No. 22-1560

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MOSHE PORAT,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 21 Cr. 170, Hon. Gerald J. Pappert)

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers, constitutionally limited government, due process, and the rule of law. As part of this mission, it appears as amicus curiae before federal and state courts.

AFPF is part of a transpartisan coalition of organizations that advocate for an array of improvements to the criminal justice system that enhance public safety and ensure the protection of constitutional rights. AFPF believes unnecessary criminalization, over-federalization of criminal law, and prosecutorial overreach are barriers to improving our justice system, which also threaten constitutional rights. AFPF has an interest in this case because the Government's prosecution of Dr. Porat is a symptom of a broader problem in our justice system: "overcriminalization and excessive punishment in the U.S. Code." *Yates v. United States*, 574 U.S. 528, 569 (2015) (Kagan, J., dissenting).

[1]All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This is a textbook case of overcriminalization. It is yet another problematic example of prosecutors using the federal fraud statutes as a vehicle to enforce notions of "moral uprightness." *Skilling v. United States*, 561 U.S. 358, 418 (2010) (Scalia, J., concurring in judgment). This case stretches the wire fraud statute's "money or property" element beyond the breaking point. Whatever else one might say about the morality or propriety of Dr. Porat's alleged manipulation of the U.S. News & World Report ("U.S. News") rankings for Temple University's Fox School of Business ("Fox"), it should have given rise to, at most, civil liability—not a federal property fraud prosecution carrying a statutory maximum sentence of *twenty years* in prison. Submitting inaccurate information to U.S. News simply is not a crime under the federal wire fraud statute.

The Government should not be allowed to bring federal felony charges just because an individual engages in conduct the prosecutor feels should be a crime deserving of punishment but which isn't, as it has done here. This Court should reject the Government's sweeping reading of the statute, which would, if accepted, "invite[] abuse by headline-grabbing prosecutors in pursuit" of those "who engage in any manner of unappealing or ethically questionable conduct" without any limiting principles. *See Sorich v. United States*, 555 U.S. 1204, 1206 (2009) (Scalia, J., dissenting from denial of certiorari).

Simply put, the federal fraud statutes are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987). A private company's online ranking of schools is not a traditional property interest for students or anyone else. These rankings have nothing whatsoever to do with the quality of the education the students receive in exchange for paying tuition. And here the students got exactly what they paid for: a quality business education. That should have ended the matter, and the district court should have granted Dr. Porat's motion to dismiss the indictment.

There is no suggestion Dr. Porat obtained even a dime from the alleged victims. After all, the students paid tuition to Temple University and Fox, not Dr. Porat. Nor was Dr. Porat the source of the inaccurate statements some of the students may have seen and factored into their decision to enroll; instead, U.S. News and similar third parties not before the Court independently published their business school rankings on the Internet.

But the district court incorrectly blessed the Government's novel and dangerous theory of property fraud. This Court should not allow the Government's theory to stand. To be sure, the alleged conduct at issue in this case may well be untoward and unscrupulous. But the alleged deceitful conduct at issue in this case simply does not support a federal wire fraud prosecution carrying a statutory maximum sentence of *twenty years*. And if Dr. Porat's conviction is allowed to

stand, it would set a dangerous precedent without a meaningful limiting principle, potentially exposing businesses and individuals that offer a wide range of products and services to federal fraud prosecutions for inaccurate online rankings, ratings, and reviews.

If the federal wire fraud statute applies as broadly as the Government seems to think, it would be constitutionally infirm for at least two reasons. *First*, it would violate due process for failure to give fair notice of prohibited or required conduct, thus creating fertile grounds for arbitrary and seriously discriminatory enforcement. *Second*, it would violate Article I's Vesting Clause and the separation of powers by delegating to prosecutors and judges the power to "create" new federal crimes, a task reserved for Congress.

This Court should vacate Dr. Porat's convictions.

