1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LAWRENCE EUGENE SHAW, :

4 Petitioner : No. 15-5991

5 v. :

6 UNITED STATES, :

7 Respondent. :

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9 Washington, D.C.

10 Tuesday, October 4, 2016

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:57 a.m.

15 APPEARANCES:

16 KOREN L. BELL, ESQ., Deputy Federal Public Defender, Los

17 Angeles, Cal.; on behalf of the Petitioner.

18 ANTHONY A. YANG, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the United States.

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

2 (10:57 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Case 15991, Shaw v. United States.

5 Ms. Bell.

6 ORAL ARGUMENT OF KOREN L. BELL

7 ON BEHALF OF THE PETITIONER

8 MS. BELL: Thank you, Mr. Chief Justice, and

9 may it please the Court:

10 Clause (1) of the Federal Bank Fraud Statute

11 premises culpability on intent to defraud a financial

12 institution, and this case concerns what that element

13 entails. The settled meaning of clause (1)'s text based

14 on a century of this Court's precedent, its fraud

15 precedent, makes clear that intent to defraud a bank

16 requires intent both to deceive the bank and wrong the

17 bank in its own property rights. Intent to wrong a

18 bank's property rights, which includes its own

19 possessory rights, in bank-held property means intent to

20 cause the bank, not the customer, to bear the proper

21 loss of a fraud scheme. And in this sense --

22 JUSTICE SOTOMAYOR: I'm sorry. Possessory

23 right means I own something. I'm holding it. In most

24 criminal charges for larceny, the issue is whether I

25 have a possessory right, regardless of what I want to do

1 with this property, over you who's taken it from me. So
2 where do you get the next step that possessory right
3 means I have to lose something of value or that I'm
4 going to ultimately bear the loss? Isn't the loss
5 merely the loss of the possessory right?
6 MS. BELL: Your Honor, the statute turns on
7 intent, and were the government to prove the defendant's
8 intent to deprive of you of your possessory right, and
9 that would be sufficient. And where that comes from is
10 from this Court's settled fraud precedent. Going back a
11 hundred years, the Court has interpreted the term
12 "defraud" to mean property lost to the victim. And we
13 see that --
14 JUSTICE BREYER: So if you're insured and
15 the -- or at least the defendant believes he's insured,
16 it isn't theft?
17 MS. BELL: If the defendant believes that
18 the bank is insured and therefore that another party
19 will bear the loss?
20 JUSTICE BREYER: Even Kardashian's thief, if
21 there is one, believes that all that jewelry is insured.
22 Indeed over insured. So it's not theft?
23 MS. BELL: Well, so it would depend on the
24 language of the statute.
25 JUSTICE BREYER: No, it says defraud. She

1 lied. He says I'm knocking on the door -- you know,
2 I'll go as far as you want. But I don't see that that
3 has anything to do with it. You mean if he -- if he
4 defrauds him out of the money, he defrauds her out of
5 the jewelry, says here I a.m., your local jewelry
6 cleaner. Gets the jewelry. Wouldn't you think that was
7 fraud? Even if she's insured. Even if he thinks she's
8 triple insured. Even if he thinks that, in fact, this
9 isn't even her jewelry, that it was just loaned her on
10 the occasion by a good friend, the necklace.
11 MS. BELL: It would depend on whether the
12 statute in that case required the intent to defraud --
13 JUSTICE BREYER: What the statute says is
14 defraud.
15 MS. BELL: Defraud. In that case it's much
16 like the mail and wire fraud statutes which do not
17 specify a required victim for the fraud scheme, and
18 therefore provided the government could prove the two
19 undisputed components of the term "defraud" which come
20 from --
21 JUSTICE BREYER: I'm not asking you to
22 repeat it. I'm asking you, if the local person comes to
23 the door and says, dear Miss Kardashian, I a.m. your
24 local jewelry cleaner. Please give me your jewelry.
25 She does. And that's not fraud. He wanted to get the

1 jewelry. He tried to get the -- he also believed that
2 the friend had just loaned it for the evening, that
3 she's triple insured, that she won't even lose any money
4 because the publicity will be worth it. Okay?
5 MS. BELL: Right. And that --
6 JUSTICE BREYER: Now, my question is:
7 There's the statute. I would have always thought from
8 first year of law school, criminal law, that that was
9 fraud, but perhaps I was wrong. So I would like you to
10 explain it.
11 MS. BELL: Yes, Your Honor. That would be a
12 scheme to defraud the insurer. If the scheme -- if
13 the -- and in this case of the mail and wire fraud
14 statutes which penalize a scheme to defraud anyone, for
15 example, and provide heightened penalties for schemes
16 that defraud anyone and happen to affect the bank, then,
17 yes, that would -- would satisfy the statute. But if
18 the statute specified a particular victim as clause (1)
19 does here, and clause (1) says the intended victim must
20 be the bank, not the customer.
21 And so our argument depends on that -- on --
22 on two steps based on this Court's long-standing fraud
23 precedent. The first is how we define defraud. But the
24 second is the presence of the direct object there. In
25 the example that Your Honor posited, there -- there was

