

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. SNYDER,)
)
) Petitioner,)
)
) v.) No. 23-108
)
) UNITED STATES,)
)
) 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 [...]"

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

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

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

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

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

1 to 10 years in prison. Remember, extensive
2 guidance tells federal employees that accepting
3 anything over \$20 is a crime.

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

8 I welcome questions.

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

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

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

1 used to mean gratuities -- these are cited at
2 page 31 of our brief. They make clear that no
3 quid pro quo payment is required. They say you
4 can't receive any authorized fee or
5 compensation.

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

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

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

1 really the government's argument.

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

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

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

17 But that, of course, is not true. You
18 had a statute that was identical to Section
19 201(c) that was a gratuity statute. And the
20 government -- the Congress did not just sneak in
21 the word "corrupt." They deleted that statute
22 in toto, hook, line, and sinker, and added
23 "corruptly [...] intending to be influenced,
24 rewarded" in a way that looks much more like the
25 201(b) bribery statute.

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

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

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

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

18 MS. BLATT: 201(b).

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

21 MS. BLATT: And our point is it looks
22 a lot like, more 201(b), which is -- has the
23 "corruptly [...] intending to be influenced."
24 And I just don't think the story is that adding
25 --

1 JUSTICE SOTOMAYOR: But they had that
2 language, but they chose something broader and
3 different. And so I don't understand.

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

10 But, under this statute, 666, the
11 government has --

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

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

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

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

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

25 MS. BLATT: Mm-hmm.

1 JUSTICE SOTOMAYOR: 666, when it was
2 clearly a gratuity, had 10-year statute --
3 penalty. So it was always disparate from other
4 statutes involving federal officers.

5 So what do I take from that?

6 MS. BLATT: Well --

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

11 MS. BLATT: Well, all --

12 JUSTICE SOTOMAYOR: It did before it
13 amended 666.

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

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

1 statute, and that is not the case of the federal
2 bribery statute. This statute actually requires
3 either an intent to be influenced or an intent
4 to be rewarded.

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

15 And that is an outlier in -- in
16 history and in the U.S. Code.

17 JUSTICE JACKSON: Can I ask you --

18 JUSTICE SOTOMAYOR: But --

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

20 JUSTICE SOTOMAYOR: I'm sorry, go
21 ahead.

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

25 MS. BLATT: Mm-hmm.

1 JUSTICE JACKSON: And it uses almost
2 exactly the same language. It has "corrupt,"
3 "corruptly." It has giving, offering, promising
4 "anything of value to [a] [...] person with
5 [the] intent to influence or reward." When I
6 look at the legislative history of 215, it says
7 -- or 666 says that it's modeled off of 215.
8 And 215's legislative history says it includes
9 gratuities.

10 So I'm just trying to understand what
11 you mean about this not looking like anything
12 else.

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

18 But, on the legislative history, to be
19 sure, a footnote in the legislative history of
20 Section 215 mentions that that statute applies
21 to gratuity.

22 But, if we're going to rely on
23 legislative history, I'll take the footnote in
24 the legislative history of Section 666 itself.
25 When it references the Section 215 statute, it

1 only refers to bribery.

2 But now we're really going to be
3 worrying over footnotes in legislative history,
4 I'll -- I'll take ours.

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

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

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

18 JUSTICE JACKSON: And are they told
19 you can -- you can accept gratuities in the 215
20 context?

21 MS. BLATT: The -- the guidelines
22 which were promulgated after Section 666 was
23 passed, but, again, I --

24 JUSTICE JACKSON: No, I'm sorry,
25 what's the answer to --

1 MS. BLATT: The guidelines do --

2 JUSTICE JACKSON: -- can they accept

3 --

4 MS. BLATT: -- the guidelines do
5 assume that 215 applies to gratuities.

6 JUSTICE JACKSON: Okay. And the --

7 MS. BLATT: And that is the
8 government's --

9 JUSTICE JACKSON: -- the language is
10 identical to 666, correct?

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

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

1 becomes corrupt. It --

2 JUSTICE JACKSON: Well, that's -- go
3 ahead.

4 MS. BLATT: It ends at 319, it starts
5 at 1999.

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

12 Can you point to any actual
13 prosecutions or convictions even that have
14 pursued those kinds of --

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

16 JUSTICE BARRETT: -- troubling
17 charges?

18 MS. BLATT: -- in our reply brief.
19 And I don't know if they reached a conviction.
20 But somebody was charged for soliciting
21 donations to a sports league, and then another
22 defendant was charged for having -- having
23 plaques and luncheon for female judges, and that
24 was considered it.

25 But this Court -- I mean, there's just

1 legions of cases that say you're not going to
2 interpret a statute with crazy breadth on the
3 trust me assumption of federal prosecutors.

4 JUSTICE SOTOMAYOR: Doesn't the --

5 JUSTICE BARRETT: And what about --
6 oh.

7 JUSTICE SOTOMAYOR: I'm sorry.

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

16 MS. BLATT: Yes. You held in Fischer
17 that it covers Medicare, which is one of the
18 largest industries in this country. It covers
19 every nurse, doctor, orderly, anyone in the
20 hospital.

21 JUSTICE BARRETT: But restaurants and
22 some of the -- yes, hospitals, of course.

23 MS. BLATT: It covers any grantee, and
24 I think we gave in the brief, I literally
25 Googled government grantees, and there's just

1 tons and tons, Lockheed, lobster --

2 JUSTICE SOTOMAYOR: I'm sorry, doesn't
3 the nexus requirement get rid of most of this?
4 The tax collector, the person who just says
5 thank you generally.

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

7 JUSTICE SOTOMAYOR: The -- the nexus
8 requirement says that the gratuity must be "in
9 connection with any business, transaction, or
10 series of transactions" of a covered -- covered
11 entity "involving anything of value of [§]5,000
12 or more."

13 MS. BLATT: Right.

14 JUSTICE SOTOMAYOR: The trash
15 collectors, not having anything to do with 5,000
16 or the contract itself.

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

21 (Laughter.)

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

23 JUSTICE GORSUCH: I -- I -- I -- I --

24 MS. BLATT: -- I'm not even joking.
25 Snow removal is worth over 5,000. Writing a

1 letter for your kid to get into college, that's
2 priceless. There are -- I could go on and on
3 and on. The --

4 JUSTICE SOTOMAYOR: But it still has
5 to have a nexus to that contract.

6 MS. BLATT: Yes, and people give gifts
7 all the time to nurses after an operation. That
8 is a crime.

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

10 JUSTICE GORSUCH: I -- I -- I -- I'm
11 sorry.

12 JUSTICE KAGAN: Go ahead. Go ahead.

13 JUSTICE GORSUCH: You sure? Okay. I
14 -- I had thought that the government had
15 actually pursued prosecutions below on the
16 theory that the \$5,000 in connection with the
17 business requirement could be satisfied by
18 pointing, for example, to a police officer's
19 salary was more than \$5,000.

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

1 it closer to 201. But, no, they've -- that's
2 why they love 666.

3 JUSTICE GORSUCH: I thought there was,
4 in fact, an affirmed conviction in the Seventh
5 Circuit in United States versus Robinson along
6 just that point.

7 MS. BLATT: You can ask them, because
8 I think they're a little cagey on how much they
9 will give on what a business or transaction is.
10 But, even assuming it's tight, it doesn't take
11 that much to do snow removal that's worth over
12 5,000 or the police officer who helps your --
13 you know, find your kid who's kidnapped.

14 This is like -- government officials
15 and healthcare workers do stuff worth over
16 \$5,000 --

17 JUSTICE GORSUCH: Can I --

18 MS. BLATT: -- every day, every
19 second, every minute.

20 JUSTICE GORSUCH: Can I ask --

21 JUSTICE KAGAN: These --

22 JUSTICE GORSUCH: No, your turn now.

23 JUSTICE KAGAN: Go ahead. Go ahead.

24 JUSTICE GORSUCH: No, please.

25 JUSTICE KAGAN: Do you think that the

1 horribles also apply to the bribery side of the
2 statute? I mean, what strikes me about this
3 statute is the number of people that it covers.

4 But you can imagine all of your
5 horribles being done on the bribery side. You
6 know, I give the orthodontist for my kids hockey
7 tickets so that -- and we kind of -- it is a
8 quid pro quo so that, you know, my kid gets the
9 best appointment or something like that.

10 I mean, you can imagine a whole lot of
11 cases where, even though there's an explicit
12 bribe, it also seems like, really, we're
13 criminalizing that? So I'm -- I'm just
14 wondering whether the horribles only apply to
15 gratuities, as opposed to there are horribles in
16 this statute because of the kinds of people it
17 applies to.

18 MS. BLATT: No, they -- no, I
19 disagree, Justice Kagan, for this reason. Under
20 Section 201, there's a 15-year sentence for
21 bribery. Government hates to have to prove a
22 quid pro quo. And there's a two-year sentence
23 for gratuity, where it's really easy to get a
24 water bottle plus a mug and it's over \$20.
25 There's vast, vast difference.

1 The government -- if it's that no big
2 deal, let the government just prove quid pro
3 quo. Just let them. It's -- it's much more
4 damaging. The government has a direct interest.
5 If you have to prove there was an influence on
6 your official conduct, at least the government
7 says it impacts the federal program.

8 Here, they have six different ways
9 where they're defining "corrupt:" if it's not
10 benign, if it was against the employer's rules,
11 if it's against common sense rules, if you're
12 conscious of wrongdoing, which I had no idea
13 what it means, if it could skew your official
14 decisionmaking. It is very different to say --
15 and I do think the fact that all states prohibit
16 bribery cold and not all states -- some
17 employers in some localities allow gifts.

18 JUSTICE JACKSON: But, Ms. --

19 MS. BLATT: They just do --

20 JUSTICE KAVANAUGH: How would you --

21 MS. BLATT: -- because they're not
22 corrupt --

23 JUSTICE KAVANAUGH: How would you --

24 MS. BLATT: -- unless it's
25 prophylactic.

1 JUSTICE KAVANAUGH: Sorry. How would
2 you define "corruptly" if you had to in this
3 particular provision?

4 MS. BLATT: Well, we would win if it
5 was defined under half of it violated your
6 employer rules, common sense ethical rules, or
7 consciousness of wrongdoing.

8 I don't know what "benign" means. I
9 don't know what "immoral" means. I mean, the
10 government says we waived, but they don't tell
11 us what we should have --

12 JUSTICE GORSUCH: Now --

13 MS. BLATT: -- what we should have
14 asked for. They never spelled out what that
15 instruction would look like.

16 JUSTICE GORSUCH: -- I -- I -- I --

17 JUSTICE KAVANAUGH: Well, just --

18 JUSTICE GORSUCH: No, I'm sorry,
19 please.

20 JUSTICE KAVANAUGH: Just on that, I
21 thought you did ask for jury instructions that
22 would make clear that an after-the-action
23 agreement --

24 MS. BLATT: A hundred percent.

25 JUSTICE KAVANAUGH: -- would require

1 acquittal.

2 MS. BLATT: JA-18 objects to the
3 definition of "corruptly" on JA-28 by saying,
4 very clearly laying out the sine qua non of
5 bribery is that quid pro quo payment and the
6 jury would have to convict if it only found a
7 gratuity.

8 What the government is trying to say
9 is that we should have said something other than
10 the way the government's prosecuted every other
11 666 case on just a knowing theory, and they've
12 said six different ways what that would look
13 like.

14 And if you charge -- again, I'm sure
15 you will ask them what the jury should be
16 charged what common sense ethical rules are. I
17 mean, the restaurant example alone, I don't know
18 where it's -- I'm pretty sure Chipotle would be
19 okay, Inn at Little Washington wouldn't, but ask
20 them about The Cheesecake Factory.

21 (Laughter.)

