No. 15-5991

In The
Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

HILARY L. POTASHNER
Federal Public Defender
CENTRAL DISTRICT OF CALIFORNIA

KOREN L. BELL
Deputy Federal Public Defender
Counsel of Record

JAMES H. LOCKLIN
Deputy Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
321 East 2nd Street
Los Angeles, California 90012
Koren_Bell@fd.org
(213) 894-5312

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR THE PETITIONER

This case is about the requisite *intent* to "defraud a financial institution" under 18 U.S.C. § 1344(1), particularly as it applies to schemes to obtain customer deposits. Raising the specter of trials mired in banking-law technicalities, the government tries to shift the focus to whether a bank in fact owns customer deposits or suffers loss from such schemes. But clause (1), like clause (2), avoids these issues by conditioning culpability solely on the defendant's intent – not on the actual legal status of property or the scheme's effect on the bank. And technicalities aside, in practice, Congress, this Court, and the average person view deposits not as bank-owned property but as customer assets entrusted to the bank for safekeeping. Because deposits are commonly understood as customer property, a defendant who schemes to obtain deposits presumptively intends to target the customer, not the bank, as the financial victim of the fraud, regardless of whether the bank suffers loss in fact. Clause (2), not clause (1), is the appropriate charge in such a case.

Against this backdrop, there are two disputes about what clause (1)'s intent-to-defraud-a-bank element entails. The first question is whether this element requires intent *both* to deceive the bank *and* to thereby wrong the bank's property rights. Although the government concedes, based on the undisputed definition of "defraud," that a clause (1) scheme must be designed to do both of these things, it asserts that the only intent required is intent to deceive the bank. The plain language of clause (1) and this Court's precedent

refute that position. Therefore, the Ninth Circuit erred in approving jury instructions that permitted a conviction based on intent to deceive alone.

The second question is whether, in customer-deposit schemes, the requisite intent to wrong a bank's *own* property rights means intent that the bank – not its customer – bear the monetary loss of the fraud. The government suggests that clause (1) applies to customer-deposit schemes, even without such proof, because the bank *in fact* has "ownership" or "possessory" interests in bank-held funds. This position ignores that the gravamen of § 1344 is intent. Whatever the actual status of the targeted property, clause (1) requires proof that the defendant *intended* that the bank, not its customer, be the financial victim of the fraud. Put differently, the intent must be to obtain bank-owned money rather than the customer's bank-held funds.

The government's position that a scheme designed to obtain *customer* deposits reflects intent to "defraud *a financial institution*" is also at odds with the Court's fraud precedent. In nearly a century of jurisprudence, the Court has tethered the concept of "defraud" to inflicting pecuniary or property loss on the victim. It has also held that, where a fraud statute designates a particular victim, a defendant must intend to harm *that* victim, not a third party. Because clause (1) designates "a financial institution" as the requisite victim of the scheme, intent to defraud *a financial institution* requires intent to cause pecuniary or property loss *to the bank* – not its customer.

Section 1344's structure supports this interpretation. Consistent with the common understanding of bank-held customer deposits as distinct from bank-owned property, clause (2) expressly distinguishes between (and covers) two different types of schemes: those where the defendant intends to obtain bank-held property, and those where the defendant intends to obtain bank-owned property. In this context, clause (1)'s requisite intent to wrong a bank's *own* property rights equates to clause (2)'s requirement of intent to obtain bank-*owned* property; it does not include the distinct intent to wrong a *customer's* property rights in bank-held deposits. So construed, § 1344 achieves Congress's goal to reach all bank-fraud conduct – a fact the government never disputes.

I. The defendant's *intent* – not the actual status of property or the impact of the completed fraud – is 18 U.S.C. § 1344(1)'s "whole sum and substance."

Section 1344 punishes the *scheme* to defraud – not the completed fraud. Pet. Br. 16-17; U.S. Br. 13. Accordingly, clause (1)'s "whole sum and substance" is the defendant's *intent* to defraud a bank. *Loughrin v. United States*, 134 S. Ct. 2384, 2389-90 (2014).

