No. 17-6560

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HOWARD BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the federal-funds bribery statute, 18 U.S.C. 666, exceeds Congress's authority under Article I of the Constitution as applied to petitioner's bribery of employees of a city agency that received millions of dollars in federal funds.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 694 Fed. Appx. 184.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2017. The petition for a writ of certiorari was filed on October 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiracy to commit federal-funds bribery, in violation of 18 U.S.C. 371, and two counts of bribery of an agent of a local government receiving federal funds, in violation of 18 U.S.C. 666(a)(2). He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A4.

1. Petitioner owned a commercial trash-hauling service that contracted with businesses to provide dumpsters, which petitioner periodically picked up and emptied at a landfill owned and operated by the City of Baltimore. The City's Department of Public Works (DPW) oversaw the administration of the landfill. Commercial trash haulers were required to pay a disposal fee for each load of trash they dumped at the landfill. Between 2001 and 2015, petitioner bribed DPW employees to allow him to use the landfill without paying the disposal fee. The DPW lost approximately $1,440,000 in revenue as a result of petitioner's scheme. Gov't C.A. Br. 3-10.

The City received financial assistance from the federal government that far exceeded $10,000 each year. The DPW specifically received millions of dollars in federal funds (including more than $10,000 per year) through loans and block grants from the Army Corps of Engineers, the Department of Housing and Urban Development, and the Environmental Protection Agency. Gov't C.A. Br. 11-12, 31.

2. A federal grand jury returned an indictment charging petitioner with conspiracy to commit federal-funds bribery, in violation of 18 U.S.C. 371, and two counts of bribery of an agent of a local government receiving federal funds, in violation of 18 U.S.C. 666(a)(2). Indictment 1-13, 32-33. Section 666 makes it a crime to give or offer "anything of value" to a person with intent to "influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions * * * involving anything of value of $5,000 or more" if the "organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(a)(2) and (b).

The conspiracy count alleged that during the relevant period, the "DPW received benefits in excess of $10,000 annually under a Federal program involving * * * Federal assistance, including grants and loans from the Environmental Protection Agency." Indictment 2. The substantive counts alleged that petitioner made cash payments to "an agent of DPW, a local government agency that received more than $10,000 of Federal benefits in a one-year period, with the intent to influence and reward that agent in connection with * * * transactions of the DPW involving $5,000 or more, that is, the collection of waste disposal fees at the Landfill." Indictment 32-33.

Petitioner moved to dismiss the indictment on the ground that Section 666 is unconstitutional on its face and as applied to his conduct. C.A. App. 44-52, 76-78, 668-669. Petitioner contended that the prosecution was not "constitutionally viable" because the government could not show a "nexus between federal funding and the [landfill]." Id. at 77-78. Petitioner also joined his co-defendant's motion, which argued that application of Section 666 in this case violated the Tenth Amendment. Id. at 50-51, 668-669. The district court denied the motion to dismiss. Id. at 669. A jury found petitioner guilty of the charged offenses. Pet. App. A2.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A4. The court observed that petitioner had conceded that his facial challenge to Section 666 was foreclosed by Sabri v. United States, 541 U.S. 600 (2004). Pet. App. A2; Pet. C.A. Br. 6-7, 10-11. And the court rejected petitioner's contention that Section 666, as applied to the bribery scheme in this case, exceeded Congress's power under the Spending Clause and the Necessary and Proper Clause. Pet. App. A2-A3. The court found his argument "that his indictment is constitutionally infirm because it failed to allege a nexus between [his] bribery and the federal funds" received by the DPW to be foreclosed by

Sabri, which had rejected the contention that, "to qualify as a valid exercise of Article I power, [Section 666] must require proof of connection with federal money as an element of the offense." Id. at A2-A3 (quoting Sabri, 541 U.S. at 605). The court also rejected petitioner's contention that the indictment did not "include sufficient allegations that the federal funds involved qualify as federal 'benefits' under [Section] 666(b)." Id. at A3.

