No. 21-1421

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM MCGLASHAN, JR.,

Appellant.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:19-cr-10080-NMG-15
Honorable Nathaniel M. Gorton

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Miscellaneous

REASONS ORAL ARGUMENT SHOULD BE HEARD

This appeal warrants oral argument because it presents important issues regarding the scope of two widely used criminal laws, the federal wire fraud and honest services fraud statutes. These issues involve significant questions of statutory interpretation and constitutional law. Furthermore, given that Appellant's challenges relate to the validity of his conviction, the interests of justice favor giving Appellant an opportunity to demonstrate at oral argument that his conviction was unlawful.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291 over Appellant's timely appeal from the judgment entered by the U.S. District Court for the District of Massachusetts on May 22, 2021, JA144-151, which is a "final decision[]" of that court.

ISSUES PRESENTED

1. Whether ACT scores constitute "property" for purposes of the federal wire fraud statute, 18 U.S.C. § 1343.

2. Whether the indictment adequately alleges a "scheme or artifice ... for obtaining" ACT test materials.

3. Whether the indictment adequately alleges a relationship between ACT, Inc. and test administrators that is cognizable under the honest services fraud statute, 18 U.S.C. § 1346.

INTRODUCTION

Appellant William McGlashan, Jr. was indicted in connection with Operation Varsity Blues, the investigation into the college-admissions scheme conceived and orchestrated by Rick Singer. The operative indictment alleged that Appellant paid Singer $50,000 to arrange for a test proctor to secretly correct his son's answers on the ACT college-entrance exam. On this basis, the indictment charged Appellant under 18 U.S.C. § 1343, the wire fraud statute, with a scheme to defraud ACT, Inc. of test scores, standardized tests, and the honest services of exam administrators. After moving unsuccessfully to dismiss the indictment, Appellant agreed to conditionally plead guilty to this charge insofar as it pertained to cheating on the ACT; Appellant did not plead guilty to the other aspect of Singer's scheme, which involved bribing university officials to obtain admission offers. Appellant's conditional plea preserved his right to appeal the denial of his motion to dismiss on the grounds set forth in this brief.

The indictment should have been dismissed for three reasons. *First*, test scores do not constitute property for purposes of wire fraud. The Supreme Court has held that § 1343 "is limited in scope to the protection of

property rights," *McNally v. United States*, 483 U.S. 350, 360 (1987), and that the property rights it protects are only those that "ha[ve] long been recognized as property," *Cleveland v. United States*, 531 U.S. 12, 23 (2000). Test scores do not satisfy this standard. Neither the government nor district court has identified any authority that test scores or anything comparable fall within "traditional concepts of property." *Id.* at 24.

In nevertheless holding that test scores are the physical and intellectual property of ACT, the district court misconstrued the indictment, mischaracterized test scores, and adopted a theory of property with startling implications. The district court first erred in concluding that test scores are confidential business information. It is well established that information constitutes confidential business information only if it is communicated under strict conditions of confidentiality and derives its value from being confidential. Test scores fail both criteria; their entire value depends on being shared with admissions officers. The district court likewise erred in treating test scores as physical property because the indictment never alleged scores were anything other than information—something this Court has recognized is purely intangible. *See United States v. Czubinski*, 106 F.3d 1069, 1074 (1st Cir. 1997).

The alarming consequences of the district court's conclusion confirm its error. If test scores are property, then much academic dishonesty is a federal crime. Any student in any setting who cheats on any test or assignment using the Internet, email, Zoom, or text messaging has committed wire fraud. In an age of remote learning, such an expansion of § 1343 imperils federalism and due process—core constitutional values that have long cabined the statute's reach. This expansion invades education, an area "traditionally regulated by state and local authorities," by converting federal prosecutors into academic disciplinarians. *Cleveland*, 531 U.S. at 24. It produces the potential for arbitrary and discriminatory enforcement by making countless individuals into criminals. And it creates grave fair notice problems, as the question of when information is property is highly unsettled. Properly applying the "traditional concepts of property," as *Cleveland* requires, avoids these results.

Second, the government's alternative theory of wire fraud—that Appellant obtained standardized tests—also fails as a matter of law. As the Supreme Court recently held, property forms the basis of a wire fraud charge only if it is the "object of the fraud"; property incidentally obtained as "implementation costs" of a fraud cannot sustain a charge. *Kelly v.*

United States, 140 S. Ct. 1565, 1573-74 (2020). Here, Appellant's "object" plainly was the test score, which the indictment acknowledges was essential to the fraud's purpose of securing admission to a selective college. The test itself was "just the implementation cost[]" of the scheme. *Id.* at 1574. The district court erred by ignoring this distinction.

In doing so, the district court again approved a construction of § 1343 with disturbing reach. Treating tests as the object of cheating schemes creates many of the same alarming consequences as treating test scores as property. Furthermore, lying happens all the time, and many everyday lies, from practical jokes to fibs in online dating profiles, result in incidental losses of property that would give rise to criminal liability under the district court's interpretation. This Court should not construe § 1343 to turn commonplace conduct of otherwise law-abiding citizens into federal crimes.

Third, the indictment fails to allege a fiduciary relationship cognizable under 18 U.S.C. § 1346, the honest services statute. The Supreme Court has held that to avoid vagueness concerns, § 1346 must be limited to the "core ... applications" of the honest services doctrine before 1987, when the Supreme Court temporarily declared the doctrine invalid.

Skilling v. United States, 561 U.S. 358, 408 (2010). Here, the honest services theory depends on an alleged fiduciary relationship between ACT, Inc. and its test administrator that arose informally, from the nature and circumstances of their interactions, rather than as a matter of law based on their formal roles. Such informal fiduciary relationships, however, are outside the pre-1987 core applications that define § 1346's scope.

In trying to exceed these limits, the government again creates grave constitutional and practical concerns. Because the legal standards for finding informal fiduciary relationships are unsettled, vary across states, and raise complex questions about the relationship between state and federal law that even courts cannot agree on, parties in ostensibly arm's-length business relationships could not know in advance if their actions were within § 1346's reach. As a result, such common commercial practices as commissions and sales incentives could give rise to criminal liability if viewed, in hindsight, as bribes or kickbacks. This Court should not expand § 1346 in ways that deny individuals fair notice and unsettle standard commercial relationships traditionally regulated by state law.

The issue in this case is not whether the conduct alleged in the indictment is unethical. It is. And Appellant has accepted responsibility,

expressed remorse, and is serving a full term of imprisonment for his role. But not every act of "deception" or "corruption" is a federal crime. *Kelly*, 140 S. Ct. at 1568. Repeatedly, the Supreme Court has emphasized that the federal wire fraud statute, 18 U.S.C. § 1343, should not be stretched to effect "a sweeping expansion of federal criminal jurisdiction." *Kelly*, 140 S. Ct. at 1574. More broadly, the Court has consistently rejected interpretations of criminal laws that would "attach criminal penalties to a breathtaking amount of commonplace ... activity." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021); *see also Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018); *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016); *Yates v. United States*, 574 U.S. 528, 540 (2015). Yet, despite the Court's clear warnings, in case after case, the government continues to overreach. Because the government's theories here do just that, this Court should reverse.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The federal wire fraud statute makes it a crime to use interstate wires to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Federal prosecutors have long

celebrated the statute's reach. During his time as a prosecutor, now-Judge Jed Rakoff described the wire fraud statute and its companion mail fraud statute as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our one true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980). Other observers have described the statutes' ubiquity less approvingly. As two prominent scholars have written, the statutes "have long provided prosecutors with a means by which to salvage a modest, but dubious, victory from investigations that essentially proved unfruitful." John C. Coffee & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in White Collar Crime: Business and Regulatory Offenses § 9.05 (Otto Obermaier & Robert Morvillo eds., 2021); *id.* § 9.01 (repeating a "well-known maxim of federal prosecutors": "[w]hen in doubt, charge mail fraud").

In a series of decisions in recent decades, the Supreme Court has made clear that it does not share the government's view of the statutes as all-purpose tools. The Court has repeatedly rejected government efforts to construe these laws in ways that would massively expand federal criminal jurisdiction, recognizing that the government's interpretations

threaten core constitutional values of due process and federalism. To protect those values, the Court has recognized important limits on the statutes' reach.

First, in *McNally*, the Court rejected the unanimous view of the regional courts of appeals and held that the mail fraud statute is "limited in scope to the protection of property rights," and does not reach schemes to defraud citizens of their intangible right to public officials' honest services, as the government contended.[1] 483 U.S. at 355, 358, 360. As the Court explained, the government's interpretation contravened the normal lenity principle that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60 (citing *United States v. Bass*, 404 U.S. 336, 347 (1971)). The government's interpretation also would have left the statute's "outer boundaries ambiguous and involve[d] the Federal Government in setting

[1] *McNally* involved convictions under the mail fraud statute, 18 U.S.C. § 1341. *McNally*, 483 U.S. at 352. The Supreme Court subsequently explained that because the mail and wire fraud statutes use identical language to define their scope, the same analysis applies to both. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

standards of disclosure and good government for state and local officials." *Id.* at 360.

Second, in *Cleveland*, the Court held that state licenses to run video poker machines are not "property" for purposes of mail and wire fraud. 531 U.S. at 26-27. Describing the state's interests in the licenses as regulatory, the Court explained that such interests do not constitute "property" because they had not "long been recognized as property" and "stray[ed] from traditional concepts of property." *Id.* at 23-24. The Court also rejected the government's theory of property because it would effect "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating 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." *Id.* at 24. Finally, the Court observed that "to the extent that the word 'property' is ambiguous as placed in § 1341, we have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 25 (internal quotation marks omitted). Indeed, the Court stressed that the rule of lenity "is especially appropriate in construing § 1341" because of the statute's severe consequences.

Id.; *see* 18 U.S.C. §§ 1341, 1343 (providing for up to 20 years' imprisonment for mail and wire fraud violations).

Third, in *Skilling*, the Court rejected the government's expansive interpretation of honest services fraud under 18 U.S.C. § 1346, the provision Congress passed after *McNally* to reinstate the honest services doctrine. *See* Pub. L. No. 100-690, tit. VII, § 7603(a), 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346). The Court held that reading § 1346 to criminalize undisclosed conflicts of interest, as the government did, would "raise the due process concerns underlying the vagueness doctrine." *Skilling*, 561 U.S. at 408. In addition, the Court again invoked the "familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* at 410 (quoting *Cleveland*, 531 U.S. at 25). Ultimately, "[t]o preserve the statute without transgressing constitutional limitations," the Court "confin[ed] its scope to the core pre-*McNally* applications" of the honest services doctrine and held that "§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 408-09.

Finally, in *Kelly*, the Court rejected the government's attempt to "end-run *Cleveland*" by treating the "incidental costs" of wrongfully

exercising governmental power as property for mail and wire fraud purposes. 140 S. Ct. at 1574. The Court held that when property represents a mere "incidental byproduct" or "implementation cost[]" of a fraud, rather than the "object of the fraud," it cannot form the basis of a mail or wire fraud charge. *Id.* at 1573-74. Again grounding its decision in federalism concerns, the Court explained that the government's view would result in the same "sweeping expansion of federal criminal jurisdiction" that *Cleveland* repudiated. *Id.* at 1574.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant, a former investment firm executive, is one of 50 individuals charged in connection with a scheme conceived and orchestrated by Rick Singer to secure admissions to selective universities for clients' children by cheating on standardized tests and, in some cases, bribing university officials. On February 10, 2021, Appellant pleaded guilty to Count Seven of the Fourth Superseding Indictment (the "Indictment"), insofar as it alleged a scheme to defraud ACT, Inc. of standardized tests, test scores, and the honest services of test administrators. As part of his conditional plea—the only conditional plea the government has agreed to in this case—Appellant retained the right to appeal the denial of his motion

to dismiss Count Seven on several issues. Those issues are the subject of this appeal.

