No. 03-44

In the Supreme Court of the United States

BASIM OMAR SABRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to the dismissal of the indictment charging him with bribing an agent of local government bodies that receive federal benefits, in violation of 18 U.S.C. 666(a)(2), (b), on the ground that the statute does not require a sufficient nexus to a federal interest and is, as a result, facially unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 326 F.3d 937. The opinion of the district court (J.A. A7-A40) is reported at 183 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2003. The petition for a writ of certiorari was filed on July 2, 2003, and was granted on October 14, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and 18 U.S.C. 666 are reproduced *infra*, App. 1a-3a.

STATEMENT

Petitioner was indicted on three counts of bribing an agent of an entity receiving federal benefits, in violation of 18 U.S.C. 666(a)(2), (b). Pet. App. A63-A66. Before trial, the United States District Court for the District of Minnesota dismissed the indictment on the ground that Section 666 is unconstitutional on its face. J.A. A7-A40. The court of appeals reversed. Pet. App. A1-A36.

1. *The Statutory Background*

Entitled "Theft or bribery concerning programs receiving Federal funds," 18 U.S.C. 666 makes it unlawful corruptly to offer, give, or agree to give anything of value "with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, 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), if the "circumstance" set forth in Section 666(b) exists. The circumstance required by Section 666(b) is that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). Section 666 defines the term "government agency" as "a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau," as well as certain government corporations. 18 U.S.C. 666(d)(2).

Section 666 was enacted in 1984 to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by

bribery." See S. Rep. No. 225, 98th Cong., 1st Sess. 370 (1983). Before Section 666's enactment, the United States had sought to protect its funds and programs through the federal theft statute, which makes it unlawful to steal money or things of value "of the United States or of any department or agency thereof," 18 U.S.C. 641, and the federal bribery statute, which prohibits corrupt efforts to influence public officials acting for or on behalf of the United States, 18 U.S.C. 201. Those statutes, however, had proved inadequate for federal programs administered by private organizations, States, local governments, and their agencies, including many federally funded programs of "cooperative federalism" administered by States or local governments to achieve federal goals.[1]

Prosecuting theft under 18 U.S.C. 641 had often proved impossible because that statute required proof that the defendant misappropriated funds "of the United States." Under many federal programs, title to the money or property would often "pass[] to the recipient before" being "stolen, or the funds [would be] so commingled that the Federal character of the funds cannot be shown." S. Rep. No. 225, *supra*, at 369. That gave "rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Gov-

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[1] "Federal grant programs to state and local governments as well as to private organizations have been in existence since the 19th century." See *Dixson* v. *United States*, 465 U.S. 482, 506 (1984) (O'Connor, J., dissenting). Currently, the United States and the States work together to administer numerous such programs, which range from Medicaid, see 42 U.S.C. 1396 *et seq.*, which provides medical services to eligible needy persons, see *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 495 (2002), to programs that finance massive public works projects spanning numerous States, see *California* v. *United States*, 438 U.S. 645, 650 (1978) (discussing the Reclamation Act of 1902).

ernment clearly retain[ed] a strong interest in assuring the integrity of such program funds." *Ibid.* Similarly, bribery prosecutions under 18 U.S.C. 201 proved difficult because that provision applied only to "public official[s]." There was "some doubt as to whether or under what circumstances persons not employed by the Federal Government [could] be considered as a 'public official' under the definition in 18 U.S.C. 201(a)." S. Rep. No. 225, *supra*, at 370; see *Salinas* v. *United States*, 522 U.S. 52, 58 (1997) (noting the circuit conflict on that issue that existed before Section 666's enactment).[2] The varying mechanisms for disbursing and accounting for federal funds created gaps in coverage as well. See *Salinas*, 522 U.S. at 58-59 (describing the impact of *United States* v. *Del Toro*, 513 F.2d 656, 661-662 (2d Cir.), cert. denied, 423 U.S. 826 (1975)); S. Rep. No. 225, *supra*, at 369.

Section 666 sought to fill those gaps so as to restore the United States' "ability * * * to vindicate significant acts of theft, fraud, and bribery" that might threaten "Federal monies * * * disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225, *supra*, at 369. To that end, Section 666 "does not require the Government to prove [that] federal funds were involved in the bribery transaction" or that "the bribe in question had any particular influence on federal funds." *Salinas*, 522 U.S. at 60, 61. Instead, Congress shifted the focus to proscribe the corruption of those private and public organizations that receive and administer substantial

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[2] Shortly after Section 666's enactment, this Court resolved that conflict in *Dixson*, holding that local officials administering federal programs could be "public officials" within the meaning of Section 201. 465 U.S. at 497, 501.

federal funds (more than $10,000 per year) under federal programs. See 18 U.S.C. 666(b).

2. *The Present Controversy*

a. At all relevant times, petitioner was a real estate developer and landlord doing business in the City of Minneapolis, Minnesota (the City). Pet. App. A64. In 2000 and 2001, petitioner was pursuing a large commercial real estate development project involving a proposed hotel and accompanying commercial retail concerns. The indictment charges that petitioner offered to and did bribe City Councilperson Brian Herron of the Minneapolis City Council to obtain favorable government action for the project. At the time, Mr. Herron represented the Eighth Ward, which included the area for which petitioner had planned his real estate development. *Ibid.* Mr. Herron was also on the City Council's Ways and Means/Budget Committee. *Ibid.* During the calendar year beginning January 1, 2001, the City received, and the City Council administered, approximately $28.8 million in federal assistance. *Id.* at A63.

As a member of the City Council, Herron also served on the Board of Commissioners for the Minneapolis Community Development Agency (MCDA). Pet. App. A64. The MCDA was created by the City Council to fund housing and economic redevelopment projects and activities within the City. *Id.* at A63. The MCDA also had an executive director appointed by the mayor. *Ibid.* The MCDA and its programs were funded in part by federal assistance, including federal Community Development Block Grants. *Ibid.* In the calendar year beginning January 1, 2001, the MCDA received approximately $23 million in such federal assistance. *Ibid.*

Councilman Herron, together with the mayor and the other members of the City Council, were members of

the policy board that managed the Minneapolis Neighborhood Revitalization Program (MNRP). Pet. App. A64. Formed by the City and other local government entities to fund the economic revitalization of City neighborhoods, the MNRP was wholly funded by the MCDA. *Id.* at A63-A64.

Count 1 of the indictment alleged that petitioner gave Herron $5000 for Herron's assistance in obtaining necessary regulatory approvals from the City. Count 2 alleged that petitioner offered Herron $10,000 to meet with the owners of property in the area of the planned development and to threaten that, absent cooperation with the development plan, the MCDA might exercise its eminent domain power to condemn their property. Count 3 alleged that petitioner offered to give Herron $80,000 as a 10% kickback in return for his assistance in obtaining $800,000 in federal community economic development grants for the real estate project through the City, the MCDA, and other entities. Pet. App. A64-A66.

The government's evidence includes conversations between petitioner and Herron that had been recorded on a hidden video camera. See Gov't Trial Br. 3-11 (C.A. App. 41-49). In those conversations, petitioner offered Herron a secret investment interest in the development equal to sixty or seventy percent of any "free" government money Herron obtained for the project. *Id.* at 4, 5 (C.A. App. 42, 43). Petitioner later changed his offer to a kickback of "ten percent . . . of what [he] get[s]" in "free money." *Id.* at 7 (C.A. App. 45); see also *id.* at 8 ("Five when you say yes, I agree to the deal," and "then ten percent" of "whatever free money I get").

In those discussions, petitioner asked Herron to help him obtain federal "Empowerment Zone" funds administered by a Minneapolis city employee. Gov't Trial Br.

8-9 (C.A. App. 46-47). He urged Herron to get his "staff workin' on this right now, like hawks." *Id.* at 9 (C.A. App. 47). When Herron reported that there was a "real good possibility [he could] get about eight hundred thousand" in federal funds, petitioner confirmed that Herron's pay-off would be ten percent, or eighty-thousand dollars. *Id.* at 9-10 (C.A. App. 47-48). In another conversation, petitioner offered Herron $10,000 to threaten existing property owners with use of the MCDA's eminent domain power so as to secure their cooperation: "If you threaten that * * * you're gonna exercise your right for eminent domain at this site," petitioner stated, the property owners "will start thinkin', 'okay, Brian Herron . . . is gonna tell the MCDA to go forward to eminent domain us. So let's try to work ourself in the project.'" *Id.* at 6 (C.A. App. 44).

