No. 13-316

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Government must prove that the defendant intended to defraud a bank and expose it to risk of loss in every prosecution under 18 U.S.C. § 1344.

TABLE OF CONTENTS

QUESTION PRESENTED..(I)

TABLE OF AUTHORITIES...................................... iii

BRIEF FOR THE PETITIONER................................1

OPINIONS BELOW...1

JURISDICTION..1

RELEVANT STATUTORY PROVISIONS.................1

STATEMENT OF THE CASE....................................1

I. Factual Background...1

II. The District Court Proceedings............................2

III. The Court Of Appeals' Decision............................6

SUMMARY OF ARGUMENT.....................................8

ARGUMENT..11

I. To Prove Bank Fraud Under Section 1344, The Government Must Prove That The Defendant Intended To Defraud A Bank............13

A. The Text And History Of Section 1344 Establish That The Statute Applies Only When A Defendant Intended To Defraud A Financial Institution...............................13

1. Section 1344 Defines A Single Offense That Requires Intent To Defraud A Bank...................................15

2. Even If Section 1344 Defines Two Separate Offenses, Nothing In The Language Of Section 1344(2) Suggests That Congress Intended To Dispense With The Requirement

That The Defendant Intend To Defraud A Bank. 23

B. Requiring Intent To Defraud A Bank Best Accords With The Statute's Purposes. 25

C. This Court Should Avoid Giving The Criminal Bank Fraud Statute Unnecessary Breadth....................................27

D. Use Of An Altered Check Is Not Sufficient, In Itself, To Prove Intent To Defraud A Financial Institution..................29

II. The Bank Fraud Statute Does Not Apply To Schemes That Pose No Risk Of Financial Or Other Property Loss To A Covered Financial Institution..36

CONCLUSION 40

APPENDIX A, 18 U.S.C. § 1344 ....1a

APPENDIX B, 18 U.S.C. § 20 ....2a

APPENDIX C, 18 U.S.C. § 1344 (1988 ed.)...............4a

APPENDIX D, 18 U.S.C. § 1341 ....6a

APPENDIX E, Act of June 8, 1872, ch. 335 § 301, 17 Stat. 323..7a

APPENDIX F, 18 U.S.C. § 1341 (1982 ed.) 8a

APPENDIX G, 18 U.S.C. § 1343 ....9a

APPENDIX H, 18 U.S.C. § 513................................10a

APPENDIX I, 31 U.S.C. § 3729 (2008 ed.) 12a

TABLE OF AUTHORITIES

Cases

Allison Engine Co. v. United States,
553 U.S. 662 (2008) ... 32

Almendarez-Torres v. United States,
523 U.S. 224 (1998) ... 25

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) ... 11

Cleveland v. United States,
531 U.S. 12 (2000) ... passim

Durland v. United States,
161 U.S. 306 (1896) ... 18, 19

Hammerschmidt v. United States,
265 U.S. 182 (1924) ... 11

J. Walter Thompson, U.S.A., Inc. v. First BankAmericano,
518 F.3d 128 (2d Cir. 2008) ... 4

Kann v. United States,
323 U.S. 88 (1944) ... 32

Kelly v. Robinson,
479 U.S. 36 (1986) ... 11

McNally v. United States,
483 U.S. 350 (1987) ... passim

Neder v. United States,
527 U.S. 1 (1999) ... 16, 21

Skilling v. United States,
130 S. Ct. 2896 (2010) ... 27, 39

State v. Barrick,
46 P.3d 770 (Utah Ct. App. 2002) ... 29

Tanner v. United States,
483 U.S. 107 (1987) 33

United States v. Ayewoh,
627 F.3d 914 (1st Cir. 2010), *cert. denied*,
132 S. Ct. 141 (2011) 12, 37

United States v. Barakett,
994 F.2d 1107 (5th Cir. 1993) 31

United States v. Blackmon,
839 F.2d 900 (2d Cir. 1988) 12, 28, 31, 37

United States v. Blockburger,
284 U.S. 299 (1931) 14

United States v. Brandon,
298 F.3d 307 (4th Cir. 2002) 12

United States v. Briggs,
939 F.2d 222 (5th Cir. 1991) 28

United States v. Brooks,
394 Fed. Appx. 953 (3d Cir. 2010)
(unpublished) 31, 35

United States v. Colton,
231 F.3d 890 (4th Cir. 2000) 37

United States v. Davis,
989 F.2d 244 (7th Cir. 1993) 12, 36, 38

United States v. Everett,
270 F.3d 986 (6th Cir. 2001) 25, 28

United States v. Goodale,
No. 11-51204, 2013 WL 2631322 (5th Cir.
June 12, 2013) (unpublished) 31

United States v. Hoglund,
178 F.3d 410 (6th Cir. 1990) 28

United States v. Kenrick,
221 F.3d 19 (1st Cir. 2000) (en banc).................... 14

United States v. Khorozian,
333 F.3d 498 (3d Cir. 2003).................................. 30

United States v. Laljie,
184 F.3d 180 (2d Cir. 1999)............................. 24, 28

United States v. Meyers,
200 F.3d 715 (10th Cir. 2000)................................. 7

United States v. Morganfield,
501 F.3d 453 (5th Cir. 2007).................................. 12

United States v. Orr,
932 F.2d 330 (4th Cir. 1991).................................. 31

United States v. Rodriguez,
140 F.3d 163 (2d Cir. 1998)............................. 28, 38

United States v. Sapp,
53 F.3d 1100 (10th Cir. 1995)................................. 4

United States v. Sprick,
233 F.3d 845 (5th Cir. 2000)............................ 28, 37

United States v. Staples,
435 F.3d 860 (8th Cir. 2006).................................. 38

United States v. Swanson,
360 F.3d 1155 (10th Cir. 2004)................................ 6

Statutes

18 U.S.C. § 20 17

18 U.S.C. § 20(1) 26

18 U.S.C. § 20(2) 26

18 U.S.C. § 20(7) 27

18 U.S.C. § 513 .... 10, 34, 35

18 U.S.C. § 513(a) 34, 35

18 U.S.C. § 513(c)(2) 34
18 U.S.C. § 513(c)(3)(A) 34
18 U.S.C. § 513(c)(4) 35
18 U.S.C. § 1028A 29
18 U.S.C. § 1028A(a)(1) 35
18 U.S.C. § 1028A(c)(5) 35
18 U.S.C. § 1341 .... 20, 21, 22, 25
18 U.S.C. § 1341 (1982 ed.) 16
18 U.S.C. § 1343 22
18 U.S.C. § 1344 .... passim
18 U.S.C. § 1344(1) .... passim
18 U.S.C. § 1344(2) .... passim
18 U.S.C. § 1961(1) 29
18 U.S.C. § 1963(a) 29
31 U.S.C. § 3729(a)(3) 32

Act of Mar. 4, 1909,
ch. 321, § 215, 35 Stat. 1088 18

Crime Control Act of 1990,
Pub. L. No. 101-647, § 2504(j), 104 Stat. 4789,
4861 17

Financial Institutions Reform, Recovery, and
Enforcement Act of 1989,
Pub. L. No. 101-73, §§ 961(k), 962(e)(2), 103
Stat. 183 17

Pub. L. 98-473,
Tit. II, § 1105(a), 98 Stat. 1837, 2133 34

Pub. L. 98-473,
Tit. II, § 1108(a), 98 Stat. 1837, 2147 .... 17, 34

Utah Code Ann. § 76-6-501 29

Other Authorities

H.R. Rep. No. 98-901 (1984).................... 15, 21, 24, 26
S. Rep. No. 98-225 (1983)...................................passim

BRIEF FOR THE PETITIONER

Petitioner Kevin Loughrin respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 710 F.3d 1111.

