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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES E. SNYDER,)

Petitioner,)

v.) No. 23-108

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Monday, April 15, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

COLLEEN R. SINZDAK, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-108, Snyder versus United States.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

Section 666 applies to 19 million state, local, and tribal officials and anyone else whose employer receives federal benefits, including 14 million Medicare-funded healthcare workers. Congress did not plausibly subject all of these people to 10 years in prison just for accepting gifts, especially when federal officials face only two years for accepting gifts under 201(c).

666 punishes corruptly receiving anything of value intending to be influenced or rewarded. "Corruptly intending to be influenced" covers classic bribes where officials get upfront payments in exchange for official conduct, while "corruptly intending to

1 be rewarded" covers bribes paid after the fact
2 and to officials who aren't actually influenced.

3 The government argues "corruptly"
4 under 666 means wrongful, immoral, depraved, or
5 evil. But the government tried this case and
6 countless others on the theory that "corruptly"
7 just meant knowingly. Regardless, the
8 government's new definition is implausible and
9 stunningly vague.

10 No gratuity statute, that's none
11 whatsoever, uses the word "corruptly" and for
12 good reason. The government can't tell you what
13 gifts are corrupt -- are corrupt. What gift is
14 too much for the doctor who saves your life? Is
15 pornography an immoral gift?

16 The federalism and due process
17 implications of the government's view are
18 gob-smacking. All states prohibit bribery, but
19 localities and states take an -- infinite
20 approaches to gifts and outside compensation.

21 Affirmance would let federal
22 prosecutors second-guess all of these judgments.
23 Meanwhile, state and local officials will have
24 no way of knowing what gift would subject them
25 to 10 years in prison. Remember, extensive

1 guidance tells federal employees that accepting
2 anything over \$20 is a crime.

3 It would be downright Kafkaesque to
4 subject state and local officials to a
5 standardless and severe regime where federal
6 interests are at their weakest.

7 I welcome questions.

8 CHIEF JUSTICE ROBERTS: Ms. Blatt, if
9 I find a lost pet and return it to the owner and
10 the owner's grateful and gives me \$10, that's a
11 reward, right, even though nothing else happened
12 in advance between the owner and -- and me?

13 MS. BLATT: So, yes, divorced from,
14 you know, a crime that makes it a corrupt --
15 corruptly giving something of value intending to
16 be rewarded, the word "reward," just divorced
17 from text of a statute, context, common sense at
18 least in this case, sure, "reward" can mean both
19 a bribery and -- a quid pro quo bribery and a
20 gratuity.

21 And we think it's very significant in
22 all the statutes that use "reward" to mean
23 gratuities, they're vastly different in four
24 respects here. They all say, when "reward" is
25 used to mean gratuities -- these are cited at

1 page 31 of our brief. They make clear that no
2 quid pro quo payment is required. They say you
3 can't receive any authorized fee or
4 compensation.

5 Also, there are 13 gratuity statutes
6 identified in the brief. Virtually all of them
7 have no express mens rea whatsoever. They have
8 vastly lower penalties. And they almost
9 exclusively apply to federal officials. And I
10 think that just highlights that gratuity
11 statutes are generally prophylactic rules where
12 the government has a direct interest.

13 And at least here, to use "corruptly"
14 in a gratuity statute would make this statute a
15 unicorn. It literally has no accepted meaning.
16 It doesn't exist in any other statute. I don't
17 think anyone knows what a corrupt gratuity is.

18 JUSTICE KAGAN: But if -- I -- I would
19 think that demanding mens rea would cut against
20 you. In other words, if you add in demanding
21 mens rea to the statute, one will have less fear
22 that the statute is going to be applied in an
23 overbroad way. So you're using that on your
24 side, but I would think that it's really the
25 government's argument.

1 MS. BLATT: No. Government -- mens
2 rea can't help you if it's standardless and has
3 no -- no meaning and just leaves it up to a jury
4 and, I guess, federal prosecutors.

5 JUSTICE KAGAN: So your view is
6 dependent on the vagueness of the standard? If
7 we just knew that it was a serious, a demanding
8 mens rea standard, then it would cut for the
9 government?

10 MS. BLATT: No, it's not just that
11 it's vague. It's also unheard of and
12 ahistorical. And I just don't think the
13 government's story holds up. The government's
14 story is, hey, in 1986, we had this gratuity
15 language when we add the word "corruptly."

16 But that, of course, is not true. You
17 had a statute that was identical to Section
18 201(c) that was a gratuity statute. And the
19 government -- the Congress did not just sneak in
20 the word "corrupt." They deleted that statute
21 in toto, hook, line, and sinker, and added
22 "corruptly intending to be influenced, rewarded"
23 in a way that looks much more like the 201(b)
24 bribery statute.

25 JUSTICE SOTOMAYOR: I'm sorry, I

1 thought the original 666 covered gratuities, and
2 what Congress then did is, instead of copying
3 the bribery statute, 201(a), it decided to copy
4 the gratuity statute, 201(c).

5 So, if they intended bribery, why
6 didn't they just copy the statute that meant
7 bribery?

8 MS. BLATT: So, in 1984, the statute
9 read you can't give or accept anything for or
10 because official conduct. And that is the
11 gratuity statute. That language got deleted in
12 toto.

13 JUSTICE SOTOMAYOR: Well, but that's
14 the point. Why not borrow then the language
15 from 201(a) -- from 201(b) -- I'm sorry --
16 instead --

17 MS. BLATT: 201(b).

18 JUSTICE SOTOMAYOR: -- (b) instead of
19 (c). I said (a), but I meant (b).

20 MS. BLATT: And our point is it looks
21 a lot like, more 201(b), which is -- has the
22 "corruptly intending to be influenced." And I
23 just don't think the story is that adding --

24 JUSTICE SOTOMAYOR: But they had that
25 language, but they chose something broader and

1 different. And so I don't understand.

2 MS. BLATT: I don't think it's broader
3 at all, and let me see if I can be clear on
4 this. 201(b) is very different. The Court in
5 McDonnell said you can actually be convicted if
6 you don't have any intent to be influenced under
7 bribery.

8 But, under this statute, 666, the
9 government has --

10 JUSTICE SOTOMAYOR: They didn't have
11 McDonnell in front of them, so I don't know what
12 that has to do with anything.

13 MS. BLATT: Well, let me -- let --

14 JUSTICE SOTOMAYOR: They -- they had
15 clear bribery language in 201(b), and, instead,
16 they chose something closer to the gratuity
17 language of 201(c).

18 MS. BLATT: So it doesn't look
19 anything like 201(c) and every -- nor any other
20 gratuity statute in the U.S. Code.

21 JUSTICE SOTOMAYOR: All right. Can I
22 go to the disparity that you were talking about?

23 MS. BLATT: Mm-hmm.

24 JUSTICE SOTOMAYOR: 666, when it was
25 clearly a gratuity, had 10-year statute --

1 penalty. So it was always disparate from other
2 statutes involving federal officers.

3 So what do I take from that?

4 MS. BLATT: Well --

5 JUSTICE SOTOMAYOR: Meaning you say
6 that Congress couldn't have intended to treat
7 state from federal officials differently. But
8 it always did.

9 MS. BLATT: Well, all --

10 JUSTICE SOTOMAYOR: It did before it
11 amended 666.

12 MS. BLATT: I wouldn't consider two
13 years always. It was a short-lived statute that
14 was immediately deleted. So -- and I don't even
15 know if the government had any prosecutions.

16 But if I could just finish my answer
17 on what I don't think the government has a
18 response to, if a jury finds that a official was
19 not influenced because he would have taken the
20 same vote anyway, the jury has to acquit if the
21 statute had just said "intending to be
22 influenced." And so "intending to be rewarded"
23 is absolutely critical in this statute, and that
24 is not the case of the federal bribery statute.
25 This statute actually requires either an intent

1 to be influenced or an intent to be rewarded.

2 The other thing I can say about the
3 disparate penalties is that no other statute in
4 the U.S. Code puts gratuity on par with bribery.
5 And the government's -- under the government's
6 view, you'd never ever have to either charge,
7 much less prove, an intent to influence because,
8 under their view, any payment that is an intent
9 to reward under their reading renders any need
10 to prove intent to influence completely
11 superfluous, irrelevant, and unnecessary.

12 And that is an outlier in -- in
13 history and in the U.S. Code.

14 JUSTICE JACKSON: Can I ask you --

15 JUSTICE SOTOMAYOR: But --

16 JUSTICE JACKSON: -- why -- oh, sorry.

17 JUSTICE SOTOMAYOR: I'm sorry, go
18 ahead.

19 JUSTICE JACKSON: Why do you keep
20 saying that this doesn't look like anything
21 else? I'm looking at 215.

22 MS. BLATT: Mm-hmm.

23 JUSTICE JACKSON: And it uses almost
24 exactly the same language. It has "corrupt,"
25 "corruptly." It has "giving, offering,

1 promising anything of value to a person with the
2 intent to influence or reward." When I look at
3 the legislative history of 215, it says -- or
4 666 says that it's modeled off of 215. And
5 215's legislative history says it includes
6 gratuities.

7 So I'm just trying to understand what
8 you mean about this not looking like anything
9 else.

10 MS. BLATT: Of course. Let me take on
11 Section -- Section 215. So you're -- you're
12 right, the -- the -- the wording is quite
13 identical, and the only court to address the
14 issue has held 215 is a bribery statute.

15 But, on the legislative history, to be
16 sure, a footnote in the legislative history of
17 Section 215 mentions that that statute applies
18 to gratuity.

19 But, if we're going to rely on
20 legislative history, I'll take the footnote in
21 the legislative history of Section 666 itself.
22 When it references the Section 215 statute, it
23 only refers to bribery.

24 But now we're really going to be
25 worrying over footnotes in legislative history,

1 I'll -- I'll take ours.

2 But the -- the other thing I would say
3 about 215, which is extraordinary, is that there
4 is a provision, I think it's 215(d), that says
5 -- orders federal agencies to give guidance.

6 So every federal agency has issued
7 extensive guidance to bank officials. There's
8 massive guidance, of course, to federal
9 officials. There is no such guidance, and had
10 the government issued guidance, it would just
11 make the federalism implications all the more
12 bizarre.

13 So bank officials are told here's what
14 you can and cannot do, and there's no -

15 JUSTICE JACKSON: And are they told
16 you can -- you can accept gratuities in the 215
17 context?

18 MS. BLATT: The -- the guidelines
19 which were promulgated after Section 666 was
20 passed, but, again, I --

21 JUSTICE JACKSON: No, I'm sorry,
22 what's the answer to --

23 MS. BLATT: The guidelines do --

24 JUSTICE JACKSON: -- can they accept
25 --

1 MS. BLATT: -- the guidelines do
2 assume that 215 applies to gratuities.

3 JUSTICE JACKSON: Okay. And the --

4 MS. BLATT: And that is the
5 government's --

6 JUSTICE JACKSON: -- the language is
7 identical to 666, correct?

8 MS. BLATT: Correct. But the only
9 court -- no court has held that Section 215
10 applies to gratuities. It's got a 30-year
11 sentence. And even if you did think it did, I
12 would say the title at least mentions gifts.
13 The legislative history says it means gifts.
14 And there is a provision for guidance. None of
15 those three things are true under Section 666.

16 The title says bribery. The
17 legislative history only mentions bribery. And
18 there's no guidance. And it is truly
19 unthinkable -- unthinkable that officials would
20 not know what type of -- of -- of gift is
21 corrupt. They -- even a gift basket, I don't
22 know where on the Harry & David menu the gift
23 becomes corrupt. It --

24 JUSTICE JACKSON: Well, that's -- go
25 ahead.

1 MS. BLATT: It ends at 319, it starts
2 at 1999.

3 JUSTICE BARRETT: Ms. Blatt, can I ask
4 you, so you're referencing some of the horribles
5 and your brief points out, you know, the Harry &
6 David gift baskets, the -- the -- the tip, the
7 gift card to your garbage collector, that sort
8 of thing.

9 Can you point to any actual
10 prosecutions or convictions even that have
11 pursued those kinds of --

12 MS. BLATT: Just -- just two --

13 JUSTICE BARRETT: -- troubling --

14 MS. BLATT: -- in our reply brief.

15 And I don't know if they reached a conviction.
16 But somebody was charged for soliciting
17 donations to a sports league, and then another
18 defendant was charged for having -- having
19 plaques and luncheon for female judges and that
20 was considered it.

21 But this Court -- I mean, there's just
22 legions of cases that say you're not going to
23 interpret a statute with crazy breadth on the
24 trust me assumption of federal prosecutors.

25 JUSTICE SOTOMAYOR: Doesn't the --

1 JUSTICE BARRETT: And what about --
2 oh.

3 JUSTICE SOTOMAYOR: I'm sorry.

4 JUSTICE BARRETT: Just one other
5 question. So, you know, federalism breadth
6 aside, you also point out that for private
7 entities that take federal funds -- and this
8 would also channel into them -- apart from the
9 pandemic money, are there other reasons to think
10 that federal funds would pull private entities
11 into this?

12 MS. BLATT: Yes. You held in Fischer
13 that it covers Medicare, which is one of the
14 largest industries in this country. It covers
15 every nurse, doctor, orderly, anyone in the
16 hospital.

17 JUSTICE BARRETT: But restaurants and
18 some of the -- yes, hospitals, of course.

19 MS. BLATT: It covers any grantee, and
20 I think we gave in the brief, literally Google
21 government grantees, and there's just tons and
22 tons, Lockheed, lobster --

23 JUSTICE SOTOMAYOR: I'm sorry, doesn't
24 the nexus requirement get rid of most of this?
25 The tax collector, the person who just says

1 thank you generally.

2 MS. BLATT: I -- I don't --

3 JUSTICE SOTOMAYOR: The -- the nexus
4 requirement says that the gratuity must be "in
5 connection with any business transaction or
6 series of transactions of a covered" -- "covered
7 entity involving anything of value of 5,000 or
8 more."

9 MS. BLATT: Right.

10 JUSTICE SOTOMAYOR: The trash
11 collectors, not having anything to do with 5,000
12 or the contract itself.

13 MS. BLATT: The doctor who removes
14 your wart, fine. But the doctor who takes your
15 gallbladder out or does your face, like my
16 plastic surgeon, no, that's worth over 5,000.

17 (Laughter.)

18 MS. BLATT: Well, no, seriously --

19 JUSTICE GORSUCH: I -- I -- I -- I --

20 MS. BLATT: -- I'm not even joking.
21 Snow removal is worth over 5,000. Writing a
22 letter for your kid to get into college, that's
23 priceless. There are -- I could go on and on
24 and on. The --

25 JUSTICE SOTOMAYOR: But it still has

1 to have a nexus to that contract.

