No. 20-6339

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE B. LARSEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

DANIEL N. LERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed reversible error in declining to give petitioner's proposed jury instruction on good faith, where the court correctly instructed the jury on the intent required for a finding of guilt for bank fraud under 18 U.S.C. 1344(1).

RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. Larsen, No. 15-190 (Aug. 17, 2018)

United States Court of Appeals (9th Cir.):

United States v. Larsen, No. 18-10320 (Apr. 17, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6339

GEORGE B. LARSEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 508.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2020. A petition for rehearing and rehearing en banc was denied on August 4, 2020 (Pet. App. 12a). The petition for a writ of certiorari was filed on November 4, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted on one count of conspiring to commit bank fraud and falsely make lending-association writings, in violation of 18 U.S.C. 371, and on five counts of bank fraud, in violation of 18 U.S.C. 1344(1). Judgment 1. The district court sentenced petitioner to 121 months of imprisonment, to be followed by two years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. From 2010 to 2011, petitioner participated in a nationwide conspiracy to fraudulently eliminate mortgage debt by forging bank documents. Gov't C.A. Br. 3. The scheme was portrayed as a "mortgage elimination program" to help distressed homeowners avoid foreclosure. Ibid. The conspirators began by enrolling distressed homeowners in a church named Shon-te-East-a, Walks with Spirit, and telling the homeowners that membership in the church would protect their homes from foreclosure. Ibid. The conspirators then filed two false documents with the county recorder's office with respect to each property. Id. at 4.

First, they recorded a fake deed of trust that gave the appearance that the homeowner had refinanced his mortgage with a new lender, when in fact the new "lender" was a sham entity that did not lend any money to the homeowner and was controlled by one of the conspirators. Gov't C.A. Br. 4-5. Second, the conspirators

recorded a fake deed of reconveyance, which fraudulently indicated that the actual mortgage loan had been discharged and that the true lienholder no longer had a security interest in the home. Id. at 5. Together, these two documents gave the impression that the homeowner had refinanced his mortgage loan with an entity controlled by a conspirator -- when in fact the homeowner had not refinanced his mortgage; the homeowner did not owe any money to the conspirator's sham entity; and the actual lender still held a lien on the homeowner's property. Ibid.

The conspirators then facilitated the sale of the home. Gov't C.A. Br. 6. Each homeowner received a portion of the proceeds from the sale of his or her own home; the leaders of the conspiracy received a portion of the proceeds from every home sold by the conspiracy; and mid-level members of the conspiracy called "franchisee[s]" received a portion of the proceeds from the sales made by their franchise, or branch, of the scheme. Id. at 3; see id. at 6. In total, 37 properties were sold through the Shon-te-East-a conspiracy, and the conspirators recorded fraudulent documents on more than one hundred additional homes that they were unable to sell before the scheme ended. Id. at 6.

Petitioner was a franchisee who operated a branch of the fraudulent mortgage elimination program. Gov't C.A. Br. 4. Petitioner's branch sold six properties and took steps toward selling 11 additional properties. Id. at 6. Petitioner created

sham entities called GJZ Group and AFOG to serve as a fake lenders. Id. at 7, 15. Petitioner then recruited homeowners to participate in the scheme and filed or caused to be filed fraudulent documents indicating that that one of petitioner's sham entities had refinanced each mortgage and that the mortgage loans issued by the real lenders -- including Bank of America and Chase Home Finance -- had been paid in full. Id. at 6-16. Petitioner and his coconspirators then facilitated the sale of each home, with petitioner sending demand letters to escrow companies as part of each sale. See id. at 11-16. Petitioner retained a portion of the proceeds from each sale. See id. at 12, 14, 16.

2. A federal grand jury in the United States District Court for the Eastern District of California returned an indictment charging petitioner with one count of conspiring to commit bank fraud and falsely make lending-association writings, in violation of 18 U.S.C. 371, and six counts of bank fraud, in violation of 18 U.S.C. 1344(1). Indictment 1-14, 17-19. On the government's motion, the district court later dismissed one of the bank-fraud counts. D. Ct. Doc. 233 (Sept. 6, 2017).

