No. 23-108

In the Supreme Court of the United States

JAMES E. SNYDER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

18 U.S.C. § 666(a)(1)(B) makes it a federal crime for "an agent" of any state, local, or tribal government or private organization receiving at least $10,000 in federal funds to "corruptly solicit[] or demand[] … or accept[] or agree to accept[] anything of value from any person, intending to be influenced or rewarded in connection with any business" of the federally funded entity "involving any thing of value of $5,000 or more."

The question presented is:

Whether section 666 criminalizes gratuities, *i.e.*, payments in recognition of actions the official has already taken or committed to take, without any quid pro quo agreement to take those actions.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion (Pet.App.3a-45a) is reported at 71 F.4th 555. The court of appeals' order denying rehearing en banc (Pet.App.1a-2a) is unreported. The district court's order denying the motion for acquittal (Pet.App.53a-69a) is unreported.

JURISDICTION

The court of appeals entered judgment on June 15, 2023, and denied rehearing en banc on July 14, 2023. Pet.App.1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 666(a)(1)(B) provides:

Whoever … 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 any thing of value of $5,000 or more … shall be fined under this title, imprisoned not more than 10 years, or both.

Other pertinent provisions are reproduced *infra*, App.1a-10a.

STATEMENT

America's 19.2 million state and local officials serve their constituents. In turn, millions of constituents routinely express their thanks in ways large and small. A crime victim's family brings the officers on the case doughnuts and coffee in gratitude for their around-the-clock efforts to arrest the perpetrator. In recognition of a town's success stopping traffic accidents, the local car-insurance company treats town workers to a baseball night in the company's box. Grateful foster parents donate to a beloved social worker's GoFundMe page to help pay the costs of her daughter's operation.

Universities bestow governors and mayors with honorary degrees in recognition of successful initiatives to expand access to education; private groups pay speaking fees to have these officials tout in-office accomplishments. Police officers solicit donations to defray legal fees in section 1983 suits arising from their official conduct. Parents band together to give kindergarten teachers gift cards as

thanks for teaching their children to read. Every campaign contribution to any state or local incumbent, from $1 to infinity, expresses thanks for official conduct thus far.

States and localities have taken all kinds of approaches to decide if and when these gifts cross ethical boundaries. Some leave it to officials' discretion; others set limits; a few bar all gifts entirely.

Yet, under the government's interpretation of 18 U.S.C. § 666, every such act of gratitude is a potential federal crime, subjecting both the official and constituent to up to ten years' imprisonment. Section 666(a)(1)(B) makes it a crime for any state, local, or tribal official to "corruptly … accept[] … anything of value …, intending to be influenced or rewarded" for any official business worth at least $5,000. Section 666(a)(1)(B) further extends to anyone employed by the millions of private companies and nonprofits that accept at least $10,000 in federal funds. And section 666(a)(2) creates a reciprocal offense for anyone who "corruptly … offers … anything of value …, with intent to influence or reward" official business.

All agree that section 666 prohibits bribery, *i.e.*, corruptly offering or accepting money in a quid pro quo exchange for official conduct. But in the government's view, by adding "rewarded" to the phrase "intending to be influenced *or rewarded*," Congress also criminalized offering or accepting gratuities—payments or gifts for conduct the official has already taken or committed to take, without any quid pro quo. The government obtained a conviction below on the theory that merely *knowing* that a gift was meant as a reward for official conduct qualifies as acting "corruptly." Under that theory, it is irrelevant whether the gift is worth $1, $100, or $100,000; all that

matters is awareness that the gift is thanks for official conduct.

The government (BIO 14) now argues that "corruptly" refers to unspecified wrongfulness. But the government cannot defend a conviction on a new theory on which the jury was not instructed. And the government never says what separates innocuous from wrongful gratuities, let alone how ordinary citizens would have notice of that dividing line.

This Court has repeatedly rejected similarly sweeping and amorphous interpretations that would extend federal criminal law to commonplace conduct that States and localities ordinarily regulate. Congress did not plausibly upend the federal-state balance and impose potential ten-year prison terms on 19.2 million state and local officials, thousands of tribal officials, and millions of private employees for accepting gifts as thanks for on-the-job acts. It is even less conceivable that Congress subjected state, local, and tribal officials to such lengthy prison terms when the federal gratuities statute imposes a maximum two-year sentence on *federal* officials, whose ethics are extensively regulated by the federal Office of Government Ethics. Congress surely did not contemplate that federal prosecutors might treat every political contribution—a form of core First Amendment activity—as a potentially unlawful gratuity.

The far more natural reading of section 666 is simple: the provision criminalizes all forms of bribery. By prohibiting "corruptly … accept[ing] … anything of value …, intending to be influenced or rewarded" in official business, Congress employed all the hallmarks of a bribery statute. Bribery involves wrongfully and deliberately trading official conduct for money. Congress used "intending to be influenced or rewarded" to cover the

waterfront of inducements. Using "rewarded" makes clear that officials still engage in bribery if they take money in exchange for official conduct and claim they would have acted the same way regardless, or take money after the fact. Those officials "intend[] to be … rewarded" with money in exchange for taking some promised action.

Congress routinely uses similar language in other bribery statutes, and routinely uses dramatically different language when criminalizing gratuities. Congress famously does not hide elephants in mouseholes, and Congress did not camouflage a gratuities crime deep within a provision targeting bribery.

A. Statutory and Factual Background

1. Entitled "Theft or bribery concerning programs receiving federal funds," 18 U.S.C. § 666 is the government's most prosecuted public-corruption statute. *See* U.S. Dep't of Just., Bureau of Just. Stat., *Number of Defendants in Cases Filed: 18 U.S.C. § 666*, https://bjs.gov/fjsrc. Section 666 applies to state, local, and tribal governments and all other organizations that receive annual "benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). Section 666's theft provision makes it a felony punishable by up to 10 years' imprisonment for "agent[s]" of covered entities to "embezzle[], steal[], obtain[] by fraud, or otherwise without authority knowingly convert[]" over $5,000 of the entity's property. *Id.* § 666(a)(1)(A).

Relevant here, section 666 also makes it a felony punishable by 10 years' imprisonment for "agent[s]" of covered entities to "corruptly solicit or demand[,] … or accept[] … anything of value …, intending to be influenced or rewarded in connection with any business [or] transaction" "of such … organization [or] government" "involving any thing of value of $5,000 or more." *Id.* § 666(a)(1)(B).

Section 666 also reaches anyone who makes such a payment, *i.e.*, "corruptly giv[ing], offer[ing], or agree[ing] to give anything of value …, with intent to influence or reward" the agent of a covered entity. *Id.* § 666(a)(2).

2. This case arises from the federal government's decision to bring a section 666 prosecution under a gratuity theory, rather than bribery theory, of petitioner James Snyder, the former mayor of Portage, Indiana. Portage's citizens elected Mayor Snyder in November 2011 on a platform of improving garbage collection and helping local businesses recover after the 2008 recession.

Once in office, Mayor Snyder began fulfilling his campaign promise to automate Portage's trash collection. Pet.App.56a. He tasked the Assistant Superintendent of Streets and Sanitation, a longtime friend, with overseeing the public bidding process to secure more efficient, automatic, side-loading garbage trucks. Pet.App.4a, 27a, 101a. In 2013, after the Portage Board of Works reviewed bids, Portage awarded two contracts to Great Lakes Peterbilt, a local truck company owned by brothers Robert and Stephen Buha. Pet.App.27a. For the first contract, awarded in January 2013, Peterbilt was the only fully responsive bidder. Pet.App.28a.

Later in 2013, Mayor Snyder learned that Peterbilt had an unused truck that Peterbilt might sell the City at a discount. 3/16/2021 Tr. 1530:13-15, 1531:9-13, D. Ct. Dkt. 594. Mayor Snyder asked the City Attorney whether Portage could purchase the truck outright. *Id.* at 1475:13-16. The City Attorney responded that public bidding was required, so the Board of Works opened another round of bidding. Pet.App.28a. In December 2013, the Board awarded Peterbilt that truck contract too. Pet.App.28a. Though the contracts were for $1.125 million, Pet.App.27a, Peterbilt's profit was only $20,000 to $30,000 total, 2/11/2019 Tr. 46:14-19, D. Ct. Dkt. 372.

Indiana law does not forbid local officials from pursuing other employment. Portage pays its mayors just $62,000. As a father of four and owner of a mortgage company hit by the Great Recession, Mayor Snyder sought additional employment, especially since he was financially strapped and owed tax penalties to the IRS. Pet.App.56a; 3/9/2021 Tr. 162:5-7, D. Ct. Dkt. 589.

Mayor Snyder began offering outside consulting services. After both bids closed, he approached the Buhas to discuss services he might provide their company. Mayor Snyder maintains that Peterbilt hired him to perform health-insurance and technology consulting. Pet.App.61a. He initially sought $15,000 for his services, but Peterbilt negotiated for $13,000 for one year of consulting at $250 per week. 3/18/2021 Tr. 1931:8-19, D. Ct. Dkt. 596. In January 2014, Peterbilt paid Mayor Snyder $13,000 upfront. Pet.App.29a. The government disputes that the $13,000 was for consulting services and deems the payment a gratuity in recognition of Mayor Snyder's past conduct. But the government agrees that Mayor Snyder did not approach the Buhas until after Portage awarded the contracts. J.A.105.

In September 2013, the FBI began investigating Mayor Snyder. 1/24/2019 Tr. 85:1-3, D. Ct. Dkt. 337. By mid-2014, the investigation had become public and attracted significant media coverage. Nonetheless, in November 2015, Portage citizens reelected Mayor Snyder.