22 JUSTICE GORSUCH: Well, I'm not going
23 to ask them about The Cheesecake Factory.
24 Somebody else may.

25 MS. BLATT: Okay.

1 JUSTICE GORSUCH: But -- but I'm going
2 to ask you a little bit more about "corruptly"
3 --

4 MS. BLATT: Okay.

5 JUSTICE GORSUCH: -- and -- and the
6 mens rea that you think it should import here,
7 putting aside the jury instructions and the
8 debate over forfeiture.

9 You mentioned consciousness of
10 wrongdoing, which the Court mentioned also in
11 Arthur Andersen if I recall.

12 MS. BLATT: Mm-hmm.

13 JUSTICE GORSUCH: And that -- that
14 suggests, I -- I think, that you have to know
15 that it's unlawful. It's one of those rare
16 statutes --

17 MS. BLATT: And willful.

18 JUSTICE GORSUCH: -- where perhaps
19 ignorance of the law is a defense, if you will.

20 What do you think of that?

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

1 "Bribery" has always had both common
2 law, historic, 201. "Corruptly" means quid pro
3 quo in this context. I think, when you have
4 Arthur Andersen, official proceedings, document
5 destruction, what have you, "corruptly" can mean
6 all kinds of things.

7 JUSTICE SOTOMAYOR: Ms. Blatt, it
8 makes no sense what you're saying to me. Here's
9 a case in which someone is -- that's the
10 allegation -- demanding money, gets it basically
11 for no services, spends his time giving two or
12 three different reasons and services that he
13 performed, which he didn't, and there's a series
14 of meetings or phone calls, texts, et cetera,
15 before the second contract is awarded between
16 these people.

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

19 MS. BLATT: Well --

20 JUSTICE SOTOMAYOR: And you're giving
21 no definition that would cover that kind of
22 behavior.

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

24 JUSTICE SOTOMAYOR: I -- I think
25 that's different than the situation the Chief

1 posited. I find someone's wallet and I tell
2 them: I'm not giving it up to you unless I get
3 a tip.

4 MS. BLATT: Yeah. So --

5 JUSTICE SOTOMAYOR: I want half the
6 money in the wallet. Right?

7 MS. BLATT: -- it's none of the
8 federal government's business if a local
9 official is doing nothing wrong with state and
10 local laws and complied with all local laws.
11 Most of their brief has nothing to do with their
12 theory. Their brief is somehow there was
13 improper steering by his buddy, who's now the --
14 the head of sanitation and trash, which is a
15 little bit ironic. But their theory is of a --

16 JUSTICE SOTOMAYOR: But you -- you --

17 MS. BLATT: Their -- the --

18 JUSTICE SOTOMAYOR: -- you are
19 suggesting that the federal government can't say
20 there is something wrong with demanding payment
21 after the fact for an official act.

22 MS. BLATT: That -- the --- the -- the
23 government has not -- sorry. Congress has not
24 criminalized gratuity against state, local, and
25 tribal officials.

1 JUSTICE SOTOMAYOR: You are --
2 MS. BLATT: Absolutely.
3 JUSTICE SOTOMAYOR: Answer my
4 question, yes or no?
5 MS. BLATT: Yes, that's not a crime.
6 JUSTICE SOTOMAYOR: It's not a
7 crime --
8 MS. BLATT: Not a federal crime.
9 JUSTICE JACKSON: But I --
10 JUSTICE SOTOMAYOR: -- for state
11 officials to run around the country with respect
12 to federal contracts and say: I voted for X,
13 now pay me?
14 MS. BLATT: It's not a federal
15 contract, but if there's bribery --
16 JUSTICE SOTOMAYOR: For -- I'm
17 sorry -- a state contract.
18 MS. BLATT: If -- if the government
19 thinks there was a quid pro quo, which they did
20 here, they did allege and try to argue to the
21 jury there was bribery, but you're making it a
22 case where --
23 JUSTICE SOTOMAYOR: No, I'm -- I'm
24 making a -- I'm asking a simple question. It's
25 all right according to you or it's wrong for

1 federal law to attempt to take the situation
2 which is alleged here that demanding payment for
3 official acts --

4 MS. BLATT: Well, I --

5 JUSTICE SOTOMAYOR: -- is wrong?

6 MS. BLATT: So you keep saying
7 demanding. If he had asked for to go fund -- to
8 please give me my go fund money for my kid's
9 cancer surgery, I think, in your view, that's a
10 crime. And I'm saying Congress could not have
11 possibly intended --

12 JUSTICE SOTOMAYOR: Well, I'm not sure
13 what --

14 MS. BLATT: -- to put that official in
15 10 years.

16 JUSTICE ALITO: Well, is it -- I mean,
17 is the --

18 MS. BLATT: But that's the problem
19 with your example.

20 JUSTICE ALITO: -- is the question
21 whether it would be wrong for Congress to
22 criminalize that or whether, in fact, Congress
23 has criminalized it?

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

25 JUSTICE ALITO: It's the latter. So,

1 okay.

2 JUSTICE JACKSON: And why doesn't the
3 language cover -- I mean, I understand you --
4 we've -- we're all thinking about this in terms
5 of gratuities, and that opens the door to all of
6 the, you know, relatively benign examples that
7 you bring up, you know, when someone's just sort
8 of showing thanks for doing services.

9 But the statute does not use the word
10 "gratuities." In fact, the statute uses
11 terminology that's very similar to what Justice
12 Sotomayor just said, right? "Someone who
13 corruptly solicits or demands" -- and I'm
14 skipping here -- "anything of value [...],
15 intending to be rewarded."

16 MS. BLATT: And the --

17 JUSTICE JACKSON: And that -- and
18 those are the facts that the government is at
19 least alleging in this case.

20 MS. BLATT: And -- and "corruptly" is
21 -- is completely a foreign concept to
22 "gratuity," and it's very familiar --

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

24 MS. BLATT: -- to bribery.

25 JUSTICE JACKSON: Set aside

1 "gratuity." I'm just looking at the statute.
2 Why is -- aren't the facts that the government
3 alleges here fitting entirely with the
4 statement, the text of this statute?

5 MS. BLATT: Because the plain language
6 of "reward" can mean bribes, and it has -- it
7 has been used that --

8 JUSTICE JACKSON: And it can't mean
9 after the fact seeking a payment in -- for
10 something that you've done officially?

11 MS. BLATT: "Rewarding" can plainly
12 mean bribes to officials who aren't actually
13 influenced. You give me money and either you're
14 never going to take the vote or you couldn't
15 take it anyway. It also applies to
16 after-the-fact payments.

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

20 JUSTICE JACKSON: No, but that's a
21 gratuity.

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

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

1 MS. BLATT: It applies to givers --

2 JUSTICE JACKSON: -- it would be the
3 same scenario.

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

8 JUSTICE JACKSON: Is she demanding it?

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

10 JUSTICE JACKSON: Is she demanding it
11 for having done something in -- to me or in my
12 family?

13 MS. BLATT: You have to divorce 601 --
14 the giver to the taker. I mean, yeah, the --
15 the -- the giver to the taker. It's the exact
16 same wording. It applies to anyone who gives
17 with an intent to reward. That's the plain
18 language. And I think, in your view, you'd have
19 to draw a line between the two-buck chuck at
20 Trader Joe's and the wine that goes up to
21 500,000.

22 And I don't know where the
23 government's line is. There is no drop-down
24 menu on Amazon for mens rea. People -- there's
25 just not a -- there's -- there is no gratuity --

1 there are 13 gratuity statutes. None of them
2 are like this. They have no mens rea because
3 they're just prophylactic bright-line rules, you
4 can't get that compensation, which is why that
5 is the federal rule.

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

11 JUSTICE JACKSON: So what is
12 "rewarded" doing in this statute? Because,
13 basically, you've defined it as bribery. And we
14 have "intending to in" -- "to be influenced."
15 So what is the work of "rewarded"?

16 MS. BLATT: Two critical things. And
17 the government has a response -- it's not a good
18 one -- on one of them. They have no response to
19 my first point. It takes the issue of timing
20 and causation off the table, and where they
21 don't have a response is on causation.

22 The statute, if it just said
23 "intending to be influenced," a jury would have
24 to acquit if the jury found the person wasn't
25 influenced. Like a gun -- I don't know, take a

1 pro-gun or an anti-gun person who says --

2 JUSTICE JACKSON: I don't understand
3 that. It says "intending to be influenced." It
4 has -- it doesn't say you have to actually have
5 been influenced. So --

6 MS. BLATT: Well --

7 JUSTICE JACKSON: -- I mean, isn't a
8 bribery you're intended to -- you're intending
9 to be influenced? Okay.

10 MS. BLATT: No, if the jury -- if he
11 says, I wasn't influenced, I would have taken
12 the vote anyway, the jury would have to acquit.
13 I wasn't influenced. I didn't even intend to be
14 influenced because I told my God, my wife, and
15 my son that I was going to vote that way anyway.
16 I had no intent to be influenced.

17 And on -- our second one is after the
18 fact. Now I agree you could stretch the English
19 language, but I just think it refers to more
20 naturally an upfront payment is -- before the
21 vote is an intent to be influenced and I'll do
22 it, and then after the vote is taken just more
23 naturally refers to reward, which is what the
24 Fifth and First Circuit found, was that it
25 totally takes timing off the table.

1 And so "corrupt" is doing all the work
2 of quid pro quo. And "intending to influence"
3 and "rewarded" is doing the work on either the
4 timing of the payment or the -- the way you
5 intend it.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Alito, anything further?

9 Justice Kagan?

10 Justice Gorsuch?

11 JUSTICE GORSUCH: I know we discussed
12 this in Sabri, but I'm just curious, your
13 thoughts on, I guess, what Justice Alito framed
14 as the first question. What are the limits to
15 what Congress can do to federalize state
16 substantive criminal law here?

17 MS. BLATT: Yeah. So Sabri is
18 definitely in the context of bribery, and so the
19 question would be if the section -- sorry -- the
20 1984 version just criminalized gratuities and
21 said for or because of official act 10-year
22 penalty, and you would have to -- that -- there,
23 you would meet, I think, the Spending Clause
24 clear statement and the clear statement under
25 Bass to upset the federal/state balance, and you

1 have a pure Sabri question.

2 I mean, it's tough. I think what the
3 government would say, the only thing they
4 intimated in their brief is that sometimes the
5 gift could be so bad, I don't know, a Ferrari,
6 that it might skew your official decisionmaking.

7 And the problem with that is they
8 don't have an answer, what about the toy
9 Ferrari? I mean, so they still have the
10 vagueness problem, but I think their argument
11 would be, although it's way less, it's certainly
12 much weaker than bribery. I think their skewing
13 is the way they would get around the sort of, I
14 guess, whatever you call it, Spending Clause
15 authority or Article I authority.

16 But it was bribery. It was definitely
17 bribery was at issue --

18 JUSTICE GORSUCH: In Sabri.

19 MS. BLATT: -- with the campaign
20 finance and with the connection with the federal
21 program, was clearly a bribery quid pro quo.

22 JUSTICE GORSUCH: And, here, we have a
23 very different scenario with gratuities. And
24 did Congress really -- did it clearly mean to
25 displace all state law?

1 MS. BLATT: It's clear it's not clear
2 to me.

3 JUSTICE GORSUCH: Yeah.

4 MS. BLATT: Not when it's -- this
5 looks nothing like any other gratuity statute in
6 history or on the books today.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: You've suggested a
11 few times that state and local governments
12 regulate gratuities of state and local
13 officials.

14 Can you give us some more color on
15 that? Is there a disparity? You know, some
16 jurisdictions will say up to \$50, others up to
17 \$100?

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

23 Here, it was not even alleged that --
24 Portage and Indiana have extensive ethical
25 rules. There's no allegation that the

1 Petitioner did anything in violation of those
2 rules.

3 And although the federal government
4 has its own, every employer has different rules.
5 Even in the banking context, DOJ is supposed to
6 work with the bank and make sure that, you know,
7 it's copacetic, and even then, DOJ says, we may
8 second-guess the banking rules if we find them
9 unreasonable, but they're supposed to at least
10 work out ahead of time, but there's just --
11 there's a lot of cities and there's a lot of
12 states, and I don't think most states even have
13 gratuity laws.

