No. 08-

IN THE

Supreme Court of the United States

CRYSTAL PORTER,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

STEPHEN U. BAER
THE BAER LAW FIRM
12830 Hillcrest Road
Suite 111
Dallas, Texas 75230
(972) 364-9020

JONATHAN D. HACKER
(*Counsel of Record*)
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. §§ 471 & 472, which prohibit making or passing "counterfeit[]" obligations of the United States, require the Government to prove, and the jury to find, that a bill was not only fake, but also similar enough to genuine currency to deceive an honest and unsuspecting person of ordinary observation and care.

PARTIES TO THE PROCEEDING

Petitioner is Crystal Porter, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Crystal Porter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

DECISIONS BELOW

The opinion of the court of appeals is reported at 542 F.3d 1088 and is reprinted in the Appendix ("App.") hereto at 1a. The trial court's judgment is unreported and is reprinted at App. 24a.

JURISDICTION

The court of appeals issued its decision on September 16, 2008. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on December 4, 2008. App. 36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 471 of Title 18 of the United States Code provides:

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 472 of Title 18 of the United States Code provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or

> other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 473 of Title 18 of the United States Code provides:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

For more than fifty years, the federal courts of appeals have uniformly agreed that the federal statutes criminalizing the acts of making, passing, and dealing in "counterfeit" money require the government to prove more than that a putative bill is fake—the bill must also be capable of convincing an honest, sensible person that it is genuine. In other words, "Monopoly" money is not *real* money, but neither is it "counterfeit" money. At least not before the decision below.

In this case, a divided panel of the Fifth Circuit held that the federal criminal statutes that prohibit making (18 U.S.C. § 471) and passing (*id.* § 472) "counterfeit[]" money require only that the bills at issue bear *some resemblance* to genuine currency, but they need not bear a resemblance that would be reasonably convincing to anyone. The court of appeals thus affirmed petitioner's conviction in this case, even though the trial court refused to instruct

the jury to find not only that the bills passed by petitioner were fake, but also that they bore such a likeness to genuine currency as to be calculated to deceive an honest person, and even though no reasonable jury could find that the bills in this case so resembled genuine bills as to deceive an honest person. The instruction requested by petitioner was drawn directly from the settled construction of 18 U.S.C. § 473, which prohibits dealing in counterfeit currency. By holding that § 473's sister statutes include no such requirement, the decision below gives a fundamentally different meaning to the act of counterfeiting addressed in closely related statutes. And as the dissent below expressly acknowledged, the decision below creates a circuit conflict over the meaning of "counterfeit" in the two federal currency counterfeiting offenses at issue here. Certiorari should be granted.

A. Factual Background

Joey Barrett lacked the funds to settle a $300 debt with a drug dealer known as Carlos, and was persuaded to let Carlos make fake money on a photocopier owned by Barrett's common-law wife, Erica Horton. App. 2a. At Barrett's house, Carlos made color copies of each side of a genuine $100 bill on manila paper, glued the images together, and crumpled them for effect; Horton drew lines on the images to evoke the magnetic strips embedded in real $100 bills. *Id.*

The end result was predictably unimpressive, which raised the question of how they would get someone to accept the obviously fake money. Horton suggested that a Wal-Mart cashier she knew, 18-

year-old petitioner Crystal Porter, might help them pass the money. *Id.* at 2a-3a. For reasons unrelated to the making of the fake money, petitioner happened to visit Horton, giving Horton occasion to show her some unfinished bills and to ask whether she would accept them at her register as payment for Wal-Mart gift certificates. *Id.* at 3a. Petitioner looked at the fake bills and said, "Yeah, this will work." *Id.* The next day, Horton and Barrett went through petitioner's checkout line and exchanged the fake bills for $500 worth of Wal-Mart gift cards. *Id.* They used $300 worth of those to pay off Carlos.