The federal bank-fraud statute makes it a crime to "knowingly execute[], or attempt[] to execute, a scheme or artifice * * * to defraud a financial institution." 18 U.S.C. 1344(1). At trial, the government proposed a jury instruction informing the jury that, in order for it to find petitioner guilty on the bank-fraud

charges, it had to find beyond a reasonable doubt that petitioner acted with "the intent to defraud the financial institution," with "intent to defraud" defined as "intent to deceive or cheat." D. Ct. Doc. 283, at 38 (Nov. 20, 2017). The proposed instruction was consistent with the Ninth Circuit's model jury instructions for bank fraud and intent to defraud. See Ninth Cir. Model Crim. Jury Instr. Nos. 3.16, 8.125 (July 2010).

Petitioner did not object to that instruction, but asked the court to also instruct the jury that it "may determine whether [petitioner] had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not [petitioner] acted with intent to defraud." C.A. E.R. 29. The district court agreed that petitioner's proposed good-faith instruction was "subsumed in" the government's proposed instruction and declined to include the good-faith instruction. Id. at 395. The court accordingly instructed the jury that, in order for petitioner to be found guilty of the bank-fraud charges, "the government must prove each of the following beyond a reasonable doubt":

> First, * * * the defendant[] knowingly executed, or attempted to execute, a scheme to defraud a financial institution as to a material matter;
>
> Second, * * * the defendant[] did so with the intent to defraud the financial institution; and

> Third, the financial institution was insured by the Federal Deposit Insurance Corporation or was a mortgage lending business.

Id. at 35. The court further instructed the jury that an "intent to defraud is an intent to deceive or cheat." Ibid.

The jury found petitioner guilty on all of the remaining counts. See C.A. E.R. 42-44. The district court sentenced petitioner to 121 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1a-7a. As relevant here, the court rejected petitioner's assertion that the district court had erred in declining to provide a good-faith instruction to the jury. Id. at 5a. The court of appeals explained that a good-faith instruction "is not necessary when a court has adequately instructed the jury with respect to the charge's specific intent," and found that in the circumstances of this case "the district court correctly instructed the jury that bank fraud requires 'intent to defraud,' and that '[a]n intent to defraud is an intent to deceive or cheat,'" such that the "proposed good faith instruction was unnecessary." Ibid. (brackets in original).

ARGUMENT

Petitioner renews his contention (Pet. 7-15) that the district court erred in declining to give his proposed good-faith instruction. The court of appeals correctly rejected that contention, and its resolution of petitioner's claim does not

conflict with any decision of this Court or another court of appeals. This Court has previously denied petitions for writs of certiorari raising similar issues, see Inzunza v. United States, 565 U.S. 1110 (2012) (No. 11-67); Leahy v. United States, 549 U.S. 1071 (2006) (No. 06-79); Green v. United States, 549 U.S. 1055 (2006) (No. 06-5392); Simkanin v. United States, 547 U.S. 1111 (2006) (No. 05-948); Lewis v. United States, 534 U.S. 814 (2001) (No. 00-1605); Bates v. United States, 520 U.S. 1253 (1997) (No. 96-7731; Von Hoff v. United States, 520 U.S. 1253 (1997) (No. 96-6518); Gross v. United States, 506 U.S. 965 (1992) (No. 92-205); Green v. United States, 474 U.S. 925 (1985) (No. 84-2032), and it should follow the same course here.

