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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. Introduction

The United States defends the court of appeals' rule that the federal bank fraud statute is violated so long as the defendant intended to defraud *someone* in order to obtain money in a bank account, even if he did not intend to deceive a bank and even if the scheme poses no risk of any loss to a financial institution. That interpretation would give the federal bank fraud statute extraordinary sweep, covering literally *every* fraudulent scheme in which the victim pays the perpetrator with a check. In every such case, the Government will be able to prove that the defendant intended to defraud *someone* (the non-bank victim) in order to "obtain[] money from a bank as part of the scheme," U.S. Br. 24 (citation and quotation marks omitted), because he will eventually exchange the check for money in a bank account. *See* Petr. Br. 27-28 (collecting examples).

The variety of covered schemes is almost limitless: the teenager selling subscriptions door-to-door, but never intending to deliver the magazines; the roofing contractor who takes the check and never returns to do the work; the vendor selling fake designer clothes; the funeral home padding its bills with bogus line items; the employee submitting false expense reports; or the con artist selling counterfeit lottery tickets.

The Government makes little effort to explain why Congress would have intended the bank fraud statute to have such enormous breadth, effectively federalizing state law crimes that are admittedly "tangential to the banking system," U.S. Br. 24,

which the statute was designed to protect. Instead, the Government offers a narrowing construction. But its proposed interpretation is as pointless as it is strange. The Government effectively proposes to replace intent to defraud a bank with intent to use false statements of the sort one would expect from someone intending to defraud a bank – *i.e.*, statements that "foreseeably or inherently" would be directed toward a bank and "would naturally influence it with respect to property in its custody." U.S. Br. 41. The Government points to nothing in text or precedent for such a rule, which substitutes *evidence* of intent to defraud a bank for an actual *finding* of intent to defraud a bank, using concepts borrowed from the law of negligence.

And for no good reason. The principal difference between the rule petitioner defends and the one the Government invents is that the Government's rule would ease prosecution of altered check schemes. But intent to defraud a bank is easily proven in many altered check cases, as when an altered check is negotiated at a bank. That leaves cases, like this one, in which the defendant uses an altered check to obtain property from a third party like Target. But the Government's interpretation is unnecessary to facilitate prosecution in such cases as well. First, third party altered check schemes are punished by Section 513 (which criminalizes use of altered bank instruments to deceive *anyone*) not Section 1344 (which criminalizes schemes to fraudulently obtain money or property "owned by, or under the custody or control of, a financial institution," not schemes to obtain the money or property of a department store). *See* Petr. Br. 29-36. Second, even if the Court were to

conclude otherwise, the Government's rule is unnecessary because the lower courts have easily found intent to defraud a bank satisfied by use of an altered check, even in third party cases. *See, e.g.*, *United States v. Morganfield*, 501 F.3d 453, 463-65 (5th Cir. 2007); *United States v. Donegan*, 97 Fed. Appx. 649, 651 (7th Cir. 2004) ; *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001).

If the Court is to reject the intent-to-defraud-a-bank requirement, the more sensible narrowing construction is the one applied by the lower courts for many years, requiring proof that the defendant's scheme knowingly exposed a bank to risk of loss, consistent with the statute's purpose of protecting banks' financial integrity.

II. Intent To Defraud A Bank Is An Essential Element Of Every Bank Fraud Prosecution.

This Court will not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). In this case, the Government and the Tenth Circuit have acknowledged the breadth of their proposed interpretation of Section 1344. Pet. App. 6a-7a; U.S. Br. 24. But the Government has failed to satisfy its heavy burden of justification.

A. Subsection (2) Does Not Dispense With The Government's Burden To Prove Intent To Defraud A Bank.

The Government begins by insisting that subsection (2) establishes an independent offense that dispenses with the intent-to-defraud-a-bank

element of subsection (1). *See* U.S. Br. 17-29. The premise of that argument is wrong, *see infra* § II.B, but the argument fails on its own terms in any event.

The Government accepts that intent to defraud a bank has two essential components: (1) intent to deceive a bank, (2) in order to obtain bank property or otherwise injure a bank's property interests. U.S. Br. 18-19. Section 1344(2) encompasses both requirements.