2 MS. BLATT: Yes, and people give gifts
3 all the time to nurses after an operation. That
4 is a crime.

5 JUSTICE KAGAN: Do -- do you think --

6 JUSTICE GORSUCH: I -- I -- I -- I'm
7 sorry.

8 JUSTICE KAGAN: Go ahead. Go ahead.

9 JUSTICE GORSUCH: Sure. Okay. I had
10 thought that the government had actually pursued
11 prosecutions below on the theory that the \$5,000
12 in connection with business requirement could be
13 satisfied by pointing, for example, to a police
14 officer's salary was more than \$5,000.

15 MS. BLATT: The government took an
16 outrageous view, expansively, which is why they
17 used 666 over 201, because they didn't think it
18 had to be linked to an official action. But
19 they did fancy footwork in their brief and says
20 no, no, we won't do that anymore, so we'll keep
21 it closer to 201. But, no, they've -- that's
22 why they love 666.

23 JUSTICE GORSUCH: I thought there was,
24 in fact, an affirmed conviction in the Seventh
25 Circuit in United States versus Robinson along

1 just that point.

2 MS. BLATT: You can ask them, because
3 I think they're a little cagey on how much they
4 will give on what a business or transaction is.
5 But, even assuming it's tight, it doesn't take
6 that much to do snow removal that's worth over
7 5,000 or the police officer who helps your --
8 you know, find your kid who's kidnapped.

9 This is like -- government officials
10 and healthcare workers do stuff worth over
11 \$5,000 every day, every second, every minute.

12 JUSTICE GORSUCH: Can I --

13 JUSTICE KAGAN: These --

14 JUSTICE GORSUCH: No, your turn now.

15 JUSTICE KAGAN: Go ahead. Go ahead.

16 JUSTICE GORSUCH: No, please.

17 JUSTICE KAGAN: Do you think that the
18 horrors also apply to the bribery side of the
19 statute? I mean, what strikes me about this
20 statute is the number of people that it covers.

21 But you can imagine all of your
22 horrors being done on the bribery side. You
23 know, I give the orthodontist for my kids hockey
24 tickets so that -- and we kind of -- it is a
25 quid pro quo, so that, you know, my kid gets the

1 best appointment or something like that.

2 I mean, you can imagine a whole lot of
3 cases where, even though there's an explicit
4 bribe, it also seems like, really, we're
5 criminalizing that? So I'm just wondering
6 whether the horribles only apply to gratuities
7 as opposed to there are horribles in this
8 statute because of the kinds of people it
9 applies to.

10 MS. BLATT: No, they -- no, I
11 disagree, Justice Kagan, for this reason. Under
12 Section 201, there's a 15-year sentence for
13 bribery. Government hates to have to prove a
14 quid pro quo. And there's a two-year sentence
15 for gratuity, where it's really easy to get a
16 water bottle plus a mug and it's over \$20.
17 There's vast, vast difference.

18 The government -- if it's that no big
19 deal, let the government just prove quid pro
20 quo. Just let them. It's much more damaging.
21 The government has a direct interest. If you
22 have to prove there was an influence on your
23 official conduct, at least the government says
24 it impacts the federal program.

25 Here, they have six different ways

1 where they're defining "corrupt:" if it's not
2 benign, if it was against the employer's rules,
3 if it's against common sense rules, if you're
4 conscious of wrongdoing, which I had no idea
5 what it means, if it could skew your official
6 decisionmaking. It is very different to say --
7 and I do think the fact that all states prohibit
8 bribery cold and not all states -- some
9 employers in some localities allow gifts.

10 JUSTICE JACKSON: But, Ms. --

11 MS. BLATT: They just do --

12 JUSTICE KAVANAUGH: How would you --

13 MS. BLATT: -- because they're not
14 corrupt --

15 JUSTICE KAVANAUGH: How would you --

16 MS. BLATT: -- unless it's
17 prophylactic.

18 JUSTICE KAVANAUGH: Sorry. How would
19 you define "corruptly" if you had to in this
20 particular provision?

21 MS. BLATT: Well, we would win if it
22 was defined under half if it violated your
23 employer rules, common sense ethical rules, or
24 consciousness of wrongdoing.

25 I don't know what "benign" means. I

1 don't know what "immoral" means. I mean, the
2 government says we waived, but they don't tell
3 us what we should have --

4 JUSTICE GORSUCH: Now --

5 MS. BLATT: -- what we should have
6 asked for. They never spelled out what that
7 instruction would look like.

8 JUSTICE GORSUCH: -- I -- I -- I --

9 JUSTICE KAVANAUGH: Well, just --

10 JUSTICE GORSUCH: No, I'm sorry,
11 please.

12 JUSTICE KAVANAUGH: Just on that, I
13 thought you did ask for jury instructions that
14 would make clear that an after-the-action
15 agreement --

16 MS. BLATT: A hundred percent.

17 JUSTICE KAVANAUGH: -- would require
18 acquittal.

19 MS. BLATT: J-18 objects to the
20 definition of "corruptly" on JA-28 by saying,
21 very clearly laying out the sine qua non of
22 bribery is that quid pro quo payment and the
23 jury would have to convict if it only found a
24 gratuity.

25 What the government is trying to say

1 is that we should have said something other than
2 the way the government's prosecuted every other
3 666 case on just a knowing theory and they've
4 said six different ways what that would look
5 like.

6 And if you charge -- again, I'm sure
7 you will ask them what the jury should be
8 charged what common sense ethical rules are. I
9 mean, the restaurant example alone, I don't know
10 where it's -- I'm pretty sure Chipotle would be
11 okay, Inn at Little Washington wouldn't, but ask
12 them about the Cheesecake Factory.

13 (Laughter.)

14 JUSTICE GORSUCH: Well, I'm not going
15 to ask them about the Cheesecake Factory.
16 Somebody else may.

17 MS. BLATT: Okay.

18 JUSTICE GORSUCH: But -- but I'm going
19 to ask you a little bit more about corruptly.

20 MS. BLATT: Okay.

21 JUSTICE GORSUCH: -- and -- and the
22 mens rea that you think it should import here,
23 putting aside the jury instructions and the
24 debate over forfeiture.

25 You mentioned consciousness of

1 wrongdoing, which the Court mentioned also in
2 Arthur Andersen if I recall.

3 MS. BLATT: Mm-hmm.

4 JUSTICE GORSUCH: And that suggests, I
5 think, that you have to know that it's unlawful.
6 It's one of those rare statutes --

7 MS. BLATT: And willful.

8 JUSTICE GORSUCH: -- where perhaps
9 ignorance of the law is a defense, if you will.
10 What do you think of that?

11 MS. BLATT: So, no, that's some other
12 case. "Corruptly" has a very, very specific
13 definition with bribery. It cannot possibly
14 mean one thing for bribery and something else in
15 this statute. It clearly means quid pro quo.

16 "Bribery" has always had both common
17 law, historic, 201. "Corruptly" means quid pro
18 quo in this context. I think, when you have
19 Arthur Andersen, official proceedings, document
20 destruction, what have you, "corruptly" can mean
21 all kinds of things.

22 JUSTICE SOTOMAYOR: Ms. Blatt, it
23 makes no sense what you're saying to me. Here's
24 a case in which someone is -- that's the
25 allegation -- demanding money, gets it basically

1 for no services, spends his time giving two or
2 three different reasons and services that he
3 performed, which he didn't, and there's a series
4 of meetings or phone calls, texts, et cetera,
5 before the second contract is awarded between
6 these people.

7 At some point, can't a jury see that
8 as a demand for payment for services?

9 MS. BLATT: Well --

10 JUSTICE SOTOMAYOR: And you're giving
11 no definition that would cover that kind of
12 behavior.

13 MS. BLATT: So, first of all --

14 JUSTICE SOTOMAYOR: I think that's
15 different than the situation the Chief posited.
16 I find someone's wallet and I tell them: I'm
17 not giving it up to you unless I get a tip.

18 MS. BLATT: Yeah. So --

19 JUSTICE SOTOMAYOR: I want half the
20 money in the wallet.

21 MS. BLATT: -- it's none of the
22 federal government's business if a local
23 official is doing nothing wrong with state and
24 local laws and complied with all local laws.
25 Most of their brief has nothing to do with their

1 theory. Their brief is somehow there was
2 improper steering by his buddy, who's now the
3 head of sanitation and trash, which is a little
4 bit ironic. But their theory is of --

5 JUSTICE SOTOMAYOR: But you -- you --

6 MS. BLATT: Their --

7 JUSTICE SOTOMAYOR: -- you are
8 suggesting that the federal government can't say
9 there is something wrong with demanding payment
10 after the fact for an official act.

11 MS. BLATT: That -- the --- the -- the
12 government has not -- sorry. Congress has not
13 criminalized gratuity against state and local
14 and tribal officials.

15 JUSTICE SOTOMAYOR: You are --

16 MS. BLATT: Absolutely.

17 JUSTICE SOTOMAYOR: Answer my
18 question, yes or no?

19 MS. BLATT: Yes, it's not a crime.

20 JUSTICE SOTOMAYOR: It's not a
21 crime --

22 MS. BLATT: Not a federal crime.

23 JUSTICE SOTOMAYOR: -- for state
24 officials who run around the country with
25 respect to federal contracts and say: I voted

1 for X, now pay me.

2 MS. BLATT: It's not a federal
3 contract, but if there's bribery --

4 JUSTICE SOTOMAYOR: For -- I'm
5 sorry -- a state contract.

6 MS. BLATT: If -- if the government
7 thinks there was a quid pro quo, which they did
8 here, they did allege and try to argue to the
9 jury there was bribery, but you're making it a
10 case where --

11 JUSTICE SOTOMAYOR: No, I'm making a
12 -- I'm asking a simple question. It's all right
13 according to you or it's wrong for federal law
14 to attempt to take the situation which is
15 alleged here that demanding payment for official
16 acts --

17 MS. BLATT: Well, I --

18 JUSTICE SOTOMAYOR: -- is wrong.

19 MS. BLATT: So you keep saying
20 demanding. If he had asked for to go fund -- to
21 please give me my go fund money for my kid's
22 cancer surgery, I think, in your view, that's a
23 crime. And I'm saying Congress could not have
24 possibly intended --

25 JUSTICE SOTOMAYOR: Well, I'm not sure

1 what --

2 MS. BLATT: -- put that official in 10
3 years.

4 JUSTICE ALITO: Well, is the -- I
5 mean, is the --

6 MS. BLATT: But that's the problem
7 with your example.

8 JUSTICE ALITO: -- is the question
9 whether it would be wrong for Congress to
10 criminalize that or whether, in fact, Congress
11 has criminalized it?

12 MS. BLATT: Yes. It's the latter.

13 JUSTICE ALITO: It's the latter. So,
14 okay.

15 JUSTICE JACKSON: And why doesn't the
16 language cover -- I mean, I understand you --
17 we've -- we're all thinking about this in terms
18 of gratuities, and that opens the door to all of
19 the, you know, relatively benign examples that
20 you bring up, you know, when someone's just sort
21 of showing thanks for doing services.

22 But the statute does not use the word
23 "gratuities." In fact, the statute uses
24 terminology that's very similar to what Justice
25 Sotomayor just said, right? "Someone who

1 corruptly solicits or demands" -- and I'm
2 skipping here -- "anything of value intending to
3 be rewarded."

4 MS. BLATT: And the --

5 JUSTICE JACKSON: And that -- and
6 those are the facts that the government is at
7 least alleging in this case.

8 MS. BLATT: And "corruptly" is -- is
9 completely a foreign concept to "gratuity," and
10 it's very familiar --

11 JUSTICE JACKSON: No, but I'm not --

12 MS. BLATT: -- to bribery.

13 JUSTICE JACKSON: Set aside
14 "gratuity." I'm just looking at the statute.
15 Why is -- aren't the facts that the government
16 alleges here fitting entirely with the
17 statement, the text of this statute?

18 MS. BLATT: Because the plain language
19 of "reward" can mean bribes. And it has -- it
20 has been used that --

21 JUSTICE JACKSON: And it can't mean
22 after the fact seeking a payment for something
23 that you've done officially?

24 MS. BLATT: "Rewarding" can plainly
25 mean bribes to officials who aren't actually

1 influenced. You give me money and either you're
2 never going to take the vote or you couldn't
3 take it anyway. It also applies to
4 after-the-fact payments.

5 And if I can just say one other thing
6 because you say on reward about "corrupt," a
7 thousand dollar bottle of wine.

8 JUSTICE JACKSON: No, but that's a
9 gratuity.

10 MS. BLATT: A \$2,000 bottle of wine.

11 JUSTICE JACKSON: But -- but I guess,
12 if the person is demanding it as a result of
13 something that they've done --

14 MS. BLATT: It applies to givers --

15 JUSTICE JACKSON: -- it would be the
16 same scenario.

17 MS. BLATT: -- equally. It's the same
18 statute that applies to the givers. So you and
19 anyone else in this room who gives an expensive
20 bottle of wine to a nurse in connection with --

21 JUSTICE JACKSON: Is she demanding it?

22 MS. BLATT: -- a \$5,000 surgery --

23 JUSTICE JACKSON: Is she demanding it
24 for having done something in -- to me or my
25 family?

1 MS. BLATT: You have to divorce 601 --
2 the giver to the taker. I mean, yeah, the giver
3 to the taker. It's the exact same wording. It
4 applies to anyone who gives with an intent to
5 reward. That's the plain language. And I
6 think, in your view, you'd have to draw a line
7 between the two-buck chuck at Trader Joe's and
8 the wine that goes up to 500,000.

9 And I don't know where the
10 government's line is. There is no drop-down
11 menu on Amazon for mens rea. People -- there's
12 just not -- there is no gratuity -- there are 13
13 gratuity statutes. None of them are like this.
14 They have no mens rea because they're just
15 prophylactic bright-line rules. You can't get
16 that compensation, which is why that is the
17 federal rule.

18 You get even a dollar, it is a crime
19 regardless of mens rea. And there are 11,000
20 pages of guidance to make sure that when you're
21 a federal employee you don't go to jail for two
22 years. I don't know what every single person --

23 JUSTICE JACKSON: So what is
24 "rewarded" doing in this statute? Because,
25 basically, you've defined it as bribery. And we

1 have "intending to in" -- "to be influenced."

2 So what is the work of "rewarded"?

3 MS. BLATT: Two critical things. And
4 the government has a response -- it's not a good
5 one -- on one of them. They have no response to
6 my first point. It takes the issue of timing
7 and causation off the table, and where they
8 don't have a response is on causation.