Finally, the court of appeals rejected petitioner's contention that application of Section 666 to his conduct violated the Tenth Amendment. The court explained that, although "the bribes at issue implicate local interests," the federal government "has an interest in ensuring that recipients of benefits do not misuse funds, directly or indirectly." Pet. App. A3 (citing Sabri, 541 U.S. at 605-606). The court also noted that Congress had ensured that Section 666 only reaches crimes that implicate a federal interest "sufficient to warrant federal intervention" because it "'condition[ed] the offense on a threshold amount of federal dollars.'" Ibid. (quoting Sabri, 541 U.S. at 606).

ARGUMENT

Petitioner renews his contention (Pet. 8-22) that 18 U.S.C. 666 is unconstitutional as applied to his bribery scheme. The court of appeals correctly rejected that contention, and its nonprecedential decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. Section 666 prohibits the payment of bribes to, or the acceptance of bribes by, "state, local, and tribal officials of entities that receive at least $10,000 in federal funds." Sabri v. United States, 541 U.S. 600, 602 (2004). Section 666 "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." Id. at 607 (quoting Salinas v. United States, 522 U.S. 52, 58 (1997)). The statutory language reflects "Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs." Fischer v. United States, 529 U.S. 667, 678 (2000). Consistent with that broad purpose, Section 666 applies to any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof," 18 U.S.C. 666(a)(2), if "the organization, government, or agency receives in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," 18 U.S.C. 666(b).

In Sabri, this Court rejected the contention that Section 666 exceeds Congress's Article I power because it does not "require proof of connection with federal money as an element of the offense." 541 U.S. at 605. The Court explained that "Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare." Ibid. The Court added that Congress has "corresponding authority under the Necessary and Proper Clause * * * to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." Ibid.

The Court acknowledged that "not every bribe or kickback offered or paid to agents of governments covered by [Section] 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant." Sabri, 541 U.S. at 605-606. But the Court emphasized that "this possibility portends no enforcement beyond the scope of the federal interest." Id. at 606. The Court reasoned that corruption involving the recipients of substantial amounts of taxpayer dollars affects a federal interest even if it does not directly affect funds traceable to the federal fisc, because "[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value." Ibid.[1]

[1] The Court in Sabri was unanimous in holding that Section 666 is within Congress's Article I power. Justice Thomas concurred in the judgment, explaining that he would not reach the question whether the statute is within Congress's power under the Spending Clause and the Necessary and Proper Clause because Section 666 "is a valid exercise of Congress's power to regulate commerce" as

2. Although the defendant in Sabri styled his challenge to Section 666(b) as "facial," 541 U.S. at 604, this Court's analysis and holding likewise foreclose petitioner's as-applied challenge. Petitioner contends (Pet. 8) that Section 666 exceeds Congress's authority under the Spending and Necessary and Proper Clauses because it does not "require[] any nexus between the program affected by the alleged criminal conduct and the alleged federal funds." In other words, petitioner appears to assert that Section 666 is unconstitutional as applied to his bribery scheme because the government failed to allege some unspecified "nexus" between the federal funds paid to the DPW and the landfill operation directly affected by his crime.

This Court rejected that sort of nexus requirement in Sabri, emphasizing that "[l]iquidity is not a financial term for nothing" and that "money can be drained off here because a federal grant is pouring in there." 541 U.S. at 606. The Court thus held that "[i]t is certainly enough" to bring Section 666 within Congress's authority that the statute "condition[s] the offense on a threshold amount of federal dollars defining the federal interest." Ibid. Sabri thus holds that Section 666 is within Congress's Article I authority even in cases where the bribery of a corrupt official cannot be shown to have had a specific effect on federal funds. And Sabri likewise answers petitioner's assertion that Section 666

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interpreted by this Court's decisions. Sabri, 541 U.S. at 611; see id. at 614.

can constitutionally be applied only to conduct that implicates a "legitimate interest cognizable under Article I, § 8." Pet. 9, 14-16 (quoting Sabri, 541 U.S. at 605) (emphasis omitted). The Court emphasized that Section 666's prohibition of certain bribes that lack a direct link to federal funds "portends no enforcement beyond the scope of the federal interest" because that interest is "defin[ed]" by "a threshold amount of federal dollars" received by the affected organization. Sabri, 541 U.S. at 606.

