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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case is an excellent vehicle to resolve the question left open in Loughrin v. United States, 134 S.Ct. 2384 (2014), about which all of the circuits have now weighed in and remain openly, and increasingly, divided: Whether, for purposes of subsection (1) of the bank-fraud statute, 18 U.S.C. §1344, a "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as the majority of circuits -- nine of twelve -- have held and as petitioner Lawrence Shaw argued before the Ninth Circuit Court of Appeals, which instead joined the minority view in affirming his convictions for a scheme directed at a non-bank third-party.

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IN THE SUPREME COURT OF THE UNITED STATES

No.____________

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

Last year, this Court held that subsection (2) of the bank-fraud statute, 18 U.S.C. §1344, does not require proof of a "scheme to defraud a financial institution," and thus proof that the defendant intended to defraud a bank. See Loughrin, 134 S.Ct. at 2387. By contrast, Loughrin held, subsection (1) does. Id. at 2389-90. But Loughrin did not address what such proof entails -- e.g. whether subsection (1)'s "scheme to defraud a financial institution" requires proof of an intent not only to deceive, but also to cheat, a bank, as nine circuits -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- agree, and as petitioner Shaw argued here.

This case presents that question -- a recurring question about which all of the circuits have now weighed in and remain openly, and now increasingly, divided in the wake of Loughrin. Shaw's scheme was designed to steal bank-customer Stanley Hsu's money from his Bank of America account. The Ninth Circuit affirmed his convictions under subsection (1) of the statute 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, as opposed to just bank-customer Hsu, and neither the trial court, nor the court of appeals, questioned the fact that Shaw intended only to cheat bank-customer Hsu, not the banks. In so holding, the Ninth Circuit joined the minority view, construing §1344(1) to require proof of an intent to deceive -- but not to cheat -- a bank, in accordance with the Sixth and Eighth Circuits.

The divide over the requisite <u>mens rea</u> -- now nine-to-three -- is clear, entrenched, and unaffected by <u>Loughrin</u>. Given the Ninth Circuit's minority-view construction of subsection (1), it rejected Shaw's sole claims that his convictions should be reversed and entry of judgment of acquittal entered given the lack of sufficient proof of his intent to cheat a bank, or in the alternative, his case remanded for a new trial because the jury instructions allowed conviction without such proof.

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).

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[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.

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).

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

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

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 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 <u>and</u> 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 <u>or</u> 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 "<u>lied to the banks</u> about important material things. . .<u>because he did that</u>, 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). Rather, Shaw argued, proof of actual or potential loss to a bank is only relevant to the extent that it supports an inference that the defendant <u>intended</u> 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 <u>and</u> 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 aimed 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 <u>arguendo</u> 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 <u>intent</u> <u>to</u> <u>cheat</u> <u>a</u> <u>bank</u> 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 Ninth Circuit law "help[ed] to define the meaning in this circuit of §1344(1)'s element of intent 'to defraud,' and establish[ed] that it does not include intent to financially victimize the bank." (Pet. App. A4). The court also reasoned that this "result is fully consistent with the Supreme Court's decision in <u>Loughrin</u>, and indeed complements <u>Loughrin</u>'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.

Although Loughrin clarified the requisite mens rea for purposes of subsection (2) last year, when it held that §1344(2) does not require proof of a scheme, and thus an intent, "to defraud a financial institution" at all, it did not address what this language means. See Loughrin, 134 S.Ct. at 2384. Because subsection (1) does, by its terms, require evidence of a "scheme to defraud a financial institution," unlike subsection (2), the inter-circuit split endures about whether the first clause of the statute requires proof of an intent not only to deceive, but also to cheat, a bank, as nine circuits -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- agree, and as petitioner Shaw argued here.

