No. _____

In The
Supreme Court of the United States

HENRY P. ALFANO and WILLIAM HIRD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the potential for collection of fines and costs which may become due to the state from unadjudicated traffic tickets, on which there has yet been no finding of guilt, constitute "property" which may be the object of a scheme to defraud under the mail- and wire-fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1349?

LIST OF PARTIES

In addition to the parties to this Petition (Henry P. Alfano, William Hird and the United States of America), the parties to the proceeding below were Appellants Thomasine Tynes, Robert Mulgrew, Michael Lowry and Willie Singletary. Ms. Tynes, Mr. Mulgrew and Mr. Lowry will be seeking certiorari via a separate joint petition to this Court. Mr. Singletary is not seeking certiorari review.

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The initial opinion of the United States Court of Appeals for the Third Circuit is reported as *United States v. Hird*, 901 F.3d 196 (3d Cir. 2018). Following petitions for rehearing, the Third Circuit issued an amended opinion, which appears in the appendix and is reported as *United States v. Hird*, 913 F.3d 332 (3d Cir. 2019).

The opinion of the United States District Court for the Eastern District of Pennsylvania denying the motion to dismiss the indictment appears in the appendix and is unofficially reported as *United States v. Sullivan*, No. 2:13-cr-00039, 2013 U.S. Dist. LEXIS 91660 (E.D. Pa. July 1, 2013).

JURISDICTION

The Court of Appeals initially denied relief on August 21, 2018. In response to petitions for rehearing submitted by Mr. Alfano and Mr. Hird's co-appellants, the Court of Appeals issued an amended opinion on January 18, 2019, when it granted rehearing in part. On April 11, 2019, Justice Alito extended the time to file this petition until May 18, 2019. *See* Docket No. 18A1048. On May 13, 2019, Justice Alito further extended the time to file this petition until June 17, 2019. This petition is thus timely. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1341 provides, in pertinent part:

> 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 provides, in pertinent part:

> 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. § 1349 provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner Henry Alfano is a Philadelphia entrepreneur with businesses in the scrap metal and towing industries. Petitioner William Hird is the former Director of Records for the Philadelphia Traffic Court ("Traffic Court"). In 2013, both men were charged with participating in a scheme to "fix" Traffic Court tickets.[1]

[1] As Mr. Alfano and Mr. Hird challenge the sufficiency of the Indictment, the facts in this petition are drawn directly from the Indictment, which is presumed to be accurate.

A. The Operation of Traffic Court

As it existed prior to the indictment in this case,[2] Traffic Court was staffed by full-time, elected judges, as well as various senior judges and other local judges appointed by the Administrative Office of the Pennsylvania Courts. The judges adjudicated tickets issued by the Philadelphia Police Department and Pennsylvania State Police within the City of Philadelphia ("City"). Once the police issued a citation, the ticketholder was given a date to appear in Traffic Court for trial. Before trial, ticketholders entered a plea (guilty or not guilty) to the alleged violation(s). When a ticketholder pleaded not guilty, the ticketholder could present evidence at a hearing, including by questioning the police officer who issued the ticket. Indictment ¶ 6.

When resolving citations, judges could choose from several different options. They could, of course, find the ticketholder guilty or not guilty. They could also find the ticketholder guilty of a different offense, guilty *in absentia*, not guilty *in absentia* or guilty with reduction of speed. Finally, they could dismiss the ticket. In addition, the ticketholder could plea bargain with the police officer who prosecuted the ticket. Indictment ¶ 7.

An adjudication of guilt of any variety subjected the ticketholder to statutorily established fines and costs. Some offenses also carried with them statutorily mandated "points" on the ticketholder's driving record.

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[2] Traffic Court's functions were transferred to the Philadelphia Municipal Court in 2013. The court was formally abolished by constitutional amendment in 2016.

The money received from the tickets would be split evenly between the City and Pennsylvania and paid out to particular funds. When a ticketholder was found not guilty, however, or when the ticket was dismissed, the ticketholder did not have to pay any fines or costs. Indictment ¶¶ 8-10.

