No. 13-316

In the Supreme Court of the United States

KEVIN LOUGHRIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether causing, or intending to cause, a risk of loss to a financial institution is an element of bank fraud.

2. Whether the district court correctly instructed the jury that it could convict petitioner of bank fraud under 18 U.S.C. 1344(2) if he "acted with intent to defraud" and knowingly executed a scheme to obtain money or property from a financial institution by means of false or fraudulent representations, but did not specify that the defendant must have intended to defraud the financial institution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 710 F.3d 1111.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2013. A petition for rehearing en banc was denied on June 14, 2013 (Pet. App. 50a-51a). The petition for a writ of certiorari was filed on September 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on six counts of bank fraud, in violation of 18 U.S.C. 1344; two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A; and one count of pos-

session of stolen mail, in violation of 18 U.S.C. 1708. Pet. App. 23a. The district court sentenced petitioner to 36 months of imprisonment, to be followed by five years of supervised release. *Id.* at 25a-26a. The court of appeals affirmed. *Id.* at 1a-22a.

1. Between December 2009 and March 2010, petitioner was involved in a fraudulent scheme in which he used stolen and altered checks drawn on accounts in federally insured financial institutions to obtain cash and gift cards from merchants in Utah. Pet. App. 2a; Presentence Investigation Report (PSR) ¶¶ 6-27. In pursuit of his scheme, petitioner dressed as a Mormon missionary and (aided by accomplice Theresa Thongsarn, who served as a lookout) stole mail from more than 50 individuals. PSR ¶ 6; C.A. App. Vol. IV at 100-102. Petitioner then altered checks that he found in the stolen mail and prepared them for reuse by, *e.g.*, crossing out or erasing the existing writing or washing and bleaching a check before ironing it and drying it with a hair dryer. PSR ¶¶ 9-10; C.A. App. Vol. IV at 78-79, 105.

Accompanied by Thongsarn, petitioner then used (and attempted to use) the altered checks to purchase items at retail stores such as Target and Wal-Mart, after which he would return many items to the store to obtain cash or gift cards. C.A. App. Vol. IV at 119-120; PSR ¶¶ 9-10. Between December 31, 2009, and March 7, 2010, petitioner made purchases at multiple Target stores using six checks stolen from six different individuals and drawn from accounts at six different federally insured financial institutions, including Bank of America, Wells Fargo, and three credit unions. PSR ¶¶ 6-25; C.A. App. Vol. I at 24. After being arrested and advised of his rights following one of the

incidents, petitioner admitted that he had stolen checks from the mail, altered them, and negotiated the checks at multiple stores. PSR ¶ 9.

2. Based on the foregoing conduct, a grand jury charged petitioner with six counts of bank fraud, in violation of 18 U.S.C. 1344; two counts of aggravated identity theft during and in relation to the bank fraud, in violation of 18 U.S.C. 1028A; and one count of possession of stolen mail, in violation of 18 U.S.C. 1708. C.A. App. Vol. I at 23-26. Petitioner pleaded not guilty and proceeded to trial.

a. At the close of the government's case, petitioner orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Pet. App. 35a. In the course of denying the motion, the district court noted that the counts of the indictment that charged petitioner with violating 18 U.S.C. 1344 appeared to rely on both subsections of that provision—Section 1344(1), which prohibits executing a scheme or artifice to "defraud a financial institution" and Section 1344(2), which prohibits executing a scheme or artifice "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." 18 U.S.C. 1344; see Pet. App. 35a. The district court explained that the Tenth Circuit had held that a conviction under Section 1344(1) requires proof that the fraudulent scheme "cause[d] a possible risk [of loss] to the bank," while a conviction under Section 1344(2) (which the Tenth Circuit has held is a "distinct offense[]") does not. *Id.* at 35a-36a (citing *United States* v. *Sapp*, 53 F.3d 1100 (10th Cir. 1995), cert. denied, 516 U.S. 1082 (1996)). The court con-

cluded that the government had not presented evidence of risk of loss and that, as a result, the case could proceed only under Section 1344(2). *Id.* at 36a-37a. The prosecutor agreed that, if risk of loss to the bank had "not been shown in the evidence," the government would submit the case to the jury—and the jury would thus only be instructed on—"the second prong" of Section 1344. *Id.* at 37a.[1]

