

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

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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