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IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN LOUGHRIN, :

Petitioner : No. 13-316

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, April 1, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

KEVIN K. RUSSELL, ESQ., Washington, D.C.; on behalf of Petitioner.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in case 13-316, Loughrin v. United States.
5 Mr. Russell.

6 ORAL ARGUMENT OF KEVIN K. RUSSELL

7 ON BEHALF OF THE PETITIONER

8 MR. RUSSELL: Mr. Chief Justice, and may it
9 please the Court:

10 This case presents the question whether to
11 commit Federal bank fraud, a defendant must intend to
12 defraud a bank, or whether, as the Tenth Circuit held,
13 it's enough that the defendant intended to defraud
14 someone in order to obtain money the victim keeps in a
15 bank account. Applying the Tenth Circuit's
16 interpretation, the government has prosecuted people
17 whose only relationship to a bank is that they tricked a
18 third party into issuing them a perfectly valid check,
19 which the defendant then cashed at a bank.

20 Such a broad interpretation of the Federal
21 bank fraud statute threatens to sweep in a garden
22 variety State law crime -- a broad sweep of the sort
23 that this Court has refused to give to Federal criminal
24 statutes absent a clear statement of congressional
25 intent. And that --

1 JUSTICE GINSBURG: If it's -- if it's the
2 words Congress used, "obtained funds owned or controlled
3 by financial -- a financial institution by means of
4 false representation."

5 MR. RUSSELL: Well, the problem is there is
6 an ambiguity in Subsection 2 about to whom the false
7 representation must be directed. Now, I acknowledge
8 that ordinarily, you would construe that silence in
9 favor of breadth that -- in favor breadth that a false
10 statement to anyone would do. But there are compelling
11 reasons not to give that ambiguity, that interpretation
12 in this case.

13 And one is the breadth that I mentioned. It
14 enabled the government to bring cases like United States
15 v. Rodriguez where the government prosecuted a
16 bookkeeper who filed false invoices with her employer
17 that led the employer then to issue perfectly valid
18 checks to people who didn't do the work.

19 CHIEF JUSTICE ROBERTS: Well, but the
20 breadth is confined -- given the development of the
21 banking system, it may not seem as significant a
22 limitation today as in years past. But, nonetheless,
23 the definition of a financial institution is -- in
24 18 U.S.C. 20 is limited to institutions with a
25 particular Federal nexus. Federal Deposit Insurance,

1 Federal Home Loan Bank, Small Business Investment Act.
2 It isn't any financial institution, but institutions in
3 which the Federal Government has a particular interest.

4 MR. RUSSELL: That's true. But nonetheless,
5 for precisely the reason you identified, it -- it covers
6 an awful lot of banks. And if you read the statute --

7 JUSTICE SOTOMAYOR: How about in this case,
8 and that's where I'm having difficulty. Why is it
9 illogical to think that a falsehood rendered through a
10 third party that might affect a bank, a false check, as
11 your client was charged with, that that would be the
12 very case Congress would have wanted covered?

13 MR. RUSSELL: So that's a question about, I
14 think, whether intent to defraud a bank could be
15 satisfied in a case like this. And I think that the
16 answer to that is possibly it could. So the government,
17 I think, tries to put you into a false choice between
18 saying you either have to accept the Tenth Circuit's
19 interpretation that sweeps in cases like United States
20 v. Rodriguez, perfectly valid checks that don't
21 implicate either of the core interests in a bank fraud
22 case, which is protecting the bank from financial harm
23 or protecting the bank from being lied to. You either
24 have to accept that or you have to leave unprosecutable
25 cases like this one. But that's not true.

1 JUSTICE ALITO: How would that -- how would
2 that work? Would the jury have to be instructed about
3 the U.C.C. and be asked to determine whether the bank or
4 Target, in this case, would be liable for the funds if
5 the bank had honored a forged check?

6 MR. RUSSELL: So that gets the -- we have
7 two theories. We have the theory that intent to defraud
8 a bank is required and under that theory, the U.C.C.
9 doesn't matter. We also argue, though, if you don't
10 require intent to defraud a bank --

11 JUSTICE ALITO: Why would it not matter?

12 MR. RUSSELL: Because under the
13 government -- it doesn't matter under the government's
14 view or ours, so --

15 JUSTICE ALITO: No, under your view. Under
16 your view that there has to be an intent to defraud a
17 bank. Why would it not matter from -- who would
18 ultimately be liable for the -- for the money -- for the
19 amount of the check?

20 MR. RUSSELL: Under our view, all the
21 government has to show is that the defendant intended to
22 deceive a bank in order to obtain property that is owned
23 by or in the custody of a bank. So in a bank account.
24 So a traditional altered check case --

25 JUSTICE SCALIA: I think on anybody's

1 theory, you -- you have to show that -- that the monies,
2 funds, credits, assets, securities or other property was
3 owned by or under the custody or control of the
4 financial institution.

5 MR. RUSSELL: That's right.

6 JUSTICE SCALIA: Doesn't either side have to
7 prove that?

8 MR. RUSSELL: That's correct. So the point
9 of departure is to whom the false statement has to be
10 directed.

11 JUSTICE SCALIA: But -- but the jury has to
12 be instructed that the money's coming out of the bank.

13 MR. RUSSELL: That's correct. That's
14 correct. And so that's -- to the extent you think the
15 U.C.C. is implicated in that inquiry, that -- that is
16 true under either one. I don't think that it is. I
17 think it's just going to be a question of, you know,
18 whose money are you trying to get and is it in a bank
19 account.

20 JUSTICE GINSBURG: Two of the -- two of the
21 six checks involved were paid by the drawing bank.
22 Isn't that so?

23 MR. RUSSELL: That is correct. And so --
24 but under our principal view that the problem here is
25 that the government -- that the jury wasn't instructed

1 that Petitioner had to intend to defraud a bank as
2 opposed to Target. And so it doesn't matter whether the
3 checks were cashed or not. And it doesn't even matter
4 under the risk of loss theory because it only has to be
5 a risk of loss, not an actual loss.

6 JUSTICE ALITO: I think you have a -- you
7 have a credible textual argument, but you run into the
8 problem that your interpretation makes Section --
9 Subsection 1 surplusage. How do you get around that?

10 MR. RUSSELL: I don't know that we do, but
11 the Tenth Circuit's interpretation doesn't either,
12 because under the Tenth Circuit's interpretation, one is
13 rendered surplusage because any prosecution that could
14 be brought under (1) could also be brought under (2).
15 If it's enough under (2) that you intend to defraud
16 someone, it's surely enough that you intended to defraud
17 a bank.

18 JUSTICE ALITO: Well, under the alternative,
19 there is certainly overlap, but (2) reaches a much
20 broader category or it reaches a broader category. So
21 it's not useless.

22 MR. RUSSELL: No, that's true. And --

23 JUSTICE ALITO: Representation doesn't have
24 to be made to the bank under (2). (2) covers those
25 instances where the representation is made to somebody

1 else. (1) would be limited to those, perhaps, in which
2 the representation is made to the bank. But under your
3 interpretation where (2) requires that the
4 representation be made to the bank, there is no point in
5 having two subsections. You might as well just have
6 one.

7 MR. RUSSELL: Well, I have two things to say
8 to that. One is Congress may have thought that what
9 they were doing in (2) is making clear that the statute
10 encompasses the broad range of particular kinds of
11 property interests that are unique or -- or at least
12 common in the banking context. And in that way it
13 serves the same function as the second clause in the
14 mail fraud statute upon which this statute is premised.

15 JUSTICE GINSBURG: It doesn't have the two
16 subparts. But here you are essentially asking us to
17 read the word "or," "(1) or (2)" to mean (1) including
18 (2).

19 MR. RUSSELL: Well, that's the same way that
20 this Court has repeatedly read the two parallel clauses
21 of the bank fraud statute. The only difference being,
22 you know, the difference in hardware terms and numerals.
23 But I don't think --

24 JUSTICE SOTOMAYOR: What this Court did
25 after the -- after -- or before this statute -- this

1 statute was passed before the Court's interpretation of
2 the mail fraud statute.

