No. 23-108

In the Supreme Court of the United States

JAMES E. SNYDER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law and often appears before this Court. It also argues for a proper balance between federal law and state sovereignty in the pursuit of a constitutional scheme of governance that enhances, rather than threatens, the full participation of citizens in the political process. More relevant to the Petition, ACLJ addressed those issues previously in a bribery law context in its amicus briefs in *McDonnell v. United States*, 579 U.S. 550 (2016).

SUMMARY OF THE ARGUMENT

The Petition presents a bribery prosecution against Mr. Snyder, a small-city mayor ("Mayor") for a financial transaction with a local businessman who was a contributor to the Mayor's campaign. The Mayor was convicted under a bribery statute that should require by its text, its context, and its similarity to a related bribery statute, and by prior precedents of this Court, proof of a quid pro quo

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*Counsel of record for the parties received notice of the intent to file this brief pursuant to Rule 37.2. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

arrangement between the Mayor and the businessman. Two circuits have embraced that standard, and there, the Mayor likely would never have faced indictment let alone conviction. However, the trial court, and the Court of Appeals for the Seventh Circuit, following a precedent of its own and of several other Circuits, upheld a guilty verdict despite the lack of proof of quid pro quo, ruling none was required.

This 5-2 split in the circuits means that full-throated political activity between the elected and the electorate as well as freedom from potentially discriminatory prosecutions, depends on mere geography. Constitutionally, that is an intolerable situation.

The threat from this shockingly broad reading of bribery law is particularly acute in smaller communities where personal, business, and political connections can naturally intersect between officials and citizens. Under the reasoning of these Circuits, ordinary transactions and points of contact can become the stuff of criminal "gratuities," subject to the harsh penalties and prison sentences fitted for bribery yet gutted of the quid pro quo bulwark historically established for such offenses. A chilling effect on political activity is inevitable.

These threats, coupled with a statute that only requires the presence of federal money in the municipality even if disconnected from the subject case, the undermining of federalism principles, and the risk of politically motivated prosecutions under

the vast scope of the law, make the Petition one that this Court should grant.

ARGUMENT

I. WITHOUT A CORRUPT INTENT TEST IN 18 U.S.C. § 666 (a)(1)(B), POLITICAL LIBERTY IS THREATENED

A. A New Political Donation Crime Has Been Created

The Petition affords the Court the opportunity to eliminate a serious potential to chill political activity currently existing in the enforcement of the federal funds bribery statute, 18 U.S.C. § 666(a)(1)(B). The flawed interpretation by Courts of Appeal in the Second, Sixth, Eighth, and Eleventh Circuits, joined by the Seventh Circuit ("Majority Circuits"), threatens to criminalize political donations if the donor and the public official recipient have sufficient financial transactional touch points, yet lack any mutual intent to trade money for official conduct. This is a reversal of the well-established law requiring quid pro quo for traditional bribery crimes. Rather, the Majority Circuits have created a *bare* gratuity crime (i.e. one not cloaked with an agreed intent of payment for official action), despite the overwhelming textual evidence that the statute's own language demands it, a fact substantiated by a related bribery statute.

By contrast, *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), and *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022) (the "Minority Circuits"), using a text-driven approach to the statute, have correctly ruled that it requires quid pro quo.

As a result, whether a political donor or an elected official goes to prison now depends on where they live.

The criminal case in the Petition follows from a retrial that focused on a payment made to the Mayor by the payor business owner of Great Lakes Peterbuilt ("GLP," a/k/a "GLPB") who testified that it was for permissible side-job consulting services the Mayor provided.[1] The Government argued the payment was an illegal reward for granting bid contracts to GLP for the municipal purchase of its garbage trucks, violating § 666(a)(1)(B). GLP had been "the lowest responsive, responsible bidder" for the truck purchase contract. Pet.App.28a.

