No. _____

In the
Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented

The Court previously considered this case in *Shaw v. United States*, 137 S. Ct. 462 (2016), where it held that a scheme to defraud a financial institution under 18 U.S.C. § 1344(1) must be one to deceive the bank and deprive it of something of value in which it had a legal property interest. After the Court remanded for reconsideration in light of its opinion, the Ninth Circuit affirmed petitioner's § 1344(1) convictions. This petition presents the following questions:

1. In *Shaw*, the Court held that the bank must have a legal interest in the property targeted by a § 1344(1) scheme to defraud; is that interest a mixed question of law and fact for the jury or a pure question of law for the trial court?
2. If the bank's interest in the targeted property is a question for the jury, did the Ninth Circuit erroneously affirm petitioner's § 1344(1) convictions given that the government did not present evidence of such an interest at his trial and the district court did not instruct the jury on that element?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Lawrence Eugene Shaw petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's original opinion in *United States v. Shaw*, Case No. 13-50136, was published at 781 F.3d 1130 (9th Cir. 2015). App. 1-15a.[1] This Court's opinion in *Shaw v.*

[1] "App." refers to the attached appendix. "ER" refers to the appellant's excerpts of record electronically filed in the Ninth Circuit on October 16, 2013 (Docket No. 8). "AOB" refers to the appellant's opening brief electronically filed in the Ninth Circuit on October 16, 2013 (Docket No. 8). "ARB" refers to the appellant's reply brief electronically filed in the Ninth Circuit on February 3, 2014 (Docket No. 23). "ASB" refers to the appellant's supplemental brief on remand electronically filed in the Ninth Circuit on February 21, 2017 (Docket No. 51). "GSB" refers to the government's supplemental brief on remand filed electronically in the Ninth Circuit on June 5, 2017 (Docket No. 61). "ASRB" refers to the appellant's supplemental reply brief on remand electronically filed in the Ninth Circuit on June 26, 2017 (Docket No. 64). "PFR" refers to the appellant's petition for panel rehearing / rehearing en banc electronically filed in the Ninth Circuit on May 10, 2018 (Docket No. 71).

United States, Case No. 15-5991, was published at 137 S. Ct. 462 (2016). App. 16-26a. The Ninth Circuit's opinion on remand was published at 885 F.3d 1217 (9th Cir. 2018). App. 27-31a.

Jurisdiction

The Ninth Circuit issued its opinion on March 27, 2018. App. 27a. It denied Shaw's petition for panel rehearing / rehearing en banc on June 4, 2018. App. 32a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

18 U.S.C. § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Statement of the Case

1. The Trial Proceedings.

A grand jury indicted Lawrence Shaw on multiple counts of bank fraud under 18 U.S.C. § 1344(1).[2] The evidence presented at his trial established the following:

Stanley Hsu lived in Taiwan but had the statements for his Bank of America ("BofA") account mailed to a California home where Shaw happened to reside.[3] Using the information in these statements, Shaw devised and implemented a scheme to obtain Hsu's money. First, he created a Hsu email account and used it to open a PayPal account in Hsu's name.[4] Shaw then linked that PayPal account to Hsu's BofA account, which he accomplished despite PayPal's security measures because he had access to the bank statements.[5] Shaw also opened accounts in his father's name at Washington Mutual Bank ("WaMu").[6] He linked some of these accounts to the Hsu PayPal account.[7] Although PayPal flagged that as suspicious, Shaw convinced PayPal that he was Hsu by providing falsified documents.[8]

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[2] ER 32-36.

[3] ER 322-26, 343-44, 581-85, 588.

[4] ER 327-29, 349-50, 358, 377-78, 524-25. PayPal is not a "financial institution" for purposes of § 1344. ER 377.

[5] ER 354-56, 378.

[6] ER 497, 589.

[7] ER 356-57.

[8] ER 357-60, 379-81, 512-14.

With these tools in place, Shaw siphoned Hsu's money from his BofA account through outgoing transfers to the PayPal account.[9] Shaw then made purchases using the PayPal account; he also moved the PayPal money through the WaMu accounts in his father's name before ultimately writing checks to himself, transferring funds to another WaMu account in his own name, or otherwise using the money for his benefit.[10] Shaw took about $300,000 of Hsu's money over four months before his scheme was discovered.[11]

It was undisputed at trial that Hsu and PayPal bore the entire loss caused by Shaw's scheme; neither BofA nor WaMu lost any money.[12] Pursuant to standard bank policies, BofA returned to Hsu the money taken by Shaw in the 60 days before Hsu reported the unauthorized withdrawals.[13] But the source of these funds was PayPal, which had to "auto-reverse" those money transfers back to BofA.[14] As for WaMu, it too would have reimbursed a customer for unauthorized activity reported within two months if the customer was a "true victim."[15] Because its only affected customer (Shaw) was not a victim, WaMu returned the limited ill-gotten funds still in Shaw's fraudulent accounts to PayPal, but the bank did not compensate PayPal (or anyone

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9 ER 361, 378-79, 495-97.