Before trial, petitioner moved to dismiss the indictment on the ground that Section "666(a)(2) is unconstitutional on its face as it does not require a connection between the alleged bribe and the federal funds." J.A. A4, A11. As part of its response, the government stated that the evidence would show a nexus between the bribery and federal funds:

> In the present case, the evidence similarly will demonstrate that (1) Councilperson Herron, the "agent" of the local government involved, had direct influence over the federal funds received by Minneapolis and the MCDA, (2) those federal funds were directly related to economic development programs of the City and the MCDA, (3) the economic development programs of the City and the MCDA were directly involved in the real estate development that was being proposed by the defendant and (4) that the bribe payments and offers of the defendant sought to directly corrupt the operation

> of the city's economic redevelopment process and even sought to corruptly obtain the very funds that the federal government had provided to the City and the MCDA.

J.A. A5.

The district court granted petitioner's motion to dismiss. The court ruled that Section 666(a)(2) "does not require the government to prove a connection between the offense conduct and the expenditure of federal funds," J.A. A25, and therefore "is an unconstitutional exercise of Congress's power under the Spending Clause," J.A. A35. The district court also held that the government's proffer that the evidence would establish a connection between the charged conduct and federal funds and programs was irrelevant, because the statute did not require such proof as an element of the offense. J.A. A25 n.9.

b. The court of appeals reversed and remanded, holding that Section 666 is not unconstitutional on its face. Pet. App. A1-A29.

i. The court of appeals began by examining Section 666's text to determine the elements of the offense it establishes. The court observed that Subsection (b) of Section 666 "requires proof that the relevant organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period." Pet. App. A4. But the court concluded that Section 666 does not, by its terms, impose a "requirement that the government prove some [other] connection between the offense conduct and federal funds beyond the express statutory requirement found in § 666(b)." *Ibid.*

> The plain language encompasses the activity of local agents wherever subsection (b) [ob]tains. There is no qualification that the prohibited conduct must

> have some relation to federal funds. Indeed, the statute proscribes the conduct of local agents in connection with "any" agency business or transaction. The word "any" is unambiguous and unqualified.

Id. at A8-A9. "The statute applies to all offense conduct * * * so long as the relevant agency received the requisite amount of federal benefits ($10,000) within the defined time period as required by § 666(b)." *Id.* at A9.

Reviewing the legislative history, the court of appeals found nothing to contradict the statute's text. Pet. App. A11-A14. Congress had enacted Section 666, the court observed, to "fill the gaps in the prior anticorruption scheme," *id.* at A12, and thereby "'safeguard finite federal resources from corruption and to police those with control of federal funds,'" *id.* at A11 (quoting *United States* v. *Rooney*, 37 F.3d 847, 851 (2d Cir. 1994)). Because the criminal laws that preceded Section 666 required proof that the affected funds were federal, the court further observed, those laws had proved inadequate where title had passed to the recipient before the funds were stolen and where the funds were commingled. *Id.* at A11-A12. Congress had therefore "decided that the most effective way to insure the integrity of federal funds disbursed to subnational agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity of the recipient agencies." *Id.* at A12.

The court of appeals also rejected petitioner's argument that Section 666, so construed, is facially unconstitutional because it exceeds Congress's enumerated powers. Pet. App. A14-A29. The court first rejected the government's argument that Section 666 could be sustained under the Spending Clause itself. Relying on the fact that Section 666 does not impose a condition on a recipient of federal benefits but instead regulates the

conduct of third parties, the court concluded that Section 666 is not the typical sort of spending condition previously upheld by this Court. *Id.* at A15-A19.

Nonetheless, the court of appeals concluded that Section 666 is valid legislation under the Necessary and Proper Clause to protect and effectuate Congress's exercise of its spending powers. Pet. App. A19-A28. Far from seeking to regulate private conduct through an exercise of general police power, the court explained, Section 666 was designed to protect the efficacy of federal spending and Congress's control over federal funds by assuring the integrity of the entities receiving them. It is "an incontestable proposition," the court stated, "that the disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution." *Id.* at A21. Congress "has a legitimate right to protect these disbursements from misappropriation once made." *Ibid.*

The court also concluded that Section 666 is "plainly adapted" to protecting the integrity of federal disbursements and programs and is therefore "necessary and proper to the execution of the spending power" under *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Pet. App. A24. Although Section 666 might have been more narrowly crafted, the court noted, Congress reasonably determined that "the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds." *Id.* at A25. A more limited statutory regime had been "rendered toothless because of the difficulty of tracing federal funds once they had been disbursed." *Ibid.* In addition, the court observed, because "money is fungible and its effect transcends program boundaries," the "maladministration of funds in one part of an agency

can affect the allocation of funds, whether federal or local in origin, throughout an entire agency." *Ibid.* (quoting *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998)).

> Thus, to suggest that corruption involving a discrete department or section of an agency that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program is to ignore the fact that money is fungible and that federal funds are often comingled with funds from other sources. Section 666 addresses this problem by policing the integrity of the entire organization that receives federal benefits.

Id. at A25-A26. Finally, the court rejected the suggestion that Section 666 is not "proper" legislation under the Constitution on the theory that it interferes with state sovereignty, explaining that the statute does not regulate the States as such, but instead regulates individuals whose conduct can threaten federal funds and federally funded programs. *Id.* at A21-A22 n.6.

ii. Judge Bye dissented. Pet. App. A29-A36. Although acknowledging that the majority's "reading of *M'Culloch* is, of course, received wisdom" and that "the majority makes a fairly convincing argument that the 'fit' between § 666(a)(2) and Congress' underlying objective to preserve the integrity of federal programs is rational," Judge Bye concluded that Section 666 is not "proper," within the meaning of the Necessary and Proper Clause. *Id.* at A31. Drawing on *Printz* v. *United States*, 521 U.S. 898 (1997), and *Alden* v. *Maine*, 527 U.S. 706 (1999), Judge Bye perceived state sovereignty limits on the type of legislation that can be deemed "proper." Pet. App. A31-A33. Because of the breadth and quantity of federal assistance provided to

state and local governments, Judge Bye concluded that Section 666 "federaliz[es] anticorruption law" and improperly "usurp[s] the traditional domain of state authority." *Id.* at A33.

SUMMARY OF ARGUMENT

Section 666 protects federal benefits and federally funded programs against significant corruption in the entities that receive the benefits. That protection is a constitutionally valid exercise of Congress's power.

I. Congress enacted Section 666 for the legitimate purpose of protecting the integrity of the federal funds it disburses to private organizations and State and local governments under federal programs. To that end, Section 666 proscribes corrupt efforts to influence a transaction or series of transactions of a private organization or State, local, or tribal government or an agency thereof involving something worth $5000 or more, if one further condition is met. 18 U.S.C. 666(a)(2). That condition is that "the organization, government, or agency" must have "receive[d], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). Those requirements limit Section 666 to significant acts of corruption where, because the relevant agency receives the requisite federal benefits, there is a strong federal interest in the integrity of federal funds and programs. As a matter of the statute's text, there is no further federal nexus requirement.

Congress enacted Section 666 because earlier criminal statutes, which required proof of an effect on specific federal funds or programs, had proved insufficient given the difficulty of tracing fungible funds, the peculiarities of funding mechanisms, and impediments

arising from the passage of title to the funds from the United States to the fund recipient. Congress therefore "decided that the most effective way to insure the integrity of federal funds disbursed by subnational agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity of the recipient agencies" responsible for administering them. Pet. App. A12.

II. Section 666 is necessary and proper legislation to protect Congress's exercise of the Spending Power. Under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress has authority to enact legislation that is "necessary," *i.e.*, "convenient, or useful" and "plainly adapted," to the execution of federal powers. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 354, 413, 421 (1819). Section 666 is "necessary" legislation. It ensures that federal funds are not diverted from their intended use and that corruption does not threaten the integrity of federal programs. Section 666 also ensures that federal funds do not subsidize acts of fraud and corruption.

The Constitution does not require that a statute addressing a matter of profound federal concern be perfectly calibrated so that every one of the statute's conceivable applications directly implicates that concern. Rather, Congress may enact legislation that sweeps somewhat more broadly when a narrower approach to the problem might jeopardize federal interests. Section 666 is not invalid on the theory that it requires the Court to pile inference upon inference to find a permissible federal interest. Section 666 is closely tied to the United States' strong interest in guarding against the threat to its funds and programs created by financial corruption in the agencies that administer them. While Section 666 may overlap with

traditional areas of state criminal law, it does so in order to protect distinct federal interests.