1. The United States does not seriously dispute that the second component of intent to defraud a bank – *i.e.*, intent to obtain bank property – is required by subsection (2). *See* U.S. Br. 22. The Government notes that subsection (2) protects a broad "range of property interests common in banking contexts." U.S. Br. 20. But it does not claim that any of those property interests fall outside the scope of subsection (1). For example, a defendant who used false identification to obtain the contents of a bank customer's safe deposit box surely would be found to intend "to defraud a financial institution" within the meaning of subsection (1), even though the property obtained was only in the bank's custody.

2. Subsection (2) is also reasonably read to require that the defendant intended to deceive a bank. The United States acknowledges that the defendant must intend to obtain bank property through intentional deception. *See* U.S. Br. 23. The only question is whether the target of the deception must be a bank or just *someone*.

a. ***Text***. The text does not specify *at whom* the "false or fraudulent pretenses, representations, or promises" must be directed. 18 U.S.C. § 1344(2). The

Government proposes to fill that statutory silence with "*anyone*," but that is hardly an inescapable inference. *See* Petr. Br. 24.

The Government argues that its broader reading is compelled because it is logically possible for a false statement directed at someone other than a bank (*e.g.*, a bank customer) to result in the defendant "obtain[ing] bank-held funds." U.S. Br. 23.[1] But this Court rejected a nearly identical argument, regarding materially indistinguishable statutory language, in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008). There, the Court construed a provision of the False Claims Act (FCA) that at the time imposed liability upon anyone who "knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id*. at 668 (quoting 31 U.S.C. § 3729(a)(2) (2008)). Thus, like Section 1344(2), the FCA provision prohibited "knowing[]" schemes to use

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[1] At times, the Government appears also to argue that the statute's intent requirement applies only to the "object" of the scheme (*i.e.*, obtaining bank property) and not to its "means" (*i.e.*, through a false representation). U.S. Br. 23. If that were true, the Government would not need to prove intent to deceive a bank even if the statute expressly covered obtaining bank property "by means of false [statements] *to a financial institution*." But the statute criminalizes "knowingly" executing a particular kind of scheme, described by both its means and its ends. As a consequence, the knowledge requirement applies to all of the non-jurisdictional elements of the offense, including both means and ends. *See Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).

fraudulent means (a "false record or statement") to obtain property of a specified victim ("to get" a false claim "paid or approved by the Government"). And also like Section 1344(2), the FCA provision did not specify to whom the false statement must be directed.

The court of appeals read that silence, as the Government does in this case, to encompass false statements to *anyone* so long as the "false statement resulted in the use of Government funds to pay a false or fraudulent claim." *Id*. at 668. In particular, the court held that it was sufficient that the defendant, a subcontractor on a Navy construction project, made false statements to the project's prime contractor in order to obtain payment from the prime contractor with government funds. It was not necessary, the court held, to prove that the defendant intended for the false statement to reach and deceive the federal government into paying a false claim. *Id*.

This Court unanimously rejected that interpretation. While the defendant need not have presented the false statement directly to the government, the Court held, the defendant must have *intended* for the false statement to mislead the Government into paying a false claim. *Id*. at 671. "If a subcontractor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim 'by the Government.'" *Id*. at 671-72.

The same construction of the parallel language of the bank fraud statute requires the same result here. It is not enough that a defendant intended to deceive *someone* – an employer, a client, a merchant, etc. – in

a way that results in a bank giving the defendant money from a bank account. The language is most sensibly read to require that the defendant intend for the false statement to deceive a bank into paying the money to the defendant. Which is simply another way of saying that the defendant must intend to defraud the bank itself.

b. ***Structure***. The Government complains that petitioner's interpretation renders subsection (2) surplusage, U.S. Br. 24, but the Government's own interpretation "produces an overlap not unlike the one it purports to avoid." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994). If subsection (2) criminalizes attempts to obtain bank property by deceiving *someone*, it surely covers schemes intended to obtain bank property by deceiving a bank directly. So it is difficult to imagine a scheme "to defraud a financial institution" covered by subsection (1) that is not also covered by the Government's reading of subsection (2). Moreover, even if there were some schemes that could only be prosecuted under the first subsection under the Government's interpretation, the Solicitor General offers no explanation why Congress would have required prosecutors to prove intent to defraud a bank only for the sliver of cases it could not also prosecute under subsection (2).

