No. 23-____

In the

Supreme Court of the United States

STEPHEN M. CALK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether something with no commercial or objective value can constitute a "thing of value" that "exceed[s] $1,000," the receipt of which is punishable as a felony under the bank bribery statute, 18 U.S.C. § 215.

2. Whether the bank bribery statute's "corrupt" intent element requires a breach of a bank officer's duty to act in the best interests of the bank or can instead be satisfied by acts undertaken with a good-faith belief they will benefit the bank.

PARTIES TO THE PROCEEDING

Petitioner Stephen M. Calk was the defendant and appellant below.

Respondent United States of America was the appellee below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States v. Calk, No. 22-313 (2d Cir.), judgment entered on November 28, 2023;

United States v. Calk, No. 19-cr-366 (LGS) (S.D.N.Y.), judgment entered on February 7, 2022.

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INTRODUCTION

In this case, the Second Circuit endorsed an unbounded and elastic construction of the bank bribery statute, 18 U.S.C. § 215. Its capacious interpretation is exactly what this Court has repeatedly admonished lower courts to avoid where, as here, the text and structure of a criminal statute supports a narrower construction. *See, e.g.*, *Ciminelli v. United States*, 598 U.S. 306, 314–16 (2023); *Percoco v. United States*, 598 U.S. 319, 328–31 (2023); *Kelly v. United States*, 140 S. Ct. 1565, 1571–74 (2020); *Yates v. United States*, 574 U.S. 528, 540 (2015). The Second Circuit's opinion criminalizes any bank transaction in which a bank officer receives any conceivable benefit from a customer, no matter how profitable the transaction is for the bank, and no matter how trivial the benefit.

Relying on an expansive construction of two separate elements of the crime, the court affirmed Petitioner's conviction in connection with loans that were fully approved, independently underwritten, and made *millions* in profits for the bank. In fact, they were the most profitable loans in the history of the bank. Petitioner was the bank's controlling shareholder, so his interests were perfectly aligned with the bank's interests. He received no cash, property, or other item with any objective value in connection with the transaction. Instead, the Second Circuit affirmed his conviction because the borrower referred Petitioner for a courtesy screening interview for a government job that Petitioner was never offered.

The decision below raises two important issues warranting this Court's review. *First*, the Second Circuit held that § 215's requirement that a defendant

solicit or accept a "thing of value" in connection with bank business can be satisfied by the receipt of literally *anything* the defendant *subjectively* believes is important. And it held that the value of the "thing"—which dictates whether the offense is a felony or a misdemeanor—can also be determined based on the defendant's subjective appraisal. Those interconnected holdings ignored the statute's structure, which establishes that the "thing of value" must be susceptible to *objective* monetary valuation. They defy the requirement to "construe language in its context and in light of the terms surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). The Second Circuit's decision also conflicts with decisions of the Third, Fourth, Seventh, and Ninth Circuits. Those circuits have construed similar statutes and held that the term "thing of value" does *not* mean "anything the recipient subjectively values."

Second, the court below held that a loan offered at a bank's standard rates and terms based on a defendant's sincere belief that the loan would benefit the bank can nonetheless be "corrupt." To reach that conclusion, the Second Circuit held that acting "corruptly" does not require a breach of duty and instead only requires an "improper purpose." That vague definition provides no ascertainable standard to guide the conduct of bank officers or their customers. For exactly that reason, numerous courts have held that defining "corruptly" to simply mean "improper" or "bad"—like the Second Circuit did here—fails to provide constitutionally adequate notice of what conduct is proscribed. The "improper purpose" definition is also irreconcilable with the history of the statute and decades of decisions equating "corrupt" intent with a

conscious breach of an established legal duty or efforts to induce such a breach.

The Second Circuit's overbroad interpretation of § 215 criminalizes a broad swath of "the most prosaic interactions" between bankers and their customers. *McDonnell v. United States*, 579 U.S. 550, 576 (2016). If left uncorrected, it would give overzealous prosecutors unchecked power to set the standards for what is "proper" within the commercial banking industry, based solely on their "subjective disapproval," *United States v. Fischer*, 64 F.4th 329, 381 (D.C. Cir. 2023) (Katsas, J. dissenting), *cert. granted*, 144 S. Ct. 537 (2023). That power exceeds the narrower reach dictated by the text of the statute and would have a profound chilling effect, particularly on small and community banks that depend on building face-to-face relationships with customers.

OPINIONS BELOW

The Second Circuit's opinion (Pet.App.1a) is published at 87 F.4th 164.

JURISDICTION

The Second Circuit issued its opinion and entered judgment on November 28, 2023, and denied rehearing on February 13, 2024. Pet.App.1a, 49a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

18 U.S.C. § 215(a)(2) provides:

> Whoever . . . as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution . . . shall be fined not more than $1,000,000 or three times the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted, whichever is greater, or imprisoned not more than 30 years, or both, but if the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted does not exceed $1,000, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 215 is reproduced in full in the appendix to this Petition. Pet.App.50a.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Stephen M. Calk is a self-made man who has, throughout his career, dedicated himself to supporting soldiers, veterans, and his community through a variety of charitable initiatives. In 2011, Calk and his brother purchased what became known as The Federal Savings Bank ("TFSB"), a privately owned, federally chartered savings association focused on community home ownership and mortgage lending. Calk owned the majority of the holding company that owned the bank; his brother owned most of the remainder. C.A.App.352–53. Calk was also the CEO and Chairman of TFSB. Pet.App.4a.

The indictment charged Calk with bank bribery in violation of 18 U.S.C. § 215, and conspiracy to commit bank bribery in violation of 18 U.S.C. § 371. It alleged that, between July and November 2016, Calk took advantage of his position at TFSB to "corruptly" facilitate approval of loans to Paul Manafort who, in turn, gave Calk a referral for an initial screening interview for a position in the administration of then-President Elect Donald Trump. Pet.App.4a–5a.