b. Petitioner requested two changes from the Tenth Circuit's Criminal Pattern Jury Instruction for bank fraud (Instruction 2.58). First, petitioner requested that the district court instruct the jury that it must find that petitioner acted with an "intent to defraud a financial institution," rather than just "an intent to defraud," in order to convict under Section 1344. Doc. No. 109-1, Def. Proposed Instruction No. 1, at 1 (Apr. 1, 2011); Pet. App. 43a. The district court denied the request, explaining that the request deviated from the Tenth Circuit's pattern instruction and the Tenth Circuit's decision in *United States* v. *Rackley*, 986 F.2d 1357, 1360-1361, cert. denied, 510 U.S. 860 (1993). Pet. App. 44a-45a. Second, at the charging conference petitioner requested in the alternative that the court alter the language in the pattern instruction explaining the phrase "intent to defraud" to state that the defendant's deception must be for the purpose of causing "financial loss to a financial institution" rather than "financial loss to another." *Id.*

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[1] Petitioner asserts that the district court "granted the [Rule 29] motion in part." Pet. 4. Although the effect at trial of the court's ruling was analogous to the partial grant of a Rule 29 motion, the court stated that it was "going to deny" the motion, Pet. App. 35a, and the Minute Entry on the docket similarly reflects that the court "denie[d]" petitioner's motion, C.A. App. Vol. I at 125.

at 45a. The court denied that request as well. *Id.* at 45a-46a. The district court ultimately used the pattern instruction's explanation of "intent to defraud," which provides that "[a] defendant acts with the requisite 'intent to defraud' if the defendant acted knowingly and with the specific intent or purpose to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant." C.A. App. Vol. I at 149.

The jury convicted petitioner on all counts and the district court sentenced him to 36 months of imprisonment, to be followed by a five-year term of supervised release. Pet. App. 25a-26a. According to the Bureau of Prisons website, petitioner was released from custody in January 2013.

3. The court of appeals affirmed. Pet. App. 1a-22a. Petitioner "argue[d] the district court erred in refusing to instruct the jury that a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn." *Id.* at 3a; see Pet. C.A. Br. 12 (arguing that the district court "erred in defining the intent required to commit bank fraud as an intent to defraud anyone, rather than as the intent to defraud a financial institution"); Pet. C.A. Reply Br. 1-13 (arguing that instruction was erroneous because it omitted a requirement "that a defendant intend to defraud a bank").

The court of appeals rejected that contention. The court explained that, under circuit precedent, the government was required to present proof that a defendant intended to defraud a bank only if it sought a conviction under Section 1344(1), which expressly reaches schemes "to defraud a financial institution." Pet. App. 4a-5a (quoting 18 U.S.C. 1344(1)). By con-

trast, the court continued, "there is no requirement in * * * the text of § 1344(2) that the fraud must be intentionally directed at a bank. Unlike clause (1), clause (2) does not explicitly state who must be the object of the scheme." *Id.* at 5a. Relying on circuit precedent, the court stated that "only an intent to defraud *someone* is required" because "an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else." *Id.* at 5a-6a.

The court of appeals acknowledged that its "interpretation of § 1344(2) may cast a wide net for bank fraud liability" and that its construction of the bank fraud statute differed from that of other courts of appeals. Pet. App. 6a-7a & n.1. The court explained, however, that its interpretation was "dictated by the plain language of the statute and [its] prior precedent." *Id.* at 7a.[2]

4. Petitioner filed a petition for rehearing en banc, which the court of appeals denied when no active judge called for a vote on the petition. Pet. App. 50a.

ARGUMENT

Petitioner argues (Pet. 8-32) that the Court should grant his petition for a writ of certiorari to resolve a conflict among the courts of appeals concerning the scope of the bank fraud statute. Petitioner is correct (Pet. 9) that the courts of appeals disagree about two aspects of the proof needed to establish the intent element of bank fraud under 18 U.S.C. 1344:

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[2] The court of appeals rejected petitioner's additional argument that the delay between his indictment and trial violated his rights under the Speedy Trial Act. Pet. App. 7a-22a. Petitioner does not renew that claim in his petition for a writ of certiorari.