Section 666 is also "proper" legislation under the Necessary and Proper Clause. Section 666 neither regulates the States as sovereigns nor commandeers state officials. It therefore does not implicate state sovereignty interests. It imposes a requirement on individuals—subjecting acts of corruption to potential federal prosecution—only when an entity (private or governmental) has elected to accept and administer the requisite amount of federal funds under a federal program. Federalism principles do not preclude Congress from protecting the federal interests in those funds and programs.

Petitioner argues that the analysis in conditional-funding cases like *South Dakota* v. *Dole*, 483 U.S. 203 (1987), describes the limits of Congress's Necessary and Proper authority to implement the Spending Power, and that, under *Dole*, regulation of private parties is invalid. That argument, like petitioner's contention that Section 666 violates the Tenth Amendment, is misplaced. If petitioner were correct, *Dole* would preclude the federal government from criminalizing acts of corruption involving the theft from grant recipients of the federal funds themselves, and would remit the government to withholding federal funds from recipients. Nothing in the Constitution prevents Congress from directly imposing penalties on individuals whose criminal acts would frustrate legitimate federal spending programs.

III. Reduced to its essence, petitioner's argument is that, because Section 666 does not require case-specific proof that a federal interest has been adversely affected, the statute is capable of reaching instances where the federal interest is attenuated; accordingly,

he concludes, it is facially unconstitutional. Congress, however, had sound reasons for dispensing with such a case-by-case inquiry that would potentially leave federal programs and funds without sufficient protection. The legislature was not required to direct courts and juries to make a potentially elusive factual inquiry into effects on federal funds and programs. In any event, a claim that *some* applications of Section 666 may be beyond federal concern does not meet petitioner's burden of showing that Section 666 is unconstitutional "on its face." This Court has twice upheld convictions under Section 666, thus recognizing the constitutionality of its application to straightforward fraud and bribery cases involving federal funds and programs. To the extent that there are peripheral applications that might exceed Congress's constitutional authority, such concerns should be addressed through as-applied challenges in individual cases.

ARGUMENT

SECTION 666 IS A FACIALLY CONSTITUTIONAL EXERCISE OF CONGRESS'S AUTHORITY TO PROTECT THE INTEGRITY OF FEDERAL FUNDS AND PROGRAMS

Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare. U.S. Const. Art. I, § 8, Cl. 1. Congress also has corresponding authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to protect that money and the integrity of the federal programs it supports. Congress enacted 18 U.S.C. 666 to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence." S. Rep. No. 225, 98th Cong., 1st Sess. 370 (1983). The legitimacy of that purpose is beyond

dispute. As this Court has observed, "grant funds to state and local governments 'are as much in need of protection * * * as any other federal money.'" *Dixson* v. *United States*, 465 U.S. 482, 501 (1984) (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544 (1943)).

There can be no serious question that bribing a local government official whose duties include managing federally funded programs and influencing the allocation of federal funds implicates the federal government's interest in the integrity of its funds and the programs they support. Petitioner contends, however, that Section 666 is "[f]acially [u]nconstitutional," Pet. Br. 24; Pet. Reply 1-2 ("The Petition is clear that the issue presented is a facial challenge to the constitutionality of 18 U.S.C. § 666."), because, in petitioner's view, Congress extended Section 666 too broadly and thereby reached cases in which the misconduct affected no federal program or federal funds. Pet. Br. 7-8. According to petitioner, the jurisdictional nexus required by Section 666(b)—the requirement that the "organization, government, or agency" at which the corruption is directed have "receive[d], in any one year period, benefits in excess of $10,000 under a Federal [assistance] program"—does not ensure that the prohibited corruption will "*uniformly* have the requisite connection to federal spending." Pet. Br. 33 (emphasis added).

Petitioner's claim of facial unconstitutionality must be rejected. Congress may enact statutes of sufficient breadth to achieve the legislature's goal of protecting its spending programs, even if some applications of the statute do not directly advance that goal. Where legitimate federal goals might be *under*protected and frustrated by narrower provisions, Congress may enact

statutes to avoid that pitfall, even if such laws have the potential to sweep in some circumstances that are of remote federal interest. The failure of Congress's earlier and narrower efforts to combat corruption touching on federal funds and programs demonstrated to the legislature that it had to do more than enact a statute directed solely at corruption with a proven effect on the federal funds themselves. Instead, Congress turned to an approach that focused on protecting the integrity of the entities that receive federal funds. That approach is constitutional.

I. Section 666, As Properly Construed By The Court of Appeals, Does Not Require Proof Of A Federal Nexus Beyond The Statutory Terms

Relying on the text of the statute and its legislative history, the court of appeals in this case held that Section 666 does not require the government to prove a federal interest in its funds or programs beyond the fact that "the relevant agency received the requisite amount of federal benefits ($10,000) within the defined time period as required in § 666(b)." Pet. App. A9. The overwhelming majority of courts of appeals that have addressed the issue, including the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, have agreed, see Pet. Br. 20 n.1, as does petitioner. Pet. Br. 17, 20-22. That conclusion is correct.[3]

[3] The Second and Third Circuits have held that the government must prove some further nexus between the corruption and federal funds or programs. See *United States* v. *Zwick*, 199 F.3d 672, 682 (3d Cir. 1999); *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999). No party to this case supports that construction.

A. The Text Of Section 666 Unambiguously Defines The Elements Of The Offense

Section 666(a)(2) addresses corruption only when at least two conditions are met. First, the corruption must have concerned a transaction or series of transactions of an organization or State, local, or tribal government or an agency thereof involving something worth $5000 or more. 18 U.S.C. 666(a)(2). Second, "the organization, government, or agency" must have "receive[d], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The first requirement limits Section 666's application to significant acts of corruption. The second limits Section 666 to cases in which, because the organization, government, or agency receives substantial federal funds under a federal program, the United States has a significant interest in preventing corruption and theft. Section 666 thus "limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions." *United States* v. *Westmoreland*, 841 F.2d 572, 578 (5th Cir.), cert. denied, 488 U.S. 820 (1988).

As this Court has observed, Section 666 provides a "broad definition of the 'circumstances' to which the statute applies"—those cases in which the "organization, government, or agency" the defendant sought to corrupt "receive[d] the statutory amount of benefits under a federal program." *Salinas*, 522 U.S. at 57 (quoting 18 U.S.C. 666(b)). The statute "provides no textual basis for" further "limiting the reach of [its] bribery prohibition." *Ibid.* To the contrary, "[s]ubject to the $5,000 threshold for the business or transaction in question, the statute forbids" corruption "in connec-

tion with *any* business transactions, or series of transactions of" the covered "organization, government, or agency." *Ibid.* (emphasis added). "The word 'any,' which prefaces the business or transaction clause, undercuts" the argument that "federal funds must be affected to violate" the statute. *Id.* at 56-57.

Although *Salinas* left open whether Section 666 "requires some other kind of connection between a bribe and the expenditure of federal funds" than the nexus expressly required by Section 666(b), 522 U.S. at 59, the same reasoning that supported the Court's conclusion in *Salinas* that no proof of an actual effect on federal funds is required, *id.* at 56-57, applies here as well. There is no language in the statute requiring some other nexus to federal funds beyond the requirement that the relevant entity received the statutory amount of benefits under a federal program.