Furthermore, if Congress had intended the Government's interpretation, it would have been more natural to retain and modify the instrumentality clause of the mail fraud statute, substituting use of a bank for use of the mails. *See* Petr. Br. 24-25. But instead, Congress eliminated the instrumentality clause altogether, founding federal jurisdiction on the identity of the victim.

c. ***Purposes***. The Government does not seriously contest that the purpose of the statute is to protect the financial integrity of banks, not to provide a vehicle for federalizing garden-variety frauds that pose no threat to that interest. *See* U.S. Br. 34-37. It claims, instead, that the breadth it seeks is necessary to protect banks from schemes like petitioner's. Not so.

The Government emphasizes that altered check schemes, even when directed at others, pose financial risks for banks. U.S. Br. 36-37. But the Tenth Circuit did not dispense with the intent-to-defraud-a-bank element only in altered check cases. As a result, its interpretation permits conviction in cases involving entirely valid checks that pose no risk whatsoever to a bank's financial interests. *See* Petr. Br. 27-28.

Moreover, the intent-to-defraud-a-bank element does not pervasively preclude conviction in altered check cases. For example, a defendant who negotiates an altered check at a bank clearly intends to defraud the bank. Petitioner and the United States disagree about whether intent to defraud a bank can be established when the defendant uses altered checks to obtain property from a third party. *See infra* § II.B. But even when the Government cannot prove intent to defraud a bank, Congress addressed the inherent risk of fraudulent banking instruments in Section 513, punishing use of altered checks to deceive anyone even if the prosecution cannot prove intent defraud a bank. *See* Petr. Br. 34-36. If the Court believed that Congress also intended Section 1344 to cover third party altered check frauds, that would be a reason to hold that use of an

altered check is sufficient evidence to prove intent to deceive both the immediate victim and a bank. *See e.g.*, *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001). It would not be a reason to dispense with the intent-to-defraud-a-bank element, even in cases having nothing to do with altered checks.

d. ***Legislative History.*** Finally, even if the Government could satisfy its clear statement burden through resort to legislative history, it has failed to do so here.

Contrary to the Government's implication, the Department of Justice's objection to one early proposal was not that it was limited to schemes intended to defraud banks, or that it failed to encompass schemes to defraud third parties out of funds deposited in a financial institution. Instead, the Department worried that because the proposed bill was not modeled on the mail fraud statute, its new language would be subject to dispute and might not encompass bank fraud schemes that "involve the deprivation of an intangible right or interest," like a bank's right to honest services of its employees. *Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary,* 98th Cong., 2d Sess. 12 (1984). The Department accordingly asked that the bill include "the phrase 'a scheme or artifice to defraud,'" – that is, the language that is now in Section 1344(1), which the Government acknowledges requires intent to defraud a bank – believing that this language in the mail fraud statute encompassed honest services fraud against banks. *Id*.

Likewise, the references to *United States v. Maze*, 414 U.S. 395 (1974), simply show that

Congress was concerned that the principle *Maze* established – that use of the mails must be part of the execution of the scheme – made it difficult to prosecute a wide range of bank fraud schemes under the mail fraud statute. *See, e.g.*, S. Rep. No. 98-225, at 377-78 (1983). Nothing in the legislative history suggests that Congress responded to *Maze* by criminalizing nearly every fraud directed at anyone with a bank account. Moreover, Congress addressed the particular credit card fraud encountered in *Maze* in a different provision of the same statute. *See* Pub. L. 98-473, Title II, § 1602(a), 98 Stat. 2183 (codified at 18 U.S.C. § 1029).

B. Section 1344 Defines A Single Offense Requiring Proof Of Intent To Defraud A Bank In All Prosecutions.

The Government's position is also irreconcilable with this Court's decisions construing the parallel clauses of the mail fraud statute as establishing a single offense, with the second clause elaborating, rather than expanding beyond, the first. *See* Petr. Br. 15-23.

1. Perhaps hoping the third time's the charm, the Government argues that the two clauses of the bank fraud statute must be treated as separate offenses, for the same reasons it gave for reading the mail fraud statute that way in *McNally v. United States*, 483 U.S. 350 (1987), and *Cleveland v. United States*, 531 U.S. 12 (2000): it points to the word "or," notes that the statute was intended to have a broad reach, and cites the canon against surplusage. U.S. Br. 25-26, 29. But if those arguments are right, then *McNally* and *Cleveland* were wrong.