(1) whether the government must prove that the defendant caused or intended to cause a risk of loss to a financial institution, and (2) whether the government must prove that the defendant intended to defraud a financial institution directly rather than obtaining funds in a financial institution by defrauding a third party. The division among the courts of appeals principally concerns the first question about risk of loss. But petitioner did not press that question in the court of appeals, and the court of appeals did not address it. Rather, the court of appeals addressed only the second question. Although some division among the courts of appeals exists on that separate question, the question arises very infrequently and is not of sufficient general importance to warrant the Court's review at this time, especially in isolation from the risk-of-loss issue that petitioner waived. The petition should therefore be denied.

1. The bank fraud statute makes it a crime when a person:

> 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.

18 U.S.C. 1344. The statute thus prohibits "any 'scheme or artifice to defraud a financial institution' or to obtain any property of a financial institution 'by false or fraudulent pretenses, representations, or promises.'" *Neder* v. *United States*, 527 U.S. 1, 20-21

(1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope, see S. Rep. No. 225, 98th Cong., 1st Sess. 378-379 (1983), and courts have construed it to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

a. As petitioner notes (Pet. 8-16), some disagreement among the courts of appeals exists concerning the intent necessary to constitute bank fraud in certain circumstances. The crux of this disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove in every case that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The Sixth, Ninth, and Eleventh Circuits have rejected such a requirement. *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002); *United States* v. *McNeil*, 320 F.3d 1034, 1037-1039 (9th Cir.), cert. denied, 540 U.S. 842 (2003); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001), cert. denied, 535 U.S. 989 (2002). In contrast, the Second, Fourth, Fifth, and Seventh Circuits have held that the government must prove, as an element of the offense, that the defendant intended to expose the bank to a risk of loss or civil liability. *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002); *United States* v. *Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States* v. *Davis*, 989 F.2d 244, 246-247 (7th Cir. 1993). The First Circuit has held both that the government need not prove

an intent to harm, *United States* v. *Kenrick*, 221 F.3d 19, 29 (en banc), cert. denied, 531 U.S. 961 and 531 U.S. 1042 (2000), and that a defendant must "know[] that his fraudulent actions will expose some bank * * * to a risk of loss," *United States* v. *Ayewoh*, 627 F.3d 914, 921 (2010). The Eighth Circuit requires a loss, or attempt to cause a loss, to a financial institution, but only to secure a conviction under Section 1344(2). *United States* v. *Staples*, 435 F.3d 860, 867, cert. denied, 549 U.S. 862 (2006). The Third Circuit similarly requires that the fraudulent scheme expose the bank to some kind of loss and that the defendant intended to harm the bank, but only in situations in which the bank is not the target of the fraud. *United States* v. *Leahy*, 445 F.3d 634, 646-647, cert. denied, 549 U.S. 1071 (2006). The Tenth Circuit takes the opposite approach, requiring "that the bank [be] put at potential risk by the scheme to defraud" only with respect to Section 1344(1). Pet. App. 4a (quoting *United States* v. *Young*, 952 F.2d 1252, 1257 (10th Cir. 1991)).

b. Although petitioner cites cases involving the risk-of-loss conflict (Pet. 8-17) and suggests that "[t]his case presents the ideal vehicle for resolving" the various conflicts about Section 1344, Pet. 22, this case is not an appropriate vehicle for such intervention for two reasons. First, the risk-of-loss issue was neither presented to nor addressed by the court of appeals. Second, it is not apparent that the outcome of petitioner's case would have been different (had he pressed the issue on appeal) in those circuits that require proof of a risk of loss.

i. Petitioner conflates (Pet. 9-17) the two separate issues on which courts of appeals disagree—whether

the government must prove a risk of loss or intent to cause such a risk; and whether the government must prove an intent to defraud a financial institution directly—suggesting that both questions are implicated by his petition. That is not so. The court of appeals did not address the risk-of-loss question on which the courts of appeals are most deeply divided because petitioner did not argue on appeal that the jury instructions erroneously omitted a risk-of-loss requirement.