The government's case turned on: (1) whether Calk accepted "anything of value" from Manafort in connection with the loans; and (2) if so, whether he acted "corruptly."

Unlike in nearly all past bank bribery prosecutions, Calk did not receive any sort of cash kickback or personal financial benefit—the usual hallmark of a

bank bribery prosecution. All he received was referrals that the government's own witnesses conceded have no market value and are often given freely. C.A.App.414. Likewise, the government did not claim that Calk participated in any fraud on the bank, or that he had facilitated clandestine "buddy" loans. It would not have made sense for him to do so: As the majority owner of TFSB he stood to lose the most financially if the loans underperformed or failed. In fact, Calk and the bank were the victims of a bank fraud the borrower, Manafort, was separately prosecuted for; he eventually admitted defrauding TFSB by overstating his income. Pet.App.8a n.2; *see also* Statement of Offenses and Other Acts at 22, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. Sept. 14, 2018), ECF No. 423.

1. There was no evidence that the referral Manafort gave Calk had any objective monetary value, much less one exceeding $1,000, as is required for a felony conviction under § 215.

The government claimed Calk traded "loans for influence," but it was undisputed that Calk gained no actual influence from Manafort's referral. *See* Pet.App.14a. Manafort had no power to offer Calk a job in the Trump administration. All he gave Calk was an indirect *recommendation* for a screening interview at Trump Tower with members of the transition team conducting initial vetting of candidates. *Id.* at 13a. The government's own witnesses testified that Calk's Trump Tower interview was: (1) merely a courtesy, (2) very unlikely to result in any offer, and (3) exactly the sort of referral people routinely obtain for

free during political campaigns. C.A.App.289–95; *see also* Pet.App.13a.

In fact, the evidence showed Calk sought and received—for free—similar recommendations from others with influence on Trump's transition team, C.A.App.380–83, 548–55, and that Manafort's recommendation had the potential to *hurt* Calk's chances of obtaining a position in the Trump administration. Pet.App.9a.[1] Calk did not receive an invitation for a second interview and never obtained a role in the Administration; in fact, there was no evidence he was ever close to being selected for a role. *Id.* at 14a.

2. Likewise, the loans were offered at TFSB's normal 7.25% interest rate for "portfolio" loans (adjustable upward to 12.25%), with fees and terms that were standard or better for the bank. The portfolio loan program was directed at borrowers who might not qualify for standard loans but were willing to pay higher interest rates and post substantial collateral. C.A.App.320–23.

It was undisputed that the terms of the loans at issue were unanimously approved by TFSB's loan committee (which included two other officers as well

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[1] The government initially claimed that Manafort also gave Calk an unpaid volunteer position on the Trump campaign's National Economic Advisory Council ("NEAC"). The government largely abandoned that alternative "thing of value" theory on appeal. In any case, the Second Circuit held that the NEAC position could not support a conviction because there was no evidence "that Calk traded a position in NEAC for approval or disbursement of any of the three loans Manafort sought from TFSB." Pet.App.30a n.5.

as Calk) and were *independently* assessed and assigned an "average" rating by TFSB's underwriters. *Id.* at 324–27, 340–42, 350, 437. Calk had no power to unilaterally offer *anyone* a loan without the approval of TFSB's underwriters and the other loan committee members. The evidence also showed that Calk repeatedly refused to make even minor concessions to Manafort on fees and costs. *See, e.g.*, *id.* at 350–52, 532–34. And when issues arose regarding Manafort's creditworthiness during the underwriting process, TFSB responded by requiring additional collateral and increasing the up-front fees from two to three points. Pet.App.6a.

Ultimately, TFSB stood to make over $1.1 million annually on the loans—which totaled $16 million and were secured by *$25 million* in cash and real estate—during a period of historically low interest rates. The loans became the most profitable in TFSB's history, even though Manafort eventually defaulted because the government seized his assets after he was indicted on charges that included his fraud on TFSB. Although the government's forfeiture of Manafort's assets initially prevented TFSB from foreclosing on the collateral, it was undisputed that by the time of sentencing TFSB had collected about $200,000 *more* than Manafort would have paid if he hadn't defaulted. C.A.App.562.

Faced with this lack of evidence supporting a prototypical § 215 violation, the government resorted to novel theories at trial:

First, the government claimed that to establish that Calk had accepted a "thing of value," it merely needed to prove Calk got something he *subjectively*

cared about from Manafort, regardless of whether that "thing" had any objective real-world value. And it argued that the $1,000 felony threshold was met because Calk had spent approximately $1,850 on hotel and airfare to attend the Trump Tower interview, and therefore must have subjectively believed that Manafort's referral was worth at least that much. Pet.App.33a.

Second, the government argued it was irrelevant whether Calk honestly believed that the Manafort loans were high quality loans that would make TFSB money, as long as Calk was in some way influenced or rewarded by Manafort's referral. C.A.App.421–22, 433–34.

B. District Court Proceedings

1. At the beginning of the trial, the court gave preliminary instructions to the jury on the elements of § 215. With respect to the requirement of receiving or soliciting a "thing of value" worth over $1,000, Calk objected to any instruction that might permit any method of valuation other than market value, negotiated value, or some other non-speculative measure. C.A.App.220, 226, 254. The court overruled the objection and told the jury that "[v]alue may be measured by the value to the defendant." *Id.* at 254, 268–70.

Calk reiterated the same objection during trial, in connection with the charge conference. *Id.* at 255–56. The court overruled him and instructed the jury that it could measure the value of the "thing" by looking to "its value to the parties." Pet.App.54a.