The Solicitor General says that the statutes should nonetheless be given different constructions because at the time the bank fraud statute was enacted, some courts of appeals had wrongly viewed the mail fraud statute as disjunctive. U.S. Br. 26-27. The Government cites nothing in the legislative history that suggests Congress relied upon (or even was aware of) those appellate decisions. Moreover, the argument assumes either that Congress intended to incorporate lower court case law even if it *wrongly* construed the mail fraud statute, or that *McNally* was wrong when it declared what the bank fraud statute had meant since 1909. Neither assumption is plausible.

Instead, the only reasonable reading of the text and history of the statute is that Congress intended the common features of the bank, mail, and wire fraud statutes to be read in tandem, as construed by *this* Court. *See Neder v. United States*, 527 U.S. 1, 20-21 (1999). Any other conclusion would lead to the anomalous result that even identically worded statutes could have radically different meanings depending on the state of the law in the lower courts at the time the language was copied. For example, by the Government's logic, the bank fraud statute has always covered honest services fraud – before and after *McNally*, without any need for additional legislation – because that was the circuits' incorrect view of the mail fraud statute when Section 1344 was enacted.

The Government argues that the reasons this Court gave for its interpretation of the mail fraud statute do not apply to the bank fraud statute. U.S. Br. 30-32. But those arguments are beside the point,

which is that Congress intended the bank fraud statute to be construed in tandem with its mail fraud model. *See* Petr. Br. 21.

2. Nothing in the textual differences between the mail and bank fraud statutes show that Congress intended Section 1344(2), unlike its mail fraud counterpart, to establish an independent offense that dramatically expands the statute. *See* Petr. Br. 21-23.

The Government points to stylistic differences between the two statutes. U.S. Br. 26. But if Congress had intended the two-clause structure of the bank fraud statute to be read radically differently from the statute upon which it was based, it surely would have conveyed that intent through means more transparent than paragraph numbering and hard returns. The "more logical explanation for the restructuring is that it broke up a lengthy principal paragraph . . . into a more readable statute," consistent with modern statutory drafting styles. *United States v. O'Brien*, 560 U.S. 218, 233-34 (2010).

C. The Government's Newly Minted Narrowing Construction Is Implausible, And Does Not Solve The Deficiencies Of Its Position.

Perhaps aware of the untenable reach of the statute under its preferred interpretation, the Government offers – for the first time in this case or, as far as petitioner can tell, *any* case – a novel narrowing construction. The Government proposes that rather than being required to prove intent to defraud a bank, prosecutors must prove only that the defendant's scheme would "foreseeably or inherently

direct false or fraudulent statements to a bank, and would naturally influence it with respect to property in its custody." U.S. Br. 41. Under that interpretation, the Government could prosecute individuals who intend only to defraud a bank customer, so long as the nature of the scheme would "naturally entail the customers' passing the false or fraudulent representations to the bank in a fashion that would influence the bank's actions." *Id*.

1. The Government does not claim any textual basis for this rule. As between petitioner's interpretation (which requires the Court to fill in a statutory *silence* regarding to whom the false statement must be directed, *see supra* pp. 4-5) and the Government's (which requires the Court to insert an extra-textual limitation on the kinds of "false or fraudulent pretenses, representations, or promises" actionable under the statute, 18 U.S.C. § 1344(2)), petitioner's is far more faithful to the text.

2. The Government's narrowing construction is also odd. Even while insisting that Congress did not intend to limit Section 1344(2) to schemes intended to defraud banks, the Government's narrowing construction focuses on the same basic issue – the likelihood that the defendant intended to defraud a bank and that a bank would, in fact, be defrauded. The Government's rule simply takes the ultimate question away from the jury, effectively imposing an irrebuttable presumption of intent to defraud a bank once the Government proves a particular set of facts (*i.e.*, use of false statements that could foreseeably deceive a bank regarding disposition of bank property) from which a jury might plausibly draw an inference of intent to defraud a bank. But such

presumptions are, at best, disfavored in criminal law. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 522-23 (1979).

