No. 23-108

In the Supreme Court of the United States

JAMES E. SNYDER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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The government barely disputes that this case warrants certiorari. The government (at 8, 18-19) concedes that the circuits "disagree[]" 5-2 on whether the most-prosecuted federal public-corruption statute, 18 U.S.C. § 666, extends beyond quid pro quo bribery to cover gratuities. Amici confirm that the question presented "impacts tens of millions of government employees and private citizens" due to section 666's "breathtaking scope." NACDL Br. 2, 4. Whether someone goes to prison should not depend "on where they live." ACLJ Br. 4.

The government (at 8) demurs that it is "unclear" whether the question presented is frequently outcome-determinative because the government believes it could

prosecute many gratuity cases on a bribery theory. But if the government thinks it can win under a bribery theory, prosecutors would presumably try to prove that to a jury. The gratuity theory makes conviction much easier, freeing the government from having to prove a corrupt quid pro quo. The government's speculation about its conviction rate in a bribery-only world is no reason to leave a circuit split unresolved when ten-year prison terms hang in the balance.

The government (at 20) speculates that Mayor Snyder "[]likely" could have been convicted on a bribery theory alone. But that is not how the government tried this case; instead, prosecutors repeatedly disavowed any burden to prove quid pro quo bribery. Pet. 9. The Seventh Circuit thus affirmed Mayor Snyder's conviction exclusively on a gratuity theory. Pet.App.38a-41a. Even on that theory, the trial judge thought the government's case was "anything but" a "slam dunk." 10/13/2021 Tr. 173:8-9, Dkt. 586.

The government devotes most of its brief to the merits. But when the circuits are concededly split 5-2 over the substantive reach of the federal government's most-prosecuted public-corruption statute, this Court should resolve the merits by granting review.

I. The Question Presented Is Important and Squarely Presented

Section 666's "breathtakingly broad" sweep covers 19.2 million state- and local-government employees, countless constituents, and private entities that accept federal funds. NACDL Br. 5-7. The 5-2 circuit split means federal public-corruption convictions "depend[] on mere geography"—"an intolerable situation" that cries out for this Court's review. ACLJ Br. 2; Pet. 19-22.

1. The government does not dispute the split or section 666's sweep. The government (at 19) merely calls it "far from clear" whether the bribes v. gratuities issue "is outcome-determinative in a significant number of cases," asserting that it could have proven bribery in many previous gratuity cases. But the government often proceeds on the gratuity theory alone[1] or presses both theories, leaving the basis for the jury's verdict uncertain.[2]

The government's frequent use of the gratuity theory is unsurprising. Gratuity prosecutions are much easier, relieving the government from having to prove a corrupt agreement. As this case illustrates, the government can win guilty verdicts simply by identifying a payment from a constituent to an official allegedly linked to past action, without presenting any evidence that the payment altered the official's conduct. BIO 2-3.

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[1] *E.g.*, *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007) ("Zimmerman was indicted for, convicted of, and sentenced for accepting gratuities rather than bribes."); *United States v. Freeman*, 443 F. App'x 664, 665 (2d Cir. 2011) ("Freeman pled guilty to … accepting illegal gratuities."); Clarification Order 2, *United States v. Hollingsworth*, No. 1:19-cr-333 (S.D.N.Y. June 28, 2021), Dkt. 64 ("Hollingsworth's offense conduct was not accepting a bribe but, rather, accepting a gratuity."); Plea Agreement 2, *United States v. Toole*, No. 3:10-cr-317 (M.D. Pa. Oct. 7, 2010), Dkt. 52 ("accepting a gratuitous reward"); Judgment 1, *United States v. Impastato*, No. 2:05-cr-325 (E.D. La. May 13, 2009), Dkt. 243 ("Unlawfully soliciting gratuities").

[2] *E.g.*, *United States v. Hawkins*, 777 F.3d 880, 881 (7th Cir. 2015) ("[T]he payments were, if not bribes, then gratuities … [Defendants] are guilty either way."); *United States v. Ng*, 934 F.3d 110, 121 n.13 (2d Cir. 2019) ("Ng was prosecuted under § 666 on both bribery and gratuity theories."); *United States v. Bahel*, 662 F.3d 610, 637 (2d Cir. 2011) ("[T]he jury convicted Bahel under Section 666 at least on the ground that he accepted illegal gratuities."); *see* Pet. 20 n.4.