When petitioner moved for judgment of acquittal at the close of the government's case, the district court stated that circuit precedent required proof of a risk of loss to the bank under Section 1344(1) and concluded that the government had not presented such proof. Pet. App. 35a-38a. The court therefore determined that the jury would be instructed only on the elements of bank fraud under Section 1344(2), which the Tenth Circuit had held does not require proof of a risk of loss. *Id.* at 37a-38a. Petitioner did not object to the district court's failure to include a risk-of-loss instruction. Nor did he request that the court include the portion of the pattern instruction that would require proof (under Section 1344(1)) that "the defendant placed [a particular financial institution] at risk of civil liability or financial loss." Doc. No. 109-1, Def. Proposed Instruction No. 1, at 1.[3]

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[3] Petitioner requested that, if the district court chose not to instruct the jury that it must find that petitioner acted with an "intent to defraud a financial institution," the court should define the phrase "intent to defraud" as acting with a purpose to cause "financial loss *to a financial institution*" rather than "to another." Doc. No. 109-1, Def. Proposed Instruction No. 1, at 1; Pet. App. 45a (emphasis added). The district court denied the request. Pet.

On appeal, petitioner conceded that the risk-of-loss issue on which courts of appeals are divided is "not relevant to [his] case." Pet. C.A. Br. 23 n.4; see Pet. C.A. Reply Br. 8 (noting that the risk-of-loss question is "not one at issue" in this case). Instead, petitioner focused only on whether the district court erred in failing to instruct the jury that it must find proof that petitioner had an intent to defraud a financial institution specifically rather than merely an intent to defraud someone. Pet. C.A. Br. 12. That was how the court of appeals understood his argument. Pet. App. 3a (first error asserted was that "the jury instructions on the bank fraud counts, 18 U.S.C. § 1344(2), failed to include a requirement that [petitioner] intended to defraud a bank or financial institution"); *ibid.* ("[Petitioner] first argues the district court erred in refusing to instruct the jury that a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn."); *id.* at 5a ("[Petitioner] contends that a conviction under subsection § 1344(2), like one under § 1344(1), requires proof that he intended to defraud a bank."). And that was the sole aspect of the jury instructions that the court of appeals addressed. *Id.* at 5a-7a. Accordingly, because petitioner affirmatively waived reliance on a

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App. 45a-46a. Although the requested definition of "intent to defraud" references financial loss, the district court understood the request as another way of requiring proof of intent to defraud a bank directly, see pp. 20-22, *infra*, rather than as a request for an instruction on risk-of-loss. Pet. App. 43a-46a. On appeal, petitioner's discussion of the "intent to defraud" definition in the instructions confirms that his request sought to require proof that his deceit was directed at the bank directly, not proof that he exposed the bank (or intended to expose the bank) to a risk of loss. Pet. C.A. Br. 12-30.

risk-of-loss requirement, and the court of appeals did not address it, this case is not a suitable vehicle for deciding whether the district court erred in omitting such a requirement from the jury instructions under Section 1344(2).[4]

ii. Second, this case would also be an unsuitable vehicle for addressing the risk-of-loss requirement because it is highly unlikely that the ultimate outcome in this case—which involves negotiation of fraudulent altered checks—would be affected by such a requirement.

Because petitioner's failure to request a risk-of-loss instruction "precludes appellate review, except as permitted under Federal Rule of Criminal Procedure 52(b)," Fed. R. Crim. P. 30(d), any instructional-error claim on that point would be limited to plain error. A case in which the defendant must establish the additional plain-error showings, see *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993), is not an appropriate vehicle for reviewing a claim of instructional

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[4] In his petition for rehearing en banc, petitioner noted that some courts of appeals have required proof of a risk of loss by a financial institution. C.A. Pet. for Reh'g 1, 10-14. Petitioner argued that adoption of such a requirement "achieves very similar results to the requirement that a defendant intend to defraud a bank," *id.* at 10, and seemed to embrace it, *id.* at 11. But "[i]t has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); see *Herrera* v. *Lemaster*, 301 F.3d 1192, 1196 (10th Cir. 2002) ("We will not consider new assertions presented for the first time on rehearing en banc."), cert. denied, 537 U.S. 1197 (2003). And petitioner offers no reason why this Court should depart from that practice in this case, particularly when he affirmatively waived the issue in his briefs to the panel.

error. And a sufficiency-of-the-evidence claim fares no better because the negotiation of a forged check, even to a third party, should be sufficient to establish bank fraud even in the risk-of-loss circuits.