It took Wal-Mart little time to discover the fake bills and trace them back to petitioner's register. The company alerted the local police, who went to petitioner's home and soon elicited an admission from her that she had agreed to accept the fake bills at her register despite knowing they were not genuine. *Id.* The matter was referred to federal authorities, who saw fit to charge petitioner under 18 U.S.C. § 371 with conspiring to manufacture and utter counterfeit obligations of the United States in violation of 18 U.S.C. §§ 471 & 472. *Id.*

B. Proceedings Below

At petitioner's trial, witnesses testified about the verisimilitude—or, rather, lack thereof—of the bills. Barrett testified that the "touch and texture" of the bills was off and that their "color [was] not even close to what a real U.S. 100-dollar bill looks like." Record Excerpts ("RE") 32.[1] Barrett characterized the

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[1] RE citations are to the Record Excerpts filed in the court of appeals.

money as being, in his mind, "like Monopoly money." RE 33. Horton testified that "no one would believe [the money] was genuine," and that because of "the way it looked" one "would have to know somebody" in order to pass it. RE 38. And a Secret Service agent testified that one could tell the money was not genuine in "a matter of seconds." RE 35.

Petitioner moved for a judgment of acquittal, arguing that the bills she allegedly conspired to pass were so insufficiently genuine-looking that no reasonable jury could find her guilty of the predicate counterfeiting offenses, 18 U.S.C. §§ 471 & 472. App. 3a-4a. The district court denied the motion. *Id.* at 4a. Petitioner then asked the district court to give jurors the following instruction defining "counterfeit," drawn from Fifth Circuit caselaw construing the remaining federal counterfeiting offense, 18 U.S.C. § 473:

> A bill is counterfeit only if it possesses similitude: it bears such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

App. 4a. The district court refused to give the proposed instruction, stating that it did not wish to "focus[] the jury's attention too much on the definition of counterfeit, because this is really a conspiracy case, not a counterfeiting case," and "there never need[s] to be a completed object crime in order for you to have a completed conspiracy." *Id.* The court instead simply instructed the jury that "[t]o be coun-

terfeit, a Federal Reserve note must have a likeness or resemblance to genuine currency." *Id.* at 5a. The jury found petitioner guilty of conspiracy to commit the offenses of making and passing counterfeit money under §§ 471 & 472. App. 6a.

The Fifth Circuit affirmed. The court first rejected petitioner's argument that the evidence was insufficient to sustain her conviction because the fake bills were not counterfeit. The court did not directly state *what* suffices as "counterfeit" within the meaning of §§ 471 & 472, but simply decided the jury had enough evidence to render a conviction. App. 9a.

Petitioner also argued on appeal that the district court erred in denying her proposed instruction on the meaning of "counterfeit," thwarting her principal defense: that while she may have conspired to make and pass *fake* bills, she did not conspire to make and pass *counterfeit* bills, because the specific bills she agreed to pass (the only bills she agreed to pass) were so plainly incapable of deceiving an honest, sensible, and unsuspecting person.

A divided panel disagreed. The majority acknowledged that petitioner had drawn her proposed instruction from Fifth Circuit caselaw addressing the "dealing" offense of § 473. App. 11a-12a; *see United States v. Scott*, 159 F.3d 916 (5th Cir. 1998). The court held, however, that §§ 471 & 472 differ materially from § 473.

Section 473, noted the court, has a specific intent requirement lacking in §§ 471 & 472—the perpetrator must deal in false obligations "with the specific *intent* that they be perceived 'as true and genuine.'" App. 13a (quoting 18 U.S.C. § 473). The court rea-

soned that the difference in intent leads to a "difference between the required level of similarity of the bogus bills to the genuine ones." *Id.* To "defraud by making or passing copies of an obligation of the United States does not require a particularly high level or degree of similitude," the court said, but, "[i]n stark contrast, to pass, publish, or use false obligations with the level of intent required under § 473 ... requires that the phony bills have a substantially greater level or degree of similitude to the genuine article." App. 13a. Thus, the court concluded, while petitioner's proposed instruction might have been necessary if a § 473 offense had been the object crime in the conspiracy charge, the instruction given was appropriate where §§ 471 & 472 offenses were the object crimes. App. 13a. The court said that the "substance of [petitioner's] proffered instruction was substantially covered by the trial court's charge," such that the instruction given was appropriate "even if we were to assume *arguendo* that [petitioner's] was a correct statement of law." *Id.* at 14a.