That low bar pressures countless defendants to plead guilty—the way the government obtains 97% of its convictions. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012). Knowing the uphill battle ahead, many defendants prefer a plea deal to the increased penalty they risk after trial. If the government did not think the gratuity issue mattered, the government would not routinely seek convictions on this basis.

2. The government (at 20-21) deems it "unclear" whether any error was harmless here because the government purportedly could have convicted Mayor Snyder on a bribery theory. But the salient point is that a win on the question presented requires vacating the judgment below, making this case a clean vehicle. Following its "usual practice," this Court determines the "[]correct understanding" of a federal criminal statute and leaves "any harmlessness questions for the courts to address on remand." *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022); *Maslenjak v. United States*, 582 U.S. 335, 352-53 (2017). The government (at 20) says that the Seventh Circuit found sufficient evidence of bribery. But that court affirmed exclusively based on its "precedents holding that 18 U.S.C. § 666 applies to gratuities" without reaching the government's harmless-error argument. Pet.App.41a. Holding that section 666 does not cover gratuities would therefore require vacatur.

Regardless, the error here was not harmless. The government's newfound confidence that it could prove bribery flies in the face of the district court's observation at sentencing that "[w]e really don't know" whether the jury would have convicted on bribery alone. 10/13/2021 Tr. 111:21-22. Were more needed, the government disclaimed any obligation to prove a quid pro quo at trial and urged the jury to convict on a gratuity theory. Pet. 9, 11, 22. And

the government offered no evidence of any quid pro quo at trial, instead invoking supposed "irregularities" in the bid process. BIO 2-3; *but see* ACLJ Br. 17-18 (explaining why these procedures were hardly irregular for small-town contracting).

The government (at 6, 20) notes that the jury instructions tracked section 666's text. But as the Fifth Circuit recognized in vacating a section 666 gratuity conviction, such a "statute-tracking instruction" does not suffice because "lay jurors" may be unsure whether gratuities are covered. *United States v. Hamilton*, 46 F.4th 389, 398-99 (5th Cir. 2022). That is particularly so where, as here, "the government proceeded on a gratuity theory and now says that it could have won either way." *Id.* at 399. Because the jury "may have convicted" on an impermissible theory, Mayor Snyder's conviction should be vacated. *See McDonnell v. United States*, 579 U.S. 550, 579-80 (2016).

3. The government (at 21) strangely claims that Mayor Snyder forfeited statutory-interpretation arguments not pressed below. By that standard, the government would have forfeited its new structural and historical arguments (at 10-14), which appear nowhere in its appellate brief. *See* U.S. C.A. Br. 54-65. Parties forfeit "claim[s]," not "argument[s]." *Hemphill v. New York*, 142 S. Ct. 681, 689 (2022). Mayor Snyder repeatedly preserved his claim that section 666 does not cover gratuities. Pet. 9. He was not required to advance every interpretive point on a question circuit precedent foreclosed.[3]

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[3] The government (at 7) notes the district court's finding that Mayor Snyder "forfeited a posttrial claim about the jury instructions." Pet.App.68a. That finding applied only to the posttrial motion, not the instructional objection; Mayor Snyder clearly preserved the latter, as the court acknowledged. Def.'s Proposed Instructions 8, Dkt. 458; 3/18/2021 Tr. 2033:21-22, Dkt. 596 ("I'm overruling it. So you've got

4. The government (at 9 & n.2) asserts that this Court has previously denied five petitions raising the question presented or "related issues." One pre-dates the circuit split. *McNair v. United States*, 562 U.S. 1270 (2011) (No. 10-533). The other petitions stretch the meaning of "related," covering questions like whether section 666 requires an "official act,"[4] and whether section 666 requires a quid pro quo as applied to "campaign contribution[s]"[5] or "issue-advocacy payments."[6] Previous denials on distinct issues do not counsel denial here.

II. Section 666 Does Not Criminalize Gratuities

The government tellingly devotes 75% of its opposition to the merits. Those arguments, of course, do not dispel the urgency of resolving an intolerable, oft-recurring circuit split that criminalizes conduct in some jurisdictions but not others. If anything, the government's mini-merits brief underscores that this issue is ripe for resolution.

1. The government is incorrect that section 666 criminalizes gratuities. By requiring "corrupt[]" payments, section 666 signals its application to bribes alone. Pet. 23; ACLJ Br. 15-20. The government (at 14-15) claims that gratuities are "corrupt[]" but never explains why they are "wrongful, immoral, depraved, or evil." The district court's instruction—which the government presumably

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your record."); *see* Fed. R. Crim. P. 30(d). The Seventh Circuit squarely ruled on the jury-instruction issue. Pet.App.41a.