First, all the courts of appeals that have addressed the issue—including those that employ a risk-of-loss requirement—agree that a defendant commits bank fraud when he knowingly and intentionally negotiates fraudulent checks at a bank. See, *e.g.*, *United States* v. *Laljie*, 184 F.3d 180, 189 (2d Cir. 1999) ("Presentation to a financial institution of a fraudulent document that exposes the institution itself to a potential loss if * * * funds be released, such as a forged or altered document, is within the scope of § 1344."); *United States* v. *Monostra*, 125 F.3d 183, 188 (3d Cir. 1997); *United States* v. *Barakett*, 994 F.2d 1107, 1111 (5th Cir. 1993), cert. denied, 510 U.S. 1049 (1994); *United States* v. *Lamarre*, 248 F.3d 642, 649 (7th Cir.), cert. denied, 533 U.S. 963 (2001); *United States* v. *Hill*, 197 F.3d 436, 444-445 (10th Cir. 1999); see also *United States* v. *Hoglund*, 178 F.3d 410, 412-413 (6th Cir. 1999) (affirming bank fraud conviction based on negotiation of forged check). Thus, had petitioner presented the altered stolen checks directly to a bank for payment, his conduct would fall squarely within the statute's proscription under the approach taken by every court of appeals.

The difference between this case and those cases is that petitioner presented the altered stolen checks to a third-party merchant that would be responsible for obtaining payment on the check from the issuing bank rather than directly to the bank itself. But the courts of appeals that require the government to prove that a defendant intended to expose a bank to a risk of finan-

cial loss have held that a showing of actual loss is not required. See, *e.g.*, *United States* v. *McCauley*, 253 F.3d 815, 820 (5th Cir. 2001); *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir.), cert. denied, 504 U.S. 926 (1992). And such courts have also made clear that the bank need not be the primary victim of the defendant's fraud. See, *e.g.*, *United States* v. *Crisci*, 273 F.3d 235, 240 (2d Cir. 2001) (explaining that a defendant "is not relieved of criminal liability for bank fraud because his primary victim was the employer from which he embezzled funds by submitting fraudulent check requests"); *Barakett*, 994 F.2d at 1111 ("[W]e have not held that [Section 1344(1)] punishes only schemes directed *solely* at institutional victims."). As the Fourth Circuit explained in *Brandon*, a defendant's knowing negotiation of a fraudulent bank check "satisfies the requirement 'that a bank [be] an actual or intended victim of [the] defendant's scheme,' even if the [fraudulent] instrument is presented to a third party and not directly to a bank." 298 F.3d at 312 (quoting *Crisci*, 273 F.3d at 240) (first alteration in original); cf. *Brandon*, 17 F.3d at 426 (1st Cir.) (refusing to allow defendants "to sanitize their fraud by interposing an intermediary or an additional victim between their fraud and the federally insured bank").[5]

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[5] Those courts have also made clear that the risk of loss faced by the bank may be slight. See *McCauley*, 253 F.3d at 820 (noting that government need not prove "substantial likelihood of risk of loss to support the convictions"; bank suffered potential risk of loss because it "lost its ability to earn interest" on funds transferred as a result of defendants' scheme); *United States* v. *Jacobs*, 117 F.3d 82, 93 (2d Cir. 1997) (observing that, "under the case law, a mere possibility of detrimental reliance [by the bank on defendant's fraudulent conduct] is enough"); *Barakett*, 994 F.2d at 1111 n.15 ("Even proof of an extremely remote risk will suffice.").

As a result, fraudulent schemes designed to obtain funds in the custody of a bank by the negotiation of an altered or forged check inherently pose a risk to the bank sufficient to satisfy the risk-of-loss circuits.