ARGUMENT

I. This Prosecution is a Textbook Example of Overcriminalization.

This case is part of a familiar pattern of overreaching federal prosecutions testing the limits of the concept of "property" under the federal fraud statutes. *See Kelly v. United States*, 140 S. Ct. 1565 (2020) (rejecting government's expansive view of what constitutes "property" under the statute); *Cleveland v. United States*, 531 U.S. 12 (2000) (same); *McNally*, 483 U.S. 350 (same). As the district court itself recognized, "[t]his is a very unique case. . . . And the parties seem to agree that this

is the first known case where university administrators have been criminally prosecuted for lying to rankings publications." Ex. D, p.130, Emergency Mot. of Def.-Appellant for Stay of Surrender Date, Bail Pending Appeal, and Stay of Fine.

As Professor Julie Rose O'Sullivan observed more broadly in a different context:

> There are many other social means by which those who cross moral lines can be held to account. Prosecutions are, and should be, reserved for those who cause criminal harm. To contend that that line ought to depend, instead, on prosecutors' views of the "morality" of a defendant's actions is a repudiation of the framers' wisdom. And it is downright scary to those of us who do not believe men are angels, and who recognize our own fallibility.

Julie Rose O'Sullivan, *Skilling: More Blind Monks Examining the Elephant*, 39 Fordham Urb. L.J. 343, 360 (2011). That observation resonates here.[2]

To be sure, Dr. Porat may have behaved badly, and the alleged conduct at issue in this case may well be unscrupulous and immoral.[3] Evidently, a prosecutor,

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[2] *Cf. United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996) ("Construing the evidence at its worst against defendants, it is true that these men behaved badly. We live in a fallen world. But, 'bad men, like good men, are entitled to be tried and sentenced in accordance with law.' And, the fraud statutes do not cover all behavior which strays from the ideal[.]" (quoting *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J. dissenting)), *overruled by United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009).

[3] And reportedly common. *See, e.g., Rutgers Business School Accused of Rankings Fraud, Hiring Own Grads in Temp Jobs to Boost Its Scores*, Philadelphia Inquirer (April 22, 2022), https://www.inquirer.com/news/rutgers-college-rankings-temple-lawsuits-20220422.html; Scott Jaschik, *Blame the Deans*, Inside Higher Ed (May 2,

a judge, and a unanimous jury of Dr. Porat's peers all thought that what he did was also criminal. But that alleged conduct should not have formed the basis of a federal prosecution under the federal wire fraud statute. And if the Government's theory of fraud is accepted in this case, it would threaten to expand the statute's "money or property" element to the point that it is meaningless. *See* 18 U.S.C. § 1343. *Cf. Cleveland*, 531 U.S. at 26 ("Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities.").

As relevant here, the federal wire fraud "statute prohibits individuals from using interstate communications to carry out 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'"[4] *United States v. Sadler*, 750 F.3d 585, 590 (6th Cir. 2014) (Sutton, J.) (quoting 18 U.S.C. § 1343). Like the federal mail fraud statute, it is "limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360. The scope of the federal fraud statutes is also bounded by common-law principles.

2022), https://www.insidehighered.com/admissions/article/2022/05/02/report-blames-deans-incorrect-data-submitted-us-news; *see also* A-31 ("It may be that the opacity of the rankings process—and the difficulty confronting students trying to discern the quality of the programs to which they were applying—created powerful incentives for schools to lie.").

[4] As the Supreme Court has made clear, deception is a necessary but not sufficient condition for federal property fraud liability. *See Kelly*, 140 S. Ct. at 1569, 1572–73.

See Neder v. United States, 527 U.S. 1, 21–23 (1999). Accordingly, "to determine whether a particular interest is property for purposes of the fraud statutes, . . . [courts] look to whether the law traditionally has recognized and enforced it as a property right." *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994). Put different, the federal fraud statutes only protect *traditional* interests in property. *See United States v. Al Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004) ("[T]he object of the alleged scheme or artifice to defraud must be a *traditionally recognized* property right." (emphasis added)).

