No. 19-1145

In the Supreme Court of the United States

NG LAP SENG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United Nations is an "organization" within the meaning of the federal-funds bribery statute, 18 U.S.C. 666(b).

2. Whether petitioner is entitled to relief from his convictions for bribing United Nations ambassadors and officials, in violation of 18 U.S.C. 666 and the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-2(a) and 78dd-3, on the theory that the government did not prove that the bribery involved an "official act."

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OPINION BELOW

The opinion of the court of appeals is reported at 934 F.3d 110.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2019. A petition for rehearing en banc was denied on October 16, 2019 (Pet. App. 71-72). On December 23, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 13, 2020. On January 23, 2020, Justice Ginsburg further extended the time to and including March 14, 2020. The petition was filed on March 16, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner

was convicted on one count of conspiring to commit federal-funds bribery and to violate the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-1 *et seq.*, in violation of 18 U.S.C. 371; one count of federal-funds bribery, in violation of 18 U.S.C. 666(a)(2); two counts of foreign corrupt practices, in violation of 15 U.S.C. 78dd-2(a) and 78dd-3; one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A). Pet. App. 73-75. The district court sentenced him to 48 months of imprisonment, to be followed by three years of supervised release. *Id.* at 75-77. The court of appeals affirmed. *Id.* at 1-70.

1. Petitioner is a real-estate developer from Macau, China. Pet. App. 2. Petitioner sought to have the United Nations designate a convention center complex he hoped to develop in Macau as the permanent site of the annual conference of the U.N. Office for South-South Cooperation—a step that petitioner believed would improve the reputation of the complex and increase the value of his nearby real-estate holdings. *Id.* at 3.

To that end, petitioner engaged in a five-year effort to bribe two officials at the United Nations: Francis Lorenzo, a U.S. citizen who served as a Deputy Ambassador from the Dominican Republic to the United Nations, and John Ashe, a U.S. permanent resident who served as Antigua and Barbuda's Ambassador to the United Nations and for a time as President of the U.N. General Assembly. Pet. App. 3-4. Petitioner made Lorenzo president of a media company that petitioner owned, paid Lorenzo a salary of $20,000 a month, and later funneled an additional $30,000 a month to a company controlled by Lorenzo's brother. *Id.* at 4, 8. The

payments over the course of the scheme totaled more than $1 million. *Id.* at 4. Similarly, petitioner paid for a vacation trip taken by Ashe and his family, paid $2500 to $6000 to Ashe's wife each month (supposedly for consulting services, even though she performed no such services), and later paid $200,000 to an account designated by Ashe. *Id.* at 5, 11.

In return for those payments, Lorenzo and Ashe took various steps to ensure that the United Nations designated petitioner's convention center as the permanent site of the annual conference. Pet. App. 6. For example, in March 2012, at petitioner's direction, Lorenzo and Ashe placed a document in the United Nations' official record reporting ambassadorial support for designating a permanent site for the conference. *Ibid.* In December 2012, again at petitioner's direction, Lorenzo and Ashe revised the document so that it expressly supported giving the responsibility of developing the conference site to petitioner's company. *Id.* at 7. In 2013, once more at petitioner's direction, Ashe and Lorenzo met with the Director of the U.N. Office of South-South Cooperation and obtained a letter committing to give the responsibility of developing the conference site to petitioner's company. *Id.* at 8-10. In 2014, while Ashe was President of the U.N. General Assembly, he helped petitioner obtain a formal agreement to host the 2015 conference, as well as a separate global forum on poverty. *Id.* at 10-11. And in 2015, Lorenzo and Ashe also worked to secure a General Assembly resolution calling for the establishment of a permanent site for the conference—a plan they abandoned upon petitioner's and their arrest. *Id.* at 12.

2. A grand jury indicted petitioner on one count of conspiring to pay bribes and to violate the FCPA, in violation of 18 U.S.C. 371; one count of federal-funds bribery, in violation of 18 U.S.C. 666(a)(2); two counts of foreign corrupt practices, in violation of 15 U.S.C. 78dd-2(a) and 78dd-3; one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(2). Superseding Indictment.