10 ER 361-65, 402-07, 436-38, 497-510.

11 ER 326, 336, 342, 497.

12 ER 336-39, 387, 389, 391-92, 434-35, 561-62, 573-74, 615.

13 ER 336-40, 614-15.

14 ER 387-89, 392-95, 573-74, 613-15.

15 ER 426-30, 445.

else) for the money already disbursed from those accounts.[16] And because PayPal is not a bank, it could not seek auto-reversals from WaMu.[17]

The district court gave three relevant instructions. First, it set forth the elements of the bank-fraud charges:

> The defendant is charged in Counts One through Twelve, and Counts Fourteen through Seventeen of the Indictment with bank fraud, in violation of Section 1344(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;
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> Second, the defendant did so with the intent to defraud the financial institution; and
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> Third, the financial institution was insured by the Federal Deposit Insurance Corporation.[18]

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[16] ER 389-90, 434-35.

[17] ER 389-91.

[18] ER 145, 725.

The problem lies in how the district court went on to define "scheme to defraud" and "intent to defraud."[19] It told the jury:

> The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value.
>
> It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.[20]

The district court also told the jury:

> An intent to defraud is an intent to deceive *or* cheat.[21]

The district court gave these instructions over Shaw's objections.[22] Among other things, he contended that the Ninth Circuit's model instruction incorrectly defined intent to defraud as "intent to deceive *or* cheat" and proffered instructions defining the requisite intent as "intent to

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[19] The district court also gave other instructions on "material matters" and "knowledge." ER 147-48, 726.

[20] ER 146, 725-26 (emphasis added).

[21] ER 149, 726 (emphasis added).

[22] ER 37-74, 101-16, 622-51.

deceive *and* cheat" instead.[23] Shaw argued that the model instruction "employs the *disjunctive language* deceive or cheat, presumably allowing conviction on the basis of mere deception, absent an accompanying intent to deprive the target of the deception of money or property."[24] Similarly, he argued: "while the Model Instruction is phrased *in the disjunctive* – i.e. that either an intent to deceive or an intent to cheat will suffice for 'intent to defraud' – for purposes of this subsection (1) § 1344 prosecution, it must be given here in the conjunctive, i.e. to require proof of an 'intent to deceive and cheat' the financial institution[.]"[25] During a mid-trial discussion about the jury instructions, after the district court proposed the scheme-to-defraud instruction that also used the word "or," defense counsel argued: "*because it's phrased in the disjunctive*[,]" the problem is "it allows for conviction if the government proves simply that Mr. Shaw intended to deceive the financial institution. ... *That's my problem, the disjunctive phrasing*."[26] Counsel later added: "If this instruction said that, you know, as long as the government is required to prove that Mr. Shaw intended to deprive the bank of something of value, not just to deceive – *that's my problem with the Court's disjunctive wording*."[27]

Because intent to deceive alone is not enough, Shaw's arguments in the district court addressed what intent to cheat means. "Defraud" refers to "'wronging one in his *property rights*

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[23] ER 70-72, 88, 90, 112-14.

[24] ER 71 (emphasis added).

[25] ER 113-14 (emphasis added).

[26] ER 646-47 (emphasis added).

[27] ER 649 (emphasis added).

by dishonest methods or schemes[.]'" *McNally v. United States*, 483 U.S. 350, 358 (1987) (emphasis added).[28] Shaw therefore repeatedly referred to banks' property in general,[29] and their property "rights" and "interests" in particular,[30] in arguing that the government had to prove that he intended to cause a bank monetary loss and, thus, intended to take the bank's property.[31] Shaw wanted the jury instructed on this element.[32]

In addition to requesting these instructions, Shaw moved for a judgment of acquittal.[33] The district court acknowledged that that motion and Shaw's requested jury instructions hinged on his interpretation of § 1344(1).[34] Because it rejected that interpretation, the district court refused to give Shaw's instructions and instead gave those set forth above.[35] The jury then convicted Shaw on 14 counts of § 1344(1) bank fraud.[36]

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[28] Shaw cited this definition several times in his district-court briefing. ER 54, 60, 69, 71, 113.