As relevant here, the Indictment alleged that Appellant schemed with Singer to obtain a high ACT score for Appellant's son by cheating. Specifically, "[i]n or about the fall of 2017, McGLASHAN agreed to pay Singer $50,000 to arrange for [Mark] Riddell to purport to proctor his son's ACT exam and secretly correct his son's answers." JA28 ¶ 182. Appellant's "principal purpose[]" was to "secur[e] the admission of [his son] to selective colleges using fraudulently obtained test scores." JA10 ¶ 65. As the Indictment explains, "[m]ost selective colleges and universities in the United States require prospective students to submit standardized test scores—typically, either the ACT or the SAT—as part of their application packages," and those scores "are a material part of the admissions process." JA6 ¶ 45.

The alleged scheme worked as follows: Appellant first arranged for his son to take the exam over two days at a Los Angeles testing center run by Igor Dvorskiy, a "compensated standardized test administrator for ACT, Inc." JA5 ¶ 32; JA28 ¶ 183; JA29 ¶ 185. According to the Indictment, "ACT ... administrators are agents of ACT ... and owe a duty of

honest services to [ACT]." JA7 ¶ 49. "Prior to administering the ACT, test administrators must typically certify that they will administer the test in accordance with the ACT Administration Manual, and that they will ensure that the 'test materials are kept secure and confidential, used for this examinee only, and returned to ACT immediately after testing.'" JA7 ¶ 50.

After making these arrangements, Appellant made a purported donation of $50,000 to a charity run by Singer. JA29 ¶ 189. Three days later, Appellant's son took the ACT exam. JA30 ¶ 191. The exam was proctored by Riddell, who flew in from Florida for the test. *Id.* ¶¶ 190-191. After Appellant's son completed the exam, and without his knowledge, Riddell corrected some of his answers. *Id.* ¶ 191. Dvorskiy then sent the exam back to ACT, Inc. in Iowa, falsely stating that the exam had been administered over two days. *Id.* ¶¶ 191, 194. Shortly thereafter, Singer paid Dvorskiy and Riddell for their roles. *Id.* ¶¶ 195-96.

Appellant's son received his ACT score in January 2018. *Id.* ¶ 197. According to the Indictment, ACT made the score available "online." *Id.* Later that year, as part of his college applications, Appellant's son submitted the score "to various colleges and universities, including

Northeastern University, in Boston, Massachusetts, via wire communication in interstate commerce."[2] JA31 ¶ 200.

The government ultimately charged Appellant with one count each of conspiracy to commit mail and wire fraud, conspiracy to commit federal programs bribery, money laundering conspiracy, and wire fraud (including honest services wire fraud). JA60 ¶ 370; JA62 ¶ 372; JA63 ¶ 374; JA65 ¶ 376. The wire fraud count, Count Seven of the Indictment, charged Appellant with "having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property, to wit, ACT ... tests and test scores" and to "defraud and deprive ... ACT, Inc. ... of [its] right to the honest and faithful services of [its] test administrators." JA65 ¶ 376. The Indictment alleged that "ACT ... tests, and the scores students earn on those tests, are the intellectual and physical property of ACT, Inc." JA7 ¶ 54.

Together with other defendants, Appellant filed several motions to dismiss the Indictment. As to Count Seven, Appellant contended that

[2] The Indictment also included allegations related to Singer's scheme to bribe university officials, *see* JA31 ¶ 201 through JA33 ¶ 209, but the Government did not pursue them as part of Appellant's conditional plea. Thus, those allegations are completely irrelevant to this appeal.

each purported object of the alleged fraud—test scores, standardized tests, and honest services—fails as a matter of law. D. Mass. Dkt. 1022 at 1. Test scores fail because they are not a traditional property interest and therefore fall outside the scope of the wire fraud statute. *Id.* at 2. Standardized tests fail because the Indictment alleges a scheme with the object of obtaining test scores, not physical tests. *Id.* at 3. And the honest services theory fails because the Indictment does not allege that Dvorskiy owed ACT the "requisite fiduciary duty" under the honest services statute, which precludes the "expansive definition of fiduciary relationships" relied on by the government. *Id.* at 4; *see also* D. Mass. Dkt. 1232 at 10-12.

On June 23, 2020, without oral argument, the district court denied Appellant's motion to dismiss. JA78-110.[3] The district court first concluded that "ACT and SAT examinations and score reports are cognizable property" based on the Third Circuit's decision in *United States v. Hedaithy*, 392 F.3d 580 (2004). JA97-98. The district court found *Hedaithy*'s reasoning "apposite to this case," including as to whether test scores are property, even though the Indictment here never alleged that

[3] The decision was reported at 468 F. Supp. 3d 428.

ACT, Inc. issued physical score reports. JA98. The court also did not address Appellant's argument that, as a matter of law, the ACT exam itself was not the object of the alleged fraud.

As to the government's honest services fraud theory, the district court concluded that "a fiduciary duty may ... arise under certain circumstances in the context of an independent contractor relationship" like that between Dvorskiy and ACT, Inc. JA100. The court based this conclusion on Second and Ninth Circuit decisions holding that 18 U.S.C. § 1346, the honest services fraud statute, reaches informal fiduciaries (i.e., relationships whose fiduciary character arises from the nature of the parties' interactions) as well as formal fiduciaries (i.e., relationships whose fiduciary character is inherent in the parties' roles). JA100.

Following the district court's decision, Appellant and the government reached a conditional plea agreement. JA111-118. Appellant agreed to plead guilty to Count Seven of the Indictment, the substantive wire fraud count, insofar as it alleged a scheme to cheat on the ACT. JA111. The agreement preserved Appellant's right to appeal the denial of his motion to dismiss:

> to the extent that the motion argued as follows: first, that test scores cannot, as a matter of law,

> constitute property for purposes of the mail or wire fraud statutes, and that, to the extent that standardized tests might be considered property under the mail or wire fraud statutes, the indictment did not adequately allege facts establishing a scheme to fraudulently obtain standardized tests in this case; and second, that the indictment did not adequately allege facts establishing that test administrators owed a fiduciary duty to testing companies .... Defendant will have the right to withdraw his guilty plea should Defendant prevail on appeal.

JA111-112.

The district court accepted Appellant's conditional guilty plea and sentenced him to three months' imprisonment and two years' supervised release. JA119-143; JA145-146. Appellant timely appealed. JA152.[4]

SUMMARY OF ARGUMENT

The district court erred in denying Appellant's motion to dismiss the Indictment's wire fraud charge for three reasons.

I. The Indictment fails to allege wire fraud based on the ACT scores because the wire fraud statute prohibits only schemes to obtain "money or property," and ACT scores are neither. The Supreme Court has held that the wire fraud statute protects only interests that "ha[ve] long

[4] Appellant is serving his sentence at USP Tucson in Tucson, Arizona, from June 2 to August 31, 2021. Appellant's Mot. for Extension, Phillips Decl. ¶ 3.

been recognized as property." *Cleveland*, 531 U.S. at 23; *accord United States v. Berroa*, 856 F.3d 141, 149 (1st Cir. 2017) (recognizing that *Cleveland* rejected the government's theory of property because it "stray[ed] from traditional concepts of property" (quoting *Cleveland*, 531 U.S. at 24) (alteration in original)). Test scores do not meet this standard. Indeed, despite alleging that test scores "are the intellectual and physical property of ACT, Inc.," JA7 ¶ 54, the government has never identified a single historical source supporting this view.

First, test scores are not intellectual property. The district court's suggestion that test scores represent confidential business information is wrong. Confidential business information comprises only information that is communicated under conditions of strict confidentiality and that derives independent economic value from being kept confidential. Test scores satisfy neither criterion. Indeed, whatever value scores have depends entirely on their being *shared*.

Second, in and of themselves, test scores plainly are not physical property. The district court reached the opposite conclusion only by treating intangible test scores the same as physical score reports, even though the Indictment alleges that Appellant obtained only the former. JA98; *see*

JA30 ¶ 197; JA31 ¶ 200 (alleging that Appellant's son received his ACT score "online" and submitted it to colleges via "wire communication"). This error allowed the district court to rely on *Hedaithy*, which had affirmed mail fraud convictions in a cheating scheme by focusing on the technicality that physical score reports were involved and thus finding that the fraud involved "tangible items." 392 F.3d at 597. In fact, *Hedaithy* provides no support for the notion that test scores, as such, are property.

The government's theory that test scores are property also threatens the very principles of federalism and due process that the Supreme Court has long recognized cabin the wire fraud statute's reach. Under the government's theory, *any* student in *any* setting who cheats on *any* assignment has committed wire fraud if their conduct involves the internet, email, or any other use of wires. This "would attach criminal penalties to a breathtaking amount of commonplace ... activity," *Van Buren*, 141 S. Ct. at 1661—particularly in an age of remote learning. As a matter of due process, such fallout invites arbitrary and discriminatory enforcement and poses severe fair notice problems regarding what information qualifies as property. And as a matter of federalism, criminalizing academic

dishonesty would invade an area "traditionally regulated by state and local authorities" and "'significantly change[] the federal-state balance' in the prosecution of crimes." *Cleveland*, 531 U.S. at 24-25 (quoting *Jones v. United States*, 524 U.S. 848, 858 (2000)). These constitutional concerns confirm that, under § 1343, test scores are not property.

II. The government's alternative property theory—that Appellant defrauded ACT, Inc. of the ACT exam itself—is also fatally flawed. In *Kelly*, the Supreme Court held that property can form the basis of a wire fraud charge only if it is the "object" of the scheme, and not if it is merely an "implementation cost[]." 140 S. Ct. at 1573-74. Here, however, the Indictment makes clear that any deprivation of the exam suffered by ACT, Inc. was just an "implementation cost[]" of the alleged fraud, rather than its "object." Indeed, *Kelly* holds that this is true even though access to the ACT test was a "foreseen" and "needed" step to obtain the test scores. *Id.* at 1574.

The district court failed to address this argument and, in doing so, again ignored an important limit on § 1343's reach. As the Supreme Court has recognized, the distinction between "objects" and "implementation costs" under the wire fraud statute avoids converting

commonplace behavior into criminal activity. *Kelly*, 140 S. Ct. at 1573 n.2. Without this distinction, a run-of-the-mill online fib to secure a date could constitute wire fraud if the deceived party pays for cab fare or dinner. The government's theory contains no limiting principle to prevent this absurd outcome.

III. Finally, the Indictment should be dismissed because it does not allege a fiduciary relationship giving rise to "the intangible right of honest services." 18 U.S.C. § 1346. In *Skilling*, the Supreme Court limited § 1346 to "the core pre-*McNally* applications" of the honest services doctrine, which consisted of "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." 561 U.S. at 407-08. The Court explained that any broader construction "would raise the due process concerns underlying the vagueness doctrine." *Id.* at 408.

Skilling's limiting construction of § 1346 is fatal to the government's theory in this case. The government's honest services theory rests on an alleged informal fiduciary relationship between ACT, Inc. and Dvorskiy, its test administrator, that supposedly arose from the nature of their interactions. Informal fiduciary relationships, however, fall outside the pre-*McNally* core of honest services cases. Rather, the "core pre-

McNally applications" of the honest services doctrine involved formal fiduciary relationships, such as "public official-public," "employee-employer," and "union official-union members," where the fiduciary character of the relationship was "beyond dispute." *Id.* at 408 n.41. Accordingly, informal fiduciary relationships do not give rise to liability under § 1346.

Moreover, stretching § 1346 to cover informal fiduciary relationships threatens due process. Standards for finding informal fiduciary relationships are legally unsettled, vary across jurisdictions, and generally are highly indeterminate. Thus, under the government's view, to ascertain whether they are within the scope of § 1346, parties in ostensibly arm's-length business relationships would have to disentangle a thicket of legal questions that even courts cannot settle. And woe betide parties who get this determination wrong. Under the government's theory, all sorts of routine commercial arrangements, such as commissions and rebates, could be characterized as bribes or kickbacks and give rise to federal criminal liability if a jury decides, in hindsight, that a relationship took on a fiduciary nature. Such a "nebulous standard[]," indiscernible to "people of ordinary intelligence," poses a plain fair notice problem and

should be rejected. *United States v. McGeehan*, 584 F.3d 560, 569 (3d Cir. 2009), *vacated on other grounds*, 625 F.3d 159 (3d Cir. 2010).