14 JUSTICE KAVANAUGH: Thank you.

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

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Yeah. So, if you're
20 right and there's a distinction between bribes
21 and gratuities in the way that you're positing
22 it, I -- I guess we'd have a statute in which
23 Congress is intending to prohibit an official
24 from going to a company ahead of time and
25 saying: Pay me \$15,000 and I will steer the

1 garbage truck contracts to your company.

2 But Congress would not have intended
3 to prohibit that same official from steering the
4 garbage truck contracts to the company and after
5 the fact going to them and saying: Okay, give
6 me \$15,000.

7 MS. BLATT: Yeah. And --

8 JUSTICE JACKSON: And I guess I don't
9 understand how you have a statute that is
10 rationally drawing a distinction between those
11 two scenarios.

12 MS. BLATT: Oh, Sun-Diamond, Justice
13 Scalia goes on and on and on, like his -- one of
14 his favorite cases ever, he just goes on and on
15 about the big difference between a bribery,
16 that's where you pay the money in exchange, and
17 a gratuity, that the action is taken is after
18 the fact. 201 made that distinction.

19 And so the other thing I would say --
20 and you can ask the government -- the
21 government's position does not depend on
22 steering. This could have been the best garbage
23 track -- garbage truck contract in the history
24 of the planet but didn't like the \$10,000 or
25 didn't like the type of gift.

1 They ask -- they say it's okay to give
2 coffee and doughnuts to the police who work
3 around the clock. Well, what about the police
4 who coerced a confession? Is that corrupt?
5 Same gift, same donut.

6 The government's theory to the jury
7 has nothing to do with the steering. It's just
8 they want to do that to make, you know, the --
9 the client look bad. It is simply you got
10 something of value after the fact because it
11 related to official conduct, which it doesn't
12 depend on any misconduct at all by the official.

13 And, again, Sun-Diamond is literally
14 all about the difference, and even in
15 Sun-Diamond, this Court went crazy to make sure
16 federal officials were protected because two
17 years was too long for federal officials to go
18 to jail for a gratuity.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Sinzduk.

22 ORAL ARGUMENT OF COLLEEN R. SINZDAK

23 ON BEHALF OF THE RESPONDENT

24 MS. SINZDAK: Mr. Chief Justice, and
25 may it please the Court:

1 The federal government needs to ensure
2 the money it appropriates to local governments
3 for public benefits is allocated in a way that
4 maximizes the benefits to its citizens, not the
5 rewards for local officials.

6 Congress therefore enacted Section 666
7 to bar officials from corruptly accepting
8 payments with the intent to be influenced or
9 rewarded in connection with their official
10 duties.

11 Petitioner ask -- asks this Court to
12 weaken Section 666's protection for the public
13 fisc by holding that a person does not violate
14 Section 666 when he corruptly solicits a payment
15 with the intent to be rewarded unless he has
16 also agreed to accept the reward beforehand.

17 But that requirement of a beforehand-
18 agreement finds no basis in the statutory text.
19 The plain meaning of "reward" readily covers a
20 payment given in return for an official action
21 or decision that is already complete.

22 So a police chief who sends his
23 officers to foil a burglary at a store and then
24 demands the store owner pay him \$10,000 for his
25 officers' work, he acts with the intent to be

1 rewarded.

2 A safety inspector who issues a
3 building permit for a dangerous project and then
4 solicits a \$30,000 payment acts with the intent
5 to be rewarded.

6 And a mayor who steers a contract for
7 a particular business and then asks that
8 business to pay him \$13,000 for the contract
9 acts with the intent to be rewarded, whether or
10 not the contractor agreed to give him the reward
11 before the contract closed.

12 Petitioner's argument to the contrary
13 ignores both the plain meaning of the term
14 "rewarded" and the statutory history. In 1984,
15 Congress enacted a flat bar on the acceptance of
16 bribes and gratuities. It was modeled directly
17 on the one in Section 201(c) that applies to
18 federal employees.

19 In 1986, Congress narrowed that bar to
20 carve out a subset of only the most culpable
21 gratuities by adding a corruptly mens rea and an
22 express exception for bona fide salary and
23 benefits paid in the ordinary course of
24 business.

25 Now Congress's textual fix worked.

1 Petitioners haven't pointed to any real-world
2 examples of Section 666 prosecutions for the
3 sort of innocuous gift-giving activity that
4 occurs in the ordinary course of business, and
5 I'm happy to explain why the -- the two examples
6 in their reply brief really just aren't what
7 they are describing.

8 But the Court should therefore reject
9 Petitioner's invitation to artificially narrow
10 the reach of Section 666.

11 I welcome the Court's questions.

12 CHIEF JUSTICE ROBERTS: Counsel, under
13 -- your theory, there are two offenses in 666,
14 the gratuity and the bribery. And a gratuity is
15 really just a bribery without a quid pro quo,
16 right?

17 MS. SINZDAK: So, first of all,
18 there's a single offense, corruptly accepting a
19 payment, and then there are two means of
20 committing that offense, either intending to be
21 influenced or intending to be rewarded.

22 So it's -- it's one offense, the
23 corrupt acceptance, and then two different
24 means. And, you're right, there -- there --
25 they overlap a lot of times when you're

1 accepting a payment.

2 CHIEF JUSTICE ROBERTS: Well, I don't
3 know if they overlap. It seems one is a lesser
4 included offense than the other, right?
5 Gratuity -- why isn't the bribery thing just
6 surplusage?

7 MS. SINZDAK: No --

8 CHIEF JUSTICE ROBERTS: You -- you can
9 -- you just show a gratuity and, as they say,
10 it's just kind of bribery without the quid pro
11 quo. That's all you need to show.

12 MS. SINZDAK: No, there are going to
13 be situations where somebody is going to accept
14 a payment intending to be influenced without
15 intending to be rewarded. So that's going to
16 happen. When somebody accepts a bribe and says:
17 Yes, this -- this \$10,000, it's going to
18 influence me in making this decision, but I
19 haven't made up my mind yet, and maybe they turn
20 to someone else and say, hey, you know, somebody
21 else gave me \$10,000 to influence me, sure, you
22 know, \$20,000 might push me in another
23 direction. At that point, the -- he -- the
24 person gets \$20,000 and does what the second
25 person wanted.

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

5 But, in the first situation, there is
6 nothing to be rewarded. So they aren't going to
7 -- so they are intending to be influenced, but
8 they haven't made a decision. They haven't
9 taken an act. So they aren't intending to be
10 rewarded.

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

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

15 JUSTICE KAGAN: I mean, I guess what
16 I'm suggesting is that you have to work pretty
17 darn hard to get out of the problem that the
18 Chief Justice suggested.

19 MS. SINZDAK: No, I -- I don't think
20 so for two reasons. First of all, I don't think
21 it's so farfetched to imagine a mayor who says
22 kind of, you know, I -- I'm taking bids on the
23 contract and, hey, it sure would help if you put
24 a payment, you know -- you know, you offered me
25 something too, and then I think you are going to

1 have a few different payments happening with the
2 intent to be influenced but not rewarded.

3 But the second point is that I think
4 this lesser included offense comes from the
5 relationship between 201(b), which covers
6 bribery for federal officials, and 201(c), which
7 covers gratuities.

8 And the 201(c) offense is a broader
9 offense. It's the for or because of language.
10 There's no corruptly mens rea. There's no
11 express exception for bona fide comp -- salary
12 and compensation. So, there, I think it -- it
13 actually can be described as a lesser included
14 offense.

15 But, here, it's not that all
16 gratuities are covered within the rewarded
17 because, of course, the other restrictions
18 within Section 666 still apply. So it has to be
19 accepted corruptly, and we have the exception
20 for --

21 JUSTICE KAVANAUGH: What -- what is --
22 keep going, sorry. What --

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

25 JUSTICE KAVANAUGH: Well, I think the

1 problem you have is what does "corruptly" mean.

2 MS. SINZDAK: So I think Arthur
3 Andersen decide -- described "corruptly." It
4 said it has to be corrupt, so that means
5 wrongful or evil or immoral. And there has --

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

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

12 JUSTICE KAVANAUGH: How about a \$500
13 one?

14 MS. SINZDAK: So I think it would be
15 helpful to set out what the guidelines are going
16 to be here because, when there's a corruptly
17 mens rea, what you -- you usually see in the
18 jury instructions, sometimes it says
19 consciousness of wrongdoing, so you have to know
20 that what you're doing is wrong, but sometimes
21 what the jury instructions do is isolate what is
22 actually wrongful, what is obviously wrongful
23 about this conduct.

24 So I think, when we're talking about
25 corruptly in connection with rewards, you have

1 to isolate what's wrongful, and what's wrongful
2 is when it appears that the government is for
3 sale. What's wrongful -- so -- so here are
4 three specific --

5 JUSTICE KAVANAUGH: Well, you're
6 change --

7 JUSTICE GORSUCH: Counsel, under --

8 JUSTICE KAVANAUGH: -- you're changing
9 the hypothetical. The -- the hypothetical is
10 the action's taken and a citizen gives a thank
11 you, and it could be a gift card to Starbucks or
12 it could be tickets to a concert or game and
13 just drops it off to the person, thank you for
14 all your hard work on this issue, appreciate
15 you.

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

22 JUSTICE KAVANAUGH: I understand that.

23 MS. SINZDAK: -- you're not going to
24 get there.

25 JUSTICE KAVANAUGH: Assume it --

1 MS. SINZDAK: Okay. I just want to
2 make sure because I do think, for example, in
3 Sun-Diamond, Justice Scalia said that requiring
4 this connection with a particular act is going
5 to eliminate innocuous gift-giving for federal
6 officials --

7 JUSTICE KAVANAUGH: But you can't --

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

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

15 MS. SINZDAK: So, again --

16 JUSTICE KAVANAUGH: -- or --

17 MS. SINZDAK: -- I think there are
18 three circumstances where the official is going
19 to know that what he's doing is obviously
20 wrongful. The first one is where he took the
21 public act with the intent to be rewarded.

22 JUSTICE GORSUCH: No, no, no.

23 JUSTICE KAVANAUGH: Assume -- assume
24 that's not the --

25 JUSTICE GORSUCH: You're collapsing

1 two different things.

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

3 JUSTICE GORSUCH: Counsel, you're
4 collapsing two different things there.

5 JUSTICE KAVANAUGH: That's not my
6 hypothetical.

7 JUSTICE GORSUCH: Yeah.

8 JUSTICE KAVANAUGH: My hypothetical is
9 the person, the official knew nothing about the
10 potential for the gratuity after the fact.

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

14 JUSTICE KAVANAUGH: Why? Why?

15 MS. SINZDAK: Because corrupt --
16 because "corruptly" has to get at what's
17 obviously wrongful in the statute, which is
18 where you are performing public acts for private
19 gain. So, if that's --

20 JUSTICE GORSUCH: Counsel, I'm sorry
21 to interrupt --

22 JUSTICE ALITO: But that's a bribe.

23 JUSTICE GORSUCH: -- but I am going to
24 interrupt there because I think the questions
25 and the ones I'm interested in have to do with

1 mens rea on "corruptly." And I think that's
2 what Justice Kavanaugh is getting at.