Second, petitioner is incorrect in asserting (Pet. 17) that his case would have come out differently if he had been prosecuted in the Fifth or Eighth Circuits. He relies on the Fifth Circuit's decision in *Odiodio*, *supra*, in which the defendants deposited a stolen check in a non-FDIC insured brokerage account and then transferred the money to Texas banks. 244 F.3d at 400. The court of appeals held that the government failed to prove risk of loss to the banks, as opposed to the brokerage firm, because "Texas law assigns the full risk of loss to the bank that dealt with the forger or his work." *Id.* at 402. *Odiodio* did not alter the Fifth Circuit's rule that the risk of loss needed to satisfy the intent element may be slight and extremely remote. See *United States* v. *Morganfield*, 501 F.3d 453, 466 & n.51 (2007), cert. denied, 553 U.S. 1067 (2008); *McCauley*, 253 F.3d at 820. And subsequent Fifth Circuit decisions strongly suggest that, under facts analogous to those of this case, the government adduced sufficient evidence of risk of loss by presenting testimony that a bank, through mistake or otherwise, honored a fraudulent check in the first instance. Compare C.A. App. Vol. IV at 75 (trial testimony that account holder discovered petitioner's fraud when she checked her "bank account on line and * * * noticed an abnormal amount of a check [written on] her checking account"), with *United States* v. *Goodale*, No. 11-51204, 2013 WL 2631322, at *5 (5th Cir. June 12, 2013) (finding that government satisfied risk-of-loss element through testimony that, even though

account on which check was written had been closed, there remained a possibility of loss "through human or computer error" in processing it), and *Jacobs*, 117 F.3d at 93 (noting that, "for purposes of construing the statute, we must assume a highly incautious bank").

Petitioner also errs in relying on the Eighth Circuit's decision in *Staples*, *supra*. The court in *Staples* recognized that the outcome there was "unusual" because it was driven in part by the "law of the case" that had developed in the course of that prosecution, including the government's erroneous request for jury instructions requiring it to establish (1) the elements of both prongs of Section 1344 and also (2) "that the defendant's scheme was designed to obtain monies that were owned by *and* under the custody of the financial institution." 435 F.3d at 866-868. Because the court of appeals found the evidence insufficient on the latter ground, *id.* at 868, its earlier conclusion with respect to risk of loss—based in part on a government concession—was not necessary to the decision, *id.* at 867.

Third, on facts quite similar to the facts of this case, courts of appeals that do require proof of risk of loss have affirmed bank fraud convictions. For example, in *Brandon*, 298 F.3d at 309-314 (4th Cir.), the indictment alleged that the defendant "stole checks from legitimate accounts, forged the account holder's signature on the checks, and then presented the forged instruments to merchants who exchanged goods for the funds held by the drawee banks." *Id.* at 312. The Fourth Circuit held that those allegations satisfied the statute's intent-to-defraud element because "an inevitable part of this process is the eventu-

al presentation of the stolen and forged checks to the drawee banks, which exposes the banks to a potential risk of loss." *Ibid.*; see *id.* at 313; see also *Crisci*, 273 F.3d at 240 (2d Cir.) (evidence sufficient to prove intent to defraud a bank where the defendant "cashed seventeen fraudulent checks with forged endorsements, even though defendant physically presented the forged checks to [a check-cashing company] and not a bank"); *Goodale*, 2013 WL 2631322, at *1, *5-*6 (5th Cir.) (affirming bank fraud conviction where defendant stole a check book from former account holder's car and "used the stolen items to negotiate fraudulently seven checks" for $460 in merchandise at a gas station, and holding that the defendant's "negotiating forged checks to [the gas station], in and of itself, established his intent to defraud [the bank], sufficient to uphold his § 1344 bank-fraud conviction").

Fourth, the district court's ruling at the close of the evidence that the government had failed to present sufficient evidence of risk of loss to merit a jury instruction on liability under Section 1344(1), Pet. App. 36a-37a, does not change the reality that negotiation of an altered or forged instrument always poses such a risk. The court's ruling appeared to be based on the mistaken premise that the government could prove risk of loss only by introducing specific evidence beyond the fact that petitioner negotiated forged or altered checks—*i.e.*, testimony that the transactional rules governing the relationship between Target and the six financial institutions allocated the risk to the banks rather than to the merchant or the individual account holders. See *ibid.* As explained, that premise is incorrect because "the presentation of a forged or

altered instrument is evidence, in and of itself, of an intent to defraud a bank." *Brandon*, 298 F.3d at 313 (4th Cir.); see *Goodale*, 2013 WL 2631322, at *6. Section 1344 criminalizes schemes to deceive financial institutions; it does not require that such schemes actually result in the fraudulent acquisition of such institutions' property. Petitioner's "scheme exposed the drawee banks to potential loss in that" petitioner altered checks "from existing bank accounts * * * and then injected the forged instruments into the stream of commerce." *Brandon*, 298 F.3d at 313 (4th Cir.). As the Fourth Circuit has explained, "[a]n inherent part of [such a] scheme was that the forged checks would eventually be presented to the drawee banks, exposing the banks to a risk of loss." *Ibid.* That was petitioner's scheme and it is irrelevant to a risk-of-loss analysis whether Target's practices might have prevented the checks from ultimately being presented to the banks.

