Circuit handed prosecutors a significant win when it affirmed the honest ser-

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[138] *See Kelly*, 140 S. Ct. at 1568, 1572–74 (reversing the wire fraud convictions of Kelly and Baroni despite significant evidence of wrongdoing because their scheme did not sufficiently involve obtaining property); Cleveland v. United States, 531 U.S. 12, 20 (2000) (vacating the mail fraud conviction of Cleveland because a sovereign's rights over its unissued licenses are not intangible property rights); *Carpenter*, 484 U.S. at 25–26 (affirming the mail and wire fraud convictions of Winans and his co-conspirators because they deprived the *Wall Street Journal* of its intangible property right in its private business information); *McNally*, 483 U.S. at 360–61 (reversing the mail fraud convictions of McNally and Gray because depriving the Commonwealth of Kentucky and its people of an intangible right was insufficient).

[139] *See* Dowling, *supra* note 16 (noting the Supreme Court's efforts to constrain prosecutors' use of mail and wire fraud by restricting the "money or property" element); Monnin & Drake, *supra* note 62 (stating that the Supreme Court's recent decisions strictly construing §§ 1341 and 1343 may impede the DOJ's property fraud prosecutions); Jauregui et al., *supra* note 62 (describing the Supreme Court's opposition to federal prosecutors stretching the scope of white collar statutes).

[140] *See infra* note 141 and accompanying text (detailing prosecutors' unique post-*McNally* and *Carpenter* approaches to satisfying the "money or property" element of mail and wire fraud).

[141] *See* STRADER, *supra* note 30, at 81 (indicating that prosecutors seek to avoid *McNally*'s implications by loosely construing property); Mogin, *supra* note 25, at 24 (describing prosecutors' use of mail and wire fraud as "creative"); Wood, *supra* note 15, at 1218 (stating that in the wake of *McNally*, prosecutors turned to inventive property theories in charging mail and wire fraud); *see also infra* notes 145–166 and accompanying text (detailing cases in the Sixth, Third, and Second Circuits where prosecutors have successfully charged mail and wire fraud despite challenges in meeting the "money or property" element).

[142] *See infra* notes 136–187 and accompanying text.

[143] *See infra* notes 145–166 and accompanying text.

[144] *See infra* notes 167–187 and accompanying text.

vices mail fraud convictions of two university professors and three graduate students.[145] There, the defendants engaged in a scheme wherein the professors effectively wrote and facilitated university approval of students' theses or dissertations in exchange for the students' help in securing federal government contracts for their research firm.[146]

On appeal, the Sixth Circuit held that § 1346 *did* apply in the private sector context, but caveated that a private sector victim's intangible right to honest services must emanate from a fiduciary's failure to safeguard a victim's *property* rights.[147] Thus, although *Frost* technically concerned honest services

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[145] *See* 125 F.3d 346, 352, 367–70 (6th Cir. 1997). Defendants in this case were charged with honest services mail and wire fraud under 18 U.S.C. §§ 1341 and 1346, but the Sixth Circuit's holding interpreted the intangible right to honest services in the private sector as reliant on the victim's property rights and, thus, required the court to determine if the university had a property interest in its unissued degrees under the mail and wire fraud statutes. *Id.* at 352, 366–67, 369. Accordingly, this case remains a helpful reference point despite being an honest services fraud case because the Sixth Circuit's analysis necessitated a property rights inquiry. *See id.* at 367, 369 (comparing unissued degrees and unissued licenses in the context of identifying property under the mail fraud statute). Indeed, Varsity Blues prosecutors successfully invoked *Frost* on two out of three occasions to secure pretrial rulings that college admission qualifies as an intangible property right, making this case particularly relevant. *Compare* United States v. Khoury, No. 20-cr-10177, 2021 WL 2784835, at *2 n.1 (D. Mass. July 2, 2021) (citing *Frost* in support of a holding that college admission qualifies as property)*, and* United States v. Sidoo, 468 F. Supp. 3d 428, 441–42 (D. Mass. 2020) (relying on *Frost* to hold that college admission constitutes property under mail and wire fraud), *appeal filed sub nom.* United States v. Chen, No. 22-01352 (1st Cir. May 9, 2022) (BL), *with* United States v. Ernst, 502 F. Supp. 3d 637, 648–49 (D. Mass. 2020) (stating that *Frost* does not support finding that college admission comprises property because it was an honest services rather than a property fraud case).

[146] *Frost*, 125 F.3d at 354, 363. The two professors, Dr. Walter Frost and Dr. Robert Turner, also ran a research firm, FWG Associates, Inc., that was largely funded by federal government contracts. *Id.* at 352. The students involved, Dr. Richard Congo, Dr. Dennis Faulkner, and Peggy Potter, notably, all worked for the federal government. *Id.* Dr. Frost served as "the major professor and advisor" for these students and their dissertation or thesis, while Dr. Turner sat on the committees charged with approving each students' thesis or dissertation. *Id.* With respect to Dr. Faulkner, evidence demonstrated that approximately 92% of his dissertation plagiarized FWG reports and a conference paper provided to him by Dr. Frost. *Id.* at 356. Dr. Faulkner, who was employed by the Department of the Army, was tangentially involved in FWG receiving a $937,248 Army contract around this time. *Id.* at 352, 355. With respect to Potter, evidence demonstrated that 95% of Potter's thesis was identical to an FWG study provided to her by Dr. Frost and Dr. Turner. *Id.* at 357. In fact, Potter confessed that she did no research or writing for her thesis. *Id.* at 358. Around this time, Potter, a National Aeronautics and Space Administration (NASA) employee, facilitated a $55,000 increase in an existing FWG-NASA contract. *Id.* at 352, 358. With respect to Dr. Congo, evidence demonstrated that his dissertation topic closely resembled the topic of an FWG-NASA contract and that an FWG employee wrote approximately two-thirds of his dissertation. *Id.* at 359. Just prior to this, Dr. Congo, a NASA employee, helped facilitate a $300,000 contract between FWG and NASA. *Id.* at 352, 359.

