No. 12-111

IN THE

Supreme Court of the United States

WILLIAM J. JEFFERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REPLY BRIEF FOR PETITIONER

The government argues at length (Opp. 13-22) that the Fourth Circuit's expansive "settled practice" construction of "official act" is correct, and that petitioner's construction is wrong. We disagree and expect the Court will too. Among its many serious flaws, the trial court's instruction allowed petitioner to be convicted of bribery for using his influence with foreign officials in a foreign country, when the "decision or action" (21 U.S.C § 201(a)(3)) being influenced was that of a foreign government. But on the more pertinent issue at this stage—whether the question presented warrants further review—the government virtually concedes the race.

The government admits (Opp. 21) that, even now, it cannot explain this Court's discussion of "official act" in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999). It admits that there is a "clear disagreement" between the decision below and the D.C. Circuit's *en banc* decision in *Valdes* v. *United States*, 475 F.3d 1319 (2007)—although it mistakenly pooh-poohs that conflict as "narrow and abstract" (Opp. 25). It acknowledges (Opp. 26) that the Eleventh Circuit, in *United States* v. *Moore*, 525 F.3d 1033 (2008), "rejected" *Valdes*'s understanding of "official act," and does not dispute our showing (Pet. 16-17, 18-22) that the decision below exacerbates a circuit conflict over the meaning of both *Sun-Diamond* and *United States* v. *Birdsall*, 233 U.S. 223 (1914). The government also recognizes (Opp. 24) that *Valdes* rejected the same "settled practice" language that petitioner's jury received and that the Fourth Circuit

upheld. And it evidently agrees—how could it not?—that the question presented is an important and recurring issue of criminal law.

Nevertheless, the government asks this Court to deny the petition because the conflict is not broad enough, the instruction was not bad enough, and oh, by the way, petitioner is guilty. None of those arguments is persuasive. For all of the reasons the government sought *en banc* review of *Valdes*, the petition for a writ of certiorari should be granted. Federal officials should not have to guess about the meaning of this Court's decisions and the scope of the bribery and illegal gratuities statute. Nor should federal officials in the District of Columbia, Maryland, Virginia, and other jurisdictions be subject to different criminal proscriptions.

I. The Decision Below Deepens A Circuit Conflict Over The Meaning Of "Official Acts" And This Court's Decisions In *Sun-Diamond* And *Birdsall*

A. The government concedes, as it must, that the court below is in "clear disagreement" with the D.C. Circuit over the meaning of this Court's decision in *Sun-Diamond*. Opp. 25. That disagreement is anything but "narrow and abstract." *Ibid*. It goes, instead, to the very meaning of "official act."

In *Valdes*, the jury was instructed, much as here, that "[t]he term 'official act' includes the decisions or actions generally expected of a public official * * * [and] includes any duty lawfully imposed in any manner by settled practice." 475 F.3d at 1325. The government defended that construction as consistent with this Court's

statement in *Birdsall* that the bribery statue reaches "[e]very action that is within the range of official duty," including "duties not completely defined by written rules [that] are clearly established by settled practice." 233 U.S. at 230, 231. The D.C. Circuit rejected the government's argument, observing that "[w]hatever the broad language in *Birdsall* may mean, it was certainly *not* the Court's holding." *Valdes*, 475 F.3d at 1322 (emphasis added).

The D.C. Circuit instead found this Court's decision in *Sun-Diamond* "[m]ore useful" for defining the term "official act." *Id.* at 1323. In particular, it focused on this Court's statement that "[w]hile numerous activities—hosting a ceremony, visiting a school, or delivering a speech, for example—are assuredly 'official acts' in some sense, it would be absurd * * * to consider them within the scope of § 201." *Ibid.* (quoting *Sun-Diamond*, 526 U.S. at 407) (quotation marks and alteration omitted). Noting that "the *Sun-Diamond* Court reached its conclusion through the definition of the term 'official act,'" *ibid.*, the D.C. Circuit held that "official acts" must include only that "class of questions or matters whose answer or disposition is determined by the government." *Id.* at 1324. The government's theory, in contrast, "ignore[d] the plain text of the statute" and, indeed, "misinterpret[ed]" *Birdsall* (*id.* at 1322) in pursuit of an "overly expansive [instruction that] extend[ed] the statute to *any* action that in effect answers *any* question" (*id.* at 1323) (emphasis added).

