No. 15-5991

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government acknowledges that the Circuits are divided over whether 18 U.S.C. §1344(1) requires proof of intent to harm a bank. BIO 18-19. It agrees that a "significant" split may endure, and that review may be warranted in the future. See id. at 19-20. And it never denies that this case is a good vehicle to resolve the conflict. Instead, the United States spends the bulk of its brief arguing that the Ninth Circuit construed §1344(1) correctly. See BIO 11-17. That claim, even if true, would not diminish the need for review where the Ninth Circuit's minority-view decision only accentuated a split in the Courts of Appeals -- now three-to-nine -- on an issue of substantial practical importance.

But the Ninth Circuit's construction of §1344(1) to require proof of an intent to deceive, but not to harm, a bank is also wrong. As this Court has underscored, the dual hallmarks of fraud are deception and harm -- "wronging one in his property rights by dishonest methods or schemes." See McNally v. United States, 483 U.S. 350, 358 (1987). Consistent with this precedent, and as nine courts -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- have held, contrary to the Ninth Circuit's decision below, §1344(1)'s "scheme to defraud" requires proof of an intent to deceive and cheat a bank.

Nor is the government's position that review is "premature" in light of this Court's analysis of the bank-fraud statute in Loughrin v. United States, 134 S.Ct. 2384 (2014), BIO 11, more availing. The government depicts Loughrin as a decision that construed "the bank-fraud statute" as a whole, and on this basis, posits that the Courts of Appeals should be given "an appropriate opportunity" to reconsider

their binding §1344(1) Circuit precedent in its wake. BIO 11, 19-20. That position is at odds with Loughrin itself, which was tethered expressly to §1344(2), and characterized the lower court's §1344(1) analysis as "not material" to the question presented for the Court's determination. See Loughrin, 134 S.Ct at 2388. Because Loughrin's holding extends to §1344(2) only, the Circuits will have no basis, and thus no "appropriate opportunity," to reconsider their binding §1344(1) Circuit precedent, as the unpublished decision of the only other court to consider §1344(1) post-Loughrin makes clear. See United States v. Reese, 603 Fed. Appx. 63, 64 (2d Cir. 2015) (non-precedential summary order reading Loughrin to apply to §1344(2) only, and reasserting pre-Loughrin §1344(1) precedent requiring an intent to harm a bank). The government does not even offer a theory about how Loughrin provides an "appropriate opportunity," under governing standards in the Circuits, for courts to reconsider their §1344(1) precedent, thus implicitly conceding that the entrenched conflict is likely to endure, absent a decision from this Court.

Finally, the government's fleeting suggestion that the overlap between §1344(1) and §1344(2) "may" diminish the practical import of future conflict over §1344(1) is undercut by its own brief. BIO 20. The government acknowledges that, post-Loughrin, petitioner Shaw's scheme could be charged under §1344(2) -- but only because it (1) targeted bank funds and (2) involved fraudulent representations communicated to banks. See id. By extension, if Shaw's scheme had not involved false representations, it could only be charged under §1344(1), at best. Thus, Loughrin's holding -- that each clause is intended to have "separate meanings," and

that §1344(2) "demands that the defendant's false statement is the mechanism naturally inducing a bank. . .to part with its money," Loughrin, 134 S.Ct. at 2391-94 (emphasis added) -- ensures that the government will continue to charge bank fraud offenses under §1344(1), not just §1344(2). Indeed, as this Court noted, id. at 2390 n.4, and as the government acknowledges, BIO 17, "check-kiting" is one example of a scheme that can be charged under §1344(1), only, post-Loughrin. Fraudulent schemes that deceive banks through the omission or concealment of material facts are others. As such, the question whether §1344(1)'s "separate meaning" requires the government to present evidence of any further intent to harm a bank has only gained, not lost, importance after Loughrin.

