No. 23-1149

In the
Supreme Court of the United States

STEPHEN M. CALK, AKA SEALED DEFENDANT 1,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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August 6, 2024

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INTRODUCTION

Petitioner believed—correctly—that the loans his bank issued to Paul Manafort posed essentially no risk for the bank. The supposed "bribe" was a mere referral for a job interview lacking any objectively quantifiable value. But under the Second Circuit's novel and overbroad interpretation of 18 U.S.C. § 215's "corrupt" intent and "thing of value" elements, none of that mattered.

This case epitomizes the central problem with the Second Circuit's interpretation: It "would criminalize a broad swath of prosaic conduct." *Fischer v. United States*, 144 S. Ct. 2176, 2189 (2024). A person could be sent to federal prison for routine interactions between community bankers and their customers—interactions including, for example, offers to throw out an opening pitch at a baseball game or perform a ceremony at a religious service. Rather than responding to these hypotheticals in the Petition, however, the government advocates the broadest possible interpretation without explaining how a reasonable person could distinguish between innocent and criminal conduct under that interpretation.

The government's arguments are also unprincipled and internally inconsistent. It defends the Second Circuit's construction of "thing of value" in § 215 based on decisions interpreting *other* statutes lacking § 215's structural characteristics. At the same time, it says there's no circuit split because the conflicting decisions involved other statutes. The government's effort to have it both ways highlights courts' inconsistent approaches to "corruptly" and "thing of value" and the need for this Court's intervention.

The questions presented are exceedingly important, and the government does not seriously dispute that they are case-dispositive. This Court has never construed § 215, but prosecutions under the statute are common, and guidance is sorely needed. Moreover, as this Court is well aware from *Fischer* and *Snyder v. United States*, 144 S. Ct. 1947 (2024), "corruptly" appears in many federal criminal statutes but has thus far eluded any definitive interpretation. The Court left its meaning open in *Fischer* and *Snyder* but should decide it now. This case presents an ideal vehicle in which to resolve the muddled state of the law about what constitutes "corrupt" intent, while also resolving the split on "thing of value."

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE MEANING OF § 215's "THING OF VALUE"

A. The Government Ignores Statutory Structure, History, And Due Process

1. The government does not dispute that whether "anything of value" in § 215 can include something with no objective value was squarely raised and outcome determinative here. It suggests the question presented is whether an "intangible benefit" can be a "thing of value" worth over $1,000 and purports to answer *that* question instead. Citing cases involving objectively valuable intangibles such as conjugal visits and property re-zonings, the government says valuable intangibles can be "things of value." BIO.12. But Calk has never disputed that intangibles with *objective* monetary value can satisfy § 215. His Petition raises whether "things" *without* objective value can be a "thing of value" worth over $1,000.

2. This Court recently emphasized six considerations for interpreting a criminal statute: "text, statutory history, statutory structure, statutory punishments, federalism, and fair notice." *Snyder*, 144 S. Ct. at 1954.

The government ignores almost all these factors. It focuses on the phrase "anything of value," but ignores the context in which it appears. That approach violates the rule requiring statutory language to be construed "in its context and in light of the terms surrounding it," especially where a term has a potentially expansive meaning. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *see also, e.g.*, *Fischer* 144 S. Ct. at 2183; *Yates v. United States*, 574 U.S. 528, 536 (2015).

The government completely ignores the structural features of § 215 indicating its "thing of value" must be susceptible to objective monetary valuation—namely, a misdemeanor/felony distinction and penalty provision tied to the specific dollar value of the "thing." Pet.15-17. Instead, the government says cases interpreting *other* statutes resolve the question—even though those statutes lack the structural features of § 215 signaling Congress's focus on objective value. But "identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates*, 574 U.S. at 537 (collecting cases).

