No. 22-849

In the Supreme Court of the United States

RICKIE FOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

REPLY BRIEF FOR PETITIONER

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This Court should grant the petition for a writ of certiorari to resolve whether the valuation threshold in 18 U.S.C. § 2113(b) requires proof of mens rea because it is a substantive element of the offense.

The government's brief fails to rebut the petition's showing that the courts of appeals are divided over whether the government must prove mens rea for all substantive elements. As petitioner explained, multiple courts hold that a mens rea requirement applies to each substantive element unless one of the limited exceptions applies. But other courts afford substantive-element status no weight and instead look only to the minimal mens rea that separates criminal conduct from perfectly lawful conduct. The government offers no reason why this case is not a perfect vehicle to resolve that frequently recurring question.

On the merits, the government fails to persuasively defend the Seventh Circuit's striking conclusion that petitioner could be convicted of conspiring to steal more than

$1,000 even though the government never so much as argued that he intended to steal more than $1,000. The government invokes rules of grand and petit larceny at English common law, but that argument is foreclosed by this Court's decision in *Carter* v. *United States*, 530 U.S. 255 (2000), which already held both that Congress did not codify common-law larceny in Section 2113(b) and that the statutory valuation threshold that distinguishes the felony offense from a misdemeanor is an element, not a sentencing factor. *Id.* at 264–269. The government's insistence (Opp. 6) that a mens rea requirement would let defendants off "scot-free" is not credible: anyone who steals money from a bank will be guilty of at least a misdemeanor federal crime, and juries consider circumstantial evidence of intent all the time without practical difficulty. But the law does not allow what the government attempted here: to convict petitioner of a felony without even attempting to prove the requisite intent that defines that felony offense.

ARGUMENT

A. The courts of appeals are divided over whether the government must prove mens rea for all substantive elements of an offense

The petition showed (Pet. 11–14) that the Seventh Circuit's holding below—that the government has no mens rea burden for the valuation element of Section 2113(b), even though the valuation is undisputedly a substantive element of the offense—conflicts with the holdings of multiple other circuit courts that mens rea must be presumed for *each* substantive element.

1. The government says (Opp. 9) that there is no circuit split because those other courts' cases did not involve Section 2113(b). But that intentionally cramped view of the issue in this case misses the point: the disagreement is over whether the courts require scienter for substantive

elements. The Fourth, Fifth, Eighth, and Eleventh Circuits have all stated the rule clearly: mens rea must be presumed for *each* substantive element. See Pet. 11–12. If petitioner had been tried in any of those circuits, then his conviction would have been reversed, because the felony valuation threshold in Section 2113(b) is undisputedly a substantive element and the government did not even attempt to prove that petitioner had the intent to steal more than $1,000.

2. The government next asserts (Opp. 10–11) that those cases did not actually recognize that principle of law, and instead held merely that the term "knowingly" in various specific statutes applied to each element that followed. But that narrow rule was not the holding of those courts, as the petition's quotations from the cases demonstrate. The courts' reasoning was not limited solely to the fact that the statutes at issue used "knowingly." The Fourth Circuit in *United States* v. *Wilson*, 133 F.3d 251 (1997), required "mens rea with respect to *each element*" under "common law principles regarding mens rea." *Id.* at 253–254, 261–262 (emphasis added). The Fifth Circuit in *United States* v. *Ahmad*, 101 F.3d 386 (1996), similarly presumptively applied mens rea "to *each element* of the crimes." *Id.* at 391 (emphasis added). And the Eighth Circuit in *United States* v. *Bruguier*, 735 F.3d 754, 762 (2013) (en banc), expressly relied on the presumption, as did the Eleventh Circuit in *United States* v. *Dominguez*, 661 F.3d 1051, 1068 (2011).