At the same time, the Government's rule permits conviction when a defendant did not *in fact* intend for a false statement to make its way to a bank, so long as the possibility of bank deception was "forseeabl[e]." U.S. Br. 40. But importing a tort law principle of negligence into the criminal bank fraud provision would mark a dramatic departure from the mail fraud statute upon which Section 1344 is based, under which the Government must show specific intent to deceive the victim. *See, e.g.*, *United States v. Stephens*, 421 F.3d 503, 509 (7th Cir. 2005). Perhaps the Government would still require proof that the defendant specifically intended to deceive the bank customer, through means that risk negligent deception of a bank, but that does not make its interpretation any less odd and unprecedented.

Ultimately, the Government offers no explanation why Congress would have required an actual finding of intent to defraud a bank under subsection (1), yet concluded that indirect evidence *suggesting* intent to defraud a bank was good enough under subsection (2), particularly given the substantial overlap between the two provisions.

3. The Government's narrowing construction also fails to give the statute a more reasonable scope. While the interpretation would exclude *some* of the Government's more egregious prosecutions, the statute would continue to reach every case in which a defendant purchases groceries or gasoline with a check the defendant knows will bounce. *See United States v. Orr*, 932 F.2d 330 (4th Cir. 1991)

(prosecution of such a scheme). The check would "foreseeably or inherently be directed to the bank and have the potential to influence" the disposition of bank property, U.S. Br. 40, given the possibility that the bank might choose to (or mistakenly) honor the check, wrongly believing that the defendant will correct the deficiency in his account and make good on the promise of payment, *see id*. 7 n.3.

4. Even if the Government's rule did not threaten to turn the bank fraud statute into a federal "bad check" law, there would be no reason to prefer it over the intent-to-defraud-a-bank standard. Both rules are readily satisfied in paradigmatic bank fraud cases (*e.g.*, check kiting, lies on loan applications, self-dealing by bank employees), in which intent to defraud a bank is readily established. And intent to defraud a bank is easily proven in many altered check cases, such as schemes in which an altered check is negotiated at a bank. *See* Petr. Br. 30.

Accordingly, the principal function of the Government's alternative is to facilitate prosecutions of defendants, like petitioner, who defraud third parties with altered checks. But as discussed below, such schemes fall outside the scope of Section 1344 for the independent reason that they are intended to obtain the property of the third party victim, not property "owned by, or under the custody or control of, a financial institution." 18 U.S.C. § 1344(2); *see infra* pp. 17-19. Those crimes are punished under Section 513, which is *precisely* tailored to such cases, punishing anyone who uses any altered bank instrument "with intent to deceive *another person*" regardless of his intent with respect to the bank and

regardless of whose property is targeted by the scheme. 18 U.S.C. § 513(a) (emphasis added).

The Government disagrees, but even if it is right that Section 1344 encompasses schemes to defraud merchants using altered checks, there is *still* no reason to adopt the Solicitor General's narrowing construction to facilitate prosecutions in such cases. Even in circuits requiring intent to defraud a bank, the Government has frequently obtained convictions in third party altered check cases. *See, e.g.*, *United States v. Morganfield*, 501 F.3d 453, 463-65 (5th Cir. 2007); *United States v. Donegan*, 97 Fed. Appx. 649, 651 (7th Cir. 2004); *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001). Consistent with these decisions, if the Court concludes that Section 1344 encompasses third party altered check frauds, it should hold that intent to defraud a bank is required in every prosecution, but can be satisfied by evidence that the defendant used an altered check. As discussed next, that interpretation would not save the conviction in this case, but that is no reason to distort the statute.

D. If Intent To Defraud A Bank Is Required, The Jury Instructions And Evidence Were Insufficient.

The Government does not contest that if intent to defraud a bank is required, the jury instructions were insufficient. *See* U.S. Br. 44 (arguing only that jury instructions were sufficient under the Government's

newly proposed narrowing construction).[2] Nor has the Government ever argued that any instructional error was harmless. Accordingly, if the Court accepts petitioner's interpretation of the statute, his conviction must at the very least be vacated.

But there is no basis for a retrial because there was insufficient evidence to prove petitioner intended to defraud a bank. *See Tibbs v. Florida*, 457 U.S. 31, 40-41 (1982). Intent to defraud a bank has two components: (1) intent to deceive a bank; and (2) intent to thereby obtain bank property. *See supra* p. 4. In this case, even if using an altered check were sufficient to show that petitioner intended to *deceive* a bank, there was insufficient evidence to show that his scheme was intended to obtain property "owned by" or in the "custody or control of" a bank, rather than Target. *See* Petr. Br. 29-36.

