No. _____

IN THE

Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following Loughrin v. United States, 134 S.Ct. 2384 (2014), the circuits remain openly and increasingly divided -- now nine-to-three with the Ninth Circuit's minority-view decision below -- over the mens rea required under subsection (1) of the bank-fraud statute, 18 U.S.C. §1344. The question presented is that which was left open in Loughrin:

Whether subsection (1)'s "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as nine circuits have held, and as petitioner Lawrence Shaw argued here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lawrence Eugene Shaw, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at United States v. Shaw, 781 F.3d 1130 (9th Cir. 2015). (Pet. App. A). The district court did not issue any relevant written decisions.

JURISDICTION

The Ninth Circuit entered its judgment on March 27, 2015. On June 8, 2015, the court denied Shaw's timely petition for rehearing en banc. (Pet. App. B). This petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. §1344 provides:

> 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.

STATEMENT OF THE CASE

This case presents the recurring question left open in Loughrin v. United States, 134 S.Ct. 2384 (2014): whether 18 U.S.C. §1344(1)'s "scheme to defraud a financial institution" requires evidence of an intent only to deceive a bank, as three circuits have held, or of an intent to deceive and cheat a bank, as nine circuits have held, and as petitioner Shaw argued here. With the Ninth Circuit's minority-view decision below, every circuit has now opined on the question and the split, post-Loughrin, has only increased.

This case is the ideal vehicle for resolving the enduring conflict. It was undisputed below that Shaw's scheme was designed to steal bank-customer Stanley Hsu's money from his bank account by deceiving the bank. It was equally undisputed that Shaw did not intend to steal the bank's money -- proof, Shaw argued, that was prerequisite to a conviction under subsection (1). The Ninth Circuit disagreed. Although the government never opposed Shaw's argument that there was no evidence to support a finding of his intent to cheat the bank, and neither lower court ever questioned the lack of evidence on this point, the court affirmed Shaw's convictions. It construed subsection (1) of the statute to require proof of an intent to deceive, but not to cheat, the bank, and upheld the trial court's refusal to instruct the jury that proof of Shaw's intent to deceive and cheat a bank was required, as well as its consequent denial of his motion for judgment of acquittal. In so doing, the Ninth Circuit acknowledged contrary authority supporting Shaw's position -- a consensus comprised of the First, Second, Third,

Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- but nonetheless joined the minority position together with the Sixth and Eighth Circuits.

1. Shaw devised a scheme to take money from the Bank of America savings account of Stanley Hsu. Hsu was a wealthy foreign businessman who employed Shaw's girlfriend's mother overseas, and arranged for his bank statements to be sent to the home Shaw shared with the girlfriend. (ER 323-326; 344; 583-585).[1] Shaw thus got ahold of the account information contained in Hsu's bank statements, created a Paypal account in Hsu's name, linked this Paypal account to Hsu's Bank of America account, and effected multiple outgoing transfers from Hsu's Bank of America account to the Hsu Paypal account between June and October 2007, thereby taking a total of over $300,000 from Hsu. (ER 377-379; 381; 386-388). Hsu did not review his statements on a regular basis, and did not thus discover his loss until October 2007. (ER 337).

Once Shaw effected these outgoing transfers of Hsu's money, he then moved it in and out of two Washington Mutual accounts he opened in the name of his father to cover his tracks, ultimately writing himself checks which he deposited into a joint account held with his girlfriend. (ER 398-407; 437-38).

[1] "ER" followed by a number refers to the applicable page in the Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals. "CR" refers to the District Court Clerk's record and is followed by the applicable docket control number.

For this conduct, Shaw was charged with 17 counts[2] of bank fraud under subsection (1) of 18 U.S.C. §1344, which applies only to schemes to "defraud a financial institution," rather than subsection (2), which is broader and covers deceptive schemes to "obtain. . . moneys. . . under the custody or control of" the bank. See 18 U.S.C. §1344. (CR 11; ER 32).

2. The evidence at trial established that Shaw intended to deceive the banks in order to take bank-account-holder Hsu's money and cover his tracks, but not that he intended to expose the banks to actual or potential loss. There was no direct evidence that Shaw intended to bilk the banks, as opposed to Hsu. Nor was there circumstantial evidence to support such an inference, given Shaw's singular focus on taking Hsu's money, his use of non-bank-entity Paypal to effectuate the scheme, and the fact that Hsu and Paypal, not the banks, bore the actual and potential loss.