3 So put aside the actus reus for a
4 moment. You say "corruptly" carries with it
5 some mens rea.

6 MS. SINZDAK: Absolutely.

7 JUSTICE GORSUCH: What is it?

8 MS. SINZDAK: Consciousness of
9 wrongdoing.

10 JUSTICE GORSUCH: So you think the
11 defendant has to know that what he is doing is
12 unlawful?

13 MS. SINZDAK: Oh -- or wrongful. He
14 -- he doesn't have --

15 JUSTICE GORSUCH: Unlawful or --

16 MS. SINZDAK: -- to know about the
17 specific -- well, he does not --

18 JUSTICE GORSUCH: -- wrongful?

19 MS. SINZDAK: Or wrongful, inherently
20 wrongful. That's correct.

21 JUSTICE GORSUCH: Where does that --
22 where does that come from?

23 MS. SINZDAK: That comes from Arthur
24 Andersen. So --

25 JUSTICE GORSUCH: Well, the

1 consciousness of wrongdoing usually means that I
2 know. I mean, wrongdoing is defined by law
3 usually, right? But you're saying -- you're
4 saying no, it doesn't -- he doesn't have to know
5 that it's unlawful. He has to know that it is
6 unlawful or -- fill in the blank.

7 MS. SINZDAK: Wrongful. And I think
8 sometimes actually -- so unlawful is usually,
9 you're right, going to get you there. And,
10 here, I think we have someone who did everything
11 he could to hide that he was getting this money
12 and said that it was a consulting fee. So you
13 have a lot of evidence of consciousness --

14 JUSTICE GORSUCH: How do you know it's
15 wrongful if it's -- if it's perfectly legal?

16 MS. SINZDAK: Well, so it is -- it was
17 not perfectly --

18 JUSTICE GORSUCH: I mean, is it a sin?
19 Are we now talking about something that, you
20 know -- you know, something that would be a -- a
21 -- a venial sin, or does it have to be a mortal
22 one?

23 MS. SINZDAK: I want to ground us in
24 the facts of this case. So I think it's
25 important here to establish that the Indiana

1 code actually bars giving a gratuity to a public
2 official. The Indiana --

3 JUSTICE GORSUCH: I'm not asking about
4 Indiana.

5 MS. SINZDAK: -- Portage -- okay. No,
6 I -- hear that.

7 JUSTICE GORSUCH: I'm asking about
8 what the government's position is on "corruptly"
9 and mens rea, and you say it has to be unlawful
10 or wrongful. And wrongful in what sense?

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

15 JUSTICE GORSUCH: Immoral?

16 MS. SINZDAK: That is what this Court
17 said in Arthur Andersen.

18 JUSTICE GORSUCH: So a gift of
19 pornography, as -- as -- as your counsel --
20 friend on the other side pointed out in her
21 opening, is -- is -- would that count in the
22 government's view?

23 MS. SINZDAK: It needs to be wrongful
24 in the way -- in the way that the statute is
25 targeting. So, here, again, what the statute is

1 targeting, the obviously wrongful conduct that
2 the statute is targeting is taking public acts
3 for private gain. So where, again -- and I'm
4 just going to give you the three circumstances.

5 JUSTICE KAVANAUGH: That -- that
6 defeats your whole theory -- I'm sorry --
7 because, if the public act was done, completed,
8 I've done -- we're done with the new zoning reg,
9 we're done with the new school board decision,
10 and then the gratuity, the gift, the thank you
11 arrives, you're still going to prosecute those
12 cases as corrupt under your theory of what
13 "corruptly" means, correct?

14 MS. SINZDAK: Where one of three
15 circumstances is met.

16 JUSTICE KAVANAUGH: So that means
17 where you haven't taken the public action for
18 private gain.

19 MS. SINZDAK: No. I think that's
20 where the -- the -- the problem is coming in.
21 So, here, for example, imagine that the official
22 just knows that the Buha brothers, they pay big
23 rewards to people who give them contracts. So
24 what he decides to do is award the contract to
25 the Buha brothers. Afterwards, he's going to

1 ask for the payment. That is corrupt. He took

2 --

3 JUSTICE KAVANAUGH: The facts of this
4 case are great in that sense for you to respond
5 to the question, but there are 19 million
6 employees who are going to --

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

8 JUSTICE KAVANAUGH: -- wonder about
9 the thank yous.

10 MS. SINZDAK: -- for all of those
11 employees, the government is going to have to
12 peruse -- pardon me -- to prove corruption. So,
13 if they can't prove that the person actually did
14 -- and let me get out the other two because
15 there are two others.

16 JUSTICE KAVANAUGH: I will.

17 MS. SINZDAK: If it can't prove that
18 the person actually took the act intending to be
19 rewarded, which gives you corruptly, they can
20 also sometimes prove that by taking this
21 payment, let's say it's \$100,000 for having won
22 a case, in the future, the person is going to be
23 try -- trying to win cases to get the money
24 rather than for -- in the interests of the
25 public.

1 And then there's also going to be --
2 with certain payments, it's just going to be
3 clear that if the public official takes this,
4 it's going to look like the government is for
5 sale, and that's because the --

6 CHIEF JUSTICE ROBERTS: Well, every
7 time --

8 JUSTICE KAGAN: How else --

9 JUSTICE ALITO: Does this --

10 CHIEF JUSTICE ROBERTS: -- every time
11 you -- go ahead.

12 JUSTICE ALITO: Does this provision
13 apply to campaign contributions?

14 MS. SINZDAK: Section 666 applies to
15 campaign contributions. Under McCormick, there
16 needs to be a quid pro quo in the campaign
17 context, so -- pardon me -- in the campaign
18 contribution context. So the government does
19 not prosecute where there is --

20 JUSTICE ALITO: So where do you get --

21 MS. SINZDAK: -- a bona fide campaign
22 contribution.

23 JUSTICE ALITO: -- how does that fit
24 into the statutory language?

25 MS. SINZDAK: So what we've taken it

1 is there would be an as-applied constitutional
2 objection if we were trying to prosecute a --
3 campaign contributions on a -- sorry -- bona
4 fide campaign contributions on a pure gratuities
5 theory.

6 And -- and, sorry, if I could just get
7 -- get back again to --

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

20 How about that? Does that fit?

21 MS. SINZDAK: So it needs to be -- we
22 walk through the statutory requirements. The
23 pay -- they -- there needs to be the acceptance
24 or the solicitation of money in connection with
25 particular business or transactions.

1 JUSTICE KAGAN: Well, they're
2 definitely going to accept the eight-figure gift
3 when it comes.

4 (Laughter.)

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

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

14 MS. SINZDAK: So it -- the government
15 is going to have to prove that accepting that --
16 that reward would be corrupt and that the --

17 JUSTICE KAGAN: Well, a lot of people
18 --

19 MS. SINZDAK: -- hospital understands
20 that it's corrupt.

21 JUSTICE KAGAN: -- a lot of people do
22 not think it's good to give super-rich people
23 better healthcare than not-so-super-rich people.
24 So I could see a jury saying that's pretty
25 immoral, but probably every hospital in America

1 does it.

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

8 JUSTICE KAGAN: Well, but there's a
9 jury that's going to decide whether they're
10 committing wrongdoing or not, and a jury might
11 say that sounds pretty corrupt.

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

21 MS. SINZDAK: Let me say -- respond to
22 that in two ways. First of all, under Section
23 201(c), the federal government officials are
24 undisputedly bound by these sorts of
25 requirements with no corruptly mens rea.

1 And in -- in -- in Sun-Diamond, this
2 Court said that requiring a tight connection
3 between the reward and specific -- and a
4 specific official acts or, here, you would say
5 specific business or -- business or transactions
6 worth more than \$5,000, that was going to
7 eliminate many, many of these cases.

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

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

25 CHIEF JUSTICE ROBERTS: Counsel, you

1 said --

2 MS. SINZDAK: So I think that's why --
3 yes.

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

11 MS. SINZDAK: That's right. And in
12 1986, neither did Congress with respect to local
13 and public officials. That's why it added the
14 corruptly mens rea, which has to be proved to a
15 jury, and that's why Congress added an express
16 exception for bona fide salary for compensation
17 in the ordinary course of business.

18 So Congress really did confront all of
19 the concerns that I think the Court is -- is
20 reflecting today, and it said we recognize we do
21 not want to just cover innocuous gift-giving
22 activity.

23 JUSTICE ALITO: And what is the --
24 what is your answer to Justice Kagan's
25 hypothetical? That's a question that would be

1 submitted to the jury, and the jury would have
2 to decide whether the donor acted wrongfully and
3 the hospital acted wrongfully, right?

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

11 JUSTICE ALITO: No, no, no, no --

12 MS. SINZDAK: -- which I think he's
13 going to.

14 JUSTICE ALITO: -- no, no, no, don't
15 turn it into a bribe. It's a gratuity. It's
16 after the fact. There's no agreement.

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

18 JUSTICE ALITO: But -- so it would be
19 whether the hospital knew that it was wrongful?

20 MS. SINZDAK: So, yes, that's --

21 JUSTICE ALITO: I mean, suppose there
22 are in -- internal emails and one -- you know,
23 one official says, you know, we really should be
24 treating -- shouldn't be giving such special
25 treatment to billionaires and another email

1 says, you know, get real, we need money, and et
2 cetera, et cetera.

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

13 JUSTICE GORSUCH: And how does --
14 counsel, how -- how does anyone in the real
15 world know the line? Put aside billionaires and
16 hospitals. Deal with small gifts with teachers,
17 doctors, police officers, all the time.

18 And one could make an argument if it
19 -- if -- if consciousness of wrongdoing doesn't
20 mean consciousness of illegality, awareness of
21 illegality, if it means something more abstract
22 than that, how does this statute give fair
23 notice to anyone in the world as to -- and I
24 hate to do it, but I'm going to -- the
25 difference between the Cheese Factory and --

1 JUSTICE ALITO: Cheesecake.

2 (Laughter.)

3 JUSTICE GORSUCH: -- and -- and -- and

4 --

5 JUSTICE BARRETT: Inn at Little
6 Washington.

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

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

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

17 MS. SINZDAK: Okay.

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

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

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

11 JUSTICE GORSUCH: How about looking at
12 state law? Counsel, how about, like, looking at
13 state law as --

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

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

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

22 JUSTICE GORSUCH: Why -- why not?

23 MS. SINZDAK: I think -- I think that
24 where we've come --

25 JUSTICE KAVANAUGH: Why?

1 JUSTICE GORSUCH: Why not? We're
2 going to have --

3 MS. SINZDAK: Because I think --

4 JUSTICE GORSUCH: Counsel, please.

5 MS. SINZDAK: Sure.

6 JUSTICE GORSUCH: We're going to have
7 internal emails just like Justice Alito posited.
8 Some people say, oh, I wouldn't go to The
9 Cheesecake Factory, that would look bad --

10 (Laughter.)

11 JUSTICE GORSUCH: -- you know, or
12 maybe you should go to The Cheesecake Factory
13 but not Little -- Inn at Little Washington. A
14 lot of nice places to me. But you're going to
15 have evidence and you could prove it, and a jury
16 might well convict.

17 MS. SINZDAK: Sure, and that's why the
18 act also has to be wrongful. This is actually a
19 protection, Justice Gorsuch, so I think that
20 maybe we're talking a little bit at
21 cross-purposes --

22 JUSTICE KAVANAUGH: Well, can I ask --

23 MS. SINZDAK: -- because what I'm
24 trying to say here is that the government has to
25 show that it's wrongful and the person's aware

1 that it's wrongful.

2 So, if it's lawful under state law,
3 then the -- the -- the defendant is going to be
4 able to come in and say, no, look, this is
5 lawful under state law. So it wasn't wrongful.
6 The state obviously didn't think it was
7 wrongful. And, by the way, I had no idea --

8 JUSTICE GORSUCH: But you're going to
9 --

10 JUSTICE KAVANAUGH: Is that an
11 automatic rule?

12 JUSTICE GORSUCH: Yeah.

13 JUSTICE KAVANAUGH: Is that an
14 automatic rule that -- is that a safe harbor?
15 If it's lawful under state law or local law,
16 then you cannot be federally prosecuted for the
17 gratuity under this statute?