JURISDICTION

The court of appeals entered judgment on March 8, 2013. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on September 9, 2013, which this Court granted on December 13, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The provisions of 18 U.S.C. §§ 20, 513, 1341, 1343, 1344, and 31 U.S.C. § 3729 are reproduced in relevant part as appendices to this brief.

STATEMENT OF THE CASE

I. Factual Background

On several occasions in 2009, petitioner Kevin Loughrin and his codefendant Theresa Thongsarn stole merchandise and cash from Target and other retail stores. R. at 102-05.[1] At times, they looked for discarded receipts in the Target parking lot, took the

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[1] "R." refers to Volume IV of the Record on Appeal, electronically filed on September 6, 2011 (Document No. 01018706266).

items listed on the receipts from store shelves, and "returned" them for cash. R. at 120-21. At other times, petitioner and his accomplice used checks they had stolen from outgoing mail in residential neighborhoods to pay for food and other merchandise. R. at 100-04, 119-20. They crudely altered the checks by crossing out the designated payee and amount, then writing in "Target" and a new amount next to or above the original text. R. at 70, 76-78, 82-84, 89, 118-19, 123-24, 155-57, 179. They often returned some of the items for cash immediately after checking out, sometimes without even leaving the store. R. at 55.

Target was an appealing victim because its cashiers were not trained to detect fraudulent checks. R. at 124-25, 214. Instead, at a later point Target Loss Prevention Agents reviewed all checks to detect forgeries and alterations before submitting them for payment to a bank. R. at 140. In this case, Target detected most of petitioner's clumsy alterations. R. at 140, 154, 179-80, 191-92, 210, 215, 240. Target staff used security footage to connect the checks to petitioner and his accomplice. R. at 175-79, 198-207. During their next visit, a Loss Prevention Agent called the local police, who arrested them when they attempted to use an altered check to pay for merchandise. R. at 240-45. Agents of the U.S. Postal Inspection Services subsequently arrested petitioner for possession of stolen mail.

II. The District Court Proceedings

In addition to charging petitioner with possession of stolen mail, federal prosecutors charged him with two counts of aggravated identity theft and six counts of bank fraud (representing six altered

checks totaling $1,184.53).[2] *See* J.A. 1-4. The bank fraud statute, 18 U.S.C. § 1344, provides:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

At trial, the Government did not claim that petitioner had ever obtained money or property directly from a bank. Instead, the prosecution's theory relied on the fact that, although petitioner had schemed to obtain merchandise and money from Target (not a bank), he obtained that money and property by presenting Target with altered checks written on accounts at financial institutions. R. at 287-89. Even so, the evidence established that petitioner's conduct never posed any risk of financial loss to a bank. R. at 256-57. Target Loss Prevention Agents noticed the obvious alterations and did not forward most of the checks to financial institutions. R. at 60-61, 140, 154, 220, 236. Additionally, one of the Government's witnesses, an Operational Risk

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[2] Thongsarn pled guilty and testified against petitioner at trial. R. at 98-99.

Consultant for Wells Fargo, testified that if a bank had honored one of the checks, Target, rather than the bank, would have been liable for any losses. R. at 165; Pet. App. 36a-37a; *see also, e.g.*, *J. Walter Thompson, U.S.A., Inc. v. First Bank Americano*, 518 F.3d 128, 131-32 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).

At the close of the Government's case, petitioner moved for acquittal pursuant to Federal Rule of Criminal Procedure 29. Pet. App. 35a. The court granted the motion in part. *Id*. The court found, and the Government accepted, that there was "simply nothing" in the evidence to "show risk of loss or putting a bank, a financial institution, at risk." *Id*. 37a. And the court held that under Tenth Circuit precedent, risk of loss to a bank is required to prove that a defendant "defraud[ed] a financial institution" within the meaning of the first subsection of Section 1344. *Id*. 36a (citing *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995)). Accordingly, the court precluded the government from proceeding under the first subsection of Section 1344. *Id*. 35a-38a.

However, the district court construed prior Tenth Circuit precedent to establish that subsection (2) creates a separate offense. And under that precedent, the court believed, risk of loss to a financial institution is not required to prove that a defendant attempted "to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises" within the meaning of subsection (2). Pet. App. 36a.

Accordingly, the court allowed the case to go to the jury under that subsection. *Id*. 36a-38a.

Petitioner subsequently requested jury instructions requiring the Government to prove that he acted with "intent to defraud a *financial institution*," Pet. App. 43a (emphasis added), and to cause some "financial loss to a financial institution," *id.* 45a. The district court rejected both requests. *Id.* 43a-46a. Instead, believing that the statute required only that the defendant have intended to defraud *someone*, the court instructed the jury simply that petitioner must have "acted with intent to defraud." J.A. 7.

The Government relied on this instruction in its closing argument, emphasizing that intent to defraud a financial institution was not required under the jury instruction given:

> You might recall that [petitioner] said he was hoping to take money from Target. He wanted to defraud Target, not a bank. That doesn't matter. That's also not in your instructions. The instructions say that he had to have the intent to defraud. He had to have a fraudulent intent. He did not have to intend to defraud the bank. He did not have to have a scheme to defraud the bank.

R. at 317.[3] The prosecutor argued that the only question was whether petitioner "intended to defraud *somebody*." R. at 292 (emphasis added). And when

[3] Petitioner's certiorari reply brief incorrectly identified the trial court, rather than the Government, as the source of portions of these statements. Cert. Reply 3-4 n.1.

defense counsel attempted to argue in closing that "there was no scheme to defraud a bank," the district court stopped him. R. at 303.

The jury found petitioner guilty on all counts. R. at 328-29. The district court summarily denied petitioner's motion for a judgment notwithstanding the verdict and sentenced him to 36 months in prison followed by 60 months of supervised release. R. at 363-64. The court further ordered petitioner to pay restitution to Target. Pet. App. 30a-31a. No restitution was ordered for any financial institution. *Id*.

III. The Court Of Appeals' Decision

On appeal, the Tenth Circuit affirmed, rejecting petitioner's challenges to the jury charge and the sufficiency of the evidence. Pet. App. 2a. Neither the Government nor the Tenth Circuit questioned petitioner's assertion that he did not intend to defraud a bank or the district court's finding that the scheme did not pose a risk of loss to any bank. *See* Pet. App. 6a; U.S. C.A. Br. § II. Nonetheless, the Tenth Circuit affirmed because, in its view, neither intent to defraud a bank nor risk of loss is required to prove bank fraud under Section 1344.

The court acknowledged that to prove a scheme to "defraud a financial institution" under subsection (1), the Government must prove that the defendant intentionally directed his scheme at a bank and created a risk of loss to that bank. Pet. App. 5a. But the court explained that, under settled circuit precedent, the two subsections are treated as "separate" albeit "largely overlapping" offenses. Pet. App. 4a. (quoting *United States v. Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004)). And under that

precedent, the court held, "an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else." *Id.* 5a-6a. Thus, in this case, the court concluded that "the government satisfied the fraudulent intent requirement of § 1344(2) with proof that Loughrin intended to defraud Target rather than a bank." *Id.* 6a.