3 MR. RUSSELL: That's right.

4 JUSTICE SOTOMAYOR: Every court that had
5 looked at it at the time the statute was passed had
6 determined there were two separate provisions. So why
7 would Congress have any reason to believe they were
8 passing a singular case, a singular charge?

9 MR. RUSSELL: I think what Congress would
10 have intended is simply that when it uses the
11 identical -- materially identical language and structure
12 in two statutes, that they would have the same meaning
13 as determined by this Court.

14 The interpretive principle that the
15 government relies on that identically-worded statutes
16 can mean very different things depending on the state of
17 the circuit law at the time Congress copies the language
18 is really untenable. And it requires a criminal
19 defendant, for example, to know what that circuit
20 precedent was and not be able to simply rely on this
21 Court's decisions interpreting the identical language in
22 another statute.

23 JUSTICE GINSBURG: But it's not identical
24 because in the bank court statute, Congress broke out
25 and separately numbered (1) and (2) and they didn't do

1 that in the mail fraud.

2 MR. RUSSELL: Now, I understand that. But I
3 don't think that if Congress intended this statute to
4 operate dramatically different from the mail fraud
5 statute, the only change it would have made was as those
6 sort of typographical changes. I don't think that's the
7 way Congress conveys that kind of intent.

8 But again, even if you think that Subsection
9 (2) creates an independent offense, it's susceptible of
10 the interpretation that we give you, which avoids having
11 to federalize the kinds of cases that are at issue in
12 United States v. Rodriguez.

13 JUSTICE KAGAN: One understanding of what
14 led to this statute is this Court's decision in Maze,
15 which actually seems on all fours with this case, right?
16 Use of a fraudulent credit card to a merchant who then
17 asks for money from the bank. Essentially the same case
18 as this with a fraudulent credit card as opposed to a
19 fraudulent check. So if we understand this statute as
20 arising from Congress's desire to make that bank fraud,
21 why should we rule for you here?

22 MR. RUSSELL: Well, I guess I have to just
23 dispute the premise. I think Congress was reacting to
24 the rule, the principle of law that Maze adopted, which
25 made it impossible to use the wire fraud statute and

1 mail fraud statute to prosecute a case even when
2 somebody goes into a bank and cashes a counterfeit check
3 because the then use of the mail to settle the account
4 afterwards wasn't good enough. And that's what Congress
5 was concerned of.

6 In this Court's own decision in *Maze*, the
7 Court noted that Congress had dealt with the specific
8 factual problem in *Maze* through an amendment, then
9 recent amendment to the Truth-in-Lending Act, which
10 prohibited credit card fraud. Congress added to those
11 remedies in another section of the same statute that
12 enacted the bank fraud statute and then dealt with the
13 parallel problem with respect to altered checks in
14 Section 513, which is part of that same statute, which
15 criminalizes any use of an altered check to deceive
16 anyone without regard to whose property the defendant is
17 intending to obtain.

18 So when you're worried about altered check
19 cases here, and we need to not just be worried about
20 these cases because this decision implicate a whole host
21 of other cases. But if you're thinking just about
22 altered check cases, Congress dealt with altered check
23 cases in Section 513. And that's important because the
24 penalties under 513 and 31 -- and the bank fraud
25 provision are very different. It's a 30-year sentence

1 for bank fraud and a 10-year sentence for a Section 513.
2 And more importantly, the bank fraud statute is a
3 predicate for aggravated identity theft, which imposes a
4 mandatory 2-year minimum sentence that must be served
5 consecutive to any other sentence.

6 And so in a petty case like this, the
7 difference between somebody being charged for bank fraud
8 and being charged under 513 for a first-time offender
9 can be the difference between zero to 6 months and 2 to
10 2 and a half years. And that gives the government
11 enormous plea bargaining leverage. So you can
12 understand where the government wants a broad
13 interpretation here.

14 But it's equally understandable that
15 Congress would have thought that cases in which
16 somebody's using an altered check in a way that
17 negligently or knowingly poses some risk to a bank is --
18 warrants less punishment than when somebody directly
19 targets the bank itself for deception in order to obtain
20 bank property.

21 JUSTICE KENNEDY: Why -- why is that? Why
22 would Congress have wanted to make that difference?

23 MR. RUSSELL: Well, because I think
24 Congress --

25 JUSTICE KENNEDY: I agree with you that the

1 disparity in -- in punishment is quite substantial.

2 MR. RUSSELL: Yeah. I think that Congress
3 would have thought it's more serious for somebody to
4 target a bank than it is for somebody to use an altered
5 check that has a risk to a bank. Because as this case
6 illustrates, using an altered check doesn't necessarily
7 impose a financial cost on the bank. Here Target
8 intercepted most -- most -- we have a disagreement with
9 the government whether it was three or four of the
10 checks, but -- and the bank itself made -- discovered
11 the alteration and refused to honor the check. But when
12 you are intending to defraud the bank, that's -- the
13 Congress could think that's a much more serious thing.
14 And I do think that, you know --

15 JUSTICE KENNEDY: It does -- it does seem to
16 me that this case can be distinguished from the example
17 you gave in your yellow brief of the person that sells a
18 magazine subscription and he gets the check and he never
19 intends to deliver the magazines. In that case, the
20 bank will -- will honor the check, I assume.

21 MR. RUSSELL: Yes.

22 JUSTICE KENNEY: And must. And must do so.

23 MR. RUSSELL: That's correct. And so --

24 JUSTICE KENNEDY: And that's quite different
25 than this case.

1 MR. RUSSELL: So the question is how to get
2 rid of those cases while preserving the government's
3 ability to prosecute.

4 JUSTICE KENNEDY: Well, you can do so, I
5 suppose, through the government's proposed fallback
6 position.

7 MR. RUSSELL: Yes.

8 JUSTICE KENNEDY: -- at page 40 of its brief
9 which talks about a risk of loss.

10 MR. RUSSELL: So there are -- there are
11 several things wrong with the government's fallback
12 position and it leads in most cases to the same result
13 as intent to defraud. So in paradigmatic bank fraud
14 cases, both our rule and their fallback rule permits
15 prosecution.

16 The only real difference is that their rule
17 is -- is designed to permit prosecution in third-party
18 check fraud cases like ours. Because if it's an altered
19 check that's presented to the bank, we acknowledge that
20 shows intent to defraud the bank. So we're only talking
21 about cases like ours where an altered check is
22 presented to a third party and the government's rule
23 permits them to continue to prosecute those cases.

24 Now, even if you agree with them that those
25 kinds of cases fall within the scope of the statute,

1 that -- all you need to do then is to say, look, those
2 cases aren't materially different than when you submit
3 the check to the bank in the first place, that the
4 altered check shows intent to defraud the bank in
5 third-party cases just like it does in a first-party
6 case. Now, we think that they're wrong about whether or
7 not these kinds of cases are covered. And if we're
8 right about that, then there's obviously no reason to
9 adopt, you know, a rule that they made up just to deal
10 with those kinds of cases.

11 And maybe I could turn to that argument just
12 for a second.

13 JUSTICE ALITO: Well, could I ask you this
14 question? Suppose the defendant testifies and suppose
15 the jury believes the defendant. The defendant
16 testifies as follows: I never intended to defraud the
17 bank. I knew that the cashiers at this particular
18 retail establishment were incredibly careful -- careless
19 and so I got these checks and they were made out to my
20 neighbor John Doe. I stole them from his mailbox. I
21 crossed out his name and I wrote in the name of the
22 retail establishment and I knew these cashiers were so
23 careless that they would honor the check. However, I
24 never thought any bank would do that. So I didn't
25 intend to defraud the bank. I intended to defraud the

1 retail establishment.

2 Now, under your theory that -- that if the
3 jury believed that, the person would not be guilty of
4 the offense.

5 MR. RUSSELL: That's right. And I don't
6 think that those cases are covered for an additional
7 reason as well. And that is, the fraud there is not
8 intended to obtain bank property. Under Subsection (2),
9 it's not any fraud that implicates bank property. The
10 object of the fraud must be to obtain the property that
11 is owned by or in the custody or control of the -- of
12 the bank.

13 And in a case like this, what my client
14 obtained was DVD players and groceries and a printer,
15 and those were not property owned by or in the custody
16 or control of the bank.

