American Bar Association
www.supremecourtpreview.org

No. 13-316

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BARBARA E. BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

DANIEL B. LEVIN
Counsel of Record
VICTORIA A. DEGTYAREVA
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
(213) 683-9100
daniel.levin@mto.com

Counsel for Amicus Curiae

February 3, 2014

TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE TEXT OF THE BANK FRAUD STATUTE DOES NOT SUPPORT THE TENTH CIRCUIT'S HOLDING 5

II. THE TENTH CIRCUIT'S INTERPRETATION OF SECTION 1344 PROMOTES THE UNWARRANTED EXPANSION OF FEDERAL CRIMINAL LAW 8

A. The Number of Federal Crimes Has Increased Dramatically in the Past Few Decades 9

B. New Federal Crimes Cover Local Conduct That Has Historically Been Prosecuted by the States 10

C. Some Prosecutors and Courts Have Further Expanded Federal Criminal Law in the Absence of Clear Congressional Intent 12

III. THE OVER-FEDERALIZATION OF CRIMINAL LAW HAS NUMEROUS ADVERSE CONSEQUENCES 13

A. Increasing the Number of Federal Crimes Overwhelms the Limited Resources of Federal Courts 14

TABLE OF CONTENTS
(continued)

Page

B. Overlapping State and Federal Jurisdiction Leads to Competition and Inefficiencies in the Administration of Criminal Justice 16

C. Federalizing Crimes Already Prosecuted by the States Does Little To Alleviate Crime and Undermines the Vital Role of the States in Prosecuting Crime 17

D. Over-Federalization Leads to the Disparate Treatment of Similarly Situated Defendants 19

IV. THE UNJUSTIFIED SEVERITY OF PETITIONER'S SENTENCE ILLUSTRATES THE DANGERS OF OVER-FEDERALIZATION 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Bressner v. Ambroziak,
379 F.3d 478 (7th Cir. 2004) 6

Burrage v. United States,
No. 12-7515 (Jan. 27, 2014) 7

Cleveland v. United States,
531 U.S. 12 (2000) 6, 7, 13

Gregory v. Ashcroft,
501 U.S. 452 (1991) 2

McNally v. United States,
483 U.S. 350 (1987),
superseded by statute, 18 U.S.C. § 1346 7

New York v. United States,
505 U.S. 144 (1992) 13

Patterson v. New York,
432 U.S. 197 (1977) 2

Scheidler v. Nat'l Org. for Women, Inc.,
547 U.S. 9 (2006) 13

Sykes v. United States,
131 S. Ct. 2267 (2011) 13

United States v. Bass,
404 U.S. 336 (1971) 6, 7

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Kenrick,
221 F.3d 19 (1st Cir. 2000) (en banc),
cert. denied, 531 U.S. 961 (2000) 6

United States v. Laljie,
184 F.3d 180 (2d Cir. 1999).................................... 6

United States v. Lopez,
514 U.S. 549 (1995) 6

United States v. Loughrin,
710 F.3d 1111 (10th Cir. 2013) 5, 8

United States v. Morganfield,
501 F.3d 453 (5th Cir. 2007) 6

United States v. Nkansah,
699 F.3d 743 (2d Cir. 2013).................................... 6

United States v. Thomas,
315 F.3d 190 (3d Cir. 2002)................................ 6, 8

FEDERAL STATUTES

18 U.S.C. § 1028A.. 22

18 U.S.C. § 1341.. 6

18 U.S.C. § 1344... *passim*

18 U.S.C. § 1344(2) 2, 5, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES - OTHER

Utah Code Ann. § 76-6-501 22

FEDERAL RULES

Supreme Court Rule 37.6 1

LEGISLATIVE MATERIALS

S. Rep. No. 98-225 (1983) 7

OTHER AUTHORITIES

Admin. Office of the U.S. Courts, *1997 Annual Report of the Director: Judicial Business of the United States Courts* 10