As Judge Sutton explained: "the ethereal right to accurate information doesn't fit that description. Nor can it plausibly be said that the right to accurate information amounts to an interest that 'has long been recognized as property.'" *Sadler*, 750 F.3d at 591 (quoting *Cleveland*, 531 U.S. at 23 (internal quotation marks omitted)). The federal fraud statutes simply do not "cover the right to accurate information before making an otherwise fair exchange." *Sadler*, 750 F.3d at 591; *accord United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021); *see also United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016). *But cf. United States v. Baroni*, 909 F.3d 550, 566–67 (3d Cir. 2018).

Yet, here, the Government has reimagined the concept of "property" to encompass an ethereal interest in "accurate" school rankings that U.S. News posts on the Internet from time to time. The Government's theory of fraud thus reminds

of Alice in Wonderland. *Cf.* Lewis Carroll, Through the Looking Glass ("'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'"). Consider the implications of the government's theory of property fraud. Customers of businesses offering a wide array of products and services would presumably also have a property interesting in online ratings, rankings, and reviews relating to those products and services. That would mean fake Yelp and Amazon reviews could give rise to federal wire fraud prosecutions, which makes no sense. Online rankings, ratings, and reviews simply are not property.[5]

The Government's salary maintenance theory is equally problematic and, if upheld, would transform employment disputes generally resolved under state employment or fiduciary duty law into federal felonies carrying a twenty-year statutory maximum sentence.[6] Acceptance of this theory "would criminalize a wide range of commonplace conduct." *Yates*, 16 F.4th at 267. Indeed, if maintaining a

[5] Perhaps that is why the district court found the Government failed to establish any loss amount under the Sentencing Guidelines. *See United States v. Porat*, No. 21-170, 2022 U.S. Dist. LEXIS 46348, at *1 (E.D. Pa. Mar. 16, 2022) (Dkt. 166, p. 15).

[6] As the district court noted, "students' tuition dollars went to Fox and Temple, not Porat himself." *Porat*, 2022 U.S. Dist. LEXIS 46348, at *22. And the district court found that, for sentencing purposes, "the Government fell short of showing his compensation would have been different had he not engaged in his crimes." *Id.* at *23. By implication, that means that the Government could not prove by a preponderance of the evidence at sentencing that Dr. Porat financially benefitted in any way from the alleged manipulation of the U.S. News rankings.

salary was "obtaining property" under the federal wire fraud statute, then virtually all cases involving employee deception would constitute federal fraud. "Consider an employee who wastes time on the Internet but then, to avoid being fired, falsely claims to have been working productively." *Id.* ("Presented with that scenario at oral argument, the government declined to say whether the employee would be guilty of federal fraud on a salary-maintenance theory. The government's hesitation is understandable."). That employee may well have committed a fireable offense. But wasting time on the Internet while at work is not federal wire fraud. If it were so, we would all have to mind our behavior much more closely. Unsurprisingly, "the only circuit courts to address the issue have rebuffed the Government's salary-maintenance theory." *United States v. Guertin*, No. 21-262, 2022 U.S. Dist. LEXIS 12485, at *7 (D.D.C. Jan. 24, 2022) (citing *Yates*, 16 F.4th at 266; *United States v. Goodrich*, 871 F.2d 1011, 1013–14 (11th Cir. 1989)).

Finally, lest any doubt remain as to the overreaching nature of the government's fraud theory, application of the convergence principle would further confirm why Dr. Porat's convictions should be reversed.[7] That is because the alleged

[7] Under the convergence theory, there is no fraud when "the party to whom the fraudulent pretenses were made . . . was not the same as the party from whom money or property would have been taken." *United States v. Bryant*, 655 F.3d 232, 249 (3d Cir. 2011). This Court has yet to address the extent to which convergence is necessary to sustain a conviction. *See id.* at 249–50. While it is unnecessary for this Court to reach that issue because the Government's theory of fraud fails for other reasons, if ever there was a case where convergence was lacking, this would be it.

representations were made to U.S. News and similar rankings organizations about matters such as the percentage of Fox students who had taken the GMAT.[8] And there is no suggestion Dr. Porat or anyone else sought to obtain money or property from U.S. News or any other rankings publisher, the parties to whom the alleged false statements were made.