17 JUSTICE SCALIA: Well, why doesn't that
18 principle cover most of the cases you're worried about?

19 MR. RUSSELL: Well, it doesn't cover the
20 cases like Rodriguez, because the government can argue
21 there that -- so, I don't know if I've finished the
22 description of Rodriguez, but in that case, a bookkeeper
23 submitted false invoices to her employer. The employer
24 issued valid checks to a third party, who then cashed
25 it. And the government can say in a case like that,

1 cashing the check results in you obtaining money in the
2 custody or control of the bank. That's what you get in
3 exchange for the check. And you obtained it by means of
4 a false statement to someone, i.e., the false invoice
5 submitted to the employer. And so it doesn't --
6 adopting our view of what bank property is doesn't
7 completely eliminate the problem. We would win the
8 case. But it doesn't --

9 JUSTICE SCALIA: Why -- why wouldn't your
10 view have enabled you to win this case?

11 MR. RUSSELL: It would -- it should have. I
12 mean, we've brought a sufficiency of the evidence
13 challenge with respect to whether -- whose property this
14 is. And the jury --

15 JUSTICE SCALIA: So if we think that was
16 wrong, there's a lot less to this case than meets the
17 eye.

18 MR. RUSSELL: There is -- that could be the
19 end of this case. It doesn't resolve the circuit
20 conflict, which there is still a circuit conflict about
21 whether intent to defraud a bank is required in cases
22 not involving this circumstance of a third party.

23 But we do think that you shouldn't believe
24 that just because -- if you agree with the government
25 that third-party altered check cases fall within the

1 scope of the statute, that's not a reason to forego
2 requiring the government to prove intent to defraud the
3 bank. It's just a reason to say that, as a number of
4 circuits have, that use of that altered check shows
5 intent to defraud a bank.

6 The government has been able to prosecute
7 altered check cases, including altered third-party
8 check -- altered check cases to third parties, in
9 circuits that require intent to defraud the bank.

10 The other thing that's wrong --

11 JUSTICE KAGAN: What's the theory behind
12 that? Why would presenting an altered check to a third
13 party constitute sufficient evidence of intent to
14 defraud a bank?

15 MR. RUSSELL: Well, I think the theory is
16 that the use of an altered check shows intent to deceive
17 the bank. And then these courts simply view obtaining
18 the property of a third party using that check as
19 materially identical to obtaining that property directly
20 from a bank, I think is the theory.

21 JUSTICE ALITO: Usually there won't be
22 evidence, direct evidence of the defendant's intent. So
23 the defendant's intent will be inferred from objective
24 evidence -- will be inferred from other evidence, and
25 then you will get into the question of whether the

1 retailer who initially accepts the check or the bank is
2 ultimately going to be liable for the amount of that
3 check. If you're -- if you're in a situation in which
4 the -- the retailer is going to be liable, that -- maybe
5 that supports the -- the inference that the defendant
6 never intended to defraud the bank. If you're in a
7 situation where the bank is going to be liable, it
8 supports the inference that the defendant intended to
9 defraud the bank.

10 So won't you get into this somewhat
11 complicated UCC question about who is ultimately going
12 to be liable for the amount? I think that's a problem
13 with your argument, but maybe there's an answer to it.

14 MR. RUSSELL: Well, I think that there is
15 and maybe I'm not explaining it very well. So there's
16 two pieces of intent to defraud the bank. There's
17 intent to deceive the bank and intent thereby to obtain
18 bank property. With respect to intent to deceive the
19 bank, I think the courts have uniformly found in -- in
20 cases, at least first party cases, that use of an
21 altered check is sufficient evidence to show that you
22 intend to deceive the bank. And when you intend --
23 whether you intend to deceive the bank, it doesn't
24 matter who's going to end up bearing the cost at the
25 end. It's just a question --

1 JUSTICE SCALIA: Doesn't -- doesn't that
2 U.C.C. question arise anyway under the requirement that
3 you have to -- you have to obtain bank property?

4 MR. RUSSELL: It -- it potentially does if
5 you're willing to --

6 JUSTICE SCALIA: Doesn't it require you to
7 ultimately decide who's -- who's going to be stuck with
8 the -- with the empty bag?

9 MR. RUSSELL: It -- it potentially could if
10 you're willing to say that somebody who obtains property
11 from Target potentially is obtaining bank property
12 because of reasons relating to the U.C.C. We don't
13 think you even need to go that far. We think it's
14 sufficient to say that in these third-party cases, what
15 you're obtaining is the property of somebody else. And
16 that doesn't mean that it's not a crime, and it doesn't
17 even mean that it's not a Federal crime. It simply
18 means it's a Section 513 crime.

19 JUSTICE SCALIA: I understand that. But --
20 but if you accept the government's view --

21 MR. RUSSELL: Yes.

22 JUSTICE SCALIA: -- of how these third-party
23 cases ought to -- ought to be resolved, you have to get
24 into the U.C.C., don't you.

25 MR. RUSSELL: I don't know. I mean, maybe

1 they can -- they're the better people to answer that
2 question for you. But I think that, at least to finish
3 the answer to Justice Alito, use of an altered check
4 which says -- when you've written, you know, your name
5 on the check rather than the person who authored it, is
6 an attempt to deceive a bank. We don't disagree with
7 that.

8 And so then the question in these
9 third-party cases is: Are you attempting to obtain
10 property of the bank? And we don't think that the
11 U.C.C. comes into that. It's just a simple common sense
12 thing that a DVD player on Target's shelves is not
13 property owned by or in the custody or control of a
14 bank. And so --

15 JUSTICE BREYER: How does it work -- how
16 does it work if you have Mr. Crook, Mr. Crook has a bank
17 account at Bank of America, he has \$32 in it. He writes
18 a check for 5,000. He sees somebody on the street whom
19 he vaguely knows and says, here, take my check; go to
20 the bank; give me \$200 or give me 1,000. Now, he's got
21 the money from Mr. Smith. He didn't obtain money from
22 the bank. It was Mr. Smith who did or did not go into
23 the bank to get the money. Does that fall within the
24 statute?

25 MR. RUSSELL: No. I mean, what that is is a

1 typical bad check case. It's the equivalent --

2 JUSTICE BREYER: It wouldn't fall within the
3 statute at all. In fact -- in other words, have we got
4 some cases on that?

5 MR. RUSSELL: We don't have this Court's
6 cases. I mean --

7 JUSTICE BREYER: No, no. This is not good,
8 but I mean, you know, what you tried -- you didn't get
9 the money from the bank. What you did was just write a
10 false check, knowing that in all likelihood the guy you
11 give the check to is going to go right to the bank and
12 get the money. Now, I just wonder is there some
13 authority as to whether that falls within these statutes
14 or not.

15 MR. RUSSELL: So the government has brought
16 those kinds of not-sufficient-funds cases. Ordinarily,
17 it goes down somewhat differently, that you've presented
18 the check that you know is going to bounce to a
19 merchant, not to some guy in the street. And the
20 government's theory is that thereby you're obtaining
21 bank property. But most of the cases say that that's
22 not actually bank fraud because you're not intending to
23 deceive a bank. And that's perfectly fine.

24 JUSTICE BREYER: It wouldn't matter. Look,
25 I don't think you have to -- when you say "intend,"

1 "intend" can encompass a known but undesired consequence
2 of an intentional act. And so you may not care -- you
3 couldn't care less when the money comes from the bank or
4 not, but you know that the bank is likely to pay it.

5 MR. RUSSELL: But --

6 JUSTICE BREYER: So therefore, you have the
7 requisite intent. But what I'm trying to figure out
8 here is what's the case law on what should be a very
9 common situation. If you give it to a third party, your
10 fake check, insufficient funds. You just want the money
11 from the third party. But you know the bank is likely
12 to honor it.

13 MR. RUSSELL: Well, if -- if I can quibble
14 with that last piece of the sentence. Ordinarily, if
15 you give a check that goes to a bank and there's not
16 sufficient funds, they bounce the check. They don't
17 honor it. So --

18 JUSTICE BREYER: All right. Try two --

19 JUSTICE SCALIA: That's certainly been my
20 experience.

21 (Laughter.)

22 JUSTICE BREYER: Try two -- two different
23 paths here. Path A, he believes that the bank will
24 honor Smith's, his check, when presented by Jones. I
25 got my names mixed up.