Admin. Office of the U.S. Courts, *2000 Annual Report of the Director: Judicial Business of the United States Courts* 10

Admin. Office of the U.S. Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 10

Admin. Office of the U.S. Courts, *2012 Annual Report of the Director: Judicial Business of the United States Courts* 12, 15

TABLE OF AUTHORITIES (continued)

Page(s)

Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Found., D.C., & Nat'l Ass'n of Criminal Def. Lawyers, D.C.), Apr. 2010 9

Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004* (2006) 19

Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Sentences in State Courts, 2004* (2007) 17, 18

Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Organization, 2011* (2013) 15

Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 Denv. U. L. Rev. 79 (2007) 18

John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26 (Heritage Found., D.C.), June 16, 2008 10

John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime,* 72 Temp. L. Rev. 673 (1999) 16, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Ronald Goldstock, Gerald Lefcourt & William Murphy, *Justice That Makes Sense*, The Champion (Nat'l Ass'n of Crim. Def. Lawyers, D.C.), Dec. 1997 14

Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747 (2005) 20, 21

Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979 (1995) 20

Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, *The Federalization of Criminal Law* (1998) .... *passim*

U.S. Dep't of Justice, United States Attorneys' Manual 20

University of Albany, *Sourcebook of Criminal Justice Statistics* (2004) 19

Utah Sentencing Comm'n, *Adult Sentencing and Release Guidelines* (2013) 22

William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1999 .... 11, 14, 15

INTERESTS OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of petitioner.[1]

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. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous *amicus* briefs each year in the United States 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.

This case presents a question of great importance to NACDL because of the substantial procedural and

---

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored any part of the brief, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

penal consequences that expanding the scope of the federal bank fraud statute would have on defendants who would otherwise be prosecuted in state court. NACDL has a particular interest in protecting against the unwarranted expansion of federal criminal law to ensure that similarly situated defendants are not treated disparately as a result of the forum in which they are prosecuted.

SUMMARY OF ARGUMENT

The Constitution limits federal power to ensure a balance between the states and federal government that "reduce[s] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). In keeping with this principle, courts have acknowledged that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). In its decision below, however, the Tenth Circuit dispensed with the requirement that a defendant intend to defraud a federally insured or chartered bank and expose it to a risk of loss in order to be convicted under the federal bank fraud statute, 18 U.S.C. § 1344(2), and thereby dramatically expanded the scope of that statute to cover purely local conduct that has historically been prosecuted by the states.

Using this overly broad interpretation, the Tenth Circuit affirmed petitioner's bank fraud conviction for using stolen and altered checks to steal merchandise and cash from a local Target store. The extent of any bank's involvement in the offense was petitioner's use of six altered checks in his scheme to steal from Target. There was no evidence petitioner intended to defraud a bank. Most of the checks were never

submitted to a bank and petitioner's crime never posed any risk of financial loss to a bank.

As a textual matter, Section 1344 cannot reasonably be read to criminalize *every* fraudulent transaction that implicates funds stored in a bank. As a policy matter, the Tenth Circuit's interpretation is part of a larger trend of the expansion of federal criminal law, which has severe consequences on both the state and federal criminal justice systems. Because NACDL and its members have extensive experience with the practical consequences of state and federal prosecutions, it submits this brief to address the policy concerns implicated by the question presented in this case.

First, the dramatic increase in the number of federal criminal offenses threatens to overwhelm the limited resources of the federal courts, which are designed to handle a comparatively smaller number of cases than their state counterparts. Forcing the federal courts to devote an ever-increasing percentage of their time to local crime critically affects their ability to fulfill their constitutional duties, including enforcing constitutional rights and adjudicating civil cases that concern uniquely federal interests.

Second, federalizing crimes that are already subject to prosecution in state courts creates counterproductive competition between state and federal law enforcement and leads to an inefficient use of limited investigative, prosecutorial, and judicial resources.