[29] ER 43-46, 50-54, 67-73, 103, 107, 109-10, 114, 116.

[30] ER 44, 54, 60, 64, 69, 71, 110, 113, 649.

[31] ER 37-74, 102-16, 624-25, 641-50.

[32] ER 37-74, 101-16, 622-51.

[33] ER 610, 622-24.

[34] ER 622-26.

[35] ER 145-46, 149, 626-51, 725-26.

[36] ER 737-40.

2. The Original Proceedings in the Ninth Circuit.

On appeal, Shaw again argued that § 1344(1) requires intent to "deceive *and* cheat" the victim bank.[37] Echoing his complaint in the district court, he pointed out that use of the disjunctive "or" in the instructions allowed the jury to convict based on intent to deceive alone.[38] Specifically, Shaw argued in his opening brief: "The error in the court's bank fraud instruction was ... that it defined each of these two requisite terms *in the disjunctive rather than the conjunctive form*, inviting the jury to convict Shaw based on no more than his deception of the banks to get [bank customer] Hsu's money."[39] Thus, by using the "*disjunctive form*," "the fatal flaw in the court's instructions [was] that they allowed the jury to convict Shaw on the basis of a mere intent to deceive, rather than to deceive *and* cheat, the bank[.]"[40] And in his reply brief, Shaw repeated that because these instructions define the terms "*in the disjunctive*[,]" they "permit conviction on the basis that the defendant merely intended to deceive, but not to cheat, the deceived party."[41] He added: "By defining each of 'intent to defraud' and 'scheme to defraud' instructions *in the disjunctive* rather than the conjunctive form, and thereby inviting the

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37 AOB 15-29; ARB 3-9.

38 AOB 11, 17, 34; ARB 7, 17-18.

39 AOB 34 (emphasis added).

40 AOB 11 (emphasis added).

41 ARB 7 (emphasis added).

jury to convict Shaw based on the mere deception of the banks to obtain Hsu's money[,]" the instructions were erroneous.[42]

Shaw also continued to argue that intent to cheat means intent to deprive the bank of something of value,[43] specifically by causing the bank, not just its customer, monetary loss.[44] Once again, he relied on the definition of "defraud" as "wronging one in his property rights by dishonest methods or schemes[.]"[45]

Shaw asserted two claims based on his interpretation of the statute. First, he argued that the trial evidence was insufficient to prove that he intended to cheat the alleged victim banks, so reversal and a judgment of acquittal was required.[46] Second, Shaw argued that, at a minimum, he should get a new trial because the district court erroneously instructed the jury on § 1344(1)'s elements.[47]

The Ninth Circuit affirmed Shaw's convictions. App. 1-15a; *United States v. Shaw*, 781 F.3d 1130 (9th Cir. 2015). That court's analysis ignored Shaw's complaint about the disjunctive phrasing of the deceive-or-cheat instructions. App. 10-15a; *Shaw*, 781 F.3d at 1134-36. But it rejected his argument that intent to cheat means intent to cause a bank monetary loss and upheld

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[42] ARB 17-18 (emphasis added).

[43] AOB 6, 21-23, 28.

[44] AOB 13-23; ARB 3-9.

[45] AOB 22, 25 (internal quotation marks omitted); *see also* AOB 25, 27-28 (relying on cases holding that § 1344(1) covers only schemes designed to deprive a bank of a "property interest").

[46] AOB 29-33; ARB 9-17.

[47] AOB 33-36; ARB 17-20.

the district court's instructions. App. 4a, 11-15a; *Shaw*, 781 F.3d at 1132, 1135-36. The Ninth Circuit did not address Shaw's insufficient-evidence claim. App. 10-15a; *Shaw*, 781 F.3d at 1134-36.

3. The Prior Proceedings in this Court.

The Court granted certiorari and reviewed Shaw's case. App. 16-26a; *Shaw v. United States*, 137 S. Ct. 462 (2018). It accepted the premise that § 1344(1) requires intent to wrong a victim bank in its property rights, but it concluded that Shaw's scheme targeting customer Stanley Hsu's funds "was also a scheme to deprive the bank of certain bank property rights." App. 19-20a; *Shaw*, 137 S. Ct. at 466. The Court based that conclusion on caselaw and treatises rather than evidence presented at Shaw's trial. App. 19-20a; *Shaw*, 137 S. Ct. at 466. The Court held that while the bank must have a legal property interest in the property targeted by a § 1344(1) scheme, the defendant need not know it was, in fact, bank property so long as he knew his deceit would cause the bank to release that property. App. 20-25a; *Shaw*, 137 S. Ct. at 466-69.