[147] *See id.* at 365–67, 369 (citing Carpenter v. United States, 484 U.S. 19, 27 (1987)) (holding that § 1346 applies in the private sector when employees violate their fiduciary duty to protect their employer's property). Based on *Carpenter*'s statement that employees have a fiduciary duty to safeguard their employer's private business information, the court reasoned that Dr. Frost and Dr. Turner had a fiduciary duty to protect the university's property and that, in turn, it had to determine whether the university had a property interest in its unissued graduate degrees. *Id.* at 366–67 (citing *Carpenter*, 484 U.S. at 25–26). In identifying unissued degrees as the focus of the property analysis, the Sixth

fraud, the Sixth Circuit evaluated whether unissued degrees fell within the scope of property to determine whether the professors violated their fiduciary duties to the university.[148] Ultimately, the court held that universities do, in fact, have a property interest in their unissued degrees.[149] In reaching this conclusion, it contrasted unissued degrees from unissued licenses on the basis that universities are fundamentally businesses rather than governments.[150] As such, awarding a graduate degree was a business consideration that took into account the limited number of degrees available, the university's image, and the university's finances rather than a regulatory consideration.[151] Thus, the Sixth Circuit found that the professors violated their fiduciary duty and committed honest services mail fraud against the university by manipulating it into issuing its proprietary degrees in situations it normally would not have.[152]

In 2004, in *United States v. Al Hedaithy*, the U.S. Court of Appeals for the Third Circuit leaned on *Carpenter* and found that prosecutors successfully carried their burden with respect to the "money or property" requirement.[153] In *Al Hedaithy*, prosecutors charged foreign nationals for their roles in a Test of English as a Foreign Language (TOEFL) cheating scheme.[154] Specifically, foreign

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Circuit seemingly relied on the sway that Dr. Frost and Dr. Turner had in determining which students earned the university's advanced degrees. *See id.* at 352, 367 (describing how Dr. Frost had a significant say in the trajectory and success of his students' dissertations and theses, how Dr. Frost chose the faculty members who would sit on his students' thesis or dissertation defense committees, and how Dr. Frost and Dr. Turner participated in defendants' thesis or dissertation defense committees).

[148] *See id.* at 366–67, 369 (evaluating whether the university was deprived of a property interest in its degrees because deprivation of the intangible right to honest services is contingent on a fiduciary's failure to protect property in the private sector context).

[149] *Id.* at 367.

[150] *Id.* Although the Supreme Court would not decide *Cleveland v. United States* until 2000, the Sixth Circuit had already held in 1988, in *United States v. Murphy*, that governments do not have property interests in unissued licenses under § 1341. *See* Cleveland v. United States, 531 U.S. 12, 20 (2000) (holding that the government does not have a property interest in unissued licenses under the mail fraud statute because the issuance of licenses is regulatory in nature); United States v. Murphy, 836 F.2d 248, 253–54 (6th Cir. 1988) (holding that the State of Tennessee does not have an intangible right to its unissued bingo permits).

[151] *Frost*, 125 F.3d at 367 ("The number of degrees . . . is finite [and] . . . [a]warding degrees . . . to students who have not earned them, will decrease the value of degrees[,] . . . hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money.").

[152] *Id.* at 366–67, 369 (holding that Dr. Frost and Dr. Turner breached their fiduciary duties to the university and, thus, defrauded the university of its intangible right to their honest services by facilitating unearned graduate degrees for students in exchange for federal government contracts).

[153] *See* 392 F.3d 580, 583, 594 (3d Cir. 2004) (citing Carpenter v. United States, 484 U.S. 19, 20 (1987)) (finding that defendants defrauded testing company Educational Testing Service (ETS) of historically acknowledged property rights in its private business information and score reports).

[154] *Id.* at 582. The specific defendants involved in this case were Saudi Arabian nationals Riyadh Al-Aiban and Hany Al Hedaithy. *Id.* at 582–83. Run by ETS, the Test of English as a Foreign Language (TOEFL) is a standardized test that foreign nationals are frequently required to take and secure a minimum score on in order to attend American colleges and universities. *Id.* at 582–83. Schools use the exam to assess a foreign national's English proficiency. *Id.* at 583. Because full-time admission

nationals registered to take the exam, but paid third parties to assume their identities, take their exams for them, and secure a passing score.[155]

Although defendants contested prosecutors' satisfaction of the "money or property" element, the Third Circuit affirmed their convictions.[156] Specifically, the Third Circuit, held that the defendants defrauded Educational Testing Service (ETS) of an intangible property right because the TOEFL and its questions were private business information, namely trade secrets, that ETS had a right to control.[157] Indeed, because of the significant restrictions ETS put in place on accessing the TOEFL—fees, confidentiality agreements, and identity certifications—the defendants' misrepresentations regarding test-takers' identities constituted unauthorized test access and a deprivation of ETS's intangible property right in prescribing said access.[158] Notably, the Third Circuit distinguished this scheme from the one in *Cleveland* because ETS is a private business entity rather than a governmental one.[159] It also rebuked defendants' argument that

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and enrollment at a school is needed to receive a student visa, achieving the requisite TOEFL score often impacts a foreign national's immigration status too. *Id.*

[155] *Id.* at 583–84. In addition to having his or her photo taken, the third party would present proof of identity, provide the TOEFL appointment number assigned to the foreign national, and sign a confidentiality agreement. *Id.* The third party would also arrange for the score report to be mailed to a co-conspirator, who would alter the score report to show a photo of the foreign national who registered for the TOEFL. *Id.* at 584. This fraudulent score report would then be mailed to colleges and universities in an envelope with a fake ETS logo. *Id.*

[156] *Id.* at 589, 594.

[157] *See id.* at 594–95 (citing Carpenter v. United States, 484 U.S. 19, 26 (1987)) (relying on *Carpenter* to find that ETS had an intangible property right in preserving the confidentiality of the TOEFL and that ETS had been defrauded of its exclusive use rights with respect to the TOEFL). Regarding the exam and exam questions, prosecutors specifically argued that defendants defrauded ETS by using misstatements to access and take the TOEFL. *Id.* In finding that ETS had a property interest in the TOEFL, the Third Circuit characterized the test as an ETS trade secret because it gave ETS an edge over its competitors in the testing industry and because ETS went to "great lengths" to safeguard the TOEFL's "confidentiality and exclusivity." *Id.* at 594 (defining trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"); *see also Trade Secret*, BLACK'S LAW DICTIONARY, *supra* note 15 (noting that under the majority view, trade secret is defined as business information, devices, processes, or formulas that are kept confidential to preserve a competitive advantage in business, and that under the minority view, trade secret is defined as typically undetermined and undeterminable information that gives its owner an edge in business, that the owner financed the production of and uses regularly in business, and that the owner desires to keep a secret).

[158] *Al Hedaithy*, 392 F.3d at 594–95 (noting that ETS rigorously safeguarded TOEFL's exclusivity and that defendants' scheme involved circumventing ETS's rules for TOEFL access). The Third Circuit further specified that ETS's "'right to decide how to use' its confidential business information" was a "recognized property interest." *Id.* at 595.