Indeed, the evidence at trial was that Paypal sent $131,000 of the $300,000-plus that was taken back to Hsu through 16 auto-reversals of the transfers that Shaw had effected in the 60-day period prior to Hsu's discovery of the scheme. (ER 387-389). As a result, Paypal sustained a net $106,000 in loss. (ER 389). Hsu himself was left with a deficit of over $170,000 from the transfers that fell outside this 60-day period, the lion's share of the loss. (ER 387).

By contrast, neither bank lost any money on account of Shaw's scheme. (ER 434; 615). The sole witness from Bank of America, a defense witness, testified

[2] The government moved to dismiss one of the counts before trial, leaving 16.

unequivocally that Bank of America never paid out a single credit to Hsu in connection with this fraud, and that it suffered no actual loss. (ER 615). Instead, when Hsu finally reported the fraud to Bank of America, the bank passed his complaint onto Paypal, the entity that effected the withdrawals; eight days later, Paypal deposited credits for the preceding 60-day-period directly into Hsu's account. (ER 613-614). As to Washington Mutual, the government's only bank witness testified that, "if the account was opened fraudulently to begin with" -- which was in fact the government's theory, given that Shaw opened the accounts in his father's name -- "[w]e are not going to be at a loss" or bear the risk of loss. (ER 428).

Further, given Shaw's use of non-bank-entity Paypal to effectuate the withdrawals, and Hsu's failure to timely review the bank statements he had sent, month after month, to Shaw's home, Paypal and Hsu -- not the banks -- also bore the risk of loss in this case. (ER 429) (outside of industry-standard 60-day period for reviewing statements and reporting fraud, bank customer assumes risk of loss); (ER 336-37; 387) (because Hsu did not review his statements, he assumed risk of loss outside of this period); (ER 385-87; 613-14) (Paypal assumed risk of loss for fraud within 60-day-period insofar as it promptly issued credits to Hsu, once Hsu contacted Bank of America, without question or dispute).

3. At trial, the government never argued that Shaw intended to cheat either bank as opposed to just bank-customer Hsu. Rather, the government's theory was simply that Shaw deceived the banks in order to take Hsu's money, and that was all subsection (1) required. (ER 666).

The lynchpin of Shaw's trial defense was that subsection (1) requires proof of an intent to cheat a bank and not just a bank customer. (ER 12-31; 37-74; 101-104; 105-116; CR 100-102). In furtherance of this defense, Shaw asked the court to give jury instructions for bank fraud that would have required the jury to find the requisite proof of Shaw's intent to deceive and cheat the banks (including definitions for the key terms "scheme to defraud" and "intent to defraud," as well as a theory-of-defense instruction). (ER 101-116; CR 100-102).

The district court declined to give Shaw's proposed instructions, and instead defined the key terms "intent to defraud" and "scheme to defraud" in disjunctive form to require proof of an "intent to deceive or cheat" the financial institution. (ER 18; 145-47; CR 98) (emphasis added). The court's instructions thus invited the jury to convict Shaw on the basis that he deceived the banks in order to take Hsu's money. The government then capitalized on the court's instruction in closing, arguing that Shaw "lied to the banks about important material things. . .because he did that, defendant is guilty of all 16 counts of bank fraud with which he is charged." (ER 666) (emphasis added). Later that day, the jury convicted Shaw of all but two counts for transactions that were not clearly traceable to the fraud. (ER 704; CR 96).

Shaw moved for judgment of acquittal after the close of the government's case and again after the close of all of the evidence. (ER 204; 622). At the hearing on the proposed jury instructions and the motions for judgment of acquittal, Shaw emphasized that the issue in dispute was how to define the statutory elements that

both parties believed to be prerequisite to a conviction -- "scheme to defraud" and "intent to defraud" -- for purposes of subsection (1) bank fraud, not whether there was an "additional element" of proof of "risk of loss," as the government had framed the question. (ER 624-25; 646-47). Specifically, Shaw argued that proof of actual or potential loss to a bank is only relevant to the extent that it supports an inference that the defendant intended to cheat a bank and not just a third party. (ER 647). With respect to these requisite elements, Shaw argued, the government must prove that the bank is the target of the deception and an intended victim of the fraud, which it had not done. (ER 624-25; 646-47). By contrast, subsection (2) of the bank-fraud statute covers schemes, like Shaw's, that aim to obtain a bank-account holder's money through mere deception of the bank. (ER 625; 644; 648).