After interpreting § 1344(1) and explaining its elements, the Court noted that it and the parties agreed "the scheme must be one to deceive the bank *and* deprive it of something of value." App. 25-26a; *Shaw*, 137 S. Ct. 469 (emphasis in original). But because the parties disputed whether the district court's jury instructions were erroneous, it left it to the Ninth Circuit "to determine whether that question was fairly presented to that court and, if so, whether the instruction is lawful, and, if not, whether any error was harmless in this case." App. 26a;

Shaw, 137 S. Ct. at 469-70. The Court therefore "remanded for further proceedings consistent with [its] opinion." App. 26a; *Shaw*, 137 S. Ct. at 470.

4. The Remand Proceedings in the Ninth Circuit.

On remand, Shaw discussed this Court's holding that a scheme to defraud a financial institution is a plan to deceive the bank *and* thereby deprive it of something of value in which it had a legal property interest.[48] Furthermore, he contended, the bank's interest in the property is a mixed question of law and fact for the jury, not a pure question of law for the trial court.[49] Given that interpretation of § 1344(1), the instructions given by the district court incorrectly stated the elements of the offense because the disjunctive deceive-or-cheat language permitted the jury to convict Shaw based solely on an intent to deceive the bank and because they did not require the government to prove that the bank had a legal interest in the targeted property.[50] Shaw explained that the objections he previously made in the district court and on appeal preserved two claims pertaining to § 1344(1)'s elements—that the trial evidence was insufficient to prove all of those elements and that the jury instructions on the elements were erroneous.[51] Shaw then argued that the Ninth Circuit should reverse his convictions and direct entry of a judgment of acquittal because *the trial evidence*—as opposed to *other* authority this Court relied upon in deciding

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[48] AOB 2-6; ARB 2-3.

[49] ARB 3-6.

[50] AOB 6-10.

[51] AOB 10-14; ARB 6-13.

Shaw's case—was insufficient to prove the bank had the required interest in the targeted property.[52] At the very least, he argued, the evidence was such that the jury-instruction errors were not harmless beyond a reasonable doubt, so the Ninth Circuit should reverse for that reason.[53] Finally, Shaw explained that even ***if*** his prior objections had not preserved these claims, he was entitled to relief under the plain-error standard of review.[54]

The Ninth Circuit once again affirmed Shaw's convictions. App. 27-31a; *United States v. Shaw*, 885 F.3d 1217 (9th Cir. 2018). Despite the considerable evidence in the record to the contrary, *see supra* Parts 1 & 2, the Ninth Circuit concluded that Shaw did not previously object "on the ground he urged in the Supreme Court—that the instruction allowed the jury to convict if it found only an intent to deceive the bank without regard to an intent to deprive it of something of value"—so he did not "fairly present[]" an objection "to the instruction on the ground it was in the disjunctive." App. 30-31a; *Shaw*, 885 F.3d at 1218-19. The Ninth Circuit went on to hold in the alternative that any instructional error was harmless because the evidence was purportedly overwhelming that Shaw deceived the bank to obtain money from Stanley Hsu's account, so there was no reasonable possibility the jury could have convicted him based on deceit alone. App. 31a; *Shaw*, 885 F.3d at 1219. The Ninth Circuit didn't acknowledge Shaw's claims pertaining to the government's failure to prove, and the district court's failure to instruct on, the element that the bank had a legal interest in the targeted property. App. 29-31a; *Shaw*, 885 F.3d

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[52] AOB 15-20; ARB 13-17.

[53] AOB 20-21; ARB 19-22.

[54] AOB 21-23; ARB 17-19, 22-25.

at 1218-19. Shaw filed a petition for panel rehearing / rehearing en banc pointing out the flaws in the court's decision,[55] but the Ninth Circuit denied it without explanation. App. 32a.

Reasons for Granting the Writ

1. The Court should grant review to address an important issue not resolved when it previously considered this case in *Shaw v. United States*, 137 S. Ct. 462 (2016)—whether, for purposes of 18 U.S.C. § 1344(1), the bank's interest in the property targeted by a scheme to defraud is a mixed question of law and fact for the jury or a pure question of law for the trial court.

Two terms ago, the Court granted review in this case and issued an opinion, *Shaw v. United States*, 137 S. Ct. 462 (2016), interpreting subsection (1) of the bank-fraud statute, 18 U.S.C. § 1344, which prohibits knowingly executing, or attempting to execute, a scheme or artifice to defraud a financial institution.[56] App. 16-26a. It held that a § 1344(1) scheme must deceive the bank *and* deprive it of something of value in which it had a legal property interest. App. 19-25a; *Shaw*, 137 S. Ct. at 466-69. After the Court remanded for further proceedings consistent with its opinion, the Ninth Circuit affirmed Lawrence Shaw's § 1344(1) convictions. App. 25-31a;

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[55] PFR 1-16.