This case fits squarely within the scope of the Court's decision in Sabri. During a scheme spanning more than a decade, petitioner bribed employees of the DPW, an agency of the City of Baltimore that received millions of dollars in federal benefits, including funds for stormwater and wastewater management projects. Gov't C.A. Br. 11-12, 30-31; see C.A. App. 581-590, 604-605, 609-629. Petitioner's bribery scheme cost the DPW approximately $1,044,225 in lost trash-disposal fees. Gov't C.A. Br. 10. That lost revenue reduced the amount of money that the DPW had available to fund its activities, including the projects for which it had received federal funds. See C.A. App. 581. The application of Section 666 to petitioner's bribery scheme was thus well within the congressional authority recognized in Sabri to "safeguard the integrity of the state, local, and tribal recipients of federal dollars." 541 U.S. at 605; see ibid. ("Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity.”).[2]

3. The court of appeals’ nonprecedential decision does not conflict with any decision of another court of appeals.

a. Petitioner frames the question presented solely in constitutional terms, asking this Court to grant certiorari to decide (Pet. i) whether Section 666, as applied here, is within Congress’s authority under “the Spending Clause and Necessary and Proper Clause.” Petitioner does not assert that there is any conflict among the circuits on that question. To the contrary, the courts of appeals have uniformly rejected similar as-applied challenges to Section 666 and “declined to require any connection between federal funds and the activity that constitutes a violation of [Section] 666” beyond the statutory requirement that the

[2] Petitioner briefly contends (Pet. 17-18) that the application of Section 666 to his scheme violates the Tenth Amendment. But this Court has held that in cases that do not involve commandeering of state governments or officials, the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” United States v. Darby, 312 U.S. 100, 124 (1941). “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” New York v. United States, 505 U.S. 144, 156 (1992). Petitioner does not and could not contend that Section 666 presents any commandeering problem. Accordingly, the conclusion that the statute lies within Congress’s Article I power also establishes that it does not violate the Tenth Amendment under this Court’s precedents. See United States v. Comstock, 560 U.S. 126, 144 (2010) (“Virtually by definition,” Congress’s “enumerated powers listed in Article I” and its “implementation authority granted by the Necessary and Proper Clause” are “not powers that the Constitution ‘reserved to the States.’”).

affected entity received more than $10,000 in federal benefits. United States v. Hines, 541 F.3d 833, 836 (8th Cir. 2008), cert. denied, 555 U.S. 1200 (2009). For example, the Eleventh Circuit rejected the contention that Section 666 exceeds Congress's authority as applied "to local government employees who have no authority over federal funds." United States v. Keen, 676 F.3d 981, 991 (11th Cir.), cert. denied, 568 U.S. 999 (2012).[3]

b. Petitioner asserts (Pet. 8, 16-22) that the court of appeals' decision conflicts with two decisions of the Eleventh Circuit. But those decisions did not hold Section 666 unconstitutional in any of its applications; instead, they interpreted Section 666's statutory requirement that the affected organization must have received, "in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. 666(b). Neither decision imposed the sort of nexus requirement that petitioner seeks to impose here, and neither suggests that Section 666 would not apply on the facts of this case.

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[3] See, e.g., United States v. Caro-Muñiz, 406 F.3d 22, 27 (1st Cir. 2005) ("We * * * join our sister circuits in holding that the government is not required to prove a nexus between the bribery charged and the municipality's receipt of federal funds."); United States v. Kranovich, 401 F.3d 1107, 1111-1112 (9th Cir. 2005) ("We * * * hold the government was not required to establish any connection between the embezzled funds and a federal interest, apart from the express requirement in [S]ection 666(b) that the County received federal benefits in excess of $10,000."); United States v. Spano, 401 F.3d 837, 840 (7th Cir. 2005) ("Sabri held [Section] 666(a)(2) to be facially constitutional and found that no nexus between the bribe and federal funds is required.").