1 MR. RUSSELL: Sure.

2 JUSTICE BREYER: Mr. Crook believes that the
3 bank will honor his check when Mr. Smith presents it.
4 And the second is the one Justice Scalia said, is being
5 sophisticated about these matters, Mr. Crook believes
6 that the bank will never own -- never, never pay the
7 check when presented by Smith. I just want to know the
8 state of the law on those two situations.

9 MR. RUSSELL: So the state of the law -- and
10 there's only a handful of these not-sufficient-fund
11 cases is that most of the circuits have said they do not
12 fall within the statute. The ones that have said that
13 they do, it's usually because the defendant has some --
14 told some additional lie to the bank. They've opened
15 the account under a false name, for example. And so
16 that's the state of law.

17 This Court in United States v. Williams,
18 though, said we should go to great lengths --

19 JUSTICE SOTOMAYOR: What is the thinking of
20 those courts?

21 MR. RUSSELL: What's that?

22 JUSTICE SOTOMAYOR: What's the thinking of
23 those courts? What's the rationale?

24 MR. RUSSELL: So the rationale is that in a
25 case where you submit -- I guess they have two. Some of

1 them are applying the risk of loss test and say that
2 there's not a sufficient risk of loss. I believe some
3 of them are saying that there's no intent to defraud the
4 bank there because the target of the fraud --

5 JUSTICE SOTOMAYOR: And the courts don't
6 hold this way, but hold, as the court did below, that
7 it's an intent to deceive anyone so long as the scheme
8 is --

9 MR. RUSSELL: Yeah. Those -- I don't know
10 that this case has come up in those circuits, but I
11 think the answer is quite clear that those circuits
12 would say they're covered. But in United States v.
13 Williams, this Court said we should go to great lengths
14 to avoid interpreting a Federal criminal statute to
15 criminalize Federally every insufficient funds check
16 case.

17 JUSTICE BREYER: You come back to those
18 general statements, you do have the language of the
19 statutes which favors you this question. But I guess
20 the theory would simply be where Mr. Crook gives him a
21 bad check, to Mr. Smith, he couldn't care less whether
22 Smith presents it to the bank, and he, as far as he's
23 fairly sophisticated, thinks probably Smith won't
24 present it to the bank. He may to an insurance company
25 or something and, therefore, he did not either obtain or

1 try to obtain or believe he would obtain money from the
2 bank.

3 MR. RUSSELL: That's right.

4 JUSTICE BREYER: Whether it's money that the
5 bank itself owns or whether it's money of which the bank
6 has custody. That would seem to me the simplest theory.
7 And I wonder, is that what courts have said?

8 MR. RUSSELL: I think what courts have said
9 is that those kinds of schemes are directed at
10 victimizing the third party, not a bank, and that leaves
11 to the States their traditional authority to prosecute
12 bad check cases, which I don't think should be
13 troublesome.

14 I'd like to reserve the remainder of my
15 time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Yang.

18 ORAL ARGUMENT OF ANTHONY A. YANG

19 ON BEHALF OF THE RESPONDENT

20 MR. YANG: Mr. Chief Justice, and may it
21 please the Court:

22 Congress drafted Section 1344 with two
23 separate clauses, each of which serves a distinct
24 function. The first clause targets schemes to defraud a
25 bank. That requires intent that the scheme have the

1 purpose of defrauding a bank.

2 Clause (2) -- and this is at page 5a of the
3 government's brief, you can see the structural
4 difference quite plainly. Clause (2) targets schemes to
5 obtain property that's either owned by or under the
6 custody or control of a bank. And Congress enacted
7 these broad disjunctive clauses in response to this
8 Court's decision in Maze as well as in Williams, which
9 had curtailed the Government's ability to prosecute
10 precisely these types of fraud.

11 JUSTICE KAGAN: But, Mr. Yang, your
12 interpretation of the statute goes far beyond Maze.
13 Maze was something with a fraudulent credit card or
14 forged check or something like that, but if I understand
15 your interpretation of the statute, you know, if I sell
16 a painting to somebody and I represent it to be by a
17 famous artist and in fact I've just made it in my
18 kitchen, and that person pays me with a check and it's a
19 perfectly valid check, it's a good check, the fraud is
20 obviously as to the person who's just bought the
21 painting. It has nothing to do with the bank. But your
22 interpretation would cover that case as well.

23 MR. YANG: That is correct. Our
24 understanding of the text, and the reason why that is
25 the case is because Congress specified in clause (2)

1 that the scheme to obtain money or property from the
2 bank has to be by means of a false or fraudulent
3 pretense, but it doesn't specify to whom that false or
4 fraudulent pretense must be made.

5 Now, we understand that that sweeps in
6 broader than what Maze --

7 JUSTICE KAGAN: And it's just a little bit
8 peculiar, right? I mean, if somebody pays me in cash,
9 the government can't prosecute the person. If somebody
10 pulls out a check, the government can, but that doesn't
11 seem to make a whole lot of sense in terms of what the
12 statute is about.

13 MR. YANG: Well, we think that the text
14 suggests that what Congress was doing was enacting a
15 broad prophylactic, because what Congress was
16 addressing, remember, were situations where this Court
17 had construed narrowly statutes which addressed
18 situations like this where banks were the inherent
19 second-line victims, and so what Congress wanted to
20 avoid is --

21 JUSTICE SOTOMAYOR: But here the bank is not
22 the victim. That's the whole point. In these con
23 -artist cases, the bank is incidental and --

24 MR. YANG: That's exactly right. That's why
25 Congress was not intending specifically to get those,

1 but enacted a broader statute so we wouldn't have
2 debates about this. Look at the debate that we're
3 having in this case. I think everyone can agree that
4 the banks are, just like the banks in Maze, they're
5 second-line victims. There's an order to the bank.
6 It's a check. A check is simply an order to the bank to
7 pay a specified sum --

8 JUSTICE KENNEDY: But in Justice Kagan's
9 hypothetical, the bank didn't have to refund the money.
10 And we could sit around here all day with examples, but
11 suppose you have a contractor on a cost plus fixed fee
12 and he inflates the cost. This would be -- to the
13 owner. This would be a violation of the statute. This
14 is a sweeping interpretation you're offering us.

15 MR. YANG: We think that that is the
16 interpretation reflected in the text, for the following
17 reason. Although it doesn't fall within the core of
18 what Congress was trying to protect, it avoids the
19 problems, the kind of debate that we're having here
20 about situations that do fall within the core, because
21 remember, now we're talking about, Petitioner says,
22 well, you know, it wasn't sufficiently targeted, He
23 didn't really victimize or harm the bank. Congress was
24 trying to get away from that type of inquiry. They
25 said, look, if the scheme has the intent of obtaining

1 property either owned by or in the custody or control of
2 the bank, so that means it can either be controlled by
3 the bank, its own property or custody, property it's
4 holding, or it's in the custody or control of others,
5 but it's owned by the bank, a very broad coverage. And
6 if you try to obtain that property by means of false or
7 fraudulent pretenses, we avoid this kind of discussion
8 about were you're sufficiently targeting, do you really
9 intend to --

10 JUSTICE SCALIA: You do indeed, but you
11 extend Federal law enormously into the kind of stuff
12 that we've usually left to the States.

13 MR. YANG: I'm not sure that that's actually
14 true. It's a very strange federalism argument the
15 Petitioner is making. The Petitioner is saying, my
16 conduct is a Federal crime. It's a Federal crime under
17 this. It could be a Federal crime under that. It's
18 just not a FEDERAL crime under the bank fraud statute.
19 That is a very strange federalism argument because
20 Congress has already put its hands all over the subject.
21 And what Congress is trying to do here was to respond to
22 cases like Maze by enacting a broad statute. Congress
23 couldn't --

24 JUSTICE BREYER: If I have it right, I just
25 want to be sure, in my Crook case, which you may or may

1 not remember, you're reading the word "obtained" to mean
2 whoever knowingly executes a scheme or artifice to
3 obtain. It doesn't mean for him to obtain. It means
4 for anybody to obtain. That's how you read it.

5 MR. YANG: That's correct because --

6 JUSTICE BREYER: And that has been -- and
7 that has been pretty much the universal --

8 MR. YANG: Understanding of obtain. This
9 Court --

10 JUSTICE BREYER: Okay, okay, okay. You
11 don't have to argue it. I just wanted to know now --

12 MR. YANG: That's just the uniform
13 understanding of the dictionary as well as this Court's
14 cases.

15 JUSTICE BREYER: Fine, fine, fine, then is
16 the way you see the statute.

17 MR. YANG: That's correct.

18 JUSTICE BREYER: That Mr. Crook goes to
19 Mr. Smith and says, dear Mr. Smith, here is my check for
20 \$50,000, knowing he only has \$3 in his account. All
21 right. Now, case one is Mr. Smith, not too bright,
22 gives him \$500. Now, he might, Mr. Crook, think that
23 Smith will then go and present the check to the bank and
24 maybe get some money. In that case, he has violated
25 this, in your view, because Mr. Smith obtained money

1 from the bank and that was part of Mr. Crook's idea as
2 what was likely to happen whether he'd wanted it to or
3 not.

4 MR. YANG: Partially correct.

5 JUSTICE BREYER: All right.

6 MR. YANG: I would --

7 JUSTICE BREYER: There's also Justice
8 Scalia's point which is an important matter to me, and
9 that is that there also is the case when Mr. Crook
10 doesn't know how the banking system works at all and he
11 has no idea that the bank will, in fact, give any money
12 or whether it will give any money. Those are the two
13 cases.

14 MR. YANG: I have at least two responses.
15 The first is --

16 JUSTICE BREYER: It doesn't need a response.
17 All I want is explanation.

18 MR. YANG: Well, two explanations about that
19 one.

20 JUSTICE SCALIA: Give an explanation rather
21 than a response.

22 MR. YANG: I will give an explanation that
23 will be connected to the question. The explanation is,
24 I think, twofold. First, as the Court explained in
25 *Neder*, the gravamen of this statute, just like the

1 gravamen of the mail fraud or the wire fraud is not the
2 particular acts or that the particular acts are done
3 well or have any likelihood of success. It is the
4 scheme. And so therefore questions about reliance --
5 the bank doesn't have to believe it or rely on it;
6 damages that result don't have to rely. This is a
7 scheme. It is criminalizing the scheme to obtain --

8 JUSTICE SOTOMAYOR: So what do you do with
9 the case, the second part of the hypothetical that
10 Justice Breyer didn't repeat where the person knows the
11 bank is not going to pay a cent because there's no money
12 in this account.

13 MR. YANG: I think that --

14 JUSTICE SOTOMAYOR: And so there is no part
15 of the scheme to obtain funds from the bank because they
16 know that the bank won't pay it.

17 MR. YANG: Well, they may -- they may
18 suspect that the bank may not pay it. Banks sometimes
19 in fact do pay checks on insufficient funds. Banks have
20 only 24 hours after receipt of a check to dishonor it or
21 not and if they don't then they are stuck in the UCC and
22 have to bring lawsuits. I mean the practical impact of
23 this type of situation is significant. About a billion
24 dollars a year --

25 JUSTICE BREYER: Answer -- what's the answer

1 to Justice Sotomayor's question?

2 MR. YANG: Well, it depends on --

3 JUSTICE BREYER: The crook is not too bright
4 and Mr. Crook doesn't even know what a bank is and all
5 he knows is he's can get \$500 from this other not-genius
6 Mr. Smith. So he does not care about banks. He doesn't
7 know how they work. He has no idea if they pay or don't
8 pay. What's the result?

9 MR. YANG: I think it would be very hard for
10 the government to prove that your inept bank -- that
11 thief had a scheme to obtain money or property from the
12 bank, but the government might be able to prove it
13 circumstantially because, just as Justice Alito
14 explained, you rarely have insight into the heart of
15 hearts of criminals. You need to have circumstantial
16 evidence.

17 JUSTICE SOTOMAYOR: In what case, what
18 Federal statute criminalizes a con game?

19 JUSTICE SCALIA: Criminalizes what? I
20 didn't --

21 JUSTICE SOTOMAYOR: A con game. What
22 Federal statute -- 513 criminalizes altering checks, but
23 what other Federal statute makes it a Federal crime to
24 engage in a con game without a check?

25 MR. YANG: I'm not sure exactly what you

1 mean by a con game the there are plenty of Federal
2 statutes that address --

3 JUSTICE SOTOMAYOR: Well, somebody says I'm
4 going to paint your house and takes a check for \$100 and
5 doesn't paint the house.

6 MR. YANG: Well, the answer is that Congress
7 has addressed false statements, schemes to defraud,
8 schemes to obtain money or property through all kinds of
9 various statutes, mail fraud, wire fraud, false
10 statements, bank fraud. It just is done so in
11 particular areas where there is a Federal interest
12 implicated. And it -- actually, those areas are quite
13 sweeping and bank fraud --

14 JUSTICE SCALIA: And that would be one of
15 them, if you -- if you accept a check, right? If -- if
16 you promise to paint the house, you have no intention of
17 doing it, so it's fraud, and -- and you accept the
18 check. That's it. You're under the statute, right?

19 MR. YANG: The government would have to
20 prove that the scheme was intended to obtain money or
21 property from the bank. If that was shown, and it was
22 shown that that was --

23 JUSTICE KAGAN: And what does that mean,
24 Mr. Yang? I mean, it could mean that the -- that the
25 defendant intends that the money come from the bank, or

1 you could mean that the defendant intends to obtain
2 money which he knows may or is reasonably likely to or
3 is foreseeable to come from the bank. Which do you
4 mean?

5 MR. YANG: I think we kind of mean both.
6 And let me explain why. As Justice Alito, I think, kind
7 of alluded to, as a practical matter, the way you prove
8 these cases is you prove that a defendant generally
9 intends the natural consequences of his or her acts.
10 And so if, for instance, you have a case like this where
11 you have a fraudulent check which is directed to a bank,
12 it says, bank, pay the payee this sum of money, that the
13 defendant is going to intend, when they tendered that to
14 the -- to the merchant, that that check is going to be
15 sent to the bank and that the bank is going to -- you
16 know, has a reasonable chance of paying it.

17 JUSTICE KAGAN: Well, I think this does go
18 back to Justice Alito's question, because the person can
19 say -- the defendant here could have said, I really
20 don't care whether the bank ends up paying Target. I
21 don't know whether the bank will end up paying Target.
22 I don't know how these things work and how often the
23 bank honors it and how often the bank doesn't honor it.
24 And I really could not care less as long as I get my
25 money from Target.

1 MR. YANG: Right. But in our legal system,
2 I don't think it's -- let me give you another example.
3 Let's say you want to kill somebody and you put a car --
4 a bomb in their car. All right? And there are two
5 people in the car. You see the target go in and you see
6 someone else go in, and you detonate the bomb. You
7 can't say I was really indifferent about the second
8 person being there.

9 JUSTICE KAGAN: No, but -- so you're saying
10 that my person -- forget the other examples. I mean,
11 you're saying that this person who could not care less
12 if the money comes from the bank and actually thinks
13 that the money may not come from the bank because it's
14 quite likely that the bank is not going to honor this,
15 you think, nonetheless, that that person has intended to
16 obtain bank property?

17 MR. YANG: Has -- yes, by the virtue of the
18 scheme. The scheme used --

19 JUSTICE SCALIA: But wait. I thought -- I
20 thought you said earlier, and -- and I was going to ask
21 you about that, that he does not have to personally
22 receive bank property.

23 MR. YANG: Right.

24 JUSTICE SCALIA: He just intends the bank
25 property be given to somebody.

1 MR. YANG: To be transferred per his
2 direction.

3 JUSTICE SCALIA: Yes.

4 MR. YANG: Yes, that's exactly right.

5 JUSTICE KENNEDY: And -- and you've been
6 slipping back into the hypotheticals where the bank is
7 going to bear the loss. But your position also covers
8 instances where the bank does not bear any loss, the
9 fraudulent contractor that -- Justice Kagan's
10 hypothetical about the phony painting, the bank is not
11 going to give that money back.