During the second trial, the Government frequently referenced to otherwise legal campaign

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[1] As the judge in the Mayor's first trial noted, in the Grand Jury the GLP owner was explicit that the Mayor did not receive a reward for a bid contract: "Although the government's attorney kept pressing him on the issue, Bob Buha did not waiver: Q. Did you feel that you owed him the money in the sense of---to thank him for getting you the trucks, or for whatever role he played in your bids being accepted? A. No. . . ." Pet.App.148a. A new trial was granted after the first trial because of certain Government conduct that "pushed the envelope." Pet.App.150a,151a. In the second trial, GLP's owner denied any connection between the payment and truck bids. Pet.Cert.11-12.

donations made by payor owner of GLP to the Mayor's political campaign.

The Petition describes how:

> The government also repeatedly mentioned the $13,000 payment alongside the [payor and GLP owner] Buhas' earlier campaign contributions to Mayor Snyder, although the government recognized that those contributions were perfectly legal.

Pet. 11. Political contributions and candidate support are not only "perfectly legal," *id.*; they are constitutionally protected free speech and political activity. *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). Yet, such evidence made its way into the criminal trial.

Evidence was introduced regarding the Mayor's "campaign platform" for securing garbage trucks. Pet.App.56a. In addition, the judge characterized the trial evidence on the garbage truck bidding process itself, central to the prosecution, as a "[f]ollow[] up" from his "campaign promise" on that issue. Pet.App.138a.

In bribery cases, such evidence might corroborate facts establishing a quid pro quo agreement—for instance, where parties intentionally trade a bid contract for a money contribution or other campaign support for favorable official action. But under the Majority Circuits' theory of "gratuity," guilt by implication rather than by corrupt agreement, even

the otherwise "lawful" campaign contributions made by GLP to the Mayor's political race could well have been prosecuted.

Such an approach to gratuities as a form of *bribery-lite* casts a *pall* over political support. In a similar political context, where an overreaching government theory of value given for mere access was rejected by this Court, the practicalities of representative government and the need for citizen breathing room in their interactions with public officials was emphasized:

> The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns — [e.g., if] the union official worried about a plant closing . . . [t]he Government's position could cast a *pall of potential prosecution* over these relationships if the union had given a campaign contribution in the past . . . .

McDonnell, 579 U.S. at 575 (emphasis added).

The boundaries of what constitutes criminal corruption in a political setting are well established: "Corruption is a subversion of the political process," not the political process itself. *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985). Only "'quid pro quo' corruption or its appearance" may be targeted. *McCutcheon v. FEC*,

572 U.S. 185, 192 (2014); *see id.* at 207 ("Congress may target only a specific type of corruption—'*quid pro quo*' corruption."). "The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *Id.* at 192 (citing *Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 497). "That Latin phrase captures the notion of a direct exchange of an official act for money." *Id.* (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)).

Criminalizing an after-the-fact "gratuity" as a criminal "reward" and tantamount to bribery but without a showing of underlying bribery-type quid pro quo opens the door to line-blurring in an area that calls for clarity rather than obscurity. Bribery offenses, plain and simple, require such quid pro quo evidence. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). Yet here, the Mayor was prosecuted under the so-called illegal gratuity ("rewarded") prong in § 666(a)(1)(B), with the Court of Appeals treating that prong as essentially a non-bribery gratuity crime.

The Seventh Circuit made only a passing reference to those two prongs of bribery and of gratuity in § 666(a)(1)(B), treating those two prongs (wrongly) as substantively different, concluding that it "easily reaches" both bribery *and* gratuities, Pet.App.38a (emphasis added), noting "that § 666(a)(1)(B) 'forbids taking gratuities *as well as* taking bribes,'" Pet.App.39a (emphasis added) (citations omitted).

If public officials are to be hung from one of two adjoining hooks of a criminal statute, it behooves the courts to explain clearly why only one of them (presumably the "to be influenced" hook) might require bribery quid pro quo while its neighboring hook ("rewarded") does not. The Court of Appeals did not do so, failing to appreciate the context of the statute and that the relationship between "influenced" and "rewarded" in the phrase "*intending* to be influenced or rewarded" is simply a difference in *timing* of the payment, not a difference in the *intent* requirement. "To be influenced" means an understanding in advance for a payment for the purpose of influencing official action in the future. "Rewarded" should refer to a payment, *specifically agreed-to* for official action, but not payable until that action is accomplished.