[159] *Id.* at 603 (rejecting defendants' argument that *Cleveland* does away with the right to control theory of property because *Cleveland* involved a government rather than private entity). The Third Circuit also held *Cleveland*'s holding inapplicable in the context of the physical score reports. *Id.* at 600. As noted, prosecutors also argued that ETS was defrauded of its physical test score reports. *Id.* at 593. In response, defendants asserted that the test score reports are not property in ETS's hands and compared the test score reports to the licenses in *Cleveland*. *Id.* at 596. In addition to arguing that test

ETS was not defrauded of its property because defendants paid for the tests and score reports.[160]

In 2017, in *United States v. Finazzo*, the U.S. Court of Appeals for the Second Circuit upheld mail and wire fraud convictions where the victim was deprived of its right to control.[161] The underlying scheme involved the defendant, an Aéropostale merchandising employee, arranging for another company to supply Aéropostale's merchandise in return for secret kickbacks.[162] This caused Aéropostale to overpay for merchandise, receive lower quality merchandise, and experience merchandise delivery delays, which prosecutors successfully argued deprived Aéropostale of its right to control its assets.[163]

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score reports are only property in the test taker's hand because ETS has no alternate use for and cannot sell the reports, defendants reasoned that deeming the reports property in ETS's hands would spur inconsistent treatment of public licensing exams and private licensing exams. *Id.* The Third Circuit disagreed with defendants' argument that ETS does not have a property interest in the reports, however, because the reports are physical items created by ETS, a *private entity*, and that ETS can choose to award according to its terms. *Id.* at 596–97. Regarding defendants' *Cleveland* argument, the Third Circuit differentiated the State of Louisiana and its unissued licenses from ETS and its score reports on the grounds that the State's license conferrals stem from its regulatory police power, while ETS's report conferrals stem from its business pursuits. *See id.* at 600 (noting that *Cleveland*'s holding that unissued licenses are not the regulator's property is irrelevant here because ETS is a private entity with no regulatory authority).

[160] *See id.* at 603–04 (holding that *Cleveland* does not indicate that mail fraud requires a financial loss by the victim and that ETS being fully paid merely means it was not deprived of money).

[161] 850 F.3d 94, 115 (2d Cir. 2017). Although in 1992, in *United States v. Bucuvalas*, the U.S. Court of Appeals for the First Circuit recognized the right to control theory under mail fraud, the case concerned government-issued licenses and *Cleveland* subsequently overturned it. *See* United States v. Bucuvalas, 970 F.2d 937, 939, 945 (1st Cir. 1992) (upholding mail fraud charges because defendants deprived the City of Boston of its right to control the issuance of its liquor and entertainment licenses), *abrogated by* Cleveland v. United States, 531 U.S. 12, 18 (2000). As there was no directly controlling circuit precedent, district judges within the First Circuit who presided over Varsity Blues cases consulted Second Circuit right to control cases, such as *United States v. Finazzo*, to evaluate the applicability of this theory in Varsity Blues cases. *See* United States v. Khoury, No. 20-CR-10177, 2021 WL 2784835, at *3 (D. Mass. July 2, 2021) (citing *Finazzo* and other Second Circuit cases in exploring the right to control theory); United States v. Sidoo, 468 F. Supp. 3d 428, 441 (D. Mass. 2020) (using a Second Circuit case's right to control holding to evaluate a university's property interest in an admission spot), *appeal filed sub nom.* United States v. Chen, No. 22-01352 (1st Cir. May 9, 2022) (BL); United States v. Ernst, 502 F. Supp. 3d 637, 651 (D. Mass. 2020) (citing *Finazzo* and another Second Circuit case when evaluating prosecutors' right to control theory because *Bucuvalas* was no longer good law).

[162] *Finazzo*, 850 F.3d at 96; *see also Kickback*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining a kickback as unlawful compensation to an authority figure in exchange for facilitating a business transaction). In total, defendant Christopher Finazzo received $25,790,822.94 for contracting with South Bay Apparel Inc. to provide Aéropostale's fleeces and t-shirts. *Finazzo*, 850 F.3d at 103.

[163] *See Finazzo*, 850 F.3d at 97, 100–02, 104 (describing the price, quality, and timing discrepancies between South Bay and other vendors' t-shirts and fleeces). With respect to t-shirts, Finazzo's insistence on using South Bay resulted in low profit margins relative to other merchandise, lost potential savings of around $5 or 6 million, and lower quality given the price. *Id.* at 100, 101. With respect to fleeces, working with South Bay caused Aéropostale to pay more upfront for inferior fleeces and to lose roughly $1.8 million in sales from lengthy delays. *Id.* at 101–02. Notably, Finazzo repeatedly

On appeal, the Second Circuit reiterated that misstating or omitting information only constitutes deprivation of a right to control when the information withheld is material enough that withholding it causes or even risks actual pecuniary damage.[164] Notably, the court stated that actual pecuniary damage can occur directly, through price inflation, or indirectly, through quality reduction.[165] Thus, given the higher prices, lower quality, and damaging delays experienced, the Second Circuit determined that the defendant had deprived Aéropostale of its right to control because his failure to disclose the kickbacks impacted Aéropostale's decision-making in a way that caused actual pecuniary harm.[166]

B. Unsuccessful Mail and Wire Fraud "Money or Property" Theories

In 1988, in *United States v. Evans*, the U.S. Court of Appeals for the Second Circuit dealt prosecutors a blow in their attempt to use the right to control theory to satisfy the "money or property" element.[167] In *Evans*, prosecutors charged defendants with mail and wire fraud for scheming to illegally sell military arms to Iran.[168] Specifically, the defendants planned to falsify documents concerning the arms sales in order to fraudulently secure the U.S. government's approval for said sales.[169] The defendants successfully moved to strike these charges on the grounds that the United States had not been deprived of money or property because the arms in question did not belong to the United

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failed to disclose his receipt of kickbacks despite Aéropostale disclosure education and requirements. *Id.* at 99.

[164] *See id*. at 107–11 (discussing previous Second Circuit holdings regarding the right to control and stating that omissions or misstatements under this theory must cause or have the potential to cause "tangible economic harm"). Notably, the Second Circuit specified that withholding information that would merely alter the victim's decision is not enough to carry a right to control mail or wire fraud conviction. *Id.* at 111. Additionally, the court noted that withheld information can or does cause actual pecuniary harm when the withheld information has "independent value" or "bear[s] on the ultimate value of the transaction." *See id.* at 109 (quoting United States v. Mittelstaedt, 31 F.3d 1208, 1217 (2d Cir. 1994)) (describing what types of misstatements and omissions satisfy the property requirement under mail and wire fraud).

[165] *Id.* at 111.

[166] *See id.* at 113–14 (noting that Finazzo's scheme "tangibly harmed Aéropostale" because Aéropostale did not receive "the best possible bargain"). In reaching this conclusion, the Second Circuit indicated that the millions of dollars lost by Aéropostale, the decreased merchandise quality, and the delays in receiving the merchandise constituted "tangible economic harm." *Id.* at 113–15. Furthermore, the Second Circuit held that right to control theories do not require an intent to deprive the victim of money. *See id.* at 115 (rejecting Finazzo's argument that right to control mail or wire fraud convictions require that a defendant intend to deprive a victim of money).

[167] *See* 844 F.2d 36, 37 (2d Cir. 1988) (holding that the United States' right to control upcoming weapons sales is not proprietary for the purposes of the mail and wire fraud statutes).