18 MS. SINZDAK: If it -- if it's lawful
19 under the governing rules that apply to the
20 person?

21 JUSTICE KAVANAUGH: In other words,
22 it's not made unlawful. If it's not made
23 unlawful --

24 MS. SINZDAK: I mean, I --

25 JUSTICE KAVANAUGH: -- let me finish

1 -- by the relevant state law or local law, is
2 that an automatic -- automatic safe harbor such
3 that the federal government cannot prosecute
4 under this statute?

5 MS. SINZDAK: Yes, but, I -- you know,
6 I have to just for the sake of the public
7 integrity unit say that if a city mayor decided
8 to change all the ethics rules to allow him to
9 take billions of dollars in -- in connection
10 with contracting, then I don't think he could
11 get it in.

12 But, otherwise, yes, we're not -- so,
13 again, this is what I'm trying to say. The
14 consciousness of wrongdoing isn't a trap for the
15 --

16 JUSTICE KAVANAUGH: Should there be a
17 --

18 JUSTICE ALITO: But say a --

19 MS. SINZDAK: -- unwary. It's to help
20 the unwary.

21 JUSTICE ALITO: -- a little town has
22 no rules about gratuities, so you can't
23 prosecute anybody in that town under 666?

24 MS. SINZDAK: No. So, first of all,
25 there would be state rules. Absolutely, there's

1 going to be state rules. I took just --

2 JUSTICE ALITO: All right. There's no
3 applicable -- the state has left the -- the
4 regulation of gratuities to the municipalities.
5 And a particular town has got 3,000 people,
6 2,000 people, 1,000 people. It has no rules
7 about the gratuities that police officers can
8 accept.

9 MS. SINZDAK: Look, if the police
10 officer can come forward and say, I just had no
11 idea this was wrongful because there were no
12 applicable rules, there was no applicable state
13 law, then the government isn't going to be able
14 to prove consciousness of wrongdoing.

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

17 MS. SINZDAK: No, no --

18 JUSTICE ALITO: And, first, you said
19 it was, and now -- an automatic safe harbor.
20 Now I think you're saying it's not.

21 MS. SINZDAK: No, I disagree. Let me
22 distinguish between two things. One is a case
23 where there are ethics rules that say this
24 is permissible, okay?

25 If there are ethics rules that say

1 this is permissible, if there are state laws
2 that say this kind of gratuity is permissible,
3 that is a safe -- safe harbor, other than --

4 JUSTICE KAVANAUGH: I -- I --

5 JUSTICE SOTOMAYOR: Usually --

6 JUSTICE KAVANAUGH: -- changed the
7 language of the --

8 MS. SINZDAK: Okay. Maybe I didn't
9 hear that.

10 JUSTICE KAVANAUGH: -- question then
11 to say also what if it's just, to Justice
12 Alito's point, not made unlawful?

13 MS. SINZDAK: Ah, ah, ah, ah. I see.
14 Okay. So I think there --

15 JUSTICE KAVANAUGH: What's the answer
16 there? Is that a safe harbor?

17 MS. SINZDAK: It's not necessarily a
18 safe harbor if it's obviously wrongful conduct,
19 but I will say it does not mean --

20 JUSTICE KAVANAUGH: What is obviously
21 wrongful?

22 MS. SINZDAK: So, yes.

23 JUSTICE JACKSON: Isn't -- counsel,
24 isn't --

25 JUSTICE KAVANAUGH: And what's the

1 jury instruction -- what -- maybe this is a good
2 way to say it. What is the exact wording of the
3 jury instruction on "corruptly" in your view?

4 MS. SINZDAK: So I think there's two
5 different options. One is to isolate what is
6 obviously wrongful in the particular case.
7 That's what happened here, right?

8 So, in this case -- and let me -- I
9 think this is a helpful way of seeing how it
10 played out. Petitioner was not saying: Oh,
11 it's -- I -- I didn't know it was wrongful to
12 take a \$13,000 payment. What -- what Petitioner
13 was saying is: Oh, I wasn't taking a \$13,000
14 reward, I was actually taking consulting fees.

15 So the jury instructions here said:
16 What the jury has to find is that the Petitioner
17 understood that this was a reward. So that's
18 what separated the wrongful from the innocent
19 conduct. So that's one way of doing jury
20 instructions, to look at a particular case and
21 just say: Okay, what would make accepting \$8
22 million for a hospital patient --

23 CHIEF JUSTICE ROBERTS: Well, I don't
24 think that -- I don't think that gets you very
25 far from the things where people have been

1 talking about, understood that this was a
2 reward. I mean, they understand that the, you
3 know, plate of cookies or whatever is a reward.

4 MS. SINZDAK: So --

5 CHIEF JUSTICE ROBERTS: But that
6 doesn't mean that they should be -- be facing
7 the criminal exposure we're talking about.

8 MS. SINZDAK: Yes. Pardon me. And
9 we're not saying that if the government was
10 somehow prosecuting a plate of cookies, this
11 instruction would be sufficient. What I'm
12 saying is that in most cases, there's actually
13 no dispute about whether it would be wrongful to
14 accept thousands of dollars in return for having
15 done some official act.

16 The dispute is about, well, was it?
17 Was it a reward for doing that specific official
18 act or was it something else entirely?

19 CHIEF JUSTICE ROBERTS: Well, you say
20 that it --

21 JUSTICE JACKSON: Well --

22 CHIEF JUSTICE ROBERTS: -- you say
23 that it doesn't -- you know, that it's -- the
24 government's not going to go after you for the
25 plate of cookies.

1 MS. SINZDAK: That's right.

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

5 MS. SINZDAK: That's right.

6 CHIEF JUSTICE ROBERTS: And, you know,
7 you were careful to make sure you weren't
8 stepping on the toes of the public integrity
9 unit, but I suspect they have a different
10 perspective on a lot of these things than others
11 might.

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

14 CHIEF JUSTICE ROBERTS: Whether they
15 can go after something that other people might
16 regard as really sort of normal type of let's
17 say gratuity, you know, whether it's a Christmas
18 gift for the -- for the trash collectors or
19 something like that.

20 MS. SINZDAK: No, I disagree. And
21 they certainly couldn't in the Seventh Circuit
22 if you look at 41A, the -- the Seventh Circuit
23 said that accepting something corruptly is
24 knowing that it's forbidden so that this is
25 already --

1 JUSTICE JACKSON: So, counsel, isn't

2 --

3 MS. SINZDAK: -- in the Seventh
4 Circuit --

5 JUSTICE JACKSON: -- isn't -- isn't
6 that really the answer to Justice Kagan's
7 hypothetical that sort of got -- got us down
8 this road?

9 MS. SINZDAK: It did.

10 JUSTICE JACKSON: In other words, to
11 the extent that we have an ordinary practice of,
12 you know, unfortunate as it may be, you know,
13 high-profile, special, you know, people,
14 billionaires who come to hospitals and it's sort
15 of understood generally that the development
16 office is going to be notified and afterwards
17 that person might, in fact, be asked to give a
18 donation to the hospital that treated him so
19 well, et cetera. That's sort of standard
20 practice.

21 So, in a situation like that, I would
22 think the government's position is that is not
23 wrongful from the standpoint of corruption. We
24 could not prove consciousness of wrongdoing
25 related to anybody who's doing that sort of

1 thing precisely because it's standard practice.

2 But, when you have a situation like
3 this one, where it's not standard practice for a
4 garbage -- a contract to be given to a
5 particular company and then the company that
6 received that contract to pay out money, \$13,000
7 for the officials who were involved, that
8 doesn't happen very often.

9 And so, when we're in that world, then
10 perhaps we do have a dispute about whether or
11 not there was wrongful behavior, consciousness
12 of wrongdoing, et cetera. But that's what
13 separates all these other standard practice, the
14 cookies, the gift cards, the whatever, that's
15 normal practice, as opposed to --

16 JUSTICE BARRETT: Unless it's a
17 corrupt -- what if -- what if it's a corrupt,
18 like -- sorry to pick, you know, on Illinois or
19 Chicago, but what if you're talking about some
20 sort of local unit or a corrupt hospital where
21 that actually is kind of corrupt practice that
22 everyone would agree would be wrongdoing?

23 Not the donation to the hospital.
24 Talk about something that's more unsavory.
25 Maybe these rewards are just kind of accepted in

1 this small town, and -- and, you know, you can't
2 use that guideline then that Justice Jackson is
3 talking about about what's standard because
4 graft could be standard or gratuities could be
5 standard even in unsavory cases.

6 MS. SINZDAK: So the government has
7 the burden of proof. They need to prove that
8 somebody acted corruptly with consciousness of
9 wrongdoing. I certainly agree with Justice
10 Jackson that if a person knows that this kind of
11 behavior is happening all the time, that's the
12 evidence they're going to put in to make it a
13 very difficult for the government to meet their
14 burden of proof.

15 I take your point --

16 JUSTICE SOTOMAYOR: Counselor, can I
17 --

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

20 JUSTICE SOTOMAYOR: Counsel?

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

23 JUSTICE SOTOMAYOR: Counsel, my head
24 is spinning.

25 MS. SINZDAK: Yes.

1 JUSTICE SOTOMAYOR: I see the
2 questions before us as twofold. Does the
3 language of -- of this 201(c) include a
4 gratuity? It's very hard for me to think
5 otherwise because the language is pretty clear.
6 So, if it's clear that it includes gratuity, a
7 lot of these questions have to do with what kind
8 of gratuity, and that's where I think my
9 colleagues are focused on what does the word
10 "corruptly" mean.

11 And you are fighting their suggestion
12 that if you limit it to accepting rewards that
13 are unlawful -- I -- I think Justice Gorsuch
14 said, "unlawful" defined how? He would say
15 under state law, I think. I don't want to be
16 putting words into his mouth, but I think he
17 would say unlawful by state law.

18 But you want to broaden it. You want
19 to say by ethical rules. But assume we -- we
20 put that aside. Can you live with yes, it
21 includes gratuities but only if you define
22 "corruptly" as being unlawful, the way that
23 Andersen suggested that went a little more
24 broadly?

25 MS. SINZDAK: With -- with the

1 understanding of -- of unlawfulness, yes,
2 absolutely. And let me answer that directly.
3 Let me also say that I -- I -- I take your
4 point, "rewarded" -- I think the reason we're
5 talking about "corruptly" is because "rewarded"
6 just very clearly does cover after-the-fact
7 payments. There is no beforehand-agreement
8 requirement.

9 And I think that to the extent there's
10 a dispute about exactly how you would define
11 "corruptly," that isn't before the Court because
12 they did not object to the definition of
13 "corruptly."

14 JUSTICE SOTOMAYOR: I understand it's
15 not before the Court, but it really is because,
16 if -- if we -- if it's not defined that way, I
17 think there's a sense of then "gratuity" has no
18 meaning, that anyone that could -- it would be
19 so vague that it would be impossible.

20 MS. SINZDAK: It would just be the
21 provision that applies to federal officials in
22 Section 201(c), which doesn't have the corruptly
23 mens rea.

24 JUSTICE SOTOMAYOR: Yes.

25 MS. SINZDAK: That's right.

1 JUSTICE SOTOMAYOR: Obviously.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Alito?

5 JUSTICE ALITO: Well, I'm not sure I
6 understood your most recent colloquy with
7 Justice Sotomayor.

8 You said that it would be -- that
9 "corruptly" should or could reasonably be
10 interpreted to mean unlawful under state law?
11 Is that what you said?

12 MS. SINZDAK: I said -- I think she
13 asked whether we could live with a -- a -- a
14 definition, and I said that understanding that
15 it was unlawful is a definition I think that
16 certainly would be preferable to carving out
17 gratuities from the statute altogether.

18 JUSTICE ALITO: So, if something is
19 not unlawful under state law, then it cannot be
20 prosecuted as a gratuity under 666?