With respect to the requirement that Calk acted "corruptly," the government repeatedly sought an instruction to the effect that "it d[id] not matter whether the actions he took were desirable or beneficial to the financial institution, or whether the defendant believed them to be desirable or beneficial to the financial institution." C.A.App.222–24.

Calk objected vociferously to any such instruction. He argued that his reasons for supporting the Manafort loans were obviously relevant to whether he had acted "corruptly," and that the government's proposed instructions would improperly allow a conviction without proof of the intent required by the statute. *Id.* at 235, 265.

The court overruled Calk's objection in material part. It instructed the jury that any intent "to be influenced or rewarded," by a personal benefit establishes a "corrupt" intent and that "[i]t is not a defense that Mr. Calk may have been motivated by both proper and improper motives." Pet.App.53a–54a. The jury convicted Calk on both counts.

2. Following trial, Calk moved for a judgment of acquittal under Rule 29. He argued that there was insufficient evidence that Manafort's assistance was a "thing of value" worth over $1,000, because § 215 "governs only bribes that are reliably susceptible to monetary valuation." D.Ct.Dkt.284 at 5–6. And he argued that because it was undisputed that the loans were made on terms that were standard or better for TFSB and had been approved by the underwriters, there was insufficient evidence of "corrupt" intent. *Id.* at 3–4.

The court denied the motion. Pet.App.41a. As to "thing of value," it held that the "critical inquiry" was whether the "thing" had value in the eyes of the recipient. And it held that the evidence showing Calk had spent $1,850 on travel expenses to attend the Trump Tower interview was sufficient to prove a "thing of value" over $1,000. *Id.* at 47a–48a. As to "corrupt" intent, the court held that the requisite question was solely whether "Calk sought and accepted Manafort's assistance in securing a position in the Trump Administration (the bribe) in exchange for Calk's assistance in securing loans to Manafort from the Bank." *Id.* at 43a.

At sentencing, however, the court acknowledged that whether Manafort's referral was a "thing of value" worth over $1,000 was a "novel or fairly debatable" question and granted Calk bail pending appeal on that basis. C.A.App.581.

C. Second Circuit Decision

On appeal, Calk again argued that the text and structure of the statute establish that § 215's "thing of value" refers only to "things" with objective and ascertainable pecuniary value. C.A.Dkt.27 at 26–35. Calk also argued that § 215's "corruptly" element requires the government to show a bank officer's conscious breach of his duty to act in the best interests of the bank. *Id.* at 37–42.

The Second Circuit adopted an expansive interpretation of § 215 and affirmed. *First*, the court held that § 215's "thing of value" "can include intangibles with a subjective value to the parties, even if they do not

have an objective market value." Pet.App.29a. Rather than focus on the text and structure of the statute, the court concluded that the words "thing of value" were "words of art" intended to be "given a broad meaning." *Id.* Quoting *United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983), the court held that "what matters is 'the value that the defendants subjectively attached to the items received.'" Pet.App.29a

Notably, the court rejected the government's "hotel and airfare" theory for valuing Manafort's referral, "because the $1,800 does not indicate how much Calk valued Manafort's assistance. Instead, the $1,800 most clearly reflects how much Calk valued the interview and his travel preferences, including his choice to stay at a luxury hotel." *Id.* at 34a. The court nonetheless held that the evidence supporting the $1,000 felony threshold was sufficient. It said the government had proven "Calk was willing to put millions of dollars of TFSB's resources on the line by approving Manafort's loans," *id.*—even though the evidence indisputably showed the loans were made on standard terms, or better for the bank, and were so well secured that they were hugely profitable for TFSB even after Manafort eventually defaulted. C.A.App.562.

Second, the court held "that 'corrupt' conduct describes actions motivated by an improper purpose, even if such actions (a) did not entail a breach of duty, and (b) were motivated in part by a neutral or proper purpose, as well as by an improper purpose." Pet.App.3a. Thus, a banker could act "corruptly" even if she was upholding her fiduciary duties and believed she was acting in the bank's best interests. *Id.* at 24a–

26a. The court justified its broad interpretation based on "the public interest 18 U.S.C. § 215 seeks to protect —namely, the public's trust in financial institutions. *Id.* at 26a.

The court acknowledged that "not every action that results in some benefit to an officer of a financial institution will necessarily constitute 'corrupt' conduct." *Id.* at 24a. However, the court declined to specify what sorts of quid pro quos are permissible under the statute, or what, if not a breach of duty, would render a defendant's purpose "improper" in the commercial banking context. *Id.* The court also affirmed the district court's jury instruction suggesting that *any* transaction resulting in a personal benefit necessarily is "corrupt": "to act 'corruptly' for purposes of Section 215(a)(2) is 'to act voluntarily and intentionally with an improper motive or purpose to be influenced or rewarded.'" *Id.* at 21a.

REASONS FOR GRANTING CERTIORARI

The Second Circuit's decision vastly expands the scope of the bank bribery statute in plain disregard of the statutory text, constitutionally derived principles of statutory interpretation, and this Court's precedents requiring that criminal statutes be narrowly construed.

The Second Circuit's conclusion that an intangible lacking real-world value and not susceptible to objective valuation can be a "thing of value" worth over $1,000 ignores the text and structure of § 215. It reflects an outdated mode of statutory construction that eschews textual analysis and instead uses amorphous notions of legislative purpose to expand the statutory

text—an approach this Court now flatly rejects. The Second Circuit's decision also renders the scope of the statute entirely uncertain and creates a circuit split on the meaning of "thing of value" in statutes that share 18 U.S.C. § 215's structure.