Moreover, the cases the government relies on, BIO.11-13, all employ the countertextual, policy-driven approach to statutory interpretation that this Court has rejected as a "relic from a bygone era." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019); *see* Pet.17-18. For example, in *United States*

v. Marmolejo the court interpreted 18 U.S.C. § 666's "thing of value" expansively based on Congress's intent to "cast a broad net" and "safeguard the integrity of federal funds." 89 F.3d 1185, 1191-92 (5th Cir. 1996) (cleaned up).

Nor does the government address the fair notice or federalism concerns raised by interpreting "thing of value" to cover literally *any* "thing" a person might subjectively value. Instead, it strikes at another straw man by suggesting Calk argues that § 215 is void for vagueness. BIO.14-15. But that has never been the argument, which is based on the canon that "allows courts to *avoid* the decision of constitutional questions" by selecting the interpretation of the statute that does not raise "serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

No reasonable banker or bank customer could understand that § 215 criminalizes exchanges of intangibles without market value, or that the dividing line between a felony and a misdemeanor turns on the defendant's subjective feelings about the "thing"'s value. Pet.18-20. Because a broad interpretation would create uncertainty regarding the statute's scope and thus fair notice and arbitrary enforcement concerns, a narrower construction is required. *E.g.*, *Snyder*, 144 S. Ct. at 1957-58; *McDonnell v. United States*, 579 U.S. 550, 576-77 (2016).

3. The government does not even try to defend the absurd, unpredictable sorts of prosecutions the Second Circuit's interpretation would license. *See* Pet.19-20. Its hypothetical involving a "picture of [a] relative" that is "worth a high amount to a particular fam-

ily member," BIO.13, undermines its argument: Imagine a banker who gives a loan on standard terms to her credit-worthy uncle. Out of gratitude, the uncle "rewards" her with a photo of her deceased father. The government's belief that the photo could be a "thing of value" capable of supporting a felony conviction for both the banker and the uncle underscores the grave constitutional concerns created by the Second Circuit's interpretation. *See Snyder*, 144 S. Ct. at 1957 ("draconian approach" to bribery statute "would border on the absurd").

4. The government's only real response to these due process problems is its suggestion that a capacious reading of "anything of value" is necessary as a matter of policy. It claims a narrower reading "would pose no bar to a bank administrator soliciting a child's admission into a top-tier college or the dismissal of an investigation in exchange for a loan to a college administrator or a prosecutor." BIO.14.

But this argument turns the correct methodology for construing criminal statutes upside down. This Court rejects expansive interpretations where, as here, the statutory text and structure limit a term's reach, and lenity principles or other constitutional concerns require a limiting construction—even if that means some morally culpable conduct may fall outside a particular statute's ambit. *E.g.*, *Snyder*, 144 S. Ct. at 1957-60; *McDonnell*, 579 U.S. at 566-77; *Skilling v. United States*, 561 U.S. 358, 412-13 (2010); *Yates*, 574 U.S. at 547-48; *Fischer*, 144 S. Ct. at 2190 (Jackson, J., concurring) ("Our commitment to equal justice and the rule of law requires the courts to faithfully apply

criminal laws as written…even when the conduct alleged is indisputably abhorrent."). In short, "judges are bound by the ancient rule of lenity to decide the case…not for the prosecutor but for the presumptively free individual." *Snyder*, 144 S. Ct. at 1960 (Gorsuch, J., concurring).

In any event, the government's parade of horribles is unpersuasive. For example, "a child's admission into a top-tier college," BIO.14, is not analogous to the referral Calk received here. Calk received no actual position—he got an informal *recommendation* from Manafort. That is more comparable to the sort of *pro forma* recommendation letter admissions officers routinely receive from influential people—and disregard. Actual admission to an elite college, on the other hand, has obvious *objective* value that could no doubt be quantified by an expert. Yet in Calk's case, the government presented no evidence that the referral had any objective value. In fact, its own witnesses (and others) testified that such recommendations are routinely given for free, Pet.App.13a, and Manafort's recommendation could have hurt Calk's chances of obtaining a position in the Trump administration, Pet.App.9a. And all Manafort received were loans at the bank's "standard terms and rates," secured by so much collateral they posed no real risk to the bank.[1] Pet.App.10a.