The court further held that a "conviction under § 1344(2) requires no proof that a bank was 'at risk' because there is no explicit requirement that a particular bank be defrauded." Pet. App. 5a. Accordingly, the court held, the "fact 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.

The Tenth Circuit acknowledged that its interpretation of Section 1344 "conflict[s] with the decisions of several circuits" and "may cast a wide net for bank fraud liability." Pet. App. 6a-7a. However, the court found itself "bound by [past] cases 'absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court.'" Pet. App. 7a. (quoting *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)). The Tenth Circuit subsequently denied petitioner's petition for rehearing en banc, Pet. App. 50a-51a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

To defraud a bank within the meaning of the federal bank fraud statute, a defendant must intend to defraud a bank; it is not enough that the defendant intended to defraud *someone* as the Tenth Circuit wrongly held below. Likewise, a scheme to defraud *someone* is not converted into bank fraud simply because the defendant obtains the victim's funds from a bank account or otherwise uses a bank in a way that poses no risk to the bank's own financial or property interests.

I. The federal bank fraud statute criminalizes schemes "(1) to defraud a financial institution; or (2) to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Everyone acknowledges that to "defraud a financial institution" within the meaning of subsection (1), the defendant must intend to defraud a financial institution. The question here is whether subsection (2) operates to relieve the Government of that burden. It does not, for two reasons.

First, despite appearances, the bank fraud statute defines a single offense, the essence of which is schemes to defraud financial institutions, as set forth in the first subsection. The second subsection simply sets out one kind of fraud on a bank that is already encompassed by the first. That understanding arises from the history of the mail fraud statute, which was the model for the bank fraud statute and is the source of the statute's disjunctive two-clause structure. This Court has explained that the second clause of the mail fraud

statute simply codified the Court's earlier construction of the first clause; it did not establish a second offense or a means for the Government to avoid the restrictions of the first clause.

Second, even if the second clause were viewed as a separate offense, nothing in its language or the purposes of the statute warrants reading it to permit the Government to convict a defendant of bank fraud without proving he intended to defraud a bank. Consistent with the first subsection, subsection (2) expressly requires proof that the defendant sought to obtain property owned by, or in the custody or control of, *a bank*. And although it does not state to whom the required false representations must be made, the overall structure and purposes of the statute make clear that Congress intended to criminalize only false statements that target a bank. Congress did not intend to enact a sweeping anti-fraud provision that applies whenever a bank is used as an instrumentality for a fraudulent scheme targeting someone else.

Reading the statute to require intent to defraud a bank also better comports with the purpose of the statute, which was to fill a gap in federal law that required the Government to prosecute frauds that victimized banks under statutes that were not specifically designed for that task. Congress's concern was with the victimization of banks, not with the use of banks to victimize others.

To read the statute otherwise would effect a sweeping expansion of federal criminal jurisdiction at the expense of traditional state authority, in conflict with the principles of lenity this Court has often

relied upon to reject broad readings of other federal criminal fraud statutes.

The Government wrongly suggests that even if intent to defraud a bank is required, use of an altered check is sufficient to prove it. While some uses of altered checks – for example, cashing a counterfeit check at a bank – plainly show intent to defraud a bank, other uses do not. In this case, for example, the altered checks were used to obtain merchandise and money from *Target*, not a bank. It made no difference to petitioner whether Target ever sent the obviously altered checks to a bank, or whether a bank ever honored them. Furthermore, a different federal statute, 18 U.S.C. § 513, already criminalizes the use of forged or altered checks. There is no need to stretch the bank fraud statute to do the same work.

II. Bank fraud typically involves schemes that create a risk of financial loss to a bank through attempts to obtain the bank's own money or property (*e.g.*, fraudulent loan applications, check kiting, or embezzlement by bank employees). If the statute is read more broadly to encompass schemes directed at bank *customers*, the Court should nonetheless limit the statute to schemes traditionally understood as constituting "fraud" on a specified victim – that is, the Court should insist that the Government prove that the scheme pose at least a risk of injury to the bank's own property interests. That reading accords with this Court's repeated narrow interpretations of the kinds of property interests protected by the mail and wire fraud statutes in order to avoid giving them unintended breadth at the expense of state criminal authority.

ARGUMENT

The "starting point in every case involving construction of a statute is the language itself." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)) (internal quotation marks omitted). In this case, 18 U.S.C. § 1344 provides:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As this Court has explained, "to defraud" someone has long been understood to mean depriving a victim "of something of value by trick, deceit, chicane, or overreaching." *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)) (internal quotation marks omitted). Accordingly, the Tenth Circuit – along with many other courts of appeals – has held that to prove that a defendant schemed to "defraud a financial institution," 18 U.S.C. § 1344, the Government must prove that the defendant (a) intended to defraud a bank, and (b) exposed the bank

to a risk of financial or other property loss. Pet. App. 4a-5a.[4] These two requirements are easily satisfied in paradigmatic bank fraud cases, in which the defendant targets a bank for deception in order to obtain a loan, embezzle bank funds, engage in check kiting, or otherwise obtain the bank's own property.

In this case, however, the Tenth Circuit concluded that the Government can avoid having to prove either of the essential elements of ordinary bank fraud by charging the defendant under subsection (2) of the bank fraud statute. *See* Pet. App. 5a-6a. Under that interpretation, a defendant can commit federal bank fraud without ever intending to defraud a bank, through a scheme that poses no risk of financial or other property loss to a bank.

As the court of appeals openly acknowledged, that interpretation of Section 1344 is exceedingly broad, encompassing numerous state-law crimes that have only glancing relevance to the federal interest in protecting the financial integrity of financial institutions. It should come as no surprise, then, that the interpretation is also wrong. Intent to defraud a bank is the *sine qua non* of every bank fraud prosecution, a requirement that cannot be avoided by charging a defendant under the second subsection of Section 1344 rather than the first.

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[4] *See, e.g.*, *United States v. Ayewoh*, 627 F.3d 914, 921 (1st Cir. 2010); *United States v. Morganfield*, 501 F.3d 453, 465 (5th Cir. 2007); *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002); *United States v. Brandon*, 298 F.3d 307, 311-12 (4th Cir. 2002); *United States v. Davis*, 989 F.2d 244, 247 (7th Cir. 1993); *United States v. Blackmon*, 839 F.2d 900, 904 (2d Cir. 1988).

Moreover, the statute cannot reasonably be read to encompass schemes to obtain money from a bank customer simply because the funds are held in a bank account when the scheme does not otherwise pose a risk to the financial or other property interests of a covered financial institution.

I. To Prove Bank Fraud Under Section 1344, The Government Must Prove That The Defendant Intended To Defraud A Bank.

The text and history of the federal bank fraud statute establish that intent to defraud a bank is an essential element of the offense of bank fraud. Congress's purpose for enacting the statute, protecting the financial integrity of federally related financial institutions, affirms that natural reading of the text. And if there is any lingering doubt, it should be resolved in favor of the narrower reading under familiar canons of federalism and lenity. Indeed, it appears that the Government may even agree. *See* BIO 22 ("[T]he government has taken the position that Section 1344(2) is 'properly applied whenever a defendant deceives the bank in order to obtain funds under the bank's custody and control.'") (citation omitted).