The Second Circuit's interpretation of "corruptly" in § 215 is standardless and inscrutable, thus raising serious concerns about fair notice and the potential for arbitrary enforcement. It is also flatly at odds with the fact that the "corrupt" intent requirement was added to the bank bribery statute to confine its coverage to conduct which induces (or is intended to induce) a banker's conscious breach of a fiduciary duty to the bank. The Second Circuit's decision also ignores decades of case law interpreting "corruptly" as entailing the breach of a clearly defined legal duty, *i.e.*, conscious illegality. By eliminating that requirement in favor of an amorphous "improper purpose" standard, the decision enables *prosecutors* and juries—rather than the legislature—to decide what is and is not a federal crime.

Each of these questions is squarely presented, outcome determinative, and important. The Court should grant review to correct the Second Circuit's standardless and overbroad interpretation of § 215.

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER INTANGIBLES WITHOUT OBJECTIVE VALUE CAN BE "THINGS OF VALUE" WORTH OVER $1,000 UNDER 18 U.S.C. § 215

The Second Circuit's freewheeling approach to the statutory phrase "anything of value" is a "relic from a

bygone era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019) (cleaned up). Its holding that intangibles without any objective market value can support a felony bank bribery conviction—based solely on the defendant's subjective valuation of the "thing"—conflicts with decisions of the Third, Fourth, Seventh, and Ninth Circuits and raises serious due process concerns. This Court should grant certiorari and reject the Second Circuit's approach.

A. The Second Circuit's Interpretation Of "Anything Of Value" Conflicts With The Statutory Text And Raises Serious Due Process Concerns

The bank bribery statute makes it a crime for an officer of a financial institution to "corruptly solicit[] or demand[] for the benefit of any person, or corruptly accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution." 18 U.S.C. § 215(a)(2). Consequently, to obtain a conviction under § 215, the government must prove the defendant solicited or accepted a "thing of value"; if there is such proof, a violation is a misdemeanor unless the "thing" is worth more than $1,000. *Id.* § 215(a).

1. The Second Circuit held that § 215's "thing of value" can include intangibles that aren't susceptible to objective valuation, so long as the "thing" is subjectively important to the defendant. Pet.App.28a–30a. And it held that a violation can be a felony based solely on the defendant's subjective appraisal of the value of the "thing." *Id.* at 32a–33a. Those interconnected

holdings directly conflict with this Court's admonition to "construe language in its context and in light of the terms surrounding it," particularly when construing highly elastic terms like "thing of value." *Leocal*, 543 U.S. at 9; *accord Yates*, 574 U.S. at 537; *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.").

A violation of § 215 is a felony only if the "thing of value" received by the defendant exceeds $1,000. This provision manifests Congress's clear intent for the phrase "thing of value" to apply only to things susceptible to objective, monetary valuation. Otherwise, the $1,000 threshold for felony convictions would be a nullity. That result would violate "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be operative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up).

Additionally, the penalty provision of § 215 instructs that a defendant convicted of bank bribery "shall be fined not more than $1,000,000 or *three times the value of the thing given* . . . whichever is greater." 18 U.S.C. § 215(a) (emphasis added). This provision, similarly, presumes that the "thing" at issue is something susceptible to objective *economic* calculation based on the evidence at trial. If that is not the case, this provision could not be applied, and it would be impossible to determine the maximum permissible fine for a conviction under the statute (or to determine whether the violation was a felony or a misdemeanor).

The Second Circuit ignored these features and eschewed any analysis of the statute's structure.

Instead, the court relied on a line of decades-old cases interpreting *other* bribery statutes lacking § 215's particular structural characteristics. Based on these outdated precedents, the court deemed the words "thing of value" as "in a sense . . . words of art" and construed them broadly and flexibly because they have "consistently been given a broad meaning" as used in those other statutes. Pet.App.29a (quoting *Williams*, 705 F.2d at 623).

Moreover, the cases the Second Circuit cited interpreted those other statutes by making assumptions about what would constitute sound public policy and looking at legislative purpose—rather than the statutes' text. That approach has been relegated to the dustbin and replaced with rigorous analysis of the text and structure of statutes. *See, e.g.*, *Food Mktg. Inst.*, 588 U.S. at 437. In *Williams* for example, the Second Circuit concluded that 18 U.S.C. § 201's "thing of value" should be given "a broad meaning . . . to carry out the congressional purpose of punishing misuse of public office." 705 F.2d at 623. But the court conducted no analysis of the statutory text and did not even mention any specific legislative history to support its policy-driven interpretation. *United States v. Girard* similarly relied on a hodgepodge of cases construing unrelated state and federal laws (including, for example, the Copyright Act) to conclude—without any analysis of the relevant statutory text—that 18 U.S.C. § 641's "thing of value" covers confidential information. 601 F.2d 69, 71 (2d Cir. 1979).

This Court has jettisoned the approach used in *Williams* and *Girard*, but the Second Circuit relied heavily on both cases. It adopted a broad interpretation of "thing of value" based on its assumption that the phrase was a term of art, *i.e.*, that when Congress drafted the bank bribery statute, it meant something broader than what the text of the law *actually says*. But this Court has consistently instructed that "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Ratlaf v. United States*, 510 U.S. 135, 148 (1994) (quoting *Crandon v. United States*, 494 U.S. 152, 160 (1990)). The Second Circuit's holding was flatly at odds with this Court's directives on how to interpret criminal statutes.

2. Construing § 215 to permit a conviction based upon the alleged receipt of a "thing" with no objective market value, and measuring the "thing"'s value based on the defendant's subjective appraisal, also raises serious due process concerns. "To satisfy due process, a penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402–03 (2010); *accord McDonnell*, 579 U.S. at 576–77.

To avoid those fair notice and arbitrary enforcement concerns, a narrowing construction is required. *See*, *e.g.*, *Skilling*, 561 U.S. at 409. The Second Circuit ignored this concern, even though it was a key part of

Calk's appeal. The issue is particularly significant given that the Second Circuit also adopted an extremely lax interpretation of the "corrupt" intent requirement. *See infra* at 26–33.