1 no required object of the fraud scheme, and therefore at
2 the very least it would certainly constitute a scheme to
3 obtain money or property by means of false pretenses.
4 CHIEF JUSTICE ROBERTS: You get -- you get
5 mired in some very abstract concepts of property rights.
6 Yes, someone is insured, but here if they keep getting
7 their property stolen, their insurance rates go up.
8 Here, okay, it wasn't that if you -- correct, it wasn't
9 the bank's own property, but it's somebody else's
10 property that they use in making loans. And, again,
11 they will have less money to make loans if the property
12 is -- is being taken.
13 Now, does your case turn on what the
14 defendant knows even if that's not right? I mean, the
15 argument may as well -- people commonly think you put
16 your money in the bank, it's your money, and they'll
17 give it back, but of course it's loaned out by the bank.
18 But if the defendant really thinks I'm not -- I don't
19 want to take anything from the bank. I'm taking this
20 from two -- and he's wrong, is -- is he off the hook?
21 MS. BELL: Yes, Your Honor. So first of
22 all, the standard here is not what he knows but what he
23 intends, which this Court, going back to the Derlin case
24 in 1896, has equated with purpose, which makes sense
25 because we're talking about a scheme which is a plan

1 with a purpose. And precisely for that reason this
2 particular liability scheme avoids the effect-based
3 technicalities that the government complains of, because
4 it doesn't matter whether the bank in fact has
5 possessory interest or whether the insurer is going to
6 in fact bear the loss. The only thing that matters is
7 as Your Honor says what the defendant intends, what his
8 purpose is in devising this scheme.
9 CHIEF JUSTICE ROBERTS: Well, is that
10 making -- is that ignorance of the law being the defense
11 because the law -- he thinks the bank -- the bank
12 doesn't have any property interest at all, but in fact
13 the bank has the property interest as either a bailee or
14 bailor or -- I forget which one it is -- and the bank
15 has the property interest because it actually uses the
16 money in its own effect, but he's wrong about that legal
17 question of property. So his ignorance of the law is a
18 defense?
19 MS. BELL: Your Honor, it wouldn't be
20 ignorance of the law. This -- there's nothing anomalous
21 about an intent-based liability scheme. And the answer
22 is that particular fraud scheme would be punished under
23 clause (2) of this statute. It's not that it's not bank
24 fraud --
25 JUSTICE GINSBURG: You mentioned the sub 2.

1 Do you recognize, do you concede that Shaw could have
2 been charged and convicted under the obtaining property
3 owned by or under the custody or control of a financial
4 institution if the -- if the government had charged that
5 instead of defrauding a financial institution, could
6 Shaw have been found guilty?
7 MS. BELL: Absolutely, Your Honor. That was
8 the appropriate charge in this case. And the reason why
9 the bank fraud statute works as a whole exactly as
10 Congress intended based on this intent-based liability
11 scheme is because the schemes that arise in the federal
12 circuits sort neatly into clause (1), clause (2), or
13 both depending on the design of the scheme. So the
14 design is in most every practical case in every
15 real-world example going to reflect the intent.
16 JUSTICE KENNEDY: Well, design here, the
17 intent here is to harm whoever has a lawful possessory
18 interest.
19 MS. BELL: Your Honor, the intent required
20 under clause (1) -- and that's quite clear because it
21 specifies the bank -- is to harm the bank in its
22 property right.
23 JUSTICE KENNEDY: But it has a possessory
24 interest --
25 MS. BELL: And -- and certainty if the --

1 JUSTICE KENNEDY: And that possessory
2 interest is harmed. It's the harm to the interest, not
3 the harm to the entity.
4 MS. BELL: It -- it -- in fact it may be
5 harmed, although in this case, of course this is an
6 example where the banks never suffered any loss, and
7 there was no dispute on that point. But certainly, Your
8 Honor, it's true that the --
9 JUSTICE KENNEDY: But it was -- was it not a
10 harm to the possessory interest?
11 MS. BELL: Yes, Your Honor. Insofar as the
12 bank was deprived for a momentary period of those funds
13 in its coffers, yes, in fact it was deprived.
14 JUSTICE KAGAN: So, Ms. Bell, I guess -- I
15 guess what Justice Kennedy is suggesting and maybe I'm
16 confused about the same thing, it now seems to me that
17 there's no difference between your view and the
18 government's view.
19 So, Mr. Yang, I'm putting you on notice that
20 this is a question to you too, because both of you are
21 saying, look, there needs to be an intent to deceive the
22 bank.
23 MS. BELL: Correct.
24 JUSTICE KAGAN: And there needs to be an
25 intent to deprive the bank of some form of property

1 interest, but with the recognition that property
2 interests includes possessory interests, as well as more
3 classic ownership interests. And you agree with that.
4 MS. BELL: Correct, Your Honor.
5 JUSTICE KAGAN: I'm going to think, and
6 Mr. Yang you'll tell me, that Mr. Yang would agree with
7 that too. So what are we fighting about?
8 MS. BELL: Correct, Your Honor.
9 JUSTICE KAGAN: Then it's just -- Mr. Yang
10 would say, well, look, a bank has a possessory interest
11 in assets that are part of its depositor's account, and
12 so, you know, that's -- whether you target the
13 depositor's account or you target something else, you're
14 still manifesting the same intent to deprive the bank of
15 a property including possessory interest.
16 MS. BELL: Right. I understand, Your Honor.
17 I think there are two issues here. The first one is
18 whether an intent to deceive is sufficient for an intent
19 to defraud. And the Ninth Circuit approved of jury
20 instructions that permitted a conviction on that basis.
21 That alone --
22 JUSTICE KAGAN: That seems right to me. I
23 want to point, you know, that you might say all of that
24 is right and that the government and you agree, and what
25 you really disagree on is whether these instructions

1 reflected that correct understanding of the law. And
2 that seems fair to me. And we should talk about the
3 instructions.
4 MS. BELL: Yes.
5 JUSTICE KAGAN: But it seems to me that the
6 understanding of the law is now you are in perfect
7 harmony.
8 MS. BELL: It -- it -- it may be the case,
9 but let me explain. I think that on the -- the second
10 prong, in terms of if intent to deceive requires more --
11 I'm sorry -- if intent to defraud requires more than
12 just intend to deceive, what is that second piece? And
13 there we get to what it means to wrong a bank and its
14 property rights.
15 JUSTICE BREYER: What it says in the
16 instructions is, "Intent to deceive, cheat, or deprive a
17 financial institution of something of value."
18 MS. BELL: Correct, Your Honor. And that
19 would --
20 JUSTICE BREYER: So what's the problem?
21 MS. BELL: That would -- because it's worded
22 in a disjunctive, in other words, or, it permits a
23 conviction on the basis --
24 JUSTICE BREYER: So the "or" goes between
25 "to deceive, cheat, or deprive."

1 MS. BELL: Correct. And so it was --
2 JUSTICE BREYER: But what you have to cheat,
3 deceive, or deprive them of, is something of value.
4 MS. BELL: Correct, Your Honor --
5 JUSTICE BREYER: And a possessory interest
6 is something of value. So what are you arguing about?
7 MS. BELL: Your Honor, two things. First of
8 all, the -- I would disagree, respectfully, with the
9 Court's interpretation of -- of the scheme to defraud
10 instruction. I do not think that the "deprive the bank
11 of something of value" is plausibly read to modify
12 "deceive" and "cheat."
13 JUSTICE BREYER: In other words, you think
14 it means "deceive, cheat, or deprive"?
15 MS. BELL: Correct, your Honor.
16 JUSTICE BREYER: But not of anything. It
17 doesn't say anything, what it seeks to deprive them of.
18 And then it comes out of the blue and
19 says --
20 JUSTICE KAGAN: I think it --
21 JUSTICE BREYER: -- someone intends a
22 financial institution of value. That's what you think
23 it means.
24 JUSTICE KAGAN: But it --
25 JUSTICE BREYER: Okay. Did you make that

1 argument in the court below?

2 MS. BELL: Yes, Your Honor. That was

3 precisely the argument --

4 JUSTICE BREYER: What page? Do you have it

5 here, by chance, what page you made that particular

6 argument?

7 MS. BELL: Sure, Your Honor. I get that on

8 rebuttal. I don't want to take the Court's time now,

9 but let -- let me be clear: Here -- we're here because

10 the -- the scheme to defraud requires the intent to

11 defraud, and that -- that's really undisputed that

12 that's the element.

13 The intent to defraud instruction simply

14 required the intent to deceive or cheat.

15 JUSTICE SOTOMAYOR: My colleague Justice

16 Alito has written extensively on this issue of intent

17 versus knowledge.

18 MS. BELL: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: All right. Why don't we

20 just, instead of using intent --

21 MS. BELL: Yes.

22 JUSTICE SOTOMAYOR: All right. You can

23 deceive someone without taking property, right?

24 MS. BELL: Certainly. Yes.

25 JUSTICE SOTOMAYOR: All right. Someone can

1 open up an account in a false name. They've deceived
2 the bank, but it's not to cheat the bank of anything its
3 holding. But it's to the cheat the wife who he wants to
4 hide money from, right?
5 MS. BELL: Okay. Yes.
6 JUSTICE SOTOMAYOR: So nothing of value has
7 been taken. You can cheat the bank in that way, too,
8 out of moving something somewhere, but not to take it.
9 Okay?
10 MS. BELL: Yes.
11 JUSTICE SOTOMAYOR: And you can deprive
12 someone of property without deceiving or cheating them.
13 You can rob them, right?
14 MS. BELL: Correct.
15 JUSTICE SOTOMAYOR: All right. So I
16 thought -- and this is what Justice Kagan was getting
17 to -- it has to be that you deceive or cheat and deprive
18 someone of property, correct?
19 MS. BELL: Your Honor, the cheat, I think,
20 is synonymous with the concept of --
21 JUSTICE SOTOMAYOR: Of defrauding.
22 MS. BELL: -- of -- of -- well, defrauding.
23 Your Honor is correct.
24 JUSTICE SOTOMAYOR: You -- you defraud
25 someone by deception.

1 MS. BELL: Deception in order to cause them
2 to bear the property loss --
3 JUSTICE SOTOMAYOR: That's why you say it's
4 two different elements.
5 MS. BELL: They're two -- no. I'm sorry.
6 They're not two different elements. It's one element.
7 It's the intent to defraud.
8 But there are two components of defraud, and
9 the government doesn't dispute that. That comes from
10 the Hammerschmidt case in --
11 JUSTICE SOTOMAYOR: So far, I perfectly
12 understand your point.
13 MS. BELL: Thank you. Yes.
14 JUSTICE SOTOMAYOR: That the defraud element
15 has two prongs to it; deception, for the lack of --
16 deception is one prong and deprivation is the other.
17 You're taking the money by -- or the possessory interest
18 by deception.
19 And you're saying that by using the
20 disjunctive, the "or," the jury could have convicted
21 merely for deceiving the bank, but didn't find that they
22 deceived "and" deprived the bank of a possessory
23 interest, correct?
24 MS. BELL: That's exactly right, Your Honor.
25 That's exactly right.

1 JUSTICE SOTOMAYOR: Now, Justice Breyer has
2 asked the operative question.
3 MS. BELL: Yes.
4 JUSTICE SOTOMAYOR: And -- and it's what
5 confused me throughout, both in the discussions below
6 and here.
7 At first, I thought this case was only about
8 reading your brief about whether the deprivation had to
9 be of something the bank owned.
10 MS. BELL: Yes.
11 JUSTICE SOTOMAYOR: As opposed to had a
12 possessory interest in. And Justice Kagan rightly says
13 you seem to have backed off from that claim. You seem
14 to be saying "owned" can mean merely a possessory
15 interest. Is that correct, now?
16 MS. BELL: Your Honor, we don't see that as
17 a different formulation, and let me explain why, 'cause
18 I certainly understand the confusion.
19 The -- the standard is that comes from this
20 Court's fraud precedent, the mail and wire fraud
21 precedent that everybody agrees is the operative body of
22 law is the intent to wrong the bank in its property
23 rights. That's --
24 JUSTICE KENNEDY: In its what?
25 MS. BELL: In its property rights. In its

1 property rights. In its own property rights.
2 JUSTICE KAGAN: Which you -- which you now
3 include can include possessory interests.
4 MS. BELL: Correctly. And we certainly
5 never meant to -- to disavow that. The issue is what
6 does that mean in practice? And in practice what that
7 means is the intent to cause the bank, and not the
8 customer, to -- to bear the property loss of the scheme.
9 JUSTICE ALITO: No. That's not what it
10 means.
11 JUSTICE KAGAN: No.
12 JUSTICE ALITO: That's not what it means.
13 And maybe something more is required. Maybe it has to
14 be deprive of an ownership interest or cause a loss, but
15 depriving of a possessory interest is not the same as
16 causing a loss to the bank.
17 MS. BELL: Well, let me explain how I mean
18 it. I mean it in the sense that, as this Court has
19 recognized, when you intend a deprivation of a victim,
20 you -- you also -- the mirror image of that is the
21 intended acquisition. And that's where we're getting
22 the idea that when you intend -- if a defendant were --
23 and I have never seen a case in my personal practice, or
24 anywhere in the Federal circuits, that approaches
25 anything like an intent to actually deprive the bank of

1 its possessory interest.

2 What defendants think about when they posit

3 these schemes to get customer deposits is to either --

4 is either that they are taking the customer's money, or

5 they are taking the bank's money, insofar as the bank is

6 going to suffer the loss, or the customer is going to

7 suffer the loss.

8 JUSTICE KAGAN: Most of them don't care.

9 JUSTICE KENNEDY: You want us to write an

10 opinion -- you want us to write an opinion and say it's

11 perfectly lawful under this statute, section (1), to

12 knowingly deprive someone of a possessory interest by

13 deception?

14 MS. BELL: Well, Your Honor, I think --

15 JUSTICE KENNEDY: You want us to write that?

16 MS. BELL: No, Your Honor. Insofar as first

17 of all, the standard would be the intent, right? So

18 we're talking about the -- the intent, which is

19 different than knowledge --

20 JUSTICE KENNEDY: Intend to deprive someone

21 by deception of a possessory interest is proper. You

22 need something more. That's what you -- that's what you

23 are saying?

24 MS. BELL: The intent to deceive the bank

25 and deprive the bank of a possessory interest would

1 suffice. That does not come up in practice, however.
2 The property --
3 JUSTICE GINSBURG: Your point is you have to
4 have the intent to the hurt the -- the bank --
5 MS. BELL: Exactly, Your -- exactly, Your
6 Honor.
7 JUSTICE GINSBERG: -- not the customer.
8 MS. BELL: That is exactly right.
9 JUSTICE GINSBURG: So if you -- if the
10 customer will end up bearing the loss, then you say one
11 doesn't apply.
12 What does one cover, in your view, other
13 than check hiding?
14 MS. BELL: Yes, Your Honor. It -- it
15 applies to -- it applies to any scheme designed to cause
16 the bank -- that -- that targets the bank as the
17 financial victim of the fraud by means of concealment,
18 omission, or any other kind of --
19 JUSTICE BREYER: By watching the movies,
20 most -- I'd be afraid, in this case, that we're going to
21 write something of five pages that nobody's going to
22 understand, with the simple thing, Jessie James goes up
23 to the bank, says, your money or your life. He sees
24 behind the teller is a drawer, and you know he's -- that
25 in that drawer, the last five customers have given him

1 some money. That's the money he wants.

2 It doesn't matter whether, in fact, the bank

3 is going to put that money in Joe Smith's account, or

4 whether the bank has something called a possessory

5 interest or something else. And in fact, if Jessie

6 James' brother comes up and says, Jessie James is on the

7 way, give me the money, it should be the same result.

8 Now that's very simple-minded, but -- and

9 it's built in me by the movies, but if, in fact, you

10 have a different approach, I would like to know where in

11 the law that different approach is, and why it is,

12 and -- and how this does -- how this is -- I'm afraid,

13 in other words, of confusion.

14 You unconfuse me, please.

15 MS. BELL: Yes, Your Honor. And when

16 Your -- when Your Honor says, if I have a different

17 approach in terms of where our -- where our construction

18 of clause (1) comes from in -- in the Court's

19 precedents? Is that the question?

20 JUSTICE BREYER: Well, my question is, why

21 hasn't Jessie James or his brother committed a crime --

22 the brother, probably, because he's lied and says Jessie

23 James is on the way, and whether the money behind the

24 desk was put there, to everyone's knowledge, by the

25 depositors, or whether the money happens to have been

1 there for 50 years by the bank -- put in by the bank's
2 founder, makes no difference to this statute. And I
3 want to know why it should, or anything else you want to
4 say about that.
5 MS. BELL: So that case where there's some
6 ambiguity, and this gets back to Your Honor's question,
7 Justice Ginsburg, that case would be best charged under
8 clause (2), which covers schemes that intend to
9 victimize either the customer or the bank provided the
10 requisite means of a false statement.
11 So whenever there's any ambiguity in terms
12 of what as a practical matter does this cover,
13 clause (2) will cover the customer scheme in Loughrin --
14 I'm sorry, the altered-check scheme in Loughrin, and it
15 will cover the deposit scheme here.
16 It will cover Your Honor's hypothetical,
17 provided the intent's also to deceive and it's not just
18 plain, let's say, bank larceny which is covered under
19 another statute and focuses on the effect of the
20 conduct.
21 And clause (1) then is reserved for other
22 cases like check kiting, which was a major, major
23 impetus for this statute's enactment, and Congress knew
24 at the time, based on this Court's 1982 decision in
25 Williams that check kiting was not going to be covered

1 under clause (2). It's one of the most pervasive forms
2 of bank fraud.
3 So that's not a minor role that clause (1)
4 serves. But in addition, it's going to serve the loan
5 fraud and the bank embezzlement types of cases no
6 affirmative false statement.
7 JUSTICE SOTOMAYOR: All right. So if we
8 disagree with you, if we were to say that this
9 subsection 1 means that you are targeting property
10 that -- depriving any bank of property in which it has a
11 possessory interest --
12 MS. BELL: Yes.
13 JUSTICE SOTOMAYOR: -- and we say you don't
14 have to prove the bank is going to lose anything of
15 value, that it's going to be reimbursed by insurance or
16 that ultimately the customer is going to receive -- bear
17 the loss, so long as you have defrauded the bank, some
18 deception to the bank, and deprived it of some
19 possessory interest, whether it bears the loss or not,
20 if that's how we rule, do you lose this case?
21 MS. BELL: No, Your Honor, because it comes
22 down to the requisite intent and purpose.
23 JUSTICE SOTOMAYOR: We're disagreeing with
24 you. That's how we're going to say what it means.
25 MS. BELL: Yes, I understand. And I --

1 JUSTICE SOTOMAYOR: All right. Do you
2 think --
3 JUSTICE KAGAN: Ms. Bell, I think your
4 answer is, no, Your Honor, because the instructions
5 don't reflect your understanding of the law.
6 MS. BELL: We certainly win on that basis.
7 So reversal is required because the intent to defraud
8 means more than just --
9 JUSTICE KAGAN: I'm not saying it does. I
10 think it's a hard question as to whether the
11 instructions do or don't, but it does seem to me you
12 have an argument about the instructions.
13 MS. BELL: Right. That's -- that's correct,
14 and I think we also, though, would not lose under that
15 second question about even if the Court construes --
16 which we agree with -- but the intent must be to harm
17 the bank and its property rights. It's the economic
18 injury, and that is reflected in every single fraud
19 decision we see from this Court starting with --
20 JUSTICE GINSBURG: But if the Court
21 disagrees with you about that, if the Court thinks that
22 someone doesn't require that you intend to cause the
23 bank financial harm, only that you intend to deprive the
24 bank of something of value, if that's -- by deception --
25 MS. BELL: Yes.

1 JUSTICE GINSBURG: -- should the Ninth
2 Circuit be affirmed?
3 MS. BELL: No, but --
4 JUSTICE GINSBURG: Should we reject your
5 theory that you have to intend to cause the bank a
6 financial loss?
7 MS. BELL: No, Your Honor, and let me be
8 clear because I understand that it is confusing with the
9 different theories, but our -- those two formulations
10 that Your Honor articulated are one in the same in our
11 view.
12 In other words, the intent to wrong a bank
13 in its property rights is the second component of
14 defraud, but what does that mean in practice? That's
15 not nonsensical for a jury. What that means is that the
16 bank must bear the loss of the scheme. And so --
17 JUSTICE ALITO: That's not what it means.
18 JUSTICE BREYER: You have a lot of cases,
19 and I think the model penal code started it, where you
20 have the word "intent" in a statute normally, not
21 always, but normally it covers both purpose and
22 knowledge. So that if you try to murder the queen by
23 blowing up the carriage, a famous example, and that
24 would lead to the death of the footman, even though you
25 love the footman, you are still guilty of killing the

1 footman through murder. Okay. That's the famous
2 example.
3 MS. BELL: Yes, Your Honor.
4 JUSTICE BREYER: So intent includes, unless
5 there's some contrary which you could argue, to the
6 both. The statute that can -- the instruction they have
7 to show, scheme to defraud, means that the person
8 intends, which means he has knowledge that, as I take
9 it, to deceive, cheat or deprive. That's where the "or"
10 is, deceive, cheat or deprive a financial institution of
11 something of value.
12 So I looked at that and I thought, what's
13 the problem? What's the problem? That's what I want
14 you to explain.
15 MS. BELL: Yes, Your Honor.
16 JUSTICE BREYER: It's not saying intends to
17 cheat or deceive somebody, and then a separate thing, or
18 deprive the financial institution of value. It's intend
19 to deceive, cheat or deprive. Who? A financial
20 institution. Of what? Of something of value.
21 So what is wrong with that instruction?
22 That's -- that's what I need explanation.
23 MS. BELL: Yes, Your Honor, and I'll answer
24 that, and then if I may reserve the remainder of my
25 time.

1 That -- the problem with that instruction is
2 that it allows for a conviction on the basis of a scheme
3 to deceive the bank alone.
4 Now even if Your Honor disagrees with me, as
5 it seems that you might, that problem is compounded by
6 the intent to defraud instruction, which plainly it does
7 not include the something of value reference. It
8 plainly allows for a conviction on the basis of an
9 intent to deceive alone. That flies in the face of this
10 Court's fraud precedent, and we see this going from
11 Hammerschmidt, in which the Court equated the idea of
12 wronging a bank in its property rights, to pecuniary or
13 property loss.
14 We see it two years later in the Cone
15 decision where the Court made it clear that an intent to
16 take something from the United States, in that case the
17 statute designated the United States, that that was
18 insufficient to simply intend to take something from the
19 United States custody without showing the intent to
20 cause pecuniary and property loss. And we see that all
21 the way through to Pasquantino, the 2005 decision about
22 economic injury, through to Skilling, where the Court
23 says traditional fraud involves the loss of property.
24 So applying the meaning, the -- really the
25 undisputed meaning of defraud, to the undisputed intent

