

**In The
Supreme Court of the United States**

—◆—
GARY HEINZ, MICHAEL WELTY
and PETER GHAVAMI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI
—◆—

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QUESTION PRESENTED

Whether 18 U.S.C. §3293(2), which extends the statute of limitations for mail or wire fraud from five to ten years if the fraud “affects a financial institution,” applies where the defendant is a bank employee, the bank is a culpable actor, and the alleged effect is that the bank made payments to settle, or incurred legal fees to defend, certain civil, regulatory and criminal actions. In other words, does the statute apply where the bank “affects itself”?

LIST OF PARTIES

The caption of the case lists all parties to the proceeding in the court whose judgment is to be reviewed.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Peter Ghavami, Gary Heinz and Michael Welty, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Second Circuit (Pet. App. (“App.”) 1-5, 6-10) affirming the convictions and sentence are available at 760 F.3d 365 (2d Cir. 2015), and 607 Fed. Appx. 52 (2d Cir. 2015) (summary order). The decisions of the United States District Court for the Southern District of New York addressing the issue presented (App. 11-64, 65-109) are available at 23 F. Supp. 3d 148 (S.D.N.Y. 2014) (post-trial opinion), and 2012 WL 2878126 (S.D.N.Y. July 13, 2012) (pre-trial opinion).

JURISDICTION

The final judgment of the United States Court of Appeals for the Second Circuit was entered on June 4, 2015. On July 30, 2015, Justice Ruth Bader Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. §3282(a), the general limitations statute, states:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. §3293 provides:

No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate –

- (1) section 215, 656, 657, 1005, 1006, 1007, 1014, 1033, or 1344;
- (2) section 1341 or 1343, if the offense affects a financial institution; or
- (3) section 1963, to the extent that the racketeering activity involves a violation of 1344;

unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

STATEMENT OF THE CASE

1. This petition squarely presents a recurring issue in criminal and civil law that has manifested itself in a number of significant, high-profile cases

and has generated several different interpretive approaches by the courts of appeals. Various provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. No. 101-73, §961, 103 Stat. 183 (1989), a legislative response to the 1980s savings and loan crisis, attach great significance to whether a fraud “affects a financial institution.” The issue here is the interpretation of that phrase.

In this criminal case, the Second Circuit’s conclusion that the fraud affected a financial institution rendered an otherwise stale prosecution timely under the statute’s ten-year limitations period. That decision turned the meaning of the word “affect” on its head. The offense here was committed by financial institution employees who, the jury found, were acting on behalf of, and conspiring with, their employers and other financial institutions to defraud municipalities in connection with bond transactions. The institutions profited greatly from the fraud, a circumstance that hardly implicates the bank-protective policy underlying FIRREA. Nevertheless, the courts below reasoned that the banks were affected because they entered into civil monetary settlements with the SEC, the IRS and other state and federal regulators, and incurred attorneys’ fees in reaching non-prosecution agreements with the Department of Justice Antitrust Division. This counter-intuitive “self-affecting” theory of liability, which has begun to take hold among certain lower courts, perilously dilutes the requirement for a sufficient nexus between

the unlawful conduct and the attendant consequence on the financial institution. Taken to its logical conclusion, this overly-broad reading of “affect” would apply to virtually *any* fraud committed by a financial institution employee. The plain language and legislative history of the statute make clear that Congress did not intend to cause such a dramatic change in the law when it passed the bank-protective FIRREA statute.

This Court should grant this petition to interpret FIRREA’s “affects a financial institution” language. The issue was clearly presented in the district court and the court of appeals and this case is a straightforward vehicle for the Court to define that term.

2. On December 9, 2010, a grand jury sitting in the Southern District of New York returned an Indictment charging Peter Ghavami, Gary Heinz and Michael Welty with fraud and related charges stemming from allegations that, while working at the New York office of the international bank UBS, they rigged bids for municipal bond reinvestment agreements and other municipal finance contracts. On September 15, 2011, the grand jury returned a six-count superseding Indictment (“the Indictment”) alleging that the schemes had “affected a financial institution” such that the charges, otherwise stale, were timely filed pursuant to the ten-year statute of limitations set forth in 18 U.S.C. §3293(2).

On August 31, 2012, following a four-week jury trial, Ghavami was convicted on all three counts in which he was charged (Counts 1-3). On July 24, 2013,

the district court sentenced Ghavami to 18 months' incarceration and imposed a \$1 million fine. He has served his sentence. Welty and Heinz were also convicted and sentenced by the district court. On June 4, 2015, the United States Court of Appeals for the Second Circuit affirmed the convictions.

3. A brief background of the municipal reinvestment business is helpful to understanding the issue here. From time to time, municipalities (or other public entities) raise money by issuing bonds. Trial transcript ("Tr.") 2703. In doing so, they have an advantage over private issuers: if certain conditions are met, the interest paid to bondholders is exempt from federal taxation. Tr. 2702.

Often, the proceeds from the sale of bonds are not needed immediately, for example if they are to be used for a capital project that will take years to complete. If so, the municipality may invest unused funds in various reinvestment products offered by financial institutions ("providers"). These reinvestment contracts are typically awarded to providers through a competitive bidding process run by "brokers." Tr. 2708-09; Superseding Indictment ("Ind.") ¶18. Some firms specialize in brokering these transactions, while others, like UBS, do so as an ancillary service to the firm's municipal clients. Tr. 2758-59, 3863. In addition to UBS, certain of the transactions here included JPMorgan Chase ("JPMorgan") and Bank of America ("BOA"), both of which were providers of reinvestment agreements and other municipal

finance contracts, Ind. ¶¶8, 9, 40, as well as a brokerage house known as CDR. Ind. ¶¶27-36.¹

4. The gravamen of the government's case was that Defendants (at UBS) and individuals at other providers (*e.g.*, JPMorgan, BOA) conspired with one another, the financial institutions and certain brokers to rig the bids for municipal investment agreements. According to the government, the conspirators sought to accomplish this goal in several ways: (i) by agreeing which provider would win a particular transaction; (ii) by soliciting intentionally losing or "courtesy" bids to meet IRS requirements for non-taxability and give the illusion of a competitive bidding process; (iii) by giving "last looks" (*i.e.*, sharing information with one bidder about other providers' bids to allow the bidder to submit a winning bid); and (iv) by falsely certifying to bond counsel that they had complied with the relevant regulations. Tr. 383-87; Ind. ¶25.

5. The core legal issue involved the statute of limitations. Peter Ghavami was convicted of Counts 1 through 3 of the Indictment. Count 1 alleged a §371 conspiracy from "as early as August 2001 until at least July 2002," Ind. ¶23; Count 2 alleged a wire fraud conspiracy from "as early as March 2001 until at least November 2004," Ind. ¶33; and Count 3 alleged a substantive wire fraud from "as early as

¹ UBS, JPMorgan and BOA were all unindicted co-conspirators.

October 18, 2001 until at least February 15, 2002,” Ind. ¶42. Thus, the original 2010 Indictment was returned well after the expiration of the usual five-year statute of limitations for wire fraud and conspiracy. 18 U.S.C. §3282.

Accordingly, Defendants moved pre-trial to dismiss these counts as untimely. In response, the government relied primarily on the ten-year limitations period set forth in Section 3293(2) for frauds (and related conspiracies) that “affect[] a financial institution.” It claimed that the scheme “exposed [UBS, JPMorgan and BOA] to considerable risk of loss and actually resulted in loss, including financial settlements that included fines and penalties.” Gov’t Mem. Opp. Mot. to Dismiss at 6. The “loss” consisted of civil monetary settlements with the SEC, the IRS and other state and federal regulators, as well as attorneys’ fees incurred in reaching non-prosecution agreements with the Department of Justice Antitrust Division. The government sought to introduce the agreements into evidence, along with testimony from bank employees that the settlements resulted in part from the charged conduct.²

² The government largely abandoned its alternative “economic benefit theory” applicable to transactions that involved a stream of payments to the municipalities at artificially suppressed rates. Under that theory, the schemes did not end (and the limitations periods did not begin to run) until the final payment was made, even if that was to occur decades later. The government successfully pressed the economic benefit theory in a parallel prosecution before another judge in the Southern

(Continued on following page)

For example, the government sought to introduce evidence that, on May 4, 2011, UBS entered into a non-prosecution agreement with the Antitrust Division in which it “admit[ted], acknowledg[ed] and accept[ed] responsibility” for illegal conduct in its company. Ex. A to Gov’t Mem. Opp. Mot. to Dismiss ¶5. Specifically, that “from 2001 through 2006, certain then-employees of UBS at its municipal reinvestment and derivatives desk . . . entered into unlawful agreements to manipulate the bidding process and rig bids on certain municipal contracts, and made payments and engaged in other activities in connection with those agreements, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and certain sections of Title 18 of the United States Code.” *Id.* At the same time, UBS also settled with the SEC, the IRS and 25 state attorneys general, agreeing to pay \$160 million to the IRS and municipalities harmed by its conduct.³

District, but the Second Circuit rejected the argument and reversed the convictions. *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013) (holding that ministerial interest payments were not overt acts in furtherance of conspiracy).

³ The government also offered the settlements of JPMorgan (\$228 million), BOA (\$137.2 million), and the broker CDR (\$70 million).

6. The district court denied Defendants' motion to dismiss in a written opinion dated July 13, 2012. It defined the issue as follows:

[Whether] the charged conduct affected certain financial institutions within the meaning of § 3293(2) by exposing them to the risk of loss and causing them to experience actual financial loss, in the form of civil monetary settlements with the Securities & Exchange Commission ("SEC") and other regulators, as well as attorneys' costs and fees associated with reaching resolutions of non-prosecution agreements with the Department of Justice Antitrust Division ("DOJ").

App. 76 (quotations and alterations omitted).

The court first held that the statute "is not limited to circumstances in which a financial institution is the object or victim of a scheme to defraud." App. 77. Next, it held that a "new or increased risk of loss is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of the statute." App. 78 (quoting *United States v. Mullins*, 613 F.3d 1273, 1278-79 (10th Cir. 2010)).

The trial court further held that the settlement and deferred prosecution agreements, and related testimony, were admissible to establish the required effect:

The Settlement Agreements and Non-Prosecution Agreements illustrate that the

alleged conduct created an increased risk of loss . . . in the form of exposure to restitution payments, civil penalties and criminal prosecution, a risk that was ultimately realized – in the form of restitution payments and civil penalties – when [the three banks and CDR] entered into the Settlement Agreements and Non-Prosecution Agreements. . . .

App. 88. The court, however, severely limited Defendants' ability to challenge that evidence, explaining:

Because the documentary evidence and testimony would be sufficient to establish that alleged conduct caused the exposure to, and realization of, the risk of loss, Defendants need not inquire into other potential reasons that may have motivated the Financial Institutions' decision to enter into those agreements, thereby eliminating the need for supplemental discovery and cross-examination of the representatives into such collateral issues as to how financial institutions interact with regulators and arrive at settlement decisions, which could potentially confuse the jury.

App. 88-89.

Finally, the court addressed the prejudice that would result from the banks' admissions that its employees committed crimes. The court stated: (i) that "[t]he Agreements do not mention any particular employee by name or description, and there is no acknowledgement that the Defendants in this case engaged in the conduct that led (at least in part) to

the Agreements”; (ii) that the evidence would “be limited to what is necessary to establish that financial institutions were exposed to the risk of loss as a result of the conduct alleged in the Indictment”; and (iii) that the court would instruct the jury “that the evidence is to be used for that purpose only, and not as evidence of Defendants’ guilt.” App. 89-90.

The court nevertheless invited the parties “to stipulate that the alleged conduct affected a financial institution.” App. 90 n.9. The parties subsequently reached such an agreement, with Defendants explicitly preserving their right to appeal the trial court’s legal determination of what constitutes “affects” under Section 3293(2). Stipulation 4; Tr. 2597-99, 3826.

7. The Second Circuit affirmed. It first held that Defendants had properly preserved their right to appeal the legal argument relating to the statute of limitations, and thus it reached the merits of the issue. App. 4. As to the merits, the entirety of the court’s analysis was as follows:

“[T]he verb ‘to affect’ expresses a broad and open-ended range of influences.” *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999). The plain language of § 3293(2) makes clear that “Congress chose to extend the statute of limitations to a broader class of crimes” than those in which “the financial institution is the object of fraud.” *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (quotation marks

omitted). And so § 3293(2) “broadly applies to any act of wire fraud that affects a financial institution,” provided the effect of the fraud is “sufficiently direct.” *Id.* (quotation marks omitted). We conclude that the Defendants’ wire fraud offenses “affected” the three banks in this case within the meaning of § 3293(2). It is undisputed that the banks executed the Bank Agreements prompted in part by the fraudulent conduct of the Defendants and their coconspirators. As a result, the banks incurred significant payments and related fees, which were foreseeable to the Defendants at the time of their fraudulent activity. The role of the banks as coconspirators in the criminal conduct does not break the necessary link between the underlying fraud and the financial loss suffered.

App. 4-5.

REASONS FOR GRANTING THE PETITION

The plain language, legislative history and clear purpose of Section 3293(2) establish that settlement agreements reached by a culpable bank are not the type of harm contemplated by the statute. To conclude otherwise, as the lower courts did here, turns on its head a statute aimed at *protecting* banks from fraud. This interpretation is as incongruous as charging a person with attempted murder for trying to commit suicide. Nonetheless, this “self-affecting” theory has

been applied in important civil and criminal cases to reach incorrect results. Although other federal courts have employed different interpretations of “affect,” the dominant approach is broad enough to encompass the “self-affecting” theory that threatens to become the law of the land. This Court should grant certiorari to clarify this important and recurring question of statutory interpretation.

I. Statutory Background

18 U.S.C. §3293 provides:

No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate –

- (1) section 215, 656, 657, 1005, 1006, 1007, 1014, 1033, or 1344;
- (2) section 1341 or 1343, if the offense affects a financial institution; or
- (3) section 1963, to the extent that the racketeering activity involves a violation of 1344;

unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

The statute was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. No. 101-73, §961, 103 Stat. 183 (1989), a legislative response to the 1980s savings and loan crisis. *See* H.R. Rep. No. 101-54, at

464 (1989), as *reprinted in* 1989 U.S.C.C.A.N. 86, 260 (“[M]isconduct, fraud, and abuse have significantly contributed to or caused hundreds of bank and thrift failures and the consequent multi-billion dollar losses facing the U.S. Government.”). At the time, Congress perceived a “tremendous backlog in pending criminal investigations,” warranting the extension of the limitations period to ten years for certain conduct affecting a financial institution. *Id.* at 464, 1989 U.S.C.C.A.N. at 260. *See also id.* at 472, 1989 U.S.C.C.A.N. at 268 (“The longer period of limitations is necessary because of the enormous backlog of thousands of currently pending investigations and prosecutions and the complexity of many of the cases.”).

In addition to extending the limitations period, FIRREA also attached other civil and criminal consequences to frauds that “affect[] a financial institution.” For example, the mail and wire fraud statutes increase the statutory maximums from 20 to 30 years if the fraud “affects a financial institution.” 18 U.S.C. §§1341, 1343 (Pub. L. No. 101-73, §961(i, j), 103 Stat. 183 (1989)). Moreover, FIRREA’s civil penalties require proof that a defendant’s fraud “affect[ed] a federally insured financial institution.” 12 U.S.C. §1833a(c)(2). And though subsequently amended, the federal sentencing guidelines also embodied materially-identical language prescribed by FIRREA. *See* U.S.S.G. §2F1.1(b)(8)(b) (2000) (four-level enhancement if offense “affected a financial institution and the defendant

derived more than \$1,000,000 in gross receipts from the offense”).⁴

II. The Lower Courts’ Different Approaches

The Second Circuit here, following its earlier decision in *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998), applied a quasi-proximate cause standard that looks to whether the offense and the effect on the financial institution are “sufficiently direct.” Lower courts in the Second Circuit have followed that approach to hold that an institution can be affected by its own wrongful conduct. *See, e.g., United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (civil case); *United States v. Countrywide Financial Corp.*, 961 F. Supp. 2d 598 (S.D.N.Y. 2013) (civil case); *United States v. Bank of*

⁴ This guideline was amended in 2001 and now provides for a two-level enhancement if “the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense.” U.S.S.G. §2B1.1(b)(16)(A) (2014). The amendment was meant “to address issues about what it means to ‘affect’ a financial institution . . . [and thus] the revised provision focuses on whether the defendant derived more than \$1,000,000 in gross receipts *from* one or more financial institutions as a result of the offense.” U.S.S.G. Amend. 617 (effective November 1, 2001) (emphasis added). In other words, the guidelines now make explicit that the enhancement applies where the defendant victimized the financial institution, and not merely where the defendant profited and the institution was “affected” in some indirect manner. This underscores our point that FIRREA’s enhanced punishment provisions were not intended to give added protection to banks acting as wrongdoers.

New York Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. 2013) (civil case); *United States v. Rubin/Chambers, Dunhill Ins. Servs.*, 831 F. Supp. 2d 779 (S.D.N.Y. 2011) (criminal case); *United States v. Daugerdas*, No. 09-Cr-581, 2011 WL 6020113 (S.D.N.Y. April 5, 2011) (criminal case); *United States v. Ohle*, 678 F. Supp. 2d 215 (S.D.N.Y. 2010) (criminal case), *aff'd on other grounds*, 441 Fed. Appx. 798, 800 (2d Cir. 2011).⁵

⁵ The *Countrywide* case, in which the district court imposed monetary penalties of more than \$1.2 billion against several bank defendants based on the “self-affecting” theory, is now on appeal to the Second Circuit and raises the same principal issue that is presented here. See Brief of Defendants-Appellants Bank of America, N.A.; Countrywide Bank, FSB; and Countrywide Home Loans, Inc., *United States v. Bank of America, et al.*, Nos. 15-496-cv, 15-499-cv, at 29 (2d Cir. filed April 22, 2015), available at 2015 WL 1910180, at *28 (arguing that “[f]ederally insured financial institutions cannot be liable under Section 1833a(c)(2) on the theory that they engaged in conduct ‘affecting’ themselves”).

However, absent a grant of certiorari, the Circuit panel that will hear the *Countrywide* appeal will likely be required to apply the rule articulated in our case. See *Johnson v. United States*, 779 F.3d 125, 128 (2d Cir. 2015) (“a panel of this Court is “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court”) (internal quotations omitted). In a criminal case also on appeal to the Second Circuit the defendant likewise argues that “the language of ‘affect[ing] a financial institution’, for purposes of both the statutory language at 18 U.S.C. §§1341 and 3293, only applies to cases where a financial institution is an alleged victim of the charged scheme and not an alleged participant.” Brief for Defendant-Appellant Paul M. Daugerdas, *United States v. Mayer, et al.*, No. 14-2437-cr (2d Cir. filed January 30, 2015), available at 2015 WL 493772, at 62 n.19.

(Continued on following page)

Other circuits, however, have adopted varying standards to assess the required nexus between the offense and the effect on the financial institution. For example, the Tenth Circuit in *United States v. Mullins*, 613 F.3d 1273, 1278 (10th Cir. 2010), held that “there may be some point where the ‘influence’ a defendant’s wire fraud has on a financial institution becomes so attenuated, so remote, so indirect that it cannot trigger the ten-year limitations period because it does not in any meaningful sense ‘affect’ the institution”) (citations omitted). The Third Circuit, in *United States v. Pelullo*, 924 F.2d 193, 216 (3d Cir. 1992), remarked that the link between conduct and loss cannot be “unreasonably remote.” See also *United States v. Murillo*, 443 Fed. Appx. 472, 474-75 (11th Cir. 2011) (conduct affected financial institution where defendant caused subsidiary to purchase fraudulent loan); *United States v. Serpico*, 320 F.3d 691, 694 (7th Cir. 2003) (scheme that exposes bank to increase risk of loss affects institution); *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000) (potential consequences to bank were too remote to satisfy §3293(2)). The Fourth Circuit, in *United States v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000), applied the tightest nexus

And, earlier this year, Reuters reported that Bank of New York Mellon, following an adverse decision on the affects issue, settled its FIRREA case with the government for \$714 million. See Frankel, *BofA ‘Hustle’ appeal tests Justice’s novel use of old S&L statute*, available at <http://blogs.reuters.com/alison-frankel/2015/04/23/bofa-hustle-appeal-tests-justices-novel-use-of-old-sl-statute/>.

requirement, looking to whether the “financial institutions themselves were harmed or victimized in any way, or that they were intended to be so harmed or victimized by the fraud scheme,” and concluding that a fraud “affected a financial institution only if the institution itself were victimized by the fraud.”

Critically, none of these cases holds that misconduct by the bank or its employees is sufficient to trigger §3293(2)’s extended statute of limitations, creating a conflict with the Second Circuit’s decision in our case. At the very least, the circuits’ varying definitions of “affect” underscore the need for nationwide clarity on this important and recurring issue.

III. The Plain Language

The Second Circuit’s government-friendly high-water mark for what satisfies an effect on a financial institution is unmoored from the terms of §3293(2). Of course, an interpretation of a statute must begin with its plain language. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). As the district court observed, the primary “meaning of the verb ‘affect’ is ‘to produce an effect upon.’” App. 79 (citing Webster’s Third New International Dictionary 35 (1976)). The same dictionary defines “effect” as “something that is produced by an agent or cause; *something that follows immediately from an antecedent*; a resultant condition.” (Webster’s at 724) (emphasis added). This definition embodies the familiar legal concept of

causation: the result must follow directly and proximately from the antecedent cause.

Where the bank is a culpable member of the conspiracy, however, its fraudulent conduct is not a proximate cause of any settlement it may later reach. Simply put, where the bank *participates in* the offense and targets others, that effect is far too attenuated. The crime must be successful, it must be detected, regulators or law enforcement (or civil plaintiffs) must bring or threaten litigation, potential liability against the institution must be feared, and the bank must agree to settle. Even then, the bank may have come out ahead. The causal chain is too *Palsgraf*-ian to satisfy whatever connective standard may be applied.

The proposition becomes even more dubious when one recognizes that large, publicly-traded and highly-regulated financial institutions settle for numerous reasons that may have nothing to do with whether they committed fraud. A bank may settle to avoid serious collateral consequences or adverse publicity, or because it is cheaper than to litigate. Surely payments that depend on complex layers of corporate decision-making about whether to enter a settlement are not a “sufficiently direct” product of the fraud. See Stanley S. Arkin, *Excluding the Corporate Guilty Plea*, 224 N.Y. Law J. 32 (2000) (noting mid-trial ruling in *United States v. Andreas*, 23 F. Supp. 2d 835 (N.D. Ill. 1998), *aff’d*, 216 F.3d 645 (7th Cir. 2000), excluding evidence of corporate guilty plea and non-prosecution commitment in trial of

executives: “Any probative value to the plea, the court found, was diluted by the many factors that cause corporations to plead guilty.”).

The structure of Section 3293 confirms that “affect” does not apply where the bank is a perpetrator. The other crimes for which the statute provides a ten-year limitations period (found in subsection (1)) are, at their core, crimes *against* institutions or the FDIC: §215 (“Receipt of commissions or gifts for procuring loans”); §656 (“Theft, embezzlement, or misapplication by bank officer or employee”); §657 (misapplication of bank funds); §1005 (making false entries in bank records); §1014 (false statements on loan or credit applications); and §1344 (bank fraud). See John K. Villa, *Banking Crimes: Fraud, Money Laundering, and Embezzlement*, §7:3 (1989) (“In essence, FIRREA treats any mail and wire fraud offense that ‘affects a financial institution’ in a similar fashion as bank fraud – 18 U.S.C.A. §1344 – while leaving the mail and wire fraud statutes untouched for other offenses.”). Unlike what was charged here, when a defendant commits these crimes, the bank stands to lose money as a *direct* result of the fraudulent conduct. This makes sense, since “the whole purpose of [the ‘affects’ language] is to protect financial institutions.” *United States v. Serpico*, 320 F.3d 691, 694 (7th Cir. 2003).

Perhaps most fundamentally, the Second Circuit’s approach yields a linguistically strange, counterintuitive result in which a bank affects itself negatively by conduct that defrauds others because

there is a chance that the bank could be caught. One does not typically think of an action against another as producing an effect upon oneself. In this case, the statutory purpose is to protect banks from bad actors, not from the banks themselves. See Filmon M. Sexton IV, *The Financial Institutions Reform, Recovery and Enforcement Act of 1989: The Effect of the "Self-Affecting" Theory on Financial Institutions*, 19 N.C. Banking Inst. 263, 265 (2015) (describing lower courts' "self-affecting" theory as "absurd" and reflective of "an impermissible reading" of FIRREA's meaning and intent).

If this court does not recalibrate the meaning of "affects," the potential consequences could be breathtaking. Simply put, a bank would be subject to FIRREA's increased civil penalties whenever its employee commits a wire or mail fraud (because there is always a chance of an investigation, a regulatory action, a lawsuit or a prosecution). Likewise, the employee would be exposed to an increased sentence, and an extended limitations period, even though he was seeking to benefit the institution. As one commentator has aptly noted:

Taken to its boundary, this broad self-affecting construction . . . makes FIRREA civil penalties applicable to conduct far afield from conduct that threatens the financial integrity of the financial institution. It may surprise the drafters of FIRREA to learn that it could be used to penalize a financial institution for fraud against a non-financial

institution counter-party. . . . A corporate accounting scandal that leads to a substantial drop in the stock price of the corporation might well “affect” the financial institution where the corporation holds accounts, but is it the kind of threat to the integrity of the financial institution that FIRREA was designed to combat? Pinpointing the outer boundary is a question sure to present itself to appellate courts in the coming years.

U.S. Chamber Institute for Legal Reform, *The FIRREA Revival: Dredging up Solutions to the Financial Crisis* at 6-7 (October 2014). Moreover, the Second Circuit’s dilution of the causation requirement will likely yield other unintended consequences. For example, virtually any misconduct involving a publicly-traded company could be the basis for an “affects” finding so long as some bank owns shares of the stock, since the bank could potentially lose money when the share price drops. Even the fact that the government or a private party brings a lawsuit against an institution for an employee’s acts would meet the Second Circuit’s near-limitless definition, regardless of whether the suit has merit, since the institution would incur legal fees in defending the action. Surely the plain meaning of “affects” cannot be stretched so far so as to capture these scenarios, but that is precisely where the law is headed absent the Court’s intervention.

IV. Legislative History

The legislative history of FIRREA shows that Congress was concerned with banks being harmed by fraud – whether committed by insiders or outsiders – and not by their own wrongful conduct. The House Report stated that FIRREA’s criminal provisions were intended “to provide for improved supervision and enhanced enforcement powers and increase criminal and civil money penalties for crimes of fraud *against* financial institutions and depositors.” H.R. Rep. No. 101-54, at 322 (1989), as *reprinted in* 1989 U.S.C.C.A.N. 86, 118 (emphasis added). Through FIRREA, Congress “authorized [the Department of Justice] to spend an additional seventy-five million dollars for the purpose of pursuing the prosecution of individuals who have acted illegally *against* financial institutions.” *Id.* at 311, 1989 U.S.C.C.A.N. at 107 (emphasis added). *See also* H.R. Rep. No. 100-1088, at 33 (1988) (“[n]ew opportunities have been provided to both insiders and outsiders who are predisposed to enrich themselves *at the expense of the institutions and the Federal deposit insurance funds*”) (emphasis added). The Senate Report stated that, “[a]ccording to the Department of Justice, the most prevalent forms of fraud and insider abuse included nominee loans, double pledging of collateral, reciprocal loan arrangements, land flips, embezzlement, and check kiting.” S. Rep. No. 101-19, at 9 (1989). *See also Prosecuting Fraud in the Thrift Industry: Hearing Before the Subcommittee on Criminal Justice: Hearing on H.R. 1278 Before the Committee on the Judiciary*, 101st

Cong. 228 (1989) (statement of Joe D. Whitley, Acting Assoc. Att’y Gen. of the United States Dep’t of Justice) (“[t]hose who have contributed to this crisis are avaricious operators, people who are attracted to the world of finance primarily because of the financial gain they can obtain *from money in the vault* and the opportunity to use that money for their own personal gain”) (emphasis added). In short, the Senate, the House, and the Department of Justice all understood that FIRREA sought to curb abuses *against* banks.

The government’s (non)use of the statute post-enactment underscores that it was not intended to stretch nearly as far as courts are now defining its reach. For example, although FIRREA was enacted in 1989, until recently it was rarely used to bring otherwise untimely fraud cases. See Andrew W. Schilling, *Understanding FIRREA’s Reach: When Does Fraud ‘Affect’ a Financial Institution*, BNA Banking Report, 99 BBR 186 (July 24, 2012) (“the Department of Justice (DOJ) seems to have recently rediscovered the statute.”); Peter Lattman & Ben Protess, *From Anonymity to Scourge of Wall Street*, N.Y. Times, October 30, 2013 (noting that government is “dusting off” this “obscure federal law”). And a survey of published cases reveals that for nearly 20 years the statute was rarely if ever invoked where the institution was an active participant in the offense.

Moreover, Congress could not have intended an interpretation of “affects” that would require the admission of evidence as prejudicial as “Non-Prosecution Agreements, Settlement Agreements, and

related testimony.” App. 90. A defendant simply cannot win a trial if the government is allowed to show: (i) that his company paid \$160 million to the IRS and various municipalities to settle charges with the SEC, the IRS and 25 state attorneys general; (ii) that it entered into a non-prosecution agreement with the Department of Justice acknowledging bid-rigging by “certain then-employees [from 2001-2006] at its municipal reinvestment desk;” and (iii) that the other financial institutions implicated in the fraud reached similar arrangements. App. 89.

A statute should be given “‘a sensible construction’ that avoids attributing to the legislature either ‘an unjust or an absurd conclusion.’” *United States v. Granderson*, 511 U.S. 39, 56 (1994) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). See also *Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892) (court should presume that legislature did not intend statute to lead to “injustice, oppression, or an absurd consequence”) (quotations omitted). This Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), made the point. That case involved 8 U.S.C. §1326, which makes it a crime punishable by up to two years for a deported alien to return to the United States, and up to 20 years if the deportation was for an aggravated felony. The Court concluded that Congress intended the enhanced penalty provision to be a sentencing factor and not an element of the offense. A “contrary interpretation,” the Court held, “risks unfairness” since “the Government would be required to prove to the jury that the

defendant was previously deported ‘subsequent to a conviction for commission of an aggravated felony.’” *Id.* at 234-35. This would be true “[e]ven if a defendant’s stipulation were to keep the name and details of the previous offense from the jury.” *Id.* at 235.⁶

To be sure, the district court noted that “[t]he Agreements do not mention any particular employee by name or description, and there is no acknowledgment that the Defendants in this case engaged in the conduct that led (at least in part) to the agreements.” App. 89. And it agreed to instruct the jury that the agreements and related testimony were not “evidence of Defendants’ guilt.” App. 90. But just as a stipulation could not sanitize the prior crimes evidence in *Almendarez-Torres*, the redactions and instruction proposed here could not ameliorate the obvious harm from the introduction of the settlement evidence. No juror could put aside the powerful implication that UBS settled because it believed that Ghavami, Heinz and Welty were guilty of the charged crimes. *Cf. Gray v. Maryland*, 523 U.S. 185, 196 (1998) (redactions of co-defendant’s confession did not solve *Bruton*

⁶ The Court cited with approval several lower court decisions that had reached the same result, including *United States v. Forbes*, 16 F.3d 1294, 1299 (1st Cir. 1994) (“strong policy reasons” counseled in favor of rejecting interpretation that would require introduction of “highly prejudicial” evidence), and *United States v. Jackson*, 824 F.2d 21, 25 (D.C. Cir. 1987) (noting that there was no “convincing evidence . . . that Congress intended to deviate” from “[the] strong policy of avoiding the introduction of this potentially prejudicial evidence in criminal trials”).

problem where “[t]he inferences . . . involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant”).⁷

Finally, our interpretation would not leave an unintended statutory lacuna. As noted above, DOJ brought virtually no cases under the theory advanced here during FIRREA’s first two decades. Nevertheless, Congress left the “affects” language unchanged despite twice amending the other subsections of Section 3293. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §320604(b) and (e), 108 Stat. 1796 (1994) (amending paragraph (1)); Crime Control Act of 1990, Pub. L. No. 101-647, §2505, 104 Stat. 4789 (1990) (adding paragraph (3)). A court will “[o]rdinarily [] resist reading congressional intent into congressional inaction.” *Kimbrough v. United States*, 552 U.S. 85, 106 (2007). But Congress’s inaction as to subsection (2) suggests that it, like the government, believed that “affects” did not encompass the conduct and harm alleged here. See *Andrus v. Allard*, 444 U.S. 51, 57 (1979) (finding “particularly relevant” that Congress twice amended statute without rejecting Department of Agriculture’s

⁷ See also *Andreas*, 23 F.Supp. 2d at 848-49 (to admit evidence of corporate plea agreement and non-prosecution commitment would “raise serious concerns of unfair prejudice in that the jury may be unable to separate [the corporation] from the individual . . . executives on trial”); Arkin, *supra*, at 32 (“A variety of other reasons exist for excluding a corporate guilty plea apart from the plea’s lack of probative value regarding even the corporation’s guilt. Obviously, the prejudice to the individual defendants would be extreme.”).

view of it); *United Airlines v. Brien*, 588 F.3d 158, 173 (2d Cir. 2009) (Congress's repeated amendment of statutory provisions without disapproval of agency's interpretation "is persuasive evidence that the Agency's interpretation is the one intended by Congress") (quoting *CFTC v. Schor*, 478 U.S. 833, 846 (1986)) (alterations and quotations omitted).

In short, Congress did not intend that FIRREA would apply where the bank was the wrongdoer.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to address the meaning of the phrase "affects a financial institution" under FIRREA and, specifically, whether a culpable bank actor can "affect" itself.

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Respectfully submitted,

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