Notwithstanding the absence of evidence to prove that Shaw intended to cheat a bank, the district court denied Shaw's motions for entry of a judgment of acquittal based on its interpretation of subsection (1) to require mere deception of the bank. (ER 651). The government never asserted, nor did the court find that, assuming arguendo Shaw's construction of subsection (1), there was sufficient proof of his intent to cheat a bank and not just Hsu. (ER 644-651).

4. On appeal, Shaw challenged the district court's denial of his Rule 29 motions and his proposed jury instructions. (Appellant's Opening Brief ("AOB")). Although the government attempted to dispute the evidence of loss and risk of loss to the banks (Appellant's Reply Brief "ARB" at 1-3), once more the government failed to assert, at any point in the appellate proceedings, that there was any proof

of Shaw's intent to cheat a bank and not just Hsu -- i.e. that any such purported evidence constituted circumstantial evidence of Shaw's intent. (Government Answering Brief ("GAB")).

The Ninth Circuit affirmed. (Pet. App. A). In so doing, the Ninth Circuit, like the district court, never questioned the fact that Shaw intended only to cheat Hsu, not the banks. (Pet. App. A14). It also acknowledged a circuit split in which other courts of appeals have sided with Shaw's construction of subsection (1) of §1344. (Pet. App. A4; A14). Nonetheless, the court joined the minority view and held that the statute is violated where the bank is the target of the deception and bank customers the only intended financial victims of the fraud. (Pet. App. A4). In so holding, the court reasoned that this "result is fully consistent with the Supreme Court's decision in Loughrin, and indeed complements Loughrin's holding that §1344(2) of the statute does not require any intent to defraud the bank." (Pet. App. A4).

The Ninth Circuit subsequently denied a petition for rehearing en banc. (Pet. App. B).

REASONS FOR GRANTING THE WRIT

"Although §1344 has produced much litigation in the Circuits and many separate opinions by learned appellate judges, federal courts do not agree on the mental state necessary to support a conviction under §1344[.]" United States v. Nkansah, 699 F.3d 743, 762 (2d Cir. 2012) (Lynch, J., concurring). This is still true as to subsection (1) of the bank-fraud statute after Loughrin.

In Loughrin, this Court held that subsection (2) of the bank-fraud statute does not require proof of a "scheme to defraud a financial institution." See Loughrin, 134 S.Ct. at 2387. By contrast, Loughrin held, subsection (1) does require proof of such a scheme, and thus, proof of the defendant's intent to defraud a bank. Id. at 2389-90. Loughrin did not, however, address what this proof entails: whether subsection (1)'s "scheme to defraud a financial institution" requires evidence of an intent only to deceive a bank, as three circuits have held, or of an intent to deceive and cheat a bank, as nine circuits have held, and as petitioner Shaw argued here. As a result, the circuits remain openly, and now increasingly, divided in the wake of Loughrin over the mens rea required to convict a defendant under subsection (1) of the bank-fraud statute.

That is the question presented here, where Shaw's scheme was directed at a non-bank third party: bank-customer Stanley Hsu. The Ninth Circuit joined the minority view in the split, and affirmed Shaw's convictions under subsection (1) of the statute for his scheme to steal bank-customer Hsu's money from his bank account, even though the government never argued during trial, or at any point on

appeal, that there was evidence of Shaw's intent to cheat the bank, and neither the district court, nor the court of appeals, questioned the fact that Shaw intended only to cheat bank-customer Hsu. In so holding, the Ninth Circuit construed §1344(1) to require proof of an intent to deceive, but not to cheat, a bank, in accordance with the Sixth and Eighth Circuits. (Pet. App. A4).

Nine circuits -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- have agreed with Shaw, to the contrary, that subsection (1) requires proof of an intent to deceive and cheat a bank. The divide over the requisite mens rea is clear, entrenched, and unaffected by Loughrin. As set forth below, this case presents an excellent vehicle for the Court to resolve the enduring post-Loughrin circuit conflict over the bank-fraud statute.