A reasonable bank employee or customer could not predict that § 215 criminalizes giving or receiving non-transferable intangibles that lack objective market value—or that the distinction between a felony and a misdemeanor would turn on how much the defendant subjectively *cares* about the "thing" given. Nor could someone reasonably anticipate that a potential technical conflict of interest would give rise to a potential felony prosecution. But that is exactly what the decision below would allow. After all, if construed to mean literally "anything" that any individual could subjectively attach value to, "thing of value" would have virtually unlimited breadth, creating "grave uncertainty" about its scope and raising serious due process concerns. *Johnson v. United States*, 576 U.S. 591, 597 (2015) (provision with "hopeless[ly] indetermina[te]" scope held unconstitutional); *see also Skilling*, 561 U.S. at 409.

Consider, for instance, a credit union loan officer who approves a loan to the Hush Puppies—a local minor league baseball team—to upgrade and expand the bleachers at the team's stadium. The loan is on standard terms, is independently approved by the credit committee, and is fully underwritten. Moreover, the Hush Puppies have a consistent track record of economic success and have consistently re-paid prior loans for capital improvements. Under the Second Circuit's rule, if the loan officer accepted an offer to throw out the ceremonial first pitch at the beginning

of baseball season (a "priceless" opportunity for a passionate Hush Puppies fan like the loan officer) as a sign of the team's gratitude for the loan, she would have accepted a "thing of value" in connection with the transaction—even though throwing out the first pitch at a baseball game clearly has no objective value. The actus reus of the offense would be completed, and the only remaining question would be whether the loan officer acted "corruptly." But as discussed below, *infra* at 26–33, under the Second Circuit's vague interpretation of § 215, the requirement of "corrupt" intent is highly malleable and offers scant protection, sweeping in anything "improper."

Or consider a banker who offers his congregation a loan to make critical repairs to the synagogue. The loan is, again, on standard terms, the congregation is credit-worthy, and the bank's loan committee and underwriters approve. According to the Second Circuit, if the banker then accepted the privilege of blowing the shofar blast at the end of the Yom Kippur fast (an important honor within the community) as a showing of the congregation's appreciation, he would have received a "thing of value" in connection with bank business. And if the banker subjectively valued the privilege highly enough the offense would be a felony, even though that honor is not capable of objective, pecuniary valuation.

Courts must give statutes "a sensible construction that avoids attributing to the legislature either an unjust or an absurd conclusion." *United States v. Granderson*, 511 U.S. 39, 56 (1994) (cleaned up). But that is what the Second Circuit's construction of "thing of

value" allows. It makes it impossible for ordinary citizens to identify any clear demarcation between things with value and things without, or to reliably gauge the subjective valuation that can transform a misdemeanor into a federal felony.

B. The Second Circuit's Decision Creates A Circuit Split

The Second Circuit's holding that an intangible without objective pecuniary value can be a "thing of value" under § 215 conflicts with decisions of the Third, Fourth, Seventh, and Ninth Circuits.

1. The Third and Fourth Circuits have each interpreted the "thing of value" required by 29 U.S.C. § 186—another bribery statute that mirrors the structure of § 215—as covering only "things" that "have at least some ascertainable value." *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008).

In *Adcock*, the issue was whether a company gave "any money or other thing of value" to a labor union, in violation of 29 U.S.C. § 186(a), the criminal anti-bribery provision of the Labor Management Relations Act. Pursuant to an agreement with the union, the company agreed to: (1) require employees to attend union presentations during company time, (2) provide the union with space to meet with employees on company property, and (3) "refrain from making negative comments about the Union during organizing campaigns." 550 F.3d at 371. Even though each of these "things" was obviously valuable to the union, the Fourth Circuit specifically rejected the argument that "a 'thing of value' means anything that has subjective

value to the Union" and held that there was no violation because no "thing of value" had been provided. *Id.* at 374.

To reach that conclusion, the court—unlike the Second Circuit here—relied on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The court particularly emphasized the penalty provision of the statute, which—mirroring the bank bribery statute—makes a violation a felony unless "the value of the amount of money or thing of value . . . does not exceed $1,000." 29 U.S.C. § 186(d)(2). The court held that the provision established that "Congress clearly intended [the statute's] 'thing of value' to have at least some ascertainable value." 550 F.3d at 375.

The Third Circuit reached the same conclusion in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2006). At issue there was whether a labor agreement that contained an arbitration clause and required the employer to give the union a current list of employees and signature samples for those employees violated 29 U.S.C. § 186. The court held that there was no violation, even though these provisions of the labor agreement clearly had subjective value to the union and benefited it "with efficiency and cost saving." *Id.* at 219. The court held that there was no "thing of value" paid, noting that it "makes no sense" to treat as a "thing of value" an alleged "bribe" that involves "no payment, loan, or delivery of anything."

Id. The Second Circuit's holding that anything a defendant subjectively thinks is "importan[t]" is a "thing of value," Pet.App.29a, creates a sharp rift with these decisions.

2. The decision below also conflicts with the Seventh Circuit's decision in *United States v. Condon*, 170 F.3d 687 (7th Cir. 1999) (Easterbrook, J.).

Condon held that a promise of immunity from prosecution is not "anything of value" under 18 U.S.C. § 201. Immunity clearly has subjective "worth" to someone facing potential criminal prosecution—in fact, it might be subjectively more valuable than almost anything. But the court held that a narrower construction was mandated because historical precedent established that immunity was never considered a "thing" that could create liability for bribery. 170 F.3d at 689.