9 The statute, if it just said
10 "intending to be influenced," a jury would have
11 to acquit if the jury found the person wasn't
12 influenced. Like a gun -- I don't know, take a
13 pro-gun or an anti-gun person who says --

14 JUSTICE JACKSON: I don't understand
15 that. It says "intending to be influenced." It
16 doesn't say you have to actually have been
17 influenced. So --

18 MS. BLATT: Well --

19 JUSTICE JACKSON: -- I mean, isn't a
20 bribery you're intended to -- you're intending
21 to be influenced? Okay.

22 MS. BLATT: No, if the jury -- if he
23 says, I wasn't influenced, I would have taken
24 the vote anyway, the jury would have to acquit.
25 I wasn't influenced. I didn't even intend to be

1 influenced because I told my God, my wife, and
2 my son that I was going to vote that way anyway.
3 I had no intent to be influenced.

4 And on -- our second one is after the
5 fact. Now I agree you could stretch the English
6 language, but I just think it refers to more
7 naturally an upfront payment is -- before the
8 vote is an intent to be influenced and I'll do
9 it and then after the vote is taken just more
10 naturally refers to reward, which is what the
11 Fifth and First Circuit found, was that it
12 totally takes timing off the table.

13 And so "corrupt" is doing all the work
14 of quid pro quo. And "intending to influence"
15 and "rewarded" is doing the work on either the
16 timing of the payment or the -- the way you
17 intend it.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Alito, anything further?

21 Justice Kagan?

22 Justice Gorsuch?

23 JUSTICE GORSUCH: I know we discussed
24 this in Sabri, but I'm just curious, your
25 thoughts on, I guess, what Justice Alito framed

1 as the first question. What are the limits to
2 what Congress can do to federalize state
3 substantive criminal law here?

4 MS. BLATT: Yeah. So Sabri is
5 definitely in the context of bribery, and so the
6 question would be if the section -- sorry -- the
7 1984 version just criminalized gratuities and
8 said for or because of official act 10-year
9 penalty, and you would have to -- that -- there,
10 you would meet, I think, the Spending Clause
11 clear statement and the clear statement under
12 Bass to upset the federal/state balance, and you
13 have a pure Sabri question.

14 I mean, it's tough. I think what the
15 government would say, the only thing they
16 intimated in their brief is that sometimes the
17 gift could be so bad, I don't know, a Ferrari,
18 that it might skew your official decisionmaking.

19 And the problem with that is they
20 don't have an answer, what about the toy
21 Ferrari? I mean, so -- and they still have the
22 vagueness problem, but I think their argument
23 would be, although it's way less, it's certainly
24 much weaker than bribery. I think their skewing
25 is the way they would get around the sort of, I

1 guess, whatever you call it, Spending Clause
2 authority or Article I authority. But it was
3 bribery. It was definitely bribery was at issue
4 --

5 JUSTICE GORSUCH: In Sabri.

6 MS. BLATT: -- with the campaign
7 finance and with the connection with the federal
8 program was clearly a bribery quid pro quo.

9 JUSTICE GORSUCH: And, here, we have a
10 very different scenario with gratuities. And
11 did Congress really -- did it clearly mean to
12 displace all state law?

13 MS. BLATT: It's clear it's not clear
14 to me.

15 JUSTICE GORSUCH: Yeah.

16 MS. BLATT: Not when it just looks
17 nothing like any other gratuity statute in
18 history or on the books today.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: You've suggested a
23 few times that state and local governments
24 regulate gratuities of state and local
25 officials.

1 Can you give us some more color on
2 that? Is there a disparity? You know, some
3 jurisdictions will say up to \$50, others up to
4 \$100?

5 MS. BLATT: Yeah, it's infinite. Some
6 of them will say, even if you do it, give the --
7 give the gift back. They don't put you in jail
8 for 10 years. I mean, the -- the government --
9 I mean, yeah, no, there's an infinite.

10 Here, it was not even alleged that --
11 Portage and Indiana have extensive ethical
12 rules. There's no allegation that the
13 Petitioner did anything in violation of those
14 rules.

15 And although the federal government
16 has its own, every employer has different rules.
17 Even in the banking context, DOJ is supposed to
18 work with the bank and make sure that, you know,
19 it's copacetic, and even then, DOJ says, we may
20 second-guess the banking rules if we find them
21 unreasonable, but they're supposed to at least
22 work out ahead of time, but there's just --
23 there's a lot of cities and there's a lot of
24 states, and I don't think most states even have
25 gratuity laws.

1 JUSTICE KAVANAUGH: Thank you.

2 MS. BLATT: So they're just making
3 something a crime that's not.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Yeah. So, if you're
7 right and there's a distinction between bribes
8 and gratuities in the way that you're positing
9 it, I guess we'd have a statute in which
10 Congress is intending to prohibit an official
11 from going to a company ahead of time and
12 saying: Pay me \$15,000 and I will steer the
13 garbage truck contracts to your company.

14 But Congress would not have intended
15 to prohibit that same official from steering the
16 garbage truck contracts to the company and after
17 the fact going to them and saying: Okay, give
18 me \$15,000.

19 MS. BLATT: Yeah. And --

20 JUSTICE JACKSON: And I guess I don't
21 understand how you have a statute that is
22 rationally drawing a distinction between those
23 two scenarios.

24 MS. BLATT: Oh, Sun-Diamond, Justice
25 Scalia goes on and on and on, like his -- one of

1 his favorite cases ever, he just goes on and on
2 about the big difference between a bribery,
3 that's where you pay the money in exchange, and
4 a gratuity, that the action is taken is after
5 the fact. 201 made that distinction.

6 And so the other thing I would say,
7 and you can ask the government, the government's
8 position does not depend on steering. This
9 could have been the best garbage track --
10 garbage truck contract in the history of the
11 planet but didn't like the \$10,000 or didn't
12 like the type of gift.

13 They ask -- they say it's okay to give
14 coffee and doughnuts to the police who work
15 around the clock. Well, what about the police
16 who coerced a confession? Is that corrupt?
17 Same gift, same donut.

18 The government's theory to the jury
19 has nothing to do with the steering. It's just
20 they want to do that to make, you know, the --
21 the client look bad. It is simply you got
22 something of value after the fact because it
23 related to official conduct, which doesn't
24 depend on any misconduct at all by the official.

25 And, again, Sun-Diamond is literally

1 all about the difference, and even in
2 Sun-Diamond, this Court went crazy to make sure
3 federal officials were protected because two
4 years was too long for federal officials to go
5 to jail for a gratuity.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Ms. Sinzdak.

9 ORAL ARGUMENT OF COLLEEN R. SINZDAK
10 ON BEHALF OF THE RESPONDENT

11 MS. SINZDAK: Mr. Chief Justice, and
12 may it please the Court:

13 The federal government needs to ensure
14 the money it appropriates to local governments
15 for public benefits is allocated in a way that
16 maximizes the benefits to its citizens, not the
17 rewards for local officials.

18 Congress, therefore, enacted Section
19 666 to bar officials from corruptly accepting
20 payments with the intent to be influenced or
21 rewarded in connection with their official
22 duties.

23 Petitioner asks this Court to weaken
24 Section 666's protection for the public fisc by
25 holding that a person does not violate Section

1 666 when he corruptly solicits a payment with
2 the intent to be rewarded unless he has also
3 agreed to accept the reward beforehand.

4 But that requirement of a beforehand-
5 agreement finds no basis in the statutory text.
6 The plain meaning of "reward" readily covers a
7 payment given in return for an official action
8 or decision that is already complete.

9 So a police chief who sends his
10 officers to foil a burglary at a store and then
11 demands the store owner pay him \$10,000 for his
12 officers' work, he acts with the intent to be
13 rewarded.

14 A safety inspector who issues a
15 building permit for a dangerous project and then
16 solicits a \$30,000 payment acts with the intent
17 to be rewarded.

18 And a mayor who steers a contract for
19 a particular business and then asks that
20 business to pay him \$13,000 for the contract
21 acts with the intent to be rewarded, whether or
22 not the contractor agreed to give him the reward
23 before the contract closed.

24 Petitioner's argument to the contrary
25 ignores both the plain meaning of the term

1 "rewarded" and the statutory history. In 1984,
2 Congress enacted a flat bar on the acceptance of
3 bribes and gratuities. It was modeled directly
4 on the one in Section 201(c) that applies to
5 federal employees.

6 In 1986, Congress narrowed that bar to
7 carve out a subset of only the most culpable
8 gratuities by adding a corruptly mens rea and an
9 express exception for bona fide salary and
10 benefits paid in the ordinary course of
11 business.

12 Now Congress's textual fix worked.
13 Petitioners haven't pointed to any real-world
14 examples of Section 666 prosecutions for the
15 sort of innocuous gift-giving activity that
16 occurs in the ordinary course of business, and
17 I'm happy to explain why the -- the two examples
18 in their reply brief really just aren't what
19 they are describing.

20 But the Court should therefore reject
21 Petitioner's invitation to artificially narrow
22 the reach of Section 666.

23 I welcome the Court's questions.

24 CHIEF JUSTICE ROBERTS: Counsel, under
25 your theory, there are two offenses in 666, the

1 gratuity and the bribery. And a gratuity is
2 really just a bribery without a quid pro quo,
3 right?

4 MS. SINZDAK: So, first of all,
5 there's a single offense, corruptly accepting a
6 payment, and then there are two means of
7 committing that offense, either intending to be
8 influenced or intending to be rewarded.

9 So it's -- it's one offense, the
10 corrupt acceptance, and then two different
11 means. And you're right, there -- there -- they
12 overlap a lot of times when you're accepting a
13 payment.

14 CHIEF JUSTICE ROBERTS: Well, I don't
15 know if they overlap. It seems one is a lesser
16 included offense than the other, right?
17 Gratuity, why isn't the bribery thing just
18 surplusage?

19 MS. SINZDAK: No --

20 CHIEF JUSTICE ROBERTS: You -- you can
21 -- you just show a gratuity and, as I say, it's
22 just kind of bribery without the quid pro quo.
23 That's all you need to show.

24 MS. SINZDAK: No, there are going to
25 be situations where somebody is going to accept

1 a payment intending to be influenced without
2 intending to be rewarded. So that's going to
3 happen. When somebody accepts a bribe and says:
4 Yes, this -- this \$10,000, it's going to
5 influence me in making this decision, but I
6 haven't made up my mind yet, and maybe they turn
7 to someone else and say, hey, you know, somebody
8 else gave me \$10,000 to influence me, sure, you
9 know, \$20,000 might push me in another
10 direction. At that point, the -- the person
11 gets \$20,000 and does what the second person
12 wanted.

13 Now, in the second situation, I think
14 that is somebody who's both intending to be
15 influenced and intending to be rewarded because
16 they're going to do something for that \$20,000.

17 But, in the first situation, there is
18 nothing to be rewarded. So they aren't going to
19 -- so they are intending to be influenced, but
20 they haven't made a decision. They haven't
21 taken an act. So they aren't intending to be
22 rewarded.

23 JUSTICE KAGAN: But, no, that's a
24 strange hypothetical, right? It doesn't really
25 happen in the real world.

1 MS. SINZDAK: I'm not sure that's --

2 JUSTICE KAGAN: I mean, I guess what
3 I'm suggesting is that you have to work pretty
4 darn hard to get out of the problem that the
5 Chief Justice suggested.

6 MS. SINZDAK: No, I -- I don't think
7 so for two reasons. First of all, I don't think
8 it's so farfetched to imagine a mayor who says
9 kind of, you know, I -- I'm taking bids on the
10 contract and, hey, it sure would help if you put
11 a payment, you know -- you know, you offered me
12 something too, and then I think you are going to
13 have a few different payments happening with the
14 intent to be influenced but not rewarded.

15 But the second point is that I think
16 this lesser included offense comes from the
17 relationship between 201(b), which covers
18 bribery for federal officials, and 201(c), which
19 covers gratuities.

20 And the 201(c) offense is a broader
21 offense. It's the for or because of language.
22 There's no corruptly mens rea. There's no
23 express exception for bona fide salary and
24 compensation.

25 So, there, I think it actually can be

1 described as a lesser included offense. But,
2 here, it's not that all gratuities are covered
3 within the rewarded because, of course, the
4 other restrictions within Section 666 still
5 apply. So it has to be accepted corruptly, and
6 we have the exception for --

7 JUSTICE KAVANAUGH: What -- what is --
8 keep going, sorry. What --

9 MS. SINZDAK: Oh, no, I was just going
10 to say the exception for bona fide salary.

11 JUSTICE KAVANAUGH: Well, I think the
12 problem you have is what does "corruptly" mean.

13 MS. SINZDAK: So I think Arthur
14 Andersen decide -- described "corruptly." It
15 said it has to be corrupt, so that means
16 wrongful or evil or immoral. And there has --

17 JUSTICE KAVANAUGH: So does a \$100
18 Starbuck gift certificate as a thank you to the
19 city council-person who -- for working on a new
20 zoning reg, is that corrupt or not?

21 MS. SINZDAK: So, no, and let me tell
22 you exactly why. I think that the reason --

23 JUSTICE KAVANAUGH: How about a \$500
24 one?

25 MS. SINZDAK: So I think it would be

1 helpful to set out what the guidelines are going
2 to be here because, when there's a corruptly
3 mens rea, what you -- you usually see in the
4 jury instructions, sometimes it says
5 consciousness of wrongdoing, so you have to know
6 that what you're doing is wrong, but sometimes
7 what the jury instructions do is isolate what is
8 actually wrongful, what is obviously wrongful
9 about this conduct.

10 So I think, when we're talking about
11 corruptly in connection with rewards, you have
12 to isolate what's wrongful, and what's wrongful
13 is when it appears that the government is for
14 sale. What's wrongful -- so -- so here are
15 three specific --

16 JUSTICE KAVANAUGH: Well, you're
17 change --

18 JUSTICE GORSUCH: Counsel --

19 JUSTICE KAVANAUGH: -- you're changing
20 the hypothetical. The hypothetical is the
21 action's taken and a citizen gives a thank you
22 and it could be a gift card to Starbucks or it
23 could be tickets to a concert or game and just
24 drops it off to the person, thank you for all
25 your hard work on this issue, appreciate you.

1 MS. SINZDAK: So I do not want to get
2 away from "corruptly." I also want to point out
3 that, of course, there's other limitations
4 within the statute. So, if the -- the business
5 or transaction that's being rewarded isn't worth
6 at least \$5,000 --

7 JUSTICE KAVANAUGH: I understand that.

8 MS. SINZDAK: -- you're not going to
9 get there.

10 JUSTICE KAVANAUGH: Assume it --

11 MS. SINZDAK: Okay. I just want to
12 make sure because I do think, for example, in
13 Sun-Diamond, Justice Scalia said that requiring
14 this connection with a particular act is going
15 to eliminate innocuous gift-giving for federal
16 officials --

17 JUSTICE KAVANAUGH: But you can't --

18 MS. SINZDAK: -- who don't have --

19 JUSTICE KAVANAUGH: I'm going to press
20 on this. What is innocuous and what is not?
21 And, just as important, how is the official
22 supposed to know ahead of time, oh, the \$100
23 gift certificate's okay, but the larger one's
24 not, or the set of books or the framed photo --

25 MS. SINZDAK: So, again --

1 JUSTICE KAVANAUGH: -- or --

2 MS. SINZDAK: -- I think there are
3 three circumstances where the official is going
4 to know that what he's doing is obviously
5 wrongful. The first one is where he took the
6 public act with the intent to be rewarded.