B. Procedural History

1. In November 2016, the federal government indicted Mayor Snyder in the Northern District of Indiana for two counts of violating 18 U.S.C. § 666(a)(1)(B) and one count of tax-obstruction under 26 U.S.C. § 7212(a). J.A.1-12. As relevant here, the indictment alleged that

Mayor Snyder "corruptly solicit[ed], demand[ed], accept[ed], and agree[d] to accept" a $13,000 payment from Peterbilt "intending to be influenced and rewarded" after Portage awarded Peterbilt the two contracts. J.A.3.

Separately, the indictment alleged that Mayor Snyder solicited bribes in connection with a towing contract; a jury later acquitted Mayor Snyder of that count. J.A.1-2; Pet.App.5a. Finally, the government charged him with obstructing IRS tax collection by omitting information on personal tax forms and routing payments through multiple bank accounts. Pet.App.18a-19a.

Initially, the U.S. Attorney's Office for the Northern District of Indiana handled the prosecution. But after Mayor Snyder's lawyer, Thomas L. Kirsch II, was confirmed as U.S. Attorney for that District (before eventually joining the U.S. Court of Appeals for the Seventh Circuit), the U.S. Attorney's Office for the Northern District of Illinois took over the prosecution. Pet.App.6a n.1.

2. Due to prosecutorial "irregularities" at his first trial, Pet.App.143a, Mayor Snyder was ultimately tried twice for the alleged gratuity from Peterbilt. At no point during either trial did the government proceed on the assumption that it needed to prove that Mayor Snyder agreed to accept $13,000 in a quid pro quo exchange for delivering contracts to Peterbilt.

a. Mayor Snyder's first trial proceeded in early 2019. Pre-trial, Mayor Snyder moved to dismiss the indictment to the extent it charged him with accepting a gratuity, arguing that "Section 666 does not apply to gratuities." Mot. to Dismiss 8, D. Ct. Dkt. 129. The government opposed, contending that "§ 666 forbids taking gratuities as well as bribes." U.S. Mot. to Dismiss Resp. 4, D. Ct. Dkt. 137 (citation omitted). The district court denied the motion,

holding that section 666 extends to gratuities. Pet.App.162a.

The jury convicted Mayor Snyder of violating section 666 based on the $13,000 payment from Peterbilt, but acquitted on the other section 666 count. Pet.App.4a-5a. The jury also convicted on the tax count. Pet.App.5a.

On Mayor Snyder's motion, the district court ordered a new trial on the section 666 count involving Peterbilt, citing "the cumulative effect of several irregularities on behalf of the government" that "pushed the envelope" too far. Pet.App.143a, 151a. The government "introduced several pieces of evidence that had not previously been provided to Mr. Snyder's attorneys" and used "too much" "second-hand testimony" from an FBI agent. Pet.App.144a. And the government "surprised" Mayor Snyder by refusing to call the Buhas—key witnesses who had "vehemently den[ied]" that their payment to Mayor Snyder had anything to do with the garbage-truck contracts. Pet.App.145a-146a. At trial, when Mayor Snyder attempted to call the Buhas, they invoked the Fifth Amendment and refused to testify. Pet.App.146a. In granting a new trial, the court criticized the government's apparent "gamesmanship" in "discourag[ing] the Buhas from testifying." Pet.App.145a n.8.

b. In March 2021, the government retried Mayor Snyder exclusively for the $13,000 payment from Peterbilt. Pet.App.5a. The government proceeded on two theories; neither required establishing a quid pro quo award of contracts in exchange for payment.

First, the government claimed that after Peterbilt won the garbage-truck contracts, Mayor Snyder approached the Buhas and told "them he needed money." J.A.105. In closing argument, the government characterized that request as "asking for a reward." J.A.105.

Second, the government argued that Peterbilt paid Mayor Snyder $13,000 because he was "a man of influence" with "lots of contacts." J.A.107. But the government never identified any later acts that Mayor Snyder purportedly took or contemplated for the Buhas' benefit. And the government disclaimed that the payment "was solicited or received by [Snyder] in exchange for Peterbilt being awarded contracts in *later* bid processes." U.S. Mots. in Limine Resp. 27, D. Ct. Dkt. 454. Indeed, the evidence showed that Peterbilt *lost* a bid after the $13,000 payment. 3/17/2021 Tr. 1701:10-17, D. Ct. Dkt. 595.

Mayor Snyder again argued that section 666 does not prohibit gratuities. He proposed a jury instruction that would have defined bribes, rewards, and gratuities to clarify that bribes and rewards require "prior agreement," unlike gratuities. J.A.18. The jury would have been instructed to acquit if it found "that Mr. Snyder solicited or accepted a 'gratuity.'" J.A.18.

The district court rejected the proposed instruction. 3/18/2021 Tr. 2033:17-22. Instead, the court instructed the jury that the government must prove that Mayor Snyder "solicited, demanded, accepted or agreed to accept a thing of value from another person," and that he "acted corruptly, with the intent to be influenced or rewarded in connection with [City] contracts." J.A.27. The instructions defined "corruptly" as "act[ing] with the understanding that something of value is to be offered or given to reward" the defendant "in connection with his official duties." J.A.28.

At the second trial, the government afforded the Buhas immunity from prosecution but did not call them as witnesses. D. Ct. Dkt. 497, 498. The defense called Robert Buha, who testified that Mayor Snyder approached the Buhas after the second contract to discuss the Mayor's

financial troubles and request money to repay a tax debt and holiday expenses. 3/18/2021 Tr. 1999:9-22. Buha testified that Peterbilt agreed to pay Mayor Snyder $13,000 for insurance and technology consulting—not for anything relating to Peterbilt's contracts. Pet.App.36a; 3/18/2021 Tr. 1931:13-19; 3/17/2021 Tr. 1894:1-7. Peterbilt's controller likewise testified that Buha consulted Mayor Snyder about the Affordable Care Act's impact on the business. J.A.49-50. An FBI agent testified that an email exchange between Mayor Snyder and Robert Buha showed that Snyder indeed put the Buhas in touch with business contacts. 3/16/2021 Tr. 1609:8-16; 1613:12-1614:2.

The second jury convicted Mayor Snyder. Pet.App.46a. But, as the district court later observed, the government's case was "anything but" a "slam dunk." 10/13/2021 Tr. 173:8-9, D. Ct. Dkt. 586. The court sentenced him to 21 months' imprisonment, followed by one year of supervised release, on the section 666 and tax counts. Pet.App.47a-48a. Mayor Snyder appealed.

3. The Seventh Circuit affirmed Mayor Snyder's conviction for receiving a gratuity based on its precedent holding "that § 666(a)(1)(B) 'forbids taking gratuities,'" not just bribes. Pet.App.39a (citation omitted). The court explained that bribery encompasses agreements to exchange something of value "for influence *in the future*." Pet.App.37a. By contrast, a gratuity is "a reward for actions the payee has already taken or is already committed to take." Pet.App.37a (citation omitted).

The court reasoned that the term "rewarded" "strong[ly] indicat[ed] that § 666 covers gratuities as well as bribes." Pet.App.40a. The court recognized it was "odd" that section 666 carries a ten-year statutory maximum for state and local officials, whereas gratuities to federal officials under 18 U.S.C. § 201(c) carry only a two-

year maximum. Pet.App.40a. But the court opined that section 666's requirement that officials "corruptly" accept gratuities mitigated that disparity. Pet.App.41a.

The Seventh Circuit denied rehearing en banc. Pet.App.1a-2a.

SUMMARY OF ARGUMENT

I. Section 666's text, structure, and history confirm that the statute does not criminalize gratuities.

A. By its text, section 666(a)(1)(B) criminalizes only bribery. The government agrees that "corruptly accepting anything of value intending to be influenced in connection with" official conduct covers only bribery. *See* BIO 10. But the government contends that the phrase "intending to be influenced *or rewarded*" also criminalizes gratuities.

That reading defies the text. "[I]ntending to be … rewarded" refers to payments exchanged for official conduct, *i.e.*, bribes. Common-law authorities and federal statutes routinely use "reward" to mean a bribe. The entire phrase "intending to be influenced or rewarded" ensures that section 666 captures officials who agreed on a quid pro quo payment but deny they were "influenced" by claiming that they would have taken the same action anyhow or that the money was paid after the act. Those officials intend to be rewarded with payment and agree to take official actions in exchange.

The government's construction of "intending to be … rewarded" creates significant superfluity. If "intending to be … rewarded" covers gratuities, Congress had no reason to also criminalize bribery in the same subsection, with the same ten-year-maximum penalty. All bribes can be recast as gratuities, because gratuities are a lesser-included offense that just requires showing that an official

accepted something of value in recognition of official conduct. Prosecutors would never have to prove a quid pro quo—the stringent distinguishing element of bribery—if easier-to-prove gratuities carry the same sentence.

Section 666's "corruptly" mens rea element further undercuts the notion that Congress criminalized gratuities. Bribery statutes routinely use "corruptly" to describe deliberately and wrongfully agreeing to a quid pro quo. Yet the jury instructions treated "corruptly" as a mere knowledge requirement, asking whether Mayor Snyder "underst[ood]" that the payment was a gratuity. J.A.28. That instruction drains "corruptly" of meaning, since "intending to be influenced or rewarded" already requires knowledge. By contrast, the government's brief in opposition defines "corruptly" as "wrongful, immoral, depraved, or evil." BIO 14 (citation omitted). That dramatic shift in defining the mens rea of a criminal statute alone requires reversal.