That is the question presented here, where Shaw's scheme was directed at a non-bank third-party, bank-account-holder 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 <u>intent to cheat the bank</u> as opposed to Hsu, and neither the district court, nor the court of appeals, questioned the fact that Shaw intended only to cheat bank-customer Hsu and not the banks. 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).

The split -- now nine-to-three -- has thus increased after <u>Loughrin</u> with the Ninth Circuit's decision here, and every circuit now having weighed in on the question. As set forth below, this case presents an excellent vehicle for the Court finally to resolve the enduring post-<u>Loughrin</u> circuit conflict over the bank-fraud statute.

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

A. <u>Loughrin</u> 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." <u>Loughrin</u>, 134 S.Ct. at 2389. According to Loughrin, this element required the government "to show <u>not just that a defendant intended to obtain bank property</u> (as the jury [t]here found), <u>but also</u> that he specifically intended to deceive a bank," <u>Loughrin</u>, 134 S.Ct. at 2389 (emphasis added) -- proof, in other words, of an intent to deceive <u>and</u> 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 -- "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 circuit split as to whether 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, most courts of appeal have also opined about whether evidence of loss or risk of loss to the bank is necessary or merely permissible circumstantial evidence of 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 proof of potential loss to a bank to be necessary evidence of the requisite mens rea, the Fourth, Fifth and Eleventh Circuits have held it to be permissible circumstantial evidence of intent, and the Second Circuit has held it to be 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 -- 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 four circuits -- the First, Second, Third and the D.C. Circuit -- (as well as the Fifth Circuit, in certain other cases) had construed the two subsections of the bank-fraud statute conjunctively but held nonetheless that §1344 fails to cover schemes that were not designed 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), their interpretation of what proof is required by the "intent to defraud a financial institution" that appears on the face of section (1) remains the law in these circuits for purposes of §1344(1).

For example, in the first group of cases construing the statute disjunctively, the Fifth Circuit, has 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) (construing the statute conjunctively, instead, and holding that 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 has held 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, the Fourth Circuit has recognized subsection (1) and (2) as distinct substantive offenses, see United States v. Brandon, 298 F.3d 307, 311 (4th Cir. 2002), and has 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 "intended victim" of deceptive scheme). In so holding, the court relied on this Court's decision in McNally v. United States, 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. 350, 358 (1987)). In this context, the court held that 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 has reached the same conclusion about mens rea, construing the statute disjunctively, and holding 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, construing the statute disjunctively and holding 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, this court has held 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.

Turning to the second group of circuits that ascribe to the majority view -- courts that, before Loughrin, interpreted the subsections conjunctively -- the Second Circuit has held, 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 has 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 has also construed the two subsections of the bank-fraud statute conjunctively, and has 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, the Eleventh Circuit, in United States v. De La Mata, 266 F.3d 1275, 1298 (11th Cir. 2001), has 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 has further held that "'risk of loss' is merely one way of establishing intent to defraud in bank fraud cases." See id.

Like these circuits, the Third Circuit had also interpreted the bank-fraud statute conjunctively, and held it to require 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). Like the Tenth Circuit, the court has further held 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 construed the two subsections conjunctively, pre-Loughrin, holding 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 has further held that, in line with the Third and Tenth Circuits, that proof of potential loss to the bank is a required showing. 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, prior to the Ninth Circuit's decision in this case, only two circuits -- the Sixth and Eighth -- had held that bank fraud does not require proof of an intent to harm the bank.

In Staples, supra, the Eighth Circuit construed the two subsections of bank fraud disjunctively, as in Loughrin, and held: "As for subsection (1), we have held that 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).

Likewise, in Everett, supra, although the Sixth Circuit construed the two subsections of Section 1344 conjunctively, it resolved a prior intra-circuit split as to the requisite intent for bank fraud in accordance with the Eighth Circuit's view, holding that "to 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;" 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 (6^{th} 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 is circumstantial evidence of the requisite intent.

By joining the minority view, the Ninth Circuit further cleaved a circuit divide which now tallies 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 appeal, but to this Court's jurisprudence as well.