STANDARD OF REVIEW

"Questions of statutory interpretation are reviewed de novo." *N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38, 54 (1st Cir. 2021). Whether an indictment adequately alleges a federal crime is a question of law that is likewise reviewed de novo. *United States v. Brissette*, 919 F.3d 670, 676 (1st Cir. 2019); *accord United States v. Stringer*, 730 F.3d 120, 123 (2d Cir. 2013).

ARGUMENT

I. ACT SCORES ARE NOT "MONEY OR PROPERTY."

The mail and wire fraud statutes prohibit use of the mail and interstate wires, respectively, in furtherance of any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. §§ 1341, 1343. In enacting these statutes, Congress was concerned with combating "classic frauds," in which "money or property are taken from a victim by means of deceit." Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, 5-6 (1998). Over the years, however, the government has used these statutes ever more inventively, "so as to cover all actions which might offend the

Government's sense of personal propriety." *United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976). In response, time and again, courts have had to reject exotic applications of the mail and wire fraud statutes, "lest [they] embrace every kind of legal or ethical abuse." *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008). As the Supreme Court recently emphasized, these statutes simply "do not criminalize all ... conduct" involving "deception, corruption, [and] abuse of power." *Kelly*, 140 S. Ct. at 1568.

Despite these warnings, the government in this case seeks to expand the wire fraud statute into a veritable academic honor code. In contending that test scores are "property" under § 1343, it advances a theory that would make much academic dishonesty a federal felony. The premise of the government's theory, however, is wrong. The Supreme Court has held that, under the wire fraud statute, the term "property" covers only "interest[s] that 'ha[ve] long been recognized as property.'" *Cleveland*, 531 U.S. at 23 (quoting *Carpenter*, 484 U.S. at 26). Because test scores are not such an interest, a scheme to obtain them provides no basis for a property-based wire fraud charge.

A. Under the Wire Fraud Statute, "Property" Includes Only Interests Traditionally Recognized as Property.

The basic error in the government's theory that test scores are property is that it construes the term "property" in § 1343 too broadly. In *Carpenter* and later *Cleveland*, the Supreme Court made clear that the property rights protected by the wire fraud statute are limited to "interest[s] that 'ha[ve] long been recognized as property.'" *Cleveland*, 531 U.S. at 23 (quoting *Carpenter*, 484 U.S. at 26). The Court explained that this limitation was necessary to avoid both "a sweeping expansion of federal criminal jurisdiction" and ambiguity in the statute's scope. *Id.* at 24-25. Thus, to allege wire fraud properly, the government must identify an object of the scheme that is property under "traditional concepts of property," *id.* at 24; that something might be considered "property" according to more modern conceptions does not suffice.

The Supreme Court's decisions interpreting the mail and wire fraud statutes track this rule. In *Carpenter*, citing cases dating back to 1905, the Court recognized confidential business information as a form of property because it "has long been recognized as property." 484 U.S. at 26. In *Cleveland*, the Court held that state licenses to operate video poker machines "do not qualify as 'property'" under the mail fraud statute because

"the Government's theories of property rights ... stray from traditional concepts of property." 531 U.S. at 24. And in *Pasquantino v. United States*, the Court explained that "[t]he right to be paid money has long been thought to be a species of property," and cited Blackstone and Kent to conclude that Canada's right to excise taxes constituted "property." 544 U.S. 349, 356 (2005).

Multiple courts of appeals have recognized the same limit on the statutes' scope. This Court, for example, has explained that *Cleveland* rested, in part, "on the fact that the government's theory of prosecution 'stray[ed] from traditional concepts of property.'" *Berroa*, 856 F.3d at 149 (alteration in original) (quoting *Cleveland*, 531 U.S. at 24). The Third, Sixth, and D.C. Circuits have adopted the same view. *See United States v. DeFries*, 43 F.3d 707, 709 (D.C. Cir. 1995) (explaining that the mail fraud statute reaches only "property right[s], traditionally considered"); *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994) ("[T]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right."); *United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988) (recognizing that the mail and wire fraud statutes do

not reach "claims which did not involve a direct intention to deprive another of a recognized and traditional property right").

Despite these precedents, the district court held that the term "property" is to be "construed in accordance with its ordinary meaning: something of value in the possession of the property holder." JA91 (quoting *United States v. Blaszczak*, 947 F.3d 17, 31 (2d Cir. 2019)). The court based this construction on *Pasquantino*, which approvingly cited the Black's Law Dictionary definition of property as "extend[ing] to every species of valuable right and interest." *Pasquantino*, 544 U.S. at 356 (quoting Black's Law Dictionary 1382 (4th ed. 1951)). That portion of *Pasquantino*, however, is dicta; as noted above, the interest at issue in that case—Canada's entitlement to collect money—was "long ... thought to be a species of property," including by Blackstone and Kent, and therefore fit the rule laid down in *Cleveland*. *Id.*; *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) (distinguishing an opinion's result and "those portions of the opinion necessary to that result," which have precedential effect, from statements in dicta, which do not). In *Cleveland*, by contrast, the fact that "the Government's theories of property rights ... stray[ed] from traditional concepts of property" was essential to the

Court's holding that video poker licenses are not property for purposes of wire fraud. *Cleveland*, 531 U.S. at 24-25. The court below therefore erred in adopting *Pasquantino*'s statement without even acknowledging *Cleveland*'s holding.

The district court's discussion of this Court's precedents compounded its error. The district court cited three First Circuit cases stating that, under the wire fraud statute, "property" covers a wide variety of interests and should be interpreted broadly. JA92 (citing *United States v. Rosen*, 130 F.3d 5, 9 (1st Cir. 1997); *United States v. Dray*, 901 F.2d 1132, 1142 (1st Cir. 1990); and *United States v. Ochs*, 842 F.2d 515, 522 (1st Cir. 1988)). Those decisions, however, all predate *Cleveland*. Moreover, they in no way contradict it. Factually, *Rosen* and *Dray* both involved schemes to deprive victims of cash, and *Ochs* was an honest services case that discussed property only in passing. *Rosen*, 130 F.3d at 8; *Dray*, 901 F.2d at 1142; *Ochs*, 842 F.2d at 522. And as a legal matter, "traditional concepts of property" embrace a wide variety of interests, as cases such as *Carpenter* and *Pasquantino* demonstrate. The choice, then, is not between broad and narrow constructions of property, but between broad and nearly limitless ones. As this Court recognized in *Berroa*—a case the

district court failed to discuss—*Cleveland* requires hewing to the broad but more clearly defined set of "traditional concepts of property." *Berroa*, 856 F.3d at 149 (quoting *Cleveland*, 531 U.S. at 24).

B. Standardized Test Scores Have Not Long Been Recognized as Property and Do Not Fall Within Any Traditional Concept of Property.

The Supreme Court's recognition that the wire fraud statute protects only interests long recognized as property is fatal to the government's view of test scores. Neither the government nor the district court has identified a single historical source suggesting that ACT scores, test scores generally, or other comparable pieces of information have traditionally been understood as property. Nevertheless, relying principally on *Hedaithy*, the district court held that ACT scores are "cognizable property" because "ACT ... scores, and by logical extension the score reports, are the intellectual and physical property of the testing companies." JA98. This conclusion, however, misstates the allegations in the Indictment, misconstrues the decision on which it relies, and ultimately misclassifies test scores. Because test scores do not fall within any "recognized and traditional property right," *Baldinger*, 838 F.2d at 179, they cannot sustain a wire fraud charge.

1. Test Scores Are Not Intellectual Property.

To begin with, the district court erred in classifying test scores as intellectual property. Although the court's opinion did not specify what form of intellectual property test scores represent, it appears to have regarded them as confidential business information, JA97-98, which *Carpenter* recognized as property for wire fraud purposes, *see* 484 U.S. at 26.[5] But the district court's conclusion was wrong. Confidential business information does not comprise all information a company generates. Rather, it includes only information that meets certain criteria. And test scores fail to meet these criteria for at least two independent reasons.

First, test scores are not communicated under any condition of continued confidentiality. As the Supreme Court recognized in *Ruckelshaus v. Monsanto Co.*—a case on which *Carpenter* relied, 484 U.S. at 26—

[5] Intellectual property also comprises patents, trademarks, and copyrights, but the government has never suggested that test scores fall into any of those categories, and they plainly do not. *See* 35 U.S.C. § 101 (defining patentable matter as "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof"); 15 U.S.C. § 1127 (defining "trademark" to include "any word, name, symbol, or device, or any combination thereof," used to "identify and distinguish" "goods or services"); 17 U.S.C. § 102 ("Copyright subsists in original works of authorship fixed in any tangible medium of expression ....").

"[b]ecause of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others."[6] 457 U.S. 986, 1002 (1984). Thus, "[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, his property right is extinguished." *Id.*; *accord* Restatement (First) of Torts § 757 cmt. b (1939) (explaining that because "[t]he subject matter of a trade secret must be secret," a trade secret may be communicated to others only if they are "pledged to secrecy"). Test scores do not satisfy this condition. There is no requirement that students keep them confidential; to the contrary, they are meant to be shared. On this basis alone, test scores do not qualify as confidential business information.

[6] As *Carpenter*'s reliance on *Ruckelshaus* demonstrates, courts often use the terms "trade secret" and "confidential business information" interchangeably, and Massachusetts courts have described them as "essentially identical concepts." *United Rug Auctioneers, Inc. v. Arsalen*, No. CA03-0347, 2003 WL 21527545, at *6 (Mass. Super. Ct. Apr. 11, 2003); *see also Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 165, 385 N.E.2d 1349, 1354 (1972) ("The essence of an action for the wrongful use of trade secrets is the breach of the duty not to disclose or to use without permission confidential information acquired from another.").

Second, test scores do not "derive[] independent economic value ... from not being generally known," another essential attribute of confidential business information and trade secrets. 18 U.S.C. § 1839(3)(B); *see generally* 1 Milgrim on Trade Secrets § 1.07A (2021). Indeed, the opposite is true: whatever value test scores have derives from being made known to others. In addition, test scores do not have "independent economic value" for ACT in the relevant sense of conferring on ACT "a competitive advantage." 1 Milgrim on Trade Secrets § 1.07A; *see Atl. Wool Combing Co. v. Norfolk Mills, Inc.*, 357 F.2d 866, 869-70 (1st Cir. 1966). Obtaining ACT's test scores would in no way help ACT's competitors because the scores, as such, are meaningless without ACT's underlying proprietary testing and scoring processes.

Hedaithy itself supports the conclusion that test scores are not confidential business information. There, in affirming mail fraud convictions arising from a scheme to cheat on the Test of English as a Foreign Language (TOEFL) exam, the Third Circuit closely analyzed whether the TOEFL exam itself was confidential business information and concluded that it was. *Hedaithy*, 392 F.3d at 594-95. Yet in determining whether the TOEFL *score reports* were property, the court never suggested that

they may be confidential business information, and instead relied entirely on the fact that they were tangible property. *See id.* at 596-601. *Hedaithy*'s silence on this point is telling. Test scores fail to meet basic criteria for being considered confidential business information, and the court below therefore erred in treating them as such. Although Appellant's actions to obtain higher ACT scores for his son were unethical, they did not deprive ACT of property and therefore did not constitute wire fraud.

2. Test Scores Are Not Physical Property.

Test scores also are not physical property because they have no "physical form and characteristics." *Tangible Property*, Black's Law Dictionary (11th ed. 2019). Rather, test scores are information, and information is "an abstract concept, lacking corporeal, physical, or palpable qualities." *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 179 (Tex. 1994). Thus, this Court has recognized that "confidential information may constitute *intangible* 'property.'" *Czubinski*, 106 F.3d at 1074 (emphasis added).