7 JUSTICE GORSUCH: No, no, no.

8 JUSTICE KAVANAUGH: Assume -- assume
9 that's not the --

10 JUSTICE GORSUCH: That's collapsing
11 two different things.

12 MS. SINZDAK: Well, I can't just --

13 JUSTICE GORSUCH: Counsel, you're
14 collapsing two different things there.

15 JUSTICE KAVANAUGH: That's not my
16 hypothetical.

17 JUSTICE GORSUCH: Yeah.

18 JUSTICE KAVANAUGH: My hypothetical is
19 the person, the official knew nothing about the
20 potential for the gratuity after the fact.

21 MS. SINZDAK: So that's going to make
22 it harder for the government to prove corruptly,
23 but there are two other circumstances --

24 JUSTICE KAVANAUGH: Why? Why?

25 MS. SINZDAK: Because corrupt --

1 because "corruptly" has to get at what's
2 obviously wrongful in the statute, which is
3 where you are performing public acts for private
4 gain. So, if that's --

5 JUSTICE GORSUCH: Counsel, I'm sorry
6 to interrupt.

7 JUSTICE ALITO: But that's a bribe.

8 JUSTICE GORSUCH: But I am going to
9 interrupt there because I think the questions
10 and the ones I'm interested in have to do with
11 mens rea on "corruptly." And I think that's
12 what Justice Kavanaugh is getting at.

13 SO put aside the actus reus for a
14 moment. You say "corruptly" carries with it
15 some mens rea.

16 MS. SINZDAK: Absolutely.

17 JUSTICE GORSUCH: What is it?

18 MS. SINZDAK: Consciousness of
19 wrongdoing.

20 JUSTICE GORSUCH: So you think the
21 defendant has to know that what he is doing is
22 unlawful?

23 MS. SINZDAK: Or wrongful. He -- he
24 doesn't have --

25 JUSTICE GORSUCH: Unlawful or --

1 MS. SINZDAK: -- to know about the
2 specific -- well, he does not --

3 JUSTICE GORSUCH: -- wrongful?

4 MS. SINZDAK: Or wrongful, inherently
5 wrongful. That's correct.

6 JUSTICE GORSUCH: Where does that --
7 where does that come from?

8 MS. SINZDAK: That comes from Arthur
9 Andersen.

10 JUSTICE GORSUCH: Well, the
11 consciousness of wrongdoing usually means that I
12 know. I mean, wrongdoing is defined by law
13 usually, right? But you're saying -- you're
14 saying no, it doesn't -- he doesn't have to know
15 that it's unlawful; he has to know that it is
16 unlawful or -- fill in the blank.

17 MS. SINZDAK: Wrongful. And I think
18 sometimes actually -- so unlawful is usually,
19 you're right, going to get you there. And,
20 here, I think we have someone who did everything
21 he could to hide that he was getting this money
22 and said that it was a consulting fee. So you
23 have a lot of evidence of consciousness --

24 JUSTICE GORSUCH: How do you know if
25 it's wrongful if it's -- if it's perfectly

1 legal?

2 MS. SINZDAK: Well, so it is -- it was
3 not perfectly --

4 JUSTICE GORSUCH: I mean, is it a sin?
5 Are we now talking about something that, you
6 know -- you know, something that would be a -- a
7 venal sin, or does it have to be a mortal one?

8 MS. SINZDAK: I want to ground us in
9 the facts of this case. So I think it's
10 important here to establish that the Indiana
11 code actually bars giving a gratuity to a public
12 official. The Indiana --

13 JUSTICE GORSUCH: I'm not asking about
14 Indiana.

15 MS. SINZDAK: -- Portage -- okay.

16 JUSTICE GORSUCH: I'm asking what the
17 government's position is on "corruptly" and mens
18 rea, and you say it has to be unlawful or
19 wrongful. And wrongful in what sense?

20 MS. SINZDAK: So, again, I think what
21 we're talking about here is wrongful in the
22 sense that Arthur Andersen said evil, corrupt,
23 immoral. And sometimes that's when --

24 JUSTICE GORSUCH: Immoral?

25 MS. SINZDAK: That is what this Court

1 said in Arthur Andersen.

2 JUSTICE GORSUCH: So a gift of
3 pornography, as -- as -- as your counsel --
4 friend on the other side pointed out in her
5 opening, is -- is -- would that count in the
6 government's view?

7 MS. SINZDAK: It needs to be wrongful
8 in the way -- in the way that the statute is
9 targeting. So, here, again, what the statute is
10 targeting, the obviously wrongful conduct that
11 the statute is targeting is taking public acts
12 for private gain. So where, again -- and I'm
13 just going to give you the three circumstances.

14 JUSTICE KAVANAUGH: That -- that
15 defeats your whole theory -- I'm sorry --
16 because, if the public act was done, completed,
17 I've done -- we're done with the new zoning reg,
18 we're done with the new school board decision,
19 and then the gratuity, the gift, the thank you
20 arrives, you're still going to prosecute those
21 cases as corrupt under your theory of what
22 "corruptly" means, correct?

23 MS. SINZDAK: Where one of three
24 circumstances is met.

25 JUSTICE KAVANAUGH: So that means

1 where you haven't taken the public action for
2 private gain.

3 MS. SINZDAK: No. I think that's
4 where the -- the -- the problem is coming in.
5 So, here, for example, imagine that the official
6 just knows that the Buha brothers, they pay big
7 rewards to people who give them contracts. So
8 what he decides to do is award the contract to
9 the Buha brothers. Afterwards, he's going to
10 ask for the payment. That is corrupt. He took
11 --

12 JUSTICE KAVANAUGH: The facts of this
13 case are great in that sense for you to respond
14 to the question, but there are 19 million
15 employees who are going to --

16 MS. SINZDAK: And what I'm saying --

17 JUSTICE KAVANAUGH: -- wonder about
18 the thank yous.

19 MS. SINZDAK: -- for all of those
20 employees, the government is going to have to
21 peruse -- pardon me -- to prove corruption. So,
22 if they can't prove that the person actually did
23 -- and let me get out the other two because
24 there are two others.

25 JUSTICE KAVANAUGH: I will.

1 MS. SINZDAK: If it can't prove that
2 the person actually took the act intending to be
3 rewarded, which gives you corruptly, they can
4 also sometimes prove that by taking this
5 payment, let's say it's \$100,000 for having won
6 a case, in the future, the person is going to be
7 trying to win cases to get the money rather than
8 for -- in the interests of the public.

9 And then there's also going to be --
10 with certain payments, it's just going to be
11 clear that if the public official takes this,
12 it's going to look like the government is for
13 sale. And that's because the --

14 CHIEF JUSTICE ROBERTS: Well, every
15 time --

16 JUSTICE ALITO: Does this --

17 CHIEF JUSTICE ROBERTS: Go ahead.

18 JUSTICE ALITO: Does this provision
19 apply to campaign contributions?

20 MS. SINZDAK: Section 666 applies to
21 campaign contributions. Under McCormick, there
22 needs to be a quid pro quo in the campaign
23 context, so -- pardon me -- in the campaign
24 contribution context. So the government does
25 not prosecute where there is a bona fide

1 campaign contribution.

2 JUSTICE ALITO: So where do you get --
3 how does that fit into the statutory language?

4 MS. SINZDAK: So what we've taken it
5 is there would be an as-applied constitutional
6 objection if we were trying to prosecute a --
7 campaign contributions on a -- sorry -- bona
8 fide campaign contributions on a pure gratuities
9 theory.

10 And -- and, sorry, if I could just get
11 -- get back again to --

12 JUSTICE KAGAN: Well, how -- how about
13 this? I mean, this statute applies to more than
14 government officials. It applies to pretty much
15 every hospital. It applies to pretty much every
16 university. So let's say billionaire patient
17 comes to a hospital and gets extra special
18 treatment. He gets appointments when nobody
19 else would get it. He gets surgery scheduled
20 when nobody else would. And -- and it's all
21 done because everybody knows he's a billionaire
22 patient, and they're hoping that he'll give an
23 eight-figure gift to the hospital.

24 How about that? Does that fit?

25 MS. SINZDAK: So it needs to be -- you

1 walk through the statutory requirements. The
2 pay -- there needs to be the acceptance or the
3 solicitation of money in connection with
4 particular business or transactions.

5 JUSTICE KAGAN: Well, they're
6 definitely going to accept the eight-figure gift
7 when it comes.

8 (Laughter.)

9 MS. SINZDAK: Oh, sorry. Are you
10 talking about the -- they're -- on the promise
11 of this eight-figure gift?

12 JUSTICE KAGAN: No. I'm just saying
13 they treat him really super nicely because they
14 are very hopeful and -- that he's going to
15 recompense them for all the special
16 consideration that they've given. Does that fit
17 or does it not fit?

18 MS. SINZDAK: So it -- the government
19 is going to have to prove that accepting that --
20 that reward would be corrupt and that the --

21 JUSTICE KAGAN: Well, a lot of people
22 --

23 MS. SINZDAK: -- hospital understands
24 that it's corrupt.

25 JUSTICE KAGAN: -- a lot of people do

1 not think it's good to give super-rich people
2 better healthcare than not-so-super-rich people.
3 So I could see a jury saying that's pretty
4 immoral, but probably every hospital in America
5 does it.

6 MS. SINZDAK: Well, the hospital has
7 to have consciousness of wrongdoing. So it's
8 what the hospital thinks that matters there,
9 right? The hospital has to understand that in
10 accepting that money, they're -- they are
11 committing wrongdoing. And -- and so --

12 JUSTICE KAGAN: Well, but there's a
13 jury that's going to decide whether they're
14 committing wrongdoing or not, and a jury might
15 say that sounds pretty corrupt.

16 And all I'm suggesting is that given
17 that this -- that this statute applies not just
18 to government officials but to pretty much,
19 like, every important institution in America, I
20 mean, that seems quite extraordinary that when
21 you do stuff hoping, thinking it might earn you
22 a big gift, even if it's just for the
23 institution, not to put in your own pocket, that
24 -- that that would land you 10 years in prison?

25 MS. SINZDAK: Let me say -- respond to

1 that in two ways. First of all, under Section
2 201(c), the federal government officials are
3 undisputedly bound by these sorts of
4 requirements with no corruptly mens rea. And in
5 -- in -- in Sun-Diamond, this Court said that
6 requiring a tight connection between the reward
7 and specific -- and specific official acts or
8 here you would say specific business or --
9 business or transactions worth more than \$5,000,
10 that was going to eliminate many, many of these
11 cases.

12 And I don't think that -- we
13 haven't -- again, Petitioner isn't here pointing
14 to a mountain of cases where this has gone
15 horribly astray. So Section 201(c) does it for
16 government officials without the "corruptly."

17 I'd also note -- and I think you were
18 pointing this out earlier with the -- in the
19 colloquy with Petitioner -- that it's not going
20 to get us out of this problem to just graft on
21 an atextual beforehand agreement because all
22 that has to happen is that that rich -- that
23 rich patient says to the doctors and nurses,
24 hey, if you treat me well, there's -- there's
25 going to be a nice big gift for the hospital at

1 the end. And -- and then the -- the beforehand
2 agreement requirement just isn't going to do
3 anything.

4 CHIEF JUSTICE ROBERTS: Counsel, you
5 said --

6 MS. SINZDAK: So I think that's why --
7 yes.

8 CHIEF JUSTICE ROBERTS: -- you said
9 the -- your friend on the other side hasn't
10 pointed to a lot of examples in the real world.
11 But we've had several cases where we've made the
12 very clear point that we don't rely on the good
13 faith of the prosecutors in deciding cases like
14 this.

15 MS. SINZDAK: That's right. And in
16 1986, neither did Congress with respect to local
17 and public officials. That's why it added the
18 corruptly mens rea, which has to be proved to a
19 jury, and that's why Congress added an express
20 exception for bona fide salary for compensation
21 in the ordinary course of business.

22 So Congress really did confront all of
23 the concerns that I think the Court is -- is
24 reflecting today, and it said we recognize, we
25 do not want to just cover innocuous gift-giving

1 activity.

2 JUSTICE ALITO: And what is the --
3 what is your answer to Justice Kagan's
4 hypothetical? That's a question that would be
5 submitted to the jury, and the jury would have
6 to decide whether the donor acted wrongfully and
7 the hospital acted wrongfully, right?

8 MS. SINZDAK: They would have to prove
9 that the hospital understood that it was
10 wrongful to accept that payment. Now, again,
11 that's going to be the case. If the donor under
12 Petitioner's theory, that's the case if the
13 donor is telling the hospital when he goes in
14 for the surgery --

15 JUSTICE ALITO: No, no, no, no --

16 MS. SINZDAK: -- he's going to.

17 JUSTICE ALITO: -- no, no, don't turn
18 it into a bribe. It's a gratuity. It's after
19 the fact. There's no agreement.

20 MS. SINZDAK: Well, no. I --

21 JUSTICE ALITO: So it would be whether
22 the hospital knew that it was wrongful?

23 MS. SINZDAK: Suppose that --

24 JUSTICE ALITO: I mean, suppose there
25 are internal e-mails and one -- you know, one

1 official says, you know, we really should be
2 treating -- shouldn't be giving such special
3 treatment to billionaires and another e-mail
4 says, you know, get real, we need money, and et
5 cetera, et cetera.

6 MS. SINZDAK: At the end of the day,
7 Congress is entitled to draw the statutes and to
8 make the bars the way it wants to. The reason
9 though that I was pushing back and giving you
10 the bribery hypothetical is that I really do
11 think that what I'm hearing today is there are
12 some payments that just aren't or some gifts
13 that just aren't corrupt.

14 And that's going to be true whether
15 you're pursuing a bribery prosecution --

16 JUSTICE GORSUCH: Counsel, how does
17 anyone in the real world know the line? Put
18 aside billionaires and hospitals. Deal with
19 small gifts with teachers, doctors, police
20 officers, all the time.

21 And one could make an argument, if --
22 if -- if consciousness of wrongdoing doesn't
23 mean consciousness of illegality, awareness of
24 illegality, if it means something more abstract
25 than that, how does this statute give fair

1 notice to anyone in the world as to -- and I
2 hate to do it, but I'm going to -- the
3 difference between the Cheese Factory and --

4 (Laughter.)