[56] In this petition, "scheme" is used as shorthand for "scheme or artifice" and "bank" is used as shorthand for "financial institution," which is defined to include a variety of institutions, including FDIC-insured banks. 18 U.S.C. § 20.

Shaw, 137 S. Ct. at 469-70; *United States v. Shaw*, 885 F.3d 1217 (9th Cir. 2018). This petition presents an important question that wasn't resolved when the Court previously considered this case—whether the bank's interest in the targeted property is a mixed question of law and fact for the jury or a pure question of law for the trial court.

1. In the 2016 proceedings in this Court, the parties agreed that the term "defraud" refers "'to wronging one in his property rights by dishonest methods or schemes[.]'" *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). *See Shaw v. United States*, Brief for the Petitioner, 2016 WL 3548945, *18-22 (June 27, 2016) (hereinafter "*Shaw Petitioner Brief*"); *Shaw v. United States*, Brief for the United States, 2016 WL 4375377, *18 (Aug. 15, 2016) (hereinafter "*Shaw Government Brief*"); *Shaw v. United States*, Reply Brief for the Petitioner, 2016 WL 4983137, *6-7 (Sept. 14, 2016) (hereinafter "*Shaw Petitioner Reply Brief*"). Applying this definition to § 1344(1), the parties also agreed that the statute covers only schemes designed to deprive a bank of a property interest by deceiving that bank. *See Shaw Petitioner Brief* at *23-24; *Shaw Government Brief* at *17 & n.1. The Court therefore considered whether Shaw's scheme implicated the victim bank's "property rights." App. 19a; *Shaw*, 137 S. Ct. at 466. Put another way, the Court agreed with the parties "that the scheme must be one to deceive the bank *and* deprive it of something of value." App. 25-26a; *Shaw*, 137 S. Ct. at 469 (emphasis in original).

Because the defendant's intent to defraud a bank is the "whole sum and substance" of § 1344(1), *Loughrin v. United States*, 134 S. Ct. 2384, 2389-90 (2014), the Court addressed what that intent element entails. App. 19-25a; *Shaw*, 137 S. Ct. at 466-69. The parties agreed that the

defendant must intend to deceive the bank. *See Shaw Petitioner Brief* at *15-24; *Shaw Government Brief* at *36-41; *Shaw Petitioner Reply Brief* at *6-7. Their dispute concerned the intent required as to the deprivation of the bank's property rights. The Court held that the defendant need not intend to cause the bank financial harm or act with the purpose of wronging a property interest of the bank. App. 19-25a; *Shaw*, 137 S. Ct. at 466-69. But the government must prove that the targeted property was something in which the bank actually had a legal property interest. App. 21-22a; *Shaw*, 137 S. Ct. at 467-68; *see also Shaw v. United States*, Oral Argument Transcript, 2016 WL 5852131, *45 (Oct. 4, 2016) (hereinafter "*Shaw Oral Argument*") (government conceding "As a fact we do have to prove there was a property interest to the bank."). The government must also prove that the defendant knowingly took (or intended to take) that property from the bank's possession, even if he was ignorant of how the law would characterize the bank's property interest. App. 21-22a; *Shaw*, 137 S. Ct. at 467-68.

2. Applying this interpretation of § 1344(1) to Shaw's case, the Court concluded that he acted with the requisite intent to take the targeted property from customer Stanley Hsu's account only because he knew that Bank of America ("BofA") possessed that account "[a]nd the bank did in fact possess a property interest in the account." App. 21-22a; *Shaw*, 137 S. Ct. at 467.[57] The finding that BofA "had property rights in Hsu's bank account" was based on caselaw and treatises—first cited by the government in this Court—discussing banking law and bailee-bailor

[57] The Court didn't separately consider whether the other bank (Washington Mutual) had a property interest in the bank account that Shaw set up in his father's name. App. 19-25a; *Shaw*, 137 S. Ct. at 466-69.

relationships. App. 19-20a; *Shaw*, 137 S. Ct. at 466; *Shaw Government Brief* at *21-23, 32-35. Only that authority purportedly establishing BofA's property interest allowed the Court to conclude that "Shaw's scheme to cheat Hsu was also a scheme to deprive the bank of certain bank property rights." App. 19-20a; *Shaw*, 137 S. Ct. at 466.[58]

3. In reaching that conclusion, the Court didn't consider whether, let alone hold that, the bank's property interest was a pure question of law for a court rather than a mixed question of law and fact for a jury. Under *United States v. Gaudin*, 515 U.S. 506 (1995), however, it's the latter.