12 MR. YANG: And -- and for good reason, for
13 multiple reasons. One, this is prohibiting the scheme,
14 not a good scheme, not a completed scheme, not an
15 effective scheme and --

16 JUSTICE KENNEDY: So you have federalized
17 every fraudulent transaction in the economy whenever a
18 check is involved.

19 JUSTICE SCALIA: Absolutely.

20 MR. YANG: Not whenever a check is involved.
21 The government would still have to show that the scheme
22 itself was intended to obtain money or property from the
23 bank and did so by --

24 JUSTICE KENNEDY: Well, I mean, I can think
25 about it tonight, but I'd like an example of a check

1 where the money doesn't come from a bank.

2 MR. YANG: Well, in the check context, I
3 think there is none. I mean, what you have, if you're
4 obtaining that check in order to get the money from --
5 or property from the bank, I think it would fall within.
6 And again, we understand this is a broad reading. We --
7 we own -- own up with -- for that.

8 JUSTICE KAGAN: Can I just make sure I -- I
9 understand your -- your answer to my question. Suppose
10 that this defendant did not return the merchandise for
11 cash. In other words, suppose he just wanted an Xbox
12 and he did the exact same thing. So he never himself
13 wanted cash and, again, could not have cared at all
14 whether the bank was going to give the vendor cash.
15 Still, you would say that person intended to obtain bank
16 property?

17 MR. YANG: By virtue -- yes, we would say
18 that by virtue of the scheme -- remember, he's not just
19 walking in and saying, you know, I'll pay you tomorrow
20 if you give me a hamburger today. The -- he's going in
21 with a check. A check is -- everyone knows what a check
22 is. It is an order to a bank to pay money. He's giving
23 it to the -- to the bank or to --

24 JUSTICE SCALIA: But he's -- he's not
25 obtaining the bank's money. You -- you read to

1 obtain -- a scheme or artifice to obtain, you read that
2 for anybody to obtain. I would read it to mean for him
3 to obtain. But that's not how you read it. And you say
4 that's -- everybody reads it the way you do?

5 MR. YANG: Well, this -- this Court has long
6 recognized that the word "obtain" not only means that
7 you obtain it for yourself, but you can obtain something
8 by directing the transfer of -- of property to someone
9 else. And that's exactly what a check does. You are
10 directing the --

11 JUSTICE GINSBURG: Mr. Yang, before you
12 finish, Mr. Russell pointed out -- and I think Justice
13 Sotomayor -- that there is Section 513. It deals
14 with -- expressly with altered checks, but the penalty
15 is much, much less. Is everything that is covered by
16 513 covered by 1344, too?

17 MR. YANG: Well, I think the answer is that
18 has not been decided. And let me just explain in -- in
19 a few ways. One, Section 513 deals with securities,
20 which includes checks of States or organizations, and
21 then it defines organizations. There is a substantial
22 question whether that applies to personal checks. One
23 court of appeals has said it has. The Department of
24 Justice's Criminal Resource Manual says it does not
25 apply to personal checks.

1 So there is a real question about whether
2 this Section 513 would apply. But even if it were to
3 apply, it applies to protect the integrity of certain
4 writings. It is a different provision than a
5 scheme-based provision like Section 1344, which more
6 broadly prohibits types of schemes to obtain money or
7 property from banks.

8 JUSTICE KENNEDY: And is it -- is it true
9 that there's a 2-year mandatory minimum?

10 MR. YANG: Not for bank fraud. There is
11 aggravated identity theft for which --

12 JUSTICE KENNEDY: Under this statute, is
13 there -- is there a mandatory minimum?

14 MR. YANG: No. Well, this -- this statute,
15 the bank fraud statute has a punishment of up to 30
16 years to reflect that frauds come in various sizes.
17 It's not a mandatory minimum. It's just a maximum. And
18 in this case, the defendant actually got 1 year for this
19 bank fraud. He got a -- a stacked sentence of 2 years
20 for identity theft, which is separate from this
21 provision.

22 JUSTICE SOTOMAYOR: Mr. Yang, if we are
23 concerned about federalizing every case involving a
24 check, okay, you -- your brief does give us an
25 alternative.

1 MR. YANG: Yes.

2 JUSTICE SOTOMAYOR: My problem is, I can't
3 locate that alternative in the language of the statute.

4 MR. YANG: Well, I think --

5 JUSTICE SOTOMAYOR: So are you asking us
6 just to make it up? Or if not, how do we reach it?

7 MR. YANG: We're not asking you actually
8 to -- to make that interpretation. It would be if the
9 Court concludes that our first interpretation is somehow
10 problematic, then we think that that is a superior
11 reading than Petitioner's for the following reason:
12 Congress addressed --

13 JUSTICE SOTOMAYOR: No, no, no. Please
14 answer, how do we get to your reading from the text of
15 the statute.

16 MR. YANG: I will. The way you get there is
17 that Congress, in Clause 2, again, remember, specifies
18 you have intent to obtain money or property from a bank
19 by means of false or fraudulent pretenses,
20 representations, and promises. It does leave silent to
21 whom those false or fraudulent representations must be
22 made.

23 Now, if you look at the legislative history,
24 it's very clear that Congress was at least concerned
25 with situations like Maze where a bank would be a victim

1 of a fraud. And those -- and Maze involved a situation
2 precisely like what we have here, where the reason that
3 the bank is a secondary victim is because that false
4 signature, the false charge slip --

5 JUSTICE SOTOMAYOR: So far I'm with you, but
6 you haven't answered my question.

7 MR. YANG: But the way it is in that
8 context, the reason that the bank is the victim of the
9 scheme is because the fraudulent method is actually
10 transferred to the bank as an inherent part of the
11 scheme itself. And so --

12 JUSTICE KENNEDY: I -- I agree that that
13 interpretation substantially narrows the statute because
14 the altered check, the bank is going to be certainly at
15 risk of loss. If -- if we were to agree with that
16 suggestion and were inclined to read the statute that
17 way, is there a case that you can cite to us that says
18 we have a duty to save poorly drawn statutes by a
19 sensible amendment?

20 MR. YANG: No. No, I don't think we --

21 JUSTICE KENNEDY: I mean, what -- what case
22 do you -- what case do you want me to cite if I adopt
23 your alternate -- your fallback position?

24 MR. YANG: I don't think we are relying on
25 the idea that the -- what the Court is -- would be doing

1 is construing the statute in light of, presumably, some
2 good reason to reject what we think is what the statute
3 normally says.

4 JUSTICE SCALIA: Why don't you try the rule
5 of --

6 MR. YANG: We think that the rule of lenity
7 doesn't apply for the reasons that we said on our
8 broader argument. If the Court rejects that, that might
9 be a reason but, again, it's construing the term
10 "means."

11 JUSTICE KENNEDY: Does the rule of lenity
12 provide a precedent for us to adopt the narrowing
13 interpretation, your fallback position?

14 MR. YANG: I think just in any context where
15 you might have constitutional doubt, the Court
16 sometimes, you know, construes a statute in a way that
17 it might not otherwise do.

18 And here what we're giving you the hook for
19 this is that the means specified leaves open to whom
20 that false or fraudulent communication must be directed.
21 You could read, in light of the history and in light of
22 what Congress's main intent was here, to read the
23 statute as saying, ah, Congress actually in clause 2 was
24 concerned with the specific type of means, that is the
25 means that are directed to the bank.

1 And the reason I think this is far superior
2 than what Petitioner suggests is because we are at least
3 construing silence in the statute. Congress
4 specifically addressed intent already in clause 1, that
5 is intent to defraud a bank, which is what Petitioner
6 says clause 2 does. But clause 2 says there's intent to
7 obtain money or property from the bank. There's no
8 reason to run over Congress's choice about what types of
9 schemes have to be intended in order to achieve this
10 result. Again, this is our fallback position --

11 JUSTICE SCALIA: If -- if we adopt your
12 fallback position, does (2) do anything that (1) doesn't
13 do? I mean, if you made -- if you made your false or
14 fraudulent representations to the bank, surely you
15 intend to defraud the bank.