[168] *Id.* Defendant Samuel Evans and his conspirators attempted to sell a variety of arms, including missiles, ammunition, aircraft, tanks, guns, cameras, and radios, among other things. *Id.*

[169] *Id.*

States.[170] Prosecutors challenged this, however, by asserting that the government had actually been defrauded of its property interest in controlling future sales of American arms.[171]

Although the Second Circuit agreed that the right to control the future use or sale of something qualified as a property right in some contexts, it found that the right to control future weapons sales did not constitute a property right.[172] The court differentiated the United States' right here in a number of ways.[173] First, it noted that under common law property estates, even nonpossessors have possession rights in certain situations.[174] The United States, however, had no current or future possessory rights over the weapons whatsoever.[175] Second, unlike the right to exclusively use private business infor-

[170] *Id.* at 38. Evans and the other defendants invoked the Supreme Court's then-recent *McNally* holding to challenge the charges against them. *Id.* According to the defendants, the United States lost no money or property because "some of the weapons were sold directly by their manufacturers to foreign governments," "[other weapons] that may have once belonged to the United States [were] now owned by foreign countries," and the monetary commission on the sales "was to be paid by the recipient governments, not by the United States." *Id.*

[171] *Id.* at 40. Among other things, prosecutors based this argument on the common law principle that the right to restrict alienation is a property right even in the hands of someone who does not own the underlying property. *Id.* Prosecutors also argued that the United States had a property interest in the weaponry for the purposes of mail fraud because *McNally* provided for an expansive property interpretation. *Id.* Although the Second Circuit acknowledged that *McNally* asserted that property should be construed permissively, it did not think this assertion bolstered prosecutors' argument here. *Id.* Interestingly, the Second Circuit interpreted this *McNally* statement not as an instruction to construe property more permissively than usual, but instead as an indication that all defrauding schemes targeting an identified property interest were captured by the mail and wire fraud statutes. *Id.*

[172] *Id.* at 40–42. For example, the Second Circuit identified a fee simple determinable, a fee simple subject to a condition subsequent, a possibility of reverter, and a power of termination as property estates that permit a nonpossessor control over land. *Id.* at 40–41; *see also Fee Simple*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining fee simple determinable as "[a]n estate that will automatically end and revert to the grantor if some specified event occurs," and defining fee simple subject to a condition subsequent as "[a]n estate subject to the grantor's power to end the estate if some specified event happens"); *Possibility of Reverter*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining possibility of reverter as "a future interest retained by a grantor . . . so that the grantee's estate terminates automatically and reverts to the grantor if the terminating event ever occurs"); *Power of Termination*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining power of termination as "[a] future interest retained by a grantor . . . so that the grantee's estate terminates (upon breach of the condition) only if the grantor exercises the right to retake it").

[173] *See Evans*, 844 F.2d at 41–42 (explaining its holding that the United States' right to restrict arms sales is not a property interest by reference to "common-law real property estates" and the Supreme Court's holding in *Carpenter*).

[174] *Id.* at 41 (reasoning that common-law property estates typically involve the estate holder holding the right to possess the property in certain situations); *see also Estate*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining estate as "[t]he amount, degree, nature, and quality of a person's interest in land or other property"); *supra* note 172 (describing the terms of various common-law estates).

[175] *Evans*, 844 F.2d at 41. Indeed, resale violations do not trigger a United States right to possession of the weapon, impact the illegal purchaser's title, or limit the seller's right to illegal profits. *Id.* Rather, when illegal resales occur, the United States can merely place constraints on upcoming weapons sales to the seller. *Id.*

mation that was at issue in *Carpenter*, the United States' right to veto arms sales had never previously been recognized as a property right.[176] Third, the Second Circuit found that the United States' remedies in the face of resale restriction violations differed enough from those typically available to property owners to weigh against finding a property interest.[177] Together, these differences convinced the court that the United States' interests were more regulatory than proprietary and, thus, that it had not been deprived of its "property" for the purposes of mail and wire fraud.[178]

In 2021, in *United States v. Yates*, the U.S. Court of Appeals for the Ninth Circuit vacated conspiracy to commit bank fraud charges and, in the process, identified two theories that fail to satisfy the "money or property" element of mail, wire, and other federal fraud statutes.[179] The defendants in *Yates* were officials at a relatively new and struggling bank.[180] After the Federal Deposit Insurance Corporation (FDIC) repeatedly flagged shortcomings in this bank's health, the defendants allegedly attempted to make the bank appear healthier and more secure than it actually was in order to protect their jobs.[181] A jury

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[176] *Id.* (noting that the common law comparison "cuts both ways" and that the right in question is not traditionally considered property).

[177] *Id.* (comparing the United States' ability to restrict future sales in response to a resale restriction violation with "the traditional property remedies of replevin, damages or specific performance"); *see also Replevin*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining replevin as "[a] writ obtained from a court authorizing the retaking of personal property wrongfully taken or detained"). The Second Circuit further reasoned that where Congress enacts detailed enforcement measures—as here—it will not readily assume that Congress inexplicitly intended for the mail and wire fraud statutes to cover the conduct as well, especially given the tremendous extension of mail and wire frauds' scope already permitted. *Evans*, 844 F.2d at 41.

[178] *Evans*, 844 F.2d at 42. Although this case occurred prior to *Cleveland*, the Second Circuit's regulatory-versus-proprietary distinction appears to track the Supreme Court's analysis in *Cleveland*. *See* Cleveland v. United States, 531 U.S. 12, 20 (deeming a government's interest in unissued licenses regulatory rather than proprietary and, thus, outside the scope of the mail and wire fraud); *Evans*, 844 F.2d at 42 (noting that laws regulating the usage of various commodities that are neither used nor possessed by the government typically do not render the regulated commodities the government's property).

[179] *See* 16 F.4th 256, 264–68 (9th Cir. 2021) (holding that depriving a bank of "its right to accurate information" and of existing salaries and bonuses did not satisfy the "money or property" element of bank fraud); *see also* Neder v. United States, 527 U.S. 1, 20–21 (1999) (describing how the bank fraud statute originates from the mail and wire fraud statutes and how overlapping elements among these statutes operate identically); Moohr, *supra* note 44, at 702 (noting that the mail and wire fraud statutes are uniformly and consistently interpreted); Podgor, *supra* note 32, at 8 (stating that the bank fraud statute stems from the mail fraud statute).

[180] 16 F.4th at 261–62. Defendants Diana Yates and Dan Heine both worked at the Bank of Oswego, which was in Lake Oswego, Oregon and founded in 2004. *Id.* at 261. In addition to founding the Bank of Oswego, Heine served as president, chief executive, and director. *Id.* at 262. Yates, on the other hand, served as executive vice president, chief financial officer, chief operating officer, and chief credit officer over the course of her career at the Bank of Oswego. *Id.*

[181] *See id.* at 263, 265–66 (describing how Federal Deposit Insurance Corporation (FDIC) oversight and the 2008 economic downfall led Heine and Yates to engage in a scheme for the purposes of (1) hiding the bank's poor financial health from stakeholders and (2) maintaining their employment).

later convicted the defendants of conspiracy to commit bank fraud on the grounds that they conspired to deprive the bank of (1) its right to accurate information and (2) their current salaries and bonuses.[182]

The Ninth Circuit found both of these property theories invalid, though.[183] Although the court recognized the existence of property rights in private business information and trade secrets, it held that an accurate information right was merely an intangible right and, as a result, not "property."[184] The Ninth Circuit likewise held that the current pay argument was an intangible right to honest services theory and thus, untenable because honest services fraud was not charged.[185] Notably, the court carefully distinguished employees who used

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Beginning in 2009, the FDIC started expressing concerns with the bank's fiscal condition and leadership arrangement. *Id.* at 262–63. Although the bank assured the FDIC it would resolve the issues flagged, the FDIC continued to identify shortcomings in the bank's health in the following years and even lowered the bank's management ratings in 2011 and 2012 *Id.* Prosecutors specifically alleged that Heine and Yates provided inaccurate loan performance information, hid foreclosed property status information, conducted unauthorized bank transfers, and withheld material loan information from bank stakeholders. *Id.* at 263.