Clause (1)'s exclusive focus on the defendant's intent – irrespective of the actual status of property or the impact of the completed fraud – is consistent with how the Court has long interpreted § 1344's predecessor mail- and wire-fraud statutes. In the first of those

decisions, the Court emphasized that "[p]unishment because of the fraudulent purpose is no new thing." *Durland v. United States*, 161 U.S. 306, 313 (1896). "The significant fact is the intent and purpose" of the scheme to defraud. *Id.* A century later, the Court reaffirmed this principle. *See Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (quoting *Durland*). Thus, the fraud statutes punish "intentional *efforts* to despoil" – not the actual effect of the defendant's conduct. *Durland*, 161 U.S. at 314 (emphasis added); *see also id*. at 313 (hypothetical scheme to obtain goods bought on credit without intent to cheat not covered even if vender suffered loss).

Consistent with this precedent, *Loughrin* held that § 1344's prefatory scheme-or-artifice text required proof, under clause (2), "that the defendant *intend* to obtain" either of two specified types of property: bank-owned *or* bank-held. 134 S. Ct. at 2388-89 (emphasis added) (internal quotation marks omitted). Given clause (2)'s "requisite intent," the Court observed, a defendant may claim that he "did not intend" to obtain bank-owned or bank-held property but rather property from a non-bank victim. *Id.* at 2393 n.6; *see also id.* at 2389 n.3 (jury rejected claim that defendant merely intended to obtain store's property). Like clause (2), clause (1) conditions liability on intent to obtain a specific type of property – bank-owned – regardless of the actual status of the property. *See infra* Part III. Shaw's construction of clause (1) is thus fully consistent with this Court's approach to clause (2), its mail- and wire-fraud precedent, and general criminal-law principles.

See Clark v. Arizona, 548 U.S. 735, 766 (2006) (noting "modern tendency has been toward more specific descriptions" of intent requirements); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (basing culpability on intent is "universal and persistent in mature systems of law").

The government acknowledges that § 1344's focus on the scheme means that damages a bank may suffer from a "completed fraud" have "no place" in a bank-fraud prosecution. U.S. Br. 13 (quoting *Neder v. United States*, 527 U.S. 1, 24-25 (1999)) (internal quotation marks omitted). But its extensive discussion of the legal relationship between a bank and customer deposits concerns just that: the potential impact of a completed fraud. U.S. Br. 27-29 & nn.5-7, 31-36 & n.8, 43-45. Shaw does not dispute that a general deposit passes title to the bank, or that the bank may suffer loss from a customer-deposit scheme. The question is not the legal status of deposits or bank loss *in fact*, however. Under clause (1), like clause (2), liability turns on the defendant's *intent* to obtain specific property.

Congress's focus on the intent behind the bank-fraud scheme – rather than its effect – makes good sense. There are other statutes that focus on the effect of bad conduct on the bank. For example, both the mail- and wire-fraud statutes provide heightened penalties equivalent to those found in § 1344 for schemes to defraud *anyone* that merely "affect[] a financial institution." 18 U.S.C. §§ 1341, 1343. Likewise, the bank-larceny statute penalizes the taking of either bank-owned or bank-held property. 18 U.S.C. § 2113(b). But

Congress enacted § 1344 in part to fill gaps created by that statute's requirement of a completed taking. Pet. Br. 37 (discussing *Bell v. United States*, 462 U.S. 356 (1983), as a catalyst for § 1344). In drafting § 1344, Congress thus focused on the defendant's intent, not the effect of his conduct. As a result, if the legal status of property or bank loss is ever relevant to a clause (1) prosecution – and, in most cases, it is not – it, at best, sheds light on whether the defendant acted with the requisite intent. *See infra* Part III.C.

II. The intent to defraud required by clause (1) includes *both* intent to deceive the bank *and* intent to cheat the bank by wronging the bank's *own* property rights.

The plain text of clause (1) requires intent *both* to deceive the bank *and* to wrong the bank's property rights. The government's contrary (and new) argument that the statute requires only intent to deceive is unfounded. Therefore, the Ninth Circuit erroneously approved instructions that allowed a conviction based on intent to deceive alone.

A. The plain text of clause (1) requires applying the requisite intent to both components of the undisputed definition of "defraud."

The applicable and undisputed definition of "defraud" found in *Hammerschmidt v. United States*, 265 U.S. 182 (1924), is to "cheat" the victim "out of property

or money" – in other words, (i) "wronging one in his property rights" (ii) "by dishonest methods or schemes." *Id*. at 188. Pet. Br. 18-23; U.S. Br. 18. It necessarily follows that a defendant intends to "defraud" a bank for purposes of clause (1) only if he intends *both* to deceive the bank *and* to wrong the bank's property rights. But the government now contends that clause (1) requires *only* intent to deceive. U.S. Br. 36-42. That argument conflicts with its concession when opposing certiorari: "A scheme to defraud a bank . . . requires proof of an intent to deprive the bank of something of value by deception[.]" Brief in Opposition at 11; *see also* Pet. Br. 22 & n.13 (noting this concession). Its new contrary position cannot be reconciled with § 1344's plain language.

First, the government still agrees that clause (1) reaches only "schemes designed to deprive a bank of a property interest by deceiving the bank." U.S. Br. 17 & n.1. The government never explains how a defendant may *design* such a scheme without *intending* to accomplish its objective. To the contrary, the government recognizes that "in a single-actor bank-fraud scheme, proof of the scheme and the defendant's intent will almost always converge" – that is, the scheme's design reflects intent and vice versa. U.S. Br. 38 n.10. Therefore, the government's concession that the scheme must be designed *both* to deceive the bank *and* to thereby deprive a bank of a property interest is an implicit acknowledgment that the defendant must intend to do both of those things.

Second, ordinary English grammar and logic compel applying clause (1)'s intent-to-defraud element to both components of "defraud." If conduct X consists of acts A and B, then a defendant does not intend to X unless he *both* intends to A *and* intends to B. *See, e.g.*, *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (aiding-and-abetting requirement of intent to facilitate offense "must go to the specific and entire crime charged" and thus "to the full scope" of a crime with multiple action elements).

Finally, in *Loughrin*, the Court held that § 1344's prefatory scheme-or-artifice language, as applied to clause (2), requires intent to obtain the specified property. 134 S. Ct. at 2388-89. Naturally, the same prefatory language, as applied to clause (1), requires the intent to wrong the bank's property rights called for by the undisputed definition of "defraud" and the rules of grammar.

B. The government's position that clause (1) requires only intent to deceive rests upon a misunderstanding of this Court's precedent.

Although the government concurs in the *Hammerschmidt* definition of defraud, U.S. Br. 18, it contends that Congress, by using the phrase "scheme to defraud," meant to incorporate the intent required for a common-law civil fraud action – which it asserts is intent to deceive, not to harm. U.S. Br. 37-41. That is incorrect.

First, the government's reliance on *Neder v. United States*, *supra*, is misplaced. That case applied the canon of construction on imputing the common-law meaning of a term unless the statute dictates otherwise. 527 U.S. at 21-22. In accordance with this canon, Shaw applied the well-established, and now undisputed, *Hammerschmidt* definition of "defraud" to clause (1). Pet. Br. 21-22. Contrary to what the government suggests, U.S. Br. 37, *Neder* does not hold that interpretation of the federal fraud statutes is dictated by the common-law *tort* of fraud. Rather, it instructs that civil-fraud law may be useful when addressing questions not answered by the statutes' text, but even then only to the extent that tort principles are not "incompatible" with that language. *Neder*, 527 U.S. at 21-25. Because applying the settled definition of "defraud" to clause (1)'s undisputed intent-to-defraud element clearly establishes the requisite intent here, there is no need to consult civil-fraud law at all.

In any event, civil-fraud law supports rather than refutes Shaw's plain-meaning interpretation of clause (1). The government misreads the authorities it cites to require *only* intent to deceive, even as it acknowledges that these sources require something *more*: namely, proof that the defendant intended to induce the plaintiff to act upon the misrepresentation. U.S. Br. 38-39 & n.11. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 105, at 728 & § 107, at 741 (5th ed. 1984) ("scienter" requires that defendant intend plaintiff both to believe misrepresentation

and to act upon it in a certain way). That civil law requires *some* intent beyond intent to deceive belies the government's claim that *only* intent to deceive is required under clause (1).

The government also contends that clause (1) cannot require intent to harm because a civil action does not require such intent. U.S. Br. 39-40. At the same time, however, it acknowledges that a civil-fraud claim requires actual harm. U.S. Br. 39 & n.12. Clause (1), by contrast, does not require actual harm but punishes the scheme and therefore the defendant's *intent* to defraud. *See supra* Part I. Thus, the plain-meaning of clause (1)'s intent-to-defraud requirement is consistent with the common law: because a person only *commits* civil fraud if he causes actual harm to the victim, he only *intends* to defraud that victim if he intends to cause the victim harm. Applying any narrower civil intent requirement would be "incompatible" with the language of clause (1), which "dictates" the scope of the requisite intent. *See Neder*, 527 U.S. at 21-22, 24-25.

Finally, contrary to the government's claim, U.S. Br. 40-41, the Court's decision in *Carpenter v. United States*, 484 U.S. 19 (1987), supports Shaw's interpretation. Although the Court noted that "monetary loss" is not required by the fraud statutes, it held that a scheme to use a newspaper's confidential business information did harm the newspaper by depriving it of property, namely, its "right to exclusive use" of this information. *Id*. at 26-27. Accordingly, the defendants

who intended to cause that harm had the requisite "specific intent to defraud[.]" *Id*. at 28.

C. Because intent to defraud requires more than just intent to deceive, the jury instructions approved by the Ninth Circuit – which permitted a conviction based on intent to deceive alone – were erroneous.

The Ninth-Circuit-approved jury instructions defining "intent to defraud" and "scheme to defraud" permitted a guilty verdict based solely on intent to deceive. J.A. 18-19. Because intent to defraud means something more than just intent to deceive, these instructions were invalid. Pet. Br. 22-23.

The government insists that the instruction defining "intent to defraud" as intent to "deceive *or* cheat" was correct because "deceive" and "cheat" purportedly "reflect alternate verbal formulations for describing fraudulent conduct." U.S. Br. 46 (emphasis added). But regardless of how "deceive" and "cheat" might be defined generally or in other contexts, Shaw's proposed instructions explained that "cheat" means something different than "deceive" and that "intent to defraud" required proof of intent to do both. J.A. 22-25. The question here is whether the jury should have received *those instructions* or at least a charge other than what it got. *See Rosemond*, 134 S. Ct. at 1250, 1252 (vacating judgment and remanding even though jury-instruction

errors asserted by defendant were somewhat different than those found by Court).

The government's reading of the "deceive *or* cheat" instruction also ignores the basic grammatical principle that terms connected by the disjunctive "or" customarily have separate meanings. *See Loughrin*, 134 S. Ct. at 2390-91. A typical juror therefore would understand that the instruction "both said 'or' and meant 'or' in the usual sense," *id.* at 2391, and would naturally (and mistakenly) conclude that proof of intent to deceive alone sufficed.

The instruction defining "scheme to defraud" as "any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value" suffered from the same problematic use of the disjunctive. J.A. 18 (emphasis added). As a result, it conflicts with the government's position that a scheme to defraud must be designed to deceive the bank *and* thereby wrong its property rights. U.S. Br. 17 & n.1. The government tries to salvage the instruction by arguing that the phrase "a financial institution of something of value" applies to each of the listed alternatives that precede it. U.S. Br. 45-46. But to adopt even that counterintuitive reading, the government must insert the word "out" into the text of the instruction actually given. U.S. Br. 46 (interpreting scheme-to-defraud instruction as to "'deceive' the bank out of 'something of value'" or "'cheat' the bank out of 'something of value'"). That the government must alter the text of the instruction and resort to linguistic gymnastics undermines any claim

that the jury would have interpreted the instruction this way, particularly given the separate intent-to-defraud instruction with its unqualified deceive-*or*-cheat language. To the contrary, the jury would have taken the two instructions at face value and concluded that it could convict based on intent to deceive alone, without any finding that Shaw also intended to wrong the bank's property rights (or anyone else's for that matter). That is not consistent with clause (1)'s requirement.

III. Under clause (1), intent to wrong the bank's *own* property rights means intent to obtain "bank-owned" property – that is, intent that the bank (not its customer) bear the monetary loss of a scheme to obtain customer deposits.

It is undisputed that Shaw's scheme targeted money in Stanley Hsu's Bank of America account. Pet. Br. 3-5; U.S. Br. 2-4. Where, as here, a scheme targets customer deposits, the text of clause (1) and the Court's precedent establish that the government must prove *intent* that the bank (not its customer) bear the monetary loss of the scheme. Put differently, the defendant must intend to obtain bank-owned property, not customer property.[1] The government's contrary position

[1] Contrary to the government's suggestion, Shaw has not been inconsistent about clause (1)'s intent requirement. U.S. Br. 8-9, 12, 36-37. In customer-deposit schemes, like Shaw's, intent to "cheat" the bank by "wronging" the bank's own property rights (intent to obtain "bank-owned" property) means intent that the bank bear the monetary loss of the fraud. That position aligns

improperly equates clause (1)'s intent to wrong a *bank's* property rights with clause (2)'s intent to obtain *either* bank-owned *or* bank-held property, thereby ignoring Congress's distinction between two different types of bank-fraud schemes. Construed in accordance with its plain meaning, clause (1), like clause (2), avoids banking-law technicalities, and the statute works as a whole to reach all bank-fraud conduct.

A. Clause (1)'s text and this Court's precedent require intent that the bank bear the monetary loss.

Because clause (1) textually specifies the bank as the requisite victim of the fraudulent scheme, intent to "defraud *a financial institution*" means intent to wrong the bank's *own* property rights, not its customer's. Pet. Br. 23-30. The government does not dispute that intent to wrong a customer's property rights cannot support a clause (1) conviction. Rather, it asserts that § 1344 protects the bank's *actual* "ownership" or "possessory interests" in bank-held property like customer deposits. U.S. Br. 16-23. This improperly shifts the focus from the defendant's intent – the gravamen of clause (1) – to the legal status of the property targeted by the scheme, which is not at issue. *See supra* Part I. The Court's precedent makes clear that the bank – not its customer

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with Shaw's proffered jury instructions below and his certiorari petition and reply. J.A. 21-25; Cert. Pet. 10-24; Cert. Reply 1-9. In any case, Shaw is not limited to the precise arguments made below. *See Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378-79 (1995).

– must be the intended financial victim of the fraudulent scheme, regardless of whether the bank holds title to the funds or loses money in fact.

First, the Court's mail- and wire-fraud precedent has consistently tethered the concept of "defraud" to inflicting pecuniary or property loss on the victim. *See*, *e.g.*, *Pasquantino*, 544 U.S. at 355-57 (scheme to evade taxes inflicted "economic injury" on Canada because "money legally due" equivalent to "money in hand"); *Cleveland v. United States*, 531 U.S. 12, 15, 20-22 (2000) (scheme to obtain license did not defraud State because defendant not alleged to take "money to which the State was entitled by law" and license thus not "property in the hands of the victim"); *Carpenter*, 484 U.S. at 26-28 (scheme deprived newspaper of property); *McNally v. United States*, 483 U.S. 350, 356 (1987) (statute prevented frauds aimed at "fleecing the innocent people" by taking "their money or property") (internal quotation marks omitted); *Fasulo v. United States*, 272 U.S. 620, 627-28 (1926) ("defraud" means "the victim's money must be taken from him by deceit") (citing with approval *Naponiello v. United States*, 291 F. 1008, 1009 (7th Cir. 1923)); *Hammerschmidt*, 265 U.S. at 188-89 (lower court mail-fraud decision limited "to pecuniary or property injury inflicted by a scheme to use the mails for the purpose"). None of these decisions supports the view that a scheme to take customer deposits held by the bank reflects clause (1)'s requisite intent to defraud – that is, to inflict monetary loss on – the bank.