21 MS. SINZDAK: If the person -- the
22 person needs to understand that what they're
23 doing is wrongful. I mean, this is why we do
24 think it means more than --

25 JUSTICE ALITO: And that's a -- it's

1 really a simple --

2 MS. SINZDAK: Yeah, I mean,
3 absolutely, because --

4 JUSTICE ALITO: Counsel, really --

5 MS. SINZDAK: Yes.

6 JUSTICE ALITO: -- it's a simple
7 question.

8 MS. SINZDAK: Okay. Let me just be
9 clear.

10 JUSTICE ALITO: It's a yes-or-no
11 question.

12 MS. SINZDAK: Let me be clear. I can
13 live --

14 JUSTICE ALITO: I just want to
15 understand your position.

16 MS. SINZDAK: Yes. Absolutely. I can
17 live with, as I said to Justice Sotomayor, that
18 narrow definition. I do not think it is
19 correct. So that's the distinction that I am
20 trying to draw.

21 But, if the Court is intent on saying
22 we have this statute that Congress wrote that
23 says you can't accept a payment intending to be
24 rewarded, but it has to be corrupt. If the
25 Court thinks that what Congress wrote is not

1 good enough, it's not protective enough of city
2 officials and we need to graft a limit on, I
3 would certainly rather you graft on a limit that
4 is still going to catch people who are, like
5 Petitioner, taking large sums of money after
6 they awarded a contract with every intent to get
7 that -- large sums of money.

8 I would certainly rather you accept --
9 leave some room for that as opposed to carving
10 it out entirely.

11 JUSTICE ALITO: Okay. And to -- just
12 to summarize so I understand where you are, you
13 think that "corruptly" means moral -- immoral or
14 wrongful, and it requires knowing, the person
15 must know that what is being done is immoral or
16 wrongful?

17 MS. SINZDAK: Know that it's
18 forbidden. Again, I'm just -- to be honest, I'm
19 quoting Arthur Andersen. So I think, if you're
20 looking for --

21 JUSTICE ALITO: Just tell me what --

22 MS. SINZDAK: -- my definition of
23 "corruptly" --

24 JUSTICE ALITO: Just tell me --

25 MS. SINZDAK: Sure.

1 JUSTICE ALITO: -- what the definition
2 is.

3 MS. SINZDAK: So what Arthur Andersen
4 said is that "corrupt" needs to be wrongful,
5 evil, immoral, and a consciousness of
6 wrongdoing. So that's it. That's what we're
7 looking at.

8 JUSTICE ALITO: Okay. And where does
9 -- where would one look to find the rules of
10 wrongfulness and immorality that would be
11 applied in that situation?

12 MS. SINZDAK: Well, again, I think
13 that the criminal laws are a great place to
14 look, so where the conduct is obviously
15 unlawful. You can also look at ethical codes
16 and regulations if you're not sure whether
17 something is obviously wrongful.

18 None of this was litigated in this
19 case because, again, there was no dispute that
20 accepting a \$13,000 payment for having granted a
21 contract was wrongful, which I think was what he
22 was doing.

23 JUSTICE ALITO: I -- I -- we -- I
24 think we understand that. But we didn't really
25 take this case just to decide whether this case

1 was correctly -- this particular case was
2 correctly decided. We took it to explore the
3 meaning of this provision.

4 Was the jury instruction here on
5 "corruptly" correct?

6 MS. SINZDAK: It was in the
7 circumstances of this case because there was no
8 dispute about whether accepting a reward was
9 wrongful. But, Justice Alia, that's what --
10 sorry, pardon me. Justice Alito, that is
11 precisely what I'm -- I'm trying to say. You do
12 have to look at the circumstances because you
13 have to isolate what was wrongful.

14 And, here, there was no dispute that
15 taking \$13,000 as a payment for having granted a
16 contract was wrongful. That's why Petitioner
17 didn't object to the jury instructions.

18 JUSTICE ALITO: Is -- is this the
19 standard instruction that the government has
20 requested --

21 MS. SINZDAK: In the Seventh --

22 JUSTICE ALITO: -- in 666 gratuity
23 cases?

24 MS. SINZDAK: In the Seventh Circuit,
25 this comes from the model jury instructions. I

1 would say that in -- in the prosecutions that I
2 have seen, there just hasn't really been room to
3 argue that the person -- that the -- the
4 acceptance of the payment wasn't wrongful
5 because what the government has been prosecuting
6 is taking money and then doing everything that
7 you can to cover up the fact that you took the
8 money as a reward.

9 And, there, it's pretty easy to show
10 consciousness of wrongdoing, right?

11 JUSTICE ALITO: But I --

12 MS. SINZDAK: I think what you're all
13 talking about is these fringe cases where, oh,
14 it's not really clear because the person
15 actually took it openly and notoriously. That's
16 going to make it really hard for the government
17 to show consciousness of wrongdoing if it's had
18 --

19 JUSTICE ALITO: If we looked at the
20 jury instructions in 50 666 gratuity cases, what
21 would we find on the question of "corruptly"?

22 MS. SINZDAK: So --

23 JUSTICE ALITO: What would -- what
24 would the jury be told? Here, what the jury was
25 told is -- am I right, page 28 of the Joint

1 Appendix -- a person acts corruptly when he acts
2 with the understanding that something of value
3 is to be offered or given to reward or
4 influence.

5 So, as to gratuity, to reward in
6 connection with his official duties. I mean,
7 all that has to be -- the person has to -- to
8 know is that this is a reward.

9 MS. SINZDAK: In this --

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

12 MS. SINZDAK: Again, that's -- in the
13 circumstances of this case, there was no
14 dispute.

15 JUSTICE ALITO: I -- I --

16 MS. SINZDAK: So I take your point.

17 JUSTICE ALITO: -- I -- I understand
18 that. I understand that. I -- I'm not -- I
19 don't want to talk about the circumstances of
20 this case.

21 MS. SINZDAK: I know.

22 JUSTICE ALITO: I want to talk about
23 what the law means and what the government's
24 position has been on the issue of "corruptly" in
25 other cases. Is this standard or, if we look at

1 the others outside of the Seventh Circuit, the
2 "corruptly" is defined as immoral or wrongful?

3 MS. SINZDAK: So the Second Circuit, I
4 believe, has instructions that ask about a
5 wrongful purpose. And, of course, if the -- if
6 the defendant thinks, look, I didn't know what
7 -- that taking this reward was wrong, then he
8 can ask for an instruction saying, I had no --
9 asking the jury to decide whether he understood
10 that the -- taking the reward was wrong.

11 So there can be that express request.
12 And -- and -- and this is just -- I'm -- I'm
13 just sort of taking a page from Arthur Andersen
14 on all of this. "Corruptly" is, I admit, a
15 relatively unique -- or a unique mens rea, but
16 it's one with a rich historical pedigree. So
17 it's not that the government is making up some
18 new limit. It's not that Congress in 1986, when
19 it was trying to -- to eliminate innocuous
20 gratuities, was doing something wild and crazy
21 by saying, you know, we're going to use the
22 corruptly mens rea because that is going to get
23 -- make sure that when people don't understand
24 that what they're doing is wrongful, that when
25 they're engaged in what everyone would

1 reasonably think or at least, you know, that
2 somebody would reasonably think was just
3 innocuous conduct, then they're not going to be
4 prosecutable because the government just isn't
5 going to be able to show that that was
6 corruptly.

7 JUSTICE SOTOMAYOR: Counsel --

8 CHIEF JUSTICE ROBERTS: I'm sorry.
9 Are you done?

10 JUSTICE ALITO: Well, I am concerned
11 about the breadth of -- the breadth of your
12 interpretation, and it all seems to -- to rest
13 on the understanding of "corruptly."

14 The person who gives a reward simply
15 because that person is grateful may not know
16 what the ethics rules are with respect to the
17 recipient of this reward. So is that a defense?

18 MS. SINZDAK: Certainly, the -- that
19 -- that person could ask for a jury instruction
20 saying they need to -- they -- there needs to be
21 consciousness of wrongdoing, so they need to
22 have understood that what they were doing was
23 wrongful. These are sort of obscure ethics
24 rules, they didn't know -- you know, the person
25 could say, I didn't know about them. These are

1 obscure ethics rules. How would anybody know,
2 you know, \$25, \$50? And, yes, then they're
3 entitled to a jury instruction saying no, there
4 had to be a consciousness of wrongdoing.

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

9 So the owner of a -- of a car
10 dealership gets money under -- during -- as a
11 result of COVID, enough money to -- to qualify,
12 and the owner is thankful to a firefighter for
13 saving the life of his daughter, and so, when
14 that firefighter comes in to -- his car breaks
15 down and wants a new car, but at that time,
16 people are lined up, the cars are in short
17 supply, and the -- the dealer says, okay, well,
18 you know what, for you, I'll put you at the top
19 of the list, is that a -- is that a violation?

20 MS. SINZDAK: If he does not have a
21 consciousness of wrongdoing, that if he does not
22 understand that what he is doing is wrong, I
23 don't think the government -- no, there's not
24 going to be a conviction for that.

25 Again, the -- the corruptly --

1 JUSTICE ALITO: There's not going to
2 be a conviction because the jury is going to be
3 sympathetic to this fellow?

4 MS. SINZDAK: No, because it's not
5 going to fulfill the corruptly mens rea. Again,
6 I want to be clear because I think we get --
7 keep losing sight of this. Section 201(c) bars
8 for federal officials just accepting gratuities,
9 and it has no corruptly mens rea.

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

15 So I think this idea that by putting
16 in something to protect -- an extra protection
17 for Section 66 -- people covered by Section 666,
18 you could somehow render all the coverage of --
19 of gratuities totally vague and unclear, I mean,
20 that just can't be right.

21 CHIEF JUSTICE ROBERTS: Thank you.
22 Thank you, counsel.

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: Counsel, you
25 answered Justice Alito by saying the instruction

1 here was correct. But I'm reading the Seventh
2 Circuit opinion at page 580, and the court is
3 talking about that it's recognizing the
4 disparate penalties for gratuities between
5 federal and state officers, and the difference
6 is mitigated -- this is the court's words -- by
7 the additional requirement in Section 666 that
8 the reward be paid or received corruptly.

9 And it defined "corruptly," i.e., with
10 the knowledge that giving or receiving the award
11 -- reward is forbidden.

12 MS. SINZDAK: That's right.

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

15 MS. SINZDAK: At 41A? No, because,
16 again, the Petitioner was not -- was not
17 arguing.

18 JUSTICE SOTOMAYOR: So -- so the
19 charge wasn't correct. It just was not the --
20 any error was not preserved to be --

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

24 JUSTICE SOTOMAYOR: I understand.
25 Just answer my question.

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

2 JUSTICE SOTOMAYOR: All right. Now
3 stop, okay?

4 MS. SINZDAK: Okay.

5 JUSTICE SOTOMAYOR: Assuming if you go
6 back below, if we say that -- I'm not saying
7 we're going to say it -- that it doesn't -- that
8 666 doesn't cover any kind of gratuity, what
9 happens? Is this a reversal or a vacate and
10 remand?

11 MS. SINZDAK: It's a vacate and remand
12 because the government was pursuing a bribery
13 theory.

14 JUSTICE SOTOMAYOR: As well?

15 MS. SINZDAK: Yes.

16 JUSTICE SOTOMAYOR: And so it was --
17 we don't know what the acquittal went to,
18 whether it went --

19 MS. SINZDAK: Well --

20 JUSTICE SOTOMAYOR: -- to the bribery
21 or to the reward?

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

24 JUSTICE SOTOMAYOR: Mm-hmm.

25 MS. SINZDAK: -- acceptance offense,

1 that can be committed through intending to be
2 influenced or rewarded.

3 Now the -- the district court actually
4 found that there was sufficient evidence to
5 convict purely on the -- on the quid pro quo
6 gratuity theory.

7 JUSTICE SOTOMAYOR: I remember that,
8 yes.

9 MS. SINZDAK: Yeah.

10 JUSTICE SOTOMAYOR: Okay.

11 MS. SINZDAK: So --

12 JUSTICE SOTOMAYOR: So -- and if I
13 don't disagree with that, then is there a
14 retrial?

15 MS. SINZDAK: No, we think that there
16 would be because the evidence was sufficient to
17 convict on the -- on the -- on the bribery.