There are at least four reasons why this is so, and why the Court of Appeals and the Majority Circuits have it wrong. First, as a statutory interpretive principle, there is "the commonsense canon of *noscitur a sociis* . . . [that] counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008).

As we have just pointed out, those next-door neighbors in the statute, the phrases "to be influenced" and "to be . . . rewarded," § 666(a)(1)(B), are most logically viewed as mere differences in

transactional timing between the time of the payment and the official conduct, nothing more.

Second, "influenced" and "rewarded" are preceded by three words: "intending to be." *Id.* The phrase "to be" suggests that the influencing part or the rewarding part both follow from something that precedes them both in point of time. Again, semantically, the best sense of that is that either the *influence* (motivating the future corrupt official act) or the *reward* (a payoff for the act already done) presupposes an existing understanding in the first place, *i.e.* a quid pro quo arrangement.

Third, the word "intending" modifies both "influenced" and "rewarded." One can be "rewarded" in the common usage of that word without necessarily acting out of an expectation to receive one, or even knowing a reward exists. A Good Samaritan can return a dog to its owner without knowing in advance that the owner had posted a "reward" for return of her pet. If a county supervisor's campaign is given a large campaign donation by a local businessman, it would be absurd to criminally charge him under § 666(a)(1)(B) if he *didn't know* that the zoning plan he had voted for previously might benefit a future shopping center that—unbeknown to him—the donor had in the private planning stage. Yet, aided by a few suspicious looking circumstances, that same campaign donation—received quite innocently from the recipient official's standpoint—could be

prosecuted as a criminal "reward" in the Majority Circuits.

A proper textual view of § 666(a)(1)(B) prevents that. The text presently requires that our hypothetical county supervisor was "intending to be . . . rewarded" by the donor at the time he voted on the zoning plan. And that requires a prior quid pro quo arrangement.

Last, the use of the word "reward" is consistent with the offense of quid pro quo bribery historically. In the outlawing of bribery-for-votes by members of Parliament under English law, the word "reward" did not negate a specific bribery intent, but actually embraced it. Blackstone described "the infamous practice of bribery and corruption" that would occur if "any money, gift, office, employment, or *reward* be given or promised to be given to any voter, at any time, *in order to influence* him to give or withhold his vote;" thus, both as to the giver as well as to the recipient, such a "reward" constituted a "bribe" (emphasis added).[2] From the outset, rewards were a form of bribery and were defined as politically corrupt payments specifically made or promised with the intent and purpose of influencing official action.

As we explain in II. A. and III. below, Congress drafted § 666(a)(1)(B) by employing both explicit and

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[2] 1 William Blackstone, *Commentaries* (Edward Christian ed. 1783) *179-80, https://books.google.com/books?id=MPra9LeKFy8C&lpg=PA181&dq=blackstone's%20commentary&pg=PA179#v=onepage&q&f=false.

implicit bribery language—thus requiring quid pro quo—which should have been, but was not, applied by the trial court and the Court of Appeals in this case.

We urge this Court to grant certiorari so it may resolve the clear circuit split on that statute, and so it may interpret it in light of longstanding *scienter* requirements for criminal laws, particularly those, as here, that intersect with political, electoral, and governmental settings.

We are not alone in voicing concern. A decade ago, legal commentators were urging caution regarding public bribery crimes in political contexts:

> defining bribery in the political campaign contribution context has proven to be particularly troublesome, as it requires the careful judicial balancing . . . . American election campaigns and political platforms have historically been privately funded; public officials have an interest in soliciting contributions in order to represent and serve their constituents.

Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 Rutgers Law Review 229, 230 n.1, 3 (2012) (citing John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. Mich. J.L. Reform 1, 22 (2010);

Paul M. Thompson, *When a Bribe Is Not Always a Bribe*, Nat'l Law J., Apr. 18, 2011, at 1).

Moreover, limitless expansion of corruption and bribery law can "conflict[] with principles of federalism." *Ocasio v. United States*, 578 U.S. 282, 304 (2016) (Thomas, J., dissenting).

While this case was *not* expressly prosecuted on a theory of bribery based on campaign-donations for-contracts, evidence of political donations and a campaign platform was injected into the trial. Under the Majority Circuits' construction of § 666(a)(1)(B), lawful political activities, not just donations but providing anything of value, can increasingly become a criminal target. Former state Attorneys General have previously argued to this Court that bribery under that statute should not be based on "unspoken, merely implied, exchange of the official act for the contribution."[3] Their prosecutorial perspective should be heeded.

More specifically, the breadth with which several Courts of Appeal have interpreted 18 U.S.C. § 666(a)(1)(B) will permit evidence of political support to taint prosecutions, and perhaps even drive them. If almost any financial transaction that involves a state or local public official can be viewed through the

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[3] Br. Former Att'ys General as Amici Curiae Supp. Pet'r at 12-13, *Siegelman v. United States*, 561 U.S. 1040 (2010) (vacated and remanded), *cited in* Garcia, *supra*, at 245 n.115 (citation omitted). The quid pro quo question raised by Petitioner Siegelman was not reached by this Court. *Id.* at 246.

flawed § 666(a)(1)(B) lens created by the Majority Circuits, the line between corrupt payments and legitimate, constitutionally protected political activity will continue to be blurred.

The result will be a chilling effect on the constitutional province of two groups. First, citizens who wish to support local politicians with outright donations or other lawful support, will likely be forced to err on the side on non-support, particularly in smaller communities, and especially if their businesses have had any dealings with the municipality. Second, elected public officials who are offered campaign assistance from the owners of such businesses will face the threat of overzealous, or even politically motivated prosecutions because of the broad interpretative sweep given to § 666(a)(1)(B) in the Majority Circuits.

If Congress desired such a draconian outcome, it could have easily done so by removing language in § 666(a)(1)(B) requiring that transactions be done "corruptly" so that it would look much more like the "gratuity" crimes of 18 U.S.C. § 201, rather than appearing, as it does now, to be a sibling to the family of bribery crimes of Section 201 that require quid pro quo. But Congress has not acted. This Court should give § 666(a)(1)(B) a much-needed constitutional and textual review.

B. The Threat of Politically Motivated Prosecutions

The same former state Attorneys General who warned against murky boundaries for 18 U.S.C. § 666 bribery law in *Siegelman v. United States*, 561 U.S. 1040 (2010), *see supra*, n. 3, specifically raised the specter that this law could be expansively abused absent clear delineation, noting that judicial clarity "minimizes the risk of politically motivated prosecutions."[4]

More than eighty years ago, then U.S. Attorney General Robert H. Jackson warned about the awesome power of prosecutorial discretion. It still rings true.

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.[5]

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[4] Br. Former Att'ys General as Amici Curiae Supp. Pet'r, *supra* note 3, at 4, *cited in* Garcia, *supra*, 252 n.163.

[5] Robert H. Jackson, Attorney General of the United States, The Federal Prosecutor 1 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

Such broad discretion allows a prosecutor to "choose his defendants," with the "most dangerous power" being "that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." [6] If that is a practical risk in the processing of ordinary federal crimes that are clear and properly interpreted, how much more dangerous is that threat under the Majority Circuits' problematic construction of § 666(a)(1)(B). What this Court has said about one aspect of the text of Section 201 is equally true of § 666(a)(1)(B): "[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 579 U.S. at 576 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

II. THE TEXT OF § 666(A)(1)(B) COMMANDS A SPECIFIC INTENT READING

A. "Corruptly" Suggests Quid Pro Quo

The text of § 666(a)(1)(B) requires that the conduct be performed "corruptly." Under the interpretation of the Seventh Circuit, in order to be illegal and to satisfy the "corrupt[]" element, the gratuity must be received "with the knowledge that giving or receiving the reward is forbidden." Pet.App.41a. (citation omitted). However, that vague, circular explanation is cold comfort to public officials

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[6] *Id.* at 4.

who employ ordinary language skills in reading the statute's text, compared to the Majority Circuits' reading.

Today, an applicable scienter element is entirely the servant of the Court of Appeals Circuit in which one resides. If § 666(a)(1)(B) is construed reasonably, as in the Minority Circuits, the problem is solved because public officials are put on adequate notice, i.e. they will have "knowledge" that "corrupt" money arrangements that seek to "influence" official conduct through *specific and intentional agreements* are "forbidden." But if construed in the manner of the Majority Circuits, the law becomes a trap for the unwary because the statute is applied far beyond its text.

In construing criminal statutes and applying *scienter* requirements like the "corruptly" element in § 666(a)(1)(B), the goal should be, rather than making it easier for the unwitting to hit a criminal trip wire, to make it harder for law abiding people to unwittingly commit a federal crime. *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (mental-state requirements "are 'as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil,'" (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

In addition, the dilution of the word "corruptly" by the Majority Circuits turns that word into mere surplusage, violating a basic cannon of statutory interpretation. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting *Corley v. U.S.*, 556 U.S. 303, 314 (2009)). In a § 201 bribery prosecution, this Court has held that a "more limited reading" of the scope of the statute was necessary to avoid key terms being rendered "superfluous." *McDonnell*, 579 U.S. at 569 (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299, n. 1 (2006)).

Viewed through the lens of § 666(a)(1)(B), the only direct witness from GLP to the actual transaction with the Mayor was clear and consistent that the payment was for lawful services. There was other supporting evidence, even though the judge in the second trial and the Seventh Circuit found it insufficient to overturn the verdict. At trial, no evidence of a corrupt, quid pro quo corrupt agreement between the two players was presented.

By contrast, the prosecution's case for guilt was built on the kind of circumstantial evidence that can often prevail in local governmental affairs in small towns without any criminal wrongdoing whatsoever, such as bidding processes handled by close associates.[7] Even if novices, they might be chosen because they will be more diligent to implement the Mayor's

[7] According to the trial judge, Reeder was, a "close and loyal friend," Pet.App.138a, a fact emphasized by the Court of Appeals, Pet.App.27a,42a.

campaign "platform" in securing garbage trucks rather than entrenched incumbents. Some officials like the Mayor are lawfully permitted to work moonlighting jobs, and may naturally prefer companies they know rather than those they do not know. [8] Finally, the fact that both the payor company and the Mayor were both carrying debt load[9] in a struggling economy, is hardly an anomaly.

Worst of all, with little meaning to "corruptly" as guidance, the jury could have implied guilt by the fact that GLP owners donated to the Mayor's campaign. After all, the Majority Circuits have shifted the burden of proof, not as a matter of law, but of practicality. Even if GLP's political support was entirely due to the Mayor's "campaign platform" about securing municipal garbage trucks, a logical conclusion, absent a quid pro quo element, such political support in the Majority Circuits will always be suspect and will bear some burden of proving its own innocence. Equally problematic, when money issues are raised regarding political officials, particularly when they involve political supporters who do any kind of municipal work, they will face the practical prospect of presumed guilt in the minds of

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[8] "Consistent with Indiana law, which does not forbid small-town mayors from pursuing other employment, Mayor Snyder began offering consulting services." Pet.6. Apparently, the Government did not contest this *moonlighting* privilege.

[9] Both GLP and the Mayor were in "financial straits," according to the trial judge. Pet.App.138a.

jurors under the overly broad construction given in several circuits. [10]

The use of "corruptly" as implying a quid pro quo agreement is also supported by two other phrases in § 666(a)(1)(B). One is the reference to a public official who "accepts or agrees to accept" a payment for the performance of an official act. Where one accepts such a corrupt deal and receives the money involved, the deal is fully consummated between the parties. One who merely "agrees to accept" such a corrupt deal is still criminally liable, if for instance, the official is caught in a sting operation before the transfer of money, or if the payor backs away from paying at the last moment.

The other phrase supporting a plain language construction of the "corruptly" element, is the text, "intending to be influenced or rewarded." An official who *intends* "to be influenced" does so by agreement *before* the official act is actually done. An official "*intending* to be . . . rewarded" has struck a deal in advance, for payment *after* corruptly performing the

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[10] The judge in the first trial, responding to motions after the first trial and ultimately granting a new trial, aptly noted, "Here, one may be tempted to succumb to the skepticism about 'all politicians being corrupt,' so surely 'he did it.' Yet the law guards the accused against the rash judgment." Pet.App.148a-149a n. 10 (citing Sir Thomas More, that the purpose of the law is to provide protection through the bramble bush thickets of its provisions applied equally, as a safe haven for the innocent even at the cost of protecting "the devil.").

official act. In either case, "intent" strongly suggests quid pro quo.