B. The Allegations

The Indictment in this case alleged violations of the mail- and wire-fraud statutes stemming from a long-standing practice by Philadelphia Traffic Court officials who used their positions to "fix" tickets at the request of politically and socially connected individuals receiving traffic citations. Specifically, the Indictment alleges that the defendants who were formally affiliated with Traffic Court during the relevant time frame (July 2008 to September 2011) provided the following benefits to the politically and socially influential:

> (1) dismissing tickets outright; (2) finding the ticketholder not guilty after a "show" hearing; (3) adjudicating the ticket in a manner to reduce fines and avoid assignment of points to a driver's record; and (4) obtaining continuances of trial dates to "judge-shop," that is find a Traffic Court judge who would accede to a request for preferential treatment.

Indictment ¶ 30.

Regarding the petitioners, the Indictment asserted that Mr. Alfano provided his friend, Judge

Fortunato N. Perri, Sr., with citation numbers, names of offenders and/or actual citations from friends, employees and associates. Judge Perri, according to the Indictment, would then convey the information to Mr. Hird to arrange preferential treatment, known as "consideration," for the citations at issue. Indictment ¶¶ 39-40.

Mr. Hird then conveyed the consideration requests to the judge assigned to each case. Sometimes, Judge Perri and Mr. Hird also attempted to arrange for a particular judge to hear the citation. Once the citation was adjudicated, Mr. Hird would provide printouts of the case disposition to Judge Perri, who would in turn mail them to Mr. Alfano or the ticketholder as a "receipt." Indictment ¶¶ 41-42. The Indictment did not allege that Mr. Alfano or Mr. Hird interfered in any way with the collection of fines or costs already imposed on ticket holders who had been found guilty.

Count 1 of the Indictment alleged, in over 50 pages, a conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349. Counts 2 through 50 alleged substantive wire-fraud violations (18 U.S.C. § 1343), while Counts 51 through 68 allege substantive mail-fraud violations (18 U.S.C. § 1341). All the mail- and wire-fraud charges (Counts 1-68) relate to the same alleged scheme to defraud and, specifically, a scheme to adjudicate traffic tickets more favorably for "politically connected individuals, and others who, because of their influential positions . . . asked Traffic Court judges . . . for preferential treatment. . . ." Indictment ¶ 28.

C. Procedural History

On January 29, 2013, Mr. Alfano and Mr. Hird, along with several Traffic Court judges, were indicted and charged with conspiracy to commit mail and wire fraud, as well as multiple counts of wire fraud and mail fraud.[3] All the charges against them stemmed from the ticket-fixing allegations detailed above. Co-defendant Michael J. Sullivan filed a motion to dismiss the Indictment, which petitioners joined. The defendants argued that the Indictment failed to allege that the alleged scheme targeted a property interest under the wire- and mail-fraud statutes because, *inter alia*, the money due from fines and costs on traffic tickets did not become "property" unless and until there was an adjudication of guilt. But the Indictment did not allege that Mr. Alfano or Mr. Hird interfered with the collection of funds from tickets for which the drivers had already been adjudicated guilty, only that they had helped to prevent an adjudication of guilt in the first place.

The district court denied the motion. In pertinent part, the district court shockingly ruled that accepting defendants' argument "would permit the alleged conspirators in this case to enter into a scheme to commit fraud and then hide behind the argument that the success of their fraud precludes prosecution under the 'money or property interest' requirement of the mail and wire fraud statutes." *Sullivan*, 2013 U.S. Dist. LEXIS 91660, at *24. In other words, the district court

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[3] Mr. Hird also was charged with making false statements to the FBI. *See* 18 U.S.C. § 1001.

appeared to conclude, the scheme itself converted the traffic tickets at issue into property under the applicable statutes.

Both petitioners later pleaded guilty to the charges against them. Their plea agreements included appellate waivers, but the parties excepted from the waivers their right to challenge the district court's ruling on the motion to dismiss. Mr. Alfano was sentenced to three years' probation and ordered to pay a special assessment of $1,300, and a $5,000 fine. Mr. Hird was sentenced to 24 months' imprisonment and ordered to pay a special assessment of $1,800 and a $5,000 fine. Both men then appealed, raising the same issue—the lack of property interest under the mail- and wire-fraud statutes in the alleged scheme.

The Third Circuit affirmed. In a precedential opinion, the court ruled that the district court "said it well. . . . Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments of guilt and the imposition of fines and costs) as the basis to claim that there is no fraud. Indeed, the not-guilty judgments that Alfano and Hird worked to obtain through the extrajudicial system were alleged in the indictment as evidence of the scheme itself." *Hird*, 913 F.3d at 343. As with the district court, the Third Circuit thus appeared to rest its opinion that the alleged scheme targeted a property interest on the nature of the scheme and not the nature of the traffic tickets that were "fixed."