A. The Text And History Of Section 1344 Establish That The Statute Applies Only When A Defendant Intended To Defraud A Financial Institution.

As noted above, the Tenth Circuit acknowledged that, by its plain text, the first subsection of the bank fraud statute – prohibiting schemes to "defraud a financial institution" – obviously requires the Government to prove that the defendant intended to

defraud a bank. Pet. App. 5a. The court's conclusion that intent to defraud a bank is not *always* required under Section 1344 was premised on two assumptions. First, the court believed that the two subsections of Section 1344 define separate criminal offenses. *Id.* 4a. Second, the court concluded that the second subsection dispenses with the essential feature of bank fraud – intent to defraud a bank in order to obtain its property – required by the first. *Id.* 5a-6a. Both premises are incorrect. In fact, the history of the statute and this Court's decisions make clear that the text establishes a single offense, the essential features of which are set forth in subsection (1). *See United States v. Thomas*, 315 F.3d 190, 197-98 (3d Cir. 2002).[5] Moreover, even if subsection (2) establishes an independent offense, it is properly read to reach only schemes intended to defraud a bank, not all frauds that happen to touch upon bank deposits or use bank instruments. *See, e.g.*, *United States v. Kenrick*, 221 F.3d 19, 28-29 (1st Cir. 2000) (en banc) (concluding that although "§ 1344(2) provides an alternative to . . . a 'scheme or artifice to

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[5] Although courts tend to formulate the issue as whether the different subsections establish separate "offenses," *see, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000), the question is not whether the subsections define distinct offenses for Double Jeopardy or multiplicity purposes. *See, e.g.*, *United States v. Blockburger*, 284 U.S. 299 (1931). The question here is whether subsection (2) establishes an independent means for the Government to prove bank fraud that dispenses with the essential element of intent to defraud a bank, which everyone agrees is requirement under subsection (1). For ease of exposition, however, this brief will use the settled terminology and discuss whether the subsections establish separate offenses.

defraud' in violation of § 1344(1)," the "intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property").

1. Section 1344 Defines A Single Offense That Requires Intent To Defraud A Bank.

Although it may be natural to assume that the separately numbered clauses in Section 1344 define independent offenses, the history of the statute and this Court's prior decisions make clear that they do not. The two-clause structure of Section 1344 is a carryover from the mail and wire fraud statutes, upon which the bank fraud statute was based. And this Court has long construed the mail fraud statute to establish a single offense, with the second subsection simply clarifying and codifying what is already encompassed within the first clause, rather than providing a means for the Government to avoid proving the essential elements of the first clause. There is no basis for reading Section 1344 any differently. As a consequence, the Government may not avoid having to prove intent to defraud a bank by proceeding under subsection (2).

a. Before Congress passed Section 1344, the federal criminal code lacked "a unitary provision aimed directly at the problem of bank fraud." S. Rep. No. 98-225, at 378 (1983). Prosecutors instead relied on other federal laws not designed to address bank fraud, including those covering embezzlement, robbery, larceny, burglary, false statements, and mail and wire fraud. *Id.* at 377, 379; H.R. Rep. No. 98-901, at 2-3 (1984).

To address this problem, Congress enacted Section 1344, modeled on the existing mail fraud statute. *Neder v. United States*, 527 U.S. 1, 20-21 (1999). At the time, the mail fraud statute provided:

> **Frauds and swindles**
>
> 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, . . . 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 . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341 (1982 ed.).[6] The mail fraud statute thus prohibited schemes described in two disjunctive clauses: (1) schemes "to defraud," or (2) schemes "for obtaining money or property by means of false or fraudulent pretenses." *Id*.

Congress carried over the two-clause, disjunctive structure into the bank fraud statute but limited the statute to schemes targeting federally related financial institutions:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –

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[6] The full text of the statute as it existed when the bank fraud statute was passed is reproduced as Appendix F to this brief.

> (1) to defraud a *federally chartered or insured financial institution*; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a *federally chartered or insured financial institution* by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Pub. L. 98-473, Tit. II, § 1108(a), 98 Stat. 1837, 2147 (emphasis added).[7]

b. This Court has repeatedly held that the two-clause, disjunctive structure of the mail fraud statute establishes a single offense, the essential elements of which are set forth in the first clause proscribing schemes and artifices "to defraud." That conclusion flows in significant part from the history of the statute.

The Court explained in *McNally v. United States*, 483 U.S. 350 (1987), that as originally enacted in 1872, the mail fraud statute did not include its

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[7] The full text of the statute as originally enacted is reproduced as Appendix C to this brief. Congress has amended Section 1344 twice, changing its penalty and replacing "federally chartered or insured financial institution" with the term "financial institution," which is defined in 18 U.S.C. § 20 to include a list of federally insured, chartered, regulated and other federally related financial institutions. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 2504(j), 104 Stat. 4789, 4861; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 961(k), 962(e)(2), 103 Stat. 183, 500, 503-04.

second clause; instead, the provision only proscribed the use of the mails to further "any scheme or artifice to defraud." *Id.* at 356.[8] In the first case in which it considered the meaning of the new statute, *Durland v. United States*, 161 U.S. 306 (1896), the Court adopted a broad reading of this language, "constru[ing] the statute to 'includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" *McNally*, 483 U.S. at 356-57 (second alteration in original) (quoting *Durland*, 161 U.S. at 511).[9]

In 1909, Congress amended the mail fraud statute to add the second clause, "add[ing] the words 'or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' after the original phrase 'any scheme or artifice to defraud.'" *McNally*, 483 U.S. at 357 (quoting Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130) (internal quotation marks omitted).[10]

Initially, some lower courts inferred from the statute's new disjunctive phrasing that Congress had established two separate criminal offenses. *McNally*,

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[8] The full text of the statute as originally enacted is reproduced as Appendix E to this brief.

[9] The petitioner in *Durland* was convicted for a scheme to sell bonds by promising significant returns, a promise he never intended to honor. 161 U.S. at 509. Arguing that mail fraud was limited to common law false pretenses (*i.e.*, false statements about the past or present), the petitioner asserted he could not be convicted for promises as to the future. *Id.*

[10] The full text of the amended statute in its current form is reproduced as Appendix D to this brief.

483 U.S. at 358. But this Court disagreed. While noting that "it is arguable that [the two clauses] are to be construed independently," the Court concluded that the amendment was better understood as "codif[ying] the holding of *Durland*." *Id.* at 357. The new language "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359.[11]

Although that interpretation arguably rendered the second clause surplusage, the Court nonetheless concluded that it was correct in light of the statutory history, reinforced by principles of lenity and federalism, which precluded giving the statute a broader interpretation that would expand the encroachment of federal criminal authority on the traditional jurisdiction of the states without a clear indication from Congress. *See id.* at 359-60.

This Court "reaffirm[ed]" *McNally*'s reading of the mail fraud statute in *Cleveland v. United States*, 531 U.S. 12 (2000). The Government argued in *Cleveland* that disjunctive clauses of the mail fraud statute "define[] two independent offenses," with the second clause providing a basis for prosecution of conduct that does not satisfy the elements of the first.