Further, section 666's title mentions only "[t]heft or bribery," tracking the statute's structure, which sets forth subsections covering those two offenses. Congress did not plausibly bury a separate gratuity offense deep within a subclause of the bribery provision.

B. Section 666 looks nothing like the many gratuity provisions in the U.S. Code. Congress typically criminalizes bribes and gratuities separately in distinct provisions with distinct language, as it did for federal officials in section 201. Gratuity-only provisions use vastly different language, omitting "corruptly … intending to be … rewarded" and instead prohibiting receiving a "gratuity," "compensation," or the like for official conduct.

Congress also typically punishes bribery far more harshly than gratuities, reflecting those crimes' relative

seriousness. For federal officials under section 201, bribes carry a fifteen-year maximum. But gratuities merely carry a two-year maximum, even though federal interests are at their zenith in regulating federal officials' ethics. Extensive Office of Government Ethics regulations also create numerous safe harbors for federal employees, including permission to accept anything worth $20 or less. Congress did not conceivably treat accepting gratuities as a relatively minor offense for federal officials, yet subject state, local, and tribal officials to a draconian, ten-year penalty for the same conduct.

C. Section 666's amendment history confirms that section 666 does not reach gratuities. As originally enacted in 1984, section 666 used the classic "for or because of" formulation that Congress used in section 201(c) to criminalize gratuities to federal officials. Congress' deletion of that language in 1986 shows that section 666 no longer criminalizes gratuities.

II. The sweeping breadth and constitutional ramifications of the government's reading underscore that Congress could not have possibly intended section 666 to criminalize gratuities.

A. Section 666 extends to tens of millions of Americans: every employee of virtually every state, local, or tribal government, every private organization accepting minimal federal funding, plus anyone who might give any of those people a gift. For all of them, the government's theory of section 666 turns all thank-you gifts into potential federal crimes. That massive but uncertain scope of criminal liability would create an implausibly far-reaching statute that raises serious due-process concerns.

B. Federalism concerns weigh strongly against the government's reading. Federal regulations let federal officials accept small gratuities. Many States and localities regulate their officials' acceptance of gratuities and outside employment. States and localities have made a wide range of choices, from permitting any gratuity to making some illegal. Under the government's reading, Congress inexplicably disrupted state and local governments traditional control over the core sovereign matter of their own officials' ethical duties.

Section 666's status as Spending Clause legislation makes it even less likely that Congress criminalized gifts. Spending Clause statutes must give federal-funding recipients clear notice of conditions. Section 666 does not clearly inform every federally funded entity that gratuities are off-limits. And, unlike theft or bribes, gratuities do not affect the integrity of federal funds.

C. Applying section 666 to gratuities risks chills core First Amendment-protected activity. Citizens donate to politicians to express approval of official conduct and encourage more of the same. Politicians accept those donations presumably knowing they are being thanked for their votes. Under the government's reading, all these contributions risk federal prosecution. The government (BIO 18) claims "legitimate campaign contributions" fall outside section 666. But the government's theory below was that *all* gratuities are criminal if the official knows that the payment is a gratuity.

D. If any doubt remains, lenity counsels against reading section 666 to create a gratuity offense.

ARGUMENT

I. Section 666(a)(1)(B) Criminalizes Bribery, Not Gratuities

Section 666(a)(1)(B) makes it a crime punishable by 10 years' imprisonment for any state, local, or tribal official—or employees of private organizations accepting federal funds—to "corruptly solicit[] or demand[] … or accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business" of the federally funded entity worth at least $5,000. By its text and structure, section 666(a)(1)(B) criminalizes only bribery, *i.e.*, a quid pro quo exchange of something of value for official conduct. Section 666(a)(1)(B) does not prohibit gratuities, *i.e.*, payments in appreciation for actions already taken or already committed to be taken, with no required connection to any quid pro quo exchange. Section 666 criminalizes corruptly inducing official conduct—not thank-you gifts in appreciation for official conduct.

A. Section 666's Text Does Not Criminalize Gratuities

Section 666(a)(1)(B) has all the hallmarks of a bribery offense, not a gratuity one.

1. Section 666 Uses "Rewarded" to Refer to a Bribe, Not a Gratuity

Section 666 uses traditional bribery language to criminalize trading official conduct for money. An "agent of an organization or … government" must "solicit[] or demand[]" or "accept[] or agree to accept[] anything of value" (the *quid*). That payment must be "in connection with any business, transaction, or series of transactions of such organization [or] government" (the *quo*). And the official must deliberately and wrongfully intend that exchange—he must "[c]orruptly … intend[] to be influenced or rewarded" for the conduct (the *pro*).

The government (BIO 10) agrees that "corruptly soliciting … anything of value," "intending to be influenced" in connection with official business is bribery, *i.e.*, a classic quid pro quo of taking money in exchange for official conduct. But, the government (BIO 10) says, Congress' inclusion of "rewarded" in "intending to be influenced or rewarded" expands section 666(a)(1)(B) to criminalize gratuities. The Seventh Circuit affirmed Mayor Snyder's conviction on that basis. Pet.App.40a.

Had Congress wanted to criminalize gratuities, making it a crime to "corruptly" accept a gift, "intending to be rewarded" would have been a strange way to do so. Congress could have just criminalized accepting anything of value in connection with official business. Or Congress could have used the far different formulations Congress normally employs to criminalize gratuities. *Infra* pp. 29-31. Making it a crime to corruptly accept a gift, intending to be gifted, is an unnatural way to create a separate gratuity offense within a single statutory phrase.

The far more natural reading of "intending to be … rewarded" is that it shares the same essential characteristic of its neighboring word "influenced" and refers to a public official's intent to trade official conduct for financial gain. To "influence" means "[t]o have power over; affect," or "[t]o cause a change in the … action." *American Heritage Dictionary* 660 (2d ed. 1985); *accord Random House Dictionary of the English Language* 980 (2d ed. 1987) ("affect; sway" or "to move or impel (a person) to some action"); *Black's Law Dictionary* 779 (6th ed. 1990) (same for noun).

Likewise, a "reward" is a "sum of money paid or taken for doing, or forbearing to do, some act." *Black's Law* 1322; *accord Random House* 1649 ("to recompense or requite … for service"). Someone spurred to find a pet by

the offer of a lost-dog reward "intend[s] to be … rewarded" when he reunites pet and owner. That conclusion "accords with the traditional meaning of the term 'reward' as something offered to induce another to act favorably on one's behalf." *United States v. Fernandez*, 722 F.3d 1, 23 (1st Cir. 2013) (quoting *United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998)).

Because bribery is a common-law crime, its common-law roots inform its contours. *See Perrin v. United States*, 444 U.S. 37, 42-43 (1979). Common-law treatises use "reward" to capture payments designed to induce official conduct, thereby corrupting public administration. As Blackstone explained, "[b]ribery … is when a judge, or other person concerned in the administration of justice, takes any undue *reward* to *influence* his behavior in his office." 4 William Blackstone, *Commentaries on the Laws of England* 139 (1769) (emphasis added).

Common-law cases likewise refer to "rewards" in classic bribery offenses to describe the inducement to exchange money for official conduct. A common-law bribery offense is "complete when an offer of reward is made to influence the vote or action of the official." *State v. Ellis*, 33 N.J.L. 102, 105 (N.J. Sup. Ct. 1868). "Bribery" at "common law" was "variously defined as taking or offering an '*undue reward*' or '*reward*' to influence official action." *Dickinson v. Van De Carr*, 87 A.D. 386, 389, (N.Y. App. Div. 1903) (collecting cases). Intending to be "rewarded" for accepting payments in connection with official business thus criminalizes intending to trade money for official conduct.

Congress' "record of statutory usage" further elucidates ordinary meaning. *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) (citation omitted); *accord Van Buren v. United States*, 141 S. Ct. 1648, 1655 & n.3 (2021). Early

American statutes used "reward" to signal quid pro quo exchanges. For instance, the Crimes Act of 1790 made it a crime to "give any bribe, present or reward … to obtain or procure the opinion, judgment or decree of any judge or judges of the United States." Ch. 9, § 21, 1 Stat. 112, 117. The "reward" is an inducement for official conduct, not an after-the-fact payment disconnected from any quid pro quo.

Modern-day federal statutes likewise treat "rewards" as the inducement to obtain official favors. For example, 18 U.S.C. § 600 makes it a crime to "promise[] any employment … to any person as consideration, favor, or *reward* for any political activity" (emphasis added). In the Executive Branch's longstanding view, "the only way § 600 might be violated … is if people were promised employment or special consideration for employment … as an enticement or reward for *future* political activity." *Effect of 18 U.S.C. § 600 on Proposal for Hiring Census Enumerators*, 4 Op. O.L.C. 454, 455 (1980) (emphasis added). Section 600 "cannot be read to prohibit rewards for past political activity," because "it conspicuously does not make it illegal simply to grant a benefit." *Id.*

Similarly, 33 U.S.C. § 447 criminalizes "giv[ing] any sum of money or other bribe, present, or reward" to harbor inspectors "with intent to influence such inspector[s] ... to permit or overlook violations" of harbor-management laws. And 13 U.S.C. § 211 criminalizes "receiv[ing] … any fee, reward, or compensation as a consideration" for appointing Department of Commerce employees. In all those bribery statutes, "rewards" are inducements to corrupt public administration. "[I]ntending to be … rewarded" naturally refers to intending to accept money inducements to perform official actions.

2. "Intending to Be Influenced or Rewarded" Work Together to Reach All Forms of Bribery

The government (BIO 10, 14) says that to avoid superfluity, "rewarded" must reach gratuities that do not induce official conduct, since "intending to be influenced" already covers quid pro quo bribes.

But "rewarded" does important work by covering the waterfront of bribery and removing any doubt that certain types of quid pro quo bribery are prohibited. "[I]ntending to be influenced" alone most naturally covers government officials who take money in exchange for some new action, like changing a vote. "Influenced" thus suggests that the official changed her position, leaving potential ambiguity as to whether officials who accept money in exchange for promising to take a certain act could perversely escape punishment by claiming they would have taken the same act anyway. "Rewarded" makes clear that section 666(a)(1)(B) reaches officials who supposedly would have acted the same way, and that section 666 prohibits all payments the official agreed to accept in exchange for official conduct. Officials who undertake official conduct "intending to be … rewarded" with payments for doing so thus violate the statute.

Further, "intending to be influenced" prohibits officials from accepting payments now in exchange for inducing official conduct later. But that phrase creates potential ambiguity as to whether requesting payment later contingent on delivering official acts now would count. "Rewarded" in section 666 thus "clarifies 'that a bribe can be promised before, but paid after, the official's action on the payor's behalf.'" *Fernandez*, 722 F.3d at 23 (quoting *Jennings*, 160 F.3d at 1015 n.3). An official is "rewarded" when he receives "a *promise* of payment …

contingent upon" future acts, *id.*, *e.g.*, "If you vote yes today, then I will pay you $10,000 tomorrow."

The government (BIO 14) claims that section 666 already covers after-the-fact payments as "agree[ments] to accept" money "intending to be influenced." But section 666 also extends to officials who "solicit[]" or "demand[]" payment. A state legislator who solicits or demands $10,000 payable once he votes yes on a bill has "corruptly solicit[ed] or demand[ed]" a reward—a quid pro quo bribe paid after the fact. But if the requested payor rebuffs the request, there is no "agree[ment] to accept." Only "corruptly solicit[ing] or demand[ing]" payment "intending to be … rewarded" clearly captures that fact pattern.

Anyway, section 666 is full of overlapping terms that reinforce the same meaning, suggesting that "intending to be influenced or rewarded" is deliberate "belt and suspenders" to cover all facets of bribery. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020). For instance, Congress criminalized theft in section 666(a)(1)(A) by punishing state, local, and tribal officials who "embezzle[], steal[], obtain[] by fraud, or otherwise without authority … convert[]" government property. Not only is embezzlement a form of stealing; Congress could have stopped with "steal[] … or otherwise without authority … convert[]" government property and accomplished the same thing. That "overlapping" formulation creates one crime, but layers together various "larceny-type offense[s]" to ensure that "guilty men" do not "escape" through statutory "gaps or crevices." *See Morissette v. United States*, 342 U.S. 246, 271 (1952) (construing similarly worded theft statute, 18 U.S.C. § 641).

Likewise, section 666(a)(1)(B)'s prohibition on "solicit[ing] or demand[ing] … anything of value" is bells and whistles—those who demand bribes necessarily solicit

them. The logical inference is that Congress also used "intending to be influenced or rewarded" to cover overlapping concepts of bribery—not to create disparate bribery and gratuity offenses.

Regardless, the government's reading creates far graver superfluity problems. Had Congress wanted to treat bribes and gratuities as equivalent offenses meriting equal penalties, Congress would have simply criminalized intentionally giving or receiving gratuities, relieving prosecutors of the extra burden of proving bribery. A gratuity-only prohibition includes bribery. Anyone who accepts money in *exchange* for official conduct (bribery) has also committed the lesser-included offense of accepting a gift in gratitude for official conduct, regardless of intent (a gratuity). *See United States v. Brewster*, 506 F.2d 62, 83 (D.C. Cir. 1974) (gratuities are "a lesser included offense within" bribery); U.S. Dep't of Just., Criminal Resource Manual § 834 (similar).

In the federal-official context, for example, bribery entails "corruptly" accepting money "in return for … being influenced in the performance of an official act." 18 U.S.C. § 201(b)(2)(A). By definition, however, that same official has also accepted money "for or because of any official act" and run afoul of the federal-official prohibition on gratuities. *Id.* § 201(c)(1)(B). The elements of bribery and gratuity track, except bribery carries a heightened mens rea requirement of "corruptly" exchanging money for official acts. *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999).

Under the government's view that Congress criminalized both bribery and gratuities in a single couplet ("intending to be influenced or rewarded"), "intending to be influenced" does no work. Rather than charging and proving quid pro quo bribery at trial, prosecutors could

obtain the same punishment under the same provision just by showing that a state, local, or tribal official accepted a gift in connection with official business. Prosecutors did just that here, repeatedly disclaiming any need to prove quid pro quo bribery under section 666. *Supra* pp. 8-10. If "intending to be influenced" is a superfluous element no prosecutor ever needs to prove, Congress' inclusion of that key language is inexplicable.

3. "Corruptly" Confirms that Section 666 Prohibits Only Bribery

Congress' use of "corruptly" as the relevant mental state reinforces that section 666 excludes gratuities. Because "corruptly" modifies both "intending to be influenced" and "intending to be … rewarded," "corruptly" must mean the same thing as applied to each verb. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). "[C]orruptly" accepting money, "intending to be influenced" in official conduct, confirms that public officials deliberately and wrongfully exchange money for official conduct. Ergo, "corruptly" accepting money, "intending to be rewarded" in official conduct, targets that same wrongful, deliberate exchange of official favor.

Unquestionably, "corruptly … intending to be influenced" requires at least the specific intent to exchange official conduct for money. *See* BIO 10. As a leading treatise explains, "[t]o constitute bribery, there must be a corrupt intent, *i.e.*, from the standpoint of the briber, an intent to influence official action, or, from the standpoint of the bribee, an intent to use his public office as a means of acquiring an unlawful benefit." 4 *Wharton's Criminal Law* § 680 (14th ed. 1981).

Countless cases involving countless bribery statutes define the relevant "corrupt intent" to mean that the official must "corruptly agree[] to receive [money] for the purpose of influencing his vote." *People v. Seeley*, 69 P. 693, 694 (Cal. 1902).[1] As numerous lower courts have held under the federal-official bribery statute, 18 U.S.C. § 201(b), "'corrupt' intent" is the "element of quid pro quo." *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978); *accord United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996); *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980). "[C]orruptly … intending to be … rewarded" requires the same intent as "corruptly … intending to be influenced" because Congress does not redefine words midstream.

Below, the government maintained that "corruptly" requires mere *knowledge* that something is given as thanks for official conduct. At the government's request, the district court instructed the jury that "corruptly" meant "act[ing] with the understanding that something of value is to be offered or given to reward" the defendant "in connection with his official duties." J.A.28; *see* U.S. Requested Jury Instructions 6, D. Ct. Dkt. 414. On appeal, the Seventh Circuit then circularly defined "corruptly" as "with the knowledge that giving or receiving the reward is forbidden." Pet.App.41a. That definition again leads with a knowledge requirement, and "forbidden" does no extra work; the only reason any payment would be forbidden is if section 666 already covers

[1] *Accord, e.g.*, *Commonwealth v. Lapham*, 31 N.E. 638, 639 (Mass. 1892) (Bribery indictment must "aver a corrupt intent[] so to influence [an official] in any matter … before him."); *People v. Johnston*, 43 N.W.2d 334, 342 (Mich. 1950) (similar); *State v. Milbrath*, 527 So. 2d 864, 865 (Fla. Dist. Ct. App. 1988) ("Corruptly" requires "a quid pro quo for receipt or expectation of receiving an illegal benefit.").

it. Moreover, when rejecting Mayor Snyder's sufficiency challenge, the Seventh Circuit held that "[a] public agent acts 'corruptly' when 'he understands that the payment given is a … gratuity.'" Pet.App.42a (citation omitted). That formulation tracks the jury instructions' focus on whether the defendant "underst[ood]" that he was accepting a gratuity.

The government's corruptly-means-knowledge theory reads either "corruptly" or "intending to be … rewarded" out of the statute. Someone who knowingly accepts a gratuity has also, on the government's view, accepted a gratuity "intending to be … rewarded." A defendant who "intend[s] to be … rewarded" will *always* "understand" that he has received a "reward."

The government's brief in opposition now defines "corruptly" as acting in a way that is "wrongful, immoral, depraved, or evil." BIO 14 (quoting *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005)). That definition conflicts with the government's previous theory of "corruptly," and the jury was never charged with finding that Mayor Snyder acted wrongfully, immorally, depravedly, or evilly. Accepting the government's new position would require vacating Mayor Snyder's conviction, because the government cannot offer "new theor[ies]" that "differ[] substantially from the jury instructions." *Percoco v. United States*, 598 U.S. 319, 332 (2023); *see Ciminelli v. United States*, 598 U.S. 306, 317 (2023).

Further, the government never explains what work "corruptly" does in differentiating permissible from impermissible gratuities. As noted, section 201(c) prohibits federal officials from accepting things of value "for or because of" official acts, but does not require accepting gifts "corruptly." The government never says what gratuities

would be forbidden under that provision, yet not rise to "corruptly" accepting gratuities under section 666.

