No. 19-1145

In the
Supreme Court of the United States

NG LAP SENG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
C. HARKER RHODES IV
MARIEL A. BROOKINS
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com
Counsel for Petitioner

June 9, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Decision Below Erroneously Extends §666 To The UN And Opens UN Officials To Prosecution 2

II. The Decision Below Ignores *McDonnell*'s Official Act Requirement Where It Is Needed Most 8

III. The Questions Presented Are Critically Important And Warrant Immediate Review 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Ankenbrandt v. Richards,
504 U.S. 689 (1992) 3

F. Hoffman-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004) 5

McDonnell v. United States,
136 S. Ct. 2355 (2016) ..... *passim*

Nixon v. Mo. Mun. League,
541 U.S. 125 (2004) 4

Return Mail, Inc. v. U.S. Postal Serv.,
139 S. Ct. 1853 (2019) 4

Skilling v. United States,
561 U.S. 358 (2010) 9

Statutes

1 U.S.C. §1 4

5 U.S.C. §4703(a) 5

12 U.S.C. §1701y 5

15 U.S.C. §78dd-2(h) 5, 7

15 U.S.C. §78dd-3(f) 5

16 U.S.C. §471h 5

18 U.S.C. §18 3

18 U.S.C. §201(a) 9

18 U.S.C. §666 1

18 U.S.C. §1343 9

18 U.S.C. §1951(a) 9

20 U.S.C. §9546(a) 5

22 U.S.C. §288 5

22 U.S.C. §288a(b) 5
33 U.S.C. §1254(*l*) 5
38 U.S.C. §2022(e)(2) 5
42 U.S.C. §5106(a)(1) 5
54 U.S.C. §304106(b) 5

Other Authorities

H.R. Rep. No. 95-640 (1977) 10
Justice Manual, *available at* https://bit.ly/32nOFQg (last visited June 8, 2020) 8
Petition, *Robles v. United States*, No. 19-912, 2020 WL 2515492 (May 18, 2020) 11
S. Rep. No. 98-225 (1983) 7

REPLY BRIEF

The government does not dispute that this prosecution of a foreign national for allegedly bribing foreign ambassadors to the United Nations (UN) to take amorphous steps to endorse a pro bono project was unprecedented. Nor does it deny the importance of the questions presented, as the Second Circuit's decision allows prosecutors to target both UN officials and foreign nationals who interact with them under 18 U.S.C. §666, which does not expressly reach public intergovernmental organizations, even though a related statute that expressly reaches such organizations pointedly excludes their officials. Nor does the government even try to explain why Congress would have bothered to amend the latter statute to expressly include public international organizations if they were already subject to even broader protection under 18 U.S.C. §666. The net result is a decision that allows prosecutors to target foreign nationals petitioning the UN for relief and UN officials all without showing any "official act."

That result is untenable. Congress knows how to write a statute to expressly include public international organizations like the UN, and it did not do so in 18 U.S.C. §666. Instead, Congress extended §666 only to an "organization or … State, local or Indian tribal government." The express inclusion of domestic governments makes clear that Congress did not use "organization" in its broadest sense. Indeed, even the government concedes that the statute does not reach foreign governments. But there is no greater reason to assume that Congress intended to reach "public intergovernmental organizations" like

the UN, especially when Congress has addressed such unique and diplomatically sensitive entities expressly in other statutes, including an anti-bribery statute specifically amended to reach such entities years after §666 was on the books. The government simply ignores that legislative chronology and offers only a gerrymandered rule of construction that is not even consistent with its own prosecutorial manual.

The government makes matters worse by endorsing a decision that holds that the official act requirement recognized in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), does not apply to either §666 or the Foreign Corrupt Practices Act. The need for that doctrine to avoid arbitrary prosecutions is only increased when it comes to international organizations and foreign governments, where there is even less certainty as to which actions are sufficient to justify prosecution. The government never suggests otherwise, but rather just presses a harmless error argument that is both incorrect and inadequate to insulate a decision that will vastly expand its prosecutorial powers in the jurisdiction where the UN is located and where the prosecutors are not bashful. This Court should not allow the extraordinarily dangerous decision below to stand.