In United States v. McLean, 802 F.3d 1228 (2015), the Eleventh Circuit determined that the government failed to present sufficient proof that an organization that indirectly received federal funds received "benefits" within the meaning of Section 666(b). The court concluded that the government must prove that the federal program under which federal funds were provided had a "sufficiently comprehensive 'structure, operation, and purpose' to merit characterization of the funds as benefits under [Section] 666(b)." Id. at 1243 (citation omitted). McLean involved a community-development organization that did not receive federal funds directly. Instead, the government argued that a city "received federal funds" and then "transferred, in one form or another, federal funds" to the organization. Ibid. The court rejected that evidence as insufficient because the government "failed to establish a connection to any identifiable federal program so that its 'structure, operation, and purpose' could be reviewed to permit a determination that the funds qualified as a federal benefit." Ibid.[4]

[4] The court in McLean stated that its scrutiny of the evidence to determine whether the government proved each element of the federal bribery offense "ensure[d] that the government [wa]s not prosecuting an act of state bribery." 802 F.3d at 1231; see id. at 1230 (addressing "the limits of a federal criminal statute to ensure the statute comports with the Constitution"). But the court acknowledged that Section 666 did not require the government to show a nexus between the criminal activity and federal funds. Id. at 1236 (citing Sabri). The court also did not mention, much less question, its prior decision in Keen holding that Section 666 is constitutional, even when read broadly to accomplish "Congress'

The defendant in the other case cited by petitioner, United States v. Doran, 854 F.3d 1312 (11th Cir. 2017), was convicted of embezzling property from an organization that received federal funds, in violation of 18 U.S.C. 666(a)(1)(A)(ii). Without addressing the constitutionality of Section 666, the Eleventh Circuit found that the government had failed to prove that the organization that was "the target of the embezzlement" received federal benefits, finding that the organization "received no federal funding, directly or indirectly." 854 F.3d at 1315.

The Eleventh Circuit's statutory holdings in McLean and Doran do not support petitioner's assertion (Pet. 8) that the Constitution requires the government to establish a "nexus between the program impacted by the alleged criminal conduct and the alleged federal funding." Instead, the only nexus at issue in those cases was the statutory requirement that the government prove that the affected organization received "benefits in excess of $10,000 under a Federal program." 18 U.S.C. 666(b). And whatever the merits of the Eleventh Circuit's interpretation and application of that requirement in McLean and Doran, those decisions do not conflict with the court of appeals' decision in this case. The Eleventh Circuit requires (1) proof that the affected organization received at least $10,000 in federal funds, and (2) sufficient evidence of the "'structure, operation, and

clear objective of ensuring the integrity of entities receiving substantial sums of federal funds." 676 F.3d at 991.

purpose'" of the relevant federal program to establish that those funds are "benefits" under Section 666(b). Doran, 854 F.3d at 1318 (citation omitted). Those requirements were amply satisfied here, and petitioner does not argue otherwise.[5] The evidence showed that the DPW received more than $10,000 in federal funds each year through "comprehensive" programs and that the agency used those funds to carry out the purposes for which the funds were provided. See, e.g., C.A. App. 582-583 ($45,000 check from Department of the Army payable to DPW's director of finance); id. at 609-610 (agreement under which Army Corps of Engineers reimbursed portion of construction costs for "waste water and storm water infrastructure"). Petitioner thus provides no reason to think that the result of this case would have been different had it been litigated in the Eleventh Circuit -- much less that any circuit conflict exists on the question presented in the petition.

[5] Even in the court of appeals, petitioner did not challenge the government's proof that the federal payments to the DPW qualified as "benefits" under Section 666(b). Instead, he argued only that "the indictment d[id] not include sufficient allegations that the federal funds involved qualify as federal benefits." Pet. App. A3 (emphasis added; internal quotation marks omitted). The court of appeals' rejection of that argument does not conflict with the Eleventh Circuit's decisions in McLean and Doran for the additional reason that those decisions addressed the amount of evidence that the government must offer at trial, not the allegations that must be included in the indictment. See Doran, 854 F.3d at 1316; McLean, 802 F.3d at 1243.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

NINA GOODMAN
Attorney

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