4. Section 666's Title and Structure Reinforce the Absence of a Gratuity Offense

"To discern … ordinary meaning," statutes "must be read and interpreted in their context." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (cleaned up). One "useful clue" is the statute's title. *Dubin v. United States*, 599 U.S. 110, 121 (2023) (citation omitted). Section 666's title and broader structure refute the notion that Congress created a gratuities crime covering 19.2 million state and local officials, thousands of tribal officials, millions of employees of private organizations that receive federal funds, and anyone giving these people gifts.[2]

Section 666 is aptly titled "[t]heft or bribery concerning programs receiving Federal funds," with no mention of gratuities. First, section 666(a)(1)(A) criminalizes theft, barring covered officials from "embezzl[ing], steal[ing], obtain[ing] by fraud, or otherwise without authority knowingly convert[ing]" their employer's property worth over $5,000. Second, section 666(a)(1)(B) prohibits those officials from "corruptly solicit[ing] or demand[ing] … or accept[ing] or agree[ing] to accept[] anything of value …, intending to be influenced or rewarded" in government business worth over $5,000. Section 666(a)(2) then separately punishes those who "corruptly give[]" or "offer[]" the money to those officials "with intent to influence or reward" official conduct. Section 666(a) closes by prescribing that whoever steals or takes or gives bribes "shall be … imprisoned not more than 10 years."

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[2] *See* U.S. Census Bureau, *2022 Census of Governments: State & Local Government Employment Data* (June 13, 2023), http://tinyurl.com/stav3t37 (19.2 million full- or part-time state and local officials).

Congress thus structured section 666 to break out the theft and bribery offenses, then yoked these offenses together under a common ten-year statutory maximum, signaling that Congress viewed bribery on par with major, intentional thefts of property by officials entrusted with safeguarding it. After punctiliously delineating separate, comparably severe offenses, Congress did not plausibly "hide elephants in mouseholes" by inserting a gratuity offense by nestling the word "rewarded" within the bribery provisions. *See Sackett v. EPA*, 598 U.S. 651, 677 (2023) (citation omitted).

The government (BIO 10) presses a different structural point, pointing to section 666(c)'s safe harbor for "bona fide salary, wages, or other compensation paid … in the usual course of business." "Salary, wages, and the like," the government claims, "are far more likely to be mistaken for a gratuity than for a *quid pro quo* bribe," making section 666(c) extraneous "if section 666 did not apply to gratuities." BIO 10.

But bribes and gratuities are equally likely to be mistaken for compensation. Take a city councilmember who also works as a small-town insurance broker—a common occurrence given how many state and local officials have outside employment. Say a real-estate developer pays the councilwoman a broker's fee on a large insurance policy the week before the councilwoman approves a key zoning ordinance. That payment could easily be mistaken for a bribe in which the developer's fee buys the councilwoman's approval. Or imagine a departing legislator who accepts a signing bonus and new job with a trade group the same week he votes for a bill the group favors. Whether those payments are bona fide "compensation … in the usual course of business," 18 U.S.C. § 666(c), or quid pro quo bribes is critical in bribery prosecutions.

B. Section 666 Does Not Resemble Gratuity Statutes

The "sharp[] contrast[]" between section 666 and the many gratuity statutes scattered throughout the U.S. Code "cautions against" reading section 666 to cover gratuities. *See Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 384 (2013); *accord Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 514 (2018).

1. Congress Criminalizes Bribes and Gratuities Separately

When Congress wants to criminalize both bribes and gratuities, Congress separates the offenses and defines them using contrasting language. Highly relevant is section 201(c), the main prohibition on federal officials accepting gratuities. Congress made it a crime for any federal official to "demand[], seek[], receive[], accept[], or agree[] to receive anything of value … *for or because of* any official act." 18 U.S.C. § 201(c)(1)(B) (emphasis added). Section 201(b) then separately criminalized bribery by forbidding any federal official to "*corruptly* demand[], seek[], receive[], accept[], or agree[] to receive … anything of value … *in return for* … *being influenced* in the performance of any official act." *Id.* § 201(b)(2)(A) (emphasis added).

Plainly, Congress understood that gratuities and bribes are different offenses warranting different provisions with markedly different language. Gratuities are prohibitions on accepting gifts outside normal compensation, regardless of any effect on official acts. But the "distinguishing feature" that makes bribery a far more serious offense is the "intent element," which requires "a specific intent to give or receive something of value *in exchange* for an official act." *Sun-Diamond*, 526 U.S. at 404-

05. Section 666(a)(1)(B) tracks that classic bribery language, applying only to those who "corruptly … intend[] to be influenced or rewarded."

The Department of Justice agrees that section 201 "comprises two distinct offenses." U.S. Dep't of Just., Justice Manual § 9-85.101 (Jan. 2020). As the Department previously elaborated: "[T]he distinction between a bribe and a gratuity is that a bribe says 'please' and a gratuity says 'thank you.'" Criminal Resource Manual, *supra*, § 2044.

Articles 124a and 124b of the Uniform Code of Military Justice similarly differentiate gratuities and bribes. Congress barred military officials from accepting gratuities by making it a crime to "wrongfully … accept[] … a thing of value as compensation *for or in recognition of* services rendered … with respect to an official matter." 10 U.S.C. § 924b(a) (emphasis added). Congress then separately prohibited bribes by criminalizing "wrongfully … accept[ing] … a thing of value *with the intent* to have the person's decision or action *influenced* with respect to an official matter." *Id.* § 924a(a) (emphasis added). Had Congress wanted to criminalize both bribes and gratuities in section 666, the natural approach would have been to create different offenses in different subprovisions with different intent-based language for bribery.

2. Gratuity Prohibitions Are Limited to Federal Officials and Omit Specific-Intent Requirements

Congress has enacted nearly a dozen gratuity-only prohibitions. Nearly all are limited to federal officials, and exclude intent requirements like "corruptly" or "intending to be influenced or rewarded." Beyond section 201(c)'s general rule for federal officials, Congress has enacted specific gratuity provisions for, *e.g.*, bank

examiners, shipping inspectors, customs officials, and consular officers. 18 U.S.C. §§ 213, 1912; 19 U.S.C. § 60; 22 U.S.C. § 4202.[3]

For the Nation's three million federal employees covered by section 201(c) and other federal-employee gratuity statutes, Congress prescribed whether federal employees can accept anything beyond their federal paychecks. These gratuity prohibitions are prophylactic protections to avoid any appearance that federal officials receive private benefits for public acts—an area of uniquely federal concern.

For instance, Congress often simply criminalizes accepting "gratuities." Federal law punishes federal bank examiners who receive a "gratuity" from banks they examined. 18 U.S.C. § 213. Federal employees cannot "receive[] any gratuity … in consideration of assistance in the prosecution of" "any claim against the United States," for example, by receiving payment as an attorney in a case against the government. *Id.* § 205(a)(1); *accord* BIO 11 (citing 19th century antecedent, Act of Feb. 26, 1853, ch. 81, §§ 2, 3, 10 Stat. 170, 170). And federal law criminalizes "receiv[ing] a fee, other consideration, or gratuity on account of legal or other services" in connection with federal workers' compensation claims, without the Secretary of Labor's approval. 18 U.S.C. § 292.

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[3] 18 U.S.C. § 292 extends beyond federal officials, but similarly prohibits the receipt of impermissible private benefits for participating in a federal program. Section 292 makes it a misdemeanor for anyone to "receive[] a fee, other consideration, or gratuity" for representing someone in a federal worker's compensation case without the Secretary of Labor's approval. That provision enforces the requirement that attorneys in federal worker's compensation cases submit their fees for Department of Labor approval. 20 C.F.R. §§ 10.703, 10.704.

Other statutes criminalize gratuities using language similarly far afield from section 666. Federal shipping inspectors may not "receive any fee or reward … except what is allowed … by law" for "inspect[ing] … vessels." *Id.* § 1912. Consular officers may not "charge[] or receive[] any fee greater in amount than that provided by law." 22 U.S.C. § 4202. Customs officials may not "demand[] or receive[] any other or greater fee, compensation, or reward than is allowed by law." 19 U.S.C. § 60. In all those statutes, "reward" covers gratuities because context indicates that Congress meant to cover payments not specifically allowed "by law." By contrast, section 666 pairs the verb "rewarded" with classic bribery language referring to an intentional exchange of payments for official conduct.

Elsewhere, Congress criminalizes gratuities by barring outside "compensation" for federal officials' acts. Members of Congress cannot receive "any compensation for any representational services … rendered or to be rendered" in relation to official proceedings "otherwise than as provided by law." 18 U.S.C. § 203(a). That provision does not require any "intent to be corrupted or influenced" or "some identifiable official act as quid pro quo." *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978). Likewise, Executive Branch officials cannot receive outside "compensation" for official services. 18 U.S.C. § 209(a). That gratuity prohibition, too, does not require "a *quid pro quo*." *Crandon v. United States*, 494 U.S. 152, 159 (1990). Had Congress wanted to criminalize gratuities in section 666, Congress had ready models at hand—none of which resembles what Congress enacted in section 666.

3. Section 666(a)(1)(B)'s Penalties Track Bribery, Not Gratuity Statutes

Throughout the U.S. Code, Congress attached significantly lower penalties to gratuities than to bribes. That disparity reflects the "relative seriousness" of bribery versus gratuity offenses. *Sun-Diamond*, 526 U.S. at 405.

