No. 13-316

In the Supreme Court of the United States

KEVIN LOUGHRIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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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 for bank fraud under 18 U.S.C. 1344.

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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 was denied on June 14, 2013 (Pet. App. 50a). The petition for a writ of certiorari was filed on September 9, 2013, and was granted on December 13, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convict-

ed of 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 possessing 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. The Bureau of Prisons website indicates that petitioner was released from custody in January 2013.

1. This case concerns the bank-fraud statute, 18 U.S.C. 1344, which Congress enacted to fill "gaps" left in prior legislation. S. Rep. No. 225, 98th Cong., 1st Sess. 377-378 (1983) (*Senate Report*). Before Section 1344, the government used various statutes to prosecute fraudulent schemes targeting funds held by banks. *Ibid*.

Until *United States* v. *Maze*, 414 U.S. 395 (1974), the "most useful" of those statutes was the mail-fraud statute (18 U.S.C. 1341). *Senate Report* 377. The scheme in *Maze* involved the fraudulent use of a stolen bank-issued credit card to purchase goods and services from merchants, which then mailed the sales slips to the card-issuing bank for payment. 414 U.S. at 396-397. The Court explained that the merchants, the bank, and the cardholder were "all * * * victims of [Maze's] scheme," but it determined that the mailings to and from the victim bank were not "for the purpose of executing [the] scheme" as required for a mail-fraud offense. *Id*. at 402, 405 (citation omitted).

Thereafter, the government turned to the false-statement statute, 18 U.S.C. 1014, as "an alternative to * * * the mail fraud [statute]," in order to prosecute a (smaller) set of schemes involving banks, in-

cluding check kiting. *Senate Report* 378. But *Williams* v. *United States*, 458 U.S. 279 (1982), then held that a check is not a "statement" under Section 1014, and *Bell* v. *United States*, 462 U.S. 356 (1983), held that Section 1014 applied to offenses obtaining "property from banks by false pretenses" but only if they involved "a taking and carrying away" of that property. *Senate Report* 378 & n.3.

In 1984, after "a decade long bipartisan effort * * * to make major comprehensive improvements to the Federal criminal laws," Congress enacted a bank-fraud statute that it "modeled" on the mail- and wire-fraud statutes (rather than the false-statement statute) to "reach a wide range of fraudulent activity." *Senate Report* 1, 378; see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147 (enacting Section 1344). As originally enacted, Section 1344 made it an offense to execute, or attempt to execute, certain fraudulent schemes or artifices involving "federally chartered or insured financial institution[s]." 18 U.S.C. 1344(a) (1988).

Congress later defined "financial institution" to include federally insured banks and credit unions, banks within the Federal Reserve System, and other federally significant banking institutions, 18 U.S.C. 20; substituted that new term into Section 1344 without otherwise materially altering Section 1344's definition of the offense; and increased Section 1344's maximum sentence from five to 20, then 30, years of imprisonment. See Crime Control Act of 1990, Pub. L. No. 101-647, §§ 2504(j), 2597(a), 104 Stat. 4861, 4908; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 961(k), 962(e), 103 Stat. 500, 503.

Section 1344 as amended defines bank fraud as "knowingly execut[ing], or attempt[ing] 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. This case concerns Section 1344's second clause, which prohibits schemes "to obtain" property owned by, or under the custody or control of, a bank, "by means of" false or fraudulent pretenses, representations, or promises.

2. Between October 2009 and his arrest in March 2010, petitioner executed a scheme in Utah in which he stole checks drawn on valid accounts in federally insured financial institutions; altered each check or forged the signature thereon; and used false identification to present the checks to merchants from which petitioner would later obtain cash. Trial Tr. (Tr.) 55, 57, 184-186, 194; Pet. App. 2a, 23a; J.A. 2, 9-10; see Tr. 196-198 (petitioner's confession).[1]

Petitioner executed his scheme by going to private homes dressed as a Mormon missionary and stealing mail from the mailboxes, sometimes with the assistance of his girlfriend, who acted as his lookout. Tr. 53-55. Petitioner stole mail from more than 20 individuals; would sometimes return to the same houses to repeatedly steal mail; and specifically targeted an

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[1] The trial transcript is reproduced at pages 48-260 (Tr. 1-213) and 282-332 (Tr. 214-264) of Volume 4 of the Court of Appeals Appendix.

"older lady" for multiple thefts when she was away from home. Tr. 54, 56. After petitioner extracted bank checks from the stolen mail, he would alter the checks and prepare them for reuse by crossing out or erasing the existing writing or by washing, bleaching, ironing, and drying the checks. Tr. 58; see Tr. 31-32. On at least one occasion, petitioner stole blank convenience checks, completed the payment information, and forged the accountholder's signature. Tr. 44-46.[2]

Petitioner would then pose as the check's lawful maker to use (or attempt to use) the forged or altered check to purchase items at, *inter alia*, Walmart, Kmart, and Target. Tr. 57, 60, 204. A check (also known as a bank draft) is a "written instruction" to the bank on which the check is drawn (the drawee) made by the person signing the check (the drawer) that unconditionally "order[s the bank] to pay a fixed amount of money" to the payee. U.C.C. §§ 3-103(4), (5) and (8), 3-104(a), (e) and (f) (2002). The drawee bank must generally pay the amount that the check orders it to pay—regardless whether the check is "properly payable or not"—unless it dishonors the check before midnight of the next banking day after having received it. *Id.* §§ 4-104(a)(10), 4-302(a)(1); see Tr. 115. If the drawee bank wrongfully dishonors a check ordering it to make payment, however, the bank is liable to its drawer-customer for actual damages, including consequential damages. U.C.C. § 4-402(b).

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[2] A convenience check is a preprinted check, generally linked to a credit card account, provided to a customer that, when used, is processed like a traditional check through the banking system but is ultimately charged against the cardholder's account. See *United States* v. *Otuya*, 720 F.3d 183, 185 (4th Cir. 2013), cert. denied, No. 13-6874 (Feb. 24, 2014).

See also Utah Code Ann. §§ 70A-3-103, 70A-3-104, 70A-4-104, 70A-4-302, 70A-4-402 (2009) (enacting U.C.C. provisions).

Once a merchant accepted petitioner's check ordering a bank to pay the merchant, petitioner would often return the purchased items to the merchant to obtain cash. Tr. 73; see Tr. 159-160, 197-198.

The bank-fraud charges in this case were based on six of the checks that petitioner altered or forged. J.A. 1-2; see Gov't Exh. 1-1, 2-1, 3-1, 4-1, 5-1, 6-1 (the checks). Those checks were drawn on then-valid accounts at six different federally insured financial institutions, some of which were local and others national (Bank of America, Wells Fargo). J.A. 2; Tr. 16, 23, 29, 36, 40-41, 44, 87-89, 175, 233. Between December 31, 2009, and early March 2010, petitioner presented each of the six checks at Target stores. J.A. 1-2; see, *e.g.*, Tr. 92-93, 178, 182. To do so, petitioner altered the first five checks (which had been signed before being stolen) by changing the payment amount and designating Target as the payee. Tr. 15-17, 22-23, 27-30, 34-37, 40-41; Gov't Exh. 1-1, 2-1, 3-1, 4-1, 5-1. Petitioner used the sixth check (which was blank when he stole it) by adding the payment and payee information and forging the accountholder's signature. Tr. 44-46, 178, 182; Gov't Exh. 6-1.

The trial testimony showed that Target deposited three of the six fraudulent checks. Tr. 116 (Check 1); Tr. 28, 101-102 (Check 2); Tr. 175 (Check 5). The evidence further indicated that two of those checks were later paid by the drawee banks, Tr. 28, 101-102, 175, but that the third check was returned by the drawee without payment because the accountholder had promptly directed the bank to refuse payment on

the check after she witnessed a man steal her outgoing mail. Tr. 21, 24, 116 (Check 1).[3] Because Target employees identified the other three checks as fraudulent before Target deposited the checks, those checks were not ultimately presented for payment. Tr. 34, 124, 132-133, 140 (Check 3); Tr. 13-14, 144-145, 172-173 (Check 4); Tr. 178, 186, 189-190, 194 (Check 6).

3. a. After the grand jury indicted petitioner, J.A. 1-4, petitioner elected a jury trial. At the close of the government's case, petitioner orally moved for a Rule 29 judgment of acquittal, which the district court denied. Pet. App. 35a; Tr. 205. The district court noted that the six counts under 18 U.S.C. 1344 appeared to rely on both subsections of that provision: Section 1344(1), which prohibits schemes or artifices to "defraud a financial institution," and Section

[3] A Target employee testified that the bank honored Check 2, Tr. 101-102, and the accountholder similarly testified that she reported the check to her bank after accessing her checking account online and identifying the cleared check as an abnormal payment, Tr. 28. An employee of the drawee bank later stated that the accountholder had changed her account before Check 2 had been "processed" and, as a result, the check was not honored and was returned to an intermediary bank. Tr. 120-121. That testimony may suggest that the check was initially paid but the drawee later challenged the payment.

A Target employee testified that he examined Check 5 because it looked suspicious but did not indicate whether Target ultimately deposited that check. Tr. 144, 147-148. An employee of Check 5's drawee bank later testified that bank records showed that the bank ultimately paid the check. Tr. 175. Although the accountholder recalled that his neighbor saw someone take his mail and that he immediately canceled his account after receiving a call from a detective later that day, Tr. 42, that testimony is consistent with a bank mistake that resulted in the drawee bank honoring the check and later swallowing the loss.