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[1] Instead of trying to value Manafort's assistance, the government claimed the cost of Calk's hotel and airfare to attend the Trump Tower interview proved he valued Manafort's assistance over $1,000. The Second Circuit correctly rejected that absurd theory. Pet.App.34a.

The government's second hypothetical is even more inapt. It is irrelevant whether giving a prosecutor a loan to convince her to drop an investigation would be covered by § 215; public corruption statutes like 18 U.S.C. § 201(b) address such conduct.

B. The Government Fails To Refute The Conflicts

The government defends its view of the statute's meaning exclusively with cases construing other statutes and not § 215. Yet it claims there is no circuit split because the cases evidencing the split involved other statutes. BIO.15-17. The government cannot have it both ways.

The government argues Third and Fourth Circuit decisions holding "thing of value" requires a showing of objective value do not apply to § 215 because they involved a different bribery statute, 29 U.S.C. § 186(a). BIO.15-16. But § 186(a) is more similar to § 215 than the statutes in the cases the government cites. Unlike the statutes in the government's favorite cases, § 186(a) shares the structural features of § 215 indicating "Congress clearly intended [the statute's] 'thing of value' to have at least some ascertainable value." *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008); *see also Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2006).

The government's efforts to dismiss *United States v. Condon*, 170 F.3d 687 (7th Cir. 1999), and *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir. 1988), are equally cursory. It says *Condon* reasoned that immunity from prosecution has not historically been

treated as a "thing of value" covered by anti-bribery statutes, and that *Tobias* was based on the "legislative history" of the federal conversion statute. BIO.16-17. But the same could be said of § 215. As the Petition discussed (at 23), § 215's legislative history explains that letters of recommendation and "courtesy" referrals from bank customers are historically accepted activities that Congress never intended to treat as bribes. *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 77, 142 (1985). The government ignores this history, even though it was a key part of the Petition. *See Fischer*, 144 S. Ct. at 2186 (emphasizing "history of the provision" as key statutory construction factor).

II. THE COURT SHOULD GRANT REVIEW TO DEFINE "CORRUPTLY"

A. The Government Fails To Address Vagueness And Ignores § 215's History

1. The government tries to brush away the grave due process concerns raised by the Second Circuit's interpretation of "corruptly" by arguing it comports with the word's "well-established" meaning. BIO.18. But as this Court knows from the two cases last Term in which the meaning of "corruptly" was hotly debated, the term has eluded a "well-established" meaning despite appearing in multiple criminal statutes.

For instance, at oral argument in *Snyder* multiple Justices grappled with the meaning of "corruptly." *See* Argument Tr. at 49-52, 144 S. Ct. 1947 (No. 23-

108). But the *Snyder* decision ultimately did not resolve what "corruptly" means. In *Fischer*, too, the Court did not define "corruptly"; as Justice Barrett pointed out, its meaning is "unsettled." 144 S. Ct. at 2201 (dissent). The government ignores these proceedings, even though it was a party in both cases, and Calk highlighted them in his Petition. Pet.35.

The government points out that some of the court of appeals decisions that conflict with the decision below were decided before *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). BIO.20-21. According to the government, certiorari is not warranted because *Arthur Andersen* subsequently defined "corruptly" and resolved the question presented here. BIO.17-19.

If things were that simple, there would have been no need for all the briefing and argument in *Fischer* and *Snyder* about what "corruptly" means. But regardless, *Arthur Andersen* did not generally define "corruptly." It held that because "'[c]orrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil," the phrase "knowingly corruptly" connotes, at *minimum*, consciousness of wrongdoing. 544 U.S. at 705-06. The Court explicitly declined to explore the exact requirements of "corruptly" because the jury instructions at issue did not even convey that consciousness of "wrongdoing" was required; the instructions were therefore insufficient under even a loose construction of "corruptly." *Id.* at 706. And the opinion below didn't even cite *Arthur Andersen*, because it is inapposite.