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[11] In *McNally*, this Court considered whether "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355. This Court held that it did not, *id.* at 356, despite the Government's argument that "the money-or-property requirement of the [second clause] does not limit schemes to defraud [*i.e.*, schemes prohibited by the first clause] to those aimed at causing deprivation of money or property," *id.* at 358.

Id. at 25.[12] This Court, however, rejected this argument and reaffirmed that the mail fraud statute defines a single offense, explaining again that the second clause "simply modifies the first." *Id.* at 26. The Court further explained that the Government's interpretation was untenable because "[w]ere the Government correct that the second phrase of § 1341 defines a separate offense, the statute would arm federal prosecutors with power to police false statements in an enormous range" of circumstances. *Id.* at 24. Relying on principles of federalism and lenity, the Court "decline[d] to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear." *Id.* at 26.

c. The Tenth Circuit's conclusion that the parallel structure of Section 1344 nonetheless establishes two offenses, the second of which dispenses with the essential elements of the first, cannot be reconciled with these precedents. Both the

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[12] The primary dispute in *Cleveland* was whether the mail fraud statute reached false statements in an application for a state poker license. 531 U.S. at 15. The Court concluded it did not violate the first clause because a "scheme to defraud" requires an attempt to obtain the property of the victim and, the Court held, a state license does not count as property while in the hands of the a state government. *Id.* Nevertheless the Government argued that the license was property in the hands of the recipient. *Id.* at 25-26. And because the second clause of Section 1341 criminalizes schemes to "obtain[] . . . property" through false representations, the United States argued it should be interpreted to encompass the defendant's scheme to obtain poker licenses from the state through false statements, even if that conduct did not amount to a scheme "to defraud" the state under the first clause. *Id.*

wire and bank fraud statutes are lineal descendants of the mail fraud statute, and this Court has previously construed the common features of all three statutes in tandem. *See Neder*, 527 U.S. at 20-21 (giving identical interpretation to all three statutes with respect to the materiality requirement); *see also* H.R. Rep. No. 98-901, at 4 (explaining that Congress expected the bank fraud statute to be construed consistently with mail and wire fraud statutes).[13]

None of the linguistic differences between the bank fraud statute and the mail and wire fraud statutes undermine this conclusion. In adapting the language of the mail fraud statute in Section 1344, Congress made two primary changes. First, it changed the federal jurisdictional hook from one based on the use of a particular *instrumentality* of interstate commerce (the mail or wires) to one based on targeting a particular *victim* (a federally related financial institution). *Compare* 18 U.S.C. § 1344, *with id.* § 1341; *see also* S. Rep. No. 98-225, at 378-79. But that difference only reinforces that Congress intended the bank fraud statute to be limited to cases that involve attempts to defraud *a bank*, not schemes to defraud a third party that involve the use of a bank in some tangential way. As the Senate Report explained, "[w]hile the basis for Federal jurisdiction in [the mail and wire] fraud statutes is the use of the

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[13] That the bank fraud statute was enacted before this Court's decision in *McNally* is immaterial. The Court in *McNally* did not transform the mail fraud statute into a unitary provision in 1987; it was interpreting the statute as it had existed since 1909, well before the enactment of Section 1344. *See McNally*, 483 U.S. at 357-58 & n.6.

mails or wire communications, in the proposed offense, jurisdiction is based on the fact that the *victim of the offense is a federally controlled or insured institution*." S. Rep. No. 98-225, at 378 (emphasis added); *see also United States v. Thomas*, 315 F.3d 190, 197-98 (3d Cir. 2002) (legislative history indicates Section 1344 was intended to protect banks as victims).

Second, whereas the second clause of the mail and wire fraud statutes refers to schemes to obtain the victim's "money or property," 18 U.S.C. §§ 1341, 1343, the second clause of the bank fraud statute includes a more tailored list of property interests specific to the banking context, *i.e.*, "moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution," *id.* § 1344(2). Even if this list somehow broadened the class of property interests protected by the statute, the list still refers to property interests *of a bank*. The change thus only reinforces Congress's focus on protecting covered financial institutions from victimization by fraud.

d. Like the mail and wire fraud statutes, Section 1344 thus establishes a single offense, the essence of which is scheming "to defraud a financial institution" as proscribed in subsection (1). As in the mail and wire fraud statutes, the second subsection of the bank fraud statute simply clarifies what was already implicit in the first, making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *McNally*, 483 U.S. at 359. It does not "indicate that Congress was departing from [the] common understanding," *id.*, of

what it means to defraud a financial institution. Accordingly, just as in *McNally* and *Cleveland*, the Government cannot sidestep the requirements of the statute's principle clause by pleading its case under subsection (2) – it must prove that a financial institution was the intended victim of a defendant's fraud in every prosecution under Section 1344.

2. *Even If Section 1344 Defines Two Separate Offenses, Nothing In The Language Of Section 1344(2) Suggests That Congress Intended To Dispense With The Requirement That The Defendant Intend To Defraud A Bank.*

Even if this Court construes the subsections of the bank fraud statute to establish separate offenses, the language of Section 1344(2) is not sensibly read to dramatically depart from the traditional conception of bank fraud criminalized in subsection (1).

As noted above, it is widely acknowledged that subsection (1) of the bank fraud statute requires proof that the defendant (a) intended to deceive a bank (b) in order to obtain bank property. *See supra* pp. 11-12 & n.4; BIO 22; *cf. McNally*, 483 U.S. at 358 (describing traditional elements of fraud). Those two requirements easily map onto the plain language of subsection (2). The provision reaches only schemes involving "false or fraudulent pretenses, representations, or promises," 18 U.S.C. § 1344(2), words that describe common modes of intentional fraud, *see McNally*, 483 U.S. at 358-59. And by its terms, the provision is limited to schemes directed at "obtain[ing] any of the moneys" or other "property" owned by, or in the custody or control of, a bank. 18 U.S.C. § 1344(2).

To be sure, the provision does not say expressly to whom the false representations must be directed. But the statutory *silence* hardly suffices to overcome the natural implications of the statute's title ("Bank fraud") and the requirement that the object of the scheme must be obtaining property of a bank, both of which strongly imply that the intended target of the scheme must be a financial institution, not merely someone who happens to have a bank account. *See, e.g., United States v. Laljie*, 184 F.3d 180, 189-90 (2d Cir. 1999) ("Because § 1344 focuses on the bank, rather than on other potential victims, a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim."); *United States v. Thomas*, 315 F.3d 190, 198 (3d Cir. 2002) ("[T]he intent-to-victimize requirement of subsection (1) pervades the statute, and is a necessary element of an indictment under either subsection (1) or (2).").[14]

The Tenth Circuit's contrary interpretation also cannot be squared with the statute's origins in the text of the mail and wire fraud statutes. On the court of appeals' view, subsection (2) effectively criminalizes any fraud in which a bank is used as an instrumentality in a fraudulent scheme. *See* Pet.

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[14] Nothing in the legislative history even hints that Congress intended substantially different scopes for the two subsections. *See, e.g.*, H.R. Rep. No. 98-901, at 4 (describing entire section as "address[ing] schemes to defraud financial institutions").