5 JUSTICE GORSUCH: And -- and --

6 JUSTICE BARRETT: Inn at Little
7 Washington.

8 JUSTICE GORSUCH: And the Inn at
9 Little Washington. Thank you, thank you. How
10 does anyone know?

11 MS. SINZDAK: Again, Justice Gorsuch,
12 I do not mean to suggest that if you are aware
13 that you are violating the law, that's not going
14 to establish consciousness of wrongdoing.

15 JUSTICE GORSUCH: No, no, no. Counsel
16 put that aside.

17 MS. SINZDAK: Okay.

18 JUSTICE GORSUCH: You've rejected that
19 as the definition of consciousness of
20 wrongdoing. You say it includes consciousness
21 of either illegality, which I would have thought
22 might mean wrongdoing, but I'm wrong. It can
23 mean something more than that, it can mean a
24 venial sin, it can mean a mortal sin, how does
25 -- how does somebody who accepts the Cheesecake

1 Factory know a trip to the Cheesecake Factory
2 for a nice treatment at the hospital, for
3 treating my child well in school, for an arrest
4 made? How does that person know whether that
5 falls on the -- what you call the wrongfulness
6 side of the equation or not?

7 MS. SINZDAK: Well, certainly they can
8 look at ethical guidance -- guidelines as they
9 were for the City of Portage.

10 JUSTICE GORSUCH: How about looking at
11 state law. Counsel, how about like looking at
12 state law --

13 MS. SINZDAK: They could -- they could
14 do that as well.

15 JUSTICE GORSUCH: Yeah. And let's say
16 it's all legal under state law. And you would
17 -- and --

18 MS. SINZDAK: If it's all legal under
19 state law, the government is not going to be
20 able to prove consciousness of wrongdoing.

21 JUSTICE GORSUCH: Why -- why --

22 JUSTICE KAVANAUGH: Why --

23 JUSTICE GORSUCH: Why not? Counsel,
24 please.

25 MS. SINZDAK: Sure.

1 JUSTICE GORSUCH: We're going to have
2 internal e-mails like Justice Alito posited.
3 Some people would say oh, I wouldn't go to the
4 Cheesecake Factory, that would look bad.

5 (Laughter.)

6 JUSTICE GORSUCH: You know, or maybe
7 you should go to the Cheesecake Factory but not
8 Little Inn at Little Washington. A lot of nice
9 places to me. But you're going to have evidence
10 and you could prove it. And a jury might well
11 convict.

12 MS. SINZDAK: Sure, and that's why the
13 act also has to be wrongful. This is actually a
14 protection, Justice Gorsuch, so I think that
15 maybe we're talking a little bit across
16 purposes.

17 JUSTICE KAVANAUGH: Well, can I ask --

18 MS. SINZDAK: Because what I'm trying
19 to say here is that the government has to show
20 that it's wrongful and the person is aware that
21 it's wrongful.

22 So if it's lawful under state law,
23 then the -- the -- the defendant is going to be
24 able to come in and say no, look, this is lawful
25 under state law. So it wasn't wrongful. The

1 state obviously didn't think it was wrongful and
2 by the, way I have no idea --

3 JUSTICE KAVANAUGH: You're going to
4 have an automatic rule?

5 JUSTICE GORSUCH: Yeah.

6 JUSTICE KAVANAUGH: Is that an
7 automatic rule is that -- is that a safe harbor
8 if it's lawful under state law or local law,
9 then you cannot be federally prosecuted for the
10 gratuity under this statute?

11 MS. SINZDAK: If it -- if it's lawful
12 under the governing rules that apply to the
13 person?

14 JUSTICE KAVANAUGH: In other words,
15 it's not made unlawful. If it's not made
16 unlawful --

17 MS. SINZDAK: I --

18 JUSTICE KAVANAUGH: Let me finish --
19 by the relevant state law or local law, is that
20 an automatic, automatic safe harbor such that
21 the federal government cannot prosecute under
22 this statute?

23 MS. SINZDAK: Yes but, you know, I
24 have to just for the sake of the public
25 integrity unit say that if a city mayor decided

1 to change all the ethics rules to allow him to
2 take billions of dollars in -- in connection
3 with contracting, then I don't think he could
4 get it in.

5 But otherwise yes, we're not -- so,
6 again, this is what I'm trying to say. The
7 consciousness of wrongdoing isn't a trap to the
8 --

9 JUSTICE KAVANAUGH: Should there be a
10 --

11 JUSTICE ALITO: Sorry, I'm --

12 MS. SINZDAK: -- unwearied. It's to
13 help the unwearied.

14 JUSTICE ALITO: A little town has no
15 rules about gratuities so you can't prosecute
16 anybody in that town under 666?

17 MS. SINZDAK: No. So, first of all,
18 there would be state rules. Absolutely, there's
19 going to be state rules. I took --

20 JUSTICE ALITO: All right. There's no
21 applicable -- the state has left the -- the
22 regulation of gratuities to the municipalities.
23 And a particular town has got 3,000 people,
24 2,000 people, 1,000 people. It has no rules
25 about the gratuities the police officers can

1 accept.

2 MS. SINZDAK: Look, if the police
3 officer can come forward and say I just had no
4 idea this was wrongful because there were no
5 applicable rules, there was no applicable state
6 law, then the government isn't going to be able
7 to prove consciousness of wrongdoing.

8 JUSTICE ALITO: Then -- the question
9 was whether that's an automatic rule.

10 MS. SINZDAK: No, no --

11 JUSTICE ALITO: And first you said it
12 was. And now -- and an automatic safe harbor.
13 Now I think you're saying it's not.

14 MS. SINZDAK: No, I disagree. Let me
15 distinguish between two things. One is a case
16 where there are ethics rules that say this
17 is permissible, okay?

18 If there are ethics rule that say that
19 this is permissible, if there are state laws
20 that say this kind of gratuity is permissible.
21 That is a safe -- safe harbor.

22 Other than --

23 JUSTICE KAVANAUGH: I -- I --

24 JUSTICE JACKSON: Usually --

25 JUSTICE KAVANAUGH: -- changed the

1 language of the question then to say also what
2 if it's just, to Justice Alito's point, not made
3 unlawful?

4 MS. SINZDAK: Ahh, Ahh, Ahh, Ahh. I
5 see. Okay. So I think there --

6 JUSTICE KAVANAUGH: What's the answer
7 is there, is that a safe harbor?

8 MS. SINZDAK: It's not necessarily a
9 safe harbor if it's obviously wrongful conduct,
10 but I will say --

11 JUSTICE KAVANAUGH: What is obviously
12 wrongful?

13 JUSTICE JACKSON: Yes, so counsel,
14 isn't --

15 JUSTICE KAVANAUGH: I mean, what's the
16 jury instruction -- what -- what -- maybe this
17 is a good way to say it. What is the exact
18 wording of the jury instruction on corruptly in
19 your view?

20 MS. SINZDAK: So I think there's two
21 different options. One is to isolate what is
22 obviously wrongful in the particular case.
23 That's what happened here, right?

24 So in this case, and let me -- I think
25 this is a helpful way of seeing how it played

1 out, Petitioner was not saying oh, it's -- I --
2 I didn't know it was wrongful to take a \$13,000
3 payment. What -- what Petitioner was saying is:
4 Oh, I wasn't taking a \$13,000 reward, I was
5 actually taking consulting fees.

6 So the jury instructions here said:
7 What the jury has to find is that the Petitioner
8 understood that this was a reward. So that's
9 what separated the wrongful from the innocent
10 conduct. So that's one way of doing jury
11 instructions, to look at a particular case and
12 just say: Okay, what would make accepting \$8
13 million for a hospital patient that --

14 CHIEF JUSTICE ROBERTS: Well, I don't
15 think that -- I don't think that gets you very
16 far from the things where people have been
17 talking about, understood that this was a
18 reward. I mean, they understand that the, you
19 know, plate of cookies or whatever is a reward
20 --

21 MS. SINZDAK: So the --

22 CHIEF JUSTICE ROBERTS: But that
23 doesn't mean that they should be -- be facing
24 the criminal exposure we're talking about.

25 MS. SINZDAK: Yes, pardon me. And

1 we're not saying that if the government was
2 somehow prosecuting a plate of cookies, this
3 instruction would be sufficient. What I'm
4 saying is that most cases there's actually no
5 dispute about whether it would be wrongful to
6 accept thousands of dollars in return for having
7 done some official act.

8 The dispute is about well, was it?
9 Was it a reward for doing that specific official
10 act or was it something else entirely?

11 CHIEF JUSTICE ROBERTS: Well, you say
12 that --

13 JUSTICE JACKSON: Well --

14 CHIEF JUSTICE ROBERTS: -- that it
15 doesn't -- you know, that it's -- the government
16 is not going to go after you for the plate of
17 cookies.

18 MS. SINZDAK: That's right.

19 CHIEF JUSTICE ROBERTS: But I mean,
20 you know, Al Capone went to jail for tax fraud,
21 right, not for killing however many people.

22 MS. SINZDAK: That's right.

23 CHIEF JUSTICE ROBERTS: And, you know,
24 you were careful to make sure you weren't
25 stepping on the toes of the public integrity

1 unit but I expect they have a different
2 perspective on a lot of these things than others
3 might.

4 MS. SINZDAK: No, no, in terms of
5 whether the reward needs to be --

6 CHIEF JUSTICE ROBERTS: Whether they
7 can go after something that other people might
8 regard as really sort of normal type of, let's
9 say gratuity, you know, whether it's a Christmas
10 gift for the -- for the trash collectors or
11 something like that.

12 MS. SINZDAK: No, I disagree. And
13 they certainly couldn't in the Seventh Circuit
14 if you look at 41A, the -- the Seventh Circuit
15 said that accepting something corruptly is
16 knowing that it's forbidden, so this is already
17 in the Seventh Circuit --

18 JUSTICE JACKSON: Counsel, isn't --
19 isn't -- isn't that really the answer to Justice
20 Kagan's hypothetical that sort of got us down
21 this road?

22 MS. SINZDAK: It did.

23 JUSTICE JACKSON: In other words, to
24 the extent that we have an ordinary practice of,
25 you know, unfortunate as it may be, you know,

1 high profile, special, you know, people,
2 billionaires who come to hospitals and it's sort
3 of understood generally that the development
4 office is going to be notified and afterwards
5 that person might, in fact, be asked to give a
6 donation to the hospital that treated him so
7 well, et cetera. That's sort of standard
8 practice.

9 So in a situation like that, I would
10 think the government's position is that is not
11 wrongful from the standpoint of corruption. We
12 could not prove consciousness of wrongdoing
13 related to anybody who's doing that sort of
14 thing, precisely because it's standard practice.

15 But when you have a situation like
16 this one where it's not standard practice for a
17 garbage contract to be given to a particular
18 company and then the company that received that
19 contract to pay out money, \$13,000 for the
20 officials who were involved, that doesn't happen
21 very often.

22 And so when we're in that world, then
23 perhaps we do have a dispute about whether or
24 not there was wrongful behavior, consciousness
25 of wrongdoing, et cetera. But that's what

1 separates all these other standard practice, the
2 cookies, the gift cards, the whatever, that's
3 normal practice, as opposed to --

4 JUSTICE BARRETT: Unless it's a
5 corrupt -- what if -- what if it's a corrupt,
6 like -- sorry to pick, you know, on Illinois or
7 Chicago, but what if you're talking about some
8 sort of local unit or a corrupt hospital where
9 that actually is kind of corrupt practice that
10 everyone would agree would be wrongdoing?

11 Not the donation to the hospital.
12 Talk about something that's more unsavory.
13 Maybe these rewards are just kind of accepted in
14 this small town, and -- and, you know, you can't
15 use that guideline then that Justice Jackson is
16 talking about about what's standard, because
17 graft could be standard or gratuities could be
18 standard even in unsavory cases.

19 MS. SINZDAK: So the government has
20 the burden of proof. They need to prove that
21 somebody acted corruptly with consciousness of
22 wrongdoing. I certainly agree with Justice
23 Jackson that if a person knows that this kind of
24 behavior is happening all the time, that's the
25 evidence they're going to put in to make it very

1 difficult for the government to meet their
2 burden of proof.

3 I take your point --

4 JUSTICE SOTOMAYOR: Counsel, can I --

5 MS. SINZDAK: -- that the government
6 might say, well, this is an obviously corrupt --

7 JUSTICE SOTOMAYOR: Counsel?

8 MS. SINZDAK: -- hospital, here's all
9 the other evidence of that.

10 JUSTICE SOTOMAYOR: Counsel, my head
11 is spinning.

12 MS. SINZDAK: Yes.

13 JUSTICE SOTOMAYOR: I see the
14 questions before us as twofold. Does the
15 language of -- of this 201(c) include a
16 gratuity? It's very hard for me to think
17 otherwise because the language is pretty clear.
18 So, if it's clear that it includes gratuity, a
19 lot of these questions have to do with what kind
20 of gratuity, and that's where I think my
21 colleagues are focused on what does the word
22 "corruptly" mean.

23 And you are fighting their suggestion
24 that if you limit it to accepting rewards that
25 are unlawful -- I think Justice Gorsuch said,

1 unlawful defined how? He would say under state
2 law, I think. I don't want to be putting words
3 into his mouth, but I think he would say
4 unlawful by state law.

5 But you want to broaden it. You want
6 to say by ethical rules. But assume we -- we
7 put that aside. Can you live with yes, it
8 includes gratuities but only if you define
9 "corruptly" as being unlawful, the way that
10 Anderson suggested it went a little more
11 broadly?

12 MS. SINZDAK: With -- with the
13 understanding of unlawfulness, yes, absolutely.
14 And let me answer that directly. Let me also
15 say that I -- I -- I take your point,
16 "rewarded" -- I think the reason we're talking
17 about "corruptly" is because "rewarded" just
18 very clearly does cover after-the-fact payments.
19 There is no beforehand agreement requirement.

20 And I think that to the extent there's
21 a dispute about exactly how you would define
22 "corruptly," that isn't before the Court because
23 they did not object to the definition of
24 "corruptly."

25 JUSTICE SOTOMAYOR: I understand it's

1 not before the Court, but it really is because,
2 if we -- if it's not defined that way, I think
3 there's a sense of then "gratuity" has no
4 meaning, that anyone that could -- it would be
5 so vague that it would be impossible.

6 MS. SINZDAK: It would just be the
7 provision that applies to federal officials in
8 Section 201(c), which doesn't have the corruptly
9 mens rea.

10 JUSTICE SOTOMAYOR: Yes.

11 MS. SINZDAK: That's right.

12 JUSTICE SOTOMAYOR: Obviously.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Alito?

16 JUSTICE ALITO: Well, I'm not sure I
17 understood your most recent colloquy with
18 Justice Sotomayor.

19 You said that it would be -- that
20 "corruptly" should or could reasonably be
21 interpreted to mean unlawful under state law?
22 Is that what you said?

