No. _____________

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTINE THERESA EVERETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held, in acknowledged conflict with the First, Second, Fifth and Seventh Circuits, that the crime of bank fraud under 18 U.S.C. § 1344 does not require proof of an intent to defraud a federally insured or chartered bank (or at least to expose the bank to a risk of loss), but only proof that a defendant "in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control."

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PETITION FOR A WRIT OF CERTIORARI

Justine Theresa Everett respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 270 F.3d 986. The order denying rehearing en banc and panel rehearing (App., *infra*, 17a) is unreported. The order of the district court denying Everett's motion for entry of judgment of acquittal, or, in the alternative, for a new trial (App., *infra*, 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2001 (App., *infra*, 1a), and rehearing was denied on January 4, 2002 (App., *infra*, 17a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The bank fraud statute, 18 U.S.C. § 1344, the closely related mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and the provision defining "financial institution" for purposes of the bank fraud statute, 18 U.S.C. § 20, are set forth at App., *infra*, 18a-22a.

STATEMENT

A. The Statutory Framework

In 1984, Congress enacted the bank fraud statute (Pub. L. No. 98-473, 98 Stat. 2147) to fill "serious gaps * * * in Federal jurisdiction over frauds against banks and other credit institutions" that are "organized or operating under Federal law or whose deposits are federally insured." S. Rep. No. 98-225, at 377, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3517. Prior to the statute's enactment, federal

prosecutors had to rely on the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, as well as on miscellaneous laws such as the bank false statement statute, 18 U.S.C. § 1014, to combat frauds perpetrated against federally chartered or insured banks. S. Rep. No. 98-225, at 377, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3517. Over time, however, these alternative means of combating bank fraud had become less effective as a consequence of legal developments. See, *e.g.*, *Williams* v. *United States*, 458 U.S. 279, 284-90 (1982) (holding that bank false statement statute does not reach the deposit in federally insured bank of "bad checks" or check-kiting); *United States* v. *Maze*, 414 U.S. 395, 400-06 (1974) (in reversing mail fraud convictions based on use of bank credit card, holding that government must prove that use of the mails played a significant part in bringing the fraudulent scheme to fruition). See also S. Rep. No. 98-225, at 377-78, *reprinted in* 1984 U.S.C.C.A.N. at 3518.

As amended, the bank fraud statute currently 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.

18 U.S.C. § 1344.[1] "Financial institution" is defined at 18 U.S.C. § 20. App., *infra*, 18a-19a. The statute was expressly "modeled on" the wire and mail fraud statutes, but the basis for federal

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[1] As originally enacted, the statute prescribed a punishment of a fine of "not more than $10,000, or imprison[ment of] not more than five years, or both." 18 U.S.C. § 1344(a) (Supp. IV 1986). In 1989, in the wake of the savings and loan crisis, Congress amended the statute by (1) increasing the maximum penalty to a fine of $1 million and 20 years imprisonment; (2) replacing the phrase "federally chartered or insured financial institution" with the defined term "financial institution"; and (3) eliminating subsection (b), which had defined "federally chartered or insured financial institution," as well as omitting the then-unnecessary designation of subsection (a) from the balance of the provision. Pub. L. 101-73, 103 Stat. 500. In 1990, Congress again increased the penalty, raising the maximum prison term to 30 years. Pub. L. 101-647, 104 Stat. 4861.

jurisdiction is different. S. Rep. No. 98-225, at 378, *reprinted in* 1984 U.S.C.C.A.N. at 3519. Federal jurisdiction in the mail and wire fraud statutes is predicated on "the use of the mails or wire communications." *Ibid.* Under the bank fraud statute, federal jurisdiction "is based on the fact that the *victim* of the offense is a federally controlled or insured institution." *Id.* at 378-79 (emphasis added).

Like the bank fraud statute, the mail and wire fraud statutes reach any "scheme or artifice" not only (1) "to defraud" but also (2) "for obtaining money" (or other "property") "by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. §§ 1341, 1343. As this Court has made clear in several cases involving the mail fraud statute, the second half of this formulation is not independent of the "to defraud" clause. *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000); *McNally* v. *United States*, 483 U.S. 350, 357-59 (1987). Rather, "the second phrase simply modifies the first by 'mak[ing] it unmistakable that the statute reached false promises and misrepresentations *as to the future* as well as other frauds involving money or property.'" *Cleveland*, 531 U.S. at 26 (emphasis added) (quoting *McNally*, 483 U.S. at 359). Accordingly, in *Cleveland*, this Court rejected the government's argument that the "second phrase * * * defines a separate offense." *Ibid.*