Judge Haynes dissented in part. He agreed with the majority that a properly instructed jury could find that the bills at issue qualified as "counterfeit" under §§ 471 & 472. App. 15a. He strongly disagreed, however, that the jury had been properly instructed on the meaning of "counterfeit" in those statutes. Petitioner's proposed instruction was a correct statement of the law under § 473, Judge Haynes noted, and he saw no basis for construing "counterfeit" differently under §§ 471 & 472. App. 16a-17a. Section 473's intent requirement "might necessitate a different instruction on intent," Judge Haynes ex-

plained, "but it does not change the meaning of the word 'counterfeit.'" App. 17a-18a. Judge Haynes further noted that the main circuit precedent construing § 473 itself had relied on caselaw interpreting "counterfeit" under § 472. App. 18a (citing *Scott*, 159 F.3d at 920-21). The "majority's distinction" between § 473, on the one hand, and §§ 471 & 472, on the other, Judge Haynes emphasized, "puts our circuit at odds with our sister circuits," which had defined "counterfeit" under §§ 471 & 472 just as petitioner proposed. App. 18a-19a.

Judge Haynes also disagreed with the majority's suggestion that petitioner's proffered instruction was substantially covered in the given charge: "Neither the district court's definition nor any other portion of its jury charge instructed the jury to what degree, if any, the fake bills had to resemble real money." *Id.* at 20a. And the failure to give the proposed charge seriously impaired Porter's ability to present her defense—"the essence of conspiracy is the agreement to commit a particular crime," Judge Haynes noted, and petitioner had proffered evidence that she had agreed only to pass a specific fake bill, as opposed to any other bill that might qualify as counterfeit, and the fake bills she agreed to pass were arguably "not sufficiently real to deceive someone." *Id.* at 21a-22a. While in Judge Haynes' view a reasonable jury *could* find these bills to be counterfeit, he considered it equally true that with petitioner's instruction "a reasonable jury could also find to the contrary." *Id.* at 22a. Petitioner may have conspired to commit a theft under state law, he concluded, but he thought a properly instructed jury could find that she committed no federal crime. *Id.* at 15a n.1, 22a.

REASONS FOR GRANTING THE WRIT

This case raises a simple question of statutory interpretation: Should the term "counterfeit" in the statutes criminalizing the *making* and *passing* of counterfeit money be defined as the identical term is defined under the statute prohibiting *dealing* in counterfeit money? Put differently, do the first two federal criminal statutes concern themselves with making or passing merely fake money, or with making or passing fake money that looks genuine enough to be confused with real money? The decision below conflicts with decisions of the nine other courts of appeals to have defined "counterfeit" under 18 U.S.C. §§ 471 & 472, which have uniformly held that the phrase carries the same meaning it does under § 473: "bear[ing] such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." *United States v. Lustig*, 159 F.2d 798, 802 (3d Cir. 1947), *rev'd in part on other grounds*, 338 U.S. 74 (1949). By breaking from the consensus interpretation of §§ 471 & 472, the Fifth Circuit's decision dramatically expands the scope of those offenses, and exposes individuals in that jurisdiction to criminal liability that would not attach anywhere else in the country.

The Fifth Circuit's decision is also wrong. Sections 471, 472, and 473 all have their roots in the 1790 first crimes act, Act of Apr. 30, 1790, § 14, ch. 9, 1 Stat. 112, 115, and were re-enacted together in their near-current forms in a single 1909 Act, Act of

Mar. 4, 1909, Pub. L. No. 60-350, §§ 148, 151, 154, 35 Stat. 1088, 1115-17. The "'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995) (quoting *Dep't of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The Fifth Circuit gives a variable meaning to "counterfeit" that cannot be discerned in the text or history of the Act that produced the three sister offenses of making, passing, and dealing in counterfeit currency. Nor does the Fifth Circuit's basis for distinguishing the offenses based on § 473's intent requirement make any sense, as Judge Haynes recognized. The nine other courts of appeals to have considered the question are correct in holding that "counterfeit" under §§ 471 & 472 means both fake *and* calculated to deceive an honest, sensible person.