Members of Congress who accept unauthorized compensation and federal employees who accept gratuities for help prosecuting claims against the United States face no more than five years' imprisonment even when their conduct is "willful[]." 18 U.S.C. §§ 203, 205, 216. Two years is the maximum penalty for federal officials who accept anything of value "for or because" of official acts. *Id.* § 201(c). Other gratuity offenses carry a maximum one-year sentence. Federal bank examiners who accept "gratuit[ies]" from banks they examine can be sentenced at most to one year in prison. *Id.* § 213. Likewise, Congress prescribed a one-year maximum sentence for unauthorized practitioners in workers' compensation cases who accept "gratuit[ies] on account of [their] legal … services," *id.* § 292, and federal officials "accept[ing] … gift[s]" for cancelling farm debts, *id.* § 217.

By contrast, bribery offenses usually carry dramatically higher penalties. Federal officials who accept bribes in exchange for official acts face up to 15 years' imprisonment. *Id.* § 201(b). Officials who work at ports and "corruptly demand[] …. anything of value … in return for … being influenced in the performance of any official act" while "knowing that such influence will be used to commit … international or domestic terrorism" may also receive up to 15 years. *Id.* § 226(a). Anyone who "corruptly" offers any employee, agent, or attorney of any financial institution "anything of value," with "intent to influence or

reward" them "in connection with" the institution's business, faces up to a 30-year sentence and a $1,000,000 fine. *Id.* § 215(a). True, more arcane types of bribery (like bribing harbor inspectors) carry lesser penalties. *E.g.*, 33 U.S.C. § 447 (maximum one-year sentence). But when prohibiting bribery among federal officials en masse, Congress provided lengthy maximum sentences.

Reinforcing the incongruity of the government's reading, the criminal law generally treats bribes as far more serious than gratuities. The Model Penal Code describes public-official bribery as "a felony of the third degree," on par with negligent homicide, aggravated assault, or making terroristic threats. Model Penal Code §§ 210.4, 211.1, 211.3, 240.1 (1962). But the Code treats as a mere misdemeanor "compensation for past official action," defined as "solicit[ing]" or "accept[ing] … any pecuniary benefit as compensation for having, as a public servant," taken some official act "favorable to another." *Id.* § 240.3.

Against this backdrop, it would be bizarre for Congress to punish state, local, and tribal officials for bribes and gratuities as if the two were equally severe crimes warranting ten years' imprisonment. It especially "does not make sense" for federal officials—whose conduct Congress polices far more zealously—to face far *lesser*, two-year-maximum sentences for accepting gratuities. *United States v. Hamilton*, 46 F.4th 389, 397 (5th Cir. 2022); *accord Fernandez*, 722 F.3d at 24. Even the Seventh Circuit below found the difference "odd." Pet.App.40a. Congress did not conceivably single out state, local, and tribal officials for uniquely harsh, disparate treatment.

C. Section 666's Amendment History Undercuts the Government's Reading

Congress in 1984 enacted section 666 to "create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery." S. Rep. No. 98-225, at 369 (1983). But the original text swept more broadly to prohibit gratuities:

> Whoever, being an agent of an organization, or of a State or local government agency [receiving $10,000 in federal funds], solicits, demands, accepts, or agrees to accept anything of value … *for or because of* the recipient's [official] conduct … shall be imprisoned for not more than 10 years.

18 U.S.C. § 666(b) (Supp. II 1984) (emphasis added).

Congress copied that text nearly verbatim from section 201(c)'s prohibition on federal-official gratuities, using the same "for or because of" formulation that captures gratuities. But the original section 666 did not criminalize bribery as a separate offense involving a heightened mens rea. Congress thus punished any acceptance of money in recognition of official conduct—whether intended as a quid pro quo bribe or simply as a thank-you for past acts. *Supra* pp. 28-31.

But in 1986, Congress *deleted* the "for or because of" phrase that signified a gratuity offense. *See* Pub. L. No. 99-646, § 59, 100 Stat. 3592, 3612-13 (1986). Instead, Congress added section 666(a)(1)(B)'s operative language requiring officials to accept money "corruptly … intending to be influenced or rewarded" in connection with official conduct. Congress' deletion of "the strongest textual hook" for the government's gratuity theory confirms that the current text excludes gratuities. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 81 (2023).

The government (BIO 12) maintains the amended section 666 continues to criminalize gratuities, albeit in a less "particularly clear" way. In the government's telling, because a House Report described all the 1986 criminal-law amendments as "technical and minor," Congress intended significantly rewritten section 666 to mean the same thing as before. BIO 13 (citing H.R. Rep. No. 99-797, at 16 (1986)).

"But legislative history is not the law." *Epic Sys.*, 584 U.S. at 523. "Treating the amendments as nonsubstantive would be inconsistent with their text, not to mention [the government's] own view" that the amendments made substantive changes by adding the "corruptly" mens rea requirement and an entirely new section 666(c). *See Burgess v. United States*, 553 U.S. 124, 135 (2008); BIO 13.

The government also understates the extent of the overhaul. Congress restructured section 666; extended its coverage to Indian tribes; deleted the material phrase "for or because of"; added two key elements ("corruptly" and "intending to be influenced or rewarded"); lifted the cap on the maximum fine; defined the terms "state" and "in any one year period"; deleted the definition of "organization"; and added a safe harbor for bona fide compensation in section 666(c). Removing the statute's application to gratuities was part and parcel of that transformation.

II. The Government's Reading Creates Implausible Overreach and Constitutional Problems

Reading section 666 to extend to gratuities would risk criminal liability for tens of millions of state, local, and tribal officials and untold millions of employees of federally funded private institutions who accept gifts of any

value to thank them for their services. And because section 666(a)(2) states a criminal offense for the *giver* of such gifts, the government's interpretation would cover tens of millions more Americans. Congress could not have contemplated such sweeping and constitutionally offensive results.

A. The Government's Reading Assumes Congress Subjected Millions of Americans to Uncertain Criminal Liability

1. "[T]he staggering breadth of the Government's reading" is reason enough to reject it. *Dubin*, 599 U.S. at 129. "Time and again, this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes," both to respect Congress' role in defining crimes and to afford "fair warning" of what conduct risks imprisonment. *Id.* at 129-30 (citation omitted). This Court thus demands "clarity" before assuming that Congress enacted a criminal law with "far reaching consequences." *Id.* (citation omitted); *accord Van Buren*, 141 S. Ct. at 1661.

Yet reading section 666 to cover gratuities would give federal prosecutors license to indict gift-giving involving some 19.2 million state and local officials, thousands of tribal officials, and untold millions of employees whose private employers accepted at least $10,000 of federal funds. *See* 18 U.S.C. § 666(b). Virtually no state, local, or tribal government accepts less than $10,000 in federal grants, contracts, or other federal aid. Justin Weitz, Note, *The Devil Is in the Details: 18 U.S.C. § 666 After* Skilling v. United States, 14 N.Y.U. J. Legis. & Pub. Pol'y 805, 816 (2011). And this Court has held that section 666 applies to every entity accepting Medicare, *i.e.*, 98% of all hospitals, doctor's offices, rehabilitation centers, nursing homes, and home health-care agencies in America.

Fischer v. United States, 529 U.S. 667, 669 (2000); *see* CMS, *About Medicare Participation for Calendar Year 2024*, http://tinyurl.com/85fn7wjw.

An extraordinary range of other private industries, from aerospace to auto manufacturers, receive far more than $10,000 per company in federal subsidies; much of the Fortune 500 would qualify. *See Subsidy Tracker Top 100 Parent Companies*, Good Jobs First (2022), http://tinyurl.com/5d4yn36t. During the pandemic alone, *5.2 million* businesses employing tens of millions of workers obtained federal Paycheck Protection Program (PPP) funds for average amounts exceeding $10,000, including TGI Fridays, Marriott, McDonald's, Ford, plus countless daycares, construction companies, and small businesses.[4]

For these many millions of Americans—plus the millions more who might offer a gratuity—the only thing standing between commonplace acts and a criminal trial risking a ten-year sentence is individual prosecutors' unbounded discretion. In the government's view, the giver of the gratuity can offer "*anything* of value," whether the gratuity is worth $1, $100, $1,000, or $100,000. *See Fernandez*, 722 F.3d at 12-13 (cataloguing government's success pressing this position).

While the value of the official or private business or transaction(s) for which someone accepts a gratuity must exceed $5,000, 18 U.S.C. § 666(a)(1)(B), that dollar amount covers most government services. Take a trash collector working for the City of Chicago. Chicago accepts all kinds of federal funds, and spends far more than $5,000

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[4] Stacy Cowley & Ella Koeze, *1 Percent of P.P.P. Borrowers Got Over One-Quarter of the Loan Money*, N.Y. Times (Dec. 2, 2020), http://tinyurl.com/bdmj6dta; *Paycheck Protection Program (PPP)*, Pandemic Oversight (Nov. 14, 2023), http://tinyurl.com/yrzmhdy8.

to operate a garbage route. On the government's view, the trash collector is subject to federal prosecution if he "corruptly" (*i.e.*, knowingly) accepts a year-end gift of any value from an appreciative homeowner.

Further, the government reads section 666's reference to "any business, transaction, or series of transactions" with the government or private organization to merely require *some* general relationship between the payment and government or private business, not specific official acts. The government business need not even be commercial. *See United States v. Lindberg*, 39 F.4th 151, 173-74 (4th Cir. 2022) (collecting cases where the government has successfully pressed this position). That interpretation adds particular breadth because *federal* officials accept unlawful bribes or gratuities only if tied to specific official acts, not routine conduct like procuring meetings. *McDonnell v. United States*, 579 U.S. 550, 574 (2016); *Sun-Diamond*, 526 U.S. at 414. Meanwhile, the bona fide compensation provision, 18 U.S.C. § 666(c), excludes only "salary, wages, fees, or other compensation" "in the usual course of business," leaving all gifts, donations, business opportunities, and campaign contributions open to prosecution.