Last, the "bribery" title in 18 U.S.C. § 666, should not be so easily dismissed. If our interpretation is correct, then § 666(a)(1)(B) is a bribery statute, therefore requiring quid pro quo. Headings and titles in statutory sections can be relevant in construing the text, especially where more than one interpretation is possible. *See INS v. Nat'l Ctr. for Immigrants' Rts.*, 502 U.S. 183, 189-90 (1991) (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989)); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959)). *See also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

B. The Rule of Lenity Requires Quid Pro Quo

The Petition should also be granted because the reasoning of the Majority Circuits defies the rule of lenity. While we believe that the textual structure of § 666(a)(1)(B) clearly compels a quid pro quo reading, if it does not, then textual uncertainty coupled with the problematic reasoning of the Majority Circuits means that lenity should *give the tie* to the defendant.

If after applying "traditional tools of statutory construction" there still "leaves any doubt about the meaning" of critical text, "the ambit of criminal statutes should be resolved in favor of lenity." *Yates v. United States*, 574 U.S. 528, 547 (2015). That approach is advisable when a criminal law fails to

clearly proscribe what conduct is unlawful. It also avoids the "encourage[ment of] arbitrary and discriminatory enforcement," *McDonnell*, 579 U.S. at 576 (quoting *Skilling v. United States,* 561 U.S. 358, 402-03 (2010)) (internal quotation marks omitted), and averts a Government-imposed "standardless sweep" on such a statute, 579 U.S. at 576 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)) (internal quotation marks omitted).

C. The Expansion of § 666 Criminal Liability Threatens Federalism

Attorney General Robert Jackson's address in 1940 stressed the avoidance of conflict between federal prosecutorial ambition and the discretion of local District Attorneys: "It is an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation, except where he requests help of Washington." [11] It might be argued that those are outdated sentiments, perhaps because our nation had a smaller number of federal crimes on the books then with a shorter reach. But that argument ignores the federalism balance that is just as necessary now as it was then.

Section 666 gives federal prosecutors a strikingly large field for potential investigations and prosecutions into state and local officials whenever federal money finds its way into local municipalities,

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[11] Jackson, *supra* note 5, at 2.

with exponentially more funds being funneled now than in the mid-twentieth century. Further, the "expansive" breadth of § 666(a)(1)(B) does not require any particular connection between the federal funds in a municipality and an official prosecuted under that statute, only that federal funds exist. *Salinas v. United States*, 522 U.S. 52, 56-57 (1997).

McDonnell noted the "significant federalism concerns" that can arise with federal bribery laws that impact state and local governance decisions:

> A State defines itself as a sovereign through "the structure of its government, and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S.452, 460, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991). That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited interpretation of [the phrase at issue there] . . . is supported by both text and precedent, we decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of "good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); see also *United States v. Enmons*, 410 U.S. 396, 410-411, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973)

> (rejecting a "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States").

579 U.S. at 576-77.

A constitutional balance must still be struck today between federal oversight and state sovereignty, and between federal prosecutorial reach and the province of local law enforcement and prosecution. That tipping point should hinge on the traditional, well-tested notions of criminal quid pro quo in bribery cases, rather than whether federal money can be found in the coffers of a state or a town together with a daisy-chain of facially inconclusive transactions between public officers and citizens.

III. THE SEVENTH CIRCUIT IMPROPERLY EXPANDED § 666(A)(1)(B).

The Seventh Circuit mentioned more than once its reliance on the Circuit precedents as a basis for ruling that § 666(a)(1)(B) does not require a quid pro quo *scienter* element. *See* Pet.App.40a-41a (The courts "do not lightly overturn circuit precedent").