1. This argument is available to petitioner. *Contra* U.S. Br. 44-46. The Government acknowledges that petitioner "argued on appeal that the evidence was insufficient '*if* an intention to defraud a bank is required.'" *Id*. 45 (citation omitted). Petitioner makes the same argument now – the evidence is insufficient because intent to defraud a bank requires proof that the defendant intended to obtain bank (not merchant) property through fraudulent means.

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[2] Because the Government never argued below that the jury instructions were valid under its new narrowing construction, the argument is waived. *See* Petr. Br. 30 n.15.

The Government inexplicably claims that petitioner "limited his certiorari petition to challenge the jury instructions and did not seek review on any sufficiency-of-the-evidence question," citing the Question Presented. U.S. Br. 45. But the Question Presented simply asks what "the Government must prove." Pet. i. Petitioner's argument that the Government's evidence did not prove what must be proven falls squarely within the scope of that question. Pet. i; *see also* Pet. 6; Pet. Reply 3 n.1.

2. The Government makes almost no effort to show how petitioner's scheme was intended to obtain bank property as required by the text of the statute. It argues instead that for "petitioner's scheme to work, Target had to accept his fraudulent checks," U.S. Br. 46, and that the scheme would work *best* if banks actually honored the checks (because it would delay detection), *id*. 47; *but see* Petr. Br. 32. However, even if there were a factual basis for this claim, it would simply show that petitioner intended for *Target* to obtain bank money; it would not transform the merchandise *petitioner* "obtain[ed]" from Target into property "owned by, or under the custody or control of, a financial institution." 18 U.S.C. § 1344(2). The Government's reliance on mail fraud precedents is thus inapt because under the mail fraud statute it makes no difference *whose* property the defendant obtains, so long as the mail is used to execute the scheme. U.S. Br. 46-47. The bank fraud statute, on the other hand, does not criminalize frauds in which a bank is used to execute the scheme; it criminalizes schemes to obtain bank property.

The Government cannot (and, in fact, does not) argue that the *merchandise* petitioner obtained from Target by means of altered checks should be treated as the equivalent of the *money* Target *might have* obtained from a bank in exchange for the checks (if it had submitted all the checks for payment, and if those checks had been honored). And this Court has rejected that kind of argument in *Allison Engine*. There, the Court held that it was not enough that the defendant used a false statement to obtain payment from a government contractor, even though the money ultimately came from the federal government. The Court explained that "getting a false or fraudulent claim 'paid . . . by the Government' is not the same as getting a false or fraudulent claim paid using 'government funds.'" 553 U.S. at 669 (first quotation from 31 U.S.C. § 3729(a)(2)). Instead, "a defendant must intend that the Government itself pay the claim." *Id*. Likewise, under Section 1344(2), the defendant must intend that his scheme result in obtaining money owned by, or under the custody or control of, a bank itself.

III. To Violate Section 1344, A Defendant's Scheme Must Knowingly Expose A Bank To Risk Of Loss.

If the Court holds that intent to defraud a bank is required, it must reverse petitioner's conviction and need proceed no further. But if the Court holds that Section 1344 encompasses fraud against *anyone* to obtain money in a bank account, it should at least adopt the well-developed narrowing construction applied for many years in the lower courts and limit the statute to cases in which the defendant's scheme knowingly exposes a bank to risk of loss.

1. The Government begins by quibbling with petitioner's articulation of the question to be decided, claiming that the Question Presented encompasses only whether a *subjective* intent to expose a bank to risk of loss is required and excludes the possibility of an *objective* test. U.S. Br. 47-48. However one reads the Question Presented, the precise nature of the test is fairly encompassed within it and is part of the circuit conflict this Court granted certiorari to resolve. *See* BIO 8-9 (describing conflict as over whether Government must prove "that the defendant exposed, or intended to expose, a bank to risk of financial loss"); Pet. 9-12 (collecting cases).