B. The Proceedings Below

1. Petitioner Justine Theresa Everett worked for an accounting firm as a certified public accountant. App., *infra*, 3a. Her clients included Expert Auto Body, Inc. ("Expert Auto"), a business in Massillon, Ohio owned by Mark Stein. *Ibid.* When Everett left her accounting firm in May 1992 to establish her own practice, she continued to do accounting work for Expert Auto. *Ibid.*

Kathy Mariani worked for the same accounting firm as Everett. App., *infra*, 3a. After Everett introduced Mariani to Stein, he hired Mariani to work for him as a bookkeeper. *Ibid.*

Mariani was responsible for accounts receivable, accounts payable, and the recording of all checks in a check register. *Ibid.* Expert Auto maintained a bank account at First National Bank until approximately 1994, when the company moved its account to Bank One. Tr. 98, 100. Mariani was a co-signer on these accounts, but she generally signed Stein's name to checks. *Ibid.* Everett was not an authorized signer on either account, but occasionally Stein or Mariani told Everett she could sign Stein's name to specific checks. *Ibid.*

When Mariani left her position at Expert Auto, her successor discovered discrepancies between the business records and the bank records. App., *infra*, 3a. After Stein reported his suspicions to the police, an FBI financial analyst reviewed the company's bank accounts and bookkeeping records. *Ibid.* The analyst found negotiated checks totaling $96,648.47 that had been issued to Everett or made payable to cash and endorsed by Everett. *Ibid.*

Everett and Mariani were each charged with two counts of bank fraud and aiding and abetting pursuant to 18 U.S.C. § 1344. Count One of the indictment charged Everett and Mariani with bank fraud in connection with Bank One. Count Two charged Everett and Mariani with bank fraud in connection with First National Bank. Mariani pleaded guilty to both counts, and testified as a government witness. Everett proceeded to trial.

2. The trial commenced on June 12, 2000. Mariani testified that Everett had asked her to issue checks for services Mariani knew Everett had not performed. App., *infra*, 4a. Mariani further testified that, after issuing an unauthorized check, either she or Everett would enter false information in the check register to conceal the illegitimacy of the checks. *Ibid.* According to Mariani's testimony, before she left Expert Auto, she and Everett removed the bank records and old checks to prevent detection of their scheme. *Ibid.*

After the government rested, the district court granted Everett's motion under Fed. R. Crim. P. 29 to dismiss Count Two of the indictment because the relevant checks drawn on First National Bank had been signed by Mariani, who was an authorized signatory. Tr. 450-51. Because Mariani had been authorized to sign these checks, the district court reasoned, First National Bank had not been subjected to any risk of loss. Tr. 451.

With respect to the remaining count, the trial court instructed the jury that one element of bank fraud was that petitioner acted "with the intent to defraud Bank One." Tr. 741. It also instructed the jury, however, that "[t]o act with an intent to defraud means to act knowingly and with the intention or the purpose to deceive or to cheat. An intent to defraud is accompanied, ordinarily, by a desire or a purpose to bring about some gain or benefit to oneself or to some other person by a desire or a purpose to cause some loss *to some person*." Tr. 743 (emphasis added). Everett's counsel did not object to this last instruction.

On June 19, 2000, the jury returned a verdict of guilty on Count One pursuant to 18 U.S.C. § 1344. Everett thereafter moved motion under Fed. R. Crim. P. 29 and 33 for a judgment of acquittal or, in the alternative, for a new trial, arguing that the evidence was insufficient to support a guilty verdict.

On July 19, 2000, the district court denied the motion in an unpublished order. App., *infra*, 10a-16a. The Bank One checks at issue in Count One, the district court explained, "did not all bear the *authentic* signature of a person authorized to sign them" (because, according to Everett's testimony, she signed Mark Stein's name to them). *Id.* at 14a (emphasis added). The trial court rejected Everett's argument that, because Stein had authorized her to sign his name, Stein could not have sued the bank for honoring these checks. *Ibid.* "Had Bank One honored a check which bore

Stein's name signed by another," the court explained, it "would have been *potentially* liable on a lawsuit by Stein." *Ibid.* (emphasis added). "Whether or not it would have been *ultimately* liable," the district court reasoned, "might turn on issues such as whether Stein had authorized Everett to sign his name and, if he did, whether such authorization was effective." *Ibid.* (emphasis added). "But requiring a bank to face possible suit, which would require it to prove these kinds of defenses in order to escape liability," the court reasoned, constituted a potential loss to the bank. *Ibid.* "Thus, even Stein's authorization of Everett to sign his name does not remove Everett's conduct from the ambit of § 1344." *Id.* at 15a. And in any event, the court explained, "it was for the finder of fact to determine whether [Everett] was authorized to sign Stein's name." *Ibid.*

On September 20, 2000, Everett was sentenced to fourteen months' incarceration and three years of supervised release.

3. A panel of the Sixth Circuit affirmed. App., *infra*, 1a-9a. The court of appeals acknowledged that the bank fraud statute requires the government to prove "that the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution" and "that the defendant did so *with the intent to defraud*." App., *infra*, 4a (emphasis added). Petitioner contended that there was no proof that she actually "intended to defraud *a federally insured bank*, or at least put the bank at a risk of loss" (as opposed to "intend[ing] to defraud *her client*," Mark Stein). *Id*. at 5a (emphasis added).

In rejecting this argument, the Sixth Circuit observed that "the [c]ircuits are not in accord as to the intent required to violate § 1344." App., *infra*, 5a & n.3 (citing numerous cases). For example, it noted that the First, Second and Seventh Circuits all require proof of a specific intent to defraud a federally insured or chartered financial institution. The First Circuit requires a showing

of "intent to deceive [a] bank in order to obtain money or property from it," but not "intent to harm." App, *infra*, 5a n.3 (citing *United States* v. *Kenrick*, 221 F.3d 19 (1st Cir. 2000) (en banc)). The Second Circuit requires "evidence of intent to expose [a] bank to loss" but not "actual or potential loss." *Ibid.* (citing *United States* v. *Laljie*, 184 F.3d 180 (2d Cir. 1999)). And the Seventh Circuit requires that a defendant "act wilfully with specific intent to deceive or cheat [a] bank." *Ibid.* (citing *United States* v. *Lamarre*, 248 F.3d 642 (7th Cir. 2001)).

The Fifth Circuit applies yet another standard. It requires only that a defendant's action place a bank "either at risk of loss or civil liability." App., *infra*, 5a n.3 (citing *United States* v. *McCauley*, 253 F.3d 815 (5th Cir. 2001)). In conflict with the Fifth Circuit but in agreement with the court below, however, the Tenth Circuit has held that "potential risk of loss is not a separate element." *Ibid.* (citing *United States* v. *Akers*, 215 F.3d 1089 (10th Cir. 2000)).

Disagreeing with these decisions of the First, Second, Fifth and Seventh Circuits, the Sixth Circuit held 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*." App., *infra*, 6a (emphasis added). "It is sufficient," the Sixth Circuit explained, "if the defendant in the course of committing fraud on *someone* causes a federally insured bank *to transfer funds under its possession and control*." *Ibid.* (emphasis altered).

The Sixth Circuit gave three reasons for adopting that sweeping construction of the bank fraud statute. *First*, it reasoned that this result was consistent with the statute's purpose, which is "to protect the federal government's interest as an insurer of financial institutions." App., *infra*, 6a; see also *ibid.* ("the purpose of [the bank fraud statute] is to protect the federally insured deposits"). That purpose is served, the Sixth Circuit asserted, because "even if [Everett] did not intend to

defraud the bank, causing a bank to transfer funds pursuant to a fraudulent scheme reduces the funds the bank has available for its loans and other activities and almost inevitably causes it some loss." *Id*. at 6a.

Second, the Sixth Circuit maintained that this "interpretation makes the bank fraud statute more harmonious with the mail and wire fraud statutes, which require only that the mail or wire communication be used to facilitate the fraud." App., *infra*, 6a. And *third*, the court of appeals indicated without analysis or even further explanation that its approach was "more in accord with the language of § 1344(2)." *Ibid*.

The Sixth Circuit recognized the expansive nature of its holding, but brushed aside concern that it had interpreted the bank fraud statute too broadly. After noting that causing a bank to transfer funds pursuant to a fraudulent scheme "almost inevitably" brings about "some loss" for the bank, the Sixth Circuit explained:

> That is not to say that in cases where the bank has minimal involvement, such as where a swindler deceives someone into voluntarily writing checks to the swindler on a good account, the government *would not be better advised* to proceed under the wire or mail fraud statutes. Nevertheless, we believe that the minimal involvement of the bank specified above is all that is required, *if the specific intent to defraud someone is present*. In such situations, the federally insured bank will almost always be placed at some risk of loss, *if only in the loss of some of the deposits*, although the perpetrator may intend to defraud *someone other than the bank*. We believe this is enough to bring the fraudulent scheme or act within the ambit of the bank fraud statute, the purpose of which is to protect the federally insured deposits.

App., *infra*, 6a (emphasis added). By eliminating any need for the government to prove that a defendant harbored the specific intent to defraud a financial institution, or even to cause the victim bank some loss, the Sixth Circuit effectively endorsed a blanket presumption of specific intent whenever a federally insured bank transfers funds in association with any type of fraud.

Finally, the Sixth Circuit rejected Everett's contention that the jury instructions concerning

the element of intent were erroneous because they defined the requisite "intent to defraud Bank One" as including "a purpose to cause some loss *to some person*." Tr. 743 (emphasis added). App., *infra*, 8a. In light of the interpretation of § 1344 we have adopted above," the Sixth Circuit explained, "it is apparent that the instructions were sufficient." App., *infra*, 8a.[2]

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve a substantial and recurring question of federal law on which the circuits are sharply divided: whether a conviction under the bank fraud statute, 18 U.S.C. § 1344, requires proof of an intent to defraud a financial institution (or at least to expose the bank to a risk of loss). In answering that question in the negative, the Sixth Circuit ruled that the government may satisfy its burden of proving the intent element of bank fraud merely by showing that the defendant "in the course of committing fraud on *someone* [has] cause[d] a federally insured bank to transfer funds under its possession and control." App., *infra*, 6a. As we explain below, the Court should bring uniformity to the interpretation of this important and frequently invoked criminal statute. Moreover, the Sixth Circuit's decision is seriously misguided as well as predicated on an understanding of the bank fraud statute that is fundamentally at odds with this Court's decisions in *Cleveland* v. *United States*, 531 U.S. 12 (2000), and *McNally* v. *United States*, 483 U.S. 350 (1987). If permitted to stand, the decision below promises to federalize vast swaths of state criminal law by making it a federal crime punishable by up to 30 years in prison and

[2] On appeal, petitioner also maintained, among other things, that her trial counsel was ineffective in failing to object to the jury instructions and that there was no bank fraud in this case because she was authorized to sign Stein's name. The Sixth Circuit rejected those arguments. App., *infra*, 4a-5a, 8a-9a. In rejecting the latter contention, the Sixth Circuit reasoned that "[t]here was sufficient evidence, i.e., the police report and the testimony of Mariani, to indicate [Everett] did not have authority to sign the checks at issue." *Id.* at 5a.

$1 million in fines to engage in a scheme to defraud another person or entity (*not* a "financial institution" within the meaning of 18 U.S.C. § 20) "in a way that happened to involve banking, without evidence that [the bank] was an intended victim." *United States* v. *Laljie*, 184 F.3d 180 (2d Cir. 1999). For all of these reasons, review by this Court is warranted.

I. THE COURT SHOULD RESOLVE THE CONFLICT OVER THE INTENT REQUIRED TO COMMIT BANK FRAUD

In holding that the bank fraud statute does not require an intention "to defraud a federally insured bank, or at least put the bank at a risk of loss," the Sixth Circuit noted that the "Circuits are not in accord as to the intent required to violate § 1344." App., *infra*, 5a. Other courts have commented on the circuit conflict as well. See, *e.g.*, *United States* v. *Kenrick*, 221 F.3d 19, 27 (1st Cir.) (en banc) ("[T]here are no Supreme Court precedents that define the intent necessary for a bank fraud conviction. There is also no consensus among the circuits on the issue."), cert. denied, 531 U.S. 961 (2000); *United States* v. *Hoglund*, 178 F.3d 410, 413 (6th Cir. 1999) (describing differences among circuits on the need to prove risk of loss); *United States* v. *Royston*, 184 F. Supp. 2d 517, 519 (W.D. Va. Jan. 30, 2002) ("[T]here appears to be a circuit split on the question what elements are required to sustain a conviction under § 1344(2).") .

Although the Sixth Circuit acknowledged some of the cases that conflict with its holding, it failed to acknowledge the full extent of the conflict in the lower courts. Courts generally agree that bank fraud is a specific intent crime. See, *e.g.*, *United States* v. *Lamarre*, 248 F.3d 642, 649 (7th Cir.), cert. denied, 533 U.S. 963 (2001); *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (1st Cir.) (en banc), cert. denied, 531 U.S. 961 (2000). As we explain below, however, the circuits are sharply divided over the need to prove an intent to defraud a financial institution (as well as the need to

prove that the fraud put the financial institution at a risk of loss). To resolve this deep and abiding conflict in the circuits on the question of intent under the bank fraud statute, further review is warranted.

1. As the Sixth Circuit recognized (App., *infra*, 5a n.3), some circuits require a showing of specific intent to defraud a financial institution. In the Second Circuit, for example, "the government must show that the defendant engaged in a pattern of deceptive conduct designed to deceive a federally chartered or insured financial institution." *United States* v. *Rodriguez*, 140 F.3d 163, 167 n.2 (2d Cir. 1998); *ibid*. (noting that this requirement applies "[r]egardless of whether a defendant is charged under 18 U.S.C. § 1344(1) or (2), or both as was the case here"). Moreover, "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*. at 168 (emphasis added). "The requirement that the defendant must have intended to victimize a federally insured financial institution * * * arises from the statute's purpose of protecting the federal government's interest, as an insurer of financial institutions, and not others who may have been fraudulently induced to write checks." *Ibid*.; see also *Stavroulakis*, 952 F.2d at 694 ("It was Congress' intent that a federally insured or chartered bank must be the actual or intended victim of the scheme.").

Applying this intent requirement, the Second Circuit in *United States* v. *Laljie*, 184 F.3d 180, 189 (1999), reversed certain convictions that would have been upheld under the Sixth Circuit's expansive view that the crime of bank fraud is committed whenever a defendant "in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." App., *infra*, 6a. In *Laljie*, the defendant was the personal executive secretary to the

chairman of a merchant banking business. Among other things, her duties included managing the chairman's personal checking account for the payment of the chairman's (and his family's) personal bills. The chairman gave the defendant a number of pre-signed checks with the amount and payee left blank. On several occasions, the defendant filled in the payee line on large checks pre-signed by the chairman by making them payable to a real estate company owned by the defendant's husband (there was no evidence that the amounts had been altered). Reversing fraud convictions based on these transactions, the Second Circuit explained that "there was no evidence that those checks were intended to victimize the bank." 184 F.3d at 191. "The insertion of a name on a payee line that has been left blank by the maker of the check," the court of appeals explained, "may defraud the maker; but it does not, of itself, evince an *intent to defraud the bank* and hence does not constitute bank fraud within the meaning of § 1344." *Ibid.* (emphasis added). The result would have been just the opposite in the Sixth Circuit, however, because the defendant in *Laljie* "in the course of committing fraud on *someone*" plainly "cause[d] a federally insured bank to transfer funds under its possession and control." App., *infra*, 6a. In other cases as well, the Second Circuit has reversed convictions based on fraudulent conduct that happened to involve a bank where there was no evidence that the defendant intended to victimize the bank by exposing it to an actual or potential loss. See, *e.g.*, *Rodriguez*, 140 F.3d at 168-69 (defendant who deposited fraudulently procured checks into federally insured bank not guilty of bank fraud); *United States* v. *Blackmon*, 839 F.2d 900, 902-07 (2d Cir. 1988) (defendant who had engaged in "pigeon drop" scheme); see also *United States* v. *Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993) (defendant who deposited an IRS check obtained by filing a phony tax return).

Other circuits have similar requirements. In the Eleventh Circuit, "the insured bank cannot

be a mere bystander to the fraudulent transaction." *United States* v. *Key*, 76 F.3d 350, 353 n.3 (11th Cir. 1996). "The requisite intent for bank fraud is present if defendant's conduct was 'designed to deceive a federally chartered or insured financial institution into releasing property, with the *intent to victimize the institution* by exposing it to actual or potential loss.'" *Id*. at 353 (emphasis added) (quoting *United States* v. *Ragosta*, 970 F.2d 1085, 1089 (2d Cir. 1992)). Similarly, in the Seventh Circuit, "[a] bank fraud conviction requires proof that a defendant had the specific intent to defraud the bank." *United States* v. *Lamarre*, 248 F.3d 642, 649, cert. denied, 533 U.S. 963 (2001). That requirement is satisfied where the government demonstrates that the "defendant intended to cause actual or potential loss to the financial institution." *United States* v. *Moede*, 48 F.3d 238, 242 (7th Cir. 1995). In the First Circuit "the intent necessary for a bank fraud conviction is an intent to deceive the bank in order to obtain from it money or other property." *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (en banc), cert. denied, 531 U.S. 961 (2000); see also *United States* v. *Benjamin*, 252 F.3d 1, 6 (1st Cir. 2001) ("The prosecution must prove * * * that the defendant had an intent to defraud the bank."). In sharp contrast to the foregoing decisions, the Sixth Circuit in this case held 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*." App., *infra*, 6a (emphasis added).[3]

2. In holding that a bank fraud conviction may be upheld even though the defendant did not "put the bank at risk of loss" (App., *infra*, 6a), the Sixth Circuit has also placed itself in conflict with

[3] The Eighth Circuit has struck out on its own path with respect to the intent element of bank fraud. In the Eighth Circuit, "[c]riminal intent * * * exists if a person acts knowingly *and if the natural result* of his conduct would be to injure or defraud the bank even though this may not have been his motive." *Willis* v. *United States*, 87 F.3d 1004, 1008 (8th Cir. 1996) (emphasis added) (internal quotation omitted); see also *United States* v. *Johnson*, 169 F.3d 569, 572 (8th Cir. 1999). Further adding to the confusion in this area of law, the First Circuit has indicated that the requisite intent under § 1344 does not include an "intent to harm." *Kenrick*, 221 F.3d at 29.

the Fourth and Fifth Circuits, both of which require the government to prove that the fraud actually placed the financial institution at a risk of loss or civil liability. *United States* v. *McCauley*, 253 F.3d 815, 820 (5th Cir. 2001); *United States* v. *Sprick*, 233 F.3d 845, 852 (5th Cir. 2000); *United States* v. *Colton*, 231 F.3d 890, 908 (4th Cir. 2000). Although the Sixth Circuit suggested that the requirement of proving that the defendant's conduct exposed the financial institution to a risk of loss or civil liability is merely one method of establishing intent to commit bank fraud (App., *infra*, 5a & n.3), in fact the Fourth and Fifth Circuit treat this as a distinct element apart from the requirement of proving criminal intent. See, *e.g.*, *Colton*, 231 F.3d at 903 n.5 ("the government must also prove a defendant's intent to defraud").[4]

Regardless of its precise function, the "risk of loss" requirement imposed by the Fourth and Fifth Circuits (but rejected by the Sixth Circuit in this case) has the virtue of removing from the ambit of the bank fraud statute cases where the defendant's conduct did not cause any financial loss (or even risk of loss) to a covered financial institution. In certain cases, the approach of the Fourth and Fifth Circuits will preclude criminal liability even where the defendant specifically intends to

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[4] The risk-of-loss requirement can also be viewed as a means of demonstrating that a defendant engaged in a "scheme or artifice to defraud." In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court explained that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" *Id.* at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). Applying that understanding to the identical language of the bank fraud statute, the Fourth Circuit recognizes "another essential element" of bank fraud: "a scheme or artifice must be one *designed* to deprive *a financial institution* of *a property interest*." *Colton*, 231 F. 3d at 907 (emphasis altered); *United States* v. *Orr*, 932 F.2d 330, 332 (4th Cir. 1991). This element arguably is satisfied by demonstrating "that a financial institution [is] exposed to 'an actual or potential risk of loss.'" *Colton*, 231 F.3d at 908 (quoting *United States* v. *Wilkinson*, 137 F.3d 214, 232 (4th Cir. 1998)); see also *United States* v. *Saks*, 964 F.2d 1514, 1520-22 (5th Cir. 1992).

cause financial loss to a bank.[5]

3. The Sixth Circuit's decision does not stand completely alone. The Tenth Circuit, like the Sixth Circuit in this case, has expressly rejected the argument that the government must prove specific intent to defraud a financial institution (or for that matter the creation of any risk of loss to a financial institution caused by the defendant's actions). In *United States* v. *Sapp*, 53 F.3d 1100, 1103 (1995), cert. denied, 516 U.S. 1082 (1996), the Tenth Circuit opined that "Clause (1)" of Section 1344 "expressly requires that the scheme be one 'to defraud' while clause (2) does not but rather extends to any knowingly false representation. Thus, clause (1) focuses on the conduct as it affects the financial institution, while clause (2) emphasizes the conduct of the defendant." *Id.* at 1103-04 (internal quotation and footnote omitted).[6] In the Tenth Circuit, moreover, "the government need not prove that a defendant put a bank 'at risk' to sustain a conviction under section 1344(2)." *Id.* at 1102-03; see also *United States* v. *Akers*, 215 F.3d 1089, 1101 (10th Cir.) (rejecting argument that indictment must allege that defendant "put a federally insured bank at risk of loss"), cert. denied, 531 U.S. 1023 (2000).

II. THE ISSUES RAISED ARE IMPORTANT AND RECURRING

Whether a conviction under the federal bank fraud statute requires a showing of intent to defraud a financial institution – or at least to expose it to a risk of loss – is an important question of federal law. As the cases cited above make clear, this issue has arisen with substantial frequency in

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[5] Although the Ninth Circuit has never squarely decided the issue, it "has never adopted a 'risk of loss' analysis in bank fraud cases." *United States* v. *Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995).

[6] Other circuits, in contrast, have rejected the notion that clauses (1) and (2) of § 1344 should be regarded as independent offenses or subject to divergent intent requirements. See pages 17-18, *infra*.

the federal courts. Statistics from the Administrative Office of the United States Courts confirm the recurring nature of this issue. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2001, tbl. D-2, at 197 (bank fraud actions filed against 1662 defendants in federal district courts in the year ending Sept. 30, 2001).

In recent years, this Court has repeatedly granted review to resolve conflicts over the meaning of the federal mail, wire and bank fraud statutes. See, *e.g.*, *Cleveland* v. *United States*, 531 U.S. 12 (2000) (defining "property" under mail fraud statute); *Neder* v. *United States*, 527 U.S. 1 (1999) (determining that materiality of falsehood is an element of mail, wire and bank fraud statutes); *McNally* v. *United States*, 483 U.S. 350 (1987) (holding that mail fraud statute does not cover deprivation of intangible rights). This Court's activity confirms the national importance of questions arising under these statutes.

Finally, the Sixth Circuit's interpretation of the bank fraud statute raises important federalism concerns. See *United States* v. *Blackmon*, 839 F.2d 900, 906 (2d Cir. 1988) (the "expansion of the coverage of section 1344 to include conduct that does not victimize federally insured banks and that is already criminal under state law would also implicate concerns of federalism"); see generally Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643 (1997) (discussing the problems inherent in federalizing state-law crimes). Eliminating the requirement that a defendant must intend to defraud a federally insured financial institution improperly federalizes instances of fraud that should be prosecuted under state law. See pages 20-21, *infra*.

III. THE DECISION BELOW IS WRONG

Further review is also warranted because the Sixth Circuit's decision is seriously flawed. The Sixth Circuit incorrectly read Section 1344 in the disjunctive as if it embodied two completely

separate, independent offenses; and it erroneously concluded that Section 1344(2) does not require an intent to commit fraud on a federally insured bank. See App., *infra*, 6a. Contrary to the lower court's conclusion, the text, the legislative history and the basis of federal jurisdiction of the bank fraud statute all demonstrate that, to secure a conviction, the government must prove an intent to commit fraud *on a financial institution*. Moreover, the Sixth Circuit's interpretation threatens to extend the reach of federal criminal law to large amounts of conduct already regulated by state law, and it runs afoul of the rule of lenity.

1. The text of the statute plainly requires, in Section 1344(1), a showing of intent to defraud a financial institution. See 18 U.S.C. § 1344 ("Whoever knowingly executes, or attempts to execute, a scheme or artifice – (1) *to defraud a financial institution* * * * .") (emphasis added). Contrary to the apparent assumption of the Sixth Circuit in this case and the Tenth Circuit's holding in *Sapp* (see page 15, *supra*), Section 1344(2) is properly understood as a *clarification* of 1344(1), not as a separate offense. See, *e.g.*, *United States* v. *Monostra*, 125 F.3d 183, 186 (3d Cir. 1997); *United States* v. *Blackmon,* 839 F.2d 900 (2d Cir. 1988). This Court has defined "to defraud" as commonly referring "to wronging one in his property rights." *McNally* v. *United States*, 483 U.S. 350, 359 (1987) (internal quotation omitted). "While not every scheme to defraud will be accomplished with the aid of false or fraudulent pretenses, representations, or promises, as prohibited by § 1344(2), the use of such devices may certainly constitute a scheme to defraud under § 1344(1) as well * * *." *Monostra*, 125 F.3d at 186.

2. The Sixth Circuit's reading of Sections 1344(1) and 1344(2) as disjunctive clauses with different intent requirements contradicts the legislative history of the statute and this Court's reading of nearly identical language in the mail fraud statute. "The legislative history of the [bank fraud]

statute * * * indicates that subsection (2) may be regarded in part as a clarification of subsection (1)." *Ibid*. The bank fraud statute is modeled on the mail and wire fraud statutes. Compare § 1344 with §§ 1341, 1343. See also *Neder* v. *United States*, 527 U.S. 1, 20-21 (1999); S. Rep. No. 98-225, at 378 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3519. In *McNally*, this Court explained that Congress amended the mail fraud statute in 1909 by adding the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the original phrase "any scheme or artifice to defraud." 483 U.S. at 357 (quoting Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130). This addition, the Court noted in *McNally*, was intended as a "codification of the holding of" *Durland* v. *United States*, 161 U.S. 306 (1896), which had rejected the argument that "scheme or artifice to defraud" was limited to misrepresentations as to *existing or past* facts (because that was the settled meaning of fraud at common law). See 483 U.S. at 358; see also *Durland*, 161 U.S. at 312-13 (explaining that statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future"). The language added by Congress, therefore, "simply made it unmistakable that the statute reached false promises and misrepresentations *as to the future* as well as other frauds involving money or property." *McNally*, 483 U.S. at 359 (emphasis added). Despite its disjunctive phrasing, the amended language of the mail fraud statute thus was not intended to create two phrases that should "be construed independently." *Id.* at 358; see also *Cleveland* v. *United States*, 531 US. at 26 (affirming this reading). "Thus, when Congress copied the phraseology of the mail and wire fraud statutes into the bank fraud statute, it adopted two provisions that never were intended to be mutually exclusive." *Monostra*, 125 F.3d at 187. This Court should take this opportunity to state clearly that the Court's interpretation of the language of the mail fraud statute found in *McNally* and *Cleveland*

applies to the nearly identical language of the bank fraud statute.

3. The Sixth Circuit justified its decision to eliminate the intent requirement, in part, on the ground that its "interpretation makes the bank fraud statute more harmonious with the mail and wire fraud statutes, which require only that the mail or wire communication be used to facilitate fraud."[7] App., *infra*, 6a. In other words, the Sixth Circuit assumed that the bank fraud statute covers all situations where a bank (or bank funds) are somehow involved in a scheme to defraud some third party. That argument ignores an important distinction between the bank fraud statute and the mail and wire fraud statutes, however. "[T]he basis for Federal jurisdiction" in the mail and wire fraud statutes "is the use of the mails or wire communications," but for the bank fraud statute "jurisdiction is based on the fact that the *victim* of the offense is a federally controlled or insured institution." S. Rep. No. 98-225, at 378 (emphasis added). This "jurisdictional distinction between the mail and wire fraud statutes on the one hand and § 1344 on the other suggests that the latter's reach is more limited than that of its sister statutes." *United States* v. *Lewis*, 67 F.3d 225, 230 (9th Cir. 1995). By expanding the statute to cover fraud not intended to victimize financial institutions, the Sixth Circuit has expanded the statute beyond its jurisdictional basis.

The need for caution in avoiding overly expansive interpretations of the bank fraud statute is reinforced by the House Judiciary Committee's expression of "'concern [with] the history of expansive interpretations of'" the "scheme to defraud" language of the mail and wire fraud statutes. *United States* v. *Blackmon*, 839 F.2d 900, 906 (2d Cir. 1988) (quoting H.R. Rep. No. 901, at 4); see

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[7] Other courts have accepted the related proposition that the bank fraud statute, like the mail and wire fraud statutes, should be read broadly. See, *e.g.*, *United States* v. *Akers*, 215 F.3d 1089, 1102 (10th Cir.), cert. denied, 531 U.S. 1023 (2000); *United States* v. *Solomonson*, 908 F.2d 358, 364 (8th Cir. 1990).

also *ibid*. ("'The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions.'") (quoting H.R. Rep. No. 901, at 4). The conclusion of the Sixth Circuit, however, expands the bank fraud statute well beyond the scope anticipated by Congress.

4. The Sixth Circuit's analysis is also flawed because it federalizes areas of traditional state authority and leads to absurd results. The court of appeals recognized that its far-reaching interpretation of the bank fraud statute vastly expanded the range of activities that could be covered by the statute. It acknowledged, for example, that under its interpretation the bank fraud statute would apply even to a situation "where a swindler deceives someone into voluntarily writing checks to the swindler on a good account." App., *infra*, 6a. But, as Judge Posner has explained, "only in the most literal, hypertechnical sense" could the swindler "be said to have schemed to defraud the *bank* of money or other property belonging to it." *United States* v. *Davis*, 989 F.2d 244, 246 (7th Cir. 1993). In this scenario, Judge Posner wrote, "there is a sense in which the bank was 'defrauded' of the amount" withdrawn, but "it is not the sense of the bank fraud statute, the purpose of which is not to protect people who write checks to con artists but to protect the federal government's interest as an insurer of financial institutions." *Id.* at 246-47.

Notably, the Sixth Circuit's interpretation of the statute would create a federal bad check law, allowing federal prosecution every time a check is written on an account that the check writer knows has insufficient funds, or when a check writer writes a bad check on an account opened using a false name. See *United States* v. *Orr*, 932 F.2d 330, 332 (4th Cir. 1991). These fraudulent checking activities, however, are already "addressed in comprehensive fashion by state law." *Williams* v.

United States, 458 U.S. 279, 287 (1982). It seems unlikely, to say the least, that Congress intended to create a federal bad check law – much less to make writing a bad check punishable by fines up to $1 million and 30 years in federal prison.

"[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland*, 531 U.S. at 25 (internal quotation omitted). Congress clearly indicated the opposite result. The purpose of the federal bank fraud statute is to prevent victimization of federally insured banks. "Section 1344 was intended to fill in 'serious gaps * * * in Federal jurisdiction' in order to ensure the effective prosecution of fraudulent schemes *targeted at financial institutions*." *United States* v. *Colton*, 231 F.3d 890, 897 (4th Cir. 2000) (emphasis added) (quoting S. Rep. No. 98-225, at 377 (1984), *reprinted in* U.S.C.C.A.N. 3182, 3517); see also *id.* at 903 n.4. The legislative history "makes it abundantly clear that Congress did not intend the bank fraud statute to cover ordinary state law offenses where * * * the fraud victim was not a federally insured bank." *United States* v. *Blackmon*, 839 F.2d 900, 905 (2d Cir. 1988); see also *United States* v. *Orr*, 932 F.2d 330, 332 (4th Cir. 1991). As in *Cleveland* v. *United States*, the Court should not allow "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." 531 U.S. at 12.

5. Finally, the Sixth Circuit's expansive reading of the bank fraud statute violates the rule of lenity, which provides that "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60; *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX