

1 in instruction 17.

2 MR. YANG: I think that's --

3 JUSTICE BREYER: It says you have to execute
4 a scheme or defraud a financial -- to defraud a
5 financial institution as to a material fact. So that
6 assumes it was separate.

7 MR. YANG: No, no. But the material --

8 JUSTICE BREYER: The deceive was separate.
9 You would have to deceive the financial institution as
10 to a material fact, which is defined in instruction 19
11 as one that has a natural tendency to influence a
12 financial institution to part with money or property.

13 So what you took away in instruction 21, you
14 gave back in instruction 19. So it's a --

15 CHIEF JUSTICE ROBERTS: And so in 18, sales
16 deceive, cheat or deprive a financial institution of
17 something of value. "Something of value" goes right
18 along with "deprive," but it doesn't go along with
19 "deceive."

20 MR. YANG: I don't think that's correct. I
21 understand Your Honor's challenge here. It's that
22 the -- you would say, like, out of something of value
23 normally if you were saying it by itself. But when you
24 have a series of verbs, it's not uncommon in -- in
25 common parlance simply to use the appropriate, you know,

1 function word "hereof" with -- that connects to the last
2 word. So when you say deceive, cheat or deprive a
3 financial institution of something of value, the normal
4 juror is going to understand that that means you're
5 deceiving the financial institution, cheating the
6 financial institution.

7 CHIEF JUSTICE ROBERTS: Not if they -- not
8 if they -- not if they read instruction 21, which
9 talks -- has nothing to do with -- it just says intent
10 to deceive or cheat, nothing of something of value. And
11 when you quote the instruction on page 46 to make it
12 read, to make it make sense, you have to add in, as you
13 do, after deceive, deceive the bank out of something of
14 value --

15 MR. YANG: But I think --

16 CHIEF JUSTICE ROBERTS: -- Because it makes
17 no sense to say deceive of something of value.

18 MR. YANG: It doesn't even parse under
19 Petitioner's reading because I think Petitioner at least
20 thinks that you have to deceive, cheat or deprive the
21 financial institution -- like, deceive the financial
22 institution.

23 JUSTICE KAGAN: They're kind of right. It
24 doesn't -- it doesn't parse neatly under either reading.
25 But I have to say that if I'm a reader, the way I

1 understand this is you have to -- you have to show --
2 the scheme has to be one to deceive a bank, to cheat a
3 bank or to deprive a bank of something of value. And in
4 that case, the "deceive a bank" is operating as a
5 disjunctive clause without the "of something of value."

6 MR. YANG: No, I think actually you could
7 read --

8 JUSTICE KAGAN: It's to deceive a bank
9 alone, cheat a bank alone, or deprive a bank of
10 something of value. And so I'm a juror. I say, well,
11 it's enough if the bank was deceived.

12 MR. YANG: I don't see how you can read --
13 you might say just "deceive" in the abstract.

14 JUSTICE KAGAN: No, it's got to be that
15 you're deceiving somebody.

16 MR. YANG: Well, but if you're deceiving the
17 bank, if a financial institution, which follows,
18 connects to deceive, then so does "of something of
19 value."

20 JUSTICE KAGAN: Well, I don't think so
21 because that would make no sense. It would be the
22 scheme must be one to deceive a bank of something of
23 value. Whoever would use words like that?

24 MR. YANG: I understand that it's a
25 slightly -- there is a slight grammatical issue with

1 this language.

2 JUSTICE KAGAN: Well, I think it's more than
3 grammatical. It's just -- like, it doesn't make sense.

4 MR. YANG: I think when you read it in
5 context, right, you have to take this -- this is the
6 definition of scheme to defraud. When you read this in
7 context with what you are -- the jury is required to do,
8 knowingly executed a scheme to defraud a financial
9 institution as to a material matter. Right? So that
10 scheme has to be with regard to a material matter. That
11 material matter has to lead the bank -- has a tendency
12 to lead the bank to part with money or property.

13 So when you take that in context, what does
14 that mean? What's the material matter mean? The only
15 way you can make sense is if you're actually depriving
16 the bank of money or property. That is something of
17 value.

18 Now, if the Court has concerns about how
19 this parses, the Court could decide the legal question,
20 which is the important issue here, and simply --

21 JUSTICE SOTOMAYOR: Why has -- why has the
22 government forgotten when it's at trial that simplifying
23 things for juries is always the best thing? Do you
24 really think that any juror reading this would parse it
25 with the care that you are? Why can't you just say

1 something like a scheme to defraud a bank is a scheme
2 to -- what was the three words? -- to deceive or cheat
3 the money and to -- to cheat the bank of some interest
4 in money or property?

5 MR. YANG: I completely agree that
6 simplicity is the -- is preferable. I don't think
7 there's a problem with what we have here, but I will
8 even one up you on the simplicity. I think the proper
9 instruction is scheme to defraud is one to intended to
10 deceive the bank for the purpose of depriving of it of
11 something of value. Just get rid of the disjunctives,
12 right? That would be the better -- the instruction for
13 a single-member bank fraud scheme.

14 Now, things get a little complicated when
15 you have schemes with multiple members. We don't have
16 to discuss it. It is discussed in footnote 10 of our
17 brief.

18 But for the purpose of this case, that would
19 be simple. We think that the instructions, they're not
20 perfect, but they're -- they -- they convey and the jury
21 would have found the requisite requirements of bank
22 fraud. And if the court has any doubts --

23 JUSTICE KENNEDY: Well, what is the -- what
24 do we cite for that? Is there something in our cases
25 that say that the instructions had to be read in the

1 context of what the jury heard or something like that?

2 MR. YANG: I think the --

3 JUSTICE KENNEDY: I mean, we'd say close
4 enough for government work.

5 MR. YANG: I don't think we've quite said
6 that, but I -- it's in pages 44 or 45 of our brief,
7 which is the general proposition that you just have
8 to -- that bank fraud -- excuse me -- that -- jury --
9 this is 46 -- jury instructions must be viewed in the
10 context of the overall charge. And when you look at
11 this in light of the materiality charge, any kind of
12 ambiguity that might have been interjected in the
13 definition of scheme to defraud I think is sufficiently
14 displaced.

15 CHIEF JUSTICE ROBERTS: It's just not the
16 instruction. It's what the court of appeals held. The
17 court of appeals held, in short -- this is a quote --
18 "The defendant was guilty of bank fraud because he
19 intended to deceive the bank." Full stop. So it's not
20 just a problem with the instructions. It's a problem
21 with what the court of appeals held.

22 MR. YANG: Again, I think this may be a
23 problem with some brevity. I don't think the court of
24 appeals meant to say if you walk into the bank and tell
25 the bank, you know, the nationals lost their game and

1 don't have home field advantage that that's bank fraud.
2 Of course, the court of appeals knows it's an order to
3 obtain something from the bank. That's what bank fraud
4 is. And I don't think that, you know, just as the
5 heading for our brief in Section C might not have been
6 fully complete, the same thing for the court of appeals
7 opinion.

8 But I'd like to get back to I think what's a
9 broader issue here, which is what is the intent
10 required. And particularly --

11 JUSTICE GINSBURG: Just tell us: Why
12 didn't -- why didn't the government charge under (2),
13 which your colleague has agreed fits this case, that if
14 he had been charged under (2) and convicted, that would
15 be fine?

16 MR. YANG: Because under (2), you need to
17 actually prove a misrepresentation.

18 JUSTICE GINSBURG: Because under (2) you
19 have to prove --

20 MR. YANG: You have to prove a false
21 statement or false misrepresentation. Now, in the
22 context of crimes that occur over the Internet, there's
23 some complications that are involved with that. The
24 charging decision was to take (1) -- clause (1) remember
25 is scheme to defraud. This is the -- the mothership of

1 language from the fraud statutes. It comes from the
2 mail fraud and the wire fraud. Congress knew that this
3 was broad, and Congress intended to adopt it
4 specifically because it was broad.

5 And, in fact, Congress considered drafting
6 language that would have required scheme to harm, cause
7 economic loss to a financial institution, and
8 specifically rejected it after the Department of Justice
9 said, hey, that's too narrow. Scheme to defraud is
10 broader, and this would unduly narrow the statute.

11 So the government chose clause (1) because
12 it was the broader clause, and we didn't need clause (2)
13 which -- it could have complicated proof a little bit.

14 Now, on the two questions that Petitioners
15 presented, two kind of legal questions are, does the
16 defendant have to have some knowledge of the legal
17 property status of the thing that's being taken? I
18 think the answer is clearly no.

19 Willie Sutton in the 20th Century, to move
20 off from Jessie James, he robbed banks because that's
21 where the money is. Now, if Willie Sutton believed all
22 the money he took was customer deposit accounts, didn't
23 belong to the bank, he didn't ever intend to harm the
24 bank, he'd still be -- you'd still call it bank robbery.
25 And if he did the same thing through deceit, you'd call

1 it bank fraud.

2 Now, there's no reason to add this
3 additional intent knowledge about the property status of
4 the thing that's being taken. It doesn't advance any
5 interest that Congress is trying to advance is to
6 protect the integrity of banks. The cost of the bank
7 does not depend on what's subjectively in the
8 defendant's mind, about what they think, is it owned by,
9 is it ownership interest, is it a possessory interest,
10 is there insurance, is there not insurance. It depends
11 on the nature of the actual scheme and what's being
12 taken.

13 Congress would not have wanted to
14 distinguish between defendants who execute the same --
15 the same scheme based on the idea that once defendant is
16 sophisticated --

17 JUSTICE BREYER: So what's the right words?

18 MR. YANG: The right words?

19 JUSTICE BREYER: For the -- I mean, there --
20 there are many situations. Do you -- you require an
21 intent that there be property? Well, how do you want to
22 say it, an intent to injure the bank in its property?
23 How do you say it? Look, some people, bank robbers go
24 into banks. They take the customers -- they line the
25 customers up against the wall, and they take out their

1 billfolds. Is that defrauding the bank?

2 MR. YANG: No, no. Because you're obtaining
3 it from the customer.

4 JUSTICE BREYER: Yeah, yeah. So how do you
5 want to do this one?

6 MR. YANG: So in bank fraud, the intent
7 required -- and remember, there's more than just intent.
8 As a fact we do have to prove there was a property
9 interest to the bank. So, for instance, in your
10 example --

11 JUSTICE BREYER: There was, but it was a
12 property interest in the bank. What do you have to
13 prove in respect to that property interest is in the
14 defendant's mind?

15 MR. YANG: So the only intent required is
16 the intent to deceive the financial institution in order
17 to obtain something of value. Now, that something of
18 value --

19 JUSTICE BREYER: In order to obtain
20 something of value, so that it could be of value and
21 belong only to the customer?

22 MR. YANG: That -- that complicates things I
23 think in the --

24 JUSTICE BREYER: Yes. That's why I want to
25 know -- that's why I need to know the words.

1 MR. YANG: There's no more required for
2 intent. Now, in order to --

3 JUSTICE KAGAN: I quoted you it was, that
4 it's an -- it's an intent to deprive the bank of a
5 property, including a possessory interest.

6 MR. YANG: No. And the reason it's
7 something of value that in fact is a possessory
8 interest. Whether or not -- or a property interest.
9 Whether or not the defendant knows it's a property --

10 JUSTICE KAGAN: Yes. But the bank -- the
11 bank has to have a possessory interest in -- a property
12 interest in this thing.

13 MR. YANG: Right. And property interest is
14 broad. But the defendant doesn't have to know about
15 that property interest. It just has to know I'm trying
16 to get money, that I want the money, and that's enough.
17 Now, the money happens to, in fact, be a property
18 interest to the bank, but the defendant doesn't have to
19 know that. We don't require our defendants to have
20 taken property law or banking law or studied the risk of
21 loss rules when frauds occur to banks. None of these
22 things have to be in the knowledge or of -- or beliefs.

23 JUSTICE KENNEDY: What does he have to know
24 about? Does he have to know that the bank is involved?
25 I mean, what does he have to know about the bank?

1 MR. YANG: He has to know that he --

2 JUSTICE KENNEDY: That the bank is likely
3 involved? I mean, this is pretty easy because he sent a
4 check, but --

5 MR. YANG: Well, no, I think what's required
6 is -- and let me take a step back. When we're
7 talking -- we're talking about financial institutions,
8 and it might help to refer to page 1A of the
9 government's appendix. Financial institutions are not
10 just banks. Financial institutions include certain
11 banks when they are FDIC insured, certain credit unions,
12 and then a whole slew with ten -- a list of ten other
13 things. It includes a small business investment
14 company --

15 JUSTICE KENNEDY: Okay. But here we have a
16 bank. What did this defendant have to know about this
17 bank, if anything?

18 MR. YANG: It didn't have to know its status
19 as a bank under the statute. It just had to know it's
20 taking something from this entity, which in fact, again,
21 is a bank under the statute. It could be a holding
22 company. It could be -- it could be any of these
23 things. If taking something from this entity by deceit,
24 and that's the intent, right? Something of value from
25 this entity by deceit. It doesn't have to know does

1 this entity -- is it a small business investment company
2 defined under Section 103 of the Small Business
3 Investment Act? It doesn't have to know these things.

4 And the reason is once you get into the
5 realm of fraudulently taking something from an entity,
6 it -- that's criminal conduct. And the additional
7 requirements that it is a bank, that's the
8 jurisdictional hook. It's similar to --

9 JUSTICE KENNEDY: It has to know that a
10 financial institution is involved?

11 MR. YANG: It doesn't have to --

12 JUSTICE KENNEDY: I mean, that's Section 1.

13 MR. YANG: It doesn't have -- it has to --
14 it doesn't have to have any knowledge about whether the
15 entity that it's depriving of property qualifies as a
16 financial institution. It could be, for instance, a
17 small kiosk in a grocery store that's conducting
18 transactions and happens actually to be a bank outpost,
19 but you don't know it's a bank. But you rob a bank or
20 you -- you defraud the bank, it's still -- you don't
21 have to have knowledge of its status as a financial
22 institution.

23 There are several examples. Bank robbery or
24 larceny, under Section 2113(a) and (b), the courts held
25 you don't need to know that the entity robbed is a bank.

1 That's Trevino in the Fifth Circuit, Schaar in the
2 Seventh Circuit. Theft of U.S. property -- if you steal
3 U.S. property, you don't have to know it's owned by the
4 U.S. There's a recent case called Rehak in the Eighth
5 Circuit that surveys the unanimous views that you don't
6 have to have knowledge of the status as property of the
7 United States.

8 JUSTICE GINSBURG: And can you clarify for
9 us, what is in the overlap area? What is covered only
10 by (1) and what is covered only by (2)?

11 MR. YANG: They are, of course, cover
12 almost -- they are almost coterminous, but there are
13 things that are outside of (1), and there are things
14 that are outside of (2). What's outside of (1) are
15 schemes that -- schemes where you do not -- fraud is not
16 targeted at the bank or -- yes, so (2) -- let me -- let
17 me start over. It's a little confusing.

18 (2) is broader than (1) in the following
19 respect: It covers --

20 JUSTICE GINSBURG: (2) covers what?

21 MR. YANG: (2) -- clause (2) is broader than
22 (1) because it covers schemes to deceive the custodian
23 of bank property. (1) does not because the deception
24 has to be directed at the bank. But (1) covers things
25 that (2) does not, because (2) is limited only to false

1 statements. This is what Loughrin explained in a
2 footnote. (1) covers frauds that are based on
3 nonstatement-type deception; for instance, check hiding.
4 Checks are not statements about the balance in the
5 account. Check training is covered.

6 Other behavioral type of frauds. If, for
7 instance -- it's a little farfetched, but you could have
8 someone that impose -- that, you know, dresses in a
9 disguise and just walks into the bank. The bank lets
10 them into the -- it's a well-known customer, walks in
11 the safety deposit box, takes out the money. No
12 statement's made. (1) would cover that kind of thing.

13 Now, these areas are, you know, on the
14 fringe. The two terms, the two provisions largely
15 overlap, and that's not surprising because the language
16 that was the impetus for two was language that the Court
17 adopted in Durland in construing the term "scheme to
18 defraud." So there's a lot of overlap between these two
19 things, and that's what Justice Kagan recognized in
20 Loughrin.

21 But they both have independent meaning, not
22 a lot, and so, you know, they often can be used at the
23 same time, but they are independent.

24 JUSTICE KAGAN: Mr. Yang, you referred to
25 us, money in a security deposit. Your answer would be

1 the same, right --

2 MR. YANG: Yes.

3 JUSTICE KAGAN: -- if -- if somebody went in
4 and said, I'd like to see the security deposit boxes,
5 and -- and made a false statement to the bank about his
6 entitlement to see the security deposit boxes and took
7 the money out?

8 MR. YANG: Yes.

9 JUSTICE KAGAN: Doesn't -- you know, the
10 bank still has a possessory interest in that, even
11 though it doesn't use that money in the same way; is
12 that correct?

13 MR. YANG: Correct.

14 JUSTICE KAGAN: Let me give you another
15 example. Suppose that I'm sitting in a coffee shop and
16 somebody comes up to me and says, I have to make a phone
17 call; would you just hang on to my computer for a
18 minute? And then disappears, and then somebody else
19 comes up, the fraudster comes up, and says, oh, she just
20 told me to pick up her computer from her --

21 MR. YANG: Uh-huh.

22 JUSTICE KAGAN: -- and that's a
23 misrepresentation.

24 MR. YANG: Uh-huh.

25 JUSTICE KAGAN: But I give him the computer.

1 MR. YANG: Uh-huh.

2 JUSTICE KAGAN: Do I -- have I had a
3 possessory interest in that computer just because
4 somebody said, why don't you take a look, you know --
5 you know -- keep -- keep your eye on this?

6 MR. YANG: Gratuitous bailee is what they
7 would be. And I think the answer is -- I think we would
8 say yes for purposes of the -- the fraud statute.

9 Now this wouldn't, of course, be bank fraud.
10 And --

11 JUSTICE KAGAN: Yeah, yeah, yeah. But I
12 mean --

13 MR. YANG: But -- but --

14 JUSTICE KAGAN: What you're essentially
15 saying is that anything I can think of, any hypothetical
16 I can think of which involves my hanging on to something
17 for somebody else, that I have a possessory interest in
18 that sufficient to satisfy this scheme.

19 MR. YANG: Yeah. And I don't -- it's
20 sufficient for this purposes. And I don't think this is
21 unusual. Oftentimes, rights and interest in the law are
22 relative to other people. So your possessory interest
23 would not be superior to the person who owned the
24 laptop. But it would be superior as to third parties
25 having no claim of right -- no valid claim of right to

1 the laptop.

2 So yes, that, I think, could fall within the
3 general understanding of a scheme to defraud.
4 Obviously, not a scheme to defraud a financial
5 institution.

6 JUSTICE KAGAN: I mean, that suggests to me
7 that as long as the person knows that the money is
8 being -- is in the bank somehow, it just shouldn't
9 matter, because anything counts as a possessory
10 interest, right?

11 MR. YANG: It shouldn't -- it shouldn't
12 matter at all. And I think that emphasizes why Congress
13 would not have wanted to add some additional knowledge
14 requirement about the property status of the money. Why
15 does it matter? All it does is complicate things.

16 Congress would not have wanted to carve out
17 this type of conduct as noncriminal. And in fact, it's
18 important to recognize, even Petitioner says she's
19 not -- he's not carving out anything that's not
20 noncriminal.

21 In page 25 of the reply brief, Petitioner
22 says it's a -- essentially, a pleading game. Well, why
23 would Congress have wanted to make the broad language of
24 scheme to defraud, which has a history going back more
25 than a century, to be a narrow appendage on something

1 else in order to force the government into a pleading
2 game, when no -- at the end of the day, if it's pled
3 properly, it's still an offense punished by the same
4 time. It just doesn't make any sense.

5 This is not what Congress intended. It has
6 no -- no basis in the text or history of the bank fraud.
7 When you look at what Congress did in the legislative
8 history, it rejected language that would have adopted
9 the same thing. As far as I can tell, everything points
10 against Petitioner here.

11 If the court has no further questions. We'd
12 ask that you affirm.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Ms. Bell, you have three minutes remaining.

15 REBUTTAL ARGUMENT OF KOREN L. BELL

16 ON BEHALF OF THE PETITIONER

17 MS. BELL: Thank you, Mr. Chief Justice.

18 To get back to Justice Breyer's question
19 about where in the record was this disputed, that --
20 that is at pages 646 to 647. And there, counsel --
21 myself -- specifically made the argument that the
22 problem with this -- this instruction, exactly as
23 Justice Sotomayor, and I believe Justice Kagan, pointed
24 out, is the disjunctive wording of intent, the intent to
25 defraud.

1 JUSTICE SOTOMAYOR: Counselor, assume I
2 agree with you --

3 MS. BELL: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: -- that there were parts
5 of your argument, both below and here in your brief,
6 that suggested the instructional error. But what I find
7 is that the way you presented the argument was
8 confusing.

9 MS. BELL: Yes.

10 JUSTICE SOTOMAYOR: It took a lot of teasing
11 out.

12 Does -- how does that affect what we do.

13 MS. BELL: Yes, Your Honor.

14 JUSTICE SOTOMAYOR: That -- that you weren't
15 clear in the instruction, don't you forfeit that
16 argument?

17 MS. BELL: No, Your Honor. The -- the claim
18 is that the intent to -- we challenge --

19 JUSTICE SOTOMAYOR: I -- I know what your
20 two claims are.

21 MS. BELL: Okay.

22 JUSTICE SOTOMAYOR: The question is if I
23 disagree --

24 MS. BELL: Yes.

25 JUSTICE SOTOMAYOR: -- with your basic

1 premise that you need to prove pecuniary loss to the
2 bank -- I know you want to win that, but please accept
3 my hypothetical. I disagree with you that the only --
4 that the only issue is that you have to cheat and
5 deprive the bank of a possessory -- of something in a
6 possessory -- in their possessory interest. Okay?
7 Simple as that. It doesn't have to cause -- you don't
8 have to intend to cause pecuniary loss. All right?

9 Where does that leave your instructional
10 error?

11 MS. BELL: It's -- it's still an error, Your
12 Honor, because it permitted a conviction on the basis of
13 the mere intent to deceive the bank. And there's no
14 curing it, looking to, for example, the materiality
15 component of the instruction, how --

16 JUSTICE SOTOMAYOR: How about if I find that
17 what you -- that you didn't articulate your argument
18 clearly enough to the court below, or to us? Where does
19 that put you? Have you forfeited? Do you waive? Have
20 you done something?

21 MS. BELL: No, Your Honor. The -- the
22 challenge was always to the disjunctively-worded jury
23 instruction. And that was consistently made from the
24 district court to the court of appeals and to this
25 Court. The only question has been how to formulate; if

1 more than intent to deceive is required, then what more?
2 How do we explain that second component?

3 Hammerschmidt itself, which is the
4 undisputed applicable definition here, uses a number of
5 different formulations, and that's part of where the
6 confusion comes from.

7 Hammerschmidt says the intent to defraud is
8 the intent to deceive, and it also uses the -- and to
9 wrong a bank in its property rights. It equates to
10 wrong a bank in its property rights with to deprive a --
11 I'm sorry -- a victim.

12 It equates to wrong a victim in its property
13 rights with depriving a victim of something of value,
14 and it also equates that with cheating a victim out of
15 something of property, and also. To make matters even
16 more confusing in terms of the number of formulations,
17 it says that the mail fraud statute is limited to the
18 infliction of pecuniary or property loss. And so our
19 formulations come out of the Hammerschmidt case.

20 And what we have always asked the Court to
21 do here is to construe intent to defraud to require, not
22 just the intent to deceive, as the lower court
23 instructions required, but also the intent to do that
24 second thing, which is --

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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MS. BELL: Thank you.

CHIEF JUSTICE ROBERTS: Case is submitted.

(Whereupon, at 11:51 a.m., the case in the
above-entitled matter was submitted.)

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