I. Review Is Warranted Because The Ninth Circuit's Minority-View Decision Accentuated The Circuit Split, Now Three-to-Nine, On Section 1344(1)'s Intent Requirement

One of the principal purposes of this Court's certiorari jurisdiction is to bring about uniformity where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of federal law. See Supreme Court Rule 10(a) (July 1, 2013); see also Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 340 (2005) (certiorari granted in securities fraud case "[b]ecause the Ninth Circuit's views about loss causation differ from those of other Circuits that have considered this issue").

The government acknowledges that the Ninth Circuit's decision here conflicts with that of other Courts of Appeals, which have held that §1344(1) requires proof of intent to harm a bank. BIO 18. By way of example, the government cites the Second Circuit's decision in United States v. Nkansah, 699 F.3d 743 (2d Cir. 2012),

and the Third Circuit's decision in United States v. Thomas, 315 F.3d 190 (3d Cir. 2002), and further acknowledges that each was abrogated by Loughrin as to §1344(2), only, but remains Circuit law as to §1344(1). See BIO 18.

The government is correct that these cases are directly contrary to the decision of the Ninth Circuit in this case. Cf. United States v. Shaw, 781 F.3d 1130, 1135 (9th Cir. 2015) ("The statutory language focuses on the intended victim of the deception, not the intended bearer of the loss. Section 1344(1) requires the intent to deceive the bank. Section 1344(2) requires false or fraudulent representations or pretenses to third parties.") with Nkansah, 699 F.3d at 748 ("convictions for bank fraud are limited to situations where 'the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss'") (citation omitted); 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). Given the enduring importance of this issue, addressed below, this conflict, standing alone, would be enough to warrant the Court's review under the well-established ground reflected in Supreme Court Rule 10(a).

But, as these decisions acknowledged, and as other courts too have recognized, the split is even more pervasive. See Shaw, 781 F.3d at 1132 ("the circuits are divided as to the requirements of § 1344(1)"); Thomas, 315 F.3d at 196

("The Courts of Appeals are not of one mind as to the proper reading of the statute, including. . .the intent requirement[.]"); Nkansah, 699 F.3d at 762 (Lynch, J., concurring) ("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, nor on the relationship between the statute's two subsections."); United States v. Staples, 435 F.3d 860, 866-867 (8th Cir. 2006) (noting the circuit split as to whether the bank-fraud statute 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. Kenrick, 221 F.3d 19, 27 (1st Cir. 2000) (en banc) ("There is also no consensus among the circuits on the issue.").

That is because, in addition to the Second and Third Circuits, seven other courts -- the First, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- have agreed that §1344(1) requires proof of an intent to harm a bank. See Pet. 13-19 (discussing each Circuit's precedent). In particular, in a case closely analogous to Shaw, the Fifth Circuit held that §1344(a)(1) (now §1344(1)) did not apply to a scheme that, like petitioner's, was designed to take a third party's money from his bank account because "the government does not argue that [appellant] attempted to obtain funds belonging to the banks, but only that she attempted to obtain funds under the custody and control of the bank" -- "a violation of subsection (a)(2), not (a)(1)." United States v. Briggs, 939 F.2d 222, 225 (5th Cir. 1991). And two courts -

- the Sixth and the Eighth Circuits -- are in accord with the Ninth Circuit's view. See Pet. 20-21.

The division in the courts of appeals is thus undeniably clear. Although the government makes the unsubstantiated claim that "some" of the decisions discussed in the petition do not support the "asserted extent of the division of authority," BIO 18, it concedes that the existing split is "significant," that it may continue post-Loughrin, and that review may be warranted in the future. See id. at 19-20. Because the conflict in the Circuits is plain and irreconcilable, and because this case is an excellent vehicle to resolve the conflict -- a fact the government does not challenge -- the Court should grant the writ.

II. The Ninth Circuit's Minority-View Decision Is Wrong

In this context, where every court has opined on the question presented and Shaw only accentuated the divide, now 3-to-9, review would be warranted even if the Ninth Circuit's construction of §1344(1) were correct. But, contrary to the government's claim, see BIO 11-18, it is not.

