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 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.              :

 8    - - - - - - - - - - - - - - - - - x

 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   C O N T E N T S

2   ORAL ARGUMENT OF   PAGE

3   KOREN L. BELL, ESQ.

5   ORAL ARGUMENT OF

6   ANTHONY A. YANG, ESQ.

8   REBUTTAL ARGUMENT OF

9   KOREN L. BELL, ESQ.

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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
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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 am, 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 am 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 tired 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 am, 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

 9   particularly in conjunction with the materiality

10   requirement, which is discuss in a material matter, you

11   have to deceive the -- defraud the bank as to a material

12   matter, and material matter is one that has a tendency

13   that causes the bank to part with money or property.

14   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   MR. YANG: I don't think we've quite said

24   that, but I -- it's in pages 44 or 45 of our brief,

25   which is the general proposition that you just have

1   to -- that bank fraud -- excuse me -- that -- jury --

2   this is 46 -- jury instructions must be viewed in the

3   context of the overall charge. And when you look at

4   this in light of the materiality charge, any kind of

5   ambiguity that might have been interjected in the

6   definition of scheme to defraud I think is sufficiently

7   displaced.

8   CHIEF JUSTICE ROBERTS: It's just not the

9   instruction. It's what the court of appeals held. The

10   court of appeals held, in short -- this is a quote --

11   "The defendant was guilty of bank fraud because he

12   intended to deceive the bank." Full stop. So it's not

13   just a problem with the instructions. It's a problem

14   with what the court of appeals held.

15   MR. YANG: Again, I think this may be a

16   problem with some brevity. I don't think the court of

17   appeals meant to say if you walk into the bank and tell

18   the bank, you know, the nationals lost their game and

19   don't have home field advantage that that's bank fraud.

20   Of course, the court of appeals knows it's an order to

21   obtain something from the bank. That's what bank fraud

22   is. And I don't think that, you know, just as the

23   heading for our brief in Section C might not have been

24   fully complete, the same thing for the court of appeals

25   opinion.

1   But I'd like to get back to I think what's a

2 broader issue here, which is what is the intent

3 required. And particularly --

4   JUSTICE GINSBURG: Just tell us: Why

5 didn't -- why didn't the government charge under (2),

6 which your colleague has agreed fits this case, that if

7 he had been charged under (2) and convicted, that would

8 be fine?

9   MR. YANG: Because under (2), you need to

10 actually prove a misrepresentation.

11   JUSTICE GINSBURG: Because under (2) you

12 have to prove --

13   MR. YANG: You have to prove a false

14 statement or false misrepresentation. Now, in the

15 context of crimes that occur over the Internet, there's

16 some complications that are involved with that. The

17 charging decision was to take (1) -- clause (1) remember

18 is scheme to defraud. This is the -- the mothership of

19 language from the fraud statutes. It comes from the

20 mail fraud and the wire fraud. Congress knew that this

21 was broad, and Congress intended to adopt it

22 specifically because it was broad.

23   And, in fact, Congress considered drafting

24 language that would have required scheme to harm, cause

25 economic loss to a financial institution, and

1 specifically rejected it after the Department of Justice

2 said, hey, that's too narrow. Scheme to defraud is

3 broader, and this would unduly narrow the statute.

4   So the government chose clause (1) because

5 it was the broader clause, and we didn't need clause (2)

6 which -- it could have complicated proof a little bit.

7   Now, on the two questions that Petitioners

8 presented, two kind of legal questions are, does the

9 defendant have to have some knowledge of the legal

10 property status of the thing that's being taken? I

11 think the answer is clearly no.

12   Willie Sutton in the 20th Century, to move

13 off from Jessie James, he robbed banks because that's

14 where the money is. Now, if Willie Sutton believed all

15 the money he took was customer deposit accounts, didn't

16 belong to the bank, he didn't ever intend to harm the

17 bank, he'd still be -- you'd still call it bank robbery.

18 And if he did the same thing through deceit, you'd call

19 it bank fraud.

20   Now, there's no reason to add this

21 additional intent knowledge about the property status of

22 the thing that's being taken. It doesn't advance any

23 interest that Congress is trying to advance is to

24 protect the integrity of banks. The cost of the bank

25 does not depend on what's subjectively in the

1   defendant's mind, about what they think, is it owned by,

2   is it ownership interest, is it a possessory interest,

3   is there insurance, is there not insurance. It depends

4   on the nature of the actual scheme and what's being

5   taken.

6   Congress would not have wanted to

7   distinguish between defendants who execute the same --

8   the same scheme based on the idea that once defendant is

9   sophisticated --

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

11   MR. YANG: The right words?

12   JUSTICE BREYER: For the -- I mean, there --

13   there are many situations. Do you -- you require an

14   intent that there be property? Well, how do you want to

15   say it, an intent to injure the bank in its property?

16   How do you say it? Look, some people, bank robbers go

17   into banks. They take the customers -- they line the

18   customers up against the wall, and they take out their

19   billfolds. Is that defrauding the bank?

20   MR. YANG: No, no. Because you're obtaining

21   it from the customer.

22   JUSTICE BREYER: Yeah, yeah. So how do you

23   want to do this one?

24   MR. YANG: So in bank fraud, the intent

25   required -- and remember, there's more than just intent.

1 As a fact we do have to prove there was a property

2 interest to the bank. So, for instance, in your

3 example --

4   JUSTICE BREYER: There was, but it was a

5 property interest in the bank. What do you have to

6 prove in respect to that property interest is in the

7 defendant's mind?

8   MR. YANG: So the only intent required is

9 the intent to deceive the financial institution in order

10 to obtain something of value. Now, that something of

11 value --

12   JUSTICE BREYER: In order to obtain

13 something of value, so that it could be of value and

14 belong only to the customer?

15   MR. YANG: That -- that complicates things I

16 think in the --

17   JUSTICE BREYER: Yes. That's why I want to

18 know -- that's why I need to know the words.

19   MR. YANG: There's no more required for

20 intent. Now, in order to --

21   JUSTICE KAGAN: I quoted you it was, that

22 it's an -- it's an intent to deprive the bank of a

23 property, including a possessory interest.

24   MR. YANG: No. And the reason it's

25 something of value that in fact is a possessory

1   interest. Whether or not -- or a property interest.

2   Whether or not the defendant knows it's a property --

3   JUSTICE KAGAN: Yes. But the bank -- the

4   bank has to have a possessory interest in -- a property

5   interest in this thing.

6   MR. YANG: Right. And property interest is

7   broad. But the defendant doesn't have to know about

8   that property interest. It just has to know I'm trying

9   to get money, that I want the money, and that's enough.

10   Now, the money happens to, in fact, be a property

11   interest to the bank, but the defendant doesn't have to

12   know that. We don't require our defendants to have

13   taken property law or banking law or studied the risk of

14   loss rules when frauds occur to banks. None of these

15   things have to be in the knowledge or of -- or beliefs.

16   JUSTICE KENNEDY: What does he have to know

17   about? Does he have to know that the bank is involved?

18   I mean, what does he have to know about the bank?

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

20   JUSTICE KENNEDY: That the bank is likely

21   involved? I mean, this is pretty easy because he sent a

22   check, but --

23   MR. YANG: Well, no, I think what's required

24   is -- and let me take a step back. When we're

25   talking -- we're talking about financial institutions,

1 and it might help to refer to page 1A of the

2 government's appendix. Financial institutions are not

3 just banks. Financial institutions include certain

4 banks when they are FDIC insured, certain credit unions,

5 and then a whole slew with ten -- a list of ten other

6 things. It includes a small business investment

7 company --

8   JUSTICE KENNEDY: Okay. But here we have a

9 bank. What did this defendant have to know about this

10 bank, if anything?

11   MR. YANG: It didn't have to know its status

12 as a bank under the statute. It just had to know it's

13 taking something from this entity, which in fact, again,

14 is a bank under the statute. It could be a holding

15 company. It could be -- it could be any of these

16 things. If taking something from this entity by deceit,

17 and that's the intent, right? Something of value from

18 this entity by deceit. It doesn't have to know does

19 this entity -- is it a small business investment company

20 defined under Section 103 of the Small Business

21 Investment Act? It doesn't have to know these things.

22   And the reason is once you get into the

23 realm of fraudulently taking something from an entity,

24 it -- that's criminal conduct. And the additional

25 requirements that it is a bank, that's the

1   jurisdictional hook. It's similar to --

2   JUSTICE KENNEDY: It has to know that a

3   financial institution is involved?

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

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

6   MR. YANG: It doesn't have -- it has to --

7   it doesn't have to have any knowledge about whether the

8   entity that it's depriving of property qualifies as a

9   financial institution. It could be, for instance, a

10   small kiosk in a grocery store that's conducting

11   transactions and happens actually to be a bank outpost,

12   but you don't know it's a bank. But you rob a bank or

13   you -- you defraud the bank, it's still -- you don't

14   have to have knowledge of its status as a financial

15   institution.

16   There are several examples. Bank robbery or

17   larceny, under Section 2113(a) and (b), the courts held

18   you don't need to know that the entity robbed is a bank.

19   That's Trubino in the Fifth Circuit, Shaw in the Seventh

20   Circuit. Theft of U.S. property -- if you steal U.S.

21   property, you don't have to know it's owned by the U.S.

22   There's a recent case called Reedhack in the Eighth

23   Circuit that surveys the unanimous views that you don't

24   have to have knowledge of the status as property of the

25   United States.

1   JUSTICE GINSBURG: And can you clarify for

2   us, what is in the overlap area? What is covered only

3   by (1) and what is covered only by (2)?

4   MR. YANG: They are, of course, cover

5   almost -- they are almost coterminous, but there are

6   things that are outside of (1), and there are things

7   that are outside of (2). What's outside of (1) are

8   schemes that -- schemes where you do not -- fraud is not

9   targeted at the bank or -- yes, so (2) -- let me -- let

10   me start over. It's a little confusing.

11   (2) is broader than (1) in the following

12   respect: It covers --

13   JUSTICE GINSBURG: (2) covers what?

14   MR. YANG: (2) -- clause (2) is broader than

15   (1) because it covers schemes to deceive the custodian

16   of bank property. (1) does not because the deception

17   has to be directed at the bank. But (1) covers things

18   that (2) does not, because (2) is limited only to false

19   statements. This is what Loughrin explained in a

20   footnote. (1) covers frauds that are based on

21   nonstatement-type deception; for instance, check hiding.

22   Checks are not statements about the balance in the

23   account. Check training is covered.

24   Other behavioral type of frauds. If, for

25   instance -- it's a little farfetched, but you could have

1   someone that impose -- that, you know, dresses in a

2   disguise and just walks into the bank. The bank lets

3   them into the -- it's a well-known customer, walks in

4   the safety deposit box, takes out the money. No

5   statement's made. (1) would cover that kind of thing.

6   Now, these areas are, you know, on the

7   fringe. The two terms, the two provisions largely

8   overlap, and that's not surprising because the language

9   that was the impetus for two was language that the Court

10   adopted in Durland in construing the term "scheme to

11   defraud." So there's a lot of overlap between these two

12   things, and that's what Justice Kagan recognized in

13   Loughrin.

14   But they both have independent meaning, not

15   a lot, and so, you know, they often can be used at the

16   same time, but they are independent.

17   JUSTICE KAGAN: Mr. Yang, you referred to

18   us, money in a security deposit. Your answer would be

19   the same, right --

20   MR. YANG: Yes.

21   JUSTICE KAGAN: -- if -- if somebody went in

22   and said, I'd like to see the security deposit boxes,

23   and -- and made a false statement to the bank about his

24   entitlement to see the security deposit boxes and took

25   the money out?

1   MR. YANG: Yes.

2   JUSTICE KAGAN: Doesn't -- you know, the

3   bank still has a possessory interest in that, even

4   though it doesn't use that money in the same way; is

5   that correct?

6   MR. YANG: Correct.

7   JUSTICE KAGAN: Let me give you another

8   example. Suppose that I'm sitting in a coffee shop and

9   somebody comes up to me and says, I have to make a phone

10   call; would you just hang on to my computer for a

11   minute? And then disappears, and then somebody else

12   comes up, the fraudster comes up, and says, oh, she just

13   told me to pick up her computer from her --

14   MR. YANG: Uh-huh.

15   JUSTICE KAGAN: -- and that's a

16   misrepresentation.

17   MR. YANG: Uh-huh.

18   JUSTICE KAGAN: But I give him the computer.

19   MR. YANG: Uh-huh.

20   JUSTICE KAGAN: Do I -- have I had a

21   possessory interest in that computer just because

22   somebody said, why don't you take a look, you know --

23   you know -- keep -- keep your eye on this?

24   MR. YANG: Gratuitous bailee is what they

25   would be. And I think the answer is -- I think we would

43

1   say yes for purposes of the -- the fraud statute.

2   Now this wouldn't, of course, be bank fraud.

3   And --

4   JUSTICE KAGAN: Yeah, yeah, yeah. But I

5   mean --

6   MR. YANG: But -- but --

7   JUSTICE KAGAN: What you're essentially

8   saying is that anything I can think of, any hypothetical

9   I can think of which involves my hanging on to something

10   for somebody else, that I have a possessory interest in

11   that sufficient to satisfy this scheme.

12   MR. YANG: Yeah. And I don't -- it's

13   sufficient for this purposes. And I don't think this is

14   unusual. Oftentimes, rights and interest in the law are

15   relative to other people. So your possessory interest

16   would not be superior to the person who owned the

17   laptop. But it would be superior as to third parties

18   having no claim of right -- no valid claim of right to

19   the laptop.

20   So yes, that, I think, could fall within the

21   general understanding of a scheme to defraud.

22   Obviously, not a scheme to defraud a financial

23   institution.

24   JUSTICE KAGAN: I mean, that suggests to me

25   that as long as the person knows that the money is

1   being -- is in the bank somehow, it just shouldn't

2   matter, because anything counts as a possessory

3   interest, right?

4   MR. YANG: It shouldn't -- it shouldn't

5   matter at all. And I think that emphasizes why Congress

6   would not have wanted to add some additional knowledge

7   requirement about the property status of the money. Why

8   does it matter? All it does is complicate things.

9   Congress would not have wanted to carve out

10   this type of conduct as noncriminal. And in fact, it's

11   important to recognize, even Petitioner says she's

12   not -- he's not carving out anything that's not

13   noncriminal.

14   In page 25 of the reply brief, Petitioner

15   says it's a -- essentially, a pleading game. Well, why

16   would Congress have wanted to make the broad language of

17   scheme to defraud, which has a history going back more

18   than a century, to be a narrow appendage on something

19   else in order to force the government into a pleading

20   game, when no -- at the end of the day, if it's pled

21   properly, it's still an offense punished by the same

22   time. It just doesn't make any sense.

23   This is not what Congress intended. It has

24   no -- no basis in the text or history of the bank fraud.

25   When you look at what Congress did in the legislative

1   history, it rejected language that would have adopted

2   the same thing. As far as I can tell, everything points

3   against Petitioner here.

4   If the court has no further questions. We'd

5   ask that you affirm.