I. After Loughrin, The Courts Of Appeals Remain Increasingly Divided, Now Nine-To-Three, Over Section 1344(1)'s Intent Requirement

A. Loughrin Did Not Resolve The Conflict Over §1344(1)

Petitioner Loughrin construed the two subsections of the statute conjunctively, and argued that subsection (2), like subsection (1), requires proof of an "intent to defraud a financial institution." Loughrin, 134 S.Ct. at 2389. According to Loughrin, this element required the government "to show not just that a defendant intended to obtain bank property (as the jury [t]here found), but also that he specifically intended to deceive a bank," Loughrin, 134 S.Ct. at 2389 (emphasis added) -- proof, in other words, of an intent to deceive and cheat the

bank, as the majority of circuits have held as to subsection (1) and as Shaw contends here. Because the government did not contest this definition of "intent to defraud," and Loughrin conceded sufficient evidence of the intent-to-obtain-bank-property prong, the dispute centered on whether subsection (2) required proof of Loughrin's intent to deceive a bank. Id. at 2389 & n.3. The Court noted nonetheless that "[t]he Government in such a case may, of course, face the separate claim" -- Shaw's claim here -- "that the defendant did not intend to obtain bank property at all." Id. at 2394 n.6 (emphasis added).

In that context, the Court held that the two subsections were legally distinct, abrogating circuit caselaw that construed the subsections conjunctively, and further, that subsection (2), unlike subsection (1), did not require proof of intent to deceive a bank. Loughrin, 134 S.Ct. at 2390-91. Whereas subsection (2) only "demands that the defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money," id. at 2393, the Court explained, it is "the first clause of §1344, as all agree," that "includes the requirement that a defendant intend to 'defraud a financial institution.'" Id. at 2389-90 (emphasis in original). The question thus remains: How must the government prove the "intent to defraud a financial institution" that "all agree" is required by subsection (1) where a scheme is designed to cheat a non-bank third party?

B. The Circuits Remain Openly, And Now Increasingly, Divided Over §1344(1)

The courts of appeals remain openly, and now increasingly, divided over that question, since Loughrin did not address it. See, e.g., United States v. Shaw, 781 F.3d 1130, 1136 (9th Cir. 2015) (Pet. App. A14) (recognizing, post-Loughrin, the enduring circuit conflict over the requisite proof for §1344(1) and the fact that the Ninth Circuit's decision is contra other circuits); see also United States v. Staples, 435 F.3d 860, 866-867 (8th Cir. 2006) (noting the circuit split as to whether the bank-fraud statute, generally, extends to situations where the defendant has no intent to expose the bank to an actual or potential loss); United States v. Everett, 270 F.3d 986, 990 (6th Cir. 2001) ("The Circuits are not in accord as to the intent required to violate §1344."); United States v. Thomas, 315 F.3d 190, 196 (3d Cir. 2002) ("The Courts of Appeals are not of one mind as to the proper reading of the statute, including. . .the intent requirement[.]"); United States v. Kenrick, 221 F.3d 19, 27 (1st Cir. 2000) (en banc) ("There is also no consensus among the circuits on the issue.").

C. Nine Circuits Agree With Shaw's Construction Of §1344(1) To Require Proof of An Intent to Cheat A Bank

A majority of courts, from nine circuits, agree that proof of an intent to cheat, and not just deceive, a bank is a prerequisite to a conviction under §1344(1). Within this consensus, which includes the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits, most courts of appeals have also opined about

whether evidence of loss or risk of loss to the bank is necessary or merely permissible circumstantial evidence of the requisite mens rea. See, e.g., United States v. Wolfswinkel, 44 F.3d 782, 785-786 (9th Cir. 1995) ("The Courts of Appeals that have adopted a 'risk of loss' analysis have not made clear whether its proof is necessary or merely sufficient to show intent."). While the First, Third and Tenth Circuits have held that proof of potential loss to a bank is necessary evidence of the requisite mens rea, the Fourth, Fifth and Eleventh Circuits have held that it is permissible circumstantial evidence of intent, and the Second Circuit has held that it is permissible circumstantial evidence only where a bank's exposure is widely known.

Specifically, prior to Loughrin, a group of four circuits -- the Fourth, Fifth, Seventh, and Tenth Circuits -- had read subsections (1) and (2) disjunctively to create two substantive offenses, as Loughrin did, and in that context held, as Shaw asserts here, that subsection (1) requires proof of an intent to cheat the bank, which subsection (2) does not. A second group of five circuits -- the First, Second, Third, Eleventh, and the D.C. Circuits -- had construed the two subsections of the bank-fraud statute conjunctively, but likewise agreed that §1344 requires proof of an intent to cheat the bank. While Loughrin abrogated the latter set of cases to the extent they construed the subsections conjunctively and applied the "intent to defraud a financial institution" element to subsection (2) as well as (1), these courts' interpretation of what proof is required by subsection (1)'s "scheme to defraud a financial institution" remains the law in these circuits for purposes of §1344(1).