The Circuit Court explained its reasoning in finding a *bare* "gratuity" crime in § 666(a)(1)(B) by analogizing § 666(a)(1)(B) to the bribery statute 18 U.S.C. § 201. That criminal law does not – as § 666(a)(1)(B) also does not – ever use the word "gratuity." But, because the Supreme Court in *Sun-Diamond* nevertheless found that the pertinent

subsection of that statute, § 201(c)(1)(A), contains a *gratuity* offense even in the absence of that word, the Circuit Court determined that the same should also be true of § 666(a)(1)(B). Pet. App.38a n. 6,39a.

In *Sun-Diamond*, the precise illegal gratuity statute in question was § 201(c)(1)(A), dealing there with the offeror rather than the recipient, and that criminalizes this:

> (c) Whoever—(1) otherwise than as provided by law for the proper discharge of official duty—(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official[.]

This full text, and especially what is *not* in the text as explained below, shows that the Circuit Court's analogy of § 666(a)(1)(B) to § 201(c)(1)(A) is a flawed, one-way street. The court failed to recognize the crucial *differences* between § 201(c)(1)(A)'s "gratuity" section and § 666(a)(1)(B) which it and the Majority Circuits have treated like a Section 201 non-bribery gratuity crime. Actually, the text of § 666(a)(1)(B) is much closer to the bribery text of § 201(b)(1) (dealing with the recipient, rather than the payor) which *Sun-Diamond* described as *requiring* quid pro quo.

The bribery language of § 201(b)(1) as to the recipient, closely tracking the language of § 201(b)(2) which relates to the bribery payor, is explained this way:

> The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was *corruptly* given, offered, or promised to a public official (as to the giver) or *corruptly* demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with *intent*, *inter alia,* "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient).

Sun-Diamond Growers of Cal., 526 U.S. at 404 (emphasis added). Further, the bribery statute, §§ 201(b)(1) (payor) and (b)(2) (recipient public official) requires proof of a quid pro quo agreement, as distinguished from a pure gratuity:

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo- a* specific intent to give or receive

> something of value *in exchange* for an official act.

Sun-Diamond, 526 U.S. at 404-05 (emphasis in original).

With this statutory background, there are, first, several textual *distinctions* that the Court of Appeals failed to recognize.

Section 201(c)(1)(A) (applied as to gratuity payors in *Sun-Diamond* and analogized to § 666 by the Seventh Circuit) makes *no reference* to conduct that must be done "corruptly," yet § 666(a)(1)(B), the criminal statute in this case, does.

Also, the gratuity crime in § 201(c)(1)(A) *does not* require any intent to "influence" official action or to be influenced in one's official duties, and yet § 666(a)(1)(B) does.

These same distinctions are also present in the parallel language in § 201(c)(1)(B) which relates to public official *recipients* of gratuities.

Next, are the textual *similarities* between § 666(a)(1)(B) in this case and the quid pro quo bribery crimes in § 201.

As we have noted, the *Sun-Diamond* opinion examined the structure of § 201 and found that it creates two "separate crimes," or two pairs of separate crimes if we take into account both payors and recipients; one type are the bribery crimes, and the other, what we have described as *bare* gratuity crimes, do not require quid pro quo. *Sun-Diamond*, 526 U.S. at 404.

That bribery crime in § 201(b)(2), a text that in its language looks remarkably like a sibling to § 666(a)(1)(B) rather than a stranger, requires proof of quid pro quo as *Sun-Diamond* explains: "for bribery there must be a *quid pro quo* -- a specific intent to give or receive something of value *in exchange* for an official act." 526 U.S at 404-05.

Yet, § 666(a)(1)(B), with all its textual trappings of a § 201-type bribery offense requiring quid pro quo, has been stripped down by the Majority Circuits to a bare "gratuity" crime requiring no specific "corrupt[]" scienter element.

The result is the rejection of the axiom about the need to protect law abiders from the jaws of criminal law, even if they are recklessly unsuspecting or negligent in their dealings, and even if it means occasionally freeing the guilty. The reasoning of the Majority Circuits has removed the intricate protections that were obviously embedded in the text of § 666(a)(1)(B) and that strongly suggest a bribery type quid pro quo. We urge this Court to take up this case to restore those protections.

CONCLUSION

Amicus respectfully requests that this Court grant review.

Respectfully submitted,

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