23 MS. SINZDAK: I said -- I think she
24 asked whether we could live with a definition,
25 and I said that understanding that it was

1 unlawful is a definition I think that certainly
2 would be preferable to carving out gratuities
3 from the statute altogether.

4 JUSTICE ALITO: So, if something is
5 not unlawful under state law, then it cannot be
6 prosecuted as a gratuity under 666?

7 MS. SINZDAK: If the person -- the
8 person needs to understand that what they're
9 doing is wrongful. I mean, this is why we do
10 think it means more than --

11 JUSTICE ALITO: And that's a simple --
12 it's really a simple --

13 MS. SINZDAK: Yeah, I mean,
14 absolutely, because --

15 JUSTICE ALITO: Counsel, really --

16 MS. SINZDAK: Yes.

17 JUSTICE ALITO: -- it's a simple
18 question.

19 MS. SINZDAK: Okay. Let me just be
20 clear.

21 JUSTICE ALITO: Because it's a
22 yes-or-no question.

23 MS. SINZDAK: Let me be clear. I can
24 live --

25 JUSTICE ALITO: I just want to

1 understand your position.

2 MS. SINZDAK: Yes. Absolutely. I can
3 live with, as I said to Justice Sotomayor, that
4 narrow definition. I do not think it is
5 correct. So that's the distinction that I am
6 trying to draw.

7 But, if the Court is intent on saying
8 we have this statute that Congress wrote that
9 says you can't accept a payment intending to be
10 rewarded, but it has to be corrupt. If the
11 Court thinks that what Congress wrote is not
12 good enough, it's not protective enough of city
13 officials, and we need to graft a limit on, I
14 would certainly rather you graft on a limit that
15 is still going to catch people who are, like
16 Petitioner, taking large sums of money after
17 they awarded a contract with every intent to get
18 that -- large sums of money.

19 I would certainly rather you accept --
20 leave some room for that as opposed to carving
21 it out entirely.

22 JUSTICE ALITO: Okay. And just to
23 summarize so I understand where you are, you
24 think that "corruptly" means moral -- immoral or
25 wrongful, and it requires knowing, the person

1 must know that what is being done is immoral or
2 wrongful?

3 MS. SINZDAK: Know that it's
4 forbidden. Again, I'm just -- to be honest, I'm
5 quoting Arthur Andersen. So I think, if you're
6 looking for --

7 JUSTICE ALITO: Just tell me what --

8 MS. SINZDAK: -- my definition of
9 "corruptly" --

10 JUSTICE ALITO: Just tell me --

11 MS. SINZDAK: Sure.

12 JUSTICE ALITO: -- what the definition
13 is.

14 MS. SINZDAK: So what Arthur Andersen
15 said is that "corrupt" needs to be wrongful,
16 evil, immoral, and a consciousness of
17 wrongdoing. So that's it. That's what we're
18 looking at.

19 JUSTICE ALITO: Okay. And where does
20 -- where would one look to find the rules of
21 wrongfulness and immorality that would be
22 applied in that situation?

23 MS. SINZDAK: Well, again, I think
24 that the criminal laws are a great place to
25 look, so where the conduct is obviously

1 unlawful. You can also look at ethical codes
2 and regulations if you're not sure whether
3 something is obviously wrongful.

4 None of this was litigated in this
5 case because, again, there was no dispute that
6 accepting a \$13,000 payment for having granted a
7 contract was wrongful, which I think was what he
8 was doing.

9 JUSTICE ALITO: I -- I -- we -- I
10 think we understand that. But we didn't really
11 take this case just to decide whether this case
12 was correctly -- this particular case was
13 correctly decided. We took it to explore the
14 meaning of this provision.

15 Was the jury instruction here on
16 "corruptly" correct?

17 MS. SINZDAK: It was in the
18 circumstances of this case because there was no
19 dispute about whether accepting a reward was
20 wrongful. But, Justice Alia, that's what --
21 sorry, pardon me. Justice Alito, that is
22 precisely what I'm trying to say. You do have
23 to look at the circumstances because you have to
24 isolate what was wrongful.

25 And, here, there was no dispute that

1 taking \$13,000 as a payment for having granted a
2 contract was wrongful. That's why Petitioner
3 didn't object to the jury instructions.

4 JUSTICE ALITO: Is -- is this the
5 standard instruction that the government has
6 requested --

7 MS. SINZDAK: In the Seventh --

8 JUSTICE ALITO: -- in 666 gratuity
9 cases?

10 MS. SINZDAK: In the Seventh Circuit,
11 this comes from the model jury instructions. I
12 would say that in -- in the prosecutions that I
13 have seen, there just hasn't really been room to
14 argue that the person -- that the -- the
15 acceptance of the payment wasn't wrongful
16 because what the government has been prosecuting
17 is taking money and then doing everything that
18 you can to cover up the fact that you took the
19 money as a reward.

20 And, there, it's pretty easy to show
21 consciousness of wrongdoing, right?

22 JUSTICE ALITO: But I --

23 MS. SINZDAK: I think what you're all
24 talking about is these fringe cases where, oh,
25 it's not really clear because the person

1 actually took it openly and notoriously. That's
2 going to make it really hard for the government
3 to show consciousness of wrongdoing if it's had
4 --

5 JUSTICE ALITO: If we looked at the
6 jury instructions in 50 666 gratuity cases, what
7 would we find on the question of corruptly?

8 MS. SINZDAK: So --

9 JUSTICE ALITO: What would -- what
10 would the jury be told? Here, what the jury was
11 told is -- am I right, page 28 of the Joint
12 Appendix -- a person acts corruptly when he acts
13 with the understanding that something of value
14 is to be offered or given to reward or
15 influence.

16 So, as to gratuity, to reward in
17 connection with his official duties. I mean,
18 all that has to be -- the person has to know is
19 that this is a reward.

20 MS. SINZDAK: In this --

21 JUSTICE ALITO: It doesn't have to be
22 immoral, wrongful, or anything else.

23 MS. SINZDAK: Again, that's -- in the
24 circumstances of this case, there was no
25 dispute.

1 JUSTICE ALITO: I -- I --

2 MS. SINZDAK: So I take your point.

3 JUSTICE ALITO: -- I -- I understand
4 that. I understand that. I -- I'm not -- I
5 don't want to talk about the circumstances of
6 this case.

7 MS. SINZDAK: I know.

8 JUSTICE ALITO: I want to talk about
9 what the law means and what the government's
10 position has been on the issue of "corruptly" in
11 other cases. Is this standard or, if we look at
12 the others outside of the Seventh Circuit, the
13 "corruptly" is defined as immoral or wrongful?

14 MS. SINZDAK: So the Second Circuit, I
15 believe, has instructions that ask about a
16 wrongful purpose. And, of course, if the -- if
17 the defendant thinks, look, I didn't know what
18 -- that taking this reward was wrong, then he
19 can ask for an instruction saying, I had no --
20 asking the jury to decide whether he understood
21 that the -- taking the reward was wrong.

22 So there can be that express request.
23 And -- and -- and this is just -- I'm just sort
24 of taking a page from Arthur Andersen on all of
25 this. "Corruptly" is, I admit, a relatively

1 unique -- or a unique mens rea, but it's one
2 with a rich historical pedigree. So it's not
3 that the government is making up some new limit.
4 It's not that Congress in 1986, when it was
5 trying to -- to eliminate innocuous gratuities,
6 was doing something wild and crazy by saying,
7 you know, we're going to use the corruptly mens
8 rea because that is going to make sure that when
9 people don't understand that what they're doing
10 is wrongful, that when they're engaged in what
11 everyone would reasonably think or at least, you
12 know, that somebody would reasonably think was
13 just innocuous conduct, then they're not going
14 to be prosecutable because the government just
15 isn't going to be able to show that that was
16 corruptly.

17 JUSTICE SOTOMAYOR: Counsel --

18 CHIEF JUSTICE ROBERTS: I'm sorry.

19 Are you done?

20 JUSTICE ALITO: Well, I am concerned
21 about the breadth of -- the breadth of your
22 interpretation, and it all seems to rest on the
23 understanding of "corruptly."

24 The person who gives a reward simply
25 because that person is grateful may not know

1 what the ethics rules are with respect to the
2 recipient of this reward. So is that a defense?

3 MS. SINZDAK: Certainly, that -- that
4 person could ask for a jury instruction saying
5 they need to -- there needs to be consciousness
6 of wrongdoing, so they need to have understood
7 that what they were doing was wrongful. These
8 are sort of obscure ethics rules, they didn't
9 know -- you know, the person could say I didn't
10 know about them. These are obscure ethics
11 rules, how would anybody know, you know, \$25,
12 \$50. And, yes, then they're entitled to a jury
13 instruction saying no, there had to be a
14 consciousness of wrongdoing.

15 JUSTICE ALITO: I mean, we can think
16 of lots of different hypotheticals, and there
17 are a lot in the briefs and a lot have occurred.
18 I'll just give you one more and then I'll stop.

19 So the owner of a -- of a car
20 dealership gets money under -- during -- as a
21 result of COVID, enough money to qualify, and
22 the owner is thankful to a firefighter for
23 saving the life of his daughter, and so, when
24 that firefighter comes in to -- his car breaks
25 down and wants a new car, but at that time,

1 people are lined up, the cars are in short
2 supply, and the -- the dealer says, okay, well,
3 you know what, for you, I'll put you at the top
4 of the list, is that a -- is that a violation?

5 MS. SINZDAK: If he does not have a
6 consciousness of wrongdoing, if he does not
7 understand that what he is doing is wrong, I
8 don't think the government -- no, there's not
9 going to be a conviction for that.

10 Again, the -- the car being --

11 JUSTICE ALITO: There's not going to
12 be a conviction because the jury is going to be
13 sympathetic to this fellow?

14 MS. SINZDAK: No, because it's not
15 going to fulfill the corruptly mens rea. Again,
16 I want to be clear because I think we keep
17 losing sight of this. Section 201(c) bars for
18 federal officials just accepting gratuities, and
19 it has no corruptly mens rea.

20 The corruptly mens rea is a break.
21 It's a break that Congress put in as an extra
22 help to make sure that people who are bound by
23 Section 666 aren't going to be prosecuted for
24 all of this innocuous conduct.

25 So I think this idea that by putting

1 in something to protect -- an extra protection
2 for Section 66 -- people covered by Section 666,
3 you could somehow render all the coverage of --
4 of gratuities totally vague and unclear, I mean,
5 that just can't be right.

6 CHIEF JUSTICE ROBERTS: Thank you.
7 Thank you, counsel.

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, you
10 answered Justice Alito by saying the instruction
11 here was correct. But I'm reading the Seventh
12 Circuit opinion at page 580, and the court is
13 talking about that it's recognizing the
14 disparate penalties for gratuities between
15 federal and state officers, and the difference
16 is mitigated -- this is the court's words -- by
17 the additional requirement in Section 666 that
18 the reward be paid or received corruptly.

19 And it defined "corruptly," i.e., with
20 the knowledge that giving or receiving the award
21 -- reward is forbidden.

22 MS. SINZDAK: That's right.

23 JUSTICE SOTOMAYOR: All right. But
24 that wasn't part of the charge here.

25 MS. SINZDAK: At 41a? No, because,

1 again, the Petitioner was not -- was not
2 arguing.

3 JUSTICE SOTOMAYOR: So -- so the
4 charge wasn't correct. It was just not the --
5 any error was not preserved to be --

6 MS. SINZDAK: I mean, that's an issue
7 that could be dealt with on remand. But what I
8 would say -- yes. Yes.

9 JUSTICE SOTOMAYOR: I understand.
10 Just answer my question.

11 MS. SINZDAK: Yes, I am. So --

12 JUSTICE SOTOMAYOR: All right. Now
13 stop, okay?

14 MS. SINZDAK: Okay.

15 JUSTICE SOTOMAYOR: Assuming if you go
16 back below, if we say that -- I'm not saying
17 we're going to say it -- that it doesn't -- that
18 666 doesn't cover any kind of gratuity, what
19 happens? Is this a reversal or a vacate and
20 remand?

21 MS. SINZDAK: It's a vacate and remand
22 because the government was pursuing a bribery
23 theory.

24 JUSTICE SOTOMAYOR: As well?

25 MS. SINZDAK: Yes.

1 JUSTICE SOTOMAYOR: And so it was --
2 we don't know what the acquittal went to,
3 whether it went --

4 MS. SINZDAK: Well --

5 JUSTICE SOTOMAYOR: -- to the bribery
6 or to the reward?

7 MS. SINZDAK: So -- pardon me. It's a
8 -- it's a single offense, the corrupt --

9 JUSTICE SOTOMAYOR: Mm-hmm.

10 MS. SINZDAK: -- acceptance offense,
11 that can be committed through intending to be
12 influenced or rewarded.

13 Now the -- the district court actually
14 found that there was sufficient evidence to
15 convict purely on the -- on the quid pro quo
16 gratuity theory.

17 JUSTICE SOTOMAYOR: I remember that,
18 yes.

19 MS. SINZDAK: Yeah.

20 JUSTICE SOTOMAYOR: Okay.

21 MS. SINZDAK: So --

22 JUSTICE SOTOMAYOR: So -- and if I
23 don't disagree with that, then is there a
24 retrial?

25 MS. SINZDAK: No, we think that there

1 would be because the evidence was sufficient to
2 convict on the -- on the -- on the bribery.

3 JUSTICE SOTOMAYOR: That was --

4 MS. SINZDAK: But, again, that's
5 something for remand.

6 JUSTICE SOTOMAYOR: All right. Thank
7 you, counsel.

8 MS. SINZDAK: Mm-hmm.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: I think I've got your
11 view of corruptly.

12 MS. SINZDAK: I'm glad.

13 JUSTICE KAGAN: But, if you put that
14 aside, are there any safe harbors in this
15 statute -- and just like if you would list for
16 me the safe harbors that the government thinks
17 exists either on the face of this statute or in
18 the way you're prosecuting this statute, just
19 give me a list.

20 MS. SINZDAK: Sure. So the -- the
21 safe harbors that come from the text, so this is
22 in a sort of trust us argument. There's the
23 that it has to be in connection with business or
24 transactions worth \$5,000.

25 JUSTICE KAGAN: Got it, five --

1 \$5,000.

2 MS. SINZDAK: Right. That's the
3 Sun-Diamond, there has to be the nexus, that's
4 going to kick out a whole bunch of innocuous
5 conduct, more even than --

6 JUSTICE KAGAN: Just -- just list
7 them.

8 MS. SINZDAK: Just list them? Okay.
9 So the corruptly mens rea, the nexus
10 requirement, the \$5,000 floor, and the express
11 exception for bona fide salary and compensation
12 in the ordinary course of business.