18 JUSTICE SOTOMAYOR: That was --

19 MS. SINZDAK: But, again, that's
20 something for remand.

21 JUSTICE SOTOMAYOR: All right. Thank
22 you, counsel.

23 MS. SINZDAK: Mm-hmm.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: I think I've got your

1 view of "corruptly."

2 MS. SINZDAK: I'm glad.

3 JUSTICE KAGAN: But, if you put that
4 aside, are there any safe harbors in this
5 statute -- and just like if you would list for
6 me the safe harbors that the government thinks
7 exists either on the face of this statute or in
8 the way you're prosecuting this statute, just
9 give me a list.

10 MS. SINZDAK: Sure. So the -- the
11 safe harbors that come from the text, so this is
12 in a sort of trust us argument. There's the
13 that it has to be in connection with business
14 and -- or transactions worth \$5,000.

15 JUSTICE KAGAN: Got it, five --
16 \$5,000.

17 MS. SINZDAK: Right. That's the
18 Sun-Diamond, there has to be the nexus, that's
19 going to kick out a whole bunch of innocuous
20 conduct, more even than --

21 JUSTICE KAGAN: Just -- just list
22 them.

23 MS. SINZDAK: Just list them? Okay.
24 So the corruptly mens rea, the nexus
25 requirement, the \$5,000 floor, and the express

1 exception for bona fide salary and compensation
2 in the ordinary course of business.

3 JUSTICE KAGAN: Anything else?

4 MS. SINZDAK: That's -- that's all --
5 well, and pardon me, and then the First
6 Amendment protection that says that under
7 McCormick we understand that to mean that there
8 really has to be an express quid pro quo when
9 we're dealing with a bona fide campaign
10 contribution.

11 JUSTICE KAGAN: Nothing else that the
12 government can say we realize that this doesn't
13 appear on the text of the -- in the text of the
14 statute on, you know, like you just read it, but
15 we never prosecute X, Y, or Z?

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

18 JUSTICE KAGAN: Yes, set aside.

19 MS. SINZDAK: And I think that's where
20 a lot of that comes in. But, for example, the
21 government does not prosecute pure charitable
22 contributions. Sometimes charitable
23 contributions are used as a funnel, so it's just
24 sort of like you pay into the charity and then
25 that goes right into the person's pocket, but

1 the government doesn't -- doesn't prosecute
2 these -- the -- the just a pure charitable
3 contribution.

4 If you actually look at the facts of
5 the cases that they're citing, I think one of
6 them is from the Local 150, that's the Donegal
7 prosecution, there's actually thousands and
8 thousands of dollars and -- of payments of all
9 different kinds. That's actually on -- on
10 Westlaw. You can look at the facts. They're
11 quite dramatic. So that's not just pure
12 charitable contributions.

13 Similarly, I think they refer to a
14 building inspector case. In that case, somebody
15 was giving -- the building inspector was giving
16 permits and then -- and then getting, again,
17 large amounts of money from developers having
18 given them that -- the permit, so I think we had
19 30 -- a \$240,000 loan, \$30,000 the person just
20 got to keep scot-free.

21 So -- so I -- I guess I'm kind of
22 trying to give you a picture of the sort of
23 prosecutions, which I -- I -- I guess I'm -- I'm
24 -- I'm not kind of including in here the kind of
25 apple for teacher and the like, you know, the

1 hypotheticals that you see in Petitioner's
2 brief. They're just not even on the radar in
3 terms -- of the government.

4 So I think those are just what we're
5 looking for is, again, corrupt acceptance of a
6 payment with the intent to be rewarded in
7 connection with business or transactions worth
8 at least \$5,000. And when we're talking about
9 all these hypotheticals, they just in the
10 government's view, I think in any court's view,
11 in any jury's view, they just don't fall into
12 that.

13 JUSTICE KAGAN: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Counsel, you in your
17 brief make the point that we have to interpret
18 "rewarded" your way rather than your friend's
19 way because, otherwise, we're going to have a
20 superfluity problem.

21 In a case we're going to hear in a
22 couple of days, the government makes the
23 opposite argument and says that -- I think it
24 says overlap is not uncommon in criminal
25 statutes, and, therefore, we -- superfluity

1 doesn't come into play.

2 Which is it?

3 MS. SINZDAK: So I think that,
4 certainly, sometimes there is superfluity in a
5 statute. There's belt and suspenders.

6 JUSTICE GORSUCH: Yes.

7 MS. SINZDAK: The reason not here,
8 Justice Gorsuch --

9 JUSTICE GORSUCH: Yeah. Why -- why --
10 why -- why does it matter here, but it doesn't
11 two days from now?

12 MS. SINZDAK: So the reason that it
13 matters in this case -- and I can't, of course,
14 speak for other cases -- but the reason it
15 matters --

16 JUSTICE GORSUCH: Well, is --

17 MS. SINZDAK: -- to this case is that,
18 well, because I'm here about this case. So the
19 reason is that --

20 JUSTICE GORSUCH: You represent the
21 government of the United States, which I would
22 hope would take consistent positions across
23 cases.

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

25 JUSTICE GORSUCH: So, counsel --

1 MS. SINZDAK: Let me explain to you
2 why we are.

3 JUSTICE GORSUCH: Thank you.

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

17 JUSTICE GORSUCH: I got it.

18 MS. SINZDAK: Instead, they added
19 "rewarded."

20 JUSTICE GORSUCH: Counsel, I -- I got
21 it. I got it, okay?

22 And earlier this term the government
23 argued that it would defy common sense for
24 Congress not to have required more serious
25 sentences for more serious crimes in Pulsifer.

1 MS. SINZDAK: Mm-hmm.

2 JUSTICE GORSUCH: And that -- that --
3 that argument prevailed.

4 Here, you're suggesting that it makes
5 sense for the more serious offense of bribery
6 and the less -- lesser offense of receiving a
7 gratuity to receive the same punishment. Can
8 you -- can you reconcile that one for me?

9 MS. SINZDAK: Of -- of course, the
10 government looks first to the text, and we know
11 that the text here says that the 10-year penalty
12 it did in 1984 when Petitioner acknowledges that
13 it undisputedly covered gratuities.

14 But I -- I can give you a historical
15 reason why I think we have that, you know, the
16 two years under 1962 and the -- and the 10-year
17 maximum --

18 JUSTICE GORSUCH: That -- that wasn't
19 -- that wasn't my question. Why would -- why
20 would both bribery and receipt of a gratuity
21 have the same 10-year sentence here and we
22 should ignore that, but we were supposed to take
23 cognizance of that kind of issue just last
24 month?

25 MS. SINZDAK: Because Section 666 was

1 enacted as part of the 1984 Crime Control Act,
2 which also enacted the sentencing guidelines.
3 And so Congress was moving from a situation
4 where, as it had in 201, it was specifying
5 specific sentences for specific law -- for
6 specific types of breaking of a law. So there's
7 201(b). It had the two-year maximum for that.

8 In 1984, Congress is doing sentencing
9 guidelines, so it's saying we're going to have,
10 you know, a maximum, but we're not going to
11 worry about that because we're going to have
12 mandatory guidelines that are going to take care
13 of this. And then, in fact, if you look,
14 Section 666 is listed both --

15 JUSTICE GORSUCH: Well, the mandatory
16 --

17 MS. SINZDAK: -- under the gratuities
18 guidelines --

19 JUSTICE GORSUCH: -- guidelines
20 argument was the same point that was made in
21 Pulsifer, and you -- you said that wasn't enough
22 there.

23 MS. SINZDAK: So just -- just to
24 finish my point, if you look at the guidelines,
25 the -- there is a gratuity guideline that

1 applies to Section 666. There is a bribery
2 guideline that applies to Section 666. Under
3 the gratuity guidelines, people are not getting
4 more than two-year sentences. And Petitioner
5 hasn't pointed to anywhere that has happened.

6 JUSTICE GORSUCH: Okay. Last one.
7 And it -- this is circling back to Justice
8 Kagan. And, again, put aside the -- the
9 question about "corruptly."

10 It seems to me that -- that the major
11 safeguard that you pointed to in that discussion
12 was the \$5,000 threshold. Is that right? The
13 \$10,000 threshold and the \$5,000 threshold?

14 MS. SINZDAK: I think the bona fide
15 salary exception is pretty important.

16 JUSTICE GORSUCH: Okay. Okay, got
17 that. Okay.

18 With respect to those thresholds, the
19 government seems to have argued that they're
20 satisfied pretty easily. In connection with
21 business of an organization, the government's
22 argued that we can take account of the salary of
23 police officers, which are obviously more than
24 \$5,000. So, because a police department
25 receives \$10,000 and the police officer makes

1 more than \$5,000, any gift of any value would
2 seem to qualify. What am I missing there?

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

7 JUSTICE GORSUCH: No, I'm not talking
8 --

9 MS. SINZDAK: I mean, that is the --
10 the case in which the -- yes.

11 JUSTICE GORSUCH: That's the case
12 where the Seventh Circuit said that --

13 MS. SINZDAK: Right.

14 JUSTICE GORSUCH: -- \$5,000 was
15 satisfied by the police officer's salary.

16 MS. SINZDAK: Right.

17 JUSTICE GORSUCH: That's true.

18 MS. SINZDAK: And the reason was
19 because they were counting up how many salary
20 hours the police officers would have spent, and
21 they were evaluating that. So it wasn't just
22 kind of like a police officer makes more than
23 \$5,000.

24 JUSTICE GORSUCH: So anytime an
25 employee at a hospital does more than \$5,000

1 worth of work on behalf of a patient, or a
2 teacher spends more than \$5,000 worth of time
3 with a student, then that -- that -- that
4 threshold would be satisfied in the government's
5 view?

6 MS. SINZDAK: Where the specific
7 transaction and business is worth more than
8 \$5,000, yes.

9 JUSTICE GORSUCH: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

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

20 And, you know, I -- I -- there's
21 widespread agreement on that, I think, and I
22 certainly do as well agree on that. I think
23 there are two issues here you need to deal with,
24 though, and I'm going to come back to them.

25 One is we're talking about state and

1 local officials who might have different state
2 and local rules than what the federal
3 government's going to come in and superimpose on
4 them. The second issue is the word "corruptly."
5 And you said, I think, that the word "corruptly"
6 was a break on an otherwise broad statute and so
7 it's a good thing here, right?

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

17 MS. SINZDAK: So I think, to -- to --
18 to alleviate that concern, it is consciousness
19 of wrongdoing. So, if there's uncertainty -- if
20 there's uncertainty about whether accepting that
21 reward is wrongful, the government isn't going
22 to be able to prove that the person had this
23 consciousness of wrongdoing. So I think --

24 JUSTICE KAVANAUGH: Well, you nicely
25 anticipated my next question, which is to drill

1 down again, and you did with Justice Sotomayor,
2 on "wrongful," and Justice Gorsuch as well.

3 I think it's your backup position. I
4 think you said you could live with it. But I'm
5 going to make sure I've got it. An instruction
6 that says you're -- you're only guilty under
7 this statute, paraphrasing, if you -- if the
8 conduct was unlawful under state or local law?

9 MS. SINZDAK: Can I live with that?

10 JUSTICE KAVANAUGH: Are you okay with
11 that?

12 MS. SINZDAK: Over -- over cutting out
13 gratuities entirely? I mean, yes, I'm going to
14 take the -- the -- the narrower statutory
15 surgery.

16 JUSTICE KAVANAUGH: And knew that it
17 was unlawful? Because you've said consciousness
18 of wrongdoing.

19 MS. SINZDAK: Yes.

20 JUSTICE KAVANAUGH: So consciousness
21 of illegality. In other words, this statute
22 would be narrowed to a situation where it was
23 unlawful under state or local law and you knew
24 it was unlawful under state or local law to take
25 that gratuity. That's your -- I mean --

1 MS. SINZDAK: Yes. Yes.

2 JUSTICE KAVANAUGH: -- that's better
3 from your perspective than --

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

12 JUSTICE KAVANAUGH: Well, that may
13 indicate that even the backup position's no
14 good. But that's a --

15 MS. SINZDAK: No, I don't -- I don't
16 think so.

17 JUSTICE KAVANAUGH: -- you're arguing
18 against yourself there a little.

19 MS. SINZDAK: No, I -- I don't think
20 so. Again, the very worst is -- I -- I think
21 what you could be saying is that, you know, we
22 know that gratuities are barred under Section
23 201(c) with no corruptly mens rea. I mean, if
24 you think that "corruptly" just can't be --

25 JUSTICE KAVANAUGH: But I'm going to

1 -- can I just --

2 MS. SINZDAK: -- adding anything --

3 JUSTICE KAVANAUGH: -- can I just stop
4 you there?

5 MS. SINZDAK: -- then we just go to
6 Section 201(c).

7 JUSTICE KAVANAUGH: That lends to the
8 clarity point, and it's clear there. But, here,
9 when you put "corruptly" in, now you don't know
10 where the line is. You don't know if the
11 concert tickets, the game tickets, the gift card
12 to Starbucks, whatever, where is the line, and
13 so there's vagueness. That creates the problem
14 that there is here.

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

16 JUSTICE KAVANAUGH: And you -- and you
17 say -- this is my last question. You said these
18 fringe cases as compared to this case. I -- I
19 think the "fringe cases" are the everyday
20 concern.

21 MS. SINZDAK: Again, there's a
22 requirement of consciousness of wrongdoing. So,
23 if the person couldn't know that this behavior
24 was wrongful because it was unclear, because
25 there are some line-drawing difficulties,

1 because some people think this is wrong and some
2 people think it's right, then the government
3 isn't going to be able to meet its burden of
4 proof.

5 JUSTICE KAVANAUGH: Well, that's --

6 MS. SINZDAK: So it's not introducing
7 vagueness.

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

18 MS. SINZDAK: No. I mean, prosecutors
19 have a responsibility not to bring prosecutions
20 that don't meet the statute. And what I'm
21 saying is that the statute prevents that kind of
22 prosecution. So it's a -- it's a -- it's a --
23 it's what Congress said, we don't want to reach
24 innocuous conduct. We want to make sure. We
25 were going to put in a mens rea that makes sure

1 that you understand that what you're doing is
2 wrongful and you do it anyway. That's the
3 nature of this mens rea. It's a break.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Okay. So I'm
8 increasingly worried about the scope of the
9 government's position. I -- I'd like you to
10 tell me how your backup position that you were
11 just talking about with Justice Kavanaugh works
12 for the private university or the private
13 hospital employee that Justice Kagan was
14 pointing out satisfies the grant amount. And
15 I'll say, you know, as Justice Gorsuch pointed
16 out, I don't think that the nexus requirements
17 or the \$5,000 requirement does a whole lot of
18 work and, you know, for the surgery, the
19 employee's time, or the police officer's time
20 working your case or the professor's time
21 spending like -- trust me, tutoring is
22 expensive. I've paid a lot of tutoring bills.
23 You know, the -- the professor is spending all
24 this extra time, you know, out -- outside of
25 class.

1 So if state and local laws -- I mean,
2 I assume you're encompassing ethics rules for
3 state and local government employees in your
4 answer to Justice Kavanaugh?

5 MS. SINZDAK: Yeah.

6 JUSTICE BARRETT: So how does that
7 cash out for the private people?

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

11 JUSTICE BARRETT: Right, but I'm
12 saying that these ethics rules aren't going to
13 apply in the private context to the car dealer,
14 the private university, the private hospital
15 that's swept in because of the federal funds.

16 MS. SINZDAK: Oh, I -- I don't think
17 that's really necessarily true. I think many
18 entities, like hospitals, research institutions,
19 the entities that are actually being covered
20 here, they do have ethics rules, so there is
21 going to be something to look at. But also that
22 they can certainly --

23 JUSTICE BARRETT: But not the state
24 and -- I -- I -- I guess let me just, like, pin
25 you down. I'm not saying that they won't have

1 ethics rules.

2 MS. SINZDAK: Mm-hmm.

3 JUSTICE BARRETT: The hospitals, the
4 universities, et cetera, they're going to have
5 ethics rules. I don't know about the car
6 dealerships.

7 (Laughter.)

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

14 MS. SINZDAK: I -- I think where --
15 where I look is whether they had, you know -- I
16 think the easiest thing is whether there would
17 be concrete evidence that this was wrongful.
18 So, yes, if their entity's rules barred the
19 thing, then I think that's going to be pretty
20 good evidence.

21 If it's unclear, though, Justice
22 Barrett, I just want to again tell you that
23 there has to be a consciousness of wrongdoing.
24 So, if there just was nowhere they could look
25 and there was no way for them to know that

1 taking the, you know, cashmere blanket for the
2 tutoring was wrongful, then the government can't
3 show consciousness of wrongdoing and it can't
4 prosecute in that case.

5 JUSTICE BARRETT: Can't show it?
6 So -- but -- but -- but you're kind of sliding,
7 I guess, into the not backup position but the
8 immoral or this is unsavory or this is wrong?

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

21 JUSTICE BARRETT: But, under your
22 first order position, there wouldn't be anything
23 to point to, right, because I thought your first
24 order position -- like your backup is if it's
25 proscribed by law. But I thought your first

1 order position was if it's wrong, if it's
2 immoral, if people would know this is corrupt.

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

10 JUSTICE BARRETT: No, no. I know. I
11 know.

12 MS. SINZDAK: Right.

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

20 MS. SINZDAK: I -- I think that the
21 government can certainly -- I think it's going
22 -- the government has to say this is something
23 that is so obviously wrongful that everyone
24 would know.

25 And I would say that in the

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

9 But this is something that is just so
10 obviously inherently unlawful or unwrong --
11 sorry, not unlawful, I don't want to confuse
12 things -- inherently wrongful that the person
13 would be bound to know.

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

23 The government isn't going to be able
24 to show and they're not -- and -- and,
25 therefore, the statute does not cover that --

1 that person because they do not understand that
2 it is wrongful.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

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

13 And I read the question presented to
14 be about reward, like what does reward mean.
15 You know, the -- the Petitioner's statement of
16 the question presented is whether 666
17 criminalizes gratuities without any quid pro quo
18 agreement to take those actions.

19 So I thought we were looking at reward
20 and determining whether or not you needed a quid
21 pro quo. But it sounds like there's a lot of
22 concern about the "corruptly" element.

23 So can I ask you, do we need to take a
24 position on "corruptly" here to rule in your
25 favor on the question presented in this case?

1 MS. SINZDAK: No. To rule in our
2 favor, you just have to look and say that
3 "rewarded" obviously encompasses rewards that
4 are accepted without a beforehand agreement.

5 JUSTICE JACKSON: All right. And if
6 we were going to think about "corruptly," I
7 guess I'm trying to understand how this case on
8 these facts even really presents that issue.

9 I mean, I understand all of these
10 hypotheticals about the blankets and the
11 Starbucks and the -- you know, the -- the -- the
12 gray areas around where people could say is this
13 person really acting corruptly.

14 But was there a dispute in this case
15 that it was corrupt for this official to -- if
16 he was taking a reward, to receive the \$13,000
17 under these circumstances?

18 MS. SINZDAK: No. And that's
19 generally the way these cases go. It's not
20 someone saying I took a reward, but I thought it
21 wasn't wrongful, so it's not someone disputing
22 the consciousness of wrongdoing point. It's
23 someone saying I wasn't taking a reward, I was
24 taking something for being friends.

25 JUSTICE JACKSON: And that's -- so

1 that's --

2 MS. SINZDAK: I was taking something
3 for --

4 JUSTICE JACKSON: -- how --

5 MS. SINZDAK: -- compensation, that's
6 right.

7 JUSTICE JACKSON: That's how that came
8 up here.

9 MS. SINZDAK: Exactly.

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

17 MS. SINZDAK: Right. He did not
18 challenge the jury instructions on "corruptly,"
19 even though the district -- the district court
20 had already rejected the request to narrow the
21 statute to gratuities, so it's not true that he
22 didn't protest the "corruptly" definition
23 because he was trying to get to -- to get at it
24 a different way, right?

25 The -- the district court had already

1 said gratuities are going to come in. He
2 doesn't contest the "corruptly" jury instruction
3 here because he wasn't saying it's rightful to
4 accept the payment.

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

7 MS. SINZDAK: Exactly.

8 JUSTICE JACKSON: -- well, I thought
9 this was right. He wasn't doing that.

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

19 In other words, it seems as though
20 that element is equating bribes, quid pro quo
21 bribes, with rewards, what I'm thinking of as
22 gratuities in this context.

23 If we agree with Petitioner, it sounds
24 as though there -- Congress would have wanted to
25 prohibit one and not the other, and I can't

1 figure out why that would be.

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

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

17 If there's a beforehand agreement in
18 this case, it doesn't change anything because
19 it's crystal-clear that what the -- the
20 Petitioner was doing was taking a public act
21 intending to get that reward.

22 And -- and whether there's a
23 beforehand agreement or not, the harm is,
24 instead of doing the public act for the public
25 good, he's doing the public act for his own --

1 to line his own pockets.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
6 Blatt.

7 REBUTTAL ARGUMENT OF LISA S. BLATT
8 ON BEHALF OF THE PETITIONER

9 MS. BLATT: Thank you, Mr. Chief
10 Justice.

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

17 No citation. Of course, it was
18 contested. The whole argument was this was a
19 legitimate consulting agreement because local
20 officials don't make any money.

21 And just because the government says
22 it at argument doesn't make it true, especially
23 when they don't have a citation. There was no
24 jury instruction. And then, at times, I feel
25 like we're in a Senate room drafting language.

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

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

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

20 And to say that it's not part of the
21 case is absurd. "Corruptly" means quid pro quo.
22 Intending to be influenced and intending to be
23 rewarded are parts of that quid pro quo.

24 The other thing I just want to get to,
25 and Justice Kavanaugh got on this, there is a

1 statute that she -- the -- the statute applies
2 to accepting. It also applies to anyone who
3 gives. That's 666(a)(2). So 300 million
4 Americans are covered by this. Anyone who gives
5 a gift commits a crime if it's corrupt.

6 Now that consciousness of wrongdoing
7 has to apply to the person who goes to the car
8 dealership or to the billionaire or the poor
9 person who wants to give a toy -- a toy truck.

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

18 I mean, this is -- this is
19 preposterous that this would go into inherently
20 wrongful. I still can't figure out what about
21 escort services. That seems not standard
22 practice to give that to your university
23 admissions. But maybe a plaque would be? Or
24 maybe a crystal -- a crystal would be. There's
25 just -- there's literally no guidance here.

1 And the real irony is at least the
2 banking officials would have more guidance.
3 This is just kind of made up as -- as like it
4 sounds like in moot court they worked this out
5 because it would sound good.

6 The stuff on the lesser included and
7 greater -- greater included was gibberish. It
8 is a -- recognized in government manuals that
9 this is a greater included offense.

10 And she said, well, it only applies to
11 "demand." But the statute says "demand or
12 agrees to accept." So, if you agree to accept
13 something, you don't have to demand. That's
14 clearly a bribery. There is no set of
15 circumstances where, if you've proved -- proved
16 a reward, you would ever need to prove a
17 bribery. And that's why the government manual
18 says go for -- go for broke, go for both. All
19 you need to do is prove one, and you'll at least
20 get, at least in the federal officials, a
21 two-year conviction. Here, you get a 10-year
22 conviction. The government sought six years
23 here. We showed examples where they've -- they
24 prosecuted for four years.

25 And the other thing in terms of the

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 11:43 a.m., the case
24 was submitted.)

25

Official

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