App. 5a; *see also, e.g.*, *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("It is sufficient if the defendant in the course of committing fraud on someone causes a federally insured bank to transfer funds under its possession and control."). But if Congress had intended for *use of a bank* to substitute for *use of the mails* in the statute upon which it was modeled, Congress would have written the statute very differently. It would have punished, for example, "whoever, having devised a scheme or artifice to obtain money or property by means of false or fraudulent pretenses, representations, or promises, causes funds to be deposited, withdrawn, or transferred from, to, or among financial institutions." *Cf.* 18 U.S.C. § 1341. Instead, Congress omitted instrumentality language altogether and substituted in its place, as the federal jurisdictional hook, the intentional victimization of a federally related bank.

B. Requiring Intent To Defraud A Bank Best Accords With The Statute's Purposes.

Regardless of whether this Court views Section 1344 as creating one offense or two, the underlying purposes of the statute support reading the text to require proof of intent to defraud a bank in every prosecution.

As its title suggests, Congress enacted Section 1344 to prohibit *bank* fraud, not simply fraud against *someone* that tangentially touches upon a bank or its deposits. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). The purpose of

the statute was to fill a gap in existing fraud statutes that left financial institutions unprotected from some forms of fraudulent conduct, such as check kiting, that were directed at, and risked imposing financial harm upon, financial institutions connected to the federal government. S. Rep. No. 98-225, at 377-78 (explaining that the provision was intended to "assure a basis for Federal prosecution of those who victimize [federally regulated or insured] banks").

The legislative history is thus replete with explanations that this statute was enacted to protect banks from schemes in which the bank itself was the intended victim. *See, e.g.*, S. Rep. No. 98-225, at 377 ("The offense of bank fraud in this part is designed to provide an effective vehicle for the prosecution of frauds *in which the victims are financial institutions* that are federally created, controlled or insured.") (emphasis added); *id*. at 378 ("[J]urisdiction is based on the fact that the *victim of the offense is a federally controlled or insured institution*. . . .") (emphasis added); H.R. Rep. No. 98-901, at 2 (explaining that the statute was enacted, despite current laws prohibiting bank theft and false statements to banks, because those provisions did "not extend to fraudulent schemes *where banks are victims* unless the specific elements of false statement or theft crimes are met") (emphasis added).

Congress recognized that frauds that victimize banks implicate a "strong Federal interest in protecting the *financial integrity* of these institutions." *See* S. Rep. No. 98-225, at 377 (emphasis added). Many of the covered institutions are federally insured, *see* 18 U.S.C. § 20(1)-(2), and others have important roles in the national economy,

see, e.g., *id*. § 20(7) (defining covered financial institutions to include "a Federal Reserve Bank or a member bank of the Federal Reserve System"). The Tenth Circuit's interpretation unmoors the statute from this central purpose, permitting bank fraud prosecutions in cases that have little or nothing to do with victimization of banks.

C. This Court Should Avoid Giving The Criminal Bank Fraud Statute Unnecessary Breadth.

This Court has repeatedly avoided constructions of federal fraud statutes that would "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress," both to avoid unintended incursions on state sovereignty and to implement the venerable rule of lenity. *Cleveland*, 531 U.S. at 25-25 (mail fraud statute); *see also, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2932-33 (2010); *McNally*, 483 U.S. at 359-60 (same).

To see the enormous breadth of the statute as interpreted by the court of appeals, one need look only at the kinds of cases the Government has brought premised on the belief that intent to defraud a bank is not a necessary element of every bank fraud prosecution. Applying that interpretation, the Government has frequently brought bank fraud charges against defendants whose schemes involved use of a bank account or check, but were aimed at defrauding a bank customer, not the bank:

- ***United States v. Thomas*, 315 F.3d 190 (3d Cir. 2002):** A home health care aide convinced her elderly employer to sign checks for groceries and other valid purposes. The worker then

cashed the checks and pocketed most of the money instead of using the funds for their intended purposes.

- ***United States v. Rodriguez*, 140 F.3d 163 (2d Cir. 1998):** An accounts payable clerk filed fake vendor invoices with her employer, causing the company to issue valid checks to her friend for services that were never rendered. *See also, e.g.*, *United States v. Everett*, 270 F.3d 986 (6th Cir. 2001) (similar scheme); *United States v. Laljie*, 184 F.3d 180 (2d Cir. 1999) (same); *United States v. Briggs*, 939 F.2d 222 (5th Cir. 1991) (same).
- ***United States v. Hoglund*, 178 F.3d 410 (6th Cir. 1999):** A personal injury lawyer executed contingency fee agreements with his clients, promising to give them two-thirds of any money received. The attorney accepted settlements without consulting his clients, told the clients that their cases were still pending, and deposited the entire settlement amounts in his own bank accounts.
- ***United States v. Sprick*, 233 F.3d 845 (5th Cir. 2000):** A financial advisor deposited clients' funds into his own accounts and used them for personal expenses.
- ***United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988):** As part of a "pigeon drop" scheme, a con artist convinced elderly women to participate in a fake investment scheme. He persuaded the women to take cash out of their bank accounts, convert it to foreign currency, and give it to him to "invest."

The Court should reject such a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. The conduct at issue falls squarely within the traditional criminal jurisdiction of the state courts. *See, e.g.*, *State v. Barrick*, 46 P.3d 770, 772-73 (Utah Ct. App. 2002) (holding that the unauthorized alteration of the payee line of a money order is criminal under Utah Code Ann. § 76-6-501). And the Court has long required that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 25 (citation omitted). That interpretative guide is "especially appropriate" when, as here, the statute provides a predicate for other offenses with particularly harsh penalties. *Id*. (explaining that the rule of lenity "is especially appropriate in construing" the mail fraud statute" because, "as this case demonstrates, mail fraud is a predicate offense under RICO and the money laundering statute") (citations omitted); 18 U.S.C. §§ 1961(1), 1963(a) (bank fraud also a predicate for RICO, which carries a twenty-year maximum sentence); 18 U.S.C. § 1028A (bank fraud a predicate for aggravated identity theft, which imposes a mandatory two-year minimum sentence).

D. Use Of An Altered Check Is Not Sufficient, In Itself, To Prove Intent To Defraud A Financial Institution.

The Government has suggested that even if intent to defraud a bank is required, "negotiation of a forged or altered check to a merchant" is sufficient to prove that the defendant "intended to defraud the

bank on which the check is drawn." BIO 22. That suggestion is incorrect.[15]

1. The use of an altered check can, in some instances, amount to bank fraud. For example, a defendant who knowingly cashes an altered or counterfeit check at a bank quite plainly intends to defraud a bank by deceiving it into giving him the bank's money. *See, e.g.*, *United States v. Khorozian*, 333 F.3d 498, 503-06 (3d Cir. 2003).

But not every altered check is used to defraud a bank. This case is an example. Although petitioner used altered checks, his scheme was intended to obtain money from merchants, not from a bank. Indeed, at the time he obtained merchandise from Target using an altered check, the property he obtained – as well as the money he received when he returned merchandise for cash – belonged to *Target*, not to any bank. The scheme thus was not intended to "obtain any of the moneys" or other property

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[15] It is also does not change to the proper disposition of this case. Even if the use of an altered check might be sufficient evidence to permit a jury to infer an intent to defraud a bank, the jury was never asked to decide whether petitioner intended to defraud a bank in this case because the district court denied petitioner's request for an instruction requiring that finding. *See supra* p. 5. The Government has never argued that this error was harmless, either in the court of appeals, *see* U.S. C.A. Br. § II, or in its brief in opposition to certiorari, BIO 19-23. Moreover, the Government never argued below that use of an altered check is sufficient evidence to prove intent to defraud a bank; its only defense against petitioner's sufficiency of the evidence claim on appeal was its assertion that it was not required to prove intent to defraud a bank. *See* U.S. C.A. Br. § II.