I. The Decision Below Erroneously Extends §666 To The UN And Opens UN Officials To Prosecution.

The Second Circuit profoundly erred by construing §666 to reach the UN. As text, context, and settled canons of construction all confirm, in prohibiting bribery related to any federally funded "organization or … State, local or Indian tribal

government," Congress did not intend to capture public international bodies like the UN. Pet.14-20. When Congress means to regulate the agents of foreign governments and quasi-sovereign international entities, it says so expressly, and often provides immunity or excludes foreign officials to reduce any resulting diplomatic friction. No such express language appears here, and both canons of construction and the legislative chronology counsel against extending §666 to the UN and UN officials.

1. The government begins with the unremarkable points that the UN is a "person other than an individual," 18 U.S.C. §18, and "qualifies as an organization in ordinary speech," BIO.9. But the same is true of state, local, tribal, and foreign governments, all of which likewise possess "juridical personality," BIO.8, and constitute "organizations" in the broad sense of that term, *see, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) (referring to "state and local government organizations"). Thus, as even the Second Circuit recognized, it is crystal clear that Congress did not intend "organization" to take that broad meaning here, which would render the enumeration of "State, local, and Indian tribal governments" redundant. Pet.App.18-19. To avoid that redundancy, "organization" is best read to reach only private organizations, not foreign governments or public intergovernmental organizations.

The government responds that because the term "person" presumptively excludes governments, and "organization" is defined as a "person other than an individual," "organization" should be read to mean a *non-government* person other than an individual.

BIO.9. But that presumption does not lump the UN in with private organizations; it is just part of the broader canon that generic terms like "person" or "organization" should not normally be read to refer to *any* kind of public entity. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004); Pet.15. The last kind of public entity that should be captured by such a generic term is a unique and diplomatically sensitive public intergovernmental organization, like the UN. After all, the presumption flows from the "express directive" of the Dictionary Act, and the definition of "person" in that act provides a long list of *private* organizations—and excludes both government entities *and* public international bodies. *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1862 (2019) (citing 1 U.S.C. §1).

The government notes that a few other statutes—none of which imposes criminal or even civil liability—specifically refer to "private organizations." BIO.10. But the fact that Congress occasionally makes its meaning especially clear when dealing with eligibility for funding or consultation on federal policy does not undermine the settled rule that generic terms like "organization" should not lightly be interpreted to extend to public bodies—particularly in criminal statutes, and particularly when it comes to foreign governments and international bodies. In those latter contexts, potential criminal liability raises issues of immunity and diplomacy that should be addressed explicitly, not inadvertently through a generic reference to a person or organization. Moreover, while the government identifies a few statutes referencing "private organization," it has no answer for the countless statutes in which Congress has expressly covered both public and private organizations, all of

which would be redundant on its view. *See, e.g.*, 5 U.S.C. §4703(a); 12 U.S.C. §1701y; 16 U.S.C. §471h; 20 U.S.C. §9546(a)(1); 33 U.S.C. §1254(*l*); 38 U.S.C. §2022(e)(2); 42 U.S.C. §5106(a)(1); 54 U.S.C. §304106(b); Ng.CA.Br.19 & n.3 (listing 15 more examples).

2. The government has little to say about the rule that federal statutes should be interpreted "to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). The government does not dispute that when Congress intends to risk such interference by regulating intergovernmental entities like the UN, it does so explicitly, and either carves out UN officials entirely (as in the FCPA) or explicitly provides for immunity to reduce the ensuing diplomatic friction. *See, e.g.*, 22 U.S.C. §§288, 288a(b) (providing immunity for defined international organizations); 15 U.S.C. §§78dd-2(h)(B), 78dd-3(f)(B) (defining "public international organization" under FCPA as organizations designated under 22 U.S.C. §288 or by the President). The government likewise does not dispute that Congress took neither step in §666—presumably because Congress never consciously confronted the possibility that it would extend to the UN and UN personnel.

Instead, the government responds with the refrain of prosecutors throughout the ages: "just trust us," proclaiming that it is "up to the Executive Branch to determine whether the benefits of a particular prosecution outweigh the possibility of diplomatic friction." BIO.10-11. But this Court has been

rightfully loath to "construe a criminal statute on the assumption that the government will use it responsibly." *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016). Equally important, the government's response elides the critical anterior question whether Congress wanted to delegate the delicate task of weighing the diplomatic consequences of prosecutions of UN officials to the executive. Given that Congress has elsewhere provided that kind of explicit authority only when accompanied by immunities or exceptions for foreign officials, there is every reason to believe that §666 did not involve any implicit delegation to the executive to weigh diplomatic consequences.