In Shaw, the Ninth Circuit held that the only mens rea required by §1344(1) is an "intent to deceive the bank" -- not proof of a further intent to "cheat," "harm," or otherwise "victimize" a bank, however that additional requirement is formulated. See Shaw, 781 F.3d at 1135. In this respect, Shaw is contrary not only to precedent in nine other Circuits, but to this Court's jurisprudence too, which underscores that the essence of traditional fraud is the intent to cheat another via deception. In McNally, for example, the Court held that, at common law, the term "to defraud"

"refer[s] to wronging one in his property rights by dishonest methods or schemes," and "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'" 483 U.S. at 358 (emphasis added) (citation omitted). In Carpenter v. United States, 484 U.S. 19 (1987), likewise, the Court held that "scheme or artifice to defraud" means "any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations or promises." Id. at 27 (emphasis added). And, more recently, in Skilling v. United States, 561 U.S. 358 (2010), the Court emphasized that traditional fraud involves "the victim's loss of money or property." Id. at 400 (emphasis added). The Ninth Circuit's construction of §1344(1) to require no more than an intent to deceive a bank -- that is, no additional proof of an intent to harm a bank (or any third party, for that matter) -- cannot be reconciled with this Court's pronouncements about the dual hallmarks of fraud. Rather, it is petitioner's construction of §1344(1) to require proof of an intent to deceive and cheat a bank that is consistent with this precedent.

Although the government acknowledges McNally and Carpenter, BIO 12-13, it attempts to paint the Court's pronouncements as inconsistent with petitioner's construction of §1344(1). Specifically, the government reduces Shaw's position to a requirement of intent to cause "financial harm" to a bank, and asserts that the problem with this construction is that it fails to cover the intentional deprivation of intangible property rights. BIO 13. That argument does not make petitioner's position wrong because the requirement of intent to deceive and cheat is broad enough to cover schemes that target banks' property rights, both traditional and

intangible. Nor does it make the Ninth Circuit's decision correct.

Indeed, assuming arguendo §1344(1) includes schemes that target a bank's intangible property rights, the Ninth Circuit's decision remains equally incorrect: Shaw held that proof of an intent to deceive a bank, alone, was sufficient. See Shaw, 781 F.3d at 1135 ("Section 1344(1) requires the intent to deceive the bank" only). This leaves no room for the requirement of any further intent to cheat the bank consistent with McNally, Carpenter, and Skilling, whether "cheat" is broadly construed to mean traditional and intangible property rights, or more narrowly interpreted to mean traditional property rights only.

For the same reasons, nor does the legislative history cited by the government, BIO 13-14, make petitioner's construction wrong -- or the Ninth Circuit's construction right. As a preliminary matter, the legislative history for §1344 suggests that Congress did not originally intend for "schemes to defraud" to cover those that targeted intangible property rights, but may have come to accept the judicial expansion of the phrase by the time §1344 was enacted. See H.R. Rep. No. 901, 98th Cong., 2d Sess. 4 (1984) ("The [bank-fraud] section thus parallels the language of the current mail fraud and wire fraud statute ("scheme to defraud"), and is intended to incorporate case law interpretations. The Committee, however, is concerned by the history of expansive interpretations of that language by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions.")

(emphasis added); see also Skilling, 561 U.S. at 400 (beginning in 1941, "the Courts of Appeals, one after the other, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights").

But what the same legislative history for §1344 cited by the government, BIO 13, makes clear is that Congress was concerned with schemes designed to victimize banks' property rights by fraud (however broadly property rights had come to be understood). See S.R. Rep. No. 225, 98th Cong., 1st Sess. 377 (1983) ("T]here is a strong Federal interest in protecting the financial integrity of these institutions, and the legislation in this part would ensure a basis for Federal prosecution of those who victimize these banks through fraudulent schemes.") (emphasis added); id. at 378 ("in the proposed offense, jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution") (emphasis added). The Ninth Circuit's construction of §1344(1) to require proof of an intent to deceive a bank, only, is at odds with Congress's concern for schemes designed to victimize banks. Conversely, petitioner's construction of §1344(1) to require proof of an intent to deceive and cheat a bank is consistent with this history.