2. The government says the Second Circuit's "improper purpose" definition "does not raise vagueness

concerns," but it fails to explain how to determine what purposes are "improper," if not by reference to clear legal duties. BIO.19. If the government does not know what an "improper purpose" is (and how could it?), how can bankers and their customers possibly understand "what is acceptable and what is criminalized by the Federal Government? They cannot." *Snyder*, 144 S. Ct. at 1958.

3. As Judge Katsas cautioned in his *Fischer* dissent (the reasoning of which this Court later substantially adopted), a legal standard based on vague, moralistic labels like "improper" or "wrongful" would allow convictions based solely on "a jury's subjective disapproval of the conduct at issue." 64 F.4th 329, 380-81 (D.C. Cir. 2023). "The flaw in the Government's approach—and it is a very serious real-world problem—is that the Government does not identify any remotely clear lines separating" what is "improper" from what is "proper." *Snyder*, 144 S. Ct. at 1957.

The due process concerns would be especially grave for small community banks that rely on employees' ability to develop meaningful relationships with customers. The Second Circuit's interpretation would create "traps for unwary" bankers left to guess what is permitted and what is a crime. *Id.* Is it "improper" for a mortgage broker who facilitates a single mother's purchase of her dream home to accept "a $100 Dunkin' Donuts gift card" as a "reward"? *Id.* And if not, "would it somehow become criminal to take the [broker] for a steak dinner?" *Id.* The Second Circuit's interpretation "would leave [bankers] entirely at sea to guess

about what gifts they are allowed to accept under federal law." *Id.* at 1958. The government ignores those concerns.

4. The government also fails to grapple with the history of the statute, which reveals "corruptly" was added to limit prosecutorial discretion by imposing an intent standard that would *not* be defined by "meaningless generalities." H.R. Rep. No. 99-335, at 5 (1985); *see* Pet.29-30. This history shows Congress added "corruptly" to limit § 215's application to cases involving breaches of a known legal duty. The Second Circuit's interpretation is thus "inconsistent with 'the context from which the statute arose.'" *Fischer*, 144 S. Ct. at 2190 (quoting *Bond v. United States*, 572 U.S. 844, 860 (2014)).

The government concedes that it 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…that involve *a breach of duty*." Brief for the United States at 104-05, *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011) (No. 08-3327-cr), 2009 WL 8170843 (emphasis added). It tries to back-track because "the cited brief" addressed a "distinct question." BIO.22 n.2. But the fact that the government previously adopted an interpretation of § 215's "corruptly" diametrically opposed to its position here only underscores the need for this Court's guidance.

B. The Government's Vehicle Argument Fails

The government does not dispute that the meaning of "corruptly" is significant. Instead, it halfheartedly claims "petitioner would be unlikely to prevail even

under his own narrowing construction" because Calk allegedly violated OCC regulations and bank policy. BIO.22. That argument belies the record.

The jury made no finding that Calk breached any OCC regulation or bank policy. It was not asked to do so, precisely because it was not charged that "corruptly" required any breach of duty. Rather, the district court instructed the jury—over Calk's objection—that an 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. Unsurprisingly, therefore, the opinion below did not even hint that Calk's convictions could be maintained under his proposed interpretation of "corruptly." To the contrary, the Second Circuit treated the question presented as case dispositive.

In any event, Congress clearly did not intend § 215 to criminalize *every* trivial conflict of interest or breach of a technical banking regulation. Rather, it amended the statute to ensure only truly corrupt conduct was covered. *See* Pet.29-30. And there is no dispute that Calk believed the Manafort loans were in his bank's best interests: The loans were unanimously approved by the loan committee, approved by underwriting, and so well-secured they became the most profitable loans in the bank's history even after Manafort defaulted. C.A.App.324-27, 340-42, 350, 437, 562.

If this Court adopts Calk's construction of "corruptly," his conviction could not stand.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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