B. The Purpose And Background Of Section 666 Confirm That It Requires No Federal Nexus Beyond That Set Forth In The Text

The conclusion drawn from Section 666's text—that no additional federal nexus is required beyond the explicit requirement that the covered entity have received the specified federal benefits—is reinforced by the provision's origin and purposes. Section 666 was designed to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery" to protect "the vast sums of money distributed through Federal programs." S. Rep. No. 225, *supra*, at 370; see *Salinas*, 522 U.S. at 58-59. The provision was enacted in response to the government's previous inability to reach significant misappropriations and corruption in federally funded assistance programs. See pp. 2-5, *supra*. Before Section 666's enactment, federal prosecutions were often hindered by the fact that title to the

relevant funds had "passed to the recipient before" the money was stolen, or because "the funds [we]re so commingled that the Federal character of the funds [could] []not be shown." S. Rep. No. 225, *supra*, at 369. That gave "rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retain[ed] a strong interest in assuring the integrity of such program funds." *Ibid.* Section 666 filled that gap by eliminating any requirement that the misconduct be traced to specific federal monies. Instead, Section 666(b) required that the institution, government, or agency at issue have received a specified amount of federal funds. 18 U.S.C. 666(b).[4]

As the court of appeals observed, Congress "decided that the most effective way to insure the integrity of federal funds disbursed by subnational agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the

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[4] *Westmoreland*, 841 F.2d at 577 ("Congress specifically chose" to "preserve the integrity of federal funds" by "enacting a criminal statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds"); *United States* v. *Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993) ("[W]hen Congress enacted section 666, it intended to 'protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal funds to a particular illegal transaction.'") (quoting *United States* v. *Simas*, 937 F.2d 459, 463 (9th Cir. 1991)); *United States* v. *Zwick*, 199 F.3d 672, 679 (3d Cir. 1999) ("By its terms, § 666 fills" the "voids" in prior legislation because "it imposes no title or tracing requirements and covers non-federal employees."); *United States* v. *Paradies*, 98 F.3d 1266, 1288 (11th Cir. 1996) ("the government is not required under § 666 to trace the flow of federal funds"), cert. denied, 521 U.S. 1106 (1997); *United States* v. *Foley*, 73 F.3d 484, 492 (2d Cir. 1996) ("the government is not required to trace the agent's corrupt expenditures to the federal program funds").

integrity of recipient agencies." Pet. App. A12. "[B]ecause § 666 changed the focus" from the policing of identifiable "federal funds to policing the agencies that receive and administer those funds, the argument that there must be a nexus between the offense conduct and the federal funds beyond that explicitly provided for in § 666(b) seems inconsistent" with Congress's goals. *Id.* at A12-A13.[5]

The scope of Section 666 is also illuminated by one of the decisions that prompted it: *United States* v. *Del Toro*, 513 F.2d 656, 661-662 (2d Cir.), cert. denied, 423 U.S. 826 (1975), which had converted the happenstance of funding, disbursement, and accounting mechanisms into impediments to federal prosecution. See *Salinas*, 522 U.S. at 58-59; S. Rep. No. 225, *supra*, at 369. In *Del Toro*, the Second Circuit overturned the federal bribery conviction of a city employee, "even though federal funds would eventually cover 100% of the costs and 80% of the salaries of the program he administered" because, at the time of the bribe, the city "had not yet entered a formal request for federal funding." *Salinas*, 522 U.S. at 58-59. There could be no prosecution, *Del Toro* held, because "[t]here were no existing committed federal funds" when the misconduct occurred. *Salinas*, 522 U.S. at 59 (quoting *Del Toro*, 513 F.2d at 662). In *Salinas*, this Court explained that construing Section 666 to require proof that a bribe is traceable to federal

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[5] An earlier proposal from which Section 666 was derived, see S. Rep. No. 225, *supra*, at 369 & n.1, would have required the government to prove that "the recipient's conduct [wa]s related to the administration of" a federally funded "program." See S. Rep. No. 307, 97th Cong., 1st Sess. 726, 803 (1981) (discussing S. 1630, 97th Cong., 1st Sess. § 1751(c)(1)(I) (1981)). Congress's decision to dispense with such a requirement when enacting Section 666 in 1984 supports the conclusion that Congress did not wish to demand such proof in particular cases.

funds "would run contrary to the statutory expansion that redressed the negative effects of the Second Circuit's narrow construction of § 201 in *Del Toro*." *Ibid.* Requiring the government to prove a particular nexus to federal funds or programs beyond that provided in Section 666(b) would have the same effect here.

C. Section 666 Is Not Ambiguous

In concluding that Section 666 requires a federal nexus not required by the statute's operative language, the Third Circuit reasoned principally that the statute's title ("Theft or bribery concerning programs receiving Federal funds") introduced ambiguity into the statute's meaning; the court then applied the canon that an ambiguous statute should be construed to avoid serious constitutional doubts. *United States* v. *Zwick*, 199 F.3d 672, 682-687 (3d Cir. 1999). While a statutory title may be a "tool[] available for the resolution of a doubt about the meaning of a statute," *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (internal quotation marks omitted), it is not a tool for *creating* ambiguity. "The title of a statute," this Court has held, "cannot limit the plain meaning of the text"; rather, "for interpretive purposes, it is of use only when it sheds light on some ambiguous word or phrase." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (punctuation altered and brackets omitted). Here, the relevant textual provisions are clear and unambiguous: They reach corruption in "*any*" business of a covered entity. *Salinas*, 522 U.S. at 57 (emphasis added). And, absent ambiguity, there is no room for the application of the canon of constitutional avoidance. *Id.* at 60-61; *Yeskey*, 524 U.S. at 212. In any event, as discussed below, there is no serious doubt that Section 666 is facially constitutional.

II. Section 666 Is Necessary And Proper Legislation To Ensure The Integrity Of Federal Funds And Programs

Congress has the power to spend federal revenues to "provide for * * * the general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Congress's authority "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936); accord *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Congress also has the authority to "make all Laws which shall be necessary and proper for carrying into Execution" its powers, including the spending power. U.S. Const. Art. I, § 8, Cl. 18.

Those grants of authority entitle Congress to enact criminal statutes that are designed to protect federal funds and the programs they support. Since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been settled that Congress has constitutional authority to enact not merely legislation that is "indispensable" to the exercise of its enumerated powers, but also such legislation as Congress in its judgment deems "necessary and proper," U.S. Const. Art. I, § 8, Cl. 18, *i.e.*, "convenient, or useful" and "plainly adapted" to the execution of federal power, so long as the means chosen are not prohibited by the Constitution. 17 U.S. (4 Wheat.) at 413, 421. It is "an incontestable proposition that the disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution." Pet. App. A21. Congress therefore also "has a legitimate right to protect these disbursements from misappropriation once made." *Ibid.*

Section 666 is both "necessary" and "proper" to the attainment of important federal objectives, and thus is facially valid. Every court of appeals that has considered Section 666's facial constitutionality has upheld the statute. *United States* v. *Edgar*, 304 F.3d 1320, 1325 (11th Cir.) ("As a means of ensuring the efficacy of federal appropriations to comprehensive federal assistance programs, the anti-corruption enforcement mechanism strikes us as bearing a sufficient relationship to Congress's spending power to dispel any doubt as to its constitutionality."), cert. denied, 537 U.S. 1078 (2002); Pet. App. A25 ("Section 666 is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States [through spending]."); *United States* v. *Bynum*, 327 F.3d 986, 991 (9th Cir.) ("We agree with the Eighth and Eleventh Circuits that § 666 is facially constitutional."), cert. denied, 124 S. Ct. 279 (2003).

This Court has repeatedly recognized that a statute is not unconstitutional on its face merely because it "might operate unconstitutionally under some conceivable set of circumstances." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Rather, "the challenger must establish that *no set of circumstances exists* under which the [law] would be valid." *Ibid.* (emphasis added); see *Anderson* v. *Edwards*, 514 U.S. 143, 155-156 n.6 (1995) (parties challenging statute "on its face" cannot "sustain their burden even if they show[] that a possible application of the rule" is invalid); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) ("To prevail" on "a facial challenge," the party "must establish that no set of circumstances exists under which the [regulation] would be valid") (quoting *Salerno*, 481 U.S. at 745); *United States* v. *Raines*, 362 U.S. 17, 21 (1960) ("one to

whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"). Petitioner's challenge falls well short of that standard.[6]

A. Congress Has The Authority To Protect Federal Spending Under The Necessary And Proper Clause

Congress's authority to enact criminal laws to protect federal funds and programs has long been recognized by this Court. In *United States* v. *Hall*, 98 U.S. 343 (1878), this Court upheld a federal statute making it a criminal offense for a guardian, agent, or attorney to embezzle a soldier's federal pension, rebuffing the claims (1) that such a law would effectively "assume all the police regulation of the States," and (2) that, because "State law authorized the guardian to receive the pension-money, the defendant cannot be subjected to an indictment under an act of Congress for embezzling it after he lawfully received it." *Id.* at 349. "Because

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[6] Even in those circumstances where members of this Court have supported a different formulation than the "no set of circumstances" test articulated in *Salerno*, they have at a minimum required that the statute's unconstitutional sweep be so great in relation to its constitutional applications, and so central to the statute, as to warrant the strong medicine of facial invalidation. See, *e.g.*, *Janklow* v. *Planned Parenthood*, 517 U.S. 1174, 1176 n.1 (1996) (Stevens, J., respecting denial of certiorari); *Chicago* v. *Morales*, 527 U.S. 41, 55 n.22 (1999) (Stevens, J., joined by Ginsburg and Souter, JJ.). Even in the First Amendment context—where concerns about chilling effects have led this Court to permit overbreadth challenges—the Court will not apply "the 'strong medicine' of overbreadth invalidation" unless the potentially unconstitutional applications are substantial both in absolute terms and in relationship to the law's legitimate applications. *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2197-2198 (2003).

the fund proceeds from the United States, * * * Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary." *Id.* at 357-358. The Court observed: "[T]hroughout the entire period since" the Constitution's adoption, "it has been the unchallenged practice of the legislative department of the government, with the sanction of every President, including the Father of the Country, to pass laws to prevent the diversion of [federal] pension-money from inuring solely to the use and benefit of those to whom the pensions are granted." *Id.* at 354. If Congress may grant pensions, Congress "may by all suitable laws guard and protect the fund thus devoted from being diverted from its object by either the craft or the extortion of unscrupulous agents." *Id.* at 356 (citing *United States* v. *Marks*, 26 F. Cas. 1162 (C.C.D. Ky. 1869) (No. 15,721)).