The same is true of the sort of "courtesy" referral Manafort provided to Calk here. In 1986, Congress narrowed the scope of the bank bribery statute because the prior version of the law was overbroad. *See* H.R. Rep. No. 99-335, at 3 (1985). In the lead-up to the enactment of the new version, proponents of the narrowing amendments pointed to a "letter of recommendation for an institution employee or his relative" from a "customer of [the] financial institution" as an example of the type of legitimate—and historically accepted—goodwill activity proscribed under the old version of law that would be shielded under the amended version. *Bank Bribery: Hearings on H.R. 2617, H.R. 2839, & H.R. 3511 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 99th Cong., 1st Sess. 61, at 142 (1985)

("Bank Bribery Hearings"); *see also id.* at 77. In light of this history, the Second Circuit's holding conflicts with *Condon*.

3. The Second Circuit's ruling is also at odds with the Ninth Circuit's interpretation of the federal conversion statute, 18 U.S.C. § 641. Section 641 criminalizes, *inter alia*, the theft, embezzlement, and conversion of "any record, voucher, money, or *thing of value* of the United States." 18 U.S.C. § 641 (emphasis added). Like § 215, it makes any violation a felony if the value of the "thing" at issue exceeds $1,000.

In *United States v. Tobias*, the Ninth Circuit held that classified information is not a "thing of value" under the statute. 836 F.2d 449, 451 (9th Cir. 1988). Applying the court's earlier decision in *Chappell v. United States*, 270 F.2d 274 (9th Cir. 1959), the court explained that "section 641 should not be read to apply to . . . intangible goods—like classified information," which would raise constitutional concerns. 836 F.2d at 451. The court specifically acknowledged that it was splitting with the Second Circuit, which had reached the opposite conclusion in *Girard*, one of the cases the Second Circuit relied on here. But the Ninth Circuit in *Tobias* was "not persuaded" to follow the Second Circuit's decision. *Id.*

These decisions on the meaning of "thing of value" are irreconcilable with the Second Circuit's decision here. Had Calk been prosecuted in the Third, Fourth, Seventh, or Ninth Circuits, his convictions likely would have been reversed.

C. This Case Is An Ideal Vehicle

This case also provides an optimal vehicle to review the issue: It is emblematic of the how the Second Circuit's overbroad interpretation of "thing of value" enables prosecutors to pursue bribery prosecutions where the quid or the quo is trivial.

The government's case hinged on Calk's *subjective* belief in the value of Manafort's referral. Several witnesses testified they would not even think of charging money for these sorts of informal recommendations. *E.g.*, C.A.App.294–95, 307–08. And others within Calk's network gave him the same sorts of recommendations for free. There was even evidence that Manafort's recommendation had *negative* real-world value because he had fallen out of favor with the Trump campaign. Pet.App.9a. Government witnesses also testified that Calk only received the Trump Tower interview as a courtesy, and that he was highly unlikely to be offered any job. For better or for worse, informal recommendations like the one Manafort gave Calk are common—and freely given—in the worlds of business, politics, and even law.

The government conceded that "[t]here is no market price" for the Manafort referral. C.A.App.415. And since the Manafort loans were made on standard terms or better for TFSB (and ultimately made the bank millions of dollars), the government was also unable to put even an approximate number on the value of what Calk allegedly gave to Manafort. So the government instead told the jury to focus not on real-world value, but subjective importance to Calk; thus, it claimed the cost of his hotel and airfare for the

Trump Tower interview proved that the value of Manafort's assistance exceeded the $1,000 felony threshold.

Calk's subjective belief in the value of Manafort's referral was also the sole basis for the Second Circuit's decision to affirm. The court held that all that mattered for the purposes of the "thing of value" element was "that Calk assigned a high subjective value to Manafort's political assistance." Pet.App.31a. Although the court rejected the government's strained hotel-and-airfare theory, it nonetheless held that the $1,000 threshold was met based on its speculation that Calk's willingness to support the loans—which effectively posed no risk and made TFSB millions of dollars—somehow proved he *subjectively* attached great value to Manafort's assistance. *Id.* at 34a–35a. The court made no finding that Manafort's recommendation had *actual* value, much less that it was worth over $1,000. 18 U.S.C. § 215.

If this Court grants review and rejects the Second Circuit's statutory interpretation, Calk's convictions would have to be reversed.

II. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER CONDUCT THAT ENTAILS NO BREACH OF DUTY CAN BE "CORRUPT" UNDER 18 U.S.C. § 215

A. The Second Circuit's Interpretation Of § 215's "Corruptly" Is Standardless And Raises Serious Due Process Concerns

1. The bank bribery statute prohibits only conduct that is committed "corruptly." 18 U.S.C. § 215. Calk's

appeal required the Second Circuit to construe the meaning of that term. That court rejected his arguments in support of a narrower reading that would require a conscious breach of the independent legal duty to act in the best interests of the bank. Instead, the court held "that 'corrupt' conduct describes actions motivated by an improper purpose, even if such actions (a) did not entail a breach of duty, and (b) were motivated in part by a neutral or proper purpose, as well as by an improper purpose." Pet.App.3a. That interpretation creates no ascertainable rule. It is an amorphous, malleable concept "so standardless that it invites arbitrary enforcement" and deprives people of fair notice about what constitutes "corrupt intent" under the bank bribery statute. *Johnson*, 576 U.S. at 595; *see also supra* at 18.

The term "improper purpose" is hopelessly imprecise. What, exactly, makes a purpose "improper," if not an intentional breach of some independent, clearly defined legal duty, *i.e.*, consciousness of illegality? By adopting a standard that turns on the vague notion of *propriety*, rather than the narrower—and more precise—duty-based construction Calk advocated, the Second Circuit ignored this Court's insistence on construing criminal statutes narrowly and consistent with lenity to avoid a "vagueness shoal." *McDonnell*, 579 U.S. at 576 (quoting *Skilling*, 561 U.S. at 368).