1 to defraud element here, where clause (1) specifies the
2 bank, that, Your Honor, is what is wrong with the
3 instructions that allow for a conviction on the basis of
4 a mere intent to deceive the bank.
5 And if I may reserve the remainder of my
6 time.
7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Yang.
9 ORAL ARGUMENT OF ANTHONY A. YANG
10 ON BEHALF OF THE UNITED STATES
11 MR. YANG: Mr. Chief Justice, and may it
12 please the Court:
13 The intent required in this bank fraud
14 scheme -- case is an intent to deceive the bank for the
15 purpose of depriving it of something of value.
16 CHIEF JUSTICE ROBERTS: Well, all right.
17 Sorry to stop you so early on, but I did not understand
18 that to be the argument in your brief.
19 I'm looking at the heading C on page 36.
20 Section 1344(1) requires proof of an intent to deceive a
21 bank, not to cause it monetary loss. It -- so I didn't
22 understand -- I'm not sure what -- when Justice Kagan
23 proposed, asked, suggested she was going to ask you the
24 question, I guess I a.m., I did not think -- I did not
25 think you agreed with the Petitioner because I think the

1 Petitioner is saying very strongly intent to deceive is
2 not enough. And I understand you to say that it is.
3 MR. YANG: I'm sorry that the -- the heading
4 was a little incomplete, but I think the rest of our
5 brief, when you take it in context --
6 CHIEF JUSTICE ROBERTS: What's missing?
7 JUSTICE KAGAN: Well, not just the heading,
8 but analysis in that part C as well. I mean, the part C
9 just seems to contradict part A or B or whichever it
10 was.
11 MR. YANG: What we were trying to --
12 JUSTICE KAGAN: If you really mean an intent
13 to deceive is not enough, that you need something about
14 to deprive the bank of its property interest.
15 MR. YANG: Yes. And I think if you look,
16 for instance, at page 14 and then at page 17 of
17 footnote 1, at page 31 we say what's required is
18 1344(1), which is on page 14, reaches deceptive schemes
19 designed to deprive the bank of property.
20 Then on --
21 CHIEF JUSTICE ROBERTS: What does the -- do
22 they have to have the intent to deprive the bank of
23 property?
24 MR. YANG: Well, when you're designing --
25 when you're -- there's only one schemer here, right, so

1 the scheme is his scheme. And does the scheme have to
2 deprive the bank of property? That's what the jury
3 instructions --
4 CHIEF JUSTICE ROBERTS: Okay. I just want
5 to clear up that it is not enough to deceive a bank,
6 right?
7 MR. YANG: No, no, no, of course --
8 CHIEF JUSTICE ROBERTS: Well, not of course,
9 since that's what you said.
10 MR. YANG: My apologies. I think, though,
11 that when you take a look at the other parts of our
12 briefs, and apology that we were trying to -- trying to
13 distinguish --
14 CHIEF JUSTICE ROBERTS: Okay.
15 MR. YANG: -- between intent to harm from
16 the intent to deceive, and we used some words that may
17 have lead to confusion. That's not our position.
18 CHIEF JUSTICE ROBERTS: Well, then if that's
19 the case, then it all comes down to the instruction,
20 deceive, cheat or deprive a financial institution of
21 something of value.
22 Because you -- as I understand your position
23 as clarified, you do have to have the intent to deprive
24 a financial institution of something of value.
25 MR. YANG: Right.

1 CHIEF JUSTICE ROBERTS: Okay. Well, then
2 it's all a question of whether "deceive" and "cheat"
3 stand alone, or if they are also modified by "of
4 something of value."
5 MR. YANG: I think there's actually a deeper
6 disagreement here, and I'm happy to talk about the jury
7 instructions, and the jury instructions, of course, have
8 to be read as a whole. And when you read that, and
9 particularly in conjunction with the materiality
10 requirement, which is discussed -- in a material matter,
11 you have to deceive the -- defraud the bank as to a
12 material matter, and a material matter is one that has a
13 tendency that causes the bank to part with money or
14 property -- I think when you read the instructions as a
15 whole, there's really no problem with the instructions,
16 but there's a really -- there is a deeper argument here.
17 And that is the argument that Petitioner
18 says that you have to intend to take something that you
19 know is a property interest of the bank. You have to
20 have knowledge of that. And I had thought until today
21 that they were disputing whether a possessory interest
22 was enough, but they've given that up.
23 JUSTICE KAGAN: Yes, so it seems to me,
24 Mr. Yang, that the real disagreement that you have is
25 that Ms. Bell wants to equate and intends to deprive a