II. This Court Should Not Construe the Federal Fraud Statute to Criminalize Civil Disputes.

As a former federal prosecutor recently explained:

> To those who have either participated in or studied the development of white-collar criminal cases in federal courts, the term "overcriminalization" is all too familiar. With regularity and for many decades, scholars have warned against a persistent trend in federal courts toward criminalizing not only civil disputes but conduct having little moral blameworthiness attached. Yet lower courts' approval of prosecutors' ever-expanding theories of crime has proceeded apace, and if anything, the trend has accelerated in recent years.

Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 140–141 (2021).[9] So too here. As

[8] It is unclear how whether other students took the GMAT at some point would affect the quality of a Fox student's education.

[9] "The main problem with overcriminalization is that it results in crimes that are often . . . poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability." Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 565 (2012). That observation resonates here.

discussed above, this case is a textbook example of the problem of overcriminalization of conduct that, at most, should give rise to civil liability.

The Supreme Court has consistently rejected statutory interpretations that "would appear to criminalize a broad range of day-to-day activity[.]"[10] *United States v. Kozminski*, 487 U.S. 931, 932 (1988). For example, the Supreme Court recently—and unanimously—rejected the Government's efforts to bulldoze statutory guardrails constraining federal prosecutors' use of the federal property fraud statutes.[11] *See Kelly*, 140 S. Ct. 1565. The Supreme Court has long followed this approach. *See, e.g.*, *Cleveland*, 531 U.S. at 24 ("We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."); *McNally*, 483 U.S. at 360 ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous . . . , we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further,

[10] *See also Yates*, 574 U.S. at 536 ("reject[ing] the Government's unrestrained reading" of 18 U.S.C. § 1519—a felony offense with a statutory maximum of 20 years imprisonment—to criminalize throwing a few fish overboard); *Bond v. United States*, 572 U.S. 844, 862 (2014) ("We are reluctant to ignore the ordinary meaning of 'chemical weapon' when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.").

[11] If it were otherwise, "even a practical joke could be a federal felony." *Kelly*, 140 S. Ct. at 1573 n.2.

it must speak more clearly than it has."). This Court should do so here and reject the Government's proposal to broadly construe the federal property fraud statute to criminalize (and federalize) a vast array of conduct that should, at most, give rise to civil disputes.

III. Broadly Construing the Federal Wire Fraud Statute's Sweep to Reach the Conduct at Issue in This Case Violates Due Process.

Bedrock principles of due process further counsel in favor of rejecting the Government's novel, sweeping theory of fraud. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 561 U.S. at 402–03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). If the government's interpretation of 18 U.S.C. § 1343's sweep were correct, the statute would satisfy neither of these bedrock constitutional requirements.

A. Fair Notice

If the federal property fraud statutes are construed to criminalize state employment and fiduciary duty matters not involving "property," let alone a traditional property interest, which did not affect the basis of the bargain the alleged

victims made with the school, then the federal fraud statutes would be unconstitutional.

"In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). As Justice Holmes has explained:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). If the federal wire fraud statute swept as broadly as the government seems to think, the statute itself would violate the first essential element of due process of law: fair notice of required or prohibited conduct.

B. Danger of Arbitrary and Discriminatory Enforcement

There is yet another related constitutional problem. The Government's unbounded theory of fraud creates fertile grounds for seriously discriminatory

enforcement. Criminal laws that "authorize and even encourage arbitrary and discriminatory enforcement" may be invalidated for vagueness. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Indeed, "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 139 S. Ct. at 2325. Thus, "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained . . . is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (finding due process violated if "judges and jurors [are] free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case").