For example, in the group of circuits that construed the statute disjunctively pre-Loughrin, the Fifth Circuit held, in United States v. Briggs, 939 F.2d 222 (5th Cir. 1991), that §1344(a)(1) (now §1344(1)) did not apply to a scheme that, like Shaw's, was designed to take a third party's money by effectuating transfers from his bank account into accounts controlled by the defendant:

> The record does not indicate that the banks suffered any loss, actual or potential, as a result of Briggs' conduct; indeed, the government does not argue that she attempted to obtain funds belonging to the banks, but only that she attempted to obtain funds under the custody and control of the bank.

Id. at 225 (emphasis added). The latter, the court reasoned, constitutes "a violation of subsection (a)(2), not (a)(1)." Id.; see also United States v. Hooten, 933 F.2d 293, 295 (5th Cir. 1991) ("Under 18 U.S.C. §1344(a)(1), the victim must be a federally chartered or federally issued institution."); cf. United States v. Morganfield, 501 F.3d 453, 465 (5th Cir. 2007) (when a defendant targets third-party merchants, the government must present facts "evincing an intent to victimize the financial institution to sustain a bank fraud charge under §1344"). In this context, the Fifth Circuit also clarified that proof of loss or risk of loss is permissible circumstantial evidence of the requisite intent. See United States v. Barakett, 994 F.2d 1107, 1111 (5th Cir. 1993) ("While section 1344(1) prohibits only crimes directed at financial institutions. . .knowing execution of schemes causing risk of loss -- rather than actual loss -- to the institution, can be sufficient to support conviction.").

Likewise, pre-Loughrin, the Fourth Circuit had recognized subsection (1) and (2) as distinct substantive offenses, see United States v. Brandon, 298 F.3d 307,

311 (4th Cir. 2002), and held that a "scheme to defraud a financial institution" requires that "such a scheme or artifice must be one designed to deprive a financial institution of a property interest." United States v. Colton, 231 F.3d 890, 907-08 (4th Cir. 2000) (emphasis added and in original); see also Brandon, 298 F.3d at 311 (bank must be the "intended victim" of the deceptive scheme). In so holding, the court relied on this Court's decision in McNally v. United States, 483 U.S. 350 (1987), which addressed the mail-fraud statute: "[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" Colton, 231 F.3d at 907 (quoting McNally, 483 U.S. at 358). In this context, the court also clarified that, as in the Fifth Circuit, proof of risk of loss is not necessary, but can be circumstantial evidence of intent. See United States. v. Adepoju, 756 F.3d 250, 255 (4th Cir. 2014) ("Risk of loss to the bank is unnecessary for a §1344(1) conviction, although it tends to prove the requisite intent under that subsection.").

The Seventh Circuit had reached the same conclusion about mens rea pre-Loughrin. It construed the statute disjunctively, and held that, "[i]n order to support a conviction under §1344(1), the government must prove that the defendant engaged in a pattern or course of conduct designed to deceive a financial institution with the intent to cause actual or potential loss." United States v. Higgins, 270 F.3d 1070, 1073-74 (7th Cir. 2001) (emphasis added).

The Tenth Circuit is in accord. This court, too, had construed the statute disjunctively pre-Loughrin and held that "victimiz[ing]" a bank is "a requirement of §1344(1) that is not necessary under §1344(2)." United States v. Young, 952 F.2d

1252, 1256 n.4 (10th Cir. 1991) (emphasis added); United States v. Sapp, 53 F.3d 1100, 1102 (10th Cir. 1995) (same). In this context, the court also clarified that proof of risk of loss to a bank is both necessary and sufficient to meet this showing. See United States v. Loughrin, 710 F.3d 1111, 1115 (10th Cir. 2013) ("To establish that a bank was defrauded under §1344(1), the government need not prove that the bank 'suffered any monetary loss, only that the bank was put at potential risk by the scheme to defraud.'") (quoting Young), abrogated in part by Loughrin,134 S.Ct. 2384.