Petitioner moved to dismiss the count of federal-funds bribery, as well as other counts that were predicated on it. C.A. Special App. 19. The federal-funds bribery statute prohibits bribery of "an agent of an organization or of a State, local or Indian tribal government, or any agency thereof," if the organization, government, or agency receives more than $10,000 in federal funds per year, where the bribery is "in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." 18 U.S.C. 666(a)(2). Petitioner argued that the United Nations does not qualify as an "organization" under that statute. C.A. Special App. 19. The district court denied petitioner's motion. *Ibid.*

Petitioner also asked the district court to instruct the jury that a guilty verdict on the federal-funds bribery and FCPA counts required proof of a *quid pro quo* involving an "official act," as this Court defined that term in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016). The district court rejected petitioner's contention that the FCPA required proof of an official act, but provided an official-act instruction on the charge of federal-funds bribery. C.A. App. 1422. The instruction read:

> The government must prove that the defendant acted with the intent to obtain 'an official act' from the agent or agents of the United Nations to whom he gave or agreed to give or offered something of value.
>
> An official act is a decision or action that must involve a formal exercise of power. It also must be specific and focused on something that is pending or may by law or rule be brought before the agent. The decision or action may include using the agent's official position to exert pressure on another official to perform an official act or to advise another official, knowing or intending that such advice will form the basis for an official act by another official.
>
> Expressing support for an idea, setting up a meeting, talking to another official, or organizing an event or agreeing to do so without more does not fit that definition of official act.

Ibid.

The jury found petitioner guilty on all counts. Pet. App. 73-75. The district court sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. *Id.* at 75-77.

3. The court of appeals affirmed. Pet. App. 1-70.

a. The court of appeals first rejected petitioner's contention that the United Nations does not qualify as an "organization" under the federal-funds bribery statute. Pet. App. 13-30. The court first observed that 18 U.S.C. 18 defines "'organization'" as "a person other than an individual." *Id.* at 17 (citation omitted). The court then explained that "[t]he context in which 'organization' is used in § 666," where "Congress used additional language—[']or a State, local or Indian tribal

government'—to identify those governmental entities it wished to cover by the statute," "signal[s] some definitional narrowing," under which "'organization'" refers only to nongovernmental entities. *Id.* at 18-19. The court accordingly determined that the term "'organization'" "applies to all nongovernmental legal persons, including public international organizations such as the U.N." *Id.* at 68 (citation omitted).

The court of appeals found no sound basis in "the text" or "structure" of the statute to support petitioner's argument that the statute applies only "to *private* organizations." Pet. App. 20. The court also disagreed with petitioner that the United Nations is analogous to a foreign government, explaining that "[t]he U.N. is not a sovereign entity" and that other statutes "refer separately to 'foreign governments' and 'international organizations.'" *Id.* at 21-22. And the court explained that, contrary to petitioner's contention, interpreting Section 666 to cover international organizations would not render superfluous the FCPA's separate prohibition on bribery involving "public international organizations." *Id.* at 27 (citation omitted). The court observed that "[t]he presumption against surplusage is a canon for construing the text of a single statute"; that "'[r]edundancies across [different] statutes are not unusual'"; and that, in any event, the statutes at issue here "are not * * * duplicative" because Section 666 requires proof of receipt of federal funds while the FCPA applies without regard to such receipt. *Id.* at 28-29.

b. The court of appeals also rejected petitioner's contention that guilty verdicts under Section 666 and the FCPA require proof of a *quid pro quo* involving an "official act," as this Court interpreted that term in *McDonnell*. See Pet. App. 30-59. The court observed

that, "[i]n addressing various manifestations of bribery under the federal criminal law," Congress has "define[d] the particular *quids* and *quos* prohibited" in different ways. *Id.* at 37. In the federal-official bribery statute that was the focus of *McDonnell*, 18 U.S.C. 201, Congress prohibited giving an official a thing of value "to influence any official act," and it specifically defined the term "official act." 18 U.S.C. 201(b)(1). The court highlighted "textual differences" between Section 201 and Section 666 and the FCPA, neither of which "identifies 'official act,' much less official act as defined in § 201(a)(3), as the necessary *quo* for bribery." Pet. App. 37, 39. In Section 666, Congress prohibited giving an official a thing of value in order to influence him "in connection with any business, transaction, or series of transactions of [the] organization * * * involving anything of value of $5,000 or more." 18 U.S.C. 666(a)(2). And in the FCPA, Congress prohibited giving a foreign official a thing of value in order to influence "any act or decision of such foreign official in his official capacity," to induce the foreign official "to do or omit to do any act in violation of the lawful duty of such official," to induce the foreign official "to affect or influence any act or decision" of the foreign government, or to "secur[e] any improper advantage." 15 U.S.C. 78dd-2(a)(1), 78dd-3(a)(1)(A).