As a preliminary matter, the Court's holding conflicts with 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. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)) (emphasis added). The

Court has 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. 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 a violation of subsection (1), if 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 comes into conflict with Loughrin insofar as it underscored that the disjunctive structure of the bank-fraud statute nonetheless "signal[s] that each [clause] is intended to have separate meaning," id. at 2391. Thus, "to read clause (1) as fully encompassing clause (2)" -- or, effectively, 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 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 it "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 that §1344(1) requires proof of "risk of loss," and thus evidence of "technical issues of banking law," but rather proof that the defendant intended to expose the bank to actual or potential loss. In this respect, the mens rea analysis for §1344(1) is no different than for any other specific intent crime, which requires juries to pass judgment, based on direct and circumstantial evidence, about the inner workings of the human mind.

Further, 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. See e.g. Shaw, 781 F.3d 1130, 1135 (9th Cir. 2015) (Pet. App. A12-13) (discussing United States v. Wolfswinkel, 44 F.3d 782, 786 (9th Cir. 1995), a subsection (1) case in which the government presented uncontroverted testimony that the bank was obligated to pay a cashier's check written on non-sufficient funds, and 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").

And, as the Second Circuit reasoned in Nkansah, supra, where the technical ramifications of banking law, given a particular scheme's design, are less than clear, any "permissible inference" about the "requisite state of mind" from "the widely understood exposure of a bank" "cannot be extended to cases," like Shaw's, "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." See Nkansah, 699 F.3d at 750. In such cases, where 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: Provided there is a misrepresentation, it will have the option of proceeding under subsection (2) instead, which 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.

II. As Shaw Illustrates, The Conflict Over §1344(1)'s Intent Requirement Is Unlikely To Be Clarified By Further Decisions In The Court 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 can 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 though aware of 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, and resulting grant of judgment of acquittal, was "not material" to the question presented there. Loughrin, 134 S.Ct at 2388. Nor would additional percolation 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; indeed, 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 and, as evidenced by the Ninth Circuit's decision, has in fact increased, in the wake of Loughrin, intervention by this Court to ensure a uniform application to defendants across different jurisdictions is warranted.

CONCLUSION

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

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender

DATED: September 4, 2015

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Deputy Federal Public Defender
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Attorneys for Petitioner

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LAWRENCE EUGENE SHAW, *Defendant-Appellant*.	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
November 17, 2014—Pasadena California

Filed March 27, 2015

Before: Mary M. Schroeder, Harry Pregerson,
and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Criminal Law

The panel affirmed a conviction for a scheme to defraud a financial institution, in violation of 18 U.S.C. § 1344(1), in a case in which the defendant used PayPal to convince banks that he was a particular bank customer and thus had authority to transfer money out of that customer's bank accounts and into a PayPal account in the defendant's control.

The panel held that for a violation of § 1344(1), the government need not prove that the defendant intended the bank to be the principal financial victim of the fraud, and that the district court therefore correctly refused jury instructions that included such a requirement.

COUNSEL

Sean Kennedy, Federal Public Defender, Koren L. Bell (argued), Deputy Federal Public Defender, Los Angeles, California, for Defendant-Appellant.

André Birotte, Jr., United States Attorney, Robert E. Dugdale, Assistant United States Attorney, Tracy L. Wilkison (argued), Assistant United States Attorney, Los Angeles, California, for Plaintiff-Appellee.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

SCHROEDER, Circuit Judge:

Congress enacted the Bank Fraud Act in 1984, and ever since, the federal courts have grappled with whether its provisions require proof of an intent to cause harm to the bank itself. The Act contains two clauses: the first criminalizes schemes "to defraud a financial institution," and the second schemes to obtain bank assets or property under its control "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Last year, the Supreme Court held that the second clause does not require proof that the defendant intended to defraud the bank. *Loughrin v. United States*, 134 S. Ct. 2384, 2387 (2014). In this case, we deal with the first clause, which by its terms does require such proof. The question here is whether that means the government must prove the defendant intended the bank to be the principal financial victim of the fraud.