Second, the Court's precedent construing statutory language that, like clause (1), designates the requisite victim of a fraudulent scheme compels the same conclusion. Pet. Br. 25-30. These cases hold that a defendant must intend to harm the victim textually specified by such fraud statutes – not a third party. Absent the requisite intent, it is not enough that the statute's designated victim merely holds the targeted property or suffers the actual loss of the fraud.

For example, in *United States v. Cohn*, 270 U.S. 339 (1926), a statute prohibiting any scheme "for the purpose and with the intent of . . . defrauding the Government of the United States" did not apply, *id.* at 343, where "the government acted solely as bailee[.]" *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943) (describing *Cohn*). "[D]efrauding the government" required the "fraudulent causing of *pecuniary or property loss*" *to the government* – not to the seller of non-dutiable cigars held at customs. *Cohn*, 270 U.S. at 343-47 (emphasis added). Because the scheme merely deceived the United States to obtain the seller's cigars, the government failed to establish the required "purpose and intent" to defraud the United States. *Id*. at 347.

Similarly, a statute penalizing conspiracies "to defraud the Government by getting a false or fraudulent claim allowed or paid" did not extend to a scheme that merely "had the effect" of obtaining government money from a private entity. *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008). Rather,

the plaintiffs were required to prove that the defendants intended to defraud the government itself. *Id*. Likewise, a statute punishing conspiracies "to defraud the United States" did not cover a scheme to defraud a government-funded-and-supervised entity absent evidence of intent to injure the United States. *Tanner v. United States*, 483 U.S. 107, 128-32 (1987) ("nature of the injury intended" and "target" of conspiracy determined statute's reach) (emphasis omitted); *see also Bridges v. United States*, 346 U.S. 209, 215, 221-22 (1953) (statute concerning the "defrauding of the United States" only applied "where fraud against the Government is an essential ingredient of the crime[,]" regardless of government's actual loss).

The same analysis applies here. Contrary to the government's claim, it is not enough that the bank holds the targeted property or suffers the actual loss of a scheme. Rather, because clause (1) textually specifies the bank as the requisite victim of the scheme to "defraud," the defendant must intend that the bank, not its customer, bear the monetary loss of a scheme to obtain deposits.[2] This may arise because the defendant believes that the bank owns the deposits targeted by the scheme or that the bank will reimburse its customer for these funds; in either case, the defendant intends that the bank pay out its *own* money and suffer

[2] The authority the government relies on from outside the fraud context, U.S. Br. 21-23, merely stands for the proposition that legally-recognized possessory rights in property may give rise to certain claims. Here, regardless of whether the bank actually has rights in the deposits targeted, clause (1) liability rests on the defendant's intent.

the loss. Conversely, if a defendant intends that the customer bear the loss of the fraud, then he does not intend to wrong the bank's property rights in those funds.

Here, the government had to prove that Shaw intended BofA, not Hsu, to bear the monetary loss of the scheme. Because the Ninth Circuit approved jury instructions that relieved the government of that burden, they were erroneous. *See supra* Part II.C.

B. The structure of § 1344 and the common understanding of deposits as customer property support the plain-meaning interpretation of clause (1).

Section 1344's structure also rebuts the government's view that a customer-deposit scheme reflects the requisite intent to defraud a bank because, it claims, there is no meaningful distinction between bank-held customer deposits and bank-owned property. Clause (1) and clause (2) punish different, though overlapping, crimes. While clause (1) requires intent to wrong a bank's own property rights, clause (2) requires intent to obtain *either* bank-owned *or* bank-held property. *Loughrin*, 134 S. Ct. at 2388-89. In this way, clause (2) distinguishes between (and covers) two distinct types of schemes. Pet. Br. 30-33.