The same analysis applies when Congress appropriates the funds for programs administered by state and local governments pursuant to cooperative federalism agreements. Federal "grant funds to state and local governments 'are as much in need of protection * * * as any other federal money.'" *Dixson*, 465 U.S. at 501 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544 (1943)). For that reason, the Court in *Dixson* construed a federal statute barring the corruption of "public officials" to extend to local officials administering federal block grant funds. See *ibid.* Similarly, in *Westfall* v. *United States*, 274 U.S. 256 (1927), the Court rejected the argument that Congress could not punish frauds perpetrated against a "State bank" that participated in the Federal Reserve System where the statute "applie[d] indifferently whether there is a loss to the [Federal] Reserve Banks or not." *Id.* at 258-259. "[E]very fraud like the one before us weakens the

member bank and therefore weakens the System," the Court stated. *Id.* at 259.

This Court has also upheld Congress's interest in ensuring the integrity of federal funds, programs, and the institutions receiving federal funds when addressing Section 666 itself. In *Fischer* v. *United States*, 529 U.S. 667 (2000), the Court concluded that the "Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery being perpetrated upon Medicare providers," which receive federal benefits to achieve federal policy ends. *Id.* at 681. Likewise, in *Salinas*, 522 U.S. at 60-61, the Court held that "there is no serious doubt about" Congress's constitutional authority to punish the taking of bribes by a county official for according favorable treatment to a federal prisoner whom the County was holding for the United States under contract. Contrary to petitioner's suggestion (Br. 28), *Salinas*'s constitutional holding was not mere "dictum." This Court squarely "decide[d] that, as a matter of statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds *and* that under this construction the statute is constitutional as applied in this case." 522 U.S. at 61 (emphasis added). Just as the power "to establish post offices and post roads" encompasses the power to "punish those who steal letters," *M'Culloch*, 17 U.S. (4 Wheat.) at 417, the power to spend for the public welfare encompasses the power to punish those whose theft and corruption threatens federal spending and programs.

B. Section 666 Is "Necessary" Federal Legislation To Protect Federal Benefits Programs

Enacted to protect the integrity of federal funds and the programs they finance, Section 666 is necessary legislation to protect the effectiveness of Congress's exercise of its spending power. Section 666 ensures that federal funding is not diverted from its intended purpose and that federal programs are not impaired by corruption. *United States* v. *Brunshtein*, 344 F.3d 91, 97 (2d Cir. 2003) ("Congress enacted § 666 to 'safeguard finite federal resources from corruption and to police those with control of federal funds.'") (quoting *United States* v. *Rooney*, 37 F.3d 847, 851 (2d Cir. 1994)). Section 666 also ensures that fraudulent acts do not threaten federal programs by depriving program participants of necessary resources. In *Fischer*, the Court explained that "financial fraud or acts of bribery * * * perpetrated upon Medicare providers" impermissibly "threaten the [Medicare] program's integrity" by "rais[ing] the risk participating organizations will lack the resources requisite to provide the level and quality of care envisioned by the program." 529 U.S. at 681-682. Likewise, in *Salinas*, the Court upheld the conviction of a county official for taking bribes in return for affording preferential treatment to a federal prisoner housed in a local facility "paid for in significant part by federal funds." 522 U.S. at 59. Even though the corruption did not necessarily impose any additional costs on the United States, it represented "a threat to the integrity and proper operation of the federal program" at issue. *Id.* at 61.

Judicial review of the "necessity" of employing a particular means to achieve Congress's purposes is deferential. As this Court explained shortly after this Nation's founding, Congress has discretion to "employ

those [means] which, in its judgment, would most advantageously effect the object to be accomplished." *M'Culloch*, 17 U.S. (4 Wheat.) at 419. "[W]here the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to * * * tread upon legislative ground." *James Everard's Breweries* v. *Day*, 265 U.S. 545, 559 (1924). "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." *Legal Tender Case*, 110 U.S. 421, 441 (1884).

Amicus Cato Institute invites this Court to reconsider the "received wisdom" of *M'Culloch* and to adopt an intermediate scrutiny standard articulated by James Madison in a private letter—that "laws executing federal powers must have a 'definite connection' to and 'some obvious and precise affinity' with permissible governmental ends." See Cato Br. 3; see *id.* at 18-22. This Court, however, has employed *M'Culloch*'s "plainly adapted," "conducive," and "appropriate" formulations for the more than 180 years since *M'Culloch* was decided. See, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *United States* v. *Butler*, 297 U.S. 1, 69 (1936). Just last Term, this Court applied *M'Culloch* to reject a Necessary and Proper Clause challenge to 28 U.S.C. 1367(d), which tolls the limitations period for certain state-law claims in state court: "[I]t suffices that § 1367(d) is 'conducive to the due administration of justice' in federal court, and is 'plainly adapted' to that end." *Jinks* v. *Richland County*, 123 S. Ct. 1667, 1671 (2003). Amicus offers no compelling justification for abandoning that longstanding constitutional formulation in favor of Madison's private critique of *M'Cul-*

loch's reasoning and the decision itself. Cato Br. 19 (citing Letter of Sept. 2, 1819 to Spencer Roane, in 8 *The Writings of James Madison* 447 (Gaillard Hunt ed. 1908)).[7]

1. *Congress selected reasonable means of achieving its interest in the protection of federal funds and programs*

Congress enacted Section 666 to broaden the sweep of federal law only after attempting to protect federal

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[7] Contrary to Amicus's suggestion (Cato Br. 13-16), *M'Culloch* (like its progeny) makes it unmistakably clear that Congress is entitled to considerable deference in judgments about necessity. See, *e.g.*, 17 U.S. (4 Wheat.) at 415 (The Framers left it "in the power of Congress to adopt any" means "which might be appropriate, and which were conducive to the end."); *id.* at 420 ("[I]t cannot be construed to restrain the [express] powers of Congress, or to impair the right of the legislature to exercise *its best judgment* in the selection of measures to carry into execution the constitutional powers of the government.") (emphasis added). Some federal courts and commentators have equated *M'Culloch*'s "plainly adapted," or "appropriate" and "conducive," standard with the rational basis test. See, *e.g.*, *United States* v. *Plotts*, 347 F.3d 873, 878 (10th Cir. 2003); *Edgar*, 304 F.3d at 1325-1326; *Laro* v. *New Hampshire*, 259 F.3d 1, 6 (1st Cir. 2001); *United States* v. *Lue*, 134 F.3d 79, 84 (2d Cir. 1998); 1 Laurence H. Tribe, *American Constitutional Law* § 5-3, at 805 (3d ed. 2000). This case does not require the Court to determine whether the "plainly adapted" test requires a closer fit than the rational basis test, because Section 666(a)(2) is more than merely a rational way to serve Congress's legitimate interest in protecting federal funds and programs that implement the Spending Power. Rather, it directly and substantially serves that goal in a reasonable manner, as is evidenced by experience that revealed that more limited means were inadequate. See pp. 3-5, 19-22 & n.4, *supra*; pp. 31-33, *infra*. And even Amicus Cato Institute does not question *M'Culloch*'s holding that the means chosen by Congress need not be indispensable to the achievement of a legitimate legislative purpose in order to be "necessary and proper."

funds and programs through more limited statutes that had proved "toothless." Pet. App. A25. Congress's long experience with those earlier statutes showed that focusing on the federal funds themselves rather than the recipient was inadequate because of the difficulty of tracing money, as well as the effects of commingling and varying accounting and disbursement methodologies. See pp. 3-5, 19-22 & n.4, *supra*; Pet. App. A25. Congress therefore made the sensible "determination that the most effective way to protect the integrity of federal funds" and federally funded programs was not to police the funds directly but "to police the integrity of the agencies administering those funds." Pet. App. A25; see *Fischer*, 529 U.S. at 678 (The language of Section 666 "reveals Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs."); *United States* v. *Bonito*, 57 F.3d 167, 172 (2d Cir. 1995) (Section 666 "seeks to preserve the integrity of federal funds by assuring the integrity of the organization that receives them.") (quoting *Westmoreland*, 841 F.2d at 578), cert. denied, 516 U.S. 1049 (1996).