Those principles resonate here. For if the Government's liability theory is accepted, it would allow federal prosecutors to bring charges—or use the threat of criminal liability as leverage—for arbitrary and seriously discriminatory reasons in circumstances where, for example, an individual expresses unpopular political views or engages in conduct the prosecutor feels *should* be a crime deserving of punishment, but which isn't. The broad interpretation of the statute urged by the Government "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they

should be punished as crimes" and "subject individuals to the risk of arbitrary or discriminatory prosecution and conviction." *Kozminski*, 487 U.S. at 949. That is patently unconstitutional.

This Court should reject out of hand any invitation to broadly construe the wire fraud statute to reach Dr. Porat's alleged conduct based on putative assurances of the exercise of prosecutorial restraint. *See United States v. Stevens*, 559 U.S. 460, 480 (2010). For such a broad construction would "leave us at the mercy of noblesse oblige." *Id.* And the limits of federal prosecutors' creativity and imagination.

IV. The Rule of Lenity, Federalism Principles, and The Constitutional Avoidance Canon Counsel in Favor of a Limiting Construction.

To the extent there are lingering doubts as to why the Government's interpretation of the federal wire fraud statute should be rejected, the rule of lenity, constitutional avoidance canon, and federalism principles further counsel in favor of cabining the statute's sweep to traditional property interests.

A. Lenity

"[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 574 U.S. at 547–48 (cleaned up). Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" *Davis*, 139 S. Ct. at 2333 (quoting *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95 (1820) (Marshall, C. J.)). "The rule of lenity requires

ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). Thus, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359–60; *see also United States v. Malik Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (en banc) (Bibas, J., concurring) ("The touchstone [for the rule of lenity] is the text: the 'ordinary,' evidently intended meaning of 'the words of the statute.'" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95)).

It "is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., joined by Sotomayor, J., concurring in judgment) (quoting *The Adventure*, 1 F. Cas. 202, 204, F. Cas. No. 93 (No. 93) (CC Va. 1812) (Marshall, C. J.)); *see also United States v. Mann*, 26 F. Cas. 1153, 1157 (CC NH 1812) ("It is a principle grown hoary in age and wisdom, that penal statutes are to be construed strictly, and criminal statutes to be examined with a favorable regard to the accused."). "Schooled in the English tradition, American judges applied the principle of lenity from the start." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 129 (2010). "In the hands of judges in this country, however, lenity came to serve distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of

powers." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in judgment). As Justice Scalia explained: "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

With respect to due process, "[l]enity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws. . . . [W]here uncertainty exists, the law gives way to liberty." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in judgment). "[L]enity's emphasis on fair notice . . . is about protecting an indispensable part of the rule of law—the promise that [individuals] . . . can suffer penalties only for violating standing rules announced in advance." *Id.* at 1083 (Gorsuch, J., concurring in judgment).

The rule of lenity also protects the separation of powers. In our system of checks and balances, only the legislature may create federal crimes through duly enacted legislation. *See United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute[.]") (cleaned up); *Fasulo v. United States*, 272 U.S. 620, 629 (1926) ("There are no constructive

offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."). As Chief Justice Marshall wrote: "[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *see* U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress[.]").

Thus, Article III Courts may not create federal crimes; "[i]t is well settled that there are no common law offences against the United States." *United States v. Eaton*, 144 U.S. 677, 687 (1892); *see also Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) ("[T]he notion of a common-law crime is utterly anathema today, which leads one to wonder why that is so. The obvious answer is that we now agree with the perceptive chief justice of Connecticut, who wrote in 1796 that common-law crimes 'partake of the odious nature of an ex post facto law.'" (citation omitted)). Nor may prosecutors and juries expand the ambit of federal criminal law. *But see Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (describing statute that "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens" as an "extraconstitutional arrangement" and suggesting the state of affairs should be revisited). Instead, "[a]ny new national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts,

interests and classes.'" *Wooden*, 142 S. Ct. at 1083 (quoting The Federalist No. 51, at 324 (J. Madison)); *see also Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