The second group of circuits that, likewise, ascribe to the majority view -- the First, Second, Third, Eleventh, and the D.C. Circuits -- are the courts that, before Loughrin, interpreted the subsections conjunctively and were abrogated by Loughrin in that respect, only. In that category, the Second Circuit held pre-Loughrin, in United States v. Rodriguez, 140 F.3d 163, 168 (2d Cir. 1998), that "a defendant may not be convicted of federal bank fraud unless the government is able to offer proof that the defendant, through the scheme, intended to victimize the bank by exposing it to an actual or potential loss." Id. (emphasis added); see also Nkansah, 699 F.3d at 748 (bank fraud "is a specific intent crime requiring proof of an intent to victimize a bank by fraud," and thus, "the government had to prove beyond a reasonable doubt that appellant intended to expose the banks to losses"). In this context, the court has underscored that proof of actual and potential loss to the bank may -- in certain circumstances but not others -- constitute circumstantial evidence of mens rea. Id. at 750. The court reasoned:

> the widely understood exposure of a bank in such a case is only a fact sufficient to support an inference of the requisite state of mind. Someone may well forge a check believing that only the account holder will suffer a loss. The inference is, therefore, not mandatory, but permissible.

Id. (emphasis added). By contrast, however, "such a permissible inference cannot be extended to cases in which evidence of the state of mind is absent and the actual exposure of a bank to losses is unclear, remote, or non-existent." Id. (emphasis added).

The D.C. Circuit is another court that construed the two subsections of the bank-fraud statute conjunctively pre-Loughrin, and held, in reliance on Second-Circuit caselaw, that "§1344 only covers frauds against banks themselves" -- that is, schemes designed to "defraud[] the bank of its property interest." United States v. Hubbard, 889 F.2d 277, 280 (D.C. Cir. 1989) (citing Blackmon, supra) (emphasis added).

Similarly, in United States v. De La Mata, 266 F.3d 1275, 1298 (11th Cir. 2001), the Eleventh Circuit construed §1344 conjunctively, pre-Loughrin, and held that "the term 'scheme to defraud' includes 'any pattern or cause of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.'" Id. at 1298 (emphasis added) (citation omitted). The court further held, in line with the Fourth and Fifth Circuits, that "'risk of loss' is merely one way of establishing intent to defraud in bank fraud cases." See id.

Like these courts, the Third Circuit also interpreted the bank-fraud statute conjunctively pre-Loughrin, and held that it required proof of an intent to cheat a bank. See, e.g., Thomas, 315 F.3d at 200 (holding that "harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud"); id. at 202 ("[e]ven a scheme which does expose a bank to a loss must be so intended") (emphasis added). In line with the Tenth Circuit, the court further clarified that evidence of loss or risk of loss is a required showing. United States v. Leahy, 445 F.3d 634, 657 (3d Cir. 2006) ("§1344 requires that the fraudulent scheme exposed the bank to some type of loss.") (emphasis added).

Finally, in Kenrick, supra, the First Circuit likewise construed the two subsections conjunctively, pre-Loughrin, and held that "the intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property." Kenrick, 221 F.3d at 29; see also United States v. Brandon, 17 F.3d 409 (1st Cir. 1994) ("The specific intent under §1344 is an intent to defraud a bank, that is, an intent to victimize a bank by means of a fraudulent scheme.") (emphasis added). The court further opined, consistent with the Third and Tenth Circuits, that proof of potential loss to the bank is a required showing. See United States v. Moran, 312 F.3d 480, 489 (1st Cir. 2002) ("[T]he bank need not be the immediate victim of the fraudulent scheme and need not have suffered actual loss so long as the requisite intent is established and the bank was exposed to a risk of loss.") (emphasis added).

D. Three Circuits Have Construed §1344(1) To Require Mere Deception Of A Bank

Against the weight of authority that supports Shaw's construction of §1344(1) to require proof of an intent to cheat a bank, only two circuits -- the Sixth and Eighth -- had held that bank fraud does not require proof of an intent to cheat the bank, prior to the Ninth Circuit's decision in this case.

In Staples, supra, the Eighth Circuit construed the two subsections of bank fraud disjunctively, as in Loughrin, and held: "As for subsection (1). . .no actual loss or intent to cause a loss is required, so long as the defendant has 'defraud[ed]' a financial institution." Staples, 435 F.3d at 867 (emphasis added).