13 JUSTICE KAGAN: Anything else?

14 MS. SINZDAK: That's -- that's all --
15 well, and pardon me, and then the First
16 Amendment protection that says that under
17 McCormick we understand that to mean that there
18 really has to be an express quid pro quo when
19 we're dealing with a bona fide campaign
20 contribution.

21 JUSTICE KAGAN: Nothing else that the
22 government can say we realize that this doesn't
23 appear on the text of the -- in the text of the
24 statute on, you know, like you just read it, but
25 we never prosecute X, Y, or Z?

1 MS. SINZDAK: I mean, you -- you've
2 told me to sort of set aside "corruptly."

3 JUSTICE KAGAN: Yes, set aside.

4 MS. SINZDAK: And I think that's where
5 a lot of that comes in. But, for example, the
6 government does not prosecute pure charitable
7 contributions. Sometimes charitable
8 contributions are used as a funnel, so it's just
9 sort of like you pay into the charity and then
10 that goes right into the person's pocket, but
11 the government doesn't -- doesn't prosecute
12 these -- the -- the just pure charitable
13 contribution.

14 If you actually look at the facts of
15 the cases that they're citing, I think one of
16 them is from the Local 150, that's the Donegal
17 prosecution, there's actually thousands and
18 thousands of dollars of payments of all
19 different kinds, that's actually on -- on
20 Westlaw. You can look at the facts. They're
21 quite dramatic. So that's not just pure
22 charitable contributions.

23 Similarly, I think they refer to a
24 building inspector case. In that case, somebody
25 was giving -- the building inspector was giving

1 permits and then -- and then getting, again,
2 large amounts of money from developers, having
3 given them the permit, so I think we had 30 -- a
4 240,000 loan, \$30,000 the person just got to
5 keep scot-free.

6 So -- so I guess I'm kind of trying to
7 give you a picture of the sort of prosecutions,
8 which I -- I -- I guess I'm not kind of
9 including in here the kind of apple for teacher
10 and the like, you know, the hypotheticals that
11 you see in Petitioner's brief. They're just not
12 even on the radar in terms -- of the government.

13 So I think those are just what we're
14 looking for is, again, corrupt acceptance of a
15 payment with the intent to be rewarded in
16 connection with business or transactions worth
17 at least \$5,000. And when we're talking about
18 all these hypotheticals, they just in the
19 government's view, I think in any court's view,
20 in any jury's view, they don't fall into that.

21 JUSTICE KAGAN: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 JUSTICE GORSUCH: Counsel, you in your
25 brief make the point that we have to interpret

1 "rewarded" your way rather than your friend's
2 way because, otherwise, we're going to have a
3 superfluity problem.

4 In a case we're going to hear in a
5 couple of days, the government makes the
6 opposite argument and says that -- I think it
7 says overlap is not uncommon in criminal
8 statutes, and, therefore, superfluity doesn't
9 come into play.

10 Which is it?

11 MS. SINZDAK: So I think that,
12 certainly, sometimes there is superfluity in a
13 statute. There's belt and suspenders.

14 JUSTICE GORSUCH: Yes.

15 MS. SINZDAK: The reason not here,
16 Justice Gorsuch --

17 JUSTICE GORSUCH: Yeah. Why -- why --
18 why does it matter here, but it doesn't two days
19 from now?

20 MS. SINZDAK: So the reason that it
21 matters in this case -- and I can't, of course,
22 speak for other cases -- but the reason it
23 matters to this case is that, well, because I'm
24 here about this case. So the reason is that --

25 JUSTICE GORSUCH: Well, you represent

1 the government of the United States, which I
2 would hope would take consistent positions
3 across cases.

4 MS. SINZDAK: We -- and we --

5 JUSTICE GORSUCH: So, counsel --

6 MS. SINZDAK: Let me explain to you
7 why we are.

8 JUSTICE GORSUCH: Thank you.

9 MS. SINZDAK: So Congress added the
10 term, added "intended to be influenced or
11 rewarded" in 1986, so there, adding the
12 "rewarded" to what would otherwise have been
13 language closely top -- closely tracking Section
14 201(b), they clearly were trying to add
15 something to cover more, to cover additional
16 material. So, there, when we have Section
17 201(b), which would be the example of what you
18 would do if you wanted to cover only the type of
19 quid pro quo bribery that Petitioner is talking
20 about, they had that, but they didn't just take
21 201(b) and plop it into Section 666. Instead --

22 JUSTICE GORSUCH: I got it.

23 MS. SINZDAK: -- they added
24 "rewarded."

25 JUSTICE GORSUCH: Counsel, I -- I got

1 it. I got it, okay?

2 And earlier this term the government
3 argued that it would defy common sense for
4 Congress not to have required more serious
5 sentences for more serious crimes in Pulsifer.

6 MS. SINZDAK: Mm-hmm.

7 JUSTICE GORSUCH: And that -- that --
8 that argument prevailed.

9 Here, you're suggesting that it makes
10 sense for the more serious offense of bribery
11 and the less -- lesser offense of receiving a
12 gratuity to receive the same punishment. Can
13 you -- can you reconcile that one for me?

14 MS. SINZDAK: Of course, the
15 government looks first to the text, and we know
16 that the text here says that the 10-year penalty
17 it did in 1984 when Petitioner acknowledges that
18 it undisputedly covered gratuities.

19 But I -- I can give you a historical
20 reason why I think we have that, you know, the
21 two years under 1962 and the -- and the 10-year
22 maximum.

23 JUSTICE GORSUCH: That that wasn't --

24 MS. SINZDAK: -- and the 10-year
25 maximum --

1 JUSTICE GORSUCH: That wasn't my
2 question. Why would -- why would both bribery
3 and receipt of a gratuity have the same 10-year
4 sentence here and we should ignore that, but we
5 were supposed to take cognizance of that kind of
6 issue just last month?

7 MS. SINZDAK: Because Section 666 was
8 enacted as part of the 1984 Crime Control Act,
9 which also enacted the sentencing guidelines.
10 And so Congress was moving from a situation
11 where -- as it had in 201, it was specifying
12 specific sentences for specific -- for specific
13 law -- types of breaking of a law. So there's
14 201(b). It had the two-year maximum for that.

15 In 1984, Congress is doing sentencing
16 guidelines, so it's saying we're going to have,
17 you know, a maximum but we're not going to worry
18 about that because we're going to have mandatory
19 guidelines that are going to take care of this.
20 And then, In fact, if you look, Section 666 is
21 listed both --

22 JUSTICE GORSUCH: Well, the mandatory
23 --

24 MS. SINZDAK: -- under the gratuity
25 guidelines --

1 JUSTICE GORSUCH: -- guidelines
2 argument was the same point that was made in
3 Pulsifer, and you -- you said that wasn't enough
4 there.

5 MS. SINZDAK: So just -- just to
6 finish my point, if you look at the guidelines,
7 the -- there is a gratuity guideline that
8 applies to Section 666. There is a bribery
9 guideline that applies to Section 666. Under
10 the gratuity guidelines, people are not getting
11 more than two-year sentences. And Petitioner
12 hasn't pointed to anywhere that has happened.

13 JUSTICE GORSUCH: Okay. Last one.
14 And it -- this is circling back to Justice
15 Kagan. And, again, put aside the -- the
16 question about "corruptly."

17 It seems to me that -- that the major
18 safeguard that you pointed to in that discussion
19 was the \$5,000 threshold. Is that right? The
20 \$10,000 threshold and the 5,000 threshold?

21 MS. SINZDAK: I think the bona fide
22 salary exception is pretty important.

23 JUSTICE GORSUCH: Okay. Okay, got
24 that. Okay.

25 With respect to those thresholds, the

1 government seems to have argued that they're
2 satisfied pretty easily. In connection with
3 business of an organization, the government has
4 argued that we can take account of the salary of
5 police officers, which are obviously more than
6 \$5,000. So because the Police Department
7 receives \$10,000 and the police officer makes
8 more than \$5,000, any gift of any value would
9 seem to qualify. What am I missing there?

10 MS. SINZDAK: No, that's not quite
11 right. So I think you're talking about the case
12 in which there was a -- a drug dealer who was
13 giving, I think \$1,000 --

14 JUSTICE GORSUCH: No, I'm not talking
15 --

16 MS. SINZDAK: I mean, that is the --
17 the case which -- yes.

18 JUSTICE GORSUCH: That's the case
19 where the Seventh Circuit said that --

20 MS. SINZDAK: Right.

21 JUSTICE GORSUCH: -- \$5,000 is
22 satisfied by the police officer's salary.

23 MS. SINZDAK: Right.

24 JUSTICE GORSUCH: That's true.

25 MS. SINZDAK: And the reason was

1 because they were counting up how many salary
2 hours the police officers would have spent, and
3 they were evaluating that. So it wasn't just
4 kind of like a police officer makes more than
5 \$5,000.

6 JUSTICE GORSUCH: So any time an
7 employee at hospital does more than \$5,000 worth
8 of work on behalf of a patient, or a teacher
9 spends more than \$5,000 worth of time with a
10 student, then that -- that -- that threshold
11 would be satisfied in the government's view?

12 MS. SINZDAK: Where the specific
13 transaction and business is worth more than
14 \$5,000, yes.

15 JUSTICE GORSUCH: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: You -- you've said
19 several times, I think, that some gratuities,
20 some thank-yous should be proscribed, either
21 because of the appearance problem they present,
22 government officials getting payments like that,
23 or because they're suggestive of something more
24 nefarious that might also be going on with
25 respect to the government official.

1 And now, I -- there's widespread
2 agreement on that, I think. And I certainly do
3 as well agree on that. I think there are two
4 issues here you need to deal with, though. I'm
5 going to come back to them.

6 One is we're talking about state and
7 local officials who might have different state
8 and local rules than what the federal government
9 is going to come in and superimpose on them.
10 The second issue is the word "corruptly." And
11 you said, I think, that the word "corruptly" was
12 a break on an otherwise broad statute, and so
13 it's a good thing here, right?

14 And I accept that, but the problem is
15 the word "corruptly" then creates enormous
16 uncertainty and vagueness about where the line
17 is drawn. And so when you have state and local
18 officials who have one set of rules they think
19 they're following, coupled with a vague federal
20 line that they have no idea where that's drawn,
21 and it's up to 10 years in prison, that's a
22 problem.

23 MS. SINZDAK: So I think to -- to
24 alleviate that concern, it is consciousness of
25 wrongdoing. So if there's uncertainty, if

1 there's uncertainty about whether accepting that
2 reward is wrongful, the government isn't going
3 to be able to prove that the person had this
4 consciousness of wrongdoing. So I think --

5 JUSTICE KAVANAUGH: Well, you nicely
6 anticipated my next question, which is to drill
7 down again, and you did with Justice Sotomayor,
8 on "wrongful." And Justice Gorsuch as well.

9 I think it's your backup position. I
10 think you said you could live with it. But I'm
11 going to make sure I've got it. An instruction
12 that says you're -- you're only guilty under
13 this statute, paraphrasing, if you -- if the
14 conduct was unlawful under state or local law?

15 MS. SINZDAK: Can I live with that?

16 JUSTICE KAVANAUGH: Are you okay with
17 that?

18 MS. SINZDAK: Over cutting out
19 gratuities entirely? I mean, yes, I'm going to
20 take the -- the -- the narrower statutory
21 surgery.

22 JUSTICE KAVANAUGH: And knew that it
23 was unlawful? Because you've said consciousness
24 of wrongdoing.

25 MS. SINZDAK: Yes.

1 JUSTICE KAVANAUGH: So consciousness
2 of illegality. In other words, this statute
3 would be narrowed to a situation where it was
4 unlawful under state or local law and you knew
5 it was unlawful under state or local law to take
6 that gratuity. That's your -- I mean --

7 MS. SINZDAK: Yes. Yes.

8 JUSTICE KAVANAUGH: That's better from
9 your perspective than --

10 MS. SINZDAK: That's absolutely
11 better. I think it might be worse for some
12 defendants where the state or local law had some
13 ticky-tacky requirement that they just couldn't
14 possibly have known was -- was really wrongful.
15 So I think this is actually less protective in
16 some ways, but I'm certainly willing to live
17 with it.

18 JUSTICE KAVANAUGH: Well, that may
19 indicate that even the backup position is no
20 good. But that's a --

21 MS. SINZDAK: No, I don't -- I don't
22 --

23 JUSTICE KAVANAUGH: -- you're arguing
24 against yourself there a little.

25 MS. SINZDAK: No, I -- I don't think

1 so. Again, the very worst is -- I -- I think
2 what you could be saying is that, you know, we
3 know that gratuities are barred under Section
4 201(c) with no corruptly mens rea. I mean, if
5 you think that corruptly can't be --

6 JUSTICE KAVANAUGH: But I'm going to
7 -- can I just --

8 MS. SINZDAK: -- adding anything --

9 JUSTICE KAVANAUGH: Can I just stop
10 you there?

11 MS. SINZDAK: -- then we both go to
12 Section 201(c).

13 JUSTICE KAVANAUGH: That lends to the
14 clarity point. And it's clear there, but here
15 when you put "corruptly" in, now you don't know
16 where the line is. You don't know if the
17 concert tickets, the game tickets, the gift card
18 to Starbucks, whatever, where is the line, and
19 so there's vagueness. That creates the problem
20 that -- there is here.

21 MS. SINZDAK: No, I -- I disagree.

22 JUSTICE KAVANAUGH: And you -- and you
23 say -- this is my last question. You said these
24 fringe cases, as compared to this case. I -- I
25 think the, quote, "fringe cases" are the every

1 day concern.

2 MS. SINZDAK: Again, there's a
3 requirement of consciousness of wrongdoing. So
4 if the person couldn't know that this behavior
5 was wrongful because it was unclear, because
6 there are some line-drawing difficulties,
7 because some people think this is wrong and some
8 people think it's right, then the government
9 isn't going to be able to meet its burden of
10 proof.

11 JUSTICE KAVANAUGH: Well, that's --

12 MS. SINZDAK: So it's not introducing
13 vagueness.

14 JUSTICE KAVANAUGH: Well, you're --
15 you're sitting in a criminal courtroom, you
16 know, you're a -- you're a regular, you know,
17 police officer or a local official, you've
18 depleted your money, you've -- to defend
19 yourself, you're -- you've lost your job because
20 you're prosecuted, and it's like, oh, well, the
21 good news is they won't be able to meet my --
22 the burden of proof because some people thought
23 it was okay to do this?