That drafting decision is consistent with the common understanding of deposits as customer property held by the bank – not owned by the bank. Congress defines a "deposit" as money "received or held" by a

bank "for which it has given or is obligated to give credit[.]" 12 U.S.C. § 1813(l)(1). This Court, too, has described deposits as property "held" by the bank, and a customer as "owner" of the deposits. *See*, *e.g.*, *Anderson National Bank v. Luckett*, 321 U.S. 233, 236-38, 245, 249-52 (1944). The Court has also recognized that, even though a bank takes title to deposits, a "depositor does not think of himself as lending money to the bank." *Texas & Pacific Ry. Co. v. Pottorff*, 291 U.S. 245, 259 (1934). Rather, "from the point of view of most depositors[,]" "[s]afe-keeping" is the "chief" function of "deposit banking[.]" *Id*. The public thus "entrust[s]" its "assets and hard earnings" to banks. *FDIC v. Philadelphia Gear Corp*., 476 U.S. 426, 432-35 (1986) (FDIC created to "safeguard" customers' assets "against the possibility that bank failures would deprive them of their savings"). This common understanding of deposits as customer property is also reflected in the language we use when talking about the funds in our bank accounts. We "deposit" and "withdraw" our money; we do not "loan" it to the bank.[3]

Contrary to the government's claim, there is thus a critical distinction between bank-held customer deposits and bank-owned property in the eyes of Congress, the Court, and the public. Accordingly, intent to obtain customer deposits is not intent to obtain bank-owned property. Consistent with this view, this Court

[3] The facts of this case – where Hsu, not BofA, suffered loss – also comport with the common understanding of customer deposits. Indeed, Hsu testified that *his* property was taken – not the bank's. R. 340-42.

has characterized a scheme to obtain customer deposits as one that intends to obtain bank-held, as opposed to bank-owned, property within the meaning of clause (2). *Loughrin*, 134 S. Ct. at 2392.

The government's contention that bank-owned and bank-held property overlap *in fact* because a bank may both own and hold the same property misses the point. U.S. Br. 24. Congress's use of the disjunctive – schemes to obtain property "owned by, *or* in the custody and control of" a bank – plainly distinguished between schemes designed to target bank-owned and bank-held property. Although the property categories may actually overlap, it does not follow that *intent* to take bank-owned property is the same as *intent* to take bank-held property. Clause (2) makes clear they are not.

In this case, for example, it may be that BofA both owned and held Hsu's customer deposits. As Shaw has acknowledged, clause (2) easily covers his scheme because it was designed to obtain deposits from the custody of the bank. Pet. Br. 45-46. By proceeding under clause (1), however, the government assumed a more difficult burden to prove that Shaw intended to obtain bank-owned funds, given the general understanding of deposits as the customer's bank-held funds.

Where a scheme is designed unambiguously to target the bank's own property – such as check kiting, loan fraud, and bank embezzlement – proving intent to take bank-owned property is straightforward. Pet. Br. 42-44. The government asserts that these schemes are akin to customer-deposit schemes because they target

what is *in fact* the same pot of funds. U.S. Br. 11, 35. To the contrary, because the gravamen of § 1344 is intent, the key difference is that the paradigmatic clause (1) schemes lack any potential intended non-bank victim. That the bank is the *only* possible intended victim in check-kiting, loan-fraud, and bank-embezzlement schemes makes proof of clause (1)'s intent-to-defraud-a-bank element straightforward. Clause (2) remains the appropriate charge for customer-deposit and altered-check schemes that involve a non-bank victim, provided the requisite means of a false statement. Pet. Br. 42-44.

The express distinction in clause (2) between two types of schemes and the general understanding of deposits as bank-held customer property confirm that clause (1)'s intent to "defraud *a financial institution*" should be interpreted in accordance with its plain meaning to require intent to obtain bank-owned (not bank-held) property. The government contends that § 1344's legislative history is inconsistent with this interpretation of clause (1) because Congress intended § 1344, *as a whole*, to "reach a wide range of fraudulent activity" and thereby "protect the financial integrity of financial institutions[.]" U.S. Br. 13, 26-27 (internal quotation marks omitted). Of course, only the "most extraordinary" showing of contrary congressional intent could justify rejecting clause (1)'s plain meaning, and the government agrees that Congress did not discuss the scope of clause (1). *See Salinas v. United States*, 522 U.S. 52, 57 (1997) (internal quotation marks omitted); U.S. Br. 26. To the extent that the legislative history is

relevant, however, it supports Shaw's interpretation of clause (1) – which, together with clause (2), makes § 1344, *as a whole*, fully serve the articulated purpose.[4] Pet. Br. 34-47.