Third, federalizing crimes that are within the ken of the state courts undermines the role of state courts in enforcing criminal law, leading to the perception that they are unable to deal adequately with

important criminal matters. Despite a significant increase in the number and type of federal crimes, however, state courts continue to adjudicate the vast majority of criminal cases and, for a number of structural and political reasons, are better equipped to handle most run-of-the-mill criminal cases.

Finally, expanding federal criminal law leads to the disparate treatment of similarly situated defendants. The decision to bring charges in federal rather than state court is left entirely to prosecutors' discretion, with little guidance or oversight. Such unfettered prosecutorial discretion increases the danger of prosecuting similarly situated defendants—in some instances, even accomplices to the same offense—in different courts, with vastly different consequences, without sufficient justification for the disparate treatment. Subjecting some defendants to federal prosecution while prosecuting others accused of nearly identical conduct in state courts is problematic considering the numerous critical procedural and substantive differences that exist between the two systems. Moreover, as illustrated by this case, the federal and state sentencing laws can differ substantially. A defendant convicted in state court for conduct that is substantially similar to petitioner's crime would have a recommended sentence of only nine months—more than two years shorter than the sentence petitioner received in federal court.

This case presents a striking example of the dangers of over-federalizing criminal law, which this Court must consider when determining the appropriate reach of the federal bank fraud statute. The Tenth Circuit's excessively broad reading of Section 1344 is not only contrary to the statutory

text; it would also exacerbate these policy problems by expanding that federal statute to reach a wide swath of criminal conduct that has traditionally been the subject of state criminal law. For both reasons, the Court should reverse the judgment below.

ARGUMENT

I. THE TEXT OF THE BANK FRAUD STATUTE DOES NOT SUPPORT THE TENTH CIRCUIT'S HOLDING

The Tenth Circuit held that the federal bank fraud statute, 18 U.S.C. § 1344(2), does not require any proof that the defendant intended to defraud a bank. Instead, under the Tenth Circuit's reading, a defendant may be convicted under Section 1344(2) as long as he obtains funds that have some connection to a bank while intending to defraud someone else. *See United States v. Loughrin*, 710 F.3d 1111, 1116 (10th Cir. 2013) ("[U]nder our precedent, an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else."). The text of the bank fraud statute does not support such an expansive interpretation.

In all subsections of Section 1344, Congress was explicit that the fraud at issue must have a nexus to a federally regulated financial institution. Section 1344 prohibits "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice" either "to defraud *a financial institution*" or to obtain property "owned by, or under the custody or control of, *a financial institution*." 18 U.S.C. § 1344 (emphases added). This language makes clear that Congress intended Section 1344 to cover only those crimes in which the intended victim is a financial institution; not the petty fraud at issue here that barely implicates the interests of any financial

institution whatsoever. *See, e.g.*, *United States v. Laljie*, 184 F.3d 180, 189-90 (2d Cir. 1999) ("Because § 1344 focuses on the bank, rather than on other potential victims, a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim."). The majority of the circuit courts that have considered this question agree that both subsections of Section 1344 require proof of intent to defraud a bank. *See United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 961 (2000); *United States v. Nkansah*, 699 F.3d 743, 748 (2d Cir. 2013); *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002); *United States v. Morganfield*, 501 F.3d 453, 465 (5th Cir. 2007); *Bressner v. Ambroziak*, 379 F.3d 478, 482 (7th Cir. 2004).

The Tenth Circuit's contrary interpretation permits Section 1344 to reach countless local crimes that have traditionally been within the exclusive criminal jurisdiction of the states. Adopting this interpretation would threaten to "convert congressional authority . . . to a general police power of the sort retained by the States." *United States v. Lopez*, 514 U.S. 549, 567 (1995). This Court has repeatedly refused to disrupt the delicate, Constitutionally-mandated balance of power between the states and federal government without a clear statement from Congress. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 24 (2000) ("We resist the Government's reading of § 1341 . . . because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."); *United States v. Bass*, 404

U.S. 336, 349 (1971) ("[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."). Nothing in the text of Section 1344 provides any indication that Congress intended for this statute to affect such a change in state-federal relations.

On the contrary, the legislative history shows that Congress intended the federal bank fraud statute to reach a relatively narrow category of offenses that victimize federally regulated or insured financial institutions. *See, e.g.*, S. Rep. No. 98-225, at 377 (1983) ("The offense of bank fraud . . . is designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured.")

To the extent that there is ambiguity in the text of Section 1344, the rule of lenity requires courts to adopt the reading that is more favorable to the defendant. As this Court has made clear, "when there are two rational readings of a criminal statute, one harsher than the other, we are 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), *superseded by statute,* 18 U.S.C. § 1346; *see also Burrage v. United States*, No. 12-7515, slip op. at 12 (Jan. 27, 2014) ("Especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.") (citation omitted); *Cleveland*, 531 U.S. at 25 ("'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (citation omitted).

II. THE TENTH CIRCUIT'S INTERPRETATION OF SECTION 1344 PROMOTES THE UNWARRANTED EXPANSION OF FEDERAL CRIMINAL LAW

This Court must also consider the practical implications of broadening the scope of federal bank fraud when Congress has not explicitly intended to do so. The Tenth Circuit acknowledged that its reading of Section 1344 enormously expands the reach of federal bank fraud to cover almost any fraudulent transaction. *Loughrin*, 710 F.3d at 1116-17 ("We recognize that our interpretation of § 1344(2) may cast a wide net for bank fraud liability . . . ."). Giving such wide breadth to a federal criminal statute contributes to a trend of expanding federal criminal law to cover conduct that is already criminalized by the states and which state courts are often better equipped to handle. *See, e.g.*, *Thomas*, 315 F.3d at 199 ("The extension [of Section 1344] proposed here by the Government offends the balance of federal and state jurisdiction and our principles of comity by imposing federal law where the federal interest is remote and attenuated."). To be sure, it is the prerogative of Congress to enact new federal crimes where it sees fit, subject to constitutional strictures. In the absence of such a clear directive from Congress, however, courts should not take it upon themselves to increase the number of federal crimes and thereby exacerbate the negative consequences of over-federalization.

A. The Number of Federal Crimes Has Increased Dramatically in the Past Few Decades

For much of the country's history, states defined and prosecuted the majority of criminal conduct, while the federal criminal code was limited to a small number of offenses that interfered directly with the federal government, its employees, or its programs. *See* Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, *The Federalization of Criminal Law* 7 (1998) [hereinafter ABA Task Force]. This traditional division of power has markedly shifted over the past few decades.

Although the exact number of federal crimes is difficult to measure,[2] the estimated number of criminal offenses in the U.S. Code increased from 3,000 in the early 1980s to over 4,450 by 2008. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Found., D.C., & Nat'l Ass'n of Criminal Def. Lawyers, D.C.), Apr. 2010, at 6. This estimate does not include the tens of thousands (or more) of additional criminal offenses scattered throughout federal administrative regulations; nor does it include statutes, such as the Lacey Act, that create federal crimes by incorporating the laws of other jurisdictions. *Id.*

---

[2] Determining the exact number of federal crimes is difficult because the offenses are scattered throughout the U.S. Code and federal administrative regulations. Additionally, the number of criminal offenses created by a single statute may be subject to varying interpretations as many statutes encompass a variety of actions and could be read as creating multiple independent crimes. *See generally* ABA Task Force at 9-10.

This expansion of federal criminal law is a relatively recent phenomenon. According to a 1998 report by the American Bar Association's Task Force on the Federalization of Criminal Law, forty percent of all federal criminal statutes enacted since the Civil War were enacted between 1970 and 1996. *See* ABA Task Force at 7. Congress created another 452 new crimes between 2000 and 2007, averaging approximately fifty-six new federal crimes each year. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26 (Heritage Found., D.C.), June 16, 2008, at 1. The rate of new criminal legislation has remained consistent since the 1980s, with roughly five hundred new crimes created every decade. *Id.* at 1-2.