"owned *by*, or under the custody or control *of*, a financial institution." 18 U.S.C. § 1344(2) (emphasis added). *See, e.g.*, *Blackmon*, 839 F.2d at 904 (finding that a scheme to defraud victims into surrendering foreign currency withdrawn from a bank did not violate Section 1344 because "[a]t the time the foreign currency was obtained, it simply was not in any way under the control or custody of the banks").

Of course, it was possible that Target might subsequently use the checks to attempt to obtain money from a covered financial institution. But it was by no means a foregone conclusion that a bank would eventually be deprived of money as a result. For one thing, Target might detect the crude alterations and never submit the checks to a financial institution (as happened with most of checks in this case). And even if Target had submitted the checks to a bank, the bank itself might detect the alterations and refuse payment.[16] Likewise, in other altered check schemes, a bank might refuse payment because the check was drawn on a closed account,[17] the account had insufficient funds,[18] or the check contained fabricated routing numbers that did not match a real account.[19]

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[16] *See United States v. Barakett*, 994 F.2d 1107, 1109 (5th Cir. 1993).

[17] *See United States v. Goodale*, No. 11-51204, 2013 WL 2631322, at *5 (5th Cir. June 12, 2013) (unpublished).

[18] *See United States v. Orr*, 932 F.2d 330, 331 (4th Cir. 1991).

[19] *Cf. United States v. Brooks*, 394 Fed. Appx. 953, 954 (3d Cir. 2010) (unpublished) (such a scheme charged under a different statute).

More importantly, whether a bank honored the check or not was irrelevant to the accomplishment of the scheme's objective. Once petitioner obtained cash from Target, his objective was achieved, and he was indifferent to whether Target ever submitted the check to a bank or whether a bank ever made payment on it. *See, e.g.*, *Kann v. United States*, 323 U.S. 88, 94 (1944) (finding no mail fraud violation where scheme involved cashing fraudulently obtained checks at a bank, but the bank's use of the mails to collect on the check from the drawee bank was not part of scheme, which "had reached fruition" when the defendants obtained the cash).

The same would be true if the question were analyzed under the text of subsection (1).[20] A scheme to obtain Target's property is not a scheme to "defraud a bank" under any normal understanding of those words. When a fraud statute designates a particular victim, the defendant must intend to obtain property that belongs to that victim (or at least property that is in the victim's custody or control) when the property is obtained. For example, in *Allison Engine Co., Inc. v. United States*, 553 U.S. 662 (2008), the Court construed a provision of the False Claims Act prohibiting conspiracies "to defraud the Government by getting a false or fraudulent claim allowed or paid," 31 U.S.C. § 3729(a)(3). Under this provision, the Court held:

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[20] As discussed, subsection (2) is properly understood as codifying what is already encompassed within subsection (1). But even if the Court thought differently, nothing in either section extends to schemes to obtain property owned by, and under the control or custody of, someone other than a bank.

> [I]t is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using moneys obtained from the Government. Instead, it must be shown that the conspirators intended "to defraud the Government."

553 U.S. at 672. Similarly, in *Tanner v. United States*, 483 U.S. 107 (1987), this Court held that a statute punishing conspiracies "to defraud the United States," 18 U.S.C. § 371, was not violated simply because the defendant had conspired to defraud a private company that, in turn, received federal funding. *Id*. at 110-12, 131-32. Likewise, in this case, it is not enough for the Government to show that Target might ultimately be reimbursed for the money it paid to petitioner with money obtained from a bank.

To be sure, it is possible that a scheme aimed at one victim will have adverse consequences for another. For example, a fraud against a federal funding recipient can indirectly inflict financial injuries on the government. But in part because money is fungible, tracing the secondary financial effects of a theft or fraud from the initial victim outwards is a project with no discernable boundaries. And here, Congress criminalized schemes to defraud a bank itself by obtaining money or property "owned by, or under the control or custody of, a financial institution," 18 U.S.C. § 1344(2), not frauds "in connection with" a bank or "using a bank facility or instrument."

2. There is no reason to contort the bank fraud statute to punish all schemes involving altered checks because Congress criminalized the use of altered checks to defraud merchants and other non-bank victims in an entirely different provision. Section 513 of Title 18, enacted as part of the same bill as the bank fraud provision, provides in relevant part:

> Whoever makes, utters or possesses a counterfeited security . . . of an organization, or whoever makes, utters or possesses a forged security . . . of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

18 U.S.C. § 513(a).[21] Under the statutory definitions, an altered bank check constitutes a "forged"[22] "security"[23] of a covered "organization."[24]

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[21] Section 513 was enacted as Section 1105(a) of Title II of Pub. L. 98-473, 98 Stat. 1837, 2133. The bank fraud provision was enacted as Section 1108(a) of the same Title. 98 Stat. 1837, 2147.

[22] "Forged" is defined as "a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents." *Id*. § 513(c)(2).

[23] "Security" is defined to include, among other things, a "check, draft, warrant. . . money order, [or] traveler's check." *Id*. § 513(c)(3)(A).

[24] An "organization" is defined to include "a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm,

Accordingly, the Government has used Section 513 to charge defendants who used altered checks to defraud merchants, like Target, through similar schemes. *See, e.g.*, *United States v. Brooks*, 394 Fed. Appx. 953, 954 (3d Cir. 2010) (unpublished) (affirming Section 513 conviction of defendant who passed six falsified checks "at Philadelphia area retail stores and fraudulently purchased various merchandise, some of which [he] thereafter returned for cash").

Importantly, the penalties for use of an altered check under Section 513 are far less severe than those imposed for bank fraud under Section 1344. The former calls for a sentence of imprisonment of "not more than ten years." 18 U.S.C. § 513(a). The maximum sentence for bank fraud, on the other hand, is thirty years. *Id.* § 1344. Just as importantly, bank fraud – but not Section 513 – is a predicate offense under the aggravated identity theft Statute, which imposes a mandatory minimum sentence of two years, even on first time offenders. *See* 18 U.S.C. § 1028A(a)(1), (c)(5).

That statutory scheme makes perfect sense if the bank fraud statute is limited to the serious offenses Congress obviously had in mind when it enacted that statute: schemes directed at banks themselves, which risk financial injury to institutions that are often insured by the federal government and have an

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partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce." *Id.* § 513(c)(4).

especially important role in the national economy. Congress reasonably concluded that fraudulent check schemes directed at others, including merchants like Target, warrant lesser punishment.

II. The Bank Fraud Statute Does Not Apply To Schemes That Pose No Risk Of Financial Or Other Property Loss To A Covered Financial Institution.

If the Tenth Circuit is correct that Section 1344(2) defines an independent offense that requires no proof of intent to defraud a financial institution, its judgment must still be reversed for an independent reason: the statute cannot reasonably be construed to encompass schemes that pose no risk of financial or other property loss to a bank.

