No. 13-316

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Government acknowledges that the courts are divided on whether the Government must prove intent to defraud a financial institution under 18 U.S.C. § 1344(2). BIO 20. It does not dispute that this case is an adequate vehicle for resolving that division. And the Solicitor General even suggests that the court of appeals erred in accepting the Government's argument that no such proof was required. *See id.* 22. Instead, the United States claims that the error should be allowed to persist indefinitely – relieving the Government of the burden of proving an essential element of the crime in at least two circuits in which the United States frequently brings bank fraud prosecutions – because the question lacks "practical importance." *Id.* 21. That claim is meritless and the need for review is only heightened by the Government's refusal to defend in this Court the rule it successfully advanced below.

The United States also agrees that the circuits are divided over whether "in order to establish that the defendant possessed the requisite intent to defraud, the government must prove in every case that the defendant exposed, or intended to expose, a bank to the risk of financial loss." BIO 8. The Government does not dispute that *this* question has practical importance, but claims that the issue was not adequately preserved below and that it "is not apparent" that its resolution would make a difference to the outcome in this case. *Id*. 9. But those assertions are also wrong. Petitioner pressed, and the Tenth Circuit indisputably passed upon, the question. And its resolution would be outcome

determinative in this case – the district court found, and the Government never disputed below, that the prosecution presented no evidence that petitioner's conduct was intended to, or did, pose a risk of loss to a bank. Pet. App. 35a-37a.

I. Whether Intent To Defraud A Bank Is An Element Of Criminal Bank Fraud Is A Question Of Substantial Practical Importance.

The Government's only significant basis for opposing certiorari on the intent-to-defraud issue is its claim that the question "rarely makes a difference in any case." BIO 20. But the Solicitor General fails to support that assertion, which in any event is no reason to allow the Government to avoid in some circuits its burden to prove that element when it *does* make a difference to the outcome.

The question is particularly important in a wide range of cases, like this one, in which the defendant targets a third party that is not a bank. *See, e.g.*, *United States v. Nkansah*, 699 F.3d 743, 746-47 (2d Cir. 2012) (defendant targeted IRS); *United States v. Repella*, 359 Fed. Appx. 294, 295 (3d Cir. 2009) (unpublished) (online merchants); *United States v. Staples*, 435 F.3d 860, 862-64 (8th Cir. 2006) (title company); *United States v. Singer*, 152 Fed. Appx. 869, 872 (11th Cir. 2005) (unpublished) (merchants); *United States v. Reaume*, 338 F.3d 577, 579-80 (6th Cir. 2003) (merchants), *cert. denied*, 540 U.S. 1166 (2004); *United States v. McNeil*, 320 F.3d 1034, 1036 (9th Cir. 2003) (IRS), *cert. denied*, 540 U.S. 842 (2003); *United States v. Thomas*, 315 F.3d 190, 193-94 (3d Cir. 2002) (employer); *United States v. Brandon*, 298 F.3d 307, 309-10 (4th Cir. 2002)

(merchant); *United States v. Crisci*, 273 F.3d 235, 237-38 (2d Cir. 2001) (employer); *United States v. Everett*, 270 F.3d 986, 988 (6th Cir. 2001) (former employer), *cert. denied*, 537 U.S. 828 (2002); *United States v. Odiodio*, 244 F.3d 398, 400 (5th Cir. 2001) (brokerage firm); *United States v. Sprick*, 233 F.3d 845, 848-50 (5th Cir. 2000) (client); *United States v. Rodriguez*, 140 F.3d 163, 165 (2d Cir. 1998) (employer); *United States v. Davis*, 989 F.2d 244, 246 (7th Cir. 1993) (IRS); *United States v. Orr*, 932 F.2d 330, 331-32 (4th Cir. 1991) (merchants); *United States v. Blackmon*, 839 F.2d 900, 902-03 (2d Cir. 1988) (con artist victim).