The principal intended victim in this case, at least according to the defendant, was a bank customer, Stanley Hsu. The defendant, Lawrence Shaw, had access to the victim's bank statements. The gist of Shaw's scheme was to use PayPal, an online payment and money transfer service, to convince the banks that he was Hsu and thus had authority to transfer money out of Hsu's bank accounts and into the PayPal account in Shaw's control.

The government charged Shaw with violating § 1344(1). Shaw sought a jury instruction that, under § 1344(1), the government had to prove not only that he intended to deceive the bank, but that he also intended to target the bank as the principal financial victim of the fraud, rather than the account holder or PayPal. The district court refused to give such an instruction, concluding that clause 1 required proof only that the defendant intended to deceive the bank, not that he also intended the bank to bear the loss.

While the circuits are divided as to the requirements of § 1344(1), our Ninth Circuit case law answers Shaw's argument. We have held that, to the extent § 1344(1) requires any intent to expose the bank to a risk of loss, the requirement is easily satisfied by the bank's having to bear some potential administrative expenses that necessarily result from being defrauded. *See United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995). We did not hold that the bank needed to be the intended financial victim of the fraud. In this case, a principal intended financial victim of the fraud was the bank customer who held the account, and our law has dealt with that specific situation. We have held that the statute is violated where the bank is the target of the deception, even if bank customers were the intended financial victims of the fraud. *See United States v. Bonallo*, 858 F.2d 1427, 1429–30, 1430 n.2 (9th Cir. 1988).

These cases help define the meaning in this circuit of § 1344(1)'s element of intent "to defraud," and establish that it does not include intent to financially victimize the bank. That 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. Section 1344(1) does require intent to defraud the bank, but neither clause requires the bank to be the intended financial victim of the fraud. We therefore affirm the conviction.

BACKGROUND

The charges in this case arose from a scheme defendant Shaw devised to take money from bank accounts belonging to Stanley Hsu, a Taiwanese businessman. Hsu opened a Bank of America account while working in the United States. When he returned to Taiwan, he arranged for the daughter of one of his employees to receive his mail in the States and forward it to him in Taiwan. Shaw was living with the daughter and routinely checked her mail. When Hsu's Bank of America statements began to arrive, Shaw opened them and learned Hsu's account and personal information.

Shaw used the information from Hsu's statements to execute the following scheme: he opened an email account in Hsu's name, then used this email account and Hsu's personal information to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. He was able to circumvent PayPal's security measures because of his access to the information in Hsu's bank statements.

On June 4, 2007, Shaw opened two accounts with Washington Mutual under the name of his father, Richard Shaw, without his father's knowledge or permission. One account was a savings account ("Tier 1" account), which Shaw linked to the fake Hsu PayPal account. During the process of linking the Tier 1 account with the Hsu PayPal account, PayPal identified the request as suspicious. PayPal sent an email to the fake Hsu email account asking for additional information. In response, Shaw faxed PayPal a copy of Hsu's Bank of America account statement, and a bank statement he had altered to appear as if Hsu owned the Richard Shaw accounts. He also sent a copy of Hsu's driver's license, which he had altered to have a younger birth date. On the basis of these falsified documents, Washington Mutual and PayPal allowed the savings account in the name of Shaw's father and the PayPal account in Hsu's name to be linked.

The second account Shaw opened in his father's name was a checking account ("Tier 2" account). This account was linked to the Tier 1 savings account. Shaw's scheme ultimately siphoned the funds into a third Washington Mutual account, a joint account which Shaw had previously opened in his and the daughter's name, although without her knowledge.