Finally, this is a suitable vehicle for resolving that circuit conflict. At the very minimum, the pathetic quality of the fake bills in this case means that a jury properly instructed that the §§ 471 & 472 counterfeiting offenses require proof of convincing genuineness easily could have concluded that petitioner did not conspire to commit those offenses here. *See Salinas v. United States*, 522 U.S. 52, 65 (1997) (a "conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense"). Indeed, petitioner submits that a reasonable jury could conclude nothing else from the record in this case. The undeniable threshold problem, however, is that her jury was denied the chance even to consider her defense that she conspired only to pass specific bills

that did not qualify as "counterfeit" under the predicate offense statutes.

Certiorari should be granted.

A. The Decision Below Creates A Circuit Conflict On The Meaning of "Counterfeit" Under §§ 471 & 472

As the dissent below noted, the Fifth Circuit's holding conflicts with decisions of numerous other circuits defining "counterfeit" under §§ 471 & 472. According to the Fifth Circuit, the district court "sufficiently defined 'counterfeit'" in instructing the jury that "counterfeit" means "hav[ing] a likeness or resemblance to genuine currency." That instruction sufficed, the court explained, because the making and passing counterfeit currency offenses of §§ 471 & 472 are materially different from their sister § 473 offense of dealing in counterfeit currency. The special treatment of "counterfeit" in §§ 471 & 472 significantly expands the reach of those offenses, and creates a category of liability unique to the Fifth Circuit.

The definition of "counterfeit" that is now generally accepted and that petitioner sought in her proposed instruction was first applied to currency in *United States v. Weber*, 210 F. 973 (W.D. Wash. 1913). There, the court construed the provision now codified at 18 U.S.C. § 474, which forbids the possession of any "security made or executed . . . after the similitude of any obligation . . . of the United States, with intent to sell or otherwise use the same," in the face of an objection that the subject fake notes purported to be an obligation not of the United States

but of "the Bank of the Empire State" and "the Bank of Howardsville." The court reasoned:

> [I]t is not necessary that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States. Nor is it necessary that the similarity or resemblance should be so great as to deceive experts, bank officers, or cautious men. *It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.* If the fraudulent obligation is of that character, the offense is made out, and whether such a similarity or resemblance exists is, in ordinary cases, a question of fact for the jury.

Id. at 976 (emphasis added) (construing § 150 of the March 4, 1909 Act).[2] The Third Circuit later adopted

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[2] The essence of the standard stated in *Weber* is actually much older. In *United States v. Sprague*, 48 F. 828 (D. Wis. 1882), for example, the court observed that to be fraudulent a bond must "bear[] such a likeness or resemblance to one of the genuine bonds of the United States as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest." *Id.* at 829 (quoting *United States v. Wilson* (E.D. Ark.; date unknown)). And in *United States v. Bogart*, 24 F. Cas. 1185 (N.D.N.Y. 1878) (No. 14617), the court stated, "[o]ne of the rules applicable to the offence of counterfeiting is, that the re-

that definition under what is now § 474 in *United States v. Lustig*, 159 F.2d 798 (3d Cir. 1947), and *Lustig* became the beacon for circuit and district courts construing the term "counterfeit" for the federal criminal counterfeiting offense statutes, including §§ 471, 472, and 473.