The Government argues that intent to defraud a bank is easily proven in such cases, BIO 21, but it ignores the decisions in which courts have found the Government's proof insufficient. *See, e.g.*, *Staples*, 435 F.3d at 868; *Thomas*, 315 F.3d at 202; *Rodriguez*, 140 F.3d at 168; *Orr*, 932 F.2d at 332; *see also Repella*, 359 Fed. Appx. at 296-97 (evidence insufficient to support guilty plea).[1] And those

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[1] While the Government insinuates that it could have proven petitioner's intent to defraud a bank in this case, *see* BIO 22, it does not claim that it actually did so; to the contrary, it has only ever argued that no such proof was required. *See* Pet. 5-6. Moreover, presentation of an altered check to a third party is not itself sufficient to prove intent to defraud a bank. *See, e.g.*, *Nkansah*, 699 F.3d at 750. And even if the Government could claim that there was sufficient evidence to prove intent to defraud a bank, the question was never put to the jury in this case and the Government has never asserted (and thus has waived) any claim that the instructional error was harmless. *See* U.S. C.A. Br. § II. Indeed, the trial court took pains to tell the jury that petitioner's assertion that "he was hoping to take

citations do not reflect the unknown number of similar cases in which the Government could not appeal a trial court's unpublished insufficiency determination or the cases the Government has declined to prosecute in circuits applying the majority rule because it understood that the intent-to-defraud requirement would preclude a conviction.

The Government says that even if intent to defraud a bank is required, leaving the circuit conflict unresolved should not result in *too* many wrongful convictions because the Tenth Circuit's position is in the minority and the Solicitor General included a sentence in a brief in opposition a decade ago that could be read to agree with the majority view. BIO 22. But the Solicitor General fails to acknowledge that the Tenth Circuit adopted the minority position in this case *at the Government's* urging.[2] And, in any event, the fact that the Tenth Circuit's position is so extreme that it has been rejected by the majority of other circuits *and* the Solicitor General is reason to extinguish it, not a reason to allow it to persist.

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money from Target" and that he "wanted to defraud Target, not a bank" "doesn't matter" because petitioner "did not have to intend to defraud the bank." R. at 317.

[2] *See* U.S. C.A. Br. § II (heading: "The Court Properly Instructed the Jury That, to Find Loughrin Guilty of Bank Fraud under 18 U.S.C. § 1344(2), the Jury must Find That Loughrin Acted with 'Intent to Defraud,' Not That He Acted with 'Intent to Defraud a Financial Institution.").

II. The Risk-Of-Loss Question Is Properly Before The Court And Outcome Determinative.

The Government does not dispute the practical importance of the risk-of-loss question, but argues that the issue was not preserved below and that it is "not apparent" that resolving the question would make a difference to the outcome of this case. BIO 9. Neither claim is correct.

A. The Risk-Of-Loss Issue Was Pressed And Passed Upon Below.

1. As an initial matter, the Government's preservation argument depends on the assertion that the two questions are sufficiently distinct as to require separate preservation. But the court of appeals saw the issues as inextricably intertwined. It explained that the circuit had previously held that "[t]o establish that a bank was defrauded," the Government must prove that "the bank was put at potential risk." Pet. App. 4a (emphasis and citation omitted). Accordingly, if the court accepted petitioner's argument that intent to defraud a bank was required for a Section 1344(2) prosecution, circuit precedent would dictate that risk-of-loss must be proven as well. But the Tenth Circuit had previously held that "a conviction under § 1344(2) requires no proof that a bank was 'at risk.'" Pet. App. 5a (citing *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995)). The court thus understood petitioner's intent-to-defraud argument to constitute a challenge to the circuit's prior rejection of a risk-of-loss requirement under subsection (2). *See* Pet. App. 7a. The court "reject[ed] Loughrin's invitation to revisit the elements of bank fraud as set forth in our

cases," *id.*, and instead held that the "district court's refusal to give Loughrin's proposed instruction to the jury" was "correct in light of *Sapp*'s holding that § 1344(2) requires no proof that the bank was 'at risk' of suffering financial loss," *id*. 6a.