Once the accounts were set up and linked, Shaw began to withdraw money from Hsu's Bank of America account through a series of online transfers and checks written to himself. He would transfer money from the Hsu Bank of America account first to the Hsu PayPal account, then transfer it from the Hsu PayPal account to the Tier 1 savings account with Washington Mutual. Then, Shaw would transfer money from the Tier 1 account to the Tier 2 checking account, which allowed him to write checks to himself, signing his father's name. Finally, he would deposit those checks into the Washington Mutual joint account that he controlled.

Using this scheme, Shaw was able to convince the banks to transfer and release approximately $307,000 of Hsu's money to Shaw between June and October 2007. Hsu's son discovered the missing money in October 2007, reported the fraud and closed the Bank of America account.

Bank of America returned approximately $131,000 to Hsu, covering the fraudulent activity that occurred within 60 days of the reported fraud. PayPal reimbursed Bank of America for this amount. In the end, PayPal bore approximately $106,000 of the loss and Hsu over $170,000, because Hsu did not notify the banks of the losses within 60 days of many of the fraudulent transactions, as the parties all agree was required by standard banking practice.

DISTRICT COURT PROCEEDINGS

The government charged Shaw with 17 counts of bank fraud in violation of § 1344(1) and in December 2012 the case went to trial before a jury. The defense theory was that a bank fraud conviction under § 1344(1) requires fraudulent intent to expose the bank itself to monetary loss, and Shaw intended only to expose PayPal and Stanley Hsu to any monetary loss. Shaw argued that "intent to defraud" means intent to deceive and cheat the bank. Shaw therefore asked for jury instructions which would require the government to prove that Shaw had intended the bank to be not only the target of the deception, but to suffer an actual loss or risk of loss as the financial victim of the fraud. His requested instructions provided:

> (1) The defendant knowingly carried out a scheme to defraud [the bank]; that is a scheme designed to victimize [the bank] by causing [the bank], not only Stanley Hsu, monetary loss;
>
> (2) The defendant actively deceived [the bank] as to a material fact; that is, a fact that had a natural tendency to influence, or was capable of influencing, [the bank] to part with money or property;

> (3) The defendant acted with the specific intent to defraud [the bank]; that is, with the intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss.
>
> (4) [The bank] was federally insured by the FDIC.
>
> It is not enough for the government to prove that Mr. Shaw carried out a scheme to obtain Mr. Hsu's money by deceiving [the bank]. In order to convict Mr. Shaw, you must find that [the bank] itself was both the target of his deception and an intended victim of the fraud.

The district court declined to give Shaw's requested jury instructions. The district court concluded that risk of loss was an element that the bank fraud statute did not require, and that the bank need not be an intended financial victim of the fraud. Instead, the trial judge gave instructions based on a combination of model jury instructions and instructions used in previous bank fraud cases in the Ninth Circuit. The judge instructed the jury that:

> [i]n order for the defendant to be found guilty of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;

> Second, the defendant did so with the intent to defraud the financial institution; and
>
> Third, the financial institution was insured by the Federal Deposit Insurance Corporation.
>
> . . . .
>
> The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.
>
> . . . .
>
> An intent to defraud is an intent to deceive or cheat.

The jury convicted Shaw of 14 counts of bank fraud on December 13, 2012, and this appeal followed.

DISCUSSION

The bank fraud statute, 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.

In *Loughrin v. United States*, the Supreme Court construed the second clause, and held that it does not require the government to prove that the defendant intended to defraud the bank. 134 S. Ct. 2384, 2387 (2014). Section 1344(2) targets schemes to obtain property held by the bank via misrepresentation to a third party, while § 1344(1) penalizes schemes to defraud the bank itself. *See id.* at 2389–92. The Supreme Court effectively required courts to treat the two clauses separately, holding that while they overlap substantially, the clauses are disjunctive and establish distinct offenses. *Id.* at 2390, 2390 n.4.