[182] *Id.* at 264. Pursuant to §§ 1349 and 1344, conspiracy to commit bank fraud occurs when a defendant plans to knowingly carry out a "scheme or artifice" to defraud a bank of money or property. *See* 18 U.S.C. § 1349 (illegalizing conspiracy); *id.* § 1344 (illegalizing bank fraud); *Yates*, 16 F.4th at 264 (detailing the elements of conspiracy to commit bank fraud); *see also Neder*, 527 U.S. at 20–21 (stating that courts should consistently interpret the phrase "scheme or artifice to defraud" in the mail, wire, and bank frauds statutes). Regarding the bank's right to accurate information, prosecutors asserted that deprivation of accurate books and records information was a property right of value because the board needed accurate information to govern the bank. *Yates*, 16 F.4th at 265. With respect to Heine and Yate's current salaries and bonuses, on the other hand, prosecutors asserted that the bank was defrauded of the monetary value of employing both defendants. *Id.* at 266.

[183] *Yates*, 16 F.4th at 264 (determining that the prosecution's right to accurate information and salary-maintenance theories fell short of alleging property deprivation). Notably, the Ninth Circuit construed the bank fraud statute to require the bank be defrauded "of something of value," like property or money. *Id.*

[184] *Id.* at 265 ("There is no cognizable property interest in 'the ethereal right to accurate information' . . . . Although a property right in trade secrets or confidential business information can constitute 'something of value,' . . . 'the right to make an informed business decision' and the 'intangible right to make an informed lending decision' cannot." (citations omitted) (first quoting United States v. Sadler, 750 F.3d 585, 591 (6th Cir. 2014); then quoting Carpenter v. United States, 484 U.S. 19, 26 (1987); and then quoting United States v. Lewis, 67 F.3d 225, 233 (9th Cir. 1995))). The Ninth Circuit also warned that finding an intangible property right to accurate information would render all dishonesty a form of illegal fraudulent conduct. *Id.*

[185] *Id.* at 266–68 (reasoning that the Supreme Court previously rejected prosecutors' "salary-maintenance" theory through its *McNally* and *Skilling v. United States* holdings). The Ninth Circuit determined that prosecutors' current pay theory was an intangible right to honest services theory by looking to the Supreme Court's holdings in *McNally* and, more significantly, *Skilling v. United States*. *Id.* (characterizing *McNally* as indicating that honest services fraud inherently involved deprivation of current pay). In *Skilling*, prosecutors charged defendant Jeffrey Skilling with conspiracy to commit honest services fraud because he exaggerated Enron Corporation's fiscal wellbeing, which falsely increased Enron's stock value and, in turn, Skilling's personal wealth. 561 U.S. 358, 369, 413 (2010). Notably, Skilling was not accused of engaging in this scheme in order to receive bribes or kickbacks from others. *Id.* at 413. Rather, he profited from the scheme by continuing to receive his salary and bonus pay and by selling his Enron stock. *Id.* The Supreme Court ultimately reversed Skilling's con-

deception to maintain their jobs and salaries from employees who used deception to obtain a promotion or increased pay.[186] Accordingly, prosecutors failed to satisfy the bank fraud statute's requirement for a deprivation of money or property.[187]

III. COLLEGE ADMISSION SHOULD QUALIFY AS AN INTANGIBLE PROPERTY RIGHT OF A UNIVERSITY OR COLLEGE

Although the Supreme Court and some federal circuit courts have undoubtedly narrowed what counts as property for the purposes of mail and wire fraud, these courts have not narrowed the "money or property" requirement so extensively as to render Operation Varsity Blues a likely failure.[188] Perhaps the most on-point case in evaluating whether college admission qualifies as an intangible property right is the Supreme Court's 1987 decision in *Carpenter v. United States*, wherein the Supreme Court held that private business information and the right to control said information are intangible property rights.[189] Private business information is information that a business puts effort

viction after finding that § 1346 covered schemes involving bribes and kickbacks, but not those involving secret self-dealing—what Skilling had done. *Id.* at 407–11, 413. Referencing this holding as refuting the salary-maintenance theory, the Ninth Circuit in *Yates* asserted that allowing prosecutors to use the salary-maintenance theory would usurp the *Skilling* holding and inadvertently criminalize common employee conduct, such as telling one's employer that they have been productive to avoid termination when they have really been surfing the Internet. *Yates*, 16 F.4th at 267. Because the court believed that Heine and Yates's misrepresentation of the bank's health to continue receiving their salaries and bonuses was comparable to the unproductive, Internet-using employee's lies, it found that Heine and Yates deprived the bank of an intangible right rather than money or property. *See id.* at 268 (concluding that Heine and Yates effectively deprived the bank of their honest services).

[186] *Yates*, 16 F.4th at 266 (differentiating between an employee scheme to receive higher pay and an employee scheme to maintain employment and current salary). The Ninth Circuit did not think Heine and Yates' receipt of yearly raises and bonuses that related to the bank's health rather than their performance as employees qualified as deprivation of new, as opposed to current, salary. *Id.* at 268.

[187] *Id.* at 264–68.

[188] *See* Brodskey et al., *supra* note 24 (positing that *Kelly v. United States* may compromise the Varsity Blues prosecutors' assertion that college admission is "property" under the mail and wire fraud statutes); Dowling, *supra* note 16 (characterizing the Supreme Court as limiting the scope of property and honest services fraud); Spektor, *supra* note 24 (discussing the potentially negative impacts of *Kelly* and *United States v. Yates* on the Varsity Blues cases); *supra* notes 57–187 and accompanying text (discussing holdings by the Supreme Court and federal circuit courts regarding the scope of "money or property" within mail and wire fraud); *infra* notes 189–207 and accompanying text (applying Supreme Court and federal appellate court case law to the Varsity Blues facts and arguing that college admission qualifies as private business information). Although debate similarly continues regarding whether college entrance exam test scores qualify as intangible property rights under the mail and wire fraud statutes, this Note only considers the college admission property question. *See* Dowling, *supra* note 16 (outlining pending and possible appeals on the test score property issue); *infra* notes 189–216 and accompanying text (analyzing the college admission intangible property rights question rather than the test score intangible property rights question).