2. In any event, to the extent he needed to, petitioner adequately preserved his risk-of-loss argument as a distinct claim below.

a. As the Government acknowledges, petitioner requested a jury instruction requiring proof that the scheme was intended to cause some "financial loss to a financial institution." Pet. App. 45a. The Government says that was just "another way of requiring proof of intent to defraud a bank directly." BIO 10-11 n.3. But the Government does not deny that, whatever the intent behind it, the instruction adequately conveys the risk-of-loss requirement. And it cites no authority for its suggestion that an instruction that is adequate on its face to preserve an issue for appeal is somehow rendered inadequate by someone's subjective understanding of it.

Even if the instructional error were not preserved, that would be no bar to review of petitioner's separate claim that there was insufficient evidence to prove risk of loss, which petitioner squarely raised in his Rule 29 briefing. *See* R. at 176, § III (heading: "The evidence does not establish that Mr. Loughrin's conduct placed the financial institution at risk of civil liability or financial loss."); *id*. at 176-77 ("The better rule is that convictions under subsection (2) require proof of risk of loss just as convictions under subsection (1)."") (footnotes omitted); *Boyle v. United Tech. Corp*., 487 U.S. 500, 513-14 (1988) (failure to preserve jury instruction

objection does not prevent appellate review of sufficiency-of-the-evidence claim); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (same).

b. The Government further does not dispute that petitioner raised the risk-of-loss issue with the first appellate body empowered to accept it – the Tenth Circuit sitting en banc. *See* BIO 12 n.4. However, it claims that this was too late, citing a *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari). But Justice O'Connor's point in that case, arising from a state court, was simply that a federal issue cannot be interjected into a state case for the first time in a petition for rehearing because the state court's refusal to consider an untimely new argument is an adequate and independent state ground for the decision and deprives this Court of jurisdiction over the appeal. *See id*. (citing, *e.g.*, *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945) (collecting cases)). No such jurisdictional impediment arises in this federal case, and petitioner's decision to raise the question to the en banc court rather than the panel was entirely appropriate.[3]

Indeed, the Government has itself urged this Court to grant review of issues raised for the first time in a petition for rehearing en banc, arguing that the "government's acquiescence in the [challenged]

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[3] *Herrera v. Lemaster*, 301 F.3d 1192, 1196 (10th Cir. 2002), does not hold to the contrary. *Contra* BIO 12 n.4. There, a party attempted to raise for the first time en banc a factual issue the panel was fully empowered to consider.

rule until the rehearing stage does not provide a basis for denying review as a matter of discretion" because the rule "represented established Ninth Circuit precedent" and the "government could not have prevailed on its initial appeal by challenging it before the panel." U.S. Pet. Reply 2, *United States v. Ramirez*, No. 96-1469.[4] Because the same is true here, there is "therefore no merit to respondent's contention that the petition should be denied because of an alleged waiver." *Id*. 2-3.

3. Ultimately, none of the above matters because the court of appeals passed on the risk-of-loss issue, which is sufficient to bring the question to this Court.

This Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added, internal quotation marks omitted). The "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.*; *see also, e.g.*, *Virgina Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

Here, the court of appeals unquestionably passed on the question whether risk-of-loss is required under the statute. As described above, the court recognized and reaffirmed its decision in *Sapp* that risk-of-loss was not required, and relied on that holding to reject petitioner's intent-to-defraud argument. Pet. App. 4a-7a. The court thus ultimately held that the "fact

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[4] *Available* at http://www.justice.gov/osg/briefs/1996/w961469w.txt.

that Loughrin fraudulently obtained funds using bank checks, *even though the bank was not at risk of loss*, is sufficient to support his conviction for bank fraud." *Id*. 7a (emphasis added).

This Court has found issues preserved in similar circumstances. For example, in *Lebron v. Nat'l RR Passenger Corp.*, 513 U.S. 374, 378-79 (1995), the plaintiff "expressly disavowed" on appeal that Amtrak was a government entity, but argued that it was nonetheless a state actor for other reasons. In addressing that assertion, the court of appeals "noted that Amtrak was . . . not a Government entity." *Id*. at 378. That statement, this Court subsequently held, passed upon the question of Amtrak's government status sufficiently to preserve the question for this Court's review. *Id*. at 379; *see also, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 330 (2010) (lower court passed on continuing validity of Supreme Court precedent by relying on those decisions to reject plaintiff's argument).