Indeed, the presence of both clauses reflects "belt-and-suspenders caution[.]" *See Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting). Although the overlap between the two clauses is "substantial[,]" *Loughrin*, 134 S. Ct. at 2390 n.4, often one clause will best fit a particular scheme, as clause (2) did here.

C. Clause (1), like clause (2), avoids banking-law technicalities given that intent is its "whole sum and substance."

The government complains that Shaw's construction of clause (1) will entangle courts in technical issues of banking law, making customer-deposit schemes

[4] The government also claims that Congress's rejection of economic-loss language undermines the plain-meaning interpretation of clause (1). U.S. Br. 41. Using language that Congress did not enact to override clear language that it did enact is inappropriate, particularly given that the drafting history suggests that the scheme-to-defraud text was chosen because Congress heeded the Justice Department's position that there was no "reason to abandon" the "settled" term "scheme to defraud," which had been interpreted by "countless court decisions[.]" *Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 4-5, 12 (1984) (testimony and statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division). If anything, this history thus supports Shaw's construction of clause (1) based on this Court's precedent. Pet. Br. 15-22.

"off limits" to prosecution. U.S. Br. 27-29, 42-44. This ignores clause (2), the appropriate charge where a scheme involves an intended non-bank victim, provided the requisite means. *See supra* Part III.B; Pet. Br. 44-46.

Although the government may still proceed under clause (1), it then invites a more difficult evidentiary burden, given the general understanding of deposits as customer property. If it elects this path, the government's best tools for meeting clause (1)'s requirement will be direct evidence of a particular defendant's intent that the bank (not its customer) bear the loss, such as statements by the defendant or co-conspirators in the course of the scheme or post-arrest. It will rarely, however, have good reason to delve into banking law. As the government itself acknowledges, the banking-law technicalities that govern the legal status of customer deposits and the apportionment of loss are unknown by "many citizens" and "even quite a few lawyers[.]" U.S. Br. 31, 43. They also fail to yield clear, predictable answers. U.S. Br. 27-29 & nn.5-7. Except perhaps in the rare case of a bank insider, these technicalities are not probative circumstantial evidence of a defendant's *intent* that the bank, rather than its customer, bear the loss of a fraud. *See United States v. Nkansah*, 699 F.3d 743, 750-51 (2d Cir. 2012) (no reasonable inference of requisite intent where "evidence of the state of mind is absent" and bank's exposure to loss not "sufficiently well-known" or "unclear, remote, or non-existent").

Still, if the government wants to present such evidence, it is well-equipped to do so. In this case, for example, after electing to proceed under clause (1), notwithstanding clause (2), it elicited testimony from a bank employee about the rules governing allocation of loss. R. 428-29. The government's summary of the loss-allocation rules here, U.S. Br. 27-29 & nn.5-6, illustrates that it could also present such information in the form of a jury instruction in an appropriate case. Indeed, courts, lawyers, and juries frequently deal with complex technical evidence and instructions.

In the end, the government does not dispute that any bank-fraud conduct will be provable under Shaw's plain-meaning interpretation of clause (1), or clause (2), or both – provided the government makes proper charging decisions. Pet. Br. 41-47; U.S. Br. 32. It also never disputes that clause (2) was the appropriate charge here, or that, so charged, its evidentiary burden would have been straightforward. Pet. Br. 45-46. Instead, having chosen the more difficult path of clause (1), the government asks the Court to reject the statute's plain meaning and lessen the burden it thereby took on. That is neither necessary nor appropriate.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and remand the case for proceedings consistent with its opinion.

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender
CENTRAL DISTRICT OF CALIFORNIA

KOREN L. BELL
Deputy Federal Public Defender
Counsel of Record

JAMES H. LOCKLIN
Deputy Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
321 East 2nd Street
Los Angeles, California 90012
Koren_Bell@fd.org
(213) 894-5312

Counsel for Petitioner

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