The district court nevertheless classified test scores as physical property by assuming that the scores were recorded and transmitted by

ACT in physical "score reports." JA98. But the Indictment provides no basis for this assumption. As relevant here, it repeatedly defines the object of Appellant's actions as obtaining higher test scores, *see* JA10 ¶ 65; JA11 ¶ 66(h); JA65 ¶ 376, and never once alleges that Appellant sought or obtained physical score reports. *Cf.* JA32 ¶ 205 (quoting email from Singer to Appellant requesting a "pdf of test scores," not a physical score report). Nor, in the digital age, is there any reason to assume that Appellant obtained a physical score report or that such a report, if it existed, was anything more than an incidental record. *Cf. Kelly*, 140 S. Ct. at 1572-74 (holding that to support a wire fraud charge, property must be an "object of the fraud" rather than "an incidental (even if foreseen) by-product"); ACT, *ACT Test Scores: Viewing, sending, and understanding your scores*, https://bit.ly/3eZErgu (last visited Aug. 10, 2021) (explaining that students' scores "are posted online" and that "ACT sends score report *data* to the recipients [the student] provided during registration" (emphasis added)). Indeed, Appellant's transmission of the scores digitally to "various colleges and universities," via interstate wires, is the express basis for the wire fraud charge. *See* JA31 ¶ 200; JA65 ¶ 376. The pursuit of test scores thus does not "necessarily impl[y]" the pursuit of physical

score reports, *United States v. Barbato*, 471 F.2d 918, 921 (1st Cir. 1973), and the district court erred in assuming otherwise.

This error, in turn, infected the district court's legal analysis. By conflating scores and physical score reports, the district court assumed that the allegations in this case mirrored those in *Hedaithy*. In the district court's view, *Hedaithy* "concluded that the TOEFL score reports themselves ... constituted a cognizable property interest under the mail fraud statute." JA98 (citing *Hedaithy*, 392 F.3d at 596-97). What the district court failed to note, however, is that *Hedaithy*'s conclusion rested entirely on the fact that the score reports were "tangible items." *Hedaithy*, 392 F.3d at 597. "We do not think it credible," the Third Circuit explained, "for Defendants to contend that tangible items, held in the physical possession of a private entity, are not property." *Id.* Because test scores are not tangible items, *Hedaithy*'s reasoning regarding physical score reports is not—contrary to the district court's view—"apposite to this case." JA98.

3. The Government's Sweeping Interpretation of "Property" Produces Implausible Results and Raises Federalism and Due Process Concerns.

In construing "property" to include test scores, the government advances an interpretation of the wire fraud statute with startling implications. The Supreme Court has repeatedly made clear that the wire fraud statute—and criminal laws generally—should not be read to expose huge swaths of everyday conduct to criminal liability or to undermine federalism and due process. The government's reading here, however, would have exactly those results.

First, the government's reading of "property" would transform everyday conduct into criminal activity. The Supreme Court has resisted reading the wire fraud statute to effect "sweeping expansion[s] of federal criminal jurisdiction," *Cleveland*, 531 U.S. at 24, and just this past term refused to read a different federal statute in a way that "would attach criminal penalties to a breathtaking amount of commonplace ... activity," *Van Buren*, 141 S. Ct. at 1661. The government's construction here, however, would have those very effects. If test scores are property, then any student, in any setting, who cheats on any test or assignment has

committed wire fraud, so long as their conduct involves the internet, email, texts, or other ubiquitous uses of interstate wires.

A recent *Wall Street Journal* article illustrates the breathtaking sweep of the government's position. It reported that "[a] year of remote learning has spurred an eruption of cheating among students, from grade school to college." Tawnell D. Hobbs, *Cheating at School Is Easier Than Ever—and It's Rampant*, Wall St. J. (May 12, 2021). At just a handful of institutions, hundreds of students have been caught cheating over the past year, including dozens of West Point cadets "caught cheating on an online calculus exam last year." *Id.* Under the government's theory, all of these students—and countless others across the country—committed wire fraud, full stop. Society appropriately condemns such conduct, but no reasonable person considers it criminal—let alone action that merits a potential sentence of two decades in a federal prison. *See* 18 U.S.C. § 1343; *cf. Kelly*, 140 S. Ct. at 1568 (reversing wire fraud convictions notwithstanding that the defendants' conduct "no doubt shows wrongdoing—deception, corruption, abuse of power"). This "fallout underscores the implausibility of the Government's interpretation." *Van Buren*, 141 S. Ct. at 1661.

Second, the government's interpretation would extend the wire fraud statute into areas "traditionally regulated by state and local authorities." *Cleveland*, 531 U.S. at 24. "[I]t is well established that education is a traditional concern of the States," *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring), and academic dishonesty is therefore traditionally handled by state and local officials, such as principals, teachers, and university administrators. What's more, academic dishonesty traditionally is not treated as a criminal matter. *Cf.* Hobbs, *supra* (noting that students at a state university who were caught cheating were given "a zero on the exam and academic integrity probation, with a second violation resulting in suspension for a semester"). The government's theory, however, would elevate federal prosecutors over academic deans, and in so doing would "significantly change[] the federal-state balance in the prosecution of crimes" without Congress having "convey[ed] its purpose [to do so] clearly." *Cleveland*, 531 U.S. at 25.

Finally, the government's construction of "property" undermines due process. By making countless individuals into criminals, it creates the "potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail [and wire] fraud affords

federal prosecutors." *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., concurring in part, dissenting in part), *abrogated on other grounds by McNally*, 483 U.S. 350; *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (explaining that penal statutes cannot be so vague as to allow "arbitrary and discriminatory enforcement"). As the Supreme Court has repeatedly emphasized, courts "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Marinello*, 138 S. Ct. at 1109 (quoting *McDonnell*, 136 S. Ct. at 2372-73).

The government's construction also poses grave fair notice problems. The legal concept of "property" is neither static nor uniform nationwide. The question of whether information is property is particularly fluid. For example, last session Congress considered the Own Your Own Data Act, which would have provided that "[e]ach individual owns and has an exclusive property right in the data that an individual generates on the internet." S. 806, 116th Cong. § 2 (2019). Or take medical records and genetic information: about half the states have laws declaring such records the property of the healthcare provider, hospital, or patient, while half have no laws recognizing property rights in medical records. *See generally* Health Information & the Law, *Who Owns Medical Records: 50*

State Comparison, https://bit.ly/3jJpSz7 (last visited Aug. 11, 2021). Similarly, while the majority of states provide for some measure of confidentiality for individuals' genetic information, as of 2018 only five states had enacted statutes defining genetic information as personal property. *See generally* Nat'l Conf. of State Legislatures, *State Genetic Privacy Laws*, https://bit.ly/3e0e8WN (last visited Aug. 10, 2021).

This Court should refuse the government's invitation to step onto these shifting sands by construing "property" as anything "of value in the possession of the property holder." JA91. Criminal statutes must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357. Under the government's theory, however, the metes and bounds of the mail and wire fraud statutes would constantly shift as society, acting through innumerable regulatory bodies, 50 state legislatures, and the federal government, grapples with difficult questions about who, if anyone, owns various types of information. *See Drye v. United States*, 528 U.S. 49, 58 (1999) (explaining that although "[t]he question whether a state-law right constitutes 'property' ... is a matter of federal law," state law

determines in the first instance what rights individuals have in the interests at issue).

Both the canon of constitutional avoidance and the rule of lenity support rejecting the government's vague interpretation in favor of the cabined, historically grounded construction adopted in *Cleveland*. Federal courts must "avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible." *Skilling*, 561 U.S. at 406 (alteration in original). Here, construing "property" to cover only "traditional concepts of property," *Cleveland*, 531 U.S. at 24, avoids the vagueness problems presented by the government's interpretation.

Finally, "to the extent that the word 'property' is ambiguous as placed in [§ 1343], ... ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 25 (internal quotation marks omitted). Indeed, as *Cleveland* recognized, lenity is "especially appropriate" in construing the mail and wire fraud statutes because of the harsh consequences they carry. *See id.*

II. THE INDICTMENT DOES NOT ALLEGE A SCHEME WITH THE OBJECT OF OBTAINING STANDARDIZED TESTS.

The Indictment does not allege a scheme to deprive ACT of standardized tests. As the Indictment makes plain, the ACT exam was not the

object of the alleged fraud. Rather, the object was obtaining test *scores*, while obtaining access to the ACT *test* was a mere implementation cost. Because the ACT exam itself was not an "object of the fraud," and the actual object—test scores—is not property, the Indictment does not allege property wire fraud.

The Supreme Court in *Kelly* recognized the critical distinction between the "object" and the "implementation costs" of a fraud. *Kelly* involved wire fraud charges arising out of "Bridgegate," in which the defendants—a top staffer to New Jersey's then-governor and a top Port Authority official—schemed to create traffic gridlock in Fort Lee, New Jersey by eliminating the dedicated Fort Lee lanes on the George Washington Bridge, all for political retribution against the town's mayor. 140 S. Ct. at 1569-70. To carry out the scheme, the defendants concocted a fictitious traffic study to serve as a cover story, and assigned Port Authority engineers to gather traffic data to make the study appear legitimate. Pulling off the scheme also required an extra toll collector per shift. *Id.* When the scheme was uncovered, the government charged the defendants with wire fraud, alleging in relevant part that the defendants "aimed to deprive the Port Authority of the costs of compensating the

traffic engineers and back-up toll collectors who performed work relating to the lane realignment." *Id.* at 1572.

The Supreme Court rejected this theory. While it agreed that a "public employee's paid time" might hypothetically constitute "property," *id.*, the Court held that to support a wire fraud charge, such property must be "an object of the fraud," not a mere "implementation cost[]," *id.* at 1573-74. Looking at the scheme holistically, the Court explained that "[t]he time and labor of Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's access lanes," which was the scheme's actual object. *Id.* The Court emphasized that it "make[s] no difference" that those costs were a "foreseen[] byproduct" of the scheme or that they were, "as the Government contend[ed], 'needed' to realize the final plan." *Id.* at 1574. They were nevertheless just the "incidental byproduct" of the scheme. *Id.*

Here, the Indictment makes plain that the object of the alleged scheme was the test score and that the tests were only an implementation cost of attaining that object. The Indictment explained that, for Appellant, the "principal purpose[]" of the alleged scheme was "securing the admission of [Appellant's son] to selective colleges using fraudulently

obtained test scores." JA10 ¶ 65. Indeed, the Indictment acknowledged that "standardized test scores are a material part of the admissions process," JA6 ¶ 45, and alleged that it was the ACT score itself, not anything related to the test materials, that was submitted in connection with the college applications of Appellant's son, JA31 ¶ 200. To be sure, obtaining access to the ACT exam itself was a "foreseen" and "needed" step towards obtaining the test score. *Kelly*, 140 S. Ct. at 1574. But, under *Kelly*, that does not transform the physical exam materials into an object of the fraud. *See id.* Like the defendants in *Kelly*, Appellant was indifferent to obtaining the ACT exam as such; access to the exam was "just the implementation cost[]" of the scheme to obtain a high test score. The exam therefore cannot sustain the property fraud charge here.

The district court failed to address *Kelly*'s implications for this case, and thereby ignored an important limit on the wire fraud statute's scope. As *Kelly* explained, without the distinction between objects and implementation costs of fraud, "even a practical joke could be a federal felony." 140 S. Ct. at 1573 n.2. The Court gave the following example:

> A [e-mails] B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation, thus expending the cost

> of gasoline. But there is no party; the address is a vacant lot; B is the butt of a joke.

Id. (internal quotation marks and citation omitted). Under the government's theory, this would be wire fraud—indeed, in the case where this hypothetical originally appeared, the government admitted that "this indeed violates § 1341." *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993). Now consider even more commonplace scenarios. Imagine a person lies about his profession or height to secure a date online, knowing that the object of his affection will pay for transportation to the date's location, or perhaps even plans to cover the costs of dinner, concert tickets, etc. *Cf.* Irina D. Manta, *Tinder Lies*, 54 Wake Forest L. Rev. 207, 230 (2019) ("Many people (some [studies] say as many as about eighty percent) lie on dating apps ...."). Without a commonsense distinction between the object and implementation costs of such schemes, they too would be wire fraud. Such outcomes "would make a joke of the Supreme Court's assurance that § 1341 [and § 1343] do[] not cover the waterfront of deceit." *Walters*, 997 F.2d at 1224.