REASONS FOR GRANTING THE WRIT

I. An Unadjudicated Traffic Ticket Does Not Constitute "Property" Under the Mail- and Wire-Fraud Statutes, 18 U.S.C. §§ 1341, 1343 and 1349, and the Third Circuit's Contrary Ruling Unduly Expands the Reach of Federal Criminal Law.

This Court has recognized that the federal mail- and wire-fraud statutes do not "purport to reach all frauds." *Schmuck v. United States*, 489 U.S. 705, 710 (1989). Rather, the statutes are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987), *superseded by statute*, 18 U.S.C. § 1346. Here, the Third Circuit ruled that an unadjudicated traffic ticket—from which no money is owed—constitutes property to the government. That conclusion was wrong. And the Third Circuit's opinion expands the reach of federal criminal law into an area Congress has seen fit to leave to the states. Thus, this Court should grant the writ to reinforce the proper boundaries of federal criminal law.

A. Legal Background: The Mail- and Wire-Fraud Statutes Require a "Property" Interest Be at Stake.

Over the course of four opinions spanning nearly 20 years, this Court announced and then later refined its view concerning the scope of "property" under the mail- and wire-fraud statutes.

The Court first addressed the issue in *McNally*, where the defendants were suspected of running a self-dealing scheme involving Kentucky state insurance contracts. 483 U.S. at 353. McNally and his co-defendant were accused of violating the mail-fraud statute, 18 U.S.C. § 1341, by denying "the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *Id.* at 352. After conviction, the Sixth Circuit affirmed, concluding based on a line of decisions in the Courts of Appeals that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355.

This Court reversed reasoning, *inter alia*, that while § 1341 could fairly be read to include intangible rights, "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. Finding such clear and definite language lacking, the Court held that § 1341 is limited to protecting property rights. *Id.* at 360.

This Court began to define the contours of the property-right requirement later that year. In *Carpenter v. United States*, 484 U.S. 19 (1987), a reporter for the Wall Street Journal provided pre-publication information from a column he wrote about stocks for the newspaper to employees at a brokerage firm, who, in turn, traded on the information. The newspaper had a policy that made pre-publication information Journal

property. *Id.* at 23. After the defendants were convicted of, *inter alia*, mail and wire fraud for their scheme, the Second Circuit affirmed their convictions. *Id.* at 21-22.

This Court granted certiorari. The defendants, petitioners before this Court, contended that, under *McNally*, the pre-publication information from the newspaper did not constitute "property." *Id.* at 25. This Court disagreed, concluding that the intangible nature of the property did not lessen its protection under the mail- and wire-fraud statutes. *Id.* The Court further held that the lack of publication of the pre-publication information was immaterial. *Id.* at 26. "[I]t is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26-27.

This Court next confronted the question of what constitutes "property" under the mail- and wire-fraud statutes in *Cleveland v. United States*, 531 U.S. 12 (2000). In *Cleveland*, the defendant was accused of committing mail fraud by lying on an application to the Louisiana State Police for an application to run video poker machines. *Id.* at 17. After his conviction (which the Fifth Circuit affirmed), this Court granted certiorari to resolve whether a state license constitutes property under the mail- and wire-fraud statutes. *Id.* at 18. The Court answered the question in the negative. As an initial matter, the Court determined that the state's concern in its video-poker-licensing regime was regulatory, not proprietary. *Id.* at 20-21. Though the state

benefitted financially from the licensing scheme, most of the money it made came after it issued the license. *Id.* at 22. Moreover, the Court concluded that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* at 24. Thus, for purposes of the mail-fraud statute, "the thing obtained must be property in the hands of the victim" to constitute property. *Id.* at 15.