1344(2), which prohibits schemes or artifices "to obtain any of * * * 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. Pet. App. 35a-36a. The court explained that, under Tenth Circuit precedent, Section 1344(1) requires proof that the fraudulent scheme "cause[d] a possible risk [of loss] to the bank," but Section 1344(2) does not. *Id.* at 36a. The court stated its view 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 stated that, "if" a risk of loss to the bank had "not been shown in the evidence," the case should be submitted to the jury on "the second prong" of Section 1344. *Id.* at 37a.

b. As relevant here, petitioner requested two changes to the jury instructions for bank fraud. Pet. App. 43a-46a. First, petitioner requested that the instruction that the jury must find that he acted with "intent to defraud" be modified by adding "a financial institution" at the end. *Id.* at 43a; cf. J.A. 7. The district court denied the request. Pet. App. 44a-45a.

Second, petitioner alternatively suggested that "if the Court [was] disinclined" to make the first change, the court could, "rather than alter" the intent-to-defraud instruction directly, revise the model instruction defining "intent to defraud." Pet. App. 45a; J.A. 8. Petitioner requested that the phrase "financial loss to another" be changed to "financial loss to a financial institution," Pet. App. 45a, such that the revised instruction would provide: "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 a financial institution] or bringing about some financial gain to the defendant." See J.A. 8. The court denied that request. Pet. App. 45a-46a.

As relevant here, the district court instructed the jury that it could convict petitioner under Section 1344 only if petitioner "knowingly executed or attempted to execute a scheme or artifice to obtain money or property from the particular bank or credit union named in the indictment by means of false or fraudulent pretenses, representations, or promises." J.A. 7. The court explained that the bank or credit union must be a "financial institution" as defined by statute, and that the requirement of a "scheme or artifice to defraud" is satisfied by any design, plan, pattern or course of action intended to deceive others "in order to obtain something of value, such as money, from the institution to be deceived." J.A. 7-8. The court similarly instructed that the requisite "false or fraudulent pretenses, representations, or promises" must be "material," *i.e.*, "they would naturally tend to influence, or were capable of influencing the decision of the particular bank or credit union." *Ibid.*

Finally, the district court instructed that the government must prove petitioner acted with "intent to defraud" and that such intent is established if petitioner "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." J.A. 7-8.

c. The jury found petitioner guilty on all counts. Tr. 260-261. Petitioner thereafter renewed his Rule 29 motion for judgment of acquittal. 1 C.A. App. 162-163. The district court denied the motion because it

found "sufficient evidence to support the jury's verdict." *Id.* at 168. Petitioner moved for reconsideration (*id.* at 169-178), arguing that, as relevant here, the evidence was insufficient to prove, as the jury instructions required, that petitioner (1) "executed a scheme to obtain money or property that was in the 'custody and control' of a financial institution," *id.* at 171-175, or (2) "intended to obtain money from a financial institution," *id.* at 176. The district court denied reconsideration. *Id.* at 180.

4. a. On appeal, petitioner argued that the district court erred by refusing to instruct that "a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn." Pet. App. 3a; see Pet. C.A. Br. 12-30; Pet. C.A. Reply Br. 1-13. Petitioner further argued that the evidence was insufficient to convict him "if an intention to defraud a bank is required." Pet. C.A. Br. 34. But petitioner conceded that, "[i]f [the district court's intent instruction was correct], then there was sufficient evidence to convict." *Ibid.*; see Pet. App. 3a.

b. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court rejected petitioner's argument that "§ 1344(2) require[d] proof that he intended to defraud the banks on which the checks had been drawn." *Id.* at 3a-7a. The court explained that Section 1344(1) and Section 1344(2) define overlapping but "separate offenses." *Id.* at 4a (citation omitted). The court stated that, under its precedent, a conviction under Section 1344(1)—which prohibits schemes "to defraud a financial institution," 18 U.S.C. 1344—requires proof that the defendant "intended to defraud a bank." Pet. App. 4a-5a. But "[u]nlike clause (1)," the court reasoned, "clause (2) does not explicitly

state who must be the object of the scheme" and Section 1344(2)'s text does not require that the fraud be "intentionally directed at a bank." *Id.* at 5a.

The court of appeals accordingly held that Section 1344(2) requires "an intent to defraud *someone*" and that "an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else." Pet. App. 5a-6a. The court noted that its "interpretation of § 1344(2) may cast a wide net for bank fraud liability" but concluded that its interpretation was dictated by the statutory text and its precedent. *Id.* at 7a.

SUMMARY OF ARGUMENT

The court of appeals correctly affirmed petitioner's convictions.

1. Section 1344's text, structure, and drafting history demonstrate that Congress adopted broad text for Section 1344(2) prohibiting schemes in which (a) the defendant *intends* to "obtain" bank property and (b) false or fraudulent "means" are employed, regardless whether the defendant *intends* to defraud the bank itself.

a. Congress enacted Section 1344 with two distinct clauses carrying different meanings. Clause (1) prohibits schemes "to defraud a financial institution." 18 U.S.C. 1344(1). It therefore requires an intent to "defraud" a bank.

Clause (2) has significantly different language and structure. It applies to "any" property "owned by, or under the custody or control of," a bank, thus protecting a range of property interests common in banking contexts. Clause (2) requires intent to "obtain" any such property, just as Clause (1) requires intent to "defraud" the bank. Yet Congress separately speci-

fied that a scheme under Clause (2) is one involving false or fraudulent "means," thus making clear that falsehood or fraud is merely a method of *pursuing* the intended *goal* of obtaining bank property.

Reading Section 1344(2) to incorporate the intent expressly specified in Clause (1) would erroneously ignore Congress's use of different language in the two provisions. And restricting Section 1344(2) just to defendants who *intend* "to defraud a financial institution" would be anomalous because Clause (2) also covers bank-owned property under the custody or control of non-banking entities.

b. Petitioner contends that Clause (2) merely covers what is already encompassed within Clause (1), thus effectively reading "or" as "including." No sense of "or" carries that meaning. Section 1344's structure also shows that its two clauses are independent: They bear numbering of equal, not subordinate, rank; are separated by line breaks; and display equal indentation. The statute's origins likewise demonstrate that Congress modeled the provision on the mail- and wire-fraud statutes to incorporate existing judicial interpretations, which, at the time, uniformly held that their use of the disjunctive "or" gave independent meaning to the clauses separated thereby.

Petitioner argues that this Court's 1987 interpretation of the mail-fraud statute in *McNally* v. *United States*, 483 U.S. 350 (1987), read the statute's second clause as an illustration of the first. Section 1344 was enacted in 1984 and Congress's intent cannot properly be judged by subsequent events. *McNally*, moreover, had powerful reasons to conclude Congress intended the non-textual use of "or" in the mail-fraud statute. For Section 1344, all indications point the other way.

c. Petitioner argues that Section 1344's purpose supports an intent-to-defraud-the-bank requirement. But Congress enacted Section 1344 in the wake of *United States* v. *Maze*, 414 U.S. 395 (1974), to restore authority to prosecute frauds involving banks. *Maze* overturned a mail-fraud conviction in which the Court acknowledged the bank was victimized by the fraudulent use of a bank card to acquire goods and services from victimized merchants, regardless which victim ultimately bore the financial loss. Congress responded with a broadly worded bank-fraud statute to cover at least similar schemes, including petitioner's, where banks are the indirect victims of deceit directly targeted at others.

Principles of lenity and federalism concerns do not aid petitioner. Lenity is only a tie-breaking concept for grievously ambiguous statutes, and petitioner offers no plausible reading for an intent-to-defraud-a-bank requirement. Federalism concerns likewise would not warrant imposing petitioner's bank-focused intent requirement.

d. The text of Section 1344(2) could be read broadly to apply to contexts in which a defendant intends to defraud a third party and obtains money from a bank as part of the scheme, even if his false or fraudulent efforts have no potential to reach the bank or affect its disposition of its property. Congress might have concluded that it was appropriate to broadly address such financial crimes through federal law. But an alternative reading of Section 1344(2) to cover only schemes that in some way target a bank still would not establish a requirement of *intent* to defraud a bank. The statute might appropriately be read to reach schemes in which false or fraudulent statements would foresee-

ably or inherently be directed at the bank and have the potential to influence its actions. That understanding of the "means" for executing the scheme would accord with the statute's expressed purpose and avoid federalizing frauds only tangentially related to the banking system without limiting its reach (as petitioner suggests) to frauds that are directly *intended* to victimize a bank. Petitioner, however, would not benefit from such a reading, because the jury instructions were adequate under that interpretation.

e. Petitioner waived his sufficiency-of-the-evidence contentions, which lie outside the question presented. In any event, the evidence was sufficient to convict petitioner on the jury instructions here.

2. Petitioner argues that Section 1344(2) should reach only schemes actually posing a risk of loss to a bank. That is a different question than the question presented, which concerns *intent* to expose a bank to risk of loss. Petitioner does not appear to make that intent-based argument. Nor is actual risk of loss a tenable reading. The gravamen of bank fraud is the scheme itself, not a completed fraud that might pose a risk of loss.

Petitioner's risk-of-loss requirement has no basis in the statutory text. In fact, Congress rejected text that would have targeted schemes to inflict such "economic loss." Nor does a risk-of-loss requirement make sense: It would hinge criminal liability on abstruse provisions of the Uniform Commercial Code unsuited for the task, draw nonsensical distinctions between equally culpable conduct, and lead to arbitrary results.