16 MR. YANG: Both clauses, actually, under our
17 fallback or our main position cover things that the
18 others will not. And I'll give you two examples. On
19 clause 1, clause 1 covers what's called bare check
20 kiting, where you write a check, it hasn't sufficient
21 funds, you withdraw the money, then you write another
22 check to cover it and another check and you play the
23 float. Nine courts of appeals have addressed this
24 question. All of them have concluded that it falls
25 under clause 1. Six of them have concluded it doesn't

1 fall under clause 2, and the additional three court of
2 appeals that have criminal jurisdiction in either
3 unpublished or in dictum have suggested agreement.

4 So it's pretty well established check kiting
5 falls under (1), not (2).

6 With respect to (2), it covers schemes like
7 this, where you can argue maybe you didn't intend to
8 defraud the bank itself, but you used false or
9 fraudulent means that would inherently go to the bank
10 because of the nature of the means themselves. Here
11 where you direct a check, it's a financial instrument.
12 It is ordering a bank to pay money. It goes to the
13 bank, and one normally intends the natural consequences
14 of their acts. It goes to the bank in the ordinary
15 course.

16 JUSTICE SOTOMAYOR: Which part of the
17 statute are you interpreting with this limiting
18 principle, the "obtain" part?

19 MR. YANG: "By means of."

20 JUSTICE SOTOMAYOR: "By means of."

21 MR. YANG: By means of the false or
22 fraudulent pretenses in this, understanding these false
23 or fraudulent pretenses to be ones which are directed to
24 the bank as an inherent consequence of the scheme
25 itself.

1 JUSTICE KAGAN: Mr. Yang, your first order
2 argument, which is, you know, the natural way one would
3 read a statute that says "(1) of (2)," is to interpret
4 it as meaning two different things.

5 MR. YANG: Yes.

6 JUSTICE KAGAN: But that requires us to read
7 it differently from the way we read the exact same
8 words, without the numbers, but the exact same words in
9 McNally. And we know that Congress wanted the bank
10 fraud statutes to mirror the mail and wire fraud
11 statutes. So we end up with this -- you know, if we --
12 if we go with your friend over there, we read a statute
13 in a way we wouldn't normally. But if we go with you,
14 we have to read these two statutes that say the same
15 thing and that we know Congress meant to say the same
16 thing differently.

17 MR. YANG: Right. And I think that there
18 are very sound reasons for doing that and I'll explain
19 why. First, when you look at the statute, Section 1344,
20 this is on page 5A in the bank frauds -- or the mail
21 fraud statute is 1341 on 2A, they are quite different.
22 I mean, even when we just look at the statutory
23 structure alone, Congress broke these clauses up, put
24 them on different lines, numbered them, indented them
25 equally. One would not naturally say you have the

1 option of one, Option A, or two, Option B --

2 JUSTICE SOTOMAYOR: I take your point that
3 the words on the page look very good for you. But we
4 also know that Congress didn't intend for those
5 differences in spacing and numerology to have a
6 difference in meaning, don't we?

7 MR. YANG: No, no. Congress modeled -- it's
8 certainly true that Congress modeled the bank fraud
9 statute on the mail fraud statute. But that doesn't
10 mean that Congress wanted the two statutes to be
11 coterminous. In fact, Congress not only expressed its
12 understanding that these were dysjunctive for the
13 various structural reasons, which I think are
14 inescapable from the text. But also Congress modified
15 the text itself. Congress didn't simply say a scheme to
16 defraud. It requires a scheme to defraud a financial
17 institution. Congress did not say a scheme to obtain
18 money or property. It specified that it's not only
19 property of the bank, owned by the bank; it is property
20 under the bank's custody that the bank doesn't own and
21 bank -- property that the bank owns, but is not even
22 under its custody or control, it's under the custody or
23 control of others.

24 This is a different statute, of course
25 modeled on the mail fraud statute, but it's different.

1 And Congress I don't think in 1984 could have been more
2 clear about its intent to make these two provisions,
3 that is the intent to defraud and the intent to obtain
4 provisions, distinct based on the choices that it made
5 in text.

6 It's just, I think, impossible to read the
7 text and come away with the conclusion that in 1984 what
8 Congress intended, regardless of what happened in the
9 mail fraud statute in 1987, that Congress intended that,
10 or notwithstanding the only reading of "or" in this
11 context that makes any textual sense, since it's not
12 even defended in the textual argument on the other side,
13 that Congress meant that "or" in that structure to mean
14 anything but "or." That is, a dysjunctive, two separate
15 clauses having independent meaning.

16 In fact, it would be anomalous to do so
17 because Section (2) covers, for instance, bank-owned
18 property that's not under the custody or the control of
19 the bank. So why would you intend to defraud the bank
20 when you're trying to really get it from the custodian
21 of the bank's property? The idea would be that the
22 means obtained, at the very least, would probably be
23 directed to the custodian of the property, not -- which
24 is not always the bank under clause 2.

25 JUSTICE GINSBURG: Is the government still

1 taking the position that it took in the district court,
2 that 1344(1) also covers this case?

3 MR. YANG: Well, we disagree with the court
4 of appeals precedent which says you need a risk of loss
5 under clause 1. But the government acquiesced to the
6 district court's narrowing of this to clause 2.

7 JUSTICE ALITO: Along those lines, if we
8 were to agree that under sub (2) it was necessary to
9 show an intent to defraud the bank, what would the
10 government have to prove in an altered check case?

11 MR. YANG: Well, I guess you've --

12 JUSTICE ALITO: Or what would you have had
13 to prove under sub (1) if this case could properly be
14 prosecuted under sub (1)?

15 MR. YANG: Well, you'd have to show that the
16 scheme was actually intended to obtain, to deceive the
17 bank, as well as obtain its property, as opposed to a --
18 and that intent difference can be significant in cases.
19 What we will have to show in here --

20 JUSTICE KAGAN: Well, how can that intent
21 difference be significant? I mean, I would have thought
22 that you would said the same proof that goes to whether
23 you intend to obtain bank property, even though you're
24 presenting this check only to a third party, and the
25 check may or may not be honored by the bank. You could

1 say the exact same thing about whether you intend to
2 defraud the bank.

3 MR. YANG: We certainly would probably rely
4 on the same types of evidence. We would then have the
5 additional burden of having to show that the intent was
6 to deceive the bank specifically.

7 JUSTICE ALITO: What I'm getting at is would
8 this require delving into the defendant's knowledge of
9 the legal relationship between the merchant here and the
10 bank?

11 MR. YANG: I think it inevitable is going to
12 come to that, and you're going to throw to juries these
13 questions of, like, you know, despite the fact that the
14 defendant has used a check, did the defendant really
15 know what a check was or did the defendant -- what is a
16 check --

17 JUSTICE KAGAN: Well, why isn't that the
18 same under the intent to obtain bank property? Where
19 you also, the defendant, might say: No, I really didn't
20 intend to obtain property, because I didn't really know
21 whether the bank would honor the check and, in fact, I
22 thought it wouldn't.

23 MR. YANG: Well, the scheme would be to
24 obtain. You don't have to necessarily show that the
25 specific means that you were using were intended to

1 deceive the bank, because that requires a lot more
2 inquiry --

3 JUSTICE KAGAN: But even on the obtain
4 property lane, it's obtain property from the bank, isn't
5 it?

6 MR. YANG: Not obtain property from the
7 bank. It is obtain property that is --

8 JUSTICE KAGAN: Well, in the custody of the
9 bank?

10 MR. YANG: It doesn't have to be in the
11 custody of the bank. It can be bank-owned property in
12 the custody of others. So, for instance, banks have a
13 lot of assets. For instance, they can foreclose on
14 houses and such. In those contexts, you might have
15 someone who is scheming to obtain bank property by
16 directing their fraud to a third party to whom the bank
17 has entrusted their assets.

18 JUSTICE KAGAN: No, but in a case like this,
19 wouldn't the difficulties of proof be the same? The
20 person -- whether you charge somebody with trying to
21 defraud the bank or with trying to obtain property owned
22 by or in the custody of the bank. If Justice Alito is
23 right as to the one, that all these questions about the
24 relationship between a bank and a retailer are going to
25 come in, isn't he also right as to the other?