And in Everett, supra, the Sixth Circuit construed the two subsections of Section 1344 conjunctively pre-Loughrin (and was therefore abrogated by Loughrin in that respect, only), and resolved a prior intra-circuit split as to the requisite intent for bank fraud in accordance with the Eighth Circuit's view. "[T]o have the specific intent required for bank fraud[,] the defendant need not have put the bank at risk of loss in the usual sense or intended to do so," the court held; rather, "[i]t is sufficient if the defendant[,] in the course of committing fraud on someone[,] causes a federally insured bank to transfer funds under its possession and control." Everett, 270 F.3d at 991 (emphasis added); see also United States v. Warshak, 631 F.3d 266, 313 (6th Cir. 2010) (same); United States v. Reaume, 338 F.3d 577, 581 (6th Cir. 2003) ("[T]he bank fraud statute is violated, even if the intended victim of

the fraudulent activity is an entity other than a federally insured financial institution, when the fraudulent activity causes the bank to transfer funds.").

E. The Ninth Circuit's Interpretation Of Section 1344(1)'s Intent Requirement Is Wrong, And Further Cleaves The Divide

The majority view supports Shaw's position that proof of intent to cheat the bank itself, not just a bank customer, is the hallmark of subsection (1) bank fraud -- and, further, that proof of actual loss or risk of loss to the bank is relevant only to the extent that it may be circumstantial evidence of the requisite intent.

By joining the minority view, the Ninth Circuit further cleaved a circuit divide which now stands nine-to-three. The Ninth Circuit held that "Section 1344(1) does require intent to defraud the bank," by contrast to subsection (2), but not that "the bank. . .be the intended financial victim of the fraud." (Pet. App. A4). Rather, proof of mere deception of the bank is enough. (Pet. App. A4). Its decision is not only contrary to the majority view in the courts of appeals, but to this Court's jurisprudence as well.

As a preliminary matter, the court's holding conflicts with this Court's decision in McNally, supra, which held, in the context of the mail-fraud statute, that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" McNally, 483 U.S. at 358 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)) (emphasis

added). McNally thus made clear that, for purposes of the word "defraud," the intent must be to obtain money or property from the one who is deceived. See id. In this way, McNally supports a construction of subsection (1) to require proof of an intent to deceive and cheat a bank, as Shaw contends, not merely an intent to deceive the bank in order to cheat a third party, as the Ninth Circuit held. As noted above, at least one circuit -- the Fourth -- has relied on McNally to construe subsection (1) as Shaw does here.

Further, the Ninth Circuit's construction of subsection (1) to require mere proof of deception of the bank virtually dissolves the distinction with subsection (2) after Loughrin, given Loughrin's recognition that a subsection (2) violation "occurs, most clearly, when a defendant makes a misrepresentation to the bank itself." Loughrin, 124 S.Ct. at 2393. In this analysis, the "clearest" subsection (2) violation would also be the clearest violation of subsection (1), if, as the Ninth Circuit held, the first clause requires no more than deception of the bank. The court's construction thus exceeds the "substantial overlap" between the subsections that Loughrin endorsed, id. at 2390 n.4, and runs into conflict with Loughrin's admonition that the disjunctive structure of the bank-fraud statute "signal[s] that each [clause] is intended to have separate meaning," id. at 2391. Thus, as this Court underscored in Loughrin, "to read clause (1) as fully encompassing clause (2)" -- or, as the Ninth Circuit effectively did, vice versa -- "contravenes two related interpretive canons: that different language signals different meaning, and that no part of a statute should be superfluous." Id. at 2388-90.

Finally, the Ninth Circuit misperceived both Shaw's argument and Loughrin. The court read Loughrin as "confirming [its] conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss" insofar as this Court "counsels against entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." (Pet. App. A13-14). But Shaw's position is not, and never was, that §1344(1) requires proof of "risk of loss," and thus the presentation of evidence of "technical issues of banking law," as the Ninth Circuit posited, but rather that subsection (1) requires proof of the defendant's intent to expose the bank to actual or potential loss. In this respect, the mens rea analysis for §1344(1) under Shaw's construction is no different than for any other specific intent crime which requires juries to pass judgment, based on direct and circumstantial evidence (which may or may not include evidence of loss and risk of loss), about the inner workings of the human mind.

There are additional problems with the court's analysis on this point. First, in most subsection (1) cases, the design of the scheme unambiguously targets the bank and not a bank customer, making it an easy task for the government to prove, and juries to infer, that a defendant's intent was to victimize the bank through fraud and not just a third party. For example, in United States v. Wolfswinkel, supra, a Ninth Circuit subsection (1) case discussed by the court in Shaw, (Pet. App. A12-13), the government presented uncontroverted testimony that the bank was

obligated to pay a cashier's check written on non-sufficient funds. Wolfswinkel, 44 F.3d at 786. In that context, the Ninth Circuit held that, to the extent evidence of "risk of loss" was required by §1344(1), "the government offered sufficient evidence at trial to prove that the conduct for which appellant was convicted exposed at least one bank to a risk of loss." Id.