For that reason, multiple circuits have held that absent some narrowing framework, the "improper purpose" definition of "corruptly" does not pass constitutional muster. In *United States v. Poindexter*, for example, the D.C. Circuit held that, as applied to lying to Congress in putative violation of 18 U.S.C. § 1505,

the term "corruptly" is unconstitutionally vague if defined to mean "evil," "depraved," or "improper." 951 F.2d 369, 378–79 (D.C. Cir. 1990). "Vague terms do not suddenly become clear when they are defined by reference to other vague terms. Words like 'depraved,' 'evil,' 'immoral,' 'wicked, and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.'" *Id.* (cleaned up).

And in *United States v. Reeves*, the Fifth Circuit—interpreting the scope of a tax obstruction statute, 26 U.S.C. § 7212—rejected "the interpretation of 'corruptly' as meaning 'with improper motive or bad or evil purpose.'" 752 F.2d 995, 998 (5th Cir. 1985). The court noted that such a definition would raise serious vagueness and overbreadth concerns, obligating the court to adopt a narrower interpretation "to specifically insure [sic] that potential violators will be on notice of what constitutes corrupt behavior." *Id.* at 999. The court went on to conclude that "merely prohibiting 'bad,' 'evil,' and 'improper purposes' is very probably insufficient" to provide the requisite notice. *Id.* at 999–1000.

More recently, Judges Walker and Katsas each reached the same conclusion in *United States v. Fischer*. At issue there was whether 18 U.S.C. § 1512(c)(2), which proscribes "corruptly" obstructing, influencing, or impeding an official proceeding, applies to "assaultive conduct" committed by supporters of former President Donald Trump on January 6, 2021. Judge Walker, concurring in the judgment, observed that a "broad definition of 'corruptly'" would raise serious constitutional concerns that could only be avoided by "[r]eading 'corruptly' to require *more*

than a 'wrongful purpose.'" *Fischer*, 64 F.4th at 360–61 (emphasis added) (Walker, J., concurring in part and concurring in the judgment). Judge Katsas, dissenting, agreed that a "wrongfulness standard" would place far too much discretion in the hands of prosecutors, and would allow "an almost boundless area for individual assessment of the morality of another's behavior. . . . Under such a vague standard, *mens rea* would denote little more than a jury's subjective disapproval of the conduct at issue." *Id.* at 380–81 (Katsas, J., dissenting) (cleaned up).

2.a. The Second Circuit adopted its overbroad and standardless "improper purpose" definition even though the history and purpose of the statute make clear that "corrupt" intent requires an intentional breach of duty.

Congress added the "corrupt" intent requirement to the statute in 1986 because of concerns that the prior version of the law "reache[d] all kinds of otherwise legitimate and acceptable conduct." H.R. Rep. No. 99-335, at 3. During hearings on the proposed legislation, the Department of Justice opposed adding this term to narrow the statute, arguing that it "would change the present law to allow a bank officer to claim that although he got a benefit from giving the loan *he thought the loan was good for the bank*." Bank Bribery Hearings at 3 (emphasis added). DOJ also argued that any concerns regarding vagueness or overbreadth with respect to the prior version of the statute were overstated because prosecutors would exercise sound discretion based on the guidance found in the U.S. Attorneys Manual and Prosecutive Guidelines, in choosing which cases to bring. *Id.* at 22–23.

Congress enacted the bill over DOJ's objection. It found the new law more tailored to the offense's purpose, which was "to deter instances of corruption in the bank industry where efforts are made *to undermine an employee's fiduciary duty* to his or her employer." H.R. Rep. No. 99-335, at 5 (emphasis added); *see also United States v. Jumper*, 838 F.2d 755, 758 (5th Cir. 1988) (statute's purpose is to prevent "unsound and improvident lines of credit from being made"). In so doing, Congress manifested its understanding that the "corruptly" element could not be proven without proof that a defendant lacked a good faith belief that the transaction at issue would benefit the bank. By adding "corruptly," Congress revised the statute to require proof of not just any act that might somehow benefit the defendant. Instead, Congress required evidence that the defendant consciously disregarded a specific legal obligation.

Moreover, by amending the statute to require a "corrupt" mens rea, Congress specifically rejected DOJ's suggestion that the expectation of sound "prosecutorial discretion" was sufficient to assuage vagueness and overbreadth concerns, especially because DOJ's Prosecutive Guidelines treated § 215's ambiguities "in nearly meaningless generalities." H.R. Rep. No. 99-335, at 5. The Second Circuit's construction of § 215 walks back the narrowing work Congress did when it amended the statute and defines "corrupt" intent by reference to a "meaningless generality" that would leave prosecutors with almost unfettered discretion. That is precisely the outcome Congress ought to avoid when it amended § 215.

Indeed, the government has *itself* previously argued that "[t]he legislative history of § 215 makes plain that Congress added the word 'corruptly' to ensure that the statute would be applied only to acts undertaken with a bad or illegitimate purpose *that involve a breach of duty*, rather than to ordinary and legitimate practices." Brief for the United States at 104–5, *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011) (No. 08-3327-cr), 2009 WL 8170843 (emphasis added). It nonetheless took precisely the opposite position in Calk's case.

b. Additionally, numerous authorities, both pre- and postdating the 1986 amendments to § 215, recognize that "corruptly," as used in the criminal laws, "denotes an act done with an intent to give some advantage inconsistent with official duty and the rights of others." *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (cleaned up).

In *United States v. Ogle*, the Tenth Circuit rejected a defendant's argument that the district court should have instructed the jury that "corruptly," as used in 18 U.S.C. § 1503, requires an "evil purpose," and held that "corruptly" instead connotes "an intent to give some advantage inconsistent with official duty and the rights of others." 613 F.2d 233, 238 (10th Cir. 1979). The Fifth Circuit adopted *Ogle*'s definition in *Reeves*, 752 F.2d at 998–99, and Justice Scalia, joined by Justices Kennedy and Thomas, quoted that same definition approvingly in *Aguilar*. 515 U.S. at 616 (Scalia, J., concurring and dissenting).