This distinction between objects and implementation costs of fraud also keeps the mail and wire fraud statutes from becoming enforcement mechanisms for academic honor codes. Many institutions require that,

for each major test, students certify they will not cheat. *See, e.g.*, Univ. of Rochester, *Honor Pledges*, https://bit.ly/3zFsFzt (last visited Aug. 11, 2021); Rice Univ., *Honor Code: Frequently Asked Questions*, https://bit.ly/3kYlKh2 (last visited Aug. 11, 2021); Harvard Univ., *The Affirmation*, https://bit.ly/3zz7D5G (last visited Aug. 11, 2021). Under the government's theory, each time students falsely make such a pledge, they "gain[] access [to the exam on] terms other than those prescribed" by the educational institution and, if they use interstate wires in connection with the exam, thereby commit wire fraud. JA98 (second alteration in original). Once again, such "fallout underscores the implausibility of the Government's interpretation." *Van Buren*, 141 S. Ct. at 1661. The distinction between the "object" and "implementation costs" of fraud provides a vital limit on the statutes' reach, and the district court erred in ignoring it.

III. THE INDICTMENT DOES NOT ALLEGE A FIDUCIARY RELATIONSHIP COGNIZABLE UNDER THE HONEST SERVICES FRAUD STATUTE.

Finally, the Indictment does not adequately allege honest services fraud. The government's theory rests on an alleged informal fiduciary relationship between ACT and Dvorskiy, the test administrator, which

supposedly arose from the totality of the circumstances of their arm's-length contractual agreement. Such relationships, however, are not cognizable under 18 U.S.C. § 1346, the honest services fraud statute, because they are outside the "core pre-*McNally* applications" of the honest services doctrine that, per *Skilling*, 561 U.S. at 408, define that statute's reach. The theory advanced by the government disregards these limits, creates uncertainty in all manner of business relationships, and, if upheld, would violate due process.

A. Informal Fiduciary Relationships Are Outside the "Core Pre-*McNally* Applications" of the Honest Services Doctrine That, Under *Skilling*, Define § 1346's Scope.

Section 1346 provides that a "scheme or artifice to defraud" under the wire fraud statute "includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. In *Skilling*, the Supreme Court considered whether § 1346 was "unconstitutionally vague" because it "d[id] not adequately define what behavior it bars." 561 U.S. at 402-03. The petitioner, Enron's former CEO, had been convicted of conspiracy to commit honest services fraud for taking official actions to further his own undisclosed financial interests. *Id.* at 409, 413. Recognizing that § 1346 "would raise the due process concerns underlying the

vagueness doctrine" if interpreted to reach such conduct, *id.* at 408, the Court adopted a "limiting construction," *id.* at 405. Congress, the Court reasoned, had enacted § 1346 in response to *McNally*, *id.* at 404, which abrogated lower court decisions recognizing an intangible-rights theory of fraud by holding that the mail fraud statute was "limited in scope to the protection of property rights," *McNally*, 483 U.S. at 360. Therefore, *Skilling* held, § 1346 "can and should be salvaged by confining its scope to the core pre-*McNally* applications" of the honest services doctrine. 561 U.S. at 408. Then, surveying the pre-*McNally* case law, the Court further held that the "core" of honest services fraud consisted of "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes"; conflict-of-interest cases like *Skilling*'s, which were "relative[ly] infrequen[t]" before *McNally*, were outside this scope. *Id.* at 407, 410.

Skilling thus established that conduct outside the "bribe-and-kickback core of the pre-*McNally* case law" is beyond § 1346's reach. *Id.* at 409. This rule resolves Appellant's case. Pre-*McNally* case law did not apply—let alone *frequently* apply—the honest services doctrine to informal fiduciary relationships like the one alleged to exist between Dvorskiy

and ACT, in which the fiduciary character of the relationship allegedly arose circumstantially from the parties' course of dealing, rather than inhering in their formal legal roles. *See generally Doe v. Harbor Schs., Inc.*, 446 Mass. 245, 252, 843 N.E.2d 1058, 1064 (2006) (distinguishing fiduciary relationships "created by law" from those that "arise from the nature of the parties' interactions"). Indeed, *Skilling* did not cite a single case applying the doctrine to an informal fiduciary, nor was such a case among the "dozens of examples" cited in the government's brief in *Skilling*, which the Court relied upon to delimit the "doctrine's solid core." *Skilling*, 561 U.S. at 407.

To be sure, in describing that core, *Skilling* did not explicitly distinguish between formal and informal fiduciaries. But the Court had no occasion to consider the issue because *Skilling* plainly involved a formal fiduciary relationship: that between a corporate officer and the corporation's shareholders. In that vein, the Court explained that debates over the source and scope of fiduciary duties "were rare in bribe and kickback cases" because "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute." *Id.* at 407-08 n.41 (citing cases involving such formal fiduciary relationships as "public official-

public," "employee-employer," and "union official-union members"). As this statement recognizes, cases involving informal fiduciaries—in which juries were asked to determine the existence of a fiduciary relationship after the fact based on the totality of circumstances—were, at best, "relative[ly] infrequen[t]." *Id.* at 410. Such cases therefore fall outside the "core pre-*McNally* applications" of the honest services doctrine. *Id.* at 408.

B. Construing § 1346 as Limited to Formal Fiduciary Relationships Avoids Serious Due Process Concerns.

Constitutional avoidance principles further support construing § 1346 not to reach informal fiduciary relationships. A "basic principle" of due process is that "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). Applied to formal fiduciaries, the honest services statute—at least as construed in *Skilling*—poses little problem in this regard. Employees, union officials, public officials, lawyers, executors, and others in inherently fiduciary relationships can readily determine that they are within the statute's scope.

The same is not true, however, for informal fiduciaries. Their fiduciary status may be evident, if at all, only in retrospect, "as determined

by the facts established, upon evidence indicating that one person is in fact dependent on another's judgment in business affairs or property matters." *UBS Fin. Servs., Inc. v. Aliberti*, 483 Mass. 396, 406, 133 N.E.3d 277, 288 (2019) (internal quotation marks and citation omitted); *see also McAdams v. Mass. Mut. Life Ins. Co.*, 391 F.3d 287, 303 (1st Cir. 2004) (explaining that "whether one party owes fiduciary duties to another" is a "fact-specific inquiry"). Indeed, "[t]he circumstances which may create a fiduciary relationship are so varied and so difficult to foresee that it is unwise for courts to attempt to make comprehensive definitions." *Aliberti*, 483 Mass. at 408, 133 N.E.3d at 290 (quotation marks omitted).

This uncertainty may be tolerable in civil cases, but not in criminal ones. If § 1346 reaches informal fiduciaries, the statute's scope will likewise turn on "varied" and "difficult to foresee" circumstances that defy "comprehensive definition[]." *Id.* The fair notice problem here is obvious: "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari); *see also Dirks v. SEC*, 463 U.S. 646, 658 n.17 (1983) (rejecting a rule proposed by the government on the ground that it "is inherently

imprecise, and imprecision prevents parties from ordering their actions in accord with legal requirements").

Uncertainties in the legal standards for finding an informal fiduciary relationship compound this problem. In Massachusetts, for example, one party's control over another can give rise to fiduciary duties, but "Massachusetts courts have not defined what level of control is sufficient to give rise to a fiduciary duty under this theory." *FAMM Steel, Inc. v. Sovereign Bank*, 571 F.3d 93, 103 (1st Cir. 2009). The legal standards also vary across states and circuits. In Texas, for instance, "[t]o impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit," *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998); Massachusetts, meanwhile, imposes no such requirement, *see Aliberti*, 483 Mass. at 406-09, 133 N.E.3d at 288-91. And complicating matters further still, "[t]he relationship between state law and the federal honest services statute is unsettled." *Urciuoli*, 513 F.3d at 298. "The Fifth Circuit has held that section 1346 extends only to conduct that independently violates state law," *id.*—which, as noted, is a narrower category in some states than in

others; "[o]ther circuits have denied that state law plays any necessary role," *id.* This Court seemingly has not committed to either camp. *Compare United States v. Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001) (explaining that "there is no need to base a prosecution under § 1341 on allegations that the defendant also violated state law"), *with Urciuoli*, 513 F.3d at 298 (explaining that "[c]onceivably in some circumstances, state law might bear on what 'services' are owed by a state legislator," while conceding that "just how far state law might be a premise for honest services fraud, or, alternatively, might 'immunize' conduct that would otherwise be a federal crime, are tricky questions").

Extending § 1346 to informal fiduciaries requires parties in ostensibly arm's-length business relationships to resolve these multiple layers of uncertainty *in advance* to determine whether they are within the scope of the statute. They must identify the applicable jurisdictions, ascertain their laws, determine the relationship between state and federal law, and then apply general fiduciary standards to the totality of circumstances a jury might find relevant. At none of these steps is the answer likely to be remotely clear. This case alone, for example, involves charges brought in Massachusetts against a California defendant charged with paying a

California resident to violate (while in California and with the help of a Florida resident) his contractual relationship with an Iowa corporation. JA2 ¶ 14; JA3 ¶ 21; JA5 ¶¶ 30-32; JA7 ¶¶ 49-50; JA30 ¶¶ 190-94. A statute requiring ordinary citizens to resolve complicated questions that bedevil appellate courts poses grave due-process concerns. As the Third Circuit has warned in applying § 1346, "the exercise of interpreting a malleable term in a criminal statute which applies to a wide variety of activity may generate nebulous standards that are not discernable to people of ordinary intelligence." *McGeehan*, 584 F.3d at 569.

The government's theory, moreover, would cast a pall over all manner of business relationships. Common commercial practices such as commissions, rebates, and dealer incentives could be characterized as bribes or kickbacks and give rise to federal criminal liability if, in hindsight, a jury concluded that a relationship crossed the line from arm's-length to fiduciary. Such "federalization under the criminal law of the law of contracts and other business transactions—quintessential matters for state regulation—is a real concern," and ought to "give pause to an expansive judicial interpretation of § 1346." *Id.* Moreover, to the extent the § 1346's scope is ambiguous, such "ambiguity concerning the ambit of criminal

statutes should be resolved in favor of lenity"—a principle "especially appropriate in construing" the federal fraud statutes. *Cleveland*, 531 U.S. at 25.

In reaching the opposite conclusion, and holding that § 1346 reaches informal fiduciaries, the district court relied on two appellate decisions that considered none of the foregoing issues. *See* JA100. Neither *United States v. Milovanovic*, 678 F.3d 713 (9th Cir. 2012), nor *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), cited any pre-*McNally* cases in support of their conclusion that § 1346 applies to informal as well as formal fiduciaries. Nor did either case consider the fair notice problems inherent in their interpretation. Indeed, *Milovanovic*—the only one of the two cases squarely to hold that § 1346 reaches independent contractors—relied heavily on civil cases, 678 F.3d at 722-23 & nn.8-9, without acknowledging that fair-notice concerns are far less demanding in that context. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *United States v. Chestman*, 947 F.2d 551, 570 (2d Cir. 1991) (noting that as "[u]seful as ... an elastic and expedient definition of confidential relations, i.e. relations of trust and confidence, may be in the civil context, it

has no place in the criminal law" because it "would offend not only the rule of lenity but due process as well").

This Court ought not follow the same path. Instead of interpreting § 1346 in a way that generates "uncertainty in business negotiations and challenges to due process and federalism," *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016), this Court should construe the statute to reach only formal fiduciary relationships, in line with the core pre-*McNally* applications.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated and the Indictment should be dismissed.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App P. 32(a)(7)(B) because this brief contains 11,394 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point size and Century Schoolbook style.

/s/ Carter G. Phillips
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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, I caused the foregoing to be electronically filed with the U.S. Court of Appeals for the First Circuit via the CM/ECF system, which will automatically send email notifications of such filing to all attorneys of record.

/s/ Carter G. Phillips
Carter G. Phillips

ADDENDUM

TABLE OF CONTENTS

18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S.C. § 1346

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

United States District Court
District of Massachusetts

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Criminal Action No. 19-10080-NMG**
	)	
Sidoo et al,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

The government has charged defendants with conspiring with William "Rick" Singer ("Singer") to have their children fraudulently admitted to elite universities by, inter alia, fabricating applications, falsifying academic and athletic credentials, cheating on standardized tests, making payments to corrupt exam proctors and bribing university employees and athletic coaches. The defendants have moved to dismiss the indictment on a number of grounds, including that the indictment fails properly to allege (1) a single conspiracy; (2) mail and wire fraud and honest services mail and wire fraud and federal programs bribery and (3) a money laundering conspiracy.