Congress's decision to focus on the corruption of institutions receiving federal funds also makes good sense even apart from the problems that plagued earlier statutes. The "federal government has an obvious interest in the incorruptibility of the City officials who are responsible for ensuring the transmission of federal funds to specific City programs." *Brunshtein*, 344 F.3d at 98. The "integrity of federal funds is placed at risk when the agency that receives those funds is corrupted." *Id.* at 100. An analogy to the private sector makes that clear:

> In the private sector, what would a reasonable funding partner who has advanced $[28] million do after

> learning that its service partner takes kickbacks, albeit regarding matters not within the partnership's scope? The funding partner might well dissolve the partnership rather than wait for the service partner's corruption to widen and infect the partnership's dealings.

United States v. *Lipscomb*, 299 F.3d 303, 332 (5th Cir. 2002) (opinion of Wiener, J.); see also *Edgar*, 304 F.3d at 1327 ("It is reasonable for Congress to conclude that any corruption of such recipient organizations * * * endangers the comprehensive programs in which the organizations participate, and thus the effective exercise of the Congressional spending power as well."). No principle of constitutional law requires Congress to wait until an official's corruption widens and infects a specific federal program and identifiable federal funds, when a reasonable, similarly situated private party would not.

This case illustrates the wisdom of that approach. The corruption at issue here (which involved an effort to distort the allocation of federal funds) came to light as a result of Councilman Herron's arrest for acts of corruption in more local matters. See Trial Br. 3, 14-15; Gov't C.A. Br. 5. Once corruption begins, those involved rarely differentiate between the local and federal programs the agency administers or carefully confine their activities to the former. The presence of corrupt officials in an entity receiving federal benefits also may indicate that the entity has broader problems, such as inadequate controls, even if the specific corruption identified does not involve federal funds or a federally funded activity.

In addition, "[m]oney is fungible and its effect transcends program boundaries." *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.) (Easterbrook, J.), cert.

denied, 525 U.S. 879 (1998). As a result, even where an agency operates some programs that receive federal funds and some that do not, corruption in non-federal programs can impair the agency's administration of federal money. See Pet. App. A25 ("maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency"). Corruption in locally funded programs can drain commingled resources from or place additional burdens on federally funded programs, impairing their achievement of federal program goals. See, *e.g.*, *United States* v. *DeLaurentis*, 230 F.3d 659, 662 (3d Cir. 2000).

Indeed, as the court of appeals explained in *Grossi*, a program that (at least as an accounting matter) appears funded by local revenues will have "more to spend * * * (or dangle as a lure for bribes) if the federal government meets some of the [agency]'s other expenses." 143 F.3d at 350. An agency that administers substantial federal funds will often be strengthened by the federal funds, increasing the opportunities for corruption and their oppressive effect. In this case, for example, petitioner paid Councilman Herron to threaten property owners with the MCDA's use of its eminent domain powers so that they would accede to his development plan on their own. See pp. 6, 7, *supra*. That threat was undoubtedly more credible because the MCDA, backed by millions of federal dollars, had the resources (for litigation and payment of just compensation) to make good on the threat.

2. *Congress is not limited to protecting against corruption in federal instrumentalities*

Petitioner argues (Br. 26-31) that the federal government's authority to address corruption does not extend beyond federal institutions and instrumentali-

ties. That argument fails to account for the obvious federal interest in foreclosing the theft and corruption of federal money held by organizations administering federal programs. And it overlooks a century of precedent recognizing the legitimacy of that interest—including cases like *Hall*, *supra*, which upheld the federal conviction of a guardian for embezzling a soldier's federal pension money; *Salinas*, *supra*, which upheld the conviction of a county official for corruptly favoring a federal prisoner in state facilities financed with federal monies; *Westfall*, *supra*, which upheld a conviction for defrauding a state bank participating in the Federal Reserve System; and *Fischer*, *supra*, which recognized the government's strong interest in prosecuting fraud aimed at Medicare providers. See pp. 25-27, *supra*. This Court's decision in *Dixson* all but forecloses petitioner's argument, interpreting the term "public official" in the federal criminal bribery statute, 18 U.S.C. 201(a), to include local officials administering federal funds:

> [W]hen one examines the structure of the program and sees that [it] vests in local administrators * * * the power to allocate federal fiscal resources for the purpose of achieving congressionally established goals, * * * it becomes clear that these local officials hold precisely the sort of positions of national public trust that Congress intended to cover * * * . The Federal Government has a strong and legitimate interest in prosecuting petitioners for their misuse of Government funds.

465 U.S. at 500-501.

Petitioner does not meaningfully distinguish those cases, none of which involved "instrumentalities of the

United States" as that phrase is ordinarily used.[8] Nor does petitioner explain why, if the individuals and institutions at issue in those cases—the private person in *Hall*, the state bank in *Westfall*, the local officials in *Dixson*, the county prison in *Salinas*, and the Medicare providers in *Fischer*—would qualify as federal instrumentalities for purposes of determining the constitutionality of those statutes, the entities receiving and administering funds under federal programs covered by Section 666 would not.

Indeed, petitioner effectively acknowledges that his position would draw into question "the constitutionality of 18 U.S.C. § 201, as interpreted in *Dixson*," Pet. Br. 27 n.2, and relies on the *Dixson* dissent, see Pet. Br. 29. But not even the dissenters in *Dixson* questioned Congress's *power* to impose criminal liability on corrupt officials with responsibility over federal programs and those who corrupt them. The dissenters merely were of the view that Congress had not exercised that power there. See 465 U.S. at 510 (federal programs should "not be interpreted to deputize States or their political subdivisions to act on behalf of the United States" within the meaning of Section 201 "unless such deputy status is expressly accepted or, where lawful, expressly imposed"; contrasting 1976 amendments to the Grain Standards Act). The Constitution does not "make the extent" of Congress's ability to "safeguard" federal

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[8] Petitioner attempts to distinguish *Salinas* on the ground that the County, its prison, or the guards were "instrumentalities of the United States." Br. 28. *Salinas* certainly did not hold that to be the case. Nor is it clear that the principles articulated in *Westfall*, *supra*, cited in *Salinas*, 522 U.S. at 61, are limited to federal instrumentalities. *Westfall* itself stands for the proposition that no actual loss to a federal institution is required to establish congressional authority, so long as the conduct might threaten a federal program. 274 U.S. at 258-259.

funds dependent on the Treasury's continued possession of those funds or "the bookkeeping devices used for their distribution." *Id.* at 501; see *Hess*, 317 U.S. at 544 ("Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states.").

3. This Court's decisions in* Lopez *and* Morrison *lend no support to a claim that Section 666 reaches too far

Petitioner invokes this Court's Commerce Clause decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), in arguing that the corruption reached by Section 666 is too attenuated from federal interests. Pet. Br. 32-33.[9] In particular, petitioner argues that Section 666, like the statutes at issue in those cases, can be sustained only if the Court is willing "to pile inference upon inference in a manner that" would accord the United States a "general police power of the sort retained by the States." Pet. Br. 33 (quoting *Lopez*, 514 U.S. at 567). The Commerce Clause analysis in *Lopez* and *Morrison* is not at issue here. This case does not involve an exercise of Congress's power to enact criminal laws to effectuate a specific enumerated grant of regulatory authority. Instead, it involves Congress's power to protect the integrity of benefits programs and federal funds established under its Spending Clause power. Congress's authority to prohibit criminal acts

[9] Petitioner raises this issue in contending that Section 666, viewed as a condition on federal spending, fails the "germaneness" or "relatedness" requirements for such conditions under *South Dakota* v. *Dole*. Pet. Br. 32. The government addresses below the argument that *Dole* provides the proper lens through which to analyze Section 666. See pp. 41-45, *infra*.

that threaten its expenditures and programs is not subject to analysis under *Lopez* and *Morrison*.