[189] *See* 484 U.S. at 25–26 (finding that a business's right with respect to and to exclusively use its private business information is an intangible property right for the purposes of satisfying the mail and wire fraud statutes). *Carpenter*, unlike *Kelly* and *Cleveland v. United States*, involves a private victim

or money into cultivating or obtaining and commercializes as part of its business.[190] Additionally, a business possesses an intangible property right in controlling access to its private business information—particularly, it seems, when it takes steps to safeguard that information and regardless of whether there is resulting monetary loss.[191]

Given the case law interpreting intangible property rights, courts should find that colleges and universities possess private business information and that the Varsity Blues defendants defrauded them of this information *and* the right to control it.[192] Regarding private business information, colleges and universities should be seen as possessing private business information in the unique educational programs they create, market, and sell in competition with other educa-

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and does not concern the regulatory-versus-proprietary interest question. *See* Information, *supra* note 15, at 3 (identifying many of the schools involved in Singer's college admission scheme as private institutions). *Compare* Kelly v. United States, 140 S. Ct. 1565, 1572–73 (2020) (identifying the victim as the government and the government interest implicated as regulatory in nature)*, and* Cleveland v. United States, 531 U.S. 12, 20 (2000) (indicating that Louisiana was the victim, but that mail fraud was not committed because unissued licenses were regulatory interests rather than property interests), *with Carpenter*, 484 U.S. at 25–26 (denoting the *Wall Street Journal* as the victim and finding a deprivation of its property interests).

[190] *See Carpenter*, 484 U.S. at 25–26 (identifying the private business information in the column as an intangible property right because the *Wall Street Journal* "generated" it for business purposes and because it constituted "stock in trade"); United States v. Al Hedaithy, 392 F.3d 580, 594 (3d Cir. 2004) (specifying private business information as that obtained or collected as part of a business endeavor and as providing strategic business leverage); *see also Stock in Trade*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining stock in trade as essential business components). Of course, in developing this rule and considering what a court might decide with respect to college admission, it is important to remember that only *Carpenter*'s holding is binding in the First Circuit where the Varsity Blues cases are underway; the circuit court cases discussed in this Note are merely persuasive authority. *See Authority*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining persuasive authority as authority, frequently from another jurisdiction, which bears influence, but lacks the ability to bind a court's decision, and defining binding authority as authority that must be followed by a court); *Stare Decisis*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining vertical stare decisis as the doctrine requiring that lower courts adhere to higher courts' judgments).

[191] *See Carpenter*, 484 U.S. at 26–27 (stating that defendants deprived the *Wall Street Journal* of its right to exclusively use its private business information even though the *Wall Street Journal* experienced no monetary loss and retained access to the information's initial public usage); Finazzo v. United States, 850 F.3d 94, 111 (2d Cir. 2017) (holding that actual pecuniary damage due to depriving another of his or her right to control through misstatements and omissions need only be a possibility); *Al Hedaithy*, 392 F.3d at 595 (providing that defendants deprived ETS of its right to control its trade secret because defendants' misstatements bypassed ETS's safeguards).

[192] *See Carpenter*, 484 U.S. at 25–27 (holding that defendant Winans and his conspirators defrauded the *Wall Street Journal* of its private business information and its right to exclusively use said information); *Finazzo*, 850 F.3d at 113 (deciding that Finazzo defrauded Aéropostale of its right to control its assets by withholding meaningful information from the company); *Al Hedaithy*, 392 F.3d at 595 (determining that defendants defrauded ETS of its private business information and its right to control said information by making false statements and accessing the test under conditions ETS would not have allowed had it known the truth).

tional institutions for the best and brightest students.[193] For example, Harvard College touts its elite professors, extensive course offerings, significant resources, and personalized student instruction.[194] Stanford University, on the other hand, emphasizes flexible learning opportunities, off-campus programs, low student-to-faculty ratios, and research programs.[195] These tailored academic programs give colleges an edge in attracting students much like the news matter in *Carpenter* and the TOEFL in *United States v. Al Hedaithy* provided business advantages.[196] This, in turn, favors construing educational programs as private

[193] *See Carpenter*, 484 U.S. at 25–26 (characterizing the article stock information that Winan shared as private business information because it was created or obtained by the *Wall Street Journal* for business reasons); *Al Hedaithy*, 392 F.3d at 594 (describing the TOEFL as a trade secret and, thus, as private business information because ETS utilized it commercially and competitively); Leonard Cassuto & Robin L. Cautin, *What's So Bad About Marketing?*, INSIDE HIGHER ED (Sept. 18, 2018), https://www.insidehighered.com/views/2018/09/18/need-sell-higher-education-real-and-there-should-be-no-shame-opinion [https://perma.cc/V3SP-F3PR] (stating that American colleges and universities "market" and sell their programs); Max Kutner, *How to Game the College Rankings*, BOS. MAG.: CITY LINE (Aug. 26, 2014), https://www.bostonmagazine.com/news/2014/08/26/how-northeastern-gamed-the-college-rankings/ [https://perma.cc/5Z94-6TFY] (describing higher education as a cutthroat industry wherein schools vie for students and income); Doug Podolsky, *How Do Schools Market Themselves to Attract Students?*, U.S. NEWS (Sept. 22, 2014), https://www.usnews.com/news/college-of-tomorrow/articles/2014/09/22/how-do-schools-market-themselves-to-attract-students [https://perma.cc/MFB7-PP3H] (discussing how colleges and universities are marketing their "academic profile[s]" and other perks in order to win over students); *infra* notes 194–195 and accompanying text (detailing the special program attributes cultivated and touted by Harvard, Stanford, and other elite schools). The educational programs created and advertised by colleges and universities—which comprise the degrees offered, the classes taught, the professors who lecture, and the other facilitated academic experiences—are arguably goods being sold to students and, thus, like news matter and an exam should be construed as a school's "stock in trade." *See Carpenter*, 484 U.S. at 25–26 (asserting that news matter and, by extension, private business information is produced and sold like stock in trade); *Al Hedaithy*, 392 F.3d at 594 (identifying the TOEFL as a trade secret utilized in ETS's transactions); Cassuto & Cautin, *supra* (noting that education is being sold); *Stock in Trade*, BLACK'S LAW DICTIONARY, *supra* note 15 (defining stock in trade as "inventory carried by a retail business for sale in the ordinary course of business"); *infra* notes 194–195 and accompanying text (overviewing how some colleges and universities market their programs).

[194] *Why Harvard*, HARV. COLL. ADMISSIONS & FIN. AID, https://college.harvard.edu/admissions/why-harvard [https://perma.cc/C9QH-7US2].