Finally, in *Pasquantino v. United States*, 544 U.S. 349 (2005), the defendants imported large quantities of alcohol from the United States into Canada surreptitiously to avoid the payment of Canadian taxes. After their conviction of wire-fraud charges, affirmed by the Fourth Circuit, this Court granted certiorari. *Id.* at 354. The Court affirmed the convictions, concluding, *inter alia*, that the unpaid taxes constituted "property" under the wire-fraud statute. *Id.* at 355. In reaching this conclusion, the Court noted that the money the defendants failed to pay to Canada in taxes was "legally due." *Id.* at 356. "Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury. . . . The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury." *Id.*

The Court's jurisprudence in this area thus establishes a couple of basic principles, particularly where government interests are at stake. If defendants' scheme seeks to deprive the government money that is

"legally due," the scheme targets property under the mail- or wire-fraud statute. But if the scheme is aimed only at obtaining something that the government holds in its regulatory capacity—or if the state is deprived of no economic benefit—then there is no property for purposes of the mail- or wire-fraud statute.

B. An Unadjudicated Traffic Ticket Does Not Constitute "Property."

The Indictment in this case charged Mr. Alfano and Mr. Hird with participating in a scheme to "fix" tickets in Traffic Court. As set forth above, the essence of the alleged scheme is that Mr. Alfano, operating through Traffic Court judges and staff, arranged for well-connected individuals to have their tickets resolved favorably. The Indictment contains no allegations that Petitioners ever interfered with the collection of fines and costs associated with ticketholders adjudicated guilty. Thus, for Mr. Alfano or Mr. Hird to have committed mail or wire fraud, the unadjudicated traffic tickets that he helped to "fix" must themselves be property under the mail- and wire-fraud statute. For several reasons, they are not.

First, the government's interest in unadjudicated traffic tickets is only regulatory and not proprietary. The Pennsylvania statutory scheme authorizing the City and Commonwealth to issue traffic citations, outlining the fines and costs for specific violations, and detailing the processes for adjudicating traffic violations is part of the Commonwealth of Pennsylvania's

regulatory function and not a revenue-raising mechanism. The Pennsylvania Vehicle Code is "a system of general regulation . . . prescribing the manner and by whom motor vehicles shall be operated upon the highways of the state, *is necessary to promote the safety of persons* and property within the state." *Maurer v. Boardman*, 7 A.2d 466, 472 (Pa. 1939) (emphasis added). "The primary purpose of the Motor Vehicle Code and its amendments is to protect and promote public safety and property within the Commonwealth. Therefore, *every provision of the Code should be interpreted in light of that intent*." *Commonwealth v. DeFusco*, 549 A.2d 140, 142 (Pa. Super. Ct. 1988) (emphasis added) (internal citations omitted). "The purpose of the Vehicle Code is to ensure public safety upon the streets and highways of the Commonwealth." *Commonwealth v. Eliason*, 509 A.2d 1296, 1298 (Pa. Super. Ct. 1986). Like the video-poker licensing scheme at issue in *Cleveland*, Pennsylvania vehicle codes constitute a "typical regulatory program." *Cleveland*, 531 U.S. at 21. While the government does collect money from issuing tickets, the Commonwealth's "core concern is *regulatory*." *Id.* at 20 (emphasis in original).

In rejecting this argument, the Third Circuit concluded that "fees charged to obtain a license cannot be equated with fines and costs that result from a traffic ticket." *Hird*, 913 F.3d at 341. In pertinent part, the court stated that a traffic ticket "merely establishes the summary violation with which the person is charged. Once a person has been charged, it is judicial power (not the state's police power) that is exercised to

determine whether the person is guilty and, if guilty, to impose the fines and costs." *Id.* The fines and costs that are issued, the Third Circuit held, "cannot be cabined as a product of the state's regulatory authority." *Id.*

Even assuming, *arguendo*, that the Third Circuit was correct about post-judgment traffic tickets, the Third Circuit's opinion elides a key point: all of the tickets at issue here were *pre*-judgment tickets. At the point of the alleged interference, no judicial action had yet taken place. Mr. Alfano and Mr. Hird were accused of interfering with a process by which tickets might be converted to judgments, *not* a process by which Traffic Court ensured that the proceeds of post-judgment tickets were collected. Even by the Third Circuit's own logic, Mr. Alfano and Mr. Hird could not commit wire or mail fraud because they interfered only with pre-judgment tickets, which were exclusively the result of the state's exercise of its regulatory authority.