In any event, no piling of inferences is necessary to sustain Section 666. That provision directly serves Congress's legitimate interest in preserving the integrity of federal funds and the programs they finance. It ensures the incorruptibility of entities to which Congress entrusts its funds and programs for administration. It eliminates impediments (*e.g.*, tracing requirements) that impaired the effectiveness of earlier laws. And it ensures that federal funding does not subsidize corruption. To the extent that a demonstrable adverse effect on federal interests is not present in every case, Congress was permitted to dispense with one. The Constitution does not demand a perfect fit between the federal interest and every possible application of the statute Congress enacts to serve that interest. The standard is whether the statute is "plainly adapted," or "convenient" and "useful," to a legitimate federal end. See pp. 23, 28-30, *supra*. Consequently, where Congress enacts a statute to address a problem squarely within national competence, the legislation may sweep somewhat more broadly than the underlying purpose if necessary to ensure its effectiveness. As this Court explained when rejecting an argument virtually indistinguishable from petitioner's in *Westfall*, *supra*, see Br. for Plaintiff in Error, No. 766, at 15-17 (Feb. 24, 1927): "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." 274 U.S. at 259.

The fact that Section 666 reaches conduct that traditionally falls within the scope of state criminal law does not prevent Congress from protecting federal interests. As the court of appeals explained, "were we to conclude

that Congress lacked the authority to legislate in this area, then the protection of federal funds would be left to the whim of state and local officials—perhaps even the same officials who pose a threat to the integrity of the federal funds in the first place and who therefore possess a strong disincentive to protect them." Pet. App. A28. The court concluded that "[t]he proposition that the federal government is powerless to vindicate its own interests is clearly untenable." *Ibid.* *M'Culloch* makes the same point. "To impose on [the United States] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." 17 U.S. (4 Wheat.) at 424.

Sustaining Section 666 would hardly accord the United States a general police power or "obliterate the distinction between what is national and what is local." Pet. Br. 32. Section 666 does not rest on putative authority to regulate all the activities on which Congress may spend federal funds, or all activities that may affect the success of federally funded programs. Section 666 instead rests on the proposition that, because the United States has an interest in ensuring the integrity of its funds and programs, it may pursue that interest by policing the integrity of the entities to which its funds and programs are entrusted. Consequently, the reach of Section 666, and Congress's ability to enact statutes like it, is limited both by the finite nature of the federal fisc, and by the direct connection between the prohibition on financial corruption in agencies administering federal program funds and the

interest in protecting those federal funds and programs.[10]

C. Section 666 Is "Proper" Legislation Under The Constitution

Petitioner suggests (Br. 40) that Section 666 violates "the sovereignty of the States" under *Alden* v. *Maine*, 527 U.S. 706 (1999), and *Printz* v. *United States*, 521 U.S. 898 (1997), and therefore is not "proper" legislation under the Necessary and Proper Clause. That argument lacks merit.

Neither *Alden* nor *Printz* is applicable here. In *Alden*, the statute sought to allow private citizens seeking damages to hale the State into its own courts, notwithstanding the State's claim to sovereign immunity. 527 U.S. at 730. In *Printz*, the statute sought to "conscript[] the States' officers" into service "to administer [and] enforce a federal regulatory program." 521 U.S. at 935. Section 666 does not run afoul of "the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits,

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[10] The contrast between Section 666's scope and the hypothetical prohibition on the solicitation of adultery by officials of agencies receiving federal benefits posited by the Cato Institute (at 24) underscores that difference. It is not immediately obvious how the solicitation of adultery would pose a threat to federal funds or programs, since the misconduct involves the officials' private lives and is not financial in nature. Consequently, the link to any federal interest would have to rest on an attenuated chain of reasoning—that the prohibited conduct demonstrates poor moral character; that those moral shortcomings may not be limited to the offending official's private life; and, that if the lack of moral rectitude extends to the official's public responsibilities, it might include a willingness to engage in financial corruption affecting federal funds and programs. Section 666, in contrast, directly addresses corruption itself, and only in connection with the business of an agency that receives substantial funds under a federal program.

without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Alden*, 527 U.S. at 730. Nor does it "conscript[]" or "commandeer" state officers into federal service. *Printz*, 521 U.S. at 929, 935. Quite the opposite: the federal obligation of public employees to refrain from corruption results from a decision by the agency, state, or local government to accept federal money and administer a federal program. Section 666 imposes precisely the same duties on the agents of *private* organizations that choose to receive federal money.[11] Petitioner offers no reason why the United States cannot insist that the state and local government recipients of federal funds operate with the same level of freedom from corruption as private ones.

Petitioner also asserts (Br. 36) that Section 666 blurs state and local accountability for prosecuting corruption in state entities. But many statutes of unquestioned constitutionality, including the mail and wire fraud statutes and the federal securities laws, create overlapping coverage. There is certainly no federalism objection where the federal legislation is plainly adapted to the service of legitimate federal interests and leaves the States both free to make their own enforcement decisions and to be held politically accountable for those choices. As the Court explained in *Westfall*:

> Of course an act may be criminal under the laws of both jurisdictions. * * * [I]f a state bank chooses to come into the System created by the United

[11] It is therefore inaccurate to assert that Section 666 "applies only to State and local institutions." Pet. Br. 26. It applies to private "organizations" receiving the requisite amount of federal funds, such as the Medicare providers at issue in *Fischer*, and to state, local, and tribal institutions that do likewise. See 18 U.S.C. 666(a).

> States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement.

274 U.S. at 258.

D. Petitioner Is Not Assisted By His Reliance On The Standards Of *South Dakota* v. *Dole*

1. *The* Dole *test for spending conditions does not exhaust Congress's "necessary and proper" authority*

Petitioner argues that, in the spending area, the "necessary and proper" test of *M'Culloch* has been subsumed in and superseded by this Court's conditional funding cases, such as *South Dakota* v. *Dole*, 483 U.S. 203 (1987). Br. 37-40. He asserts that the *Dole* test incorporates all of Congress's necessary and proper power to implement the Spending Clause. According to petitioner, the United States' interests are satisfied if the grant recipient complies with its contractual obligations—or if, in the event of breach, the recipient "*compensates* the Federal Government or a third-party beneficiary * * * for the loss caused by that failure." Pet. Br. 29-30. In arguing that *Dole* occupies the field and that Congress cannot reach beyond imposition of conditions on the grant recipient, petitioner is, in effect, arguing that the federal government could not prosecute a state official even if that official stole the federal funds themselves or accepted a bribe in direct connection with a federal program. Congress, petitioner seems to argue, is limited to the protection of its funds by imposing some sort of anti-corruption condition and then withdrawing the funds if the condition is not satisfied. That position cannot be correct.

The present case illustrates the point. Like many similar cases, it does not involve a breach of conditions by the funding recipients. It involves the efforts of individuals like petitioner and the local official he bribed to corrupt the operations of otherwise innocent governmental entities administering federal program funds. Petitioner nowhere explains why it would make sense for those institutions, and the citizens they serve, to be punished for his and Herron's misconduct. See *Lipscomb*, 299 F.3d at 333 (Wiener, J.) (fiscal reprisals directed at a fund recipient would cause the local populace, which is "by definition innocent of official corruption," to "suffer a cut in federally funded services"). That would defeat the goal of the spending, which is to provide federal funding to serve public needs, not to take funds away from local government recipients to make up for federal corruption losses. *Ibid.* Nor would petitioner's proposed remedy deter individuals who seek to enrich themselves through the corruption of public agents in agencies that receive federal funds and administer federal programs, since the burdens of that remedy fall on the funding recipient rather than the criminally corrupt. Petitioner cites no case that prohibits Congress from protecting its interest in disbursed federal funds and federal programs by imposing criminal prohibitions on the individual wrongdoers. To the contrary, the interests in safeguarding federal benefits and programs have been held sufficient to sustain federal criminal penalties throughout this Nation's history, as *Hall*, *Westfall*, *Salinas*, and *Fischer* all make clear.

2. *Petitioner's conditional funding arguments are without merit*

Petitioner also claims that Section 666 transgresses the limits of the *Dole* factors in several respects. Because Section 666 is properly understood as a valid

exercise of Congress's power under the Necessary and Proper Clause, those arguments do not justify his position that Section 666 is facially unconstitutional. This Court's conditional funding decisions, including *Dole*, govern where Congress encourages or requires States to act in their sovereign capacity by conditioning the provision of federal funding on some undertaking by the States. In *Dole*, for example, the United States conditioned a portion of federal highway funds on the States' enactment of legislation that increased the drinking age to 21, a requirement that Congress could not, because of the 21st Amendment, impose itself. 483 U.S. at 209. In this case, the United States did not encourage or require state governments to regulate. Instead, Congress enacted federal legislation itself to serve the national government's own legitimate ends in protecting federal spending.