Relatedly, the court of appeals rejected petitioner's contention that vacatur was warranted on account of the district court's instructions on Section 666, which directed the jury that a guilty verdict under Section 666 required proof of an official act, but which defined "official act" in a manner petitioner found objectionable. Pet. App. 51-59. The court of appeals explained that,

because the district court "should not have charged 'official act' at all as to the § 666 counts," any error in the definition of "'official act'" was harmless under the circumstances of this case. *Id.* at 53. The court of appeals also explained that the jury had in all events found that the government had satisfied *McDonnell*'s "official act" requirement and that "overwhelming record evidence" supported that finding. *Id.* at 56-57.

Judge Sullivan concurred. Pet. App. 70. He agreed with the majority that "the official acts requirement" set out in *McDonnell* does not apply to Section 666 or to the FCPA. *Ibid.* He declined to join the court of appeals' "alternative holding" that petitioner was not entitled to relief if *McDonnell* did apply. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-23) that the United Nations does not qualify as an organization under 18 U.S.C. 666 and (Pet. 23-37) that Section 666 and the FCPA require proof of an "official act" as this Court defined that term in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016). The court of appeals correctly affirmed petitioner's convictions, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that the United Nations qualifies as an "organization" under 18 U.S.C. 666.

a. The United Nations satisfies the legal definition of "'organization'" for purposes of Title 18, because it is "a person other than an individual," 18 U.S.C. 18. The United Nations is a person—an international treaty provides that "[t]he United Nations shall possess juridical personality," Convention on Privileges and Immunities of the United Nations art. I, § 1, *adopted* Feb. 13,

1946, T.I.A.S. No. 6900, 21 U.S.T. 1420—and it is not an individual. The United Nations also qualifies as an organization in ordinary speech. In fact, this Court has previously referred to the United Nations as an organization. See, *e.g.*, *Jam* v. *International Finance Corp.*, 139 S. Ct. 759, 765 (2019) (referring to "organizations * * * includ[ing] the United Nations").

Petitioner errs in contending (Pet. 12) that Congress "use[d] 'organization' in a narrow sense to capture *private* organizations." Section 666 says "organization," not "private organization." And this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (citation omitted).

Petitioner is mistaken in suggesting (Pet. 15) that reading "'organization'" to mean "'organization'" rather than "private organization" renders superfluous Section 666's separate reference to state, local, and Indian tribal governments. Title 18 defines "organization" to mean "a person other than an individual," 18 U.S.C. 18, and this Court has traditionally applied "a presumption against treating the Government as a statutory person," *Return Mail, Inc.* v. *United States Postal Service*, 139 S. Ct. 1853, 1862 (2019). That presumption explains why it was necessary for Congress to list state, local, and Indian tribal governments separately. There is no comparable presumption against treating the United Nations as a person; to the contrary, as just discussed, an international treaty specifically provides that the United Nations possesses legal personhood.

Contrary to petitioner's assertion (Pet. 15), a comparison between Section 666 and other statutes does not

support his interpretation. Many other statutes specifically limit their coverage to "private" organizations even as they also cover state agencies. See, *e.g.*, 6 U.S.C. 644 ("any State, local, or tribal government or private organization"); 42 U.S.C. 5402(17) ("State agency or private organization"); 42 U.S.C. 5564 ("Federal agencies, State and local government agencies, and private organizations"). The inclusion of the adjective "private" in those provisions and the exclusion of the same adjective in Section 666 suggests, if anything, that Section 666 covers all organizations, not just private organizations.