Thus, even if the intent element includes a risk-of-loss requirement, the undisputed evidence that petitioner presented stolen and altered checks to Target precludes a showing that any forfeited instructional error affected petitioner's substantial rights and would be sufficient to submit the case to the jury. Accordingly, this case would not be a suitable vehicle for addressing the circuit conflict on that requirement even if petitioner had not waived the issue by failing to present it to the court of appeals.

c. In any case, petitioner's argument that Section 1344(2) requires proof of risk of loss lacks merit. The text of the statute makes no mention of foreseeable or contemplated risk of loss. 18 U.S.C. 1344; see *United States* v. *Nkansah*, 699 F.3d 743, 754-755 (2d Cir.

2012) (Lynch, J., concurring). To the contrary, "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank, is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037. Congress could reasonably conclude, as the text of the bank fraud statute indicates, that ensuring the integrity of federally insured and controlled financial institutions requires criminalizing all attempts to use deception to obtain assets within the institutions' custody or control, whether or not the government proves, in a particular case, that the attempt has exposed, or was intended to expose, the institution to a potential loss. See *Id.* at 1038-1039.[6]

2. Unlike the risk-of-loss issue, the court of appeals did squarely address (Pet. App. 5a-7a) petitioner's contention that a bank fraud conviction under Section 1344(2) requires proof that the defendant intended to defraud a financial institution directly. Although the courts of appeals disagree on that ques-

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[6] Nor is there merit to petitioner's suggestion (Pet. 25) that applying the bank fraud statute to the present case without a risk-of-loss requirement improperly "federalizes broad swaths of traditional state crimes." As discussed at pp. 13-14, *supra*, this case does not implicate that concern because negotiating forged checks does threaten the bank with a risk of loss, even when the checks are first presented to a third party. Even if the conduct at issue may be prosecuted in state court, moreover, that possibility neither precludes federal prosecution nor eliminates the federal interest. See *United States* v. *Morgenstern*, 933 F.2d 1108, 1113 (2d Cir. 1991) ("While [defendant's] conduct could have been handled in state court as a simple case of business fraud, this does not preclude treating it as an instance of federal bank fraud if the relevant statutory elements are satisfied."), cert. denied, 502 U.S. 1101 (1992).

tion as well, further review is not warranted at this time because the answer to that question rarely makes a difference in any case, and the Court should not address it in a case in which the defendant waived his opportunity to raise the more important risk-of-loss question.

a. Petitioner correctly identifies (and the court of appeals acknowledged, see Pet. App. 6a-7a & n.1), a conflict among the courts of appeals on the question whether Section 1344 requires proof that the defendant intended to deceive the bank itself, rather than a third party. Although a majority of the circuits has held that bank fraud under either prong of Section 1344 requires an intent to deceive the bank directly, see, *e.g.*, *Jacobs*, 117 F.3d at 92-93 (2d Cir.); *United States* v. *Thomas*, 315 F.3d 190, 197-198 (3d Cir. 2002), the court below joined the Sixth Circuit in holding that the intent element in prosecutions under Section 1344(2) can be satisfied if the defendant intends to defraud a third party and obtains money from a bank as part of the scheme, see Pet. App. 5a-6a; *Everett*, 270 F.3d at 991.[7]

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[7] Petitioner errs in suggesting (Pet. 15-16) that the Ninth Circuit agrees with the minority view that the government need not prove an intent to defraud a financial institution directly (rather than a third party), quoting that court's statement that "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank[] is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037. Here again petitioner conflates the risk-of-loss issue addressed above with the question whether a defendant may commit bank fraud under Section 1344(2) without an intent to defraud a bank directly. The Ninth Circuit in *McNeil* did not conflate those issues, expressly declining to decide "whether § 1344(2) reaches cases in which no deception actually is aimed at the bank" because