In *United States v. Smith*, 318 F.2d 94 (4th Cir. 1963), the Fourth Circuit held that the subject bills could not sustain a § 472 conviction because they were "an undisguised and rude forgery," and "not of such falsity in purport as to fool an 'honest, sensible and unsuspecting person of ordinary observation and care.'" *Id.* at 95 (quoting *Lustig*, 159 F.2d at 802). Following *Smith*, every other circuit to have addressed the issue has likewise applied the *Lustig* conception of counterfeiting to one of more of the three main federal counterfeiting offenses. *See United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970) (reversing § 472 conviction because a counterfeit obligation must be "calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest" (quoting *Weber*, 210 F. 973; citing *Lustig*, 159 F.2d 798, and *Smith*, 318 F.2d 94)); *United States v. Chodor*, 479 F.2d 661, 664 (1st Cir. 1973) (applying definition to convictions under §§ 472, 473, & 474); *United States v. Grismore*, 546 F.2d 844, 849 (10th Cir. 1976) (holding in § 472 case that *Lustig* formulation "is the proper jury instruction for the determination of that which is

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semblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution." *Id.* at 1185.

counterfeit"); *United States v. Fera*, 616 F.2d 590 (1st Cir. 1980) (adopting definition in § 473 case), *United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981) (adopting definition for purposes of §§ 471, 472, & 474); *United States v. Cantwell*, 806 F.2d 1463 (10th Cir. 1986) (adopting definition for purposes of § 471); *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988) (adopting definition in reversing convictions under §§ 471 & 472 because the bills were "patently fake and [could not] fool 'an honest, sensible and unsuspecting person of ordinary observation and care'"); *United States v. Wethington*, 141 F.3d 284 (6th Cir. 1998) (adopting definition in § 472 case); *United States v. Taftsiou*, 144 F.3d 287, 290 (3d Cir. 1998) (adopting this definition in a case under §§ 472 & 473); *United States v. Scott*, 159 F.3d 916, 920-21 (5th Cir. 1998) (adopting this definition in § 473 case); *United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir. 2000) (*Lustig* definition of "counterfeit" is correct for cases under §§ 471, 472, & 473); *United States v. Collett*, 135 F. App'x 402 (11th Cir. 2005) (applying definition in § 471 case) *cf. United States v. Hall*, 801 F.2d 356, 358-60 (8th Cir. 1986) (noting correctness of definition for "counterfeit" under § 472, but noting that an *altered* obligation might not need to have the same degree of similitude); *United States v. Hammoude*, 51 F.3d 288, 294 (D.C. Cir. 1995) (stating, in a case involving 18 U.S.C. § 1546(a), that "[t]o pass as a counterfeit, an image must bear such a likeness to the original as 'is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care deal-

ing with a person supposed to be upright and honest'" (quoting *United States v. Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992))).[3]

Thus, nine courts of appeals—the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have adopted petitioner's construction of "counterfeit" for purposes of § 471. Four courts of appeals—the Fourth, Seventh, Tenth, and Eleventh Circuits—have applied it to § 472. And three circuits—the First, Third, and Eleventh—have held that the same definition applies to § 473 *and* either § 471 or § 472. Until the Fifth Circuit's decision, *none* of the courts of appeals ever suggested that § 473 stands alone on this point, and that some other conception of counterfeiting is appropriate for §§ 471 & 472.[4] That conflict warrants resolution by this Court.

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[3] The courts of appeals have also regarded the currency-counterfeiting definition as single in applying that definition to other counterfeiting provisions. *See, e.g., United States v. Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992) (observing that the "yardstick [for counterfeit currency] has routinely been applied to other documentary imitations").

[4] Several courts have speculated that §§ 471 & 472 is *narrower* than § 474, because the latter offense "is intended to cover a much broader range of counterfeiting enterprises than the predecessor statutes of sections 471 and 472," in that it governs securities made "in whole or *in part*" after the similitude of a U.S. security. *Johnson*, 434 F.2d at 829-30; *Chodor*, 479 F.2d at 664 n.3; *accord, e.g., Ross*, 844 F.2d at 190-91; *United States v. Harrod*, 168 F.3d 887 (6th Cir. 1999). No court has previously suggested that §§ 471 & 472 should be given a more *expansive* definition than either § 473 or § 474.