To be clear, however, petitioner believes that the language of the statute – which criminalizes only "knowing[]" conduct, 18 U.S.C. § 1344 – best accords with the test articulated by the First Circuit and Second Circuits: the Government must show the defendant's "knowledge that his fraudulent actions would expose some bank to a risk of loss." *United States v. Ayewoh*, 627 F.3d 914, 922 (1st Cir. 2010) (en banc); *see also United States v. Nkansah*, 699 F.3d 743, 749 (2d Cir. 2012) (same). Under that standard, causing the loss need not be the scheme's objective or purpose, but to establish criminal culpability, the Government must show at least knowledge that the scheme exposed a bank to such a risk.[3]

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[3] If the prospect of relieving unsophisticated defendants from criminal liability is intolerable, *see* U.S. Br. 48-49, that would be a reason to adopt an objective test, not grounds to leave in place the court of appeals' unbounded interpretation.

2. This Court does not lightly presume that Congress intended a federal criminal statute to displace state legislative judgment and prosecutorial discretion with respect to the appropriate regulation and punishment of garden-variety frauds. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Instead, the Court should presume that Congress intends to limit federal criminal jurisdiction to cases genuinely implicating federal interests – here, the interest in protecting the financial integrity of federally related banks. Interpreting the bank fraud statute to cover fraud that threatens no loss to a financial institution would eliminate the connection between the statute and that basic purpose, as well as the constitutional power upon which the provision is premised.

The Government's arguments to the contrary are not convincing. Having just proposed an a-textual limitation on the statute to avoid excessive breadth, U.S. Br. 40-44, the Government shows no sense of irony in complaining that the risk-of-loss requirement "has no basis in the text" of Section 1344, *id*. 49. In fact, the risk-of-loss limitation bears the same relationship to the text as the Government's rule – it can be seen as an "understanding of the 'means' required by Section 1344(2) to obtain bank property," U.S. Br. 41, limiting prosecutions to cases in which the means employed knowingly risk loss to a bank and, therefore, injury to the interests the statute was enacted to protect. But unlike the Government's narrowing construction, the risk-of-loss requirement is well grounded in the purposes of the statute, as well as principles of lenity and federalism. *Cf. Skilling v. United States*, 130 S. Ct. 2896, 2928

(2010) (paring criminal statute "down to its core" to avoid vagueness concerns arising from statute's potential breadth).

The Government's practical objections to the risk-of-loss requirement are likewise unsound. The Government ignores that in the vast majority of prosecutions, the requirement can be applied without difficulty or even serious dispute. There is no question, for example, that paradigmatic bank fraud cases knowingly expose banks to risk of loss. Conversely, when the defendant simply obtains a valid check from a non-bank victim, there is also no difficulty because the scheme plainly poses no risk to any bank. *See, e.g.*, *United States v. Laljie*, 184 F.3d 180, 190 (2d Cir. 1999).

The Government's complaints are founded instead almost exclusively on the rule's application to altered check schemes. U.S. Br. 51-55. But even in that context, the Government exaggerates the difficulty. For example, the U.C.C. need not be consulted when the defendant uses a false check written on a non-existent or closed account. *See* Petr. Br. 31. And the Government itself points out that banks must deal with altered checks on a regular basis, apportioning responsibility for losses among themselves, and between themselves and their customers. U.S. Br. 52. While the rules may sometimes be complicated, they are well known in the industry and can be explained to a jury through expert testimony or, as in this case, through bank witnesses who must be called in any event. *See* Petr. Br. 3-4. Indeed, juries are frequently required to resolve disputes under the U.C.C. *See* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a*

Slippery Slope, 54 SMU L. REV. 561, 562 (2001) (noting that "in cases arising under the UCC, parties will almost always have a jury-trial right in federal court").

The Government likewise complains that a risk-of-loss requirement would require some elaboration. U.S. Br. 53-54. But in contrast with the rule the Government proposes, the basic contours of the test are well established in the lower courts and the guiding principles should be relatively clear, drawing upon the purposes of the statute and traditional fraud principles.

Finally, the fact that risk of loss may vary depending on the form of check fraud may reflect a seeming arbitrariness in the U.C.C., but that does not render the risk-of-loss test itself arbitrary – it is commonplace that similar conduct may or may not result in criminal liability depending on whether the conduct results in harm (consider the two drunk drivers, only one of whom kills a pedestrian and is charged with manslaughter). And here, the bank fraud statute works in tandem with its companion provision, Section 513: the latter punishes all use of altered checks to deceive, while the more serious punishment of the bank fraud provision is reserved for schemes that can be proven to expose a bank to a genuine risk of loss.

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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