Here, the Government's novel theory of property fraud in this case is in serious tension with the statutory text and at odds with the rule of lenity's core functions: protecting due process and enforcing the separation of powers. And it is simply wrong for Dr. Porat to "languish[] in prison" without "the lawmaker ha[ving] clearly said [that he] should." *United States v. Bass*, 404 U.S. 336, 348 (1971). "[I]t is appropriate, before . . . [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Yates*, 574 U.S. at 548 (cleaned up). Congress did not do so here. *Cf. Wooden*, 142 S. Ct. at 1085–86 (Gorsuch, J., concurring in judgment) ("Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity.").

B. Constitutional Avoidance

Buttressing the conclusion that the Government's novel theory of fraud should be rejected is the doctrine of constitutional avoidance, which often works in a tandem with the rule of lenity to counsel a *narrow* but constitutionally permissible reading of a criminal statute. Under the avoidance canon, "when presented with two fair alternatives, th[e Supreme] Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed

more broadly." *Davis*, 139 S. Ct. at 2332 (cleaned up). "[W]hat Congress has written . . . must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *United States v. Rumely*, 345 U.S. 41, 45 (1953) (cleaned up); *see, e.g.*, *McDonnell v. United States*, 579 U.S. 550, 576–77 (2016) (rejecting expansive reading of criminal statute that "would raise significant constitutional concerns"); *Skilling*, 561 U.S. at 405 ("It has long been our practice . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."). "Applying constitutional avoidance to narrow a criminal statute . . . accords with the rule of lenity." *Davis*, 139 S. Ct. at 2333. So too here.

C. Federalism Principles

Federalism principles further counsel in favor of limiting the federal wire fraud statute's sweep here. As the Supreme Court has explained, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Bond*, 572 U.S. at 859. The Government's stretching of broadly worded federal criminal laws to prosecute matters traditionally regulated by the States raises federalism concerns, as the Court has long recognized. *See, e.g.*, *id.* at 857–60; *Cleveland*, 531 U.S. at 24 (declining to extend the mail fraud statute to "a wide range of conduct traditionally regulated by state and local authorities"); *Jones v. United States*, 529 U.S. 848, 858 (2000) (declining to broadly construe

federal arson statute). "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond*, 572 U.S. at 858.

"Lightly equating deceptions with property deprivation, even when the full sales price is paid, would occupy a field of criminal jurisdiction long covered by the States[.]" *Sadler*, 750 F.3d at 591; *see also United States v. Ernst*, 502 F. Supp. 3d 637, 652 (D. Mass. 2020) (noting "the Supreme Court's refrain that the federal property fraud statutes should not be used as a backdoor for expanding the scope of federal criminal jurisdiction without a clear statement by Congress" and collecting cases). Here, the Government's theory of property fraud would do just that. The Government's reading of § 1343 in this case "invites . . . a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. And it "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.*

That is yet another independent reason to reject the government's wayward effort to expand the statute's scope beyond traditional property interests. For "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Id.* at 25 (cleaned up); *see Bond*, 572 U.S. at 858–59 ("'[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.'" (quoting *Bass*, 404 U.S. at 349)); *see also United States*

Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020) (Congress must speak clearly "if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."). And Congress did not do so here.

CONCLUSION

For these reasons, this Court should vacate Dr. Porat's convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to 3d Cir. L.A.R. 28.3(d), I hereby certify that the attorneys whose names appear on this brief are members of the bar of this Court.
2. This brief complies with the type-volume requirements of FRAP 29(a)(5) and 32(a)(7)(B) because it contains 5,531 words, excluding the parts of the brief exempted by FRAP 32(f).
3. The brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) and 3d Cir. L.A.R. 32.1(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.
4. Pursuant to 3d Cir. L.A.R. 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies, and that it has been scanned for viruses using Windows Security Custom Scan, and no virus was detected.

/s/ Michael Pepson
Michael Pepson

Dated: July 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Defendant-Appellant with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: July 1, 2022