[195] *Academics*, STAN. UNDERGRADUATE ADMISSION, https://admission.stanford.edu/academics/ [https://perma.cc/X5HN-8VCS]. Notably, USC, Wake Forest University, and Georgetown University—all likewise implicated in Varsity Blues—also market their unique educational attributes. *See* Press Release, U.S. Att'y's Off., *supra* note 1 (listing the schools involved in Varsity Blues); *Learn: Unique Learning Opportunities*, UNIV. S. CAL., https://admission.usc.edu/learn/unique-learning-opportunities/ [https://perma.cc/Y28C-BKS8] (emphasizing student access to study abroad programs, seminars, and fellowships); *Academics*, WAKE FOREST UNIV., https://admissions.wfu.edu/academics/ [https://perma.cc/9WCK-TLMG] (drawing attention to the university's numerous majors and minors, emphasis on taking a broad range of classes, and award-winning library); *Academic Life*, GEO. UNIV., https://www.georgetown.edu/academics/ [https://perma.cc/YP93-SFCV] (stressing the school's varying academic opportunities, small class sizes, and post-graduation employment and graduate school attendance rate).

[196] *See Carpenter*, 484 U.S. at 25–26 (highlighting the role of news matter in business); *Al Hedaithy*, 392 F.3d at 594 (indicating that the TOEFL provided ETS with a leg up in the standardized

business information under the mail and wire fraud statutes.[197] By fraudulently securing admission to elite schools and accessing universities' educational programs, the Varsity Blues defendants effectively deprived the schools of their intangible property rights in their private business information.[198]

Regarding the right to control private business information, there are two compelling reasons that courts should find that colleges and universities have an intangible property right in controlling access to their educational programs.[199] First, much like ETS required test takers to pay to take the TOEFL exam, confirm their identity, and take a photograph for identity verification purposes in *Al Hedaithy*, colleges and universities take steps to restrict who can access their educational programs.[200] Consider that most, if not all, American higher education institutes require students to submit an application, pay an application fee, write personal statements, and pay tuition in order to access its curated coursework, selection of professors, and degrees.[201] Moreover, many colleges and universities, including several of those involved in the Varsity Blues scandal, have students submit an application via the Common App.[202] Notably, just as ETS required TOEFL exam takers to show identification and certify their identity as a registered exam taker, students submitting a

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test industry); Podolsky, *supra* note 193 (detailing the role of academic programs in building a student body).

[197] *See supra* note 196 and accompanying text (comparing educational programs, the TOEFL, and news matter).

[198] *See* Press Release, U.S. Att'y's Off., *supra* note 1 (describing the activities of the Varsity Blues defendants); *supra* notes 190 and 192–197 (outlining the contours of private business information and arguing that educational programs qualify as private business information).

[199] *See Carpenter*, 484 U.S. at 26–27 (stating that exclusive use of private business information and other forms of property is critical); Finazzo v. United States, 850 F.3d 94, 111 (2d Cir. 2017) (asserting that deprivations of another's right to control through misstatements and omissions need only create potential financial harm); *Al Hedaithy*, 392 F.3d at 595 (deciding that defendants, by lying to get around ETS's access restrictions, deprived ETS of its right to control the TOEFL).

[200] *See Al Hedaithy*, 392 F.3d at 595 (describing the steps taken by ETS to "assiduously" cater and restrict people's access to the TOEFL); *infra* note 201 and accompanying text (describing steps taken by colleges to control access to their classes, professors, degrees, and other programs).

[201] *See* Farran Powell, Emma Kerr, & Sarah Wood, *What You Need to Know About College Tuition Costs*, U.S. NEWS (Sept. 17, 2021), https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs [https://perma.cc/GJU6-VKR2] (discussing tuition at American colleges and universities, and noting that although some schools do not charge tuition, work is typically expected in lieu of tuition at those institutions); Sarah Wood, *Colleges with the Highest Application Fees*, U.S. NEWS (Jan. 28, 2022), https://www.usnews.com/education/best-colleges/the-short-list-college/articles/colleges-with-the-highest-application-fees [https://perma.cc/P7VD-5NJX] (indicating that applying to college often requires an application, application fees, personal statements, and college entrance exams).

[202] *See* Press Release, U.S. Att'y's Off., *supra* note 1 (listing institutions implicated in Operation Varsity Blues); *Explore Colleges*, COMMON APP, https://www.commonapp.org/explore/ [https://perma.cc/R8Y5-Z43F] (indicating that Yale University, USC, Wake Forest University, and Stanford University all use the Common App for undergraduate applications); *About*, COMMON APP, https://www.commonapp.org/about [https://perma.cc/BZX7-DSNF] (describing how the Common App represents over nine hundred higher education institutions).

Common App must certify the accuracy of their application.[203] Thus, like in *Al Hedaithy*, the Varsity Blues defendants' misrepresentations regarding their children's credentials should be characterized as depriving the colleges and universities of their right to restrict access to their private business information.[204] Second, as required in the Second Circuit, misrepresenting information regarding an applicant to colleges and universities also carries a risk of indirect, actual financial harm.[205] Indeed, just as the Second Circuit found in 2017, in *Finazzo v. United States* that Aéropostale received lower quality merchandise on account of Finazzo's dishonesty, the colleges and universities implicated in Varsity Blues received students of lesser academic and athletic ability because of the defendants' deception.[206] The possible pecuniary impact of admitting lower quality students is particularly salient given the impact that admitted student criteria has on national college rankings and, in turn, school success.[207]

Alternatively, college admission should be deemed an intangible property right on the basis of *United States v. Frost*, in which the Sixth Circuit, in 1997, held that a university has a property interest in its unissued degrees in the context of honest services fraud.[208] By the Sixth Circuit's logic, each of the colleg-

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[203] *See Al Hedaithy*, 392 F.3d at 583 (detailing TOEFL exam access procedures on exam day); *Application Affirmations*, COMMON APP, https://www.commonapp.org/application-affirmations [https://perma.cc/F82Q-N5GQ] (describing how applicants must confirm several Common App affirmations as they apply, and noting that the affirmations serve as attestations of the applicant's truthfulness throughout the application).

[204] *See Al Hedaithy*, 392 F.3d at 594–95 (stating that defendants defrauded ETS of its right to control the TOEFL by giving ETS misleading information); Press Release, U.S. Att'y's Off., *supra* note 1 (overviewing how Varsity Blues parents misrepresented students' qualifications to schools).

[205] *See* Finazzo v. United States, 850 F.3d 94, 111 (2d Cir. 2017) (indicating when lies and omissions qualify as deprivations of another's right to control under the mail and wire fraud statutes); *infra* notes 206–207 and accompanying text (reasoning that sufficient pecuniary harm exists in the Varsity Blues cases to support a right to control mail or wire fraud theory under the Second Circuit doctrine).

[206] *See Finazzo*, 850 F.3d at 113–15 (identifying lower quality as one way in which Aéropostale suffered actual pecuniary damage); Press Release, U.S. Att'y's Off., *supra* note 1 (asserting that schools admitted students whose SAT and ACT scores were inauthentic and whose athletic abilities were other than advertised).