In that case, the Court considered whether the element of materiality in a false-statement prosecution is a jury question. *Gaudin*, 515 U.S. at 507. It began by noting that the Constitution requires a criminal conviction to rest upon a jury's determination that the government proved every element of the charged crime beyond a reasonable doubt. *Id*. at 509-11. The resolution of the question presented was therefore "simple"—"The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality." *Id*. at 511. Although the Court acknowledged that a trial court

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[58] This property-rights finding provides context for the sentence immediately following that one: "Hence, for purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution,' at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds." App. 20a; *Shaw*, 137 S. Ct. at 466.

may rule on pure questions of law, the jury must resolve mixed questions of law and fact. *Id*. at 512-15. In other words, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id*. at 514.

A mixed question requires applying a rule of law to established facts. *See U.S. Bank National Association v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018); *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996). Whether a financial institution has a legal interest in property targeted by a fraudulent scheme is such a mixed question of law and fact that requires delving into both the nature of the particular institution and the nature of the particular property at issue. *Cf. St. Louis & S.F. Ry. Co. v. Gill*, 156 U.S. 649, 664 (1895) ("There are often in pleadings general allegations of mixed law and fact, such as the ownership of property and the like[.]"); *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 111 (2d Cir. 2006) ("The question of who owns a given item of personal property is a mixed question of law and fact."); *Merritt v. Mackey*, 827 F.2d 1368, 1370 (9th Cir. 1987) ("Whether Merritt had a protected property right in his employment is a mixed question of fact and law."). Although this petition uses "bank" as a shorthand for the long list of financial institutions covered by § 1344,[59]

[59] *See* 18 U.S.C. § 20 (defining "financial institution" to include "(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act); (2) a credit union with accounts insured by the National Credit Union Share Insurance Fund; (3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; (4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971; (5) a small business

these institutions' property rights are not necessarily all the same, so in every bank-fraud case, it is incumbent upon the government to prove exactly what interests, if any, the specific institution had in the specific targeted property. Thus, the government correctly conceded before this Court, "[a]s a *fact* we do have to prove there was a property interest to the bank." *Shaw Oral Argument* at *45 (emphasis added).

4. This important question has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). Its prior decision in *Shaw* arguably creates the mistaken impression that, as the government argued on remand, the Court "held that the bank had property rights in Hsu's account *as a matter of law*."[60] Indeed, even though Shaw explained below that wasn't the case,[61] the Ninth Circuit nevertheless concluded that the matter is settled as to all schemes targeting bank-customer money: "As the Supreme Court has now clarified, an intent to obtain money from

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investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); (6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act; (7) a Federal Reserve bank or a member bank of the Federal Reserve System; (8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act; (9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or (10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.").

[60] GSB 20 (emphasis added).

[61] ASRB 3-6; PFR 11-13.

a depositor's bank account is sufficient to constitute bank fraud under 18 U.S.C. § 1344(1)." App. 30a; *Shaw*, 885 F.3d at 1219. If the government continues to assert, and courts continue to accept, the claim that § 1344(1)'s interest-in-property element is a pure question of law for a court rather than an issue that must be presented to the jury, many defendants may be unjustly convicted. The Court should not wait for the inevitable confusion in the lower courts; it should clarify now exactly what the government must prove to a jury beyond a reasonable doubt with regard to this element.

2. If the bank's interest in the targeted property is a question for the jury, the Ninth Circuit erroneously affirmed petitioner's § 1344(1) convictions because the government did not present evidence of such an interest at his trial and the district court did not instruct the jury on that element.

If the bank's interest in the targeted property is a question for the jury, the Ninth Circuit erroneously affirmed petitioner's § 1344(1) convictions. First, the trial evidence was insufficient to prove that element. The jury also wasn't instructed on that element. Contrary to what the Ninth Circuit found, Shaw's objections in the district court and on appeal preserved these claims. Even if they didn't, however, Shaw is entitled to relief under the plain-error standard.