B. The Decision Below Incorrectly Construes The Meaning of "Counterfeit" Under §§ 471 & 472

1. The Constitution expressly grants Congress the power to punish "counterfeiting the Securities and current Coin of the United States," U.S. Const. art. I, § 8, cl. 6, and the first Congress wasted little time in executing that power. In its Act of April 30, 1790, Congress provided that if

> any person or persons shall falsely make, alter, forge or counterfeit ... any certificate, indent, or other public security of the United states, or shall utter, put off, or offer, or cause to be uttered, put off, or offered in payment or for sale any such false, forged, altered or counterfeited certificate, indent, or other public security, with intention to defraud any person, knowing the same to be false, altered forged or counterfeited ... every such person shall suffer death.

Act of Apr. 30, 1790, § 14, ch. 9, 1 Stat. 112, 115; *see Weems v. United States*, 217 U.S. 349, 399-400 (1910) ("By § 14 of the first crimes act (Art. April 30, 1790, ch. 9, 1 Stat. 115), forgery, etc., of the public securities of the United States, or the knowingly uttering and offering for sale of forged or counterfeited securities of the United States with intent to defraud, was made punishable by death."). Thus, from the earliest days of the Republic, it has been a federal crime to make, pass, or sell counterfeit currency.

The Constitution's Framers and the first Congress had an obvious reason for singling out for such emphasis the federal crime of counterfeiting U.S.

currency: to protect the nascent federal monetary system from the widespread circulation of genuine-looking but worthless notes, which would severely undermine public confidence in the value of the new Nation's currency. As this Court has observed, Congress's purpose in enacting the currency-counterfeiting offenses was "the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals." *Prussian v. United States*, 282 U.S. 675, 678 (1931); *see United States v. Turner*, 32 U.S. (7 Pet.) 132, 136 (1833) ("The object [of the 1816 act] is to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank"); *Dunbar v. United States*, 156 U.S. 185, 193 (1895) (the purpose of § 472's predecessor was "the protection of the bonds or currency of the United States").

The substance of the federal counterfeiting offenses has remained essentially the same since 1790. Congress has revised the penalties over time, first reducing the punishment from death to ten years' imprisonment, *see* Act of March 3, 1825 § 17, ch. 65, 4 Stat. 115, 119, then increasing it to fifteen years' imprisonment, Act of June 30, 1864 § 10, ch. 172, 13 Stat. 218, 221. In 1909, Congress separated the offenses of making, passing, and dealing in counterfeit currency into distinct provisions with their own penalties. *See* Act of March 4, 1909, Pub. L. No. 60-350, § 148, 35 Stat. 1088, 1115 (making counterfeit obligations of the United States punishable by fifteen years of imprisonment); *id.* § 151, 35 Stat. at 1116 (passing counterfeited obligations of the United States punishable by fifteen years' imprisonment); *id.* § 154, 35 Stat. at 1117 (buying, selling, exchang-

ing, transferring, receiving, or delivering counterfeited obligations of the United States punishable by ten years' imprisonment); *see also United States v. Sacks*, 257 U.S. 37, 39-40 (1921) (describing the three provisions). Finally, in 1948, Congress enacted §§ 471, 472, & 473 as a trio in its consolidation of the federal criminal laws in Title 18 of the United States Code. Act of June 25, 1948, Pub. L. No. 80-772, §§ 471, 472, & 473, 62 Stat. 683, 705-06. Under the 1948 Act, whoever, "with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States" faced fifteen years in prison, *id.* § 471; whoever, "with intent to defraud, passes, utters, publishes, or sells ... any falsely made, forged, counterfeited, or altered obligation or other security of the United States" also faced fifteen years in prison, *id.* § 472; and whoever "buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine" faced ten years in prison, *id.* § 473.[5]

2. It is axiomatic that an Act of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Rather, a statute is understood to be "a symmetrical and coherent regulatory scheme . . . in which the operative words . . . should normally be given the same meaning." *Watson v. United States*, 128 S. Ct. 579, 584 (2007) (quoting *Gustafson*, 513

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[5] The current version of these offenses employs the same language to define each offense, but each is now punishable by 20 years' imprisonment. *See* 18 U.S.C. §§ 471, 472, 473.