Petitioner is similarly incorrect (Pet. 19) that reading Section 666 to cover the United Nations would render "pointless" the FCPA's separate provisions prohibiting the payment of bribes to officials at certain public international organizations. This Court has explained that "[r]edundancies across statutes are not unusual events." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253 (1992). And as the court of appeals observed, although Section 666 and the FCPA overlap, they are not redundant; Section 666 applies to organizations that receive federal funds irrespective of whether the organizations are domestic or international, while the FCPA applies to (among others) specified international organizations irrespective of whether they receive federal funds. Pet. App. 29.

Finally, petitioner's suggestion (Pet. 17) that this Court should read Section 666 to exclude international organizations in order to avoid "diplomatic friction" is misplaced. The Constitution vests both the power to conduct foreign affairs and the power to bring prosecutions in the Executive Branch, and it is up to the Executive Branch to determine whether the benefits of a

particular prosecution outweigh the possibility of "diplomatic friction." Petitioner cites (Pet. 16) this Court's decision in *F. Hoffmann-La Roche Ltd.* v. *Empagran S. A.*, 542 U.S. 155 (2004), but that case expressly distinguished suits brought by "the Government of the United States" from those brought by "private plaintiff[s]," and it explained that "'[p]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign government sensibilities generally exercised by the U.S. Government.'" *Id.* at 170-171 (citation omitted).

b. Petitioner fails to identify any case in which any other court of appeals has considered the first question presented in this case—much less one in which a court of appeals has held, in conflict with the decision below, that an international organization such as the United Nations does not qualify as an "organization" under Section 666. Petitioner states that "numerous courts have *described* §666 as applying to 'private organizations,'" Pet. 20 (emphasis added), but none of the cases petitioner cites actually involved an international organization. See *United States* v. *Newell*, 658 F.3d 1, 24 (1st Cir. 2011), cert. denied, 565 U.S. 955, and 565 U.S. 1137 (2012); *United States* v. *Sussman*, 709 F.3d 155, 167 (3d Cir. 2013); *United States* v. *Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998); *United States* v. *Moeller*, 987 F.2d 1134, 1136 (5th Cir. 1993); *United States* v. *McLean*, 802 F.3d 1228, 1237 (11th Cir. 2015). The courts in those cases thus did not confront, much less resolve, the question presented in this case. Given the absence of a circuit conflict, no further review is warranted.

2. Petitioner also contends (Pet. 23-37) that this Court should grant review to address whether Section

666 and the FCPA require proof of an "official act" as this Court defined that term in *McDonnell*. This Court has previously denied petitions for writs of certiorari presenting the question whether Section 666 requires proof of an "official act." See *Robles* v. *United States*, No. 19-912, 2020 WL 2515492 (May 18, 2020); *Robles* v. *United States*, 571 U.S. 1222 (2014) (No. 13-8099); *McNair* v. *United States*, 562 U.S. 1270 (2011) (No. 10-533). The same course is warranted here.

a. In *McDonnell*, the government prosecuted a former state governor for honest-services fraud in violation of 18 U.S.C. 1343 and 1349, and Hobbs Act extortion in violation of 18 U.S.C. 1951(a), based on his acceptance of things of value in exchange for setting up meetings with other public officials. 136 S. Ct. at 2361-2364. The parties agreed that honest-services fraud and Hobbs Act extortion should be defined by reference to the federal-official bribery statute, 18 U.S.C. 201. 136 S. Ct. at 2365. That statute makes it a crime for a person to pay or a public official to accept anything of value in return for being "influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A). The statute defines an official act as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." 18 U.S.C. 201(a)(3).

This Court explained that Section 201 sets out two requirements for an official act. *McDonnell*, 136 S. Ct. at 2368. First, the government must identify a "focused and concrete" question or matter that involves "a formal exercise of governmental power." *Id.* at 2369-2370. Second, the government must show that the public official made a decision or took an action "on" that question

or matter. *Id.* at 2368. The Court concluded that merely "[s]etting up a meeting, hosting an event, or calling an official" does not satisfy that latter requirement, but that "using [one's] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act,'" does suffice. *Id.* at 2371-2372.