ARGUMENT

SECTION 1344(2) DOES NOT REQUIRE PROOF OF INTENT TO DEFRAUD A BANK OR PROOF THAT THE FRAUDULENT SCHEME POSED A RISK OF FINANCIAL OR PROPERTY LOSS TO THE BANK

Congress has made it unlawful knowingly to execute or attempt to execute a scheme or artifice either "(1) to defraud a financial institution," or "(2) to obtain any of the * * * 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. Petitioner's scheme satisfied the second clause of Section 1344. Petitioner used checks that, with his fraudulent modifications, ordered each drawee bank to pay specified sums and, because petitioner fraudulently tendered those checks to Target as valid checks, the jury could reasonably find that a reasonably foreseeable or inherent part of his scheme was that each check would be presented to banks for payment as he ordered. Indeed, the jury concluded beyond a reasonable doubt that petitioner's scheme sought "to obtain money or property from [each] bank"; each bank was a "financial institution"; petitioner's scheme involved a plan "intended to deceive others in order to obtain something of value * * * from the institution to be deceived" in his scheme; and his fraudulent representations "naturally tend[ed] to influence, or were capable of influencing[,] the decision of [each] bank." J.A. 7-8.

Petitioner contends that the court of appeals erred in affirming his conviction because Section 1344(2) requires "intent to defraud a bank," Pet. Br. 13-36, and proof of a "risk of financial or other property loss to a bank," *id.* at 36-40. Neither contention can be

squared with Section 1344's text, structure, or drafting history. Section 1344 contains an explicit "intent to defraud a bank" requirement in Clause (1) but no such requirement can be imported into Clause (2). And a "risk of loss" requirement is nowhere in the statute's text and is inconsistent with its history.

Imposing such requirements would be at odds with the statute's purpose. Congress altered prior law in order to protect banks against the use of false or fraudulent statements to obtain bank-held funds. In Clause (2), it avoided any requirement that juries determine whether a particular defendant *intended* that his false or fraudulent statements would victimize a bank. And nothing in the statute requires proof that, under local commercial law, the bank would face possible financial loss.

The statute's broad language makes it possible to read it as prohibiting false statements that are designed to obtain bank funds from a bank customer, even when no false information is conveyed to the bank capable of influencing its action as a foreseeable or inherent component of the scheme. Alternatively, it may be appropriate to limit the statute's reach to cases in which the scheme foreseeably or inherently directs false statements to the bank that may influence its disposition of funds. But that interpretation would not assist petitioner: *His* scheme involved fraudulent checks that would naturally be submitted to a bank for payment, and the jury instructions permitted conviction on that basis. Under either reading, the district court correctly declined to give petitioner's intent-to-defraud-a-bank and risk-of-loss instructions, which might exonerate even persons who use false or fraudulent financial instruments that will be

used in the ordinary course to obtain money from banks.

A. Section 1344(2) Does Not Require Proof That The Defendant Intended To Defraud A Bank

1. The statutory text and structure show that Section 1344(2) requires proof of intent to obtain bank property but not intent to defraud the bank itself

Section 1344 makes it unlawful to execute a fraudulent scheme that falls into at least one of two overlapping but independent categories: Clause (1) of Section 1344 describes schemes "to defraud a financial institution," 18 U.S.C. 1344(1), whereas Clause (2) describes schemes to obtain property either owned by the bank or property owned by others in the bank's custody or control, by means of false or fraudulent pretenses. The text of those provisions is materially different, describing different types of schemes with different intent requirements. Section 1344(2), unlike Section 1344(1), does not require proof that the defendant "intended to defraud a bank."[4]

Section 1344 defines a bank-fraud offense as "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—

(1) to defraud a financial institution; or

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[4] The relevant question in this case, as petitioner notes (Br. 14 n.5), is whether there are two distinct means of proving bank fraud under 18 U.S.C. 1344, not whether the statute contains two offenses for purposes of the Double Jeopardy Clause or multiplicity analysis. In the latter context, courts widely agree that the unit of prosecution for bank-fraud offenses is each execution or attempted execution of the fraudulent scheme. See *United States* v. *Hickman*, 331 F.3d 429, 446 (5th Cir. 2003) (collecting cases).

> (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. Congress modeled Section 1344 "on the mail and wire fraud statutes" in Sections 1341 and 1343. *Neder* v. *United States*, 527 U.S. 1, 20-21 (1999). The provisions thus share certain traits. The introductory text of all three demonstrates that the "gravamen of [each] offense is the scheme" itself, *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008), "rather than [a] completed fraud," *Neder*, 527 U.S. at 24-25. Concepts such as "reliance and damage" that are integral to a common-law action for fraud thus "have no place" in a Section 1344 prosecution. *Ibid.*

After Section 1344's introductory language, however, Congress made several material modifications to text drawn from the mail- and wire-fraud statutes in order to tailor the language to the banking context. Those changes are reflected in Section 1344's two categories of proscribed schemes that Congress described in two numbered clauses.

a. The first clause of Section 1344, which describes a scheme "to defraud a financial institution," requires that the defendant *intend* "to defraud a [bank]" because it textually specifies that goal as the purpose of the scheme. In the mail-fraud context, this Court has concluded that "the words 'to defraud'" incorporate their familiar common-law sense and thus "refer 'to wronging one in his property rights by dishonest methods or schemes.'" *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (citation omitted). That conclusion applies directly to Section 1344(1).

Petitioner asserts (Br. 23) that it is widely acknowledged that Section 1344(1) requires not just deceit generally but "inten[t] to deceive a bank" in order to obtain its property. Schemes to deceive banks directly are common in this context and, in cases in which the defendant's intent to deceive a bank had already been established, some courts of appeals have stated that Section 1344(1) requires such intent. See *United States* v. *Brandon*, 298 F.3d 307, 311 (4th Cir. 2002); *United States* v. *Kenrick*, 221 F.3d 19, 29 (1st Cir.) (en banc), cert. denied, 531 U.S. 961, and 531 U.S. 1042 (2000) (addressing Section 1344(2)); *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir.), cert. denied, 504 U.S. 926 (1992). For present purposes, the government assumes *arguendo* that a scheme to "defraud a financial institution" under Section 1344(1) requires proof of intent to obtain bank property *and* proof of intent to deceive the same bank. That assumption makes no difference here, where petitioner's conviction rests on Section 1344(2).[5]

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[5] While fraudulent schemes frequently involve attempts to deceive the owner of the targeted property, the deceit need not necessarily involve deceiving the owner. In the context of the mail- and wire-fraud statutes, the courts of appeals, including the same court that decided *Kenrick*, have nearly unanimously held that a scheme to deprive a person of property by deceiving someone else can qualify as mail or wire fraud. See *United States* v. *Seidling*, 737 F.3d 1155, 1161 & n.2 (7th Cir. 2013) (citing cases); see also, *e.g.*, *United States* v. *McMillan*, 600 F.3d 434, 449 (5th Cir.), cert. denied, 131 S. Ct. 504 (2010); *United States* v. *Christopher*, 142 F.3d 46, 54 (1st Cir.), cert. denied, 525 U.S. 1054 (1998); *United States* v. *Blumeyer*, 114 F.3d 758, 767-768 (8th Cir.), cert. denied, 522 U.S. 938 and 522 U.S. 1008 (1997). But see *United States* v. *Lew*, 875 F.2d 219, 221 (9th Cir. 1989) (stating that defendant must intend to "obtain money or property from the one who is deceived").

b. Section 1344(2) is structurally separated from 1344(1) and employs significantly different language. In contrast to Clause (1)'s prohibition of schemes to defraud a bank, Clause (2) specifically addresses schemes that have the goal of obtaining property owned by, or in the custody of, a bank by means of misrepresentation. In that context, Congress required proof of the defendant's intent to obtain the property specified but did not require proof that the defendant intend to defraud a bank.

Whereas Section 1344(1) expressly focuses on schemes "to defraud a financial institution," Section 1344(2)'s text focuses on schemes that target a range of property interests common in banking contexts. For example, the relationship between a bank and a customer with a deposit account is ordinarily one of debtor to creditor. 5A *Michie on Banks and Banking* § 1, at 1-2 (2003). That relationship is subject to state law and contract principles but, as a general matter, when a bank customer deposits funds into a general account, "title to the money is immediately vested in, and becomes the property of, the bank," *id.* § 38, at 7 (Supp. 2013), which then becomes indebted to the customer in the amount of the deposit and repays that debt by, for instance, "honoring checks drawn against the deposits," *id.* § 1, at 8-18 (2003). In other contexts involving "special deposit[s]," however, the customer will retain title while the bank takes custody of the deposit, serving as the customer's principal or bailee. 5B *id.* § 337, at 465-470 (1991); see *Marine Bank* v. *Fulton Bank*, 69 U.S. (2 Wall.) 252, 256 (1865) (discussing deposits). As a result, a bank normally will hold title to deposits and occasionally (in special contexts) will have possession of deposits owned by the

depositors. A bank, of course, may also own property from non-deposit sources. And like any legal entity that may own property, a bank may choose to place that property into the custody or control of others for investment or other purposes.

Section 1344(2) specifically addresses those forms of bank-related property by making it unnecessary to determine precisely which property interest is at stake. Consistent with Congress's desire to prohibit "a wide range of fraudulent activity" involving banks, *Senate Report* 378, Section 1344's second clause applies to "any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution." 18 U.S.C. 1344(2). The "word 'any' has an expansive meaning" that extends the provision to "'whatever kind'" of property specified. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The "property" targeted by a fraudulent scheme, for instance, need not be "owned by" a bank. Because Section 1344(2) provides that the property can be "owned by, *or* under the custody or control of" a bank, it covers property owned by a non-bank entity (like a customer with a special deposit account) so long as it is within the bank's "custody or control." Likewise, because Section 1344(2) covers all property "owned by" a bank, it protects bank-owned property that a bank has entrusted to the custody or control of others.