If section 666 extends to gifts, liability would lurk behind every corner. People routinely give employees of state, local, and tribal governments and private organizations all sorts of gifts, benefits, and opportunities based on their official work, from teacher-appreciation gifts to governors' honorary degrees.

For the millions of private institutions receiving federal funds, the government's interpretation would usher in a world of endless potential section 666 liability, especially since doctor's offices, hospitals, therapy centers,

restaurants, hotels, and small businesses commonly receive federal funds. Giving playoff tickets to your kids' hockey-loving orthodontist as thanks for straightened teeth should not risk prison time. Sending orchids to hotel staff who did a top-notch job hosting your wedding reception should not be a federal case. Giving your surgeon a cashmere blanket in gratitude for fixing your spine should not invite prosecutorial judgment calls about whether the blanket is too nice to be innocent conduct. An Apple gift card to the college admissions counselor when your child gets into her first choice, a case of beer to the mechanic who rescues your Mustang, or an extra-generous tip to your favorite waitress for helping with a 50-person birthday dinner should not be the subject of federal prosecutorial line-drawing.

2. The Due Process Clause requires Congress to define offenses with "sufficient definiteness" so "that ordinary people can understand what conduct is prohibited" and prosecutors cannot engage in "arbitrary and discriminatory enforcement." *McDonnell*, 579 U.S. at 576 (citation omitted).

For federal officials, the Office of Government Ethics provides 11,000 words of regulatory guidance on the precise circumstances when federal employees' acceptance of something of value turns from innocent gift to criminal gratuity. 5 C.F.R. §§ 2635.201-.205; *see id.* § 2635.202(c). But for state, local, and tribal officials and millions of private employees, it is anyone's guess when federal prosecutors will deem gratuities impermissible—and the point of criminal law is to eliminate guessing where lines get crossed.

Again, the jury instructions and the Seventh Circuit equated "corruptly" with knowingly accepting a gratuity. J.A.28; Pet.App.42a; *supra* pp. 24-25. The government

(BIO 14) now suggests "corruptly" means "wrongful" in some hitherto-unspecified way. This Court has already rejected the notion that criminalizing vast swaths of conduct is fine so long as Congress "require[s] an individual to act 'corruptly.'" *Dubin*, 599 U.S. at 130 (quoting *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018)). "Had Congress intended" to sweep so far, "it would have spoken with more clarity." *Marinello*, 138 S. Ct. at 1108. Regardless, the government cannot qualify the scope of a major criminal statute by letting prosecutors define "corruptly" in their discretion. *Supra* pp. 25-26. As the Court has repeatedly said, "to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor." *Marinello*, 138 S. Ct. at 1108. This Court will not "construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell*, 579 U.S. at 576 (citation omitted).

This Court has repeatedly rejected similarly amorphous interpretations of public-integrity and bribery statutes, for instance by reading honest-services fraud under 18 U.S.C. § 1346 to "criminalize[] *only* the bribe-and-kickback core" of honest-services offenses. *Skilling v. United States*, 561 U.S. 358, 408-09 (2010). This Court has likewise interpreted "official acts" under section 201 to require the discharge of actual, defined public duties, not "prosaic interactions" like hosting meetings or making introductions. *McDonnell*, 579 U.S. at 567, 576. This Court should similarly interpret "corruptly … intending to be influenced or rewarded" to cover quid pro quo bribes, not whatever indefinite range of gratuities strikes prosecutors as objectionable.

3. Adding to the incongruity of reading section 666 to criminalize gratuities, the bank-bribery statute, 18 U.S.C. § 215, uses nearly identical words to make it a crime for an "officer, director, employee, agent, or attorney of a financial institution" to "corruptly accept[] … anything of value …, intending to be influenced or rewarded in connection with any business or transaction of such institution." *Id.* § 215(a)(2). Violators face up to a $1,000,000 fine and 30 years' imprisonment. *Id.* § 215(a).

Perhaps recognizing the untenable results of subjecting 6.7 million Americans who work at 12,000 financial institutions to prosecution for accepting all work-related gifts,[5] the federal government has purported to cabin section 215's scope. Guidance from the Office of the Comptroller of the Currency instructs banks to adopt their own codes of conduct outlining when gratuities are permissible. 52 Fed. Reg. 46046, 46046 (Dec. 3, 1987); *see* 18 U.S.C. § 215(d) (authorizing federal banking agencies to promulgate guidance to facilitate compliance). In OCC's view, those codes may "specify appropriate exceptions" to gratuities prohibitions, recognizing many "instances where a bank official, without risk of corruption or breach of trust, may accept something of value from someone doing or seeking to do business with the bank." 52 Fed. Reg. at 46049. Banks can allow "case-by-case" approval of gifts. *Id.* But no dollar amounts define permissible gifts, since "[w]hat is reasonable in one part of the country may appear lavish in another part." *Id.*

[5] *See* FDIC, *Statistics at a Glance* (Sept. 30, 2023), http://tinyurl.com/3u3fr99f; Nat'l Credit Union Admin., *Credit Union Assets, Shares, and Deposits Grow in Fourth Quarter* (Mar. 8, 2023), http://tinyurl.com/4yea2y9v; Bureau of Lab. Stats., *Finance and Insurance: NAICS 52*, http://tinyurl.com/mtmavrz3.

Moreover, the Department of Justice will "take into account" OCC's guidelines—and banks' codes of conduct—when deciding whether to bring section 215 prosecutions. Criminal Resource Manual, *supra*, § 836. Evidence of compliance "with the bank's own code of conduct supports the argument that there has been no breach of trust," so long as the Department of Justice deems the bank's code of conduct "reasonable." *Id.*

Yet the government offers no such deference to state, local, or tribal definitions of permissible and impermissible gratuities. Nor is it clear how the government could divine sufficient guardrails from section 666's text. *See Sun-Diamond*, 526 U.S. at 411-12. Certainly, the government has never announced those guardrails or given potential defendants any notice. The better reading is that Congress intended neither section 215 nor section 666 to criminalize gratuities.

B. The Government's Reading Infringes on Core State Powers

Any federal law that would subject state and local officials to up to a decade in prison threatens federalism. As Spending Clause legislation, section 666 is the last place one would expect such an affront to state and local sovereignty. Congress must speak clearly about the strings it attaches to federal funds for States and localities to consent. Section 666's use of "rewarded" comes nowhere close to putting federal-funding recipients on clear notice that giving and receiving gratuities are federal crimes.

1. Congress does not lightly authorize the federal government to "use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020). It is inconceivable that Congress used part of a dependent

clause in a bribery provision to create a new gratuities offense "render[ing] traditionally local criminal conduct a matter for federal enforcement." *See United States v. Bass*, 404 U.S. 336, 350 (1971).

Congress' comparative lack of concern with *federal* officials' ethics is particularly inexplicable. Congress has a paramount interest in placing prophylactic restrictions on federal officials to avoid the appearance of impropriety. *Supra* p. 30. Yet Congress imposed a five-times-lower penalty on federal officials who accept gratuities. *See* 18 U.S.C. § 201(c). Extensive federal regulations from the Office of Government Ethics also prescribe when federal employees may accept gifts, including a safe harbor for unsolicited gifts under $20 that do not involve quid pro quo exchanges. 5 C.F.R. §§ 2635.204, 2635.205(a). And the federal government advises all employees that if they follow those regulations, they do not violate section 201(c). *Id.* § 2635.202(c). It is implausible that agency officials could freely accept an $18 thermos from a visiting environmental group in appreciation for a recently promulgated regulation, yet section 666 would impose criminal punishment on state and local officials who accept the same gift as thanks for state and local regulations.

Policing "the character of those who exercise government authority" is part of how a "State defines itself as a sovereign." *McDonnell*, 579 U.S. at 576 (citation omitted). "[T]he permissible scope of interactions between state officials and their constituents" is at the heart of state sovereignty. *Id.* States, not federal prosecutors, "set[] standards of good government for local and state officials." *Id.* at 577 (citation omitted).

In keeping with local control, States and localities employ diverse approaches to gratuities. Some States do not

criminalize gratuities for most officials, prohibiting only quid pro quo bribery. *E.g.*, Ala. Code § 13A-10-61(a)(2); Mich. Comp. Laws § 750.117; *but see* Ala. Code §§ 36-25-7(d), 36-25-12 (exceptions for gratuities in connection with lobbying and regulatory officials accepting gratuities from regulated businesses); Mich. Comp. Laws § 791.222(3) (exception for probation officers). Other States and localities authorize officials to receive gratuities below a certain threshold. In Hamilton County, Indiana, 120 miles outside Portage, officials may accept "any gratuity" up to "$300 per day." Hamilton Cnty., Ind. Ordinance 08-14-17-A (2017); *see* Mass. State Ethics Comm'n, *Receiving Gifts and Gratuities*, http://tinyurl.com/mr2cz7r2 (allowing gratuities under $50).

Other States make accepting gratuities a misdemeanor. Alaska Stat. § 11.56.120; Del. Code Ann. tit. 11, § 1206; N.Y. Penal Law § 200.35. And Florida treats gratuities as a serious felony punishable by 15 years' imprisonment when officials intentionally accept "any pecuniary or other benefit not authorized by law, for the past … performance" of official acts. Fla. Stat. §§ 775.082(3)(d), 838.016(1). The government's reading of section 666 would supplant this calibrated patchwork of state and local prerogatives about whether, when, and how to penalize gratuities.