24 MS. SINZDAK: No. I mean, prosecutors
25 have a responsibility not to bring prosecutions

1 that don't meet the statute. And what I'm
2 saying is that the statute prevents that kind of
3 prosecution. So it's a -- it's a -- it's a --
4 it's what Congress said, we don't want to reach
5 innocuous conduct. We want to make sure. We
6 were going to put in a mens rea that makes sure
7 that you understand that what you're doing is
8 wrongful and you do it anyway. That's the
9 nature of this mens rea. It's a break.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Okay. So I'm
14 increasingly worried about the scope of the
15 government's position. I -- I'd like you to
16 tell me how your backup position that you were
17 just talking about with Justice Kavanaugh works
18 for the private university or the private
19 hospital employee that Justice Kagan was
20 pointing out satisfies the grant amount. And
21 I'll say, you know, as Justice Gorsuch pointed
22 out, I don't think that the nexus requirements
23 or the \$5,000 requirement does a whole lot of
24 work. And, you know, for the surgery, the
25 employee's time, or the police officer's time,

1 working your case or the professor's time
2 spending like -- trust me, tutoring is
3 expensive. I've paid a lot of tutoring bills.
4 You know, the professor is spending all this
5 extra time, you know, out -- outside of class.

6 So if state and local laws -- I mean,
7 I assume you're encompassing ethics rules for
8 state and local government employees in your
9 answer to Justice Kavanaugh?

10 MS. SINZDAK: Yeah.

11 JUSTICE BARRETT: So how does that
12 cash out for the private people?

13 MS. SINZDAK: So if it's acceptable
14 under those rules, I think, it's a safe harbor,
15 is what we've been discussing.

16 JUSTICE BARRETT: Right, but I'm
17 saying that these ethics rules aren't going to
18 apply in the private context to the car dealer,
19 the private university, the private hospital
20 that's swept in because of the federal funds.

21 MS. SINZDAK: Oh, I -- I don't think
22 that's really necessarily true. I think many
23 entities like hospitals, research institutions,
24 the entities that are actually being covered
25 here, they do have ethics rules. So there is

1 going to be something to look at. But also that
2 they can certainly --

3 JUSTICE BARRETT: But not the state
4 and -- I guess -- let me just, like, pin you
5 down. I'm not saying that they won't have
6 ethics rules.

7 MS. SINZDAK: Mm-hmm.

8 JUSTICE BARRETT: The hospitals, the
9 universities, et cetera, they're going to have
10 ethics rules. I don't know about the car
11 dealerships.

12 (Laughter.)

13 JUSTICE BARRETT: But what I'm saying
14 is if local -- state and local government rules
15 don't apply to them, where do you look for your
16 backup position? Is it like, you know, the
17 university ethics rules, the hospital ethics
18 rules?

19 MS. SINZDAK: I -- I think where I
20 look is whether they had, you know -- I think
21 the easiest thing is whether there would be
22 concrete evidence that this was wrong. So --
23 so, yes. If their entity's rules barred the
24 thing, then I think that's going to be pretty
25 good evidence.

1 If it's unclear, though, Justice
2 Barrett, I just want to again tell you that
3 there has to be a consciousness of wrongdoing.
4 So if there just was nowhere they could look and
5 there was no way for them to know that taking
6 the, you know, cashmere blanket for the tutoring
7 was wrongful, then the government can't show
8 consciousness of wrongdoing and it can't
9 prosecute in that case.

10 JUSTICE BARRETT: Can't show it?
11 So -- but -- but you're kind of sliding I guess
12 into the not backup position but the immoral or
13 the this is unsavory or this is wrong?

14 MS. SINZDAK: No, they need to show
15 that the person understood that what they were
16 doing was wrongful. So if they -- the
17 government cannot show that what the person --
18 that the person understood what they were doing
19 was wrongful, was against the law is the easiest
20 way to show that, but if they don't have any
21 laws to point to, if they don't -- just don't
22 have any -- anything that they can point to,
23 then they're not going to be able to prove that
24 the person would know, would understand that
25 what they're doing is wrongful.

1 JUSTICE BARRETT: But under your first
2 order position there wouldn't be anything to
3 point to, right, because I thought your first
4 order position -- like your backup is if it's
5 proscribed by law. But I thought your first
6 order position was if it's wrong, if it's
7 immoral, if people would know this is corrupt.

8 MS. SINZDAK: So our -- our position
9 is just -- just -- let me be clear, it's that
10 the act has to be wrongful and the person has to
11 have consciousness of wrongdoing. That
12 requirement of consciousness of wrongdoing, we
13 recognize that. That's not a backup position.
14 That's a first order.

15 JUSTICE BARRETT: No, no. I know --

16 MS. SINZDAK: Right.

17 JUSTICE BARRETT: I know, but I'm
18 saying like you said if the person doesn't have
19 any place to look to know that it's wrongful and
20 I'm saying that I thought that your first order
21 position was that they don't have a specific
22 place to look because you should know it's
23 immoral, you should know it's wrong.

24 MS. SINZDAK: I -- I think that the
25 government can certainly -- I think it's going

1 -- the government has to say this is something
2 that is so obviously wrongful that everyone
3 would know.

4 And I would say that in the
5 circumstances you're pointing to, the government
6 isn't going to take that position. They're not
7 going to be able to say that just because -- you
8 know, that -- it has to be obviously wrongful
9 because what they're saying is we don't have
10 evidence to demonstrate that this specific
11 person knew what -- that what they were doing
12 was wrongful.

13 But this is something that is just so
14 obviously inherently unlawful or -- not
15 unlawful, I don't want to confuse things --
16 inherently wrongful that the person would be
17 bound to know.

18 And I agree with you that when it's
19 something that is either permitted by ethics
20 rules or it's just never governed by ethics
21 rules, this isn't something that people even
22 think about in the ethics world maybe because
23 cookies are just so, you know, obvious, then
24 there's just -- the government -- that -- that
25 -- there isn't going to be that consciousness of

1 wrongdoing.

2 The government isn't going to be able
3 to show and they're not -- and -- and therefore
4 the statute does not cover that -- that person
5 because they do not understand that it is
6 wrongful.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So I guess I'm just
10 totally confused in a lot of ways because I -- I
11 had understood this case to be about a totally
12 different part of the statute. So -- by what I
13 mean is that suddenly it seems as though it's
14 becoming a vehicle to investigate the corruptly
15 solicits or demands element as opposed to the
16 influenced or rewarded element.

17 And I read the question presented to
18 be about reward, like what does reward mean, you
19 know, the -- the Petitioner's statement of the
20 question presented is whether 666 criminalizes
21 gratuities without any quid pro quo agreement to
22 take those actions.

23 So I thought we were looking at reward
24 and determining whether or not you needed a quid
25 pro quo. But it sounds like there's a lot of

1 concern about the corruptly element.

2 So can I ask you, do we need to take a
3 position on corruptly here to rule in your favor
4 on the question presented in this case?

5 MS. SINZDAK: No. To rule in our
6 favor you just have to look and say that
7 rewarded obviously encompasses rewards that are
8 accepted without a beforehand agreement.

9 JUSTICE JACKSON: All right. And if
10 we were going to think about corruptly, I guess
11 I'm trying to understand how this case on these
12 facts even really presents that issue.

13 I mean, I understand all of these
14 hypotheticals about the blankets and the
15 Starbucks and the, you know, the -- the -- the
16 gray areas around where people could say is this
17 person really acting corruptly.

18 But was there a dispute in this case
19 that it was corrupt for this official to -- if
20 he was taking a reward, to receive the \$13,000
21 under these circumstances?

22 MS. SINZDAK: No. And that's
23 generally the way these cases go. It's not
24 someone saying I took a reward, but I thought it
25 wasn't wrongful, so it's not someone disputing

1 the consciousness of wrongdoing point. It's
2 someone saying I wasn't taking a reward, I was
3 taking something for being friends --

4 JUSTICE JACKSON: And that's -- so
5 that's --

6 MS. SINZDAK: I was taking something
7 for --

8 JUSTICE JACKSON: -- how --

9 MS. SINZDAK: -- compensation, that's
10 right.

11 JUSTICE JACKSON: That's how that came
12 up here.

13 MS. SINZDAK: Exactly.

14 JUSTICE JACKSON: So that's why in
15 response to Justice Sotomayor this wasn't a
16 question that was put to the jury about -- like
17 this is why it's not in the jury instructions,
18 this question of what is the definition of
19 corruptly because he essentially conceded that
20 element for the purpose of this case?

21 MS. SINZDAK: Right. He did not
22 challenge the jury instructions on corruptly,
23 even though the district -- the district court
24 had already rejected the request to narrow the
25 statute to gratuities, so it's not true that he

1 didn't protest the corruptly definition because
2 he was trying to get to -- to get at it a
3 different way, right?

4 The -- the district court had already
5 said gratuities are going to come in. He
6 doesn't contest the corruptly jury instruction
7 here because he wasn't saying it's rightful to
8 accept the --

9 JUSTICE JACKSON: Right. He wasn't in
10 the gray area scenario where people could say --

11 MS. SINZDAK: Exactly.

12 JUSTICE JACKSON: -- well, I thought
13 this was right. He wasn't doing that. All
14 right.

15 So final question. With respect to
16 the question I asked Ms. Blatt, if we hold
17 constant the corruptly aspect of this, the
18 demand aspect of this, we assume that's all met
19 and now we're really just focusing on reward,
20 intended to be influenced or rewarded, could --
21 can you articulate why Congress would not have
22 wanted rewarded to include these gratuities?

23 In other words, it seems as though
24 that element is equating bribes, quid pro quo
25 bribes with rewards. What I'm thinking of is

1 gratuities in this context.

2 If we agree with Petitioner, it sounds
3 as though there -- Congress would have wanted to
4 prohibit one and not the other. And I can't
5 figure out why that would be.

6 MS. SINZDAK: I -- I can't either
7 because, again, gratuities have long been
8 recognized to be as corrupt as rewards in many
9 circumstances. We have the bar on gratuities in
10 our Constitution itself. We have Blackstone
11 saying that the acceptance of gratuities is --
12 is -- is -- is -- is corrupt and that, you know,
13 the Romans were wrong to permit it.

14 We have Congress barring not just
15 bribery but also the -- the acceptance of
16 gratuities without the corruptly mens rea in
17 Section 201. So there's just no reason. And --
18 and that's not because Congress was like an
19 overly -- overly moral being in this respect.
20 It's because it's the same harm.

21 If there's a beforehand agreement in
22 this case, it doesn't change anything because
23 it's crystal clear that what the Petitioner was
24 doing was taking a public act intending to get
25 that reward.

1 And -- and whether there's a
2 beforehand agreement or not, the harm is instead
3 of doing the public act for the public good,
4 he's doing the public act for his own -- to line
5 his own pockets.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
10 Blatt.

11 REBUTTAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE PETITIONER

13 MS. BLATT: Thank you, Mr. Chief
14 Justice.

15 I mean, at least we should get a 9/0
16 remand because everything that we heard today
17 was not charged to the jury. It is truly -- as
18 a former government lawyer -- baffling how
19 someone could just say that it was not
20 contested, that this was wrongful.

21 No citation. Of course it was
22 contested. The whole argument was this was a
23 legitimate consulting agreement because local
24 officials don't make any money.

25 And just because the government says

1 it at argument doesn't make it true, especially
2 when they don't have a citation. There was no
3 jury instruction. And then at times I feel like
4 we're in a Senate room drafting language.

5 She literally said, here's what the
6 guidelines are going to look like going forward.
7 What we're going to do is we're going to isolate
8 wrongfulness, we're going to talk about if it
9 appears for public sale on and on and on and
10 then she said consciousness of wrongdoing 36
11 times.

12 Consciousness of wrongdoing has never
13 appeared and here's where if we're going to look
14 at text, guess what, corruptly applies to
15 bribery. It has to mean the same thing.
16 Corruptly as a consciousness of wrongdoing has
17 never been the mens rea for bribery.

18 And so now every single prosecution
19 for bribery, I guess a defendant is entitled to
20 an instruction -- I didn't know what I was doing
21 was wrongful. I didn't know it was unlawful.
22 My hospital said I could do this. No. She
23 wants a separate rule for corruptly.

24 And to say that it's not part of the
25 case is absurd. Corruptly means quid pro quo.

1 Intending to be influenced and intending to be
2 rewarded are parts of that quid pro quo.

3 The other thing I just want to get to,
4 and Justice Kavanaugh got on this, there is a
5 statute that she -- that -- the statute applies
6 to accepting. It also applies to anyone who
7 gives. That's 666(a)(2). So 300 million
8 Americans are covered by this.

9 Anyone who gives a gift commits a
10 crime if it's corrupt. Now that consciousness
11 of wrongdoing has to apply to the person who
12 goes to the car dealership or to the billionaire
13 or the poor person who wants to give a toy -- a
14 toy truck.

15 And then she said well, I guess it's
16 standard practice, and you have to ask for it
17 and be for sale. You see something, you say,
18 you know, I like your water bottle, it's got
19 that, you know, nice little Apple logo. Here,
20 take it. Gratuity, you just give your job away
21 for sale. You literally said, you know, you
22 want it, you can have it or they asked for it.

23 I mean, this is -- this is
24 preposterous that this would go into inherently
25 wrongful. I still can't figure out what about

1 escort services. That seems not standard
2 practice to give that to your university
3 admissions. But maybe a plaque would be? Or
4 maybe a crystal -- a crystal would be. There's
5 just -- there's literally no guidance here.

6 And the real irony is at least the
7 banking officials would have more guidance.
8 This is just kind of made up as -- as like it
9 sounds like in moot court they worked this out
10 because it would sound good.

11 The stuff on the lesser included and
12 greater -- greater included was gibberish. It
13 is a -- recognized in government manuals that
14 this is a greater included offense.

15 And she said, well, it only applies to
16 "demand." But the statute says "demand or
17 agrees to accept." So if you agree to accept
18 something, you don't have to demand. That's
19 clearly a bribery. There is no set of
20 circumstances where, if you've proved -- proved
21 a reward, you would ever need to prove a
22 bribery. And that's why the government manual
23 says go for -- go for broke, go for both. All
24 you need to do is prove one, and you at least
25 get, at least in the federal officials, a

1 two-year conviction. Here you get a 10-year
2 conviction. The government sought six years
3 here. We've showed examples where they've --
4 they prosecuted for four years.

5 And the other things in terms of the
6 line drawing, I don't know why "can I get a ride
7 in the Uber" would not count because that's
8 asking for, you know, part of -- part of a -- a
9 value. And this definition of consciousness of
10 wrongdoing, I don't think it gives anybody any
11 guidance whatsoever about what happens day in
12 and day out. So at least we get a remand.

13 And -- and, Justice Sotomayor, on the
14 harmless error under Nader, I'm not sure why she
15 said evident sufficiency. The standard is
16 beyond a reasonable doubt. They'd have to show
17 the jury instruction, and so there would have to
18 be overwhelming evidence of bribery. And so
19 that would have to be worked on a remand. But
20 none of this was in the jury instruction. It
21 was adequately yelling to the -- the top of the
22 roof that this could only apply to gratuity,
23 i.e., gratuities were not wrongful.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:43 a.m., the case
3 was submitted.)

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