U.S. at 569). It is thus a "standard principle of statutory construction" that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 127 S. Ct. 2411, 2417 (2007); *see Gustafson*, 513 U.S. at 570 (the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning" (quotation omitted). That maxim is "doubly appropriate" when the subject language "was inserted into [the statute] at the same time," *Powerex*, 127 S. Ct. at 2417, and perhaps triply so when identical words are used "in the same section of the same enactment," *Dewsnup v. Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting) (emphasis deleted).

As noted, the making, passing, and selling of counterfeit currency was first criminalized in a single provision in 1790, and the crimes were enacted in their current forms in successive provisions of the 1909 Act. The language of each provision mirrors the others; § 471 prohibits "falsely mak[ing], forg[ing], counterfeit[ing], or alter[ing]" U.S. obligations, while §§ 472 & 473 prohibit passing or dealing in falsely made, "forged, counterfeited, or altered" U.S. obligations. It follows from the tight relationship between the three provisions that the key term "counterfeit" should be construed identically in all three provisions. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (particularly when provision refers back to identical term in preceding provision, the terms should be construed as the same).

3. The Fifth Circuit majority's contrary interpretation—treating "counterfeit" to mean merely "fake"

in §§ 471 & 472, while requiring proof of convincing genuineness under § 473—lacks merit. The court of appeals' theory turns on § 473's separate "intent" element, which requires proof that the alleged dealer of counterfeit notes intended them to be "passed" as genuine. Because a dealer must intend the "counterfeit" notes to be passed as genuine, the court of appeals reasoned, it makes more sense to construe the meaning of "counterfeit" itself in that context to require convincing genuineness. But as the dissent below recognized, the different, specific intent requirement of § 473 at most means that a § 473 charge requires a *different instruction on intent*, viz., that the defendant intended to pass the counterfeit note as genuine. There is no basis for reading the special intent element of § 473 back into the definition of "counterfeit" itself in § 473, thereby distinguishing it from the term as used in §§ 471 & 472. For decades courts have understood that "counterfeit" currency is a technical term meaning *more than* just fake money, but instead fake money made to appear so genuine as to deceive an honest and unsuspecting person. The special intent requirement applicable to those who deal in "counterfeit" currency does nothing to change the accepted understanding of what "counterfeit" currency is.[6]

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[6] What is more, §§ 471 & 472 also include an intent requirement: the person must make or pass counterfeit notes with the intent to defraud. In the vast majority of situations, a scheme to defraud by making or passing fake money will necessarily involve bills that look genuine enough to deceive. If the prescribed intent affects the definition of counterfeit, then, the term should have the same meaning for maker and passer liability as it does for dealer liability. And to the extent schemes

There is further reason to reject the Fifth Circuit's construction. As explained above, *supra* pp. 16-17, the currency-counterfeiting offenses exist to protect the monetary system from the circulation of fake-but-genuine-looking notes, not to punish individual frauds that do not reflect the kind of conduct that motivated the Framers to write the counterfeiting crime directly into the Constitution, and the first Congress to subject perpetrators to punishment by death. The threat to the monetary system from genuine-looking but worthless notes exists whether a defendant is making, passing, or dealing in the notes—confirming that the act of "counterfeiting" should be construed *in pari materia* for all three offenses.[7] And the threat is assuredly *not* present where, as here, "any school child, or the most illiterate person, would not be duped into accepting" as genuine the paper at issue, *United States v. Gellman*, 44 F. Supp. 360, 363 (D. Minn. 1942)—confirming that convincing genuineness is a foundational requirement for all three offenses.

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to defraud and other criminal acts—like simple theft—can be accomplished by using Monopoly money, as it were, there are plenty of criminal statutes available to punish and deter such behavior. The federal counterfeit offenses target the distinctly wrongful and especially dangerous act of using money that looks real enough to deceive someone, which is conduct that poses a specific threat to the nationwide monetary system. *See supra* pp. 16-17.

[7] Indeed, when the three offenses were first segregated into different provisions, § 471 & § 472 violations were punished more harshly than § 473 violations. *See supra* pp. 17-18. There is no reason to believe Congress considered the makers and users of amateurish false notes more culpable than the sellers of high-quality false notes.

In *Prussian*, this Court refused to enlarge § 471's predecessor to cover forged endorsements on government drafts, mindful that "strained construction[s]" are "inadmissible in the interpretation of criminal statutes." 282 U.S. at 677. The strained interpretation of §§ 471 & 472 adopted by the decision below likewise should not be permitted to subject individuals, including petty wrongdoers, to special federal criminal liability and punishment within the Fifth Circuit's boundaries.

C. This Case Is An Appropriate Vehicle For Clarifying The Definition Of Counterfeit In 18 U.S.C. §§ 471 & 472

This case presents a clean vehicle for resolving the circuit conflict created by the decision below. Because of the amateurish quality of the bills at issue in this case, a properly instructed jury could decide—indeed, petitioner submits, would be required to decide—that the bills petitioner agreed to accept did not qualify as "counterfeit," and thus could not support petitioner's conviction for conspiracy to make or pass counterfeit bills. The district court thought the conspiracy charge warranted a more general instruction so that the jury did not get caught up in the details of what is and is not counterfeit. But a "conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense," *Salinas v. United States*, 522 U.S. 52, 65 (1997), and if petitioner did not join a plan to make counterfeit money, she cannot be convicted of conspiring to violate §§ 471 & 472. This Court itself previously considered the meaning of § 471 in a case charging conspiracy to commit that object offense. *United States*

v. Janowitz, 257 U.S. 42, 43-44 (1921). It can and should do the same here.[8]

The panel majority's assertion that the given charge substantially covered petitioner's requested charge even "assum[ing] *arguendo* that hers was a correct statement of the law" (App. 14a) is patently wrong and presents no obstacle to review. As the dissent below pointed out, the charge given allowed the jury to convict petitioner on the theory that the bills merely had "a likeness or resemblance to genuine currency," even if the bills did not have even an outside chance of fooling anyone. App. 20a. "Neither the district court's definition [of counterfeit] not any other portion of its jury charge instructed the

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[8] There would be no merit in any suggestion that petitioner's conspiracy conviction may stand because she agreed to commit the object offenses of making and passing counterfeit bills and took overt steps toward accomplishing those objectives, even if the bills employed ultimately did not qualify as "counterfeit" under the traditional definition. That argument cannot save the conviction because petitioner's trial theory was that she at most agreed to make or pass *only* the amateurish bills, and because those bills were not "counterfeit," she did not conspire to commit the offenses of making and passing counterfeit bills. The decision below correctly recognizes that the poor-quality bills were the specific bills she conspired to pass (App. 8a-9a), and nothing in the record suggests otherwise. Accordingly, a properly instructed jury would have been entitled to agree with petitioner that whatever conspiracy she may have joined—perhaps a conspiracy "to commit simple theft," as the dissent proposed (App. 15a)—it was not a conspiracy to make and pass counterfeit bills. *See* App. 22a ("with Porter's jury instruction, a reasonable jury could also find . . . that the specific bills she agreed to pass were not sufficiently real to qualify as counterfeit"). The denial of her proposed instruction precluded that defense altogether.

jury to what degree, if any, the fake bills had to resemble real money." *Id.*

Finally, the court of appeals made plain its holding that §§ 471 & 472 define "counterfeit" differently from § 473. It is inconceivable that courts in the Fifth Circuit, or future Fifth Circuit panels, will consider themselves free to define §§ 471 & 472 as requiring proof of the same degree of genuineness required under § 473. The court of appeals' erroneous construction of §§ 471 & 472 is properly presented and should be reversed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

STEPHEN U. BAER
THE BAER LAW FIRM
12830 Hillcrest Road
Suite 111
Dallas, Texas 75230
(972) 364-9020

JONATHAN D. HACKER
(*Counsel of Record*)
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner