

# Care and Custody in Federal Bank Robbery

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*By the time federal appellate courts began to examine the withdrawal of money from an ATM and the question of to whom that money belongs pursuant to the first paragraph of the Federal Bank Robbery Act (“FBRA”), 18 U.S.C. § 2113(a), the FBRA had been law for over seventy years and automated teller machines (“ATM”) had been in use for around thirty-five years. Since then, the circuit courts have disagreed as to whom the money belongs when an individual forces a victim to withdraw money and give it to the perpetrator. This question stems from competing methods of statutory interpretation and analysis. This Note examines the facts and holdings of the federal appellate court cases that gave rise to this circuit split as well as the analysis in federal and state court cases that have come after the split. Further examination of the case law shows that the courts representing the majority approach—which holds that forcing a victim to withdraw money from an ATM constitutes bank robbery under federal law—not only ignored the intent of Congress when it passed the FBRA, but also erroneously followed an “unwilling agent” theory in their analysis. As such, this Note contends that the circuit minority approach reflects the proper construction of § 2113(a) and demonstrates that, under the textualist and purposive theories of statutory interpretation and the rule of lenity, the action of an individual forcing a victim to withdraw money from an ATM does not constitute federal bank robbery under § 2113(a). This Note also argues that the majority errs in applying the “unwilling agent” theory without properly analyzing § 2113(a). This Note concludes by proposing possible resolutions by the Supreme Court and Congress to resolve this split and discussing how this case study is an exemplar of why courts must clarify existing law or pass new laws to adapt to rapidly changing technology.*

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## TABLE OF CONTENTS

INTRODUCTION.....	1141
I. BACKGROUND .....	1143
A. LEGISLATIVE HISTORY OF THE FEDERAL BANK ROBBERY ACT.....	1143
B. DEVELOPMENT OF ATMS AND ATM ROBBERIES IN THE UNITED STATES .....	1143
C. JUSTICE DEPARTMENT PROSECUTION OF CRIMES AT ATMS .....	1145
II. COURT DECISIONS ON ATMS AND BANK ROBBERIES .....	1145
A. INTRODUCTION .....	1145
B. THE FIFTH CIRCUIT'S DECISION IN <i>UNITED STATES V. VAN</i> .....	1146
C. THE SEVENTH CIRCUIT'S DECISION IN <i>UNITED STATES V. MCCARTER</i> .....	1146
D. THE FIFTH CIRCUIT'S DECISION IN <i>UNITED STATES V. BURTON</i> .....	1148
E. OTHER COURT DECISIONS INTERPRETING § 2113(A) IN CASES WITH SIMILAR FACT PATTERNS .....	1149
III. THE TENTH CIRCUIT'S DECISION IN <i>UNITED STATES V. CHAVEZ</i> .....	1150
IV. MODES OF STATUTORY ANALYSIS .....	1154
A. TEXTUALIST INTERPRETATION.....	1154
B. PURPOSIVE INTERPRETATION.....	1156
C. RULE OF LENITY.....	1157
D. UNWILLING AGENT THEORY.....	1158
V. PROPOSED RESOLUTIONS AND FUTURE IMPACT.....	1160
A. THE SUPREME COURT SHOULD ADOPT THE FIFTH CIRCUIT STANDARD FROM <i>UNITED STATES V. BURTON</i> .....	1160
B. CONGRESS SHOULD PASS LEGISLATION CLARIFYING § 2113(A).....	1161
C. TECHNOLOGICAL ADVANCEMENTS AND THEIR IMPACT ON § 2113(A).....	1162
CONCLUSION.....	1164

## INTRODUCTION

The Federal Bank Robbery Act (“FBRA”), 18 U.S.C. § 2113, makes bank robbery and attempted bank robbery a felony.<sup>1</sup> Section 2113(a) provides that bank robbery occurs when:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . .<sup>2</sup>

To convict a criminal defendant under § 2113(a), the government must prove that the defendant used force to take, or attempt to take, property in care or custody of a bank.<sup>3</sup> A conviction under § 2113(a) carries a maximum sentence of twenty years imprisonment.<sup>4</sup>

Currently, there is a split among federal appellate courts as to whether a criminal defendant who is proven to have forced a customer-victim to withdraw money from an automated teller machine (“ATM”) and give the money to the defendant has violated § 2113(a).<sup>5</sup> The United States Courts of Appeals for the Seventh and Tenth Circuits concluded that forced ATM withdrawals are a violation of § 2113(a), whereas the Fifth Circuit concluded that it is not a violation of the statute.<sup>6</sup> Regardless, forced ATM withdrawals constitute a crime, the question is whether they amount to bank robbery under the federal bank robbery statute.

An individual who forces a customer-victim to take money from an ATM and who is then charged with violating § 2113(a) will face opposite outcomes solely depending on the geographic location in which the case is tried. If the trial takes place in the Seventh or Tenth Circuit, the criminal defendant would may be convicted of attempted bank robbery under § 2113(a) of the FBRA.<sup>7</sup> On the other hand, if the criminal defendant is tried in the Fifth Circuit, a charge under § 2113(a) will likely fail.<sup>8</sup>

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1. 18 U.S.C. § 2113.

2. *Id.* § 2113(a).

3. *Id.*

4. *Id.*

5. Compare *United States v. McCarter*, 406 F.3d 460, 465 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007) (affirming the attempted bank robbery conviction in violation of 18 U.S.C. § 2113(a)), and *United States v. Chavez*, 29 F.4th 1223, 1227 (10th Cir. 2022) (holding that a robbery concerning an ATM withdrawal is covered by the federal bank robbery statute), with *United States v. Burton*, 425 F.3d 1008, 1012 (5th Cir. 2005) (concluding that the customer-victim was the one robbed rather than the bank itself).

6. Compare *McCarter*, 406 F.3d at 462 (holding that a coerced ATM withdrawal violates FBRA), and *Chavez*, 29 F.4th at 1225, 1230 (agreeing with *McCarter* that forcing a customer-victim to withdraw money from an ATM constitutes a federal bank robbery), with *Burton*, 425 F.3d at 1012 (finding no evidence to support a bank robbery).

7. See *McCarter*, 406 F.3d at 462, 465; *Chavez*, 29 F.4th at 1225.

8. See *Burton*, 425 F.3d at 1012.

The circuit courts disagree as to whom the money belongs to once it is withdrawn from the ATM.<sup>9</sup> In the Seventh and Tenth Circuits, the courts have held that money in an ATM belongs to the bank and continues to belong to the bank at the time of the coerced withdrawal.<sup>10</sup> This is because the customer-victim becomes an “unwilling agent” of the robber, and therefore it is the bank, and not the customer-victim, that is robbed.<sup>11</sup> Under a Fifth Circuit analysis, when the customer-victim withdraws money from an ATM, coerced or not, the money comes into the customer-victim’s care, custody, and control, albeit briefly, at the moment of withdrawal before the customer hands the money to the person attempting the robbery.<sup>12</sup> Ultimately, the opposite outcomes—whether forcing a victim to withdraw money from an ATM constitutes federal bank robbery—result from the circuit court’s interpretation regarding to whom the money belongs to at the moment of the withdrawal.

This Note examines the current circuit split and argues for resolution in accordance with the Fifth Circuit analysis. This Note also demonstrates the importance of courts and Congress clarifying existing or passing new laws to reduce statutory ambiguity and to adapt to technological developments in society as they arise. Part I of this Note discusses the legislative history and policies behind the Federal Bank Robbery Act, the history and increasing use of ATMs in the United States, and the statistics for bank robberies involving ATMs. Part II discusses the holdings and rationales of the federal appellate courts that have addressed § 2113(a) under similar factual situations. Part III discusses *United States v. Chavez*, the 2022 Tenth Circuit case that added to the circuit split, and analyzes the party briefs and oral arguments. Part IV analyzes the majority and minority circuit court approaches to § 2113(a) through the lens of statutory interpretation and argues that the Fifth Circuit’s decision in *United States v. Burton* best aligns with both textualist and purposive theories of statutory interpretation. Further, this Note examines the applicability of the rule of lenity and the theory that the majority circuits use to come to their decisions. Part V proposes two possible resolutions. First, the Supreme Court should adopt the Fifth Circuit’s position in the next opportunity presented to the Court by a relevant case. Second, Congress can clarify this statute by passing legislation. Either resolution would resolve the circuit split and ensure uniformity in federal criminal law. Further, Part V explains the application of § 2113(a) in a hypothetical scenario involving new technology. Finally, Part VI concludes that the interpretation of § 2113(a) in the context of ATM-related robbery illustrates the importance of passing and clarifying laws as technology advances rapidly.

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9. Compare *McCarter*, 406 F.3d at 462–63, and *Chavez*, 29 F.4th at 1229, with *Burton*, 425 F.3d at 1011.

10. *McCarter*, 406 F.3d at 463; *Chavez*, 29 F.4th at 1230.

11. *Chavez*, 29 F.4th at 1230 (quoting *McCarter*, 406 F.3d at 463).

12. *Burton*, 425 F.3d at 1010–11.

## I. BACKGROUND

### A. LEGISLATIVE HISTORY OF THE FEDERAL BANK ROBBERY ACT

Congress passed the Federal Bank Robbery Act (“FBRA”) in 1934 and codified it as 18 U.S.C. § 2113 in response to frequent interstate bank robberies.<sup>13</sup> Before 1934, bank robbery was only punishable under state law.<sup>14</sup> However, by 1934, local police and state authorities did not have the resources to organize and capture bank robbers who operated from one state to another.<sup>15</sup> In response, United States Attorney General Homer Cummings recommended that Congress pass legislation creating new federal offenses to protect the banks, which the federal government had an interest in.<sup>16</sup>

The original FBRA prosecuted “robbery, robbery accompanied by aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter.”<sup>17</sup> Section 2 of the original law made it a criminal offense to “take or attempt to take money or property belonging to or in the possession of such a bank without its consent.”<sup>18</sup>

In 1937, Congress amended the FBRA to prosecute lesser crimes against banks, including larceny and entering a bank with intent to commit any felony.<sup>19</sup> In 1948, Congress separated the larceny provision to § 2113(b), and left the robbery provision in § 2113(a).<sup>20</sup> In 1986, Congress amended the statute to include “obtains or attempts to obtain by extortion” to the first paragraph of § 2113(a). Since 1986, there have been no substantive amendments to § 2113(a).<sup>21</sup>

### B. DEVELOPMENT OF ATMS AND ATM ROBBERIES IN THE UNITED STATES

ATMs provide customers the ability to withdraw cash from and deposit funds into their bank accounts without the need to go into a physical bank location and interact with a human bank teller.<sup>22</sup> Since their introduction in the

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13. S. REP. NO. 73-537, at 1 (1934) (citing memorandum from the Department of Justice); *see* *Bell v. United States*, 462 U.S. 356, 361 (1983).

14. *Jerome v. United States*, 318 U.S. 101, 102 (1943).

15. *Id.* (citing H.R. REP. NO. 73-1461, at 2 (1934)).

16. *Id.* (citing S. 2841, 73d Cong. (2d Sess. 1934)); *see* 78 CONG. REC. 5738 (1934).

17. *Prince v. United States*, 352 U.S. 322, 325 (1957).

18. *Jerome*, 318 U.S. at 103.

19. Act of June 25, 1948, ch. 645, 62 Stat. 796–97 (1948) (codified as amended at 18 U.S.C. § 2113); *see also Jerome*, 318 U.S. at 103 (stating that amendments included the definition of larceny, in addition to “making it a federal offense to enter or attempt to enter any bank with intent to commit therein ‘any larceny or other depredation.’”).

20. Act of June 25, 1948, ch. 645, 62 Stat. 796–97 (1948) (codified as amended at 18 U.S.C. § 2113); *see Jerome*, 318 U.S. at 105.

21. OFF. L. REVISION COUNS., *18 U.S.C. § 2113: Bank Robbery & Incidental Crimes*, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section2113&num=0&edition=prelim> (last visited Feb. 29, 2024).

22. John Egan & Mitch Strohm, *ATMs (Automated Teller Machines): What Are They?*, FORBES ADVISOR (Nov. 22, 2021, 7:00 AM), <https://www.forbes.com/advisor/banking/atm-automated-teller-machine>.

United States in the 1970s, ATMs have become common in banks, supermarkets, stores, and other commercial and retail locations.<sup>23</sup> The number of ATMs in the United States doubled in the 1990s, marking the period of greatest expansion of ATMs.<sup>24</sup>

The prevalence and popularity of ATMs provided consumers ease of access to cash but also created new opportunities for criminals. One of the earliest bills in Congress addressing ATM safety was the Automated Teller Machine Crime Prevention Act of 1986 introduced in the 99th Congress by Representative Mario Biaggi of New York.<sup>25</sup> The bill would have required a bank to implement minimum security standards, including alarms, surveillance, and secure enclosures, to protect bank customers who used ATMs owned or operated by the bank.<sup>26</sup> The bill was referred to the Subcommittee on Financial Institutions Supervision, Regulation and Insurance but it was never brought to a vote and expired at the end of the 99th Congress.<sup>27</sup>

As ATM use has increased, ATM robberies have become particularly prevalent in major cities and generally across the United States.<sup>28</sup> In 2021, the federal government charged 254 ATM robberies under § 2113, an increase from 2020 (229 ATM robberies), and a significant increase from 2019 (31 ATM robberies) and 2018 (74 ATM robberies).<sup>29</sup> With the increase of robberies at ATMs, the criminal justice system requires clarity on whether forcing someone to take money out of an ATM constitutes bank robbery under § 2113(a).

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23. John Marten, Note, *ATM Fees: Federal Government Pushed to the Forefront of ATM Surcharge Bans*, 15 LOY. CONSUMER L. REV. 301, 301 (2003).

24. *Id.*

25. H.R. 5238, 99th Cong. (1986), <https://www.congress.gov/bill/99th-congress/house-bill/5238/titles?s=1&r=12&q=%7B%22search%22%3A%22H.R.78%22%7D>.

26. *Id.*

27. *Id.*

28. Ethan Ward, *Crime at ATM Machines Spikes During COVID*, CROSSTOWN (Nov. 18, 2020), <https://xtown.la/2020/11/18/rise-atm-crime-covid/> (Los Angeles); John Ferrannini, *Amid Spike in Armed ATM Robberies, Oakland Police Give Safety Tips*, KRON4 (Oct. 20, 2022, 5:21 AM), <https://www.kron4.com/news/bay-area/amid-spike-in-armed-atm-robberies-oakland-police-give-safety-tips/> (Oakland); Joel Moreno, *Armed Robberies of ATM Users in King, Pierce Counties Likely Related, Officials Say*, KOMO NEWS (Aug. 19, 2022), <https://komonews.com/news/local/police-say-armed-atm-robberies-likely-related> (Washington State); *ATM Crime Task Force Report*, TEX. BANKERS ASS'N 2 (Nov. 2020), [https://www.sml.texas.gov/wp-content/uploads/2021/07/tba\\_atm\\_crime\\_task\\_force\\_report.pdf](https://www.sml.texas.gov/wp-content/uploads/2021/07/tba_atm_crime_task_force_report.pdf) (Texas); *Three Men Wanted in String of Violent ATM Robberies in Queens*, ABC7NY (Jan. 6, 2022), <https://abc7ny.com/atm-robberies-queens-violent-armed-robbery/11432317> (New York); Yasmine Julmisse, *Two Robbed at Gunpoint at Boca Raton ATM, Police Looking for Suspects*, ABC WPBF 25 NEWS (Jan. 1, 2023, 9:01 PM), <https://www.wpbfl.com/article/robbed-gunpoint-boca-raton-atm-police-suspects/42376247> (Florida).

29. FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., 2021 BANK CRIME STATISTICS REPORT, 1–2 (2021), <https://www.fbi.gov/file-repository/bank-crime-statistics-2021.pdf/view>; FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., 2020 BANK CRIME STATISTICS REPORT 1–2 (2020), <https://www.fbi.gov/file-repository/bank-crime-statistics-2020.pdf/view>; Fed. Bureau Investigation, U.S. DEP'T JUST., 2019 BANK CRIME STATISTICS REPORT 1–2 (2019), <https://www.fbi.gov/file-repository/bank-crime-statistics-2019.pdf/view>; FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., 2018 BANK CRIME STATISTICS REPORT 1–2 (2018), <https://www.fbi.gov/file-repository/bank-crime-statistics-2018.pdf/view>.

### C. JUSTICE DEPARTMENT PROSECUTION OF CRIMES AT ATMS

The Department of Justice (“DOJ”) provides internal prosecutorial guidance to United States Attorneys.<sup>30</sup> Historically, the DOJ published the United States Attorneys’ Manual along with resource manuals for criminal law and antitrust law.<sup>31</sup> In 2018, these manuals were revised and superseded by the current Justice Manual.<sup>32</sup>

In the archived Criminal Resource Manual, the DOJ guidance on the prosecution of bank robberies mentions that bank customers who are robbed *after* making a withdrawal from the ATM cannot be prosecuted under § 2113(a) because at the time of the robbery, the money is in possession of the customer rather than the bank.<sup>33</sup> However, the DOJ also clarified that if a defendant forces a bank customer to withdraw funds from an ATM and then takes those funds from the customer, there “may” be a federal bank robbery violation.<sup>34</sup> The DOJ considered this to be the case because the “customer never had possession or control of the funds taken from the bank” and the defendant used the customer as a mere instrument for accomplishing a bank robbery.<sup>35</sup>

However, the current Justice Manual removed this bank robbery prosecutorial guidance.<sup>36</sup> This may indicate that the DOJ now recognizes the inconsistency in circuit court decisions regarding robberies following coerced ATM withdrawals. Federal prosecutors have “wide latitude” in whether to prosecute for apparent violations of federal criminal law.<sup>37</sup> If a similar crime is committed in a circuit without precedent on this issue, prosecutors will base their judgment of whether or not to prosecute on this non-binding guidance.

## II. COURT DECISIONS ON ATMS AND BANK ROBBERIES

### A. INTRODUCTION

The Fifth Circuit was the first circuit to examine a robber forcing a victim to withdraw money from a bank, though not in the context of an ATM, in the 1987 case *United States v. Van*.<sup>38</sup> Not until 2005 did any other circuit court examine cases of robbers forcing victims to withdraw money from ATMs.<sup>39</sup> In *United States v. McCarter*, the Seventh Circuit held that a robber forcing a

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30. U.S. DEP’T JUST., JUST. MANUAL § 1-1.200 (2018).

31. *United States Attorneys’ Manual & Resource Manual Archives*, OFF. U.S. ATT’YS, <https://www.justice.gov/archive/usao/usam/index.html> (last visited Feb. 11, 2024).

32. *Id.*

33. U.S. DEP’T JUST., CRIM. RES. MANUAL § 1358, <https://www.justice.gov/archives/jm/criminal-resource-manual-1358-bank-robbery-automated-teller-machines-atms> (last visited Feb. 11, 2024).

34. *Id.*

35. *Id.*

36. See U.S. DEP’T JUST., JUST. MANUAL § 9-61.000 (2018).

37. *Id.* § 9-27.110.

38. 814 F.2d 1004, 1004–05 (5th Cir. 1987).

39. See *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005); *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005).

victim to withdraw money from an ATM constituted bank robbery under § 2113(a) because the money was in the “care [and] custody” of the bank and the victim was an “unwilling agent” of the robber.<sup>40</sup> That same year, in *United States v. Burton*, the Fifth Circuit explicitly rejected the Seventh Circuit’s *McCarter* holding and held that forcing a victim to withdraw money from an ATM was a robbery of the victim rather than the bank because the money was not in the “care [and] custody” of the bank when the victim handed the money to the robber.<sup>41</sup> The Fifth Circuit therefore held that there was no violation of § 2113(a).<sup>42</sup> After *McCarter* and *Burton*, federal and state courts outside the Fifth Circuit that have examined § 2113(a) have all agreed in their analysis with the Seventh Circuit’s holding in *McCarter*.<sup>43</sup> The following Subparts discuss these court decisions in greater depth.

#### B. THE FIFTH CIRCUIT'S DECISION IN *UNITED STATES V. VAN*

In *United States v. Van*, the defendants held the victim’s daughter hostage and instructed the victim to withdraw money from her account at a bank (though not through an ATM).<sup>44</sup> The defendants then instructed the victim to drive to two 7-Eleven stores and turn over the money to one of the defendants at the second store.<sup>45</sup> The defendants were convicted at trial of federal bank robbery.<sup>46</sup>

On appeal, the Fifth Circuit examined whether the defendants’ actions violated § 2113(a).<sup>47</sup> The court reversed the defendants’ federal bank robbery convictions because the money did not “belong to” a bank and was not “in the care, custody, control, management or possession of a bank” when the victim gave the money to the defendants at the 7-Eleven store.<sup>48</sup>

#### C. THE SEVENTH CIRCUIT'S DECISION IN *UNITED STATES V. MCCARTER*

In April 2005, the Seventh Circuit was the first circuit court to address whether money in an ATM is “in the care, custody, control, management, or possession of [] any bank” and whether forcing a customer to withdraw cash from an ATM is robbing the bank rather than robbing the customer.<sup>49</sup>

In *United States v. McCarter*, defendant Terrance McCarter held the victim, Claudia Cahill, at gunpoint and found her ATM card in her purse.<sup>50</sup>

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40. 406 F.3d at 463.

41. 425 F.3d at 1010–11.

42. *Id.* at 1012.

43. *See infra* Part II.E.

44. *United States v. Van*, 814 F.2d 1004, 1005 (5th Cir. 1987).

45. *Id.*

46. *Id.*

47. *Id.* at 1004.

48. *Id.* at 1007–08.

49. *United States v. McCarter*, 406 F.3d 460, 462 (7th Cir. 2005) *overruled on other grounds by* *United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

50. *McCarter*, 406 F.3d at 462.

McCarter forced Cahill to drive her car out of the garage.<sup>51</sup> As Cahill drove out of the garage, she cried for help at a couple, causing McCarter to leap from the car and run away.<sup>52</sup> The jury found that, had the crime not been interrupted, McCarter would have forced Cahill to insert her ATM card into an ATM to withdraw money from her bank account.<sup>53</sup> McCarter was convicted by a jury in the United States District Court for the Northern District of Illinois of attempted bank robbery in violation of § 2113(a), among other crimes.<sup>54</sup> McCarter appealed his conviction.<sup>55</sup>

The Seventh Circuit affirmed the bank robbery conviction.<sup>56</sup> The court's analysis of § 2113(a) focused on two issues: (1) statutory interpretation of § 2113(a); and (2) who is robbed in the scenario of a forced ATM withdrawal.<sup>57</sup> First, the Seventh Circuit examined whether money in an ATM is "in the care, custody, control, management, or possession of, any bank" pursuant to § 2113(a).<sup>58</sup> The court's answer was that it was "obvious that it is."<sup>59</sup> The court's statutory interpretation begins and ends there. The analysis, such as it is, does not address who has the "care, custody, control, management, or possession" of the money in possible scenarios such as: if the money is in the ATM tray and the robber takes the money from the tray; or if the customer takes the money in the ATM tray and then gives it to the robber.

Second, the court analyzed which party—the bank or the customer—is robbed when a criminal defendant forces a customer to withdraw cash from an ATM.<sup>60</sup> The court first explained, agreeing with *Van*, that if a customer withdraws money, leaves the bank, and then is robbed, such facts would not constitute bank robbery under § 2113(a).<sup>61</sup> The court then distinguished the facts in *Van* from those present in *McCarter*.<sup>62</sup> Key to the Seventh Circuit's analysis was its "unwilling agent" theory.<sup>63</sup> The Seventh Circuit held that if the robber forces a bank customer to withdraw money from an ATM, then the customer is an "unwilling agent" of the robber, and the bank is robbed.<sup>64</sup> Notably, the court did not explain from where this "unwilling agent" theory originates.<sup>65</sup>

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51. *Id.*

52. *Id.*

53. *Id.*

54. *United States v. McCarter*, 307 F. Supp. 2d 991, 993–94 (N.D. Ill. 2004).

55. *McCarter*, 406 F.3d at 460.

56. *Id.* at 465.

57. *Id.* at 462–63.

58. *Id.* at 462.

59. *Id.*

60. *Id.* at 463.

61. *Id.* (citing *United States v. Van*, 814 F.2d 1004, 1006–08 (5th Cir. 1987))

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* Notably, the *McCarter* court uses "cf" in its cites to *Embrey v. Hershberger*, 131 F.3d 739 (8th Cir. 1997) (en banc). See *McCarter*, 406 F.3d at 463. However, nowhere in *Embrey* does the term "unwilling agent"

D. THE FIFTH CIRCUIT'S DECISION IN *UNITED STATES V. BURTON*

In September 2005, five months after *McCarter*, the Fifth Circuit came to the opposite conclusion over similar facts in *United States v. Burton*.<sup>66</sup> In *Burton*, the Fifth Circuit held that money withdrawn by a customer from an ATM was not in the “the care, custody, control, management, or possession” of the bank.<sup>67</sup>

In *Burton*, defendant Donald Burton grabbed the victim, Chelsey Childs, and demanded money.<sup>68</sup> Burton then forced Childs to get into her car and drove them to a bank.<sup>69</sup> Burton backed the car into a drive-through ATM and forced Childs to withdraw \$150.<sup>70</sup> Childs then gave the money to Burton.<sup>71</sup> A jury found Burton guilty of bank robbery under § 2113(a).<sup>72</sup> Burton admitted that the evidence showed that he robbed Childs.<sup>73</sup> However, Burton argued on appeal that he could not be convicted of bank robbery under § 2113(a) because there was insufficient evidence to show that the money “belong[ed] to” or was in “the care, custody, control, management or possession” of the bank.<sup>74</sup>

The Fifth Circuit compared the facts in *Burton* with its holding in *Van* from almost two decades earlier.<sup>75</sup> The court concluded that *Van* was “controlling” and “directly on point.”<sup>76</sup> The Fifth Circuit explicitly “declined . . . to follow” the Seventh Circuit’s holding in *McCarter* and instead followed its own precedent from *Van*.<sup>77</sup> In *Van*, the victim withdrew money then traveled nine miles before giving the funds to the defendants.<sup>78</sup> The court concluded in *Burton* that, similar to *Van*, the defendant did not seek the bank’s money.<sup>79</sup> Instead, Burton sought the victim’s money, and knowing she had money in her account, forced her to make a valid withdrawal which Burton then stole from her.<sup>80</sup> Therefore, as in *Van*, the victim’s \$150 in *Burton* was not in the “the care, custody, control, management, or possession” of the bank at the time that the

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appear, and the facts in *Embrey* can be distinguished in that the robbers in *Embrey* forced a bank employee, not a bank customer, to withdraw money from the bank. See generally 131 F.3d at 739.

66. See generally *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005).

67. *Id.* at 1012.

68. *Id.* at 1009.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1010.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1011.

78. *Id.*; see also *United States v. Van*, 814 F.2d 1004, 1006–07 (5th Cir. 1987).

79. *Burton*, 425 F.3d at 1010.

80. *Id.*

victim transferred the money to Burton.<sup>81</sup> The Fifth Circuit vacated Burton's § 2113(a) bank robbery conviction.<sup>82</sup>

E. OTHER COURT DECISIONS INTERPRETING § 2113(A) IN CASES WITH SIMILAR FACT PATTERNS

Since *McCarter* and *Burton*, other federal circuit courts have discussed the language of § 2113(a) under different federal charges<sup>83</sup> and different fact patterns.<sup>84</sup> These courts found *Burton* to be unpersuasive<sup>85</sup> and instead agreed with and applied the unwilling agent theory established in *McCarter*.<sup>86</sup> Federal district courts and state courts have also agreed with the *McCarter* holding when examining the language of § 2113(a).<sup>87</sup>

In 2009, the United States District Court for the Middle District of Florida examined *McCarter* and *Burton* in its analysis of the § 2113(a) language in *United States v. Smith*.<sup>88</sup> In *Smith*, defendant Damian Smith pled guilty to federal robbery and firearm offenses.<sup>89</sup> Smith objected to the pre-sentence report.<sup>90</sup> The court had to determine whether a sentencing enhancement for taking property of a financial institution applied.<sup>91</sup> The court noted that the *McCarter* holding is “preferred” under the Seventh Circuit’s unwilling agent theory because this theory gave legal effect to the customer’s withdrawal under duress.<sup>92</sup>

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81. *Id.* at 1010–11.

82. *Id.* at 1012.

83. In 2018, the Second Circuit faced a similar factual scenario of ATM robbery in *United States v. Rose* but did not take a position on whether that action satisfied § 2113(a). 891 F.3d 82, 87 (2d Cir. 2018). In *Rose*, defendant Floyd Rose forced the victim to withdraw money from the bank’s ATM and hand over the money. *Id.* at 84. Rose was charged with federal bank robbery under § 2113(a) and a Hobbs Act robbery under 18 U.S.C. § 1951(a)—a robbery that affects interstate commerce. Brief for the United States of America at 5, *United States v. Rose*, 891 F.3d 82 (2d Cir. 2017) (No. 17–689), 2017 WL 6405938, at \*1–2. Rose pleaded guilty to the Hobbs Act robbery charge, which was accepted by the United States District Court for the Southern District of New York. *Rose*, 891 F.3d at 84. Rose moved to withdraw the guilty plea, which the district court denied. *Id.* at 84–85. Rose appealed on the grounds that this robbery lacked connection to interstate commerce as required by the Hobbs Act, in addition to the district court’s denial of his withdrawal. *Id.* at 85–86. On appeal, the Second Circuit examined § 2113(a) and *Burton*. *Id.* at 87. In *Burton*, the court reversed the defendant’s Hobbs Act conviction because the robbery conviction did not fall under § 2113(a). *Id.* The Second Circuit here found the conclusion in *Burton* unpersuasive, and upheld Rose’s Hobbs Act conviction. *Id.* The Second Circuit did not state an opinion on the statutory analysis of § 2113(a). *See id.*

84. The Fourth Circuit agreed with the Seventh Circuit’s holding in *McCarter* when comparing § 2113(a) with the New York state robbery statute, stating that “federal law, too, covers robbery by conscription.” *See United States v. Johnson*, 915 F.3d 223, 232 (4th Cir. 2019) (a case in which the criminal defendant held up a bank and demanded money from bank tellers).

85. *Rose*, 891 F.3d at 87.

86. *See Johnson*, 915 F.3d at 232.

87. *See, e.g.*, *Commonwealth v. McGhee*, 25 N.E.3d 251 (Mass 2015); *United States v. Smith*, 670 F. Supp. 2d 1316 (M.D. Fla. 2009), *aff’d* 385 F. App’x 977 (11th Cir. 2010).

88. *Smith*, 670 F. Supp. 2d at 1319–20.

89. *Id.* at 1318.

90. *Id.*

91. *Id.* at 1318–21.

92. *Id.* at 1321.

In 2015, in *Commonwealth v. McGhee*, the Massachusetts Supreme Judicial Court, examined § 2113(a) when analyzing an argument from the defendant that he did not intend to take money from the ATM.<sup>93</sup> McGhee was convicted under Massachusetts state law for “confi[n]g . . . or put[ting] any person in fear, for the purpose of stealing from a building, bank, safe, vault or other depository of money.”<sup>94</sup> McGhee intimidated victims into withdrawing money from an ATM and handing those funds to McGhee.<sup>95</sup> On appeal, McGhee argued that the purpose was not to steal money from an ATM, but instead steal from the victim.<sup>96</sup> The Massachusetts Supreme Judicial Court examined § 2113(a), finding McGhee’s argument was analogous to the ones made in *McCarter* and *Burton*.<sup>97</sup> The court agreed with *McCarter*’s unwilling agent theory because McGhee’s purpose was to steal the money located inside the ATM.<sup>98</sup>

### III. THE TENTH CIRCUIT’S DECISION IN *UNITED STATES V. CHAVEZ*

A circuit split exists when two or more circuits in the U.S. Court of Appeals reach different decisions on the same legal issue.<sup>99</sup> As noted in Part II, since 2005, there has been a circuit split between the Fifth and Seventh Circuits on the interpretation and application of § 2113(a).<sup>100</sup>

In the seventeen years following *McCarter* and *Burton*, neither Congress nor the Supreme Court has taken any steps to clarify § 2113(a). Other than the Fifth Circuit in *Burton*, all other courts analyzing § 2113(a) under a similar fact pattern of a forced ATM withdrawal have agreed with the *McCarter* analysis. It was not until 2022 that another circuit court heard a case with similar facts. In *United States v. Chavez*, the Tenth Circuit joined the Seventh Circuit in its analysis regarding § 2113(a).<sup>101</sup>

In *Chavez*, defendant Charles Chavez, armed with a rifle, ran up to an occupied car parked at a Wells Fargo ATM.<sup>102</sup> The ATM was not on a Wells Fargo bank premises.<sup>103</sup> Chavez demanded that the victims put their bank card into the ATM and withdraw cash.<sup>104</sup> Chavez was later arrested and the government charged him with violation of § 2113(a) (attempted federal bank

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93. 25 N.E.3d 251, 254 (Mass 2015).

94. *Id.* at 253–54 (citing MASS. GEN. LAWS ch. 265, § 21 (1974)).

95. *McGhee*, 25 N.E.3d at 253.

96. *Id.* at 254.

97. *Id.* at 254–55.

98. *Id.* at 255.

99. Cornell Legal Information Institute, *Circuit Split*, CORNELL L. SCH. (July 2022), [https://www.law.cornell.edu/wex/circuit\\_split](https://www.law.cornell.edu/wex/circuit_split).

100. Compare *United States v. McCarter*, 406 F.3d 460, 463 (7th Cir. 2005), with *United States v. Burton*, 425 F.3d 1008, 1010–12 (5th Cir. 2005).

101. See 29 F.4th 1223, 1230 (10th Cir. 2022).

102. *Id.* at 1225.

103. *Id.*

104. *Id.*

robbery), as well as other crimes.<sup>105</sup> Chavez moved to dismiss the § 2113(a) charge.<sup>106</sup>

The United States District Court for the District of New Mexico granted Chavez's motion to dismiss.<sup>107</sup> In doing so, the district court considered "whether an individual violates 18 U.S.C. § 2113(a) when he forces someone to make a withdrawal from an ATM."<sup>108</sup> The government urged the court to adopt the Seventh Circuit's reasoning in *McCarter* and the Massachusetts Supreme Judicial Court's holding in *McGhee* that (1) the money in an ATM is in the care, and custody of a bank, and (2) forcing a customer to withdraw cash from an ATM is robbing the bank, rather than robbing the customer.<sup>109</sup> The government's position was that money "belong[s] to, or [is] in the care, custody, control, management, or possession of, any bank" when a robber holds up a bank, an ATM at a bank, or an offsite ATM because the bank maintains an interest in its funds in the aforementioned scenarios.<sup>110</sup>

Chavez, on the other hand, urged the court to apply the standard held by the Fifth Circuit in *Burton*.<sup>111</sup> Chavez argued that once the money is withdrawn by a bank customer, the money is no longer in the care, custody, control, management, or possession of the bank, and therefore no longer its property.<sup>112</sup> Instead, Chavez argued, the money now belongs to the customer.<sup>113</sup>

The district court agreed with Chavez. Reasoning that, once the funds were withdrawn from the ATM, the funds no longer belonged to the bank at the time the bank customer then transferred the money to Chavez, the district court concluded that the holding in *Burton* was proper and "indistinguishable" from the present case.<sup>114</sup>

The government appealed the district court's decision, arguing that the court erred in granting Chavez's motion to dismiss.<sup>115</sup> On appeal, the government argued that the money inside the ATM was in the bank's control, and therefore § 2113(a) applied.<sup>116</sup> The government argued that a robber who

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105. *Id.*

106. *Id.*

107. *Id.*; see also *United States v. Chavez*, 460 F. Supp. 3d 1225, 1231 (D.N.M. 2020), *rev'd*, 29 F.4th 1223 (10th Cir. 2022).

108. *Chavez*, 29 F.4th at 1229 (quoting *Chavez*, 460 F. Supp. 3d 1229).

109. United States' Response to Defendant's Motion to Dismiss Counts 5 and 6 at 10, *United States v. Chavez*, 460 F. Supp. 3d 1225 (D.N.M. 2020) (No. 19-01818), ECF No. 29.

110. United States' Response to Defendant's Motion to Dismiss Counts 5 and 6, *supra* note 109, at 13–15.

111. Mr. Chavez's Reply to the Government's Response to Motion to Dismiss Counts 5 and 6 of the Indictment at 6, *United States v. Chavez*, 460 F. Supp. 3d 1225 (D.N.M. 2020) (No. 19-01818), ECF No. 30.

112. Mr. Chavez's Reply to the Government's Response to Motion to Dismiss Counts 5 and 6 of the Indictment, *supra* note 111, at 3.

113. Mr. Chavez's Reply to the Government's Response to Motion to Dismiss Counts 5 and 6 of the Indictment, *supra* note 111, at 5.

114. *Chavez*, 460 F. Supp. 3d at 1230.

115. See *United States v. Chavez*, 29 F.4th 1223, 1226 (10th Cir. 2022).

116. Appellant's Opening Brief – With One Attachment at 6, *United States v. Chavez*, 29 F.4th 1223 (10th Cir. 2022) (No. 20-02083).

forces a bank customer to involuntarily withdraw money from an ATM causes the money to leave the bank's control directly into the robber's control, regardless of whether the robber takes the cash from the ATM dispenser or allows the victim to take the cash then hand it to the robber.<sup>117</sup>

During oral argument before the Tenth Circuit, the government fleshed out § 2113(a), aligning each element of the statute to a specific factual occurrence, shown in Table 1, below.

Section 2113(a) Language	Factual Occurrence
Whoever, by force and violence, or by intimidation, takes, or attempts to take	The robber says that they have a gun and tells the customer to withdraw money from the ATM—this is attempted taking.
from the person or presence of another, or obtains or attempts to obtain by extortion	The victim is sitting in the car next to the ATM and starts the process of taking money from the ATM.
any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank	The money in the ATM belongs to the bank and is therefore within the bank's control. This is undisputed in the district court decision. <sup>118</sup>

*Table 1: § 2113(a) Language and Corresponding Factual Occurrence in Chavez*

The government argued that the taking of the money by the criminal occurs when the money is dispensed into the ATM cash dispenser, regardless of who—either the robber or the victim—takes it from the dispenser.<sup>119</sup> If the robber takes it from the dispenser itself then the money went from the bank's possession (in the ATM) directly into the robber's possession. If the victim takes the money from the ATM dispenser, the robber has constructive possession due to his control over the victim.<sup>120</sup>

Chavez's contention, on the other hand, was that he did not commit federal bank robbery under § 2113(a)<sup>121</sup> because he was attempting to rob the victims.<sup>122</sup>

117. Appellant's Opening Brief – With One Attachment, *supra* note 116, at 6.

118. Oral Argument at 10:41–12:51, *United States v. Chavez*, 29 F.4th 1223 (10th Cir. 2022) (No. 20-02083), <https://www.ca10.uscourts.gov/sites/ca10/files/oralarguments/20-2083.mp3>.

119. Oral Argument, *supra* note 118, at 13:50.

120. Oral Argument, *supra* note 118, at 13:55.

121. Oral Argument, *supra* note 118, at 14:45.

122. Oral Argument, *supra* note 118, at 14:45.

Chavez argued that, once money was dispensed from an ATM, it is in possession of the *customer*, and not the bank.<sup>123</sup> During oral argument, the court acknowledged there are intellectual arguments for both sides.<sup>124</sup>

In its opinion, the Tenth Circuit considered whether, “had the accountholders withdrawn money, Chavez would have committed federal bank robbery under 18 U.S.C. section 2113(a).” The court recognized the circuit split between the Fifth and Seventh Circuits, and analyzed both opinions in light of the current case.<sup>125</sup> In deciding whether the money in the ATM was in the “care, custody, control, management, or possession of” Wells Fargo at the time Chavez attempted to take it “from the person or presence of another,” the court agreed with the Seventh Circuit in *McCarter* that money in an ATM “obviously” belongs to (or is in the “possession of”) the bank, constituting federal bank robbery under § 2113(a).<sup>126</sup>

The Tenth Circuit agreed with the Seventh Circuit’s holding that money in an ATM “obviously” belongs the bank.<sup>127</sup> The court noted that if Chavez had physically taken the money directly from the ATM, he would be have been taking money that belonged to the bank, in violation of § 2113(a).<sup>128</sup> The court also agreed with the Seventh Circuit’s “unwilling agent” theory, that if Chavez had succeeded in forcing the bank customer to withdraw the money from the ATM, he would have stolen the cash *from* the bank *through* instrumentality of the customer.<sup>129</sup> In doing so, the Tenth Circuit rejected the Fifth Circuit’s approach in *Burton*, where ownership of the money was defined at the moment the defendant physically placed his hands on the cash, and also rejected the Fifth Circuit’s conclusion that a forced withdrawal from an ATM is a valid withdrawal despite being coerced.<sup>130</sup> The Tenth Circuit further distinguished the Fifth Circuit’s holding in *Van* from *Chavez* because Chavez’s control of the customer was much more immediate and physically closer than the control in *Van*.<sup>131</sup>

The Tenth Circuit ultimately reversed the district court’s dismissal and remanded the case for further proceedings.<sup>132</sup> In doing so, the Tenth Circuit deepened the circuit split by siding with the Seventh Circuit against the Fifth Circuit.<sup>133</sup>

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123. Oral Argument, *supra* note 118, at 16:10.

124. Oral Argument, *supra* note 118, at 31:40.

125. *Chavez*, 29 F.4th at 1228–29.

126. *Id.* at 1230.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* at 1225, 1230–31 (citing *United States v. McCarter*, 406 F.3d 460, 462–63 (7th Cir. 2005); *United States v. Burton*, 425 F.3d 1008, 1012 (5th Cir. 2005)).

#### IV. MODES OF STATUTORY ANALYSIS

In examining whether forcing a customer-victim to withdraw money from an ATM constitutes bank robbery under the first paragraph of § 2113(a), the circuit split centers around whether the statutory language is ambiguous, as well as the proper approach to statutory interpretation. The circuit majority—the Seventh and Tenth Circuits—apply the “unwilling agent” theory to the facts of the cases, while the circuit minority—the Fifth Circuit—applies a textualist interpretation and follows their own case precedent. The following Subparts examine § 2113(a) under two of the major theories of statutory interpretation, “textualism” and “purposivism,”<sup>134</sup> as well as examining the role of rule of lenity in interpreting § 2113(a) in the context of forced ATM withdrawals.

##### A. TEXTUALIST INTERPRETATION

Textualist interpretation of a statute requires an ordinary and plain reading of what a reasonable person would understand the statute to mean.<sup>135</sup> “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”<sup>136</sup> The relevant part of § 2113(a) provides that:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . .

The *Burton* standard is based on the Fifth Circuit’s textualist interpretation of the phrase “care, custody, control, management, or possession of any bank”<sup>137</sup> as unambiguous. In *Burton*, the Fifth Circuit began its textualist interpretation of § 2113(a) by pointing out that the question of “care, custody, control, management, or possession” concerns the moment at which the money or property is transferred from victim to perpetrator.<sup>138</sup> The court noted that *Burton* forced the victim to withdraw money from the ATM, meaning that at the moment that the victim handed the money to *Burton*, the money was no longer in the “care, custody, control, management, or possession of [] any bank” but rather in the possession of the customer-victim.<sup>139</sup> Therefore, the statutory requirements for a federal bank robbery charge were not satisfied under such facts.<sup>140</sup> This plain text reading of the statute by the Fifth Circuit provides a

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134. CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 10 (2022).

135. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819–20 (3d ed. 2001).

136. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

137. *Burton*, 425 F.3d at 1010.

138. *Id.*

139. *Id.* at 1011.

140. *Id.*

standard of federal bank robbery that ensures a limited reading of the statute's scope.

Courts have historically applied the federal bank robbery statute to property inside a bank during a bank robbery.<sup>141</sup> In the limited cases that § 2113(a) has been applied to robberies of bank property outside the bank, it has typically been applied when the criminal robs a bank *employee* on the job—not a bank *customer*.<sup>142</sup> This strict reading of the statute and its application is proper when the victim is a bank employee as the bank property is still in the “care, custody, control, management, or possession of, any bank” via the bank employee.

Contrast this strict textualist interpretation with the statutory interpretation approach in *McCarter* and *Chavez*. The Supreme Court case of *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.* held that “statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”<sup>143</sup> In *McCarter*, the Seventh Circuit ignored the Supreme Court holding on statutory interpretation articulated in *Park 'N Fly, Inc.*<sup>144</sup> The Seventh Circuit began its initial statutory analysis by holding that money inside an ATM is money that is in the possession of the bank.<sup>145</sup> However, the Seventh Circuit's next step in its analysis deviated from the “ordinary meaning” standard held in *Park 'N Fly, Inc.*<sup>146</sup> The Seventh Circuit ignored Supreme Court precedent by not applying the unambiguous, plain text meaning of the statute. Instead, the court applied the “unwilling agent” theory to find that the bank was robbed by the defendant via the instrument of the bank customer.

Similar to the Seventh Circuit, the Tenth Circuit's reading of § 2113(a) in *United States v. Chavez* also ignored a plain textualist interpretation. The Tenth Circuit held that Chavez's actions satisfied the statute because “the funds belonged to the bank at the time of the coerced withdrawal.”<sup>147</sup> However, this is a misreading of § 2113(a). The statutory text does not define to whom the funds belong at the time of the “coerced withdrawal,” a term not even mentioned in the statute. What the statute does do is define an element of federal bank robbery as taking “from the person or presence of another.”<sup>148</sup> As the district court

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141. See *United States v. Reed*, 26 F.3d 523, 527–28 (5th Cir. 1994) (defendant forced a credit union employee to open the vault and put money in a bag for him, court convicted defendant of § 2113(a)); *United States v. Dix*, 491 F.2d 225, 226 (9th Cir. 1974) (contents of a safety deposit box “were within the care of the bank”); *Chapman v. United States*, 346 F.2d 383, 387 (9th Cir. 1965) (property of the bank and bank employee stolen from the bank employee's desk were “within the care, custody, or control of the bank”).

142. Press Release, Dep't of Just., U.S. Attorney's Office, Southern District of Illinois, Michigan Man Sentenced to 57 Months' Imprisonment for Valentine's Day Robbery of Highland Bank (Aug. 12, 2014), <https://www.justice.gov/usao-sdil/pr/michigan-man-sentenced-57-months-imprisonment-valentine-s-day-robbery-highland-bank>.

143. See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

144. See generally *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005).

145. *Id.* at 462.

146. Compare *id.*, with *Park 'N Fly*, 469 U.S. at 194.

147. *United States v. Chavez*, 29 F.4th 1223, 1230 (10th Cir. 2022).

148. 18 U.S.C. § 2113(a).

pointed out in its opinion of *Chavez*, a plain language textualist reading of this element would examine the issue from the point in time at which the defendant takes the money from the victim, and determine who had care and custody at that moment.<sup>149</sup> After the customer withdraws the money from the ATM, the customer—not the bank—has care and custody of the money when the defendant subsequently takes it from the customer.<sup>150</sup> Therefore, a plain textualist interpretation would result in the same conclusion as the Fifth Circuit's *Burton* holding and the district court's holding in *Chavez* that § 2113(a) does not apply where a victim is coerced to make an ATM withdrawal and then surrenders the money to the perpetrator.

#### B. PURPOSIVE INTERPRETATION

The purposive theory of statutory interpretation assumes that “legislation is a purposive act” and therefore “judges should construe statutes to execute that legislative purpose.”<sup>151</sup> Courts should interpret statutes “in a way that is faithful to Congress’s purposes” by examining the legislative history and process.<sup>152</sup>

The original intent behind the federal bank robbery statute was to authorize federal criminal prosecutions as a significant deterrent to the national concern of individuals crossing state lines to rob banks.<sup>153</sup> The opening sentence of the House Report on the original FBRA states that the bill’s purpose was to “provide punishment for certain offenses committed against banks organized or operating under laws of the United States . . . .”<sup>154</sup> The House Report also includes a statement from the Attorney General to the committee, which stated that the bill “provides punishment for those who rob, burglarize, or steal from such institutions, or attempt so to do.”<sup>155</sup> The Senate Report re-emphasizes the same findings.<sup>156</sup>

Neither the Fifth Circuit in *Burton*, the Seventh Circuit in *McCarter*, nor the Tenth Circuit in *Chavez* analyzed the legislative history of the federal bank robbery bill to determine congressional intent.<sup>157</sup> However, if courts were to engage in a purposive analysis, their conclusion would result in the same holding as in *Burton* because the original intent of the FBRA focused on protecting banks, not customers.

The House Report, Senate Report, and statement from the Attorney General to the House Committee on the Judiciary explicitly mention that the

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149. *United States v. Chavez*, 460 F. Supp. 3d 1225, 1230 (D.N.M. 2020).

150. *Id.* at 1230–31.

151. ROBERT A. KATZMANN, *JUDGING STATUTES* 31 (2014).

152. *Id.*

153. *See Jerome v. United States*, 318 U.S. 101, 102–03 (1943) (citing S. 2841, 73d Cong. § 3 (2d Sess. 1934); 78 CONG. REC. 5738 (2d Sess. 1934)).

154. H.R. REP. NO. 73-1461, at 1 (1934).

155. *Id.* at 2.

156. S. REP. NO. 73-537, at 1 (1934).

157. *See generally* *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005); *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005); *United States v. Chavez*, 29 F.4th 1223 (10th Cir. 2022).

original intent of the bill was to protect banking institutions, and do not mention protecting individuals.<sup>158</sup> The language in the report notes that the FBRA was conceived to “provide punishment for certain offenses committed against banks . . . .”<sup>159</sup> There is no language in the congressional reports, executive branch statement, nor amendments to the statute to suggest that Congress intended this law to protect bank *customers*.<sup>160</sup> The word “customer” is also not mentioned in any of the reports or legislation.<sup>161</sup> Therefore, it is logical to infer that Congress did not intend for § 2113(a) to apply to the subset of robberies involving an offender forcing a victim to take money from an ATM.

It follows, then, that if Congress had intended to broaden the FBRA to cover the factual scenario of a defendant forcing a victim to take money out of an ATM, it would have amended the statute and inserted language into the text to explicitly include ATM robberies within the scope of the statute. Because Congress did not include that language, a court construing § 2113(a) faithful to Congress’s purpose<sup>162</sup> must interpret that Congress meant for the FBRA to apply only to banks and not bank customers.

The decisions by the courts in *McCarter* and *Chavez* vastly expanded the scope of § 2113(a) to encompass acts far beyond the scope intended by Congress, whereas the reading by the Fifth Circuit in *Burton* and the District Court for the District of New Mexico in *Chavez* reflects Congress’s intent when it passed the FBRA, even if purposivism was not one of their interpretive approaches.

Statutory interpretation based on textualist and purposive analysis indicates that the plain language of and congressional intent behind FBRA is not ambiguous with respect to whether forced ATM withdrawals fall under § 2113(a).<sup>163</sup> The plain terms of the section indicate that the property must be in the possession of the bank, and the limited language adopted suggests that Congress intended to limit the applicability of the section to crimes committed against banks.<sup>164</sup> The history of the FBRA’s passage suggests the same.

### C. RULE OF LENITY

Another tool of statutory construction is the rule of lenity, which requires strict construction of ambiguous penal statutes and for ambiguity to be resolved in favor of a criminal defendant.<sup>165</sup> Even if a court holds that the language of § 2113(a) is ambiguous, then “ambiguity concerning the ambit of criminal

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158. See H.R. REP. NO. 73-1461, at 1–2; S. REP. NO. 73-537, at 1.

159. See H.R. REP. NO. 73-1461, at 1–2 (emphasis added).

160. See generally H.R. REP. NO. 73-1461; S. REP. NO. 73-537.

161. See generally H.R. REP. NO. 73-1461; S. REP. NO. 73-537; 18 U.S.C. § 2113(a).

162. See KATZMANN, *supra* note 151, at 31–32.

163. See *supra* Parts IV.A (Textual Interpretation) & IV.B (Purposive Interpretation).

164. See *supra* Part IV.B (Purposive Interpretation).

165. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018).

statutes should be resolved in favor of lenity.”<sup>166</sup> One purpose of the rule of lenity is to ensure that people have fair notice of a criminal law and the conduct it punishes.<sup>167</sup> The rule of lenity also has a basis in the separation of powers.<sup>168</sup> Federal criminal laws and statutes require congressional legislation to pass or amend, and the rule of lenity prevents the judicial branch from superseding the legislature and punishing individuals based on ambiguity in the law passed by the legislative branch.<sup>169</sup> If the government wants to clarify or make changes in federal criminal law, it is Congress’s duty to do so.<sup>170</sup>

In applying the rule of lenity to robberies following coerced ATM withdrawals, and assuming the FBRA is ambiguous as to whether the customer or bank is in possession of the money at the time in question, a court should resolve this issue in favor of the defendant. The defendant in a case of forced ATM withdrawal would not have fair notice due to the ambiguity of whether his conduct violated the federal bank robbery statute. Therefore, even if a court were to find that the statutory language is ambiguous, applying the rule of lenity should lead to a holding with a more limited interpretation of the statute, resolving in favor of the defendant.

The rule of lenity dovetails with the principle that federal criminal law should be consistent across jurisdictions to ensure similarly situated defendants ensure similar prosecution outcomes. There are also legitimate public policy considerations for adopting a standard that gives deference to defendants, such as ensuring that courts do not overstep Congress’s authority in defining crimes. In sum, regardless of whether a court interprets § 2113(a) under an approach of textualism or a purposivism, or through the lens of the rule of lenity, a forced ATM withdrawal should not be found to meet the requirements of a § 2113(a) violation.

#### D. UNWILLING AGENT THEORY

The “unwilling agent” theory used by the Seventh Circuit in *McCarter* and employed by the Tenth Circuit in *Chavez* has neither statutory nor legal basis in federal criminal law.<sup>171</sup> Indeed, the “unwilling agent” term has rarely been used in court opinions.<sup>172</sup> The Supreme Court first used this “unwilling agent” term

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166. *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

167. *Wooden v. United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring in part and in judgment) (citing *Sessions v. Dimaya*, 584 U.S. 148, 175–78 (2018) (Gorsuch, J., concurring in part and in judgment)).

168. *Wooden*, 595 U.S. at 389.

169. *Id.*

170. *United States v. Santos*, 553 U.S. 507, 514 (2008).

171. Section 2113(a) does not mention the term “unwilling agent.” See generally 18 U.S.C. § 2113(a); see also *infra* notes 172–178.

172. The term “unwilling agent” has only been used sixty times (including citations to prior opinions using the term) in court opinions across all court levels and jurisdictions in history. See Westlaw search for the term “unwilling agent.”

in a 1989 case regarding the production of sealed documents.<sup>173</sup> Before *McCarter*, the only criminal cases using the term “unwilling agent” were two state court cases dealing with state criminal law, cases that have no relevance to the facts or analysis here.<sup>174</sup> The theory has also only been seldom used in other legal areas such as business,<sup>175</sup> torts,<sup>176</sup> and property,<sup>177</sup> among others.<sup>178</sup>

The Seventh Circuit was the first to apply this term to a federal criminal case.<sup>179</sup> In *McCarter*, the court held that when “a robber forces a bank’s customer to withdraw money, the customer becomes the unwilling agent of the robber, and the bank is robbed.”<sup>180</sup> The court’s only cited support for this “unwilling agent” theory was the Eighth Circuit case *Embrey v. Hershberger*.<sup>181</sup> In *Embrey*, the defendant forced a bank employee to withdraw money from his bank, and then took the banker hostage.<sup>182</sup> Embrey was convicted of armed bank robbery in violation of § 2113(a).<sup>183</sup> However, nowhere does that Eighth Circuit opinion mention the term “unwilling agent.”<sup>184</sup> In addition, *Embrey* involved a defendant who robbed a bank employee, and not a bank customer.<sup>185</sup> The Seventh Circuit in *McCarter* ignored conducting a statutory analysis of

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173. *United States v. Zolin*, 491 U.S. 554, 571 (1989) (“There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.”).

174. *See State v. Hauss*, 688 P.2d 1051, 1055 (Ariz. Ct. App. 1984) (police recording conversations); *State v. Miller*, 877 P.2d 1044, 1049 (Nev. 1994) (police responding to a call).

175. The term “unwilling agent” was first used in a published court case in a business law case. *See Carnaghan v. Exp.’ & Producers’ Oil Co.*, 11 N.Y.S. 172, 174 (Gen. Term 1890). The court quoted a treatise that used this term: “This right seems to result from the implied consent of the corporation, for it is evident that the shareholders of a corporation would not desire the delicate duties which devolve upon directors to be performed by unwilling agents.” *Id.* (quoting VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE (Boston, Little, Brown & Co. 1882)). Multiple business law cases also cited Morawetz’s treatise with this term. *See People ex rel. Van Dyke v. Colo. Cent. R. Co.*, 42 F. 638, 643 (C.C.D. Colo. 1890); *State ex rel. Crow v. Boonville R. Bridge Co.*, 103 S.W. 1052, 1067 (Mo. 1907).

176. *See Doubt v. Pitt. & Lake Erie R. Co.*, 6 Pa. D. 238, 240 (C.P. Pa 1897) (state judicial discretion law in a tort case).

177. *See State v. Skinner*, 358 So. 2d 280, 282 (La. 1978) (court quoting defendant’s argument challenging validity of chattel mortgage law).

178. *See United States v. Day*, 9 C.M.R. 46, 56 (C.M.A. 1953) (admissibility of evidence in a military court case); *Wilson v. State of N.Y.*, 343 N.Y.S.2d 216, 217 (N.Y. Ct. Cl. 1973) (civil claims). *See generally Zolin*, 491 U.S. at 554 (seal documents); *Pelozo v. Capistrano Unified Sch. Dist.*, 782 F. Supp. 1412 (C.D. Cal. 1992) (plaintiff’s argument in first amendment case); *Nw. Airlines, Inc. v. Globe Indem. Co.*, 225 N.W.2d 831 (Minn. 1975); *U.S. Fire Ins. Co. v. First State Bank of El Paso*, 538 S.W.2d 209 (Tex. Civ. App. 1976) (insurance cases both citing an unreported memorandum in another case that mentions this term); *Aetna Cas. & Sur. Co. v. Hepler State Bank*, 630 P.2d 721 (Kan. Ct. App. 1981) (insurance); *Seelig v. Shepard*, 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991) (civil practice subpoena case mentioning the term when analyzing union representation).

179. *See United States v. McCarter*, 406 F.3d 460, 463 (7th Cir. 2005).

180. *Id.*

181. *Id.*

182. *Embrey v. Hershberger*, 131 F.3d 739, 739 (8th Cir. 1997).

183. *Id.*

184. *See generally id.*

185. *Id.*

§ 2113(a) and instead went directly to applying their “unwilling agent” theory.”<sup>186</sup>

There is no statutory basis in the FBRA for the “unwilling agent” theory. The statute does not mention it, and neither do the Senate and House reports for the FBRA and § 2113(a).<sup>187</sup> Section 2113(a) does discuss whether a victim is “willing” or “unwilling” at any point during a bank robbery, but rather simply focuses on whether the property taken was in the “care, custody, control, management, or possession of, any bank.”<sup>188</sup> As a result, this novel theory invented by the Seventh Circuit and adopted by the Tenth Circuit deviates from the standard statutory analysis and interpretation that courts are required to perform when confronted with legislation applied to new contexts.<sup>189</sup>

## V. PROPOSED RESOLUTIONS AND FUTURE IMPACT

### A. THE SUPREME COURT SHOULD ADOPT THE FIFTH CIRCUIT STANDARD FROM *UNITED STATES V. BURTON*

The number of ATM robberies per year is trending upward and insurance experts predict that this trend will continue.<sup>190</sup> This places the Supreme Court in a timely position to settle the circuit split regarding § 2113(a). The surge in ATM-related robberies involves substantial expenditure of DOJ time and resources in the federal prosecution of these cases. However, in December 2022, the Supreme Court denied the petition for writ of certiorari in the *Chavez* case.<sup>191</sup> If another opportunity arises for the Supreme Court to review a substantially similar case, the court should adopt the interpretation of § 2113(a) held in *Burton*. Doing so would capture the intent of Congress and serve justice by not granting the government overly broad authority to prosecute individuals for actions plainly outside of the statute.<sup>192</sup>

*Burton* produces the proper result for several reasons. First, it is a direct reading of the unambiguous statute, which provides the government with prosecutorial boundaries that do not exceed the explicit statutory language. Second, *Burton* aligns with a plain textualist and purposive interpretation of the statute, even though the Fifth Circuit did not undertake a detailed statutory

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186. See *McCarter*, 406 F.3d at 463. Under a realist perspective, such judicial opinion is “composed with a predetermined result and purposefully crafted to ignore conflicting precedent.” Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L. F. 5, 8 (1998). The Seventh Circuit in *Burton* ignores Supreme Court precedent on statutory interpretation and instead crafted the “unwilling agent” theory to skip and ignore the statutory analysis requirements. See *United States v. Burton*, 425 F.3d 1008, 1010–12 (5th Cir. 2005). If the Seventh Circuit applied the statutory analysis process required by the Supreme Court in *Park ‘N Fly*, it would yield the opposite result that robbery following coerced ATM withdrawals do not fall under § 2113(a). See *Park ‘N Fly v. Dollar Park & Fly*, 469 U.S. 189, 194.

187. See H.R. REP. NO. 73-1461, at 1–2 (1934); S. REP. NO. 73-537, at 1–2 (1934); 18 U.S.C. § 2113(a).

188. See 18 U.S.C. § 2113(a).

189. See *Park ‘N Fly*, 469 U.S. at 194.

190. See *supra* Part I.B (Development of ATMs in the United States).

191. *Chavez v. United States*, 143 S. Ct. 485 (2022).

192. See *supra* Parts IV.A (Textualist Interpretation) & IV.B (Purposive Interpretation).

analysis.<sup>193</sup> Third, even if the Court should find that § 2113(a)'s statutory language is ambiguous, the rule of lenity would apply,<sup>194</sup> which should result in the same conclusion as *Burton*, that robberies following coerced ATM withdrawals do not constitute federal bank robbery.

#### B. CONGRESS SHOULD PASS LEGISLATION CLARIFYING § 2113(A)

It is also timely for Congress to clarify the federal bank robbery statute and resolve the circuit courts' conflicting interpretations of § 2113(a). Congress has two options for resolution: (1) clearly incorporate the scenario of an individual forcing a customer-victim to take money out of an ATM into the definition of federal bank robbery, or (2) explicitly exclude the aforementioned factual scenario in its definition of federal bank robbery.

The first option is reflected in recent legislation that has been proposed in Congress, but the fact that the legislation has failed to become enacted supports the notion that congressional intent favors the conclusion reached in *Burton*. In October 2022, Democratic Representative Carolyn Maloney of New York and Republican Representative John Rose of Tennessee introduced the Safe Access to Cash Act of 2022.<sup>195</sup> This bill would amend § 2113 to include the following language:

(a) Offenses Against ATM Users And Servicers.—Whoever, by force and violence, or by intimidation, willfully takes, or attempts to take, from any person using, loading cash into, or servicing, or attempting to use, load cash into, or service, or having just used, loaded cash into, or serviced, an ATM, or from any owner of any network-connected ATM while such owner is engaged in transporting or delivering cash that is to be inserted into any such ATM, or from any person engaged in such transport or delivery under contract with, or employment by, any such owner, or who attempts to obtain by extortion, any property or money or any other thing of value from any such person, shall be fined under this title or imprisoned not more than twenty years, or both.<sup>196</sup>

If this language were added to § 2113, a coerced ATM withdrawal followed by the victim handing the money to the robber would plainly fall under the federal bank robbery statute. However, this bill has stalled in Congress. It was referred to the House Committee on the Judiciary and expired at the conclusion of the 117th Congress.<sup>197</sup> In the 118th Congress, Republican Representative John Rose and Democratic Representative Glenn Ivey of Maryland re-introduced similar legislation as the Safe Access to Cash Act of

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193. See *supra* Parts IV.A (Textualist Interpretation) & IV.B (Purposive Interpretation).

194. See *supra* Part IV.C (Rule of Lenity).

195. H.R. 9248, 117th Cong. (2022).

196. *Id.*

197. *Id.*

2023.<sup>198</sup> This bill was referred to the House Committee on the Judiciary in May 2023 and is still pending.<sup>199</sup>

As for the second option, Congress can amend the statute to explicitly exclude robberies following coerced ATM withdrawals from § 2113(a). For example, the current language “or in the care, custody, control, management, or possession of” can be modified to “*directly* in the care, custody, control, management, or possession of” the bank, which will explicitly exclude robberies following coerced ATM withdrawals from the definition since money ceases to be in the direct control of the bank once a bank customer withdraws it from the ATM. Sponsors of this amendment can mention in the Congressional Record that this amendment is in direct response to *Chavez* and include that the Fifth Circuit’s holding in *Burton* was the original intent of Congress, further clarifying the purpose of the change.

The exercise of either option by Congress would clarify the language in the statute and ensure uniformity in federal prosecutions of bank robbery.

### C. TECHNOLOGICAL ADVANCEMENTS AND THEIR IMPACT ON § 2113(A)

Laws, including criminal laws, tend to be backward-looking in addressing a problem.<sup>200</sup> The FBRA, for example, was enacted in response to an increase in bank robberies.<sup>201</sup> New technologies, such as ATMs, present novel problems to the interpretation and application of the laws that predate them. Varying approaches to the interpretation and application of § 2113(a) between jurisdictions yields opposite outcomes in similar scenarios of robberies following coerced ATM withdrawals.<sup>202</sup> Resolution either by the Supreme Court or Congress to clarify the scope of § 2113(a) is required to resolve the circuit split and ensure a consistent interpretation of the statute.

The advent of ATMs and the efforts of courts to interpret § 2113(a) in light of them presents a paradigmatic example of why criminal laws must adapt rapidly to new technology and to the techniques employed by individuals to commit crimes involving that technology. The ATM robbery fact pattern and the lesson it presents can also be applied to the more recent technology of today, such as mobile banking applications. Just as ATM technology allowed bank customers to have quick and easy access to money in their bank accounts,<sup>203</sup> mobile banking technology, such as Venmo and other applications, has

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198. H.R. 3398, 118th Cong. (2023).

199. *Id.*

200. Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012). *See also supra* Part I.A (Legislative History of the Federal Bank Robbery Act).

201. *See supra* Part I.A (Legislative History of the Federal Bank Robbery Act).

202. *Compare* United States v. Burton, 425 F.3d 1008, 1010–12 (5th Cir. 2005), *with* United States v. McCarter, 406 F.3d 460, 463 (7th Cir. 2005).

203. *See supra* Part I.B (Development of ATMs in the United States).

revolutionized customers' access to their financial accounts.<sup>204</sup> One of Venmo's core features is that customers can send money from a linked bank account to another Venmo user.<sup>205</sup> Venmo users can also fund their Venmo accounts by linking a bank account, withdrawing money from their bank account, and depositing the funds into their Venmo account.<sup>206</sup> Once the money is in their Venmo account, users can send funds from their Venmo account balance to other users.<sup>207</sup>

Consider this hypothetical scenario: A perpetrator forces a victim at gunpoint to send money to the perpetrator's Venmo account. The victim opens their Venmo application, withdraws money from their bank account to fund their Venmo account balance, then enters the perpetrator's Venmo account information and sends the funds to the criminal's Venmo account. If the perpetrator in this hypothetical scenario was charged with federal bank robbery under § 2113(a), a court applying the holding in *McCarter* and *Chavez* would convict the criminal of federal bank robbery. Using the Seventh and Tenth Circuit's reasoning, the money was in the bank's control when it was in the victim's bank account. The victim would then be an "unwilling agent" of the perpetrator due to being held at gunpoint when forced to fund their Venmo account balance via their bank account and transferring the money to the perpetrator's Venmo account. Therefore, the bank was robbed, resulting in the conviction of the perpetrator under § 2113(a).

This hypothetical scenario illustrates the error of the Seventh and Tenth Circuit's reasoning and application of § 2113(a). First, the criminal and the victim may not be physically at or near any bank location. Second, the criminal did not seek the bank's money. Instead, the victim made a valid, albeit coerced, withdrawal from their bank account via the Venmo application (removing it from the bank's control), funded their own Venmo account balance with that money (placing it in their, or Venmo's, control), then sent the money to the criminal's Venmo account. This result deviates from the congressional purpose of the FBRA, whose legislative history shows that it was intended to protect banks, not customers. A clarification of § 2113(a) such as this Note suggests would be responsive both to ATM and more recent technological developments.

Regardless of what option Congress or the Supreme Court pursues, with the rapid development of technology, the current federal bank robbery law must be clarified and adapted to reflect technological changes. Nearly fifty years passed between the introduction of the ATM and the introduction in Congress of a bill to address ATM robberies.<sup>208</sup> Nearly twenty years passed between

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204. John Egan & Daphne Foreman, *What Is Venmo And How Does It Work?*, FORBES (Dec. 6, 2021, 7:00 AM), <https://www.forbes.com/advisor/money-transfer/what-is-venmo-how-it-works>.

205. *Id.*

206. *Id.*

207. *Id.*

208. *See supra* Parts I.B & V.B.

*McCarter* and the introduction a bill to address ATM robberies.<sup>209</sup> Present and future technological developments call for faster and more agile responses from Congress and the Supreme Court alike.

### CONCLUSION

Circuit courts disagree on whether an individual who coerces a victim to withdraw money from an ATM and then takes the money from the victim violates § 2113(a) of the FBRA.<sup>210</sup>

This Note has proposed that a textualist and purposive approach to interpreting § 2113(a) of the statute yields the correct outcome: that forcing a bank customer to withdraw money from an ATM does not meet the § 2113(a) requirement that the money must be in the bank's care and control. Once the customer withdraws the money, the criminal defendant is robbing the customer—not the bank. Clarifying the statute would be beneficial to society as technology advances.

Resolution of this issue is ultimately up to the Supreme Court or Congress. Yet, while ATMs have been in use for over half a century, this issue has been left unsettled for over seventeen years, as neither courts nor Congress has come to a resolution on this issue. The Supreme Court declined to grant a writ of certiorari for *Chavez* in December 2022, while the 117th Congress allowed Representative Maloney's proposed legislation to clarify the FBRA to expire. The Supreme Court should grant certiorari for a similar case at its next opportunity, and rule in favor of the approach taken by the court in *Burton*. Alternatively, or in addition, Congress should pass legislation amending the FBRA to explicitly include or exclude forced ATM-withdrawal robberies from the definition of federal bank robbery.

The circuit split over § 2113(a) is a paradigmatic example of the importance of passing or clarifying laws in the face of new technology. Clarifying at the highest judicial or legislative level whether robberies following forced ATM withdrawals is conduct that falls under the FBRA is critical to fairness and justice, as will be the case with other new technologies that have arisen and will arise. With three circuit courts already having faced this issue on appeal, other circuits will have to decide whether or not this conduct falls under § 2113(a), a law that carries a penalty up to twenty years in federal prison. Criminal defendants must be treated the same under federal criminal law when they commit the same crime, irrespective of the jurisdiction they find themselves in. The advent of ATM technologies and other present and future technologies demands that Congress and the Supreme Court act more quickly and responsively to the issues of statutory interpretation those technologies present.

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209. See *supra* Parts II.B & V.B.

210. See generally *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005); *United States v. Chavez*, 29 F.4th 1223 (10th Cir. 2022); *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005).