As the number of federal crimes has grown, so too has the number of defendants prosecuted in federal courts. In 1996, the federal government filed charges against 67,700 defendants in U.S. district courts. That number increased to 83,963 defendants in 2000 and reached an all-time high of 102,931 defendants in 2011. *See* Admin. Office of the U.S. Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D; Admin. Office of the U.S. Courts, *2000 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D; Admin. Office of the U.S. Courts, *1997 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D.

B. New Federal Crimes Cover Local Conduct That Has Historically Been Prosecuted by the States

Many new federal crimes are already covered by state law. As commentators have noted, "[n]ew crimes are often enacted in patchwork response to

newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." ABA Task Force at 14-15. Many new federal criminal statutes are passed because they are politically popular and not because of an inability by state courts to deal with the conduct at issue. *See generally* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1999 [hereinafter 1998 Year-End Report] ("The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas . . . .").

As a result, areas of dual state and federal criminal jurisdiction are becoming the norm. While federal criminal statutes were initially limited to uniquely federal offenses such as treason, bribery of a federal official, and perjury in federal court, *see* ABA Task Force at 5-6, federal law now reaches many crimes that were traditionally thought to be of exclusively local concern, such as theft, assault, domestic violence, robbery, and murder.

The shift in the focus of federal criminal law from conduct that implicates federal interests to conduct that is primarily local in nature is also evident from changes in the federal case load. In 1947, criminal statutes that had no direct state or local counterparts accounted for twenty-six percent of all federal cases, while immigration offenses, which also implicate important federal interests, accounted for another eighteen percent. *See* ABA Task Force at 23. In other words, just under half of all federal cases dealt with uniquely federal crimes. In 2012, drug offenses alone,

which almost always have a state law equivalent, accounted for more than thirty percent of federal cases. *See* Admin. Office of the U.S. Courts, *2012 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D-2 [hereinafter 2012 Judicial Business of the U.S. Courts].

As the increasing number and variety of federal criminal offenses show, the federalization of criminal law has created a largely redundant federal criminal justice system that supplants, rather than complements, the state system.

C. Some Prosecutors and Courts Have Further Expanded Federal Criminal Law in the Absence of Clear Congressional Intent

While much of the federalization of criminal law is a result of congressional legislation that explicitly creates new federal crimes, some federal prosecutors and courts have contributed to the expansion of federal criminal law by advocating for and approving broad interpretations of imprecise statutory language to reach conduct not previously subject to federal prosecution. That is exactly what the Tenth Circuit has done in this case.

As Justice Scalia recently warned,

> We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-

> the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty.

Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

Whatever the wisdom of Congress' decision to federalize criminal law, it is not the role of the courts to affect such significant changes in federal-state relations, especially in light of the grave policy concerns that accompany this shift.

III. THE OVER-FEDERALIZATION OF CRIMINAL LAW HAS NUMEROUS ADVERSE CONSEQUENCES

Broad expansion of the federal bank fraud statute increases the dangers that accompany "'the accumulation of excessive power in any one branch.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted). Under the Tenth Circuit's incorrect reading, Section 1344 sweeps in countless instances of purely local conduct that, in light of history and a proper balance of power, belong in state rather than federal court. *See generally Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (holding that the government's broad interpretation of the Hobbs Act "would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution"); *Cleveland*, 531 U.S. at 24 ("Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities."). Bringing primarily local conduct—such

as the petty fraud at issue here—within the jurisdiction of the federal courts adversely affects not only the individual defendants subject to prosecution, but the entire administration of state and federal criminal law.

A. Increasing the Number of Federal Crimes Overwhelms the Limited Resources of Federal Courts

In keeping with the Constitution's mandate that federal courts be courts of limited jurisdiction not intended to replace the state court system, federal courts were designed to adjudicate only a small number of disputes involving important national interests. As a result, federal courts are not equipped to handle the ever-increasing docket that results from the over-federalization of criminal law. *See* 1998 Year-End Report ("The trend to federalize crimes that traditionally have been handled in state courts . . . is taxing the Judiciary's resources and affecting its budget needs . . . ."); *see also* Ronald Goldstock, Gerald Lefcourt & William Murphy, *Justice That Makes Sense*, The Champion (Nat'l Ass'n of Crim. Def. Lawyers, D.C.), Dec. 1997 (representing the views of the Chair of the Criminal Justice Section of the ABA, the President of the National Association of Criminal Defense Lawyers, and the President of the National District Attorneys Association) ("There can be little doubt that increased federal prosecutive authority has adversely affected the Department of Justice's ability to fulfill its role of enforcing traditional federal offenses; it has overwhelmed federal courts with matters best handled in state venues; it has a major impact on the federal correctional system . . . .").

Compared to the state court systems, there are relatively few federal judges. In 2011, there were 27,570 state trial court judges and 1,336 state appellate court judges. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Organization, 2011*, tbl. 2 (2013). In stark contrast, there were only 677 authorized judgeships for the federal district courts and only 167 for the federal courts of appeals in 2012. *See* 2012 Judicial Business of the U.S. Courts, tbls. 1, 3. That year, a total of 94,121 defendants were prosecuted in federal district courts, representing twenty-five percent of all cases filed in the district courts. *Id.* tbl. D. Even more significantly, criminal cases accounted for fifty-nine percent of all trials in the district courts. *Id.* tbl. T-1. Similarly, criminal cases represented nearly twenty-four percent of the appeals filed in federal courts of appeals. *Id.* tbl. B1-A. Considering the small size of the federal judiciary, the rising number of federal prosecutions threatens the federal courts' ability to devote sufficient resources to the fulfillment of their core functions, including enforcing federal constitutional and statutory rights and handling cases of national importance.

The Tenth Circuit's unduly broad reading of the federal bank fraud statute would only further burden the federal courts by making them a venue for prosecution of petty crimes better handled through state prosecutions. *See generally* 1998 Year-End Report ("Federal courts were not created to adjudicate local crimes . . . . State courts do, can, and should handle such problems.").

B. Overlapping State and Federal Jurisdiction Leads to Competition and Inefficiencies in the Administration of Criminal Justice

Expanding federal criminal jurisdiction to cover conduct traditionally prosecuted by the states also creates counterproductive competition between state and federal law enforcement and leads to the ineffective duplication of resources when state and federal crimes overlap.

Those most familiar with the effects of expanding federal crimes have repeatedly warned of the inefficiencies created by over-federalization. According to the Conference of Chief Justices, which reflects the views of the nation's state judges, the "'federalization of criminal law is a mounting concern of the state judiciary'" because it results in "'the needless disruption of effective state and local enforcement efforts.'" ABA Task Force at 41-42 (quoting Resolution IX, Conference of Chief Justices, Feb. 10, 1994). Similarly, the National Governors Association counseled that "'some attempts to expand federal criminal law into traditional state function would have little effect in eliminating crime, but could undermine state and local anticrime efforts.'" *Id.* at 42 (quoting National Governors Association Policy HR-19, "Federalism and Criminal Justice").

Prosecutors and defense attorneys agree that overlapping criminal jurisdiction can be ineffective and undesirable. *See, e.g.*, John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime,* 72 Temp. L. Rev. 673, 677 n.26 (1999) ("'The National District Attorneys Association has long opposed the unwarranted federalization of crime in the belief that it works to the detriment of the efficient and effective

use of our law enforcement and legal resources.'" (quoting Letter from William J. Murphy, then-President of the Nat'l Dist. Att'ys Ass'n, to Prof. James Strazella, ABA Task Force (Oct. 17, 1997))); *id.* ("'Federalization can inappropriately displace state policy and . . . political accountability is impaired when decisions are moved from the state to the federal level.'" (quoting Letter from Elizabeth Alexander, then-Director of the ACLU, to Edwin Meese, III, Chair, ABA Task Force (Feb. 25, 1998))).

C. Federalizing Crimes Already Prosecuted by the States Does Little To Alleviate Crime and Undermines the Vital Role of the States in Prosecuting Crime

The expansion of federal criminal law also undermines the role of the states in the administration of criminal justice. Giving the federal government the power to prosecute conduct that is already being prosecuted by the states without explaining the need for federal interference can lead to a perception by the general public that state prosecutors and courts are not capable of adequately handling important criminal matters. *See, e.g.*, ABA Task Force at 41-42 ("'Congress has for more than a decade shown a strong tendency to denigrate the state role in addressing crime and to inject federal agencies into the realm of state criminal law.'" (quoting Resolution IX, Conference of Chief Justices, Feb. 10, 1994)).

In reality, however, state courts remain the primary forum for criminal prosecutions. Federal courts account for only six percent of all felony convictions nationwide. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Sentences in*

State Courts, 2004, at 1 (2007). Consequently, increasing the number of offenses subject to federal prosecution is unlikely to have any significant effect on reducing or controlling the types of violent crime that most concern the public.

Furthermore, even if federal courts could handle a larger percentage of criminal prosecutions, state courts remain better equipped to preside over most criminal cases. Given the substantially greater number and geographic diversity of state courts, it is usually easier for defendants, victims, witnesses, and jurors to attend state court proceedings. Additionally, because state courts have historically had larger and more diverse criminal dockets, many have developed a wide range of social services, outreach programs, and alternative-sentencing programs, which are lacking in the federal system.

Finally, leaving the states to define and prosecute local crime promotes many of the important practical advantages of federalism. It promotes political accountability in criminal law, ensures that criminal justice policies are narrowly tailored to local communities, and permits useful experimentation in the administration of criminal justice. *See generally* Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 Denv. U. L. Rev. 79, 91 (2007) ("It is one thing for a state such as Ohio to develop criminal laws and ranges of criminal punishments for 11.4 million people who live within 41 thousand square miles; it is quite another for Congress to undertake the same task for 299 million people who live within 3.5 million square miles. . . . Criminal law experiments unleashed on 300 million people are as difficult to implement and monitor as they are to change.").

D. Over-Federalization Leads to the Disparate Treatment of Similarly Situated Defendants

The creation of new federal crimes has a significant effect on the fairness of the criminal justice system. Expanding the scope of federal criminal law to cover conduct that is already criminalized by state law creates areas of dual criminal jurisdiction in which identical conduct may be prosecuted in both state and federal courts. The result is a system in which defendants who engage in nearly identical conduct may receive substantially different treatment depending on where they are prosecuted.

Even for the most frequently prosecuted federal offenses—those relating to drugs—the vast majority of such crimes are still prosecuted in state courts. For example, in 2004, there were 1,745,712 arrests for drug offenses nationwide, but only 32,980 of these were for federal offenses. *See* University of Albany, *Sourcebook of Criminal Justice Statistics*, tbls. 4.1, 4.33 (2004). In other words, while drug offenses accounted for almost twenty-five percent of all federal arrests that year (and more than thirty-five percent of all federal prosecutions), less than two percent of the nation's drug arrests were handled in federal court. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004*, tbl. 2.2 (2006). As a consequence of the federal government's decision not to prosecute the vast majority of offenses that now fall within its jurisdiction, only a small subset of individuals who could be charged with a federal crime are prosecuted in federal court.

The decision to bring charges in federal rather than state court is left entirely to prosecutors' discretion, with little guidance or oversight. The United States Attorneys' Manual, which is intended to provide standards for the exercise of prosecutorial discretion, lacks clear guidelines for many criminal offenses. For example, for the federal bank fraud statute at issue here, the Manual states only that "[t]he choice of offenses charged should be based on the facts of the individual case," without any further guidance on when federal versus state prosecution is appropriate. U.S. Dep't of Justice, United States Attorneys' Manual § 9-40.826.