Those courts' holdings that the mens rea "knowingly" distributed to each succeeding element in the offenses at issue were thus *applications* of the broader legal principle that the government must prove mens rea for all substantive elements. And that principle is foundational to due process. The government does not attempt to explain why

one adverbial modifier ("knowingly") presumptively applies across all other elements while the adverbial modifier here ("with intent to steal or purloin") does not.

3. The government argues that the courts of appeals require proof of mens rea only for those specific elements "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Opp. 11–12 (quoting *Elonis* v. *United States*, 575 U.S. 723, 736 (2015)). Even if that formulation appropriately captured the legal rule, the circuits disagree over whether "otherwise innocent conduct" means that which is *entirely* innocent under *any* criminal law (as the D.C., Third, and Seventh Circuits hold, see Pet. 14 and *United States* v. *Burwell*, 690 F.3d 500, 508 (D.C. Cir. 2012) (en banc)), or instead conduct that makes the defendant innocent of the offense in question (*i.e.*, "proof of knowledge with respect to the *actus reus* of the crime," *United States* v. *Ivey*, 60 F.4th 99, 116–117 (1st Cir. 2023)). The latter view is the correct one, as then-Judge Kavanaugh's *Burwell* dissent explained. 690 F.3d at 529. That is because the presumption of mens rea is essential to ensure that the specific crime charged by the government matches the degree of the defendant's culpability.

Anyway, the government is incorrect that courts require mens rea only for elements that distinguish criminal from wholly innocent conduct. Again, the substantive rule in the Fourth, Fifth, Eighth, and Eleventh Circuits—which the petition quoted directly—is that mens rea presumptively applies to all substantive elements. There is no reason to think that those courts' rule for "each" substantive element did not mean *all* of them.

The Fourth Circuit in *Ivey*, 60 F.4th 99, quoted the "otherwise innocent conduct" language, but it explained that this meant "proof of knowledge with respect to the *actus reus* of the crime," and so it then adopted a *height-*

ened intent requirement for the statute at issue. *Id.* at 116–117. The Fifth Circuit in *United States* v. *Valencia*, 394 F.3d 352 (2004), read in a scienter requirement and applied the presumption to avoid overbreadth; it did not base its decision on whether the conduct in question would otherwise be criminal. *Id.* at 355–356. And although the Eleventh Circuit in *United States* v. *Fleury*, 20 F.4th 1353 (2021), recited the "otherwise innocent conduct" standard, it did not explain its understanding of that standard, and the presumption was not determinative because the "plain language" of the statute clearly established the offense's mens rea. *Id.* at 1371.

4. The government is also wrong about the other courts described in the petition. In *United States* v. *Little*, 961 F.3d 1035 (2020), the Eighth Circuit applied *Bruguier* (a presumption case) to hold that the express mens rea element applied to "each element." *Id.* at 1038. In *United States* v. *Mitchell-Hunter*, 663 F.3d 45 (2011), the First Circuit applied the substantive/jurisdictional element distinction. *Id.* at 51. And although the question was whether a fact was a matter for trial, the court said that, because it was not an "element," it "[did] not relate to whether a defendant committed the proscribed actus reus or possessed the necessary mens rea." *Ibid.* (quoting *United States* v. *Vilches-Navarrette*, 523 F.3d 1, 21 (1st Cir. 2008)). In *United States* v. *Bunn*, 154 F. App'x 227 (2005), the Second Circuit noted that it was leaving open the question whether a fact was "jurisdictional only, or an element of the crime with a corresponding *mens rea*." *Id.* at 229 (citing *United States* v. *Pinckney*, 85 F.3d 4, 6 (2d Cir. 1996)). But that language made clear that a "substantive element of the offense" *would* have a "corresponding *mens rea*." *Ibid.*

B. The decision below is incorrect

The Seventh Circuit erred because the text of the felony offense that the government charged against petitioner under Section 2113(b) required proof that he conspired to take more than $1,000 from a bank, and the government introduced *no evidence* whatsoever on that element. None of the government's responses is persuasive.

1. The government insists (Opp. 6–7) that the presumption of mens rea applies if the statute is either silent on scienter or includes a scienter element without saying which other elements that scienter covers. But Section 2113(b) is at least in the latter category. And although the government argues that "intent to steal or purloin" is the *only* intent required under Section 2113(b), that is plainly mistaken. After all, the statutory text is clear that a defendant must *intend* to "take and carry away" the "money." Taking and carrying away is part of the crime's actus reus, just like the valuation element. There is no reason for the intent requirement to apply differently between them. And anyway, "intent to steal or purloin" is a grammatically incomplete phrase that does not completely articulate the required intent. It is missing its direct object in the felony version of the offense: "money … exceeding $1,000."

Recall that Section 2113(b) establishes two different bank-robbery offenses: one a felony and the other a misdemeanor. See *Carter*, 530 U.S. at 272–273. That structure means that, if the government wants to charge a completed felony bank robbery, then it indisputably must prove that the defendant took more than $1,000. And if the government wants to charge a conspiracy to commit the felony offense, then it needs to prove that the defendant

conspired to steal more than $1,000—*i.e.*, that he had that intent and took a substantial step toward that result.

2. The government also repeats the misconception (Opp. 7–8) that the mens rea presumption applies only to conduct that would otherwise be perfectly innocent. But then-Judge Kavanaugh explained in *Burwell* that this Court has never limited the presumption in that way. 690 F.3d at 529 (Kavanaugh, J., dissenting). The presumption also applies to "avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct." *Ibid.* Put another way, without any proof from the government that petitioner stole $1,000 or more, he is *actually innocent* of the crime of felony bank robbery.

The government tries in a footnote (Opp. 8 n.*) to dismiss entirely then-Judge Kavanaugh's detailed discussion in *Burwell*, arguing that the statute in that case was different. But regardless of the details of the offenses, the summary of the law of mens rea in that opinion remains accurate, and it supports petitioner here. The government's misconception reinforces why this Court should take this case and clarify that law now.

3. The government's statutory interpretation arguments lack merit. Like the Seventh Circuit, the government says (Opp. 4) that "intent to steal or purloin" in Section 2113(b) is "set off by commas" from "exceeding $1,000." But the commas make no difference in meaning. "Steal" and "purloin" are both verbs that take a direct object. There is just one here: money exceeding $1,000. Grammatically, there is no separation at all. They are within the same clause. Under the government's view, if a person were to "purchase and take, with intent to eat, a sandwich," she would *purchase* a sandwich and *take* a sandwich but only *intend to eat* something in general—maybe yogurt, not the sandwich. Baloney.

The government incorrectly insists that *Carter* supports its view because *Carter* listed "intent to steal" and "value exceeding $1,000" separately. Opp. 4–5 (citing 530 U.S. at 261–262). But *Carter* also separately listed "asportation" (taking, carrying away), and no one suggests that "value exceeding $1,000" does not apply to that element. It is well established that a discretely listed mens rea requirement generally applies to all the other elements of an offense. Model Penal Code § 20.02(4); *Rehaif* v. *United States*, 139 S. Ct. 2191, 2195–2196 (2019).

The government also says (Opp. 5) that English common law did not differentiate grand and petit larceny based on intent, and so Section 2113(b) cannot have such a distinction either. But Section 2113(b) did not codify English common-law larceny. At common law, grand and petit larceny were two grades of the *same* offense—and a felony either way. *Carter*, 530 U.S. at 288 (Ginsburg, J., dissenting) (citing 4 William Blackstone, *Commentaries on the Laws of England* 229 (1769)); *Black's Law Dictionary* 1012 (10th ed. 2014). *Carter* held that Section 2113(b) describes two *distinct* offenses, and this Court rejected reliance on the elements of common-law larceny and robbery. 530 U.S. at 264–267 (calling any "resemblance" to the common-law crimes "beside the point").

4. The government further insists (Opp. 7) that the valuation threshold "affects only the punishment for the crime," but *Carter* rejected the suggestion that the valuation element was a mere sentencing factor. 530 U.S. at 273. Citing *Dean* v. *United States*, 556 U.S. 568, 575 (2009), the government argues (Opp. 7) that many laws increase punishment based on unintended consequences of unlawful acts. But the examples that the government cites are all sentencing factors, not substantive elements.

The government also contends (Opp. 8) that, even if the presumption of scienter applies, it is overcome in Section 2113(b). But all the government offers in support are its textual argument that misapplies grammar, its historical argument that this Court rejected in *Carter*, and a hypothetical that overstates the practical ramifications. That is not a clear signal from Congress to overcome the presumption. Regardless, a court must start by applying the presumption before deciding whether it is rebutted. Pet. 17. The Seventh Circuit did not conduct that analysis; it presumed from the outset that scienter did not apply and did not examine the exceptions.

5. The government next contends (Opp. 5–6) that a mens rea requirement "would render the statute ineffectual." Not at all. For starters, there is no canon that favors tilting the table of interpretation in a prosecutor's favor. And the lone example that the government offers is not credible. The government complains (Opp. 6) that a mens rea requirement would protect a defendant who "steals property … without knowing its value" by "grabbing a fistful of cash … without pausing to count it." That defendant is unambiguously guilty of a misdemeanor at least, because he took *some* amount of money with the intent to steal it. If the government wants to charge that defendant with a felony, then it needs to prove that he intended to steal more than $1,000.

That proof might be made in any number of ways. The statute does not impose a *knowledge* requirement—just a requirement of *some* evidence of intent. There are several possible legal standards, such as willful blindness or recklessness, that the government might use to establish that intent. And in the case of a completed offense, a jury could reasonably infer a person's intent from the actual amount of money that he stole. Grabbing a fistful of $1 bills would

show an intent to take less than $1,000; emptying a tray of hundreds into a sack would suggest an intent to take more. See, *e.g.*, *United States* v. *Silva*, 715 F.2d 43 (2d Cir. 1983) (reasonable for jury to infer that appellant knew she was carrying more than $5,000 because bundle of bills was one-and-a-half inches thick). The government uses circumstantial evidence to show intent in all sorts of criminal cases. See *Cuellar* v. *United States*, 553 U.S. 550, 567 n.8 (2008) ("[W]here the consequences of an action are commonly known, a trier of fact will often infer that the person taking the action knew what the consequences would be and acted with the purpose of bringing them about."). It could under Section 2113(b) too.

6. Finally, the government insists (Opp. 12–13) that it does not matter that this conviction was for conspiracy, not for a completed offense. But the government concedes that a conspiracy conviction requires proving "that the conspirators *agreed* to commit the substantive offense." Opp. 12 (emphasis added). The only thing that differentiates a conspiracy to commit a felony and a conspiracy to commit a misdemeanor is the amount that the conspirators intended to steal. If the government wants the more serious charge, then it must prove it.

C. The question presented is recurring and important, and this case is an ideal vehicle

The government does not dispute that the question presented was preserved at every stage below. Pet. 24. It also does not dispute that the mens rea issue is dispositive here: if this Court holds that the mens rea presumption applies, then petitioner's conviction must be vacated. Pet. 25. That makes this case an ideal vehicle to answer the question presented.

The government does argue that the issue in this case will not recur frequently. Opp. 13. But here again the gov-

ernment attempts to re-frame the dispute to be narrower than it is. The question in this case is about the relationship between substantive elements and mens rea, and the Court's holding on *that* issue will apply to many statutes beyond Section 2113(b). Pet. 25. This case will also clarify how the government must prove conspiracy charges predicated on other offenses that never came to pass. Pet. 26. The petition explained why those issues are increasingly relevant. Pet. 26. And beyond disputing the frequency of the question in the specific context of this particular statutory provision, the government does not say otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 2023