This memorandum and order addresses the following motions to dismiss: (1) Defendants' Motion to Dismiss Count One Insofar as it Alleges Conspiracy to Defraud Testing Companies of

Property and Honest Services (Docket No. 1021); (2) Defendant William McGlashan's Motion to Dismiss Count Seven of the Fourth Superseding Indictment (Docket No. 1023); (3) Defendant I-Hsin "Joey" Chen's Motion to Dismiss Count Five of the Fourth Superseding Indictment (Docket No. 1026); (4) Defendants' Motion to Dismiss Pursuant to Federal Rules of Criminal Procedure 8 and 12(b)(3)(B)(i), (iv), and (v) (Docket No. 1031); (5) Elisabeth Kimmel's Motion to Dismiss Pursuant to Federal Rules of Criminal Procedure 12(b)(1) and 12(b)(3)(B) (Docket No. 1035); (6) Defendants' Motion to Dismiss (i) Count One Insofar as it Alleges Conspiracy to Commit Honest Services Fraud against the University of Southern California and Georgetown University and (ii) Count Two Alleging Conspiracy to Commit Federal Programs Bribery (Docket No. 1037); (7) Defendants' Motion to Dismiss the Money Laundering Conspiracy (Count III) (Docket No. 1039) (8) Defendants' Motion to Dismiss Count One Insofar as it Alleges Conspiracy to Defraud Universities of Property (Docket No. 1041) and (9) The Joint Motion of Amy and Gregory Colburn to Dismiss Second Superseding Indictment (Docket No. 341). For the following reasons, those motions will be denied.

I. Background

A. "Side door"

The Fourth Superseding Indictment ("the FSI") alleges that, beginning in 2007 and continuing through February, 2019, Singer

orchestrated a scheme, which he referred to as the "side door" whereby he conspired with defendants (other than defendants Gregory and Amy Colburn and I-Hsin Chen) to fraudulently designate students as athletic recruits to bypass the traditional admissions process. In order to effectuate and conceal the scheme, Singer used two entities, the Edge College & Career Network, LLC ("The Key"), a for-profit college counseling and preparation business, and the Key Worldwide Foundation ("KWF"), a non-profit corporation.

In essence, the government alleges that the side-door operated as follows: Defendants would agree with Singer to begin the scheme and would make large payments to The Key and/or KWF, often $250,000 or more per student. Singer, in concert with defendants, would fabricate academic and athletic records for defendants' children. He would then submit the falsified athletic application to the targeted university, at which point a corrupt university insider or coach would present the student as a legitimate athletic recruit to obtain admission for the student. In return, Singer would make payments, disguised as donations, from one of his entities to the corrupt insider or accounts at the university over which the insiders exercised control.

B. Test Cheating

In addition to the side-door scheme, the FSI alleges that

Defendants William McGlashan, I-Hsin Chen, Marci Palatella, and Gregory and Amy Colburn (collectively, the "testing defendants") conspired with Rick Singer to fraudulently inflate their children's scores on the ACT and SAT college admissions exams.

As part of the test cheating scheme, the testing defendants allegedly paid Singer to hire individuals to pose as exam proctors (and secretly correct or provide exam answers) and to bribe exam administrators to allow the cheating to occur. Specifically, to achieve the desired high scores, the indictment alleges that Singer and the testing defendants paid (1) Mark Riddell, an allegedly corrupt test proctor, to provide or correct the student's answers on the tests (or take the tests himself) and (2) Igor Dvorskiy, a corrupt test site administrator who Singer bribed to allow test cheating to occur at a testing facility in West Hollywood, California.

Defendants allegedly participated in the test cheating scheme in several ways, including supplying Singer with copies of their children's photo identification to allow Singer to create false identifications for Riddell to take exams on the students' behalf and obtaining testing accommodations at Singer's direction or by requesting that Singer and Riddell obtain specific scores for their children. The government maintains that Riddell often communicated directly with defendants to discuss the test answers and scores. In exchange

for the services of Singer and Riddell, defendants paid up to $75,000 per student as a "donation" to KWF which Singer then used to pay Riddell and Dvorskiy.

C. The Indictment

Count One of the FSI charges the defendants with conspiracy to commit wire fraud and conspiracy to commit mail fraud. In brief, the government maintains that the defendants conspired to deprive universities and testing companies of (1) property in the form of admissions slots and accurate test scores and (2) the honest services of their coaches and administrators and test administrators, respectively.

Count Two of the FSI charges nine of the defendants with conspiring to commit federal programs bribery by bribing agents of the University of Southern California ("USC") in order to secure the admission of their children to that university.

Count Three of the FSI charges the defendants with conspiracy to commit money laundering in connection with payments made to KWF and The Key in furtherance of the admissions scheme.

Counts Four through Twelve charge defendants with substantive fraud and bribery and Count Thirteen charges just defendant Wilson with tax fraud.

II. Legal Standard on a Motion to Dismiss

The Federal Rules of Criminal Procedure provide that an indictment must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). When considering a motion to dismiss in a criminal case, a court accepts the factual allegations in the indictment as true. Boyce Motor Lines v. United States, 342 U.S. 337, 343 n.16 (1952). Such a motion is properly directed only to the question of the validity of the indictment on its face and Courts are to be mindful that

> the question is not whether the government has presented enough evidence to support the charge, but solely whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense.

United States v. Ngige, 780 F.3d 497, 502 (1st Cir. 2015) (citation omitted). It is typically sufficient that an indictment articulate the offense in "the words of the statute itself as long as those words set forth all the elements of the offense without any uncertainty or ambiguity." United States v. Brown, 295 F.3d 152, 154 (1st Cir. 2002)(citation omitted). An indictment is ripe for dismissal if the facts demonstrate that, as a matter of law, the prosecution will not be able to prove each of the elements of the charged offense. United States v. Huet, 665 F.3d 588, 596-97 (3d Cir. 2012).

III. Defendants' Motion to Dismiss the Conspiracy

Each of the three conspiracy counts in the FSI charges defendants with a single conspiracy. Defendants have moved to dismiss the FSI on the grounds that: (1) the allegations are duplicitous and allege individual conduct, not a single conspiracy i.e., a so-called rimless wheel conspiracy and (2) it improperly joins the defendants in a single prosecution.

A. Conspiracy Allegations

In support of their contention that the indictment should be dismissed for failure to allege a single conspiracy, the defendants rely on the United States Supreme Court decision in Kotteakos v. United States, 328 U.S. 750 (1946) which held that a so-called "rimless wheel" conspiracy cannot sustain conviction for a single conspiracy. As articulated by the Fourth Circuit Court of Appeals,

> A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction.

Dickson v. Microsoft Corp., 309 F.3d 193, 203 (4th Cir. 2002).

It is well established, however, that "whether a single conspiracy or a multiple conspiracy exists is, of course, a question of fact for the jury." United States v. LiCausi, 167 F.3d 36, 45 (1st Cir. 1999); see also United States v.

Villarman-Oviedo, 325 F.3d 1, 12 (1st Cir. 2003)(noting that the "issue of single conspiracy v. multiple conspiracies is a question of fact for the jury."). To properly charge a conspiracy an indictment must allege the existence of: (1) a common goal, (2) overlap between the participants and (3) inter-dependence. See United States v. Portela, 167 F.3d 687, 695 (1st Cir. 1999). On its face the FSI adequately alleges a single conspiracy, the existence of which is a factual question for the jury.

The FSI alleges that for both the fraud and the federal programs bribery conspiracies the defendants shared the common goal of using bribery and fraud in order to secure their childrens' admission to prestigious colleges and universities. With respect to the money laundering conspiracy it alleges that defendants sought to effectuate, and conceal, their fraud by funneling payments through Singer's entities, The Key and KWF. The common goal requirement is to be "broadly drawn" and such allegations are sufficient to allege a common goal and survive a motion to dismiss. Id. at 69 n.3; see also United States v. Ortiz-Islas, 829 F.3d 19, 25 (1st Cir. 2016).

That defendants allegedly accomplished their common goal through varied chicanery (including but not limited to test cheating and the "side-door" admissions) does not warrant dismissal of the indictment for failure to allege a conspiracy.

A conspiracy may be multifaceted or contain multiple components but may still be properly charged as a single overarching scheme. See United States v. Holt, 777 F.3d 1234, 1263 (11th Cir. 2015); United States v. Prieto 812 F.3d 6 (1st Cir. 2016).

The FSI also properly alleges overlap and, to the extent required, inter-dependence. Overlap is "satisfied by the pervasive involvement of a single core conspirator." Portela, 167 F.3d at 695. The FSI plainly alleges that Singer acted as the core conspirator. It further alleges that each defendant agreed to achieve the common objective of the conspiracy. As the government notes, the extent and consequence of the alleged overlap will be properly determined by the jury.

With respect to inter-dependence, the government maintains the scheme as a whole would not have been feasible without the participation of the codefendants. See Portela, 167 F.3d at 695 n.2 (noting that when discussing inter-dependence the analysis is regularly characterized "as an analysis of the nature of the scheme but there is no conceptual difference between the tests"). The FSI alleges that the defendants were aware of the nature and scope of the scheme. They knew they were not the only participants. That others had engaged successfully in the scheme, tended to promote it and encouraged others to enroll. The FSI alleges that the participation of others was necessary to the scheme's success. Inter-dependence is therefore

satisfied for the purpose of the indictment. See United States v. Seher, 562 F.3d 1344, 1368 (11th Cir. 2009).

Finally, as the government points out, district courts consistently (and properly) rebuff defendants' efforts to dismiss conspiracy allegations based on claims of duplicity. See, e.g., United States v. Gabriel, 920 F. Supp. 498, 503-04 (S.D.N.Y. 1996).

In summary, the indictment sufficiently alleges that the defendants engaged in a singular, overarching conspiracy. The question of whether they participated in a single conspiracy or multiple conspiracies is properly left to the jury and the defendants' motion to dismiss on that ground will be denied.

B. Joinder

Similar to their argument with respect to conspiracy, defendants maintain that they have been improperly joined pursuant to Fed. R. Crim. P. 8(b). Under that rule:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

The general rule in the First Circuit is that:

> those indicted together are tried together to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources.

United States v. Soto–Beniquez, 356 F.3d 1, 29 (1st Cir. 2004). The First Circuit recognizes two requirements for proper joinder under Rule 8(b): (1) the offenses in question must constitute a series of acts or transactions and (2) a showing that joining the defendants is of benefit to the government. United States v. Barbosa, 666 F.2d 704, 707–08 (1st Cir. 1981). For the purposes of Rule 8(b) a "series of acts o[r] transactions means more than just similar acts." See United States v. Prange, 922 F. Supp. 2d 127, 129 (D. Mass. 2013) (quoting King v. United States, 355 F.2d 700, 703 (1st Cir. 1966)).

For joinder of multiple counts to be suitable, a "rational basis . . . should be discernible from the face of the indictment." United States v. Natanel, 938 F.2d 302, 306 (1st Cir. 1991). The burden falls on the defendant to demonstrate misjoinder and, if that burden is carried, the appropriate remedy is severance. Id. Further, for joinder to be proper it is "settled that a conspiracy count can forge the needed linkage." Id. at 307. Although some common activity between defendants is required, joinder may be apt "even when the objecting defendant is only connected to one part of [a] scheme." United States v. Azor, 881 F.3d 1, 11 (1st Cir. 2017).

As to the first prong, joinder here is proper because the allegations set forth in the FSI indicate that the charged offenses are sufficiently related to constitute a "series of

transactions." Prange, 922 F. Supp. 2d at 129. As previously discussed, the FSI alleges an overarching conspiracy, whereby defendants conspired, all with Singer, to commit fraud and money laundering and, as to all but three of defendants, federal programs bribery. The scheme involved common participants, entities and victims. All substantive fraud and bribery charges are acts that were alleged to have been conducted in furtherance of the scheme.