B. The Government's Claim That It Might Have Been Able To Prove Risk-Of-Loss In This Case Is No Basis To Deny Review.

The Government's claim that it "is not apparent" that the risk-of-loss question would make a difference to the outcome of this case, BIO 9, is no ground for denying certiorari and is baseless in any event. The district court found that the Government failed to produce any evidence that petitioner's conduct posed any risk of loss to a bank. Pet. App. 36a-37a. The Government acquiesced to that finding in the trial court, *id*., 37a, and never argued on appeal that it was wrong, Pet. 22. The court of appeals thus

affirmed petitioner's conviction on the understanding that "the bank was not at risk of loss." Pet. App. 7a.

The Solicitor General now suggests, for the first time in the case, that the evidence did show risk of loss to the bank, under a proposed per se rule that "negotiation of an altered or forged check" is always sufficient, as a matter of law, to satisfy the Government's burden. BIO 15. But that argument is waived in this case, and in any event has been rejected in decisions from the Second, Third, Fifth, and Eighth Circuits. *See* Pet. 13-14 (discussing *Odiodio*, 244 F.3d at 402 (insufficient evidence of risk of loss despite defendant's use of altered checks); *Staples*, 435 F.3d at 867 (same)); *Thomas*, 315 F.3d at 201-02 (rejecting the Government's "assump[ption] that the mere act of presenting fraudulently drawn checks to a bank for payment constitutes a loss to it or a potential for liability"); *Nkansah*, 699 F.3d at 746, 749-51 (evidence insufficient in forged endorsements case); *Repella*, 359 Fed. Appx. at 295-97 (same for falsified check information for online purchases); *cf. J. Walter Thompson, U.S.A., Inc. v. First BankAmericano*, 518 F.3d 128, 131 n.2 (2d Cir. 2008) ("The loss associated with an altered check typically rests with the party who took it from the wrongdoer.") (emphasis omitted).

The Solicitor General's attempts to address some of these precedents are unconvincing. He argues that "subsequent Fifth Circuit decisions strongly suggest that" the Fifth Circuit has changed course since *Odiodio*. BIO 15. But his only authority for that proposition is an unpublished decision which did not adopt the Government's per se rule, but turned instead on the fact that in *that* case, the

Government's bank witness testified that because the altered checks had been written on a closed account, the bank would be obligated to absorb any loss if the checks were honored. *See United States v. Goodale*, No. 11-51204, 2013 WL 2631322, at *5 (5th Cir. June 12, 2013) (unpublished). Of course, that circumstance did not arise in this case and the Government's bank witness here gave the opposite testimony. Pet. 3; Pet. App. 36a-37a; *cf. Davis*, 989 F.2d at 247 (reversing conviction where Government perhaps could have, but did not, prove risk of loss); *Sprick*, 233 F.3d at 853 (same).

The Government's attempt to distinguish *Staples*, BIO 16, is likewise unconvincing. Rather than apply the Government's propose per se rule, the Eighth Circuit found the evidence "insufficient, because there was no loss, or attempt to cause a loss, to a financial institution," *id.*, even though the checks were altered, *id*. at 862-63. While the Government might have avoided the need to prove risk-of-loss if it had pleaded the case differently, BIO 16, that does not undermine the court's holding on what proof of risk-of-loss requires. And the fact that the Eighth Circuit found the evidence insufficient in other respects as well, *id*., means only that there were alternative holdings, not that the risk-of-loss holding was dicta. *See Sutton v. Addressograph-Multigraph Corp.*, 627 F.2d 115, 117 n. 2 (8th Cir. 1980) ("When two independent reasons support a decision, neither can be considered obiter dictum.") (citation omitted).

Accordingly, at best, the Government can argue that there is a further circuit conflict over what is required to prove risk-of-loss in a case involving altered checks. But that is no reason for this Court

to leave unresolved the antecedent and "more important risk-of-loss question." BIO 20.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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