As we previously explained (Pet. 13-22), there is now considerable division within the courts of appeals regarding the meaning of "official act" as

well as this Court's decisions in both *Birdsall* and *Sun-Diamond*. As the government concedes, in *Moore*, "[t]he Eleventh Circuit rejected *Valdes*." Opp. 26. Holding that *Birdsall*, and not *Sun-Diamond*, "is the controlling precedent"—and explicitly agreeing with the dissenters in *Valdes*—the Eleventh Circuit reasoned that "[e]very action that is within the range of official duty" is an "official act." *Moore*, 525 F.3d at 1041 (quotation marks omitted).

Largely siding with the Eleventh Circuit, the lower court here defined "official acts" as any and all activities that are "part [of] a public official's position" based on "settled practice." Pet. App. 42a, 51a. In an opinion that is virtually a reprise of the *Valdes* dissent (see Pet. 16), the Fourth Circuit explicitly stated that it was "unwilling to accept" the D.C. Circuit's reading of *Sun-Diamond*. Pet. App. 45a. In the Fourth Circuit's view, this Court's identification in *Sun-Diamond* of various well-settled practices by public officials that nevertheless do not constitute "official acts" was simply *dictum*. *Id.* at 45a n.35, 49a. Instead, the Fourth Circuit grounded the "settled practice" interpretation on precisely the same statement in *Birdsall* that the D.C. Circuit had concluded was "not the Court's holding." *Valdes*, 475 F.3d at 1322.

In its opposition, the government relies heavily on *Birdsall*, insisting that *Birdsall*'s reference to "settled practice" is not *dictum* and therefore justifies the instructions petitioner received. But as the government is constrained to admit, whether that portion of *Birdsall* is or is not *dictum*, and what precisely it means, is exactly what now divides the D.C. Cir-

cuit from the Fourth and Eleventh—and why this Court's review is needed. Only this Court can clarify the meaning of *Birdsall*.

B. As for *Sun-Diamond*, the government acknowledges that, even now, it does not understand what this Court meant by its discussion of "official act." The government speculates—it cannot say with any confidence—that in identifying various examples of conduct that "would not be 'official acts,' the Court *may* have assumed that none entails action on a 'question, matter, cause, suit, proceeding or controversy.'" Opp. 21 (quoting 18 U.S.C. § 201(a)(3) (emphasis added)). That speculation is reason enough to grant review: When the prosecutorial authority of the United States isn't sure what this Court was getting at, it is time to sort things out.

But review is even more urgent *because the government evidently disagrees with the narrowing construction it attributes to* Sun-Diamond. In the government's view, *anything* a government official does in his official capacity is action on a "question, matter, cause, suit, proceeding or controversy." 18 U.S.C. § 201(a)(3). Opp. 14-18, 21-22, 24. The Eleventh Circuit clearly agrees with that expansive view, the court below appears to as well (though it is harder to tell), and the D.C. Circuit emphatically holds to the contrary. As with the disagreement regarding *Birdsall*, only this Court can resolve the confusion regarding the meaning—and even the binding nature—of *Sun-Diamond*'s discussion of "official acts."

C. The government attempts to paper over these clear disagreements by emphasizing aspects of *Valdes*, *Moore*, and the decision below that are

immaterial to their holdings. The government notes, for example, that petitioner's jury—like the one in *Moore* but unlike the one in *Valdes*—was read the statutory definition of "official act" in addition to the "settled practice" gloss. Opp. 24-26. But as we previously explained (Pet. 18), that purported distinction is foreclosed by *Sun-Diamond* itself. In *Sun-Diamond*, the district court "read [the gratuity statute] to the jury *twice* (along with the definition of 'official act' from § 201(a)(3)), but then placed an expansive gloss on that statutory language." 526 U.S. at 403 (emphasis added). This Court reversed and ordered a retrial. In doing so, it noted with approval why the D.C. Circuit had "tersely rejected th[e] claim" (*id*. at 414): "[R]epeat[ing] the terms of the statute * * * could not possibly * * * have overcome the broader message" conveyed by the improper gloss. *United States* v. *Sun-Diamond Growers of California*, 138 F.3d 961, 968 (D.C. Cir. 1998). So, too, here.