1. In the prototypical bank fraud case, where the defendant intends to deceive a bank in order to obtain the bank's property, the scheme obviously subjects the bank to risk of financial loss, implicating the statute's central purpose of "protecting the financial integrity of these institutions." S. Rep. No. 98-225, at 377. For example, check kiting, loan fraud, and embezzlement by bank employees directly target and endanger a bank's own funds.

In other cases, however, the Government has attempted to charge individuals under Section 1344 even though the defendant targeted a third party, simply because the scheme involved obtaining money from a bank account. *See supra* § I.C (providing examples). For instance, in *United States v. Davis*, 989 F.2d 244 (7th Cir. 1993), the defendant filed a tax return in someone else's name and received a refund check to which he was not entitled. He negotiated the check through a bank, drawing funds from the

U.S. Treasury's account. *Id*. at 246. Because the bank was a holder in due course of a facially valid check, "[t]here is no way in which the fraud could have endangered" the bank's property. *Id.* at 247. Even if the defendant might have deceived the bank into negotiating the check, the scheme was directed at obtaining money from the IRS, not the bank.

As the vast majority of lower courts have rightly perceived, reading the statute to encompass frauds that pose no risk of harm to a bank would expand the statute far beyond its obvious purposes, invade the traditional criminal jurisdiction of the states, and run counter to principles of lenity. *See United States v. Ayewoh*, 627 F.3d 914, 921 (1st Cir. 2010) (holding that the Government must show that the "defendant knowingly . . . exposed a . . . bank to a risk of loss") (omissions in original) (citations and emphasis omitted), *cert. denied*, 132 S. Ct. 141 (2011); *Blackmon*, 839 F.2d at 906 ("Where the victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under section 1344(a)(2)."); *Thomas*, 315 F.3d at 200 (holding that, however charged, the Government must prove that "harm or loss to the bank [was] contemplated by the wrongdoer to make out a crime of bank fraud"); *United States v. Colton*, 231 F.3d 890, 908 (4th Cir. 2000) (A "financial institution [must] be exposed to 'an actual or potential risk of loss.'" (citation omitted)); *Sprick*, 233 F.3d at 852 (under Section 1344(2), Government "must show not only that the money or assets in the custody or control of a financial institution were obtained by means of fraud but also that doing so placed the financial institution at risk of civil

liability”); *Davis*, 989 F.2d at 246-47 (reversing bank fraud conviction for IRS tax refund scheme because although the defendant “may well have committed fraud against the Internal Revenue Service,” there was “no way in which the fraud could have endangered the” bank); *United States v. Staples*, 435 F.3d 860, 867 (8th Cir. 2006) (reversing bank fraud conviction because “there was no loss, or attempt to cause a loss, to a financial institution”).[25]

The text of the statute is reasonably read to avoid criminalizing as bank fraud conduct that risks no property loss to a bank. As petitioner has demonstrated, the statute at its core prohibits schemes to “defraud a financial institution,” 18 U.S.C. § 1344(1), and this Court has long construed “the words ‘to defraud’ [to] commonly refer to wrongdoing one in *his* property rights by dishonest methods or schemes.” *McNally*, 483 U.S. at 358 (citation omitted) (emphasis added). A scheme to get

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[25] A rigorous application of the intent-to-defraud-a-bank element may make resort to risk of loss analysis unnecessary in many cases. For example, when a bookkeeper issues valid checks to friends who have performed no work for her employer, the defendant should not be seen to have intended to defraud a bank, but rather her employer. *See United States v. Rodriguez*, 140 F.3d 163, 167-68 (2d Cir. 1998). An additional risk of loss analysis is unnecessary. *But see id*. at 168. However, were the Court to accept the court of appeals’ conclusion that intent-to-defraud-a-bank is not required in every bank fraud prosecution – or if the Court accepted the Government’s assertion (BIO 13) that this requirement is satisfied whenever a defendant uses an altered check, *see supra* § I.D – then the risk-of-loss requirement would stand as the sole remaining constraint on the statute’s breadth.

at the funds in a bank customer's account is not a scheme to wrong the bank in *its* property rights unless the bank itself stands to lose some money or other property of its own.

To be sure, subsection (2) refers also to funds that are in the "control or custody" of a financial institution. But given the history and purposes of the statute, the second subsection must be understood as simply an elaboration of the first, not as an attempt to radically expand the statute's scope. *See supra* § I.A.1. Accordingly, the provision is most reasonably read to encompass only those schemes risking the kind of injury addressed by the traditional conception of fraud – that is, schemes that risk an injury to the financial or other property interests of the victim of the fraud (here, the bank). Thus, when the defendant's scheme is not directed at obtaining the bank's own money or property, but is instead directed at money held in a customer account, the Government should be required to prove that the scheme created a risk of injury to the bank's own financial or other property interests.

It may be possible to give the text a more expansive reading. But in similar circumstances, this Court has not hesitated to give federal fraud statutes a narrowing construction to avoid "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement from Congress." *Cleveland*, 531 U.S. at 24 (narrowly construing scope of property interests covered by mail fraud statute); *see also, e.g., McNally*, 483 U.S. at 360 (same); *Skilling*, 130 S. Ct. at 2928-2933 (construing the honest services fraud amendment to mail fraud statute narrowly to encompass only core applications

clearly intended by Congress). Likewise, in this case, the Court should read the property interests protected by the bank fraud statute as limited to the core interests Congress had in mind, in order to avoid giving the statute the kind of sweep it has long presumed Congress does not intend without making its purpose clear.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX A
18 U.S.C. § 1344

BANK FRAUD STATUTE

(current form)

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX B
18 U.S.C. § 20

DEFINITION OF "FINANCIAL INSTITUTION"
(current form)

§ 20. Financial institution defined

As used in this title, the term "financial institution" means –

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

APPENDIX C
18 U.S.C. § 1344 (1988 ed.)

BANK FRAUD STATUTE

(as originally enacted)

§ 1344. Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term 'federally chartered or insured financial institution' means —

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States".

APPENDIX D
18 U.S.C. § 1341

MAIL FRAUD STATUTE

(current form)

§ 1341. Frauds and swindles

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.

APPENDIX E
Act of June 8, 1872, ch. 335 § 301, 17 Stat. 323

MAIL FRAUD STATUTE
(as originally enacted)

SEC. 301. That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by citing such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device.

APPENDIX F
18 U.S.C. § 1341 (1982 ed.)

MAIL FRAUD STATUTE

(as existed at time Bank Fraud statute enacted)

§ 1341. Frauds and swindles

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 takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail 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 not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX G
18 U.S.C. § 1343

WIRE FRAUD STATUTE

(current form)

§ 1343. Fraud by wire, radio, or television

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. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX H
18 U.S.C. § 513

USE OF COUNTERFEIT OR FORGED SECURITIES TO DEFRAUD

§ 513 Securities of the state and private entities

(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

* * *

(c) For purposes of this section –

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(3) the term "security" means –

(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) [2] of

the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce;

APPENDIX I
31 U.S.C. § 3729 (2008 ed.)

FALSE CLAIMS ACT

(As construed in *Allison Engine*)

§ 3729. False claims

(a) Liability for Certain Acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * *

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * * * .