No. 15-5991

In The
Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

JEFFREY L. FISHER
Co-Chair, NACDL
AMICUS COMMITTEE
559 Nathan Abbott Way
Stanford, CA 94305

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St.,
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

QUESTION PRESENTED

Whether, for purposes of clause (1) of the bank-fraud statute, 18 U.S.C. § 1344, knowingly executing a scheme "to defraud a financial institution" requires proof of an intent to deceive and cheat a bank--in other words, that the defendant's objective in devising the scheme was to obtain bank-owned property by deceiving the victim bank.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. Its approximately 9,200 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL works to resist overcriminalization—the steady expansion of federal crimes, through new criminal statutes and broad interpretations of

[1] Under S.Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Amicus has lodged with the Court letters of consent to the filing of this brief from all parties.

existing statutes by the executive and judicial branches.[2] This case presents another example of that trend. NACDL's views will assist the Court in placing the narrow question presented in this case within the broader context of government efforts to stretch federal criminal statutes beyond their plain language.

SUMMARY OF THE ARGUMENT

The statement of facts in petitioner's brief leaves little doubt that he behaved badly toward his victim, Stanley Hsu. As this Court observed long ago, however, "under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr v. United States*, 363 U.S. 370, 394 (1960) (reversing mail fraud conviction where mailing did not fall within the scope of the statute). The Court unanimously reaffirmed this principle only days ago. In a case it found "distasteful" and "tawdry," the Court nonetheless resisted "the broader legal implications of the Government's boundless interpretation of the federal bribery statute" and rejected the government's argument that performing ordinary political favors constitutes a federal criminal offense. *McDonnell v. United States*, 2016 U.S. LEXIS 4062, at *51 (June 27, 2016).

This case warrants similar treatment. The government charged petitioner's taking of Hsu's money under 18 U.S.C. § 1344(1), a statute that

[2] For a description of NACDL's efforts to reduce overcriminalization, see https://www.nacdl.org/overcrim/.

prohibits fraud directed against a financial institution, not the institution's customers such as Hsu. The court of appeals sought to preserve the conviction by stretching § 1344(1) beyond its plain terms.

The Court should reverse the court of appeals' decision and reinforce the principle that, no matter how culpable the defendant's behavior, a conviction may only be obtained under a statute that clearly encompasses the conduct at issue. In addition to the rules of statutory interpretation urged in petitioner's brief, the Court should interpret § 1344(1) in light of the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). To the extent ambiguity remains after the Court has interpreted the statute, "the tie must go to the defendant" under the rule of lenity. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *see, e.g., Skilling v. United States*, 561 U.S. 358, 410-11 (2010).

ARGUMENT

1. In case after case in recent years, this Court has turned to settled principles of interpretation to cabin prosecutors' efforts to expand federal criminal statutes beyond the limits of their language. In *Cleveland v. United States*, 531 U.S. 12 (2000), for example, the Court rejected prosecutors' efforts to extend the "property" element of the mail fraud statute to licenses held by the state. *Id.* at 26-27. In *Skilling*, the Court limited the honest services

fraud statute to its core meaning of bribes and kickbacks. *See* 561 U.S. at 410-11. In *Sekhar v. United States*, 133 S. Ct. 2720 (2013), the Court held that "property" in the Hobbs Act did not include a state employee's prospective recommendation. *Id*. at 2727. In *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court rejected the government's view that an undersized fish was a "tangible object" in a statute aimed at document destruction. *See id*. at 1088-89 (plurality opinion). And most recently, in *McDonnell*, the Court rejected the government's "boundless interpretation" of the "official act" element of the federal bribery statute.

These cases apply a number of interpretive principles. Some principles, such as *noscitur a sociis*,[3] apply in all cases, civil and criminal. Others, such as the rule that statutes must be interpreted narrowly to ensure fair notice,[4] apply primarily in criminal cases. But the Court's application of these principles in cases interpreting federal criminal statutes underscores a fundamental point: that criminal provisions may not be expanded beyond their terms, no matter how culpable the conduct at issue.

2. Two principles that recur in these cases are of particular interest to NACDL. First, the Court has repeatedly recognized that use of broadly worded federal crimes to prosecute matters traditionally regulated by the states raises federalism concerns. *See, e.g., McDonnell*, 2016 U.S. 4062, at *45

[3] *See, e.g., Yates*, 135 S. Ct. at 1085 (plurality opinion); *id*. at 1089 (Alito, J., concurring in judgment).

[4] *See, e.g., McDonnell*, 2016 U.S. LEXIS 4602, at *44.

(government's interpretation of the federal bribery statute "raises significant federalism concerns"); *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (declining to read 18 U.S.C. § 229 broadly to "alter sensitive federal-state relationships") (quotation omitted); *Cleveland*, 531 U.S. at 24 (declining to extend the mail fraud statute to "a wide range of conduct traditionally regulated by state and local authorities"); *Jones v. United States*, 529 U.S. 848, 858 (2000) (same; interpreting federal arson statute); *Williams v. United States*, 458 U.S. 279, 290 (1982) (construing statute narrowly in part because the case involved "a subject matter that traditionally has been regulated by state law"); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (construing 18 U.S.C. § 1952 and rejecting a broad interpretation where it "would alter sensitive federal-state relationships").

Shifting the prosecution of crimes from state to federal court has several potential adverse consequences. For example, federal prosecution of offenses punishable under state law diminishes the stature of state courts by suggesting they lack the competence to address such cases. Such prosecutions tend to centralize police power in the federal government, contrary to the constitutional model of distributed federal and state powers designed to "reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Federal prosecution of offenses prosecutable under state law also risks disparate results for the same conduct, places an increased burden on federal courts, and diminishes the distinct role of federal courts as stewards of distinctly federal interests. *See, e.g.*, American Bar Association Task Force on the

Federalization of Criminal Law, *The Federalization of Criminal Law* at 26-39 (1998).

To address these federalism concerns, the Court has held that, absent a clear statement of congressional intent, the federal government may not intrude into areas of criminal law enforcement traditionally left to the states. *See, e.g., Bond*, 134 S. Ct. at 2088 ("The problem with this interpretation is that it would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do.") (quotation and brackets omitted); *Cleveland*, 531 U.S. at 25 ("[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." (quotation omitted)); *Jones*, 529 U.S. at 858 (same); *Bass*, 404 U.S. at 349 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). This "clear statement" rule performs a crucial function in cabining the scope of broadly worded federal crimes.

Second, under the rule of lenity, "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 v. United States*, 483 U.S. 350, 359-60 (1987); *see, e.g., Yates*, 135 S. Ct. at 1088 (2015) (same) (plurality opinion); *Skilling*, 561 U.S. at 410-11 (applying rule of lenity to honest services statute); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003) (applying rule of lenity to Hobbs Act). The rule requires that

> the tie must go to the defendant. . . . This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, 553 U.S. at 514 (plurality opinion).

These principles strongly support petitioner's interpretation of § 1344(1). As petitioner demonstrates in his brief, the plain language and structure of § 1344(1) show that Congress intended the statute to apply only when the defendant intends to wrong a financial institution in its property rights through deceit. The legislative history buttresses that interpretation. Principles of federalism and the rule of lenity confirm that petitioner's interpretation is correct.

3. To the extent § 1344 addresses frauds that target the property of federally insured banks and other financial institutions, the federal government has an obvious interest in prosecuting. But to the extent the statute addresses frauds against bank *customers* such as Hsu, the offense falls within an area of traditional state regulation. For example, California--where petitioner's conduct occurred--has a series of statutes under which he could have been

prosecuted in state court for his criminal actions toward Hsu. *See, e.g.,* Cal. Penal Code §§ 484(a) (theft), 528.5 (impersonation through electronic means), 530 (receiving money or property as a result of false personation), 530.5 (unauthorized use of personal identifying information). There is nothing to suggest that state authorities lack the means or the will to prosecute offenses under these statutes.[5]

Because extending § 1344(1) to schemes that target bank customers would sweep in "a wide range of conduct traditionally regulated by state and local authorities," *Cleveland*, 531 U.S. at 24, the Court should adopt that interpretation only if Congress has clearly stated its intent to protect bank customers, as well as banks. Congress provided such a clear statement in § 1344(2); that provision extends not only to property "owned by" a bank, but also to property "under the control of" a bank, which includes the property of bank customers such as Hsu. But far from including a clear statement of intent to protect customers in § 1344(1), Congress did the opposite; it specified that the target of the fraud had to be a "financial institution." To avoid "significant federalism concerns," *McDonnell*, 2016 U.S. 4062, at *45, the Court should limit § 1344(1) to schemes intended to wrong a financial institution in its property rights.[6]

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[5] Here, as in *Parr*, "the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement, and theft were committed does not establish the federal crime" of scheming to defraud a financial institution. *Parr*, 360 U.S. at 393-94.

[6] In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Court rejected a federalism argument that, in the Court's words,

4. To the extent the "clear statement" rule and other tools of statutory interpretation leave doubt about the scope of § 1344(1), the rule of lenity requires that the ambiguity be "'resolved in favor of lenity.'" *Yates*, 135 S. Ct. at 1088 (quoting *Cleveland*, 531 U.S. at 25). That rule serves as a critical safeguard against the temptation--evident here--to distort the language of a federal criminal provision to encompass blameworthy conduct that does not fall clearly within the statutory text.

CONCLUSION

The judgment of the court of appeals should be reversed.

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sought to add "an invisible element" (intent to defraud a bank) to § 1344(2). *Id.* at 2393. Here, by contrast to *Loughrin*, the government--not the defense--seeks to expand the plain language of § 1344(1), and it does so without a clear statement that Congress intended the broad reading it urges.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of John D. Cline
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 662-2260

JEFFREY L. FISHER
Co-Chair, NACDL Amicus
Committee
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Amicus Curiae
National Association of Criminal
Defense Lawyers

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