1. The Due Process Clause requires the government to prove beyond reasonable doubt "every fact necessary to constitute the crime" charged. *In re Winship*, 397 U.S. 358, 364 (1970). An appellate court must reverse a conviction and direct entry of a judgment of acquittal if,

viewing the trial evidence in the light most favorable to the government, no rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Burks v. United States*, 437 U.S. 1, 18 (1978). At Shaw's trial, there was no evidence that the bank had a legal property interest in funds held in its customer's account. *See supra* Statement of the Case, Part 1. Again, in the prior proceedings, the Court concluded that the bank possessed a property interest in the customer's account only because it consulted caselaw and treatises first cited by the government after certiorari was granted. App. 19-20a; *Shaw*, 137 S. Ct. at 466; *Shaw Government Brief* at *21-23, 32-35. But neither that authority nor the relevant facts (like, for example, the particular contractual relationship between the bank and its customer) were presented *at Shaw's trial*. The government therefore didn't prove an essential element of the charges. Moreover, even if there was *some* basis in the record to reasonably infer the requisite property rights, Shaw's convictions would still have to be reversed for insufficient evidence because an appellate court cannot affirm a conviction on a legal or factual theory that wasn't presented to the jury. *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991); *Chiarella v. United States*, 445 U.S. 222, 236 (1980).

2. An omission or misstatement of an element of the offense in the jury instructions is constitutional error requiring reversal unless it's harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15-16 (1999). Here, the district court didn't instruct the jury on the interest-in-property element. The district court defined "scheme to defraud" as "any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value" and it similarly defined "intent to defraud" as "an

intent to deceive *or* cheat."[62] The disjunctive language in these two instructions permitted the jury to convict Shaw based solely on an intent to deceive a bank, without it finding any intent to deprive that bank (or anyone else for that matter) of property. After all, it's a basic grammatical principle that terms connected by the disjunctive "or" customarily have separate meanings. *See Loughrin*, 134 S. Ct. at 2390-91. A typical juror therefore would understand that the instructions "both said 'or' and meant 'or' in the usual sense[,]" *id*. at 2391, and would naturally (and mistakenly) conclude that proof of intent to deceive alone sufficed. That's clearly wrong given the Court's holding that "the scheme must be one to deceive the bank *and* deprive it of something of value." App. 25-26a; *Shaw*, 137 S. Ct. at 469 (emphasis in original). Because the instructions required no more than intent to deceive, they certainly did not require the jury to find that Shaw intended to take something of value *in which the banks had a legal property interest*.

This error wasn't harmless. As discussed above, Shaw is entitled to entry of a judgment of acquittal because the evidence was insufficient to prove the interest-in-property element such that a properly-instructed jury should have acquitted him. At the least, the evidence on this point was weak enough that a properly-instructed jury might not have convicted. Although the Ninth Circuit nevertheless concluded that any instructional error was harmless, it did so based on its erroneous belief that obtaining money from a depositor's bank account always constitutes § 1344(1) bank fraud, so it overlooked that the government had to prove (as part of the intent-to-cheat element) that the bank actually had a legal interest in the targeted property. App. 30-31a;

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[62] ER 146, 149, 725-26 (emphasis added).

Shaw, 885 F.3d at 1219. It therefore failed to appreciate the instructional error was not harmless *as to that*.

3. On remand, the Ninth Circuit found that Shaw didn't "fairly present[]" an objection to jury instructions on the ground they were phrased in the disjunctive and thereby allowed the jury to convict based only on intent to deceive the bank. App. 30-31a; *Shaw*, 885 F.3d at 1218-19. That finding is belied by the record, which shows that Shaw raised such objections repeatedly, both in the district court and on appeal. *See supra* Statement of the Case, Parts 1 & 2.

Even putting that aside, however, the Ninth Circuit misapprehended an important legal point when it concluded that Shaw had not preserved his *arguments*. App. 30-31a; *Shaw*, 885 F.3d at 1218-19. Claims, not arguments, are deemed waived or forfeited. For example, in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), the plaintiff argued below that Amtrack was a private entity yet still subject to constitutional requirements because it was closely connected with federal entities. *Id*. at 378-79. When the case got to this Court, however, the plaintiff argued for the first time that Amtrack was itself a federal entity. *Id*. at 379. The Court said that was okay. It noted the "traditional rule" that "'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Id*. It therefore concluded that the contention about Amtrak being a federal entity was not a new claim but only a new argument to support the plaintiff's consistent claim that Amtrak violated his constitutional rights. *Id*. By the same token, Shaw has made two consistent claims: (1) that the government failed to present sufficient evidence to support his convictions because it did not prove the intent-to-cheat element; and (2)

that the intent-to-cheat jury instructions were erroneous. *See supra* Statement of the Case, Parts 1 & 2. He may therefore present new arguments to support those claims.

