No. 22-849

In the Supreme Court of the United States

RICKIE FOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for "tak[ing] and carr[ying] away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to * * * any bank," in violation of 18 U.S.C. 2113(b), requires proof of specific intent to steal more than $1000 in value.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 50 F.4th 616. The opinion of the district court (Pet. App. 116a-119a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2022. On December 15, 2022, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including March 2, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to commit felony bank theft, in violation of 18 U.S.C. 371 and 2113(b). Pet. App. 4a;

Judgment 1. The district court sentenced petitioner to 37 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-18a.

1. In June 2020, petitioner and his co-conspirators surrounded a Bank of America ATM in Chicago, Illinois. Pet. App. 2a. Using a hammer, a crowbar, a rod, and other tools, they tried to force open the ATM and steal its contents. *Ibid.* Although they damaged the outside of the ATM, they had failed to break it open by the time the police arrived and arrested them. *Ibid.* The ATM held over $190,000 in cash. *Id.* at 3a-4a.

A grand jury indicted petitioner for conspiring to commit bank theft, in violation of 18 U.S.C. 371 and 2113(b). Pet. App. 4a. Section 2113(b) provides that a person commits a felony if he "takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to * * * any bank." 18 U.S.C. 2113(b). After a bench trial, the district court found petitioner guilty. Pet. App. 4a.

The district court orally denied petitioner's motion for a new trial, rejecting petitioner's contention that conviction under Section 2113(b) requires proof of specific intent to steal more than $1000 in value. Pet. App. 117a-120a. The court observed that the plain text of the statute requires proof of "intent to steal," not proof of "intent to steal property or money exceeding $1,000." *Id.* at 117a-118a. The court also noted that, "as a practical matter," petitioner's reading "would lead to a strange result where the government can only prosecute individuals who know how much money is in a bank or an ATM at the time of the taking." *Id.* at 119a.

2. The court of appeals affirmed. Pet. App. 1a-18a.

Like the district court, the court of appeals rejected petitioner's contention that conviction under Section 2113(b) requires proof of specific intent to steal more than $1000 in value. Pet. App. 6a-10a. Looking to the statute's "plain language," the court observed that the "dollar valuation modifier is separated from the intent language, which is offset by commas," and it found no basis for "read[ing] the dollar-amount modifier into the intent clause." *Id.* at 7a-8a. The court also noted that, in *Carter* v. *United States*, 530 U.S. 255 (2000), this Court had "stated that [Section 2113(b)] requires that the defendant act with intent to steal or purloin, with no mention of monetary constraints." Pet. App. 8a (citation and internal quotation marks omitted). And the court observed that petitioner's reading "would lead to impractical and illogical results," such as "absolv[ing] those who rob an ATM but did not have a specific intent regarding the amount of money they intended to steal." *Id.* at 9a-10a. The court additionally noted that it "need not separately analyze intent under" the conspiracy statute, because the "mental state required for a conspiracy conviction is no greater than that necessary to commit the underlying substantive offense." *Id.* at 10a (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 9-28) that a felony conviction under 18 U.S.C. 2113(b) requires proof of specific intent to steal more than $1000 in value. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. The first paragraph of Section 2113(b) states that a person commits a felony, punishable by up to ten years

of imprisonment, if he "takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to * * * any bank." 18 U.S.C. 2113(b). The second paragraph states that a person commits a misdemeanor, punishable by up to one year of imprisonment, if he "takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to * * * any bank." *Ibid.*

The court of appeals correctly recognized that the first paragraph of Section 2113(b) does not require proof that the defendant intended to steal more than $1000. The statute sets forth, in plain terms, the mental state required for conviction: "intent to steal or purloin." 18 U.S.C. 2113(b). The statute does not say "intent to steal or purloin more than $1000." To the contrary, the phrase "intent to steal or purloin" is set off by commas and separated from the phrase "exceeding $1,000." *Ibid.* Thus, as the court of appeals observed, the grammatical structure of the provision precludes reading "the dollar-amount modifier into the intent clause." Pet. App. 8a.