In addition, the Ninth Circuit's concern about Shaw's construction "entangling courts" in complex evidentiary issues is also misplaced because, where the particular design of a scheme means that the technical ramifications of banking law are unclear, any "permissible inference" about the "requisite state of mind" becomes inappropriate. See Nkansah, 699 F.3d at 750. Specifically, as the Second Circuit has held, the inference about mens rea that may flow from "the widely understood exposure of a bank" "cannot be extended to cases" "in which evidence of the state of mind is absent and the actual exposure of a bank to losses is unclear, remote, or non-existent." Id. In other words, under Shaw's construction, courts and juries should not be stuck trying to parse technical issues of banking law in order to pass judgment on mens rea because the very complexity of such a task, where the exposure of the bank is not "widely understood," undermines its utility insofar as it cannot yield reliable circumstantial evidence of intent.

In such rare cases, like Shaw's, where evidence of intent is absent or unclear for purposes of subsection (1), the "substantial" "overlap" that Loughrin recognized between §1344(1) and §1344(2), see Loughrin, 124 S.Ct. at 2390 n.4, means that the government will not be left without a recourse for charging a readily-provable

offense: it will, in most cases, have the option of proceeding under subsection (2) instead. As Loughrin clarified, subsection (2) dispenses with proof of such intent and covers schemes that target a range of property interests common in banking contexts, including the relationship between a bank and a customer with a deposit account (Bank of America and Hsu here).

II. As Shaw Illustrates, The Conflict Over §1344(1)'s Intent Requirement Is Unlikely To Be Clarified By Further Decisions In The Courts Of Appeals

Because Loughrin did not address what "intent to defraud a financial institution" means but held that such proof is not required for subsection (2) at all, circuit courts from both sides of the divide will continue to invoke Loughrin as consistent with their respective, entrenched positions. The Ninth Circuit's decision here, which accentuated the circuit split, is illustration of the lack of movement toward a consensus position in the wake of the question left open in Loughrin. The court joined the minority view notwithstanding other circuits' contrary decisions, and invoked Loughrin to support its conclusion about subsection (1), even though Loughrin was tethered to subsection (2). Indeed, the Ninth Circuit invoked Loughrin despite this Court underscoring that the district court's subsection (1) analysis was "not material" to the question presented there. Loughrin, 134 S.Ct at 2388. In addition to solidifying the divide along existing lines, additional percolation is unlikely to benefit this Court, given that it has already analyzed the

text and history of the statute and relevant caselaw for purposes of Loughrin, and the question has now been addressed by each of the courts of appeals.

III. Following Loughrin, This Case Presents An Excellent Vehicle For Resolving The Enduring, And Increased, Circuit Split

This case presents an excellent vehicle for resolving the enduring conflict over subsection (1)'s intent requirement. First, the court of appeals directly addressed the question presented. (Pet. App. A3). Second, the court's answer to the question determined the outcome of the case, given that Shaw's sole defense was built around the interpretation of "intent to defraud a financial institution" for purposes of Section 1344(1), advanced herein. Third, the government never argued at trial, nor asserted at any time on appeal, that there was evidence to support a finding that Shaw intended to cheat a bank as opposed to just Hsu. Finally, neither the district court nor the Ninth Circuit questioned the lack of evidence that Shaw intended to cheat a bank, as opposed to just Hsu. The Ninth Circuit upheld Shaw's convictions for the sole reason that it construed Section 1344(1) to require only an intent to deceive, and not cheat, the bank. (Pet. App. A15).

IV. The Question Presented Arises Often And Is Outcome-Determinative For Many Federal Prosecutions

Just as with subsection (2), subsection (1) bank fraud is a federal crime that is frequently charged as a stand-alone offense, and also as a predicate in connection with other federal offenses, like aggravated identity theft and racketeering, 18 U.S.C. §§1028A; 1961(1). That will be all the more true now that this Court has

clarified the disjunctive construction of a statute that a number of circuit courts had previously construed conjunctively, as discussed supra Section I, and thus made clear that subsection (1) is a legally-distinct crime from subsection (2). Because the statute is important, the question presented here will repeat, and the existing conflict will endure post-Loughrin, intervention by this Court is warranted to ensure a uniform application to defendants across different jurisdictions.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: September 1, 2015

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