1. The court of appeals correctly determined that the district court did not err in declining to give the good-faith instruction. A separate instruction on good faith is not required when the trial court correctly instructs the jury on the intent required for the charged offense. See United States v. Pomponio, 429 U.S. 10, 13 (1976) (per curiam) ("The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary."); see also Cheek v. United States, 498 U.S. 192, 201 (1991) (relying on Pomponio). The bank-fraud statute requires "knowing[] execut[ion]" of a "scheme * * * to defraud a financial institution." 18 U.S.C. 1344(1); see Shaw v. United States, 137 S. Ct. 462, 468-469 (2016). By instructing the jury that it was

required to find that petitioner "knowingly executed" a "scheme to defraud" and "did so with the intent to defraud" -- defined as "an intent to deceive or cheat," C.A. E.R. 35 -- the district court correctly provided instruction on intent, and thus was not required to provide a separate good-faith instruction.

Every other court of appeals with criminal jurisdiction has likewise recognized that a district court's decision not to provide a separate good-faith instruction is not reversible error so long as the jury is adequately instructed on the intent required for conviction. See United States v. Berroa, 856 F.3d 141, 160-161 (1st Cir.), cert. denied, 138 S. Ct. 488 (2017); United States v. McElroy, 910 F.2d 1016, 1025-1026 (2d Cir. 1990); United States v. Gross, 961 F.2d 1097, 1102-1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); United States v. Mancuso, 42 F.3d 836, 847 (4th Cir. 1994); United States v. Sanjar, 876 F.3d 725, 742 (5th Cir. 2017), cert. denied, 138 S. Ct. 1577 (2018); United States v. Sassak, 881 F.2d 276, 278-280 (6th Cir. 1989); United States v. Lunn, 860 F.3d 574, 579–780 (7th Cir. 2017); United States v. Rashid, 383 F.3d 769, 777-778 (8th Cir. 2004), cert. denied, 543 U.S. 1080 (2005), and cert. granted and judgment vacated on other grounds, 546 U.S. 803 (2005); United States v. Bowling, 619 F.3d 1175, 1183-1185 (10th Cir. 2010); United States v. Walker, 26 F.3d 108, 109-110 (11th Cir. 1994) (per curiam); United States v. Akhigbe, 642 F.3d 1078, 1083-1084 (D.C. Cir. 2011).

Petitioner suggests (Pet. 8) the district court's determination not to give a specific good-faith instruction violated the "general proposition" that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). That assertion lacks merit. A determination not to include a requested instruction is reversible error only if the requested instruction is substantially correct, the actual charge given to the jury did not substantially cover the content of the proposed instruction, and the omission of the proposed instruction seriously impaired the defendant's ability to present a defense. See United States v. Pettigrew, 77 F.3d 1500, 1510 (5th Cir. 1996); see also, e.g., United States v. Godofsky, 943 F.3d 1011, 1019 (6th Cir. 2019). And here, the actual charge given to the jury on the bank-fraud counts substantially covered the content of petitioner's proposed good-faith instruction.

Any jury that found that petitioner "knowingly executed" a "scheme to defraud" with "an intent to deceive or cheat" a "financial institution," C.A. E.R. 35 (as the district court's instructions required) would necessarily have rejected the conclusion that petitioner acted with an "honest, good faith belief in the truth of the specific misrepresentations," id. at 29. See Rashid, 383 F.3d at 778 (explaining that "[t]he essence of a good-faith defense is that one who acts with honest intentions cannot

be convicted of a crime requiring fraudulent intent" and finding no error in a district court's refusal to provide a good-faith instruction as part of a charge for attempted bank fraud) (citation omitted); see also Bowling, 619 F.3d at 1184-1185 (similar). Because the instructions actually given by the district court covered the same ground as the proposed good-faith instruction, the court of appeals permissibly determined that a "good faith instruction was unnecessary." Pet. App. 5a; see Pomponio, 429 U.S. at 13. And petitioner's ability to present his theory that he did not know or believe that the mortgage elimination process was fraudulent, see, e.g., 11/28/17 Tr. 36-37; C.A. E.R. 512-518, moreover demonstrates that the absence of an explicit good-faith instruction did not seriously impair his ability to present a defense.