Even if viewed through the prism of conditional funding decisions like *Dole*, petitioner's arguments are mistaken.[12] He contends (Br. 32) that Section 666 is invalid under *Dole* because it is not "related to the purpose of the federal program." See *Dole*, 483 U.S. at 207 (condition may be "illegitimate" if "unrelated 'to the federal interest in particular national projects or programs'"). That claim is answered above, in the discussion of how Section 666 is plainly adapted to serve Spending Power interests under the Necessary

[12] To the extent that petitioner relies on the Tenth Amendment as an independent theory, Br. 37, this Court recently declined to address "whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question." *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003); cf. *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 144 (1939).

and Proper Clause. See pp. 25-33, *supra*. Petitioner's basic premise (Br. 33-34) that each and every possible application of Section 666 must have a nexus to a federal interest misconceives *Dole*'s relatedness requirement. *Dole* mandates a "reasonable relationship" between the condition and the purpose of the funding, not a perfect fit in every conceivable application. See *New York* v. *United States*, 505 U.S. 144, 172 (1992) (spending conditions valid under *Dole* because they are "reasonably related to the purpose of the expenditure"); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").[13]

Petitioner's claim that Section 666 unconstitutionally coerces fund recipients is likewise without merit. This Court has suggested that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the law has long "been guided by a robust common sense which assumes the freedom of the will as a working hypothesis." *Steward Machine Co.*, 301 U.S. at 590. Here, no government entity claims coercion, and petitioner offers no evidence that the United States exerted "a power akin to undue influence" to overcome the ordinarily "robust" presumption of free will. *Ibid.*

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[13] In *South Dakota* v. *Dole*, for example, the Court did not require that every proscribed sip of beer by an underage drinker (such as one who is hiking in the mountains miles from a road) affect the safety of funded highways. Instead, it was sufficient that underage drinking, as a general matter, has a reasonable relationship to highway safety. 483 U.S. at 209-210.

A large financial inducement is not necessarily coercive. "In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If [the State or its citizenry] finds the [federal] requirements so disagreeable, [they are] ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." *Kansas* v. *United States*, 214 F.3d 1196, 1203 (10th Cir.), cert. denied, 531 U.S. 1035 (2000); see *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947); *Board of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990).

Petitioner's coercion theory also produces paradoxical results: the greater the federal benefits afforded to state, local, tribal, and private entities, the lesser the federal government's power to protect the integrity of its funds and programs. According to petitioner, because the price of declining to accept federal largesse is simply too great for a State (or, presumably, a local entity) to bear, Congress must make the funds available *without* putting in place federal means to protect the expenditures. Nothing in the Constitution, however, forbids Congress from affording protection commensurate with its legitimate expenditures.

III. Section 666 Is At Most Subject To As Applied Challenges

At bottom, petitioner's position is that "Section 666 is facially invalid because the conduct it covers does not *uniformly* have the requisite connection to federal spending, and no element within the offense requires the jury to find the necessary connection *in each specific case*." Br. 33 (emphases added). Petitioner posits the example of a Section 666 prosecution for the bribery of a parks department agent where the only federal benefits received by the governmental entity are for highway programs. Pet. 32. Such an observation does

not come close to establishing facial invalidity. As discussed above, Congress legitimately framed Section 666 to sweep broadly enough to eliminate barriers to the protection of federal funds and programs that had hampered the effectiveness of earlier statutes and reasonably concluded that significant corruption anywhere in an entity receiving the requisite federal funds is at least a potential threat to federal funds and programs. See pp. 30-36, *supra*. That justification establishes the constitutionality of Section 666 in *all* of its applications, even those that might be viewed in isolation as tangential or remote from the underlying purpose of Section 666.

In any event, the argument that some remote applications may be unconstitutional certainly cannot justify total invalidation of the statute on its face. This Court's cases, including *United States* v. *Salerno*, 481 U.S. 739 (1987), make that clear. See pp. 24-25, *supra*. Petitioner's contrary argument parallels the claim this Court rejected in *United States* v. *Raines*, 362 U.S. 17 (1960). In that case, the plaintiff challenged the Civil Rights Act of 1957 as facially unconstitutional because it purportedly reached some conduct—private discrimination—that was alleged to be beyond Congress's power to proscribe under the Fifteenth Amendment. 362 U.S. at 19-20. Although the Act on its face made no distinction between state action and private conduct, the Court held that purported defect insufficient to invalidate the statute in all its applications:

> [I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality. And as to the application of the statute called for by the complaint, * * * it is enough to say that the conduct charged

> * * * is certainly * * * 'state action' * * * subject to the ban of that Amendment, and that legislation designed to deal with such discrimination is "appropriate legislation" under it.

Id. at 24-25. The same reasoning applies here.[14]

This Court has suggested that facial invalidation may also be warranted where the statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover." *Raines*, 362 U.S. at 23; see also *Butts* v. *Merchants & Miners Transp. Co.*, 230 U.S. 126, 133 (1913) (law facially unconstitutional where Congress would not have intended "to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part"). In *Lopez* and *Morrison*, the Court did not remit defendants to as-applied challenges in order to preserve statutory applications that, because of a factual showing unrelated to the design of the statute, would have been constitutional. But this Court has found Section 666 to be constitutional in its core applications—the ones Congress most clearly intended to reach—as this Court's decisions upholding convictions under it attest. See *Salinas*, 522

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[14] Petitioner errs in arguing (Br. 34-35) that this case is analogous to the circumstances identified by Justice Scalia's dissenting opinion in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 731-732 (1995). Section 666 is not at all like a regulation that fails to include an element required by the statute. To the contrary, Section 666 has a jurisdictional element. Petitioner merely argues that the element is not sufficient to ensure the statute's constitutional application in each and every case. As *Raines* demonstrates, that concern is not enough to render Section 666 unconstitutional on its face.

U.S. at 60-61 (holding that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts" there, and that "the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds"); *Fischer*, 529 U.S. at 681-682 (recognizing that the "Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery" given the threat to a federal "program's integrity" created there). The existence of a substantial body of such applications alone "is enough to defeat [the] assertion that the [law] is facially unconstitutional." *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

As a matter of prosecutorial discretion, the Department of Justice's policy is that "Federal prosecutors should be prepared to demonstrate that a violation of 18 U.S.C. § 666 affects a substantial and identifiable Federal interest before bringing charges," because "[t]his policy ensures that Federal prosecutions will occur only when significant Federal interests are involved." U.S. Attorney Manual § 9-46.110 (Sept. 1997). The adoption of such a policy as a matter of prosecutorial discretion suggests that there may be few cases brought to court in which the government's interest in applying Section 666 will not meet a federal nexus test.[15] Nevertheless, if it were thought constitutionally problematic to apply Section 666 in a particular case in which the federal interest that supports the statute cannot be concretely identified, even in a "highly attenuated" fashion, *United*

[15] The government's policy, of course, does not indicate that Congress was constitutionally precluded from casting a wider net to ensure adequate protection of federal interests, without entrusting to a jury potentially difficult proof issues in each case about the degree of a federal nexus.

States v. *Zwick*, 199 F.3d at 672, 687 (3d Cir. 1999), the correct constitutional solution would be to consider such a challenge on an as-applied basis. Any theoretical potential for unconstitutional applications provides no basis for facial invalidation.[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2004

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[16] Based on the concern that Section 666 might otherwise be unconstitutional, two courts have limited Section 666's application to situations where the offense conduct implicates a federal interest, although "a highly attenuated implication of a federal interest will suffice." *Zwick*, 199 F.3d at 687; *United States* v. *Foley*, 73 F.3d 484, 488-493 (2d Cir. 1996). That statutory-interpretation approach may differ from considering challenges to Section 666 on an as-applied basis, because a statutory nexus requirement would require a jury determination of that issue in every case. See *Brunshtein*, 344 F.3d at 98-99; cf. *Ring* v. *Arizona*, 536 U.S. 584, 606-607 (2002). In *Salinas*, this Court resolved the "constitutional as applied" issue itself. 522 U.S. at 60-61.

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Spending Clause of the United States Constitution, Article I, Section 8, Clause 1, provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

2. The Necessary and Proper Clause of the United States Constitution, Article I, Section 8, Clause 18, provides:

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Section 666 of Title 18, United States Code, provides:

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> > (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful

owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded 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; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, 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;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.