The division among the courts of appeals on this issue does not, however, present a question of general importance warranting the Court's review. As noted at pp. 13-14, *supra*, the courts of appeals widely agree that a defendant can commit bank fraud even when the bank is not the immediate or even the primary victim of the defendant's fraudulent scheme. See, *e.g.*, *Crisci*, 273 F.3d at 240 (2d Cir.); *Leahy*, 445 F.3d at 662 (3d Cir.); *Brandon*, 298 F.3d at 312 (4th Cir.); *McNeil*, 320 F.3d at 1037 (9th Cir.); *United States* v. *Singer*, 152 Fed. Appx. 869, 876 (11th Cir. 2005). As the Second Circuit's decision in *Crisci* demonstrates, even those courts that construe the statute to require proof that the defendant intended to victimize a financial institution regularly find that element satisfied when a third party (*e.g.*, the defendant's employer) is the primary victim and fraudulent documents are presented to a bank. The distinction between the majority position and the view adopted by the court below on this issue—*i.e.*, the difference between an instruction requiring the jury to find simply an "intent to defraud" and one requiring "an intent to defraud a financial institution"—will rarely be of practical importance.

The lack of practical importance is borne out by the infrequency with which the Sixth Circuit's intent phrasing has been dispositive. Indeed, in *Everett* itself, the defendant was an accountant who engaged in deception toward a bank by forging (or having a co-schemer) forge the signature of a client on checks and

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the defendant there *had* "engaged in a course of deception toward the bank." *Ibid.* The other Ninth Circuit case on which petitioner relies, *United States* v. *Rizk*, 660 F.3d 1125 (2011), did not concern Section 1344(2) at all.

then presenting the checks to a bank for payment. 270 F.3d at 988. Before the decision below, the Sixth Circuit's decision in *Everett* was the only court of appeals decision to expressly hold that the government may prove bank fraud under Section 1344(2) by proving that "the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." *Id.* at 991. In prior briefs in opposition to certiorari involving bank fraud, the 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." U.S. Br. in Opp., *Wilson* v. *United States*, No. 03-304, 2003 WL 22471180, at *13 (Oct. 27, 2003). And since *Everett*, no Sixth Circuit prosecution appears to have been based on any different understanding. The government's historic focus on fraudulent schemes that feature acts of deception aimed at a bank thus indicates that bank fraud prosecutions that do not involve deception toward a bank should be exceedingly rare. The majority rule would bar prosecutions based on any different theory in most other circuits. And this case would be an exception only if one assumes that the negotiation of a forged or altered check to a merchant is not intended to defraud the bank on which the check is drawn, a dubious assumption. If review were warranted of the rare scenario in which a person intends to deceive or defraud only a third party, it should await an appropriate case presenting that issue as well as the deeper circuit conflict involving the risk-

of-loss question that petitioner expressly declined to press in the court of appeals.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2013

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[8] Petitioner's argument (Pet. 26-32) that the Tenth Circuit's view that Section 1344 creates two separate offenses conflicts with this Court's decisions construing the separate mail fraud statute in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Cleveland* v. *United States*, 531 U.S. 12 (2000), also fails to provide a reason for review of the bank fraud statute in this case. Petitioner failed to press any such claim in the court of appeals, but instead relied on the distinct elements of the two subsections. *E.g.*, Pet. C.A. Br. 17. Petitioner identifies no conflict on that issue in the courts of appeals and there does not appear to be a well-developed divide. Besides the court below, see *United States* v. *Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004) (relying on *United States* v. *Bonnett*, 877 F.2d 1450, 1453-1454 (10th Cir. 1989)), several other courts of appeals have also held that Subsections (1) and (2) describe two different manners of committing bank fraud, see, e.g., *Kenrick*, 221 F.3d at 27-29 (1st Cir.); *Crisci*, 273 F.3d at 239-240 (2d Cir.); *Staples*, 435 F.3d at 867 (8th Cir.); *McNeil*, 320 F.3d at 1037 (9th Cir.). The Third Circuit has held, however, "that the intent to defraud the bank element of § 1344(1) must apply to § 1344(2) as well." *Leahy*, 445 F.3d at 642-643.