2. Contrary to petitioner's assertion (Pet. 8-15), the courts of appeals are not divided on the question presented. See pp. 7-8, supra. While both the Eighth and Tenth Circuits previously issued decisions finding that a district court had erred in declining a good-faith instruction even where the jury received a proper instruction on intent, both courts of appeals have since aligned their positions with the remaining circuits. See, e.g., Rashid, 383 F.3d at 778 (finding that the district court did not err in refusing to provide a good-faith instruction because the instructions given on specific intent "were sufficient to cover the essence of the good faith defense"); United States v. Ribaste,

905 F.2d 1140, 1143 (8th Cir. 1990) (upholding the district court's rejection of a good-faith instruction in part because the instructions adequately informed the jury of the requisite intent); United States v. Bowling, No. 08-6184, 2009 WL 6854970, at *1 & n.* (10th Cir. Dec. 23, 2009) (en banc).

In overruling its prior decision, the Tenth Circuit observed that "every one of our sister circuits has come to reject the idea that district courts must give a separate 'good faith' jury instruction in fraud cases." Bowling, 2009 WL 6854970, at *1 n.*. Petitioner cites (Pet. 11 n.31, 13) United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). In McGuire, however, the Sixth Circuit concluded that the district court erred in failing to provide a good-faith instruction but found the error harmless because "'[t]here is nothing so important about the words "good faith" that their underlying meaning cannot otherwise be conveyed,'" and because "[t]he instructions with regard to specific intent adequately informed the jury of the defendant's theory of the case." Id. at 1201-1202 (citation omitted). McGuire thus does not conflict with the decision below.

The remaining decisions that petitioner cites (Pet. 10-13) in support of a purported division among the courts of appeals are cases in which the district court elected to give a good-faith instruction to the jury, and the court of appeals found that the district court did not commit reversible error by providing the specific good-faith instruction that was at issue. See United

States v. Jimenez, 513 F.3d 62, 74-76 (3d Cir.) (upholding the district court's good-faith instruction, over a challenge from the defendants), cert. denied, 553 U.S. 1034 (2008); United States v. Frost, 125 F.3d 346, 372-373 (6th Cir. 1997) (same), cert. denied, 525 U.S. 810 (1998); United States v. Stull, 743 F.2d 439, 445-446 (6th Cir. 1984) (same), cert. denied, 470 U.S. 1062 (1985); United States v. Prude, 489 F.3d 873, 882-883 (7th Cir. 2007) (same); United States v. Hamaker, 455 F.3d 1316, 1325-1326 (11th Cir. 2006) (same).

Because those decisions focused on whether it was reversible error to include a particularly worded good-faith instruction, none of them considered whether it would have been reversible error for the court to decline to provide a good-faith instruction. None of those decisions holds that it would be reversible error to decline to give a good-faith instruction to the jury under the circumstances presented by this case. And each of those courts of appeals has elsewhere found no reversible error where, as here, the district court declines to provide a good-faith instruction but adequately instructs the jury on the intent required for a finding of guilt. See, e.g., Gross, 961 F.2d at 1103 (3d Cir.) ("[A] jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully. Therefore, in this case, we conclude that failure to give the instruction on the good faith defense did not constitute an abuse of discretion."); Sassak, 881 F.2d at 280 (6th Cir.) (finding that failure to give

a "good faith belief" instruction was not reversible error because "the substance of the proposed instruction is fully covered by the charge actually given by the district court"); Prude, 489 F.3d at 882 (7th Cir.) ("We previously have considered and rejected claims that a district court was required to give a good faith theory-of-defense instruction."); Walker, 26 F.3d at 110 (11th Cir.) (finding that the "instruction to the jury on intent to defraud adequately addressed the concept of good faith" and thus "a good faith defense instruction would have been superfluous"). Accordingly, no further review of the decision below is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

DANIEL N. LERMAN
Attorney

FEBRUARY 2021