Second, and relatedly, the presumption of innocence mandates in favor of a finding that pre-judgment traffic tickets are not "property" under the mail- and wire-fraud statutes. The Indictment makes clear that the City and Commonwealth were not entitled to any fines or costs unless and until a ticketholder was adjudicated guilty. *See* Indictment ¶ 10 ("Upon an adjudication of not guilty or dismissal, the ticketholder did not pay any fines or costs."). This makes sense; the ticket fixing occurred pre-adjudication, at a point when the ticket holder is presumed innocent and the elements of the alleged motor vehicle code violation must

be proven beyond a reasonable doubt. *See*, *e.g.*, *Commonwealth v. Kittleberger*, 616 A.2d 1, 6 (Pa. Super. Ct. 1992) ("To sustain a conviction for speeding, the Commonwealth must show beyond a reasonable doubt that: (1) an accused was driving in excess of the speed limit; (2) the speed timing device was approved by the Department of Transportation; and (3) the device was calibrated and tested for accuracy within the prescribed time period by a station which has been approved by the department."); *Commonwealth v. Hamaker*, 541 A.2d 1141, 1142 (Pa. Super. Ct. 1987) (Commonwealth must prove certain factors beyond a reasonable doubt to sustain a conviction for speeding); *Commonwealth v. Maddesi*, 588 A.2d 580, 583 (Pa. Commw. Ct. 1991) ("In order to prove that the licensee failed to stop for a red light, the Commonwealth must show that the traffic control signal was red, and that the licensee traveled through that part of the intersection controlled by the red signal."); *Commonwealth v. Hudson*, 38 Pa. D&C 3d 248, 253-54 (Pa. Com. Pl. 1985) (Commonwealth bears burden to prove violation of Vehicle Code § 3323(b), or failing to stop at a stop sign). Thus, before a guilty adjudication, a ticketholder owes nothing, and the City and Commonwealth have no property in their "hands." *Cleveland*, 531 U.S. at 26.

In resisting this argument, the Third Circuit dismissively referred to the presumption of innocence, a foundational component of our republic,[4] as a "red

[4] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the

herring that is properly disregarded here." *Hird*, 913 F.3d at 344. The court reasoned that Mr. Alfano, Mr. Hird and their co-defendants acted "for the purpose of obviating judgments of guilt imposing fines and costs in those selected cases." *Id.* Later, the court concluded, "traffic tickets (*or more precisely, judgments arising from them*)" constitute property under §§ 1341 and 1343, as a "scheme to obviate judgments imposing fines . . . imposes an economic injury that is the equivalent of unlawfully taking money from fines paid out of the Government's accounts." *Id.* at 344-45.

But the Third Circuit's reasoning is incoherent. By the court's own admission, the right to property exists in the judgment. As a general matter, a judgment occurs after some event, such as an adjudication by the court or the agreement of the parties, and becomes binding on the parties through the action of the tribunal. Judgment is only entered once parties have waived or exercised their due-process rights. *See*, *e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (right to litigate claims against oneself guaranteed by Due Process Clause and conditions upon which that right is waived "must be respected"). The entry of judgment is a crucial event—for example, it generally triggers the right to execute or collect on the judgment, *see* Fed. R. Civ. P. 62(a) (prevailing party may execute on judgment once 14 days from entry have passed), and the right to appeal, *see* Fed. R. App. 4(b)(1)(A)(i) (in

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administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

criminal case, appeal must ordinarily be filed within 14 days of entry of judgment).

A ticket, at least under the Pennsylvania laws, on the other hand, is nothing more than a charging document, equivalent to an indictment in a criminal case. Only upon a finding of guilt are fines and costs due. This circumstance cannot be reconciled with *Cleveland*, where this Court has explained, "[i]t does not suffice . . . that the object of the fraud *may* become property in the recipient's hands; for purpose of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15 (emphasis added). As the *Pasquantino* Court further explained, an "entitlement to collect money," such as a tax, qualifies as property because, consistent with the notion of common-law fraud, the "right to be paid money has long been thought to be a species of property." 544 U.S. at 356. This, as the Court noted, makes sense "given the economic equivalence between money in hand and money legally due." *Id.*

Here, no right to money exists at the time of the alleged interference. Instead, any such right exists only *after* an adjudication of the ticket. Money or "property" (in the form of fines and costs) is only legally due when there is a finding of guilt. Before the ticketholder has been found guilty, the ticket represents, at most, *potential* revenue for the City and/or Commonwealth, a potential obviated by the presumption of innocence. The government has no authority to collect on the debt until the ticket has been adjudicated. In fact, the government has nothing to collect. Far from being "a red

herring that is properly disregarded," the presumption of innocence thus plays a key role in the analysis of the property interests at issue in this case. Even assuming, *arguendo*, that fines and/or costs due on a judgment arising from a traffic ticket constitute property under the mail- and wire-fraud statutes, the ticket itself does not, and the Third Circuit erred in brushing aside the difference between the two.