This case illustrates the point: Indiana criminalizes quid pro quo bribery, not gratuities. Ind. Code § 35-44.1-1-2; *but see id.* § 7.1-5-5-2 (exception for Alcohol and Tobacco Commission employees). But Indiana has a host of other regulations on public servants, including bans on official misconduct, conflicts of interest, and "profiteering from public service." *Id.* §§ 35-44.1-1-1, 35.44.1-1-4, 35-44.1-1-5. Indiana's State Board of Accounts independently audits "all accounts and all financial affairs of

every" Indiana municipality. *Id.* §§ 2-5-1.1-6.3(a)(3), 5-11-1-9(a), 5-11-1-16(h). And Portage has its own independent ethics commission that enforces an ethics code against City officials, including a prohibition on using public property for "private benefit." City of Portage Code of Ordinances §§ 2-176, 2-178(b)(1).

Indiana and Portage have not charged Mayor Snyder with any wrongdoing. Yet the federal government now wants to second-guess that choice with the full weight of the federal criminal-justice system. This Court does not ordinarily read federal criminal statutes to raise such "significant federalism concerns" by intruding "into the criminal jurisdiction of the States." *McDonnell*, 579 U.S. at 576, 580 (citation omitted).

The government's interpretation of section 666 also risks upending the norm of outside employment in state and local governments. Indiana state officials may take second jobs so long as they avoid conflicts or confidentiality issues. Ind. Code § 4-2-6-5.5(a)(1)-(2). And California state officials may engage in outside work unless "clearly inconsistent, incompatible, in conflict with, or inimical to" their official duties. Cal. Gov't Code § 19990. In nearly 90% of America's 20,000 cities, such outside work is essential for city councilors, whose government jobs are part-time. *See* Kellen Zale, *Part-Time Government*, 80 Ohio St. L.J. 987, 988 (2019).

Likewise, legislators in 40 States work part-time and cannot "make a living without having other sources of income." Nat'l Conf. of State Legislatures, *Full and Part-Time Legislatures* (July 28, 2021), http://tinyurl.com/y8y268ee. In Texas, where the legislature sits five months every other year, legislators make just $600 per month. Tex. Const. art. III, §§ 5, 24(a)-(b). Virginia delegates similarly meet for just a few months a year and earn

a $17,640 salary. Va. Const. art. IV, § 6; 2022 Va. Acts, ch. 2, § 1-1. Both States let legislators work second jobs. *See* Tex. Ethics Comm'n, *Guide to Ethics Laws* 3 (Jan. 1, 2022), http://tinyurl.com/3dy5pe6j; 22 Va. Admin. Code § 30-103(6).

Yet, on the government's reading, any supplemental job offer risks being charged as an unlawful gratuity. Legislators, councilmembers, and mayors who accept outside work as consultants, lawyers, or public speakers are presumably attractive for their governmental accomplishments. Under the government's view, those offers could be intended to "reward" official conduct so long as they arguably fall outside the "usual course of business." 18 U.S.C. § 666(c).

Nothing in section 666 suggests that Congress intended to chill state- and local-government operations or trample their judgments about official ethics this way. This Court ordinarily requires a "clear statement" that Congress meant to reach "local criminal conduct." *Bass*, 404 U.S. at 349-50; *see Jones v. United States*, 529 U.S. 848, 858 (2000). This Court has read criminal statutes narrowly to avoid putting every "building in the land" under a "federal statute's domain," *Jones*, 529 U.S. at 857, and sidestep a "massive federal anti-poisoning regime," *Bond v. United States*, 572 U.S. 844, 863 (2014). Congress did not empower federal prosecutors to prosecute millions of state and local officials for accepting gratuities large or small just by adding "rewarded" to a quid pro quo bribery provision.

2. Because Spending Clause statutes are "in the nature of a contract," the "legitimacy" of the government's reading "rests on whether the State voluntarily and knowingly accepts [Congress'] terms." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "[I]f Congress

intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *id.*, so that States and localities can "decline a federal grant" if the strings are too onerous, *New York v. United States*, 505 U.S. 144, 168 (1992); *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002).

Section 666 applies to theft and bribes, which are already state-law crimes everywhere. But many States and localities *allow* gratuities in connection with official business. States do not "make an informed choice" about whether to "accept[] funds" on that condition. *Pennhurst*, 451 U.S. at 25.

Moreover, the federal "interest in ensuring that federal funds 'are in fact spent for the general welfare, and not frittered away in graft'" cannot justify a sweeping prohibition on gratuities. *Contra* BIO 17 (quoting *Sabri v. United States*, 541 U.S. 600, 605 (2004)). Federal funds need not even be "involved in the bribery transaction." *Salinas v. United States*, 522 U.S. 52, 60 (1997). Were the government concerned about squandered federal research grants to a private university's chemistry department, prosecuting the track coach for accepting gifts from a grateful walk-on would be an odd way to show it. Federal regulations already require federal-funding recipients to "maintain written standards of conduct" prohibiting officials from soliciting or accepting "gratuities, favors, or anything of monetary value from contractors or parties to subcontracts." 2 C.F.R. § 200.318(c)(1).

Anyway, gratuities stretch section 666's spending-power rationale past the breaking point. This Court upheld section 666 as valid Spending Clause legislation on the theory that "[m]oney is fungible" and "bribed officials are untrustworthy stewards of federal funds." *Sabri*, 541 U.S. at 606. Even if the at-issue transaction does not involve federal money, federal money might be "drained

off" elsewhere. *Id.* That rationale equally explains section 666(a)(1)(A)'s prohibition on theft—money stolen from one project must come from somewhere. But in gratuity cases, no money is diverted, federal or otherwise. By definition, the official receives a gratuity for something he has already done or committed to do. *Sun-Diamond*, 526 U.S. at 405. As the Department of Justice has previously warned, section 666 should not be read to "[f]ederalize many state offenses in which the Federal interest is slight or non-existent." Criminal Resource Manual, *supra*, § 1001.

C. The Government's Reading Raises First Amendment Problems

The government's interpretation creates significant First Amendment problems by sweeping in political contributions, which are constitutionally protected free speech and political activity. *Citizens United v. FEC*, 558 U.S. 310, 336-39 (2010). Individuals "participate in the public debate" by giving candidates contributions. *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (plurality op.). Even for federal elections, Congress "may target only a specific type of corruption—'quid pro quo' corruption"—when restricting federal campaign contributions. *Id.* at 207.

But under the government's reading, any campaign contribution to a state or local incumbent could qualify as a prohibited gratuity. Such contributions often applaud the incumbent's track record. Both donors and politicians clearly understand as much. "Money is constantly being solicited on behalf of candidates … who claim support on the basis of their views and what they intend to do or have done." *McCormick v. United States*, 500 U.S. 257, 272 (1991). Under this Court's precedents, that is democracy

in action. Under the government's interpretation, such contributions invite potential criminal prosecution.

The government (BIO 18) insists that "legitimate campaign contributions" would not meet section 666's "corruptly" element. But the government tried this case on the theory that "corruptly" meant merely *knowing* that a payment is intended as thanks for past official conduct. *Supra* pp. 24-25. Even if "corruptly" meant unspecified moral depravity (BIO 14), the government never explains how that interpretation could carve out campaign contributions alone. Millions of Americans need more protection for core political activity than the government's atextual assertion that "legitimate campaign contributions" are safe.

D. The Rule of Lenity Resolves Any Ambiguity

If any doubt remains, the rule of lenity resolves "ambiguities about the breadth of a criminal statute … in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). When a public-corruption statute can "linguistically be interpreted to be either a meat axe or a scalpel," the scalpel wins. *McDonnell*, 579 U.S. at 576 (quoting *Sun-Diamond*, 526 U.S. at 412). That rule ensures that citizens are not "subjected to punishment that is not clearly prescribed" and that courts do not "mak[e] criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.); *see Wooden v. United States*, 595 U.S. 360, 389-91 (2022) (Gorsuch, J., concurring in judgment).

An "expansive construction of § 666[] is … inconsistent with the rule of lenity." *Fischer*, 529 U.S. at 691 (Thomas, J., dissenting). Section 666 is best read not to cover gratuities. But at minimum, the ordinary tools of statutory interpretation leave more than "reasonable

doubts" whether section 666 reaches gratuities. *Hamilton*, 46 F.4th at 397-98 n.2; *see Fernandez*, 722 F.3d at 40 (Howard, J., concurring). Section 666 does not suspend a Sword of Damocles over millions of citizens' heads, whereby everyday gift-giving could be repackaged as a federal crime subject only to unknown conceptions of when gratitude turns into unlawful gratuities.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

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18 U.S.C. § 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any

agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(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; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper

discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

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

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such

trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

18 U.S.C. § 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 any thing 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.

18 U.S.C. § 666 (Supp. II 1984). Theft or bribery concerning programs receiving Federal funds

(a) Whoever, being an agent of an organization, or of a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000 or an amount equal to twice that which was obtained in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so Imprisoned and fined.

(c) Whoever offers, gives, or agrees to give to an agent of an organization or of a State or local government

agency, described in subsection (a), anything of value for or because of the recipient's conduct in any transaction or matter or any series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned not more than ten years or fined not more than $100,000 or an amount equal to twice that offered, given or agreed to be given, whichever is greater, or both so imprisoned and fined.

(d) For purposes of this section—

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

(2) "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, and any other association of persons;

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

(4) "local" means of or pertaining to a political subdivision within a State.