A rational basis for joinder is therefore apparent from the indictment. Further, as is the case here, it is permissible for the government jointly to indict "based on what it reasonably anticipates being able to prove...at the time of indictment." Azor, 881 F.3d 1 at 10 (quoting Natanel, 939 F.2 at 306).

The second prong is also clearly satisfied. Joinder will provide a substantial benefit. Separate trials, of which there may be more than ten, would be extremely costly to the government and in judicial resources. Moreover, if separate trials were to be held, much of the evidence and many witnesses would be duplicative. As a final consideration weighing in favor of joinder, evidence which is relevant to one defendant's guilt may also be relevant to proving the overall conspiracy. See Prange, 922 F. Supp. 2d at 129.

In short, the FSI alleges offenses which properly constitute a series of acts or transactions and joining defendants is of benefit to the government and to the court. Defendants have not met their burden to show misjoinder and their motion will be denied.

IV. Elizabeth Kimmel's Motion to Dismiss

Defendant Elizabeth Kimmel has moved to dismiss for reasons similar to the defendants' joint motion to dismiss the conspiracy and for improper joinder. The FSI alleges that Ms. Kimmel participated in the side-door scheme twice, once in 2012 to secure admission for her daughter to Georgetown University as a purported tennis recruit and once in 2017 to secure admission for her son to USC as a purported track and field athlete.

In charging her with a single conspiracy offense in each count, Kimmel claims that the government has impermissibly grouped together two non-overlapping conspiracies, one involving Georgetown and one involving USC. She claims the Georgetown conspiracy was entirely complete by 2013 and is unrelated to the USC conspiracy which began in 2017. She maintains that any allegations with respect to the Georgetown conspiracy are therefore barred by the statute of limitations.

Kimmel's motion is premised on essentially the same argument that the indictment impermissibly alleges a single conspiracy which the Court has already addressed. The common

goal and inter-dependence of the conspiracy is demonstrated as to Kimmel just as it was with the other defendants for the reasons expounded and her motion will also be denied.

V. Defendants' Motion to Dismiss Count One Insofar as it Alleges Conspiracy to Defraud Universities and Testing Companies of Property and Honest Services

A. Legal Standard

The mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, proscribe use of any

> scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

The Court considers the mail and wire fraud statutes and standards (and the relevant caselaw interpreting those statutes) interchangeably. See Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) (noting that the Supreme Court has "construed identical language in the wire and mail fraud statutes in pari materia.")

In the wire fraud statute, the word property is to be "construed in accordance with its ordinary meaning: something of value in the possession of the property holder." United States v. Blaszczak, 947 F.3d 19, 31 (2d Cir. 2019) (citing Paquantino, 544 U.S. at 355). Black's Law Dictionary, as cited by the Paquantino Court, defines property as "extend[ing] to every species of valuable right and interest." Property, Black's Law Dictionary (4th ed. 1951). Paquantino at 544 U.S. at 355.

In Carpenter v. United States, the United States Supreme Court held that the contents and publication schedules of forthcoming Wall Street Journal articles were confidential business information that constituted property. 484 U.S. 19 (1987). The Court held that the Journal had "a property right in keeping confidential and making exclusive use" of its confidential business information. Id. at 26. That the property was intangible did "not make it any less property protected by the mail and wire fraud statutes." Id. at 25.

As articulated by the First Circuit Court of Appeals, the Carpenter Court gave a "broad reading to protected property interests." United States v. Ochs, 842 F.2d 515, 522 (1st Cir. 1988). The First Circuit has made clear that the wire fraud statute should be read broadly and explained that it covers "a wide variety of tangible and intangible property interests." United States v. Rosen, 130 F.3d 5, 9 (1st Cir. 1997). See also United States v. Dray, 901 F.2d 1132, 1142 (1st Cir. 1990)(noting that "the mail fraud statute is limited to the protection of property rights, but the concept of property is to be interpreted broadly")(quoting McNally v. United States, 483 U.S. 350, 356 (1987)).

Although broad, the mail and wire fraud statutes do not have limitless reach. In Cleveland v. United States, the Supreme Court held

> a State's interest in an unissued video poker license was not property, because the interest in choosing particular licensees was purely regulatory and [could not] be economic.

Pasquantino 544 U.S. at 357 (2005) (quoting Cleveland v. United States, 531 U.S. 12, 22-23 (2000)). As noted by the Second Circuit Court of Appeals, however, "while Cleveland remains good law, courts have consistently rejected attempts . . . to apply its holding expansively." Blaszczak, 947 F.3d 19, 32 (2d Cir. 2019). After Cleveland, the Supreme Court reaffirmed that the "exercise of regulatory power . . . fails to meet the statutes' property requirement." Kelly v. United States, 140 S. Ct. 1565, 1568-69 (2020).

B. Application to University Admissions Slots

The government contends that an "admissions slot" at a university qualifies as a cognizable property interest under the mail and wire fraud statutes. It maintains that the mail and wire fraud statutes are not, as defendants claim, limited to "traditional" forms of property and that this conclusion follows logically from Supreme and Circuit Court precedent.

Defendants counter that the Supreme Court has specifically limited the fraud statutes to reach only "traditional" forms of property which they contend are only those "long recognized in common law." Because university admissions slots do not constitute such traditional property, defendants proclaim that

they cannot be subject to prosecution for wire fraud. Further, defendants protest that a reading of property which encompasses admissions slots represents a sweeping expansion of criminal liability not contemplated by Congress when it passed the fraud statutes.

This Court holds that application slots to universities are property interests owned by the university cognizable under the mail and wire fraud statutes. Although certainly not boundless, the definition of "property" extends readily to encompass admission slots.

This conclusion is supported by the Sixth Circuit Court of Appeals' decision in United States v. Frost, 125 F.3d 346 (6th Cir. 1997). In Frost, graduate students and professors were convicted of mail fraud for their roles in a scheme whereby students were allowed to submit plagiarized academic work in furtherance of a degree. The Frost Court held that prospective university degrees are property cognizable under the mail fraud statute and explained:

> 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. Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will 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.

Id. at 367.

The logic of Frost neatly applies to the case at bar. As the government notes, an admissions slot is not, in this case, meaningfully distinct from an unissued degree. A student seeks admission to a university with the purpose of gaining a degree and all the advantages, rights and privileges that such a degree confers. Though not sufficient, gaining admission to a university is a necessary precursor to obtaining its degree. The object of the alleged conspiracy in this case was to obtain those inherently limited "admission slots" at universities because they would, presumably, lead to degrees. It follows that if a prospective degree is property, so too, is its direct precursor, an offer of admission.

Admission slots at competitive universities, such as USC, are both limited and highly coveted. The ability to grant admission is an asset of the university subject to its control. See United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007) (noting that "[s]ince a defining feature of most property is the right to control the asset in question . . . the property interests protected by the statutes include the interest of a victim in controlling his or her own assets"). A university has a vested interest in admitting only those students who are

qualified and equipped to contribute to the academic community and campus life. Most importantly, a university has an interest in admitting only those students who are capable of completing the coursework necessary to obtain a degree.

Admission slots and prospective degrees are valuable to a certain extent because they are limited. Students seek admission to universities to be among other qualified and talented individuals and to learn from professors who are attracted to employment at a particular university, in part, for the opportunity to teach qualified students. Admission also entitles those students to a vast array of material university resources, from dormitories to laboratories.

If a university admits students who are unqualified, it inevitably decreases the value of its degrees, hurts its reputation and its ability to attract qualified tuition-paying students and recruit accomplished professors. It also impairs its ability to solicit donations. Universities have an intangible property interest in the integrity of their academic system. See United States v. Barrington, 648 F.3d 1178, 1191 n.11 (11th Cir. 2011) (noting that a "[u]niversity certainly has an intangible property interest in the integrity of its grading system"). The integrity of that system begins with the probity of the admissions process. Admission slots, therefore,

constitute an intangible property interest cognizable under the mail and wire fraud statutes.

C. Application to Accurate Test Scores

In a similar vein, the testing defendants submit that accurate standardized test scores or score reports are not a traditional form of property and therefore the indictment cannot properly allege wire fraud with respect to the test cheating scheme. The government, relying largely on reasoning articulated by the Court in United States v. Hedaithy, 392 F.3d 580 (3d Cir. 2004) maintains that accurate test scores constitute cognizable property for the purpose of the wire fraud statute.

In Hedaithy, foreign nationals hired an imposter to take and pass (on their behalf) the Test of English as a Foreign Language ("TOEFL"), a standardized test administered by the Educational Testing Service ("ETS"). The TOEFL is often used by educational institutions to assess English language proficiency and potential students are regularly required to pass the exam as a prerequisite to admission. ETS owns copyrights to the TOEFL examination and its component questions and keeps its operations and test material confidential.

Affirming defendants' conviction for mail fraud after a thorough review of relevant caselaw, the Third Circuit Court of Appeals held that ETS had a cognizable property interest in its

confidential business information, (i.e. the TOEFL exam) and that it had been deprived of "the right to decide how to use" that confidential information. Id. at 595. The Court concluded that the TOEFL score reports themselves, and ETS' right to distribute those score reports to only those individuals who met its "prescribed conditions", constituted a cognizable property interest under the mail fraud statue. Id. at 596-97.

The reasoning articulated in Hedaithy is apposite to this case. Similar to ETS, The ACT and SAT are private for-profit businesses that "provide[] a service and report test results in pursuit of a profit-seeking endeavor." Id. At 600. The FSI alleges that ACT and SAT scores, and by logical extension the score reports, just as the TOEFL, are the intellectual and physical property of the testing companies. And, as in Hedaithy, the defendants here have allegedly made misrepresentations (having Riddell correct exam answers) to the ACT and SAT in order to achieve elevated test scores.

It follows, therefore, that like the TOEFL, ACT and SAT examinations and score reports are cognizable property. When the defendants allegedly conspired to have their childrens' test answers altered to achieve higher scores they, as the defendants in Hedaithy,

> (1) gain[ed] access [to the exam on] terms other than those prescribed [by ACT and (2) violated the testing companies]

> right to convey [score reports] only to those individuals who [met] its prescribed conditions. Id. at 595-97.

Moreover, the product provided by a testing company is only valuable so long as it is not the product of fraud or viewed as corruptible and unreliable. A testing company's business depends almost entirely upon the integrity of its testing process and the goodwill it has developed. If that process is corrupted, or is viewed as corruptible, the product, i.e. its tests and the resulting scores, become valueless. Eventually, if the integrity of the test is subverted (or perceived as subvertable) with any frequency the company itself becomes worthless. See e.g., Id. at 600; Barrington, 648 F.3d at 1192 n.11.

Accordingly, a testing company has a cognizable property right in its test and accurate test scores and the defendants' motion to dismiss the FSI based on the lack thereof will be denied.

D. Honest Services Mail and Wire Fraud

1. Fiduciary Duties

Defendants next move to dismiss Count One of the FSI because they submit that the government does not allege that ACT and College Board employee, Igor Dvorskiy ("Dvorskiy") had the requisite fiduciary duty to either testing company such that his

misconduct could constitute a theft of honest services in violation of the federal mail and wire fraud statutes.

For conduct to fall under the auspices of the honest services fraud statute it must involve an "offender[] who, in violation of a fiduciary duty, participated in bribery or kickback schemes." Skilling v. United States, 561 U.S. 358, 407 (2010). As the Supreme Court noted, the existence of a fiduciary relationship between employer and employee is "beyond dispute." Id. at 407 n.41. Relevant here, a fiduciary duty may also arise under certain circumstances in the context of an independent contractor relationship. See United States v. Rybicki, 354 F.3d 124, 127, 141–42, 142 n.17 (2d Cir. 2003) (noting that § 1346, when applied to private actors includes "an officer or employee of a private entity or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers."); United States v. Milovanovic, 678 F.3d 713, 722 (9th Cir. 2012)(noting that a defendant is not exempted from prosecution for mail fraud "simply because [he is an] independent contractor" and reviewing caselaw holding that such a fiduciary relationship "encompasses informal fiduciaries"). Whether or not a specific employment arrangement qualifies as creating a fiduciary relationship is a factual question reserved for the jury. Id. at 723.