The government also argues (Opp. 12, 22-23, 26) that the clear disagreements between the D.C., Fourth, and Eleventh Circuits are immaterial because all three courts made reference to the Second Circuit's decision in *United States* v. *Biaggi*, 853 F.2d 89 (1988). But as we previously explained (Pet. 17-18), the common citation establishes nothing. The D.C. Circuit observed that Congressman Biaggi's "use of his office to secure Navy contracts for a ship repair firm" was likely an "official act" because it "concern[ed] inappropriate influence on decisions that the government actually makes." *Valdes*, 475 F.3d at 1325. But that does not mean the D.C. Circuit viewed any response to a constituent request as an "official act" merely

because, as the Fourth Circuit held, it was a "settled practice" (particularly when, as here, a "constituent" is understood to be any resident of the United States). See *id.* at 1326 (rejecting dissenters' attempt to expand the definition of "official act" by "disaggregate[ing] the activities [at issue]" and "generaliz[ing] them"). The Fourth Circuit's position would be a non-starter in the D.C. Circuit.

II. The Decision Below Is Erroneous

A. The government devotes much of its opposition to arguing that our definition of "official act" is wrong. In the fullness of time, we believe this Court will conclude otherwise. For one thing, the government's sweeping interpretation—which leads to absurd results (see Pet. 12)—makes a hash of the statutory text. If "pending" means simply "not yet decided" (Opp. 17), then it adds nothing to the word "question"—since *all* questions on which an official may "act" are, by their nature, "not yet decided." As we have explained (Pet. 26), the better definition of "official act" (by a Member of Congress) is one that contemplates questions or matters that are resolved through the formal legislative process. The words "pending" and "may by law be brought" plainly connote some formal process—such as the initiation of a bill in committee or the instigation of a vote on the floor. They do *not* suggest questions that happen to pop up merely as a matter of "settled practice," whatever that is. And they certainly do not describe the vast majority of constituent inquiries, which after all address questions that are "pending" before an *agency official*, not the Congressman.

The government also offers no direct response to our account of the legislative history. As we

explained (Pet. 2-3, 27-28), the current version of the bribery statute, enacted in 1962, reflected Congress's efforts to consolidate a variety of office-specific bribery provisions *without altering or expanding the nature of the substantive offense*. Notably, the prior provisions addressed to Members of Congress covered payments relating to matters "pending *in either House of Congress, or before any committee thereof*"—that is, actions that are part of the formal legislative process. 18 U.S.C. §§ 204, 205 (1958) (emphasis added). The government has never claimed that Jefferson's activities in this case would come within this language.[1]

B. In any case, the central question is not whether our view is correct but whether "settled practice" is wrong. Even if our construction is rejected, but the D.C. Circuit's middle ground in *Valdes* is approved, petitioner's convictions would be reversed.

Though *Valdes* did not address whether "official act" reaches matters that are determined only by

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[1] The prior formulation is a persuasive guide not only because of Congress's clearly stated intent not to expand the bribery offense but also because it reflects the bribery statute's underlying purpose. See Pet. 27-28. In contrast to the steep penalties attached to bribery, Congress has punished less severely conduct by a Member of Congress that involves no corruption of the formal legislative decision-making process. For example, as we noted (Pet. 28 n.12), 18 U.S.C. § 203(a)(1) broadly addresses instances where a Member is paid to act in any representational capacity on a question that is pending *not* before him or Congress, but elsewhere, such as before an executive agency. The government chose not to bring that charge here, perhaps because the penalties are less severe.

foreign governments—such as whether a foreign government will award a contract to an American business at the behest of a Member of Congress (see Opp. 4-5)—the answer is surely no. Section 201(a)(3) by its terms applies only to questions or matters that are "before any public official." And Section 201(a)(1) states clearly: "the term 'public official' means * * * an officer or employee or person acting for or on behalf of the United States." 18 U.S.C. § 201(a)(1). A question that is before a foreign government is by definition not one that is before someone acting "for or on behalf of the United States."