[4] Pet. i, *Jackson v. United States*, 583 U.S. 1054 (2018) (No. 17-448); *United States v. Garrido*, 713 F.3d 985, 999-1001 (9th Cir. 2013), *cert. denied sub nom.*, *Robles v. United States*, 571 U.S. 1222 (2014) (No. 13-8099).

[5] Pet. i, *Robles v. United States*, 140 S. Ct. 2761 (2020) (No. 19-912).

[6] Pet. i, *Roberson v. United States*, 142 S. Ct. 1109 (2022) (No. 21-605).

thinks matches that definition—defined "corruptly" as "act[ing] with the understanding that something of value is to be offered or given to reward or influence [the defendant] in connection with his official duties." Jury Instructions 18, Dkt. 505.

In other words, the jury was told that someone acts "corruptly" when they know the payment is a "reward" for "official duties." But that definition adds nothing to the statute's requirement that the defendant "intend[] to be … rewarded." 18 U.S.C. § 666(a)(1)(B). That definition also captures campaign contributions that intentionally reward official acts—a result the government (at 18) disclaims. Amicus offers other examples that fit this definition but cannot possibly be federal crimes, like donating to a politician's favorite charity. NACDL Br. 9-10. Only petitioner's reading gives the "corruptly" requirement teeth.

Moreover, section 666 mirrors the federal-official *bribery* statute, 18 U.S.C. § 201(b), not the *gratuity* statute, *id.* § 201(c). Pet. 23-24; ACLJ Br. 24-27. The government (at 12-14) tries to spin this point in its favor, noting that a short-lived predecessor of section 666 more closely paralleled the gratuity statute. Citing omnibus legislative history, the government (at 13) insists that Congress' overhaul of section 666 two years later to track the federal-official bribery statute was merely "technical." The government thus reasons that the current text must also cover gratuities. That theory defies this Court's presumption that legislative amendments "have real and substantial effect." *Van Buren v. United States*, 141 S. Ct. 1648, 1660 (2021) (citation omitted). Congress' *deletion* of the government's "textual hook" does not prove the government right. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 81 (2023).

The government's reading also produces the bizarre anomaly that state and local officials would face up to ten years for gratuities, while federal officials would face only two years. Pet. 24; NACDL Br. 13-14. The government's only response (at 15) is that section 666's short-lived predecessor had the same problem. But Congress' enactment and swift repeal of an anomalous sentencing regime in the mid-1980s does not counsel reading that same anomaly into today's differently worded statute.

2. Reading section 666 to cover gratuities also raises significant federalism, First Amendment, vagueness, and lenity concerns. Pet. 25-28; ACLJ Br. 6-7, 20-23; NACDL Br. 10-13. The government (at 15-16) deems these canons irrelevant because section 666 is purportedly "unambiguous" and this Court has rebuffed other federalism and lenity objections to "unambiguous" aspects of section 666. *Salinas v. United States*, 522 U.S. 52, 60 (1997). But section 666 is best read *not* to criminalize gratuities, much less to unambiguously criminalize gratuities. Pet. 23-25.

Beyond that categorical response, the government does not engage with vagueness or lenity concerns. On federalism, the government (at 16) asserts "a strong interest" in ensuring that federal funds are "not frittered away in graft." But gratuity prosecutions hardly further that goal. By definition, a gratuity involves no frittering—the official receives the gratuity after the fact. Here, the government did not even allege that Portage's garbage trucks are federally funded, making the federal interest especially dubious.

On the First Amendment, the government disclaims criminalizing political speech, suggesting (at 18) that "legitimate campaign contributions" would not meet section 666's "corruptly" element. But, the government's defini-

tion of "corruptly" seemingly encompasses every contribution where the official knew the contribution was intended to reward official action. *Supra* pp. 6-7. Many "legitimate" donations prompted by official acts (signing bills, announcing new policies, fulfilling campaign promises) would risk federal liability. Pet. 26-27. Even if the government's reading did not extend that far, the "sweeping, standardless breadth" of the government's interpretation would risk a "corrosive," "chilling effect on political activity," triggering constitutional-avoidance concerns. ACLJ Br. 2; NACDL Br. 9, 12.