The indictment sufficiently alleges that Dvorskiy, by the nature of his employment with ACT and the College Board, owed a fiduciary duty to those organizations. It alleges that Dvorskiy and other test administrators were employed by ACT to administer standardized tests and were agents of the ACT and College board who owed a duty of honest services to those organizations. The FSI further describes the duties of certification and test administration undertaken by an administrator such as Dvorskiy. Such allegations are sufficient to set forth an indictment for honest services fraud. See United States v. Troy, 618 F.3d 27, 34 (1st Cir. 2010). Whether or not Dvorskiy indeed maintained the requisite fiduciary duty is another issue to be explored at trial and determined by the jury.

2. Bribery Allegations and Federal Programs Bribery Charges

Defendants also contend that the honest services fraud and federal programs bribery allegations must be dismissed because the FSI does not properly allege that payments made to university administrators and coaches constitute bribery. The FSI identifies two sets of payments that the government alleges constitute bribes: 1) payments made by the defendants and Singer to university accounts controlled by corrupt insiders and 2) payments made by Singer (or Singer's entities) directly to corrupt athletic coaches.

a. Payments to Universities

For a payment to constitute a bribe, there must be "a quid pro quo – a specific intent to give or receive something of value in exchange for an official act." United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404–05 (1999).

The government contends that so long as defendants made payments with a corrupt intent (exchanging money for admission based on false credentials) those payments constitute bribes. The defendants rejoin that because 1) the payments went to the university and 2) in the case of USC, Donna Heinel did not receive any cognizable personal benefit from accepting the payments, those payments cannot be bribes.

The honest services fraud statute, as explained by the Supreme Court in Skilling, extends only to bribery and kickback schemes but includes those involving private sector employees. See United States v. Bryant, 655 F.3d 232, 245 (3d Cir. 2011) (noting that "Skilling did not eliminate from the definition of honest services fraud any particular type of bribery [or kickbacks], but simply eliminated honest services fraud theories that go beyond bribery and kickbacks"); United States v. DeMizio, 741 F.3d 373, 381 (2d Cir. 2014).

The federal programs bribery statute, 18 U.S.C. § 666(a)(2) incorporates the same extension and covers, in relevant part, whomever:

> corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value...

Even if the victim, in this case the university, ends up profiting as a result of a kickback scheme, there still exists actionable harm "in the denial of that party's right to the offender's honest services." See Skilling, 561 U.S. at 400. That the payments made by defendants eventually went to USC does not thereby preclude such payments from constituting bribes. See DeMizio, 741 F.3d at 381.

The issue, as the government reiterates, is whether the defendants paid money with the intent to accomplish a corrupt quid pro quo. Whether the defendants possessed the requisite corrupt intent is an issue of fact for the jury. See, e.g., United States v. DeMizio, No. 08-cr-336, 2012 WL 1020045, at *10 (E.D.N.Y. Mar. 26, 2012).

Further, the FSI alleges that the payments were made to designated accounts that were either controlled by the corrupt insiders or that otherwise inured to their benefit professionally. Those payments, therefore, represent a "thing

of value" to those insiders, even if the payments were not deposited directly into personal accounts. As the government notes, in an honest services prosecution a

> thing of value is defined broadly to include the value which the defendant subjectively attaches to the items received.

United States v. Renzi, 769 F.3d 731, 744 (9th Cir. 2014)(citation omitted).

Payments made to accounts controlled by university insiders, even if such payments were ultimately received by the universities, may still constitute a benefit to those insiders who exercise control over the accounts. This logic applies to the federal programs bribery charges as well. Again, to the extent the defendants maintain that they were unaware that their payments were going to corrupt insiders or of the extent to which those insiders deprived the universities of their honest services is a factual question to be resolved at trial. In sum, the FSI adequately alleges that the defendants engaged in a scheme which falls under the ambit contemplated by the fraud and federal program bribery statutes.

b. Direct Payments to Coaches

Defendants next argue that payments made to Ms. Heinel by Singer after she had presented the fraudulent applications to the admissions committee constitute a legal gratuity rather than a bribe. The FSI alleges that Singer agreed to transfer money

directly to Heinel in late 2017, after Singer and Heinel had already engaged in the "side-door" scheme on numerous occasions. That the direct payments were made after Heinel had already participated in the scheme is not, however, relevant to the sufficiency of the indictment.

As explained by the First Circuit, the difference between a licit gratuity and a bribe is

> not [related to] the time the illegal payment is made, but the quid pro quo, or the agreement to exchange [a thing of value] for official action.

United States v. Fernandez, 722 F.3d 1, 19 (1st Cir. 2013)(citation omitted). In discerning that difference, the relevant question is the "timing of the agreement to make or receive a payment." Id. The government maintains that the probative agreement was not the agreement between Singer and Heinel to compensate her directly but the agreement between Singer and defendants to effectuate the side-door scheme. That the defendants may have been unaware of the exact destination of their allegedly corrupt payments does not mandate dismissal of the indictment. United States v. Potter, 463 F.3d 9, 15 (1st Cir. 2006).

The FSI alleges that in exchange for admitting their children as specious athletic recruits, the defendants knew that their payments would be directed to corrupt university insiders. Such

quid pro quo allegations are sufficient to survive the motion to dismiss.

VI. Defendants' Motions to Dismiss the Money Laundering Conspiracy (Count III)

Count III of the FSI alleges that defendants engaged in a money laundering conspiracy in violation of 18 U.S.C. § 1956(h). In brief, the FSI contends that the defendants made purported charitable donations to The Key or KWF with the intent that those payments would then be used by Singer to effectuate the side-door and test cheating schemes. Singer did in fact use that money to make payments to corrupt university insiders and to test administrators. The FSI further declares that the defendants structured the payments as purported donations in order to conceal their fraud.

A. Legal Standard

The money laundering statute is intended to "punish a separate offense from the underlying specified unlawful activity." United States v. Castellini, 392 F.3d 35, 45 (1st Cir. 2004). It "criminalizes separate financial transactions involving the funds derived from such illegal activity." Id. Money laundering therefore must involve funds that were "the proceeds of some form of unlawful activity." United States v. Misla-Aldarondo, 478 F.3d 52, 68 (1st Cir. 2007).

The laundering of funds cannot be concurrent to the "transaction through which those funds first became tainted by crime." United States *v.* Richard, 234 F.3d 763, 769 (1st Cir. 2000)(citation omitted). There is, however, no requirement that the underlying crime be completed before money laundering can take place. Instead, so long as the underlying offense has progressed to the point of creating proceeds "the money becomes proceeds of illegal activities and it can be laundered." Castellini, 392 F.3d at 48. In other words, so long as a "phase" of the ongoing offense has been completed (and has generated proceeds) a defendant may be liable for money laundering. Id.

B. Application to the Sufficiency of the Indictment

Defendants maintain that the FSI does not properly allege that they engaged in a complete phase of an ongoing unlawful activity which generated proceeds prior to engagement in a separate money laundering transaction. In brief, they maintain that the government impermissibly presents the same transactions as both fraud and money laundering. The government rejoins that FSI properly alleges that the money laundering conspiracy came after a complete phase of the underlying fraud offenses. According to the government, as soon as the defendants made payments to KWF and/or The Key in furtherance of the admissions scheme, they had committed mail or wire fraud and thus those

payments constituted proceeds from that scheme. When Singer made payments from his corporate shell entities to corrupt insiders using those proceeds, those transactions constituted money laundering.

The FSI sufficiently alleges a money laundering conspiracy. As set out in the indictment, the scheme operated in stages. Defendants first allegedly made payments to KWF and The Key with the intent that Singer would use the proceeds to pay Heinel, Dvorskiy and others. Singer then used that money to pay the corrupt insiders and effectuate the admissions cheating. The purported initial payments to KWF and The Key therefore constitute a discrete phase of an ongoing offense and were consequently "tainted by crime." Richard, 234 F.3d at 769. Accordingly, the payments made by Singer to Heinel and others, if proven, were in fact money laundering transactions.

Further, as the government notes, because the defendants are charged with money laundering conspiracy, if the allegations are proved, they are liable for the actions of their co-conspirators. Each defendant is liable for the payment of every other defendant to entities controlled by Singer. Once those funds were deposited in Singer-controlled accounts, the subsequent payments to other co-conspirators in furtherance of the scheme constituted money laundering transactions.

Defendants allegedly structured the payments in that manner in an attempt to conceal their scheme. Such action is a hallmark of money laundering. See Castellini, 392 F.3d at 49 (noting that "[t]he money laundering of the proceeds of an underlying illegal activity may make the underlying crime more difficult to detect or to prove. And Congress wanted to curtail the separate market of criminal activity which money laundering represents").

Finally, as the government argues, defendants are charged only with a money laundering conspiracy. Thus the government need only allege that defendants "agreed with another person to violate the substantive provisions of the money-laundering statute." United States v. Hynes, 467 F.3d 951, 964 (6th Cir. 2006). As previously explained, the indictment alleges that defendants (1) made payments to Singer's entities; (2) agreed with Singer that he would use those proceeds to make subsequent payments to university and testing officials in furtherance of the fraud scheme and (3) structured the transaction to conceal the nature, location, source, ownership, and control of those proceeds. 18 U.S.C 1956(h). Accordingly, the indictment properly alleges money laundering conspiracy and survives a motion to dismiss.

VII. Amy and Gregory Colburn's Joint Motion to Dismiss Second Superseding Indictment

Because defendants Amy and Gregory Colburn raise identical or substantively similar arguments as those addressed and rejected by this memorandum and order, their motion to dismiss will also be denied.

VIII. William McGlashan's Motion to Dismiss Count Seven and I-Hsin Chen's Motion to Dismiss Count Five

Likewise, the motions of defendants McGlashan and Chen will also be denied.

ORDER

For the foregoing reasons, the following motions of the defendants to dismiss the indictment (Docket Nos. 341, 1021, 1023, 1026, 1031, 1035, 1037, 1039 and 1041) are **DENIED.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated June 23, 2020

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
WILLIAM MCGLASHAN, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: **1: 19 CR 10080 - 15 - NMG**

USM Number: 25462-111

John C. Hueston, Esq.
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 7ss

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343 and 18 U.S.C. § 1346	Wire Fraud and Honest Services Wire Fraud	10/24/18	7ss

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) 1ss, 2ss, 3ss ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/12/2021
Date of Imposition of Judgment

/s/ Nathaniel M. Gorton
Signature of Judge

The Honorable Nathaniel M. Gorton
U.S. District Judge
Name and Title of Judge

5/22/2021
Date

AO 245B (Rev. 11/16) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: **1: 19 CR 10080 - 15 - NMG**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 3 month(s)

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to FCI - Lompoc, if deemed the appropriate security level, or another facility closest to his home in CA.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 6/9/2021 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: **1: 19 CR 10080 - 15 - NMG**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 2 year(s)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: **1: 19 CR 10080 - 15 - NMG**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B(Rev. 11/16) Judgment in a Criminal Case
Sheet 3D — Supervised Release

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: **1: 19 CR 10080 - 15 - NMG**

SPECIAL CONDITIONS OF SUPERVISION

1. You must complete 250 hours of community service at an agency approved by the Probation Office.
2. You must pay the balance of any fine or restitution imposed according to a court-ordered repayment schedule.
3. You are prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.
4. You must provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: 1: 19 CR 10080 - 15 - NMG

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$ 250,000.00	$

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5A — Criminal Monetary Penalties

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: **1: 19 CR 10080 - 15 - NMG**

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

It is further ordered that the defendant shall make a lump sum payment of $250,000 which is due within 60 days of sentencing.

Any fine imposed is to be continued to be paid until the full amount, including any interest required by law, is paid. All fine payments shall be made to the Clerk, U.S. District Court. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the fine remains unpaid.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: WILLIAM MCGLASHAN, JR.
CASE NUMBER: **1: 19 CR 10080 - 15 - NMG**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

See Page 7

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.