1 MR. YANG: I'm not quite -- I don't think
2 that's quite right. And the reason is that whenever you
3 have to show an additional intent requirement, it ups
4 the ante. Just like in homicide, you have various
5 gradations of a homicide including up to murder. When
6 you have an additional --

7 JUSTICE ALITO: Doesn't the answer depend on
8 from whom -- for whom the money, either owned or
9 under -- in the custody of the bank has to be obtained?
10 If it -- if it doesn't have to be obtained by the
11 defendant, then it wouldn't seem to me that there would
12 be much of a question. Because even if the only thing
13 that the defendant obtains from the merchant is an Xbox,
14 if the -- if the check is honored, it is going to be
15 obtained by the merchant. Somebody is going to be
16 obtaining money from the bank if the check is ultimately
17 honored.

18 MR. YANG: May I just -- I would just
19 qualify that by saying that the defendant is obtaining
20 the money. It's obtaining it through the check to be
21 paid to the merchant. That's --

22 JUSTICE ALITO: Right. The ultimate --

23 JUSTICE SCALIA: Excuse me. You have -- you
24 have to posit his expectation that the check will be
25 honored, don't you?

1 MR. YANG: It has to -- the scheme has to
2 contemplate that.

3 JUSTICE SCALIA: Exactly.

4 MR. YANG: The scheme has to contemplate
5 that.

6 JUSTICE SCALIA: And if it's a scheme
7 that -- that's making alterations that no reasonable
8 person would expect the bank to honor, it seems to me
9 you're out of luck.

10 MR. YANG: Well, I don't -- if I might
11 respond, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Sure.

13 MR. YANG: The -- I don't think that
14 actually plays out in fact. Banks suffer about a
15 billion dollars in check fraud a year. There are \$10
16 billion that banks put into check fraud prevention.
17 There are so many checks that fly through, including the
18 checks here. If you look at the checks here, the ones
19 that he got caught for, not the ones that he might have
20 washed and dried, weren't artfully done. But some still
21 go through. And the transaction costs that it imposes
22 on the financial system is something that Congress could
23 have been concerned with. In fact, we think it was.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Five minutes, Mr. Russell.

1 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

2 ON BEHALF OF PETITIONER

3 MR. RUSSELL: Thank you. Congress was
4 concerned about the -- the risks to banks of altered
5 checks, but it dealt with that in Section 513, not
6 Section 1344.

7 JUSTICE GINSBURG: Mr. Yang said it
8 wasn't -- wasn't -- the scope of 513 wasn't clear.

9 MR. RUSSELL: I don't think that that's
10 correct. I mean, we cited a case in our brief in which
11 the government actually succeeded in prosecuting someone
12 for an altered check under Section 513. I don't
13 understand the argument that checks aren't encompassed
14 within 513. We've reproduced the language at 10-A of
15 the blue brief. And what it says is that it
16 criminalizes the use of a forged security. And it
17 defines "forged" to mean altered. It defines "security"
18 to mean check. And then it has to be a forged security
19 of an organization. And it defines "organization" to
20 mean any legal entity other than a government
21 established or organized for any purpose and includes
22 any corporation, company, association, firm, et cetera.
23 I just don't understand what the argument is
24 that Section 513 doesn't cover some species of altered
25 checks. But at the very least, if you thought that

1 Congress must have intended to Federally criminalize use
2 of all altered checks, it's an easier interpretation to
3 say that 513 covers it than the bank fraud statute.

4 The government's argument here today makes
5 utterly clear how broad the Federal bank fraud statute
6 will be if you adopt their interpretation. They're
7 going -- it encompasses the fake Renoir example and all
8 of the ones in our briefs and it includes every
9 not-sufficient-funds case. And -- and the government
10 acknowledges --

11 JUSTICE SOTOMAYOR: Could you please tell me
12 why -- what your objections are to the "by means of
13 limiting principle" the government gives as an
14 alternative?

15 MR. RUSSELL: So there's -- there's several
16 objections. One is the one that you raised. There's no
17 basis for it in the text. It is a limitation on what
18 the -- the statute says. Any false representation, then
19 they say no, only those false representations that would
20 foreseeably go to a bank and might fool them into paying
21 a check.

22 Second, it doesn't do any useful work
23 because all it does is -- the only difference between
24 their fallback position and intent to defraud a bank is
25 two things. One is it permits them to bring cases in

1 these third-party altered check cases, and we've argued
2 we don't think that those fall under the statute anyway.

3 But even if you think that they do, the much
4 easier thing to say is they fall under the statute.
5 Intent to require -- you know, defraud a bank is
6 required, but the use of the altered check is sufficient
7 evidence.

8 JUSTICE KENNEDY: Well, I think it does a
9 lot of work because it -- it takes out of the equation
10 schemes to defraud where the bank is not going to be
11 liable.

12 MR. RUSSELL: Right. I'm -- I'm saying it
13 doesn't do any work that intent to defraud a bank
14 doesn't already do. So if you're choosing between our
15 test and their test, both tests allow prosecutions of
16 paradigmatic fraud cases. Both cases, both tests
17 eliminate the Renoir example. But their test permits --
18 the only difference, practical difference, is their case
19 facilitates prosecution in these third-party cases that
20 we don't think are covered by the statute anyway, but
21 even if there are, you don't have to adopt this extra
22 textual interpretation. Instead --

23 JUSTICE SOTOMAYOR: But I don't understand
24 how, if the falsehood is made to Target, who gives the
25 person the DVD off the shelf, how you prove that that's

1 an intent to defraud the bank as opposed to defraud
2 Target.

3 MR. RUSSELL: Well, so there's the --

4 JUSTICE SOTOMAYOR: So what's the charge you
5 give to the jury to get to that? I think the limiting
6 principle is the charge that they want to get.

7 MR. RUSSELL: You say that they have to show
8 that the defendant intended to deceive a bank, and the
9 government can argue -- and the government has
10 successfully argued in many cases that use of an altered
11 check shows that the defendant intended to deceive a
12 bank.

13 And the government raises -- you know, the
14 government never likes to have to prove intent. But the
15 government raises these theoretical difficulties in
16 proving intent, but it hasn't shown that this actually
17 ever arises. In fact, the government routinely convicts
18 people in circumstances like this case, even in circuits
19 where intent to defraud a bank is required. It's just
20 they didn't try to do that here because they didn't ask
21 the jury to make that finding.

22 In addition, the difficulty of their test is
23 it's just plain strange. They say you should adopt
24 their test because Congress didn't care about intent to
25 defraud a bank. Then they adopt a rule that looks very

1 much like the kind of rule you would adopt if you
2 thought Congress cared about intent to defraud a bank.
3 It's simply substituting some circumstantial evidence
4 that one could argue to a jury shows intent to defraud a
5 bank and saying that's all the government has to prove.

6 JUSTICE ALITO: Your textual hook is that
7 there -- that the representation has to be made to the
8 bank, right? That's the only way you can get this
9 within the statute.

10 MR. RUSSELL: That's correct.

11 JUSTICE ALITO: But that's different from an
12 intent to defraud the bank, isn't it?

13 MR. RUSSELL: I think -- well, that's the
14 first half. So there's two pieces: Intent to deceive
15 the bank, intent to obtain bank property.

16 We say that you can read the statute to
17 require intent to deceive the bank because there's a
18 statutory silence. And then the government has to prove
19 intent to obtain bank property. That's easily proven
20 when the check is directly presented to a bank. We
21 don't think it can be proven in a case like this because
22 our client intended to obtain Target's property, not the
23 bank's.

24 JUSTICE ALITO: But where is the textual
25 silence about -- where do you get intent to deceive the

1 bank into this?

2 MR. RUSSELL: I think that's what -- I get
3 it from this Court's decision, for example, in McNally
4 where it said --

5 JUSTICE ALITO: Where do you get it the from
6 the text? I understand the argument. It's a -- it's a
7 very credible argument. It doesn't say to whom the
8 representations have to be made. So you put in to the
9 bank.

10 MR. RUSSELL: Right.

11 JUSTICE ALITO: I don't see how you get from
12 there to defrauding the bank.

13 MR. RUSSELL: So if you read it to mean that
14 you have to direct the false statement to the bank, that
15 is the first half of what McNally said intent to deceive
16 a bank -- or intent to defraud a bank is, you have to
17 intend to deceive a bank. And the second half is you
18 have to get -- intend the deceit to obtain bank
19 property, which is on the face of Subsection (2).

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 11:06 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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