III. Loughrin Does Not Enable the Courts to Reconsider Binding §1344(1) Circuit Precedent

The government's position that review is "premature" in light of this Court's analysis of the bank-fraud statute in Loughrin, BIO 11, is also unavailing. Loughrin did not construe "the bank-fraud statute," cf. BIO 11, but instead §1344(2), only. See Loughrin, 134 S.Ct at 2387 ("The question presented is whether

the Government must prove that a defendant charged with violating that provision [§1344(2)] intended to defraud a bank.") (emphasis added). And Loughrin expressly characterized the lower court's §1344(1) analysis as "not material" to the question presented for the Court's determination. See id. Because Loughrin did not address what the "intent to defraud a financial institution" means for §1344(1) but held that the two sub-sections are legally distinct and that such proof is not required for §1344(2), id. at 2389-90, Loughrin will provide no "appropriate opportunity" for the Circuits to reconsider their binding precedent about §1344(1). Cf. BIO 11, 19-20.

Courts are typically bound by prior decisions of the Circuit unless and until the precedents established therein are reversed by this Court or en banc. The latter is "not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. Proc. 35(a). Some courts have carved out an exception to this rule, however, allowing precedent to be reconsidered without convening an en banc panel where an intervening decision of this Court is in conflict with, even if it does not expressly overrule, prior circuit authority.

As discussed above, the government identifies the Second and Third Circuits as examples of courts that are in direct conflict with the Ninth Circuit's construction of §1344(1) here. BIO 18. But the standard in these Circuits will not allow the precedent the government acknowledges to be contrary to Shaw -- the Second

Circuit's decision in Nkansah, and the Third Circuit's decision in Thomas, see id. -- to be reconsidered in light of Loughrin.

In the Second Circuit, the court may reconsider Nkansah only if Loughrin creates "a conflict, incompatibility, or inconsisten[cy]" between Circuit §1344(1) precedent and the Court's intervening decision. See In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F.3d 144, 155 (2d Cir. 2015) (citation omitted). And in the Third Circuit, the court may reconsider Thomas only if Loughrin is found to be "patently inconsistent" with Circuit authority, see Cox v. Dravo Corp., 517 F.2d 620, 627 (3d Cir.1975), or "in conflict" with it, see Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 294 n. 9 (3d Cir.1998). While the Ninth Circuit's standard is similar, other courts whose precedent conflicts with Shaw have an even more stringent carve-out. Cf. Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (where the reasoning or theory of prior circuit authority is "clearly irreconcilable" with intervening higher authority, the prior circuit opinion is effectively overruled) with Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 337 n.7 (4th Cir.1996) (permitting three-judge panels to overrule a prior panel upon the basis of a superseding decision of the Supreme Court); White v. Estelle, 720 F.2d 415, 417 (5th Cir.1983) (same, upon "intervening and overriding Supreme Court decisions"); Dawson v. Scott, 50 F.3d 884, 892 n. 20 (11th Cir.1995) (same, upon a "directly applicable" intervening Supreme Court decision).

The government fails to articulate any theory under which either court would have an "appropriate opportunity" to reconsider the precedent it acknowledges

directly conflicts with Shaw. That is because no such theory exists. Nothing in Loughrin comes even close to a "conflict" or "patent[] inconsisten[cy]" with the Third Circuit's decision in Thomas as to §1344(1). See Cox, 517 F.2d at 627; Mennen Co., 147 F.3d at 294 n.9. Likewise, Loughrin contains nothing approaching "a conflict, incompatibility, or inconsisten[cy]" with the Second Circuit's Nkansah's holding as to §1344(1). See In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F.3d at 155.