3. As the petition noted at length, Pet.18-19, the government's effort to extend §666 to the UN *and* UN officials is irreconcilable with the legislative chronology that culminated in express extension of the FCPA to public intergovernmental organizations, but not the officials of those entities. Unable to reconcile its position with that chronology, the government simply ignores it, and notes only that "[r]edundancies across statutes are not unusual events." BIO.10. But the issue here is not mere overlap; it is that the government's view of §666 makes Congress' amendment of the FCPA to include "public international organizations" a fool's errand. If the government and the Second Circuit are correct, not only was that last-in-time exercise a waste of time (because public international organizations were already covered sub silentio under §666), but §666 already provided *broader* coverage by imposing criminal liability on the briber and bribee alike. Thus, expressly amending the FCPA to cover only the briber

of a public intergovernmental agency was pointless and, if anything, a retreat.

Dismissing that as a mine-run overlap will not do. It is impossible to believe that after carefully limiting the FCPA to foreign governments (not public international bodies) and to paying bribes (not recipients), Congress intended seven years later for §666 to cast those careful limitations aside and authorize diplomatically sensitive prosecutions of international officials without any indication to that effect in the statutory text or legislative history. Pet.18-19. And it is even harder to believe that 14 years after *that*, Congress would have specifically amended the FCPA to cover *only* the subset of public international organizations designated by the President under the International Organizations Immunities Act or the FCPA itself, *see* 15 U.S.C. §78dd-2(h)(2)(A)-(B), if it believed that §666 already criminalized bribery of all such organizations (and penalized the bribe-taking officials to boot).

4. The government concedes that numerous circuits have described §666 as applying to "private organizations." BIO.11; *see* Pet.20. But it brushes them aside because none "actually involved an international organization." BIO.11. But that only underscores the unprecedented overreach of this prosecution. The government likewise has no response to the legislative history of §666, which similarly describes the statute as applying to "private organizations." S. Rep. No. 98-225, at 369 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. Perhaps most telling, it does not explain—or even acknowledge—its own manual, which likewise states

that §666 criminalizes bribery related to "private organizations." Justice Manual §9-46.100, *available at* https://bit.ly/32nOFQg (last visited June 8, 2020).

The government does not respond to these problems because it cannot. As text, context, and settled canons of construction all confirm, Congress plainly did not intend §666 to empower the government to bring comity-endangering prosecutions seeking to impose domestic anti-corruption norms on an international public organization like the UN or its officials.

II. The Decision Below Ignores *McDonnell*'s Official Act Requirement Where It Is Needed Most.

The decision below not only extends §666 far beyond its intended scope, but eviscerates *McDonnell*'s official act requirement in a context where it is sorely needed, finding that constitutional limitation wholly inapplicable under both §666 and the FCPA. As this Court has often observed, federal anticorruption statutes can raise substantial constitutional and practical concerns, and must be carefully construed to avoid threatening public officials and their constituents with federal criminal liability for routine political interactions. Such concerns are at their zenith when it comes to foreign governments or international bodies, where norms and practices are quite literally foreign. The Second Circuit ignored this Court's warnings, adopting an interpretation of §666 and the FCPA that raises serious due process and international comity problems, and risks subjecting foreign officials to

federal prosecution for providing normal constituent services.

1. While the government vigorously argued below that neither §666 nor the FCPA requires an official act, its carefully worded opposition conspicuously avoids defending that proposition. The closest the government comes is to simply note that those statutes do not specifically use the term "official act." BIO.13. But neither do the provisions covering honest services fraud and Hobbs Act extortion, *see* 18 U.S.C. §§1343, 1951(a), under which McDonnell was convicted. Pet.27. This Court interpreted those statutes (with the government's agreement) to incorporate the "official act" provision of 18 U.S.C. §201(a)(3) because without that limitation they would be unconstitutionally vague. Pet.27; *cf., e.g.*, *Skilling v. United States*, 561 U.S. 358, 408 (2010).

So too here: Even if §666 and the FCPA do not use the term "official act," the official act requirement applies because that is the only way to ensure that a bribery prosecution under those statutes will comply with the Constitution. Pet.27-28. While Congress "may, of course, define the particular *quids* and *quos* prohibited" under federal anticorruption laws, BIO.13 (quoting Pet.App.37), it must define them in a way that meets constitutional requirements—and if it does not do so explicitly, then those requirements must be implied. *See McDonnell*, 136 S. Ct. at 2372-73; *Skilling*, 561 U.S. at 408. That is every bit as true for §666 and the FCPA as it is for the Hobbs Act. After all, the "basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their

concerns." *McDonnell*, 136 S. Ct. at 2372. Any statute that attempts to impose criminal sanctions for such interactions is necessarily fraught with constitutional peril—especially when its terms are broad enough to reach even "the most prosaic interactions." *Id.* at 2373.

Those concerns are especially prominent here, where the government prosecuted a foreign national for interactions with foreign ambassadors to the UN. Applying §666 to public international officials—with the threat of federal criminal prosecution if those officials accept payments that may be perfectly legal in their home countries—already threatens international comity in a way that Congress plainly never intended. *See supra* pp.5-7. But if §666 is to apply to UN officials, both it and the FCPA must provide precise standards that will allow those foreign international officials to structure their conduct to avoid federal criminal liability. After all, it is not at all clear what actions by the UN or its officials should qualify as an impermissible *quo*, especially since interactions that "may be reprehensible in the United States … are not necessarily so viewed elsewhere in the world." H.R. Rep. No. 95-640, at 8 (1977).

2. Rather than defend the official act holding that it procured, the government asserts only that this would be a poor vehicle to review that question because, in its view, the official act requirement was met here. BIO.13-16.[1] That claim is untenable. The

[1] The government also suggests that this Court has denied petitions seeking review of whether §666 requires an official act. BIO.12. That suggestion is disingenuous. The petitions it cites have nothing to do with whether the official act requirement

district court gave no official act instruction on the FCPA charges, and its official act instruction on the §666 charge was fatally flawed. Pet.35. Instead of requiring a decision or action on a "specific and focused" *question or matter* that "involve[s] a formal exercise of governmental power," *McDonnell*, 136 S. Ct. at 2372, it transferred those qualifying phrases to the necessary "decision or action" and placed no meaningful limitation on what underlying "question or matter" could qualify. C.A.App.1422.

That error was amplified by the government's case at trial, which centered on four purported "official acts"—a document on UN letterhead, a visit to Macau, letters of support, and the "pro bono agreement"—that related at best to the generic question of whether the UN should provide "formal UN support" for the planned convention center, a question far too abstruse to satisfy the *McDonnell* standard. Pet.10-11, 34-35. And while the government now tries to back away from its invitations to convict on a legally deficient theory, there is simply no denying that it repeatedly told the jury not that visits and letters were *evidence* of official acts, but that they *were* official acts, simply because they were taken in an "official capacity." C.A.App.1333.

In short, the government repeatedly urged the jury to convict based on legally insufficient acts, and

---

applies to §666; indeed, two were filed before *McDonnell* was decided. BIO.12. Those petitions instead ask whether §666 requires proof of a specific *quid pro quo*—that is, whether the government must prove that a bribe was exchanged for a particular act. *See, e.g.*, Petition at i, *Robles v. United States*, No. 19-912, 2020 WL 2515492 (May 18, 2020).

the instructions permitted the jury to do so. That eliminates any confidence that the failure to require the official act *McDonnell* demands was "harmless beyond a reasonable doubt." *McDonnell*, 136 S. Ct. at 2375. Particularly given that the government urged the Second Circuit to resolve the broader legal question rather than just rest its holding on harmless error, the Second Circuit's gratuitous harmless error analysis should not insulate from review a holding that has sweeping implications for the jurisdiction in which the UN is located and corruption prosecutions are most commonly brought.

III. The Questions Presented Are Critically Important And Warrant Immediate Review.

As the government tacitly concedes, the questions presented are enormously important. The government does not contest the significant impact the decision below will have, by empowering federal prosecutors to bring anti-corruption charges that risk serious injury to international comity, federalism, and political discourse. The government does not deny the especially pressing need for review given that the decision below comes from the Second Circuit, where the UN is headquartered, exacerbating the potential threat to foreign interests and the risk of prosecutorial overreach. Pet.36. And the government has no response to the significant impact the decision below will have on federal anti-corruption prosecutions, by effectively rendering *McDonnell* a dead letter as long as the prosecutor makes the right charging decisions. Pet.36. This Court should grant certiorari and reverse the Second Circuit's unsupportable holdings.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
C. HARKER RHODES IV
MARIEL A. BROOKINS
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com
Counsel for Petitioner

June 9, 2020