More recently, the Sixth Circuit adopted that same definition in *United States v. Buendia*, 907 F.3d 399,

402 (6th Cir. 2018). The Third Circuit has similarly held that the term "corruptly persuades," as used in 18 U.S.C. § 1512(b), refers to "'corrupting' another person by influencing him to violate his legal duty." *United States v. Davis*, 183 F.3d 231, 249 (3d Cir. 1999) (quoting *Poindexter*, 951 F.2d at 379).

In this case, the Second Circuit ignored authorities supporting a narrower construction of § 215 limited to conduct involving a conscious disregard for the law. Instead, it adopted a vague and sweeping interpretation, in plain contravention of this Court's directive to interpret criminal statutes narrowly where such a construction is permissible. *See, e.g.*, *Yates*, 574 U.S. at 548 ("harsher" reading of criminal statute impermissible unless Congress has "spoken in language that is clear and definite") (citation omitted).

3. The constitutional concerns presented by the Second Circuit's expansive interpretation are not just abstract. The vague phrase "improper purpose"—when detached from any independent legal standard—offers no guidance to bank employees or their customers on what is "corrupt" and what is not. Under the "standardless sweep" of the Second Circuit's definition, bankers and their customers "could be subject to prosecution, without fair notice, for the most prosaic interactions." *McDonnell*, 579 U.S. at 576. The court's ruling—especially when coupled with its capacious interpretation of § 215's "anything of value," *see supra* 14–21—will lead to illogical results. And it could have a profound chilling effect on the sort of "legitimate and acceptable conduct" that Congress sought to avoid criminalizing by adding the "corruptly" mens rea requirement. H.R. Rep. No. 99-335,

at 3. The consequences will be especially acute for small community banks, which depend on their employees' ability to develop relationships with customers.

Consider for example, a loan officer who facilitates a loan to a local chef opening a new restaurant. The chef has a sound business plan, excellent credit, and a solid track record of successful ventures in the neighborhood. The loan officer expects the bank will earn a profit on the loan, which is well-collateralized and offered on the credit union's standard terms for small businesses. Additionally, the loan is approved by the credit committee and the bank's loan underwriters.

After the loan closes, the chef shows his gratitude by extending the loan officer an invitation to attend a free "friends and family meal" celebrating the restaurant's opening. If the officer accepted, he would have received a "thing of value" (a free meal) as a "reward" "in connection with" bank business. *See* 18 U.S.C. § 215. Whether the banker's conduct (and the chef's) amounts to a federal crime would turn solely on the amorphous question whether accepting an invitation for a celebratory meal from a customer is "improper." An ordinary person in the loan officer's position could not reasonably predict that § 215 would criminalize this conduct, and yet, it could be a crime under the Second Circuit's interpretation of the statute.

B. The Question Is Important And Squarely Presented

The scope of "corruptly" in § 215 is exceptionally important. Dozens of federal bribery and obstruction statutes use that term. *See Fischer*, 64 F.4th at 341.

Nonetheless, the term is a source of persistent confusion and inconsistency within the courts. *See generally, e.g.*, Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. Legis. 129 (2004). This Court's review is merited to resolve the disarray within the lower courts.

This case also presents an ideal vehicle to address the issue, because it is emblematic of the way prosecutors have taken advantage of the imprecision of "corruptly" to target conduct beyond the bounds Congress intended to proscribe. At trial, the government argued that the jury could convict "even if [it] found that these were the best loans in the world," and it made no effort to prove that Calk lacked a good faith belief that the Manafort loans would benefit TFSB. C.A.App.434. Nor could it have, given that the loans were made on standard terms (or better for TFSB), were approved by the underwriting department, and were supported by so much collateral that they posed effectively *no risk* to the bank.

The Second Circuit was squarely presented with the question whether "corruptly" requires a breach of duty. It squarely rejected that argument and held "'corrupt' conduct describes actions motivated by an improper purpose, even if such actions (a) did not entail a breach of duty, and (b) were motivated in part by a neutral or proper purpose, as well as by an improper purpose." Pet.App.3a. Based on that holding, it affirmed Calk's convictions. The court's interpretation of "corruptly" was outcome determinative and is ripe for this Court's review.

III. AT A MINIMUM, THIS COURT SHOULD HOLD THE PETITION PENDING THE OUTCOMES IN *FISCHER* AND *SNYDER*

On December 13, 2023, this Court granted two petitions for certiorari requesting that this Court examine the scope of criminal statutes which require the government to prove a defendant acted "corruptly." In *Snyder v. United States*, No. 23-108 (U.S. Dec. 13, 2023), the question presented is whether 18 U.S.C. § 666, the federal program bribery statute, criminalizes gratuities as well as quid pro quo bribes. In *Fischer v. United States*, No. 23-5572 (U.S. Dec. 13, 2023), the question is whether 18 U.S.C. § 1512(c), a federal obstruction statute, criminalizes acts unrelated to investigations and evidence.

In each case, the parties, as well as amici, briefed the meaning of the term "corruptly," and the implications of that term with respect to the breadth (and potential vagueness) of the statutes at issue. And in *Snyder*, the parties' briefs discuss Congress's use of the term "corruptly" in § 215. The meaning of "corruptly" was also a focus of several Justices' questions at oral argument in *Snyder*, which was held on April 15, 2024, and was discussed during oral argument in *Fischer* on April 16, 2024.

This case provides an ideal vehicle to address the scope of § 215's "corrupt" intent requirement. At a minimum, and in the alternative, however, Calk requests that if this Court does not grant his Petition outright, it hold his Petition pending the outcomes in *Snyder* and *Fischer*.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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