[207] *See* Kutner, *supra* note 193 (describing the impact of low and high U.S. News college rankings on school notability, student quality, alumni donations, and revenue); Robert Morse & Eric Brooks, *A More Detailed Look at the Ranking Factors*, U.S. NEWS (Sept. 12, 2021), https://www.usnews.com/education/best-colleges/articles/ranking-criteria-and-weights [https://perma.cc/J6VW-KL7A] (indicating that the U.S. News national college rankings consider the caliber of admitted students, among other things). Notably, 7% of a school's U.S. News ranking depends on student quality criteria, such as SAT and ACT scores and high school class percentile. Morse & Brooks, *supra*.

[208] *See* 125 F.3d 346, 367 (6th Cir. 1997) (providing that the university "ha[d] a property right in its unissued degrees"). Notably, *Frost*'s use in support of college admission's property status split the Boston federal judges who were overseeing Varsity Blues cases. *Compare* United States v. Khoury, No. 20-cr-10177, 2021 WL 2784835, at *2 n.1 (D. Mass. July 2, 2021) (relying on *Frost* in finding that college admission constitutes property), *and* United States v. Sidoo, 468 F. Supp. 3d 428, 441–42 (D. Mass. 2020) (invoking *Frost* in a decision holding that college admission is property), *appeal filed sub nom.* United States v. Chen, No. 22-01352 (1st Cir. May 9, 2022) (BL), *with* United States v.

es and universities defrauded of college admission by the Varsity Blues defendants is a business and the decision to award an admission spot to a student boils down to business considerations.[209] The number of students a college or university can admit annually is limited in much the same way the number of degrees a college or university can bestow annually is limited.[210] Moreover, admitting undeserving students arguably negatively affects a school's reputation and finances in the same manner awarding undeserving students with degrees does.[211]

Of course, arguments could be made that the Supreme Court's *Cleveland v. United States* and *Kelly v. United States* holdings in 2000 and 2020, respectively, weigh against recognizing college admission as property for mail and wire fraud purposes.[212] The thrust of these holdings—that governments do not have proprietary interests in regulatory decisions—is seemingly confined to government victims, though.[213] Most of the schools implicated in Varsity Blues, however, qualify as private institutions rather than public ones, and it is difficult to see how a private institution's college admission decision could be construed as regulatory-related rather than property-related or as stemming from sovereign power.[214]

Ernst, 502 F. Supp. 3d 637, 648–49 (D. Mass. 2020) (deciding that *Frost* was inapplicable in evaluating whether college admission was property because *Frost* was an honest services fraud case).

[209] *See Frost*, 125 F.3d at 367 ("Ultimately, a university is a business: in return for tuition money and scholarly effort, it agrees to provide an education and a degree. The number of degrees which a university may award is finite, and the decision to award a degree is in part a business decision.").

[210] *See id.* (characterizing college degrees as limited in number); *Top 100—Lowest Acceptance Rates*, U.S. NEWS, https://www.usnews.com/best-colleges/rankings/lowest-acceptance-rate [https://perma.cc/K9GL-888P] (noting that "the supply of open seats often does not meet the demand from applicants" and providing acceptance rates for many American colleges and universities).

[211] *See Frost*, 125 F.3d at 367 (describing the impact that presenting degrees to incompetent and undeserving students can have on universities).

[212] *See* Kelly v. United States, 140 S. Ct. 1565, 1572 (2020) (providing that "a scheme to alter such a regulatory choice is not one to appropriate the government's property"); Cleveland v. United States, 531 U.S. 12, 20 (2000) (holding that "§ 1341 does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not 'property' in the government regulator's hands"). In fact, at least one Varsity Blues defendant tried to compare college admission offers in school's hands to unissued licenses in regulator's hands in a debate over college admission's status as property. *See* United States v. Khoury, No. 20-cr-10177, 2021 WL 2784835, at *3 (D. Mass. July 2, 2021) (detailing defendant Khoury's unsuccessful assertion that *Cleveland* and *Kelly* render college admission spots regulatory interests rather than proprietary ones).

[213] *See Kelly* 140 S. Ct. at 1572 (holding that defrauding schemes aiming to change regulatory decisions do not deprive a governmental victim of an intangible property right); *Cleveland*, 531 U.S. at 20 (holding that government regulators do not have a property interest in unissued licenses).

[214] *See* Information, *supra* note 15, at 3 (identifying the schools involved in Singer's college admission scheme as private institutions). Indeed, even in *Frost*, where the university in question was a public institution, the court differentiated unissued degrees from unissued licenses because the university was acting as a business rather than a government entity. *See* 125 F.3d at 367 (contrasting unissued degrees from unissued licenses based on the differing characteristics and purposes of degrees). The Third Circuit's reasoning in *United States v. Al Hedaithy* is particularly compelling here. *See* 392

Additionally, although the Ninth Circuit's holding in 2021, in *United States v. Yates* implied that universities and colleges do not have an intangible property right to accurate information in college applications, *Yates* is not binding in the First Circuit where the Varsity Blues cases are ongoing.[215] Moreover, even if colleges and universities have no right to accurate information, they likely have intangible property rights in their private business information—their educational programs—and in their right to control said information under *Carpenter* and its progeny.[216]

CONCLUSION

Since the Supreme Court's 1987 decision in *McNally v. United States*, prosecutors and the Supreme Court have engaged in a continuous back-and-forth over the scope of the "money or property" element in the federal mail and wire fraud statutes. Although many justifiably speculate that the Supreme Court's trend toward a narrow conception of intangible property rights and recent 2020 decision in *Kelly v. United States* may spell disaster for Operation Varsity Blues, these concerns are likely overblown given the Supreme Court's 1987 holding in *Carpenter v. United States*. Moreover, cases in the Sixth, Third, and Second Circuits identifying or further delineating intangible property rights in unissued diplomas, standardized tests, and the right to control provide compelling arguments for prosecutors to use in fending off Varsity Blues appeals.

Ultimately, despite the thin line between intangible property rights and intangible rights, *Carpenter*'s holding that businesses have an intangible property interest in their private business information and its exclusive use should carry the day in the Varsity Blues cases. Specifically, courts should find that colleges and universities have private business information in the form of their unique educational programs and, in turn, hold that the Varsity Blues defendants defrauded them of this information and their right to control it.

BLAIR A. ROTERT

F.3d 580, 600 (3d Cir. 2004) (finding that *Cleveland* is not on point because ETS is a private business that offers a service to secure a profit and possesses no regulatory authority).

[215] *See* 16 F.4th 256, 265 (9th Cir. 2021) (rejecting the prosecution's right-to-accurate-information property theory); *Investigations of College Admissions and Testing Bribery Scheme*, *supra* note 11 (noting that the Varsity Blues defendants have been charged in the U.S. District of Massachusetts); *supra* note 190 and accompanying text (distinguishing binding and persuasive authority).

[216] *See* 484 U.S. 19, 25–26 (1987) (finding that a business's right to exclusively use its private business information qualifies as an intangible property right for the purposes of satisfying the mail and wire fraud statutes); *Yates*, 16 F.4th at 265 (recognizing a property right in private business information as sufficient); *supra* notes 189–207 and accompanying text (using case law to argue that college admission is property under *Carpenter*, *Finazzo*, and *Al Hedaithy*).