Lebron and the general principle that only claims, not arguments, can be forfeited are particularly important here given how the law developed in Shaw's own case before this Court. As discussed above, Shaw consistently argued that § 1344(1) bank fraud requires intent to deceive *and* cheat, rather than to deceive *or* cheat. *See supra* Statement of the Case, Parts 1 & 2. Because intent to deceive alone is not enough, Shaw's arguments in the district court addressed what intent to cheat means. He pointed to the definition of "defraud" as "'wronging one in his *property rights* by dishonest methods or schemes[.]'" *McNally*, 483 U.S. at 358 (emphasis added).[63] Shaw therefore repeatedly referred to banks' property in general, and their property "rights" and "interests" in particular, in arguing that the government had to prove that he intended to cause a bank monetary loss and, thus, intended to take the bank's property.[64] Shaw moved for a judgment of acquittal because the government failed to prove this intent-to-cheat element.[65] In the alternative, he wanted the jury instructed on this element.[66] Shaw made the same arguments on appeal.[67]

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[63] ER 54, 60, 69, 71, 113.

[64] ER 37-74, 102-16, 624-25, 641-50.

[65] ER 610, 622-24.

[66] ER 37-74, 101-16, 622-51.

[67] AOB 15-36; ARB 1-20.

In this Court, the government agreed that § 1344(1)'s intent element requires something more than intent to deceive, so the primary issue concerned what intent to wrong a bank's property rights entails. *See Shaw Petitioner Brief* at *9-47; *Shaw Government Brief* at *8-47; *Shaw Petitioner Reply Brief* at *1-25. The Court ultimately held that the government must prove that a defendant charged under § 1344(1) intended to deprive the bank of something of value in which it actually had a legal property interest, but the defendant need not know how the law would characterize that property interest. App. 19-25a; *Shaw*, 137 S. Ct. at 466-69. Thus, the Court made the bank's actual property rights a component of the disputed intent-to-cheat element. Shaw therefore did not previously focus on the government's failure to prove the bank had a legal property interest in its customer's account. That *argument* is not a new *claim*, however. Now that the Court has defined exactly what intent to cheat means, Shaw may continue to press his claims under that standard.

4. Finally, even ***if*** Shaw didn't preserve the insufficient-evidence and instruction-error claims, he can still get relief if the district court erred, that error was plain, the error affected his substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993). For the reasons given above, the district court did err. And under *Shaw*, those errors are plain. *See Henderson v. United States*, 568 U.S. 266, 279 (2013) (error must be plain at time of appellate review). The final two prongs of the plain-error standard are also satisfied as to each of the claims.

First, those prongs are necessarily satisfied when convictions are based on insufficient evidence. *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011); *United States v. Cruz*, 554

F.3d 840, 844-45 (9th Cir. 2009). Plain-error review of an insufficient-evidence claim is only "theoretically more stringent" than the generally-applicable standard of review. *Flyer*, 633 F.3d at 917; *Cruz*, 554 F.3d at 844.

As for the erroneous jury instructions, the error affected Shaw's substantial rights because there's a reasonable probability that it affected the outcome of the trial. *United States v. Garrido*, 713 F.3d 985, 995 (9th Cir. 2013); *see also United States v. Bear*, 439 F.3d 565, 570 (9th Cir. 2006) (substantial rights affected where erroneous instructions create "genuine possibility" that jury convicted on legally-inadequate ground); *United States v. Alferahin*, 433 F.3d 1148, 1957-58 (9th Cir. 2006) (substantial rights affected unless "strong and convincing evidence" on missing element). And because a properly-instructed jury probably wouldn't have found Shaw guilty, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Garrido*, 713 F.3d at 998; *Bear*, 439 F.3d at 570-71; *Alferahin*, 433 F.3d at 1159-60.

Thus, Shaw's convictions should be reversed, even under the plain-error standard.[68] "[P]lain-error review is not a grading system for trial judges." *Henderson*, 568 U.S. at 278. By the same token, the plain-error standard doesn't require defendants, or defense counsel, to be clairvoyant. Where, as here, a defendant has litigated a legal issue all the way to the Supreme Court, he cannot be faulted for failing to predict exactly how the Court would resolve a complicated circuit conflict. Applying at least the plain-error standard in these circumstances

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[68] Although Shaw made these plain-error arguments on remand (ASB 21-23; ASRB 17-19, 22-25), the Ninth Circuit ignored them. App. 29-31a; *Shaw*, 885 F.3d at 1218-19.

serves its purpose by "allowing courts of appeals better to identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity." *Id.* This principle has even more force here given that the new authority at issue is the Court's decision *in Shaw's own case*.

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

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Respectfully submitted,

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