The government (at 18) hints at an as-applied fix whereby section 666 would apparently apply more narrowly to campaign contributions. But this Court ordinarily reads statutes "consistently" across contexts. *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004). The serious First Amendment problems with applying section 666 to gratuities counsel against that reading across the board.

The meager "limitations" the government (at 17-18) accepts on section 666 underscore the staggering breadth of conduct the government would criminalize. The government notes that the entity must accept "significant" federal benefits, *i.e.*, $10,000. 18 U.S.C. § 666(b). But federal largesse means that virtually every state, local, and tribal government meets that threshold, alongside legions of businesses, schools, and nonprofits. Pet. 20-21; NACDL Br. 5-8. The government notes that the act must be "corrupt[]." But the government's definition—which encompasses merely "understanding" that a payment is a reward—drains that word of meaning. Jury Instructions 18, Dkt. 505; *supra* pp. 6-7. The government notes that the payment must be connected to official business involving at least $5,000. But even minor functions, like buying a garbage truck, clear that low bar. And the government

notes that section 666 does not encompass bona fide compensation. 18 U.S.C. § 666(c). But countless gifts or donations qualify.

Disturbingly, those non-limitations would jeopardize amicus' hypothetical little-league coach who gives city parks employees baseball hats in thanks for opening a baseball field. NACDL Br. 10. The city received $10,000-plus in federal funding. The coach acted "corruptly" under the government's definition, *i.e.*, "understanding" that he was "reward[ing]" the employees for "official duties." Jury Instructions 18, Dkt. 505. The baseball field cost over $5,000. And the hats are not compensation. If passing out little-league-baseball hats risks 10 years in federal prison, something is deeply awry.

3. The government's contrary reading (at 9-10) focuses on section 666's "intending to be … rewarded" language, which the government says "comfortably" covers gratuities. 18 U.S.C. § 666(a)(1)(B). The government likewise notes that this Court, 13 years after section 666's enactment in current form, described a gratuity for federal officials as "a reward" for an official act. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999). Congress in 1986, the government reasons, must have meant the same thing.

Had Congress wanted to track the federal-official gratuity statute, the more natural approach would have been to copy that statute's language—as the original version of section 666 did. *Supra* p. 7. Instead, "rewarded" clarifies that the bribe can be promised before the official action but paid after—*e.g.*, "if you vote yes, then I will pay you." Pet. 24-25; ACLJ Br. 8-9.

The government (at 14) claims petitioner's reading leaves "rewarded" superfluous because section 666 already covers "agree[ing] to accept" payment "intending to be influenced." But that language alone would have left uncertain whether the defendant was truly "influenced" if the payment came later or if the defendant intended to take the act regardless. The use of "rewarded" confirms that after-the-fact payments are covered. Regardless, superfluity arguments carry little purchase when the party offering them advances a reading that "would create its own redundancy problem." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). And here, the government's interpretation leaves "corruptly" meaningless. ACLJ Br. 17; *supra* pp. 6-7.

The government (at 10) invokes section 666(c), which provides that section 666 "does not apply to bona fide salary, wages, fees, or other compensation." The government (at 10) claims that compensation is "far more likely to be mistaken for a gratuity" than a bribe, so section 666 must cover gratuities. Where the government gets that factual hypothesis is unclear. Compensation could easily be mistaken for a bribe. Take amicus' hypothetical small-town insurance broker who is on the city council. NACDL Br. 9. Suppose a real-estate developer pays the councilwoman a broker's fee on a massive insurance policy the week before the councilwoman approves a key zoning ordinance that benefits the developer's business. Section 666(c) confirms that the councilwoman cannot be prosecuted for that fee so long as the payment was "in the usual course of business."

The government (at 10-12) asserts that gratuities have long been criminal, implying that Congress must have made the same choice in section 666. But the government's historical examples include such gems as a 1789

customs act that covered bribes and rewards "for conniving … at a false entry," 1 Stat. 29, 46-47 (cited at BIO 11 n.3), language that seemingly *did* require an advance agreement, *i.e.*, a quid pro quo. Other examples, like the federal-official gratuity statute, 18 U.S.C. § 201(c) (cited at BIO 11-12), do cover gratuities. But those examples show that Congress knew how to criminalize gratuities and chose differently in section 666. *Supra* p. 7; Pet. 23-24.

In any event, the place to resolve the government's merits arguments is on the merits. This Court should grant certiorari to resolve this cleanly presented, recurring, and critical question on which the circuits are undeniably split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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