This Court's decision in *Carter* v. *United States*, 530 U.S. 255 (2000), confirms that straightforward reading of the statutory text. In *Carter*, the Court distinguished Section 2113(b) from the separate bank-related crime in Section 2113(a), agreeing with the government that "three elements required by § 2113(b)'s first paragraph are not required by § 2113(a): (1) specific intent to steal; (2) asportation; and (3) valuation exceeding $1,000." *Id.* at 261 (emphasis omitted); see *id.* at 262. And, reinforcing the separateness of the first and third elements, the Court continued throughout the opinion to describe the statute's mental-state element as requiring proof of

"intent to steal," rather than proof of "intent to steal more than $1000." See, *e.g.*, *id.* at 262 ("[Section 2113(b)] requires that the defendant act 'with intent to steal or purloin.'"); *id.* at 267 ("intent to steal or purloin"); *ibid.* ("the text of [Section 2113(b)] requires a specific 'intent to steal or purloin'"); *id.* at 269 ("intent to steal or purloin").

Section 2113(b)'s mental-state element tracks the mental-state element of the traditional crime of larceny. See *Carter*, 530 U.S. at 264 (noting the "close resemblance" between Section 2113(b) and the common-law crime of "larceny"). English common law distinguished between grand and petit larceny based on the value of the property stolen. See 4 William Blackstone, *Commentaries on the Laws of England* 229 (1769). And "practically all American jurisdictions by statute divide larceny * * * into categories, depending upon the amount stolen." 3 Wayne LaFave, *Substantive Criminal Law* § 19.4(b) (3d ed. 2018) (footnote omitted). But under both English common law and American law, a larceny conviction requires proof of intent to steal ("*animus furandi*")—not proof of intent to steal a specific amount of money. See 4 Blackstone 232; 3 LaFave § 19.4(b).

Section 2113(b) carries forward that tradition by distinguishing a felony violation from a misdemeanor violation based on the amount stolen, with both violations requiring the same mental state: the "intent to steal or purloin." 18 U.S.C. 2113(b). Indeed, as the court of appeals and district court both recognized, petitioner's atextual and ahistorical proposal to read the mental-state requirement to include intent as to valuation would render the statute ineffectual in a number of scenarios. See Pet. App. 9a-10a, 119a. Suppose, for example,

that a defendant steals property from a bank without knowing its value—say, by quickly grabbing a fistful of cash from an ATM's coffers without pausing to count it. On petitioner's view, such a person could not be convicted under Section 2113(b)'s felony clause, because he did not specifically intend to steal property of value "exceeding $1,000." 18 U.S.C. 2113(b). The person also could not be convicted under the misdemeanor clause, because he did not specifically intend to steal property of value "not exceeding $1,000." *Ibid.* The person would instead get off scot-free. Nothing in the text suggests that Congress meant to leave that bizarre gap in the statute's coverage.

2. Petitioner relies (Pet. 17-24) on decisions applying the "presumption in favor of scienter"—that is, the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif* v. *United States*, 139 S. Ct. 2191, 2195 (2019) (citation omitted). But that presumption has no bearing on this case.

This Court has applied the presumption in favor of scienter in two categories of cases. First, it has applied that presumption when the statute "does not specify any scienter in the statutory text." *Rehaif*, 139 S. Ct. at 2195; see, *e.g.*, *Staples* v. *United States*, 511 U.S. 600, 618 (1994); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437-438 (1978); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Second, it has applied the presumption when the statute "includes a general scienter provision," but fails to specify "'the material elements'" to which that requirement applies. *Rehaif*, 139 S. Ct. at 2195 (citation omitted); see, *e.g.*, *id.* at 2195-

2196; *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994); *Liparota* v. *United States*, 471 U.S. 419, 424-425 (1985).

This case falls within neither of those categories. Section 2113(b) specifies both the mental state required ("intent") and the element to which that mental-state requirement attaches ("to steal or purloin"). In such circumstances, the best way to discern the scope of the statute's mental-state element is to apply the text that Congress actually enacted, not to invoke a general presumption. "It is one thing to infer the common-law tradition of a *mens rea* requirement where Congress has not addressed the mental element of a crime. * * * It is something else to expand a *mens rea* requirement that the statutory text has carefully limited." *Flores-Figueroa* v. *United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment).

Furthermore, even when the presumption of scienter applies, it extends only to the "elements that criminalize otherwise innocent conduct." *Rehaif*, 139 S. Ct. at 2195 (citation omitted). Section 2113(b)'s valuation element does not criminalize otherwise innocent conduct. Stealing a bank's property is a federal crime regardless of the amount of money, or other property, that the thief takes. The valuation element instead affects only the punishment for the crime. See 18 U.S.C. 2113(b). And "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Dean* v. *United States*, 556 U.S. 568, 575 (2009); see *ibid.* (listing examples of laws that increase a defendant's punishment based on the unintended consequences of his acts).

Put another way, the "purpose of scienter" is "to separate wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2197. But the mental-state element in the statutory text—"intent to steal or purloin"—already separates wrongful from innocent acts. Taking and carrying away someone else's money or property with the intent to steal it is wrongful, not innocent. Because "the concerns underlying the presumption in favor of scienter are fully satisfied" by the intent requirement that Congress has already enacted, "the presumption in favor of scienter does not justify reading a [further] intent requirement" into the statute. *Carter*, 530 U.S. at 269-270.

In all events, the presumption in favor of scienter is just that—a presumption. Like any other interpretive presumption, it can be overcome by contrary indicators of statutory meaning. See *Rehaif*, 139 S. Ct. at 2195. Here, the plain language of the statute, the common-law background against which Congress enacted it, and the implausible consequences of petitioner's reading overcome any presumption and establish that Congress required only proof of "intent to steal or purloin," 18 U.S.C. 2113(b), not proof of "intent to steal or purloin more than $1000."*

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* Petitioner's repeated reliance (Pet. 14, 17-20, 23) on then-Judge Kavanaugh's dissent in *United States* v. *Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (en banc), cert. denied, 568 U.S. 1196 (2013), is misplaced. *Burwell* involved a different statute: 18 U.S.C. 924(c)(1)(B)(ii), which requires a 30-year sentence for carrying a machinegun during and in relation to a crime of violence. After considering "relevant textual and contextual considerations" as well as the presumption of scienter, Judge Kavanaugh's dissent concluded that a conviction under Section 924(c)(1)(B)(ii) requires proof that the defendant knew that the weapon he was carrying was a machinegun. *Burwell*, 690 F.3d at 551 (Kavanaugh, J., dissenting). But the text of Section

3. Contrary to petitioner's contention (Pet. 10-17), the decision below does not conflict with the decisions of other courts of appeals. None of the decisions that petitioner cites involved Section 2113(b). Nor do those decisions suggest that any other court of appeals would have reached a different result in this case.

As an initial matter, many of the decisions cited by petitioner (Pet. 13) involved issues unrelated to this case and referred to the presumption of scienter, if at all, only in dicta. See *United States* v. *Mitchell-Hunter*, 663 F.3d 45, 50-51 (1st Cir. 2011) (determining that, because a particular fact was not an element of the crime at all, the defendant was not entitled to a jury trial on it); *United States* v. *Bunn*, 154 Fed. Appx. 227, 229 (2d Cir. 2005) (determining that the government had "provided insufficient evidence to prove [a] jurisdictional element"); *United States* v. *Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (determining that, "[r]egardless of whether" the statute should be read to contain "a *mens rea* element," the government "ha[d] failed to prove all of the elements of [the crime] beyond a reasonable doubt"); *United States* v. *Little*, 961 F.3d 1035, 1038-1039 (8th Cir. 2020) (determining that the evidence of the mental-state element expressly required by the statute was insufficient). Those decisions shed no meaningful light on how those courts of appeals would approach this case.

924(c)(1)(B)(ii) differs from the text of Section 2113(b). As discussed in the text, the latter plainly establishes that Congress required proof only of "intent to steal or purloin," not proof of intent to steal or purloin more than $1000. See *id.* at 547 ("Of course, the presumption of mens rea is a presumption; it thus may be overcome by a plainly contrary congressional intent, as revealed in the statutory text or context.").

In several more decisions cited by petitioner (Pet. 12-14), courts of appeals *rejected* an effort to read a mental-state requirement into a criminal statute. In some of those cases, the court explained that the presumption of scienter does not apply to jurisdictional elements. See *United States* v. *Escalera*, 957 F.3d 122, 134 (2d Cir.) ("purely jurisdictional elements"), cert. denied, 141 S. Ct. 399 (2020); *United States* v. *Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988) ("purely jurisdictional element"); *United States* v. *Murillo*, 826 F.3d 152, 159 (4th Cir. 2016) ("jurisdictional elements"), cert. denied, 137 S. Ct. 812 (2017); *United States* v. *Taylor*, 942 F.3d 205, 214 (4th Cir. 2019) ("jurisdictional element"); *United States* v. *Houston*, 683 Fed. Appx. 434, 438 (6th Cir. 2017) ("facts giving rise to federal jurisdiction"), cert. denied, 138 S. Ct. 286 (2017); *United States* v. *Muza*, 788 F.2d 1309, 1311-1312 (8th Cir. 1986) ("interstate commerce" element). In other cases, courts of appeals relied on the exception to the presumption of scienter for "sex offenses, such as rape, in which the victim's actual age [i]s determinative despite [the] defendant's reasonable belief that the girl had reached age of consent." *Morissette*, 342 U.S. at 251 n.8; see *United States* v. *Washington*, 743 F.3d 938, 943 (4th Cir. 2014); *United States* v. *Daniels*, 685 F.3d 1237, 1249 (11th Cir. 2012), cert. denied, 563 U.S. 1164 (2013). But those courts, in determining that the presumption of scienter was inapplicable in those cases, did not suggest that they would find the presumption applicable in a case such as this one.

As for the four cases cited by petitioner (Pet. 10-12) in which courts of appeals read statutes to contain mental-state elements: Each simply applied the principle of "ordinary English grammar" that, when a criminal

statute "introduces the elements of a crime with the word 'knowingly,'" that word usually applies "to each element" that follows. *Flores-Figueroa*, 556 U.S. at 650, 652; see *United States* v. *Wilson*, 133 F.3d 251, 261 (4th Cir. 1997) (concluding that "the 'knowing' mens rea accompan[ies] each element of the offense"); *United States* v. *Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996) (concluding that "the phrase 'knowingly violates' * * * should uniformly require knowledge as to each of those elements"); *United States* v. *Bruguier*, 735 F.3d 754, 758 (8th Cir. 2013) (en banc) (concluding that "the term 'knowingly' * * * appl[ies] to all elements that follow it"); *United States* v. *Dominguez*, 661 F.3d 1051, 1068 (11th Cir. 2011) (concluding that "court may treat the *mens rea* Congress provided in the statute as modifying each element that follows it"), cert. denied, 566 U.S. 1034 (2012). Section 2113(b), in contrast, does not use a term such as "knowingly" to introduce a series of elements. It instead specifies the precise mental state required for commission of the crime: "intent to steal or purloin." It would contradict, rather than comport with, the rules of "ordinary English grammar," *Flores-Figueroa*, 556 U.S. at 650, to extend that intent requirement to Section 2113(b)'s valuation element.

More broadly, petitioner errs in asserting that the Fourth, Fifth, Eighth, and Eleventh Circuits disagree with other circuits about the scope of the presumption of scienter. This Court has repeatedly stated that the presumption entitles a court to read into a statute "*only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Elonis* v. *United States*, 575 U.S. 723, 412 (2015) (emphasis added; citation omitted); see, *e.g.*, *Ruan* v. *United States*, 142 S. Ct. 2370, 2377 (2022) ("statutory terms

that 'separate wrongful from innocent acts'") (citation omitted); *Rehaif*, 139 S. Ct. at 2197 ("separate wrongful from innocent acts"). Like every other circuit, the Fourth, Fifth, Eighth, and Eleventh Circuits adhere to that approach. See *United States* v. *Ivey*, 60 F.4th 99, 117 (4th Cir. 2023) ("only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'") (citation omitted); *United States* v. *Valencia*, 394 F.3d 352, 356 (5th Cir. 2004) ("only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'"), cert. denied, 544 U.S. 1034 (2005); *United States* v. *Moreira-Bravo*, 56 F.4th 568, 575 (8th Cir. 2022) ("element separating wrongful from innocent conduct"); *United States* v. *Fleury*, 20 F.4th 1353, 1371 (11th Cir. 2021) ("separate wrongful conduct from 'otherwise innocent conduct'") (citation omitted).

4. Petitioner's additional arguments for certiorari likewise lack merit.

To the extent that petitioner urges review specifically because he was charged and convicted for conspiracy, rather than the substantive offense, see Pet. 23, his focus is misplaced. He does not meaningfully contend that his particular conviction required a heightened mens rea, see Pet. 16-17, and any suggestion that "intent is all there is" to his crime, Pet. 23 (emphasis omitted), is mistaken. A conspiracy conviction under 18 U.S.C. 371 requires the government to prove not only that the conspirators agreed to commit the substantive offense, but also that at least one of them performed an overt "act to effect the object of the conspiracy." *Ibid.* The government did so here by showing that petitioner and his accomplices "used an assortment of tools, including a hammer, crowbar, and rod, to attempt to break open

the ATM and access its contents." Pet. App. 2a; see Gov't C.A. Br. 6-7 (photographs of crime).

Petitioner also errs in arguing (Pet. 25) that the question presented "will recur frequently." Petitioner has not cited any case (apart from this one) in which the question presented—whether a felony conviction under Section 2113(b) requires proof of intent to steal more than $1000—has even come up. Nor has he provided any reason to think that the question will often arise in future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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