b. Unlike Section 201, neither Section 666 nor the FCPA specifically refers to an "official act." Nor does a circuit conflict exist on whether either requires proof of one. Rather, the courts of appeals that have addressed the issue have held that they do not. See Pet. App. 42 (declining to read Section 666 and the FCPA to require proof of an "official act"); *United States* v. *Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) (same for Section 666), cert. denied, 138 S. Ct. 938 (2018); *United States* v. *Porter*, 886 F.3d 562, 565 (6th Cir. 2018) (same for Section 666); *United States* v. *Maggio*, 862 F.3d 642, 646 n.8 (8th Cir.) (same for Section 666), cert. denied, 138 S. Ct. 437 (2017); see also Pet. App. 43-44 (noting that "courts have uniformly rejected vagueness challenges both to § 666 and to the FCPA") (footnote omitted). Those courts have reasoned that, "[i]n addressing various manifestations of bribery under the federal criminal law, Congress may, of course, define the particular *quids* and *quos* prohibited" in different ways. Pet. App. 37; see, *e.g.*, *Porter*, 886 F.3d at 565; *Maggio*, 862 F.3d at 646 n.8.

In any event, this case would be an unsuitable vehicle for addressing the second question presented, because petitioner's view that the government was required to prove an official act in the context of this case does not provide any basis for relief from his convictions. The

jury in fact found that the evidence in this case satisfied the *McDonnell* standard, and the record supported its finding. The court of appeals, moreover, explicitly relied on that ground as an alternative basis for denying petitioner relief. See Pet. App. 53-59; see also *id.* at 70 (Sullivan, J., concurring) (discussing the court's "alternative holding").

In particular, the district court instructed the jury that, in order to obtain a guilty verdict on the Section 666 charges, the government was required to "prove that the defendant acted with the intent to obtain 'an official act' from the agent or agents of the United Nations." Pet. App. 51 (citation omitted). The court further instructed the jury that "[a]n official act is a decision or action that must involve a formal exercise of power." *Ibid.* (citation and emphasis omitted). The court also specifically instructed the jury that merely "[e]xpressing support for an idea, setting up a meeting, talking to another official, or organizing an event or agreeing to do so without more does not fit that definition of an official act." *Id.* at 52 (citation omitted). By finding the defendant guilty of violating Section 666, the jury necessarily found that the government had satisfied that standard.

The court of appeals, for its part, found that "overwhelming record evidence" supported the jury's finding. Pet. App. 56. The question or matter at issue in this case—the "procurement of formal U.N. designation of [petitioner's] Macau convention center as the permanent site for" an annual U.N. conference, *id.* at 55—was "focused and concrete" and involved "a formal exercise of [the United Nations'] power," *McDonnell*, 136 S. Ct. at 2369-2370. And the recipients of the bribes agreed to take action "on" that question or matter, see *id.* at 2368,

for instance by "us[ing] their official positions at the U.N." to influence another U.N. official to "enter into a contract with [petitioner]" and by placing a report supporting petitioner's efforts "into the General Assembly record," Pet. App. 57-58.

Petitioner erroneously suggests (Pet. 34) that "the government repeatedly urged the jury to convict based on legally insufficient acts." The court of appeals explained that "[t]he pleadings, evidence, and arguments all identif[ied] * * * procurement of formal U.N. designation" as the "single, overriding 'question, matter, [or] cause' informing the alleged official actions in this case." Pet. App. 54-55 (citation omitted; third set of brackets in original). Petitioner also erroneously suggests (Pet. 35) that the jury instructions "invited the jury to convict even on the theory that mere letters or visits can qualify as official acts." In fact, the district court instructed the jury that "[e]xpressing support for an idea, setting up a meeting, talking to another official, or organizing an event or agreeing to do so without more does *not* fit th[e] definition of official act." Pet. App. 52 (emphasis added). The court did state that "[t]hese actions could serve as *evidence* of * * * an agreement to take an official act," *ibid.* (emphasis added), but that instruction comports with this Court's statement in *McDonnell* that "[i]f an official sets up a meeting, hosts an event, or makes a phone call * * * , that could serve as evidence of an agreement to take an official act," 136 S. Ct. at 2371.

Finally, petitioner contends (Pet. 35) that "the district court gave no official act instruction whatsoever with respect to the FCPA charges." But given that the same evidence supported both the Section 666 and the FCPA counts, there exists no sound basis to believe that

the jury would have found the *McDonnell* standard satisfied with respect to Section 666 but not with respect to the FCPA. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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