6   CHIEF JUSTICE ROBERTS: Thank you, counsel.

7   Ms. Bell, you have three minutes remaining.

8   REBUTTAL ARGUMENT OF KOREN L. BELL

9   ON BEHALF OF THE PETITIONER

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

11   To get back to Justice Breyer's question

12   about where in the record was this disputed, that --

13   that is at pages 646 to 647. And there, counsel --

14   myself -- specifically made the argument that the

15   problem with this -- this instruction, exactly as

16   Justice Sotomayor, and I believe Justice Kagan, pointed

17   out, is the disjunctive wording of intent, the intent to

18   defraud.

19   JUSTICE SOTOMAYOR: Counselor, assume I

20   agree with you --

21   MS. BELL: Yes, Your Honor.

22   JUSTICE SOTOMAYOR: -- that there were parts

23   of your argument, both below and here in your brief,

24   that suggested the instructional error. But what I find

25   is that the way you presented the argument was

 1   confusing.

 2   MS. BELL: Yes.

 3   JUSTICE SOTOMAYOR: It took a lot of teasing

 4   out.

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

 6   MS. BELL: Yes, Your Honor.

 7   JUSTICE SOTOMAYOR: That -- that you weren't

 8   clear in the instruction, don't you forfeit that

 9   argument?

10   MS. BELL: No, Your Honor. The -- the claim

11   is that the intent to -- we challenge --

12   JUSTICE SOTOMAYOR: I -- I know what your

13   two claims are.

14   MS. BELL: Okay.

15   JUSTICE SOTOMAYOR: The question is if I

16   disagree --

17   MS. BELL: Yes.

18   JUSTICE SOTOMAYOR: -- with your basic

19   premise that you need to prove pecuniary loss to the

20   bank -- I know you want to win that, but please accept

21   my hypothetical. I disagree with you that the only --

22   that the only issue is that you have to cheat and

23   deprive the bank of a possessory -- of something in a

24   possessory -- in their possessory interest. Okay?

25   Simple as that. It doesn't have to cause -- you don't

1   have to intend to cause pecuniary loss. All right?

2   Where does that leave your instructional

3   error?

4   MS. BELL: It's -- it's still an error, Your

5   Honor, because it permitted a conviction on the basis of

6   the mere intent to deceive the bank. And there's no

7   curing it, looking to, for example, the materiality

8   component of the instruction, how --

9   JUSTICE SOTOMAYOR: How about if I find that

10   what you -- that you didn't articulate your argument

11   clearly enough to the court below, or to us? Where does

12   that put you? Have you forfeited? Do you waive? Have

13   you done something?

14   MS. BELL: No, Your Honor. The -- the

15   challenge was always to the disjunctively-worded jury

16   instruction. And that was consistently made from the

17   district court to the court of appeals and to this

18   Court. The only question has been how to formulate; if

19   more than intent to deceive is required, then what more?

20   How do we explain that second component?

21   Hammerschmidt itself, which is the

22   undisputed applicable definition here, uses a number of

23   different formulations, and that's part of where the

24   confusion comes from.

25   Hammerschmidt says the intent to defraud is

1   the intent to deceive, and it also uses the -- and to

2   wrong a bank in its property rights. It equates to

3   wrong a bank in its property rights with to deprive a --

4   I'm sorry -- a victim.

5   It equates to wrong a victim in its property

6   rights with depriving a victim of something of value,

7   and it also equates that with cheating a victim out of

8   something of property, and also. To make matters even

9   more confusing in terms of the number of formulations,

10   it says that the mail fraud statute is limited to the

11   infliction of pecuniary or property loss. And so our

12   formulations come out of the Hammerschmidt case.

13   And what we have always asked the Court to

14   do here is to construe intent to defraud to require, not

15   just the intent to deceive, as the lower court

16   instructions required, but also the intent to do that

17   second thing, which is --

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   MS. BELL: Thank you.

20   CHIEF JUSTICE ROBERTS: Case is submitted.

21   (Whereupon, at 11:55 a.m., the case in the

22   above-entitled matter was submitted.)

23

24

25

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