Section 1344(2) then prohibits schemes "to obtain" the property. "Obtain" read naturally means to "gain or attain [either] possession or disposal of" something. *Webster's Third New International Dictionary* 1559 (1976) (*Webster's*). Section 1344(2) thus applies when an individual either (a) schemes to gain possession of

the property himself or (b) schemes to attain "disposal" of the property by gaining "the power or authority to dispose of" it, *i.e.*, "to transfer [it] into new hands or to the control of someone else." *Id.* at 654 (defining "disposal" and "dispose of"); see *United States* v. *Green*, 350 U.S. 415, 417, 420 (1956) (holding that a person "obtains" property by extortion in violation of 18 U.S.C. 1951(b)(2) by securing a payment that is made to another; explaining that the extortionist need not acquire any "direct benefit" to "obtain[] the property"). Schemes to obtain property by orchestrating its direct transfer to another are thus covered by Section 1344(2). Any other rule would leave a significant hole in the statute and facilitate circumvention.

Finally, Section 1344(2) requires that the scheme's method to obtain bank property must be "false or fraudulent." The phrase "by means of" in Section 1344(2) specifies that the property must be obtained "by the use of" a false or fraudulent method through which the "desired end is attained or made more likely." *Webster's* 1398-1399 (defining "by means of" and "mean"). In other words, Section 1344(2) prohibits a scheme if the scheme's "desired end"—obtaining bank-owned or bank-controlled property—is to be achieved with "false or fraudulent pretenses, representations, or promises." Those "'false or fraudulent pretenses, representations, or promises,'" in turn, must involve "material[] * * * falsehood[s]" to fall within the statute. *Neder*, 527 U.S. at 21, 25 (quoting 18 U.S.C. 1344(2)).

c. By specifying that the "scheme" must be "to obtain" property owned by, or under the custody or control of, a bank, Section 1344(2) requires proof of *intent* to acquire that property. The word "to" in this

context is "used as a function word to indicate purpose" or "intention." *Webster*'s 2401 (definition 2a). Congress thus defined the type of scheme encompassed by Clause (2) as one "for the purpose of" (*ibid.*) attaining or disposing of bank property.

Unlike Section 1344(1), nothing in the text of Section 1344(2) suggests that a defendant must also *intend* "to defraud a financial institution." Section 1344(2) provides that the scheme must use "false or fraudulent pretenses, representations, or promises" as the "means" of *pursuing* its goal of obtaining bank-related property. Section 1344(2) thus recognizes that deception can be used to obtain bank-held funds even if the scheme is not immediately aimed at the bank, and even if the object of the scheme is funds over which it has custody rather than ownership. That broader coverage makes it unimportant to determine whether a schemer who passes fraudulent checks to a merchant also specifically intends to defraud a bank; it is enough that an inherent part of his scheme involves obtaining the bank's property through deception (*i.e.*, the fraudulent check).

Restricting Section 1344(2) to defendants who *intend* "to defraud a financial institution" would be particularly anomalous given the broad categories of property expressly protected under Section 1344(2). A scheme to obtain bank-owned property that the bank has entrusted to the custody or control of others, for instance, could presumably be committed by deceiving the property's custodians, not the bank. Yet under petitioner's reading, such schemes to obtain property owned by the bank can never fall within Section 1344(2), notwithstanding its broad text, be-

cause (petitioner contends) all schemes under Section 1344(2) must be intended to directly deceive the bank.

Limiting Section 1344(2) to schemes directly aimed "to defraud a financial institution" would also disregard Congress's careful drafting of the provision. And it would do so in a particularly pernicious way because Congress, after adopting that very language specifying that intent requirement in Clause (1), adopted entirely different language for Clause (2). Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). No sound basis exists for overriding that presumption. Indeed, petitioner's view (Br. 15) that Section 1344(2) "simply clarif[ies] and codif[ies] what is already encompassed within the first clause" runs afoul of yet another "cardinal principle of statutory construction," namely, that courts "must 'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

The text of Section 1344(2) could be broadly read to apply to circumstances in which a defendant "intend[s] to defraud [a third party]" and "obtain[s] money from a bank" as part of the scheme, Pet. App. 5a-6a, even if the false or fraudulent pretenses, representations, or promises he uses have no potential to be conveyed to the bank or affect its disposition of the money. Although such frauds may be tangential to the banking system, Congress might have concluded that it was appropriate to broadly address such financial crimes through federal law or that capturing such

conduct would avoid disputes (like that in this case) about whether fraudulent conduct that can affect bank property was sufficiently directed at the bank to trigger the statute's protection. But regardless whether other aspects of Section 1344(2) might be read to constrain the statutes' reach (see pp. 40-44, *infra*), nothing in the statute's text or structure warrants requiring proof of intent to defraud a bank.

2. Section 1344 uses the word "or" in its normal disjunctive sense

Petitioner recognizes (Br. 15) that it is "natural" to interpret the two numbered clauses in Section 1344, which are separated by the disjunctive term "or," as separate provisions that should each be given independent meaning according to their own terms. But petitioner contends (Br. 8) that, "despite appearances," the second clause in Section 1344 merely specifies what "is already encompassed by the first." Br. 15-23. Nothing in the text supports petitioner's position.

a. The conjunction "or" is "almost always" used to express the "disjunctive," such that "the words it connects are to 'be given separate meanings.'" *United States* v. *Woods*, 134 S. Ct. 557, 567 (2013) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Congress plainly intended to express that meaning in Section 1344, because no other meaning of "or" will fit the text.

"Or" can in some limited contexts be used to "introduce an appositive—a word or phrase that is synonymous with what precedes it" (*e.g.*, "Batman or the Caped Crusader"), *Woods*, 134 S. Ct. at 567—and "or" may similarly be used when the phrase that immediately follows it provides a "correction or greater exactness of phrasing or meaning" that then limits the

preceding language (*e.g.*, the "king had no children—[or] no legitimate children"). *Webster's* 1585 (definitions 1(3) and (4)). But petitioner does not contend that the detailed text in Section 1344(2) is synonymous with "to defraud a financial institution"; nor does he argue that Section 1344(2) narrows Section 1344(1). He instead asserts that Section 1344(2) describes "what is already *encompassed* within the first clause" of Section 1344. Br. 15 (emphasis added). Petitioner thus contends Congress intended "or" to mean "including," but that view is textually untenable. No sense of the word "or" means "including."

The structure that Congress adopted for Section 1344 reinforces that linguistic conclusion. Congress numbered the provision's two clauses "(1)" and "(2)"; inserted a line break before, between, and after them; and gave each clause the same indentation, thus placing them visually on equal footing. Legislatures that intend a statutory clause to be a subset of an immediately preceding provision designated as "(1)" will enact a subordinate identifier for the clause—*e.g.*, "(a)"—not an identifier of equal rank like "(2)." Moreover, Congress's use of line breaks and indentation would not make sense if the text in Section 1344(2) were merely an illustration of the language in Section 1344(1). It is difficult to imagine legislative drafting that more clearly expresses Congress's intent that Clauses (1) and (2) be interpreted independently.

Section 1344's origins point to the same conclusion. When Congress drafted the text that became Section 1344, it expressly "modeled [the provision] on the [then-]present wire and mail fraud statutes which ha[d] been construed by the courts to reach a wide range of fraudulent activity." *Senate Report* 378. At

that time, "each of the Courts of Appeals that ha[d] addressed" the issue had concluded that the mail-fraud statute's first two clauses joined by "or" must be read "in the disjunctive" and "construed independently." *McNally*, 483 U.S. at 358; see *id*. at 365 & n.5 (Stevens, J., dissenting); *Skilling* v. *United States*, 130 S. Ct. 2896, 2926 (2010). Because "Congress modeled [Section 1344] after [the mail- and wire-fraud statutes]" and "passed [Section 1344] with the explicit understanding that it would be interpreted as [those earlier provisions]," Congress is presumed to have been aware "[a]t the time of [Section 1344's] enactment" of the then-existing uniform appellate precedent interpreting those predecessors and "intended [Section 1344] to be interpreted similarly." *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 258-259 (2009) (construing statute to follow then-extant court of appeals precedents); see *Franklin* v. *Gwinnett Cnty. Pub. Schs*., 503 U.S. 60, 71 (1992) ("[W]e evaluate the state of the law when the Legislature passed [the statute]" to "determin[e] Congress' intent."); *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

The drafting history of Section 1344 also reflects that Congress rejected narrower language. After the Senate passed the Comprehensive Crime Control Act bill (S. 1762, 98th Cong.) containing the text ultimately enacted as Section 1344, see 130 Cong. Rec. 1587, 1636-1637 (1984); *Senate Report* 377-379, 772, a House subcommittee hearing addressed the relevant portions of S. 1762 and a competing House measure (H.R. 5405). *Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (*House Hearing*). The House bill was narrower than its Sen-

ate counterpart, defining a Section 1344 offense as knowingly "devis[ing] a plan to obtain the property of a national credit institution, or to cause economic loss to such an institution by fraudulent means." *Id.* at 19. The Justice Department "strongly urge[d]" the subcommittee "to follow the format in * * * S. 1762" because, the Department explained, Section 1344 should be given "broader coverage" and the Senate text was "modeled on the present mail and wire fraud statutes deliberately to incorporate [the] existing case law," which did not limit the offenses to schemes "to obtain money or inflict an economic loss." *Id.* at 4, 12. The House bill was later reported as a clean bill (H.R. 5872) with revisions to "address[] some of the Justice Department's concerns" by adopting S. 1762's two-clause structure with language "intended to incorporate case law" giving "expansive interpretations" to the mail- and wire-fraud statutes. H.R. Rep. No. 901, 98th Cong., 2d Sess. 3-4 (1984). The House passed that bill. 130 Cong. Rec. at 21,493.