In holding that the two clauses create separate offenses, the Court rejected the reasoning of the Third Circuit. *See id.* at 2388–89. The Third Circuit held that clauses 1 and 2 conjunctively create only one offense, and thus all violations of the statute require both the intent to defraud the bank and that the bank be exposed to a risk of loss under the relevant law. *United States v. Thomas*, 315 F.3d 190, 199–201 (3d Cir. 2002) (holding that under both clauses, "a defendant must intend to cause a bank a loss or potential liability, whether by way of statutory law, common law, or business practice" (internal quotation marks omitted)). The Supreme Court expressly held that § 1344(2) does not require either intent to defraud a bank or a risk of loss to a bank. *Loughrin*, 134 S. Ct. at 2389–90, 2395 n.9. In doing so, it emphasized that intent to defraud a bank is the essence of § 1344(1). *Id.* at 2389–90.

Shaw's argument in this case therefore focuses on the difference between the two clauses. He points out that the second clause covers schemes intended to obtain a third party's property. He argues that the first clause, under which he was convicted, therefore must require that a defendant intend to obtain the bank's property. Thus, he asks us to conclude that a conviction under § 1344(1) requires a showing that the defendant intended to expose the bank to the principal risk of loss. Such a requirement was not satisfied since, in this case, Shaw intended his principal target to have been the bank's customer, Hsu.

Shaw thus seeks to characterize the difference between the two clauses as involving the intended financial victim of the fraud, i.e., the intended bearer of the loss. The language of neither clause of the statute, however, refers to monetary loss or to the risk of such loss. 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. The Supreme Court made this point in *Loughrin* when it noted that the second clause was intended to broaden the scope of bank fraud to include schemes that did not involve deception of the bank directly, such as schemes to use stolen credit cards. *See* 134 S. Ct. at 2391–92. Section 1344(1) thus covers schemes to deceive the bank directly. Neither clause requires the government to establish the defendant intended the bank to suffer a financial loss.

Analysis of our circuit's law before *Loughrin* counsels the same result. In *United States v. Bonallo*, 858 F.2d 1427 (9th Cir. 1988), we recognized that under § 1344(1) the bank itself need not be the sole or primary victim of the scheme. Rather, the bank is defrauded within the meaning of § 1344(1) when it is the target of the deceit, even if the scheme targeted the bank's customer accounts as the source of the money. *See id.* at 1434 n.9.

In *Bonallo*, a bank employee withdrew funds from his own account via the ATM, then manipulated the bank's computer system to charge the withdrawals against other customers' accounts. *Id.* at 1429–30. The defendant argued that the other customers were the intended victims of his scheme and therefore the bank was not defrauded within the meaning of the statute. We rejected this argument, finding that the bank was the target of his misrepresentation, even if the customers' accounts were the source of the funds. *See id.* at 1434 n.9. In short, the defendant was guilty of bank fraud because he intended to deceive the bank.

In *United States v. Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995), we considered whether a risk of financial loss to a bank was as an element of § 1344(1). We held that even if there were such a requirement of financial loss to the bank, it was easily satisfied. The defendant was convicted of bank fraud under § 1344(1) after he engaged in a check-kiting scheme, during which he convinced a bank officer to sell him cashier's checks paid for with insufficiently-backed checks. *Id.* at 784. On appeal, Wolfswinkel argued that the government had to show he exposed the bank to a risk of loss under § 1344(1), and he had not, because he provided collateral to the bank to secure any losses for the bounced checks. *Id.* at 785–86.

In affirming Wolfswinkel's conviction, we recognized a circuit split as to whether § 1344(1) requires proof of risk of loss to the bank to establish the defendant's intent to defraud. *Id.* at 786. We held, however, that even assuming there were such a requirement, Wolfswinkel's scheme satisfied it. *See id.* Although he had provided security for potential losses, Wolfswinkel exposed the bank to a risk of loss in the form of administrative costs and the threat of competing creditor claims if it were forced to liquidate the collateral. *Id.* The defendant need not have intended the bank to bear the risk of losing the amount involved in the financial scheme itself.