It is clear that the Second Circuit agrees. In Reese, 603 Fed. Appx. at 64, the court opted for a non-precedential summary order, rather than a published opinion, to review a challenge to appellant's §1344(1) conviction post-Loughrin. Therein, the court read Loughrin as impacting §1344(2) only. See id. ("the Supreme Court held that specific intent to defraud a financial institution was not an element of §1344(2)"). It then reasserted its pre-Loughrin §1344(1) precedent, citing, inter alia, to Nkansah. Id. ("[t]he defendant need only have intended to victimize the bank by exposing it to an actual or potential loss"). Although the government attempts to dismiss the Second Circuit's choice to resolve this matter in a non-precedential summary order that reasserts pre-Loughrin §1344(1) jurisprudence as a function of its finding of sufficiency-of-the-evidence, cf. BIO 19 n.*, the summary order makes clear -- both in its unpublished form and in its substance -- the court's belief that its §1344(1) precedent was unaffected by Loughrin, and thus endures as the standard by which the sufficiency of the evidence to support the §1344(1) conviction was to be assessed.

IV. Post-Loughrin, Whether §1344(1) Requires Proof Of An Intent To Cheat, Not Only Deceive, A Bank Is A Question Of Enduring Practical Importance

At the heart of Loughrin is its construction of §1344(2) to have a "separate meaning[]" from §1344(1): Whereas §1344(2) "demands that the defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money," it is "the first clause of §1344" that "includes the requirement that a defendant intend to 'defraud a financial institution.'" Loughrin, 134 S.Ct at 2389-91, 2393. Thus, "to read clause (1) as fully encompassing clause (2)" -- or 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.

The government acknowledges the distinction between §1344(1) and §1344(2), but nonetheless posits that the overlap between the provisions "may" diminish the practical import of future conflict over §1344(1). BIO 18, 20. Not so. Now that the Court has held that §1344(1) and §1344(2) are legally distinct, and has further defined §1344(2), the question posed by Shaw's petition as to §1344(1) remains, and calls out even more strongly for resolution.

That this question has enduring significance post-Loughrin finds additional support in Loughrin itself. There, this Court underscored that "Clause (2)" does not, following its construction, "emerge so broad as to wholly swallow Clause (1)," and gave check-kiting as but one example of a scheme that can be prosecuted under §1344(1) but not §1344(2):

> The Courts of Appeals, for example, have unanimously agreed that the Government can prosecute check-kiting (i.e., writing checks against an account with insufficient funds in a way designed to keep them from bouncing) only under Clause (1), because such schemes do not involve any false representations.

Loughrin, 134 S.Ct at 2390 n.4 (emphasis added). The same would be true of any other fraudulent scheme that deceives a bank via the concealment or omission of material facts.

The government recognizes the enduring role §1344(1) will play in check-kiting cases. BIO 18. It also acknowledges that petitioner's scheme could have been charged under §1344(2) -- but only because it (1) targeted bank funds and (2) involved fraudulent representations communicated to banks. BIO 20. Conversely, absent false representations, petitioner's scheme could not be charged under §1344(2). This in turn begs the question whether Shaw's conduct, in this scenario, would fall under §1344(1) instead -- the answer to which depends on §1344(1)'s reach, given the undisputed lack of evidence of Shaw's intent to cheat a bank.

Thus, post-Loughrin, §1344(1) will continue to play a significant role as a stand-alone offense -- at the least, where the "false statement" required by §1344(2) is absent. For the same reason, §1344(1) will continue to act as a predicate for other federal offenses, like aggravated identity theft and racketeering, 18 U.S.C. §§1028A, 1961(1). Indeed, the government's targeted use of §1344(1) should be greater now that this Court has clarified the disjunctive construction of a statute that a number of circuit courts had previously construed conjunctively. Defining the precise contours of §1344(1) has, in short, only become more important now that Loughrin

determined §1344(2)'s. Intervention by this Court, at this juncture, is warranted to ensure a uniform application of §1344(1) to defendants across different jurisdictions.

CONCLUSION

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

Respectfully submitted,

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