Such unfettered prosecutorial discretion increases the danger of prosecuting similarly situated defendants—in some instances, even accomplices to the same offense—in different courts, with vastly different consequences, without sufficient justification for the disparate treatment. *See, e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 998-99 (1995) (collecting cases in which similarly situated defendants, including co-defendants, received vastly different sentences based on where they were prosecuted).

The decision to bring a case in federal rather than state court has significant consequences. Depending on the jurisdiction, a federal prosecution may involve a more powerful grand jury system, a lower standard for the approval of search warrants, a lower burden of proof to justify a wiretap, and more restricted discovery of the government's case. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54

Am. U. L. Rev. 747, 768-69 (2005) (citing to federal and state procedural rules). And, as illustrated by this case, the federal and state sentencing laws often differ substantially.

IV. THE UNJUSTIFIED SEVERITY OF PETITIONER'S SENTENCE ILLUSTRATES THE DANGERS OF OVER-FEDERALIZATION

By allowing a federal bank fraud conviction without any proof of intent to defraud a bank, the Tenth Circuit has wrongly converted a relatively minor, local crime into a federal offense that carries substantially more severe penalties than its state-law equivalents.

The petitioner in this case used six altered checks totaling $1,184.58. Apart from using checks, most of which were never even submitted to a financial institution, petitioner's crime had no nexus to a bank or to any other federally regulated institution and did not implicate any uniquely federal interests. Petitioner's conduct is a prime example of the type of purely local crime that state courts are best equipped to handle and which the constitutional balance between the state and federal governments suggests should belong within state criminal jurisdiction.

Because the prosecutors chose to charge petitioner in federal court, however, he received a sentence that was significantly higher than what he would have received had he been prosecuted in state court. Petitioner was sentenced to thirty-six months of imprisonment: twelve months for his federal bank fraud convictions and an additional twenty-four months for his convictions of aggravated identify theft. The length of his sentence was a direct result of several substantive provisions that are unique to the

federal criminal code and that would not have applied in state court. First, Section 1344 is a predicate for aggravated identity theft, 18 U.S.C. § 1028A, which carries a mandatory minimum sentence of two years. The U.S. Code further requires that the mandatory minimum sentence run consecutively to the terms of imprisonment imposed for any other crimes, except other Section 1028A convictions. In this case, petitioner's Section 1344 conviction was the only predicate act for his conviction under Section 1028A. In other words, had the courts properly interpreted the federal bank fraud statute as not extending to the conduct at issue here, petitioner would not have been subject to the mandatory consecutive two-year sentence.

A defendant convicted in state court for conduct that is substantially similar to petitioner's crime would receive a significantly shorter sentence. For example, in Utah, where the crime occurred, a defendant with no criminal history who was convicted of forging checks for more than $1,000 but less than $5,000 would have a recommended sentence of only nine months—more than two years shorter than the sentence petitioner received in federal court. *See* Utah Code Ann. § 76-6-501 (defining crime of forgery and producing false identification); Utah Sentencing Comm'n, *Adult Sentencing and Release Guidelines* 11 (2013).

Petitioner received these severe penalties without any indication from Congress that it intended to subject individuals accused of such minor local crimes to federal prosecution. Affirming the Tenth Circuit's holding would permit the continued disparate treatment of similarly situated defendants and subject countless others to the same inappropriately

harsh consequences without a decision by Congress that expanding federal bank fraud is warranted or necessary.

CONCLUSION

For the reasons discussed above and in the Petitioner's brief, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

BARBARA E. BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

DANIEL B. LEVIN
Counsel of Record
VICTORIA A. DEGTYAREVA
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
(213) 683-9100
daniel.levin@mto.com