The House version of Section 1344, however, remained narrower than the Senate measure because it did not include text targeting schemes to obtain non-bank-owned property "under the custody or control" of a bank. See 130 Cong. Rec. at 21,492. Proponents of the Senate's broader approach thus inserted the Senate-passed text of S. 1762 (introduced as H.R. 5963) into pending legislation (H.R. J. Res. 648) that the House passed. *Id.* at 26,780-26,781, 26,834-26,838; see *id.* at 26,727-26,728. After the Senate concurred with amendments not relevant here, H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415-419 (1984), Section 1344 was enacted into law. Comprehensive Crime

Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147.

The drafting history thus further demonstrates that Congress was cognizant of the appellate decisions broadly construing the mail-fraud statute because of its disjunctive "or"[6] and enacted a broadly worded provision modeled on that statute "to reach a wide range of fraudulent activity." *Senate Report* 378.

b. Petitioner primarily rests (Br. 15-20) his argument on the view that Section 1344 should be construed like the mail-fraud statute (18 U.S.C. 1341), which contains text similar to Section 1344, including two similarly worded initial clauses separated by the word "or." Three years *after* Congress enacted Section 1344, this Court in *McNally* effectively treated the "or" in the mail-fraud statute as meaning "including" because the Court construed the second clause of the mail-fraud statute as merely codifying an 1872 decision that construed the first. Petitioner contends (Br. 17-19) that *McNally*'s 1987 result should be extended to Section 1344. That chronologically challenged theory is unsound. Congress should not be expected to predict future events. And although *McNally* adopted a non-textual application of "or" for the mail-fraud statute, which *Cleveland* v. *United States*, 531 U.S. 12, 26 (2000), later reaffirmed, the Court did so because it found powerful indications that the Congress that enacted the relevant mail-fraud text in-

[6] See, *e.g.*, *United States* v. *Frankel*, 721 F.2d 917, 920 (3d Cir. 1983) (citing decisions adopting this "disjunctive reading"); *United States* v. *Scott*, 701 F.2d 1340, 1343 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Castor*, 558 F.2d 379, 382-383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

tended that result. For Section 1344, all indications point the other way.

The Court in *McNally* held that the mail-fraud statute, 18 U.S.C. 1341, as it then existed, did not reach schemes to "defraud citizens of their intangible rights to honest [services]" and, instead, was "limited in scope to the protection of property rights." 483 U.S. at 355, 360. In reaching that conclusion, the Court noted that the phrases "to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" in Section 1341 arguably should be "construed independently" because they are separated by "or." *Id.* at 358. But the Court concluded that the statute's drafting history showed that the 1909 addition of the second phrase was intended merely to codify the holding in *Durland* v. *United States*, 161 U.S. 306 (1896), which itself construed the statute's text prohibiting "any scheme or artifice to defraud." 483 U.S. at 356-358.

The 1909 version of the mail-fraud statute that added the mail-fraud statute's second clause was enacted in the Criminal Code of 1909, which comprehensively "codif[ied], revise[d], and amend[ed]" federal criminal laws in a single Act, repealing the then-existing mail-fraud statute (Rev. Stat. § 5480) and other laws and reenacting their provisions within the new Code. Act of Mar. 4, 1909, ch. 321, §§ 1, 215, 341, 35 Stat. 1088, 1130, 1153. When Congress "revis[es] and consolidat[es] the laws" in such codification statutes, textual changes to revised provisions are generally presumed not "to change their policy, unless such intention be clearly expressed." *Fulman* v. *United States*, 434 U.S. 528, 538 (1978) (quoting *United States*

v. *Ryder*, 110 U.S. 729, 740 (1884)); see *United States* v. *Williams*, 341 U.S. 70, 79 (1951) (plurality opinion) (1909 Criminal Code's changes to a provision did not make "any change in substance"). The statutory context thus reversed the normal presumption that new text should be given a distinctive meaning and strongly indicated that the mail-fraud statute's second clause was merely a recodification describing the earlier prohibition without change.

The Court in *McNally* had more than the codification statute; it identified evidence confirming that Congress intended no substantive change. The new language added by the 1909 codification was suggested by a congressional report citing *Durland* as the source of the recodified text. *McNally*, 483 U.S. at 357 n.7. Moreover, the new statutory text was drawn directly from language in *Durland*. *Id*. at 358. Those factors provided powerful reasons to conclude that the 1909 recodification of the mail-fraud statute—notwithstanding its use of "or"—added statutory text that simply reflected *Durland*'s interpretation of the preexisting prohibition on "schemes or artifices 'to defraud'" and, thus, should not be "construed independently." See *id*. at 358-359.

The Court later reaffirmed *McNally*'s "reading of § 1341" in *Cleveland* for another "compelling" reason: statutory *stare decisis*. *Cleveland*, 531 U.S. at 26 (citing *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991)).

None of those reasons justifies a non-textual reading of "or" in Section 1344. Section 1344 was not enacted as part of a recodification and no legislative history indicates that the provision's second clause—which includes significant new text that did not origi-

nate in a judicial opinion—was intended to reflect an interpretation of the first. In fact, all indications point the other way. Congress enacted Section 1344 when the mail-fraud statute's "or" was uniformly understood to compel a disjunctive reading; drafted the provision to rely on existing appellate precedent; adopted new language to tailor Section 1344 for the banking context; and ultimately structured Section 1344 with numbered clauses, line breaks, and indentation quite distinct from the block text still used by the mail- and wire-fraud statutes, all of which demonstrate Congress's intent that Section 1344's clauses be construed independently. In short, no basis exists for departing from the disjunctive meaning of "or" compelled by Section 1344's text.

3. Petitioner fails to provide any textual justification for his intent-to-defraud-a-bank requirement

Petitioner argues (Br. 23-25) that, even if Section 1344's two clauses are given independent meanings, the Court should still read Clause (1)'s requirement of an intent to defraud a bank into Clause (2) because, in his view, that requirement "easily map[s] onto the [latter's] plain language" and accords with Clause (1)'s "traditional" conception of bank fraud. Br. 23. Petitioner is incorrect.

Section 1344(1)'s intent requirement does not "easily map" (Br. 23) onto Section 1344(2). Petitioner fails to account for key textual differences between the two subsections. Most prominently, Section 1344(2)'s text distinguishes between the schemer's intent (to obtain bank property) and his false or fraudulent means to achieve that goal; extends to property for which the bank has no ownership interest; and covers bank-owned property held by non-bank custodians

for which an intent-to-deceive-the-bank requirement makes little sense. See pp. 21-24, *supra*.

Petitioner contends (Br. 24) that Section 1344's title—"Bank fraud"—"strongly impl[ies]" an intent-to-defraud-a-bank requirement. But "[t]he title of a statute . . . cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corr.* v. *Yeskey*, 52 4 U.S. 206, 212 (1998) (citation omitted), and the label "bank fraud" no more implies an intent to defraud a bank than the label "mail fraud" implies an intent to defraud the mail. Both modern, short-hand labels merely reflect that the offenses concern banks and the mail.

Petitioner suggests (Br. 24-25) that Congress would have drafted Section 1344 differently if it had intended to cover frauds where a bank is a mere instrumentality of the offense (in the sense that bank funds available to a customer are targeted, but the customer, not the bank, is the object of the fraud). But Congress drafted Section 1344(2) to cover a wide range of situations to protect bank-held property as well as bank-owned property against deceptive schemes, whether or not aimed directly at the bank. A narrow focus on defrauding the bank would not have achieved that purpose, if, as petitioner argues here, his fraudulent-check scheme would fall outside Section 1344(2) because he aimed to defraud only the merchants to whom he negotiated the forged and altered checks and not the banks that would later receive, process, and potentially pay those forged and altered checks. And, as discussed, petitioner has offered no plausible textual reading to support his intent-to-deceive-the-bank requirement.

4. Neither Section 1344's purpose nor principles of lenity and federalism warrant importing an intent-to-defraud-a-bank requirement into Section 1344(2)

Petitioner further contends (Br. 25-36) that Section 1344(2) should be construed to require intent to defraud a bank because that reading best accords with congressional purpose and is compelled by the rule of lenity and federalism principles. None of those arguments supports his effort to collapse Section 1344's two distinct subsections into one single scheme-to-defraud-a-bank prohibition.

a. Petitioner contends (Br. 25-27) that Section 1344's legislative history reflects Congress's intent that Section 1344 protect banks from "frauds in which the victims are financial institutions" and that the government has a strong interest in "protecting the financial integrity" of banks. Br. 26 (quoting *Senate Report* 377). Such statements provide no reason to negate the distinct sweep of Section 1344(2).

"The best evidence of th[e] purpose [of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Consequently, "[t]he operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification." *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 326 (2008). Even when legislative history is consulted, "'[o]nly the most extraordinary showing of contrary intentions' in [that] history will justify a departure from [statutory] language." *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (citation omitted). Thus, in contexts where the relevant history does not expressly discuss the application of a provision in certain contexts, "the fact that a statute can be

'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212; see *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

Section 1344(2) cannot properly be treated as redundant of Section 1344(1) simply because Congress identified banks as "victims" of frauds and expressed an interest in banks' financial integrity. Congress enacted Section 1344 in response to this Court's mail-fraud decision in *United States* v. *Maze*, 414 U.S. 395, 396-397 (1974), in which the Court confronted a fraudulent scheme (similar to that in this case) in which Maze stole a credit card and used it by forging the cardholder's signature to make purchases at various merchants. See *Senate Report* 377-378; see also pp. 2-3, *supra*. The Court concluded in *Maze* that the merchants, the bank that issued the card, and the card-owner were "all * * * victims of [the fraudulent] scheme," regardless "which of [the] victims ultimately bore the loss," but concluded that the mailing element of the offense was not satisfied by post-purchase mailings directed toward "adjusting accounts between * * * th[ose] victims." *Id.* at 402. The Senate Report presumably had *Maze*'s understanding of banks as "victims" in mind when explaining that Section 1344 was intended to fill the gap left by *Maze*. And because Congress enacted Section 1344 to restore authority curtailed by *Maze*, if Congress had intended Section 1344 not to reach schemes similar to that in *Maze*, it presumably would have adopted textual limitations to curtail its scope rather than enacting broad

text intended to "reach a wide range of fraudulent activity." *Senate Report* 378.[7]

Nor does the federal interest in "protecting the financial integrity" of banks warrant petitioner's position. As an initial matter, Congress rejected text that would have limited Section 1344 to frauds that deprived banks of their own property or caused them "economic loss." See pp. 27-28, *supra*. And schemes involving the use of false or fraudulent instruments that will ordinarily be submitted to banks for payment to obtain bank-held funds can threaten the financial integrity of banks, even if not as directly as frauds that are squarely and intentionally aimed at banks. Indeed, in 2010, banks lost approximately $900 million from check fraud and $950 million from debit-card fraud directed at deposit accounts and spent an additional $10 billion for check-fraud-prevention strategies. American Bankers Ass'n, *2011 Deposit Account Fraud Survey Report* 7 (2011). Those bank losses were attributed to counterfeit checks (30%), forgeries (29%), alterations (6%), kiting (1%), deposited items

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[7] Until *Maze*, the mail-fraud statute had been the government's "most useful" tool for combating bank fraud, because "the collection procedures of victim banks ordinarily entailed use of the mails." *Senate Report* 377. After *Maze*, the government turned to the false-statement statute, 18 U.S.C. 1014, to combat a narrower category of conduct, including check kiting. *Senate Report* 378. This Court subsequently held that a check is not a "statement" under Section 1014 and that Section 1014 applies to offenses obtaining "property from banks by false pretenses" only if they involve "a taking and carrying away" of that property. See p. 3, *supra*. Thereafter, Congress enacted Section 1344 "modeled" on the mail- and wire-fraud statutes (not Section 1014) to restore the prior authority to prosecute a "wide range" of frauds involving banks. *Senate Report* 378.

later returned by other banks (33%), and other fraud. *Id.* at 20-21, 23-24. That year, the banking industry estimates that there were 626,000 instances of check fraud. *Id.* at 17. Congress's choice to enact a broadly worded provision to "assure a basis for Federal prosecution of those who victimize [federally insured or organized] banks through fraudulent schemes," *Senate Report* 377, should not be revised by inserting petitioner's intent-to-defraud-the-bank requirement.

b. Petitioner's reliance (Br. 27-29) on the rule of lenity and federalism principles likewise provides no sound basis for reading an intent-to-defraud-the-bank requirement into Section 1344(2).

The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted). "Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved." *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

No such equipoise exists here. While lenity is a tool that may apply when choosing between equally plausible textual interpretations, petitioner has never proffered a plausible textual reading for his position.

Petitioner's resort (Br. 29) to federalism principles provides him no shelter. Although this Court normally does not interpret statutes "to have significantly changed the federal-state balance" unless Congress clearly conveys its desire to effect such a change, *Cleveland*, 531 U.S. at 25 (citation and internal quotation marks omitted), that principle does not apply, where, as here, Congress has enacted a broad statute that is textually "unambiguous" on the disputed question. *Salinas*, 522 U.S. at 60. Petitioner's invocation of federalism, moreover, is somewhat perplexing because he concedes (Br. 10, 30) that cashing a fraudulent personal check at a bank will constitute bank fraud. It is not apparent why Congress would believe that an otherwise local check-fraud offense would warrant federal prosecution when done at a bank, but not when the offense involves presentation of a fraudulent bank check to a merchant in interstate commerce, which will present the check to its own bank. Cf. 18 U.S.C. 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.")

Petitioner (Br. 27-28) cites decisions from 1988 to 2002 to support his view that Section 1344(2) has "enormous breadth" without an intent-to-defraud-the-bank requirement. But those decisions illustrate that schemes in which the bank presence is truly attenuated may fall outside Section 1344's scope for other reasons. *E.g.*, *United States* v. *Blackmon*, 839 F.2d

900, 904 (2d Cir. 1988) (foreign currency obtained via "pigeon drop" scheme was not "under the custody or control" of the bank); see *United States* v. *Nkansah*, 699 F.3d 743, 755 n.1 (2d Cir. 2012) (Lynch, J., concurring) (discussing *Blackmon*). And if the Court were to construe Section 1344(2) to require that the fraudulent means of obtaining bank-held property must have a natural tendency to influence the bank (*e.g.*, by reaching the bank) as a foreseeable or inherent consequence of the scheme, see pp. 40-44, *infra* (discussing this construction), it would further alleviate concerns about the statute's breadth. No appropriate construction, however, would justify an intent-to-defraud-a-bank requirement drawn from text in Section 1344(1) that Congress did not enact in Section 1344(2).

To the extent that petitioner advocates an interpretation of Section 1344 that would not reach other schemes that *do* involve deception directed at a bank, his position undermines the very function that Congress enacted the provision to serve. Excluding schemes involving deception directed at a bank would incorrectly constrict Section 1344(2) and dishonor Congress's response to this Court's mail-fraud decision in *Maze* by enacting a statute "to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions." *Senate Report* 377.

5. A requirement that the means selected to execute the scheme must involve false or fraudulent representations that would foreseeably or inherently be directed to the bank would alleviate concerns about Section 1344(2)'s breadth without imposing an intent-to-defraud-the-bank requirement

Petitioner suggests (Br. 24) that the scheme under Section 1344(2) must in some way target a bank, rather than "someone who happens to have a bank account," but that suggestion does not establish that, as petitioner contends, Section 1344(2) requires *intent* to defraud a bank. Any such targeting requirement that could be read into Section 1344(2) would still reach schemes, like petitioner's, involving the fraudulent use of forged or altered checks that have the natural tendency of deceiving a bank with respect to funds it owns or has in its custody.

Petitioner is correct (Br. 24) that a scheme described in Section 1344(2) must be to obtain property owned by, or under the custody or control of, a bank. He is also correct (*ibid.*) that "the provision does not say expressly to whom the false representations must be directed." Congress's failure to specify to whom such deceit will be directed could be understood as a decision to prohibit any fraudulent schemes to obtain bank property, even if no false or fraudulent representations are conveyed to a bank. That, however, is not necessarily the only interpretation of the text, when read in context. The statute might appropriately be read to reach schemes in which false or fraudulent statements would foreseeably or inherently be directed to the bank and have the potential to influence its actions. Such a reading of the "means" required by Section 1344 would accord with the statute's

purpose, and avoid federalizing frauds that are only tangentially related to the banking system, without artificially limiting the statute's coverage (as petitioner would do) to frauds that are directly *intended* to victimize the bank.

When Congress enacted Section 1344, it was well aware that many fraudulent financial instruments flow through the banking system because they are submitted by customers who are themselves victimized and who submit the instruments in the normal course to banks for payment. That was the precise scenario in *Maze*, and one purpose of Section 1344 was to overcome the limitations in the mail-fraud statute that (after *Maze*) precluded prosecution in such instances. See pp. 2-3, 35-36 & n.7, *supra*. Congress thus modeled Section 1344 on the mail-fraud (and wire-fraud) statutes after having concluded that the mail-fraud statute had been the "most useful" tool for combating bank fraud before *Maze*, "because the collection procedures of victim banks" had enabled prosecution. See *Senate Report* 377-378.

A possible interpretation of Section 1344's gap-filling function, therefore, would permit prosecution when 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. That understanding of the "means" required by Section 1344(2) to obtain bank property would exclude fraudulent schemes against bank customers that did not naturally entail the customers' passing the false or fraudulent representations to the bank in a fashion that would influence the bank's actions. It also would be consonant with Congress's intent to "provide an effective vehicle for the

prosecution of frauds in which the victims are financial institutions." *Senate Report* 377.

But such an interpretation, if adopted, would not justify limiting Section 1344(2) to schemes *directly* targeting a bank with false or fraudulent statements. Such a restriction would unduly undermine Congress's restoration of authority lost after *Maze*. Accordingly, to the extent that the "by means of" requirement in 18 U.S.C. 1344(2) were read to require some connection between the false or fraudulent representations and the obtaining of funds beyond mere causation, it would not entail only fraud that involved direct dealings with the bank. It would also cover cases, such as *Maze* and this case, in which forged or falsified instruments would naturally be submitted to a bank for payment after having been submitted to someone else. See *Nkansah*, 699 F.3d at 754 (Lynch, J., concurring).

Here, an inherent part of petitioner's scheme was the use of forged or altered instruments that, if undetected (as petitioner no doubt hoped), would be submitted to banks for payment. See *Brandon*, 298 F.3d at 313 (concluding that "[a]n inherent part of [a similar check] scheme" was that checks would be injected "into the stream of commerce" and "presented to the drawee banks"); *United States* v. *Morganfield*, 501 F.3d 453, 466 (5th Cir. 2007) (concluding that "an inherent consequence of the [defendant's] scheme" was that "bad checks would be presented to the bank by the merchants who accepted the[m]"), cert. denied, 553 U.S. 1067 (2008); *United States* v. *Crisci*, 273 F.3d 235, 240 (2d Cir. 2001) ("inherent in [the defendant's] transactions with [check-cashing business] was the risk that the forged checks would be presented to a

bank for payment"). That the initial target of the fraud was a merchant did not prevent the scheme from targeting other financial actors in the banking system as a natural aspect of the scheme. And the longer the downstream holders of the altered checks remained deceived, the greater the possibility of petitioner continuing and repeating his scheme.

b. Petitioner argues (Br. 34-35) that Congress could not have intended Section 1344(2) to reach schemes involving forged or altered checks tendered to merchants, which would then be submitted to banks, because when Congress enacted Section 1344, it also enacted a statute prohibiting the use of altered securities (including checks) of a State or an "organization" with "intent to deceive" another person. 18 U.S.C. 513(a), (c)(2), (3)(A) and (4). Assuming that Section 513 applies to forged checks of individuals drawn on banking organizations, each statute nevertheless serves a distinct purpose. Section 513 protects "the integrity of writings" by prohibiting the deceptive use of counterfeit and forged securities; it does not serve as a general fraud statute. See S. Rep. No. 307, 97th Cong., 1st Sess. 773 & n.40 (1981); cf. *United States* v. *Hunt*, 456 F.3d 1255, 1268 (10th Cir. 2006) (explaining that the "1981 Senate report" provides "the authoritative legislative history of § 513").[8] By contrast, the "gravamen of the offense" in Section 1344 is not the particular acts contemplated by the

[8] Departing from other counterfeiting and forgery statutes enacted at the same time, Section 513 requires "intent to deceive" rather than "intent to defraud." S. Rep. No. 307, at 773 ("[I]t is not necessary that the intent be to deprive another person or a government of property or some other tangible right."); see *United States* v. *Blood*, 435 F.3d 612, 619-620 (6th Cir. 2006).

scheme but "the scheme" itself, see *Bridge*, 553 U.S. at 647—a scheme that must seek to defraud a bank or to obtain property either owned by a bank or under its custody or control. "It is not unusual for a particular act to violate more than one criminal statute, and in such situations the Government may proceed under any statute that applies." *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (internal citations omitted); see *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).

c. The jury instructions in this case are adequate to sustain petitioner's conviction under this theory. The jury was instructed that a bank-fraud conviction would require "a design, plan, pattern or course of action * * * to obtain something of value, such as money, from the *institution to be deceived*" and that the scheme's "false or fraudulent pretenses, representations, or promises" must "naturally tend to influence, or were capable of influencing[,] the *decision of the particular bank.*" J.A. 7-8 (emphasis added); cf. Tr. 249. Those instructions fairly conveyed that the methods used in petitioner's scheme had to have the natural tendency of "deceiv[ing]" the financial institution with false or fraudulent statements in a way that influences the bank's actions in connection with its property.

6. Petitioner waived his evidentiary sufficiency argument, which lies outside the question presented and is without merit

Because Section 1344(2) does not require intent to defraud a financial institution, the court of appeals correctly affirmed the district court's rejection of petitioner's requested jury instruction. See Pet. App.

5a-6a. Petitioner nevertheless appears to argue (Br. 30-32) that the evidence was insufficient for a reason having nothing to do with that instruction. Petitioner affirmatively waived that evidentiary contention, which lies outside the question presented and, in any event, is incorrect.

a. Petitioner suggests that the evidence was insufficient to prove that his fraudulent scheme was aimed at obtaining "property owned by, or under the custody or control of," a bank, 18 U.S.C. 1344(2), because, he contends, his scheme was completed once he obtained cash from Target, regardless whether banks later honored his checks. Br. 30-32 (citing *Kann* v. *United States*, 323 U.S. 88 (1944)). Although petitioner made this argument to the jury (Tr. 233-235) and district court (p. 10, *supra*), he waived it on appeal by conceding that, "[i]f the [district court's] intent[] to defraud" instruction was correct, "then there was sufficient evidence to convict." Pet. C.A. Br. 34. In light of that express waiver, petitioner's evidentiary challenge to the scope of the scheme is foreclosed. *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993) ("Deviation from a legal rule is [not] 'error'" if "the rule has been waived.").

Petitioner argued on appeal that the evidence was insufficient "*if* an intention to defraud a bank is required." Pet. C.A. Br. 34 (emphasis added). The court of appeals thus did not pass on that contention because it rejected its premise. See Pet. App. 3a (noting that sufficiency argument was premised on existence of instructional error). Petitioner accordingly limited his certiorari petition to challenge the jury instructions and did not seek review on any sufficiency-of-the-evidence question. Pet. i. Petitioner thus again

waived his fact-bound evidentiary contention in this Court, because it is not "fairly included" in the question he presented. See Sup. Ct. R. 14.1(a); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (questions are "not fairly included" in the question presented simply because they are "*related*" and "perhaps *complementary* to" that question) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 537 (1992)).

b. In any event, petitioner's contention lacks merit. For petitioner's scheme to work, Target had to accept his fraudulent checks as payment for merchandise. A merchant, of course, will only accept a check on the understanding that it can obtain funds from a bank by depositing the check, which then "would eventually be presented to the drawee bank[]." *Brandon*, 298 F.3d at 313. A bank check is itself an unconditional order to the drawee bank to pay the amount specified. See p. 5, *supra*. Petitioner's scheme was thus built on the fact that his orders to make payment would be presented to the drawee banks "in the ordinary course of business," *Periera* v. *United States*, 347 U.S. 1, 8-9 (1954). See pp. 42-43, *supra* (injection of fraudulent checks into stream of commerce is an inherent aspect of check-fraud schemes); cf. *Cramer* v. *United States*, 325 U.S. 1, 31 (1945) (jury may infer that defendant "intend[ed] the natural consequences * * * reasonably expect[ed] to result from his acts"). The jury could also reasonably infer that the scheme involved an attempt to pass fraudulent checks that would not be detected (or at least would delay detection) in order to forestall the possible involvement of law-enforcement.

Moreover, petitioner did not engage in an isolated transaction. Petitioner repeatedly stole mail from

some of the same individuals and repeatedly tendered fraudulent checks to the same merchants from (at least) October 2009 to March 2010. See pp. 4-6, *supra*. If the drawee bank pays a fraudulent check deposited by a deceived merchant, the odds of detecting petitioner as the fraudster decrease. The jury could thus reasonably infer that the scheme thus sought to provide checks that would evade detection and result in payment by a bank. Even in the mail-fraud context, a jury may reasonably find that a mailing that occurs after the schemer's "receipt of the goods [directly] obtained by the fraud" was part of the scheme when it would "postpone [the merchants'] ultimate complaint to the authorities" and thus "make the apprehension of the defendant[] less likely." *United States* v. *Lane*, 474 U.S. 438, 451-452 (1986) (quoting *Maze*, 414 U.S. at 403). A rational jury thus have could convicted petitioner on the trial evidence.

B. Section 1344(2) Does Not Require Proof That The Fraudulent Scheme Actually Posed A Risk Of Financial Or Other Property Loss To The Bank

Petitioner further argues (Br. 36-40) that the Court should limit Section 1344 to "schemes that pose [a] risk of financial or other property loss to a bank," even if "no proof of intent to defraud a financial institution" is required. Br. 36. Petitioner thus appears to argue a different question than the Question Presented, which asks whether Section 1344 always requires proof that "the defendant *intended to* defraud a bank and *expose it to risk of loss*." Pet. i (emphases added). That question does not ask whether the "scheme," in fact, poses that risk.

Petitioner may have elected not to address the question presented because requiring an intent to

expose the bank to a risk of loss makes little sense where, as here, the schemer must already intend "to obtain * * * property owned by, or under the custody or control of, a [bank]," 18 U.S.C. 1344(2). It is hard to imagine why Congress would have wanted such an intent requirement, and petitioner does not now appear to argue that such intent is necessary.[9]

Petitioner thus argues (Br. 36) that Section 1344(2) proscribes a scheme to obtain bank property only if it, in fact, "pose[s] [a] risk of financial or other property loss to a bank." But it is well established that the "gravamen of the offense is the scheme" itself, *Bridge*, 553 U.S. at 647, "rather than [a] completed fraud," *Neder*, 527 U.S. at 25 (construing Section 1344). All a defendant must do to violate Section 1344 is knowingly "attempt[]" to execute the "scheme" specified by the statute. 18 U.S.C. 1344. Section 1344 thus does not require "damage" or actual "reliance" on any false or fraudulent pretense, representation, or promise. *Neder*, 527 U.S. at 25. Unless Congress intended to ensure that the most incompetent of fraudsters who earnestly attempt to obtain bank property but are so inept that they create no "risk of loss" fall *outside*

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[9] Petitioner makes no effort to rely on common-law fraud for good reason. Even if Congress had intended to borrow from common law, the intent element of common-law fraud entails only the "intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation." W. Page Keeton et al., *Prosser and Keeton on Torts* § 105, at 728 (5th ed. 1984); see Restatement (Second) of Torts § 525 (1976) ("One who fraudulently makes a representation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); *Kenrick*, 221 F.3d at 28 ("[C]ommon-law fraud has no additional 'intent to harm' requirement.").

Section 1344's prohibitions, while those with better planned schemes violate the statute, petitioner's submission must be incorrect.

1. A risk-of-loss requirement has no basis in the text or history of Section 1344

a. Nothing in Section 1344(2)'s text suggests a risk-of-loss requirement. Section 1344(2) "facially requires only that the perpetrator engage in a 'scheme or artifice' in order to obtain bank funds or funds in bank custody." *United States* v. *Thomas*, 315 F.3d 190, 196 (3d Cir. 2002); see *United States* v. *McNeil*, 320 F.3d 1034, 1037 (9th Cir.), cert. denied, 540 U.S. 842 (2003). Indeed, the provision appears "carefully worded" to "*avoid* imposing [a risk-of-loss] requirement" and related "technical issues about whether the money that a fraudster obtained actually *belonged* to the bank, or whether the bank itself would suffer a financial loss." *Nkansah*, 699 F.3d at 754 (Lynch, J., concurring). This Court "ordinarily resist[s] reading words * * * into a statute that do not appear on its face," *Bates* v. *United States*, 522 U.S. 23, 29 (1997), and petitioner provides no reason to do so.

Petitioner makes little effort to ground his a risk-of-loss requirement in Section 1344's text for good reason: That requirement "has been from the start a judicial construct, not expressed in or even suggested by the statutory language." *Nkansah*, 699 F.3d at 755 (Lynch, J., concurring). Although petitioner relies (Br. 38-39) on the term "defraud" in Clause (1) of Section 1344 to conclude that that provision addresses plans to "wrong the bank in its property rights," petitioner ignores the fact that the gravamen of the offense is the scheme, not any results of the scheme. See p. 48, *supra*.

Petitioner's attempt to extend his logic to Clause (2) runs further afield. He argues (Br. 39) that Section 1344(2) "must be understood simply as an elaboration of [Section 1344(1)]," but, as explained, that conclusion cannot be reconciled with the disjunctive statute Congress enacted. See pp. 25-32, *supra*. Moreover, petitioner appears to misunderstand the nature of bank deposits in asserting (Br. 39) that "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" if the scheme is "directed at money held in a customer account." Most bank accounts, including personal checking accounts, are general accounts. The bank thus honors a check with its *own* money, not the customer's money. See p. 20, *supra*.

Petitioner suggests (Br. 39) that the Court may adopt his atextual "narrowing construction" by citing *Cleveland*, *McNally*, and *Skilling*. But in those cases the Court interpreted the relevant text in light of the normal understanding of "property," *Cleveland*, 531 U.S. at 20-24; the statutory context showing Congress's codification of a decision of this Court, see pp. 29-31, *supra* (discussing *McNally*); and lower-court decisions that Congress codified in an effort to overturn the result in *McNally*, see *Skilling*, 130 S. Ct. at 2928-2931. None of those decisions justifies imposing a "risk of loss" test that has no foundation in the statute's text, history, or purpose.

b. Section 1344's drafting history demonstrates that Congress did not intend a risk-of-loss requirement. Congress specifically considered and rejected language for Section 1344 that would have limited its application to schemes to obtain a bank's property or to cause "economic loss" to a bank. *House Hearing* 19

(reproducing H.R. 5405). After the Department of Justice objected that Section 1344's application should be "broader" than schemes to "inflict an economic loss" on a bank, *id.* at 4, Congress eliminated the economic-loss provision and adopted broader text in Section 1344. See pp. 27-28, *supra*. Petitioner's risk-of-financial-loss requirement would unjustifiably rewrite Section 1344 by incorporating a modification of language that Congress rejected.

2. Petitioner's risk-of-loss element is unsound

Petitioner ultimately suggests (Br. 38-40 & n.25) that a risk-of-loss element is needed to "constrai[n]" the scope of Section 1344. Even ignoring the textual problems with his position, a risk-of-loss requirement would be poorly suited to that role. The requirement would make criminal liability hinge on abstruse provisions of the Uniform Commercial Code (U.C.C.) and would lead to "entirely arbitrary" "distinction[s] between those [who] are and those [who] are not subject to prosecution," *Nkansah*, 699 F.3d at 761 (Lynch, J., concurring).

a. Requiring the government to prove that a fraudulent scheme placed a bank at risk of loss would require courts—and juries—to determine whether the bank would suffer a loss or be subject to civil liability if the scheme were successful. That, in turn, would require consideration of state commercial law unsuited for this context.

The rules for determining the bank's liability for a fraudulent check after the bank has honored it are set forth in the U.C.C., as incorporated into state law. See *J. Walter Thompson, U.S.A., Inc.* v. *First Bank-Americano*, 518 F.3d 128, 131 n.2 (2d Cir. 2008) (cited at Br. 4). A leading treatise describes the material in

its chapter on "Basic Liability Arising from Stolen Instruments and Forged Signatures" as "abstract, difficult,[] interrelated," and "'for adults only.'" 2 James J. White et al., *Uniform Commercial Code* § 19:1, at 311, 318 (6th ed. 2013). The authors explain that the bank on which a check is drawn generally "is not entitled to charge the drawer's account when it pays over a forged drawer's signature or over a forged indorsement or when it pays an altered instrument (except to the extent of its original tenor)." *Id.* at 313. But they immediately note that "there are exceptions to these rules" and that "[t]heft, forgery, and alteration of negotiable instruments have generated thousands of litigated cases." *Ibid.* Another treatise has multiple chapters discussing the liability rules for check kiting, check fraud via forged and counterfeit checks, check fraud by alteration, and check fraud through forged indorsements. 1-2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collection and Credit Cards*, Chs. 9-12 (rev. ed. 2013). Most of the detailed rules governing the check payment system are thus understandably foreign to "anyone but a small cadre of bankers, banking lawyers, and law professors who teach courses in negotiable instruments." *Nkansah*, 699 F.3d at 760 (Lynch, J., concurring).

These complexities would make it difficult to administer a risk-of-loss requirement in principled fashion. A single federal appellate precedent construing a particular State's commercial law is unlikely to set the boundaries for bank-fraud liability, even for categories of cases involving similar schemes (such as check fraud). Compare *United States* v. *Odiodio*, 244 F.3d 398, 402 (5th Cir. 2001) (finding evidence of risk-of-

loss was insufficient under Texas law in case involving stolen check), with *Morganfield*, 501 F.3d at 466 n.52 (distinguishing *Odiodio* in check-cashing-scheme prosecution; noting that "*Odiodio*'s description of Texas law is not exhaustive" because it "does not, for instance, consider protections for holders in due course, the final payment rule, or the circumstances when presenting a forged instrument may not violate presentment warranties") (citations omitted). The need to elaborate the applicable (and potentially State-by-State dependent) U.C.C. principles over time underscores "the obvious difficulty of making [criminal] liability for federal bank fraud turn on the correct application of state commercial law and possible subsequent state-court adjudication." *McNeil*, 320 F.3d at 1038. That difficulty extends beyond just the U.C.C. Petitioner's submission would create uncertainty more generally about what must be shown to establish "risk of loss" (*e.g.*, *de minimis* risk, civil liability, or something else).

b. Petitioner relies (Br. 36) on *United States* v. *Davis*, 989 F.2d 245 (7th Cir. 1993), but *Davis* itself reveals serious flaws in the risk-of-loss requirement.

The *Davis* defendants filed a false tax return in the name of a homeless man; obtained a refund check for more than $12,000; tricked the homeless man into endorsing the check and signing a signature card for a bank account they fraudulently opened; and withdrew cash from the bank after depositing the IRS check. 989 F.2d at 246. As Judge Lynch later explained about a similar scheme, the text of Section 1344(2) fits *Davis* "like the proverbial glove": The fraudster "devised *a scheme to obtain money* from the banks at which the accounts were opened by making *false rep-*

resentations to them, and obtained cash that had been in the banks' hands." *Nkansah*, 699 F.3d at 754 (Lynch, J., concurring). But *Davis* reversed the bank-fraud conviction after concluding that the bank was not "endangered" by the scheme, because it qualified under the U.C.C. as "a holder in due course of the IRS' check" and thus "took free of any defenses that the IRS might have had to a suit by the payee [the homeless man] or other holders." 989 F.2d at 246.

Other courts have concluded that banks can "suffer various reputational or other indirect harms that will satisfy [the risk-of-loss] element even if they are a holder in due course." *Nkansah*, 699 F.3d at 750 n.3. And even if "the bank is not legally liable," the Second Circuit has noted that banks "will often swallow the loss for the customer" resulting from a forged check. *Stavroulakis*, 952 F.2d at 695. That may well be the logical choice not only to preserve customer satisfaction but also because of the potential transaction costs of seeking to recover a payment after the bank has honored a check. The indeterminate character of petitioner's risk-of-loss requirement is itself reflected in *Davis*, which suggested that the conviction could have been affirmed *if* the government had established that one of the exceptions to the U.C.C.'s holder-in-due-course rules had applied. 989 F.2d at 247. Criminal liability should not turn on such vagaries.

c. Moreover, even if the liability rules governing certain transactions were sufficiently clear, a risk-of-loss requirement would lead to arbitrary results in prosecutions. This case, for instance, implicates different U.C.C. rules governing (1) alterations to checks and (2) forged signatures on checks. As petitioner notes (Br. 4), a bank that presents an *altered* check to

the drawee bank for payment normally bears the loss, which may then be recovered from the merchant that accepted the check. *J. Walter Thompson*, 518 F.3d at 131 n.2. The drawee bank, by contrast, is normally liable for paying a check over its customer's *forged* signature. *Ibid.*; see *Wachovia Bank, N.A.* v. *Foster Bancshares, Inc.*, 457 F.3d 619, 622 (7th Cir. 2006). Liability—and hence risk of loss—thus can turn on whether a fraudulent check was altered or forged, a fact that is not always obvious from the face of the check. See *ibid.* And a single case can involve multiple kinds of check fraud. Petitioner, for instance, altered Checks 1-5 and forged the signature on Check 6. See p. 6, *supra.* Resting criminal liability under Section 1344(2) on such distinctions "makes no sense." *Nkansah*, 699 F.3d at 762 (Lynch, J., concurring).[10]

[10] For the reasons explained in the brief in opposition (at 10-12), petitioner waived and forfeited any risk-of-loss argument. See also Pet. C.A. Br. 16 (conceding that instruction on "risk of civil liability or financial loss" was unnecessary). Even if petitioner had not waived the argument, it should be reviewed only for plain error.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 18 U.S.C. 20 provides:

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[1] 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;

[1] Per original.

(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.

2. 18 U.S.C. 1341 provides:

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. 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.

3. 18 U.S.C. 1343 provides:

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.

4. 18 U.S.C. 1344 (1988) provided:

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.

5. 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.