C. The Third Circuit's Opinion Represents a Results-Oriented Expansion of Federal Criminal Law.

The Third Circuit's opinion is not merely in error. It represents a substantial encroachment of federal criminal law into an area of state concern. "States possess primary authority for defining and enforcing the criminal law." *Medellin v. Texas*, 552 U.S. 491, 532 (2008); *see also Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Federal criminal authority in areas of overlapping concern, on the other hand, is to be interpreted in a more limited manner, except where Congress has spoken clearly to the contrary. *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."); *see also Jones v. United States*, 529 U.S. 848, 860 (2000) (Stevens, J., concurring) ("I reiterate my firm belief that we should interpret narrowly federal criminal

laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain.").

This Court has been particularly careful not to extend the reach of the mail- and wire-fraud statutes, except where Congress has made its intention abundantly clear. "Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." *Cleveland*, 531 U.S. at 27. The *Cleveland* Court specifically rejected the government's construction of the mail-fraud statute because of concerns about the potentially "sweeping expansion" of federal criminal law it might bring about. "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; *see United States v. Ratcliffe*, 488 F.3d 639, 649 (5th Cir. 2007) (rejecting argument that salary of public official obtained via fraudulent campaigning constituted property under mail-fraud statute, given that theory, if endorsed, would "bring[] state election fraud fully within the province of the federal fraud statutes. The mail fraud statute does not evince any clear statement conveying such a purpose.").

Here, the Third Circuit's opinion threatens to effect a similar encroachment of federal criminal law onto state sovereignty. Pennsylvania, like other states, has enacted a robust system for dealing with matters of alleged judicial misconduct. Complaints concerning

judges are initially made to the Judicial Conduct Board of Pennsylvania, which has the power, *inter alia*, to compel testimony under oath and the production of documents, determine whether there is probable cause to file formal charges against a judge and present the case in support of charges to the Court of Judicial Discipline. *See* Pa. Const. art. V, § 18(a)(7). The Court of Judicial Discipline, in turn, hears complaints against judges and conducts on-the-record hearings to determine if sanctions against a judge are warranted. *See* Pa. Const. art. V, § 18(b)(5). A judge who is sanctioned has the right to appeal to the Pennsylvania Supreme Court. *See* Pa. Const. art. V, § 18(c)(1). A Pennsylvania Supreme Court justice who is sanctioned can appeal to a special tribunal composed of judges from Pennsylvania's intermediate appellate courts. *Id.*

Regulation of state judicial conduct is a quintessential area of state concern, one that states like Pennsylvania are well-equipped to handle. Converting every traffic ticket—or other similar charging document—into property threatens to federalize the entire realm of judicial ethics. This would constitute the sort of "sweeping expansion" of federal criminal law about which the *Cleveland* Court warned.

The Third Circuit overreached by employing a results-oriented analysis that sought to penalize Mr. Alfano and Mr. Hird for engaging in behavior that the court deemed unsavory. The court wrote: "Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments

of guilt and the imposition of fines and costs) as the basis to claim that there is no fraud." *Hird*, 913 F.3d at 343. But the Third Circuit gave no reason for this conclusion, and cited nothing except the district court's opinion in support. The Third Circuit's ends-oriented jurisprudence distorts the balance of authority between the state and federal government to address the alleged misconduct at issue. The lower court's circular reasoning also distorts and ignores this Court's disdain for invading "the legislative domain." *United States v. Stevens*, 559 U.S. 460, 481 (2010). If Congress wishes to penalize interfering with a judicial process that at its end might entitle the government to money, then Congress should do so. However, absent evidence of such legislative intent, the restraint traditionally employed by this Court "in assessing the reach of a federal criminal statute" mandates reversal. *United States v. Aguilar*, 515 U.S. 593, 600 (1995). A writ of certiorari should issue.

CONCLUSION

An unadjudicated traffic ticket is not "property" as that term is used in the mail- and wire-fraud statutes. To avoid an undue expansion of the federal fraud statutes into areas of traditional state regulation, Mr.

Alfano and Mr. Hird respectfully request that this Court grant its writ of certiorari.

Respectfully submitted:

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