C. As explained in the petition (at 32-34), the lower court's "settled practice" instruction is also unconstitutionally vague. See *Bouie* v. *City of Columbia*, 378 U.S. 347, 350 (1964).[2] As we showed, *both* words employed by the lower court—"settled" and "practice"—are hopelessly indeterminate. Like the Fourth Circuit, the government offers virtually no answer to this challenge.[3]

Indeed, the government's responses only strengthen our point. It argues (Opp. 27) that concerns about vagueness were minimal here because the jury was instructed that any "settled practice" must be "clearly established." But "clearly estab-

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[2] The government argues for the first time that petitioner failed to raise a vagueness challenge below. That is demonstrably incorrect. Petitioner exhaustively briefed his vagueness challenge before the court of appeals. See Pet. C.A. Op. Br. 14, 16-23; Pet. C.A. Reply Br. 10-16.

[3] Tellingly, the government omits from its description of the proceedings below that the district court itself was so confused about the meaning of "official act" that it had to withdraw its first opinion and issue an amended opinion. See Pet. 7.

lished" is just a synonym for "settled." The government provides no response to any of the questions posed in our petition (at 32), among them how frequently a Congressman must do something before it becomes "settled" (or "clearly established"). Nor does it suffice to say that the activity must be "known and accepted components of *a* Member's official duties." Opp. 27-28 (emphasis added). Not only does that standard bear no connection with the statutory text, it would cause the bribery statute to constantly shift in scope, as the practices of Members—or even just *one* Member—evolve. This would effectively endow courts with the power to define the bribery offense as they go along. *E.g.*, C.A. J.A. 1167 (district court: "[Constituent services] can be an official act if the expert testimony establishes it. We don't know yet. * * * It's what's customary.").[4]

D. Finally, the government contends that petitioner didn't really receive—and the court of appeals didn't really approve—the "settled practice" instruction. Instead, it asserts (Opp. 13 & n.2) that petitioner received "settled practice plus" because only if conduct is *both* a "settled practice," and *also* involves a "question, matter, cause, suit, proceeding

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[4] The government attempts (Opp. 5, 28) to demonstrate that "petitioner knew his conduct was illegal" by quoting the record out of context. Jefferson's reference to the "pokey" was not made about any of the "constituent services" underlying his conviction. Rather, it reflected his concern that Vernon Jackson, the President of iGate, would unlawfully defraud Lory Mody if, as Jackson proposed, he falsely declared Mody to have breached their contract. C.A. J.A. 777-85. And the "freezer" incident (Opp. 5) involved a count on which petitioner was *acquitted*. See Pet. 9 n.5.

or controversy," 18 U.S.C. § 201(a)(3), is it an "official act."

This argument flatly misreads the record. The district court instructed the jury, point blank, that "official acts *include* those activities that have been clearly established by settled practice as part [of] a public official's position." Pet. App. 117a (emphasis added). That unambiguously told the jury that, if it found any of petitioner's conduct to be "settled practice," it was free to find an "official act." And the prosecution capitalized on that instruction in summation, telling the jury that "[t]he touchstone * * * for what qualifies as an official act, are those activities that have been clearly established by settled practice as part of the public official's position." C.A. J.A. 4906.

At bottom, the Fourth Circuit agreed. Although that court observed that the jury was read the statutory text "in tandem" with the "settled practice" instruction, the court of appeals nowhere explained how the former *narrows* the latter. Pet. App. 51a. Unlike the D.C. Circuit in *Valdes*—which, "relying on the canon of *noscitur a sociis*," construed "the six-term series [in 'official act' to] refer[] to a class of questions or matters whose answer or disposition is determined by the government" (475 F.3d at 1323-24)—the Fourth Circuit offered no limiting principle at all. Like the government and the Eleventh Circuit, the Fourth Circuit treated "settled practice

plus" as nothing more than "settled practice" *simpliciter*.[5]

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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[5] In any event, in *Sun-Diamond*, this Court rejected the very same claim the government makes here (and the Fourth Circuit accepted)—that an impermissible gloss on Section 201 could be disregarded simply because the jury was twice read the statutory definition of "official act." See *supra* Part I.C; Pet. 18.