The Supreme Court's decision in *Loughrin* does not affect the validity of our precedent, or undermine it in any way. If anything, it lends credence to our reluctance to impose any risk of loss requirement in a prosecution under the bank fraud statute. *Loughrin* confirms our 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. *See* 134 S. Ct. at 2389–90 (emphasizing that nothing in § 1344(2) requires specific intent to deceive a bank, which § 1344(1) already covers).

Shaw stresses that under the applicable law, the bank, in the end, did not actually lose anything. The losses ultimately fell on Hsu for failing to spot much of the fraud within the legally required 60 days, and on PayPal, which had to reimburse the bank for the rest. Shaw therefore asks us to conclude that he could not have intended to defraud the bank. A similar argument with respect to clause 2 was dismissed summarily in *Loughrin* on the ground that the federal statute was intended to avoid having cases turn on the technical ramifications of banking law. *Id.* at 2395 n.9. In characterizing § 1344(2), the Court said that the language "appears calculated to avoid 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." *Id.* We conclude that the same legislative intent must be ascribed to § 1344(1). There is no reason to believe Congress wanted courts to become more entangled in such technical issues under the first clause than under the second clause.

We recognize that some circuits have held that risk of financial loss to the bank is an element that must be proven under § 1344(1). *See, e.g.*, *United States v. Staples*, 435 F.3d 860, 866–67 (8th Cir. 2006) (discussing difference of opinion among circuits on whether intent to harm or cause the bank a risk of loss is required). The reason given is that the purpose of the statute is protection of the federal fisc, and that purpose is not served if the bank faces no financial risk. *See, e.g.*, *Thomas*, 315 F.3d at 201. Circuits adopting the requirement cite to the legislative history of the bank fraud statute, which shows that Congress enacted it because of the "strong federal interest in protecting the financial integrity of [federally insured financial] institutions." *See, e.g.*, *id.* (quoting S. Rep. No. 98-225, at 377 (1984), *reprinted in* 1984

U.S.C.C.A.N. 3182, 3517.); *United States v. Nkansah*, 699 F.3d 743, 759 (2d Cir. 2012) (same). But requiring proof of intent that a bank bear a risk of loss does not serve this end. The entity that bears the risk of loss does not necessarily depend upon the entity (i.e., the federally insured financial institution) that the defendant intends to harm. It depends on the operation of banking laws that, as this case demonstrates, may result in having the instruments of the fraud, like the bank's customers or entities like PayPal, ultimately bear the loss. A scheme that is intended to harm third parties may, in fact, end up hurting the bank, and vice versa. Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss. Requiring intent to harm the bank only makes it more difficult to prosecute bank fraud. *Nkansah*, 699 F.3d at 759 (Lynch, J., concurring); *see also Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Nkansah* concurrence with approval).

The Court in *Loughrin* held that § 1344(2) does not require intent to defraud a bank because the plain language of that section includes no such requirement. 134 S. Ct. at 2389–2390. We similarly decline to read an additional element into § 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law. The district court correctly refused instructions that included such a requirement.

AFFIRMED.

Appendix B

FILED

JUN 08 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LAWRENCE EUGENE SHAW, Defendant - Appellant.	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 Central District of California, Los Angeles ORDER

Before: SCHROEDER, PREGERSON, and NGUYEN, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing. Judges Pregerson and Nguyen have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

No. __________

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE EUGENE SHAW,
Petitioner,

- v. -

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I, Koren L. Bell, an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), hereby certify pursuant to Sup. Ct. R. 29 that on this 4th day of September, 2015, a copy of Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage-prepaid, to the Solicitor General of the United States, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington, DC 20530-0001, counsel for the Respondent.

Respectfully submitted,

DATED: September 4, 2015

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