1 bank of a property interest with an intent to have a
2 bank suffer a pecuniary loss in the end. She says those
3 are the same things. You say they're different things.
4 Let's assume you're right. Let's assume that that's --
5 that whether the bank in the end suffers a monetary loss
6 is utterly irrelevant to the form of intent that's
7 required by this statute. All right? So you won that
8 one, let's say.
9 MR. YANG: Okay.
10 JUSTICE KAGAN: Go back to the Chief
11 Justice's question about how these instructions reflect
12 that there needs to be an intent to deprive the bank of
13 a posessory interest in property.
14 MR. YANG: I will go to those instructions,
15 and I'm kind of happy to discuss them, but I don't think
16 that's the end of the matter. I do think that there are
17 actually two questions that are -- that Petitioner is
18 trying to merge that are distinct. And they're
19 actually --
20 JUSTICE KAGAN: I thought I was giving you
21 them.
22 MR. YANG: No, no. They're making two
23 arguments. One --
24 JUSTICE KENNEDY: But could we talk about
25 the instruction? I know --

1 MR. YANG: Yeah. Yeah, I just want to --
2 JUSTICE KENNEDY: -- that's the -- that's
3 the last part of your argument. We want it first. Do
4 you mind? Okay.
5 MR. YANG: Not at all. I'm happy to discuss
6 it. But in terms of the enduring legal consequence of
7 this Court's decision, the bigger ones I'd like to get
8 to. But I will discuss the instructions here.
9 JUSTICE KENNEDY: Well, we know there's a
10 big picture in the world, but we want to know about the
11 instructions first.
12 MR. YANG: The instructions --
13 CHIEF JUSTICE ROBERTS: The enduring
14 consequence to Mr. Shaw is a little bit different, so --
15 MR. YANG: Undoubtedly. But the Court
16 generally doesn't take cases for error construction, and
17 I want to -- and in the government's interest goes to
18 the broader question of what does Section 1344(1) --
19 JUSTICE KAGAN: Say, Mr. Yang, the
20 instructions.
21 MR. YANG: So on the instructions -- this is
22 at pages 17 through 19 of the joint appendix. And the
23 first instruction that's relevant is the instruction
24 that the defendant has to have knowingly executed a
25 scheme to defraud -- that's a defined term -- a

1 financial institution as to a material matter.
2 Now, we look -- if you turn the page to 18,
3 the scheme to defraud is a scheme in which someone
4 intends to deceive, cheat or deprive a financial
5 institution of something of value.
6 Here there's only one schemer. So the
7 schemer, the one that created the scheme, had to intend
8 to deceive, cheat or deprive a financial institution of
9 something of value.
10 Now, remember the first instruction that we
11 discussed talks about -- has to be a scheme to defraud
12 as to a material matter. If you go further down on
13 page 18, a material matter is one that has the necessary
14 tendency to influence or is capable of influencing the
15 financial institution to part with money or property.
16 This is what a scheme to defraud is.
17 Now, I don't think when you take that in
18 context, and you have to read instructions holistically,
19 that there's really any question --
20 JUSTICE SOTOMAYOR: Don't forget instruction
21 21. You're cherry-picking.
22 MR. YANG: Well --
23 JUSTICE SOTOMAYOR: An intent to defraud is
24 an intent to deceive or cheat.
25 MR. YANG: Right. And then we'll have to go

1 back to instruction 17 to see how that fits in. The
2 second part is you also have to independently find that
3 you did so; that is, execute the scheme to defraud that
4 we discussed as to a material matter, with intent to
5 defraud the financial institution.
6 So their intent to defraud simply says you
7 have to intend or deceive or cheat, again, the financial
8 institution. That's somewhat superfluous in a
9 single-person fraud scheme like this because you've
10 already defined the scheme to embed those requirements.
11 CHIEF JUSTICE ROBERTS: Well, but you've
12 kind of -- instruction, you do read it in context, but
13 if I read instruction 18 in the context of 21, it kind
14 of highlights that you have deceive or cheat separate
15 from the deprivation of something of value.
16 So linguistically, you have to say that what
17 they meant in the instructions was somebody who intends
18 to deceive a financial institution of something of
19 value. And that's just not grammatical.
20 MR. YANG: It's not great, but it's not --
21 but it's not unacceptable here because --
22 JUSTICE BREYER: It's okay once you put in
23 the word "material" --
24 MR. YANG: I think --
25 JUSTICE BREYER: -- which is what you have

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 Trubino in the Fifth Circuit, Shaw in the Seventh
2 Circuit. Theft of U.S. property -- if you steal U.S.
3 property, you don't have to know it's owned by the U.S.
4 There's a recent case called Reedhack 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.

1 MS. BELL: Thank you.

2 CHIEF JUSTICE ROBERTS: Case is submitted.

3 (Whereupon, at 11:51 a.m., the case in the

4 above-entitled matter was submitted.)

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